1-1-2012

Political Reasons, Deliberative Democracy, and Administrative Law

Glen Staszewski
Michigan State University College of Law, staszew2@law.msu.edu

Follow this and additional works at: http://digitalcommons.law.msu.edu/facpubs
Part of the Administrative Law Commons, and the Other Law Commons

Recommended Citation

This Article is brought to you for free and open access by Digital Commons at Michigan State University College of Law. It has been accepted for inclusion in Faculty Publications by an authorized administrator of Digital Commons at Michigan State University College of Law. For more information, please contact domannbr@law.msu.edu.
ABSTRACT: The role of "political reasons" in agency decision making has tremendous importance for administrative law. The conventional wisdom posits that an agency's policy decisions should be justified based on their substantive merits, rather than the preferences of public officials or other political considerations. Yet, the Supreme Court is closely divided on this issue, and prominent commentators have relied on the political control model of administrative law to argue that political reasons should play an enhanced role in agency decision making and that the judiciary should give agencies credit for justifying their policy choices on political grounds.

This Article argues that those scholarly proposals are fundamentally misguided because political-control theories of administrative law are based on untenable conceptions of democracy and implausible empirical assumptions. It claims that deliberative theories of administrative legitimacy provide a superior alternative but acknowledges that deliberative democratic theorists have not provided a clear account of the proper role of political preferences in agency decision making. After providing such an account, this Article sets forth a concrete proposal for reforming administrative law that would improve the transparency of the administrative process and allow agencies to incorporate political considerations into their decision making, consistent with the basic principles of deliberative democratic theory. This Article also identifies several reasons to be wary of any reform proposal that would embrace a greater role for political reasons in agency decision making, and concludes that the best way of promoting agency legitimacy and deliberative democracy may be to retain the existing version of hard-look judicial review.

* The A.J. Thomas Faculty Scholar, Associate Dean of Research, and Professor of Law, Michigan State University College of Law. I would like to thank Evan Criddle, Rick Levy, Lou Mulligan, and Sid Shapiro for excellent comments and suggestions on an earlier draft of this Article. I also received helpful comments when I presented the project at the 2010 Annual Meeting of the Law and Society Association and faculty workshops at The University of Kansas School of Law and Michigan State University College of Law. Finally, I would like to thank Justin Bratt, Chaoyi Ding, and Matt Martin for very helpful research assistance.
INTRODUCTION

I. THE IMPORTANCE OF THE PROBLEM

II. THE LIMITS OF POLITICAL CONTROL
   A. MAJORITY RULE IS NOT THE TRUE END OF DEMOCRACY
   B. POLITICAL CONTROL OF AGENCY ACTION DOES NOT RESULT IN
      MAJORITY RULE
   C. POLITICAL REASONS AND POLITICAL-CONTROL THEORY

III. POLITICAL REASONS AND DELIBERATIVE DEMOCRACY
   A. DELIBERATIVE DEMOCRATIC THEORY AND HARD-LOOK JUDICIAL
      REVIEW
   B. THE ROLE OF POLITICAL REASONS IN DELIBERATIVE DEMOCRATIC
      THEORY

IV. POLITICAL REASONS AND ADMINISTRATIVE LAW
   A. THE STATE FARM TWO-STEP
   B. DELIBERATION ABOUT DELIBERATION AND THE DEEPER WISDOM OF
      HARD-LOOK REVIEW

CONCLUSION
Should the legality of a regulatory agency's policy decisions be strengthened by an agency's assertion that it was following the preferences of the President or members of Congress? Since the Supreme Court articulated the standard formulation of the arbitrary and capricious standard of judicial review in its landmark decision in the State Farm case, agencies, courts, and commentators have almost uniformly assumed a negative answer to this question. Rather, the validity of agency decision making has been understood to turn on technical considerations and other factors that focus on the reasonableness of any agency's decisions on the merits. Accordingly, agencies have generally declined to provide "political reasons" for their discretionary decisions, and courts have had few occasions to review them, even though there are good reasons to think that political considerations frequently influence agency decision making.

Meanwhile, administrative law theory is widely understood to have shifted toward a model of legitimacy that emphasizes the importance of political control of agency decision making by the President (or other elected officials). The presidential control model of agency legitimacy has been reflected in a number of the Supreme Court's most important administrative law decisions over the past quarter century, including the Chevron decision, which explicitly endorsed the notion that executive branch agencies could "properly rely upon the incumbent administration's views of wise policy to inform its judgments." Partly as a result of this major transformation in administrative law theory and doctrine, several prominent commentators have recently argued that political reasons should play a larger and more transparent role in administrative decision making and that the judiciary should give agencies credit for providing political reasons for their policy decisions in a variety of contexts. In recent decisions, the

---

3. See id. at 35; see also Lisa Schultz Bressman, Beyond Accountability: Arbritrariness and Legitimacy in the Administrative State, 78 N.Y.U. L. REV. 461, 485-92 (2003) (describing the presidential control model and claiming that it has become the "dominant" model of the administrative state); Cynthia R. Farina, The Consent of the Governed: Against Simple Rules for a Complex World, 72 CHI.-KENT L. REV. 987, 988 (1997) ("Increasingly, scholars (and, at times, the judiciary) look to the President not only to improve the managerial competence and efficiency with which regulation occurs but also, and more deeply, to supply the elusive essence of democratic legitimation.").
5. See Nina A. Mendelson, Disclosing "Political" Oversight of Agency Decision Making, 108 MICH. L. REV. 1127, 1175-75 (2010); Watts, supra note 2, at 32-45; see also Richard J. Fierce, Jr.
Supreme Court has been closely divided over the extent to which political reasons can justify an agency's discretionary policy choices.\(^6\) Considering that the newest Justice, Elena Kagan, was an early advocate of giving agencies credit for relying on political reasons for their policy decisions,\(^7\) this is an issue that the Court may be interested in addressing again in the near future.

This Article accepts the proposition that administrative agencies should be given credit for justifying their policy decisions with political reasons under the presidential control model. It claims, however, that this model of administrative legitimacy is fundamentally misguided because policymaking in a democracy is not, and should not try to be, purely majoritarian; and even if we wanted policy decisions to reflect the pre-political preferences of the people, relying on elected officials to control the discretionary policy choices of administrative agencies could not plausibly be expected to produce this outcome. This Article contends that a deliberative theory of administrative legitimacy provides a more effective means to a more attractive end from the standpoint of democracy. It acknowledges, however, that deliberative democratic theorists have generally failed to provide a clear account of the precise role of political preferences in agency decision making.

This Article therefore assesses the appropriate role of political reasons in agency decision making from the perspective of deliberative democratic theory. It proceeds to set forth a concrete proposal for reforming administrative law that would improve the transparency of the administrative process and allow agencies to incorporate political reasons into their decision making, consistent with the basic principles of deliberative democratic theory. This Article also acknowledges, however, that a deliberative perspective would recognize that it may be better to stick with the status quo on the grounds that we do not want to encourage agencies to give greater weight to political reasons. Political reasons will exert more than enough weight as things stand. If we openly embrace those influences, they

---


\(^7\) Elena Kagan, Presidential Administration, 114 Harv. L. Rev. 2246, 2380 (2001) (advocating a relaxation in "the rigors of hard look review when demonstrable evidence shows that the President has taken an active role in, and by so doing has accepted responsibility for, the administrative decision in question"). Dean Christopher Edley was another early advocate of giving agencies credit for relying on political reasons during judicial review. CHRISTOPHER F. EDLEY, JR., ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREAUCRACY 190-92 (1990) (advocating "a judicial insistence that agencies frankly acknowledge the role of political, ideological, or subjective analyses in their reasons and findings," and suggesting that courts should give credit to politics "as an acceptable and even desirable element of decision making" in appropriate circumstances).
will be likely (1) to predominate agency decision making and thereby undermine the underlying goals of many statutory programs, (2) to alter the accepted role of administrators (and their own self-definition) in very damaging ways, and (3) to give politically appointed officials within agencies even more power over the career staff and civil servants who are most likely to possess technical expertise and to engage in reasoned deliberation about the best ways to solve our most difficult collective problems. Accordingly, this Article closes by considering whether we should ultimately recognize a limited role for political reasons in administrative law or affirmatively embrace the existing version of hard-look judicial review.

I. THE IMPORTANCE OF THE PROBLEM

Administrative agencies are routinely delegated broad discretionary authority to implement federal programs in the modern regulatory state. It is therefore fundamentally important for agency employees and other public officials to understand what considerations can permissibly be taken into account when agencies make policy decisions—and, more to the point, how agencies can justify the validity of their discretionary policy choices. Although an agency's governing statute will sometimes identify certain factors that shall or shall not be taken into consideration, there will almost always be a host of other logically relevant considerations that are not specifically addressed by the agency's statutory mandate. Moreover, while Congress typically gives agencies broad instrumental goals to achieve, it is generally understood that agencies will be pursuing those goals in a highly political environment. Not only are agencies dependent upon elected officials for their budgets, but their leaders are appointed (and can frequently be removed) by elected officials, and they are subject to other forms of political oversight. The extent to which agencies can justify their policy decisions based on political reasons is therefore of tremendous practical importance.

8. See Pierce, supra note 5, at 67 (“It is hard to imagine any administrative law issue more basic than identifying the factors that an agency must, can, and cannot consider in making a decision.”).

9. See id. at 72–75 (providing a variety of examples and claiming that “[t]he list of goals and purposes shared by most members of the public and by most members of Congress is far longer than any list of decisional factors Congress has included, or could include, in any single statute”).

10. Richard B. Stewart, The Reformation of American Administrative Law, 88 Harv. L. Rev. 1669, 1671 n.5 (1975) (“Most administrative agencies act in a highly charged field of political forces which include the legislature, other executive bodies and officials, and a variety of more or less well-organized political, social and economic groups and interests.”).


12. I will explain more precisely what I mean by “political reasons” at the end of this Part. For now, it is useful to equate this term with the political preferences of elected officials.
Given the practical importance of the issue, it is somewhat surprising that the state of the law on this question can best be described as unsettled. In *Motor Vehicle Manufacturers Ass'n of the United States, Inc. v. State Farm Mutual Automobile Insurance Co.*, the Supreme Court reviewed the National Highway Traffic Safety Administration's ("NHTSA") decision to rescind a rule that would have required car manufacturers to install passive restraints in new motor vehicles. Because the decision was made shortly after Ronald Reagan was elected President, the "(de)regulatory philosophy" of his administration would surely have provided a plausible explanation for the agency's change of course. Nonetheless, the Court ignored this political context and invalidated the agency's decision under the Administrative Procedure Act ("APA") based on NHTSA's failure to provide a reasoned explanation for its decision on the merits. The Court explained:

Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Justice Rehnquist's dissenting opinion pointed out that "[t]he agency's changed view of the standard seems to be related to the election of a new President of a different political party," and suggested that "[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." Because the Court ignored this aspect of Justice Rehnquist's opinion, however, most agencies, courts, and commentators have understood *State Farm* to reject the notion that political reasons can justify an agency's discretionary policy choices under the arbitrary and capricious standard of judicial review.

Despite the conventional understanding of *State Farm*, Richard Pierce has recently argued that until the past few years, the Supreme Court and the D.C. Circuit have both followed a consistent approach to the question of which factors "an agency must, can, and cannot consider in making a

---

15. *State Farm*, 463 U.S. at 34, 41–44.
16. *Id.* at 43.
17. *Id.* at 59 (Rehnquist, J., concurring in part and dissenting in part).
18. See Watts, *supra* note 2, at 19 (explaining that *State Farm* "has been widely read over time to represent the triumph of expertise to the exclusion of politics").
decision." This approach essentially allowed agencies to consider any "logically relevant decisional factor" that is not precluded from consideration by statute when making a decision. Because Pierce would consider the political preferences of elected officials a logically relevant factor in most situations, this reading of the case law would presumably allow agencies to rely upon political reasons for their decisions on a regular basis. It is not clear, however, whether this reading of the case law is correct with respect to the validity of an agency's reliance on political reasons because agencies have generally accepted the conventional understanding of State Farm, and they have therefore declined to provide political justifications for their decisions as a matter of course. As a result, federal courts have had very few occasions to assess the extent to which agencies can justify the validity of their policy choices based on political reasons.

Nonetheless, as Professor Pierce points out, several recent Supreme Court decisions have significantly muddied the waters. In Massachusetts v. EPA, a bare majority of the Court invalidated the agency's denial of a petition to regulate greenhouse gas emissions from new motor vehicles based on a "laundry list" of nonstatutory policy reasons, including a professed desire to rely upon voluntary executive branch programs, avoid impairing "the President's ability to negotiate emissions reductions with 'key

20. Id. at 72–73.
21. Richard J. Pierce, Jr., Response, Presidential Control Is Better Than the Alternatives, 88 Tex. L. Rev. See Also 113, 121–24 (2009) (claiming that administrative agencies should consider a host of political factors in making any important decision).
22. Cf. Watts, supra note 2, at 45–52 (exploring Congress's intent regarding political factors, discussing the relevant case law, and advocating a presumption "that when Congress is silent on the matter, Congress intended agencies to be able to consider all factors that are rationally and logically relevant to the agency's decision, including certain political influences").
23. See Mendelson, supra note 5, at 1155–59; Watts, supra note 2, at 29–29.
24. Pierce, supra note 5, at 77–88 (describing and criticizing these decisions, which include Energy Corp. v. Riverkeeper, Inc., 129 S. Ct. 1498 (2009), Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644 (2007), and Massachusetts v. EPA, 549 U.S. 497 (2007)); cf. Stephen M. Johnson, Disclosing the President's Role in Rulemaking: A Critique of the Reform Proposals, 60 Cath. U. L. Rev. 1003, 1028 (2011) (analyzing recent Supreme Court decisions on the role of nonstatutory factors in agency decision making, and claiming that (1) "agencies should be able to consider factors that are not explicitly listed in statutes, as long as they are relevant to the factors and standards set forth in the statute as the basis for agency decision making"; (2) "agencies should be able to consider political influences and factors [in their decision-making] as long as those factors are relevant to the statutory factors and standards"; and (3) "agencies cannot rely on political influences and factors to justify a decision when those considerations disregard the factors or standards [for decision-making] set forth in a statute").
25. Massachusetts v. EPA, 549 U.S. at 528–35 (invalidating the EPA's decision on the grounds that it "rest[ed] on reasoning divorced from the statutory text").
26. Id. at 533.
developing nations, and allow the President to develop a more comprehensive approach to the climate change issue. In contrast, Justice Scalia's dissenting opinion argued that there was no legal basis for rejecting the agency's rationale, and claimed that "the reasons EPA gave are surely considerations executive agencies regularly take into account (and ought to take into account) when deciding whether to consider entering a new field: the impact such entry would have on other Executive Branch programs and on foreign policy." More recently, in FCC v. Fox Television Stations, Inc., the Justices were equally divided on whether "significant political pressure from Congress" is a factor that can help to justify an agency's policy decisions under the APA. Although lower federal courts have only had a few opportunities to address the extent to which agencies can justify their policy decisions based on political reasons, they have expressed significant differences of opinion on the matter as well.

Not only is the role of political reasons in agency decision making a matter of great practical importance and sharp legal disagreement, but this particular issue goes to the very heart of what distinguishes the leading contemporary theories of legitimacy in the modern regulatory state. In this regard, the "political control model" focuses on the ability of elected officials to supervise and control the discretionary policy choices of regulatory agencies as the basis for democratic legitimacy. The central idea is that if agencies are following the preferences of elected officials who are politically accountable to voters, then agency policy decisions will be democratically legitimate because they will presumably reflect the will of the people and achieve the consent of the governed. The political control model is based upon a majoritarian or pluralistic conception of democracy, which reflects a "belief in the hegemony of popular control of all governmental decisions."

27. Id. (quoting 68 Fed. Reg. 52932 (2003)).
28. Id.
29. Id. at 552 (Scalia, J., dissenting).
30. FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800 (2009). Compare id. at 1815–16 (Scalia, J., plurality opinion) ("[T]he precise policy change at issue here was spurred by significant political pressure from Congress.") with id. at 1832 (Breyer, J., dissenting) (questioning the notion that the APA authorizes agencies "to change major policies on the basis of nothing more than political considerations or even personal whim").
31. Compare UAW v. Chao, 561 F.3d 249, 256 (3d Cir. 2004) (Pollak, J., concurring) (arguing that "[t]here is nothing obscure, and nothing suspect" about "a change in regulatory policy coincident with a change in administration"), with Tummino v. Torti, 603 F. Supp. 2d 519, 544–50 (E.D.N.Y. 2009) (invalidating the FDA's decision to place an age restriction on over-the-counter Plan B contraceptives due to improper political influence).
32. See Watts, supra note 2, at 35.
The model also exemplifies an "aggregative" view of democracy, whereby the primary role of the government is merely to ascertain and implement the pre-political preferences of its citizens. This conception of democracy privileges political power, either in the form of numerical majorities or other forms of coercive influence.

In contrast, a "deliberative model" of administrative legitimacy focuses on the obligation of public officials to engage in reasoned deliberation on which courses of action will promote the public good. Agency officials must engage in a decision-making process that considers all of the relevant interests and perspectives, and they must provide reasoned explanations for their decisions that could reasonably be accepted by free and equal citizens with fundamentally competing perspectives. Agency decisions


36. See, e.g., Jon Elster, Deliberation and Constitution Making, in DELIBERATIVE DEMOCRACY 97, 104 (Jon Elster ed., 1998) ("Because there are powerful norms against naked appeals to interest or prejudice [in a deliberative setting], speakers have to justify their proposals by the public interest"); Dennis F. Thompson, Deliberative Democratic Theory and Empirical Political Science, 11 ANN. REV. POL. SCI. 497, 498 (2008) (explaining that a reason-giving requirement is "at the core of all theories of deliberative democracy"); id. at 504 (explaining that reason giving must be "directed toward the collective good of the group that will be bound by the decision"). Deliberative democracy's emphasis on the public good is a legacy of civic republican theory. See Evan J. Criddle, When Delegation Begets Domination: Due Process in the Administrative State, 46 GA. L. REV. (forthcoming) (manuscript at 126) ("Republicanism asserts that all governments bear a basic obligation to advance the good of their people as a whole—res publica—rather than their own self-interest or the factional interests of particular groups or individuals."); Mark Seidenfeld, A Civic Republican Justification for the Bureaucratic State, 105 HARV. L. REV. 1511, 1530 (1992); Cass R. Sunstein, Interest Groups in American Public Law, 38 STAN. L. REV. 29, 63 (1985).

