

# THE YALE LAW JOURNAL

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## Proposing a Place for Politics in Arbitrary and Capricious Review

**ABSTRACT.** Current conceptions of “arbitrary and capricious” review focus on whether agencies have adequately explained their decisions in statutory, factual, scientific, or otherwise technocratic terms. Courts, agencies, and scholars alike, accordingly, generally have accepted the notion that influences from political actors, including the President and Congress, cannot properly help to explain administrative action for purposes of arbitrary and capricious review. This means that agencies today tend to sweep political influences under the rug even when such influences offer the most rational explanation for the action. This Article argues that this picture should change.

Specifically, this Article argues for expanding current conceptions of arbitrary and capricious review beyond a singular technocratic focus so that credit would also be awarded to certain political influences that an agency transparently discloses and relies upon in its rulemaking record. Such an expansion of arbitrary and capricious review could yield many benefits. First, it would help to bring arbitrary and capricious review into harmony with other major doctrines, such as *Chevron* deference, that seem to embrace the “political control” model of agency decisionmaking. Second, it could help to create a more effective separation between science and politics. Third, giving politics a place could give courts another reason to defer to agencies, thereby softening the “ossification” charge frequently levied against arbitrary and capricious review. Finally, such a change would facilitate greater political accountability and monitoring.

Ultimately, whether an expanded conception of arbitrary and capricious review can be attained will rest in the hands of courts and agencies. Agencies would need to begin openly acknowledging political influences, and courts would need to become comfortable acknowledging that an agency’s reliance on political influences involving policy considerations and value judgments, such as a President’s desire to push a specific environmental issue to the top of the EPA’s priority list, might help legitimize an agency’s decision. This Article suggests that courts and agencies might be most comfortable first making this move in narrow contexts, such as decisions to deny discretionary rulemaking petitions.

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## INTRODUCTION

At 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.<sup>1</sup> Although existing case law does not always make it easy to separate reasons that “adequately” support an agency decision from those that are “inadequate,”<sup>2</sup> the Supreme Court’s famous 1983 decision in *Motor Vehicle Manufacturers Ass’n v. State Farm Mutual Auto Insurance Co.*<sup>3</sup> has been read to clarify one important aspect of arbitrary and capricious review: agencies should explain their decisions in technocratic, statutory, or scientifically driven terms, *not* political terms.<sup>4</sup>

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1. The Administrative Procedure Act (APA) requires that agencies act in a manner that passes “arbitrary and capricious” review. See 5 U.S.C. § 706(2)(A) (2000). The term “hard look” review developed in the D.C. Circuit as a judicial gloss on the meaning of the APA’s arbitrary and capricious test. See Matthew Warren, *Active Judging: Judicial Philosophy and the Development of the Hard Look Doctrine in the D.C. Circuit*, 90 GEO. L.J. 2599 (2002); see also *infra* notes 51-74 and accompanying text (discussing the development of hard look review). Even though hard look review calls for a more searching and less deferential type of judicial review than section 706(2)(A) may have originally contemplated, see *infra* notes 44-52 and accompanying text, this Article uses the terms hard look review and arbitrary and capricious review interchangeably to refer to the reason-giving requirement that agencies now face under the modern reading of section 706(2)(A). In other words, this Article does not attempt to attack the existence of hard look review *per se*, but rather suggests a modification of hard look review.
  2. As Professor Richard Pierce has aptly explained, “adequacy is in the eye of the beholder,” which makes it quite difficult for agencies to predict whether or not a court will deem an agency’s explanation to be sufficient. RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW* 84-85 (2008).
  3. 463 U.S. 29 (1983).
  4. See CHRISTOPHER F. EDLEY, JR., *ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREAUCRACY* 183 (1990) (noting that *State Farm* “entails a conception of politics as distinguishable from and in opposition to the required rationality of agency decision making”); JERRY L. MASHAW & DAVID L. HAREFT, *THE STRUGGLE FOR AUTO SAFETY* 226 (1990) (“[T]he submerged yet powerful message in the Supreme Court’s decision in *State Farm* [was] that the political directions of a particular administration are inadequate to justify regulatory policy.”); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2246, 2381 (2001) (describing how *State Farm* demanded that the agency “justify its decision in neutral, expertise-laden terms to the fullest extent possible”); Jerry L. Mashaw, *The Story of Motor Vehicle Manufacturers Association of the U.S. v. State Farm Mutual Automobile Insurance Co.: Law, Science and Politics in the Administrative State*, in *ADMINISTRATIVE LAW STORIES* 335, 335 (Peter L. Strauss ed., 2006) (noting that in *State Farm*, “politics and ideology were required to take a backseat to administrative law’s demand for reasoned policy judgment”); Kevin M. Stack, *The President’s Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263, 307 n.191 (2006) (noting that *State Farm* now serves as “common contemporary shorthand for the requirement that agencies rationalize their decisions in

In *State Farm*, the Court reviewed a decision made by the new Reagan Administration's National Highway Traffic Safety Administration (NHTSA) to rescind a rule previously promulgated under the Carter Administration that required certain cars to be equipped with either air bags or automatic seat belts.<sup>5</sup> In a partial dissent, then-Justice Rehnquist openly noted that the NHTSA's changed views seemed "to be related to the election of a new President," which Rehnquist viewed as "a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations."<sup>6</sup> The majority, however, skipped over the political context of the decision,<sup>7</sup> and it instead focused on the technocratic justifications that the NHTSA offered to support its rule rescission.<sup>8</sup> The Court's singular focus in *State Farm* on technocratic justifications, accordingly, has been widely read to represent the triumph of expertise to the exclusion of politics in administrative decisionmaking.<sup>9</sup>

Ever since the Court handed down *State Farm*, agencies, courts, and scholars alike generally seem to have accepted the view that influences coming from one political branch or another cannot be allowed to explain administrative decisionmaking, even if such factors are influencing agency decisionmaking. Take agencies to begin with. Agencies today generally try to meet their reason-giving duties under *State Farm* by couching their decisions in technocratic, statutory, or scientific language, either failing to disclose or affirmatively hiding political factors that enter into the mix. A good example of this can be found by looking at the Food and Drug Administration's (FDA) attempt in the 1990s to regulate teen smoking. Even though President Clinton played a very active role in directing the rulemaking (going so far as to personally announce the final rule in a Rose Garden ceremony), the FDA's statement of basis and purpose accompanying the final rule relied upon

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terms of statutory criteria, and that a change of administration is not a sufficient basis for agency action").

5. *State Farm*, 463 U.S. at 32-38.
6. *Id.* at 59 (Rehnquist, J., concurring in part and dissenting in part).
7. A likely explanation for this is that even the NHTSA itself did not openly seek to explain its decision based on political considerations.
8. See *State Farm*, 463 U.S. at 46-57; see also Michael Herz, *The Rehnquist Court and Administrative Law*, 99 NW. U. L. REV. 297, 310 (2004) ("Justice White did not contradict Justice Rehnquist's description of the political setting or conclude that it was outweighed by other factors. Rather, he ignored it altogether, implicitly deeming the politics of the rescission simply irrelevant.").
9. See *supra* note 4; see also *infra* Section I.A. (discussing the *State Farm* decision).

statutory, scientific, and expert justifications—barely even hinting at President Clinton’s role in the rulemaking.<sup>10</sup>

Judicial review of agency action is similarly technocratic in focus. Courts applying arbitrary and capricious review today routinely search agency decisions to ensure they represent expert-driven decisionmaking.<sup>11</sup> Decisions from the D.C. Circuit, for example, borrow from *State Farm*’s language and repeatedly frame arbitrary and capricious review in expert-driven terms, asking whether the agency “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*.”<sup>12</sup>

In terms of scholarly attention to the issue, a few scholars have given some attention to how arbitrary and capricious review might take politics into account.<sup>13</sup> For the most part, however, the blanket rejection of politics in administrative decisionmaking has been casually accepted as the status quo by courts, agencies, and scholars alike. The result is that insufficient attention has been given to exploring whether political factors ought to be allowed to validly explain agency rulemaking decisions as a normative matter and what concrete alterations might be made to existing arbitrary and capricious review doctrine to embrace a proper, even if limited, place for politics.

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10. See Peter L. Strauss, *Presidential Rulemaking*, 72 CHI.-KENT L. REV. 965, 965-67 (1997) (describing Clinton’s active involvement in the FDA’s tobacco rulemaking); see also *infra* notes 94-98 and accompanying text (discussing the FDA’s rulemaking proceeding).
  11. See Kagan, *supra* note 4, at 2270 (noting that courts “requir[e] that agency action bear the indicia of essentially apolitical, ‘expert’ process and judgment”); see also *infra* Section I.A. (describing the judicial search for technocratic decisionmaking by agencies).
  12. *Wedgewood Vill. Pharmacy v. DEA*, 509 F.3d 541, 549 (D.C. Cir. 2007) (emphasis added) (internal quotations omitted); see also *Morall v. DEA*, 412 F.3d 165, 177 (D.C. Cir. 2005) (drawing on *State Farm*).
  13. See EDLEY, *supra* note 4, at 9, 59, 66, 170-94 (1990) (arguing that present judicial doctrine demonstrates an ineffectual ambivalence toward politics); MARTIN SHAPIRO, *WHO GUARDS THE GUARDIANS: JUDICIAL CONTROL OF ADMINISTRATION* 171 (1988) (arguing that judges incorrectly treat agencies engaged in rulemaking as if the agencies are “bodies engaged in a true science of synoptic public administration” and that judges instead should treat agencies as “subordinate legislatures making a good deal of law within broad congressional constraints and in the face of considerable uncertainty about facts and diverse and changing political sentiments”); Kagan, *supra* note 4, at 2381-82; see also *infra* Section I.C. (describing scholarly attention given to the place of politics in agency decisionmaking).

This Article aims to give some much needed attention to the topic.<sup>14</sup> Specifically, this Article seeks to identify those rulemaking proceedings in which agencies acting as “mini legislatures” might most appropriately rely upon political influences coming from the President, other members of the executive branch, or Congress to justify agency decisions for purposes of arbitrary and capricious review.<sup>15</sup> The heart of the argument set forth here is that what count as “valid” reasons under arbitrary and capricious review should be expanded to include certain political influences from the President, other executive officials, and members of Congress, so long as the political influences are openly and transparently disclosed in the agency’s rulemaking record. This means that the term “political influences,” as used in this Article, refers to influences aimed at agencies coming from executive and legislative actors, including the President, members of Congress, and those who speak for

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14. This Article analyzes only the appropriate place of politics when an agency acts through *rulemaking* and thus does not deal with *adjudication*. There are two reasons for focusing exclusively on rulemaking. The first is practical: limiting the reach of this Article to the role of politics in rulemaking helps to make the scope and breadth of the topic more manageable. The second reason is more substantive: agencies play very different roles when engaging in rulemaking vs. adjudication. In the rulemaking context, agencies act as mini legislatures, whereas agencies act as mini courts in the adjudicatory context. This distinction may well demand a different role for politics in rulemaking vs. adjudication. Cf. *Sierra Club v. Costle*, 657 F.2d 298, 400 (D.C. Cir. 1981) (distinguishing between agency adjudication, which resembles judicial action, and informal rulemaking of a policymaking sort, which does not implicate the same notions of due process). I, however, leave the answer to that question to another day—focusing only on rulemaking in this Article.
  15. This Article focuses on arbitrary and capricious review and thus does not directly propose changes to other judicial review doctrines, such as Step Two of *Chevron*. In this sense, this Article proceeds under the understanding that arbitrary and capricious review and Step Two of *Chevron* deference are distinct in what they require—meaning that *Chevron* “reasonableness,” which is used to test the fit of an agency’s interpretation with a statute, does not equate to *State Farm* “reason giving,” which is used to assess the rationality of an agency’s reasoning process. See *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 1001 n.4 (2005) (differentiating between *Chevron* Step Two and arbitrary and capricious analysis in noting that inconsistency in an agency’s position “bears on whether the Commission has given a reasoned explanation for its current position, not on whether its interpretation is consistent with the statute” under *Chevron*). There are, however, some scholars (as well as judicial opinions) that support the view that Step Two of *Chevron* merges with arbitrary and capricious review. See, e.g., *Nat’l Ass’n of Regulatory Util. Comm’rs v. ICC*, 41 F.3d 721, 726 (D.C. Cir. 1994); *Gen. Am. Transp. Corp. v. ICC*, 872 F.2d 1048, 1053 (D.C. Cir. 1989); Ronald M. Levin, *The Anatomy of Chevron: Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253 (1997); Laurence H. Silberman, *Chevron—The Intersection of Law & Policy*, 58 GEO. WASH. L. REV. 821, 827-28 (1990). If this view equating *Chevron* Step Two and arbitrary and capricious review were to be accepted, then the proposals set forth here would have implications for Step Two of *Chevron* as well.

and act for the President (such as the President's Chief of Staff and the head of the Office of Management and Budget).

Acceptance of the argument set forth here would *not* mean that any and all political influences would be allowed to legitimize agency action. Rather, some political influences should be read to justify agency action whereas other political influences should be read to corrupt. Although drawing a precise line between permissible and impermissible influences is difficult, legitimate political influences can roughly be thought of as those influences that seek to further policy considerations or public values, whereas illegitimate political influences can be thought of as those that seek to implement raw politics or partisan politics unconnected in any way to the statutory scheme being implemented. This would mean, for example, that the Department of Health and Human Services (HHS) would be allowed to rely upon a public statement issued by President Obama articulating his pro-choice agenda and his pro-choice policy initiatives if HHS chose to rescind a Bush-era rule that forbids medical facilities that receive federal money from discriminating against health care providers who refuse, on religious grounds, to perform abortions.<sup>16</sup> Conversely, it would mean that HHS could not legitimately justify a decision to rescind the same Bush-era “provider conscience” rule by simply saying: “President Obama directed us to rescind the rule in order to reward various pro-choice organizations for their endorsement of him during his campaign.”

Three recent developments highlight the timeliness and significance of this Article's exploration of the proper role of politics. First, we are still in the early stages of a new presidential administration as President Obama settles into the White House and seeks to reprioritize agency goals.<sup>17</sup> Shortly after winning the election in November 2008, then-President-elect Obama made clear that he had asked his transition team to begin reviewing the federal agencies and

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16. See generally Laura Meckler, *Bush-Era Abortion Rules Face Possible Reversal*, WALL ST. J., Dec. 17, 2008, at A5 (describing the so-called “provider conscience” rule); Robert Pear, *Obama Will Ease Restraints on States' Health Insurance Programs for Children*, N.Y. TIMES, Jan. 20, 2009, at A25 (reporting that Obama has said that “he objects to a last-minute Bush administration rule that grants sweeping new protections to health workers who refuse to help perform abortions, dispense contraceptives or provide other care because of their ‘religious beliefs or moral convictions’”).

17. See generally Sam Kalen, *Changing Administrations and Environmental Guidance Documents*, 35 ECOLOGY L.Q. 657, 659 (2008) (“With each new election cycle, the ability of the executive branch to influence policy on the myriad of issues—such as climate change—will surface. . . . [T]he modern administrative law state assumes that federal agencies will be imbued with the political philosophy of any new president *and* that they enjoy sufficient flexibility to develop and change policy.”).

considering changes to be made.<sup>18</sup> In particular, President Obama has made it clear that he will order federal departments and agencies to act in ways that will promote energy efficiency and proenvironmental goals,<sup>19</sup> and he has indicated his desire to implement a shift away from deregulation toward more proactive government regulation, largely as a response to the recent economic crisis.<sup>20</sup> These and other impending changes that will be implemented under the new administration point out the need to better understand whether and when it is appropriate for agencies to justify certain decisions based on political influences, such as campaign promises or presidential priorities.<sup>21</sup>

Second, the Supreme Court recently issued two divided decisions that highlight the need to better understand whether politics should be given an accepted role in agency decisionmaking. In one decision issued in 2009, *FCC v. Fox Television Stations, Inc.*, the Court reviewed the FCC's change in its policy involving the broadcasting of fleeting expletives.<sup>22</sup> In upholding the FCC's new policy that fleeting expletives can be actionable, Justice Scalia's opinion seemed comfortable with the fact that the FCC's policy change was "spurred by significant political pressure from Congress."<sup>23</sup> In fact, Justice Scalia's opinion, which rejects the notion that agency change must be subjected to more searching judicial review, arguably makes it easier for agencies to change their policies due to changes in the political wind.<sup>24</sup> In contrast, in a dissenting opinion, Justice Breyer argued that existing law does not permit the FCC to

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18. See Meckler, *supra* note 16; Peter Nicholas & Christi Parsons, *Obama Plans a Swift Start*, L.A. TIMES, Jan. 20, 2009, at A1; Editorial, *Undoing the Damage Done*, N.Y. TIMES, Jan. 25, 2009, at WK9; Jeff Zeleny, *Obama Reviewing Bush's Use of Executive Powers*, N.Y. TIMES, Nov. 10, 2008, at A19.

19. John M. Broder & Peter Baker, *Obama's Order Likely To Tighten Auto Standards*, N.Y. TIMES, Jan. 26, 2009, at A1.

20. See Kevin G. Hall & Margaret Talev, *Obama to Financial Sector: More Regulation Is Coming*, NEWS & OBSERVER, Dec. 10, 2008, at 1A; cf. Jackie Calmes, *Both Sides of the Aisle See More Regulation, and Not Just of Banks*, N.Y. TIMES, Oct. 14, 2008, at A15 (reporting that the "pro-regulation climate will probably spill over into other sectors" outside of just the financial industries and that "the political fallout of this renewed respect for government regulation is evidenced in the current election campaigns").

21. President Obama made many campaign promises, a number of which involve administrative regulations and/or administrative agencies. See generally Robert Farley & Angie Drobnic Holan, *510 Campaign Promises and We're Watching*, ST. PETERSBURG TIMES, Jan. 15, 2009, at A1 (noting that Obama's campaign promises call for "more regulation, new agencies and at least 11 new groups that would have 'corps' in their name").

22. 129 S. Ct. 1800 (2009).

23. *Id.* at 1815-16. Justice Scalia was joined in this Part of the opinion only by Chief Justice Roberts and Justices Thomas and Alito—not by Justice Kennedy.

24. *Id.* at 1810.

“make policy choices for purely political reasons.”<sup>25</sup> The split decision in *Fox*, accordingly, opens the door for more discussion about the proper role of politics.

In the other recent decision—the Court’s 2007 “global warming” decision in *Massachusetts v. EPA*—the Court reviewed the EPA’s denial of a rulemaking petition that asked the EPA to regulate certain emissions from new motor vehicles that lead to global warming.<sup>26</sup> In a split 5-4 decision, the Court rejected the EPA’s reasons for declining to regulate and sent the EPA back to the drawing board, embracing an expertise-driven notion of agency decisionmaking akin to what *State Farm* has been read to have embraced some twenty years earlier.<sup>27</sup>

Although newspapers across the country immediately trumpeted the *Massachusetts* decision as a blockbuster case,<sup>28</sup> the ramifications of the decision continue to unfold. After the Court’s decision came down in April 2007, the EPA went back to the drawing board, concluding that motor vehicle emissions do endanger the public health and welfare and that they should be regulated.<sup>29</sup> Based on this conclusion, the EPA sent a draft of proposed rules that would have regulated the emissions to the White House’s Office of Management and Budget (OMB) for review in December 2007.<sup>30</sup> OMB, however, reportedly chose to sit on the proposed rules, going so far as to tell EPA officials that it would not even open the EPA’s email message containing the proposed rules.<sup>31</sup> It was not until July 2008, after much back and forth between the EPA and the

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25. *Id.* at 1829 (Breyer, J., dissenting).

26. 549 U.S. 497, 511-12 (2007).

27. See Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 SUP. CT. REV. 51, 54 (2007).

28. See, e.g., Linda Greenhouse, *Justices Say E.P.A. Has Power To Act on Harmful Gases*, N.Y. TIMES, Apr. 3, 2007, at A1; Michael Hawthorne, *EPA Must Regulate Greenhouse Gases*, CHI. TRIB., Apr. 3, 2007, at 3.

29. Brad Knickerbocker, *Bush’s ‘Caution’ on CO<sub>2</sub> Seen as ‘Foot-Dragging’ by Critics*, CHRISTIAN SCI. MONITOR, Apr. 3, 2008, at 17 (reporting that EPA staffers concluded that the emissions were a “major threat to water supplies, crops, wildlife, and other aspects of public welfare” and that this finding was “forwarded to the White House for review in December”); Christopher Lee, *Scientists Report Political Interference*, WASH. POST, Apr. 24, 2008, at A19 (“[A] congressional committee recently reported that EPA staff members had determined in December that greenhouse gas emissions endanger public health . . .”).

30. See Juliet Eilperin, *White House Tried To Silence EPA Proposal on Car Emissions*, WASH. POST, June 26, 2008, at A2; Editorial, *More Flimflam on Warming*, N.Y. TIMES, Mar. 29, 2008, at A16.

31. Felicity Barringer, *White House Refused To Open E-mail on Pollutants*, N.Y. TIMES, June 25, 2008, at A15.

White House,<sup>32</sup> that the EPA finally issued *not* a set of proposed rules (as it initially proposed to do) but rather a diluted Advanced Notice of Proposed Rulemaking (ANPR) that gave the public an opportunity to comment on the issue *before* the EPA issued any proposed rules.<sup>33</sup> Thus, political forces at OMB during the Bush Administration trumped the EPA's initial attempts to exercise its expertise to propose rules regulating the emissions. Things then changed again when President Obama came into office in 2009, and the EPA under Obama determined that greenhouse gases do pose a danger to the public's health and welfare.<sup>34</sup> This prominent political zigzagging highlights the tension between expertise and politics and underscores the need to better understand what role politics should properly play in administrative decisionmaking.

Finally, a third recent development that highlights the need to gain a better understanding of the proper place of politics involves charges that regularly were thrown at the Bush White House accusing the Administration of distorting scientific facts to serve political goals.<sup>35</sup> Regardless of whether or not the Bush Administration deliberately sought to subvert science, the mere frequency of such allegations helps to highlight how the current demand for technical, scientific, or expert-driven explanations from agencies may well cause agencies to feel pressure to align facts and science with political goals.

In exploring the appropriate place of politics in administrative rulemaking, this Article proceeds in four parts. Part I is descriptive. It describes how courts, agencies, and scholars today generally assume that agency decisions made in the rulemaking context must speak in expert-based terms, *not* political terms, in order to meet the reason-giving requirement of arbitrary and capricious review.

Part II makes the normative case for change. Specifically, Part II sets forth four major benefits that would flow from altering modern day conceptions of arbitrary and capricious review in order to give certain political influences an accepted and transparent place in agency rulemaking. First, although some major administrative law doctrines reflect a shift from an expert-based model of agency decisionmaking to a politically-based model, hard look review has

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32. *Id.*

33. See Regulating Greenhouse Gas Emissions Under the Clean Air Act, 73 Fed. Reg. 44,354 (proposed July 30, 2008) (to be codified at 40 C.F.R. ch. 1).

34. See Juliet Eilperin, *EPA Says Emissions Are Threat to Public*, WASH. POST, Apr. 18, 2009, at A1.

35. See Juliet Eilperin, *Putting Some Heat on Bush: Scientist Inspires Anger, Awe for Challenges on Global Warming*, WASH. POST, Jan. 19, 2005, at A17; Jeremy Symons, Op-Ed., *How Bush and Co. Obscure the Science*, WASH. POST, July 13, 2003, at B4; see also *infra* notes 175-179 and accompanying text (describing charges levied against the Bush Administration accusing it of distorting science to serve political goals).

failed to reflect this change. Allowing agencies to 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 doctrines, such as *Chevron* deference,<sup>36</sup> which seem to embrace the newer political control model. Second, encouraging agencies to disclose political factors could help to take some of the pressure off of science, creating a more effective separation between science and politics. Third, embracing a proper role for politics could give courts yet another reason to defer to agencies, thereby offering a means of softening the “ossification” charge frequently raised against arbitrary and capricious review. Fourth, encouraging agencies to disclose political factors rather than hiding behind technocratic façades would enable political influences to come out into the open, thereby enabling greater political accountability.

Part III considers the specific mechanics of how such a change might occur, analyzing as a doctrinal matter when arbitrary and capricious review could most appropriately embrace political considerations. In particular, Part III looks at four questions. First, when can statutes be read as signaling Congress’s intent to allow or to disallow agency reliance upon political influences? Second, assuming that a particular congressional statute has not prohibited an agency from relying upon political influences altogether, what specific types of political influences should be allowed to justify agency action? Third, who stands as a potential source of legitimate political influence? Fourth, what specific types of rulemaking decisions might most appropriately be influenced by politics?

