

*[The traditional parameter of elasticity] cannot be used directly in the type of model developed by the Congressional Budget Office (CBO) because a percentage increase in quantity cannot be applied to a firm that initially does not offer insurance in the base case, where the initial offer rate is zero. (The same logic applies to individual take-up of insurance coverage.) To derive the likelihood of a new offer for a currently nonoffering firm, the CBO model employs a converted elasticity, called a take-up elasticity:*

$$\varepsilon_t = \varepsilon \times \frac{Q_1}{1 - Q_1}$$

*where  $\varepsilon$  is the literature-derived offer elasticity and  $\varepsilon_t$  is the take-up elasticity.<sup>1</sup>*

## §1 Introduction

The authors do not understand what the epigraph means. Yet this is arguably a good thing. The epigraph discusses the United States Congressional Budget Office's (CBO's) method of interpreting the elasticity of demand for health insurance. The Department of Health and Human Services (HHS) relied on CBO's assumptions when estimating the impact of health insurance exchanges in its regulatory impact analysis accompanying proposed rules to implement portions of the Patient Protection and Affordable Care Act (PPACA), one of the most significant pieces of American legislation in the last few decades. Given the importance and impact of the rules implementing the PPACA, it was imperative for HHS to use sophisticated methods of analysis that the authors of this paper – neither economists nor specialists in healthcare – lack the background to comprehend. The thesis of this paper is that this need for highly sophisticated analysis by administrative agencies is incompatible with the most prominent account of liberal democratic justification in the current moral and political philosophy literature: John Rawls's idea of public reason. In short: public reason is inconsistent with the administrative state.

Our basic argument runs as follows. Broadly speaking, the demands of public reason require citizens to justify policies on the basis of reasons all citizens accept or endorse. These reasons include scientific and social scientific considerations. Thus, insofar as these considerations are employed to justify policies, they must be such that all citizens accept or endorse them. However,

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<sup>1</sup> Congressional Budget Office, *CBO's Health Insurance Simulation Model: A Technical Description* (2007): 29, <http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/87xx/doc8712/10-31-healthinsurmodel.pdf>.

given (i) reasonable disagreement among professional scientists and social scientists over which theories are correct, most appropriate, most fecund, etc., and (ii) citizens' lack of competent training and thus lack of complex scientific knowledge, the set of scientific reasons that citizens may appeal to in public debate is astonishingly small. Public reason falls silent.

Now, one benefit of having administrative agencies is that it puts complex decisions in the hands of capable experts. What does the average citizen or member of Congress know about health insurance demand elasticity? Not much, but this is not a problem if they are not the ones setting the nitty-gritty of health insurance exchange rules. Better this be done by the experts at HHS. But if the average citizen knows nothing about health insurance demand elasticity then the demands of public reason prohibit anyone – *including the experts at HHS* – from justifying health insurance exchange rules by appealing to facts about health insurance demand elasticity, as they do in the epigraph to this paper. Public reason is silent on this issue, so the demands of public reason prevent health insurance experts from appealing to their expertise when deciding the appropriate regulation. More generally, there is a direct tension between the requirements of public reason and one important and salutary fact about the administrative state. Public reason requires citizens appeal to reasons and thus scientific and social scientific considerations that all can accept or endorse, but the administrative state is desirable *precisely because such a set of reasons does not exist*.

The problems for public reason do not end here. Following Rawls, most contemporary proponents of public reason favor a fairly robust version of egalitarianism. But material equality is achieved largely through decisions made by administrative agencies that can be justified only on the basis of non-public reasons. Health insurance exchange rules are a prime example. Their purpose is to make healthcare more accessible to the least advantaged, but they are justified on the basis of complex facts about health insurance demand elasticity and the like, which fall outside the scope of public reason. The upshot? The methods of achieving an egalitarian distribution that proponents of public reason often advocate are inconsistent with their more general commitment to the idea of public reason as a theory of liberal democratic justification. Indeed, we are skeptical that there is any way of achieving an egalitarian distribution that satisfies the demands of public reason.