37. See HENRY S. RICHARDSON, DEMOCRATIC AUTONOMY: PUBLIC REASONING ABOUT THE ENDS OF POLICY 215 (2002) (claiming that the legitimacy of decision making is enhanced "if (1) the process of debate allows for a fair hearing of all; (2) the process is contrived in such a way that majorities . . . need to take account of the views of the others; and (3) the formulation of alternatives and the process of debate is conducted in a way that encourages reasonable compromise among all participants, who may thus view themselves as cooperatively engaged in a process of determining 'what we should do'"); see also Joshua Cohen, Deliberation and Democratic Legitimacy, in THE GOOD POLITY: NORMATIVE ANALYSIS OF THE STATE 17, 92–93 (Alan Hamlin & Philip Pettit eds., 1989) (claiming that the public policies adopted by a majority can only be legitimate if the minority's interests and perspectives were adequately considered during the decision-making process and the prevailing outcome is one that "could be the object of a free and reasoned agreement among equals"); Bernard Manin, On Legitimacy and Political Deliberation, 15 POL. THEORY 338, 355–60 (1987) (explaining that the principle of majority rule is only justified if "[t]he decision results from a [deliberative] process in which the minority point of view was also taken into consideration").

38. For influential statements of this requirement, see AMY GUTMANN & DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT 52–94 (1996); id. at 55 (describing a principle of "reciprocity," which requires citizens and officials to "appeal to reasons or principles that can be shared by fellow citizens who are similarly motivated" when they "make moral claims in a deliberative democracy"); Joshua Cohen, Democracy and Liberty, in DELIBERATIVE DEMOCRACY,
adopted pursuant to these criteria are democratically legitimate because each interest and perspective is treated with equal respect and arbitrary decision making is prohibited. A deliberative model of administrative legitimacy is based upon broader theories of deliberative democracy, which seek to eliminate arbitrary governmental action and reach the best decisions on the merits in light of the available information and fundamental differences of opinion.

While these two competing models plainly coexist, it is generally understood that the prevailing theory of legitimacy in administrative law for the past quarter century has been the "presidential control model," a version of the political control model. As Lisa Bressman has explained, "[T]he presidential control model seeks to ensure that administrative policy decisions reflect the preferences of the one person who speaks for the entire nation." Because the President is the only nationally elected official in the United States, his decisions will presumably reflect the preferences of a majority of the electorate. If the President strays from the people's will, he

\textit{supra} note 36, at 185, 193–94 (describing a deliberative process in which participants regard one another as free, equal, and reasonable "in that they aim to defend and criticize institutions and programs in terms of considerations that others, as free and equal, have reason to accept, given the fact of reasonable pluralism and on the assumption that those others are themselves concerned to provide suitable justifications"); John Rawls, \textit{The Idea of Public Reason Revisited}, 64 U. Chi. L. Rev. 765, 773 (1997) ("A citizen engages in public reason... when he or she deliberates within a framework of what he or she sincerely regards as the most reasonable political conception of justice, a conception that expresses political values that others, as free and equal citizens might also reasonably be expected reasonably to endorse.").

39. Glen Staszewski, \textit{Reason-Giving and Accountability}, 93 Minn. L. Rev. 1253, 1291 (2009); see id. at 1282–84 (discussing the capacity of reason giving to promote the legitimacy of governmental authority in a democracy); Thompson, \textit{supra} note 36, at 502 ("[L]egitimacy... prescribes the process by which... collective decisions can be morally justified to those who are bound by them. It is the key defining element of deliberative democracy.").

40. See, e.g., Richardson, \textit{supra} note 37, at 17 (seeking to develop a conception of public reasoning that would "reconcile administrative discretion with democratic control in such a way as to prevent bureaucratic power from being exercised arbitrarily"); see also Gutmann & Thompson, \textit{supra} note 38, at 199–229; Philip Pettit, \textit{Republicanism: A Theory of Freedom and Government} 31–32 (David Miller & Alan Ryan eds., 1997) (distinguishing "freedom as non-domination" from "freedom as non-interference," and explaining that the republican tradition understands "exposure to the arbitrary will of another, or living at the mercy of another, as the great evil"); Cohen, \textit{supra} note 38, at 185.

41. See Stephenson, \textit{supra} note 33, at 57 ("The notion that one can increase the political responsiveness of bureaucratic decisions by increasing the influence of the most politically responsive decision maker commands widespread acceptance."); Watts, \textit{supra} note 2, at 35 (claiming that the political control model "has... gained widespread acceptance" since the 1980s, and recognizing that "[m]ost scholars see political control of the administrative state as resting with the President due to the unique role he plays in overseeing agency action"); \textit{supra} note 3 and accompanying text.

42. Bressman, \textit{supra} note 3, at 490, \textit{quoted in} Staszewski, \textit{supra} note 39, at 1260 (describing these aspects of the presidential control model).

43. See Stephenson, \textit{supra} note 33, at 59 (recognizing that the premises of the political control model "imply the need for presidential control over bureaucratic policymaking,
(or his party) can be held politically accountable at the next election.\textsuperscript{44}
From this perspective, Congress's delegation of broad policymaking authority to regulatory agencies, which would otherwise be difficult to square with the constitutional structure, can be legitimized if agency decisions are subject to the control of the Chief Executive who is politically accountable to all of the nation's voters.

If the fundamental goal of administrative law is to ensure that the policy choices of agencies are subject to the control of the President and ultimately reflect his preferences, it would be strange if agencies were precluded by law from expressly justifying their policy choices on this very basis. Rather than ignoring the fact that NHTSA rescinded its mandate for car manufacturers to install passive restraints based on the preferences of the Reagan Administration\textsuperscript{45} (or that President Clinton directed the Food and Drug Administration ("FDA") to regulate the marketing and sale of tobacco to minors, to cite another well-known example),\textsuperscript{46} the political reasons for these policy decisions should be of the utmost importance to the judiciary. After all, an agency's statement that it made a discretionary policy choice based on a presidential directive or because "it was what the President wanted" would appear to provide the ideal form of legitimacy under this model. The agency's willingness to attribute potentially controversial policy decisions to the President would also improve the electorate's ability to hold the President politically accountable for those choices. It is therefore not surprising that prominent commentators, such as Nina Mendelson and Kathryn Watts, have invoked the presidential control model (or the political control model more broadly) to argue that administrative agencies should be given "credit" for providing political reasons for their policy decisions under the arbitrary and capricious standard of judicial review.\textsuperscript{47}

\begin{footnotesize}
\begin{itemize}
\item[44.] Bressman, supra note 3, at 491.
\item[45.] See Watts, supra note 2, at 6–7 (discussing this example).
\item[46.] Id. at 23–24 (discussing this example); see also Steven P. Croley, Public Interested Regulation, 28 FLA. ST. U. L. REV. 7, 66–75 (2000) (describing the development of the FDA's initiative to regulate tobacco and the importance of White House support).
\item[47.] See Watts, supra note 2, at 33 ("[A]llowing agencies to unapologetically disclose political influences and enabling courts to credit openly political judgments would help to bring hard look review, which currently hinges on an outmoded model of 'expert' decisionmaking, into harmony with other major administrative law doctrines that embrace the more current 'political control' model."). While Professor Mendelson is not as strongly committed to the political control model, she recognizes that when value judgments are at stake, "many theorists and the Supreme Court have suggested that some level of presidential supervision can be critical and can make agency action more legitimate than if the agency acted alone"; and her article is consistent with this premise. Mendelson, supra note 5, at 1146; see also Kagan, supra note 7, at 2380 ("A revised doctrine [of hard-look judicial review] would acknowledge and, indeed, promote an alternative vision centered on the political leadership
\end{itemize}
\end{footnotesize}
problem, however, is that the political control model of administrative legitimacy is fundamentally misguided.

Before proceeding any further, it is important to provide a working definition of the term "political reasons." Professors Mendelson and Watts both define political reasons as any reasons that emanate from elected officials or high-level members of their staffs. This definition has the virtue of simplicity, but it is also problematic because it plainly encompasses reasons that focus directly on the merits of the policy issues facing agencies. For example, the President might oppose the adoption of a costly and burdensome regulatory requirement on the grounds that the agency's proposed rule would not accomplish its stated objectives (and the White House might even provide valid studies to support its position). Not only would an agency's reliance on these political reasons be entirely unproblematic (from virtually any theoretical perspective), but the agency would be legally obligated to consider those reasons if they were set forth in the administrative record. Existing law does not (and should not) preclude agencies from considering these political reasons, or justifying their decisions on these bases.

As discussed below, however, one place where advocates of political-control theories and deliberative democratic theories tend to part ways is on the importance of the fact that particular views on the merits were articulated by elected officials or high-level members of their staffs. A related debate focuses on the extent to which agencies should consider and rely upon political reasons that are further removed from the merits of an agency's policy decisions. These political reasons, which are more accurately characterized as "political preferences" or "political priorities," include statements from elected officials (or their staffs) of the following nature: "this is what I want," "this is what my supporters want," "this is what the majority wants," "this will help me win an election," "this is what I promised during my campaign," "this is more consistent with my philosophy," and "this will best advance my priorities." While distinguishing between political reasons that directly address the merits of a policy decision and those that reflect more tangential political preferences or priorities presents line-drawing problems that are avoided by Mendelson's and Watts's definition, this Article focuses on whether administrative agencies can justify their policy decisions based on political reasons that fall within this latter category because their normative
status is deeply controversial under both existing law and theories of democratic legitimacy.

II. THE LIMITS OF POLITICAL CONTROL

This Part claims that the political control model of administrative legitimacy is a poor means to the wrong end from the standpoint of democracy. First, it claims that policymaking in a constitutional democracy is not, and should not try to be, purely majoritarian. Second, it contends that even if we wanted policy decisions to reflect the pre-political preferences of the people, relying on elected officials to control the discretionary policy choices of administrative agencies could not plausibly be expected to produce this outcome. Third, it explains that although the political control model suggests that agencies should be able to justify their policy decisions with a wide array of political reasons, the implementation of this theory would have normatively unattractive consequences that even the strongest proponents of an enhanced role for political reasons in administrative law have sensibly resisted. This Part concludes by criticizing the recent proposals to give agencies credit for relying on political reasons for their policy decisions on a number of grounds.

A. MAJORITY RULE IS NOT THE TRUE END OF DEMOCRACY

The argument in favor of majority rule is straightforward and superficially compelling. When society makes a collective decision, the citizens who will be legally bound by that decision (or their politically accountable representatives) should have the opportunity to vote, and the side with the most votes should win.49 This decision-making process has the virtue of treating everyone equally in the sense that each vote carries the same weight and therefore no one’s preferences count for more than anyone else’s.50 Majority rule is also thought to increase free will, preference satisfaction, and the extent to which citizens can be said to consent to governmental authority because, by definition, more people are getting what they want than would be the case under any other decision-making procedure.51 Finally, since a modern government makes so many decisions

49. See Stephen Macedo, Against Majoritarianism: Democratic Values and Institutional Design, 90 B.U. L. REV. 1029, 1031 (2010) ("Majoritarianism can be supported on a variety of grounds, but the simplest and apparently most morally basic defense is that when ‘equal’ persons disagree about what the rules or policies should be, the fairest way of settling the disagreement is to give everyone an equal vote and the side that gets the most votes wins.").

50. See Rebecca L. Brown, The Logic of Majority Rule, 9 U. PA. J. CONST. L. 23, 34 (2006) ("Equality lies in some form at the heart of each defense of majority rule."); Amy Gutmann, How Not To Resolve Moral Conflicts in Politics, 15 OHIO ST. J. ON DISP. RESOL. 1, 5 (1999) ("The great virtue of majoritarianism is that its voting procedures express the idea that all adults are free and equal citizens.").

51. See Brown, supra note 50, at 31–32 (describing the classic liberal argument and utilitarian or rational actor justifications for majority rule).
on such a wide variety of issues, each citizen will be a member of both majorities and minorities.\(^5\) Majority rule is therefore thought to be the most democratic procedure for making collective decisions in a pluralistic society that is characterized by persistent political disagreement. This idea has particularly caught on in a post-realist, post-Bickel, post-1960s world, where it is widely believed that there are no single, objectively correct answers to most controversial moral or political questions.\(^5\) If we cannot agree on the answers, we can at least agree to abide by the results of a majority vote.

Despite its superficial appeal, majority rule has a number of widely recognized problems from the standpoint of democracy. First, as a purely procedural theory, it places no substantive limits on the permissible contents of the majority’s decisions.\(^5\) Second, the majority is under no obligation to consider the interests or perspectives of minorities in making its decisions under this procedure.\(^5\) Majority rule therefore suggests that numerical might makes right, but it is notoriously difficult to explain how the minority could plausibly be understood to have consented to the coercive decisions of

---

52. See, e.g., Luis Fuentes-Rohwer, Note, The Emptiness of Majority Rule, 1 Mich. J. Race & L. 195, 237 (1996) (recognizing that "one of the standard justifications for simple majority rule . . . is the notion that an individual might be in the minority today, tomorrow, and perhaps the next day as well," but "chances are that the individual will find himself or herself in the majority more often than in the minority" in the long run); Lani Guinier, Keynote Address by Lani Guinier, 25 U. Tol. L. Rev. 875, 879 (1994) (explaining that the conventional case for majority rule is based on "a rule of shifting majorities, as the losers at one time or on one issue join with others and become part of the governing coalition at another time or on another issue").

53. See Erwin Chemerinsky, Foreword: The Vanishing Constitution, 103 Harv. L. Rev. 43, 64–72 (1989) (describing these developments and their impact on constitutional theory); see also Bressman, supra note 3, at 478–85 (discussing the impact of the majoritarian paradigm in constitutional theory on administrative law theory and doctrine).

54. See, e.g., Gutmann & Thompson, supra note 38, at 27–33 (criticizing procedural theories of democracy and claiming that "[a] majority vote alone cannot legitimate an outcome when the basic liberties or opportunities of an individual are at stake"); Gutmann & Thompson, supra note 35, at 96 (endorsing "the standard objection" that "mere procedures, such as majority rule, cannot justify outcomes that are unjust according to substantive principles"). Of course, most majoritarian theories of democracy recognize some fundamental constitutional rights in an effort to limit the scope of this problem. See Gutmann & Thompson, supra note 38, at 31. It is also widely accepted that administrative agencies cannot exceed the scope of their statutory authority. See infra notes 102–05 and accompanying text. Accordingly, the law imposes some constraints on the extent to which agencies can implement majoritarian preferences. Because these constraints are relatively minimal and agencies routinely exercise substantial policymaking discretion, there remains a need to legitimize the exercise of administrative authority in a democracy. Reliance on the will of the majority to control such broad exercises of agency discretion would not prevent the threat of arbitrary governmental action. As a result, and for the reasons explained above, a deliberative model of administrative legitimacy is superior to the presidential control model as a means of legitimizing the wide array of specific policy choices that are made on a daily basis by administrative agencies in the modern regulatory state.

55. See Gutmann, supra note 50, at 5 (criticizing procedural theories of democracy on the grounds that they "are silent about . . . the evidence, arguments, and claims that [must be] considered before a vote is taken," and therefore neglect the importance of deliberation).
the majority under these conditions. Third, this problem is exacerbated by the fact that there may be groups within a society that systematically lose on the issues of greatest importance to them. Finally, although majority voting can reliably measure preferences when there are only two options, nearly every important issue of public policy could be resolved in a wide variety of ways. Social choice theory has demonstrated that "[i]n some circumstances, majority rule may not resolve the choice among three or more mutually exclusive alternatives that are voted on in pairs." Accordingly, the final outcome of majority voting in lawmaking bodies is frequently the result of the way in which the decision-making process is structured, rather than the true policy preferences of a majority of voters.

For an example that illustrates some of the problems with majority rule, imagine a scenario in which a group of five strangers is riding together in a cabin on a passenger train. Three of the passengers smoke cigarettes, and the question arises whether they should be allowed to engage in their habit while the other passengers are in the car. Under a system in which the majority rules, there is a good chance that smoking will be allowed in the cabin because the smokers outnumber the nonsmokers three-to-two. This may or may not be a defensible solution, but imagine further that one of the two nonsmokers has a severe case of asthma, and that being exposed to secondhand smoke in such close quarters will likely cause her to become seriously ill and perhaps even die. Imagine further that the second nonsmoker noticed on an earlier trip to the restroom that there is a designated "smoking" cabin just down the hall from where the five passengers are located. In a purely majoritarian system, where voting is conducted without deliberation and where citizens are expected to express their pre-political preferences, the majority may still vote to allow smoking in

---

56. See Amy Gutmann, Deliberative Democracy and Majority Rule: Reply to Waldron, in Deliberative Democracy and Human Rights 227, 232 (Harold Hongju Koh & Ronald C. Slye eds., 1999) (claiming that majority rule can constitute "a numerical version of might makes right"; and that "[a]ll individuals, regardless of whether they are willing or able to deliberate, are deemed equally powerful, and 50 percent plus one of a group are deemed sufficiently powerful to move the entire body whatever way they please").

57. See id. ("Majority rule loses its moral appeal when there are discrete and insular minorities whose equally meritorious political views are consistently less likely to prevail than those of a relatively cohesive majority.").

58. Cf Macedo, supra note 49, at 1039 (acknowledging that majoritarianism "has the virtue of simplicity, and it is decisive when there are two options"; but claiming that "majoritarianism as an ideology is a simplistic and morally unattractive solution to the problem of collective self-rule amidst the great diversity and disagreement of modern mass societies").


61. This is a modified version of an example that was previously used by Amy Gutmann. For her discussion, see Gutmann, supra note 50, at 3–4.
the cabin. I would contend, however, that this decision would be procedurally and substantively illegitimate. If, however, the parties engaged in reasoned deliberation on which course of action would promote the public good, they would almost certainly adopt a different and better alternative, which might even be memorialized by a vote at the end of the discussion.62 Unlike the previous choice, moreover, this decision could fairly be described as a collective one, and it would be procedurally and substantively valid. The latter choice would therefore be more democratic, even though it is not what a majority of the participants would initially have wanted.

