

REASONED EXPLANATION AND POLITICAL  
ACCOUNTABILITY IN THE ROBERTS COURT

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In the past two years, the Supreme Court has invalidated two major executive-branch initiatives—the termination of the Deferred Action for Childhood Arrivals (DACA) policy and the addition of a citizenship question to the census—as arbitrary and capricious. Many have cast Chief Justice Roberts’s decisive votes and opinions in these cases as efforts to protect the Court’s public standing by skirting political controversy. Taken on their own terms, however, the opinions seem less about keeping the Court out of the political thicket and more about pushing the Trump Administration into it. And that use of arbitrariness review as a judicial backstop for political accountability is an important jurisprudential development in its own right. For decades, the Court has understood arbitrariness review mainly as a check against bureaucratic blunders, lawlessness, and political interference with agency expertise. But in the DACA and census cases, a narrow majority refashioned this form of review as a tool for forcing an administration to pay the appropriate political price for its discretionary choices.

Through close and context-laden readings of these back-to-back opinions, I aim to surface the “accountability-forcing” form of arbitrariness review that they employ and to draw out its significance. Between the two cases, the Roberts-led majority identified three kinds of agency explanations that should be rejected or disfavored on political-accountability grounds: post hoc explanations, buck-passing explanations, and pretextual explanations. Standing alone, these new rules (and new justifications for old ones) have wide-ranging consequences. But if the shift toward an accountability-centric vision of arbitrariness review continues, it could also lead to renovations of several other administrative-law doctrines—including narrowing the carve-outs from judicial review, undermining the remedy of “remand without vacatur,” and empowering courts to discount agencies’ fallback justifications for their choices.

After laying out the accountability-forcing turn in the Court’s recent cases and sketching its possible ramifications, I consider several grounds for doubt about its propriety and efficacy. Some of these objections, I conclude, have real force. Still, none debunks the core insight that I take to underlie Roberts’s approach: The reasoned explanation requirement can sometimes be deployed so as to promote not only rational administration, but democracy as well.

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TABLE OF CONTENTS

INTRODUCTION.....	1
I. ACCOUNTABILITY-FORCING IN ACTION.....	7
A. Accountability-Forcing in <i>Regents</i> .....	10
1. <i>DACA’s Rescission and the Avoidance of Responsibility</i> .....	10
2. <i>Accountability-Forcing and Post Hoc Explanations</i> .....	16
3. <i>Accountability-Forcing and Buck-Passing Explanations</i> .....	22
B. Accountability-Forcing in <i>Department of Commerce: Pretext</i> .....	32
II. WHAT NEXT?.....	42
A. Reviewability.....	42
1. “ <i>No Law to Apply</i> ”.....	42
2. <i>General Enforcement Policies</i> .....	45
B. Remand without Vacatur.....	47
C. Arguments in the Alternative.....	49
III. GROUNDS FOR DOUBT.....	51
A. Administrative Common Law.....	51
B. Political Questions and Agency Burdens.....	55
C. Efficacy and the Removal Comparison.....	60
D. Half-Measures and White-Washing.....	67
CONCLUSION.....	70

## INTRODUCTION

According to a familiar picture, the President and his administration are held accountable in two parallel ways: legally and politically. Legal accountability comes largely from judicial review under the Administrative Procedure Act (APA), which authorizes courts to set aside agency actions that are “arbitrary” or otherwise unlawful.<sup>1</sup> Political accountability operates through a much more diffuse set of mechanisms—the risk of the President’s ouster at the next election, the sting of public criticism, the loss of political capital, the burdens of congressional oversight, and more.<sup>2</sup> Unlike arbitrariness review, these political checks impose no defined “test.” But they ensure that agency actions are publicly acceptable, not just legally permissible, or at least that the decision makers bear consequences if their decisions are not.

Courts engaged in arbitrariness review under the APA have always been aware of the parallel channel of political accountability, but they have not traditionally viewed it as their concern. Under the classic conception, the court’s job is to ensure that an agency’s decision was “based on a consideration of the relevant factors” and did not involve a “clear error of judgment.”<sup>3</sup> Such review protects the public from bureaucratic blunders, legal violations, and (more controversially) political interference with agency expertise.<sup>4</sup> No doubt the mechanisms of political accountability loom in the background of this process, just as judicial review looms in the background of politics.<sup>5</sup> And if the APA requires an agency to facilitate or entertain

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<sup>1</sup> 5 U.S.C. § 706(2)(A) (2018). Although the President’s own actions are not subject to APA review, *see* *Franklin v. Massachusetts*, 505 U.S. 788, 796 (1992), much (if not most) of his power lies in his influence over the decisions of the various agencies that report to him. *See* Lisa Manheim & Kathryn A. Watts, *Reviewing Presidential Orders*, 86 U. CHI. L. REV. 1743, 1750-74 (2019).

<sup>2</sup> *See, e.g.*, Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2335 (2001) (describing the various incentives for a President to respond to popular opinion); Aziz Z. Huq, *Removal as a Political Question*, 65 STAN. L. REV. 1, 53-54 (2013) (describing agencies’ various forms of accountability to Congress).

<sup>3</sup> *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971); *see* 5 U.S.C. § 706(2)(A) (2018).

<sup>4</sup> *See, e.g.*, JOHN F. MANNING & MATTHEW C. STEPHENSON, *LEGISLATION AND REGULATION* 914-21 (3d ed. 2017); Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 SUP. CT. REV. 51, 87-92.

<sup>5</sup> Most notably, the existence of alternative, political checks on agency action forms part of the case for judicial deference and humility. *See, e.g.*, *Chevron U.S.A. Inc. v. Nat’l Res. Def. Council, Inc.*, 467 U.S. 837, 866 (1984) (“[F]ederal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do.”); Mark Seidenfeld, *The Irrelevance of Politics for Arbitrary and Capricious Review*, 90 WASH. U. L. REV. 141, 159 (2012) (similar).

public input on the front end of its decision-making process, courts will enforce those procedural requirements.<sup>6</sup> But when it comes to reviewing the agency’s ultimate policy choice, under this classic conception, a court need not concern itself with any parallel, political process that the same choice might (or might not) also have set in motion.

I argue here that the Supreme Court’s recent decisions have begun to turn away from this “parallel lines” understanding of political accountability and arbitrariness review and toward a markedly different one. Under the emerging model, ensuring robust political accountability is *itself* a central concern of such review, alongside (or perhaps ahead of) ensuring the substantive soundness or political neutrality of agency decisions. Accordingly, courts can and should use arbitrariness review to force an administration into explaining itself in ways that facilitate, rather than frustrate, the natural political repercussions of its choices. Borrowing a page from “political process theory” in constitutional law, courts applying this approach will give agencies broad substantive deference—deference based, in part, on the executive branch’s greater political accountability—but they will guard against efforts to clog and manipulate the very channels of political accountability themselves.<sup>7</sup>

My argument rests on two cases, both decided in the Court’s past two Terms, that suggest a new embrace of this “accountability-forcing” conception of arbitrariness review.<sup>8</sup> The first and more central is *DHS v. Regents of the University of*

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<sup>6</sup> See 5 U.S.C. § 553 (2018) (laying out rulemaking procedures); *infra* note 186 (discussing the relevance of the notice-and-comment process to political accountability).

<sup>7</sup> See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (suggesting “more exacting judicial scrutiny” of “legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation,” including “restraints upon the dissemination of information”); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 73-104 (1980). I will sometimes speak of “the executive branch,” rather than of “agencies” generally, because the main cases I discuss all concern executive-branch agencies. The argument’s application to independent agencies raises distinct issues that I do not take up here.

<sup>8</sup> Although the Court’s apparent embrace of this role is new (and raises a host of new issues), I am hardly the first to challenge or complicate the “parallel lines” picture sketched above. For starters, then-Professor Elena Kagan’s defense of presidential administration offered an alternative vision of hard-look review “centered on the political leadership and accountability provided by the President.” Kagan, *supra* note 2, at 2380; see *infra* notes 168-174- (discussing how the Court’s recent cases may vindicate that vision). More recently, Kathryn Watts has argued that treating broadly “political” considerations as valid grounds for agency action, but requiring that these factors be openly disclosed, would facilitate “greater political accountability” by making these influences known to the public. Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 *YALE L.J.* 2, 42-45 (2009); see also *infra* notes 162-168 (discussing related ideas). Mark Seidenfeld has likewise argued that “there is a role for judicial review to facilitate proper operation of the political arena” by demanding reasoned explanations for agency actions—

*California*, in which the Court invalidated the Trump Administration’s rescission of the Deferred Action for Childhood Arrivals (DACA) policy.<sup>9</sup> Read closely and in context, I will argue, *Regents* reflects an overriding concern to ensure that the Trump Administration could not rescind DACA without paying the appropriate political price. That is why the Court stressed that the Administration had rested its decision on a mistaken claim of legal compulsion, rather than an avowed exercise of discretion. And that is why, when the Administration *did* offer grounds for rescinding DACA based on immigration policy, the Court refused to entertain them. Unless the Administration was forced to start over, the Court worried, “the public” would be denied the opportunity to “respond fully and in a timely manner to [the Administration’s] exercise of authority.”<sup>10</sup> While the Court sought to ground that concern in “foundational principle[s] of administrative law,”<sup>11</sup> its explicit use of arbitrariness review as a tool for enforcing political accountability is nearly unprecedented.

And the Court’s express appeal to that value is “nearly” unprecedented—rather than completely so—only because it had hinted in the same direction in *Department of Commerce v. New York* the year before.<sup>12</sup> There the Court rebuffed the Secretary of Commerce’s attempt to add a citizenship question to the 2020 census, reasoning that his only avowed rationale for that choice (better enforcement of the Voting Rights Act) was pretextual. An obvious problem with pretextual justifications is that

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not in order to make political influences transparent, as Watts suggests, but in order to inform the public of “the likely concrete implications” of the agency’s decision. Seidenfeld, *supra* note 5, at 160, 197. Lisa Schultz Bressman has made a related argument based on congressional monitoring. Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1782-83 (2007). An overlapping body of commentary argues that the Court’s decision in *Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983), in particular, might be justified by implicit political-accountability concerns. *See infra* note 166. Kevin Stack has argued (now presciently, as I will explain) that the longstanding rule limiting judicial review to an agency’s contemporaneous rationale could best be justified by political-accountability concerns. *See infra* note 98 and accompanying text. And Daniel Hemel and Aaron Nielson have defended an important line of cases in the D.C. Circuit in part on the basis of their contribution to political accountability. *See infra* notes 154-157. Finally, several others have made related observations about the benefits of notice-and-comment rulemaking (although, as I will explain, that process has generally been understood as a means of making agencies responsive to public input on the front end, not as a means of subjecting them to political accountability on the back end). *See infra* note 186. While the analysis of arbitrariness review that I develop here is distinct from those offered in these various works (and my argument that the Court has moved toward this conception rests on cases post-dating them), it is indebted to all of them.

<sup>9</sup> 140 S. Ct. 1891 (2020).

<sup>10</sup> *Id.* at 1909.

<sup>11</sup> *Id.*

<sup>12</sup> 139 S. Ct. 2551 (2019).

they frustrate judicial review. But the Court framed the problem more broadly than that: “The reasoned explanation requirement of administrative law,” it said, “is meant to ensure that agencies offer genuine justifications for important decisions, reasons that can be scrutinized by courts *and the interested public.*”<sup>13</sup> By disabling the agency from relying on a pretext for purposes of judicial review, therefore, the Court was also protecting the distinct, political channel of accountability that runs from the agency to the public at large. Again, no prior case had construed the office of the “reasoned explanation requirement”—an implied corollary of a *court’s* obligation to review for *arbitrariness*—to extend so far.

I have referred to “the Court” throughout the last two paragraphs, but of course the pivotal figure in this turn is actually Chief Justice John Roberts. Roberts authored the 5–4 opinions in both cases; he was the only member of the majority to rely solely on his pretext theory in *Department of Commerce*; and he was the least obvious member of the majority in *Regents* as well.<sup>14</sup> Many have cast Roberts’s aisle-crossing votes in these high-stakes cases as essentially political—as marks of his “institutionalism,” meaning roughly his concern to protect the public reputation and perceived neutrality of the Court.<sup>15</sup> It is certainly possible that Roberts’s approach to these cases was motivated by a desire to skirt political controversy and burnish the reputation of the institution he leads. But taking his opinions in *Regents* and *Department of Commerce* on their own terms, they seem less about keeping the Court out of the political thicket and more about pushing the Trump Administration into it. They reflect a vision of courts as political ombudsmen—one might even say umpires—who will rarely second-guess the executive branch’s policy judgments themselves, but who will police the reason-giving process to ensure that the public has a fair opportunity to evaluate and respond to those same decisions.<sup>16</sup>

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<sup>13</sup> *Id.* at 2575-76 (emphasis added).

<sup>14</sup> This is apparent from the *Regents* oral argument, *see generally* Transcript of Oral Argument, *DHS v. Regents*, 140 S. Ct. 1891 (2020) (No. 18-587); from the fact that Chief Justice Roberts alone had previously accepted the substantive adequacy of Secretary Ross’s justification in *Department of Commerce*, *see infra* notes 176-183 and accompanying text; and from his apparent vote to hold the related Deferred Action for Parents of Americans (DAPA) policy unlawful in 2016, *see United States v. Texas*, 136 S. Ct. 2271 (per curiam) (affirming by an equally divided Court).

<sup>15</sup> *See, e.g.*, Jennifer M. Chacón, *The Inside-Out Constitution: Department of Commerce v. New York*, 2019 SUP. CT. REV. 231, 268 (2019); Michael J. Klarman, *Foreword: The Degradation of American Democracy—and the Court*, 134 HARV. L. REV. 1, 253 (2020); John O. McGinnis, *What Does the Chief Justice Maximize?*, LAW & LIBERTY (July 9, 2020), <https://lawliberty.org/what-does-the-chief-justice-maximize> [<https://perma.cc/ZWT3-ZJRJ>].

<sup>16</sup> *Cf.* ELY, *supra* note 7, at 103 (“A referee analogy is also not far off: the referee is to intervene only when one team is gaining unfair advantage, not because the ‘wrong’ team

And one need not be naïve about Chief Justice Roberts’s possible motivations in these cases to think that this vision, taken at face value, matters. For one thing, it now has a significant foothold in the law.<sup>17</sup> Whatever brought them about, the Court’s opinions in *Regents* and *Department of Commerce* will require lower courts to reckon with the role of political accountability in arbitrariness review in new ways. By the same token, they also lend new weight to arguments of the same kind in future cases before the Court itself. And even assuming a good bit of motivated reasoning on Roberts’s part, it is always revealing how a person, once motivated to reach some result, goes about convincing himself or herself of its soundness. Here, Roberts zeroed in on political accountability as a central concern of arbitrariness review. With a majority of the Court keen to rein in perceived excesses of the administrative state, and Roberts continuing to wield the assignment power (albeit not necessarily the swing vote), there is good reason to think that the infrastructure he built could be put to work again sooner rather than later.<sup>18</sup>

Placing this development in its larger jurisprudential context, moreover, suggests that it is not a *deus ex machina* but a logical next step. As many have observed, the arc of prevailing understandings of judicial review and the administrative state is defined by a tension between politics and expertise.<sup>19</sup> In stylized form, the story starts with the emergence of “hard-look review,” exemplified by *Motor Vehicles Association v. State Farm*,<sup>20</sup> as a demand that agencies bring a kind of neutral expertise to bear on even politically charged problems.<sup>21</sup> In a later era epitomized by *Chevron* deference,<sup>22</sup> the Court shifted toward understanding political

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has scored.”); Klarman, *supra* note 15, at 253 (“Perhaps the Chief was just playing the part of the proverbial umpire calling balls and strikes, but the smart money is betting that his concern for the Court’s legitimacy and his own historical reputation were the determinative factors.”).

<sup>17</sup> Cf. Gerald Gunther, *The Supreme Court, 1971 Term: Foreword—In Search of Evolving Doctrine on a Changing Court*, 86 HARV. L. REV. 1, 36-37 (1972) (noting, in assessing the significance of the Court’s recent invalidations of statutes under rationality review, that “the reiterations of the rationality formulas are after all on the books and have some claim to a life and momentum of their own,” and that “[t]hey demonstrate at least an instinctive receptiveness to a changing Court role”).

<sup>18</sup> See Gillian E. Metzger, *The Roberts Court and Administrative Law*, 2019 SUP. CT. REV. 1, 67 (2019) (observing that “skepticism about administrative government may well be the consistent driver animating Roberts Court administrative law”).

<sup>19</sup> See, e.g., Freeman & Vermeule, *supra* note 4, at 87; Kathryn A. Watts, *Controlling Presidential Control*, 114 MICH. L. REV. 683, 684-88, 720-23 (2016).

<sup>20</sup> *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).

<sup>21</sup> See, e.g., Manheim & Watts, *supra* note 1, at 1752-53; Freeman & Vermeule, *supra* note 4, at 88; Kagan, *supra* note 2, at 2270-71.

<sup>22</sup> See *Chevron U.S.A. Inc. v. Nat’l Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984). The story is stylized in part because *Chevron* itself was nearly contemporaneous with *State*

responsiveness as a *virtue* in agency decision-making, one with which courts ought not interfere.<sup>23</sup> Then, a little over a decade ago, *Massachusetts v. EPA*<sup>24</sup> suggested that the pendulum had swung back toward the older, “expertise-forcing” vision of judicial review.<sup>25</sup>

But it is now clear that, thanks to developments within and beyond the Court, this throwback to technocracy was short-lived—and that some vision more tolerant of political control will take its place. For one thing, the Court’s conservatives have never subscribed to the expertise-forcing agenda.<sup>26</sup> And more fundamentally, the last few presidencies leave little doubt that, as Kathryn Watts recently observed, “presidential control over the regulatory state is here to stay.”<sup>27</sup> As she rightly says, the real question now is how “administrative law doctrines can and should respond to the new status quo.”<sup>28</sup> The “accountability-forcing” form of arbitrariness review represents a natural answer to that question emerging at a natural time.<sup>29</sup> It takes the

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*Farm. See Freeman & Vermeule, supra note 4, at 88 n.102; 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, 398 (Peter L. Strauss ed., 2006) (explaining that “Chevron was almost instantly seized upon as a major decision by the D.C. Circuit[,] . . . and after establishing itself as a leading case there, it migrated back to the Supreme Court, where it eventually came to be regarded as a landmark decision”).*

<sup>23</sup> See, e.g., Gillian E. Metzger, *Foreword: Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293, 1333-34 (2012); Kagan, *supra* note 2, at 2372-76.

<sup>24</sup> 549 U.S. 497 (2007).

<sup>25</sup> Freeman & Vermeule, *supra* note 4, at 52; *see id.* (defining “expertise-forcing” as the “attempt by courts to ensure that agencies exercise expert judgment free from outside political pressures”).

<sup>26</sup> Chief Justice Roberts’s opinion for that majority in *Department of Commerce* is a case-in-point: He inveighed against “subordinating the Secretary’s policymaking discretion to the [Census] Bureau’s technocratic expertise,” and he disavowed any implication that political influence is improper. 139 S. Ct. at 2571; *accord* Metzger, *supra* note 18, at 37 (suggesting that “Roberts’ split vote . . . allowed him reinforce th[e] structural principle of political control of policy”).

<sup>27</sup> Watts, *supra* note 19, at 726; *see id.* at 684-726 (documenting how presidential control is “woven into the fabric” of the administrative process and “occurs regardless of the political party in the White House”); Metzger, *supra* note 23, at 1332 (“Expanding presidential control over administration is the central dynamic of contemporary national governance.”); Seidenfeld, *supra* note 5, at 157.

<sup>28</sup> Watts, *supra* note 19, at 686; *see id.* at 686-87; Kagan, *supra* note 2, at 2271-72.

<sup>29</sup> It not the only possible answer to that question. Indeed, Watts has laid out a multi-pronged framework for how “a variety of . . . doctrines can be coordinated to enhance the positive *and* restrain the negative aspects of presidential control.” Watts, *supra* note 19, at 687. One notable proposal would require or at least reward disclosure of presidential influences on agency decisions. *See, e.g., id.* at 735-40; Nina A. Mendelson, *Disclosing ‘Political’ Oversight of Agency Decision Making*, 108 MICH. L. REV. 1127, 1163-77 (2010); *see also infra* notes 168-172 and accompanying text.



political nature of many significant executive-branch decisions entirely for granted, then uses the main lever at the courts' disposal—the power to invalidate agency actions as inadequately reasoned—to try to promote political accountability for those political choices.<sup>30</sup>

I do not want to overstate the point: Any emerging development can turn out, in retrospect, to have been a false start. And predicting the trajectory of the Court's jurisprudence would be especially unwise when the Court's membership has been changing rapidly and the Court itself has been under unusual political pressures.<sup>31</sup> Suffice it to say, then, that the Court's most recent cases point toward a substantial and intriguing vision of arbitrariness review as a servant of political accountability and that, for practical and intellectual reasons alike, this vision well warrants explanation and critique.

I will undertake that project over three parts. Part I identifies three kinds of explanations that the Roberts-led majority treated as threats to political accountability in *Regents* and *Department of Commerce* and unpacks the opinions' responses to each. Part II then identifies three further directions in which the law of APA review could plausibly move spurred by the same concern. Finally, Part III identifies and tentatively evaluates several objections to the propriety and efficacy of using arbitrariness review to promote political accountability. The objections make clear that the accountability-forcing brand of arbitrariness review has both limits and drawbacks. But, I conclude, they do not negate the idea's core appeal: Under the right circumstances, the reasoned explanation requirement can be deployed so as to promote not only rational administration, but democracy as well.

## I. ACCOUNTABILITY-FORCING IN ACTION

The accountability-forcing vision of APA review begins from a simple premise: Political accountability sometimes depends on the public's understanding not only *what* the government has done, but *why*.<sup>32</sup> That premise, in turn, reflects a more

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<sup>30</sup> Put another way, the approach conceives arbitrariness review less as a substitute for political accountability—an alternative check that compensates for bureaucrats' political insulation, *see, e.g.*, David S. Tatel, *The Administrative Process and the Rule of Environmental Law*, 34 HARV. ENVTL. L. REV. 1, 2 (2010)—and more as a complement that makes political accountability itself more robust. *See infra* notes 291-293 and accompanying text.

<sup>31</sup> *See, e.g.*, Annie Linskey, *Biden, Squeezed on the Supreme Court, Promises a Commission to Consider Changes*, WASH. POST (Oct. 22, 2020, 8:50 PM EDT), [https://www.washingtonpost.com/politics/biden-promises-commission-on-overhauling-supreme-court/2020/10/22/4465ead6-121d-11eb-ba42-ec6a580836ed\\_story.html](https://www.washingtonpost.com/politics/biden-promises-commission-on-overhauling-supreme-court/2020/10/22/4465ead6-121d-11eb-ba42-ec6a580836ed_story.html) [https://perma.cc/C8FP-NBJB].

<sup>32</sup> "Accountability" can mean many different things. *See, e.g.*, Nicholas O. Stephanopoulos, *Accountability Claims in Constitutional Law*, 112 NW. U. L. REV. 989, 999-1000 &

general truth about how we assess decisions and decision makers. Such evaluations ordinarily depend on the attitudes, or ways of responding to reasons, that a decision expresses.<sup>33</sup> Consider a simple, nonlegal example: An elderly relative asks me to visit her in a nursing home, but I decline.<sup>34</sup> If I did that for fear of transmitting a contagious disease to her, my choice warrants one reaction; if I did it in order to stay home and watch television, it merits another. Armed only with the fact of what I did, you will not be able to say whether my decision showed conscientiousness or callousness. And, as a result, you will not know whether my choice warrants praise or blame, or how it should affect your expectations of me in the future.<sup>35</sup>

Political decisions and our assessments of them are not fundamentally different. Take President Trump’s refrain that he would (and did) tackle the DACA question “with heart and compassion.”<sup>36</sup> As Trump evidently appreciated, the same ultimate policy will have a different meaning, and thus will meet with a different reaction, if

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n.37 (2018) (collecting definitions). In speaking of “political accountability” for executive-branch decisions, I mean the opportunity of individuals and institutions outside the executive branch, other than the courts, to assess those decisions and to have their assessments affect, positively or negatively, the executive-branch decision makers. (The effect need not be electoral or, for that matter, even tangible; for example, the very fact of public disapproval can be a form of accountability, so long as that fact is valued negatively by the decision makers, *see infra* note 336 and accompanying text.) In contrast, I do not intend “political accountability” to refer to relationships of accountability internal to the executive branch (such as an agency’s subjection to presidential control), except insofar as such relationships are instrumentally relevant to the external relationships just described. As earlier noted, I bracket independent agencies altogether, *supra* note 7, although the potential extension to that context will sometimes be obvious.

<sup>33</sup> See T.M. SCANLON, MORAL DIMENSIONS: PERMISSIBILITY, MEANING, BLAME 4 (2008) (distinguishing between the permissibility of an action and “its meaning—the significance, for the agent and others, of the agent’s willingness to perform that action for the reasons he or she does”); Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1509-12 (2000) (defending an “approach to evaluating action” that asks whether “performing act *A* for the sake of goal *G* express[es] rational or morally right attitudes toward people”).

<sup>34</sup> *Cf.* Anderson & Pildes, *supra* note 33, at 1511 (suggesting a similar example); SCANLON, *supra* note 33, at 52 (same).

<sup>35</sup> See SCANLON, *supra* note 33, at 52-60 (discussing the relevance of an action’s meaning, which “depends on the agent’s reason for performing it,” to the warranted reactions of others).