The structure of the paper is as follows. In §2 we briefly introduce the idea of public reason. In §3 we argue that the demands of public reason apply to scientific and social scientific reasons when used to justify policies. In §4 we argue that public reason implies that the administrative state

is impermissible, and that its demands prevent the administrative state from being even marginally effective. In §5 we demonstrate that public reason condemns the tools required for achieving an egalitarian distribution. In §6 we entertain and refute four objections to our central argument: that publicly justifying a constitution, or perhaps the institution of delegation, which does not require expert scientific and social scientific knowledge, suffices to justify administrative policies; that idealization can circumnavigate disagreement and ignorance on scientific and social scientific matters; that citizens can come to learn the relevant scientific and social scientific reasons through engagement with expert public intellectuals; and that public reason is concerned with legitimizing only the ends of policy, whereas the administrative state deals strictly with the means of policy implementation. There is a concluding section.

## §2 The Idea of Public Reason

Public reason approaches to justification begin with the fact of reasonable pluralism. As Rawls describes it: “A modern democratic society is characterized not simply by a pluralism of comprehensive religious, philosophical, and moral doctrines, but by a pluralism of incompatible yet reasonable comprehensive doctrines” (Rawls 2005: xvi). Two things are worth noting about the fact of reasonable pluralism. First, reasonable pluralism does not occur by mere chance. Rather, we should *expect* reasonable pluralism to obtain in a society governed by liberal institutions, for reasonable pluralism results from persons exercising the freedom of thought and expression: “a plurality of reasonable yet incompatible comprehensive doctrines is the normal result of the exercise of human reason within the framework of the free institutions of a constitutional democratic regime” (Rawls 2005: xvi).

Second, the fact of reasonable pluralism is not identical to the fact of pluralism, or disagreement more generally. There are many kinds of disputes in which persons find themselves, but not all such disagreements are reasonable and thus instances of reasonable pluralism. As Rawls notes, disagreement may occur because “people hold views to advance their own more narrow interests,” or “perhaps people are often irrational and not very bright, and this mixed with logical errors leads to conflicting opinions” (Rawls 2005: 55). The fact of reasonable pluralism is not meant to encapsulate these sorts of disagreements. Rather, reasonable pluralism refers to those disputes that are the result of the *burdens of judgment*, which are a set of factors that lead to disagreement. If

disagreement is the result of these factors, then the disagreement is reasonable; if disagreement is *not* the result of these factors, then the disagreement is not reasonable. To offer a brief summary of the burdens of judgment: (a) evidence is often conflicting and complex, and thus hard to assess and evaluate; (b) we disagree over how much weight to assign relevant considerations; (c) concepts are vague and subject to hard cases, requiring interpretation; (d) the way we assess evidence and moral and political values is shaped by our total life experience; (e) there are often different kinds of considerations of different forces on both sides of an issue; and (f) social systems are limited in the values they can realize, and some selection must be made (Rawls 2005: 56-57). When any one of (a)-(f) leads to disagreement, then we say that such disagreement is an instance of reasonable pluralism.

In the face of reasonable pluralism, public reason approaches to justification demand that those engaged in justification avoid controversial issues, and that when justifying political proposals to one another citizens rely on considerations that all can accept or endorse. As Jonathan Quong describes it in his excellent survey article: “The idea of public reason... is a view about what kinds of reasons citizens in a well-ordered democratic society ought to invoke when deciding important political questions. It asks us to refrain from appealing purely to religious or comprehensive doctrines over which reasonable people disagree, and instead to seek shared reasons acceptable to similarly motivated persons to justify political principles and laws” (Quong 2014: 270). For example, suppose Rowena is a Christian and Colin a Muslim. If Rowena wants to justify some policy *p* to Colin, then public reason demands that she refrain from relying on the Bible or other Christian doctrine, for these are subject to reasonable disagreement. She cannot argue for *p* by showing how certain parts of scripture support *p*. Rather, public reason demands that Rowena appeal to considerations she and Colin share: perhaps that all citizens are born free and equal, and policy *p* will help better secure equality. To put it succinctly: “people should respond to points of disagreement by retreating to neutral ground, to the beliefs they still share” (Larmore 1996: 135).