Stephen Macedo has recently argued that "we should stop talking about 'majoritarianism' as a plausible characterization of a political system that we would recommend," and that "legitimate democracies are those that respect minority rights and promote fair and inclusive deliberation."63 "Majoritarianism" is also not a remotely plausible characterization of the political system we have. In this regard, the Framers of the Constitution were particularly concerned with the potential for "faction" within the populace and the resulting "tyranny of the majority."64 They rejected direct democracy at the federal level in favor of a republican democracy, "which was intended to ensure that lawmaking was the product of thoughtful deliberation by elected representatives, rather than the passions or narrow self-interests of the people."65 The Framers, of course, also devised a system of separated powers and checks and balances, including bicameralism and presentment,66 which imposes a super-majority requirement on the enactment of legislation, and thereby facilitates reasoned deliberation in an effort to achieve broad consensus on ways of promoting the public good that take the views of political minorities into account.67 Cass Sunstein has characterized the picture of American democracy that emerges from this constitutional structure as a "deliberative democracy," rather than a system that merely aggregates the pre-political preferences of citizens or elected representatives.68

The Constitution did not explicitly reserve a place for policymaking by unelected administrators who are authorized by statute to promulgate

62. I would assume that this decision would be unanimous, but as Stephen Macedo has recently pointed out, "Somewhere there will be a crank, zealot, or nut who disagrees with the most sensible and well-justified of policies." Macedo, supra note 49, at 1035.
63. Id. at 1030.
64. See THE FEDERALIST NO. 10 (James Madison).
legally binding rules without complying with the requirements of bicameralism and presentment.⁶⁹ Public officials and scholars have therefore devoted tremendous effort to developing theories of legitimacy for the modern regulatory state, where such administrative policymaking is pervasive.⁷⁰ Legal scholars have also studied the intellectual history of these efforts and documented how the prevailing theories of the legitimacy of the modern regulatory state have shifted over time.⁷¹ Lisa Bressman has persuasively claimed that the interest group representation model that prevailed during the late 1960s and 1970s provided the first theory of legitimacy for the administrative state that focused primarily on the extent to which agency decision making reflected popular preferences, rather than focusing on the extent to which structural safeguards existed to prevent arbitrary decision making.⁷² When the interest-group-representation model was replaced by the presidential control model during the 1980s, the emphasis on popular control of agency decision making was retained, but the mechanism for achieving popular control shifted "from interest groups to the one governmental actor responsive to the entire nation."⁷³ The presidential control model is characterized, in its strongest form, by the importance that it attaches to giving the President (or allowing the President to assert) directorial control, as opposed to merely supervisory or managerial control, over the modern administrative state.⁷⁴ Not only does presidential control provide the prevailing model of legitimacy in administrative law at this time, but Bressman has quite plausibly predicted that "[t]he President's

⁶⁹. See William N. Eskridge, Jr. & John Ferejohn, A Republic of Statutes: The New American Constitution 10 (2010) ("The biggest change in the Constitutional structure [over time] has been the creation of the modern administrative state . . . ").

⁷⁰. See Farina, supra note 3, at 987 ("Like an intriguing but awkward family heirloom, the legitimacy problem is handed down from generation to generation of administrative law scholars.").


⁷². Bressman, supra note 3, at 475–78.

⁷³. Id. at 486.

⁷⁴. See id. at 485 ("President Reagan and his successors, both Republican and Democrat, have asserted not only managerial but directorial control of the administrative state."). The validity of the strongest form of the presidential control model is subject to ongoing debate. Compare Kagan, supra note 7, at 2251 ("[A] statutory delegation to an executive agency official . . . usually should be read as allowing the President to assert directive authority . . . over the exercise of the delegated discretion."); with Peter L. Strauss, Foreword, Overseer, or "the Decider"?: The President in Administrative Law, 75 GEO. WASH. L. REV. 696, 704–05 (2007) ("[I]n ordinary administrative law contexts, where Congress has assigned a function to a named agency subject to its oversight and the discipline of judicial review, the President's role—like that of the Congress and the courts—is that of overseer and not decider."). Although the resolution of this debate is beyond the scope of this Article, my arguments have a tendency to undermine the former view and suggest certain conditions or limitations on the latter position.
unique capacity for public responsiveness—in a word, majoritarianism—ensures that this model is likely to survive into the future."\textsuperscript{75}

The problem, of course, is that while the presidential control model of administrative law may be straightforward and superficially compelling, it does not reflect a sound understanding of the American constitutional structure or the meaning of democracy. Even if the presidential control model worked as predicted, an agency's decision to follow the preferences of a President who is adhering to the will of a majority of the people would not be constitutionally or democratically legitimate. The reason is that this model fully incorporates the most fundamental problems with the democratic legitimacy of majority rule.\textsuperscript{76} First, as a procedural theory, it places no substantive limits on the permissible contents of an agency's decisions.\textsuperscript{77} Second, the presidential control model does not impose any obligation on decision makers to consider the interests and perspectives of minorities. On the contrary, because presidential elections are expected to serve as the mechanism for ensuring that agencies make policy decisions that comport with the will of the people, the interests and perspectives of anyone who lacks political clout can safely be ignored, even if those individuals or groups will be most directly affected by a decision. Third, this problem is exacerbated by the fact that there may be groups within society that systematically lose on the issues of greatest importance to them. The presidential control model therefore suggests that electoral might makes right, but it cannot explain how the minority could plausibly be understood to have consented to the adverse decisions of the majority under these conditions. As such, agency policy decisions would not represent truly collective decisions that the minority, as well as the majority, would have public-regarding reasons to accept.

It would also be ironic if the constitutionally suspect nature of administrative policymaking could be overcome by its allegedly majoritarian nature when the Framers of the Constitution were at such pains to establish a government that would avoid the potential for faction within the populace and the resulting tyranny of the majority.\textsuperscript{78} If the goals of representation, bicameralism, and presentment were to ensure that lawmaking was the product of thoughtful deliberation by elected representatives rather than the passions or narrow self-interests of the people, the replacement of those structural safeguards with a purely majoritarian model of administrative law is not even remotely responsive to the problem. While the President could theoretically engage in reasoned deliberation about which courses of action

\textsuperscript{75} Bressman, supra note 3, at 491.
\textsuperscript{76} Cf. supra notes 54-58 and accompanying text.
\textsuperscript{77} As explained above, some agency action could potentially be invalidated on statutory or constitutional grounds, but that does not obviate the need to legitimize other discretionary exercises of administrative authority. See supra note 54.
\textsuperscript{78} See supra notes 64-68 and accompanying text.
would best promote the public good that took the views of political minorities into account, so could a benevolent dictator (or an administrative agency). The key point, however, is that the presidential control model does not contemplate this role for the President, and even if it did, we would need to adopt other structural safeguards (besides elections) to ensure that those responsibilities were upheld. At the end of the day, the presidential control model cannot legitimize administrative policymaking because a presidential directive to an agency to implement the preferences of a majority of voters is not, standing alone, democratically or constitutionally legitimate.

B. POLITICAL CONTROL OF AGENCY ACTION DOES NOT RESULT IN MAJORITY RULE

The previous Subpart claimed that the presidential control model could not legitimize agency policy decisions even if the model worked as anticipated because governmental decisions in a constitutional democracy are not supposed to reflect the unfiltered preferences of the majority. This Subpart points out that there is little reason to think that the presidential control model works as anticipated. The model assumes that the President’s decisions will typically reflect the preferences of a majority of the electorate, and if the President strays from the will of the people, he or his political party will be held politically accountable. Neither assumption is warranted. First, the President is rarely held politically accountable for the specific policy decisions of agencies. Second, an unregulated political process would not prevent the President from favoring powerful special interests over the potentially contrary preferences of the disorganized general public. As a result, it is deeply problematic to assume that the presidential control model reliably promotes majoritarianism. The White House’s influence on agency decision making is more likely to capture the strength of competing interest group pressures, but existing inequalities render an unregulated pluralistic conception of the administrative process normatively unattractive.

I have previously argued that contrary to the conventional wisdom, “elected representatives are not politically accountable to the voters for their specific policy decisions.” This form of political accountability would require the electorate (1) to know about the government’s decisions, (2) to have established preferences about their desirability, (3) to be capable of identifying who was responsible for particular policy choices, and (4) to vote.

79. See supra notes 42–44 and accompanying text.
on the basis of this information at the next election. Yet the political science
literature on voter knowledge and decision making calls into question
whether any of these conditions are regularly met. On the contrary, the
White House makes countless decisions that are invisible to the electorate,
and even the relatively small number of decisions that receive some public
attention are not necessarily salient to a majority of voters. The electorate
does not have preexisting or fixed preferences on many of the issues that are
brought to its attention, and public opinion can potentially be “crafted” by
public officials and other elites for their own purposes. Not only is it
difficult to ascertain who is responsible for policy decisions in a federal
system of government with separated powers and a variety of checks and
balances, but White House officials undoubtedly play a major role in many
governmental decisions that are never attributed to the President. Even if a
first-term President made numerous unpopular decisions that were
transparent, American voters would still only be presented with one
reasonably viable alternative. Finally, the President is not eligible for
reelection after his second term, and he makes far too many decisions for
electoral sanctions realistically to come into play on any regular basis.

81. For examples of works recognizing the low level of voter knowledge, see John A.
Ferejohn, Information and the Electoral Process, in INFORMATION AND DEMOCRATIC PROCESSES 3, 3
(John A. Ferejohn & James H. Kuklinski eds., 1990) ("Decades of behavioral research have
shown that most people know little about their elected officeholders, less about their
opponents, and virtually nothing about the public issues that occupy officials from Washington
to city hall."); Ilya Somin, Political Ignorance and the Countermajoritarian Difficulty: A New Perspective
important point established in some five decades of political knowledge research is that the
majority of American citizens lack even basic political knowledge.").

82. See Schacter, supra note 80, at 59-63.

83. See Peter M. Shane, Political Accountability in a System of Checks and Balances: The Case of
Presidential Review of Rulemaking, 48 ARK. L. REV. 161, 207 (1995); see also Lisa Schultz Bressman
& Michael P. Vandenbergh, Inside the Administrative State: A Critical Look at the Practice of
House influence on the EPA and reporting that “White House involvement seldom was
transparent to the public,” and “the president (and most notably, President Clinton)
demonstrated little official involvement in EPA rule-makings”); Mendelson, supra note 5, at
1146-59 (reviewing available information, and reporting that “it seems clear that public
documents describing OMB views on agency decisions in the George W. Bush Administration
significantly understate the impact of OMB review”).

84. See NELSON W. POLSBY & AARON WILDAVSKY, PRESIDENTIAL ELECTIONS: CONTEMPORARY
STRATEGIES OF AMERICAN ELECTORAL POLITICS 292 (7th ed. 1988) ("It is possible for candidates
to get 100 percent of the votes and still have every voter opposed to most of their policies, as
well as having every one of their policies opposed by most of the voters."); Farina, supra note 3,
at 998 (describing the acute “bundling problem” faced by voters in presidential elections, which
"precludes any facile translation of election results into ‘the people’s will’ on specific policy
issues").

85. See Shane, supra note 83, at 199-200 ("[D]uring both an initial campaign and another
for reelection, a presidential candidate knows that his detailed stances on matters of policy are
not likely to make decisive differences in his political fortunes. . . . [F]ollowing a successful
Similarly, "the vast majority of regulatory decision making flies beneath the general public's radar and implicates established preferences of the electorate only at very high levels of abstraction."\textsuperscript{88} Not only are most voters unlikely to know or care about most administrative decisions, but they will routinely have difficulty accurately gauging responsibility for those decisions that subsequently prove unpopular. While some of the highest profile agency decisions might occasionally be attributed to the President, all of the limitations on his political accountability would exist in this context as well. In short, the idea that voters will hold the President accountable in an election for discretionary agency decisions is wildly unrealistic, except in very unusual circumstances.\textsuperscript{87} The "chain of accountability" that is envisioned by political control models of administrative legitimacy is therefore broken, and policy decisions by administrative agencies cannot really be attributed to the will of the people in this fashion.\textsuperscript{88}

Advocates of the political control model of administrative law must still believe that the political influence of the President or Congress "will make administrative agencies more responsive to the current will of the people."\textsuperscript{89} This could occur if elected officials had a clear mandate from the voters and acted consistent with their expectations, but it seems unlikely in an era that is characterized by a closely divided electorate with limited knowledge of, or opinions about, the detailed policy questions that confront agencies.\textsuperscript{90} It could also occur, however, if elected representatives vigorously pursued the apparent preferences of their constituents who stood to be affected by particular administrative decisions. In other words, agencies may be accountable to the voters because elected representatives exert political pressure on agencies to adopt policies that further the pre-political interests of their constituents.

The problem, however, is that this understanding of the political control model ignores the basic lessons of public choice theory. As I have previously pointed out in a related context:

If narrow private interests have organizational advantages that allow them to extract "rents" from the general public in exchange

\textsuperscript{86} Staszewski, supra note 99, at 1271 & n.68.

\textsuperscript{87} Glen Staszewski, Textualism and the Executive Branch, 2009 Mich. St. L. Rev. 143, 175; see also Criddle, supra note 80, at 456-65 (evaluating the premises of theories of presidential administration, and concluding that "the case for viewing the American presidency as a reliable proxy for the will of the people collapses all too quickly once its assumptions are exposed to close scrutiny").

\textsuperscript{88} Staszewski, supra note 99, at 1271 n.68.

\textsuperscript{89} Staszewski, supra note 87, at 176 (discussing and critiquing this possibility).

\textsuperscript{90} See Criddle, supra note 80, at 458 ("Political scientists have long recognized that presidential elections can rarely, if ever, be construed as conferring genuine mandates for presidents to pursue particular regulatory policies.").
for providing support to self-interested public officials, the implementation of a theory that relies upon elected representatives to exert political pressure on agencies to further the interests of their “constituents” is a recipe for disaster (or, at least, regulatory capture).91

From this perspective, the presidential control model’s assumption that political influence on administrative agencies will reliably promote majoritarianism appears completely unwarranted. Rather, in the absence of a more meaningful electoral check (or other structural safeguards), there is nothing to prevent the President from favoring powerful special interests over the potentially contrary preferences of the disorganized general public. Public choice theory tells us that the diffuse public interests that are typically promoted by modern social welfare legislation will systematically be disadvantaged by an unregulated administrative process.92

Contrary to the underlying assumptions of the presidential control model, there is little reason to think that the President’s influence over administrative agencies will regularly lead them to make decisions that comport with the preferences of a majority of citizens, or that the electorate will hold the President politically accountable for agency decisions that deviate from this standard. It is just as likely to think that the President will encourage agencies to cater to narrow special interests and the vast majority of the general public will not know or care, and that the attentive public who does learn about such decisions will not have sufficient political influence to do very much about it.

An unapologetic advocate of the presidential control model might contend that there is nothing that the law can or should do about this state of affairs. As long as agencies follow the directives of the President and the President must stand for periodic elections, we should rely upon a free political market to correct any unpopular or allegedly unacceptable agency policy decisions. If the general public is unaware of, or unconcerned about, what agencies are doing, then attentive members of the public who are

91. Staszewski, supra note 87, at 177; see McNollgast, supra note 33, at 1714 (“If elected officials are a willing co-conspirator in agency capture, evidence that they influence policy will not assuage fears that the public interest is subverted.”).

92. See, e.g., Steven P. Croley, Theories of Regulation: Incorporating the Administrative Process, 98 COLUM. L. REV. 1, 34-41 (1998) (describing the central aspects of public choice theory); id. at 39-40 (explaining that from the perspective of public choice theory, “[i]nterest groups with the most at stake in a particular regulatory decision, who spend the most to buy that decision, typically see their demand for regulation met by legislators who acquiesce in order to enjoy continued electoral success and the benefits that holding office brings”); Cass R. Sunstein, What’s Standing After Lujan?: Of Citizen Suits, “Injuries,” and Article III, 91 MICH. L. REV. 163, 219 (1992) (criticizing Justice Scalia’s restrictive view of standing, and pointing out that “[s]ome minorities are especially well-organized and do indeed have access to the political process, including the executive branch,” while “some majorities are so diffuse and ill-organized that they face systematic transaction costs barriers to the exercise of ongoing political influence”).

HeinOnline -- 97 Iowa L. Rev. 870 2011-2012
critical of agency decision making should do a better job of mobilizing the citizenry. If, however, the political opposition is unsuccessful in those efforts, then the President should continue to encourage agencies to give the interest groups that exert the most political pressure on behalf of their preferred outcomes precisely what they want. From this perspective, such a decision would embody "the will of the people."

There are at least three overwhelming problems with this response to a critique of the operative assumptions of the presidential control model. First, because the President is not politically accountable for the specific policy decisions of administrative agencies, the electoral check on agency decision making that is demanded by the model is essentially an empty formality. Second, there are undeniable market failures in the political process that make it extremely difficult for the broad, disorganized general public (i.e., the majority) and certain discrete and insular or otherwise unpopular minorities to exert sufficient political pressure on the executive branch adequately to protect their interests. Those market failures would need to be addressed and resolved before a pluralistic conception of the administrative process could even fairly (if not legitimately) operate. Finally, and perhaps most important, the advocates of the presidential control model have not promoted their theory on the grounds that it provides the best mechanism for ensuring that administrative agencies satisfy the preferences of powerful special interests. Rather, the presidential control model has been portrayed as the best mechanism for ensuring that administrative agencies make policy decisions that comport with the preferences of a majority of the people. The theory has therefore capitalized on the widespread perception that the majority should rule in a democracy. If the proponents of the presidential control model were

93. See Criddle, supra note 80, at 464 ("[T]he available evidence suggests that presidential administration does not reliably reduce the threat of countermajoritarian agency rulemaking and may, in fact, greatly exacerbate the problem."); see, e.g., Bressman & Vandenbergh, supra note 83, at 87-88 ("[A]ccording to EPA respondents [to survey questions], business groups exerted somewhat more influence on White House involvement in EPA rule-making than environmental groups did... [T]he outputs [of White House interventions] favored narrow interests... [because] the White House readily sought changes that would reduce burdens on regulated entities, and veered from those that would increase such burdens... [and] the White House did not hesitate to seek changes that reduced protections for human health and the environment, and routinely eschewed changes with a positive effect."); Steven Croley, White House Review of Agency Rulemaking: An Empirical Investigation, 70 U. CHI. L. REV. 821, 858 fig.6 (2003) (reporting greater attendance at OIRA meetings by persons representing narrow interests than by persons representing broad-based interests); Wendy Wagner et al., Rulemaking in the Shade: An Empirical Study of EPA's Air Toxic Emissions Standards, 63 ADMIN. L. REV. 99, 123-51 (2011) (finding substantial imbalances in representation and influence between industry and environmental groups regarding the EPA’s hazardous-air-pollutant rules at several stages of the administrative process).

94. See supra notes 42-44 and accompanying text.
actually required to defend an unadulterated version of interest group theory, their model would lose most of its apparent normative appeal.