Finally, Part IV addresses five potential hurdles that could stand in the way of providing politics with a place. The first obstacle discussed in Part IV can be called the “first-mover” dilemma: agencies may be reluctant to rely upon political factors without knowing ahead of time whether courts will accept them, yet courts may lack incentives to send signals to agencies indicating in the abstract their willingness to consider political factors if agencies have yet to rely openly upon such factors. A second potential objection is whether the “carrot” offered to agencies by this Article’s proposal needs to be balanced by a “stick” that would punish agencies when they rely upon political influences but fail to fess up to such reliance. A third potential obstacle involves whether courts realistically can be expected to embrace politics in the regulatory regime, or whether courts’ own discomfort with politics will likely lead them to continue to insist on agency decisions explained in technocratic terms. A fourth possible objection is whether giving politics a place in rulemaking would unduly undermine separation of powers principles. Finally, a fifth objection

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36. See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

involves the potential difficulty of asking courts to review political influences that may be ill-suited to legal restraint. Ultimately, Part IV concludes that none of these hurdles is insurmountable.

### I. A FOCUS ON EXPERT, NOT POLITICIZED, AGENCY DECISIONMAKING

When agencies engage in rulemaking today, they face a number of legal constraints that check their decisionmaking process: agencies' factual findings must be supported by the evidence,<sup>37</sup> their legal conclusions must be consistent with relevant constitutional and statutory provisions,<sup>38</sup> and the reasons agencies give to support their decisions must be adequate.<sup>39</sup> This last requirement—a “reason-giving” requirement that demands that agencies adequately explain their decisions—stems from section 706(2)(A) of the APA, which instructs courts to set aside agency action found to be “arbitrary” or “capricious.”<sup>40</sup>

As this Part describes, courts, agencies, and scholars today generally read the reason-giving requirement that flows from arbitrary and capricious review as demanding that agencies justify their decisions in expert-driven or statutory terms. Courts applying arbitrary and capricious review, accordingly, search for technocratic decisionmaking.<sup>41</sup> Agencies—likely taking a cue from the judiciary's preference for expert-based decisionmaking—routinely accompany their newly promulgated rules with detailed and lengthy discussions of the relevant statute, the data, the methods of reasoning, and responses to comments received.<sup>42</sup> And scholars too generally seem to embrace agencies' reason-giving duty as a means of forcing expert-based decisionmaking.<sup>43</sup>

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37. See Administrative Procedure Act, 5 U.S.C. § 706(2)(A), (E) (2006).

38. See *id.* § 706(2)(B)-(C).

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

40. Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (instructing reviewing courts to “hold unlawful . . . agency action . . . found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”).

41. See *infra* Section I.A.

42. See PIERCE, *supra* note 2, at 82; see also *infra* Section I.B. (discussing the judiciary's demand for expert-based decisionmaking).

43. See *infra* Section I.C.

*A. The Judiciary's Search for Expert-Based Decisionmaking*

The judiciary's application of arbitrary and capricious review has "changed dramatically" over time.<sup>44</sup> Initially, before the passage of the APA, the Supreme Court likened agencies to legislatures for purposes of judicial review<sup>45</sup> and indicated that only very minimal judicial review—akin to mere rationality review—would be applied.<sup>46</sup> Hence, courts would not find an agency rule to be arbitrary so long as "any state of facts reasonably [could] be conceived that would sustain it."<sup>47</sup> As Professor Richard Pierce has explained, under this formulation of arbitrariness review, "an agency needed no evidence, no record, and no statement of reasons to support a rule; rules were rarely challenged; and challenges were rarely successful."<sup>48</sup>

After the APA was enacted in 1946, things did not change much. The APA's text did require that agencies include with their notice-and-comment rules a "concise . . . statement of . . . basis and purpose,"<sup>49</sup> thereby providing courts with a basis for striking down agency rules as arbitrary or capricious under section 706(2)(A) of the APA. However, even after the APA's passage, agencies continued to receive an "extraordinary level of deference."<sup>50</sup>

It was not until the 1960s and 1970s that change really began in the world of arbitrary and capricious review. At this time, serious concerns emerged that agencies were being "captured" by the private interests that they regulated.<sup>51</sup> What had been the prevalent "expertise-based" model of agency decisionmaking, which viewed agencies as professional, apolitical experts

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44. PIERCE, *supra* note 2, at 81.

45. *See Pac. States Box & Basket Co. v. White*, 296 U.S. 176 (1935).

46. *See* GARY LAWSON, *FEDERAL ADMINISTRATIVE LAW* 558 (4th ed. 2007); Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505, 532 (1985).

47. *Pac. States Box & Basket Co.*, 296 U.S. at 185; *see also Nat'l Broad. Co. v. United States*, 319 U.S. 190, 224 (1943) ("The Regulations are assailed as 'arbitrary and capricious.' If this contention means that the Regulations are unwise, that they are not likely to succeed in accomplishing what the Commission intended, we can say only that the appellants have selected the wrong forum for such a plea.").

48. PIERCE, *supra* note 2, at 81.

49. Administrative Procedure Act, 5 U.S.C. § 553(c) (2006).

50. LAWSON, *supra* note 46, at 558.

51. Warren, *supra* note 1, at 2602 (noting that in 1960s and 1970s, "trust in agency experts evaporated" and "academics and public officials began to believe that many agencies had been captured by the industries and private interests that they regulated"); *see also* Thomas W. Merrill, *Capture Theory and the Courts: 1967-1983*, 72 CHI.-KENT L. REV. 1039 (1997) (describing capture theory); Richard B. Stewart, *Administrative Law in the Twenty-First Century*, 78 N.Y.U. L. REV. 437, 441 & n.17 (2003) (same).

charged with pursuing the public interest, began to fade away.<sup>52</sup> In response, various prominent judges on the D.C. Circuit crafted a ramped up version of “arbitrary and capricious” review—called “hard look” review—that enabled courts to scrutinize agency decisions and to ensure that the public interest was being served.<sup>53</sup> According to this more aggressive, less deferential version of arbitrary and capricious review, a court has a duty “to intervene . . . if the court becomes aware . . . that the agency has not really taken a ‘hard look’ at the salient problems, and has not genuinely engaged in reasoned decision-making.”<sup>54</sup>

Applying this more stringent level of review, courts began to scrutinize the substantive elements of agency decisions to ensure that agencies gave adequate consideration to the relevant data and gave reasoned explanations to support their decisions.<sup>55</sup> This meant that courts expected an agency to specify in detail its “policy preferences, its reasoning, and its factual support” in addition to demonstrating that it “had responded to significant points made during the public comment period, had examined all relevant factors, and had considered significant alternatives to the course of action ultimately chosen.”<sup>56</sup>

Given that hard look review and its fairly onerous reason-giving requirements stretched the traditional understanding of the APA, some observers thought that the Supreme Court—when presented with the right opportunity—would reject hard look review.<sup>57</sup> In fact, however, in 1983 in *State*

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52. Warren, *supra* note 1, at 2602.

53. See PIERCE, *supra* note 2, at 82 (describing how “[t]his new approach to judicial application of the arbitrary and capricious test to rules adopted through use of informal rulemaking was referred to as the ‘hard look’ doctrine”); see also Garland, *supra* note 46, at 525 (discussing the birth and the development of hard look doctrine); Warren, *supra* note 1, at 2602-03 (describing development of hard look review).

54. Greater Boston Television Corp. v. FCC, 444 F.2d 841, 851 (D.C. Cir. 1970) (Leventhal, J.).

55. See, e.g., United States v. Nova Scotia Food Prods., 568 F.2d 240, 251 (2d Cir. 1977) (quoting Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971)) (“Though a reviewing court will not match submission against counter-submission to decide whether the agency was correct in its conclusion on scientific matters (unless that conclusion is arbitrary), it will consider whether the agency has taken account of all ‘relevant factors and whether there has been a clear error of judgment.’”); Nat’l Ass’n of Food Chains v. ICC, 535 F.2d 1308, 1314 (D.C. Cir. 1976) (quoting Greater Boston Television Corp. v. FCC, 444 F.2d 841, 851 (D.C. Cir. 1970)) (“This court repeatedly has emphasized, however, that an agency must demonstrate that it has ‘really taken a “hard look” at the salient problems, and has . . . genuinely engaged in reasoned decision-making.’”); Indus. Union Dep’t v. Hodgson, 499 F.2d 467, 475 (D.C. Cir. 1974) (“What we are entitled to at all events is a careful identification by the Secretary, when his proposed standards are challenged, of the reasons why he chooses to follow one course rather than another.”).

56. Garland, *supra* note 46, at 526-27.

57. See PIERCE, *supra* note 2, at 83.

*Farm*, the Court issued an opinion that embraced the D.C. Circuit’s “hard look” take on arbitrary and capricious review.<sup>58</sup>

In *State Farm*, the Court reviewed a decision made by the new Reagan Administration’s NHTSA to rescind a rule previously promulgated under the Carter Administration that required certain cars to be equipped with either air bags or automatic seat belts.<sup>59</sup> In the Court’s opinion written by Justice White, the Court rejected the government’s argument that arbitrary and capricious review “requires no more than the minimum rationality a statute must bear in order to withstand analysis under the Due Process Clause.”<sup>60</sup> Instead, the Court explained that although review under the arbitrary and capricious standard is “narrow,” an agency’s reason-giving duty under arbitrary and capricious review requires the agency to take a close look at the evidence, data, and facts before the agency:

[T]he agency must examine the *relevant data* and articulate a satisfactory explanation for its action including a “rational connection between the *facts found* and the choice made.” In reviewing that explanation, we must “consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.” 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*.<sup>61</sup>

Applying this standard, the Court ultimately concluded that the NHTSA had failed to adequately meet its duty of reasoned decisionmaking. Specifically, the Court held that the NHTSA had acted arbitrarily and capriciously in rescinding the passive restraint requirement because—although the agency claimed that automatic detachable seat belts would not attain anticipated safety benefits—the agency had failed to consider the possibility of an airbags-only requirement.<sup>62</sup> The majority also concluded that the agency had failed to

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58. *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto Ins.*, 463 U.S. 29 (1983).

59. *Id.*

60. *Id.* at 43 n.9.

61. *Id.* at 43 (emphasis added) (internal citations omitted).

62. *Id.* at 46-48 (noting that the ineffectiveness of one safety mechanism “does not cast doubt on the need for a passive restraint standard or upon the efficacy of airbag technology”); *see also id.* at 46 (“There was no suggestion in the long rulemaking process . . . that if only one of these options were feasible, no passive restraint standard should be promulgated.”).

adequately justify its decision to dismiss the safety benefits of automatic detachable seat belts.<sup>63</sup>

Then-Justice Rehnquist, joined by three others, wrote a separate opinion concurring in part and dissenting in part. He agreed with the majority that the agency had failed to explain why it rescinded the airbag requirement and concurred in that portion of the majority's opinion. However, he disagreed with the majority's conclusion that the NHTSA's "view of detachable automatic seat belts was arbitrary and capricious."<sup>64</sup> He accepted the agency's conclusion (based primarily on logic and on the agency's dismissal of the relevance of a study) that any safety benefits would be small because of the likelihood that users would detach the belts and not reattach them.<sup>65</sup>

At the end of his opinion, Rehnquist proceeded to provide a possible explanation of what was really going on in the case—an explanation related to politics.<sup>66</sup> Specifically, Rehnquist wrote:

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

Rehnquist's acceptance of the agency's rescission of the detachable belt portion of the standard did not ultimately hinge on this political explanation. Nor did Rehnquist's opinion suggest that politics *alone* could be treated as a

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63. *Id.* at 53-55.

64. *Id.* at 58 (Rehnquist, J., concurring in part and dissenting in part).

65. *Id.*

66. *Id.* at 59. The lower court in *State Farm* also noted the political context of the NHTSA's decision. See *State Farm Mut. Auto. Ins. v. Dep't of Transp.*, 680 F.2d 206, 213 (D.C. Cir. 1982) (noting that the NHTSA's proposal of the possible rescission was "announced by the White House Press Office on April 6, 1981, as part of a larger package of economic recovery measures"); see also *id.* at 240 n.44 (noting that "notice of rulemaking to rescind [the] standard was based at least in part on economic problems of the automobile industry, and was announced by [the] White House in *Actions to Help the U.S. Auto Industry*").

67. *State Farm*, 463 U.S. at 59 (Rehnquist, J., concurring in part and dissenting in part).

sufficient justification for the agency's decision. Yet Rehnquist clearly did embrace the notion that political influences might reasonably act as a legitimate pressure on an agency's policymaking process, so long as the agency remains within the boundaries set by Congress in the relevant statutory scheme.

The Court did not respond to Rehnquist's points about the political context of the decision. In fact, the Court's decision skipped over the political context altogether, focusing on the agency's technocratic justifications for the rule rescission instead.<sup>68</sup> Most likely this was because the NHTSA itself did not openly acknowledge that political factors had influenced its decision. Thus, the Court's focus on the evidence and facts before the agency (and its silence on the issue of politics) likely was not meant to signal the Court's affirmative rejection of Rehnquist's embrace of politics. Instead, the Court's silence on the issue most likely was simply a reflection of the fact that the agency and the litigants had not teed up the issue.<sup>69</sup> Nonetheless, the opinion has been widely read over time to represent the triumph of expertise to the exclusion of politics.<sup>70</sup> Ever since *State Farm*, courts engaging in arbitrary and capricious review routinely have demanded more than mere minimum rationality, and they have searched agency decisions to ensure they represent expert-driven, technocratic decisionmaking.<sup>71</sup>

Decisions from the D.C. Circuit, which is by far the most important court in the country when it comes to federal administrative law,<sup>72</sup> help to illustrate how prevalent *State Farm*'s focus on evidence, facts, and expertise has become. Opinions from the D.C. Circuit do not expressly reject political considerations but they repeatedly borrow from *State Farm*'s language, framing arbitrary and capricious review in expert-driven terms and asking whether the agency "offered an explanation for its decision that runs counter to the *evidence* before

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68. See *id.* at 46–57 (majority opinion); see also Herz, *supra* note 8, at 310 ("Justice White did not contradict Justice Rehnquist's description of the political setting or conclude that it was outweighed by other factors. Rather, he ignored it altogether, implicitly deeming the politics of the rescission simply irrelevant.").

69. Compare EDLEY, *supra* note 4, at 63–66 (arguing that *State Farm* misidentified the decision-making "paradigm as science rather than politics"), with Stephen F. Williams, *The Roots of Deference*, 100 YALE L.J. 1103, 1107–08 (1991) (reviewing EDLEY, *supra* note 4) (arguing that the Court in *State Farm* did not identify science instead of politics as the decision-making paradigm but rather that the agency and the litigants did).

70. See EDLEY, *supra* note 4, at 183; MASHAW & HARFST, *supra* note 4, at 226; Herz, *supra* note 8, at 310–11; Kagan, *supra* note 4, at 2380–81; Stack, *supra* note 4, at 307 n.191.

71. See Kagan, *supra* note 4, at 2270 (noting that courts require "that agency action bear the indicia of essentially apolitical, 'expert' process and judgment"); see also *supra* note 4 and accompanying text (discussing courts' demand for expert-based decisionmaking).

72. See LAWSON, *supra* note 46, at 244.

the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency *expertise*.”<sup>73</sup> Other courts are no different. They too, although generally not expressly ruling out political considerations, have ruled out politics by inference, routinely asking whether the agency’s decision is adequately explained in light of the statute, the evidence and facts before the agency, or the agency’s expertise.<sup>74</sup>

Only one recent arbitrary and capricious case from the circuit courts—a concurring opinion issued in *UAW v. Chao*<sup>75</sup>—represents a significant departure from the judiciary’s singular focus on law, facts, and expertise.<sup>76</sup> In *Chao*, the Third Circuit reviewed OSHA’s 2003 denial of a rulemaking petition filed in 1993 asking it to promulgate a rule that would have established a standard for occupational exposure to metalworking fluids. Although OSHA’s ultimate decision (made during the Bush Administration) to deny the petition seemed inconsistent with the agency’s prior 1995 decision (made during the Clinton Administration) to designate metalworking fluids as a high agency priority, the Third Circuit upheld the denial of the petition. The court stressed that OSHA’s decision was not arbitrary and capricious because OSHA “weighed the scientific evidence of health hazards . . . against its other regulatory priorities” and “identified the reasons why regulating . . . [would] require an ‘enormous’ allocation of resources.”<sup>77</sup>

In a concurring opinion, Judge Pollak agreed with the majority but explained that he would acknowledge what was really at stake in the case:

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73. *Wedgewood Vill. Pharmacy v. DEA*, 509 F.3d 541, 549 (D.C. Cir. 2007) (emphasis added) (internal quotations omitted); see also *Morall v. DEA*, 412 F.3d 165, 177 (D.C. Cir. 2005) (“[W]e must satisfy ourselves that the agency examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made.”) (internal citations omitted).
74. See *Ctr. for Biological Diversity v. Nat’l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1193 (9th Cir. 2008) (quoting *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983)); *CBS Corp. v. FCC*, 535 F.3d 167, 174 (3d Cir. 2008) (quoting *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983)), judgment vacated by *FCC v. CBS Corp.*, 129 S. Ct. 2176 (2009).
75. 361 F.3d 249 (3d Cir. 2004).
76. Portions of a dissenting opinion written by Judge Kozinski in 2006 also suggest that Judge Kozinski might be inclined, at least in the inaction context, to allow agencies to decide not to adopt regulations for political reasons, such as a change in administrations. See *Animal Legal Def. Fund v. Veneman*, 469 F.3d 826, 850 n.6 (9th Cir. 2006) (Kozinski, J., dissenting), vacated, 490 F.3d 725 (9th Cir. 2007). However, rather than suggesting that such political factors be embraced by arbitrary and capricious review, Judge Kozinski suggests that the presence of political, nonlegal justifications for agency inaction are a reason to apply a rule of nonreviewability to agency inaction. See *id.* at 850.
77. *Chao*, 361 F.3d at 255.

“[W]hat is at issue in this case is a change in regulatory policy coincident with a change in administration.”<sup>78</sup> Citing Rehnquist’s opinion in *State Farm*, Judge Pollak noted that “[t]here is nothing obscure, and nothing suspect, about” a change in regulatory priorities that coincides with a change in administration.<sup>79</sup> Rather, he said that this is “one of the important things that elections are about.”<sup>80</sup>

Consistent with *State Farm* and with the judiciary’s overall willingness to turn a blind eye to the role political influences actually do play in agency decisionmaking processes, the majority in *Chao* said nothing about Judge Pollak’s reliance on the political context of the agency’s decision. Thus, in contrast to Judge Pollak’s views, the majority opinion in *Chao* simply serves to underscore the judiciary’s widespread practice of demanding that agency decisions be explained in expert-driven or legal terms, not political terms.

One of the Supreme Court’s most recent pronouncements of note involving arbitrary and capricious review, *Massachusetts v. EPA*,<sup>81</sup> should only help to solidify the judiciary’s overall willingness to demand technocratic decisionmaking. In *Massachusetts*, the Court reviewed the EPA’s denial of a rulemaking petition that asked the EPA to regulate certain emissions from new motor vehicles that lead to global warming.<sup>82</sup> Justice Stevens’s opinion for a five-Justice majority held that the EPA has the statutory authority to regulate such emissions and that the various policy-driven reasons the EPA offered for declining to regulate, ranging from a desire to avoid piecemeal regulation to a desire to avoid interfering with the President’s foreign policy initiatives, were not sufficient reasons for denying the rulemaking petition.<sup>83</sup> Thus, the Court ultimately sent the EPA back to the drawing board, embracing an expertise-driven notion of agency decisionmaking akin to what the Court previously embraced in *State Farm*.<sup>84</sup> Essentially, the Court told the EPA that it wanted to see the “expert” agency do the work and make a scientific determination of whether the emissions do or do not endanger the public health or welfare

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78. *Id.* at 256 (Pollak, J., concurring).

79. *Id.* at 256 & n.1.

80. *Id.*

81. 549 U.S. 497 (2007). In *Massachusetts*, the Court did not apply the APA but rather applied a specific provision of the Clean Air Act (CAA) that closely tracks section 706(2)(A) of the APA. See 42 U.S.C. § 7607(d)(9) (2000) (calling for reversal of action “found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”).

82. *Massachusetts*, 549 U.S. at 513.

83. *Id.* at 533.

84. See Freeman & Vermeule, *supra* note 27, at 54 (arguing that *Massachusetts* could be considered “*State Farm* for a new generation”) (citation omitted).

within the meaning of the statute. Policy-driven considerations were to factor into the agency decision to regulate or not to regulate, if at all, only *after* the expert agency did the technical work and made an expert judgment.<sup>85</sup>

As Professors Vermeule and Freeman have argued, the Court's focus in *Massachusetts* on agency expertise embraces a type of "expertise-forcing" whereby the Court sought to "protect administrative expertise from political intrusion" by forcing agencies to engage in expert-driven decisionmaking.<sup>86</sup> In this sense, *Massachusetts* loudly reiterates the message that *State Farm* has been read to have established more than twenty years earlier: agencies must justify their decisions in expert-driven, *not* political, terms if they wish to convince courts that reasoned decisionmaking has occurred.

Just this past Term, however, the Court issued a notable decision involving arbitrary and capricious review, *FCC v. Fox Television Stations, Inc.*,<sup>87</sup> that does not seem to neatly fit within *Massachusetts's* and *State Farm's* technocratic lenses. In *Fox*, the Court reviewed orders issued by the FCC upholding indecency findings for the isolated utterances of the F- and S-words during television broadcasts. The FCC's decision that fleeting expletives can be actionable marked a change in the FCC's policy—a change that Justice Scalia frankly acknowledged was "spurred by significant political pressure from Congress."<sup>88</sup> In upholding the FCC's orders, Justice Scalia's opinion for the Court emphatically rejected the notion that all shifts in agency policy are subject to more rigorous judicial review,<sup>89</sup> and hence his opinion seems to make it easier for agencies to change their policies due to changes in the political landscape.<sup>90</sup> In this sense, Justice Scalia's opinion for the Court at least implicitly seems to cast doubt on a technocratic approach.<sup>91</sup> In contrast, in his dissenting opinion in *Fox*, Justice Breyer joined by Justices Stevens and

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85. Kathryn A. Watts & Amy J. Wildermuth, *Massachusetts v. EPA: Breaking New Ground on Issues Other Than Global Warming*, 102 NW. U. L. REV. 1029, 1043 (2008).

86. Freeman & Vermeule, *supra* note 27, at 54, 64-65.

87. 129 S. Ct. 1800 (2009).

88. *Id.* at 1816. Justice Scalia was joined in this Part of the opinion only by Chief Justice Roberts and Justices Thomas and Alito—not by Justice Kennedy.

89. *Id.* at 1810 ("We find no basis in the Administrative Procedure Act or in our opinions for a requirement that all agency change be subjected to more searching review.").

90. *Id.*

91. *Id.* at 1810-11. This part of Justice Scalia's opinion was joined by Chief Justice Roberts and Justices Thomas, Kennedy, and Alito. Another portion of Justice Scalia's opinion, which was not joined by Justice Kennedy, implies even more strongly that political explanations may be enough to justify agency action: "If the FCC is indeed an agent of Congress, it would seem an adequate explanation of its change of position that Congress made clear its wishes for stricter enforcement." *Id.* at 1816 (internal citations omitted).

Ginsburg and then-Justice Souter expressed discomfort with allowing political influences to factor into agency decisionmaking, arguing that existing law does not permit the FCC to “make policy choices for purely political reasons.”<sup>92</sup> The Court’s divided opinion in *Fox*, accordingly, might suggest that some cracks are forming in the foundation holding up the technocratic model despite the judiciary’s longstanding pattern of demanding technocratic decisionmaking.

*B. Agencies’ Focus on Technocratic Factors*

Given that courts generally apply arbitrary and capricious review in a way that calls on agencies to justify their decisions in technocratic terms, it should come as no surprise that agencies today generally couch their decisions in technocratic, statutory, or scientific language, either failing to disclose or affirmatively hiding political influences that factor into the mix. Numerous examples of this can be found in recent rulemaking proceedings.<sup>93</sup>

Take, for example, the FDA’s controversial attempt in the 1990s to regulate teen smoking. President Clinton played a very active role in directing the rulemaking. He personally announced the initiation of the rulemaking at a press conference, publicly stating: “[T]oday I am authorizing the Food and Drug Administration to initiate a broad series of steps all designed to stop sales and marketing of cigarettes and smokeless tobacco to children.”<sup>94</sup> He also subsequently announced the final rule in a Rose Garden ceremony where he noted that the rule being announced was “the right thing to do, scientifically, legally, and morally.”<sup>95</sup> Yet the detailed and lengthy statement of basis and purpose supporting the FDA’s final rule relied upon statutory, scientific, and expert justifications—barely even hinting at President Clinton’s significant

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92. *Id.* at 1829 (Breyer, J., dissenting).

93. See generally Strauss, *supra* note 10, at 966-67 (describing agencies’ failure to disclose political influences in certain rulemaking proceedings).

94. See The President’s News Conference, II PUB. PAPERS 1237 (Aug. 10, 1995) (announcing that “by executive authority, I will restrict sharply the advertising, promotion, distribution, and marketing of cigarettes to teenagers”).