<sup>36</sup> *Statement from President Donald J. Trump*, WHITE HOUSE, Sept. 5, 2017, <https://www.whitehouse.gov/briefings-statements/statement-president-donald-j-trump-7> [<https://perma.cc/XRA5-XVAN>]; *see, e.g.*, Nolan D. McCaskill, *Trump Says He Will Treat Dreamers ‘With Heart,’* POLITICO, Feb. 16, 2017; *Trump To Find ‘Compassionate’ Way To Deal with Dreamers: White House*, REUTERS (June 19, 2020, 2:01 PM), <https://www.reuters.com/article/us-usa-court-immigration-whitehouse/trump-to-find-compassionate-way-to-deal-with-dreamers-white-house-idUSKBN23Q300> [<https://perma.cc/C2S5-CRFP>].

it is understood to show compassion rather than, say, cruelty. And just as with the nursing-home decision, that question of meaning depends on the action's reasons. A decision to end DACA based on a judgment that its beneficiaries are unworthy would say one thing; a decision to do so because the law forbids the policy would say something else.<sup>37</sup> Voters and others thus need to form judgments about an action's reasons in order to exercise their role of "pass[ing] judgment on [the Administration's] efforts,"<sup>38</sup> much as courts need to know the action's reasons in order to assess whether it was "arbitrary," "capricious," or the like.

And that shared need for reasons points toward a salutary function that courts could serve: They could facilitate the *public's* effective access to information about the government's reasons for action, not merely their own. Indeed, Gerald Gunther argued long ago that courts could "improve the quality of the political process," in the legislative context, by "plac[ing] a greater burden on the state to come forth with explanations" of its reasons for adopting a law.<sup>39</sup> Gunther's proposal fell flat in light of the difficulty of aggregating different legislators' objectives and the Court's felt lack of authority to "insist[] that a legislative body articulate its reasons for enacting a statute."<sup>40</sup> In the APA context, however, the judicial demand for a satisfactory explanation of an action's reasons is already firmly in place.<sup>41</sup> And as a practical matter, the explanation that an agency offers to satisfy that demand will be importantly linked to the public's understanding of an action's reasons as well.<sup>42</sup> By insisting on certain kinds of explanations for purposes of judicial review, therefore, courts can exercise indirect control over the kinds of explanations that will be available to the public, too.

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<sup>37</sup> See *infra* Section I.A.1 (recounting the Administration's rationales for rescinding DACA).

<sup>38</sup> *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 498 (2010); *cf. infra* Section III.C (discussing *Free Enterprise Fund* and other cases resting the President's power to remove agency officials on a theory about political accountability).

<sup>39</sup> Gunther, *supra* note 17, at 44; *see id.* at 44-46.

<sup>40</sup> *U.S. Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980). For further discussion, see, for example, GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* 520-23 (8th ed. 2018); and Lawrence Gene Sager, *Foreword: Constitutional Limitations on Congress' Authority To Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 91, 158-61 (1981).

<sup>41</sup> See *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971); *cf. United States v. Nova Scotia Food Prod. Corp.*, 568 F.2d 240, 252 (2d Cir. 1977) ("[T]he agencies do not have quite the prerogative of obscurantism reserved to legislatures."); *Ethyl Corp. v. EPA*, 541 F.2d 1, 68 (D.C. Cir. 1976) (en banc) (Leventhal, J., concurring) ("In the case of legislative enactments, the sole responsibility of the courts is constitutional due process review. In the case of agency decision-making the courts have an additional responsibility set by Congress.").

<sup>42</sup> I return to the nature and strength of that linkage below. See *infra* Section III.C.

My central argument is that the Roberts Court’s most recent APA decisions have seized on this logic and begun to use arbitrariness review in just this way. Those decisions indicate that three kinds of explanations will be disfavored or rejected on the ground that they frustrate political accountability: post hoc explanations (*Regents*), buck-passing explanations (*Regents* again), and pretextual explanations (*Department of Commerce*). In the balance of this Part, I will defend that reading of the cases and draw out the significance of each of the three accountability-forcing moves they make. Because the first two both require a grasp of the political and legal context of DACA’s rescission, however, I start there.

## A. ACCOUNTABILITY-FORCING IN *REGENTS*

### 1. *DACA’s Rescission and the Avoidance of Responsibility*

In the brief narrative account that follows, two features of the Trump Administration’s approach to rescinding DACA should stand out. First, the Administration sought to deflect political responsibility by insistently denying that the decision about DACA’s fate was really its to make. Second, the Administration ultimately gave additional reasons for its decision that, because of their belated articulation, escaped meaningful public scrutiny. As I will argue below, both of these dynamics are essential to understanding the Court’s accountability-forcing response in *Regents*.<sup>43</sup>

#### a) *Round One: The Buck-Passing Explanation*

When Donald Trump announced his run for President, he promised to end DACA “immediately.”<sup>44</sup> Adopted in 2012, the policy had made certain young people who were brought to the United States as children (known as “Dreamers”) presumptively eligible for “deferred action” and related benefits, including work authorization.<sup>45</sup> But despite Trump’s campaign promise, his Administration did nothing about DACA for seven months. We now know that he was caught between competing pressures, both internally and externally.<sup>46</sup> Some hardliners viewed maintaining the policy as an unacceptable departure from both the President’s anti-

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<sup>43</sup> The most comprehensive account of the Administration’s internal decision-making about DACA is JULIE HIRSCHFELD DAVIS & MICHAEL D. SHEAR, *BORDER WARS: INSIDE TRUMP’S ASSAULT ON IMMIGRATION* (2019). I draw on their reporting, as well as other journalists’ accounts, public statements, and materials obtained in FOIA litigation, throughout this subsection.

<sup>44</sup> *Donald Trump’s Presidential Announcement Speech*, *TIME* (June 16, 2015), <https://time.com/3923128/donald-trump> [<https://perma.cc/RQ8M-XNJQ>].

<sup>45</sup> See *Regents*, 140 S. Ct. at 1901-02 (summarizing DACA policy).

<sup>46</sup> See DAVIS & SHEAR, *supra* note 43, at 170-75.

immigrant agenda and the rule of law (ideas that tended to blur together). But many others—including, seemingly, Trump himself—did not relish the prospect of upending the lives of hundreds of thousands of blameless young people who had formed deep connections with their American communities. And so the Administration dithered—at least until several Republican state attorneys general (colluding with DACA’s internal opponents) forced the issue by threatening to challenge the policy in court.<sup>47</sup>

At that point, a two-fold solution emerged. First, the Administration would end DACA, but with a six-month delay. That deadline, the thought went, would give the Administration potent leverage in negotiations with Democrats in Congress. If all went well, the President could avoid actually acting against DACA beneficiaries and, at the same time, obtain funding for a border wall that would gratify his supporters.<sup>48</sup> Second, the Administration would cast the decision in legal terms, not as a policy objection to immigration relief for “Dreamers.” In part that was because the Acting DHS Secretary, Elaine Duke, “did not want her name on” the policy arguments proposed by the most anti-immigrant members of the Administration.<sup>49</sup> But the decision to rely on legal grounds was not just about Duke’s personal scruples or reputation. For one thing, the Administration’s nuanced position—it would end DACA, but it supported legislation protecting the same people—made far more sense if the objection to DACA was based on legal compunctions, not immigration policy.<sup>50</sup> And perhaps most importantly, the legal rationale relieved not just Duke, but Trump as well, of personal responsibility for an unpopular choice.

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<sup>47</sup> See Letter from Ken Paxton, Att’y Gen. of Tex., to Jeff Sessions, U.S. Att’y Gen. (June 29, 2017), [https://www.texasattorneygeneral.gov/sites/default/files/files/epress/DACA\\_letter\\_6\\_29\\_2017.pdf](https://www.texasattorneygeneral.gov/sites/default/files/files/epress/DACA_letter_6_29_2017.pdf) [<https://perma.cc/9765-B6RL>]; see also DAVIS & SHEAR, *supra* note 43, at 158-59, 167 (describing the genesis of this strategy).

<sup>48</sup> See DAVIS & SHEAR, *supra* note 43, at 172-74; see also “Principals Committee, DACA: Summary of Conclusions,” available at Dkt. 63-1, p. 209, No. 1:18-cv-02445 (E.D.N.Y. Aug. 14, 2019) (memorializing rescission plan and directing agencies to “develop a unified list of legislative items” for inclusion in possible legislation “that addresses individuals who had previously been eligible [for] DACA”).

<sup>49</sup> Michael D. Shear, Julie Hirschfeld Davis & Adam Liptak, *How the Trump Administration Eroded Its Own Legal Case on DACA*, N.Y. TIMES (Nov. 11, 2019), <https://www.nytimes.com/2019/11/11/us/politics/supreme-court-dreamers-case.html> [<https://perma.cc/5E79-A729>]; see DAVIS & SHEAR, *supra* note 43, at 175.

<sup>50</sup> For example, when a reporter asked the White House Press Secretary where “the President stand[s] on the program itself,” she answered that “it’s something that he would support if Congress puts it before him” (at least as part of “responsible immigration reform”). His concern, she said, was that “this has to be something where the law is put in place.” *Press Briefing by Press Secretary Sarah Sanders*, WHITE HOUSE (Sept. 5, 2017), <https://www.whitehouse.gov/briefings-statements/press-briefing-press-secretary-sarah-sanders-090517> [<https://perma.cc/86PU-DMUC>].

An anecdote about the rescission announcement makes this point vivid. As of the day before the announcement, Trump planned to announce the decision himself. But he “detested the press coverage of his impending decision,” which “portrayed ending DACA as a coldhearted, shortsighted move.”<sup>51</sup> He “could not stand the thought of being seen as mean to defenseless kids.”<sup>52</sup> And so he decided to leave Attorney General Jeff Sessions to make the on-camera announcement alone, issuing only a little-noticed written statement in his own name. At the White House Press Secretary’s briefing that afternoon, reporters asked if the President was trying to avoid responsibility in just that way. Not at all, she said: “It was a legal decision, and that would fall to the Attorney General, and that’s why he would be the one making the announcement. . . . [I]t would be [up to] the Department of Justice to make a legal recommendation, and that’s what they did.”<sup>53</sup>

The White House’s buck-passing strategy went far beyond the optics of who would appear on TV. Indeed, the public defense of the Administration’s decision was, on the whole, remarkably uniform. As the Press Secretary put it: “The President made the best decision in light of the fact that the system was set up by the Obama administration in clear violation of federal law.”<sup>54</sup> After all, the White House argued, the Administration had “two, and only two, real options to choose from: the likely sudden cancellation of the program by a judge, or an orderly wind-down that preserves the rule of law and returns the question to the legislative branch where it belongs.”<sup>55</sup> Naturally, then, “[t]he President chose the latter of the two options.”<sup>56</sup> Anyone dismayed by the result should remember that “[t]he legislative branch, not the executive branch, writes these laws,” and that, under existing law, the policy “c[ould] not be successfully defended in court.”<sup>57</sup> Trump and Duke were thus blameless; as Trump insistently tweeted, Congress could and should “do [its] job—DACA” before the rescission took effect.<sup>58</sup>

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<sup>51</sup> DAVIS & SHEAR, *supra* note 43, at 175.

<sup>52</sup> *Id.*

<sup>53</sup> Press Briefing, *supra* note 50.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Statement of Donald J. Trump, supra* note 36.

<sup>58</sup> *Trump Tells Congress: ‘Get Ready to Do Your Job - DACA!’*, REUTERS (Sept. 5, 2017), <https://reut.rs/2Ba2Q2c> [<https://perma.cc/8U7Z-TAXM>]. The same basic message described in this paragraph was repeated in a set of detailed talking points distributed by the White House to allies in Congress, see *Talking Points - DACA Rescission* (Sept. 5, 2017), <http://i2.cdn.turner.com/cnn/2017/images/09/05/daca.talking.points%5B8%5D.pdf> [<https://perma.cc/8KJD-J2KM>]; in a “fact sheet” posted on the White House website, see *President Donald J. Trump Restores Responsibility and the Rule of Law to Immigration*, WHITE HOUSE (Sept. 5, 2017), [<https://perma.cc/DDD5-ASPP>]; in a written statement

As the deadline approached with no legislative bargain in sight, the Administration faced mounting pressure not to make good on its threat. But time and again, it used its legal rationale to deflect those appeals. Pressed on the “[e]ighty-six percent of the American people” who favor relief for “DACA-protected kids,” for example, Trump responded that he “doesn’t have the right to do this” without “go[ing] through Congress.”<sup>59</sup> And when the new DHS Secretary, Kirstjen Nielsen, was pressured in a Senate hearing to extend the “wind down” period, she “stress[ed] how strong[ly] [she] fe[el]t about finding a permanent solution for this population,”<sup>60</sup> but reiterated that neither she nor the President had the legal authority to change course. “The Attorney General has made it clear that he believes such exercise is unconstitutional,” she said. “It’s for Congress to fix.”<sup>61</sup>

*b) Round Two: The Post Hoc Explanation*

Not long after, the U.S. District Court for the District of Columbia vacated the rescission action (formally, the “Duke Memorandum”) as arbitrary and capricious, reasoning that the Administration’s legal conclusion was “inadequately explained.”<sup>62</sup> The logic of the court’s decision allowed the Administration to rescind DACA again with a better explanation, and the court stayed its own judgment in

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issued by the President, see *Statement from Donald J. Trump*, *supra* note 36; in the Press Secretary’s briefing, see Press Briefing, *supra* note 50; in a written statement issued by Acting Secretary Duke, see *Statement from Acting Secretary Duke on the Rescission of DACA*, DEP’T HOMELAND SECURITY (Sept. 5, 2017), <https://www.dhs.gov/news/2017/09/05/statement-acting-secretary-duke-rescission-deferred-action-childhood-arrivals-daca> [<https://perma.cc/YD65-Z8TJ>]; and in the on-camera announcement by Attorney General Sessions, see Jeff Sessions, Att’y Gen, Attorney General Sessions Delivers Remarks on DACA (Sept. 5, 2017), <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-daca> [<https://perma.cc/Z8VC-HE7S>]. Although the overwhelming focus in all of these statements was legal concerns and the need for Congress to act, a couple of them mentioned policy-based criticisms of DACA as well. Most conspicuously, Attorney General Sessions added an assertion that DACA had spurred illegal immigration and deprived Americans of jobs. See Sessions, *supra*. And the fact sheet on the White House website said, as part of an extended critique of President Obama for acting “beyond his authority,” that “[p]artly because of DACA, the United States saw a surge in illegal immigration.” *President Donald J. Trump Restores Responsibility*, *supra*.

<sup>59</sup> Remarks by President Trump in Meeting with Bipartisan Members of Congress on Immigration, WHITE HOUSE (Jan. 9, 2018), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-meeting-bipartisan-members-congress-immigration> [<https://perma.cc/5QHA97S6>].

<sup>60</sup> See *Oversight of the U.S. DHS: Hearing Before S. Judiciary Comm.*, 115th Cong. (Jan. 16, 2018), 8:44-8:52, <https://www.c-span.org/video/?439257-3/homeland-security-oversight-part-2> [<https://perma.cc/8FAJ-AL6V>].

<sup>61</sup> *Id.* at 2:37:10-30.

<sup>62</sup> NAACP v. Trump, 298 F. Supp. 3d 209, 238, 245 n.30 (D.D.C. 2018).

order to preserve the status quo while the Administration decided whether to do so.<sup>63</sup>

Secretary Nielsen then responded with a new memorandum (the “Nielsen Memorandum”) that not only offered a meatier legal analysis, but also went on to advance, in the alternative, “sound reasons of enforcement policy to rescind the DACA policy.”<sup>64</sup> In loose keeping with the Administration’s prior public messaging, most of Nielsen’s “policy” grounds amounted to process objections—to the effect that nonenforcement policies of DACA’s scope should only be adopted by Congress, or that “[t]here are sound reasons for a law enforcement agency to avoid discretionary policies that are legally questionable.”<sup>65</sup> But Nielsen also asserted that the lenience represented by DACA encouraged unlawful immigration<sup>66</sup>—one of the same arguments purposely omitted from the Duke Memorandum nine months earlier.<sup>67</sup> And Nielsen clearly stated that she would rescind DACA as a matter of discretion, “whether the courts would ultimately uphold it or not.”<sup>68</sup>

Despite offering these new explanations, Secretary Nielsen did not purport to take a new action rescinding DACA. Instead, she expressly “declined to disturb” Acting Secretary Duke’s prior (and, under the court’s order, soon-to-be-vacated) decision.<sup>69</sup> In line with this approach, the government presented the Nielsen Memorandum to the district court as a basis for “revising” the court’s judgment so as to “leave in place [Duke’s] September 5, 2017 decision.”<sup>70</sup> It did not treat the new memorandum as rescinding DACA in its own right.

We can only speculate about the Administration’s motivations for taking this unusual course, but three are plausible candidates. First, preliminary injunctions entered in other challenges to the DACA rescission were already on appeal, and the

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<sup>63</sup> *Id.* at 245.

<sup>64</sup> Memorandum from Kirstjen M. Nielsen, Sec’y, U.S. DHS 2 (June 22, 2018), [https://www.dhs.gov/sites/default/files/publications/18\\_0622\\_S1\\_Memorandum\\_DACA.pdf](https://www.dhs.gov/sites/default/files/publications/18_0622_S1_Memorandum_DACA.pdf) [<https://perma.cc/877X-8J3Z>] [hereinafter “Nielsen Memorandum”].

<sup>65</sup> *Id.* The district court ultimately concluded that these “policy” arguments “simply repackage[d] legal arguments previously made,” *NAACP v. Trump*, 315 F. Supp. 3d 457, 461 (D.D.C. 2018), and it speculated that the “chief design of doing so . . . [was] to defeat judicial review,” *id.* at 470; *see id.* at 467 (explaining that the court had initially found the rescission reviewable in part because it rested solely on DHS’s legal judgment).

<sup>66</sup> *See* Nielsen Memorandum, *supra* note 64, at 3.

<sup>67</sup> *See* Shear et al., *supra* note 49.

<sup>68</sup> Nielsen Memorandum, *supra* note 64, at 2.

<sup>69</sup> *Id.* at 3.

<sup>70</sup> *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1908 (2020) (quoting Defendants’ Motion to Revise Order at 2, 19, *NAACP*, 315 F. Supp. 3d 456 (No. 1:17-cv-01907)).



Administration seemed intent on reaching the Supreme Court as soon as possible.<sup>71</sup> A new, superseding agency action could have reset the litigation and thereby delayed Supreme Court review. Second, a new decision might, as a practical matter, have required a new wind-down period as well, meaning further delay.<sup>72</sup> Third, a new decision—a “DACA Rescission 2.0”—might well have prompted a new public reckoning over the Administration’s choice, especially if the action came with the highly visible consequences just mentioned. This time, however, the Administration would be on record taking the position that it would rescind DACA as a matter of its own discretion—the polar opposite of the message to which the White House had clung the first time around.

Whether or not the Nielsen Memorandum was designed to fly under the radar in this way, it certainly did so. Not a single newspaper mentioned it.<sup>73</sup> Nor did CNN, MSNBC, Fox News, and the like.<sup>74</sup> That is hard to understand if one views the document, as the government’s lawyers did, as the Administration’s last, best statement of its reasons for a decision of immense public interest.<sup>75</sup> But the lack of coverage is easy to understand if one views the document, as the media evidently did, as just another filing in a long-running court case, and one with no immediate real-world effect.

Part of the explanation, too, is that the Administration essentially ignored its new reasoning outside of court. When the district court reaffirmed its original decision, for example, Attorney General Sessions issued a statement blasting the court. But he made no mention of the Nielsen Memorandum or its policy rationales—the central issues in the ruling he attacked. Rather, he reiterated that “[t]he Trump Administration’s action to withdraw [DACA] simply reestablished the legal policies consistent with the law,” as it was the Administration’s “duty to do.”<sup>76</sup> Nor did

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<sup>71</sup> See Petition for a Writ of Certiorari Before Judgment at 15-17, *Regents*, 140 S. Ct. 1891 (No. 18-587) (arguing that “[a]n immediate grant of certiorari,” before any court of appeals had ruled, “[wa]s necessary to obtain an appropriately prompt resolution of this important dispute”).

<sup>72</sup> Thanks to Marty Lederman for suggesting this possibility.

<sup>73</sup> To confirm this, I searched Factiva’s database of nearly 3,000 U.S. newspapers for mentions of “DACA” and “court,” or “DACA” and “Nielsen,” in the week following the June 22, 2018 memorandum. There were no relevant results.

<sup>74</sup> I conducted the same search described above, *supra* note 73, in Factiva’s database of broadcast transcripts.

<sup>75</sup> See, e.g., Transcript of Oral Argument at 89, *Regents*, 140 S. Ct. 1891 (No. 18-587) (“[Solicitor] General Francisco: . . . [Nielsen] sets forth explicitly . . . several separate and independently-sufficient reasons. We own this.”).

<sup>76</sup> Office of Pub. Affairs, *Attorney General Jeff Sessions Issues Statement on DACA Court Order*, U.S. DEP’T JUST. (Aug. 6, 2018), <https://www.justice.gov/opa/pr/attorney-general-jeff-sessions-issues-statement-daca-court-order> [https://perma.cc/6DNX-M2P6].

Nielsen herself mention any policy arguments for rescinding DACA when she testified before Congress a few months later. Instead, she predicted that “ultimately the judicial branch will reach the same conclusion that DHS, DOJ, and the White House reached: DACA was an unlawful use of executive authority.”<sup>77</sup>

This was the political context in which the Supreme Court took up the legality of DACA’s rescission: a sustained and conspicuous effort by the Trump Administration to disclaim responsibility for any discretionary choice, tempered by an inconspicuous, belated, and in-the-alternative proffer of discretionary grounds for rescinding DACA. That context is critical to understanding the first two of the three accountability-forcing moves that I will examine here: the rejection of the Nielsen Memorandum on the ground that it was a post hoc rationalization; and the invalidation of the original rescission decision for failing to acknowledge the scope of the Administration’s actual discretion.

## 2. *Accountability-Forcing and Post Hoc Explanations*

Start with *Regents*’ dismissal of the Nielsen Memorandum as an “impermissible post hoc rationalization[.]”<sup>78</sup> The basic rule that the Court invoked (the “*Chenery* rule”)<sup>79</sup> is nothing new. But “the purpose of th[at] rule,” the Court has often said, “is to avoid ‘propel[ling] the court into the domain which Congress has set aside exclusively for the administrative agency.’”<sup>80</sup> In holding that the same rule required

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The court’s second ruling attracted only modest news coverage, and most of this again emphasized the question of DACA’s legality. *See, e.g.,* Miriam Jordan, *Judge Upholds Order for Trump Administration To Restore DACA*, N.Y. TIMES (Aug. 3, 2018), <https://www.nytimes.com/2018/08/03/us/federal-judge-daca.html> [<https://perma.cc/C9X8-UG9E>] (“Nielsen . . . responded [to the court’s first order] last month, arguing that DACA would likely be found unconstitutional in the Texas case and therefore must end.”); *cf.* Tal Kopan & Dan Berman, *Judge Upholds Ruling that DACA Must Be Restored*, CNN (Aug. 4, 2018), <https://www.cnn.com/2018/08/03/politics/daca-ruling/index.html> [<https://perma.cc/EJ37-NVfV>] (“[DHS] largely reiterating its previous argument: that DACA was likely to be found unconstitutional in the Texas case if it were challenged there and thus it had to end. . . . Nielsen also said in the DHS response that the agency had the discretion to end the program, as much as its predecessors had the discretion to create it.”).

<sup>77</sup> *Written Testimony of DHS Secretary Kirstjen Nielsen for a House Committee on the Judiciary Hearing Titled “Oversight of the Department of Homeland Security,”* U.S. DEP’T HOMELAND SEC. (Dec. 20, 2018), <https://www.dhs.gov/news/2018/12/20/written-testimony-dhs-secretary-nielsen-house-committee-judiciary-hearing-titled> [<https://perma.cc/TT6K-5D7X>].

<sup>78</sup> *Regents*, 140 S. Ct. at 1909.

<sup>79</sup> *See Securities & Exch. Comm’n v. Chenery Corp.*, 318 U.S. 80 (1943).

<sup>80</sup> *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 169 (1962) (quoting *Chenery II*, 332 U.S. 194, 196 (1947)); *see* Kevin M. Stack, *The Constitutional Foundations of Chenery*, 116 YALE L.J. 952, 979 & n.106, 993 & n.173 (2007) (collecting and discussing

disregarding the Nielsen Memorandum—an agency head’s *own* statement of the agency’s position on a matter within her discretion to decide—the Court was required to give the rule a new rationale. And so the Court recast *Chenery* as, in no small part, a judicially enforced safeguard of agencies’ political accountability.

This shift and the debate that prompted it are best understood through the lens of harmless-error doctrine. To see how, suppose that Acting Secretary Duke’s purely legal reasoning was insufficient to justify her action (as the Court went on to hold).<sup>81</sup> Under the Court’s cases, and as a matter of ordinary language, that alone should dispose of the question whether the Duke Memorandum was arbitrary; a decision taken for insufficient reasons is, by definition, an arbitrary one.<sup>82</sup> And so, for that merits question, it makes no difference whether the agency later reached the same conclusion for other, better reasons. (Put slightly differently, if Duke stumbled into the same conclusion that Nielsen later reached through considered judgment, Nielsen’s care does not make Duke’s stumbling any less arbitrary.) Rightly understood, then, the relevance of the Nielsen Memorandum in *Regents* was not that it somehow could have saved Duke’s rescission decision from arbitrariness, but rather that it raised a question about whether Duke’s failure to give satisfactory reasons amounted to the “*prejudicial error*” required for relief under the APA.<sup>83</sup>

And that question was serious. After all, Secretary Nielsen had already issued a second, formal memorandum explaining why, in her view, “the decision to rescind the DACA policy was, and *remains*, sound.”<sup>84</sup> DHS stood by that reasoning before the Court, and the Administration represented that there was “no basis for concluding that [its] position might change” with a remand.<sup>85</sup> So, if Nielsen’s reasons for favoring DACA’s rescission sufficed—as the dissenters concluded, and the

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cases invoking this idea); *see also Regents*, 140 S. Ct. at 1934 (Kavanaugh, J., dissenting) (“Under our precedents, . . . the *post hoc* justification doctrine merely requires that courts assess agency action based on the official explanations of the agency decisionmakers, and not based on after-the-fact explanations advanced *by agency lawyers during litigation* (or by judges).”).