C. POLITICAL REASONS AND POLITICAL-CONTROL THEORY

As explained above, prominent scholars have relied upon the political control model to argue that courts should give agencies credit for justifying their policy decisions with political reasons under the arbitrary and capricious standard of judicial review. Yet, the advocates of an increased role for political reasons in administrative law uniformly impose a couple of important conditions or limitations on their proposals. First, they claim that agencies should only receive credit for following the President's preferences or otherwise relying on political reasons when the White House's influence is openly and transparently disclosed. This condition is consistent with the presidential control theory because it increases the likelihood that voters could hold the President politically accountable for an agency's policy choices. Professor Mendelson has persuasively explained that the current lack of adequate transparency regarding the White House's influence on agency rulemaking "makes it less likely that the electorate will perceive that there is meaningful presidential supervision of agency decision making, making the agency actions less legitimate," and "also reduces the chance of the electorate understanding the content of that presidential supervision, further reducing the accountability of the President for those decisions." Second, the advocates of an increased role for political reasons in administrative law have endorsed important substantive limits on what potentially counts as a legitimate political influence on agency decision making. In particular, Professor Watts distinguishes between "legitimate political influences . . . that seek to further policy considerations or public values," and "illegitimate political influences . . . that seek to implement raw
politics or partisan politics unconnected in any way to the statutory scheme being implemented.” She therefore claims, for example, that agencies should not receive credit for justifying their policy decisions by purporting to rely on presidential directives to reward important campaign contributors, or when presidential directives are unadorned by further policy explanations. Professor Watts also claims:

[P]residential prodding should not be allowed to help explain agency action where the President directs an agency to act in a way that would flout congressional will as set forth in the statute being implemented, or where the President asks the agency to act in a way that would conflict with the existing evidence.

Similarly, Professor Mendelson contends that “[c]ertain types of presidential pressure seem clearly out of bounds,” including “presidential influence that is inconsistent with the agency’s legal constraints” or “that prompts the agency to ignore its factual or technical conclusions,” as well as “influence that is aimed at achieving some goal other than service to the public interest.”

While these proposed limitations on the contents of legitimate political reasons seem sensible enough, they are decidedly not the product of the presidential control model of administrative law. Rather, if the presidential control model were taken to its logical conclusion, 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. There is certainly no warrant for concluding that “raw politics” or “partisan politics” are illegitimate under a model of regulatory legitimacy that relies on the prospect of political accountability to ensure that elected officials influence agencies to make decisions that comport with

99. Watts, supra note 2, at 9; see also id. at 53–57 (discussing “types of political factors that might appropriately be relied upon” by agencies and courts).
100. Id. at 54–55.
101. Id. at 55 (“Allowing an agency to base a decision on such a bald presidential direction—unbounded by the relevant statutory scheme, facts, or evidence—would leave the President with unfettered discretion to direct the outcome of an agency’s decision in a way unconnected to any articulation of public values or the public interest.”).
102. Id. at 60 (footnote omitted).
103. Mendelson, supra note 5, at 1141; see also id. at 1171–77 (discussing the appropriate scope of judicial review of agency decisions that are influenced by political reasons, and providing some preliminary thoughts on the types of political reasons that are legitimate).
104. Mendelson and Watts correctly emphasize that administrative agencies must comply with statutory limits on their authority. See supra notes 102–03 and accompanying text. It therefore follows that agencies cannot legitimately violate their statutory authority based on a directive from the President. It bears noting, however, that some advocates of the presidential control model have endorsed administrative law doctrines that expand executive power in ways that potentially allow agencies to deviate from Congress’s intent in a variety of circumstances. See Staszewski, supra note 87, at 154–55.
majoritarian preferences or the results of interest group pressure. The presidential control model is premised on a theory of democracy that questions the very existence of a “public interest” that is independent of these considerations. It is therefore difficult to see why the presidential control model would frown upon agency decisions that are justified by compliance with presidential directives to make certain policy choices because, for example, (1) the decision would help the President’s reelection chances, (2) the decision would benefit an important supporter (and campaign donor) of the President, or (3) “the President said so.” A President’s efforts to improve his reelection chances are presumably correlated with his ability to make decisions that are favored by a majority of voters. Accordingly, decisions that are made on this basis are presumably most likely to reflect the will of the people, and they would therefore be completely legitimate from the perspective of the political-control theory. Similarly, if voters dislike policies that are adopted to satisfy the naked preferences of the President or his campaign donors, they should either outspend their political rivals or vote for another candidate who will adopt a different point of view. A well-functioning pluralist democracy should naturally result in policies that are favored by elected officials, a majority of citizens, or the constituents with the most intense preferences on a matter—even if those decisions deviate from the factual or technical evidence in the administrative record. As Justice Scalia has suggested, “[T]he retribution or reward [for such decisions] will be meted out by Congress, or at the polls, but not in the courts.”

The limitations that Mendelson and Watts devise for legitimate political reasons are therefore deviations from the presidential control model and the product of more deliberative alternatives. Professor Watts acknowledges:

In thinking about how judges might approach this problem of line drawing, it is helpful to look to work by Cass Sunstein and other proponents of “civic republicanism” who have detailed as a descriptive matter how judges seek to (and as a normative matter how they ought to seek to) ensure that challenged governmental

---

105. Stewart, supra note 10, at 1683 (claiming that in the post-New Deal era, “we have come not only to question the agencies’ ability to protect the ‘public interest,’ but to doubt the very existence of an ascertainable ‘national welfare’ as a meaningful guide to administrative decision”); see supra note 53 and accompanying text.

106. See Fierce, supra note 21, at 121-24 (claiming that agencies should consider a host of political factors in making any important decision); Antonin Scalia, The Role of the Judiciary in Deregulation, 55 ANTITRUST L.J. 191, 197-98 (1986) (claiming that rulemaking is inherently political; agencies do not give the entire explanation for their decisions; and “if you thought that [the formula adopted by EPA in Sierra Club v. Costle] was scientifically arrived at and was not the product of a political compromise between the high-sulphur states and the low-sulphur states, you believe in Santa Claus”).

decisions implicating constitutional and administrative law issues are supported by some kind of "public value" rather than by a mere "naked preference" for one group over another."\textsuperscript{108} She points out that "civic republicans assert that judges generally seek to ensure that political actors reflect on the public good and make decisions designed to advance the public interest and public values rather than merely caving to interest group pressure."\textsuperscript{109} Similarly, Professor Mendelson claims that even though agencies should be allowed to rely more heavily on transparent political reasons, "the agency's action still must be bounded, roughly speaking, by the terms of the law under which the agency operates and by a demand for reasoned, nonarbitrary decision making."\textsuperscript{110} Not only is such a demand for reasoned, nonarbitrary decision making in the public interest a trademark of deliberative democratic theories, but Mendelson ultimately acknowledges her ambivalence toward the dominant political control models. She concludes her article by suggesting that "it may be time to revisit presidential supervision as a basis for the legitimacy of the administrative state," and claiming that it could turn out that "we might rather have our 'experts' make our value choices for us than our politicians."\textsuperscript{111}

The fact that the leading proponents of an enhanced role for political reasons in administrative law feel compelled to abandon the presidential control model and impose limitations drawn largely from deliberative democratic theory strongly suggests that there is something fundamentally wrong with the presidential control model. Indeed, I have already identified the dual nature of the problem: (1) majority rule is not the true end of constitutional democracy, and (2) political control of agency action does not reliably lead to majority rule. It is therefore not surprising that thoughtful scholars, like Professors Mendelson and Watts, who advocate a greater role for political reasons in administrative law would also seek to temper the inherent pathologies of the presidential control model and try to ensure that political reasons are only valued when they promote a plausible conception of the public good and do not result in arbitrary decision making.

Nonetheless, by developing reform proposals that simultaneously embrace some political reasons based on the presidential control model while also precluding other political reasons based on deliberative democratic theory, these scholars have achieved results that are theoretically

\textsuperscript{108} Watts, supra note 2, at 53 (citing Seidenfeld, supra note 36, at 1511; Sunstein, supra note 36, at 29; Cass R. Sunstein, Naked Preferences and the Constitution, 84 COLUM. L. REV. 1689, 1689 (1984)).

\textsuperscript{109} Id.

\textsuperscript{110} Mendelson, supra note 5, at 1144.

\textsuperscript{111} Id. at 1178.
incoherent. Although pragmatic ideas that draw from the best of different theoretical traditions are frequently desirable, political control models of administrative law and more deliberative approaches are fundamentally incompatible. This criticism is therefore not solely about an abstract desire for theoretical purity. One simply cannot evaluate the appropriate role of political reasons in administrative law without a normative conception of what administrative agencies should be doing. Both Mendelson and Watts conclude that political reasons can be legitimate or illegitimate, depending on their content. They rely upon the presidential control model for their understanding of the potential value of political reasons, which is based on the popular notion that policy choices should be made by politically accountable officials. Meanwhile, they rely upon deliberative theories of administrative legitimacy to describe the potential dangers of an agency's reliance on political reasons. But, as explained above, it is not clear why some important categories of political reasons that Mendelson and Watts find illegitimate would be problematic under the presidential control model. Nor is it clear why an agency's reliance on political reasons would have any significant value from the perspective of deliberative theories. The President and members of Congress can already comment on proposed agency rules, and those comments must be considered on the merits along with other information in the administrative record.

The fact that certain views came from the President or Congress is not ordinarily important from the perspective of deliberative democratic theory. Thus, if one wants to justify giving agencies credit for relying on political reasons from the perspective of deliberative democratic theory, one needs to identify the circumstances in which specific types of political

---

112. See Gutmann & Thompson, supra note 35, at 13 (distinguishing between first-order theories of democracy that "seek to resolve moral disagreement by demonstrating that alternative theories and principles should be rejected," and second-order theories that "make room for continuing moral conflict that first-order theories purport to eliminate"; and explaining that "[d]eliberative democracy's leading rivals among second-order theories are what are known as aggregative conceptions of democracy"). Thus, while deliberative theories can and do incorporate majoritarianism, and majoritarian theories can and do incorporate deliberation, these theoretical models have fundamentally different goals and operational principles. Coherent theories of deliberative democracy and majoritarian democracy (or political control) must therefore be consistent with their underlying goals and operational principles.

113. As explained above, the presidential control model and deliberative democratic theory provide fundamentally incompatible answers to this question. See supra notes 32-40 and accompanying text.

114. See Watts, supra note 2, at 69 & n.279.

115. See Cohen, supra note 37, at 22 (claiming that political power can be justified "if and only if [a decision] could be the object of a free and reasoned agreement among equals"); Thompson, supra note 36, at 506 ("[D]eliberative democracy is based on a moral principle of reciprocity, a form of mutual respect that requires treating citizens as equals (even if, or especially if, they are not equal in power.").
reasons would help to justify agency decision making based on the tenets of this theory. Mendelson and Watts have not done this, and they have therefore either failed to justify some of the most significant limitations that they would impose on political reasons, or failed to explain why political reasons should be considered valuable in the first place.

One might object that it is unfair to criticize Mendelson and Watts for blending political control models of administrative law and deliberative democratic theory, while simultaneously proposing a deliberative democratic approach to political reasons that takes certain majoritarian preferences into account. From this perspective, my proposal to incorporate some political preferences into a deliberative model of administrative decision making could be understood as the flip side or mirror image of Mendelson’s and Watts’s proposals. While this observation has some validity, our respective differences in emphasis are quite important. Mendelson and Watts apparently view deliberative democracy (or legal and technical considerations) as a constraint on majoritarianism, whereas I suggest that certain majoritarian preferences may be considered when reasoned deliberation fails to settle an issue. The crux of the disagreement, then, is on the appropriate starting place or baseline for agency decision making: (1) majoritarianism tempered by some reasoned deliberation, or (2) reasoned deliberation supplemented by some majoritarianism. In my view, a model of administrative law that requires agencies to engage in reasoned deliberation, supplemented by some majoritarian preferences, is far superior because this model is more constitutionally and democratically legitimate and more empirically plausible. Moreover, while Mendelson and Watts fail to explain why majoritarian preferences should be tempered by reasoned deliberation from the perspective of political-control theories, I suggest that deliberative democratic theory coherently incorporates certain majoritarian preferences in some circumstances. The key question, as always, under deliberative democratic theory is whether the reasons for a policy decision could reasonably be accepted by free and equal citizens with competing perspectives. My claim is that free and equal citizens could reasonably agree to abide by the ascertainable preferences of a majority of citizens or the broader philosophy and priorities of a duly elected President if (1) reasoned deliberation has occurred, (2) the agency has not identified a feasible alternative that is superior, and (3) the policy chosen by the agency is consistent with fundamental rights and liberties and nonarbitrary on the merits. In this specific and narrow context, the arguments for majority rule and the agency theory of political representation could reasonably be viewed as persuasive.

116. See infra Part IV.A.
In any event, the recent proposals to give politics a place in agency decision making suffer from a host of other related problems. First, Mendelson and Watts claim that their proposals will lead to greater transparency and candor regarding the role of political reasons in agency decision making. Yet, Watts's proposal leaves it entirely up to an agency to decide when it wants to disclose political influences on its decision making, and therefore does not require the disclosure of political reasons. This approach is likely to result in the disclosure of political reasons that portray the executive branch in a positive light (or that are difficult to verify or contest), while simultaneously resulting in a continued refusal to disclose the very types of unflattering political reasons that Watts would consider illegitimate. Mendelson's proposal largely avoids this problem by requiring agencies to summarize the contents of executive review positions and explain how those positions influenced final agency decisions, but this requirement would not necessarily result in the disclosure of the real political reasons behind the White House's efforts to convince agencies to adopt particular positions. The White House will continue to have incentives to explain its preferences by reference to "legitimate" political considerations, such as cost–benefit analysis or the President's philosophy or priorities, rather than "illegitimate" efforts to benefit major campaign.

For other recent critiques of Mendelson's and Watts's proposals, see Johnson, supra note 24, at 1004 (identifying obstacles to the effective implementation of the proposals; and claiming that they could unintentionally "contribute to further ossification of the rulemaking process" and increase partisan decision making by courts, in addition to undermining the stability of administrative decision making); Mark Seidenfeld, The Irrelevance of Politics for Arbitrary and Capricious Review (Fla. State Univ. Coll. of Law, Public Law Research Paper No. 565, 2011) (manuscript at 3), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1961753 ("Those who have addressed the role of politics have conflated the question of the legitimacy of politics in rulemaking with that of the legitimacy of judicial consideration of politics in reviewing rulemaking. ... The hard look doctrine is a mechanism to ensure that agencies do not hide value judgments behind simple incantations that their actions are justified by political influence. Therefore, although politics may be a legitimate motivation for agency regulation, it should be irrelevant to judicial review of that regulation.").

Mendelson, supra note 5, at 1163-64; Watts, supra note 2, at 42-45.

Mendelson, supra note 5, at 1164.
donors or the President's brother-in-law. Accordingly, both proposals would benefit the executive branch (by increasing its perceived legitimacy and the chances of having its decisions upheld by a court) without necessarily providing accurate information about the basis for the White House's influence or its true motivations.

Second, any effort to distinguish between legitimate and illegitimate political reasons will necessarily create significant line-drawing problems and slippery-slope concerns. These problems are exacerbated by any unresolved theoretical tensions between the alleged value of political reasons and the perceived limitations on their legitimacy. For example, in discussing potential objections to her proposal, Professor Watts points out that a "major hurdle that might stand in the way of giving politics a place involves what could be described as some judges' normative judgments that the politicization of agency decisionmaking is dangerous." While this particular normative judgment is hardly limited to judges, Watts claims that "judges are not likely to believe that political influences should completely be kept out of agency decisionmaking." Instead, she plausibly characterizes the likely judicial attitude as follows:

"It seems far more likely that judges want to avoid seeing too much politicization of agencies, not that they want to avoid seeing any politicization at all. Thus, judges—even those judges who are skeptical of political influences—might well be willing to modify existing judicial doctrine to encourage agencies to openly disclose political influences in appropriate circumstances. Doing so would empower courts to ensure that political factors are used in an appropriate fashion, not to covertly distort science or to suppress politically inconvenient evidence."

But if there is no general consensus—and no coherent guiding principles—on when and why political reasons are legitimate and when and why they should be limited, there are good reasons to worry that the resulting judicial doctrine will be arbitrary or, even worse, that courts will simply open the floodgates to the politicization of agencies. Professor Mendelson and Professor Watts both seek to avoid this problem and provide more concrete

---

123. *Id.* at 1144 (providing the latter examples as the "type of executive influence [that] obviously undermines the legitimacy of an agency decision, rather than enhancing it").

124. See *Johnson*, *supra* note 24, at 1051 ("[T]he most difficult issues that would arise in implementing Professor Watts' proposal . . . involve determining which political factors an agency can consider, and how to weigh those political factors against other criteria that an agency is required to consider by law.").

125. *Watts*, *supra* note 2, at 77.

126. *Id.* at 78.

127. *Id.*
legal guidance by resorting to “Congress’s intent.”

The idea is that because agencies are legally obligated to follow Congress's intent, they may only consider logically relevant factors that were not precluded from consideration by Congress in making their decisions. Thus, one can determine which political reasons may lawfully be considered by ascertaining the types of political reasons that Congress would consider “logically relevant” and presumably endorse. Because Congress does not ordinarily answer these questions, however, any conclusions are necessarily guesswork. Mendelson and Watts contend that their distinctions between legitimate and illegitimate political reasons are consistent with what Congress would likely intend if it had considered and resolved these matters. An equally compelling conclusion would be that because Congress has not made any effort to alter the existing status quo whereby political reasons are not given any credit under the arbitrary and capricious standard, Congress apparently does not want agencies to be able to justify their decisions with political reasons. My sense is that because the attribution of a controlling legislative intent in this area would necessarily be a fiction, any effort to develop appropriate default rules would merely reproduce the same underlying theoretical and empirical debates that pit the presidential control model against deliberative democratic alternatives. It is therefore highly doubtful that turning to Congress’s intent can resolve the relevant questions.

Third, even if there was general agreement on the types of political reasons that could legitimately influence agency decision making, the advocates of “giving politics a place” do not provide sufficient guidance on precisely how agencies should weigh the competing considerations in making specific policy decisions. Political considerations—including the President’s

---

128. Mendelson, supra note 5, at 1140–46, 1171–75 (noting that whether agencies can rely on political reasons is “an interpretive question”; providing guidance on the appropriate parameters of this practice and the accompanying scope of judicial review; and concluding that “even if courts are deferential, they should at least be willing to inquire into the content of political reasons considered by agencies to determine whether those reasons are consistent with the agency’s authorizing statute”); Watts, supra note 2, at 45–52 (recognizing that “the key [to assessing the legality of an agency’s reliance on political reasons] is to determine Congress’s intent”; advocating a presumption “that when Congress is silent on the matter, Congress intended agencies to be able to consider all factors that are rationally and logically relevant to the agency’s decision, including certain political influences”; and acknowledging that “this . . . begs [the] question: where should the line be drawn between rational and logically relevant political influences that we can presume Congress intended the agency to be able to consider versus those sorts of corrupting political influences that Congress would not intend an agency to consider?”).

129. See Mendelson, supra note 5, at 1140–41; Watts, supra note 2, at 45; see also Pierce, supra note 5, at 71–73.

130. See supra notes 126–28 and accompanying text; Watts, supra note 2, at 53–57 (explaining the types of political factors on which judges may rely).