95. See Remarks Announcing the Final Rule To Protect Youth from Tobacco, II PUB. PAPERS 1332, 1333 (Aug. 23, 1996) (“A year ago this month, we launched a comprehensive strategy to kick tobacco out of the lives of our children. We proposed strong restrictions on advertising, marketing, and sales of cigarettes to children. In the year that followed, the FDA received a torrent of comments from the public, more than 700,000, by far the largest outpouring of public response in the FDA’s history. The FDA has heard from doctors, scientists, tobacco companies, and tens of thousands of children. We have carefully considered the evidence.”).

involvement in the rulemaking.<sup>96</sup> Thus, as Professor Peter Strauss has noted, “[a] person who had not been reading newspapers or listening to presidential speeches” would have seen “only an ordinary (if high-visibility) agency rule, adopted and defended in the ordinary manner” and would not have seen evidence of the President’s active and open political involvement.<sup>97</sup> Likewise, a court limiting its review to the rulemaking record would have seen only “a quite ordinary collection of documents and voluminous explanations of *expert* judgment.”<sup>98</sup>

Another example of an agency’s failure to disclose political influences in the course of a rulemaking can be found in the EPA’s lowering of the reporting thresholds for certain persistent, bioaccumulative, toxic (PBT) chemicals.<sup>99</sup> In connection with Earth Day in April 1998, Vice President Gore directed the EPA to list and lower the reporting thresholds for PBT chemicals reported under section 313 of the Emergency Planning and Community Right-to-Know Act.<sup>100</sup> In accordance with Vice President Gore’s directions, the EPA went ahead and promulgated a rule in 1999 that, among other things, lowered the reporting thresholds for certain PBTs.<sup>101</sup> Yet the EPA’s statement of basis and purpose

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96. See Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco To Protect Children and Adolescents, 61 Fed. Reg. 44,396 (Aug. 28, 1996). One brief and fleeting reference to the President’s involvement can be found in the FDA’s response to a comment raising concern that the FDA’s real goal was to achieve an outright ban on tobacco. See *id.* at 44,419 (noting that “when the President announced the proposed FDA regulations on August 10, 1995, one reporter asked whether an outright ban would be more logical than a ‘regulatory partial step’” and the President replied by stating that he thought “it would be wrong to ban cigarettes outright”).
97. Strauss, *supra* note 10, at 967; see also Kagan, *supra* note 4, at 2283 (“The final documents, containing new proscriptions on tobacco manufacturers and vendors, a statement of the health-related justifications for those proscriptions, and a lengthy defense of FDA jurisdiction over the issue, nowhere mentioned the President; rules, as a historic matter, very rarely have done so, and this one was no exception.”).
98. Strauss, *supra* note 10, at 967 (emphasis added).
99. Persistent Bioaccumulative Toxic (PBT) Chemicals, 64 Fed. Reg. 58,666 (Oct. 29, 1999).
100. See EPA Statement of Regulatory and Deregulatory Priorities, 65 Fed. Reg. 73,453, 73,460 (Nov. 30, 2000) (noting that the initiative was “announced by the Vice President on EPA’s Earth Day 1998 in response to the finding that most commercial chemicals have very little, if any, publicly available toxicity information on which to make sound judgments about potential risks”); *id.* at 73,458 (“The Chemical Right-to-Know Initiative, which was announced by the Vice President in April 1998, included a directive to the Agency to list and lower the reporting thresholds for *persistent, bioaccumulative, toxic* (PBT) chemicals reported under section 313 of the Emergency Planning and Community Right-to-Know Act.”) (emphasis added).
101. See Persistent Bioaccumulative Toxic (PBT) Chemicals, 64 Fed. Reg. 58,666; see also EPA Statement of Regulatory and Deregulatory Priorities, 65 Fed. Reg. at 73,458 (“In accord with the Vice President’s directive, EPA has set out the criteria that will be used for determining if

accompanying the final rule says nothing about influences from the executive branch generally or the Vice President more specifically.<sup>102</sup> Rather, the EPA's document announcing the final rule speaks entirely in statutory and scientific terms.

The EPA's silence about Vice President Gore's involvement is particularly interesting when the EPA's 1999 rule is contrasted with the agency's November 2000 regulatory plan published in the Unified Agenda. In the November 2000 Unified Agenda, in the course of disclosing another proposed rule involving PBTs that was on the agency's agenda at the time, the EPA noted that it previously promulgated the 1999 rule lowering the reporting thresholds "[i]n accord with the Vice President's directive."<sup>103</sup> One could speculate that the EPA included this reference to political influence in its November 2000 description of its regulatory plan—but *not* in the actual statement of basis and purpose accompanying the 1999 rule—because the point of the regulatory plan is to speak directly to *the executive branch*: the plan seeks to demonstrate to the executive branch that the agency's rulemaking priorities and agenda are consistent with presidential priorities.<sup>104</sup> In contrast, a notice of a final rule could be thought of as speaking to *interested parties* and to *the courts* in that it aims to justify the validity of that particular rule in terms sufficient to stave off or to withstand judicial challenge and perhaps also to win a broader public relations battle.

The two examples just given—the high-profile tobacco rulemaking and the lower-profile rulemaking involving PBT chemicals—both involved the Clinton Administration. Examples of agencies' failures to disclose political factors influencing their rulemaking proceedings, however, are not limited to the Clinton Administration. Rather, the same pattern persisted during the recent Bush presidency as well. One representative example from the Bush presidency involves a rulemaking conducted by the Department of Health & Human Services (HHS). Shortly after President Bush entered the White House, he

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a chemical is persistent and bioaccumulative under EPCRA section 313 and has lowered the EPCRA section 313 reporting thresholds.”).

102. See Persistent Bioaccumulative Toxic (PBT) Chemicals, 64 Fed. Reg. 58,666.

103. EPA Statement of Regulatory and Deregulatory Priorities, 65 Fed. Reg. at 73,458.

104. See Exec. Order No. 12,866, § 4(b), (c), 58 Fed. Reg. 51,735, 51,738 (Oct. 4, 1993) (requiring federal agencies to prepare a “unified regulatory agenda” and “regulatory plan” for submission to OIRA); see also *id.* § 4(c)(5), 58 Fed. Reg. at 51,739 (“If the Administrator of OIRA believes that a planned regulatory action of an agency may be inconsistent with the President’s priorities or the principles set forth in this Executive order or may be in conflict with any policy or action taken or planned by another agency, the Administrator of OIRA shall promptly notify, in writing, the affected agencies, the Advisors, and the Vice President.”).

publicly issued a written statement concerning federal regulations involving the privacy of medical records.<sup>105</sup> In his public statement, President Bush noted that he had directed the Secretary of HHS to allow the medical privacy rules that had been crafted during the Clinton Administration to become effective, but he also noted that – in light of “legitimate concerns” about the rule – he had asked the Secretary “to recommend appropriate modifications to the rule.”<sup>106</sup> In the wake of this public directive from the President, the Secretary directed HHS to propose appropriate changes to the privacy rules, which HHS ultimately did on March 27, 2002.<sup>107</sup> The proposed changes to the rules were published in August 2002 and went into effect October 15, 2002.<sup>108</sup> Notably, however, the final rulemaking document includes only statutory and technocratic justifications for the rule changes; it does not even so much as mention President Bush’s public statement directing modification of the rules.<sup>109</sup> Thus, HHS’s rulemaking follows the clear pattern that can be seen in agency rulemakings as a whole: a focus on traditional statutory, scientific, or technocratic terms and a failure to transparently disclose political influences.

There are, however, a few recent agency decisions that seem to buck this general trend, serving as “exceptions” to the general rule. One very recent exception involves fuel economy standards for model year 2011 passenger cars and light trucks issued by the Department of Transportation (DOT) under the Obama Administration.<sup>110</sup> During the Bush Administration, the NHTSA under the DOT issued proposed rules to address fuel efficiency standards for model years 2011 through 2015. However, on January 7, 2009, right at the end of Bush’s presidency, the DOT issued a statement explaining that the fuel efficiency standards would not be finalized under the Bush Administration because “[t]he recent financial difficulties of the automobile industry will require the next administration to conduct a thorough review of matters affecting the industry, including how to effectively implement the Energy Independence and Security Act of 2007 (EISA).”<sup>111</sup> Just days after being sworn

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105. Statement on Federal Regulations on Privacy of Medical Records, 37 WEEKLY COMP. PRES. DOC. 611 (Apr. 12, 2001).

106. *Id.* at 612.

107. Standards for Privacy of Individually Identifiable Health Information, 67 Fed. Reg. 53,182, 53,183 (Aug. 14, 2002).

108. *Id.* at 53,182.

109. *Id.*

110. See Average Fuel Economy Standards Passenger Cars and Light Trucks Model Year 2011, 74 Fed. Reg. 14,196 (Mar. 30, 2009).

111. *Id.* at 14,199 (quoting Statement from the U.S. Department of Transportation, *available at* <http://www.dot.gov/affairs/doto109.htm>).

into office in January 2009, President Obama—following through on a campaign promise to promote energy efficiency—brought the issue back to life by issuing a memorandum directing the DOT to quickly finalize standards for model year 2011 and to establish standards for subsequent model years via a separate rulemaking.<sup>112</sup> The President publicly announced this directive at the White House while flanked by the head of the DOT, as well as other key members of his energy and environment teams.<sup>113</sup>

The NHTSA quickly followed President Obama’s directions, issuing final standards for model year 2011 in March 2009 and postponing decision on subsequent model years. Most significant for purposes of this Article is the fact that the NHTSA’s final rule adopting the 2011 standards repeatedly references the President’s directions and preferences, thereby giving the clear impression that the President had exerted significant influence over the agency’s decision. For example, the NHTSA noted in the summary of its action that “the President issued a memorandum on January 26, 2009” in the “context of his calls for the development of new national policies to prompt sustained domestic and international actions to address the closely intertwined issues of energy independence, energy security and climate change.”<sup>114</sup> The NHTSA also explained that it was deferring action on standards for the later model years so as to ensure that it will select standards that contribute “to the maximum extent possible within [statutory limits], to meeting the energy and environmental challenges and goals outlined by the President.”<sup>115</sup>

Another exception to agencies’ general failure to disclose political influences involves the withdrawal of a rule initially proposed in 1989 by the Mine Safety and Health Administration (MSHA). The proposed rule would have, among other things, established “permissible exposure limits” for substances that might adversely affect the health of miners.<sup>116</sup> In September 2002, the MSHA decided to withdraw portions of the proposed rule from its agenda,<sup>117</sup> explaining in a cursory fashion that its decision to withdraw the proposed rule

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112. See *id.*; see also John M. Broder & Peter Baker, *Obama’s Order Likely To Tighten Auto Standards*, N.Y. TIMES, Jan. 26, 2009, at A1.

113. See Steven Mufson & Juliet Eilperin, *Obama Issues Orders Toward More Fuel-Efficient Cars*, WASH. POST., Jan. 27, 2009, at A4.

114. Average Fuel Economy Standards Passenger Cars and Light Trucks Model Year 2011, 74 Fed. Reg. 14,196.

115. *Id.*

116. Air Quality, Chemical Substances, and Respiratory Protection Standards, 54 Fed. Reg. 35,760 (proposed Aug. 29, 1989).

117. Air Quality, Chemical Substances, and Respiratory Protection Standards, 67 Fed. Reg. 60,611 (Sept. 26, 2002).

“was the result of changes in agency priorities” and the possible adverse effect of an appellate court decision. The MSHA also explained that it had been “more than 13 years since the proposal was published and more than 12 years since the comments were received” and that the record was stale.<sup>118</sup>

The MSHA’s rulemaking withdrawal ultimately faced a judicial challenge, and the D.C. Circuit concluded that the agency had failed to provide a sufficient explanation justifying the withdrawal.<sup>119</sup> On remand, the MSHA published a detailed explanation of its rule withdrawal, elaborating on why its statutory responsibilities, the change in agency priorities, and the staleness of the rulemaking record all called for withdrawal. On the issue of changing agency priorities, the MSHA stressed that the Secretary of Labor had revisited and reprioritized the agency’s agenda consistent with a “federal agency-wide initiative intended to maintain sound regulatory practice,” which was announced by President Bush’s Chief of Staff Andrew Card in a written memorandum to agency heads.<sup>120</sup> Notably, in justifying why this politically driven reprioritization should count as an “adequate” explanation for its decision, the MSHA drew directly from the views Judge Pollak set forth in *Chao* just one year earlier: “[T]here is nothing obscure, and nothing suspect about regulatory policy changes coincident with changes in administration,” the MSHA explained, quoting from Judge Pollak.<sup>121</sup> “[E]ach administration embraces its own priority-setting process and regulatory philosophy such that items considered priority by one administration may not be so by another administration.”<sup>122</sup>

Although the MSHA’s explanation of the rule withdrawal provides a very good example of how agencies are in fact influenced by political factors and how they could disclose such influences, the MSHA’s acknowledgement of politics in its rulemaking—just like the NHTSA’s references to Obama’s

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118. *Id.*

119. See *Int’l Union, United Mine Workers v. U.S. Dep’t of Labor*, 358 F.3d 40, 44 (D.C. Cir. 2004) (concluding, among other things, that the “MSHA’s statement that there was a ‘change in agency priorities,’ without explanation, is not informative in the least”).

120. See *Air Quality, Chemical Substances, and Respiratory Protection Standards*, 69 Fed. Reg. 67,681, 67,686 (Nov. 19, 2004) (citing Memorandum from Andrew H. Card, Jr., Assistant to the President and Chief of Staff, to Heads and Acting Heads of Executive Departments and Agencies, 66 Fed. Reg. 7702 (Jan. 24, 2001)).

121. *Id.* (citing *UAW v. Chao*, 361 F.3d 249, 256 (3d Cir. 2004) (Pollak, J., concurring)).

122. *Air Quality, Chemical Substances, and Respiratory Protection Standards*, 69 Fed. Reg. at 67,686.

influence in its 2009 fuel efficiency rulemaking—stand as exceptions, *not* the norm. Generally agencies sweep political influences under the rug.<sup>123</sup>

### C. Scholars' Acceptance of the Push for Expertise

Like courts and agencies, scholars too have spent insufficient time considering whether politics and arbitrary and capricious review could work together. This is not due to a lack of scholarly interest in hard look review in general. To the contrary, scholars have spent inordinate amounts of time debating hard look review and criticizing it on a variety of grounds. For example, many scholars have attacked hard look review on the ground that it has “ossified” the rulemaking process by making informal rulemaking burdensome and expensive and by pushing agencies to use other tools to set regulatory policies.<sup>124</sup> In addition, some scholars have argued that intrusive arbitrary and capricious review is inconsistent with the minimal procedural requirements imposed by the APA as interpreted by the Supreme Court in the seminal case of *Vermont Yankee*.<sup>125</sup> Notably absent from this scholarship,

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123. A draft of a work by Professor Nina Mendelson corroborates this conclusion, documenting in detail how “public information about executive supervision” of agency decisions is “surprisingly rare” despite the frequency with which presidents direct “agencies to take action of one sort or another, including the promulgation of rules.” Nina A. Mendelson, *Disclosing “Political” Oversight of Agency Decisionmaking*, 108 MICH. L. REV. (forthcoming 2010) (manuscript at 24, on file with The Yale Law Journal), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1470850](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1470850).
124. See William S. Jordan, III, *Ossification Revisited: Does Arbitrary and Capricious Review Significantly Interfere with Agency Ability To Achieve Regulatory Goals Through Informal Rulemaking?*, 94 NW. U. L. REV. 393, 395 (2000) (summarizing ossification arguments made by opponents of hard look review); Richard J. Pierce, Jr., *The Role of the Judiciary in Implementing an Agency Theory of Government*, 64 N.Y.U. L. REV. 1239, 1264 (1989) (“There is mounting evidence that fear of judicial rejection of a policy based on the requirement of reasoned decisionmaking has introduced into the policymaking process delay and resource commitments so great that some agencies have abandoned their efforts at policymaking completely.”); Mark Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals To Modify Judicial Review of Notice and Comment Rulemaking*, 75 TEX. L. REV. 483, 483 (1997) (“Articles lamenting the recent ‘ossification’ of notice and comment rulemaking seem to be the fashion in administrative law scholarship today.”).
125. In *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978), the Supreme Court admonished courts for piling additional procedures on top of the minimal procedures for notice-and-comment rulemaking set out in the APA. For examples of scholarly works arguing that the judiciary’s formulation of hard look could be read to violate *Vermont Yankee*’s command, see Richard J. Pierce, Jr., *Waiting for Vermont Yankee III, IV, and V? A Response to Beermann and Lawson*, 75 GEO. WASH. L. REV. 902, 904-10 (2007); and Paul R. Verkuil, *Judicial Review of Informal Rulemaking: Waiting for Vermont Yankee II*, 55 TUL. L. REV. 418 (1981). For a contrary view, see Jack M. Beermann & Gary

however, has been much critical analysis of how hard look review currently embraces expertise to the exclusion of politics and incentivizes agencies to speak only in technocratic terms. Indeed, many scholars seem to accept the desirability of our current system's focus on expertise and science.

Take, for example, Professors Vermeule and Freeman's recent article, which describes how the Court's decision in *Massachusetts* embraces a notion of "expertise-forcing" that attempts to ensure that agencies exercise expert judgment free from political pressures.<sup>126</sup> In describing the Court's embrace of "expertise-forcing," Professors Vermeule and Freeman speak in a decidedly positive light about the judiciary's attempt to insulate administrative expertise from political influence.<sup>127</sup>

Other scholars have spoken affirmatively about the virtues of expertise and insulation and the negative aspects of politics as well. Justice Stephen Breyer, who has co-authored a prominent administrative law casebook,<sup>128</sup> is one of these scholars. Justice Breyer, for example, has argued that "[a] depoliticized regulatory process might produce better results, hence increased confidence, leading to more favorable public and Congressional reactions" and that elite, professional administrators should play a larger role in regulatory policymaking.<sup>129</sup> Specifically, Justice Breyer has stressed what he sees as the "inherent" virtues of rationalization, expertise, and insulation, which he believes should be distanced from politics and public opinion.<sup>130</sup>

Given that expertise tends to be associated with positive attributes and politics with negative attributes,<sup>131</sup> very little serious, sustained scholarly attention has been given to exploring how arbitrary and capricious review might be tweaked to embrace a role for politics in the agency rulemaking process. Two notable exceptions, however, deserve consideration: a book published in 1990 by then-Professor and now Dean Christopher Edley; and a

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Lawson, *Reprocessing Vermont Yankee*, 75 GEO. WASH. L. REV. 856, 880-82 (2007) (arguing that hard look review is not necessarily inconsistent with *Vermont Yankee*).

126. Freeman & Vermeule, *supra* note 27, at 54, 64-67.

127. *Id.* at 54, 64-65.

128. See STEPHEN G. BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY, at xxxvii (6th ed. 2006).

129. See STEPHEN BREYER, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION 55-56, 59-60 (1993).

130. See *id.* at 60-63 ("[T]he group must have a degree of *political insulation* to withstand various political pressures, particularly in respect to individual substances, that emanate from the public directly or through Congress and other political sources.").

131. See EDLEY, *supra* note 4, at 20-21 (describing the negative attributes often associated with politics as including willfulness, subjectivity, tyranny by the majority, and nonscientific norms).

law review article published by Elena Kagan, former dean of Harvard's law school and currently Solicitor General of the United States.<sup>132</sup> Both works address, to varying degrees of detail, the value of political judgment in administrative decisionmaking and how judicial doctrine might be altered to embrace political influences.

Edley's book devotes one chapter to discussing how arbitrary and capricious review might be read to embrace a role for politics in agency decisionmaking. Specifically, Edley argues that agencies should "frankly acknowledge the role of political, ideological, or subjective analyses in their reasons and findings rather than attempting to obscure those elements behind the filigree so readily generated by the scientific and adjudicatory fairness methods of decisionmaking and explanation."<sup>133</sup> He also argues that courts applying arbitrary and capricious review should police the mix and quality of an agency's reliance on political factors, giving "credit [to] politics as an acceptable and even desirable element of decision making" in appropriate circumstances.<sup>134</sup>

Kagan's 2001 article, much like Edley's book, represents a major scholarly attempt to argue for the value of political judgment in administrative decisionmaking generally. In the article, Kagan focuses on chronicling the arrival of what she calls an "era of presidential administration," which Kagan believes has made the regulatory activity of executive agencies "more and more

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132. See *id.*; Kagan, *supra* note 4. In addition, three other works that discuss the general subject of politics in agency decisionmaking are well worth mentioning. The first is a recent piece that makes the argument that "swerves" or "changes" in agency policies due to changes in administration are not necessarily arbitrary or capricious within the meaning of the APA. See Joshua McKarcher, *Restoring Reason: Reformulating the Swerve Doctrine of Motor Vehicle Manufacturers v. State Farm*, 76 GEO. WASH. L. REV. 1342 (2008). The second is a book published in 1988 by Professor Martin Shapiro, which criticizes courts for treating rulemaking agencies like courts rather than like "subordinate legislatures" and for effectively driving "the very prudential decisions that ought to be out front and subject to public and judicial scrutiny under a technological smoke screen." SHAPIRO, *supra* note 13, at 156, 171. The third is a forthcoming article by Professor Nina Mendelson. See Mendelson, *supra* note 123. Professor Mendelson's work presents detailed evidence of agency silence regarding presidential influence on agency rulemaking and argues for greater disclosure by agencies of such presidential influence. *Id.* Its primary focus is on the need for agency disclosure of political influences rather than on judicial review or the arbitrary and capricious doctrine more specifically. In particular, Professor Mendelson argues that instead of focusing primarily on judicial review (as this Article does), we should call for a more transparent role for political influences by imposing procedural requirements on agencies that require them to disclose executive supervision. See *id.* at 3, 39-42.

133. EDLEY, *supra* note 4, at 190.

134. *Id.* at 192.

an extension of the President's own policy and political agenda."<sup>135</sup> At the end of her lengthy article, Kagan considers in a short section what the arrival of presidential administration might mean for various judicial review doctrines, including hard look review. In that Section, she suggests that the rise in the presidential control model of agency decisionmaking should lead courts to alter hard look review so that courts look not only for technical, expert-driven explanations but also for publicly disclosed political factors that demonstrate presidential leadership and accountability.<sup>136</sup>

Both Edley's and Kagan's works provide some much-needed attention to the virtues of political judgment in regulatory decisionmaking. However, neither is sufficient. Kagan's work speaks only very briefly about how agencies and courts might alter their thinking to enable arbitrary and capricious review to embrace political influences, and Edley's book, which was published in 1990, was unable to fully capitalize on more recent developments in administrative law, such as the *Chevron* deference doctrine,<sup>137</sup> that point away from an expertise-based notion of agency decisionmaking and toward a political accountability model.

Thus, in the end, we are left with the following picture: courts have read arbitrary and capricious review in a way that enables them to search rulemaking records for expert-based decisionmaking. Agencies—likely following courts' cues—justify their rulemaking decisions in technocratic terms, failing to disclose or affirmatively hiding political influences. And scholars generally have uncritically accepted the current system's focus on technocratic decisionmaking.

## II. THE BENEFITS OF GIVING POLITICS A PLACE

Despite how well entrenched the expertise-based view of hard look review has become in judicial doctrine, agency practice, and academic scholarship, there are real reasons to change this picture. Specifically, this Article proposes that arbitrary and capricious review be modified so that certain political influences would be viewed as an appropriate factor in rulemaking. Altering hard look review in this way—so that it openly embraces a transparent role for politics in agency decisionmaking—could yield four major benefits. First,

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135. Kagan, *supra* note 4, at 2246, 2248.

136. *Id.* at 2380-83.

137. The "*Chevron*" deference doctrine is named after *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), in which the Court set up its now famous two-step doctrine governing deference to reasonable agency constructions of ambiguous statutory provisions.

allowing 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. Second, giving politics its own sphere could help to take some of the political pressure off of science. Third, facilitating a role for politics would give courts yet another reason to defer to agencies, thereby offering a means of softening the “ossification” charge frequently leveled against arbitrary and capricious review. Fourth, encouraging agencies to disclose political factors—rather than hiding behind technocratic façades—would enable political influences to come out into the open, thereby enabling greater political accountability, monitoring, and transparency. This Part will discuss in turn each of these reasons for altering current conceptions of hard look review.

A. *Bringing Greater Coherence to Administrative Law’s Vacillation Between Expertise and Politics*

One major reason why hard look review should be rethought is that it currently embraces aspects of an outmoded model of agency decisionmaking: the “expertise model.” During the Progressive Era through the New Deal period, agencies derived their legitimacy from the notion that they were made up of professional and capable government “experts” pursuing the “public interest.”<sup>138</sup> Joseph Eastman, who served as a member of the Interstate Commerce Commission, summed up this view of agencies as apolitical experts in 1928 when he wrote that independent regulatory commissions are “clearly nonpartisan in their makeup, and party policies do not enter into their activities except to the extent that such policies may be definitely registered in the statutes which they are sworn to enforce.”<sup>139</sup> Similarly, James M. Landis, a

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138. See 1 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 1.7, at 25 (4th ed. 2002) (“The explosive growth of administrative agencies during the New Deal took place in an environment of reverence for technocratic solutions and judicial distrust of political institutions.”); see also SHAPIRO, *supra* note 13, at 60–62 (“The Progressive creed was experts in the service of the public and government as essentially a set of technical services provided to the citizenry.”); Paul R. Verkuil, *Understanding the “Public Interest” Justification for Government Actions*, 39 ACTA JURIDICA HUNGARICA 141, 141 (1998) (“The words ‘public interest’ are probably invoked more than any other to explain and justify government action, whether in delegations of legislative authority to agencies or in explanations by agency officials to the public.”).