Public reason is thus a constraint on the reasons citizens may give one another in public discourse.<sup>2</sup> Why accept such onerous restrictions? The general idea is that the very concept of justification *requires* we rely on public reasons in our discourse with one another. As Rawls notes:

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<sup>2</sup> A related research program says that the *rules* persons follow – like coercive laws or social-moral rules – must be in some sense acceptable to all who follow them. This approach is taken by the likes of Gaus (2011); Vallier (2019). Our concern in this paper is with the idea of public reason, which is about the *reasons* persons may give one another in public justification. We are not sure what, if any, relevance our thesis has for the other research program, that takes as its focus acceptability of the rules that persons follow. For more on the distinction between these two closely related research agendas, see Lister (2013: 15).

“...justification is addressed to others who disagree with us, and there it must always proceed from some consensus, that is, from premises that we and others publicly recognize as true” (Rawls 1999: 394). To give an example, suppose Rowena wants to justify some policy  $p$  to Colin, who is skeptical of it. For her to actually justify  $p$  to Colin, she must (according to Rawls) rely on premises that both she and Colin accept. But in doing so, Rowena ends up adhering to the demands of public reason, which say that when confronted with reasonable disagreement citizens must rely on shared considerations in their discourse. Hence, justification in the face of reasonable disagreement requires a reliance on public reason.<sup>3</sup>

To end, it is worth noting that there is some disagreement among its supporters concerning the *scope* of public reason. In particular: for what sorts of political questions must public reason be employed as the method of justification? Rawls’s view on this issue remains unclear. He says that public reason need only be employed when “matters of basic justice” and questions concerning “constitutional essentials” are at issue in the public sphere (Rawls 2005: 214). Sometimes he seems to think public reason should never be employed beyond this narrow set of issues (e.g., Rawls 2001: 91n13). In other places he suggests that, ideally, public reason should apply to all political questions (e.g., Rawls 2005: 215). More recently, Quong has argued that public reason should apply to all political issues involving coercion (Quong 2004). On this view, if policy  $p$  will be carried out by some coercive means, then  $p$  must be justified with shared reasons. This is the understanding of public reason’s scope that we shall adopt for the purposes of this paper. Since our thesis in part hinges on this wider account of public reason’s scope, we shall offer a defense of it in §6.1 below, when we entertain objections to our thesis.

### §3 Public Reason and the Sciences

It is clear from both the introduction of this paper and simple reflection that many political questions cannot be settled by appeal to normative reasons alone. Debate over such questions will thus not only involve normative considerations – freedom, equality, and the like – but also positive

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<sup>3</sup> One might further wonder why we owe persons justification at all, or why we only owe persons justification when our disagreements with them are reasonable. This gets into the question of what *grounds* public reason (be it respect for persons, civic friendship, etc.), and why we should differentiate between the reasonable and unreasonable when it comes to our duties to others. Such issues are important, but beyond the scope of the current paper. We assume that justification is owed to (at least) persons who reasonably disagree with us. This is sufficient to trigger the public reason requirement.

considerations: considerations from the sciences and social sciences needed to adjudicate between different policy options that confront a polity. It is clear public reason demands that citizens only appeal to shared normative reasons when engaged in public discourse. Rowena the Christian cannot appeal to Christian moral teachings in her debate with Colin the Muslim but must appeal to considerations the two share: for instance, a common understanding of equality. It is less clear, though, whether this demand applies to scientific and social scientific considerations used in public discourse. Rawls seemed to think so. He tells us that, along with normative considerations, public reason contains “guidelines of inquiry: principles of reasoning and rules of evidence in the light of which citizens are to decide whether substantive principles properly apply and to identify laws and policies that best satisfy them” (Rawls 2005: 224). While Rawls’s position seems clear, we should not just take him on authority. If Colin argues for policy *p* by appealing to social scientific considerations that Rowena does not accept, has he violated the demands of public reason?<sup>4</sup>

We believe that Colin *has* violated the demands of public reason. This is because many disagreements over scientific and social scientific questions result from the burdens of judgment, and are thus reasonable disagreements. Since the public reason theorist adopts a general imperative to move to shared ground when confronted with reasonable disagreements, consistency demands that she also insist on shared science and social science in public debate when reasonable disagreement obtains in these domains. If the disagreement between Rowena the Christian and Colin the Muslim is reasonable, then the two must find shared ground according to public reason. Similarly, if the disagreement between Rowena the neoclassical economist and Colin the Austrian economist is a reasonable one, then by the same reasoning so too must the pair retreat to shared ground. Hence, public reason applies to scientific and social scientific considerations used in public discourse. What remains to be seen in more detail is whether scientific and social scientific disputes do in fact result from the burdens of judgment.