131. See Watts, supra note 2, at 47 & n.206 (recognizing the plausibility of this position).
philosophy, priorities, or campaign pledges, efforts to support particular constituencies, the resource constraints on agencies, and the preferences of a majority of voters—are frequently only broadly or tangentially related to the substantive merits of the policy issues under consideration. These political considerations will therefore not necessarily be responsive to, or commensurate with, the evidence and arguments that are presented regarding the best ways of implementing an agency’s statutory authority on the merits. Accordingly, there is a serious concern that the existing proposals to give politics a place would, in practice, systematically allow political considerations to trump an agency’s considered judgment regarding the best manner of implementing its statutory authority on the merits. Professor Watts attempts to avoid this problem by emphasizing that "political considerations alone should not be allowed to justify the promulgation of a rule that conflicts with the existing evidence or with the statute itself" because such an approach would "allow naked politics to trump science and/or to trump the law." Professor Mendelson takes a similar approach. Meanwhile, they seem to agree that political reasons can help justify agency decisions that are based at least in part on questions of value in areas of scientific uncertainty. Most decisions by most agencies, however, fall within these two categories. Thus, the proposals to give politics a place would allow political considerations to justify agency decision making nearly all the time. But when agencies make decisions that involve questions of value in areas of scientific uncertainty, it frequently is the case that some decisions are demonstrably better than others on the merits.

132. Id. at 73.

133. Mendelson, supra note 5, at 1144 ([T]he agency’s action still must be bounded, roughly speaking, by the terms of the law under which the agency operates and by a demand for reasoned, nonarbitrary decision making.); id. at 1174 ("Even if a court were to treat value-laden reasons from the executive branch highly deferentially, the legal- and expertise-laden aspects of the decision should remain as susceptible to judicial review as before.").

134. Id. at 1142-46 ("A large space still remains in which potential presidential influence should be seen as clearly appropriate. This space includes areas in which an agency must make 'policy judgments,' as well as, perhaps, decisions on some more technical or legal issues."); Watts, supra note 2, at 58 ("[A] prime example of where presidential prodding should be allowed to come into play is when agencies make value-based judgments in the face of scientific uncertainty."); see also Kagan, supra note 7, at 2356-57 (claiming that a strong presidential role is appropriate on issues that involve "political judgment").

135. See Kagan, supra note 7, at 2356-57 ("Agencies, for example, often must confront the question, which science alone cannot answer, of how to make determinate judgments regarding the protection of health and safety in the face both of scientific uncertainty and competing public interests.").

136. Cf. GUTMANN & THOMPSON, supra note 38, at 17 ("Deliberative democracy certainly does not accept as equally valid whatever reasons and principles citizens and public officials put forward in defense of their own interests."); Gutmann, supra note 56, at 230-34 (pointing out that disagreement is not reasonable on all political issues; and that even in the more limited realm of genuinely reasonable disagreement, "there is good reason for democrats not to insist on majority rule," when "a non-majoritarian decision-making rule is more likely to produce
The existing proposals to give politics a place therefore create a serious
danger that agencies will routinely be allowed to rely on political
considerations to justify decisions that are not the most effective ways of
implementing their statutory authority. The proposals would thereby
undermine the underlying goals of the statutes enacted by Congress.\textsuperscript{37}

Fourth, the existing proposals to give politics a place would further
shield agency inaction from meaningful judicial review.\textsuperscript{138} Professor Watts
contends that her proposal could most readily be applied in the contexts of
denials of rulemaking petitions, withdrawals of proposed rules, and rule
rescissions.\textsuperscript{139} Not only are those decisions inherently deregulatory, but they
can nearly always be explained by reference to resource constraints or
competing priorities. It is notoriously difficult, however, for the judiciary to

\begin{itemize}
\item \textsuperscript{37} Alternatively, it is possible that adopting such proposals would have little practical
impact. When elected officials provide compelling arguments and evidence on the
administrative record regarding the best course of action on the merits, there is nothing that
would prevent agencies from following this approach under the arbitrary and capricious
standard. It is true that an agency would be required to justify such a decision on the merits
rather than on the grounds that it was following the views of an elected official, but there is
nothing to prevent elected officials from persuading agencies to adopt their preferred courses
of action under the existing law. Moreover, to the extent that scholarly proposals to give politics
a place would only allow agencies to rely on political reasons when their decisions are consistent
with the agency's statutory authority and the evidence in the administrative record, it is difficult
to see what these political reasons would add since the agency's decisions should already be
upheld on the merits under the existing version of the arbitrary and capricious standard. In
other words, agencies do not need any "credit" for relying on political reasons in precisely those
circumstances when reliance on political reasons would seem most legitimate. It may be a good
thing for the electorate to have more information about whether elected officials agree with an
agency's policy choices, but the law does not prevent elected officials (or agencies) from
providing this information to voters as things stand.

\item \textsuperscript{138} It is already difficult to obtain judicial review of agency inaction because of potential
limitations on standing and the manner in which the APA has been interpreted by federal
describing the relevant doctrine). For leading academic critiques of the judiciary's disparate
treatment of agency action and inaction, see Lisa Schultz Bressman, Judicial Review of Agency
nonreviewability and standing doctrines facilitate faction because "[t]hey make it more likely
that agencies will respond to private or political pressure rather than public welfare by giving
those typically harmed by agency action (i.e., regulated entities) more power to protest than
those typically harmed by agency inaction (i.e., regulatory beneficiaries)"); Cass R. Sunstein,
the Court's distinction between agency action and inaction; and emphasizing that "the
availability of [judicial] review will often serve as an important constraint on regulators during
the decisionmaking process long before review actually comes into play," and that "[r]eview at
the behest of statutory beneficiaries may perform a critical function in ensuring against unduly
lax enforcement that would violate statutory requirements").

\item \textsuperscript{139} Watts, supra note 2, at 65-72. Watts also suggests that her proposal could be invoked
when agencies promulgate final legislative rules, but she acknowledges that this is a "somewhat
messier" area. Id. at 72-73.
\end{itemize}
assess whether these particular justifications are meritorious. And, while there is obviously a legitimate need for each agency and Administration to establish priorities, there are reasons to be wary of eliminating any meaningful external review of those decisions. First, some Administrations do not support the underlying goals of various statutory programs, and it would be fairly easy for those Administrations to "prioritize" those programs out of existence without ever defending the substantive merits of their positions (or changing the laws on the books). Second, when an agency declines to take action on the basis of resource constraints or competing priorities, it should be fair to assume that the agency and the Administration have other priorities they are conscientiously pursuing. But a court that defers to these justifications in an individual case has no reliable way of assessing whether this is in fact the case, or whether those alternative plans and priorities are reasonable. Giving agencies more credit for relying on political reasons in these contexts would therefore seemingly provide the White House and executive branch agencies with a "blank check" to decline to take regulatory action. There is no reason to assume, however, that agencies are immune from making arbitrary decisions in these contexts. On the contrary, several scholars have pointed out that the absence of meaningful judicial review of agency inaction creates incentives for agencies to favor the views of regulated entities over the views of regulatory beneficiaries during the administrative process regardless of the merits of a policy dispute. Accordingly, the existing proposals to give politics a place in agency decision making could significantly increase the problem of agency capture.

Finally, and to some extent most fundamentally, Professor Watts claims that the existing version of the arbitrary and capricious standard is based on

141. See Michael D. Sant'ambrogio, Agency Delays: How a Principal-Agent Approach Can Inform Judicial and Executive Branch Review of Agency Foot-Dragging, 79 GEO. WASH. L. REV. 1381, 1396 (2011) (explaining that "[t]he President can delay the implementation of regulations contrary to the administration's goals," and pointing out that "unchecked agency inaction caused by the President constitutes an extralegislative veto on duly enacted statutes").
142. Recall, for example, that the George W. Bush Administration's EPA justified its denial of a petition to regulate greenhouse gas emissions from new motor vehicles based, in part, on the President's desire to develop a comprehensive plan to address the climate change issue. Massachusetts v. EPA, 549 U.S. 497, 533 (2007). Yet this "comprehensive plan" never came to fruition during his tenure in office.
143. See, e.g., GUTMANN & THOMPSON, supra note 35, at 69 ("[T]he failure of the state to act can subject citizens to as much coercion and violation of their rights as a decision to act. Neither action nor inaction by the state should have a privileged status in moral justification.").
144. See supra note 138.
the expertise model, an “outmoded model of agency decisionmaking,” and that agency decisions that are inherently political in nature are therefore frequently justified based on “technocratic façades.” Most contemporary observers agree that agencies are delegated too much discretionary authority for their decisions to be controlled solely by the application of “neutral expertise,” but that does not mean that regulatory decisions based on an agency’s assessment of the substantive merits of an issue are “technocratic façades”—or that scientific or technical considerations do not frequently favor one proposed solution over another. Moreover, the existing version of hard-look review does not preclude agencies from considering questions of “value.” When agencies are faced with questions of value in areas of scientific uncertainty, they could resolve the underlying policy disputes by resorting to majority rule or the results of interest group pressure. The primary alternative to political control models of administrative law in contemporary democratic theory, however, is not the “outmoded expertise model,” but rather models of

145. Watts, supra note 2, at 13; id. at 33–35; cf. id. at 14–32 (explaining that the current version of the arbitrary and capricious standard of review focuses on expert agency decision making, rather than politicized agency decision making).

146. Id. at 13; see id. at 42–45.

147. See, e.g., Stewart, supra note 10, at 1683–84 (“Today, the exercise of agency discretion is inevitably seen as the essentially legislative process of adjusting the competing claims of various private interests affected by agency policy. . . . Once the function of agencies is conceptualized as adjusting competing private interests in light of their configuration in a given factual situation and the policies reflected in relevant statutes, it is not possible to legitimate agency action by either the ‘transmission belt’ theory of the traditional model, or the ‘expertise’ model of the New Deal period.”).

148. See, e.g., Mariano-Florentino Cuéllar, Rethinking Regulatory Democracy, 57 ADMIN. L. REV. 411, 463 (2005) (recognizing that regulatory problems often involve policy judgments, but claiming that “[t]hose choices are almost certainly wiser when they are informed by the views of technical experts and scientists, or by reasonable calculations of a regulation’s likely costs and benefits”).

149. See id. at 467–68 (claiming that “legal decisions nearly always encompass policy and value choices along with scientific ones”; and “[u]nless one defines technical expertise or science in a way that explicitly includes political judgments, it is not plausible to treat all regulatory policy issues as being primarily about expert or scientific decisionmaking”); Holly Doremus, Listing Decisions Under the Endangered Species Act: Why Better Science Isn’t Always Better Policy, 75 WASH. U. L.Q. 1029, 1081–82 (1997) (pointing out that the APA mandates consideration of “the input of the general public”; even though this requirement “directly contradicts the norms of science, which permit consideration only of informed opinions”); Thomas J. Miles & Cass R. Sunstein, The Real World of Arbitrariness Review, 75 U. CHI. L. REV. 761, 761–62 (2008) (“The [hard-look] doctrine found its origins in judicial decisions requiring administrative agencies to demonstrate that they had taken a ‘hard look’ at the underlying questions of policy and fact. . . . Eventually courts went well beyond these procedural requirements to take a hard look on their own, assessing the reasonableness of agency judgments of policy and fact on their merits.” (footnotes omitted)). But cf. Nina A. Mendelson, Foreword, Rulemaking, Democracy, and Torrents of E-Mail, 79 GEO. WASH. L. REV. 1343, 1346 (2011) (claiming that agencies appear to be discounting value-laden comments from the general public during notice-and-comment rulemaking).
regulatory governance that are based on principles of deliberative democratic theory. Such theories are self-consciously designed to facilitate legitimate policy decisions in the face of fundamental moral disagreement. Considering the problems associated with the presidential control model and existing proposals to give politics a place in agency decision making that are based on this theory, it is worthwhile to evaluate the proper role of political reasons in administrative law from this alternative theoretical perspective. That is the project to which this Article now turns.

III. POLITICAL REASONS AND DELIBERATIVE DEMOCRACY

This Part briefly describes the central tenets of deliberative democratic theory, and explains why policy decisions made pursuant to the theory’s requirements will have greater legitimacy and a better chance of promoting statutory goals than policy decisions that merely reflect political preferences. It proceeds to explain that hard-look judicial review is best understood as a structural safeguard that seeks to ensure that administrative agencies make decisions that are compatible with deliberative democratic theory. Nonetheless, this Part recognizes that political reasons are not necessarily irrelevant under deliberative democratic theory and explains that deliberative democratic theorists have not clearly articulated the appropriate role for political reasons in administrative decision making. This Part therefore identifies the underlying principles that should guide any effort to incorporate political reasons into administrative decision making from the perspective of deliberative democratic theory.

A. DELIBERATIVE DEMOCRATIC THEORY AND HARD-LOOK JUDICIAL REVIEW

While majoritarian or pluralistic theories of democracy tend to dominate modern public law, deliberative democracy has become “the ‘most active’ area of political theory” in recent years. The literature is increasingly broad and diverse, but there are some fundamental ideas that are central to deliberative democratic theory. First, political decisions should reflect the preferences that emerge from a process of reasoned deliberation,
rather than the pre-political preferences of a majority of citizens or the
strength of competing interest group pressures.\textsuperscript{153} This means that the
participants in the lawmaking process should engage in a process of
deliberation and debate where they exchange information, ideas, and
arguments about the best course of action under the circumstances. It also
means that participants should be open-minded and willing to revise their
preexisting views and preferences based on new information and arguments,
and that any empirical claims that underlie their positions should be based
on the best available information and reliable methods of inquiry.\textsuperscript{154}

Because participants in a deliberative process have no reason to be
persuaded by the naked preferences ("this is what I want") or self-interested
arguments ("this is good for me") of others, public officials and citizens are
expected to provide reasoned explanations for their positions that could
reasonably be accepted by free and equal citizens with fundamentally
competing perspectives, and to explain how a proposed course of action
would promote the public good.\textsuperscript{155} The deliberative process should
generally be transparent to the general public, and the justifications that
public officials offer for their decisions should be publicly accessible.\textsuperscript{156}
Such transparency is needed to provide citizens and other public officials with an
opportunity to discuss, evaluate, and criticize those decisions, "as well as
potentially to seek legal or political reform."\textsuperscript{157} The results of the
deliberative process are therefore generally understood as provisional
because most legal and policy decisions can and should be changed if new
information and arguments (as well as experience under the existing
regime) suggest a better course of action on the merits.\textsuperscript{158}

For present purposes, the key distinctions between majoritarian or
pluralistic theories of democratic governance and more deliberative
alternatives is that while the former theories focus on making decisions that
accord with the prevailing distribution of political power, the latter theories
emphasize the importance of having mutually respectful discussions of the

\textsuperscript{153}. See Bessette, supra note 68, at 106 (distinguishing between "the rule of the
deliberative majority" and "unreflective popular sentiments"); Sunstein, supra note 36, at 31–32 (claiming
that the American government "was not a scheme in which people impressed their private
preferences on the government," but was instead a deliberative democracy "in which the
selection of preferences was the object of the governmental process").

\textsuperscript{154}. See Gutmann & Thompson, supra note 38, at 15, 56; Robert B. Reich,
("During the course of deliberation, people may discover both new information and new
perspectives about what is at stake in the decision before them. This may lead [them] not only
to modify their choice of means for achieving their ends, but perhaps to reconsider those
ends.").

\textsuperscript{155}. See supra notes 36–38 and accompanying text.

\textsuperscript{156}. See Gutmann & Thompson, supra note 38, at 95–127.

\textsuperscript{157}. Staszewski, supra note 39, 1281.

\textsuperscript{158}. See Gutmann & Thompson, supra note 35, at 6–7, 116–19.
merits of the issues and ensuring that everyone's interests and perspectives are taken into account in making decisions. The former theories are purely procedural in nature, whereas the latter theories tend to be concerned with both the procedural and substantive validity of authoritative policy choices. Deliberative democratic theories therefore have a tendency, above all, to seek to eliminate arbitrary governmental action, which includes legal and policy decisions that fail to consider important aspects of a problem, deviate from applicable legal requirements or the best available empirical information, or cannot reasonably be justified to the opponents of a chosen course of action. For the foregoing reasons, majoritarian and pluralistic theories of democratic governance are primarily concerned with who adheres (or how many people adhere) to particular views rather than their substantive merits, whereas deliberative democratic theories tend to maintain that "[u]ses of political power should be choice-sensitive and status-insensitive," meaning that the merits of a particular argument, position, or policy choice are far more important than the identity of its source.

Deliberative democratic theories have several major advantages over majoritarian or pluralistic conceptions of democratic governance. First, policy decisions that are adopted pursuant to the requirements of deliberative democratic theory are likely to be better than policy decisions that deviate from (or are considered exempt from) those standards. The deliberative process is designed to pool the best available information on a

---

159. See id. at 15 ("Aggregative theorists thus believe that the collective outcomes produced by their various methods need no further justification beyond the rationale for the method itself.").

160. See, e.g., GUTMANN & THOMPSON, supra note 38, at 27-28; Cohen, supra note 38, at 187.

161. See supra note 40 and accompanying text.

162. Christopher H. Schroeder, Deliberative Democracy's Attempt To Turn Politics into Law, 65 LAW & CONTEMP. PROBS. 95, 100-01 (2002).

163. See, e.g., GUTMANN & THOMPSON, supra note 35, at 144-45 ("If someone says that God demands that fetal tissue not be used for research, and he also offers accessible reasons for not using fetal tissue—reasons that happen to be based on what God tells him—then it is those accessible reasons that satisfy the standard. The source of those reasons, even if inaccessible, is irrelevant to their mutual justification."); Cohen, supra note 38, at 194 (explaining that deliberative democratic theory's conception of equality means that "everyone with the deliberative capacities—which is to say, more or less all human beings—has and is recognized as having equal standing at each stage of the deliberative process").

164. See James D. Fearon, Deliberation As Discussion, in DELIBERATIVE DEMOCRACY, supra note 96, at 44-46 (describing "six major reasons or arguments for discussing a matter before reaching a decision on what to do"); Staszewski, supra note 39, at 1288 ("[T]he underlying hope is that if we take unduly partial reasons for acting off the table, provide decision-makers with the best available empirical information, and encourage them to resolve the problem through deliberations that are conducted in a spirit of mutual respect and cooperation, the final policy decision is likely to be the most legitimate and meritorious option under the circumstances.").
subject and require participants to explain why their proposals would promote the public good. The process thereby limits self-interested proposals, and helps participants to ascertain their own preferences on the best course of action under the circumstances. Because decision makers are required to provide reasoned explanations for their decisions that could reasonably be accepted by interested parties with competing points of view, there are meaningful safeguards in place to prevent arbitrary governmental action. Simply put, a deliberative process can be expected to yield more justifiable decisions on the merits because the deliberative process is, by definition, focused on the substantive merits of the decision. This is not necessarily true of decision-making procedures that merely aggregate the pre-political preferences of voters, elected representatives, or interest groups. Contrary to the allegations of some critics, securing this benefit does not require a single correct answer to controversial policy questions, but it does depend on a belief in a well-informed decision maker's ability reasonably to conclude that some policy choices are more justifiable than others on a fairly regular basis.