<sup>81</sup> *See infra* Section I.A.3.

<sup>82</sup> *See Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (“Section 706(2)(A) requires a finding that *the actual choice made was not ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.’* To make this finding the court must consider whether the *decision was based on* a consideration of the relevant factors . . . .” (emphasis added) (citation omitted)). I intend my formulation here to be agnostic about what it takes for reasons to be sufficient to justify an action. *Cf.* Jacob Gersen & Adrian Vermeule, *Thin Rationality Review*, 114 MICH. L. REV. 1355, 1401-03 (2016) (distinguishing possible views of that question).

<sup>83</sup> 5 U.S.C. § 706 (2018) (emphasis added); *see Reply Brief for Petitioners at 6, DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1909 (2020), 2019 WL 5589031 (invoking this provision).

<sup>84</sup> Nielsen Memorandum, *supra* note 64, at 1 (emphasis added).

<sup>85</sup> Reply Brief for Petitioners, *supra* note 83, at 7.

majority did not deny—then why was insisting on a “new” decision not “an idle and useless formality”?<sup>86</sup> As Justice Kavanaugh put the point: “It would make little sense for a court to exclude official explanations by agency personnel such as a Cabinet Secretary simply because the explanations are purportedly post hoc, and then to turn around and remand for further explanation by those same agency personnel.”<sup>87</sup> In this case, DHS could just “relabel and reiterate the substance of the Nielsen Memorandum” on remand—as it said it would—and “the only practical consequence of the Court’s decision” would be “some delay.”<sup>88</sup>

The Court’s answer to this charge of formalism was that “here the rule serves important values of administrative law.”<sup>89</sup> Foremost among these, “[r]equiring a new decision before considering new reasons promotes ‘agency accountability’ by ensuring that parties and the public can respond fully and in a timely manner to an agency’s exercise of authority.”<sup>90</sup> That value, the Court said, “would be markedly undermined were we to allow DHS to rely on reasons offered nine months after Duke announced the rescission.”<sup>91</sup> Without the political context recounted above—all of which was before the Court, more or less,<sup>92</sup> but none of which it recited—the point might seem opaque or niggling. But with that context in view, it is clear and forceful. When the Administration had the public’s attention (and “announced” its decision), it was adamant that it had no discretion over DACA’s fate. To allow the Administration to justify the same action as an exercise of discretion—without triggering the new public reckoning that could accompany a new rescission action—would deny the public a full opportunity to hold the Administration accountable for what would have proved, in the end, the decisive reasons. Seen in this light, Chief Justice Roberts’s insistence that “the Government should turn square corners in

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<sup>86</sup> *Regents*, 140 S. Ct. at 1909 (quoting *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 766 n.6 (1969) (plurality opinion)).

<sup>87</sup> *Id.* at 1934 (Kavanaugh, J., dissenting).

<sup>88</sup> *Id.* at 1934-35. As I discuss below, both the Solicitor General’s representation and Justice Kavanaugh’s prediction were later proved wrong: The administration did not adhere to the substance of the Nielsen Memorandum after the Court’s decision in *Regents*, and the practical consequence of the Court’s decision was thus to preserve the policy indefinitely. See *infra* notes 342-344 and accompanying text.

<sup>89</sup> *Id.* at 1909 (majority opinion).

<sup>90</sup> *Id.* (quoting *Bowen v. Am. Hosp. Ass’n*, 476 U.S. 610, 643 (1986)).

<sup>91</sup> *Id.*

<sup>92</sup> The Court’s discussion of the three “important values of administrative law” at issue, *id.*, tracked the discussion of “three central values of administrative law” in the brief for the plaintiffs in the D.C. case, which laid out the history of the Administration’s public messaging and connected it to the concern about “agency accountability.” See Brief for the D.C. Respondents 51-55, *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1909 (2020) (No. 18-587), 2019 WL 4748381.

dealing with the people” was not about punctiliousness; it was about the government’s candidly subjecting its important choices to public scrutiny.<sup>93</sup>

This use of *Chenery* as an accountability-forcing tool breaks new ground in terms of both doctrine and theory. As for doctrine, the majority cited one case linking *Chenery* to the “principle of agency accountability.”<sup>94</sup> But “agency accountability” there appears to have referred, as it often does, to “simple accountability *to law* enforced through judicial review”<sup>95</sup>—not to the particular value of public engagement with an agency’s reasoning.<sup>96</sup> And as for theory, the classic justifications for the *Chenery* rule had little to do with such public awareness. As noted above, they turned instead on the notion that Congress had given agencies themselves—not their lawyers, and not courts—the authority to make the relevant judgments (and, moreover, had at least sometimes required the agencies to do so through particular procedures).<sup>97</sup> Thus, when Kevin Stack argued (now presciently) that *Chenery* could better be justified as a means of “bolster[ing] the political accountability of [agency] action,” he presented that proposal as an alternative to the “conventional justifications” touted by courts.<sup>98</sup> *Regents* has now elevated this idea, never before mentioned by the Court, to the foremost “functional reason[] for requiring contemporaneous explanations.”<sup>99</sup>

Reformulating *Chenery* as an accountability-forcing rule could have large ramifications. As Nicholas Bagley has documented, “every one of the federal courts of appeals has made a practice of upholding unsound agency decisions when they are confident that the agency would reach the same decision on remand.”<sup>100</sup> But *Regents*

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<sup>93</sup> *Regents*, 140 S. Ct. at 1909.

<sup>94</sup> *Bowen v. Am. Hosp. Ass’n*, 476 U.S. 610, 643 (1986); *see Regents*, 140 S. Ct. at 1909.

<sup>95</sup> JERRY L. MASHAW, REASONED ADMINISTRATION AND DEMOCRATIC LEGITIMACY 41 (2018) (emphasis added).

<sup>96</sup> *See Bowen*, 476 U.S. at 626-27; *cf. id.* at 643 (referencing “the principle of agency accountability recited earlier”).

<sup>97</sup> *See supra* note 80.

<sup>98</sup> *Id.* at 958; *see id.* at 996 (arguing that *Chenery* “makes the validity of agency action in part a matter of the agency’s prior public statements and the opportunity for such statements to attract the attention of the executive, Congress, and the public”). Moreover, insofar as Stack’s argument rested on the value of ensuring that agency decisions were made by the politically accountable decision makers, or that they did not bypass applicable processes (such as notice-and-comment) that allow the public to “seek mid-course revisions,” *id.* at 994-95, *Regents* goes further still. Neither of those concerns applies to an agency head’s explanation of her reasons for favoring an action she could take by mere memorandum.

<sup>99</sup> *Regents*, 140 S. Ct. at 1909.

<sup>100</sup> Nicholas Bagley, *Remedial Restraint in Administrative Law*, 117 COLUM. L. REV. 253, 302 (2017); *see also* *Mass. Trs. of E. Gas & Fuel Assocs. v. United States*, 377 U.S. 235, 248 (1964) (“[*Chenery* and similar cases] are aimed at assuring that initial

significantly complicates that inquiry. For one thing, the Court’s opinion suggests that “prejudicial error” does not turn solely on the likelihood of the agency’s reinstating the same decision. After all, the Court invoked the “important value[]” of enabling the public’s full and timely “*respon[se]*” to the agency’s decision. Nothing in the opinion suggests that this value is exhausted by whatever bearing the *prospect* of that response might have, in advance, on what the agency decides. Put differently, even if it had been true that DHS would simply rescind DACA again if it lost in *Regents* (which we now know it was not),<sup>101</sup> *Regents* suggests that allowing the agency to achieve that result *without* the political consequences attending an actual second decision could well be its own form of prejudice.<sup>102</sup> And to the extent that the prejudice question does depend on an assessment of what the agency would in fact do, *Regents* teaches that neither the agency’s representations, nor the fact that its chosen course would be legally permissible, suffices to resolve that question.<sup>103</sup> The inquiry has to account as well for the possibility that the political costs of actually making a fresh decision on that ground might be prohibitive. Both of these points suggest an accountability-oriented harmlessness inquiry that is difficult and wide-ranging, at least in cases involving policies of public interest.

Building on these two points, a proponent of the accountability-forcing vision of *Chenery* could take the next logical step: Perhaps an agency’s failure to give an adequate contemporaneous justification can *never* be deemed harmless. In effect, this would be the administrative-law analogue of a “structural error” in a criminal trial.<sup>104</sup> That analogy is instructive. As the Supreme Court recently reiterated, errors can rank as structural because “the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest,” such

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administrative determinations are made with relevant criteria in mind and in a proper procedural manner; when a mistake of the administrative body is one that clearly had no bearing on the procedure used or the substance of decision reached . . . [remand] would not advance the purpose they were intended to serve.”).

<sup>101</sup> See *infra* notes 342-344 and accompanying text.

<sup>102</sup> *But cf.* Henry J. Friendly, *Chenery Revisited: Reflections on Reversal and Remand of Administrative Orders*, 1969 DUKE L.J. 199, 211 (“*Chenery* does not mean that any assignment of a wrong reason calls for reversal and remand; this is necessary only when the reviewing court concludes there is a significant chance that but for the error the agency might have reached a different result.”).

<sup>103</sup> *But cf.* Bagley, *supra* note 100, at 301 (“When an agency has adopted a reasonable construction of a statute, when its actions indicate that it prefers that interpretation to the alternative, and when it represents to a reviewing court that it would stick to that interpretation even if the statute could be read differently, the rule of prejudicial error suggests that the interpretation should stand.”).

<sup>104</sup> *Cf. id.* at 290 (noting that courts often “treat notice-and-comment failures like structural trial errors—the sorts of mistakes that require automatic reversal, without any opportunity to demonstrate lack of prejudice”).

as the interest of the “public at large” in an open courtroom.<sup>105</sup> Even when only the defendant’s interest in the outcome is at issue, moreover, an error is sometimes treated as structural “if the effects of the error are simply too hard to measure,” as with the court’s denial of a defendant’s counsel of choice.<sup>106</sup> Here, the lost chance for the “public [to] respond fully and in a timely manner to [the] agency’s exercise of authority” arguably implicates both rationales: It concerns systemic public interests that do not depend on the upshot of the agency’s decision-making, and (as just noted) its *ex ante* effect on that decision-making will often be all but impossible for a court to determine.

To be sure, *Regents* does not go this far. The majority appeared to accept Justice Kavanaugh’s premise that remanding based on an inadequate explanation could sometimes be an “idle and useless formality” that courts should forgo.<sup>107</sup> It pointedly asserted that “*here* the rule serves important values,” suggesting a case-specific assessment.<sup>108</sup> And the context laid out above underscores that this was, indeed, an exceptionally strong case for the concern about political accountability—even if the majority was uneasy about spelling out why.<sup>109</sup> In the vast majority of cases, by contrast, any public interest in the agency action is so meager that it is hard to see what work political-accountability concerns could do, and remanding in their name would seem a clear waste of resources. Moreover, the Court’s sparse case law about the APA’s harmless-error rule has “warned against courts’ determining whether an error is harmless through the use of mandatory presumptions,” rather than “case-specific application of judgment.”<sup>110</sup> So the better view of the law, for the moment, is probably that courts applying *Chenery* should undertake a harmless inquiry—but that they should take account of the newly explicit accountability-forcing function of arbitrariness review in doing so. I will defer until later the question of whether such politically informed judgments are judicially manageable and, if not, how courts might devise proxies that are.<sup>111</sup>

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<sup>105</sup> *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1908, 1910 (2017).

<sup>106</sup> *Id.* at 1908.

<sup>107</sup> *See* *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1909 (2020). This also accords with then-Judge Roberts’s stated view that “*Chenery* does not require that we convert judicial review of agency action into a ping-pong game.” *PDK Labs. Inc. v. DEA*, 362 F.3d 786, 809 (D.C. Cir. 2004) (Roberts, J., concurring in part and in judgment) (quoting *Time, Inc. v. U.S. Postal Serv.*, 667 F.2d 329, 335 (2d Cir. 1981)) (internal quotation marks omitted).

<sup>108</sup> *Regents*, 140 S. Ct. at 1909 (emphasis added); *see also id.* at 1909-10 (“This is not the case for cutting corners to allow DHS to rely upon reasons absent from its original decision.”).

<sup>109</sup> I return to what we should make of the majority’s reticence to lay out the facts relevant to its own reasoning below. *See infra* note 300 and accompanying text.

<sup>110</sup> *Shinseki v. Sanders*, 556 U.S. 396, 407 (2009).

<sup>111</sup> *See infra* Section III.B.

### 3. *Accountability-Forcing and Buck-Passing Explanations*

*Regents* also features the second of our three accountability-forcing moves—this one reflected in the majority’s approach to Acting Secretary Duke’s buck-passing explanation, rather than Secretary Nielsen’s post hoc supplement. The role of political-accountability concerns is somewhat less explicit here; in formal terms, the Court held that Acting Secretary Duke had “failed to consider . . . important aspects of the problem,” as *State Farm* requires.<sup>112</sup> But the key to understanding that holding is the theme of discretion and responsibility that runs through Chief Justice Roberts’s explanation of how and why Duke fell short. His focus was not really her failure to consider factors bearing on her choice about DACA’s fate, or even her failure to explain how she considered those factors, but the particular *reason* for those two failures: the notion that she had no real choices to make. And context and logic alike suggest that this notion was problematic largely because it deflected political accountability for an unpopular decision.<sup>113</sup>

Consider how Roberts’s analysis unfolded. He began by assuming that Attorney General Sessions had acted permissibly in embracing the Fifth Circuit’s finding of illegality with respect to a similar deferred-action policy (known as Deferred Action for Parents of Americans, or “DAPA”) and in extending that reasoning to DACA.<sup>114</sup> Roberts also accepted that the Attorney General’s legal analysis was binding, as far as it went, on DHS.<sup>115</sup> But even so, he explained, “deciding how best to address a finding of illegality moving forward can involve important policy choices.”<sup>116</sup> And “[t]hose policy choices are for DHS”—not, in other words, for the law, the courts, or anyone speaking in their name.<sup>117</sup> Yet when Duke decided *how* to comply with the law, she “did not appear to appreciate the full scope of her discretion.”<sup>118</sup> First, because the Fifth Circuit opinion embraced by Sessions was best read as

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<sup>112</sup> *Regents*, 140 S. Ct. at 1910 (alteration omitted) (quoting *Motor Vehicle Mfrs. Ass’n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)) (internal quotation marks omitted).

<sup>113</sup> The concern about political accountability was more explicit in the lower-court decisions in all three of the cases before the Court. *See Regents of the Univ. of Cal. v. U.S. DHS*, 908 F.3d 476, 498- (9th Cir. 2018) (“[J]udicial review under these circumstances serves the critical function of promoting accountability within the Executive Branch—not accountability to the courts, but democratic accountability to the people.”); *NAACP v. Trump*, 298 F. Supp. 3d 209, 249 (D.D.C. 2018) (“When an official claims that the law requires her to exercise her enforcement authority in a certain way . . . she excuses herself from [political] accountability.”); *Batalla Vidal v. Nielsen*, 279 F. Supp. 3d 401, 421 (E.D.N.Y. 2018) (similar).

<sup>114</sup> *Regents*, 140 S. Ct. at 1903, 1908-09.

<sup>115</sup> *Id.* at 1910.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 1911.



condemning only *collateral benefits* of deferred action, it had not “compelled DHS to abandon” DACA’s core policy of enforcement forbearance.<sup>119</sup> “[C]ontinuing forbearance” thus “remained squarely within the discretion of Acting Secretary Duke,” whom Congress had made “responsible” for setting immigration enforcement priorities.<sup>120</sup> Second, even assuming that DACA had to be ended in full, “DHS ha[d] considerable flexibility in carrying out its responsibility”; there were “difficult decision[s]” about how to wind down the policy that it was “the agency’s job” to make.<sup>121</sup> In short, “DACA was rescinded because of the . . . illegality determination,” but “nothing about that determination foreclosed . . . the options of retaining forbearance or accommodating particular reliance interests.”<sup>122</sup> Duke ran afoul of *State Farm* because her unduly narrow conception of her legal authority short-circuited any apparent reckoning with the costs and benefits of those options.<sup>123</sup>

To appreciate the stakes and lessons of this analysis, we need to step back and ask why an agency’s erroneously narrow construction of its own authority really matters in the first place. The most obvious reason is that the agency might have preferred a different course if only it knew it had other options. But here, as in many cases, that seems distinctly unlikely.<sup>124</sup> It would require imagining that President Trump and his subordinates might well have *wanted* to construct a novel, forbearance-only deferred-action regime, or to wind down the DACA policy on more generous terms, but that their (famously modest) conception of their authority over immigration policy stood in the way. If the practical value of vacatur and remand really rode on the theoretical prospect of correcting such a misapprehension here, it might be difficult to justify the result as anything more than a convenient technicality.<sup>125</sup>

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<sup>119</sup> *Id.* at 1912.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 1914.

<sup>122</sup> *Id.* at 1915.

<sup>123</sup> *See id.* at 1913-14.

<sup>124</sup> Daniel Hemel and Aaron Nielson make an analogous point about cases in which agencies mistakenly treat statutes as unambiguous. “In a world in which agency officials are able to spot ‘ambiguities’ that courts reject as nonexistent or borderline frivolous,” they point out, “it is more than a bit strange to think that agency officials are unable to spot ambiguities that support the agency’s preferred policy and that the reviewing court can nonetheless identify.” Daniel J. Hemel & Aaron L. Nielson, *Chevron Step One-and-a-Half*, 84 U. CHI. L. REV. 757, 791 (2017); *see* Bagley, *supra* note 100, at 301 (similar).

<sup>125</sup> Perhaps the best defense of this reasoning would adapt a point of Hemel and Nielson’s. *See* Hemel & Nielson, *supra* note 124, at 807-09. They argue that courts should remand when agencies erroneously deem statutes unambiguous in part to thwart intra-agency strategic behavior: “[A]n agency’s general counsel may maintain that the statute compels X,” they point out, “so as to exert greater control over the intra-agency decisionmaking process.” Hemel & Nielson, *supra* note 124, at 807. Here, one could argue that

Indeed, if this were all that Chief Justice Roberts was worried about, he could (and perhaps should) have just read the Duke Memorandum more generously. He could, for instance, have accepted the Solicitor General’s argument that Duke’s “statement that she ‘should’—not must—rescind DACA” reflected a discretionary decision to end the policy based on legal risk, a rationale that could explain her implicit rejection of the kinds of alternatives later advanced by the plaintiffs.<sup>126</sup> Likewise, he could have found Duke’s failure to separate benefits from forbearance reasonable in light of the fact that the courts had enjoined *all* aspects of the DAPA policy, not merely the benefits component, or in light of the practical difficulty of decoupling the two.<sup>127</sup> Relatedly, he could have concluded that it was reasonable (whether or not inevitable) to read the Fifth Circuit’s opinion as foreclosing both forbearance *and* benefits, as the Administration apparently did.<sup>128</sup> Or he could simply have held any deficiency in Duke’s explanation harmless in light of the agency’s evident commitment to its chosen (and again, permissible) course.<sup>129</sup>

But the problem with all of these approaches will now be familiar: They would have failed to account for the distinct *political* significance of the Administration’s choice to rely on a claim of legal compulsion. Yes, it is unlikely that DHS and the White House would have acted differently if only they had *believed* that they could. But what might have happened if they had been forced to *acknowledge* as much is a different story. Recall, for instance, how Secretary Nielsen deflected pressure to modify or extend the wind-down on the ground that, without new legislation, that would be “unconstitutional.”<sup>130</sup> Who knows what the Administration might have

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Attorney General Sessions did the same, only with respect to the Administration-wide decision-making process. And if so, then perhaps the Court’s making clear that there were “policy choices . . . for DHS,” *Regents*, 140 S. Ct. at 1910, would aid DHS in the jockeying for influence over the Administration’s strategy. In context, though, this prospect seems very remote as well. First, Acting Secretary Duke had endorsed the same legal analysis as Sessions; she had not merely acquiesced to it as binding on her. *See NAACP v. Trump*, 298 F. Supp. 3d 209, 238 (D.D.C. 2018). Second, the Nielsen Memorandum (and the agency’s positions in court) clearly asserted that DHS favored moving forward with the rescission as planned—so any daylight between DHS and the Attorney General had disappeared. *See supra* notes 84-88 and accompanying text.

<sup>126</sup> Brief for the Petitioners at 28, *Regents*, 140 S. Ct. 1891 (Nos. 18-587, 18-588, 18-589); *cf. Regents*, 140 S. Ct. at 1910 n.4 (rejecting this argument).

<sup>127</sup> *See Texas v. United States*, 809 F.3d 134, 188 (5th Cir. 2015), *aff’d by an equally divided Court*, 136 S. Ct. 2271 (2016); *see also Regents*, 140 S. Ct. at 1929 & n.14 (Thomas, J., dissenting) (laying out reasons why separating deferred action from collateral benefits could be practically and legally difficult).

<sup>128</sup> *See Regents*, 140 S. Ct. at 1929 n.14 (Thomas, J., dissenting) (arguing that “[t]he majority’s interpretation of the Fifth Circuit’s opinion is highly questionable”).

<sup>129</sup> *Cf. supra* notes 84-88 and accompanying text (discussing an analogous harmless-error question arising from the post hoc nature of the Nielsen Memorandum).

<sup>130</sup> *See supra* note 60 and accompanying text.

done if Nielsen instead had to defend the six-month deadline as her (or Trump’s) favored immigration policy, or as a calculated attempt to launch a game of immigration-reform chicken?<sup>131</sup> Moreover, even if the Administration would ultimately have chosen exactly the same policy (or would go on to do so again after the Court’s decision), forcing the Administration to openly exercise its discretion would at least ensure the public a full opportunity to *respond* to that choice—the same opportunity that the majority invoked in explaining its *Chenery* holding.

The critical point about the Duke Memorandum is thus the same one that Roberts made about the Nielsen Memorandum a few pages earlier in the opinion. Upholding the rescission based on Nielsen’s post hoc explanation would frustrate political accountability, he reasoned, because the administration had not taken public responsibility for Nielsen’s reasons when it acted.<sup>132</sup> Upholding the rescission by effectively reading into the Duke Memorandum a less-than-clearly-stated exercise of discretion—even a perfectly reasonable one—would amount to the very same thing, only with the Court playing Nielsen’s part. And so it makes sense that Roberts rejected Duke’s explanation in like fashion, rather than trying to salvage it. In fact, he framed his entire APA discussion with a quotation that ties together the two issues (and one that seems carefully chosen): “The APA,” he said, “sets forth the procedures by which federal agencies are *accountable to the public* and their actions subject to review by the courts.”<sup>133</sup> Seen in that context, the majority’s observation that Duke “did not appear to *appreciate*” her actual discretion seems just a more politic way of faulting the Administration for failing to *own* its choice.<sup>134</sup> Whereas the Administration had insisted that addressing DACA was Congress’s “job,”<sup>135</sup> the Court corrected the record: There were “difficult decision[s]” that it

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<sup>131</sup> Aside from the political consequences of such an admission, it is an interesting and open question whether courts would accept the goal of pressuring Congress as a permissible reason under the APA. *Cf.* D.C. Fed’n of Civic Ass’ns v. Volpe, 459 F.2d 1231, 1245-49 (D.C. Cir. 1971) (holding that a congressman’s threats to block funding for one project unless another proceeded did not provide a statutorily relevant reason for authorizing the latter project); *see also* MASHAW, *supra* note 95, at 67-68 (questioning that holding).

<sup>132</sup> *See supra* Section I.A.2.

<sup>133</sup> *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1905 (2020) (quoting *Franklin v. Massachusetts*, 505 U.S. 788, 796 (1992)) (emphasis added). *Regents* is the first Supreme Court case to quote this sentence from *Franklin*, and *Franklin* is the only Supreme Court case that so directly links the APA with public or political accountability. The *Franklin* Court appears to have been referring to the APA’s requirement that some agency actions be “promulgated to the public in the Federal Register,” *Franklin v. Massachusetts*, 505 U.S. 788, 796 (1992), which is essentially irrelevant in *Regents*.

<sup>134</sup> *Regents*, 140 S. Ct. at 1911 (emphasis added).

<sup>135</sup> *See supra* notes 58-61 and accompanying text.

was “the *agency’s* job” to make, and it had to take responsibility for them before its implicit choices could survive judicial review.<sup>136</sup>

In addition to fitting with the opinion’s reasoning and context, this reading of the majority’s *State Farm* analysis goes a long way toward explaining an otherwise-surprising result. For those with a robust conception of arbitrariness review, to be sure, the majority’s holding will seem eminently defensible as a “straight” application of *State Farm*.<sup>137</sup> But Chief Justice Roberts had never before evidenced such a conception. In deciding whether the Commerce Department’s stated rationale for adding a citizenship question was legally sufficient, for example, Roberts gave the agency “every possible benefit of the doubt and then some.”<sup>138</sup> And Roberts’s broader record is to the same effect: He had shown no appetite for vacating an agency’s decision when the agency’s ultimate preference was both permissible and clear.<sup>139</sup>

So what made this case different? Some will say that it was Roberts’s desire “to avoid a politically controversial . . . decision,”<sup>140</sup> and of course I cannot rebut that speculation. But the evident concern that the Trump Administration was evading political accountability does the same explanatory work at least as well.<sup>141</sup> As

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<sup>136</sup> *Regents*, 140 S. Ct. at 1914 (emphasis added).