Let us examine this more carefully. In doing so we shall focus mostly on disputes among economists, for this is where our familiarity lies. Consider one of the burdens of judgment, that disagreement can occur because “evidence—empirical and scientific—bearing on the case is

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<sup>4</sup> The authors can find only two papers related to the topic of science and public reason. In the first, Jønch-Clausen and Kappel (2016) examine what they take to be Rawls’s account of when scientific considerations should be included in public reason. In the second, Badano and Bonotti (forthcoming) examine whether the *accessibility theory of public justification* – a variation of Rawls’s theory of public reason (which is what our paper is concerned with) – would permit scientific considerations in public debate (to which they answer: yes).

conflicting and complex, and thus hard to assess and evaluate” (Rawls 2005: 56). Disagreement over how to assess evidence in the sciences is clearly illustrated by a recent event in the economics profession. The 2019 Nobel Memorial Prize in Economic Sciences was awarded to Abhijit Banerjee, Esther Duflo, and Michael Kremer for their work in development economics. These scholars’ main contribution is their innovative use of field experiments. The general idea is that we can learn about “what works” in development economics by testing theoretical proposals on a smaller scale. For instance: given that important public health professionals like nurses often do not show up for work in developing countries, would a system of monitoring and punishment decrease absences? The answer is no, as local health administrators in India responded to such an incentive system by increasing the number of permitted sick days for nurses (Banerjee *et al* 2001).

Or, do microloans actually help reduce poverty? The results are ambiguous – investment in small business increases, but there was no meaningful change in health outcomes, education, or women’s empowerment (Banerjee *et al* 2015). While impressive in their scope, several notable figures (including other Nobel Laureates) question how much we can really learn from the evidence collected in these sorts of experiments (e.g., Deaton and Cartwright 2018). In a world characterized by complexity, how much can we really learn about the practice of microfinancing generally speaking by offering small loans to fifty-two randomly selected neighborhoods in Hyderabad, India? This is something economists disagree much about, and seems to be an example of one of Rawls’s burdens of judgment in action: in particular, disagreement over how to assess the relevant evidence.

Another burden of judgment occurs when we “agree fully about the kinds of considerations that are relevant,” but nonetheless “disagree about their weight, and so arrive at different judgments” (Rawls 2005: 56). Scientists and social scientists frequently disagree about over how to weigh shared standards. Indeed, this is a point emphasized by philosopher of science Thomas Kuhn. Kuhn argued that scientists use five desiderata to appraise theories: accuracy, logical consistency, scope, simplicity, and fecundity (Kuhn 1977: 321-322; Kuhn 2012: 184-185). These criteria, though, often conflict with one another. More accuracy will often yield less simplicity, and vice versa. Thus, scientists must make judgments about which of our conflicting desiderata to emphasize and which to discount – in other words, they must decide how to weigh the criteria. But, which criteria to emphasize and which to discount is something scientists disagree over: “When scientists must choose between competing theories, two men fully committed to the same list of criteria for choice may nevertheless reach different conclusions... perhaps they agree about these matters but differ

about the relative weights accorded to these or other criteria” (Kuhn 1977: 324). As an example of this, Colin might endorse theory  $T_1$  because it does better across accuracy than theory  $T_2$ ; Rowena might endorse  $T_2$  because it does better across simplicity than  $T_1$ . Such a dispute is clearly a result of Rawls’s burdens of judgment.