139. Joseph B. Eastman, *The Place of the Independent Commission*, 12 CONST. REV. 95, 101 (1928).

major champion of the modern administrative state,<sup>140</sup> articulated a similar view in 1938 when he wrote that administrators are bureaucratic “men of professional attainment” and “men bred to the facts” who “envisage governance as a career.”<sup>141</sup>

By the time hard look review emerged in the 1960s and 1970s, this “expertise-based” model of agency decisionmaking had fallen out of favor.<sup>142</sup> In place of the expertise-based model had come a new theory of agency behavior—the “capture” theory—which saw agencies *not* as apolitical experts but rather as entities that were susceptible to “capture” by the regulated industry.<sup>143</sup> Yet even as the capture theory took hold, certain underpinnings of the expertise model—specifically, the notion that agencies had a duty to deliberate to “choose the good”—continued to persist in judges’ minds.<sup>144</sup> Courts, accordingly, sought to shape administrative law doctrine in a way that would enable them to smoke out agency capture and to force agencies to engage in technocratic decisionmaking open to participation by varying interest groups such that the public interest (rather than special interests) would be served.<sup>145</sup> Hard look review was one of the main tools that the courts developed to ensure that agencies were looking at the statute and the evidence and were choosing answers that served the public good. In this sense, hard look review actually embraced certain aspects of the original expertise-based

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140. In the 1930s, James Landis served as a member of the FTC, a member of the SEC, and chair of the SEC. See Carl McFarland, *Landis’ Report: The Voice of One Crying in the Wilderness*, 47 VA. L. REV. 373, 374 n.2 (1961).

141. JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 154-55 (1938).

142. See SHAPIRO, *supra* note 13, at 62-63 (describing how the “New Deal ideal of government by experts that flourished in the 1930s and 1940s began to tarnish badly in the fifties”); see also Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1761 (2007) (noting that by the 1970s, “[e]xperience had bred a certain amount of skepticism about the expertise model”).

143. See SHAPIRO, *supra* note 13, at 62-66 (noting that the capture theory described the phenomenon of how agencies that regulate particular industries over time “tend . . . to see the world more and more the way the industry sees it” and begin “to regulate in the interest of the regulated”); see also *supra* note 51 and accompanying text (discussing the capture theory).

144. See SHAPIRO, *supra* note 13, at 75 (noting that judges insisted that “agencies make right decisions clearly and consciously directed by properly articulated public values and resting on correct technical analysis”).

145. See *id.* (noting that courts viewed it as their duty to make sure that agencies “deliberated rightly,” which meant that the agency had deliberated “in the way a moral philosopher armed with technical as well as moral knowledge would deliberate” to “choose the good”); Bressman, *supra* note 142, at 1761 (noting that hard look’s reasoned decisionmaking requirement reflected an interest group representation model, which sought to promote participation in the decisionmaking process by all affected interests).

model of agency decisionmaking—specifically, those aspects that viewed agency decisionmaking as involving pursuit of the public good through a technocratic process.

By the 1980s, administrative law took yet another turn by moving to embrace a new model of agency decisionmaking: the “political control” model.<sup>146</sup> This model, which has since gained widespread acceptance,<sup>147</sup> acknowledges that many policymaking decisions made by agencies cannot be resolved through a myopic technocratic lens but rather are highly political decisions that should be made by politically accountable institutions.<sup>148</sup> The political control model of agency decisionmaking, accordingly, legitimizes agency decisionmaking by stressing that agencies are subject to political control.

Most scholars see political control of the administrative state as resting with the President due to the unique role he plays in overseeing agency action.<sup>149</sup> The President, for example, can steer administrative agencies through his

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146. See Bressman, *supra* note 142, at 1763 (“By the 1980s, administrative law theory and doctrine had transitioned to presidential control of agency decisionmaking as a principal mechanism for legitimating such decisionmaking.”); David Zaring & Elena Baylis, *Sending the Bureaucracy to War*, 92 IOWA L. REV. 1359, 1370-77 (2007) (noting the shift from expertise toward a political model of agency decisionmaking); see also 1 PIERCE, *supra* note 138, § 1.7, at 25-26 (describing increased focus on presidential control over the administrative state); Kagan, *supra* note 4 (describing the rise in the presidential control model of agency decisionmaking).

147. See James F. Blumstein, *Regulatory Review by the Executive Office of the President: An Overview and Policy Analysis of Current Issues*, 51 DUKE L.J. 851, 851-53 (2001) (describing the widespread belief in presidential regulatory review); Bressman, *supra* note 142, at 1764 (noting that the presidential control model enjoys “bipartisan political appeal” and “broad scholarly appeal” and that it “has enjoyed widespread support”); cf. Matthew C. Stephenson, *Optimal Political Control of the Bureaucracy*, 107 MICH. L. REV. 53, 59 (2008) (noting that “[s]cholars with diverse ideological and methodological commitments have asserted that . . . bureaucratic policy should track majoritarian values and that this goal is best advanced by giving decision-making authority to the most politically accountable officials,” which implies “the need for presidential control over bureaucratic policymaking, because the president is the institutional actor most responsive to the preferences of a national majority”).

148. See generally 1 PIERCE, *supra* note 138, § 1.7, at 25-26 (discussing the recognition that policymaking is political).

149. See, e.g., Blumstein, *supra* note 147, at 855 (“[C]entralized presidential review of agency regulatory activity is an understandable and salutary development.”); Philip J. Harter, *Executive Oversight of Rulemaking: The President Is No Stranger*, 36 AM. U. L. REV. 557, 568 (1987) (“We vote for presidents, not secretaries or administrators. . . . White House oversight places accountability precisely where it should be, namely, where the electorate can do something about it.”); Kagan, *supra* note 4, at 2384 (“Presidential administration . . . advances political accountability by subjecting the bureaucracy to the control mechanism most open to public examination and most responsive to public opinion.”).

power to appoint and to remove executive officials.<sup>150</sup> In addition, presidents increasingly have put specific mechanisms into place to achieve greater regulatory control, including various executive orders issued by recent presidents that seek to control agencies and to subject them to oversight by the OMB.<sup>151</sup>

Other scholars who subscribe to the political control model, however, focus on Congress rather than the President.<sup>152</sup> Among these scholars are positive political theorists.<sup>153</sup> These scholars emphasize how Congress can use a number of formal and informal tools to exert oversight and influence over agency policymaking, including Congress's ability to hold oversight hearings (sometimes called "police patrols") and its ability to respond to alarms sounded

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150. The President's appointment powers are spelled out in the Constitution in the "Appointments Clause." See U.S. CONST. art. II, § 2, cl. 2. Although there is no equivalent "Removal Clause," the Supreme Court has held that Congress cannot constrain the President's removal power over executive officials in a way that would unduly interfere with the President's constitutionally appointed duty under Article II to faithfully execute the laws. See *Morrison v. Olson*, 487 U.S. 654 (1988). The Supreme Court is poised to speak to the issue of removal again this Term in a pending case involving the constitutionality of the Public Company Accounting Oversight Board. See *Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd.*, 537 F.3d 667 (D.C. Cir. 2008), *cert. granted*, 129 S. Ct. 2378 (U.S. May 18, 2009) (No. 08-861).
151. See Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993); Exec. Order No. 12,498, 3 C.F.R. 323 (1986); Exec. Order No. 12,291, 3 C.F.R. 127 (1982); see also Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1261 (2006) (describing how Reagan "tapped the Office of Management and Budget (OMB) to review agency rulemaking and help streamline the administrative state"); Blumstein, *supra* note 147, at 863-70 (describing the Reagan and Clinton Administration's embrace of executive orders to structure regulatory review).
152. See generally Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61, 64-65 (2006) (observing that presidential control over administration has received significant legal attention but that Congress's role in administration has been "insufficiently noted"); Zaring & Baylis, *supra* note 146, at 1371 (contrasting how some theorists "have focused their attention on congressional control of agencies and have addressed the competence of agencies to act by considering how Congress would oversee their actions" whereas "Presidentialists, on the other hand, have cited the political choices that agencies make with the president and have characterized agency action as subject to strong presidential control").
153. See, e.g., Matthew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431 (1989); Matthew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 166 (1984). See generally David B. Spence, *Administrative Law and Agency Policy-Making: Rethinking the Positive Theory of Political Control*, 14 YALE J. ON REG. 407, 414-15 (1997) (describing positive political theorists' focus on Congress's control over agencies).

by constituents (often called “fire-alarm” oversight).<sup>154</sup> Congress also, of course, possesses the power of the purse and thus can exercise oversight over agencies by controlling their financial resources.<sup>155</sup> In addition, Congress (or committees or small groups of Congressmen) can informally supervise agencies through a “variety of forms, including cajoling, adverse publicity, audits, investigations, committee hearings, factfinding missions, informal contacts with agency members and staff, and pressure on the President to appoint persons chosen by members of Congress to agency positions.”<sup>156</sup>

Whether defined in terms of attention on the President or on Congress, the general scholarly embrace of the “political control” model began to gain traction in the courts in the 1980s. Most prominently, in 1984, the Supreme Court handed down *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,<sup>157</sup> its now famous decision establishing the *Chevron* “two-step.”<sup>158</sup> In the course of explaining why courts should defer to agencies’ reasonable constructions of statutory ambiguities, Justice John Paul Stevens’s opinion stated:

[A]n agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration’s views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices . . . .<sup>159</sup>

As this passage suggests, the rule of deference set forth in *Chevron* ultimately has been read to rest on a presumption of Congress’s delegatory intent: courts must defer to agency interpretations where Congress intends the

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154. See McCubbins & Schwartz, *supra* note 153, at 165-66.

155. See U.S. CONST. art. I, § 9, cl. 7 (“No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . .”). See generally Beermann, *supra* note 152, at 84 (“The power of the purse is among Congress’s most potent weapons in its effort to control the execution of the laws.”).

156. Beermann, *supra* note 152, at 70.

157. 467 U.S. 837 (1984).

158. For some examples of articles discussing the significance and implications of the *Chevron* doctrine, see, for example, Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 GEO. L.J. 833 (2001); Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467 (2002); and Kathryn A. Watts, *Adapting to Administrative Law’s Erie Doctrine*, 101 NW. U. L. REV. 997 (2007).

159. *Chevron*, 467 U.S. at 865.

agency rather than the courts to make an interpretive judgment.<sup>160</sup> However, the Court's decision also acknowledges openly that presidential influences can validly impact an agency's interpretive decisions where Congress has chosen to delegate interpretive powers to executive agencies.<sup>161</sup> Thus, unlike the Court's 1983 decision in *State Farm*, which was silent about the relevance of political factors, *Chevron* underscored the relevance of political influences (and political accountability) to agencies' interpretive processes. For this reason, *Chevron* can be seen as having "anchor[ed] the presidential control model."<sup>162</sup>

Other cases also have helped to solidify a place for political control of the regulatory state. *Sierra Club v. Costle*, a significant decision handed down by the D.C. Circuit in 1981, is one such case.<sup>163</sup> In *Costle*, the D.C. Circuit considered a challenge brought against a rule adopted by the EPA governing emissions from coal burning power plants. Among the many challenges raised was a claim that improper political arm-twisting had taken place during postcomment, undocketed communications between the EPA and political actors, including a U.S. Senator, the President of the United States, White House staff, and other executive branch members.<sup>164</sup> In rejecting the argument that the alleged congressional pressure was improper, the court in an opinion by Judge Patricia Wald<sup>165</sup> held that it was "entirely proper for Congressional representatives vigorously to represent the interests of their constituents before administrative agencies engaged in informal, general policy rulemaking, so long as individual Congressmen do not frustrate the intent of Congress as a whole as expressed in statute, nor undermine applicable rules of procedure."<sup>166</sup>

In terms of the intra-executive communications, the court held that these too were unproblematic, going to great lengths to describe the need for the executive branch to "monitor the consistency of executive agency regulations with Administration policy."<sup>167</sup> The court noted that the President and his advisers "surely must be briefed fully and frequently about rules in the making,

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160. See generally Merrill & Watts, *supra* note 158, at 479 (describing how the Court has made clear that "*Chevron* deference is grounded in a congressional intent to delegate primary interpretive authority to the agency").

161. See generally Bressman, *supra* note 142, at 1764 (noting that *Chevron* is the "[m]ost prominent example" of how administrative law now reflects the presidential control model).

162. *Id.* at 1765.

163. 657 F.2d 298 (D.C. Cir. 1981).

164. *Id.* at 386-91.

165. Judge Wald had served as a "subcabinet appointee in the Carter administration." EDLEY, *supra* note 4, at 178.

166. *Costle*, 657 F.2d at 409.

167. *Id.* at 405.

and their contributions to policymaking considered,” and it explained that “[o]ur form of government simply could not function effectively or rationally if key executive policymakers were isolated from each other and from the Chief Executive.”<sup>168</sup> The court acknowledged that allowing agencies to face undisclosed presidential prodding might mean that an agency reaches “an outcome that *is* factually based on the record, but different from the outcome that would have obtained in the absence of Presidential involvement.”<sup>169</sup> However, the court was unconcerned by this possibility, noting that it did “not believe that Congress intended that the courts convert informal rulemaking into a rarified technocratic process, unaffected by political considerations or the presence of Presidential power.”<sup>170</sup> *Costle*, accordingly, quite clearly embraces the political control model by expressing the view that informal rulemaking *is* a politically influenced process, *not* a technocratic process that must mimic the sanitized process used in a courthouse.

Even though the political control model has been accepted in a variety of administrative law doctrines ranging from *ex parte* communications in *Costle* to judicial review of agency legal interpretations under *Chevron*, hard look review continues to insist on technocratic rather than political decisionmaking when it comes to agencies’ reason-giving duties.<sup>171</sup> This means that one major advantage of rethinking hard look review as this Article proposes is that hard look could be better harmonized with administrative law’s current embrace of political decisionmaking.<sup>172</sup> This would bring greater coherence to administrative law doctrine and theory by helping to resolve some of the current vacillation between politics and expertise.

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168. *Id.* at 405-06; *see also id.* at 400 n.502 (“Democratic ideology requires control of administrative action by elected representatives of the people.” (quoting Seymour Scher, *Conditions for Legislative Control*, 25 J. POL. 526, 526 (1963))).

169. *Id.* at 408.

170. *Id.*

171. *See supra* Part I.

172. One could argue that instead of altering hard look review’s expert-driven slant to bring it in line with the presidential control model, an alternative might be to alter other administrative law doctrines to bring them in line with hard look’s expert-driven model. This approach, however, would be undesirable for several reasons. Most prominently, moving away from administrative law’s current political control model would reduce the opportunity for political accountability and monitoring of agencies. *Cf. infra* Section II.D. (discussing accountability benefits).

*B. Creating Better Separation Between Science and Politics*

Second, encouraging agencies to disclose political factors could help to take some of the political pressure off of science, creating a more effective separation between science and politics.<sup>173</sup> Under the current technocratic model's focus on facts and evidence, agencies have an incentive to dress up their decisions in technocratic terms and to hide political influences. Agencies, accordingly, may well be tempted to align facts and science with political choices rather than giving science its own rightful place that is separate from political or value-laden considerations.<sup>174</sup>

Concerns along these lines surfaced regularly during the Bush Administration. For example, in the global warming context, the Bush White House was accused of attempting to rewrite an EPA report in order to downplay the risks of global warming,<sup>175</sup> and in 2005, a NASA official accused the Administration of trying to keep him from discussing the effects of global warming.<sup>176</sup> Even more recently, allegations surfaced in 2008 that Vice President Dick Cheney's office "remov[ed] statements on health risks posed by global warming from a draft of a health official's Senate testimony [in 2007]."<sup>177</sup>

Outside of the global warming context, similar charges were raised against the Bush Administration. In 2004, for example, more than sixty leading scientists, including twenty Nobel laureates, issued a statement accusing the

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173. For an interesting book on the general ways in which politics may intrude on science, see *RESCUING SCIENCE FROM POLITICS: REGULATION AND THE DISTORTION OF SCIENTIFIC RESEARCH* (Wendy Wagner & Rena Steinzor eds., 2006). See also Wendy E. Wagner, *The Science Charade in Toxic Risk Regulation*, 95 COLUM. L. REV. 1613, 1617 (1995) (arguing that "agencies exaggerate the contributions made by science in setting toxic standards in order to avoid accountability for the underlying policy decisions").

174. President Obama has taken steps to ensure that agencies do not distort science to serve political goals—most recently issuing a directive that seeks to guarantee scientific integrity. See Sheryl Gay Stolberg, *Obama Puts His Own Spin on the Mix of Science with Politics*, N.Y. TIMES, Mar. 10, 2009, at A18 (discussing Obama's directive to "guarantee scientific integrity, in federal policy making"). Obama's directive has been read to seek to separate scientific judgments from policy judgments so that scientists are not making policy but rather are merely providing the best available scientific information to policymakers, who then may take both science and politics into account in setting policy. Cf. *id.* (noting that the directive "will not divorce science from politics, or strip ideology from presidential decisions").

175. See Jeremy Symons, *How Bush and Co. Obscure the Science*, WASH. POST, July 13, 2003, at B4.

176. Juliet Eilperin, *Putting Some Heat on Bush: Scientist Inspires Anger, Awe for Challenges on Global Warming*, WASH. POST, Jan. 19, 2005, at A17.

177. Andrew C. Revkin, *Cheney's Office Said To Edit Draft Testimony on Warming*, N.Y. TIMES, July 9, 2008, at A12.

Bush Administration of distorting scientific evidence in order to serve political goals.<sup>178</sup> In addition, in 2007, former Surgeon General Richard H. Carmona accused the Bush Administration of muzzling him and preventing him from speaking on politically sensitive topics like stem cell research and the emergency contraceptive Plan B.<sup>179</sup>

Regardless of whether or not these sorts of allegations are true (a question that this Article does not purport to resolve), the mere existence and frequency of such allegations suggests that the current demand for technical, scientific, expert-driven explanations from agencies may have elevated the stakes of science. Giving politics its own discrete, transparent, judicially-accepted role in agency rulemaking processes likely would help to take some of the pressure off of science. Politics and science, in other words, could each operate more appropriately if given their own respective spheres.

### C. Softening the “Ossification” Charge

Third, embracing a role for politics would give agencies yet another way to justify their rulemaking decisions and thus courts would have yet another potential reason to defer to agencies’ decisions. This, in turn, could help to soften the “ossification” charge frequently leveled against arbitrary and capricious review.<sup>180</sup> Essentially, those who assert that our current version of arbitrary and capricious review has “ossified” the rulemaking process note that hard look review has pushed agencies to draft lengthy statements of basis and purpose filled with lengthy explanations and data that courts ultimately “may, or may not, consider an adequate response to the 10,000-1,000,000 pages of comments” received by the agency.<sup>181</sup> Some critics claim that this type of

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178. See James Glanz, *Scientists Say Administration Distorts Facts: Accusations Include Suppressing Reports and Stacking Committees*, N.Y. TIMES, Feb. 19, 2004, at A18; Guy Gugliotta & Rick Weiss, *President’s Science Policy Questioned: Scientists Worry that Any Politics Will Compromise Their Credibility*, WASH. POST, Feb. 19, 2004, at A2; Andrew C. Revkin, *Bush vs. the Laureates: How Science Became a Partisan Issue*, N.Y. TIMES, Oct. 19, 2004, at F1.

179. Christopher Lee, *Ex-Surgeon General Says White House Hushed Him*, WASH. POST, July 11, 2007, at A1.

180. See, e.g., Richard J. Pierce, Jr., *Seven Ways To Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 93-95 (1995); Paul R. Verkuil, Comment, *Rulemaking Ossification—A Modest Proposal*, 47 ADMIN. L. REV. 453, 457-58 (1995); see also *supra* note 124 and accompanying text (citing ossification literature).

181. Pierce, *supra* note 125, at 920; see also Jordan, *supra* note 124, at 395 (summarizing ossification arguments made by opponents of hard look review).

unpredictable judicial review has led certain agencies to stop using informal rulemaking and to turn to other modes of policymaking instead.<sup>182</sup>

If agencies were allowed to justify their decisions in both technocratic *and* political terms, then these sorts of “ossification” charges likely would be softened because courts would have yet another reason to uphold agency decisions.<sup>183</sup> In other words, if political influences could serve as yet another kind of reason justifying agency action, then agency decisions might be more likely to withstand judicial review and thus agencies might be more willing to engage in informal rulemaking. Although this alone might not be a sufficient reason for embracing political influences in the rulemaking realm, it nonetheless is a benefit that—when combined with even more compelling benefits, such as bringing greater coherence to administrative law and separating politics from science—suggests the value of giving politics a proper place.

#### *D. Enabling Greater Political Accountability*

Finally, a fourth significant reason (and perhaps the most important reason) for giving politics a place in agency rulemaking involves political accountability. 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.<sup>184</sup>

As Professor Lisa Schultz Bressman has explained, hard look review’s reasoned decisionmaking requirement can be thought of as serving a significant “monitoring” purpose: by requiring agencies to explain their decisions in a transparent manner, political actors and their constituents gain access to information about agency action and can monitor agencies.<sup>185</sup> The problem, of course, is that hard look review currently incentivizes agencies to

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182. See Jordan, *supra* note 124, at 394.

183. Cf. Kagan, *supra* note 4, at 2382-83 (noting that enabling politics to play a role in hard look review would help to respond to the ossification charge often levied against hard look review because “courts would have an additional reason to defer to administrative decisions in which the President has played a role” and hence courts would reverse agency decisions less often).

184. See Mendelson, *supra* note 123, at 34 (arguing that the fact that presidential influences on agencies are currently not transparent “has significant adverse consequences, both for the appropriateness of presidential influence and for the legitimacy of agency decision making”); see also EDLEY, *supra* note 4, at 22 (noting that political accountability is one of the positive norms associated with decisions based on politics).

185. Bressman, *supra* note 142, at 1780.

disclose only *certain* decisionmaking factors—scientific, technical, or statutory factors—that are likely to gain judicial approval. Thus, political factors influencing agency decisions are kept out of the public’s eye and are not subject to open public scrutiny. This creates a type of monitoring gap: an agency’s scientific and technocratic reasoning can be closely monitored, whereas political influences directed toward agencies by Congress or the President will not be publicly disclosed and thus will not be subject to the same type of monitoring and accountability.<sup>186</sup> This monitoring gap would be reduced (although likely not completely eliminated) if courts applied arbitrary and capricious review in a way that gave political influences an accepted place in rulemaking decisions.<sup>187</sup>

The accountability benefits that would flow from expanding arbitrary and capricious review should follow regardless of whether independent or executive agencies are involved. Independent agencies do enjoy some job protection in terms of being insulated from the President’s broad removal powers.<sup>188</sup> However, the fact that they are not subject to the President’s unfettered removal powers does not mean that the President lacks the ability to exert influence over independent agencies in other ways, such as informal contacts.<sup>189</sup> In addition, independent agencies certainly are not independent of Congress, which can control agencies’ budgets, jurisdiction, and statutory

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186. See Thomas O. McGarity, *Presidential Control of Regulatory Agency Decisionmaking*, 36 AM. U. L. REV. 443, 457 (1987) (arguing that because agencies do not disclose ex parte influences from the President, “[t]he public cannot judge the President’s reasons or motivations in deciding how to vote in the next election because the public is never even aware of the intervention, much less of its content”).
187. The monitoring gap would not be completely eliminated, even if politics were given an accepted place, if agencies were allowed to choose to disclose only some political influences and not others. See generally *infra* Section IV.B. (discussing whether disclosure of political influences should be mandated).
188. See *Humphrey’s Ex’r v. United States*, 295 U.S. 602 (1935) (upholding limits on the President’s ability to remove a member of the FTC, an independent regulatory commission).
189. See 1 PIERCE, *supra* note 138, § 7.9, at 500-01 (noting that the President can exert control over policymaking by independent agencies through informal means, such as by simply calling or having a subordinate call “the critical decisionmakers at the agency to express the President’s views”); Neal Devins & David E. Lewis, *Not-So Independent Agencies: Party Polarization and the Limits of Institutional Design*, 88 B.U. L. REV. 459, 498 (2008) (concluding that institutional designs to insulate independent agencies do not mean that Presidents lack control over agencies and noting that “there is good reason to think that independent agencies will adhere to presidential preferences *once* a majority of commissioners are from the President’s party”).

commands.<sup>190</sup> As Justice Scalia recently put it, “independent agencies are sheltered *not from politics but from the President*, and it has often been observed that their freedom from presidential oversight (and protection) has simply been replaced by increased subservience to congressional direction.”<sup>191</sup>

One key to achieving monitoring and accountability benefits must be stressed: courts would have to be clear that political influences can help to justify agency decisions *only* when agencies *openly* and *transparently* disclose such influences in their rulemaking records.<sup>192</sup> This means that the agency would need to expressly reference the political influences in its public rulemaking documents, such as a notice of proposed rulemaking, a statement of basis and purpose accompanying a final rule, or a statement explaining the denial of a rulemaking petition pursuant to section 555(e) of the APA. If a court could discern by, for example, combing public press accounts, that presidential policy likely influenced an agency’s rulemaking proceeding but the agency failed to disclose the political influence in its rulemaking record, then the court could *not* credit the presidential policy as a factor supporting the rulemaking. Rather, in order to permit the reasoned decisionmaking requirement to serve its monitoring purpose, courts would need to enforce the well-established rule that “an administrative order must be judged” solely “upon [those grounds] which the record discloses that [the] action was based.”<sup>193</sup> Courts, in other words, would need to refuse to “rummag[e]’ through the record to elicit” a rationale not clearly relied upon by the agency.<sup>194</sup> Agencies themselves would face the burden of sufficiently indicating the reasons for their actions in regulatory documents. This rule, which flows from the famous *Chenery* decisions decided by the Supreme Court in 1943 and 1947, serves to ensure that agencies disclose all of the evidence and reasoning on which they wish to rely

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190. See generally Beermann, *supra* note 152, at 109 (noting that independent agencies “are supposed to be insulated from politics, but the truth is that while the independent agencies may be insulated from the President, they are often much more responsive to direct (albeit informal) congressional supervision than agencies within the executive branch”).