<sup>137</sup> I argued that the Duke Memorandum flunked *State Farm* review, without any special modification, in light of the administration’s failure to distinguish deferred action from its downstream regulatory consequences—and, to be clear, I do not mean to retreat from that view here. See Brief for the D.C. Respondents, *supra* note 92, at 34-48; Benjamin Eidelson, *A Way Out for the Supreme Court on DACA*, N.Y. TIMES (Oct. 27, 2019), <https://www.nytimes.com/2019/10/27/opinion/daca-supreme-court.html> [<https://perma.cc/X2GP-ZYGM>]; see also Benjamin Eidelson, *Unbundling DACA and Unpacking Regents: What Chief Justice Roberts Got Right*, BALKINIZATION (June 25, 2020), <https://tinyurl.com/ya6qta7x> (explicating the *State Farm* argument that the Court adopted). On the range of conceptions of *State Farm* review’s rigor, see Gersen & Vermeule, *supra* note 82, at 1356-60.

<sup>138</sup> Metzger, *supra* note 18 at 26-27; see *Dep’t of Commerce*, 139 S. Ct. at 2569-71, 2573.

<sup>139</sup> See, e.g., *Massachusetts v. EPA*, 549 U.S. 497, 553 (2007) (Scalia, J., joined by Roberts, C.J., and Thomas and Alito, JJ., dissenting) (rebuking the majority for imposing an “essay requirement” on the EPA when its bottom-line position was apparent). In fact, then-Judge Roberts once penned a separate opinion specifically arguing that courts should not remand when an agency’s action evinces a “manifest desire” to reach a permissible result that the agency had mistakenly viewed as compelled. *PDK Labs.*, 362 F.3d at 808-09 (Roberts, J., concurring in part).

<sup>140</sup> See, e.g., *Regents*, 140 S. Ct. at 1919 (Thomas, J., dissenting) (“Today’s decision must be recognized for what it is: an effort to avoid a politically controversial but legally correct decision.”); Klarman, *supra* note 15, at 253.

<sup>141</sup> In fact, the two explanations may be complementary rather than competing. First, even assuming (for the sake of argument) a deeply realist picture of Chief Justice Roberts’s decision-making, the political-accountability concern offers a needed middle step—a way

Gillian Metzger observed in the wake of *Department of Commerce*, Roberts’s spirited defense of “the Secretary’s policymaking discretion” against contrary claims of “technocratic expertise”<sup>142</sup> signaled that, “[f]or Roberts,” deferential arbitrariness review “rests fundamentally on principles of political accountability.”<sup>143</sup> And if that is Roberts’s broader vision (as much of *Regents’* rhetoric also suggests), then holding DACA’s rescission arbitrary is perfectly consistent with it—no resort to a political agenda needed. Put another way, if the Administration had simply owned its choices—but then offered vacuous explanations for them—it is easy to imagine Roberts upholding Acting Secretary Duke’s reasoning as good enough for government work.<sup>144</sup> But given the centrality of political accountability to his conception of APA review, it makes sense that the Administration’s failure to do even that much would yield a different result.<sup>145</sup>

Just as with *Regents’* renovation of the rule against post hoc rationalizations, what is new here is not so much the raw materials as the theoretical and practical work they are being used to do. The notion that agencies must actually exercise their discretion before their choices may be upheld in court dates back to *Chenery* and beyond.<sup>146</sup> Here again, however, viewing this principle as a safeguard of public or political accountability is a significant shift.<sup>147</sup> And here, too, that shift has important consequences—only some of which are visible in *Regents* itself, and none of which are fully articulated there. I will briefly note four here.

First, an aversion to discretion-denying (and hence buck-passing) justifications that is based on political accountability suggests a kind of clear statement rule: In order to receive deferential *State Farm* review, an agency must make its exercise of

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that Roberts could see the outcome he preferred as serving important values of administrative law, rather than an extra-legal agenda. Second, the political cost of upholding the DACA rescission was *itself* partly due to the Administration’s buck-passing efforts. After all, it was to the courts, at least in part, that the Administration was passing the buck. To that extent, cracking down on buck-passing and protecting the Court from political flak came to the same thing.

<sup>142</sup> *Dep’t of Commerce*, 139 S. Ct. at 2571.

<sup>143</sup> Metzger, *supra* note 18, at 36.

<sup>144</sup> Indeed, Chief Justice Roberts intimated that even the Solicitor General’s bare description of forbearance and benefits as “importantly linked” might have sufficed to explain the decision to terminate forbearance. *Regents*, 140 S. Ct. at 1913.

<sup>145</sup> Although I have focused on Chief Justice Roberts here, he is not alone on the current Court in viewing political accountability as a central pillar undergirding deference to agencies. *See, e.g.*, *Kisor v. Wilkie*, 139 S. Ct. 2400, 2413 (2019) (opinion of Kagan, J.); *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 547 (2009) (Breyer, J., dissenting); *see also infra* notes 168-174 and accompanying text (discussing then-Professor Kagan’s treatment of this issue).

<sup>146</sup> *See Chenery*, 318 U.S. at 94-95; *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 197 (1941).

<sup>147</sup> *See supra* notes 96-99 and accompanying text.

discretion fully explicit. Put differently, whatever willingness courts may have to “uphold a decision of less than ideal clarity”<sup>148</sup> should not extend to the threshold issue of whether the agency exercised its discretion in the first place. To allow “the public” the opportunity to “respond fully” to the agency’s action, the fact of that “exercise of authority,” at least, has to be made entirely clear to the public from the start.<sup>149</sup>

Second, the same concerns suggest that, when an agency rests its action on a claimed lack of authority, that legal assertion should receive no deference.<sup>150</sup> That might seem obvious, but in fact the government argued throughout the DACA-re-scission litigation that its legal analysis should be upheld unless it amounted to “the type of ‘clear error of judgment’ that would make it arbitrary and capricious” under *State Farm*’s ordinary, deferential standard.<sup>151</sup> And without regard to political-accountability concerns, one can see the logic in that position: If the agency’s view of the issue is a reasonable one, perhaps courts have no business substituting their own.<sup>152</sup> The distinct concern that an agency’s disavowal of authority sows public confusion about who is to blame for an unpopular result, however, gives courts a

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<sup>148</sup> Nat’l Ass’n of Home Builders v. Defs. of Wildlife, 551 U.S. 644, 658 (2007) (citation omitted).

<sup>149</sup> *Regents*, 140 S. Ct. at 1909; see *supra* note 126 and accompanying text (explaining how Chief Justice Roberts could have read an exercise of discretion into the Duke Memorandum but did not do so); cf. Gunther, *supra* note 17, at 46 (arguing that the political process is undermined when “the Court supplie[s] [a] ‘conceivable’ rationale” for a statute without requiring the legislature to publicly invoke that rationale).

<sup>150</sup> Cf. *supra* note 128 and accompanying text (explaining how Roberts could have held that the administration’s broad reading of the Fifth Circuit’s opinion was at least permissible, but did not do so). More precisely, an agency’s claim that it lacks authority should receive no deference unless the agency makes clear (in keeping with the last point) that nothing but its own scruples barred it from taking a different view of its power. If the agency does make that degree of freedom clear, then it has not really denied that it has discretion or authority over the matter; it has simply framed its discretionary choice in terms of its legal philosophy, and the public can render a judgment on the agency’s second-order choice to opt for a narrow view of its own authority.

<sup>151</sup> Brief for Petitioners, *supra* note 126, at 50-51; see also *NAACP*, 298 F. Supp. 3d at 242 n.26 (noting the government’s contention that its legal analysis should be “reviewed for ‘a clear error of judgment’—that is, under the ordinary test for arbitrary and capricious action,” and reserving the issue).

<sup>152</sup> Cf. *City of Arlington, Tex. v. FCC*, 569 U.S. 290, 293 (2013) (holding, in the context of an agency’s determination that it *had* authority, that “an agency’s interpretation of a statutory ambiguity that concerns the scope of its regulatory authority” is eligible for *Chevron* deference); Hemel & Nielson, *supra* note 8, at 781-82 (arguing that “intelligent interpreters acting in good faith will sometimes differ in their assessments” of whether a statute is unambiguous, and hence that an agency’s erroneous assertion of unambiguity will sometimes survive ordinary *State Farm* review).

distinct and powerful reason to ensure that such a convenient explanation is not just reasonable, but correct.<sup>153</sup>

Third, an accountability-forcing approach to buck-passing explanations at least partly vindicates an important but controversial line of cases in the D.C. Circuit. This doctrine, labeled “*Chevron* Step One and a Half” by Daniel Hemel and Aaron Nielson, insists upon remanding to agencies when they interpret a statute to reach a permissible result but mistakenly characterize the statute as unambiguous.<sup>154</sup> As Hemel and Nielson point out, this result is not clearly required by *Chenery* itself: If the agency identifies the relevant interpretive considerations in its decision—erring only in treating them as supporting a conclusion of unambiguousness—it has arguably met *Chenery*’s basic requirement to identify the reasons that support its ultimate course of action.<sup>155</sup> But as they also argue, remanding in these cases serves political accountability; it prevents agencies from “attributing to Congress policy decisions that agency officials have made themselves.”<sup>156</sup> The DACA rescission is the clearest example of that basic problem to reach the Supreme Court. And while *Regents* involved *State Farm* rather than *Chevron*, its accountability-driven skepticism of disavowals of discretion supports both the D.C. Circuit’s practice and Hemel and Nielson’s cognate justification for it.<sup>157</sup>

Finally, and related, a focus on political accountability suggests that courts’ discomfort with discretion-denying justifications ought to vary with the actual force of accountability-related concerns. It makes more sense to demand a clear statement

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<sup>153</sup> Although I have focused on the DACA rescission here, the buck-passing aspect of agencies’ claims about their own legal authority is also nicely captured by the EPA’s disavowal of authority over greenhouse gases during the Bush Administration. See, e.g., Press Release, *EPA Denies Petition to Regulate Greenhouse Gas Emissions from Motor Vehicles*, U.S. EPA, Aug. 28, 2003, <https://bit.ly/3597BVC> (“Congress must provide us with clear legal authority before we can take regulatory action to address a fundamental issue such as climate change. . . . We cannot try to use the Clean Air Act to regulate for climate change purposes because the Act was not designed or intended for that purpose.”); see also *infra* notes 167, 268 and accompanying text (discussing the relevance of accountability-forcing to *Massachusetts v. EPA*, 549 U.S. 497 (2007)).

<sup>154</sup> See generally Hemel & Nielson, *supra* note 124; see, e.g., *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985). For criticism of the doctrine, see Bagley, *supra* note 100, at 296-301.

<sup>155</sup> See Hemel & Nielson, *supra* note 124, at 779-81.

<sup>156</sup> *Id.* at 808-.

<sup>157</sup> *Negusie v. Holder*, 555 U.S. 511 (2009), also provides an example of the same practice: The Supreme Court remanded to the Board of Immigration Appeals because the agency erroneously believed it had no discretion to interpret a statute differently. But, as Hemel and Nielson observe, *Negusie*’s analysis was cursory, and it has not been taken to settle the issue in the lower courts. See Hemel & Nielson, *supra* note 124, at 787. Moreover, it had little to do with political accountability. As the Court explained, the remand there ensured that “[t]he agency can bring its expertise to bear upon the matter” and “evaluate the evidence” before deciding how to proceed. *Negusie*, 555 U.S. at 524 (quoting *Gonzales v. Thomas*, 547 U.S. 183, 186 (2006)) (internal quotation marks omitted).

of the agency’s exercise of discretion, for example, when the decision is one with real political significance. Likewise, the *Chevron* Step One and a Half doctrine might appropriately be applied in those cases but not in others.<sup>158</sup> In making these judgments, moreover, courts might look to the way a major decision has been justified to the public, rather than merely to the formal decision memoranda.<sup>159</sup> As with the analogous issues about the harmlessness of an agency’s resort to post hoc explanations, I will defer a fuller consideration of whether and how courts should draw these lines until later.<sup>160</sup>

In suggesting that *Regents’* use of *State Farm* as an accountability-forcing tool represents a significant shift, I do not mean to deny that *State Farm* review has always had at least an arguable accountability-forcing dimension. In fact, *State Farm* itself is probably the best prior example. The Court held that President Reagan’s Department of Transportation (DOT) had failed to justify its rescission of a safety standard for new cars.<sup>161</sup> In a well-known dissent, Justice Rehnquist contended that such deregulatory measures could justifiably be based on “the philosophy of the administration.”<sup>162</sup> But the majority never really suggested otherwise: DOT had justified its action under a “substantive standard tilting strongly toward regulation,” and the majority simply evaluated that explanation on its own terms.<sup>163</sup> By taking that explanation at face value and rejecting it, the Court effectively forced the Administration to either mount a defense based on its deregulatory philosophy or abandon the proposal (as it ultimately chose to do).<sup>164</sup> Despite the

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<sup>158</sup> At least, that is, in the absence of *other* reasons for thinking that the agency’s treatment of its choice as legally compelled affected the result. In some cases, there might be ground for doubt on that front because of intra-agency or intra-executive-branch dynamics. *See supra* note 125. And in still other cases, a decision maker might be comfortable reaching a harsh result only if she can tell *herself* that her hands are tied. These alternative reasons for remanding decisions predicated on buck-passing grounds do not depend on political salience. (Thanks to Daniel Hemel for highlighting this point.)

<sup>159</sup> *See, e.g., supra* note 58 and accompanying text (collecting the Trump Administration’s public statements regarding its reasons for rescinding DACA).

<sup>160</sup> *See supra* notes 104-111 and accompanying text (raising that question with respect to *Chenery*); *infra* Section III.B.

<sup>161</sup> *See* *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 34 (1983).

<sup>162</sup> *See id.* at 59 (Rehnquist, J., dissenting in part). Several commentators have developed that thesis in the years since. *See* Kagan, *supra* note 2, at 2381-82; Watts, *supra* note 19, at 737-38; Watts, *supra* note 8, at 2, 5-8, 32-44 (2009); Mendelson, *supra* note 29, at 1145-46.

<sup>163</sup> Stephen F. Williams, *The Roots of Deference*, 100 YALE L.J. 1103, 1107-08 (1991) (reviewing CHRISTOPHER F. EDLEY, JR., *ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREAUCRACY* (1990)); *see* Watts, *supra* note 8, at 19; Seidenfeld, *supra* note 5, at 161-63.

<sup>164</sup> *See* Bressman, *supra* note 8, at 1783.



prevailing conception of *State Farm* as a “triumph of expertise to the exclusion of politics,”<sup>165</sup> then, it can also be seen as forcing the Administration to subject itself to political accountability for what were all along its actual reasons. And if that account captures the real stakes of *State Farm* (as some have suggested),<sup>166</sup> *Regents’* use of *State Farm* review to insist that the Trump Administration publicly acknowledge and exercise its discretion represents a natural extension of the same logic.<sup>167</sup>

Finally, in evaluating my thesis that the Court used *State Farm* review as an accountability-forcing tool in *Regents*—and in assessing whether it is likely to continue down the same path—it bears noting that then-Professor Elena Kagan once proposed something quite similar.<sup>168</sup> In contrast to the prevailing, expertise-centered conception of arbitrariness review, Kagan advocated a “revised” doctrine that would “acknowledge and, indeed, promote an alternative vision centered on the political

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<sup>165</sup> Watts, *supra* note 8, at 19.

<sup>166</sup> See Bressman, *supra* note 8, at 1783; Ronald M. Levin, *Administrative Discretion, Judicial Review, and the Gloomy World of Judge Smith*, 1986 DUKE L.J. 258, 272 (1986); Cass R. Sunstein, *Deregulation and the Hard-Look Doctrine*, 1983 SUP. CT. REV. 177, 211. This account of *State Farm* is not without difficulties. Most importantly, the Reagan Administration *had* publicly touted its rule change as part of its deregulatory agenda—even though it offered a justification based on efficacy in the rule itself and in court. Viewed in that light, *State Farm* seems less about forcing the Administration to publicly admit and rest on a deregulatory, pro-industry rationale (which it already had), and more a straightforward rejection of the feeble rationale on which the Administration (perhaps doubting the legal viability of its true and public rationale) formally relied. See *infra* notes 352-353 and accompanying text.

<sup>167</sup> Even *Massachusetts v. EPA*—the leading contemporary example of “expertise-forcing,” see *supra* note 25—arguably had a secondary, accountability-forcing dimension of the same kind. Cf. Freeman & Vermeule, *supra* note 4, at 99-100 (suggesting that “a kind of politics” might “enforce the majority’s attempt to prod EPA to make an expert judgment independent of politics”). In *Massachusetts*, the EPA refused to regulate greenhouse gases, but it did not determine that these gases do *not* contribute to climate change or, alternatively, that it was impossible to determine whether they do. Instead, the agency “not[ed] the uncertainty surrounding various features of climate change and conclude[ed] that it would therefore be better not to regulate at this time.” *Massachusetts v. EPA*, 549 U.S. 497, 534 (2007). In rejecting that reasoning, the Court allowed the possibility that “the scientific uncertainty is so profound that it precludes EPA from making a reasoned judgment as to whether greenhouse gases contribute to global warming.” *Id.* But it insisted that, if that was the agency’s view, “EPA must say so.” *Id.* Justice Scalia derided this as a pointless and intrusive demand in light of the agency’s extensive, existing discussion of uncertainty. *Id.* at 553-55 (Scalia, J., dissenting). Plausibly, however, the Court perceived a difference in the *political* ramifications of the two explanations: “there’s enough uncertainty in this whole area that we’d rather wait” sounds a good deal better than “it’s beyond our ken to form any judgment about whether greenhouse gases contribute to climate change.” (Thanks to Matthew Stephenson for suggesting an interpretation along these lines.)

<sup>168</sup> Kagan, *supra* note 2, at 2380-83.

leadership and accountability provided by the President.”<sup>169</sup> Courts, she suggested, should “relax the rigors of hard look review when demonstrable evidence shows that the President has taken an active role in, and by so doing has accepted responsibility for, the administrative decision in question.”<sup>170</sup> A “candid and public acknowledgment of the presidential role in shaping an administrative decision,” the thought went, grounds that decision in “the control mechanism most open to public examination and most responsive to public opinion.”<sup>171</sup> Such decisions warrant greater judicial respect, Kagan argued—and affording them that respect, she suggested, would have the benefit of encouraging more of them.<sup>172</sup>

On my reading, *Regents* is animated by much the same idea, albeit applied to an unusual set of facts. In Kagan’s terms, the White House did make clear that President Trump had “taken an active role in” the decision to rescind DACA (at least the first time around).<sup>173</sup> But Trump had not “by so doing . . . accepted responsibility for” it. Quite the opposite: He and his subordinates went to great and unusual lengths to transfer all political responsibility to Congress and the courts. Accordingly, Kagan’s functional argument about subjection to political accountability would justify a *State Farm* penalty in *Regents* just as it would a bonus in a more typical case of conspicuous presidential involvement. And, at least relative to the deferential form of arbitrariness review that Roberts has otherwise embraced, *Regents* seems to have imposed just such a penalty in rejecting the Administration’s buck-passing explanation for DACA’s rescission.<sup>174</sup>

#### B. ACCOUNTABILITY-FORCING IN *DEPARTMENT OF COMMERCE*: PRETEXT

I have so far identified two kinds of explanations that the Court has rejected or disfavored in order to ensure political accountability for executive-branch decisions: post hoc reasons and buck-passing ones. Rounding out the set are pretextual reasons of the kind at issue in *Department of Commerce*.

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<sup>169</sup> *Id.* at 2380.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at 2382, 2384.

<sup>172</sup> *See id.* at 2381, 2385. David Barron and Kagan also argued, in a similar vein, that political-accountability concerns favor limiting *Chevron* deference to interpretations embraced by “high-level agency officials” who “have connections to political institutions and through them to the general public.” David J. Barron & Elena Kagan, *Chevron’s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 242-44.

<sup>173</sup> For example, the White House Press Secretary argued at length that “[t]he President made the best decision.” *Press Briefing*, *supra* note 50; *see also Statement of Donald J. Trump*, *supra* note 36 (“I am not going to just cut DACA off, but rather provide a window of opportunity for Congress to finally act.”).

<sup>174</sup> *See supra* notes 141-144 and accompanying text.

The case concerned Commerce Secretary Wilbur Ross’s decision to add a citizenship question to the 2020 census. In his formal decision memorandum, Ross justified that change as the best means of satisfying a Justice Department request for information that would aid in enforcing the Voting Rights Act (VRA).<sup>175</sup> As the district court recounted, Ross also offered the same justification in testimony before three congressional committees.<sup>176</sup> Faced with Democrats’ skepticism about his motives, he insisted that he was “responding solely to [the] Department of Justice’s request.”<sup>177</sup> In the course of litigation, however, that story unraveled.<sup>178</sup> And in the end, Chief Justice Roberts authored a split opinion invalidating the agency’s action. Writing for himself and those to his right, he held that Secretary Ross’s explanation, taken as true, would withstand arbitrary-and-capricious review.<sup>179</sup> Writing for himself and those to his left, he held that “the VRA enforcement rationale—the sole stated reason—seems to have been contrived,” and that this fact alone vitiated the decision.<sup>180</sup>

The key point for my purposes is *why* the mismatch between the agency’s articulated reasons and its real ones doomed the decision. As Chief Justice Roberts put it: “The reasoned explanation requirement of administrative law, after all, is meant to ensure that agencies offer genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested public.”<sup>181</sup> “Accepting contrived reasons,” he explained, “would defeat the purpose of the enterprise.”<sup>182</sup> The agency thus violated the APA when it offered a “distraction,” rather than an “explanation,” for its choice.<sup>183</sup>

Despite Roberts’s framing of all this as a matter of common sense, bringing “the interested public” within the purview of the “reasoned explanation requirement” is in fact a significant development. As we have seen, the demand that agencies explain themselves in order to withstand judicial review certainly *can* also facilitate accountability to the public.<sup>184</sup> But at least for actions not subject to the APA’s rule-making procedures—which includes the memoranda at issue in both *Department of Commerce* and *Regents*—it is far from clear that anyone “meant” the requirement

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<sup>175</sup> See *New York v. U.S. Dep’t of Commerce*, 351 F. Supp. 3d 502, 542-45 (S.D.N.Y. 2019), *aff’d in part, rev’d in part*, 139 S. Ct. 2551 (2019).

<sup>176</sup> See *id.* at 546.

<sup>177</sup> *Id.* (emphasis omitted).

<sup>178</sup> See *Dep’t of Commerce v. New York*, 139 S. Ct. 2551, 2564-65, 2574-75 (2019).

<sup>179</sup> *Id.* at 2569-71.

<sup>180</sup> *Id.* at 2575-.

<sup>181</sup> *Id.* at 2575-76.

<sup>182</sup> *Id.* at 2576.

<sup>183</sup> *Id.*

<sup>184</sup> See *supra* Section I.A.

to serve that purpose.<sup>185</sup> In such cases, after all, the “reasoned explanation requirement” has no statutory basis apart from the provision instructing courts to set aside actions that are “arbitrary,” “capricious,” or the like. No surprise, then, that the Court had never before ascribed it a purpose beyond enabling that judicial task.

So why did Chief Justice Roberts take that step in *Department of Commerce*? Although the discussion in the opinion is brief, I do not think this was a coincidence or an accident.<sup>186</sup> The key point is that Roberts’s approach to the pretext issue required recasting the “reasoned explanation requirement” as a freestanding condition of an action’s lawfulness, rather than a mere window into whether the agency had engaged in reasoned decision-making.<sup>187</sup> If the explanation requirement were only

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<sup>185</sup> I return to the general issue of whether accountability-forcing via arbitrariness review comports with the original purposes of the APA below. *See infra* Section III.A.

<sup>186</sup> One might imagine that Roberts had the notice-and-comment process in mind (with its statutory requirement of a “general statement of . . . basis and purpose,” 5 U.S.C. § 553(c) (2018)) and mistakenly imputed its function to the more general reasoned-explanation requirement. But even the notice-and-comment regime has not been characterized by the Court (or mainly been understood by commentators) as a device to aid the public in passing judgment on an agency’s final decision. Rather, it has generally been understood as a means of empowering the public to *contribute to* or *participate in* that decision, while enabling *courts* to evaluate the ultimate result in a more informed way. *See, e.g.*, *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35 (D.C. Cir. 1977) (“[T]hese procedural requirements are intended to assist judicial review as well as to provide fair treatment for persons affected by a rule.”); *accord* MASHAW, *supra* note 95, at 96-99; Bagley, *supra* note 100, at 265; Stack, *supra* note 80, at 995-98. For arguments that come closer to the connection drawn by *Department of Commerce* (at least in the rulemaking context), see MASHAW, *supra* note 95, at 50-51 (noting that “reasons also inform participants concerning . . . the agency’s understanding of the material issues in the rulemaking proceeding”); Kenneth A. Bamberger, *Regulation as Delegation: Private Firms, Decisionmaking, and Accountability in the Administrative State*, 56 DUKE L.J. 377, 406-07 (2006) (suggesting that disclosures in the course of the rulemaking process “provide both private groups and other government institutions with meaningful yardsticks for reviewing, assessing, and critiquing ultimate agency action”); Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM L. REV. 515, 550 (2015) (suggesting that the rulemaking process aids “the general public . . . in identifying and litigating questionable agency actions”); Alec Webley, *Seeing Through a Preamble, Darkly: Administrative Verbosity in an Age of Populism and “Fake News,”* 70 ADMIN. L. REV. 1, 26-35 (2018) (contending that the APA’s preamble requirement was meant to promote “popular accountability” by advising the public of “what the government was doing and why”); and sources cited *supra* note 8 (discussing scholarship connecting political accountability and arbitrariness review more generally).