Second, policy decisions adopted pursuant to the requirements of deliberative democratic theory are likely to be more legitimate than policy decisions that deviate from those standards. This is true from the perspective of the majority because the deliberative process provides most decision makers with the information and competing perspectives they need to ascertain their own preferences on the best resolution of specific policy issues. The deliberative process sometimes builds a broad consensus

---

165. See Fearon, supra note 164, at 49-52 (recognizing that reasoned deliberation alleviates the problem of "bounded rationality"; and that "faced with a complex problem, individuals might wish to pool their limited capabilities through discussion and so increase the odds of making a good choice"); supra note 36 and accompanying text.

166. See Elster, supra note 36, at 100 ("The mere fact that an assembly of individuals defines its task as that of deliberation rather than mere force-based bargaining exercises a powerful influence on the proposals and arguments that can be made."); Sunstein, supra note 108, at 1695 ("If naked preferences are forbidden . . . and the government is forced to invoke some public value to justify its conduct, government behavior becomes constrained.").

167. See Manin, supra note 37, at 350 ("[D]uring political deliberation, individuals acquire new perspectives not only with respect to possible solutions, but also with respect to their own preferences.").

168. See Gutmann, supra note 50, at 8-9 (describing deliberative democracy's aim of "resolving" moral conflict as justifiably as possible," and explaining that this requires "attend[ing] to the content of the conflict to assess the justifiability of both the means of reaching a resolution and the resolution itself").

169. See Staszewski, supra note 39, at 1282-84 (explaining how "reason giving" promotes the legitimacy of governmental authority in a democracy).

170. See GUTMANN & THOMPSON, supra note 35, at 157 ("When citizens bargain and negotiate, they may learn how better to get what they wanted to begin with, but when they deliberate, they can expand their knowledge, including their self-understanding of what is best for them and their collective understanding of what will best serve their fellow citizens."); Manin, supra note 37, at 349-50.
around a particular solution, but even when such a consensus is lacking, public officials should ordinarily be expected to have good reasons for choosing certain courses of action over the available alternatives to make legitimate policy decisions in a democracy. Because deliberative democratic theory requires a decision-making process that adequately considers the interests and perspectives of minorities, as well as substantive outcomes that "could be the object of a free and reasoned agreement among equals," the resulting policy decisions can be understood as collective choices that are presumptively legitimate from the standpoint of minorities. Rebecca Brown has argued that from this perspective, elected representatives may have a constitutionally mandated obligation to consider the interests and perspectives of all of their constituents and provide reasoned explanations for their policy decisions that could reasonably be accepted by minorities whom they are obligated to represent. In any event, a theory that requires public officials to consider the interests and perspectives of minorities will clearly have greater democratic legitimacy from the minority's point of view than a theory that assumes that all citizens have provided their blanket consent to be governed by the unfiltered preferences of a majority, irrespective of the substantive merits of those decisions.

Third, deliberative democratic theories are easier to monitor and enforce in practice than their majoritarian or pluralistic competitors. The advocates of majoritarian or pluralistic theories tend to envision a political market that operates with an invisible hand like an economic market. The idea is that the need to maintain political support will lead elected officials to make decisions that reflect the will of the people and that elected officials

171. See Gutmann, supra note 50, at 2 (claiming that reasoned deliberation has noninstrumental value because it "expresses the basic democratic value of mutual respect among free and equal citizens"); Thompson, supra note 36, at 504 ("[T]he primary conceptual criterion for legitimacy, and the most important distinguishing characteristic of deliberation, is mutual justification—presenting and responding to reasons intended to justify a political decision.").

172. See Manin, supra note 37, at 359-60.

173. Cohen, supra note 37, at 22.

174. See Cohen, supra note 38, at 222 ("[D]eliberative democracy is connected to political community because the requirement of shared reasons for the exercise of political power—a requirement absent from the aggregative view—itself expresses the full and equal membership of all in the sovereign body responsible for authorizing the exercise of that power, and establishes the common reason and will of that body."); see also Thompson, supra note 36, at 502-04 (discussing deliberative democracy's focus on "the need for a collective decision in a state of disagreement").


176. See, e.g., ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY (1957); JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 269-83 (Harper & Bros. 3d ed. 1950) (1942).
will be voted out of office if they deviate from this course of action.\textsuperscript{177} Yet, it has become increasingly clear that there are significant "market failures" in the world of politics and that periodic elections are not dependable mechanisms for ensuring that public officials implement the will of the people on most specific policy matters.\textsuperscript{178} Moreover, any effort to correct these market failures by developing more accurate ways to assess the majority's preferences, reducing or eliminating unjustifiable inequalities in political influence, and identifying and adopting more reliable mechanisms for ensuring that elected representatives follow their constituents' instructions would be an overwhelmingly daunting task.\textsuperscript{179} In contrast, although no one would contend that deliberative democratic theories are currently implemented in their ideal fashion, such theories do ironically have the potential to be relatively "self-correcting." Deliberative democratic theory depends upon interested public officials and citizens to participate in the deliberative process, to present competing points of view, and to evaluate and potentially criticize policy decisions and their proffered justifications, as well as potentially to seek legal or political reform. This system can work if the lawmaking process is accessible and transparent, public officials provide reasoned explanations for their policy decisions on a consistent basis, and the deliberative process meaningfully engages a broad range of viewpoints.\textsuperscript{180} While there are no guarantees that these conditions will be met, deliberative democratic theory stands a much more realistic chance of succeeding on its own terms—and being able to identify and rectify its own shortcomings in practice—than its majoritarian or pluralistic counterparts.\textsuperscript{181}

\textsuperscript{177} See Gutmann & Thompson, supra note 35, at 14.

\textsuperscript{178} See Eskridge et al., supra note 60, at 50–54 (discussing prominent critiques of pluralism); supra Part II.B.

\textsuperscript{179} Similar problems contributed to the demise of interest group representation theory as the dominant theory of legitimacy for the administrative state. See Cass R. Sunstein, Factions, Self-Interest, and the APA: Four Lessons Since 1946, 72 Va. L. Rev. 271, 283–84 (1986) ("[The interest group representation model] foundered in light of four considerations: the fact that the relevant representatives were self-selecting; the weaknesses in the notion that the purpose of administration is to aggregate preferences; the unlikelihood that, even if preference-aggregation were desirable, it would be accomplished by a judicially-administered system of interest-representation; and the possibility that such procedures would impose costs not justified by improvements in administrative outcomes.").

\textsuperscript{180} Staszewski, supra note 39, at 1291–92 (acknowledging that existing inequalities in political knowledge and participation are troubling, but claiming that they are not fatal to deliberative democratic theory).

\textsuperscript{181} See Gutmann & Thompson, supra note 38, at 357–58 ("The gap between the theory and practice of deliberative democracy is narrower than in most other conceptions of democracy . . . . [T]he theory of deliberative democracy partly constitutes its own practice: the arguments with which democratic theorists justify the theory are of the same kind that democratic citizens use to justify decisions and policies in practice."); Gutmann & Thompson, supra note 35, at 57–58 (describing the "self-correcting capacity of deliberative democracy").
As explained above, deliberative democratic theory is more consistent with the structure of the American Constitution than majoritarian or pluralistic conceptions of democratic governance. Deliberative democratic theory also provides the best explanation for the existing version of the arbitrary and capricious standard of judicial review. Professor Watts correctly recognizes in the first sentence of her article that “[a]t its core, arbitrary and capricious review, or ‘hard look’ review as it is sometimes called, enables courts to ensure that administrative agencies justify their decisions with adequate reasons.” Reason giving is, of course, also the central element of deliberative democratic theory. Shortly after the Supreme Court endorsed hard-look judicial review, Cass Sunstein published a classic law review article that recognized that this doctrinal innovation was “classically republican” because of its requirements of “deliberation” and “reasoned analysis.” Professor Sunstein perceptively described the underlying rationale for this development as follows:

Reviewing courts are attempting to ensure that the agency has not merely responded to political pressure but that it is instead deliberating in order to identify and implement the public values that should control the controversy. A principal concern is that without the procedural and substantive requirements of the hard-look doctrine, the governing values may be subverted in the enforcement process through the domination of powerful private groups.

Mark Seidenfeld subsequently argued that “the political theory of civic republicanism, with its emphasis on citizen participation in government and deliberative decision making, provides the best justification for the American bureaucracy,” and that “the paradigmatic process for agency formulation of policy—informal rulemaking—is specifically geared to advance the requirements of civic republican theory.” I have previously pointed out that:

182. See supra notes 63–68 and accompanying text; see also Bessette, supra note 68, at 102; Sunstein, supra note 36, at 29.
183. Watts, supra note 2, at 5.
184. Thompson, supra note 36, at 498 ("At the core of all theories of deliberative democracy is what may be called a reason-giving requirement.").
185. Sunstein, supra note 36, at 56–58. "Civic republican" political theory is widely viewed as the predecessor to modern versions of deliberative democratic theory. See supra note 36.
186. Sunstein, supra note 36, at 56 (citation omitted). Sunstein observed that the governing "values may be found in the statute, which must of course be taken as authoritative." Id. When "the statute is ambiguous, [however,] the values must be ascertained by the agency through a more open-ended process." Id.
187. Seidenfeld, supra note 36, at 1512.
188. Id. at 1560.
The net result of APA procedures and "hard-look" judicial review under *State Farm* is to encourage and enforce republican ideals of deliberation and reasoned decisionmaking in the administrative lawmaking process. Those ideals are generally assumed to be satisfied in the traditional legislative process by virtue of representation and the structural safeguards of bicameralism, presentment, and separation of powers that are enshrined in the Constitution.\(^{189}\)

In any event, hard-look judicial review is perhaps the prime example of a well-established legal doctrine that has firmly embraced and squarely adopted the most fundamental principles of deliberative democratic theory. Accordingly, it is not surprising that agencies, courts, and commentators have traditionally understood arbitrary and capricious review as a process that should focus on the substantive merits of an agency's policy choices rather than other political considerations.\(^{190}\) Moreover, proposals to alter the arbitrary and capricious standard by giving agencies credit for justifying their policy decisions based on political reasons would naturally strike advocates of deliberative democratic theory as inherently misguided and potentially quite destabilizing to the basic quality and legitimacy of the modern regulatory state.

On the other hand, political reasons are not necessarily irrelevant to administrative decision making under the principles of deliberative democratic theory. For example, nearly everyone agrees that agencies routinely have limited resources that inhibit their ability to fully enforce their statutory authority, and that agencies must therefore establish sensible priorities that will almost inevitably reflect some political considerations.\(^{191}\)

---

189. Staszewski, *supra* note 65, at 443–44 (footnote omitted); *see also* Criddle, *supra* note 80, at 484 ("The fiduciary model [of administrative law] favors promoting deliberative rationality in agency rulemaking through mandatory reason-giving requirements backed by judicial review."); Gillian E. Metzger, *Ordinary Administrative Law As Constitutional Common Law*, 110 COLUM. L. REV. 479, 490 (2010) (identifying hard-look review as a primary example of "the ways that constitutional concerns have shaped the development of ordinary administrative law doctrines"); 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, 388 (explaining that hard-look review "is best understood as a form of heightened scrutiny of the rationale of agency decisions and that the doctrine of separation of powers requires such scrutiny because of the unique position of administrative agencies in terms of the constitutional structure of government").

190. *See* Watts, *supra* note 2, at 14–32 (documenting the current understanding of the arbitrary and capricious standard of review).

191. *See, e.g.*, Biber, *supra* note 140, at 18 ("Priority setting is . . . central to the role that an Executive Branch, headed by an elected officer, plays in our constitutional system of government."); *see also* Staszewski, *supra* note 138, at 385–92 (discussing the Supreme Court's adoption of a presumption against judicial review of nonenforcement decisions based, in part, on these considerations; and recognizing that "[e]ven the sharpest critics of the Court's current approach to agency inaction have recognized the validity of these practical concerns").
Moreover, deliberative democratic theorists typically agree that
majoritarian preferences can legitimately play a tie-breaking function when
public officials are choosing between two or more equally valid policy
alternatives. Nonetheless, deliberative democratic theorists have not
provided a clear account of the precise role of political preferences in
agency decision making. The next Subpart therefore assesses the
appropriate role of political reasons in agency decision making from the
perspective of deliberative democratic theory.

B. THE ROLE OF POLITICAL REASONS IN DELIBERATIVE DEMOCRATIC THEORY

Deliberative democratic theory recognizes that political preferences and
priorities have a legitimate role to play in policymaking in many situations
when certain conditions are met. This issue has been addressed by some
commentators in discussions of the role of voting in deliberative democratic
theory. Contrary to the assertions of some prominent critics, deliberative
democratic theorists have emphasized that voting is essential to their
theories of democratic governance because reasonable disagreement will
frequently remain after reasoned deliberation has taken place, and the act
of voting marks the close of an episode of reasoned deliberation, allows each
participant to express her views on the merits of the relevant proposals, and
ultimately results in political action with potentially significant
consequences. The need to make decisions with real policy consequences
is what distinguishes political deliberation from academic discussion. As
Amy Gutmann has explained, "Deliberation is more accurately understood
as the give and take of public argument with the aim of making an action-
guiding decision that can be justified to the people bound by it." Because

192. See, e.g., GUTMANN & THOMPSON, supra note 38, at 141-42 (describing the
circumstances in which "the deliberative principle of accountability justifies or allows deference
to popular opinion"); Cohen, supra note 38, at 197 (acknowledging that "the fact that a
proposal has majority support" can "count as a reason for endorsing it" in some situations); see
also Staszewski, supra note 39, at 1292 ("The apparent preferences of a majority might . . . play a
tie-breaking function in the absence of any need for structural safeguards to protect minority
interests.").
193. See Jeremy Waldron, Deliberation, Disagreement, and Voting, in DELIBERATIVE DEMOCRACY
AND HUMAN RIGHTS, supra note 56, at 210, 212 ("[T]here is something embarrassing about
voting in a deliberative context—or at least that is the impression we are given—and those
committed to deliberation will often go to extraordinary lengths to avoid it. Voting seems like
an admission of failure, for it shows that a discussion based on the merits has failed to resolve
the issue.").
194. See Gutmann, supra note 56, at 228-29 ("Voting is essential to the ideal of deliberative
democracy . . . because (1) people reasonably disagree during and after deliberating on
political issues, (2) people's reasonable disagreements ought to be respected, and (3) one way
of respecting those disagreements—and respecting people as political equals—is to count all
their views in the final voting.").
195. See id. at 233-34.
196. Id. at 233.
policy decisions must be made, theories of “deliberative democracy should dovetail with voting.”

While deliberative democratic theorists do not necessarily believe that majority rule is required by democracy, they do recognize that abiding by the results of a majority vote would be an appropriate decision-making procedure in many situations. Deliberative democratic theorists also recognize that popular opinion can be a significant factor in making policy decisions in similar circumstances. The difference, however, is that while majoritarian and pluralistic theories of democracy understand the aggregation of preferences or the weighing of competing interest group pressures as the only legitimate goals of policymaking, deliberative democratic theory views a majority vote or deference to public opinion as “a closure device when reasonable disagreement remains after a period of reasoned deliberation if no fundamental rights or liberties are implicated.”

Thus, while majoritarianism and pluralism are purely procedural theories of democracy, which are typically silent on “the evidence, arguments, and claims that are considered before a vote is taken”; deliberative democratic theory contains both procedural and substantive elements and, therefore, recognizes the need to attend to the content of a policy dispute “to assess the justifiability of both the means of reaching a resolution and the resolution itself.” This means, for example, that “deliberative democratic theory has no problem saying that what the majority decides, even after deliberating, need not be right.”

At the end of the day, deliberative democratic theory is willing to embrace the results of a vote or defer to public opinion if several conditions are met. First, an adequate deliberative process must have preceded the final

197. Id.
198. See id. at 232–34 (“If a non-majoritarian decision-making rule is more likely to produce justifiable decisions, or likely to produce more justifiable decisions, than the available alternatives, and if that rule is consistent with the civic equality of individuals, then there is good reason for democrats not to insist on majority rule.”).
199. See id. at 233 (acknowledging that “a case may be made for a presumption in favor of majority rule after due deliberation” in circumstances of reasonable disagreement); see also supra note 192 and accompanying text.
200. See GUTMANN & THOMPSON, supra note 38, at 140–42. Gutmann and Thompson emphasize, however, that elected officials are not required to defer to popular opinion under conditions of reasonable disagreement, and that they should instead feel free to exercise independent judgment. Id. at 141–42.
201. RICHARDSON, supra note 37, at 203; see also GUTMANN & THOMPSON, supra note 38, at 27–33; GUTMANN & THOMPSON, supra note 35, at 95–124, 130–35; RICHARDSON, supra note 37, at 167–69, 203–13; Cohen, supra note 38, at 197–98, 212–21; Gutmann, supra note 50, at 3.
202. Gutmann, supra note 50, at 5.
203. Id. at 9.
204. GUTMANN & THOMPSON, supra note 35, at 135.
vote or policy decision.\textsuperscript{205} Second, the resulting decision may not violate any fundamental rights or liberties, as determined by the principles of deliberative democratic theory.\textsuperscript{206} Finally, the decision may not be arbitrary or capricious on the merits, meaning that the participants in the deliberative process must consider the interests and perspectives of everyone who will be affected by the decision, and the decision must be justified by the arguments and evidence presented and supported by a reasoned explanation.\textsuperscript{207}

Because any assessment of whether these conditions are met will necessarily turn on the particular circumstances and precise content of a policy dispute, deliberative democratic theory tends to be sympathetic to external review mechanisms such as judicial review and to emphasize the provisional nature of most policy choices in a democracy.