191. *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1815 (2009) (emphasis added).

192. Edley previously reached a similar conclusion about the importance of bringing political influences out into the open. See EDLEY, *supra* note 4, at 190-91 (“The disclosure of the subjective, ideological, and electoral factors that influence the agency’s decision is a crucial step toward disciplining them. The failure of courts to demand disclosure encourages secret politics, premitting the process of continuing, between-elections political accountability.”).

193. *SEC v. Chenery Corp. (Chenery I)*, 318 U.S. 80, 87 (1943).

194. *Conn. Light & Power Co. v. NRC*, 673 F.2d 525, 535 (D.C. Cir. 1982).

in defending their decisions.<sup>195</sup> If certain political influences factoring into an agency's rulemaking decision were not set forth by the agency in its rulemaking record with "such clarity as to be understandable,"<sup>196</sup> then the monitoring function would not be fulfilled.

### III. THE MECHANICS OF GIVING POLITICS A PLACE

It is fairly easy to articulate the reasons *why* arbitrary and capricious review should be altered to embrace a role for political influences. It is more difficult to articulate precisely *when* political influences should be accepted in rulemaking decisions and when they should not be since the inquiry is likely to depend on the facts of each particular case. Despite the challenges of articulating generally applicable principles, this Part attempts to sketch out the mechanics of how political influences could be embraced by arbitrary and capricious review by addressing four specific questions. First, when should statutes be read as signaling Congress's intent to allow or disallow any agency reliance upon political influences? Second, assuming that Congress has not prohibited an agency from relying upon political factors in a particular statutory scheme, what types of political influences should count as legitimate factors (rather than corrupting factors) when openly and transparently disclosed by the agency? Third, who stands as a potential source of legitimate political influence? Finally, fourth, what specific types of rulemaking decisions might most appropriately be influenced by political factors?

#### *A. Determining Congress's Intent Regarding Political Factors*

It is a well-accepted rule of administrative law that federal administrative agencies, which act pursuant to congressional delegations of power, must act consistent with congressional intent and must consider only factors that Congress intended the agency to consider.<sup>197</sup> This means that if a statute

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195. See *Chenery I*, 318 U.S. at 94; see also *SEC v. Chenery Corp. (Chenery II)*, 332 U.S. 194, 196 (1947) (reiterating the rule that "a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency").

196. *Chenery II*, 332 U.S. at 196.

197. See, e.g., *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins.*, 463 U.S. 29, 43 (1983) ("Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider . . ."); JERRY L. MASHAW, RICHARD A. MERRILL & PETER M. SHANE, *ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM* 294 (5th ed. 2003) ("[A]gencies empowered by Congress to regulate may do so only if consistent with their underlying statutory mandates.").

expressly indicates Congress's decision to foreclose a certain factor, such as economic or political factors, from an agency's decisionmaking calculus, then the agency plainly should *not* be allowed to rely upon that factor in justifying its decision.<sup>198</sup> The key, accordingly, is to determine Congress's intent.

Occasionally, Congress will make its intent known by explicitly or implicitly prohibiting agencies from considering certain decisional factors that might otherwise logically be relevant to the agency's decisionmaking process.<sup>199</sup> One prominent example of this can be found in the Endangered Species Act (ESA) enacted by Congress in 1973.<sup>200</sup> Under the ESA, the Secretary of the Interior must determine by regulation whether or not a species qualifies as endangered or threatened because of any of five specified factors.<sup>201</sup> In making an assessment based on the five factors, the ESA directs that the Secretary must make a determination "*solely on the basis of the best scientific and commercial data available . . . after conducting a review of the status of the species and after taking into account those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species.*"<sup>202</sup> Thus, because the statute itself requires the agency to rely solely on the "best science" available when making listing decisions, the Secretary is foreclosed from considering other factors, such as economic and political considerations.<sup>203</sup> This has led one former Secretary of the Interior,

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198. Cf. *Sierra Club v. Costle*, 657 F.2d 298, 409 (D.C. Cir. 1981) (noting that an administrative rulemaking may be overturned on the grounds of political pressure *if* the "content of the pressure . . . is designed to force [the agency] to decide upon factors *not made relevant by Congress in the applicable statute*" and *if* the agency's determination was actually affected by the "extraneous considerations") (emphasis added).

199. See generally Richard J. Pierce, *What Factors Can an Agency Consider in Making a Decision?*, 2009 MICH. ST. L. REV. (forthcoming) (manuscript at 4, on file with The Yale Law Journal), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1157497](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1157497) ("Congress rarely explicitly forbids an agency from considering a decisional factor that is logically relevant to a decision or class of decisions. It sometimes chooses decisional standards that implicitly preclude consideration of a logically relevant decisional factor, however.").

200. Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1544 (2006).

201. *Id.* § 1533(a)(1).

202. *Id.* § 1533(b)(1)(A).

203. But see Holly Doremus, *Using Science in a Political World: The Importance of Transparency in Natural Resource Regulation*, in *RESCUING SCIENCE FROM POLITICS: REGULATION AND THE DISTORTION OF SCIENTIFIC RESEARCH* 143, 164 (Wendy Wagner & Rena Steinzor eds., 2006) (noting that "[n]atural resource management decisions [such as those made under the ESA], although they appear superficially to be dictated by scientific information, in fact can hide numerous judgments," such as policy-driven and politically-driven judgments). See generally *Tenn. Valley Auth. v. Hill*, 437 U.S. 153 (1978) (holding in the famous "snail darter" case that the ESA placed an "incalculable" value on endangered species and thus did not empower the courts to weigh the economic cost of halting completion of a dam against the

Dirk Kempthorne, to call the ESA “perhaps the least flexible law Congress has ever enacted.”<sup>204</sup>

As Secretary Kempthorne’s comment suggests, most statutes delegating rulemaking powers to agencies are not as rigid as the ESA. In fact, for most statutory schemes, no clear line separates those “permissible” factors that may be taken into account from those that are “impermissible.” In particular, statutes delegating rulemaking powers to agencies generally have little, if anything, to say about Congress’s views on the propriety of agency consideration of political influences, such as presidential consultation or congressional pressure.<sup>205</sup> This congressional silence could plausibly be read in one of two ways: congressional silence about the propriety of consideration of political factors *forecloses* agencies from considering such factors,<sup>206</sup> or alternatively Congress’s silence leaves agencies *free* to consider political factors and influences.<sup>207</sup> If congressional silence were read to mean the former, then the proposal set forth in this Article advocating for a place for politics in agency rulemaking would quite plainly flout congressional design.

A line of D.C. Circuit cases suggests an answer, supporting the view that when Congress is silent (i.e., when it is silent with respect to whether a logically relevant factor may be considered), Congress’s silence should be read to leave room for the agency to consider the factor in its decisionmaking process.<sup>208</sup> For example, in a D.C. Circuit case decided in 1998 involving whether the EPA had improperly considered international law and international trade in crafting a new rule involving gasoline, the D.C. Circuit

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benefit of saving the snail darter species); *W. Watersheds Project v. Fish & Wildlife Serv.*, 535 F. Supp. 2d 1173 (D. Idaho 2007) (finding that the Fish and Wildlife Service acted arbitrarily and capriciously when determining whether to list the greater sage-grouse under the ESA by failing to use “best science” and by allowing extensive political interference by a deputy assistant secretary in the Interior Department).

204. See *The Threatened Polar Bear; It Gets Federal Protection, but Nothing To Save Its Habitat*, WASH. POST, May 15, 2008, at A14 (reporting on Kempthorne’s statement).
205. MASHAW ET AL., *supra* note 197, at 292 (“Virtually all statutes conveying rulemaking power to executive (as well as ‘independent’) agencies are silent on such questions as whether the agency head may consult with the President or his agents and, if so, on what basis.”).
206. One reason to read Congress’s silence this way might be that Congress could have legislated against the backdrop of the current understanding of arbitrary and capricious review. In other words, Congress might have remained silent in most statutes about what factors can and cannot be considered by agencies because Congress assumed that the judicial pattern favoring technocratic decisionmaking would prevail.
207. See 1 PIERCE, *supra* note 138, § 7.4, at 453.
208. See *Warren v. EPA*, 159 F.3d 616 (D.C. Cir. 1998); *Grand Canyon Air Tour Coal. v. FAA*, 154 F.3d 455 (D.C. Cir. 1998); see also 1 PIERCE, *supra* note 138, § 7.4, at 453-55 (discussing the D.C. Circuit’s cases on the issue).

explained that it is generally reluctant “to infer from congressional silence an intention to preclude the agency from considering factors other than those listed in a statute.”<sup>209</sup> This general rule about congressional silence rests on the notion that “Congress always wants an agency to attempt to further a list of societal goals that is far too long to incorporate in any statute.”<sup>210</sup>

A contrary rule—which would read congressional silence to mean the exclusion of certain decisional factors, such as presidential communications—would significantly undermine the currently accepted notion that administrative agencies’ legitimacy hinges on politically accountable actors.<sup>211</sup> As the D.C. Circuit has explained, “Americans rightly expect their elected representatives to voice their grievances and preferences concerning the administration of our laws.”<sup>212</sup> Thus, if Congress’s silence in statutory schemes about the relevance of presidential and congressional views were read to mean that such factors *cannot* be considered by agencies, then agencies would be deprived of “legitimate sources of information.”<sup>213</sup> In addition, reading Congress’s silence in this way would effectively mean that Congress has stripped not just the President of his influence but also stripped its own members of the ability to influence agency decisions through informal congressional pressure, oversight hearings, or other congressional communications—all tools that Congress uses on a regular basis.<sup>214</sup>

The text of the APA also lends support to the argument that Congress generally does not intend to prohibit agencies from considering political influences in the informal rulemaking context. The APA expressly regulates *ex parte* contacts in the context of formal adjudications and formal rulemakings required to be conducted on the record but not in the context of informal notice-and-comment rulemakings.<sup>215</sup> This suggests that Congress did not intend to prohibit or limit *ex parte* communications, including those coming from political actors, in informal rulemakings.

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209. *Warren*, 159 F.3d at 624.

210. 1 *PIERCE*, *supra* note 138, § 7.4, at 453 (citing *MASHAW & HARFST*, *supra* note 4, at 202-23 (1990)).

211. *See supra* Section I.A.

212. *Sierra Club v. Costle*, 657 F.2d 298, 409 (D.C. Cir. 1981).

213. *Id.* at 410.

214. Another reason to assume that Congress intended to allow politics to play a role in agency decisions can be found—at least as to executive agencies—in Congress’s choices regarding agency structure. By creating executive agencies whose heads are removable at will by the President, Congress seems to have quite clearly accepted the notion that the President would be allowed to influence agency decisions.

215. *See Dist. No. 1, Pac. Coast Dist. v. Mar. Admin.*, 215 F.3d 37, 42-43 (2000) (citing 5 U.S.C. §§ 553(c), 554(a), 557(d) (2000)).

Despite the various reasons why the D.C. Circuit’s rule allowing extrastatutory decisional factors makes sense, the Supreme Court recently muddied the waters a bit. Most notably, in *Massachusetts v. EPA*,<sup>216</sup> the majority acknowledged that the EPA had given a “laundry list” of reasons not to regulate, such as a desire to avoid inefficient, piecemeal regulation and a desire to avoid interfering with the President’s own foreign policy initiatives.<sup>217</sup> The Court, however, ultimately dismissed all of these policy-driven considerations, declaring that they were “divorced from the *statutory text*.”<sup>218</sup> The statute provided that the Administrator of the EPA “shall by regulation prescribe . . . standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.”<sup>219</sup> According to the Court, the EPA was required to “ground its reasons for action or inaction *in the statute*.”<sup>220</sup>

The Court’s conclusion—that the EPA’s justifications for declining to defer were divorced from the statutory text—is somewhat confusing because, as Justice Scalia pointed out in his dissenting opinion, the statutory text “says *nothing at all* about the reasons for which the Administrator may *defer* making a judgment.”<sup>221</sup> Instead, the statutory text expressly dictates only that when the Administrator actually “*makes* a judgment [about] whether to regulate greenhouse gases, that judgment must relate to whether they are air pollutants that ‘cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.’”<sup>222</sup> *Massachusetts*, accordingly, could very easily be read as a rejection of the D.C. Circuit’s rule that congressional silence leaves agencies with ample room to consider extrastatutory decisional factors.<sup>223</sup> Although at least one commentator has read *Massachusetts* this

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216. 549 U.S. 497 (2007). Another case recently decided by the Supreme Court, *National Ass’n of Home Builders v. Defenders of Wildlife*, 127 S. Ct. 2518 (2007), also arguably confuses matters a bit. For a detailed discussion of the significance of *National Ass’n of Home Builders*, see Pierce, *supra* note 199, at 14–18.

217. *Massachusetts*, 549 U.S. at 533.

218. *Id.* at 532 (emphasis added).

219. 42 U.S.C. § 7521(a)(1) (2000).

220. *Massachusetts*, 549 U.S. at 535 (emphasis added).

221. *Id.* at 552 (Scalia, J., dissenting).

222. *Id.* (quoting 42 U.S.C. § 7521(a)(1) (2000)).

223. *Cf. id.* (noting that the statutory text is “silent, as texts are often silent about permissible reasons for the exercise of agency discretion”). See generally Pierce, *supra* note 199, at 14 (“I have no doubt that many petitioners will argue that *Massachusetts* . . . stand[s] for the proposition that congressional silence with respect to a decisional factor should be

way,<sup>224</sup> there is reason to doubt that the Court would follow this reading of *Massachusetts* in future cases.<sup>225</sup>

First, although the majority in *Massachusetts* chastised the EPA for basing its decision on factors divorced from the statutory text, the Court did not definitively say that the EPA's decision about whether or not to regulate had to be based *solely* on factors that are embraced by the statutory text. Instead, the Court expressly noted at the end of its decision that it was not reaching the question of whether "policy concerns can inform EPA's actions in the event that [the EPA] makes" an endangerment finding.<sup>226</sup> In other words, the Court seems to have left the door open for the agency to decline to regulate for policy reasons *not* set forth in the statutory text *after* the EPA exercised its expertise to assess whether greenhouse gases endanger the public health and welfare.<sup>227</sup> Furthermore, in embracing a deferential standard of review for denials of rulemaking petitions, the Court at least implicitly recognized that policy-driven considerations might impact an agency's decision about whether or not to regulate, noting that "an agency has broad discretion to choose how best to marshal its limited resources and personnel to carry out its delegated responsibilities."<sup>228</sup>

Second, *Massachusetts* was not a normal, run-of-the mill case: *Massachusetts* dealt with global warming, an issue that many consider the most important environmental issue of our time.<sup>229</sup> The case resulted in a sharp 5-4 split among

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interpreted as congressional rejection of that factor and as a prohibition on agency consideration of that factor in making decisions . . .").

224. See Jack M. Beermann, *The Turn Toward Congress in Administrative Law*, 89 B.U. L. REV. 727, 740 (2009) (arguing that *Massachusetts* supports the general principle that "when an agency decides whether to take even preliminary steps in the regulatory process that might lead to rulemaking, it must consider Congress's factors rather than the agency's or the administration's preferred factors"); cf. Pierce, *supra* note 199, at 12-13 ("I fear that the majority opinion in *Massachusetts* will be interpreted to reject the long line of D.C. Circuit opinions in which that court has interpreted congressional silence to permit an agency to consider a logically relevant decisional factor . . .").

225. Pierce, *supra* note 199, at 18 ("I doubt that any Justice actually wants lower courts to interpret *Massachusetts* . . . to stand for the broad proposition that congressional silence with respect to a factor that is logically relevant to an agency decision must be interpreted to prohibit the agency from considering the factor.").

226. *Massachusetts*, 549 U.S. at 534-35.

227. See Watts & Wildermuth, *supra* note 85, at 1043.

228. *Massachusetts*, 549 U.S. at 527 (noting that the scope of review is narrow).

229. See Watts & Wildermuth, *supra* note 85, at 1043; see also *Massachusetts*, 549 U.S. at 535 (noting that petitioners seeking certiorari called global warming "the most pressing environmental challenge of our time"); *Examining the Case for the California Waiver: Before the S. Subcomm. on Clean Air and Nuclear Safety*, 110th Cong. 27 (2007) (statement of

the justices down ideological lines. Thus, the majority’s willingness to stretch to read congressional silence in the statute in a way that seriously constrained the hands of the EPA might be limited to the specifics of the immensely important and highly political case.<sup>230</sup> In future cases, the Court could simply choose to limit its reasoning in *Massachusetts* to the specific provisions of the Clean Air Act at issue in *Massachusetts* rather than to draw broader, more general principles from the case about the permissibility of basing agency decisions on nonstatutory factors.<sup>231</sup>

Finally, just this past Term the Court issued a divided decision, *Entergy Corp. v. Riverkeeper*, in which a different majority of the Court embraced the notion that congressional silence “represents ambiguity and an invitation for the [relevant agency] to decide for itself which factors should govern its regulatory approach.”<sup>232</sup> In *Entergy*, the Justices split over whether “cost” was an appropriate factor to be considered by the EPA in making decisions under a specific section of the Clean Water Act, which directs the EPA to require that certain water intake structures “reflect the best technology available for minimizing adverse environmental impact.”<sup>233</sup> Justice Scalia writing for a majority of the Court read Congress’s silence about the propriety of considering “cost” to mean that the agency—relying upon *Chevron* deference—could reasonably conclude that a cost-benefit analysis was an appropriate decisional factor. Specifically, Justice Scalia explained that he read Congress’s silence in the relevant statute “to convey nothing more than a refusal to tie the agency’s hands as to whether cost-benefit analysis should be used, and if so to

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Edmund G. Brown Jr., Att’y Gen. of California) (“Global warming is the most important environmental and public health issue we face today.”).

230. See *Watts & Wildermuth*, *supra* note 85, at 1043; *cf.* *Pierce*, *supra* note 199, at 18 (discussing how the justices’ conclusions in *Massachusetts* were driven more by politics than by legal doctrine). The notion that judges should play a special role in environmental law cases—although never embraced openly by the Supreme Court—has been expressly articulated by some judges, including Judge Bazelon of the D.C. Circuit. See, e.g., *Natural Res. Def. Council v. Nuclear Regulatory Comm’n*, 547 F.2d 633, 657 (D.C. Cir. 1976) (“Decisions in areas touching the environment or medicine affect the lives and health of all. These interests, like the First Amendment, have ‘always had a special claim to judicial protection.’”); *Env’tl. Def. Fund v. Ruckelshaus*, 439 F.2d 584, 598 (D.C. Cir. 1971).
231. For example, *Massachusetts* could be viewed as resting on very particular aspects of the Clean Air Act, including the fact that the statute provided that the Administrator “shall by regulation prescribe . . . standards” rather than using the term “may.” 42 U.S.C. § 7521(a)(1) (2000) (emphasis added). See *Pierce*, *supra* note 199, at 15 (noting the potential relevance of the word “shall”).
232. 129 S. Ct. 1498, 1518 (2009) (Stevens, J., dissenting) (characterizing the majority’s approach).
233. See *id.* at 1516; see also 33 U.S.C. § 1326(b) (2000).

what degree.”<sup>234</sup> In contrast, Justice Stevens writing for himself, then-Justice Souter and Justice Ginsburg in dissent determined that Congress had chosen *not* to authorize cost-benefit analysis and that “Congress intended to control, not delegate, when cost-benefit analysis should be used.”<sup>235</sup> In this sense, *Massachusetts* and *Entergy* suggest diverging approaches to congressional silence about the propriety of decisional factors—leaving it far from clear that *Massachusetts* should be read to mark out a definitive path on the subject.

For these and other reasons,<sup>236</sup> *Massachusetts* should not be read to signal a new take on congressional silence—at least not until the Court has a chance to openly grapple with the issue. Rather, it makes sense to continue to follow the D.C. Circuit’s rule on congressional silence, giving agencies the freedom to consider any factors that are logically relevant to agency decisions so long as Congress has not prohibited the agency from considering the factor. For purposes of the proposal set forth in this Article, adherence to this rule would mean that *unless* a statute explicitly or implicitly forecloses political considerations from an agency’s calculus altogether (as the ESA’s “best science” standard appears to do with respect to the listing of endangered species), agencies remain free to take some kinds of political influences into consideration in their rulemaking proceedings. In other words, a presumption would exist 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.<sup>237</sup> This, however, simply begs yet another 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?<sup>238</sup>

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234. 129 S. Ct. at 1508.

235. *Id.* at 1518 (Stevens, J., dissenting).

236. See generally Pierce, *supra* note 199, at 14–18 (detailing various additional reasons why *Massachusetts* should not be read to mean that congressional silence on a factor forecloses agency consideration of the factor).

237. Cf. Kagan, *supra* note 4, at 2326–31 (suggesting that congressional delegations to agencies to engage in rulemaking that are silent on the issue of presidential involvement should presumptively be read to permit presidential guidance).

238. If Congress cannot be presumed to have intended the agency to consider a certain factor, then the agency plainly should not be allowed to consider it. In other words, the President or other political actors should *not* be allowed to inject decisional factors that Congress cannot be presumed to have intended the agency to consider. If the rule were otherwise, then we would be acknowledging the lack of legal constraints governing the delegation of power to the executive branch. In light of Chief Justice Marshall’s opinion in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), such a lack of legal constraints would in turn suggest

*B. Types of Political Factors That Might Appropriately Be Relied Upon*

Clearly not all political influences should be viewed as legitimate but neither should all political influences be treated as illegitimate. 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 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.<sup>239</sup> In other words, 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.<sup>240</sup>

Leaving aside the normative question of whether judges *ought* to be searching for public values to support governmental decisions, the descriptive thesis seems quite powerful and persuasive: judges routinely seek out public justifications to support challenged governmental action. Judges, for example, are quite comfortable concluding that a statute is constitutional because it furthers some kind of reasonable or legitimate governmental interest,<sup>241</sup> but they would not be comfortable saying a statute is constitutional simply because it was approved by a majority of Congress and signed by the President.

Assuming that this descriptive picture of courts is correct and that the judiciary does in fact seek to locate public values to support governmental action, then it seems inconceivable that the courts would suddenly become

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the unavailability of judicial review because the question would rest within the President’s discretion and thus would be political, not legal, in nature.

239. See, e.g., Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511 (1992); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985) [hereinafter Sunstein, *Interest Groups*]; Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984) [hereinafter Sunstein, *Naked Preferences*].

240. See Sunstein, *Interest Groups*, *supra* note 239, at 63 (“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.”).

241. Cf. Sunstein, *Naked Preferences*, *supra* note 239, at 1692 (“The ‘reasonableness’ constraint of the due process clause is perhaps the most obvious example. The minimum requirement that government decisions be something other than a raw exercise of political power has been embodied in constitutional doctrine under the due process clause before, during, and after the *Lochner* era.”).

willing to embrace raw politics, crass political horse trading, or pure partisanship as factors that could help to legitimize an agency's decision. Nor does it seem as a normative matter that courts ought to accept reliance on raw politics or pure partisanship in the rulemaking realm given that Congress likely did not intend such influences to be logically relevant decisional factors in an agency's rulemaking process.<sup>242</sup> Put another way, courts should be wary of political influences resting on pure partisan politics because such influences are not tied to the public values or policies being implemented by the statutory scheme and hence Congress cannot be presumed to have authorized agency reliance on such factors.<sup>243</sup> In contrast, it is much easier to presume that Congress would view political considerations tied to policy choices or public values falling within the general rubric of the statutory scheme as logically relevant considerations that the agency was authorized to take into account in implementing the statutory scheme.