<sup>187</sup> The prior decision that came closest to effecting this separation was *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117 (2016), which held that a Department of Labor rule was arbitrary and so not entitled to *Chevron* deference. Although the opinion is somewhat opaque, the Court stressed the inadequacy of the agency’s *explanation* of its weighing of reliance interests without necessarily inferring that the agency’s actual *consideration* of those interests was insufficient. *See id.* at 2126-27. That arguably suggests an understanding

the latter, Secretary Ross’s failure to satisfy it would not necessarily invalidate his decision. The merits question in the case would still be whether his *actual* reasons (whatever they were) sufficed to justify his choice.<sup>188</sup> And so the logical next step, after finding that Ross’s contemporaneous statement failed to disclose those reasons, would be to proceed with efforts to unearth and evaluate them.<sup>189</sup> Meanwhile, because there would not yet be any judicial determination that Ross’s actual reasons were insufficient, the decision to vacate his existing action would at least require some special justification.<sup>190</sup> Perhaps it could be explained as a kind of punishment for bad faith, or as an adverse inference about the legality of Ross’s unstated reasons—but neither of those justifications would be clear-cut (and the Court said nothing of the kind). And there would also be substantial arguments weighing against this remedy. After all, the Court had essentially held that the Administration *could* add the citizenship question if it wished to do so (as it obviously did). Yet vacating the existing decision could preclude the Administration from implementing that preference before the deadline for finalizing the census form.<sup>191</sup> If the point of arbitrariness review were simply to filter out policy changes that are legally or logically unsupportable—and if Ross’s resort to pretext thus mattered only insofar as it frustrated that endeavor—the ultimate result of keeping the citizenship question off the census seems hard to swallow (even if the Administration had only itself to blame).

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of explanation as a distinct condition of lawfulness under the APA. Unlike in *Department of Commerce*, however, there actually was a statutory explanation requirement in *Encino Motorcars*, *see supra* note 186 (discussing § 553(c)), and there was no option of simply remanding to the agency for further explanation of its original reasons, *see infra* note 189 (discussing that path).

<sup>188</sup> *See supra* note 82 and accompanying text (explaining that arbitrariness turns on the sufficiency of an actor’s reasons).

<sup>189</sup> This would most likely mean remanding to the agency for a more satisfactory explanation of Secretary Ross’s original reasons. *See Checkosky v. SEC*, 23 F.3d 452, 463 (D.C. Cir. 1994) (opinion of Silberman, J.) (explaining that “reviewing courts will often and quite properly pause before exercising full judicial review and remand to the agency for a more complete explanation” when the agency’s existing explanation does not suffice to enable that review); *see also DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1907-08 (2020) (similar).

<sup>190</sup> The district court had concluded that vacatur was appropriate because “[t]he problem with Secretary Ross’s decision was not that it was inadequately explained, but rather that it was substantively arbitrary and capricious and ‘not in accordance’ with statutes that constrain his discretion.” *New York v. U.S. Dep’t of Commerce*, 351 F. Supp. 3d 674 (S.D.N.Y. 2019). But the Supreme Court concluded exactly the opposite. *See Dep’t of Commerce v. New York*, 139 S. Ct. 2551, 2569-71, 2573-76 (2019).

<sup>191</sup> *See* Leading Case, *Department of Commerce v. New York*, 133 HARV. L. REV. 372, 380 (2019) (“Because of the questionnaire’s June deadline, there would effectively be no remand.” (footnote omitted)).

But all of this looks different if we add “the interested public” back into the picture. If one purpose of the reasoned explanation requirement is to ensure political accountability for an agency’s reasons, then it is easy to see how grave violations of that requirement could justifiably be treated as fatal to an agency action—irrespective of whether the agency’s actual reasons sufficed, and irrespective of whether the agency could lawfully have taken the same action in the end. Here, when Secretary Ross lied about his reasons for adding the citizenship question, any damage to *political* accountability was done. Even if further litigation might have revealed his actual reasons as non-arbitrary, his decision could not be upheld on those grounds without creating the same *Chenery* problem as in *Regents*: The Administration would have rolled out its policy and publicly defended it on one, more politically attractive ground, only to have it upheld on a different one.<sup>192</sup> Similarly, allowing Ross’s decision to take immediate effect would mean letting the Administration have its way without ever weighing (and, if it chose, paying) the political cost of publicly switching to a new rationale or re-adopting one that had been exposed as a lie. Given the sparseness of the opinion’s text, it would go too far to claim that Roberts must have had all of this firmly in mind. But whatever Roberts’s own level of awareness might have been, the connection that he drew between the reasoned explanation requirement and the “interested public” was thus key to justifying his treatment of pretext as a fatal defect.<sup>193</sup>

And whatever its impetus, the connection that *Department of Commerce* established between arbitrariness review, pretext, and political accountability matters for reasons that extend beyond that particular case. Put in more general terms, the basic insight goes something like this. The executive branch will often prefer to take some action within its discretion while misleading the public about its reasons for doing so. But from the point of view of political accountability, that kind of dissembling is a problem. As I noted at the outset, the public’s ability to evaluate and respond to an action is compromised when it does not grasp (let alone when it misapprehends) the action’s reasons.<sup>194</sup> Courts can help to mitigate this problem by insisting that the agency’s *formally stated* reasons, at least, not be pretextual. So long as the public

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<sup>192</sup> See *supra* Section I.A.2.

<sup>193</sup> One could perhaps argue that the Administration’s pretext was so self-evident that there was no real work for political-accountability concerns to do. *Cf. infra* notes 214-220 and accompanying text (making a related suggestion regarding *Trump v. Hawaii*, 138 S. Ct. 2392 (2018)). But even if that were true on the facts of this case, it would not stop the Court’s resort to these concerns from doing the analytical job of making the reasoned explanation requirement a freestanding basis for vacatur. And while it may well have been obvious to the interested public that the VRA rationale was a sham, the public still did not have an accounting of the “genuine justifications” for the action that it could subject to scrutiny. See Chacón, *supra* note 15, at 251 (discussing the Administration’s possible aims); Klarman, *supra* note 15, at 216-17 (same).

<sup>194</sup> See *supra* notes 33-42 and accompanying text.

understanding of the agency’s reasons is linked to that formal statement, a court-imposed demand that the formally stated reasons be linked to the actual reasons will facilitate political accountability for the actual reasons as well.<sup>195</sup> The Court’s refusal to countenance pretextual explanations for agency actions thus fits into the larger accountability-forcing agenda that I have described.<sup>196</sup>

This understanding of *Department of Commerce*’s logic casts valuable light on what exactly the pretext rule should be taken to demand of an agency—an issue that the opinion itself left quite obscure. Although Roberts found it unacceptable that Ross’s “sole” articulated reason was “contrived,” he also took pains to clarify that an agency need not disclose *all* of its actual reasons.<sup>197</sup> The dissenters thus read the majority’s theory to reach only cases in which “an agency’s stated rationale did not factor *at all* into the decision” (and some early commentary has followed suit).<sup>198</sup> Under this view, if only Ross had cared a bit about the citizenship question’s asserted benefits for VRA enforcement, the case would have come out his way. And if one proceeds from traditional assumptions about the purposes of arbitrariness review, that narrow reading of the Court’s holding makes some sense. If the agency had *a* reason for its action that was legally sufficient to support it, there seems little justification for courts to stand in the agency’s way—even if, from the agency’s point of view, that reason actually carried little weight.<sup>199</sup>

But, from a political-accountability perspective, we should ask a different question and reach a different answer. The question is: When the executive branch predicates its action on a given ground, what is it representing to the public? On the

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<sup>195</sup> I consider the strength of that linkage between formally stated reasons and public understanding below. *See infra* Section III.C.

<sup>196</sup> This understanding of the pretext rule also harmonizes it with Chief Justice Roberts’s insistence—in the same case, but on behalf of a different majority—that arbitrariness review should privilege “the Secretary’s policymaking discretion” over the Census Bureau’s “technocratic expertise.” *Dep’t of Commerce v. New York*, 139 S. Ct. 2551, 2571 (2019); *see supra* note 26, notes 142-143 and accompanying text (discussing the significance of that holding). Insofar as deference to the agency head’s policymaking discretion rests on his political accountability, a requirement that he forthrightly subject himself to such accountability could simply be the flip side of the same coin. *Cf. supra* notes 168-174 and accompanying text (discussing a related argument that the degree of deference should vary with the extent of the decision makers’ political accountability).

<sup>197</sup> *See Dep’t of Commerce*, 139 S. Ct. at 2573 (“[A] court may not reject an agency’s stated reasons for acting simply because the agency might also have had other unstated reasons. . . . [Agency] decisions are routinely informed by unstated considerations of [various kinds].”).

<sup>198</sup> *Id.* at 2579 (Thomas, J., concurring in part and dissenting in part); *see Louis Murray, Note, Reconceptualizing Pretext’s Role in Administrative Law*, 57 HARV. J. ON LEGIS. 481, 491 (2020) (similar).

<sup>199</sup> *See supra* notes 189-191 and accompanying text (making a similar point about *Department of Commerce* under the actual facts of the case).

one hand (and to Chief Justice Roberts’s point), such a statement probably does not imply the absence of any “unstated considerations of politics, the legislative process, [or] public relations.”<sup>200</sup> Precisely because our norms of political dialogue do not call for exhaustive disclosures of such factors, failing to disclose them in a particular case does not amount to misleading anyone.<sup>201</sup> But on the other hand, a statement that the agency is doing *x* because of *R* surely does imply that the agency viewed *R* as a *sufficient* reason for doing *x*. If that is not so—if, in fact, the agency would have acted differently but for the weight of other, undisclosed reasons—then its omission of those other reasons misleads the public about the meaning of its choice and thereby undermines political accountability.<sup>202</sup> The pretext rule should thus require not only that the stated reasons be *among* the actual reasons, but also that the stated reasons be ones regarded by the agency as sufficient without the aid of others.<sup>203</sup>

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<sup>200</sup> *Dep’t of Commerce*, 139 S. Ct. at 2573.

<sup>201</sup> There is a loose analogy here to a traditional rationale for the puffery defense in fraud cases: Some statements cannot support a claim of “deceit” because “[a]ll men know” that such statements are apt to be overstated (or, here, incomplete). *Kimball v. Bangs*, 11 N.E. 113, 114 (Mass. 1887). The more general point is that deception operates by exploiting maxims of conversation and so can only be identified with reference to those norms. See generally Michael Franke et al., *Strategies of Deception: Under-Informativity, Uninformativity, and Lies—Misleading with Different Kinds of Implicature*, 12 TOPICS IN COG. SCI. 583, 584-85 (2020).

<sup>202</sup> By way of analogy, consider the nursing-home example again. See *supra* notes 34-35 and accompanying text. Suppose that I had a contagious disease and genuinely counted that in favor of staying home. Still, I cared far more about watching television; if the cable had been out, I would have gone to the nursing home despite the risk of contagion. If I then told you that I stayed home because of the risk of contagion, I would be misleading you about the meaning of my decision. (Note, though, that there is no similar problem posed by the inevitable reality that I would have decided differently but for the non-occurrence of various other circumstances that, had they occurred, would have been countervailing reasons. Suppose, for instance, that if my relative had been in greater need, I would have visited. Her lack of greater need is a “but for” cause of my staying home, but it is not itself a reason that weighs for or against that decision. Accordingly, this counterfactual dependence does not change the fact that I take the risk of contagion as sufficient reason for staying home, and I would not ordinarily mislead you by stating only that reason.)

<sup>203</sup> At least in principle—and if one cared only to maximize political accountability—the total disclosure rule that *Department of Commerce* rejects would be better than this one. Cf. SCANLON, *supra* note 33, at 55-56 (“[A]n agent may see many considerations as bearing on an action, and may see more than one of them as sufficient to make that action worth undertaking. When this is so, all of the various ways in which the agent saw those considerations as bearing on the action can be relevant to its meaning.”). But *Department of Commerce* forecloses that rule, and understandably so. Here, as in many other contexts, affirmative misrepresentation is reasonably treated differently than a failure to provide additional, potentially useful information.



What about the opposite problem: If the agency discloses reasons that are both actual and (by its lights) sufficient, may it *also* include others that are purely contrived? Again, some have read *Department of Commerce* to pose no obstacle to such dissembling; and again, from the perspective of traditional arbitrariness review, that makes sense.<sup>204</sup> If the agency had reasons for action that were sufficient in its view and in the reviewing court’s, padding the explanation with other reasons (even made-up ones) does not make the action “arbitrary” in the sense of lacking sufficient reason.<sup>205</sup> But, yet again, political-accountability concerns cut differently. The pretextual rationale could well have operated as a “distraction”<sup>206</sup> that interfered with the public’s chance to “respond fully and in a timely manner”<sup>207</sup> to the agency’s actual reasons—and, by the logic of *Department of Commerce* and *Regents*, that alone might justify a court in demanding a pretext-free do-over. Indeed, as I will explain later, the accountability-forcing mode of arbitrariness review could support vacating agency actions that are justified on both valid and invalid grounds regardless of whether the invalidity stems from pretext or some other defect.<sup>208</sup>

Regardless of how one resolves these questions about the substantive scope of the pretext rule, the rule’s real-world significance will depend on how difficult agencies actually find it to lie to courts about their reasons. That, in turn, will depend in large part on how high courts set the bar for extra-record discovery: If pretexts will hardly ever be exposed in litigation (and the government knows it), judicial review might not do much to protect the public from misrepresentations about why agencies acted as they did.<sup>209</sup> Lisa Heinzerling has forcefully argued that the presumption against discovery in APA cases should be softened in order to remedy that problem.<sup>210</sup> And counting political accountability squarely among the purposes of arbitrariness review, as the Court’s most recent cases do, certainly strengthens

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<sup>204</sup> See, e.g., Murray, *supra* note 198, at 491.

<sup>205</sup> See *supra* note 82 and accompanying text (laying out this understanding of arbitrariness).

<sup>206</sup> Dep’t of Commerce v. New York, 139 S. Ct. 2551, 2574 (2019).

<sup>207</sup> DHS v. Regents of the Univ. of Cal., S. Ct. 140 S. Ct. 1891, 1909 (2020).

<sup>208</sup> See *infra* Section II.C.

<sup>209</sup> See Lisa Heinzerling, *The FDA’s Plan B Fiasco: Lessons for Administrative Law*, 102 GEO. L.J. 927, 952-58 (2014) (arguing that the FDA’s extensive dissembling in connection with its handling of emergency contraceptives was exposed only because “the district court . . . departed from the ordinary rule [against] discovery,” and drawing the “lesson that unless courts are sometimes willing to depart from the usual plotline for judicial review, they will be unlikely to uncover and remedy the most serious violations of administrative law”).

<sup>210</sup> See *id.* at 976-82.

Heinzerling’s case.<sup>211</sup> But even if the bar to discovery were to remain high, the pretext rule would still go some way toward enhancing political accountability. Its very existence means that agencies do run at least some risk of having their policies invalidated when they lie about their reasons (whereas there is no such risk inherent in lying directly to the public). Moreover, if “it is both possible and necessary for executive branch lawyers to constrain unlawful executive branch action,”<sup>212</sup> then a substantive rule against pretext might well shape agency conduct indirectly—by deputizing the career government attorneys who are at least reluctant to make false, in-court representations about what the agency has done and why.<sup>213</sup>

Before leaving *Department of Commerce* and its treatment of pretext, one last point bears mention. On the surface, at least, there is a striking tension between the Court’s ruling on the citizenship question and its decision, just a year before, to uphold President Trump’s entry suspension for nationals of several Muslim-majority countries.<sup>214</sup> In *Department of Commerce*, Chief Justice Roberts looked behind a “contrived” justification for a preordained policy,<sup>215</sup> but in *Trump v. Hawaii*, he

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<sup>211</sup> As Heinzerling observes, “easing the rule against probing the minds of the decision makers w[ould] help to ensure that there is a meaningful connection between the public reasons the decision makers give for their choices and the actual reasons that motivated them.” *Id.* at 982.

<sup>212</sup> Dawn E. Johnsen, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 UCLA L. REV. 1559, 1601 (2007).

<sup>213</sup> Two recent examples are suggestive of this dynamic. The first is *Department of Commerce* itself, where Secretary Ross’s cover story began to unravel when, “at DOJ’s urging,” the agency filed a supplemental memorandum with the court correcting its initial account. *Dep’t of Commerce*, 139 S. Ct. at 2564; see *New York v. U.S. Dep’t of Commerce*, 351 F. Supp. 3d 502, 547-48 (S.D.N.Y. 2019). The second comes from the Trump Administration’s short-lived policy barring New York residents from “Trusted Traveler Programs.” In July 2020, the Administration abandoned that policy altogether when Justice Department lawyers learned, in the course of preparing the government’s defense, that the policy’s pretextual rationale was factually incorrect. See Letter from Acting U.S. Attorney, Southern District of New York at 1-2, *New York v. Wolf*, No. 20 Civ. 1127 (S.D.N.Y. July 23, 2020) (acknowledging that prior representations that New York’s privacy restrictions “were unique and precluded . . . adequate risk assessments of New York applicants” were false); *id.* at 3 (reporting that DHS “has decided to restore New York residents’ access to the Trusted Traveler Programs, effective immediately”). Like Ross’s lie, that misrepresentation had previously been advanced both in court and in public. See *id.* at 1-2; Acting Sec’y Chad Wolf (@DHS\_Wolf), TWITTER (Feb. 9, 2020, 10:50 AM), [https://twitter.com/dhs\\_wolf/status/1226533953949097984](https://twitter.com/dhs_wolf/status/1226533953949097984) [<https://perma.cc/4QCT-L2B9>]. Both examples suggest that attorneys’ sense of the bounds of candor in court can play a role in keeping pretexts out of the public record (or at least in correcting that record) as well.

<sup>214</sup> *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018).

<sup>215</sup> *Dep’t of Commerce*, 139 S. Ct. at 2575.

dismissed the policy's real reasons as essentially irrelevant.<sup>216</sup> There are several possible explanations for that discrepancy—in terms of the applicable law, the subject matter, the sophistication of the bureaucratic laundering process, the formally responsible actor, and more. But focusing on the connection between pretext and political accountability highlights another intriguing possibility: For all of the travel ban's flaws, nobody could think that the Administration had somehow evaded political responsibility for President Trump's actual, invidious reasons for adopting it. After all, Trump had run for office on the very "Muslim ban" that he stood accused of trying to implement.<sup>217</sup> His later orders were obviously meant to deliver on that promise; in fact, he went out of his way to communicate as much.<sup>218</sup> And if a "reasonable observer" would readily draw that connection—as the lead dissent argued, and the majority did not dispute<sup>219</sup>—then perhaps the President's resort to a cover story for purposes of judicial review, however dishonest, posed no real threat to the public's ability to hold him accountable through the political process for what everyone already understood. If the plaintiffs were right about the policy's public meaning, in other words, their constitutional challenge simply called upon the Court to perform the traditional function of holding the government *legally* accountable for failing to respect the rights of a vulnerable minority.<sup>220</sup> Understood in this way, the Court's decision in *Hawaii* is not necessarily in tension with a turn toward prioritizing political accountability in judicial review of executive action; it just underscores the wide gap between political accountability and liberal democracy.

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<sup>216</sup> In particular, the Court held that the policy could be upheld if it "c[ould] reasonably be understood to result from a justification independent of unconstitutional grounds," *Hawaii*, 138 S. Ct. at 2420, and that the order could "reasonably" be so understood under rational-basis review, *id.* at 2420-23. *See also* Daphna Renan, *The President's Two Bodies*, 120 COLUM. L. REV. 1119, 1198-1201 (2020) (explaining how the Court effectively transmuted a case about the anti-Muslim bigotry of "a particular President" into a case about "the authority of the Presidency itself" (quoting *Hawaii*, 138 S. Ct. at 2418)).

<sup>217</sup> *See Hawaii*, 138 S. Ct. at 2417 (describing Trump's proposal for a "total and complete shutdown of Muslims entering the United States").

<sup>218</sup> *See id.* at 2435-40 (Sotomayor, J., dissenting); *see also* Klarman, *supra* note 15, at 220 (detailing how "Trump used a wink and a nod to assure his supporters that while lawyers had laundered the ban to improve the prospects of its surviving legal challenge, its purpose was still to keep Muslims out of the country").

<sup>219</sup> *Hawaii*, 138 S. Ct. at 2435 (Sotomayor, J., dissenting); *see id.* at 2420 n.5 (majority opinion) (refusing to undertake a "*de novo* 'reasonable observer' inquiry").

<sup>220</sup> To extend the "political process" analogy, *Hawaii* implicates the other branch of the *Carolene Products* footnote. *See* *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (suggesting "more exacting judicial scrutiny" not only of "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation," but also of "statutes directed at particular religious, or national, or racial minorities"); *supra* note 7 and accompanying text.

## II. WHAT NEXT?

Thus far I have argued that the Court’s most recent decisions have moved toward an accountability-forcing conception of the purposes, and hence also the parameters, of arbitrariness review. What else might that development foretell? As a first pass at answering that question, I will sketch here three doctrinal changes—concerning reviewability, the remedy of “remand without vacatur,” and agencies’ reliance upon arguments in the alternative—that plausibly belong on an accountability-forcing agenda.<sup>221</sup>

### A. REVIEWABILITY

#### 1. “No Law to Apply”

The first concerns the APA’s proviso that agency action is unreviewable to the extent that it is “committed to agency discretion by law.”<sup>222</sup> Courts have long held that this exception to the ordinary presumption of reviewability covers cases in which there is “no law to apply”<sup>223</sup>—that is, “where the relevant statute ‘is drawn so that a court would have no meaningful standard against which to judge the agency’s exercise of discretion.’”<sup>224</sup> But, in practice, that unitary formulation has masked a two-track inquiry. First, some actions are held to be “committed to agency discretion by law” because they fall within “certain *categories* of administrative decisions that courts *traditionally* have regarded as ‘committed to agency discretion.’”<sup>225</sup> The list of such categories is short, with nonenforcement decisions being the most familiar and important.<sup>226</sup> Second, some other actions fall within the statutory exception because they directly satisfy the “no law to apply” test, without the

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<sup>221</sup> A fourth agenda item would be ratcheting down the showing that is required before plaintiffs may undertake extra-record discovery into an agency’s reasons; that would certainly make the pretext rule more effective as an accountability-forcing tool. *See supra* note 211 and accompanying text. I will not delve into the merits of such a change here, although I do note below one way in which an accountability-centric understanding might inform the calibration of the threshold across different kinds of cases. *See infra* note 310 and accompanying text.

<sup>222</sup> 5 U.S.C. § 701(a)(2) (2018).

<sup>223</sup> *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971) (quoting S. Rep. No. 79-752, at 212 (1945)).

<sup>224</sup> *Lincoln v. Vigil*, 508 U.S. 182, 191 (1993) (quoting *Webster v. Doe*, 486 U.S. 592, 599-600 (1988)).

<sup>225</sup> *Id.* at 191 (emphasis added); see *Dep’t of Commerce*, 139 S. Ct. at 2568-69.

<sup>226</sup> *See Heckler v. Chaney*, 470 U.S. 821, 837-38 (1985); *see also Lincoln*, 508 U.S. at 191-92 (allocation of funds from a lump-sum appropriation); *Interstate Commerce Comm’n v. Locomotive Eng’rs*, 482 U.S. 270, 282-84 (1987) (denial of a request for reconsideration based on material error).

help of any category-wide tradition. Significantly, however, only one Supreme Court case, *Webster v. Doe*, has ever held an action (there, firing a CIA employee) to qualify for unreviewability in this second way.<sup>227</sup>

Together, *Department of Commerce* and *Regents* take large steps toward cutting off this second branch of the “no law to apply” inquiry altogether. First, in *Department of Commerce*, Chief Justice Roberts silently (and dubiously) recast *Webster* as having rested on a categorical tradition relating to national security, apparently in order to parry Justice Alito’s objection that the census statute equally “exude[d] deference.”<sup>228</sup> Having done that, Roberts could tacitly write the noncategorical track out of existence entirely in *Regents*. “To ‘honor the presumption of review,’” he wrote, “‘we have read the exception in §701(a)(2) quite narrowly,’ *confining it to those rare ‘administrative decision[s] traditionally left to agency discretion.’*”<sup>229</sup> This is not a holding abolishing the second, non-tradition-dependent track, but it casts the vitality of that line of cases (which continues to loom large in the lower courts) into significant doubt.

And if one understands arbitrariness review as, in part, a means of enforcing political accountability, this shift makes a good deal of sense. Insofar as the APA aims “to ensure that agencies offer genuine justifications for important decisions,”<sup>230</sup> that aim will always be better served by keeping the explanatory demand itself in place, even if the substantive standard of judicial review will be extraordinarily deferential. Likewise, if the purpose of the reasoned-explanation requirement encompasses facilitating “scrutin[y] by . . . the interested public,”<sup>231</sup> relieving agencies of the obligation to explain themselves because there are no *judicially manageable* standards for evaluating their choices becomes a non sequitur. The infeasibility of judicial second-guessing is no reason for freeing agencies of the obligation to subject themselves to *political* accountability; if anything, it is all the more reason for insisting on it.

Consider *Department of Commerce* itself as an example. No degree of substantive discretion on Secretary Ross’s part would have undercut the value that Chief Justice Roberts understood judicial review to serve there. After all, he concluded that even a bottom-line choice within the Secretary’s existing zone of discretion

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<sup>227</sup> See *Webster*, 486 U.S. at 600 (concluding that the statutory provision authoring termination “exudes deference” and “foreclose[s] the application of any meaningful judicial standard”).

<sup>228</sup> See *Dep’t of Commerce*, 139 S. Ct. at 2568; *id.* at 2603 (Alito, J., concurring in part and dissenting in part).