A third burden occurs when our concepts or theories “are vague and subject to hard cases.” Because this is so, “we must rely on interpretation (and on judgments about interpretation) within some range (not sharply specifiable) where reasonable persons may differ” (Rawls 2005: 56). Problems of interpretation and the disagreements that ensue are also frequently present in the sciences. Consider just one example, articulated by economist Peter J. Boettke (1997). One of the most important technical results of twentieth century economics is the so-called first fundamental theorem of welfare economics, proved by Kenneth J. Arrow and Gérard Debreu (1954). Roughly, this result shows that markets – when modeled under highly unrealistic assumptions – are always Pareto efficient: there exists no transfer of goods that could make some party better off without making at least one other party worse off.

Economists differ greatly over how to interpret the stunning theorem. The so-called “Neo-Keynesians” use the model “as a critical standard with which reality could be indicted when it failed to measure up” (Boettke 1997: 23). On this view, because the fundamental theorem depends on unrealistic assumptions, it suggests that markets in our actual world do *not* live up to the theorem’s optimistic results, and thus need intervention to correct their failures. On the flipside, Chicago school economists interpret the result as descriptively meaningful: “In their view, real markets come breathtakingly close to approximating the efficiency properties of general competitive equilibrium” (Boettke 1997: 23). Finally, an eclectic group of thinkers led by Ronald Coase interpret these models as “foils,” where “the descriptive value of the model lay precisely in its departure from observed reality, for this underscores the function of real-world institutions in dealing with *imperfect* knowledge, uncertainty, and so forth” (Boettke 1997: 23). So here we have three major schools of economic thought – all harboring numerous Nobel Laureates – whose disagreements are grounded in fundamental interpretive questions. This, surely, counts as an instance of the burdens of judgment in action.

More examples are available, but we do not want to belabor the point. The above case studies are sufficient to show that disputes in the sciences and social sciences often result from the



burdens of judgment. Such disputes are instances of reasonable pluralism. Given this conclusion, public reason then demands that, when debating political questions in the public sphere, citizens must strictly rely on *shared* scientific and social scientific considerations in public debate, just as they must rely on shared moral considerations. Reasonable disagreement over normative considerations forces a retreat to shared ground, as does reasonable disagreement over scientific questions.

There are two general ways citizens can fail to live up to the demands of public reason when using scientific and social scientific considerations in public debate, and it will be helpful to distinguish them. In the first, called *controversy failure*, Rowena relies on scientific and social scientific consideration that Colin rejects. Here is an example. Rowena might look at a market with large information asymmetries and suggest that, because the assumptions of the first fundamental theorem don't hold, the market must be failing and requires intervention. Colin, though, rejects this interpretation of the theorem and, as a Chicago school economist, thinks that the market Rowena points to approaches the results of the theorem, and is thus efficient. No intervention is required, and would likely make things worse. Because Colin rejects the considerations Rowena relies on, she has failed to rely on shared reasons, and thus violates public reason.

The second way public reason can misfire when it comes to scientific and social scientific considerations is through *ignorance failure*, which occurs when Rowena relies on considerations that Colin does not understand. To give an example: Rowena attempts to argue in defense of policy  $p$  by appealing to a complex partial equilibrium model of a market where firms and consumers have asymmetric information sets, which Colin does not and moreover cannot understand. What Rowena says to him might as well be in another language. Unable to comprehend the social science Rowena relies upon, it can hardly be said that Colin accepts or endorses such considerations. Once again, Rowena has failed to rely on shared social scientific reasons in her debate with Colin, and thus violates the demands of public reason.

We now arrive at the main point of this section: the scientific and social scientific considerations that successfully avoid controversy and ignorance failure will be quite simple and rudimentary. In other words: the set of scientific public reasons will be quite small. This is something Rawls both recognized and seemed quite comfortable with. He twice says that persons in public debate cannot appeal to “elaborate economic theories of general equilibrium and the like” (Rawls 2005: 225; Rawls 2001: 90). This is the case even though the standard Arrow-Debreu general

equilibrium model is *the* foundation of neoclassical economics, taught in nearly all mid-level undergraduate microeconomics classes in universities across the United States. If mid-level undergraduate economics is off the table, then certainly everything one would learn in an economics PhD course sequence is off limits as well so as to avoid ignorance and controversy failure. We now go on to show what implications this has for an essential – and, we would argue, ineliminable – feature of contemporary liberal democracies: the administrative state.