Take, for example, a recent decision issued by the Eastern District of New York, *Tummino v. Torti*.<sup>244</sup> There, the district court reviewed the FDA's decision involving the nonprescription availability of the emergency contraceptive Plan B. In asserting that the FDA's action was not the product of reasoned decisionmaking, the plaintiffs alleged that the FDA's decisions were improperly motivated by political considerations outside the scope of the FDA's statutory authority because "the FDA bowed to political pressure from the White House and anti-abortion constituents despite the uniform recommendation of the FDA's scientific review staff to approve over-the-counter access to Plan B without limitation."<sup>245</sup> In agreeing with the plaintiffs that the FDA's decision was not the result of reasoned decision making, the district court seemed unwilling to presume that Congress intended raw political calculations (e.g., the desire to see success achieved in confirmation hearings) as rationally or logically related to the agency's statutory mandate.<sup>246</sup>

To take another example, imagine that the FDA during the Obama Administration rescinded various preemption regulations promulgated during the Bush Administration, and the FDA justified its decision by boldly stating: "The President directed us to rescind the preemption regulations in order to reward the trial lawyers, who provided significant campaign support to the President." Given that this explanation seeks to serve a private interest but not any broader conception of the public good, it is highly unlikely that any court

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242. See *supra* notes 197-238 and accompanying text.

243. See *id.*

244. 603 F. Supp. 2d 519 (E.D.N.Y. 2009).

245. *Id.* at 538.

246. See *id.* at 546.

today would view this as a legitimate factor supporting the FDA's decision. Nor should courts be willing to presume that Congress intended such raw political calculations (i.e., the desire to feed an important campaign contributor) as rationally or logically related to the agency's statutory mandate.

Similarly, an agency's assertion that it adopted a particular standard (such as a standard setting permissible emission levels at 0.5 parts per million) because "the President made us do it" should not fare any better.<sup>247</sup> 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. This would be problematic for at least three reasons. First, as Professor Peter Strauss has pointed out, accepting the notion that the President enjoys unfettered discretion to direct an agency's decision would run smack up against Chief Justice Marshall's opinion in *Marbury v. Madison* suggesting the unavailability of judicial review where a matter rests within the President's discretion and is political in nature.<sup>248</sup> Second, it is highly unlikely that courts would be willing to presume that Congress—having set up a statutory scheme designed to direct and cabin the relevant agency's discretion—nonetheless intended for the President to enjoy unfettered discretion to direct the outcome of the agency's decision-making process. Finally, as Professor Mendelson has concluded, allowing an agency to simply proclaim that the "President said so" seems arbitrary because it does not seem to supply any reason at all.<sup>249</sup>

At the other end of the spectrum, when the EPA under the Obama Administration issued its proposed rule in 2009 finding that greenhouse gases do endanger the public health and welfare within the meaning of section 202(a)(1) of the Clean Air Act,<sup>250</sup> imagine that it had explained its decision by

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247. See 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) (arguing that an agency's claim that "[t]he President made me do it" would delegitimize the agency action rather than count as a "good" reason); see also Mendelson, *supra* note 123, at 52 (arguing that "[s]aying 'The President said so,' seems arbitrary because it does not identify any more general principle that might explain the choice made either within the agency or within the executive review process").

248. 5 U.S. (1 Cranch) 137 (1803); see also Peter L. Strauss, *Legislation That Isn't—Attending to Rulemaking's "Democracy Deficit,"* 97 *CAL. L. REV.* (forthcoming 2009-2010) (manuscript at 11, on file with The Yale Law Journal) (arguing that if an agency based a decision on political factors not authorized by Congress, this would "take us straight into the quagmire suggested" by *Marbury*).

249. See Mendelson, *supra* note 123, at 52.

250. See Proposed Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act, 74 *Fed. Reg.* 18,886 (Apr. 24, 2009).

pointing to factual and scientific evidence to support its conclusion and also by stating: “Our conclusion that carbon dioxide emissions endanger the public health and welfare serves the President’s overarching policy goal of protecting the environment and is consistent with the President’s foreign policy initiatives, including his promises to foreign leaders that he will work to combat global warming to the extent possible.” This kind of political influence speaks not in raw political terms but rather speaks to broader policy concerns and public values that the Clean Air Act touches upon – namely, protecting the environment. It, accordingly, is the type of political influence that courts should feel much more comfortable allowing to help justify agency action.

As this discussion should make clear, trying to define what sorts of political influences should be viewed as legitimate and which should be viewed as illegitimate is not an easy task that can be summed up with a precise test. However, it does seem clear that courts are unlikely to (and should be unwilling to) view political arguments as rational statutory considerations authorized by Congress when they are driven by pure partisanship or raw politics. Conversely, courts ought to be much more likely to accept political influences as congressionally authorized considerations where the political factors seek to implement policy considerations or value judgments tied in some sense to the statutory scheme being implemented.<sup>251</sup> Thus, “legitimate” political influences from political actors should be defined in a way that includes policy considerations and political value judgments (e.g., “The President favors a reading of the Clean Air Act that excludes greenhouse gases from its coverage because the statute cannot work effectively or comprehensively to deal with global warming.”), but excludes raw political goals or pure partisan politics (e.g., “The President has directed us not to regulate greenhouse gases because his key campaign contributors do not want to incur regulatory costs associated with preventing global climate change.”).

Of course, the inherent fuzziness of the line between impermissible and permissible political influences makes it possible that agencies could try to manipulate the line by spinning partisan or raw political decisions as somehow being driven by public values or policy choices. While this is certainly possible, the harm of this possibility is minimized by the fact that, even under such a “hide the ball” scenario, agencies at least will be acknowledging some kinds (even if not all kinds) of political influences and thus will be opening the door

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251. Examples of legitimate policy considerations could include the allocation of agency workload, personnel, and budgets. These policy considerations clearly embody “political” choices. For example, when Congress allocates money to different agencies, it is engaging in a political decision (e.g., should it give more money to fund environmental efforts or financial sector regulation?).

for greater accountability and monitoring. Furthermore, courts might be able to decrease the likelihood that agencies will hide the ball by smoking out undisclosed, extra-record political influences,<sup>252</sup> as well as by penalizing agencies for decisions that seem to be based upon undisclosed political influences.<sup>253</sup>

### *C. Possible Sources of Political Influences*

Besides trying to define a line that can assist in separating legitimate political influences from illegitimate ones, it also is necessary to think about potential sources of political influence. This Section considers political influences coming from three possible sources: (1) direct presidential involvement through executive orders, presidential directives, or more informal presidential communications; (2) directives from other executive officials, such as the Vice President or the President's Chief of Staff; and (3) congressional oversight and pressure from members of Congress. Ultimately, this Section concludes that – if fully disclosed in the rulemaking record – all of these sources of political influences serve as potentially valid sources.

#### *1. Presidential Directives, Executive Orders and Other More Informal Communications*

Directions from the President expressed through Executive Orders, directives, more informal communications, and “jawboning”<sup>254</sup> all represent prime sources of political pressure directed at agencies.<sup>255</sup> Given the prominence of the presidential control model today<sup>256</sup> and given that the

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252. See *Tummino v. Torti*, 603 F. Supp. 2d 519, 543-44 (E.D.N.Y. 2009) (noting that the court may consider extra-record materials where an agency decision was made in bad faith, such as where the decision was tainted by impermissible political and ideological considerations).

253. See *infra* note 329 and accompanying text (discussing how courts presently are willing to penalize agencies for basing decisions on undisclosed evidence or studies).

254. For an article on the role of jawboning in the administrative state and whether such ex parte contacts should be limited, see Paul R. Verkuil, *Jawboning Administrative Agencies: Ex Parte Contacts by the White House*, 80 COLUM. L. REV. 943 (1980).

255. See generally 1 PIERCE, *supra* note 138, § 7.9, at 497-503 (describing executive control over agency rulemaking); Blumstein, *supra* note 147, at 863-70 (describing the history of centralized presidential regulatory review); Kagan, *supra* note 4, at 2281-99 (describing President Clinton's exertion of control over administrative agencies through executive orders and presidential directives); Verkuil, *supra* note 254, at 944-47 (analyzing White House contacts with administrative agencies).

256. See *supra* notes 149-151 and accompanying text.

Constitution vests the executive power with the President and requires him to “take Care that the Laws be faithfully executed,”<sup>257</sup> these sorts of presidential directions aimed at executive policymakers could serve as a legitimate and rational influence on agency decisions *so long as* the President does not seek to prod the agency to act contrary to the relevant statute or contrary to existing evidence. This means that 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.<sup>258</sup>

For example, if the President communicated to an agency his desire to see certain issues appear on the agency’s rulemaking agenda or to see certain discretionary rulemaking proceedings treated with priority over other issues,<sup>259</sup> the relevant agency should be able to explain its discretionary decision to move forward with high-priority rulemakings and not to move forward with others by reference to the President’s clearly expressed executive priorities.<sup>260</sup> Similarly, if the President reached out to an agency and expressed his views about how that agency’s policies might best fit together uniformly with the policies set by other agencies, the agency should be able to explain its policymaking decisions to a court by referencing its attempts to adhere to the President’s desire for uniform, consistent regulatory policy.<sup>261</sup> Both of these sorts of influences coming from the President speak to policy-driven judgments rather than raw partisan politics and thus can be understood as

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257. U.S. CONST. art II, §§ 1, 3.

258. See Kagan, *supra* note 4, at 2356-57 (noting that agencies often must make value-laden rather than expert-driven judgments and that a strong presidential role accordingly should be appropriate where, for example, agencies “confront the question, which science alone cannot answer, of how to make determinate judgments regarding the protection of health and safety in the face of both scientific uncertainty and competing public interests”).

259. See, e.g., Statement on Federal Regulations on Privacy of Medical Records, 37 WEEKLY COMP. PRES. DOC. 611, 612 (Apr. 12, 2001) (statement by President Bush directing Secretary Thompson to “recommend appropriate modifications” to a medical privacy rule to address concerns about the content of the rule).

260. Air Quality, Chemical Substances, and Respiratory Protection Standards, 69 Fed. Reg. 67,681, 67,686 (Nov. 19, 2004) (explaining the Department’s decision to remove a number of rulemakings from its agenda in light of a reprioritization of the agency’s agenda that flowed from the new Administration’s goals).

261. In denying the rulemaking petition that was at issue in *Massachusetts v. EPA*, 549 U.S. 497 (2007), the EPA did attempt to explain its denial in part by invoking a consistency and uniformity rationale: it stressed that it wanted to avoid regulating in a piecemeal fashion and stepping on the President’s own foreign policy initiatives. *Id.* at 513. The Court, however, rejected this as an inadequate explanation for the agency’s denial of the petition, noting that this and other explanations provided by the agency were “divorced from the statutory text.” *Id.* at 532.

rational policy explanations that legitimize (rather than taint) the agency decision.

In addition, if the President campaigned on certain issues and thus came into office perceiving certain electoral mandates that would serve the country's good, then the President likely would try to influence relevant agencies to act accordingly. This may well have been what was really going on in *State Farm*. There Reagan campaigned on the promise that he would respond to economic woes plaguing the auto industry by getting rid of "several thousand" federal regulations on American automakers,<sup>262</sup> and the NHTSA under Reagan's new leadership ultimately rescinded the prior Administration's passive restraint regulations to better align with his promises and goals.<sup>263</sup>

Where, as in these situations, a perceived electoral mandate exists *and* the President embraces the mandate by directing agency action in accord with the mandate and within the confines of the relevant statutes, it would be entirely reasonable for an agency to justify a decision based in part on the President's embrace of the mandate and for courts to accept that justification. In such a situation, the President would be identifying the existence of the electoral mandate that he believes serves the public good and accepting political responsibility for implementing the mandate. Thus, the agency would not be faced with the task of trying to read the political "tea leaves" on its own. Rather, the agency would merely be seeking to align its own policymaking decisions with the President's own priorities, promises, and goals.

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262. Lou Cannon & David S. Broder, *Reagan Vows To Try To Halt 'Deluge' of Japanese Autos*, WASH. POST, Sept. 2, 1980, at A2 ("Ronald Reagan campaigned for Democratic votes in the recession-ridden auto capital today and said that as president he would try to get rid of 'several thousand' federal regulations on American automakers and move to halt the 'deluge' of Japanese auto imports."); see also Lucia Mouat, *Automakers' Plea to Reagan Leadership: Less Regulation*, CHRISTIAN SCI. MONITOR, Dec. 26, 1980, at 6 ("Hopes are high among US automakers that the Reagan administration will conduct an early, hard-hitting assault on what they see as questionable and costly safety and environmental regulations affecting them."); Hedrick Smith, *Republicans Gather in Detroit for Start of National Parley*, N.Y. TIMES, July 13, 1980, at S1 (reporting that while Reagan was campaigning for President, he released a "four-point economic recovery program keyed to the automobile industry and aimed at using recession-bound Detroit to underscore the nation's economic plight under President Carter").

263. See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins.*, 463 U.S. 29, 59 (1983) (Rehnquist, J., concurring in part and dissenting in part) (noting that the NHTSA's change in views "seem[ed] to be related to the election of a new President of a different political party"). See generally *State Farm Mut. Auto. Ins. v. Dep't of Transp.*, 680 F.2d 206, 213 (D.C. Cir. 1982) (noting that the NHTSA's proposal of the possible rescission was "announced by the White House Press Office on April 6, 1981, as part of a larger package of economic recovery measures").

Of course, presidential 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,<sup>264</sup> or where the President asks the agency to act in a way that would conflict with the existing evidence. The results of some decisions are driven by science or law and thus should be unconnected to political judgment.<sup>265</sup> For example, it would clearly be *inappropriate* for an agency charged with implementing a statute that forecloses a cost-benefit analysis to apply a cost-benefit analysis and to attempt to justify its decision by relying upon a presidential directive asking it to look to economic efficiency.<sup>266</sup> It would likewise be *inappropriate* for a new Republican administration in the course of interpreting a statute that requires price regulation to reject arguments for lower prices simply because it doesn't believe in price regulation. Conversely, it would be wholly *appropriate* for an agency to justify a decision to consider economic costs in choosing Rule A over Rule B where the President encouraged the agency to engage in a cost-benefit analysis and where nothing in the relevant statute being implemented precluded the agency from engaging in an economic cost-benefit calculation (e.g., where the statute focused primarily on social benefits but was silent about balancing economic interests).

## 2. *Communications from Other Executive Officials*

Directions from the President himself are not the only type of presidential communications that agencies might reasonably rely upon: directions from executive officials that have presidential authority behind them, such as

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264. *Sierra Club v. Costle*, 657 F.2d 298, 410 (D.C. Cir. 1981) (noting that an administrative rulemaking may be overturned on the grounds of political pressure if “the content of the pressure . . . is designed to force [the agency] to decide upon factors *not made relevant by Congress in the applicable statute*” and if the agency’s determination was actually affected by the “extraneous considerations”) (emphasis added).

265. See Kagan, *supra* note 4, at 2352 (noting that “some hesitation is warranted” in allowing a presidential administration to influence agency decisions that are “most scientific or otherwise technical in nature and, as such, least connected to political judgment”).

266. Cf. 1 PIERCE, *supra* note 138, § 7.9, at 501 (“OMB cannot order an agency to base its decisions on a cost-benefit analysis . . . if Congress has explicitly required the agency to base its decisions on a standard that is inherently inconsistent with that analysis.”).

authorized directions from the President's Chief of Staff<sup>267</sup> or the Vice President,<sup>268</sup> also should be given a place.<sup>269</sup>

When President Bush entered office in January 2001, for example, his Chief of Staff Andrew Card issued a memorandum to agency heads that, among other things, directed them not to send any proposed or final regulations to the Office of the Federal Register for publication “unless and until a department or agency head appointed by the President after noon on January 20, 2001, reviews and approves the regulatory action.”<sup>270</sup> The memorandum also directed agency heads to withdraw any regulations that had been sent to the Office of the Federal Register but not yet published and to temporarily postpone the effective date of any regulations that had been published but that had not yet taken effect.<sup>271</sup> Similarly, when President Obama entered the White House, his Chief of Staff Rahm Emanuel issued a memo to the heads of executive departments and agencies halting the implementation of new and proposed regulations.<sup>272</sup> Even though these memos came from the Presidents'

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267. See, e.g., Memorandum from Andrew H. Card, Jr., Assistant to the President and Chief of Staff, to Heads and Acting Heads of Executive Departments and Agencies, 66 Fed. Reg. 7702 (Jan. 24, 2001).

268. See, e.g., Statement of Regulatory and Deregulatory Priorities, 65 Fed. Reg. 73,453, 73,460 (Nov. 30, 2000) (noting that an initiative involving chemicals “was announced by the Vice President on EPA’s Earth Day 1988 in response to the finding that most commercial chemicals have very little, if any, publicly available toxicity information on which to make sound judgments about potential risks”).

269. If an executive official issuing a directive to an agency is low ranking, it may be hard to show that the official is actually speaking for the President or that the official is subject to presidential control. See generally Verkuil, *supra* note 254, at 947 (noting that contact between lower level aides and assistants “bears a heavier burden of justification since it is more removed from direct presidential control”). This might undercut the rationality of an agency’s reliance on the official’s directions since the official may not represent the views of the President and may not be subject to political control and accountability.

270. Memorandum from Andrew H. Card, Jr., *supra* note 267.

271. This type of instruction to agency heads—to withhold proposed regulations when there is a change in administrations—is quite common. See *Animal Legal Def. Fund v. Veneman*, 469 F.3d 826, 850 n.6 (9th Cir. 2006) (Kozinski, J., dissenting) (“Withholding proposed regulations that are final but for publication in the Federal Register seems to be common when there is a change in administrations.”), *vacated*, 490 F.3d 725 (9th Cir. 2007); see also Marianne Koral Smythe, *Judicial Review of Rule Rescissions*, 84 COLUM. L. REV. 1928, 1931 n.18 (1984) (noting that “[o]ne of Reagan’s first actions on taking office was to impose a 60-day freeze on about 100” of the rules issued on the eve of Carter’s last days in office). Upon entering the White House this year, President Obama continued this trend. See Jim Tankersley, *Bush-era Acts Elude Reversal by Obama*, CHI. TRIB., Jan. 22, 2009, at 26 (“Like Bush, Obama took office and immediately froze federal regulations not yet finalized.”).

272. See Memorandum from Rahm Emanuel, Assistant to the President and Chief of Staff, to Heads of Executive Departments and Agencies, 74 Fed. Reg. 4435 (Jan. 26, 2009).

Chiefs of Staff rather than directly from the mouths of the Presidents, they are precisely the type of influence from the executive branch that—if openly disclosed in an agency’s rulemaking proceeding—should be allowed to help justify an agency’s decision, such as an agency’s decision to withdraw a proposed rule.<sup>273</sup>

The Office of Information and Regulatory Affairs (OIRA) stands as another possible source of nondirect presidential influence. OIRA is part of the White House’s OMB, which assists the President in ensuring that “agency reports, rules, testimony, and proposed legislation are consistent with the President’s Budget and with Administration policies.”<sup>274</sup> Although OIRA generally exercises a type of supervisory authority over agencies by reviewing regulatory decisions already initiated by agencies, OIRA in 2001 began to play a role in directing agency priorities and prompting agencies to take action by issuing “prompt letters.”<sup>275</sup> Prompt letters are used to suggest OIRA’s view that a particular matter needs agency attention, that a rulemaking proceeding needs to be accelerated, or that an existing rule might call for rescission or modification.<sup>276</sup> Given that prompt letters communicate the views of the executive branch to agencies in a transparent manner that permits public scrutiny and debate,<sup>277</sup> prompt letters further accountable and transparent decisionmaking. Prompt letters, accordingly, serve as a very useful example of a source of political influence that—if openly disclosed in an agency’s rulemaking record—could appropriately and rationally help to explain an agency rulemaking decision, such as a decision to modify or rescind an existing rule.

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273. See Air Quality, Chemical Substances, and Respiratory Protection Standards, 69 Fed. Reg. 67,681, 67,686 (Nov. 19, 2004) (citing the Card Memorandum as a reason the agency had reprioritized its agenda, resulting in a drop in the total number of rulemaking projects on the agency’s agenda from 145 in the fall of 2000 to just 79 by the fall of 2003).

274. See OMB’s Mission, [http://www.whitehouse.gov/omb/organization\\_role](http://www.whitehouse.gov/omb/organization_role) (last visited Sept. 5, 2009) (describing the mission of OMB).

275. See Robin Kundis Craig, *The Bush Administration’s Use and Abuse of Rulemaking, Part I: The Rise of OIRA*, 28 ADMIN. & REG. L. NEWS, Summer 2003, at 8 (“OIRA has recently created, out of no recognizable legal authority, the ‘prompt letter’—a letter written to an administrative agency requesting that it take specific regulatory actions.”); see also Office of Management and Budget News Release 2001-35, *OMB Encourages Lifesaving Actions by Regulators* (Sept. 18, 2001), <http://www.reginfo.gov/public/prompt/2001-35.html> (last visited Sept. 22, 2009) (describing how “[t]he prompt letter is a new tool created by OIRA’s Administrator, John D. Graham, to highlight issues that may warrant the attention of regulators”).

276. Introduction to the Regulatory Plan and the Unified Agenda of Federal Regulatory and Deregulatory Actions, 70 Fed. Reg. 64,079, 64,087 (Oct. 31, 2005) (describing how “OIRA’s first set of prompts suggested lifesaving opportunities at FDA, NHTSA, OSHA and EPA”).

277. *Id.*

### 3. *Congressional Oversight*

The President and those who speak for the President are not the only possible sources of political influences that might be aimed at agency rulemaking decisions: Congress too plays an important role in overseeing and shaping rulemaking decisions.<sup>278</sup> Thus, particularly with respect to independent agencies, congressional influences could serve as yet another possible source of political influence that—if openly disclosed—could help to adequately explain an agency’s rulemaking decision for purposes of arbitrary and capricious review.

Members of Congress, for example, are free (just like any interested member of the public would be) to file written comments with an agency during a notice-and-comment rulemaking proceeding in an attempt to influence the agency’s outcome.<sup>279</sup> Alternatively, congressional committees composed of certain members of Congress might hold oversight hearings to try to prod an agency to act one way or another or to try to prod an agency into action. In addition, certain members of Congress might choose to engage in informal attempts to influence an agency, such as by simply calling up or meeting with the decisionmakers at the agency and encouraging the agency to act in a certain way.

Agencies are likely to pay attention to all of these different sorts of congressional communications because it is, after all, Congress that ultimately decides what powers to delegate to the agency and what type of funding the agency will receive. However, whether agencies ought to pay attention to these sorts of congressional influences (and whether such influences ought to be

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278. See *supra* notes 152–155 and accompanying text.

279. Because such comments are part of the rulemaking record and form part of the public comments that agencies must adequately respond to when the APA applies, see 5 U.S.C. § 553(c) (2006), it is common to see agencies acknowledge the filing of such public comments by congressmen. See, e.g., Mandatory Country of Origin Labeling of Beef, Pork, Lamb, Chicken, Goat Meat, Perishable Agricultural Commodities, Peanuts, Pecans, Ginseng, and Macadamia Nuts, 73 Fed. Reg. 45,106, 45,114 (Aug. 1, 2008) (noting the receipt of “5,600 timely comments from consumers, retailers, foreign governments, producers, wholesalers, manufacturers, distributors, *members of Congress*, trade associations and other interested parties”) (emphasis added); Federal Motor Vehicle Safety Standards; Rearview Mirrors, 73 Fed. Reg. 42,309, 42,310 (July 21, 2008) (noting comments filed by two members of Congress); Card Format Passport; Changes to Passport Fee Schedule, 72 Fed. Reg. 74,169, 74,170 (Dec. 31, 2007) (“Among those submitting comments were: four Members of Congress, Senators Hillary Clinton and Charles Schumer of New York, Senator Patrick Leahy of Vermont, and Representative Louise Slaughter of New York.”). Thus, agencies’ willingness to mention and discuss public congressional comments stands as an exception to the normal rule that agencies will sweep political influences under the rug.

brought out into the open) is likely to be more controversial than whether agencies ought to be encouraged to openly rely upon presidential influences. Specifically, two objections might be raised if agencies openly acknowledged their reliance on congressional influences.

First, open reliance on congressional influences is likely to incite more controversy than reliance on presidential influences because the current model of agency decisionmaking often is described as hinging on the notion that administrative agencies (and their place in our tripartite constitutional structure) can best be legitimized by placing agencies under *the President's* control. In other words, allowing administrative agencies to resolve wide-ranging policy decisions is often viewed as justifiable not because of Congress's influence over agencies but rather because agency officials "are accountable to the people through their relationship with the politically accountable President."<sup>280</sup>

Even "presidentialists,"<sup>281</sup> however, do not claim as a factual matter that Congress exerts no control over administrative agencies. To the contrary, Congress (and individual congressmen as well as committees of congressmen) play a significant role in overseeing the administrative state through formal and informal mechanisms,<sup>282</sup> and thus administrative agencies can be seen as deriving their legitimacy from *both* the President and Congress. This means that even if the *presidential* control model of agency decisionmaking is not necessarily furthered by allowing congressional influences to explain agency decisions for purposes of arbitrary and capricious review, the *political* control model more generally certainly would be.