<sup>229</sup> *Regents*, 140 S. Ct. at 1905 (emphasis added) (quoting *Weyerhaeuser Co. v. U.S. Fish and Wildlife Serv.*, 139 S. Ct. 361, 370 (2018), and *Lincoln v. Vigil*, 508 U.S. 182, 191 (1993)).

<sup>230</sup> *Dep’t of Commerce*, 139 S. Ct. at 2575-76.

<sup>231</sup> *Id.* at 2576.

could not stand. And when it comes to reviewability in particular, the consequences of this accountability-oriented conception of “the purpose of the enterprise”<sup>232</sup> are underscored by one of Justice Alito’s arguments in dissent. “[T]he importance of the census” did not justify judicial review, Alito argued, because “the Secretary is accountable in other ways for census-related decisionmaking.”<sup>233</sup> These include oversight by Congress (where, Alito noted, Secretary Ross had testified repeatedly) and by “the President, who is, in turn, accountable to the people.”<sup>234</sup> This argument makes sense within a traditional vision of political accountability and arbitrariness review as substitutes for one another. But it collapses if one instead understands arbitrariness review as, in part, a means of clearing the channels of political accountability themselves—here, by stopping the administration from lying about its reasons to the audiences who, as Justice Alito says, would ordinarily be expected to hold it accountable for how it wields its broad substantive discretion.

A substantial counterargument to all of this is that requiring genuine explanations for the sake of political accountability, rather than to facilitate traditional arbitrariness review, simply has no basis in the APA.<sup>235</sup> Much the same could be said of the entire turn toward an accountability-forcing brand of arbitrariness review, so I will return to that general issue below.<sup>236</sup> For the moment, the distinction between the two “tracks” to unreviewability may offer a partial answer. In cases controlled by the first—those where there is a tradition of judicial noninvolvement that the APA is best read to codify—courts’ disengagement comes at a cost to political accountability, but one that even a proponent of accountability-forcing might find unavoidable. But the same does not necessarily follow when the only reason for unreviewability is a statute-specific judgment that the agency wields exceedingly broad substantive discretion. To be sure, even in such cases, I doubt that the Court would (or should) construct a novel regime in which agencies must state their genuine reasons for the sake of political accountability, but then face no review for arbitrariness. In deciding *whether* there should be such review for arbitrariness, however, it seems likely, and perhaps appropriate, that the Court will be guided in part by what it takes to be the “important value[]” of “agency accountability” to the

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<sup>232</sup> *Id.*

<sup>233</sup> *Id.* at 2606 (Alito, J., concurring in part and dissenting in part).

<sup>234</sup> *Id.*

<sup>235</sup> Along similar lines, it might seem in tension with *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978), which forbade courts from devising procedural requirements beyond those imposed by the APA itself. *Cf.* *Checkosky v. SEC*, 23 F.3d 452, 464 (D.C. Cir. 1994) (opinion of Silberman, J.) (reconciling *Overton Park*’s explanation requirement with *Vermont Yankee* on the ground that a reasoned explanation is necessary to arbitrariness review).

<sup>236</sup> *See infra* Section III.A.

public,<sup>237</sup> even if a court will nearly always uphold the agency’s choice as reasonable in the end.<sup>238</sup>

## 2. General Enforcement Policies

For similar reasons, a focus on political accountability also argues for narrowly construing the categorical, tradition-based carve-outs from reviewability. Perhaps the most significant live question of that kind concerns the distinction between so-called “single-shot” exercises of enforcement discretion and general enforcement policies. In *Heckler v. Chaney*, the Court held the FDA’s denial of an individual petition for enforcement unreviewable.<sup>239</sup> Since *Chaney*, however, the government has argued (including in *Regents*) that this carve-out does or should extend to an agency’s more general enforcement policies as well. While the D.C. Circuit has indicated that such policies are presumptively reviewable, it has rarely applied that rule, and some courts have construed it as a limited exception for policies based on legal interpretations.<sup>240</sup> The Supreme Court reserved the issue in *Regents* after holding the DACA rescission to be reviewable on other grounds.<sup>241</sup>

From the point of view of political accountability, the case for distinguishing general policies from one-off decisions is strong. Of course, there might be accountability benefits to requiring explanations of *all* enforcement decisions. But in the case of individual, often *ad hoc* determinations, that is unrealistic.<sup>242</sup> Moreover, such determinations will usually be of limited significance—the kinds of decisions that would not register with the public in the way that accountability arguments presuppose in the first place.<sup>243</sup> When an agency takes the consequential step of formulating a general policy for when and how it will exercise its authority, by contrast, the argument for at least requiring it to offer a “genuine justification for [that]

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<sup>237</sup> *Regents*, 140 S. Ct. at 1909.

<sup>238</sup> *Cf. Massachusetts v. EPA*, 549 U.S. 497, 527-28 (2007) (“Refusals to promulgate rules are . . . susceptible to judicial review, though such review is ‘extremely limited’ and ‘highly deferential.’” (citations omitted)).

<sup>239</sup> 470 U.S. 821, 827-38 (1985).

<sup>240</sup> *See Crowley Caribbean Transport, Inc. v. Peña*, 37 F.3d 671, 676-77 (D.C. Cir. 1994); *OSG Bulk Ships, Inc. v. United States*, 132 F.3d 808, 812 (D.C. Cir. 1998); *see also NAACP v. Trump*, 298 F. Supp. 3d 209, 231 (D.D.C. 2018) (limiting this line of cases to legal interpretations).

<sup>241</sup> *See Regents*, 140 S. Ct. at 1906.

<sup>242</sup> *See Crowley*, 37 F.3d at 677 (explaining that agencies’ statements of reasons “in the context of individual decisions to forego enforcement tend to be cursory, ad hoc, or post hoc”); *cf. Massachusetts*, 549 U.S. at 527 (drawing a similar distinction between non-enforcement decisions and decisions not to initiate rulemakings).

<sup>243</sup> For further discussion of the distinction between major and minor actions and its relevance to political accountability arguments, see *infra* Section III.C.

important decision[]”<sup>244</sup> has a good deal more force. A court’s review of that justification should certainly respect the agency’s “complicated balancing of . . . factors which are peculiarly within its expertise.”<sup>245</sup> But, again, that is no reason to forgo the *political* accountability that comes with a reasoned explanation, and especially with one subject to the court-imposed rules against post hoc rationalizations, false claims of legal compulsion, and pretexts.

Recent litigation over the U.S. Attorney for the District of Columbia’s policy of bringing felon-in-possession cases in federal court, rather than D.C. court, offers a particularly good example.<sup>246</sup> That policy was predictably controversial; whatever its overall merits, it diminishes the practical relevance of D.C. law and exposes offenders to harsher sentences.<sup>247</sup> When the U.S. Attorney announced the policy at a press conference, she disclaimed any purpose to obtain harsher sentences and defended the policy solely as a means of bringing federal *investigative* resources to bear on the relevant crimes.<sup>248</sup> Then, when the policy was challenged under the APA—including on the ground that the stated reason is factually unsupported—the government shifted to defending it principally as a means of securing “higher conviction rates and longer sentences.”<sup>249</sup> So the case is essentially *Regents and Department of Commerce* folded into one: The government announced and publicly justified a controversial policy on an anodyne ground—one that may well have been contrived—and then, more than a year later, defended it in court on a politically inflammatory ground it had previously disavowed. In deciding whether courts should set that kind of policy aside, the traditional reluctance to second-guess prosecutors’ charging decisions seems quite beside the point. When it comes to the value of assuring the interested public “genuine justifications for important decisions,”<sup>250</sup>

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<sup>244</sup> Dep’t of Commerce v. New York, 139 S. Ct. 2551, 2576 (2019).

<sup>245</sup> *Chaney*, 470 U.S. at 831.

<sup>246</sup> See United States v. Reed, No. 1:19-cr-00093-EGS (D.D.C. Mar. 12, 2019). The challengers are represented by the Impact Defense Initiative (IDI) of Harvard Law School, and I have consulted with the IDI regarding the case.

<sup>247</sup> A supermajority of the D.C. Council promptly condemned the measure on these and other grounds. See Sense of the Council in Opposition to the Prosecution of Local Gun Offenses in Federal Court, P.R. 194, 2019 Council, 23rd Period (D.C. 2019), <https://lims.dccouncil.us/downloads/LIMS/42105/Introduction/PR23-0194-Introduction.pdf> [<https://perma.cc/6UZW-MQB3>].

<sup>248</sup> See Transcript of Press Conference at 8-12, United States v. Reed, No. 1:19-cr-00093-EGS (D.D.C. Feb. 6, 2019), Dkt. 48-1.

<sup>249</sup> U.S. Opp. to Mot. to Dismiss at 6, United States v. Reed, No. 1:19-cr-00093-EGS (D.D.C. Feb. 6, 2019); see Crabb Decl. ¶ 6, United States v. Reed, No. 1:19-cr-00093-EGS (D.D.C. Feb. 6, 2019), Dkt. 48-3.

<sup>250</sup> Dep’t of Commerce v. New York, 139 S. Ct. 2551, 2575-76 (2019).



as well as the chance to “respond fully and in a timely manner” to them,<sup>251</sup> the case is no different in kind than *Department of Commerce and Regents*.

Finally, the case for permitting review of policies that rest on claims *about what the law requires* is especially strong.<sup>252</sup> As we saw with the buck-passing explanation for rescinding DACA, agencies’ assertions that their actions are legally compelled serve to deflect political accountability.<sup>253</sup> Permitting an agency to assert both that an action is legally compelled and that the matter is committed to its *unreviewable* discretion goes still further in the same direction. It invites agencies to use even feeble claims of powerlessness as a means of diffusing responsibility for unpopular decisions.<sup>254</sup> And at least on this issue, there is little need for a court to freelance from the statutory text. Agency action is unreviewable only “to the extent that . . . [it] is committed to agency discretion by law.”<sup>255</sup> When an agency bases its action on a determination that it *lacks* discretion, it is natural to presume that, at least “to the extent” of that determination, the agency’s judgment is not also “committed to [its] discretion.”<sup>256</sup>

## B. REMAND WITHOUT VACATUR

Since the 1980s, the D.C. Circuit has developed a controversial practice of remanding some defective rules or other agency actions back to the agency without vacating them.<sup>257</sup> The basic idea is that, when the agency is likely to reach the same

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<sup>251</sup> *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1909 (2020).

<sup>252</sup> The Court reserved that issue in *Chaney*. See *Heckler v. Chaney*, 470 U.S. 821, 833 n.4 (1985). The D.C. Circuit has suggested that “[t]he interpretation an agency gives to a statute is not committed to the agency’s unreviewable discretion,” *Citizens for Responsibility & Ethics in Wash. v. Fed. Elections Comm.*, 892 F.3d 434, 441 n.11 (2018), but its caselaw is not entirely clear or uniform on that point. See, e.g., *Crowley Caribbean Trans., Inc. v. Pena*, 37 F.3d 671, 677 (1994) (suggesting that *individual* nonenforcement decisions are always presumed unreviewable).

<sup>253</sup> See *supra* Section I.A.3.

<sup>254</sup> See *NAACP v. Trump*, 298 F. Supp. 3d 209, 249 (2018) (stressing this point in holding that DACA’s rescission was reviewable).

<sup>255</sup> 5 U.S.C. § 701(a).

<sup>256</sup> The most serious obstacle to narrowing unreviewability in this way is *Interstate Commerce Comm. v. Bhd. of Locomotive Eng’rs*, 482 U.S. 270 (1987), which rejected the notion “that if the agency gives a ‘reviewable’ reason for otherwise unreviewable action, the action becomes reviewable.” *Id.* at 283. *Locomotive Engineers* predates the developments that I have described here, however, and the scope of its holding is disputed. Compare, e.g., Brief for the Petitioners 24-25, *Regents*, 140 S. Ct. 1891 (Nos. 18-587, 18-588, 18-589) (reading *Locomotive Engineers* broadly), with Brief for the D.C. Respondents, *supra* note 92, at 27-30 (reading it narrowly).

<sup>257</sup> See Bagley, *supra* note 100, at 307-12; Ronald M. Levin, “*Vacation*” at Sea: *Judicial Remedies and Equitable Discretion in Administrative Law*, 53 DUKE L.J. 291, 298-305 (2003).

result again and an interim change will be disruptive, it is better to leave the status quo intact while the agency reconsiders the issue.<sup>258</sup> The practice has been attacked on two main grounds. First, it is said to conflict with the APA’s instruction that a reviewing court “shall” set aside an unlawful action.<sup>259</sup> Second, it is thought to leave agencies with little incentive to promptly address the errors that the court has identified.<sup>260</sup>

But the Court’s new focus on political-accountability concerns suggests a third, and potentially more serious, objection to remand without vacatur in some cases: The interim changes that the practice avoids are sometimes essential to ensuring meaningful political accountability for the agency’s revised reasoning. The facts of *Regents* exemplify the problem, and the Court’s grounds for disregarding the Nielsen Memorandum there appear sensitive to “functional reasons” of precisely this kind.<sup>261</sup>

Recall how the successive explanations for DACA’s rescission unfolded. In September 2017, the Administration rescinded DACA through the Duke Memorandum and based on its legal rationale. That decision, and the agonized deliberations that preceded it, captivated the media and received intense public scrutiny.<sup>262</sup> Indeed, the White House Press Secretary recounted how “the President wrestled with this decision all throughout the weekend” before the fateful announcement.<sup>263</sup> When the D.C. district court held the Duke Memorandum invalid several months later, the court vacated the agency’s action but stayed the effect of its order for three months—essentially remanding-without-vacatur for a limited period.<sup>264</sup> That meant that nothing about DACA’s status changed as a result of the court’s decision. DACA remained rescinded, and thus new applicants were still barred from applying for its benefits. And other courts’ preliminary injunctions protecting existing beneficiaries were not mooted, because the agency action at issue remained in effect. This preservation of the status quo—together with the agency’s eventual decision not to take a new action that could moot the other cases—meant that nothing changed for DACA beneficiaries with the Nielsen Memorandum, either. And that lack of real-world impact is presumably why this second explanation of DACA’s rescission, in sharp

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<sup>258</sup> See *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm’n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993).

<sup>259</sup> See, e.g., *Checkosky v. S.E.C.*, 23 F.3d 452, 490-93 (opinion of Randolph, J.). *But see* Bagley, *supra* note 100, at 309; Levin, *supra* note 257, at 309-15.

<sup>260</sup> See, e.g., *Nat. Res. Def. Council v. EPA*, 489 F.3d 1250, 1262-64 (D.C. Cir. 2007) (Randolph, J., concurring); Kristina Daugirdas, *Evaluating Remand without Vacatur: A New Judicial Remedy for Defective Agency Rulemakings*, 80 N.Y.U. L. REV. 278, 301-05 (2005).

<sup>261</sup> *Regents*, 140 S. Ct. at 1909.

<sup>262</sup> See *supra* Section I.A.1.

<sup>263</sup> *Press Briefing*, *supra* note 50; see *supra* notes 47-58 and accompanying text.

<sup>264</sup> See *supra* note 62 and accompanying text.

contrast to the first, occasioned no public interest and was paired with no public roll-out—not even a presidential tweet.<sup>265</sup>

But if it is the lack of contemporaneous real-world impact that blunts political accountability, as I have just suggested, then even a “new” action that comes after a remand without vacatur is always at risk of being post hoc in the relevant and problematic sense. Put in *Regents*’ terms, such an action still comes well after the agency’s actual “exercise of authority”—its taking action with concrete effects on the world.<sup>266</sup> In *Regents* itself, it just happened that the district court’s decision to employ remand-without-vacatur was, in this respect, canceled out by other courts’ preliminary injunctions. Those injunctions ensured that a new decision would have made a real-world difference—namely, mooted those other cases and setting DACA on a course to be rescinded in full for the first time—that Secretary Nielsen’s post hoc explanation did not. But absent the fortuity of other injunctions, remanding without vacatur will mean that even a new, superseding decision has no real-world impact of the kind that *Regents* evidently considered important to political accountability. Like a post hoc explanation, such a “decision” is apt to be viewed as just another court filing in an ongoing legal dispute over the validity of the same, original decision that remained in effect all along. At least in cases of public significance, then, *Regents*’ accountability-forcing logic suggests that the classic benefit of remand without vacatur—avoiding interim changes for affected parties—is a major strike against that remedy as well.<sup>267</sup>

### C. ARGUMENTS IN THE ALTERNATIVE

Finally, the accountability-forcing brand of arbitrariness review also has significant implications for agencies’ practice of justifying their decisions on multiple, alternative grounds. To see how, suppose that the Trump Administration had offered a document like the Nielsen Memorandum as its *first* justification for rescinding DACA. Assume, in other words, that DHS issued a decision memorandum that relied principally on legal grounds, but that also asserted, in the alternative, that the agency would take the same course on policy grounds even if the legal analysis were

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<sup>265</sup> See *supra* notes 64-74 and accompanying text.

<sup>266</sup> *Regents*, 140 S. Ct. at 1909.

<sup>267</sup> This same logic extends to “remands for explanation” that *precede* a judicial determination of arbitrariness. See *supra* note 189. But the accountability-forcing perspective suggests no serious problem when the agency’s later explanation is merely an “amplified articulation” of grounds that the agency invoked from the outset—a distinction already drawn by the caselaw about such interim remands. See, e.g., *Local 814, Int’l Bhd. of Teamsters v. NLRB*, 546 F.2d 989, 992 (D.C. Cir. 1976).

mistaken. And assume also that the Administration's *public* defense of its decision relied heavily (or exclusively) on the first, legal rationale.<sup>268</sup>

An accountability-forcing court should at least be uneasy about this. To be sure, the hypothetical is not as problematic as the actual facts of *Regents*. The inclusion of policy grounds from the outset invites the media and the public to call the administration to account for its willingness to exercise discretion in an unpopular way—and ultimately, one might think, the responsibility of bringing this to the fore has to fall to political actors, not courts. Still, there are grounds for concern that closely resemble *Regents*' concern about the actual DACA rescission. If the administration defends its policy overwhelmingly on one ground (especially a buck-passing ground), and that ground is invalid, it seems problematic to uphold the policy on a different ground that the administration (thanks to the invalid ground) may not really have paid the political price for invoking.<sup>269</sup> Put differently, the public's realistic opportunity to absorb and respond to an agency's reasons is often a function of the *overall set* of such reasons offered at any given time. And if we think in terms of such sets, upholding an action based on a *subset* of its original reasons is a form of upholding it based on a different set than the agency gave when people were paying attention.

As with the more straightforward *Chenery* problem in *Regents*, the issue here is probably best understood through the lens of harmless-error analysis.<sup>270</sup> And as we have seen, *Regents* suggests that such an inquiry has two distinct aspects.<sup>271</sup> First, and more familiar, a court should consider whether the agency would have reached the same conclusion but for the invalid ground.<sup>272</sup> When the court makes that determination, however, *Regents*' gloss on *Chenery* invites the court to consider the

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<sup>268</sup> The actual facts of *Massachusetts v. EPA*, 549 U.S. 497 (2007), somewhat resemble this hypothetical. In its decision refusing to initiate a rulemaking, the EPA concluded both that it lacked statutory authority to regulate greenhouse gases and, in the alternative, that it would not exercise any such authority on policy grounds. *See id.* at 511-13. The agency's public defense of that decision emphasized the former, buck-passing rationale. *See supra* note 153 (quoting agency press release); *see also* Jeffrey Ball, *EPA Rejects Cap on Carbon Dioxide*, WALL ST. J., Aug. 29, 2003 (“[T]he EPA said that any effort to curb greenhouse-gas emissions would exceed its authority unless Congress specifically expanded its powers in new legislation.”); Chris Baltimore, *US EPA Says Won't Regulate CO2 Emissions from Autos*, REUTERS, Aug. 28, 2003 (“The Bush administration . . . [said] it has no authority over emissions linked to global warming.”). Ultimately, the Court rejected both arguments on their merits. *See Massachusetts*, 549 U.S. at 528, 534.

<sup>269</sup> For purposes of this argument, the invalidity at issue could stem from either a garden-variety error or the fact that the rationale was pretextual. *See supra* notes 203-208 and accompanying text.

<sup>270</sup> *See, e.g., Fogo De Chao (Holdings) Inc. v. DHS*, 769 F.3d 1127, 1149 (D.C. Cir. 2014) (analyzing an agency's reliance on alternative justifications in those terms).

<sup>271</sup> *See supra* Section I.A.2.

<sup>272</sup> *See, e.g., Fogo De Chao*, 769 F.3d at 1149.

relevance of political accountability to the agency’s decision-making. For example, if the agency relied overwhelmingly on the invalid ground in public (as DHS did with DACA’s rescission), that is a reason to doubt that the agency would have made the same choice without that arrow in its quiver—even if the agency dutifully recited, in its formal decision memorandum, that it would have done so.<sup>273</sup> Second, a court could conclude that, even if the agency *would* have taken the same action in the end, the inclusion of the erroneous ground operated as a “distraction”<sup>274</sup> that denied the public the chance to “respond fully to and in a timely way to the agency’s [actual] exercise of authority.”<sup>275</sup> If the error undercut political accountability in this way, an accountability-forcing court might find “prejudicial error” on that ground alone and insist that the agency render a new decision, free of the erroneous ground on which it had publicly relied.

### III. GROUNDS FOR DOUBT

With the Court’s turn to an accountability-driven variant of arbitrariness review squarely in view, we can begin to ask critical questions about it. I will take up four challenges here: (A) the turn to political accountability has no basis in the APA; (B) it requires courts to either make untenable political judgments or impose pointless burdens on agencies in apolitical cases; (C) it rests on unrealistic premises about public awareness of and interest in agencies’ reasons for action; and (D) it represents a half-measure that effectively white-washes the invidious motives actually underlying the policies at issue.

#### A. ADMINISTRATIVE COMMON LAW

An obvious challenge to the accountability-forcing brand of review I have identified is that, while it “may be wise policy,” the courts “lack authority ‘to impose upon an agency [their] own notion of which procedures are “best” or most likely to further some vague, undefined public good.”<sup>276</sup> After all, Congress empowered courts to set aside agency actions that are (as relevant here) “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”<sup>277</sup> Nothing in that text suggests the authority to invalidate an action because the agency did not explain itself to the *public* in a manner that adequately facilitates *political* accountability.

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<sup>273</sup> See *supra* note 58 and accompanying text (collecting the Trump Administration’s public statements regarding its reasons for rescinding DACA).

<sup>274</sup> *Dep’t of Commerce v. New York*, 139 S. Ct. 2551, 2576 (2019).

<sup>275</sup> *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1909 (2020).

<sup>276</sup> *Perez v. Mortg. Bankers Ass’n*, 575 U.S. 92, 102 (2015) (quoting *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 549 (1978)).

<sup>277</sup> 5 U.S.C. § 706(2)(A) (2018).

Nor does exercising the granted authority with that objective in mind clearly serve the original purposes of judicial review under the APA, at least if these are described at a less-than-stratospheric level of generality. Or so the argument would go.

In my view, this objection is substantial but far from conclusive. First of all, there is an active debate over the merits of judge-made rules of the kind I have just described (so-called “administrative common law”),<sup>278</sup> and even the Court’s recent opinions are by no means consistent on the matter.<sup>279</sup> If one goes further back, many of the administrative-law doctrines that we now accept as foundational turn out to be only loosely inspired by the APA itself.<sup>280</sup> So if the accountability-forcing turn is of the same ilk, it is in good company.<sup>281</sup>

Even taking the challenge on its own terms, moreover, my rendition above is at least overstated. As I suggested earlier, the accountability-based rejection of post hoc reasons really depends not on the word “arbitrary” or its neighbors, but on the question of which errors can be forgiven as harmless.<sup>282</sup> And close scrutiny of buck-passing explanations is, in principle if not in form, much the same. Whenever a court asks whether the agency’s reasoning falls *far enough* short of the ideal of reasoned decision-making to constitute it as arbitrary, the court is effectively asking whether the agency’s departure from that ideal made a difference to anything worth caring about.<sup>283</sup> In assessing the positive-law basis for these two accountability-

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<sup>278</sup> See, e.g., Evan D. Bernick, *Envisioning Administrative Procedure Act Originalism*, 70 ADMIN L. REV. 807, 809 & n.11 (2018) (collecting articles attacking various forms of administrative common law); Metzger, *supra* note 23, at 1342-52 (defending administrative common law).

<sup>279</sup> See Metzger, *supra* note 18, at 57 (“For many decades, the Court has periodically rejected administrative common law as being at odds with the APA while simultaneously developing new administrative common law doctrines.”); *id.* at 55 (noting that “the Roberts Court has equivocated between textualist and common law approaches to major administrative law statutes”).

<sup>280</sup> See, e.g., Nicholas Bagley, *The Puzzling Presumption of Reviewability*, 127 HARV. L. REV. 1285, 1303-09 (2014); Gillian E. Metzger, *Ordinary Administrative Law as Constitutional Common Law*, 110 COLUM. L. REV. 479, 491 (2010) (“It is generally accepted, at least by scholars, that ‘arbitrary and capricious’ review under *State Farm* is a far cry from the lenient scrutiny originally intended by the Congress that enacted the APA.”). Ironically, the Court’s avowed skepticism of administrative common law might also belong on this list of common-law innovations. See Kenneth Culp Davis, *Administrative Common Law and the Vermont Yankee Opinion*, 1980 UTAH L. REV. 3, 10-12.

<sup>281</sup> The same point holds only more strongly if we widen the lens beyond administrative law. After all, the political process theory in constitutional law has no firmer textual foundation; it reflects instead a vision of the role of courts in a democracy. See ELY, *supra* note 7, at 73-104. (Thanks to Michael Klarman for highlighting this point.)