Most discussions of the proper roles of voting, majority rule, and public opinion in deliberative democratic theory have been conducted in the abstract or appear to be focused primarily on the legislative process. Although these discussions are instructive for purposes of assessing the role of political reasons in administrative law, decision making by administrative agencies is distinctive in several important ways. First, federal agency officials are not elected but are instead appointed by the President with the advice and consent of the Senate, and they can typically be removed from office by the President for any reason.\textsuperscript{208} Second, agencies can only exercise the

\textsuperscript{205} See Gutmann & Thompson, supra note 38, at 33 ("To assess the justifiability of a procedure in particular instances, even a procedure as widely accepted as majority rule, we need to know what kind of discussion took place, who participated, what arguments they presented, and how each responded to the claims of the others."); Richardson, supra note 37, at 169 ("The application of majority rule formalizes an agreement that has been forged by deliberation."); Cohen, supra note 38, at 197 ("[W]hen people do appeal to considerations that are quite generally recognized as having considerable weight, then the fact that a proposal has majority support will itself commonly count as a reason for endorsing it."); Gutmann, supra note 50, at 4--5 (recognizing that "[m]ajority rule may . . . be the best procedural standard for resolving many political disputes," but claiming that "[i]t would be a serious mistake to judge conflict resolution only by its voting rules and not also by how the decisionmaking is designed and by whether decisionmakers are encouraged to deliberate about their disagreements before voting"); Manin, supra note 37, at 359 ("Because [a majority vote] comes at the close of a deliberative process in which everyone was able to take part, choose among several solutions, and remain free to approve or refuse the conclusions developed from the argument, the result carries legitimacy."); see also Bessette, supra note 68, at 106--11 (describing the concept of the "deliberative majority" that was embraced by the framers of the Constitution).

\textsuperscript{206} See, e.g., Gutmann & Thompson, supra note 38, at 30 ("A majority vote alone cannot legitimate an outcome when the basic liberties or opportunities of an individual are at stake."); Cohen, supra note 38, at 201--07 (developing "the thesis that democracy—on the deliberative interpretation of collective choice—must ensure religious, expressive, and moral liberties").

\textsuperscript{207} See supra notes 36--40 and accompanying text (describing the chief tenets of deliberative democratic theory and its underlying goal of preventing arbitrary governmental action).

\textsuperscript{208} See U.S. Const. art. II, § 2, cl. 2; Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3146 (2010) ("Since 1789, the Constitution has been understood to
authority that has been delegated to them by Congress, and they are, in turn, responsible for the successful implementation of their statutory mandates.\footnote{209} Third, agencies typically have technical expertise in the areas they are responsible for regulating, and they often develop substantial experience in implementing their programmatic responsibilities.\footnote{210} While the agency heads will typically change with each new presidential administration, most agencies have a staff of career civil servants with technical expertise and experience, as well as an institutional memory.\footnote{211} Fourth, agencies are subject to a variety of forms of political oversight, including presidential review of rulemaking by the Office of Information and Regulatory Affairs ("OIRA"), hearings on Capitol Hill, the annual budget appropriations process, and informal lobbying efforts by the White House and members of Congress.\footnote{212} Fifth, executive branch agencies do not ordinarily vote when they make policy decisions, but rather announce their decisions in the general statement of basis and purpose that accompanies a legislative rule or the opinion that accompanies an order.\footnote{213} Their decisions therefore have the appearance of being made by a single individual, such as the agency head, or through a consensual, institutional decision-making process within the agency.\footnote{214} These characteristics of agencies must be taken into account in any effort to ascertain the appropriate role of political reasons in administrative law from the perspective of deliberative democratic theory. The final Part of this Article explains how political reasons could be given a more prominent role in administrative law from this perspective and evaluates whether this reform would be desirable.

\footnote{209. See Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988) ("It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress.").}

\footnote{210. See Renee M. Jones, Legitimacy and Corporate Law: The Case for Regulatory Redundancy, 86 Wash. L. Rev. 1273, 1309 (2009) ("Agencies are widely viewed to be better suited to administrative tasks than the legislature due to institutional qualities such as professionalism, administrative expertise, subject-matter expertise, and experience.").}

\footnote{211. See Jeffrey J. Rachlinski & Cynthia R. Farina, Cognitive Psychology and Optimal Government Design, 87 Cornell L. Rev. 549, 579 (2002) ("The agency's career staff provide an ongoing repository not only of substantive knowledge but also of decisionmaking experience, so that agencies... need not reinvent the wheel every four or eight years.").}

\footnote{212. See Bradley Lipton, Note, Accountability, Deference, and the Skidmore Doctrine, 119 Yale L.J. 2096, 2101-20 (2010) (canvassing recent literature on the political accountability of the bureaucracy, and explaining that agency policies are "subject to significant oversight by political officials in both the executive and legislative branches").}

\footnote{213. See 5 U.S.C. § 551(4), (6) (2006); id. § 555(c).}

\footnote{214. Cf. Michael Asimow & Ronald M. Levin, State and Federal Administrative Law 91-92 (3d ed. 2009) (describing the institutional model of agency decision making). Independent agencies that are headed by bipartisan, multimember commissions do, however, frequently vote on their policy decisions. See Pierce et al., supra note 11, at 101-02 (describing independent agencies' functional and structural characteristics).}
IV. POLITICAL REASONS AND ADMINISTRATIVE LAW

While the current version of arbitrary and capricious review is consistent with the core principles of deliberative democratic theory, political reasons could legitimately play a larger and much more transparent role in agency decision making from this theoretical perspective. For starters, there is little question that communications between the White House or Congress and agency decision makers regarding the manner in which an agency should exercise its rulemaking authority should ordinarily be disclosed on the public record. As Professor Mendelson has shown, there are good reasons to think that the political influence of the White House has a significant impact on the legislative rules that are promulgated by agencies, but the nature of this influence is not ordinarily disclosed by either the White House or agencies—even though there are executive orders in place that appear to compel this result.\footnote{215} The existence of, and failure to disclose, political influence on agency decision making by members of Congress is almost certainly prevalent, as well.\footnote{216} Professor Mendelson’s proposal to require agencies “to summarize the critical details of... executive review positions and explain the extent to which those positions are connected to the agency’s ultimate decision”\footnote{217} would therefore undoubtedly be a significant improvement from the perspective of deliberative democratic theory. Agencies should also be required to summarize the positions that were taken by members of Congress on proposed rules, and to explain how congressional input influenced their final decisions. Similarly, proposals to require the disclosure of significant ex parte contacts between politicians and agency officials during informal rulemaking should also be endorsed from this perspective.\footnote{218} The bottom line is that in order to facilitate greater transparency in the administrative process, a summary of any communications between the agency and political officials that are directly related to the decision should, at the very least, be included with the other comments in the administrative record. Accordingly, Congress should ideally amend the APA to require this result.

\footnote{215} Mendelson, supra note 5, at 1146–59; see also supra note 93 (citing sources that report the results of empirical studies on the White House’s influence on agencies).

\footnote{216} See Jack M. Beermann, Congressional Administration, 43 SAN DIEGO L. REV. 61 (2006) (describing Congress’s involvement in the administration of the law, and discussing some of the potential implications for administrative law).

\footnote{217} Mendelson, supra note 5, at 1164.

\footnote{218} See, e.g., William D. Araiza, Judicial and Legislative Checks on Ex Parte OMB Influence over Rulemaking, 54 ADMIN. L. REV. 611, 615 (2002) (suggesting that external checks would be useful “to guard against potentially inappropriate ... influence over the rulemaking process”); Sidney A. Shapiro, Two Cheers for HBO: The Problem of the Nonpublic Record, 54 ADMIN. L. REV. 853, 855 (2002) (“[A]gencies and the White House should reveal private communications of central relevance to ... rulemaking proceedings....”).
and the White House and executive branch agencies should comply with existing executive orders. The real issue, therefore, is whether and when agencies should receive credit for justifying their policy decisions with political reasons during the course of hard-look judicial review. The next Subpart provides one answer to this question from the perspective of deliberative democratic theory, while the final Subpart suggests that it may ultimately be a bad idea to give agencies credit for justifying their policy decisions with political reasons—even if, in theory, the degree of such credit could be properly circumscribed.

A. The State Farm Two-Step

Deliberative democratic theory maintains that an adequate deliberative process must precede the assessment of, or reliance upon, majoritarian preferences or public opinion in making authoritative policy decisions. In the context of administrative rulemaking, this means that an agency should conduct a public notice-and-comment proceeding that focuses on the best way of implementing its delegated statutory authority on the merits before taking into account other potentially relevant political considerations. If elected officials want to participate in this process by providing substantive arguments and supporting evidence regarding their conceptions of the best ways to implement an agency’s statutory authority, they should be more than welcome to submit comments, which must be considered by the agency on their merits along with all of the other arguments and evidence in the administrative record. The agency should take all of the arguments and evidence into account in reaching a decision about the best course of action under the circumstances. The agency should also provide a reasoned explanation for its decision, which responds to the major issues of policy that were ventilated and could reasonably be accepted by interested parties with competing points of view. In other words, the agency should reach a decision about the best way to implement its statutory authority and explain that decision “in technocratic, statutory, or scientifically driven terms, not political terms,” just as they currently do.

If an agency’s assessment of the best course of action under the circumstances is feasible, then the agency should promulgate a final rule that implements this particular policy decision. When an agency reasonably concludes, however, that its preferred course of action is infeasible because

219. The extent to which this proposal could be extended to formal rulemaking, adjudication, or guidance documents is therefore beyond the scope of this Article. It bears noting, however, that due process considerations may render political considerations more problematic in the adjudication context. See Kevin M. Stack, Agency Statutory Interpretation and Policymaking Form, 2009 Mich. St. L. Rev. 225, 227–33 (describing the different role of politics in agency rulemaking and adjudication).

220. Watts, supra note 2, at 5 (describing the existing practice).
of limitations on its statutory authority or its own competing programmatic responsibilities, then the agency should acknowledge that it has chosen to pursue a less desirable alternative and explain why it has done so. The agency should then evaluate the existing alternatives on the merits and identify the best remaining solution that is feasible under the circumstances. Political reasons that do not bear directly on the merits, such as political preferences or public opinion, should only come into play when the best decision is infeasible and two or more roughly equal alternatives are available. At this point, the agency should identify any political reasons that it considered and explain how they affected its analysis. As explained above, a summary of any communications between the agency and political officials that are directly related to the decision should be included with the other comments in the administrative record as a matter of course.

Under this framework, the first step of the analysis would involve an agency’s assessment of the best course of action under the circumstances and whether this policy decision could feasibly be adopted, and the second step would involve an agency’s identification of the best remaining alternative if it reasonably concluded that it could not implement its statutory authority in the most effective manner. If the agency identified two or more roughly equal alternatives in the second step of this analysis, it could take into account legitimate political considerations that are not directly related to the merits of the policy dispute in selecting from among this set of options. Those political reasons, however, must reflect considerations that are relevant to a plausible conception of the public good, rather than the naked preferences or self-interested goals of elected officials, because only the former types of considerations could reasonably be accepted by everyone who will be affected by the decision. Thus, for example, an agency could rely on reputable evidence that a majority of the public favored one policy option over another to select the more popular proposal. Similarly, an agency could rely on the White House’s transparently disclosed preference for one policy option over another on the grounds that the chosen option is more consistent with the President’s philosophy and priorities, assuming that those assertions are true and the President has

221. The State Farm two-step would therefore provide a potential mechanism for agencies to incorporate values expressed by the general public into their decision making during notice-and-comment rulemaking. Cf Mendelson, supra note 149, at 1372 (claiming that agencies should engage “in some way” with value-laden comments from the general public, “especially when they arrive in large numbers”). While it is also possible that value-laden comments from the general public could persuade an agency to change its mind about the best course of action on the merits under the first step of this framework, such comments could potentially be too general to provide much meaningful guidance on the detailed and complex issues that are typically resolved in rulemaking.

222. See, e.g., Elster, supra note 36, at 101 (describing deliberative democracy’s norm of impartiality); Sunstein, supra note 108, at 1699–1704 (distinguishing between naked preferences and public values).
articulated a reasonably plausible conception of the public good that informs such determinations. In contrast, an agency could not rely on the President’s bald assertion of authority, naked preference for one policy choice over another, or partisan political considerations because those political reasons could not reasonably be accepted by everyone, including the President’s political opponents.

One might object that this analytical framework does not provide enough room for agencies to justify their policy decisions with political reasons from a deliberative democratic perspective. First, agencies might sometimes conclude that there is more than one equally effective way to implement their delegated statutory authority. Why should they be required to identify the best way to implement their statutory mandates or be precluded from considering public opinion or the President’s philosophy or priorities in those circumstances? Second, legitimate political considerations, including public opinion and the President’s philosophy or priorities, may strongly favor an option that an agency considers inferior on the merits. Why shouldn’t these legitimate political considerations be allowed to trump an agency’s assessment of the best way to implement its statutory authority under these circumstances? Finally, it may be difficult, if not impossible, for agency officials (or other human beings) to disentangle their assessment of the merits of various policy options from other political considerations. How could political considerations realistically come into play only in limited circumstances under the second part of this analytical framework?

The two-pronged answer to each of these well-taken objections is that such limitations on the use of political reasons in agency decision making are necessary to ensure the truth orientation of the administrative process and attend to the unique characteristics of administrative agencies. Requiring agencies to identify the best way to implement their statutory authority under the circumstances does not imply that there is a single correct answer to questions of regulatory policy, but it does suggest that agencies have been delegated the responsibility to use their expertise and experience to make their own best judgments regarding the most effective ways of achieving their programmatic objectives and thereby promote the public good. Simply stating that there is a range of satisfactory options, and

223. See generally Edley, supra note 7, at 72–95 (criticizing administrative law's “trichotomy” of politics, science, and adjudicatory fairness; and claiming that all agency decisions have political, scientific, and legal dimensions that are difficult or impossible to disentangle).

224. See supra notes 208–14 and accompanying text. Compare Richardson, supra note 37, at 207 (pointing out that one of the primary dangers associated with incorporating majority rule into deliberative democratic theory is that “knowing that an issue will be settled by majority rule can stunt the truth orientation of debate” because “[i]nstead of attempting to figure out how their pet causes and concerns ought to be balanced with those of other groups, factions often simply push for what they can get, subject only to the need of building a winning coalition”), with Waldron, supra note 193, at 215 (“The need for majority support is what makes me take the interests of others into account in the proposals that I make.”).
that the agency has chosen the alternative that is most consistent with public opinion or the President’s preferences and priorities, would be too easy of a way out and would fail to satisfy the agency’s statutory responsibilities. Agencies should instead be strongly encouraged to make an independent assessment of the best course of action on the merits from among the range of serious alternatives that were presented during the deliberative process. Similarly, political considerations should not be allowed to trump an agency’s assessment of the best way of implementing its statutory authority because this would undermine the truth orientation of the administrative process and conflict with the agency’s statutory responsibilities. In contrast, asking agency officials to separate their assessment of the merits of various policy options from other political considerations promotes the truth orientation of the administrative process and the achievement of an agency’s statutory responsibilities, even if this will sometimes prove difficult to accomplish in practice.

In sum, this two-step framework would encourage agency officials to remain focused on the best ways of carrying out their programmatic responsibilities on the merits, and would thereby promote the truth orientation of the administrative process. The framework would also encourage agencies to use their experience and substantive expertise to make independent judgments regarding the best ways to implement their statutory authority, and would thereby respect the public-regarding reasons for delegating policymaking authority to administrative agencies in the first place. At the same time, the framework would recognize that agency decision making could legitimately be influenced by the political preferences of elected officials and the public in a narrow range of circumstances. The framework would thereby complement legitimate means of political oversight without undermining the ability of administrative agencies to perform their core functions or carry out their statutory responsibilities.

Of course, even when policy decisions are made pursuant to an adequate deliberative process, they must also be consistent with fundamental rights and liberties and nonarbitrary on the merits to meet the requirements of deliberative democratic theory. Judicial review should therefore routinely be available to assess whether an agency’s policy decisions comport with constitutional requirements. Moreover, final agency decisions should be subject to judicial review to ascertain whether they are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. Although judicial review of final agency action is presumptively

---

225. Under this proposed framework, it would be unreasonable for an agency to identify an alternative that clearly exceeded its statutory authority or was facially impracticable as the best course of action and then to choose from among the remaining alternatives based on political reasons.

226. See supra notes 206–07 and accompanying text.
available on these grounds under the APA,227 the scope of judicial review under the arbitrary and capricious standard would need to be modified to some extent to accommodate this proposed two-step framework.

In particular, the judiciary should continue to require agencies to provide reasoned explanations for their decisions, but the precise mode of analysis would need to be reformulated to accord with the foregoing two-step framework. Thus, if an agency adopted its conception of the best course of action on the merits under the circumstances, the judiciary would merely need to ascertain whether this decision was reasonable in light of the administrative record. In other words, the current version of hard-look judicial review should be applied. If, however, an agency concluded that the best course of action on the merits was infeasible and adopted an inferior policy alternative, the scope of judicial review would be slightly more complicated. Specifically, a court would need to ascertain (1) whether the agency's decision to deviate from its own conception of the best course of action was reasonable under the circumstances, (2) whether the alternative that the agency adopted was reasonable in light of the administrative record, and (3) whether the agency provided an adequate justification for deviating from the best course of action and adopting its chosen alternative. The judiciary should verify that the agency only deviated from its own conception of the best course of action on the merits based on an accurate conception of the limits of its own statutory authority or budgetary limitations, or a reasonable decision to divert more resources to other problems that fall within the agency's programmatic responsibilities. Moreover, the judiciary should verify that the agency's decision to adopt a second-best alternative was based solely on a reasonable assessment of the next-best means of implementing its statutory authority, as well as legitimate political considerations, including public opinion and presidential priorities. In any event, the judiciary should vacate and remand an agency's policy decisions whenever its choices were not supported by the evidence in the administrative record or the agency relied on illegitimate political considerations. This framework for analysis—let's call it "the State Farm two-step"—would provide a novel method of implementing the arbitrary and capricious standard of judicial review under the APA, which would incorporate a greater role for political reasons in administrative law while remaining consistent with deliberative democratic theory.

It may be useful to consider an example of how the different approaches to political reasons might play out in a concrete case. In 1979, the EPA considered whether to set the maximum permissible level of emissions for sulfur dioxide from coal-fired power plants at 0.55 lb/MMBtu or 1.2 lb/MMBtu.228 When the agency adopted the less stringent standard

---

(1.2 lb/MBtu), environmental groups challenged its decision on procedural grounds because the EPA was subject to a blitz of undisclosed ex parte contacts by political officials and industry representatives after the public notice-and-comment period had ended. In Sierra Club, the D.C. Circuit upheld the agency's decision, even though it implicitly conceded that (1) EPA would have chosen the lower limit but for the undisclosed political influence, and (2) the actual reasons for the agency's decision differed dramatically from the publicly disclosed reasons. The court was persuaded that the agency provided a reasoned explanation for its decision based on the administrative record, and the court was therefore unconcerned that other political reasons may have influenced the EPA's decision.