A second objection that could be levied against allowing congressional influences to play an open role might revolve around the fact that the President is a unitary official who can speak with one voice whereas Congress consists of 535 voting members. Put another way, it might be more difficult for courts to determine precisely when congressional influences should be viewed as a permissible explanation and when they should not be. In the end, the courts likely would be faced with the task of assessing the weight due to congressional

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280. 1 PIERCE, *supra* note 138, § 1.7, at 26; *see also* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865-66 (1984) (noting that "[w]hile agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of Government to make such policy choices").

281. *See supra* note 149 and accompanying text.

282. *See supra* notes 152-155 and accompanying text; *see also* Mark Seidenfeld, *The Psychology of Accountability and Political Review of Agency Rules*, 51 DUKE L.J. 1059, 1076-78 (2001) (discussing the mechanisms through which Congress exercises oversight over agency rulemaking).

influences on a case-by-case basis.<sup>283</sup> In engaging in this case specific task, the courts would need to deem some kinds of influences permissible and others impermissible. For example, a group of congressmen's comments on the substance of a proposed rule (e.g., comments that help to explain Congress's intent in a particular statute) clearly should be found to fall on the line of permissible considerations that might help to explain an agency decision.<sup>284</sup>

At the other extreme, one congressman's "hard-ball" threats made through the back door to an executive agency (e.g., a threat that if the agency proceeds with a certain rule, the congressman will withhold all financial support for other unrelated programs) should not be allowed to help adequately explain an agency decision. Such an influence would not only fail to be a factor that Congress intended to be logically related to the agency's decision,<sup>285</sup> but it also would fail to reinforce the positive attributes of political influences, such as representativeness and accountability.<sup>286</sup> Similarly, comments made by congressmen who were outvoted in writing the bill authorizing a rulemaking would need to be ruled out or at least minimized when compared to comments made by congressmen who served as conferees of the bill.

*D. Types of Rulemaking Proceedings in Which Political Factors Might Appropriately Play a Role*

With an understanding of what types of political influences might most appropriately count as valid factors justifying an agency's rulemaking decision,

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283. Although this might sound like a difficult task to impose on the courts, it is not all that different from how courts currently give different weight to different types of legislative history when construing statutes—giving more weight, for example, to committee reports than to other types of legislative history. See, e.g., *Thornburg v. Gingles*, 478 U.S. 30, 43 n.7 (1986) (“We have repeatedly recognized that the authoritative source for legislative intent lies in the Committee Reports on the bill.”).

284. Cf. *Hazardous Waste Treatment Council v. EPA*, 886 F.2d 355, 358-59 (D.C. Cir. 1989) (noting that the agency relied upon comments filed by eleven members of Congress who had served as conferees on the statutory amendments at issue).

285. Cf. *Sierra Club v. Costle*, 657 F.2d 298, 409 & n.539 (D.C. Cir. 1981) (noting that it would be improper for a congressman to exert pressure on an agency that would force the agency to decide an issue based on “factors not made relevant by Congress in the applicable statute”); *D.C. Fed’n of Civic Ass’ns v. Volpe*, 459 F.2d 1231, 1246 (D.C. Cir. 1972) (suggesting that it would be improper for the Secretary of Transportation to make a determination that a proposed bridge should be part of an interstate highway system because of a congressman’s statements to the effect that money earmarked for another project would be withheld unless the Secretary approved the bridge).

286. Cf. EDLEY, *supra* note 4, at 196-97 (noting that political influences should be accepted as “good politics” only where they “embody the positive attributes like representativeness and accountability”).

the final question to consider in terms of the mechanics of giving politics an accepted place is this: In what rulemaking contexts might courts most appropriately view agency reliance on political factors as a positive factor rather than as a danger signal? Rulemaking decisions can arise in a variety of contexts (both regulatory and deregulatory), including denials of petitions to initiate rulemaking proceedings, the promulgation of final rules, the rescission of final rules, and the withdrawal of proposed rules. Some types of rulemaking decisions might be viewed as more appropriately turning on political influences than others.<sup>287</sup>

### 1. Denials of Rulemaking Petitions

An agency's denial of a petition asking the agency to initiate a discretionary rulemaking proceeding presents perhaps the clearest example of a type of agency decision that could very properly turn on political considerations. Agencies are often given broad rulemaking powers yet given wide discretion to decide whether and when to initiate rulemaking proceedings.<sup>288</sup> Agencies, however, may be prodded into action by interested parties who invoke Section 553(e) of the APA, which provides: "Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule."<sup>289</sup> If an agency receives a petition asking it to initiate rulemaking proceedings but ultimately decides to deny the petition, section 555(e) of the APA requires the agency to give prompt notice of the denial, explaining the grounds for the denial.<sup>290</sup>

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287. The only types of rulemaking proceedings considered here are rulemakings that would count as informal proceedings. In other words, "formal" rulemaking proceedings subject to sections 556 and 557 of the APA (rather than section 553) are *not* considered here because section 557 expressly precludes *ex parte* contacts in the context of formal rulemaking. *See* 5 U.S.C. § 557(d)(1) (2006) (prohibiting *ex parte* contacts); *see also* Verkuil, *supra* note 254, at 968 (discussing the prohibition placed on *ex parte* contacts in formal rulemaking proceedings). Rulemaking today, however, overwhelmingly takes place under the rubric of informal notice-and-comment rulemaking, *not* formal rulemaking.

288. *Cf.* Merrill & Watts, *supra* note 158, at 504-19 (discussing numerous statutes that give agencies broad general grants of rulemaking power).

289. 5 U.S.C. § 553(e) (2006). In addition to the default provisions of the APA, some statutes specifically provide for a "right to petition for rulemaking, and some of these statutes specify procedures to be followed in the petitioning process." Petitions for Rulemaking (Recommendation No. 86-6 n.1), 1 C.F.R. § 305.86-6 (1987).

290. 5 U.S.C. § 555(e) (2006) ("Except in affirming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial.").

Consistent with the prevailing technocratic and expertise-driven vision of agencies' reason-giving duties, agencies today tend to explain their denials of rulemaking petitions *not* by openly mentioning influences from political actors but rather by referencing the agency's statutory authority, the underlying statutory purposes, the desirability of proceeding on a case-by-case basis rather than through generally applicable policy, the necessity or desirability of statutory revisions, the lack of evidence of a problem warranting federal intervention, and sometimes the availability of agency resources.<sup>291</sup> For example, even when the EPA denied the politically charged rulemaking petition at issue in *Massachusetts v. EPA*,<sup>292</sup> the EPA tried to explain its decision first in *statutory* terms and only then in policy-driven terms that focused heavily on alleged *scientific* uncertainty facing the agency.<sup>293</sup> Mention was made of the EPA's desire to avoid stepping on the President's own foreign policy initiatives involving global warming;<sup>294</sup> however, the EPA's explanation of its denial of the rulemaking petition—consistent with the prevailing expertise-based view of agency decisionmaking—focused heavily on statutory as well as scientific factors.<sup>295</sup>

Despite the current tendency of agencies to avoid justifying rulemaking denials by relying upon communications from political actors, these sorts of political influences are precisely the kinds of influences that might appropriately help to explain an agency's denial of a rulemaking petition. Just

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291. See, e.g., 10 C.F.R. § 490.6 (2009) (listing reasons why the Department of Energy might deny a rulemaking petition); 11 C.F.R. § 200.5 (2009) (listing reasons that might explain why the Federal Election Commission chooses to act a certain way on a petition for rulemaking); see also Denial of Petition for Rulemaking; Federal Motor Vehicle Safety Standards, 61 Fed. Reg. 38,135 (proposed July 23, 1996) (to be codified at 49 C.F.R. pt. 571) (denying the rulemaking petition, among other reasons, because of the lack of evidence of a significant safety problem that would warrant federal intervention).

292. 549 U.S. 497 (2007).

293. *Id.* at 511-14; see also Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,922, 52,930 (Sept. 8, 2003) (“Although there have been substantial advances in climate change science, there continue to be important uncertainties in our understanding of the factors that may affect future climate change and how it should be addressed.”).

294. *Massachusetts*, 549 U.S. at 513-14; see also Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. at 52,931 (noting that “the President has laid out a comprehensive approach to climate change that calls for near-term voluntary actions and incentives along with programs aimed at reducing scientific uncertainties and encouraging technological development so that the government may effectively and efficiently address the global climate change issue over the long term”).

295. *But see* Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. at 52,929 (discussing the President's attempts to deal with climate change and noting that the EPA did “agree with the President that ‘we must address the issue of global climate change’”).

as Congress must weigh competing interests and competing priorities when deciding which issues to tackle via legislation, agencies faced with rulemaking petitions asking them to regulate inevitably must weigh competing agency priorities against limited agency personnel, budgets, and time.<sup>296</sup> This sort of priority-setting process is exactly the type of decision that political actors, including the President, are likely to try to influence to ensure the consistency of agency actions with overall government policy and priorities.<sup>297</sup>

To consider how this might play out, think once again about Judge Pollak's concurring opinion in *UAW v. Chao*.<sup>298</sup> There, as you will remember, in 2003, OSHA denied a rulemaking petition filed in 1993 asking it to promulgate a rule that would have established a standard for metalworking fluids. Although OSHA's decision to deny the petition seemed inconsistent with the agency's prior 1995 decision to designate metalworking fluids as a high agency priority, the Third Circuit ultimately upheld the denial of the petition, stressing that the decision was *not* arbitrary and capricious "because OSHA weighed the scientific evidence of health hazards . . . against its other regulatory priorities" and "identified the reasons why regulating . . . [would] require an 'enormous' allocation of resources."<sup>299</sup> Judge Pollak's concurring opinion took things a step further: he agreed with the majority that the decision was not arbitrary, but he explained that what was really at stake in the case was "a change in regulatory policy coincident with a change in administration."<sup>300</sup> Specifically, Judge Pollak highlighted the fact that OSHA's counsel admitted at oral argument that "[t]he metalworking fluids . . . were listed as a high priority only following the priority-setting process of a prior administration . . . and those priorities are different than the current ones."<sup>301</sup>

Judge Pollak's willingness to credit what appears to be an oral, post hoc justification offered by agency counsel (as opposed to requiring the agency to

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296. See generally *Natural Res. Def. Council, Inc. v. SEC*, 606 F.2d 1031, 1046 (D.C. Cir. 1979) ("An agency's discretionary decision *not* to regulate a given activity is inevitably based, in large measure, on factors . . . [such as] internal management considerations as to budget and personnel; evaluations of its own competence; [and] weighing of competing policies within a broad statutory framework.").

297. Cf. *NHTSA Vehicle Safety Rulemaking and Supporting Research: Calendar Years 2003-2006*, 68 Fed. Reg. 43,972, 43,973 (July 25, 2003) (to be codified at 49 C.F.R. pt. 571) ("Agency priorities emanate from many sources, including . . . Executive initiatives, [and] Congressional interest and mandates . . .").

298. 361 F.3d 249 (3d Cir. 2004); see also *supra* notes 75-80 and accompanying text (discussing the *Chao* case).

299. *Chao*, 361 F.3d at 255.

300. *Id.* at 256 (Pollak, J., concurring).

301. *Id.* (quoting the attorney representing Chao).

justify its decision based solely on the evidence and reasoning disclosed in the agency's rulemaking record) is not ideal in the sense that it undercuts open, transparent agency reasoning. It also runs against the well-settled rule that agency actions must be upheld based on the reasons actually articulated by the agency itself, *not* by counsel's post-hoc rationalizations for the agency.<sup>302</sup> Judge Pollak, however, was on the right track in terms of his general willingness to acknowledge and embrace the role that political factors may play in agency denials of rulemaking petitions.

Other judges too have at least implicitly recognized that political considerations, such as changes in administrations or decisions about how best to direct limited agency resources, play a role in agency denials of rulemaking petitions.<sup>303</sup> Generally, however, courts have allowed the political and policy-driven influences swirling around rulemaking petitions to convince them that when it comes to discretionary rulemaking proceedings, denials of rulemaking petitions should be subject to only the most limited and deferential review.<sup>304</sup> Courts, accordingly, have *not* thought to incentivize agencies to openly and transparently disclose in their rulemaking records the political influences bubbling under the surface of rulemaking denials. This should change. The

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302. See, e.g., *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins.*, 463 U.S. 29, 50 (1983) (“[C]ourts may not accept appellate counsel’s *post hoc* rationalizations for agency action. . . . It is well-established that an agency’s action must be upheld, if at all, on the basis articulated by the agency itself.”); *SEC v. Chenery Corp. (Chenery I)*, 318 U.S. 80, 87 (1943) (noting that “an administrative order must be judged” solely “upon [those grounds] which the record discloses that its action was based”); *Yale-New Haven Hosp. v. Leavitt*, 470 F.3d 71, 81 (2d Cir. 2006) (“Generally speaking, after-the-fact rationalization for agency action is disfavored.”).
303. See, e.g., *Chao*, 361 F.3d at 255-56 (rejecting the claim that OSHA acted in an arbitrary and capricious manner in denying rulemaking petition where OSHA denied the petition in part because OSHA has “limited resources” and where it named three “more pressing” priorities); *Natural Res. Def. Council, Inc. v. SEC*, 606 F.2d 1031, 1046 (D.C. Cir. 1979) (stating that “[a]n agency’s discretionary decision *not* to regulate a given activity is inevitably based, in large measure, on factors not inherently susceptible to judicial resolution,” such as considerations as to budget and personnel). *But see* *Pub. Citizen Health Research Group v. Chao*, 314 F.3d 143 (3d Cir. 2002) (rejecting the notion that competing agency priorities could justify a nine year delay in adopting a new workplace exposure standard).
304. See, e.g., *Massachusetts v. EPA*, 549 U.S. 497, 527-28 (2007) (holding that refusals to grant rulemaking petitions are susceptible only to judicial review that is “extremely limited” and “highly deferential” (quoting *Nat’l Customs Brokers & Forwarders Ass’n of Am. v. United States*, 883 F.2d 93, 96 (D.C. Cir. 1989))); see also *Cellnet Comm’n, Inc. v. FCC*, 965 F.2d 1106, 1111 (D.C. Cir. 1992) (“[A]n agency’s refusal to initiate a rulemaking is evaluated with a deference so broad as to make the process akin to non-reviewability.”); *Am. Horse Protection Ass’n v. Lyng*, 812 F.2d 1, 3-4 (D.C. Cir. 1987) (noting deferential review that applies when reviewing an agency’s refusal to initiate a rulemaking).

decision about whether or not to regulate (i.e., to make law) is quintessentially “legislative” in nature. Evidence and expertise, accordingly, may not be dispositive in explaining such decisions—making it all the more appropriate for rulemaking agencies acting as mini legislatures to rely upon political influences when deciding whether or not to regulate in the first place.<sup>305</sup>

## 2. *Withdrawals of Proposed Rules*

Withdrawals of discretionary rules (i.e., rules that an agency is under no statutory duty to enact) that have been proposed but that have not yet been adopted provide another good example of a type of rulemaking that is quintessentially legislative in nature and that might rationally turn on political influences. Much like denials of rulemaking petitions, withdrawals of proposed discretionary rules—especially the withdrawal of rules proposed under a prior administration—may well turn on political calculations and influences, such as administration priorities and overall agenda setting.<sup>306</sup> Evidence and science often will not be dispositive. This becomes quite clear when one considers how common it has become for new presidents coming into office to order the withholding of regulations proposed under the prior presidential administration that are final but for publication in the Federal Register.<sup>307</sup>

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305. Cf. SHAPIRO, *supra* note 13, at 117-18 (“We never say that Congress has a duty to pass a particular law or indeed any laws at all. So an agency exercising Congress’s delegated law-making powers had no such duty either.”).

306. See, e.g., *Animal Legal Def. Fund v. Veneman*, 469 F.3d 826, 850 (9th Cir. 2006) (Kozinski, J., dissenting) (“Absent a statutory duty to act, an agency need not adopt regulations, even if all public comments submitted favor them . . . . The agency may decide not to adopt regulations because of a change in administrations, or some other change in policy.”), *vacated by* 490 F.3d 725 (9th Cir. 2007); Notice of Withdrawal of Proposed Rulemaking, 69 Fed. Reg. 13,805 (Mar. 24, 2004) (“We have decided to terminate the rulemaking for the administrative rewrite of headlighting requirements, due to other regulatory priorities and limited agency resources.”).

307. See generally 469 F.3d at 850 n.6 (Kozinski, J., dissenting) (noting the practice of presidents coming into office and withholding final publication of regulations proposed under prior administrations); *Chen v. INS*, 95 F.3d 801, 804 (9th Cir. 1996) (“President Clinton, following his inauguration on January 22, 1993, directed his newly appointed director of the Office of Management and Budget to issue a memorandum requesting that each agency withdraw from the Federal Register regulations that had not yet been published.”); *Kootenai Tribe of Idaho v. Veneman*, 142 F. Supp. 2d 1231, 1236 n.6 (D. Idaho 2001) (“On January 20, 2001, President Bush issued an order postponing by sixty (60) days the effective date of all of the Clinton Administration’s 11th hour regulations and rules that had not yet been implemented.”); *Dabney v. Reagan*, 542 F. Supp. 756, 760 (S.D.N.Y. 1982) (“Shortly after taking office, President Reagan directed the heads of all Executive Departments to postpone all pending regulations.”).

President Obama did this upon entering the White House in 2009, and President Bush did the same thing in 2001.<sup>308</sup>

For a good example of how an agency might appropriately justify its withdrawal of a proposed rule based on political considerations, consider another example discussed earlier: the MSHA's withdrawal of a proposed rule that would have, among other things, "established permissible exposure limits" and monitoring methods for substances that might adversely affect the health of miners.<sup>309</sup> In its detailed explanation of its rule withdrawal, the MSHA explained that it had revisited and reprioritized the agency's agenda consistent with a "federal agency-wide initiative intended to maintain sound regulatory practice," which was announced by President Bush's Chief of Staff Andrew Card in a written memorandum to agency heads.<sup>310</sup> Notably, in justifying why this President-driven reprioritization should count as an "adequate" explanation for its decision, the MSHA drew directly from the views Judge Pollak set forth in his concurring opinion in *Chao* just one year earlier: "[T]here is nothing obscure, and nothing suspect about regulatory policy changes coincident with changes in administration," the MSHA explained, quoting from Judge Pollak.<sup>311</sup>

### 3. Rule Rescissions

Rescissions of discretionary rules stand as another type of rulemaking decision that might rationally and appropriately turn on political influences. Some rule rescissions—rather than relying entirely on factual conclusions about the ineffectiveness or obsolete nature of a rule—might appropriately reflect the fact that a change in administration has taken place and that the new administration does not wish to administer or enforce rules that run contrary to its own political choices, goals, and policies.<sup>312</sup> If an agency rescinding a rule openly and transparently discloses its reliance on such political considerations

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308. See Jim Tankersley, *Bush-era Acts Elude Reversal by Obama*, CHI. TRIB., Jan. 22, 2009, at C26 ("Like Bush, Obama took office and immediately froze federal regulations not yet finalized."). See generally *supra* note 271 and accompanying text (discussing the common practice of presidents coming into office and issuing instructions to agency heads to withhold regulations proposed under the prior administration).

309. See Air Quality, Chemical Substances, and Respiratory Protection Standards, 69 Fed. Reg. 67,681 (Nov. 19, 2004) (to be codified at 30 C.F.R. pts. 56-58, 70-72, 75, and 90); see also *supra* notes 116-122 and accompanying text (discussing the MSHA's withdrawal of its rule).

310. See 69 Fed. Reg. at 67,686 (citing Memorandum from Andrew H. Card, Jr., *supra* note 267).

311. *Id.* (citing *UAW v. Chao*, 361 F.3d 249 (3d Cir. 2004) (Pollak, J., concurring)).

312. See Smythe, *supra* note 271, at 1931-33 (describing how rule rescissions may be based in part on political change).

in explaining its decision to rescind the rule, then courts should embrace such an explanation as rational rather than treating it as a danger signal.<sup>313</sup>

Take, for example, the “passive restraint” regulation rescinded by the NHTSA at issue in *State Farm*.<sup>314</sup> Although the agency failed to acknowledge it openly, much of the explanation for the NHTSA’s rescission likely lay in the fact that President Reagan had recently come into office, and he sought to address the country’s economic woes by, among other things, achieving “regulatory relief” for the ailing automobile industry.<sup>315</sup> If the NHTSA had openly disclosed its reliance on the Administration’s overall priorities in explaining its rescission of the detachable belt portion of the rule, the agency’s explanation should have been enough (combined with its focus on facts and logic) to constitute a reasonable and adequate explanation for the rescission of that portion of the standard.<sup>316</sup> Similarly, had the NHTSA explicitly appealed to presidential priorities in addition to any relevant studies or facts in dealing with the possibility of an airbags-only option, then the NHTSA’s justification for refusing to pursue an airbags-only option should have been viewed as sufficient.<sup>317</sup>

#### 4. Promulgation of Final Rules

A final (although somewhat messier) area in which political influences might help to explain an agency’s decision involves the promulgation of final rules. Clearly, if an agency is deciding between promulgating Rule A, B, or C and the relevant statute, evidence, and science would support *only* the selection of Rule A or B but not Rule C, then the agency should *not* be allowed to rely

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313. See McKarcher, *supra* note 132, at 1369–70 (“There is nothing patently arbitrary or capricious about a newly elected administration exercising congressionally delegated discretion to implement [new] policy choices [that were] debated publicly for months or years leading up to the President’s election and presumably motivated the majority of voters to support the President eventually elected.”).

314. *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto Ins.*, 463 U.S. 29 (1983).

315. See Smythe, *supra* note 271, at 1933 & n.32; *cf.* *State Farm*, 463 U.S. at 59 (Rehnquist, J., concurring in part and dissenting in part) (noting the change in presidential administration).

316. *Cf.* *State Farm*, 463 U.S. at 59 n.\* (Rehnquist, J., concurring in part and dissenting in part) (noting that a change in presidential administration is a perfectly reasonable basis for reappraising a rule and noting that in this case, “Congress has not required the agency to require passive restraints”).

317. The NHTSA’s downfall in the case, of course, was that it entirely failed to consider an airbags-only option. See Smythe, *supra* note 271, at 1933–35 (discussing how the NHSTA’s problem was its failure to meet even its minimal obligation to explain its rule rescission); see also *supra* notes 59–67 and accompanying text.

upon political considerations alone to select Rule C. Put another way, 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.<sup>318</sup> Allowing this would be to allow naked politics to trump science and/or to trump the law. However, if the relevant statutory provisions and the evidence would equally support the selection of either Rule A, B, or C, then it would be entirely rational for the agency to rely upon political influences in explaining why it chose Rule C over Rules A or B.

A harder case might be presented if the relevant statute and evidence strongly supported the selection of Rule A but did not entirely foreclose the possibility of Rule B. In such a situation, could an agency rely upon political considerations, such as a presidential directive, in explaining why it ultimately chose Rule B over Rule A? The answer to this question should vary depending on the circumstances of the particular case involved. One relevant consideration would be the certainty of the factual evidence; the more uncertain the science, the more room for political considerations to tip the scales. Other very relevant considerations would be the content, form, and perceived significance of the political influences. For example, a publicly announced presidential directive ordering an agency to promulgate Rule B because it better aligns with the administration's goals and comprehensive strategies should be viewed as much weightier and more capable of properly tipping the scales toward Rule B than a mere phone call made by a single congressman. This is because the presidential directive would help to reinforce positive attributes of politics, such as accountability and representativeness, whereas the congressional phone call would not.

#### **IV. OBJECTIONS TO GIVING POLITICS A PLACE**

The proposal that courts add political factors to the list of “valid” justifications for agency decisionmaking is open to criticism on a number of grounds. Five possible objections are considered here. Ultimately, however, none of them prove insurmountable.

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318. Cf. Kagan, *supra* note 4, at 2356–57 (arguing that a strong presidential role is inappropriate where the agency decision is purely scientific in nature but is appropriate where agencies confront value-laden judgments that must be made in the face of “scientific uncertainty and competing public interests”).

*A. The First-Mover Dilemma*

One major roadblock that could prevent politics from gaining an accepted role in rulemaking involves what could be thought of as a “first-mover” dilemma, or perhaps a type of “chicken-and-egg” problem.<sup>319</sup> The specific dilemma is this: either courts or agencies will have to be the first mover. Will courts indicate a willingness to embrace political factors before agencies have openly started disclosing their reliance on politics, or will agencies need to move toward disclosing political factors first without knowing ahead of time if courts will accept such factors? Given how expensive and time-consuming the rulemaking process is today, agencies might well be unwilling to render their decisions vulnerable to attack by openly disclosing political factors without first knowing whether courts are likely to embrace political considerations. Likewise, courts might be disinclined to send abstract signals to agencies on the issue, or perhaps courts would view it as inappropriate to speculate in dicta about how they might handle a situation that may or may not come along in the future.