<sup>282</sup> See *supra* Section I.A.2.

<sup>283</sup> See *supra* notes 148-149 and accompanying text; *cf.* *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974) (“[W]e will uphold a decision of less than ideal clarity if the agency’s path may reasonably be discerned.”).

forcing moves, then, we should consider not just the list of agency actions that courts should set aside, but also the meaning and seeming flexibility of the open-ended instruction that “due account shall be taken of the rule of prejudicial error.”<sup>284</sup>

The APA’s adopters might not have expected the relevant notion of prejudice to encompass damage to political accountability, but neither is that reading textually foreclosed or wholly unmoored from the statute’s purposes. The statute’s reference to “the rule of prejudicial error” apparently invoked the existing common-law practice.<sup>285</sup> But that practice centered on court-like adjudications quite unlike the kinds of major policy decisions at issue here, so it provides limited guidance about such decisions.<sup>286</sup> More generally, a statute incorporating an existing body of law does not necessarily freeze that law in place.<sup>287</sup> And a court’s judgment about what should count as prejudice for purposes of the APA could reasonably take account of certain provisions of the APA itself that reflect a concern about public-facing explanations, even if those provisions do not apply as substantive rules of conduct for the particular action at hand. Most notably, the provisions for notice-and-comment rulemaking require that a final rule include “a concise general statement of [its] basis and purpose”;<sup>288</sup> according to the oft-cited Attorney General’s Manual,

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<sup>284</sup> 5 U.S.C. § 706. The pretext rule, by contrast, lacks any apparent textual basis, at least in cases not governed by any statutory reason-giving requirement. As Gillian Metzger notes, “Roberts never stopped [in *Department of Commerce*] to respond to Justice Thomas’s complaint that such a pretext inquiry . . . had no basis in the APA’s text.” Metzger, *supra* note 18, at 56.

<sup>285</sup> For discussion of the original understanding and legislative history of the APA’s harmless-error provision, see Bagley, *supra* note 100, at 259 & n.35.

<sup>286</sup> See U.S. DEP’T OF JUSTICE, ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 110 (1947) [hereinafter AG’S MANUAL] (explaining that the statute incorporates “the ‘harmless error’ rule applied by the courts in the review of lower court decisions as well as of administrative bodies” (citing *Market Street Ry. v. R.R. Comm’n*, 324 U.S. 548, 561-62 (1945))). Insofar as the court believes that the agency might have settled on a different bottom line if it had to publicly embrace different reasons when doing so, the agency’s mistaken reliance on its asserted reasons could fairly be counted as “prejudicial error” even under a traditional conception keyed to the likelihood of a different result. See *supra* notes 100-107 and accompanying text (distinguishing different forms of prejudice that might be inflicted by an agency’s evasion of accountability).

<sup>287</sup> See *Jam v. Int’l Fin. Corp.*, 139 S. Ct. 759, 769-70 (2019) (outlining the issue of statutory interpretation that such a cross-reference poses); cf. *Webster v. Doe*, 486 U.S. 592, 609-10 (1988) (Scalia, J., concurring) (suggesting that 5 U.S.C. § 701(a)(2) incorporates a body of “common law . . . shaped over the course of centuries and *still developing* in its application to new contexts” (emphasis added)). Moreover, as Gillian Metzger has argued at length, there are good reasons to “impose a high threshold before concluding that further judicial development of administrative law,” in particular, “is precluded.” Metzger, *supra* note 23, at 1351; see *id.* at 1351-52; see also Levin, *supra* note 257, at 312 (“[T]he draftsmanship of section 706 as a whole suggests that Congress expected courts to flesh out its meaning over time.”).

<sup>288</sup> 5 U.S.C. § 553(c).

that “statement is intended to advise the public,” as well as the courts, “of the general basis and purpose of the rules.”<sup>289</sup> Indeed, Alec Webley has recently argued that these regulatory preambles were conceived precisely as a means to promote “popular accountability” by informing the public directly “of what the government was doing and why” (hence, he argues, the statutory demand for “concis[ion]”).<sup>290</sup> In sum, while the use of arbitrariness review to promote political accountability may not follow from a plain-vanilla reading of the statute, it may not require an especially exotic reading either.

For those who take a less text-centric view of the courts’ role in implementing the APA, moreover, the accountability-forcing turn could plausibly be justified as a needed adaptation to modern realities. As I noted at the outset, presidential administration has only recently become an assumed and entrenched premise of administrative law.<sup>291</sup> The Court has embraced that turn (most prominently, by insisting on the President’s removal power) and has defended it, in part, as a fitting response to the expansion of the administrative state itself.<sup>292</sup> But with these two developments—a more powerful administrative state, and greater presidential (hence political) control over it—comes greater need to ensure robust political accountability for these high-stakes political judgments as well. And perhaps *Regents* and *Department of Commerce* show arbitrariness review evolving to meet that need: Perhaps such review can operate less as a substitute for political accountability—an alternative means of keeping bureaucrats in check, demanded and justified by their political insulation<sup>293</sup>—and more as a complement that makes the mechanisms of political accountability themselves more effective.

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<sup>289</sup> AG’S MANUAL, *supra* note 289, at 32. *But cf.* *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240, 252 (D.C. Cir. 1977) (construing the same requirement with reference to the needs of judicial review rather than other values). As earlier noted, the Court and commentators have not generally understood the notice-and-comment regime as aimed at facilitating political accountability for the agency’s ultimate explanation of its reasons. *See supra* note 186.

<sup>290</sup> Webley, *supra* note 186, at 30; *see id.* at 25-31.

<sup>291</sup> *See supra* notes 27-28 and accompanying text; *see also* Metzger, *supra* note 23, at 1332 (“Held politically accountable for the actions and performance of the executive branch, Presidents since Nixon have sought greater control over its operations.”).

<sup>292</sup> As Chief Justice Roberts wrote (just weeks after *Regents*), “the expansion of th[e] bureaucracy . . . only sharpens our duty to ensure that the Executive Branch is overseen by a President accountable to the people.” *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2207 (2020); *cf. id.* at 2191-92 (defending the same construction of the President’s removal power on broadly originalist grounds).

<sup>293</sup> *See, e.g.*, MANNING & STEPHENSON, *supra* note 4, at 860 (“Congress’s delegation of substantial lawmaking authority to administrative agencies raises serious concerns about unconstrained bureaucratic power, and judicial review is seen as a vital check on the dangers of administrative arbitrariness.”); Tatel, *supra* note 30, at 2.



Meanwhile, the same shift toward an accountability-centric conception of the court's task also draws force from a separate and even more recent development: the extraordinary rise in the President's practical ability to mislead, distract, and manipulate a polarized public and enfeebled press with an onslaught of "alternative facts."<sup>294</sup> Whether any form of judicial review can actually do much about that is, of course, a serious question.<sup>295</sup> But it makes sense that, as the channels of political accountability become so obviously clogged with misinformation, courts would come to see administrative law's "reasoned explanation requirement" as promising a cleaner, judicially supervised channel of reason-giving from the executive branch to the public. And when that development is viewed in the larger context of courts' refinement of administrative law over time, I expect that few will see its evolutionary character as a fatal strike against it.

## B. POLITICAL QUESTIONS AND AGENCY BURDENS

A second natural concern about an accountability-forcing mode of review is that it requires judgments courts are ill-suited to make.<sup>296</sup> Courts conducting harmless-error review, for instance, will find themselves assessing whether the *political* implications of two agency rationales are different enough that a belated switch from one to the other cannot be held harmless.<sup>297</sup> In principle, that question may be no less answerable than other questions about prejudice that courts ask, and somehow

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<sup>294</sup> Cf. Allison Orr Larsen, *Constitutional Law in an Age of Alternative Facts*, 93 N.Y.U. L. REV. 175, 177-81, 190-93 (2018) (summarizing the effects of "infinite access to information, a balkanized press, and a diluted notion of expertise" on the political process).

<sup>295</sup> See *infra* Section III.C.

<sup>296</sup> A related but more technical concern is that judgments about political-accountability effects will sometimes depend on material outside the administrative record. But this concern does not pose a serious obstacle; the familiar reasons for limiting review to the administrative record generally do not apply to an inquiry into those effects. First, much of the relevant evidence (for instance, about the administration's public messaging) is public by definition, avoiding any problem of intrusive discovery. Cf. *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2573-74 (2019) (discussing the narrow circumstances in which such discovery is permitted). And second, any extra-record material is not addressed to the merits of the agency's decision, so there is no issue of relitigating in court the question decided by the agency. Cf. *Camp v. Pitts*, 411 U.S. 138, 142 (1973) ("In applying th[e] [arbitrary-and-capricious] standard, the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court."). Perhaps for these reasons, courts have looked beyond the administrative record in loosely analogous circumstances in the past. See, e.g., *Util. Solid Waste Activities Grp. v. EPA*, 236 F.3d 749, 754-55 (D.C. Cir. 2001) (considering petitioner's attendance at a public meeting, as recounted in a declaration, in resolving harmless-error claim regarding omission of notice-and-comment).

<sup>297</sup> See *supra* Section I.A.2.

manage to answer, all the time.<sup>298</sup> But it is at least uncomfortable (and some might say untenable) for courts to make explicitly political judgments of the kind that this framework would require.<sup>299</sup> And if that is so, we might seem to be left with two unattractive options. First, courts could consider the political dimension of the reason-giving process on a case-by-case basis, but without fully airing their *own* reasoning—thereby departing, ironically, from values of candor and reasoned explanation.<sup>300</sup> Second, they could eschew such case-specific judgments in favor of bright-line, accountability-inspired rules—such as a rule that relying on a faulty rationale is *never* harmless—that would result in pointless repetition of agency proceedings in the myriad cases in which the public has no real interest.<sup>301</sup> It might seem better, then, just to leave political accountability out of the equation.

But even if one believes that courts could not openly reckon with the political dimension of the reason-giving process (a premise that I will question in a moment),<sup>302</sup> this dilemma omits a natural compromise. By identifying a *class* of situations in which political-accountability concerns are *likely* to be significant, courts could give effect to those concerns without undertaking unmanageable or unseemly inquiries into the politics of particular decisions, and without imposing gratuitous burdens on agencies in the many cases that will fall outside the relevant

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<sup>298</sup> See, e.g., *Turner v. United States*, 137 S. Ct. 1885 (2017) (dividing 7-2 over whether there was a “reasonable probability” of a different outcome if a jury had seen certain exculpatory evidence); see also Bagley, *supra* note 100, at 316 (making a similar point).

<sup>299</sup> Cf. Watts, *supra* note 8, at 81-82 (noting “judges’ relative discomfort with assessing the political factors that feed into legislative-like decisions” and suggesting that her proposal to credit “political” factors in arbitrariness review thus “inevitably would force courts to cast aside some of their current discomfort with politics”).

<sup>300</sup> *Regents* itself may offer a partial example of this first approach. As noted above, the majority asserted generally that political accountability “would be markedly undermined were we to allow DHS to rely on reasons offered nine months after Duke announced the rescission.” *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1909 (2020). Presumably the Administration’s extensive efforts to shift responsibility in connection with that announcement are an important part of the reason. See *supra* note 92 and accompanying text. Yet Chief Justice Roberts never mentioned that political context; he just asserted that political accountability would be disserved “here” and that “this is not the case” for making exceptions from the bar on post hoc rationalizations. *Regents*, 140 S. Ct. at 1910-11. A natural inference is that Roberts’s own political concerns led him to prefer a more conventional-looking and technical-sounding opinion about formal memoranda issued by agency heads to one about President Trump, the White House, and their messages to the public.

<sup>301</sup> See *supra* notes 104-109 and accompanying text (entertaining the possibility of a “structural error” rule for failures of contemporaneous explanation); Bagley, *supra* note 100, at 314-18 (emphasizing the neglected costs of judicial invalidations of substantively permissible agency decisions).

<sup>302</sup> See *infra* notes 320-322 and accompanying text.

class.<sup>303</sup> Indeed, the three accountability-forcing moves I have identified already reflect a version of this approach: They single out *types* of explanations that are apt to pose special accountability problems, rather than simply directing courts to consider the on-the-ground accountability consequences of the agency’s explanatory choices in every case. In the same spirit, one could balance the concerns I have just described by narrowing the range of cases in which accountability-forcing is fair game, on the one hand, while making the relevant rules insensitive to more particularized facts about accountability within that range, on the other.

The natural model for defining the relevant class of cases here is the “major questions” doctrine, which denies deference to an agency’s statutory interpretation if it touches on a “question of deep economic and political significance.”<sup>304</sup> That doctrine is controversial.<sup>305</sup> But whether or not it makes sense to distinguish between “major” and “minor” questions with respect to interpretive deference, it makes sense to do so with respect to the relevance of political-accountability concerns. Cases involving “major” questions are, almost by definition, the cases in which political accountability is a meaningful possibility.<sup>306</sup> Courts could thus treat significant lapses in an agency’s contemporaneous explanation as inherently prejudicial when a major question is at stake, but not otherwise.<sup>307</sup> Likewise, they could refuse to employ remand-without-vacatur in such cases (at least absent weighty countervailing considerations).<sup>308</sup> They might also reserve heightened scrutiny of buck-passing explanations for major-questions cases.<sup>309</sup> And perhaps they should

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<sup>303</sup> Cf. Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274, 1298-1306 (2006) (explaining how constitutional rules often under- and over-enforce underlying values, including in the name of workability).

<sup>304</sup> *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (quoting *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014)); see WILLIAM N. ESKRIDGE, JR., *INTERPRETING LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION* 288 (2016). The distinction apparently traces to Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986).

<sup>305</sup> Among other concerns, the doctrine rests on an idea about the democratic superiority of Congress over agencies, but it has the effect of transferring responsibility for settling the major questions it identifies from agencies to courts. See, e.g., Blake Emerson, *Administrative Answers to Major Questions: On the Democratic Legitimacy of Agency Statutory Interpretation*, 102 MINN. L. REV. 2019, 2084 (2018).

<sup>306</sup> See *U.S. Telecom Ass’n v. FCC*, 855 F.3d 381, 422-23 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc) (“[T]he Court’s cases indicate that a number of factors are relevant, including . . . the degree of congressional and public attention to the issue.”); see also *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 190 (2000) (Breyer, J., dissenting) (“[T]he very importance of the decision taken here, as well as its attendant publicity, means that the public is likely to be aware of it and to hold [the administration and its supporters] politically accountable.”).

<sup>307</sup> See *supra* Sections I.A.2, II.C.

<sup>308</sup> See *supra* Section II.B.

<sup>309</sup> See *supra* Section I.A.3.

reserve the pretext rule for such cases as well—or, at least, apply a lower threshold for authorizing extra-record discovery in those cases than in others, given the greater upside to exposing a pretextual rationale if it exists.<sup>310</sup>

Both *Regents* and *Department of Commerce* lend some support to a “major questions” approach along these lines. I mentioned above Chief Justice Roberts’s apparent preference not to delve into the political backdrop that gave his avowedly “functional” argument about accountability in *Regents* its functional force.<sup>311</sup> But when Roberts explained that an administration’s judgment of legal invalidity still leaves open “important policy choices,” he noted that this was “especially” so “when the finding concerns a program with the breadth of DACA.”<sup>312</sup> And when he rejected Secretary Nielsen’s post hoc explanation, he admonished the Administration that “*particularly when so much is at stake, . . . the Government should turn square corners in dealing with the people*” (and thus chided Justice Kavanaugh, too, that “[t]his is not the case for cutting corners”).<sup>313</sup> *Department of Commerce* likewise pointed to the value of ensuring that “agencies offer genuine justifications for *important* decisions.”<sup>314</sup> Both opinions, then, could easily be read as “major questions” cases, and perhaps as using that category as a proxy for the relevance of political accountability that avoids addressing politics more directly.

Like any middle ground, this one can be attacked by purists of two different stripes. First, if one thinks it is inappropriate for courts to attend to the political ramifications of agency choices, then incorporating those same considerations indirectly—by way of the “major questions” proxy—might seem not to solve that problem so much as to disingenuously conceal it. But this first complaint fails, in my view, because its premise is false: There is nothing inherently inappropriate about judicial attention to politics in the first place. It is true (of course) that judges are supposed to base their decisions only on a policy’s legality, not on whether they

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<sup>310</sup> See *supra* Section I.B; *supra* note 221. There is an important wrinkle here, however: Whether an agency action commands significant public attention may itself turn on what the public understands about the action’s reasons. Indeed, with respect to some agency actions, an interest group might credibly argue that *if* the administration were required to adduce its real reasons, the group could *make* the issue of wide public interest (even though it is not yet). That contention will generally be impossible to evaluate in the abstract, but it at least cautions against a rule foreclosing all inquiry into pretext unless the issue is already of broad public interest. (Thanks to David Strauss for highlighting this issue.)

<sup>311</sup> 140 S. Ct. at 1909; see *supra* notes 92-109, 300 and accompanying text.

<sup>312</sup> *Regents*, 140 S. Ct. at 1910.

<sup>313</sup> *Id.* at 1909 (citation omitted) (emphasis added); see also *id.* at 1914 (explaining “that there was much for DHS to consider” in weighing the consequences of different ways of winding down DACA).

<sup>314</sup> 139 S. Ct. at 2559 (emphasis added).

like the policy or think the public would prefer to see it upheld.<sup>315</sup> And because that distinction is so deeply ingrained in our conception of the judicial role—and so often the centerpiece of judicial speechifying about that role—it is easy to understand why a court might be uncomfortable resting its decision on an account of the politics of an agency’s choices.<sup>316</sup> But understandable discomfort is not always a sign of any actual breach of principle, and I do not think it is one here. After all, the court is not picking the policies it likes (or thinks the public likes) and deeming them legal. It is simply answering a legal question, such as whether a *Chenery* violation was harmless, in the light of an “important value[] of administrative law”—one to which real-world facts about the political environment are plainly relevant.<sup>317</sup> If there is a problem with undertaking that politically informed analysis, then, it is one of appearances: Perhaps the reasoning will too much *resemble* the bad form of judicial entanglement with politics.<sup>318</sup> And if so, then the “major questions” work-around may be necessary to avoid the *misimpression* of impropriety.<sup>319</sup> But if the work-around is understood in that way, it cannot be criticized as papering over some actual impropriety, and I do not think it can be described as disingenuous in the ordinary, pejorative sense.

The “major questions” compromise is also vulnerable to attack from the other direction: If judicial review really *should* account for the actual significance of political-accountability effects, then this proxy will inevitably prove an imperfect means of doing that. Most importantly, it will recommend invalidating at least some policies—and worse, some “major” ones—based on failures of explanation that really are best viewed as harmless.<sup>320</sup> This objection points toward a more textured

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<sup>315</sup> Or at least, this simplification is true enough for present purposes. For more nuanced treatments of the relevance of public acceptability to both legality and judgments about what courts should do, see, for example, LAWRENCE LESSIG, *FIDELITY AND CONSTRAINT* 451-55 (2019); and Fallon, *supra* note 303, at 1328-31.

<sup>316</sup> See, e.g., Fallon, *supra* note 303, at 1330 (describing the enduring “image of courts as institutions with an obligation to apply the law disinterestedly, not to temper or adapt it, and to do so without regard to public sentiments”).

<sup>317</sup> *Regents*, 140 S. Ct. at 1909; cf. *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 196 (2012) (“[C]ourts cannot avoid their responsibility merely ‘because the issues have political implications . . . .’” (quoting *INS v. Chadha*, 462 U.S. 919, 943 (1983))).

<sup>318</sup> Cf. Fallon, *supra* note 303, at 1330 (noting concern that “acknowledgment [of] courts[’] atten[tion] to public opinion might undermine public confidence in their ability to enforce doctrinal rights disinterestedly and thus to satisfy a core requirement of the rule of law”).

<sup>319</sup> Cf. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2498-99 (2019) (expressing concern about “assuming political, not legal, responsibility for a process that often produces ill will and distrust”).

<sup>320</sup> Although under-inclusion is theoretically possible as well, it is far less likely in light of the close connection between “majorness” and the public salience that is a precondition for political accountability. See *supra* note 306 and accompanying text.

and tailored approach: Yes, judicial efforts to force political accountability should generally be limited to “major questions” cases (as the middle-ground option holds)—because those are the only cases in which such accountability is a meaningful possibility—but *among* those cases, the court’s analysis ought to be further informed by its considered sense of the real-world relevance of political accountability to the particular case. Moreover, that is an issue that the parties ought to litigate (as some of the *Regents* plaintiffs did) and that the court ought to candidly address (as the *Regents* opinion mostly did not).<sup>321</sup> I think there is much to recommend this approach, but for those who are less sanguine about judges either making or voicing the kinds of judgments it would involve—a group that, as just noted, appears to include Chief Justice Roberts—the “major questions” compromise offers a reasonable, albeit imperfect, alternative.<sup>322</sup>

### C. EFFICACY AND THE REMOVAL COMPARISON

A third concern pertains not so much to the propriety of accountability-forcing as to its efficacy. The point is now familiar from the debate over the Court’s recent cases insisting on a presidential power to remove agency officials.<sup>323</sup> The core idea of those cases—also authored by Chief Justice Roberts—is that the President supplies the critical middle link in the chain of political accountability from agency

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<sup>321</sup> Regarding the plaintiffs’ fact-heavy argument about accountability, see *supra* note 92. And regarding the Court’s fact-light embrace of that argument, see *supra* note 300 and, more generally, *supra* notes 112-144 and accompanying text.

<sup>322</sup> I am more sanguine because I doubt that judgments about political dynamics really pose grave and unusual challenges to judicial competence or legitimacy. As to the former, the issues are far more intuitive than the many technical disciplines with which judges routinely must engage in APA cases. And as to the latter, I do not see why particular mistrust would be engendered by a court’s invalidating a policy based on the damage to political accountability done by an administration’s failure of explanation. In contrast to much of the Supreme Court’s case-law, such a holding sounds in a process-oriented, democracy-promoting rationale—not a substantive judgment about which liberties are truly fundamental, which state objectives are truly compelling, whether Congress overestimated the scale of some social problem, or the like. *Cf.* RICHARD H. FALLON, JR., LAW AND LEGITIMACY IN THE SUPREME COURT 158 (2018) (describing the threat to sociological legitimacy posed when sharp divisions in moral views are “reflect[ed] . . . at the porous intersection between legal and moral decision making in the Supreme Court”). Indeed, as I noted at the outset, accountability-forcing seems a quintessential act of “umpiring” and ought to appeal to those who see the judge’s role in that way. See *supra* note 16 and accompanying text. In a similar vein, Judge Thomas Griffith has recently pointed to the Court’s reliance on “the democracy-promoting requirements of reasoned decisionmaking” in *Regents* and *Department of Commerce* as laudable examples of judicial minimalism. Judge Thomas B. Griffith, *The Degradation of Civic Charity*, 134 HARV. L. REV. F. 119, 138 (2020).

<sup>323</sup> *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2197 (2020); *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 514 (2010).

officials to the general public.<sup>324</sup> This argument amounts to another brand of accountability-forcing, so it is no surprise that its leading proponent would see the same values at stake in *Regents* and *Department of Commerce* as well. After all, what was the Duke Memorandum (and accompanying public campaign) if not an effort to “escape responsibility for [the Administration’s] choices by pretending that they [we]re not [its] own”?<sup>325</sup> Likewise, Roberts’s argument that political accountability demands a single, contemporaneous statement of the agency’s reasons parallels the notion that presidential control is necessary to provide “a single object for the jealousy and watchfulness of the people.”<sup>326</sup> But these comparisons do not necessarily reflect favorably on the APA cases: The removal decisions have faced withering criticism for their seeming naïveté about the realities of political behavior.<sup>327</sup> So it is important to consider how a parallel argument would fare with respect to the accountability-forcing brand of arbitrariness review.

In the removal context, the scholarly indictment goes roughly as follows. First, there is so little public awareness of the structure of the federal government that it is hard to believe changes in that structure meaningfully influence public attributions of responsibility for agency decisions.<sup>328</sup> Second, people almost never vote in presidential elections based on particular past policy decisions anyway.<sup>329</sup> They do not even know about most of those decisions.<sup>330</sup> And insofar as they do know about them, they cannot realistically “use a single quadrennial ballot to express preferences on th[e] enormous range of policy decisions” for which the President is theoretically responsible.<sup>331</sup> Therefore, to the extent that voters engage in “retrospective voting” at all (which is limited), they do so “based on coarse-grained

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<sup>324</sup> If the President cannot remove officials at will, the argument goes, the “public cannot ‘determine on whom the blame or the punishment of a pernicious measure . . . ought really to fall,’” and “the public’s ability to pass judgment” via presidential elections is undercut. *Free Enterprise Fund*, 561 U.S. at 498 (quoting THE FEDERALIST NO. 72, at 487 (Alexander Hamilton) (J. Cooke ed., 1961)); see *Seila Law*, 140 S. Ct. at 2203.

<sup>325</sup> *Free Enterprise Fund*, 561 U.S. at 497.

<sup>326</sup> *Seila Law*, 140 S. Ct. at 2203 (quoting THE FEDERALIST NO. 70, at 479 (Alexander Hamilton)).

<sup>327</sup> See Stephanopoulos, *supra* note 32, at 1021-32; Aziz Z. Huq, *supra* note 2, at 52-66 (2013); see also Glen Staszewski, *Reason-Giving and Accountability*, 1265-78 (2009) (“[T]he presumption that elected officials are politically accountable for their specific policy decisions is wildly unrealistic.”).

<sup>328</sup> See Stephanopoulos, *supra* note 32, at 1026-27.

<sup>329</sup> See *id.* at 1029-30; Huq, *supra* note 32, at 65; see also Peter M. Shane, *Political Accountability in a System of Checks and Balances: The Case of Presidential Review in Rulemaking*, 48 ARK. L. REV. 161, 199 (1995) (arguing that “the President’s incentives to follow the polls in any close way are not as strong as is often assumed”).