But what were those political reasons, were they legitimate, and would the agency have been entitled to more credit during judicial review if it had justified its decision on those bases? Because the details of the ex parte contacts were undisclosed, we can only speculate regarding their contents. Nonetheless, Richard Pierce has recently provided a plausible description of the likely nature of those conversations given the economic and political climate in 1979. Pierce claims, for example, that President Carter's domestic-policy advisor likely endorsed the less stringent emissions standard and reminded EPA officials that (1) a general election was scheduled for a few months after the EPA's expected decision on this matter; (2) polls showed dissatisfaction with the level of inflation and unemployment; (3) polls also showed Ronald Reagan with an edge over President Carter, and Republican candidates running ahead of Democratic candidates for Congress; (4) a decision to adopt the 0.55 lb/MBtu limit would increase unemployment across Appalachia and increase electricity rates across the Midwest, two regions President Carter and Democratic candidates for Congress had to carry to retain control of the White House and Congress; and (5) Administrator Costle was a loyal Democratic supporter of President Carter, as well as an at-will employee of the President. Consistent with the preceding analysis, all of this information would be relevant to EPA's decision under the political control model of administrative legitimacy. While Professors Mendelson and Watts would plainly treat an agency's reliance on the most partisan aspects of this information with disfavor, it is not entirely clear where they would draw the line in their efforts to give politics a place in agency decision making under these circumstances.

229. Id. at 384, 387.
230. Id. at 396-410.
231. Id.
233. Id. at 123-24.
234. See supra notes 104-07 and accompanying text.
From a deliberative perspective, the information conveyed by President Carter's domestic policy advisor can be divided usefully into three categories. First, the claim that a decision to adopt the 0.55 lb/MMBtu limit would increase unemployment across Appalachia and increase electricity rates across the Midwest goes to the merits of the appropriate emissions standard (and is therefore not a "political reason" at all, under my definition), and this argument should be placed on the record and evaluated along with other relevant considerations. It bears noting that Bruce Ackerman and William Hassler have suggested that the economic analysis underlying these predictions may have been flawed, which illustrates why it is important to subject the arguments of public officials to critique and potential refutation. Second, several of the reasons provided by the domestic policy advisor for adopting the less stringent emissions standard would be irrelevant under deliberative democratic theory because they could not reasonably be accepted by free and equal citizens with fundamentally competing perspectives. These irrelevant reasons include statements that (1) a general election was scheduled for a few months after the EPA's expected decision, (2) Republican presidential and congressional candidates held an edge over Democrats, (3) President Carter and the Democrats needed to carry the Midwest and Appalachia to retain control of the White House and Congress, (4) and Administrator Costle was a loyal supporter and at-will employee of President Carter. Third, the claim that public opinion polls showed dissatisfaction with the level of inflation and unemployment would be relevant to the agency's decision under the second step of my proposed analytical framework if the EPA's preferred emissions standard was not feasible and a more lenient emissions standard would be equally effective in fulfilling the agency's statutory responsibilities. The agency's potentially legitimate reliance on public opinion polls is unlikely to arise in this situation, however, because (1) there is nothing to suggest that the EPA's preferred emissions standard would not be feasible, (2) there is no reason to think that a less stringent emissions standard would be equally effective, and (3) the EPA should already have considered the impact of its proposed emissions standard on the levels of inflation and unemployment in reaching a decision on the merits. Accordingly, the EPA's emissions standard should not be influenced by any of the political reasons allegedly proffered by President Carter's domestic policy advisor in this particular situation.

235. See supra text accompanying note 48.
236. Bruce A. Ackerman & William T. Hassler, Clean Coal/Dirty Air 99 (1981) (explaining that the negative impact of a 0.55 lb/MMBtu emissions standard was significantly overstated, and the inadequacies of the underlying analysis "were well recognized by the EPA bureaucracy").
I want to emphasize a couple of lessons that emerge from this example. First, the differences between an undiluted political control model and a deliberative democratic approach to administrative law and political reasons are profound. In this regard, Professor Pierce contends that all of the political reasons that were provided in the foregoing hypothetical should have been considered by the EPA (along with a number of others), and that none of those political reasons should have been disclosed on the administrative record. He justifies this conclusion on the grounds that the presidential control model "is better than the alternatives," and that:

It is impossible for an agency to engage in candid explanations of an invariably complicated and inherently political policy decision in our legal culture without taking a high risk that a court will reverse the decision or that a naive public will react negatively to the political nature of the decision-making process.

On the contrary, a deliberative democratic theory of administrative legitimacy would suggest that (1) all of these political reasons should have been disclosed on the administrative record; (2) the agency should have considered all of the reasons that focused on the merits of its decision along with other relevant information; and (3) other political preferences or priorities should only be considered, if at all, under narrow circumstances that were not present in this particular case. While administrative decision making is "invariably complicated and inherently political," that does not mean that its true nature should be "shrouded from public view," or that the federal judiciary and other interested members of the public are incapable of understanding it.

Second, the practical differences between the State Farm two-step and Mendelson's and Watts's proposals to give politics a place in agency decision making are relatively subtle but real. Political preferences and priorities would potentially play a much larger role under their proposals because they seem to view those considerations as relevant whenever an agency addresses questions of value in areas of scientific uncertainty, whereas the State Farm two-step would give priority to an agency's preferred solution whenever it could feasibly be implemented and would arguably be more effective on the merits. I am therefore confident that the State Farm two-step is more coherent in theory and would be more attractive in practice than other proposals to give politics a place in agency decision making. There is no

238. Id. at 124.
239. Id. at 113.
240. Id. at 124.
241. Id.
242. Id. at 121 (discussing the limits of transparency and claiming, for example, that "the ubiquitous process of presidential jawboning of agencies in the rulemaking process should continue to be shrouded from public view").
question, however, that the implementation of this analytical framework
would be relatively complicated and would create line-drawing problems
that do not exist under the current version of hard-look judicial review. It is
therefore important to consider whether the benefits of my proposal would
outweigh its costs.

B. DELIBERATION ABOUT DELIBERATION AND THE DEEPER WISDOM OF HARD-LOOK
REVIEW

Deliberative democratic theory does not claim that more deliberation
always improves a decision-making process. Rather, deliberative democratic
theory requires that the decision-making procedures that are adopted must
be justifiable from a deliberative perspective.243 If it turns out that less
deliberative procedures would, under some circumstances, lead to more
justifiable and legitimate outcomes, those procedures should be adopted
under deliberative democratic theory.244 It is therefore necessary to consider
whether the foregoing proposal to revise administrative law to provide more
space for political reasons in agency decision making would truly be
beneficial. If not, we should ultimately retain and affirmatively embrace the
existing version of hard-look judicial review based on the principles of
deliberative democratic theory.

The primary benefits of providing more space for political reasons in
agency decision making pursuant to the foregoing proposal would be the
increased transparency of the administrative process, and the potential to
improve the alignment between agency decision making and public opinion
or the philosophy and priorities of the existing political leadership, without
sacrificing the quality or legitimacy of agency policy choices. As Professor
Watts points out, if agencies are encouraged to provide political reasons for
their policy decisions in appropriate circumstances, they will be less likely to
manipulate their scientific or technical conclusions to reach a result that was
driven primarily by political considerations.245 Moreover, when agencies
expressly rely on legitimate political considerations, such as public opinion
or the sitting President’s philosophy or priorities, to choose from among two
or more roughly equal alternatives when the best course of action cannot be
followed, democratic accountability is enhanced because other

243. See Gutmann & Thompson, supra note 35, at 3 ("[N]ot all issues, all the time, require
deliberation. Deliberative democracy makes room for many other forms of decision-making
(including bargaining among groups, and secret operations ordered by executives), as long as
the use of these forms themselves is justified at some point in a deliberative process.");
Gutmann, supra note 50, at 17-18 ("We even need to deliberate in order to know when not to
deliberate.").

244. See Gutmann & Thompson, supra note 35, at 113 (emphasizing the possibility of
questioning “from within deliberative theory, whether deliberation is justifiable—and what it
entails”).

245. Watts, supra note 2, at 40-41.
governmental officials and interested members of the public can better understand and evaluate the rationale for the agency's decision.\textsuperscript{246} The requirement that agencies disclose a summary of the relevant communications between public officials and agency decision makers would greatly improve the democratic accountability of the administrative process for similar reasons.\textsuperscript{247}

While the preceding benefits would be largely procedural or systemic, the \textit{State Farm} two-step could also improve the quality of agency decision making. When an agency's assessment of the best course of action is infeasible, and there are two or more roughly equal alternatives, the most justifiable policy decision on the merits is likely to be the one that is supported by public opinion or the philosophy and priorities of the Administration. Not only does deliberative democratic theory embrace these considerations when the resulting decision was preceded by an adequate deliberative process and is justifiable on the merits, but any other basis for making the final policy decision (such as flipping a coin) would seem arbitrary or capricious under these circumstances.

The foregoing proposal also has fewer drawbacks than previous efforts to give politics a place in agency rulemaking.\textsuperscript{248} First, it provides a coherent understanding of the potential benefits of an agency's reliance on political considerations in appropriate circumstances, as well as the fundamental limitations on the ability of political reasons to justify agency decision making. Second, while the foregoing proposal would not necessarily result in the disclosure of the real political reasons behind the White House's efforts to convince agencies to adopt particular positions, this is not an overwhelming problem for deliberative democratic theory, which "is premised on a conviction that it is more productive to debate the merits of particular policy choices, rather than trying to ascertain or impugn the motives of those who have taken a position."\textsuperscript{249} It would be nice if public officials provided the real reasons for their policy positions, "but insincerity

\textsuperscript{246.} Cf. Mendelson, \textit{supra} note 5, at 1177 ("More disclosure would enable the public to react to political reasons and to better register its views on which ones are sufficient to justify a particular agency decision."); Watts, \textit{supra} note 2, at 42-45 ("Encouraging agencies to disclose political factors rather than hiding behind technocratic façades would enable more political influences to come out into the open, thereby enabling greater political accountability and monitoring."). Professor Watts also claims that her proposal would be beneficial because it would improve the fit between administrative law doctrine and political-control theories of agency legitimacy and give courts another reason to defer to agency decision making. \textit{Id.} at 33-42. I do not necessarily perceive either of these results as beneficial. \textit{See supra} Part II (criticizing political-control theory and its implications). The \textit{State Farm} two-step is therefore not intended to alter the extent to which courts defer to agency decision making but rather to revise the analytical framework that is used by agencies and courts to make and review administrative policy decisions.

\textsuperscript{247.} \textit{See supra} Part II.C (criticizing Mendelson's and Watts's proposals on various grounds).

\textsuperscript{248.} \textit{See supra} Part II.C (criticizing Mendelson's and Watts's proposals on various grounds).

\textsuperscript{249.} Staszewski, \textit{supra} note 39, at 1289.
does not eliminate our ability to evaluate the merits of their choices or the explanations they have provided to justify them,” and “insincere justifications are more likely to be vulnerable to criticism.”250 Third, the foregoing proposal would not shield agency inaction from meaningful judicial review or facilitate regulatory capture. On the contrary, the State Farm two-step would likely provide a useful new analytical framework for policy decisions of this nature. Under the first step of the analysis, the agency would need to make a decision regarding the best course of action on the merits under the circumstances. This means that an agency should explain whether it believes that the requested action is appropriate based on its statutory authority and the best available information. If the agency concludes that the requested action is inappropriate, its decision should be reviewed on the merits under the existing version of the arbitrary and capricious standard. The agency may decide, however, that while it would like to proceed with the requested action, it cannot do so at the present time because of limitations on its statutory authority or its available resources. If an agency adopts this latter course of action, a court should evaluate the reasonableness of the decision, which could include issues of statutory interpretation,251 as well as an analysis of specifically how the agency plans to pursue its programmatic responsibilities in light of its existing budgetary resources. Legitimate political considerations, such as the ascertainable preferences of elected officials or the general public, would only be relevant to inform this latter inquiry. Not only would such an analytical framework limit arbitrary agency action and facilitate a more meaningful discussion of the merits of an agency’s priorities and decisions regarding when to take action, but it would also place the views and interests of regulated entities and regulatory beneficiaries on more even footing during the administrative process, and therefore promote the goals of deliberative democratic theory.252

The real question from the standpoint of implementation is whether the State Farm two-step would create overwhelming line-drawing or slippery-slope problems for either agencies or courts.253 This is a serious—and perhaps overwhelming—problem for any proposal to give politics a limited space in agency decision making because most policy questions involve legal, technical, and political considerations that cannot easily be disentangled, as well as questions of value.254 In contrast to other proposals, the State Farm two-step has coherent theoretical underpinnings that provide “intelligible

250. Id.
251. The appropriate standard of judicial review of questions of agency statutory interpretation is beyond the scope of this Article.
252. See supra Part III.A.
253. My remaining criticisms of Mendelson’s and Watts’s proposals do not apply to the State Farm two-step. See supra notes 145–151 and accompanying text.
254. See generally EDLEY, supra note 7, at 98–105.
principles” for ascertaining which political considerations are legitimate, and when they should be allowed to justify an agency’s policy decisions. Nonetheless, political reasons are inherently unruly, my proposed analytical framework is intricate and potentially malleable, and many public officials are not devotees of deliberative democratic theory. Accordingly, there are still good reasons to worry that the resulting judicial doctrine will be arbitrary or, even worse, that courts will simply open the floodgates to the politicization of administrative agencies. Moreover, there is still a potential concern that this proposal to give politics a place could, in practice, periodically allow political considerations to trump an agency’s considered judgment regarding the best manner of implementing its statutory authority on the merits.

These possibilities raise more fundamental concerns based on the underlying reality that political considerations will inevitably play a substantial role in agency decision making as a result of the existing methods of political control. There is little need to provide administrative agencies with further incentives to take political reasons into account in their decision making. On the contrary, we should be striving to develop structural mechanisms to encourage agencies to engage in reasoned deliberation about the best ways to implement their statutory authority on the merits. The existing version of hard-look judicial review, which instructs agencies to “explain their decisions in technocratic, statutory, or scientifically driven terms, not political terms,” is administrative law’s most important tool for serving this very purpose. We would therefore risk losing something dear if the arbitrary and capricious standard was altered in any way that would dilute this message and open the door for agencies to justify their policy decisions based on political considerations.

The first concern is that if we openly embrace political reasons in agency decision making, political considerations would be more likely to predominate agency decision making and thereby undermine the underlying goals of many statutory programs. While the State Farm two-step is specifically designed to mitigate this concern, there is still a legitimate possibility that any such reform would be the equivalent of opening Pandora’s box. A second related concern is that openly embracing political reasons in agency decision making could alter the accepted role of administrators, and their own self-identities, in very damaging ways. If
administrators can no longer always realistically be viewed as the repositories of neutral expertise, they can be understood as public servants who are charged with engaging in reasoned deliberation about the best ways of implementing their delegated statutory authority and thereby promoting the public good. They should not be viewed as political flunkies, whose only job is to implement the directives of elected officials, powerful interest groups, or a majority of citizens, regardless of the substantive merits of a policy dispute. Once again, the State Farm two-step plainly envisions the former role rather than the latter role for agency officials, but it does send the message that political reasons can be legitimate considerations, rather than something that should generally be resisted. This message is accurate in theory, but it may become difficult for public officials to cabin the role of politics in practice, and it may therefore ultimately be preferable to continue to send the message that political considerations should be kept off the table when agencies make policy decisions. Finally, political considerations will generally be more pressing for appointed (and removable) agency heads than for the professional staff and civil servants who devote their careers to studying the best ways of implementing an agency's statutory authority and achieving its programmatic responsibilities.

It is therefore conceivable that any proposal that openly embraces political reasons in agency decision making would give politically appointed officials within agencies even more power over the career staff and civil servants who are most likely to possess technical expertise and to engage in reasoned deliberation about the best ways to solve our most difficult collective problems. In contrast, the existing version of hard-look judicial review has a tendency to empower an agency's professional staff and career civil servants relative to its politically appointed leadership. Accordingly, revising administrative law doctrine to give greater weight to political considerations in agency decision making could change the internal dynamics within agencies in ways that would ultimately prove harmful to the goals of deliberative democratic theory.

At the end of the day, then, we are left with a choice. On the one hand, we could adopt the State Farm two-step and revise administrative law in ways that would improve the transparency of agency decision making, recognize morality," which reflects "the particular moral principles associated with particular social roles"); see also id. at 178–79.

Cf. Jerry L. Mashaw, Small Things Like Reasons Are Put in a Jar: Reason and Legitimacy in the Administrative State, 70 FORDHAM L. REV. 17, 21 (2001) ("[A] retreat to political will or intuition is almost always unavailable to modern American administrative decisionmakers.... [S]uch claims delegitimate administrative action rather than count as good reasons.").

260. See Seidenfeld, supra note 36, at 1554–58 (describing the professional rather than the political nature of the bureaucratic staff).

an appropriate role for legitimate political considerations within the administrative process, and likely produce more candid explanations for an agency's policy decisions that better reflect its actual decision-making process when an agency is behaving in normatively desirable ways. On the other hand, we could maintain the status quo on the grounds that reserving a place for politics in agency decision making sends the wrong message, and that even the best conceivable reform proposal is unduly vulnerable to unintended consequences that could ultimately prove detrimental to the dual projects of legitimizing administrative authority and promoting deliberative democracy. My sense is that we should probably maintain the status quo at this time because the line-drawing problems associated with the State Farm two-step and the risk that such a proposal would result in the over-politicization of agency decision making are simply too great. We should also recognize, however, that the existing version of hard-look judicial review is not some outdated or naïve relic of New Deal thinking about the regulatory state, but rather a sophisticated and perhaps brilliant mechanism for promoting reasoned deliberation by administrative agencies, and thereby helping to ensure that their discretionary policy choices are democratically legitimate. This, of course, means that we should flatly reject other recent proposals to give politics a place in agency decision making that are based on the political control model of administrative legitimacy.

CONCLUSION

The proper role of political reasons in agency decision making has tremendous practical and theoretical importance in administrative law. The conventional wisdom has been that an agency's policy decisions should be justified based on their substantive merits, rather than the preferences of elected officials or other political considerations. Nonetheless, the Supreme Court has recently been evenly divided on this issue, and several prominent commentators have relied on political control models of administrative legitimacy to argue that political reasons should play a larger and more transparent role in agency decision making and that the judiciary should give agencies credit for justifying their policy choices on some political grounds.

This Article has argued that those scholarly proposals are fundamentally misguided because political-control theories of administrative law are based on untenable conceptions of democracy and implausible empirical assumptions. While deliberative theories of administrative legitimacy provide a superior alternative, deliberative democratic theorists have not provided a clear account of the proper role of political preferences in agency decision making. After providing such an account, this Article set forth a concrete proposal for reforming administrative law that would improve the

262. Thanks to Sid Shapiro for bringing this latter point to my attention.
transparency of the administrative process and allow agencies to incorporate political considerations into their decision making, consistent with the basic principles of deliberative democratic theory. This Article also identified several reasons to be wary of any reform proposal that would embrace a greater role for political reasons in agency decision making and concluded that the best way of promoting agency legitimacy and deliberative democracy may be to retain the existing version of the arbitrary and capricious standard of judicial review.