Perhaps the simplest solution to this problem would be for a bold agency to set aside its fears and to decide to act as a “guinea pig” by openly relying upon political factors in a rulemaking proceeding, thereby giving the courts an opportunity to embrace politics. At first blush, this solution might seem quite improbable given the risks of reversal that the agency would be accepting. Yet upon closer examination, the solution may not actually be all that improbable. One reason why is that agencies should have an incentive to see politics affirmatively embraced as an appropriate factor in rulemaking decisions: if courts accept political factors under arbitrary and capricious review, then agencies will gain yet one more reason why they can claim an entitlement to deference by the courts.

To play it safe, agencies might well want to begin by relying upon political factors in narrow situations where courts are more likely to see the value of political judgments—such as denials of rulemaking petitions or withdrawals of proposed rules based upon clearly articulated administration priorities (such as a presidential directive ordering an agency to withdraw a proposed rule that conflicts with the administration’s goals and comprehensive strategy).<sup>320</sup> If

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319. See EDLEY, *supra* note 4, at 192 (using the term “chicken-and-egg problem”).

320. Cf. *UAW v. Chao*, 361 F.3d 249, 256 (3d Cir. 2004) (Pollak, J., concurring) (embracing change in administration as a valid reason supporting agency decision in the context of an agency’s denial of a discretionary rulemaking petition); *Air Quality, Chemical Substances, and Respiratory Protection Standards*, 69 Fed. Reg. 67,681, 67,686 (Nov. 19, 2004) (explaining the withdrawal of the proposed rule by noting that “each administration

agencies can get courts to routinely accept political factors in those specific contexts, then they might feel more comfortable testing the waters in broader contexts later on.

Another reason why it actually might not be all that implausible to see agencies begin to openly rely upon political factors is that some judges and agencies already have begun to plant the seeds for giving politics some place in agency decisionmaking.<sup>321</sup> Take, for example, the Supreme Court's recent decision in *Fox*, which suggests willingness on the part of at least some members of the Court to allow political influences to play some role in agency decisionmaking.<sup>322</sup> Or take Judge Pollak's concurrence in the Third Circuit's recent *Chao* decision discussed earlier.<sup>323</sup> In *Chao*, Judge Pollak signaled his willingness to embrace politics, and at least one agency (the MSHA) has already relied upon Judge Pollak's view that "there is nothing obscure, and nothing suspect about regulatory policy changes coincident with changes in administration."<sup>324</sup> Or consider the final rule adopting fuel efficiency standards recently issued by the NHTSA under the Obama Administration, which openly acknowledges the role that presidential directions and goals played in the agency's decision-making process.<sup>325</sup>

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embraces its own priority-setting process and regulatory philosophy such that items considered priority by one administration may not be so by another administration").

321. See *State Farm*, 463 U.S. at 59 (Rehnquist, J., concurring in part and dissenting in part); *Chao*, 361 F.3d at 256 (Pollak, J., concurring); see also *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984) ("[A]n agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments."); *Sierra Club v. Costle*, 657 F.2d 298, 405 (D.C. Cir. 1981) ("The court recognizes the basic need of the President and his White House staff to monitor the consistency of executive agency regulations with Administration policy."). But see *Tummino v. Torti*, 603 F. Supp. 2d 519, 547 (E.D.N.Y. 2009) (noting in the context of review of an FDA decision involving the emergency contraceptive Plan B that there was "unusual involvement of the White House" and that this was "not the norm").
322. *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800 (2009).
323. See *Chao*, 361 F.3d at 256; see also *supra* notes 75-80 and accompanying text (discussing the *Chao* case).
324. See *Air Quality, Chemical Substances, and Respiratory Protection Standards*, 69 Fed. Reg. at 67,686 (citing *Chao*, 361 F.3d at 249 (Pollak, J., concurring)).
325. See Department of Transportation, National Highway Traffic Safety Administration, *Average Fuel Economy Standards Passenger Cars and Light Trucks Model Year 2011*, 74 Fed. Reg. 14,196 (Mar. 30, 2009).

*B. Balancing The Carrot With A Stick*

Some might object to the proposal set forth here because the “carrot” offered to agencies (i.e., the additional reason for deference) is not balanced by a “stick.” Agencies, in other words, are given the best of both worlds: they could choose to disclose political influences when it would help give them an additional reason to claim deference, or they could choose to ignore political influences when such influences might be viewed as improper. For example, agencies might be more willing to disclose publicly available directives from the President and less willing to disclose back door congressional pressure that could be viewed as inappropriate political meddling.

The clearest way to solve this problem might well be to create an express “stick” to affirmatively require agencies to disclose political influences. Such an affirmative disclosure requirement, however, would mean that courts would be forced to attempt to determine when political communications did occur and when they did not occur. This would be difficult for courts to do—at least in today’s statutory environment—given that section 553 of the APA does not require that informal, ex parte communications, such as communications from the White House to executive agencies, be docketed in notice-and-comment rulemaking records.<sup>326</sup> Thus, an affirmative requirement that agencies disclose political communications would likely require an amendment to the APA or the enactment of a new statute that affirmatively requires disclosure of certain political influences, such as significant executive supervision. Certainly, this type of statutory disclosure requirement is a possibility. Professor Nina Mendelson, for example, argues in a forthcoming article that such an affirmative disclosure requirement would be superior to addressing the issue of politics solely through judicial review.<sup>327</sup> However, such a statutory change would likely face various hurdles—including claims of executive privilege.<sup>328</sup>

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326. As the D.C. Circuit has explained, the APA prohibits ex parte contacts only “in an adjudication or rulemaking ‘required by statute to be made on the record after opportunity for an agency hearing.’” *Dist. No. 1, Pac. Coast Dist. v. Mar. Adm’n*, 215 F.3d 37, 42 (2000) (citing 5 U.S.C. §§ 553(c), 554(a), 557(d) (2000)). It, accordingly, would likely violate *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978), if courts instructed agencies to disclose all ex parte contacts from political actors in informal rulemaking proceedings. See *Dist. No.1, Pac. Coast Dist.*, 215 F.3d at 43.

327. See Mendelson, *supra* note 123, at 4, 39 (“[R]ather than addressing the issue [of politics] indirectly through judicial review, I suggest that we proceed directly to regulating procedure [by requiring] . . . that a significant agency decision include at least a summary of the substance of executive supervision.”).

328. See generally 1 PIERCE, *supra* note 138, § 7.9, at 502 (noting that Congress has “considered passage of a statute that would require public disclosure of all communications between

Even if a new statutory requirement forcing agencies to disclose political influences does not materialize anytime soon, courts might nonetheless be able to create a type of “stick” to balance the “carrot” by essentially penalizing agencies for decisions that seem to be based upon undisclosed, secret political influences—akin to how the courts presently are willing to penalize agencies for making decisions that seem to be based upon undisclosed expert studies or evidence.<sup>329</sup> This, for instance, could be what happened in *State Farm*. There, the NHTSA failed to acknowledge political influences and thus the Court’s opinion could be read as saying that the “agency had not provided the full story” and that the agency should be forced to “reveal the political basis for its decision” so that it also would consider “the opposing political position.”<sup>330</sup>

### C. *Judicial Dislike of Agency Politicization*

Another 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.<sup>331</sup> As Professors Freeman and Vermeule have explained, this general concern—that bad things may come from the politicization of agencies—may very well have been what drove the Court in *Massachusetts v. EPA* to force the EPA to exercise its expertise.<sup>332</sup>

If it is true that most judges truly believe as a normative matter that the politicization of agencies is a bad thing, then judges will be unlikely to give politics an accepted role in agency rulemaking. There is good reason, however, to doubt that most judges truly believe that *any* politicization of agencies is a bad thing. In light of *Chevron*’s acknowledgement of the role politics can play in agency decisionmaking and other signs that judges are well aware of the

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OMB and the agencies it ‘regulates’” but that “Congress’ ability to require such disclosure may be limited to some uncertain extent by the doctrine of Executive Privilege”).

329. See, e.g., *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240, 251-52 (2d Cir. 1977) (concluding that the agency acted improperly in failing to disclose scientific research upon which the proposed rule was based); see also EDLEY, *supra* note 4, at 190 & n.34 (describing as an analog “those cases in which courts have rejected agency decisions that seem[] to be based on secret or undisclosed expert studies or reasoning”).

330. Bressman, *supra* note 142, at 1783.

331. Cf. Freeman & Vermeule, *supra* note 27, at 94 (describing how the Court’s treatment of some cases is “tinged with underlying suspicion about politically motivated executive usurpation of judgments normally left to experts”).

332. See *id.* at 93-95 (viewing *Massachusetts* as part of a judicial pattern demonstrating the Court’s discomfort with seeing “executive override of expert judgments by professionals or agencies”).

influences political actors can have on agency decisionmaking,<sup>333</sup> judges are not likely to believe that political influences should completely be kept out of agency decisionmaking.<sup>334</sup> Rather, 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 being used in an appropriate fashion, *not* to covertly distort science or to suppress politically inconvenient evidence.

In addition, bringing political influences out into the open might deter courts themselves from covertly making their own political decisions under the guise of applying arbitrary and capricious review. A significant amount of literature criticizes arbitrary and capricious review by suggesting that the results turn on the political and ideological beliefs of the judges applying the doctrine.<sup>335</sup> This concern that judges are manipulating hard look review to reach results that fit their own ideological predilections could be remedied, or at least reduced, by requiring agencies openly to disclose political factors influencing their rulemaking decisions. If an agency openly disclosed political factors that influenced its rulemaking decisions (such as a presidential directive) in its rulemaking record, then the reviewing court would have to grapple openly with the political factors influencing the agency's decision, making it much harder for the court simply to substitute surreptitiously its own policy views under the guise of legal constraints.

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333. See *supra* notes 158-170 and accompanying text.

334. See generally Freeman & Vermeule, *supra* note 27, at 108-09 (noting the Court must view it as “inevitable that political considerations will come into play in executive agencies headed by political appointees who are accountable to the President”).

335. See, e.g., Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U. CHI. L. REV. 761 (2008) (providing evidence indicating that judges' own ideologies play a role in judicial review of agency decisions for arbitrariness); Pierce, *supra* note 125, at 908-09 (citing “[n]umerous studies [that] have found that the results of hard-look review depend primarily on the political and ideological beliefs of the judges who apply the doctrine”); Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717, 1719, 1769-70 (1997) (concluding that “ideology significantly influences judicial decisionmaking on the D.C. Circuit” and discussing how this may call into question the benefits of hard look review).

#### D. Separation of Powers Concerns

A fourth possible objection involves separation of powers concerns. As the administrative state grew in the post-New Deal world, the courts condoned huge transfers of legislative-like powers to administrative agencies by, for example, allowing the nondelegation doctrine to become a toothless doctrine.<sup>336</sup> The death of the nondelegation doctrine now means that agencies often enjoy an unlimited number of actions that they might permissibly take when implementing vague, broad statutory commands. Hard look review's insistence on expert-driven decisionmaking can be thought of as a judicial "check" against this large power transfer to agencies and as a judicially-imposed check on political decisionmaking. By enabling courts to engage in fairly aggressive judicial review, hard look's reason-giving requirement allows courts to ensure that agencies are engaging in expert-driven decisionmaking consistent with Congress's instructions.<sup>337</sup> Courts, accordingly, can more easily maintain the fiction that agencies are not actually exercising "lawmaking" powers at all but rather are merely "implementing" or "executing" Congress's instructions.<sup>338</sup>

If courts were openly to accept political judgment as a valid factor supporting agency rulemaking decisions, then courts might have more trouble continuing to maintain the fiction that agencies are simply "executing" or "implementing" laws set by Congress. Rather, courts would at least implicitly

336. See generally Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1237-40 (1994) (describing the "death" of the nondelegation doctrine and noting that "the Supreme Court has not invalidated a congressional statute on nondelegation grounds since 1935").

337. Cf. Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 487 (1989) (noting that "the permissibility of delegating regulatory power" has hinged on the courts' ability to police and check agency exercises of delegated power); 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 (1987) (arguing that *State Farm's* heightened reason-giving requirement flows from separation of powers principles and responds to the broad delegations of legislative authority given to agencies).

338. Cf. *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 472 (2001) (explaining that the text of the Constitution permits "no delegation" of legislative powers but does permit executive actors to make policy decisions in the context of executing or applying the law set down by Congress); *id.* at 488 (Stevens, J., concurring) (accusing the Court of "pretend[ing]" that legislative power is not actually being delegated); Travis H. Mallen, *Rediscovering the Nondelegation Doctrine Through a Unified Separation of Powers Theory*, 81 NOTRE DAME L. REV. 419, 432 (2005) (noting that the sole test for impermissible delegations—the "intelligible principle" test—"advances the fiction that administrative rulemaking is not an exercise of legislative power when it does not involve too much discretion").

need to recognize that agencies are making political judgments and thus are acting essentially as mini legislatures engaged in the process of lawmaking.<sup>339</sup> Those who believe in a robust and vigorous nondelegation doctrine might find this change to be quite objectionable given that they believe only Congress has the power to legislate. Most, however, embrace a much more pragmatic or functionalist take on the nondelegation doctrine and openly accept that agencies play a lawmaking role.<sup>340</sup>

Furthermore, even under the version of hard look review proposed in this Article, hard look review would continue to ensure that agencies engaging in lawmaking functions remain faithful to congressional intent and to existing evidence and facts. In this sense, hard look review would continue to function as a constraint on political decisionmaking.<sup>341</sup> It would operate to ensure that political judgments do not play an inappropriate role: political judgments alone would not be allowed to trump or to nullify congressional intent set forth in a particular statutory scheme, nor to justify an administrative decision that runs contrary to existing evidence.

#### *E. Difficulty of Judicial Review*

A final potential objection—and perhaps the most serious objection— involves questions about whether judges are capable of and whether they would be comfortable with the notion of subjecting political influences to legal

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339. Cf. SHAPIRO, *supra* note 13, at 171 (“Agencies ought to be allowed to act and to admit that they act as subordinate legislatures making a good deal of law within broad congressional constraints and in the face of considerable uncertainty about facts and diverse and changing political sentiments.”).

340. See, e.g., *Whitman*, 531 U.S. at 488 (Stevens, J., concurring) (“I am persuaded that it would be both wiser and more faithful to what we have actually done in delegation cases to admit that agency rulemaking authority is ‘legislative power.’”); *Loving v. United States*, 517 U.S. 748, 758 (1996) (noting that the nondelegation principle “does not mean . . . that only Congress can make a rule of prospective force”); *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (“[O]ur jurisprudence has been driven by a practical understanding that in our increasingly complex society . . . Congress simply cannot do its job absent an ability to delegate power . . . .”); Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 95-98 (1985) (arguing that accountability concerns tip in favor of broad delegations to agencies); Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2170-71 (2004) (arguing for an exclusive delegation doctrine under which Congress has the exclusive power to decide when and whether to delegate lawmaking powers).

341. Hard look’s purpose, in other words, would not be to constrain political decisionmakers by ensuring that decisionmakers are forced to make decisions based solely on technocratic and scientific factors. But hard look review would operate to ensure that political influences are playing a proper role.

discipline.<sup>342</sup> As the D.C. Circuit has aptly explained, judges, unlike members of Congress or the President, “are insulated from [political] pressures because of the nature of the judicial process in which [they] participate.”<sup>343</sup> Thus, it may be tempting for judges to try to force agency rulemaking decisions into an adjudicatory mold and “to look askance at all face-to-face lobbying efforts, regardless of the forum in which they occur, merely because [judges] see them as inappropriate in the judicial context.”<sup>344</sup>

Evidence of judges’ relative discomfort with assessing the political factors that feed into legislative-like decisions can be seen in many different places. For example, the judiciary’s desire to force federal agencies into an adjudicatory mold of agency decisionmaking is evident in how the judiciary has “moved us from a vision of rule making as quasi-legislative to one of rule making as quasi-judicial by requiring all kinds of new adjudicatory style procedures in rulemaking,”<sup>345</sup> including the detailed reason-giving requirement embraced by *State Farm*.<sup>346</sup> In addition, various nonreviewability rules, such as *Heckler v. Chaney*’s rule that nonenforcement decisions are not judicially reviewable,<sup>347</sup> suggest that the courts will sometimes refrain from scrutinizing executive decisions that they perceive to turn on factors ill-suited to judicial review, such as a lack of agency resources.<sup>348</sup>

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342. See generally EDLEY, *supra* note 4, at 189 (“It might be claimed that by ignoring politics the courts are able to escape the difficult problem of assessment and balancing that might be thrust on them were the veil lifted . . .”).

343. *Sierra Club v. Costle*, 657 F.2d 298, 401 (D.C. Cir. 1981).

344. *Id.*

345. SHAPIRO, *supra* note 13, at 118.

346. *Cf.* *Am. Radio Relay League v. FCC*, 524 F.3d 227, 246–48 (D.C. Cir. 2008) (Kavanaugh, J., concurring in part and dissenting in part) (criticizing the courts for expanding arbitrary and capricious review from a narrow test into a “far more demanding test” that leads to unpredictable results).

347. *Heckler v. Chaney*, 470 U.S. 821 (1985). See generally Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 N.Y.U. L. REV. 1657, 1667–69 (2004) (discussing *Chaney*’s decision to insulate agency failures to enforce from judicial review).

348. See, e.g., *Animal Legal Def. Fund v. Veneman*, 469 F.3d 826, 848 (9th Cir. 2006) (Kozinski, J., dissenting) (“[A]n agency may choose *not* to adopt discretionary regulations for a variety of reasons, many of which a court can’t review: a change in policy; a lack of enforcement resources; a lack of scientific expertise to address the problem at this time; a change in direction based on a determination that the problem is better addressed some other way.”), *vacated by* 490 F.3d 725 (9th Cir. 2007); *WWHT, Inc. v. FCC*, 656 F.2d 807, 817 (D.C. Cir. 1981) (noting that review of denials of rulemaking petitions is constrained because “[a]n agency’s discretionary decision *not* to regulate a given activity is inevitably based, in large measure, on factors not inherently susceptible to judicial resolution—e.g., internal management considerations as to budget and personnel; evaluations of its own competence; weighing of competing policies within a broad statutory framework”) (internal citations

It is true that this Article's proposal inevitably would force courts to cast aside some of their current discomfort with politics. Changing the judicial mindset, however, may not be as difficult as it sounds. In many situations, judges would not actually need to "weigh" political factors against science and evidence but rather would merely be called upon to acknowledge the factual existence of a rational and legitimate political influence. This might be the case where an agency declined to initiate a completely discretionary rulemaking proceeding or decided to withdraw a draft of a discretionary rule based entirely on its adherence to known presidential priorities and preferences (e.g., "we decline to grant the rulemaking petition because the President wants to develop a comprehensive strategy to the problem" or "we decline the rulemaking petition because the President wants to be able to negotiate a global solution to the problem"). Here, the reviewing court would not need to evaluate the merits of the President's preferences but rather would merely need to acknowledge the factual existence of such preferences and to determine that the agency's reliance on these priorities in setting its own discretionary rulemaking agenda was rational.

It might also be the case that no value-laden weighing of political influences against facts and evidence would be required where an agency used political influence as a "tiebreaker" of sorts to help it choose between multiple factually supportable and statutorily permissible options (for example, where political influences pushed an agency to choose Rule B rather than Rule A where the statute and the science before the agency supported Rule A and B equally). In this situation, a reviewing court would not be called upon to weigh the merits of the political influences against the weight of the existing evidence but rather would simply be called upon to assess as a factual matter whether the agency was correct to claim that rational and legitimate political influences supported the selection of one factually and legally permissible rule over another.

Where things would be much more complicated for judges are those situations in which the science before an agency strongly supports one answer (Answer A) but neither the statute nor the science clearly foreclose another answer (Answer B). Here, if an agency chose Option B instead of A because B was most closely aligned with political influences, such as a presidential directive instructing the agency to promulgate Option B because the President believed Option B best balanced the costs and the benefits in a way that would

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omitted); *see also* EDLEY, *supra* note 4, at 180-81 (discussing how political influences are sometimes "acknowledged as a reason to treat the agency's discretion as unreviewable, and hence immune to legal discipline").

maximize the public good, then a reviewing court would be faced with directly weighing the political influences against the evidence before the agency.

In assessing the weight to be given to a given political influence, courts likely would need to take into account both the *content* and the *form* of the political influence. The *content* of the political influence would be relevant because, as discussed above, not all political influences should be treated as equal.<sup>349</sup> Rather, courts will need to draw lines between permissible and impermissible political influences. Given courts' general desire to force agency decisionmaking into an adjudicatory mold that resembles judicial proceedings sanitized of political influences, courts are not likely to be entirely comfortable with this line-drawing task. In addition, they may not believe they have the capacity to evaluate or weigh certain political judgments. Yet just because courts do not have much experience identifying and weighing political influences does not mean that courts should give up on the task.<sup>350</sup> Furthermore, as discussed above, defining valid "political" factors as those influences coming from political actors that speak to policy judgments or value-laden judgments rather than raw partisan politics should go a long way toward easing courts' discomfort with the notion of giving "politics" a place.<sup>351</sup>

In addition to taking the *content* of political influences into account when assessing the weight to be given to a given political influence, courts also would need to take the *form* of the political influence into account. As Edley has suggested, some political influences may be articulated in a form designed to reinforce some of the positive attributes of politics, such as accountability, public participation, and representativeness, whereas other influences may be articulated in a form that underscores the negative attributes of politics, such as willfulness and tyranny of the majority.<sup>352</sup> If courts pay attention to the form of the political influences relied upon by an agency, then courts can ensure that

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349. See *supra* Section III.B. In her forthcoming article, Professor Mendelson has reached a similar conclusion about the importance of the content of political influences. See Mendelson, *supra* note 123, at 4 (arguing that whether presidential influences on agency decisions help to increase or decrease legitimacy depends "on the *content* of that influence").

350. Cf. *Sierra Club v. Costle*, 657 F.2d 298, 401 (D.C. Cir. 1981) ("As judges . . . we must refrain from the easy temptation to look askance at all face-to-face lobbying efforts, regardless of the forum in which they occur, merely because we see them as inappropriate in the judicial context."); SHAPIRO, *supra* note 13, at 171 (arguing that judges need to remember "what rule-making agencies are" and need to stop treating them "as if they were courts instead of subordinate legislatures" free to make law in the face of "diverse and changing political sentiments").

351. See *supra* Section III.B.

352. See EDLEY, *supra* note 4, at 21 fig.1; cf. *id.* at 196-97 (arguing that politics should be accepted as "good politics" only where the political influences "embody the positive attributes like representativeness and accountability").

the positive aspects of politics are reinforced. Such an approach would likely mean that agency reliance on publicly announced presidential directives or publicly available “prompt letters” issued by OIRA could be viewed as permissible (depending on the content of the directives and letters), whereas agency reliance on backdoor political tactics would be viewed as impermissible because such influences fail to reinforce notions of accountability, representativeness, or public participation.

## CONCLUSION

The judiciary’s current formulation of arbitrary and capricious review, which focuses on whether agencies have adequately explained their decisions in technocratic rather than political terms, has incentivized agencies to hide behind technocratic façades. Expanding current conceptions of arbitrary and capricious review beyond its singular technocratic focus—so that credit also would be given to certain influences from political actors that an agency openly and transparently discloses and relies upon in its rulemaking record—would yield many significant benefits. Such a move would better harmonize arbitrary and capricious review with other major administrative law doctrines, such as *Chevron* deference, which seem to embrace the political control model of agency decisionmaking. Such a change would also enable political influences to come out into the open, thereby facilitating greater political accountability. In addition, it could lead courts to defer to agencies more often, thereby offering a means of softening the “ossification” charge frequently raised against arbitrary and capricious review. Finally, encouraging agencies to disclose political factors could help to create a more effective separation between science and politics.

Despite the benefits of giving politics a place in arbitrary and capricious review, the success of the expanded conception of arbitrary and capricious review proposed here ultimately will rest in the hands of courts and agencies. Agencies will need to become comfortable openly acknowledging influences by political actors and explaining their decisions in both technocratic and political terms, and the courts will need to acknowledge that an agency’s reliance on influences from political actors that involve policy considerations and value judgments can help to provide a reasonable, nonarbitrary explanation in the rulemaking context. Although certainly this calls for significant change on the part of agencies and courts, there are signs that such change might not be all that far off. The Court’s recent decision in *FCC v. Fox Television Stations, Inc.*, for example, suggests that at least some members of the current Court might be ready to acknowledge a role for political influences in agency

decisionmaking.<sup>353</sup> Similarly, the NHTSA's recent rule setting fuel efficiency standards for cars and light trucks could serve as a sign that agencies under the Obama Administration might more readily acknowledge and disclose presidential oversight.<sup>354</sup>

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353. See *supra* notes 87-92 and accompanying text.

354. See *supra* notes 110-115 and accompanying text.