<sup>330</sup> See Stephanopoulos, *supra* note 32, at 1022-23; Staszewski, *supra* note 327, at 1267.

<sup>331</sup> Huq, *supra* note 2, at 64 (describing this as a “bundling” problem); see *id.* nn. 318-320 (collecting discussions of this issue).

factors like the state of the economy, not subtler issues like specific agency actions.”<sup>332</sup>

A parallel argument could easily be made about accountability-forcing efforts under the APA. Although the point about public ignorance of agency structure drops out, an analogous doubt can bear the same weight: What does the public really know about the *particular justifications* advanced for agency policies, and especially about the justifications advanced in the formal decision documents that are subject to APA review? Precious little, one might think. And if so, efforts to promote political accountability by shaping the contents of those justifications might seem quixotic. Meanwhile, the critics’ doubts about the other links in the hypothesized chain of electoral accountability—such as the “bundling” problem and the sheer rarity of retrospective voting—apply with no less force in this context than that one.

While this critique undoubtedly has some bite, I think it has a good deal less than might at first appear. First, as I have already suggested, arbitrariness review can and should account for the distinction between major decisions and minor ones.<sup>333</sup> And once we narrow our focus to major decisions, there is good reason to think that anticipated political accountability can indeed be an important factor in an administration’s decision-making. For one thing, decisions of great significance are at least somewhat more likely to influence a person’s vote (or, equally significant, motivation to vote).<sup>334</sup> Even setting direct electoral consequences aside, moreover, presidents are apt to appreciate the linkage between their public standing and the political capital needed to effect their agendas.<sup>335</sup>

And perhaps most important, presidents, being human, will just tend to care what people think of them—not merely insofar as those opinions have downstream political consequences, but as a powerful motivator in its own right.<sup>336</sup> Indeed, the

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<sup>332</sup> Stephanopoulos, *supra* note 32, at 993.

<sup>333</sup> See *supra* Section III.B. In contrast, the cases striking down removal restrictions employ a much blunter instrument: They restructure the overall chain of command within the executive branch based on generalizations about the accountability-promoting effects of that formal mechanism of control.

<sup>334</sup> Cf. Stephanopoulos, *supra* note 32, at 1031 (noting that there are at least some “exemplary voters” who “know about higher-profile agency actions, appraise them reasonably objectively, deem the President more responsible if the agency is executive and less so if it is independent, and make their voting decisions partly on these grounds”).

<sup>335</sup> See Kagan, *supra* note 22, at 2335 (pointing to this and other factors in explaining how and why “the President . . . is likely to consider, in setting the direction of administrative policy on an ongoing basis, the preferences of the general public”); see also Hemel & Nielson, *supra* note 8, at 808-09 (“[A]ccountability theories need not rely on electoral accountability as the exclusive transmission belt.”).

<sup>336</sup> Cf. R. JAY WALLACE, *THE MORAL NEXUS* 75 (2019) (“We are, as Rousseau was acutely aware, deeply social creatures, and it matters to us profoundly how we are thought



greatest downside of framing my analysis in terms of “accountability” is that the term’s formal, almost-punitive connotation risks marginalizing this central dynamic. Accountability of the kind that matters here need not involve the deliberate imposition of a tangible consequence, akin to punishment.<sup>337</sup> Rather, it suffices that the public’s attitudes toward decision makers will shift with its understanding of the reasons for their decisions. Those shifts are not reprisals directed at decision makers; they are simply rational reactions that align individuals’ actual attitudes with the attitudes warranted by the facts known to them. Nonetheless, these predictable changes in attitudes also serve as incentives for the decision makers for whom the changes (withdrawals of trust, lowerings of esteem) represent a loss.<sup>338</sup> The upshot is that so long as presidents care—for any of these electoral or non-electoral reasons—about how their important actions are viewed, whether a decision will be viewed as theirs will sometimes matter to the choices they make. And so, too, will the attitudes or character traits that they believe the action, if attributed to them, will be taken to reveal.

Here, again, the DACA rescission offers perhaps the most powerful example in recent history. Recall how President Trump reportedly “could not stand the thought of being seen as mean to defenseless kids.”<sup>339</sup> That preference not to be seen as acting with cruelty is the obvious explanation for the Administration’s concerted effort to pass the buck (an effort that, after all, made life much harder for the government’s lawyers).<sup>340</sup> So there is good reason to think that Trump’s ability to avoid taking responsibility for the decision was material to the Administration’s bottom-line choice of approach—whether because of feared electoral consequences or simply because of the attitudes that Trump wanted others to hold toward him.<sup>341</sup> And indeed, once the Supreme Court indicated in *Regents* that no legal constraint “compelled DHS to abandon” DACA’s core policy of enforcement forbearance, and that the question of how to wind down the policy would be open regardless, Trump

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of by our fellows, in particular whether people hold attitudes of angry disapprobation toward us on account of what we do. We care about such attitudes not merely because it is disagreeable to experience them, but because we do not wish to inhabit a social world in which such attitudes are harbored toward us . . . .”).

<sup>337</sup> See *supra* note 32 (offering a working definition of “accountability”).

<sup>338</sup> Cf. T.M. Scanlon, *Forms and Conditions of Responsibility*, in *THE NATURE OF MORAL RESPONSIBILITY: NEW ESSAYS* 89, 92-93 (Randolph Clarke et al., eds. 2015) (offering a related account of reactive attitudes and drawing a like distinction between blame, broadly understood, and punishment).

<sup>339</sup> See *supra* note 52 and accompanying text.

<sup>340</sup> See *supra* Section I.A.1.

<sup>341</sup> See *supra* notes 130-131 and accompanying text.

“flail[ed]” over how to proceed.<sup>342</sup> From an electoral point of view, he “want[ed] to energize immigration hardliners in [his] base,” but also “to win over the swing voters, evangelicals and Hispanics who support Dreamers.”<sup>343</sup> Ultimately, the Administration compromised by leaving the policy in place, on an “interim” basis, for all existing beneficiaries.<sup>344</sup> That is a profound shift from the original decision to rescind DACA in full. Of course, it is possible that the politics had changed for other reasons since the saga began. But it is also plausible that the Court’s accountability-forcing intervention worked: Faced with the need to publicly own the choice, Trump made a different one.

More generally, the supposition that only an administration’s bottom-line policy choices matter politically—that the public is indifferent to the *reasons* for those choices—is implausible. As I noted at the outset, the meaning of any action necessarily depends on how the actor took different facts to bear on his or her choice.<sup>345</sup> Whenever we evaluate other people as agents, as choosers, that is what we are grading them on. Although we often forgo any deliberate assessment of others’ reasons, that is just because some actions speak for themselves.<sup>346</sup> Many other actions or policy choices do not. As with my hypothetical decision not to visit my relative in a nursing home, we can imagine different reasons for which those choices might plausibly be made, reasons that would give them different meanings.<sup>347</sup> And because politics involves sizing up other people as choice-makers no less than other domains of social life, it would be extraordinary if the resolution of such ambiguities

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<sup>342</sup> 140 S. Ct. 1891, 1912 (2020); Anita Kumar, *‘Whiplash’: Trump and His Team Face an Internal Struggle Over Dreamers*, POLITICO (July 24, 2020), <https://www.politico.com/news/2020/07/24/trump-internal-struggle-fate-of-dreamers-380572> [<https://perma.cc/YC36-QRGJ>].

<sup>343</sup> *Id.*

<sup>344</sup> See Memorandum from Chad F. Wolf, Sec’y of Homeland Sec., Reconsideration of the June 15, 2012 Memorandum Entitled “Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children,” at 4 (July 28, 2020), [https://www.dhs.gov/sites/default/files/publications/20\\_0728\\_s1\\_daca-reconsideration-memo.pdf](https://www.dhs.gov/sites/default/files/publications/20_0728_s1_daca-reconsideration-memo.pdf) [<https://perma.cc/MF5Z-PRPD>]. *But see id.* (limiting grants of deferred action to one year rather than two). In December 2020, a district court vacated this latest memorandum on the ground that its author, Chad Wolf, was not validly serving as Acting Secretary of the Department of Homeland Security. *See*

<sup>345</sup> *See supra* notes 32-38 and accompanying text.

<sup>346</sup> Widespread family separation at the border is a good example: Because the result could seemingly only be reached through cruelty, one does not need to know much else to know what it says about the decision makers. *Cf.* Majority Staff Report, *The Trump Administration’s Family Separation Policy: Trauma, Destruction, and Chaos 2*, COMM. ON JUDICIARY OF U.S. HOUSE OF REPS. (Oct. 2020), <https://tinyurl.com/y2a8gtlz> (“Public outrage at this cruel policy was swift and shared by Democrats and many Republicans alike. . . . The investigation reveals a process marked by reckless incompetence and intentional cruelty.”).

<sup>347</sup> *See supra* notes 34-35 and accompanying text.

carried no political consequences. Certainly politicians appear to care about how their reasons are understood: That is why they are constantly defending their important decisions—articulating the values they understood a choice to serve, the considerations they weighed, and the like—rather than just reciting the policies they adopted or the votes they cast. Those reason-based defenses speak to familiar questions of manifest concern to voters and others, such as whether a leader “shares my values” or “cares about people like me.”<sup>348</sup>

All of this suggests that the harder question is not whether the public’s sense of an (important) action’s reasons can make a difference, but whether the *formally articulated* reasons ever do. After all, the public’s sense of an action’s reasons will presumably be shaped far more by the story the Administration tells in press releases, on cable news, via Twitter, and the like—as well as by the counter-narrative advanced by critics, and by a background sense of the Administration’s values—than by the kinds of decision memoranda issued by Duke, Nielsen, or Ross. It might seem, then, that accountability-forcing efforts trained on the contents of those documents are hopeless.

But this objection, too, can be met with a plausible response. The efficacy of courts’ efforts to force political accountability via arbitrariness review does not really depend on the public’s reading the decision memoranda; it depends on the more modest premise that the publicly understood reasons for a policy will be importantly linked to those formally stated at the time of a policy’s announcement. And while an administration will often have incentives to talk out of both sides of its mouth—giving the courts one explanation and the public another—each audience can also be expected, in different ways, to make that kind of inconsistency difficult or costly.

First, Congress and the media, aided by interest groups, can highlight divergences and thereby promote political accountability for the reasons on which an administration formally predicates its action—undermining the acoustic separation between courts and the public that the administration might seek to create.<sup>349</sup> In the DACA case, for example, it is doubtful that the Trump Administration would have

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<sup>348</sup> See, e.g., David Jones, *Early Results Show Voters Want a Candidate Who “Shares My Values,”* N.Y. TIMES (Feb. 1, 2016), <https://www.nytimes.com/live/iowa-caucus-2016-election/early-results-show-voters-want-a-candidate-who-shares-my-values> [<https://perma.cc/NFW8-2YQ8>]; Laura Meckler, *Exit Polls 2016: Voters Show a Deep Hunger for Change,* WALL ST J. (Nov. 9, 2016), <https://www.wsj.com/articles/exit-polls-2016-voters-back-more-liberal-immigration-policy-oppose-border-wall-1478646147> [<https://perma.cc/25SQ-VYJZ>].

<sup>349</sup> Cf. Hemel & Nielson, *supra* note 124, at 808-09 (“To be sure, we doubt whether citizens are consulting the Federal Register along with the League of Women Voters’ Guide before they head to the polls. . . . [But] [w]e might take a more pluralistic approach and imagine interest groups, media organizations, and other sophisticated actors attributing credit and blame across branches based in part on agencies’ characterizations of their own degrees of freedom.”).

found it tenable to maintain its buck-passing posture in public—and in sworn testimony before Congress—if the Duke Memorandum itself had purported to rescind DACA as a pure exercise of policymaking discretion. Recall how Acting Secretary Duke “did not want her name on” the hard-liners’ policy arguments for rescinding DACA; presumably that was because she anticipated that she would bear some public responsibility for those reasons as a result.<sup>350</sup>

Second, courts, too, will generally look unfavorably on major divergences between an administration’s public-facing and formal rationales. For one thing, such divergences undermine the credibility of the formal rationale: They invite suspicion that the rationale was contrived for purposes of judicial review and thereby diminish the deference it is likely to receive.<sup>351</sup> In *State Farm*, for example, “the D.C. Circuit and Supreme Court both noted that when [the Department of Transportation] initially proposed rescinding the passive-restraint requirement, it cited the ‘difficulties of the automobile industry’ as a justification.”<sup>352</sup> And the D.C. Circuit further noted that “the White House Press Office announced the proposed rescission as part of a package of ‘Actions to Help the U.S. Auto Industry.’”<sup>353</sup> The courts evidently found that political context relevant to their assessments of the safety rationale that they went on to reject. After *Department of Commerce*, moreover, the same gaps between formally stated and publicly trumpeted reasons will also invite freestanding allegations that the formally stated reason is a pretext that vitiates the decision; in fact, that has already begun.<sup>354</sup> And finally, I have argued that, in cases involving multiple formally stated rationales, an administration’s failure to publicly embrace one of them could permissibly factor into a court’s harmless-error inquiry as well.<sup>355</sup> For all of these reasons, accountability-forcing efforts trained on the administration’s formal explanations can plausibly contribute to political accountability for

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<sup>350</sup> See *supra* note 49 and accompanying text.

<sup>351</sup> Cf. Jeffrey A. Pojanowski, *Neoclassical Administrative Law*, 133 HARV. L. REV. 852, 880 (2020) (noting how *State Farm* “leaves a reviewing court flexibility to approach a case with a light or heavy touch, depending on the stakes and the general sense of whether the agency is implementing its mandate in good faith”); M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1414 (2004) (similar).

<sup>352</sup> Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505, 555 (1985) (citations omitted).

<sup>353</sup> *Id.*

<sup>354</sup> This issue arose in connection with the Trump Administration’s attempt, amid the COVID-19 pandemic, to resume enforcement of a requirement that student-visa holders already in the United States must attend in-person classes. The policy change was formally justified as a return to the ordinary legal regime. But as the plaintiffs challenging the policy pointed out, the agency head had publicly defended it as an effort to “encourage schools to reopen.” Motion for Temporary Restraining Order at 15, *Harvard College v. DHS*, No. 1:20-cv-11283 (D. Mass. July 8, 2020) (citation omitted). The Administration abandoned the policy before that APA claim could be resolved.

<sup>355</sup> See *supra* Section II.C.

the administration’s reasons for action—even though such accountability will ultimately depend on the publicly understood reasons, not the formally operative ones.

#### D. HALF-MEASURES AND WHITE-WASHING

A final concern about the form of arbitrariness review that I have described is that, despite the pretension to holding decision makers accountable for their actual reasons for action, the method does not encompass any serious effort to ferret out what those reasons were. And without such an effort, the argument would go, political accountability can be at most modestly improved. Perversely, in fact, recasting decisions based on invidious motives as violations of process norms about reasoned explanation might serve to *undercut* political accountability for the more basic violations of constitutional commitments that the same policies represent.

Both *Department of Commerce* and *Regents* invite this critique: Even if Chief Justice Roberts’s APA analyses in these cases employed an accountability-forcing logic, his larger approach to each suggests at most a very qualified commitment to facilitating public scrutiny of the Administration’s decision making. As Jennifer Chacón observes, Roberts’s opinion in *Department of Commerce* “manages never to mention Hispanics or Latinos at all,” despite the Administration’s apparent “intent to increase white political power at the expense of communities of color.”<sup>356</sup> And in *Regents*, Roberts went out of his way to reject the plaintiffs’ equal-protection challenge, including by suggesting (quite implausibly) that President Trump’s motives were barely relevant.<sup>357</sup> This effort to defang equal-protection law undermines not just legal accountability but, more relevant here, political accountability as well. As I have argued throughout, courts can promote political accountability for an administration’s actions by helping to make clear what their reasons actually were. But at least when it comes to race, Roberts seems determined to stop such efforts in their tracks.<sup>358</sup>

Taken together and as a whole, these cases suggest a willingness to say that the Administration did not adequately expose its reasons (whatever they were) to public view, but no willingness to aid in exposing, over the Administration’s objection, uncomfortable facts about what those reasons *actually* were. As Chacón argues, this

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<sup>356</sup> Chacón, *supra* note 16, at 252.

<sup>357</sup> *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1915-16 (2020). This went beyond the “naiveté” that Chief Justice Roberts decried in *Department of Commerce v. New York*, 139 S. Ct. 2551, 2575 (2019), to something more like willful blindness. As explained above, the White House was unabashed about President Trump’s role as the ultimate decision maker. See *supra* note 263 and accompanying text.

<sup>358</sup> *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), is related but not the same. There, Chief Justice Roberts did not obscure or deny the fact of the President’s invidious reasons for action (which were in any event plain for all to see); he just treated them as legally irrelevant. See *supra* notes 216-220 and accompanying text.

can mean that “[t]he Court never grapples with the identity-based dignity and status harms suffered by nonwhite plaintiffs as the result of challenged policies,” and that “[r]acial animus is white-washed” in the process.<sup>359</sup> There is a powerful echo here of the Court’s post-*Brown* decisions regarding de jure segregation—decisions that were similarly “‘cool,’ not ‘hot,’” and that likewise avoided “analyzing the racial logic of the regulation[s] in any but the most abstract form.”<sup>360</sup> There, the turn to an abstract racial-classification rule, disconnected from the uncomfortable reality of racism, left the doctrine ill-equipped to address that same reality in its evolving forms.<sup>361</sup> Chacón’s worry about cases such as *Department of Commerce and Regents* is parallel in form: the Court’s “failure to grapple with the equality concerns at stake” results in “procedural protections much narrower in scope than the underlying threats to equality require.”<sup>362</sup>

All of this is true and important—but I doubt that it furnishes a persuasive objection to the accountability-forcing mode of arbitrariness review itself. If Chief Justice Roberts’s willingness to deploy this form of arbitrariness review in the DACA and census cases and his undermining of equal protection somehow represented a package deal, and one were faced with the choice whether to take it, that could be a hard choice. Similarly, if the liberal Justices are faced with the choice of *acquiescing* in the latter to facilitate the former, that might be a difficult judgment call as well.<sup>363</sup> But, in fact, the accountability-forcing brand of arbitrariness review does not seem, either in itself or as wielded by Roberts, meaningfully to advance the parallel effort to weaken substantive legal scrutiny of an administration’s actual reasons. Simply put, there is no reason to think that if the APA challenges to the citizenship question or the DACA rescission had been wiped away, a majority of the Court would have invalidated those policies based on racial animus instead; far

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<sup>359</sup> Chacón, *supra* note 15, at 236.

<sup>360</sup> Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over Brown*, 117 HARV. L. REV. 1470, 1503 (2004); *see id.* at 1476, 1497-1505.

<sup>361</sup> *See, e.g.*, Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1129-31 (1997); David A. Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. CHI. L. REV. 935, 939-56 (1989).

<sup>362</sup> Chacón, *supra* note 15, at 236.

<sup>363</sup> The decision by Justices Ginsburg, Breyer, and Kagan to join *Regents*’ equal-protection discussion is notable in this regard. *Cf.* Micah Schwartzman & Nelson Tebbe, *Establishment Clause Appeasement*, 2019 SUP. CT. REV. 271, 273 (arguing, with respect to the Establishment Clause, that “there is a discernible pattern of decision making in which some liberal Justices seem to have made significant concessions to conservative majorities and thereby risked conferring legitimacy on sweeping changes to the doctrine”).

more likely, the Court would simply have upheld them.<sup>364</sup> What the accountability-forcing conception offers is a principled explanation of how and why the courts should frustrate an administration’s invidious policies—policies that will often, though not always, be justified in accountability-skirting ways—even if the courts are unwilling to recognize their invidiousness.<sup>365</sup>

The key, then, is just not to be lulled into thinking that this approach is anything like a complete recipe for political accountability, let alone other democratic values.<sup>366</sup> Indeed, the greatest obstacles to political accountability have nothing to do with an administration’s stated reasons for its actions—be they post hoc, buck-passing, pretextual, or none of the above. The far greater problem is that people who know full well what they think of the President simply lack the effective “ability to pass judgment on his efforts”<sup>367</sup> because of systematic obstacles to exercising their right to vote. Whatever “response” they may have to an administration’s “exercise of authority” is thereby rendered largely inert.<sup>368</sup> Yet the Roberts Court has almost never interfered with a law making it harder to vote, and it has frequently intervened to stop lower courts from doing so.<sup>369</sup> The reasons for those voting-rights decisions are beyond my scope here, and I do not mean to suggest that they reveal the

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<sup>364</sup> See *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1915-16 (2020) (rejecting an equal protection challenge); *supra* notes 216-220 and accompanying text (discussing the Court’s rejection of the constitutional challenge in *Hawaii*).

<sup>365</sup> What Gerald Gunther wrote of “[o]ld equal protection with new bite” may be apt here as well: “[A]voidance of controversial and difficult broad questions via narrower routes . . . is mandatory if a genuine narrow ground is available; it is admirable so long as it is invoked with candor and integrity; and it is justified so long as the Court remembers that the narrower ground, too, must have a principled content.” Gunther, *supra* note 17, at 22. Accountability-forcing APA review, like the brand of equal protection review that Gunther identified, “can be such a principled ground”: “It warrants application whether or not a more difficult issue lurks in the case. And its availability as an avoidance device can increase its appeal without draining its integrity.” *Id.* See also Griffith, *supra* note 322, at 138 (pointing to *Regents* and *Department of Commerce* as examples of judicial minimalism).

<sup>366</sup> As I noted earlier, *Hawaii* offers a powerful example of how the executive branch can inflict grave harm to basic values without running afoul of any principle about political accountability. See *supra* notes 216-220 and accompanying text.

<sup>367</sup> *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 498 (2010).

<sup>368</sup> *Regents*, 140 S. Ct. at 1909.

<sup>369</sup> See, e.g., *Republican Nat’l Comm. v. Democratic Nat’l Comm.*, 140 S. Ct. 1205 (2020) (staying injunction requiring counting of certain votes); *Andino v. Middleton*, No. 20A55, 2020 WL 5887393 (U.S. Oct. 5, 2020) (same); *Democratic Nat’l Comm. v. Wisconsin State Legislature*, No. 20A66, 2020 WL 6275871 (U.S. Oct. 26, 2020) (refusing to vacate a lower court’s stay of an injunction requiring counting of certain votes); see also Nicholas Stephanopoulos, *The Anti-Carolene Court*, 2019 SUP. CT. REV. 111, 160 & n.318 (“The Roberts Court . . . has never nullified a law making it harder to vote.”); Klarman, *supra* note 15, at 178-231 (recounting “the Supreme Court’s contribution[s] to the degradation of democracy”).

commitment to political accountability in the context of arbitrariness review as insincere. They do underscore, however, that the accountability-forcing form of judicial review highlighted here is indeed a half-measure in a literal sense: At least when it comes to electoral accountability, such review targets only one half of a two-sided cycle. Improving the channel of communication from the executive branch to the public will be of limited use if the inverse channel of electoral control, running from the public back to the government, remains badly clogged.<sup>370</sup>

## CONCLUSION

“[T]he factor that best explains Roberts Court administrative law,” Gillian Metzger recently observed, “seems to be the varied administrative law jurisprudence of Chief Justice Roberts himself.”<sup>371</sup> I have argued that the Court’s (and Roberts’s) two most recent decisions applying arbitrariness review—which also must rank as two of its most important of that genre, period—reflect an overarching concern about political accountability. Placing that concern at the center of arbitrariness review is strikingly new, even as it builds on familiar themes and repurposes venerable doctrinal tools. If we wanted to be grand about it, we might say that “hard-look review” is giving way to “political-process review.”<sup>372</sup> This doctrinal innovation ought to inform the agendas of lower courts in administrative-law cases involving significant executive-branch policies, and it invites litigants both to develop and to reprise arguments that sound in the same register. At the same time, it raises fundamental questions about the wisdom and the efficacy of judicial efforts to promote political accountability by policing the political dimension of the reasoning process, and about what we should make of such efforts from a Court that has largely abandoned the field when it comes to the electoral process itself.

I have noted throughout the ways in which an action’s significance—what the philosopher T.M. Scanlon calls its “meaning”—depends on the reasons for which it was undertaken.<sup>373</sup> That connection undergirds the core appeal of accountability-forcing arbitrariness review: By insisting that major policy decisions be justified in a manner that does not obscure the decision makers’ reasons, courts can help citizens to judge their leaders accurately and to modify their own attitudes toward those leaders accordingly.<sup>374</sup> Yet the very same connection between an action’s reasons and its meaning is crucial to deciding what to make of the Court’s decisions in

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<sup>370</sup> Importantly, however, this point does not apply to non-electoral mechanisms of political accountability. *See supra* note 335 and accompanying text.

<sup>371</sup> Metzger, *supra* note 18, at 61.

<sup>372</sup> *See supra* note 7 and accompanying text.

<sup>373</sup> *See supra* notes 33-35, 200-203, 336, 345-348 and accompanying text.

<sup>374</sup> *Cf.* SCANLON, *supra* note 33, at 122-82 (offering an account of the connections among meaning, blame, and modifications to a relationship, such as withholding of trust).



*Regents and Department of Commerce.* If linking reasoned explanation to political accountability was just a contrivance to get the Court out of a tight spot (or two), Roberts arguably defied the same commitment to reason-giving that he invoked, and the “important value[]” of “agency accountability”<sup>375</sup> might be expected to recede from view. But it is also possible, and I would hazard more likely, that these two cases offer a window into a genuine vision of the role of courts as mediators between the administrative state and the political process, whatever other considerations may have been in play as well. And if so, that vision warrants careful investigation—an endeavor that I have begun, but certainly not completed, here.

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<sup>375</sup> DHS v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1909 (2020).