#### §4 The Administrative State

One of the hallmarks of modern administrative agencies is their expertise. Members of the bureaucracy have (often advanced) degrees in the relevant fields and belong to relevant professional associations. For example, at the time of writing, the director of the Office of the Actuary at HHS's Centers for Medicare and Medicaid Services is a mathematician who is a member of the American Academy of Actuaries. The same often goes for politically appointed agency heads. At the time of writing, heads of seven of the nine operating divisions within HHS that have a permanent politically appointed leader have an advanced degree in either science, medicine, or public health – some have multiple advanced degrees. The backgrounds of employees and heads of administrative agencies should give a strong indication of the kinds of reasoning that these agencies employ in their work. If agencies did not need to engage in advanced scientific and social scientific reasoning, they would have no need to hire individuals with highly specialized backgrounds directly related to the agency's work. Constituting agencies this way would seem very peculiar.

Moreover, agencies' outputs often reflect very complicated scientific and social scientific analyses. HHS's application of the CBO analysis quoted in the epigraph is typical of regulatory impact analyses, which US federal agencies must perform for all significant regulatory actions (Executive Order 12,866, §§ 3(f)(1), 6(a)(3)(C) (1993)). These impact analyses must include, among other things, cost-benefit analyses (which require agencies to engage in complex processes of quantifying costs and benefits) and estimates of the effectiveness of non-regulatory economic incentives to accomplish the purposes of the regulation (Executive Order 13,563, § 1(b) (2011)). These analyses, necessarily, are extremely complicated. And this is desirable: one would hope that regulations affecting hundreds of millions of lives and trillions of dollars would incorporate the most sophisticated analyses available.

Next, the agency-court relationship – created both legislatively and judicially – is founded on agencies’ comparative scientific and social scientific expertise. Section 706 of the Administrative Procedure Act governs judicial review of agency action, findings, and conclusions. It gives courts the authority to set aside agency actions, findings, and conclusions only if they are “arbitrary and capricious” or “unsupported by substantial evidence,” which are generally understood to be interchangeable.<sup>5</sup> The Supreme Court’s gloss on this standard from the seminal case of *Motor Vehicle Manufacturers Association v. State Farm Mutual Insurance Co.* is instructive: “Normally an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise” (*State Farm*, 1983: 43). This articulation of the standard of review (known as “hard look” review) makes clear that the agency, not the court, is the body that employs the expert reasoning – indeed, the courts have prohibited themselves from substituting their judgment for that of the agency (*Citizens to Protect Overton Park*, 1971: 416). Instead, courts most often employ hard look review to invalidate agency action when the agency has failed to provide any justification whatsoever (Wald 1996: 234). This is precisely the type of review one would expect when the reviewing body is incapable of understanding, to any substantial degree, the reasoning in which the body being reviewed typically engages.

Furthermore, when courts find that an agency did not perform the necessary analysis in promulgating a rule, the remedy is usually to give the agency another opportunity to justify it, not to invalidate it (Meazell 2011: 741). For instance, the *State Farm* court rejected a rule promulgated by the National Highway Traffic Safety Administration (NHTSA) that would have permitted cars to be constructed without passive restraints such as airbags and automatic seatbelts because “NHTSA apparently gave no consideration whatever to modifying the [motor vehicle safety standard] to require that airbag technology be utilized . . . . There was no suggestion in the long rulemaking process that led to [the standard] that, if only one of these options were feasible, no passive restraint standard should be promulgated” (*State Farm*, 1983: 46). But, instead of holding the rule invalid, the court remanded the case to the agency to evaluate certain issues that “rest[ed] within the expertise of NHTSA” (*State Farm*, 1983: 53). If the courts believed they had the capacity to understand whether

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<sup>5</sup> The statute also contains grounds for invalidating agency actions that are not relevant here.

the agency's policy was justified by the relevant scientific or social scientific considerations, one would expect them to simply hold that the rule was arbitrary and capricious and invalidate it, not give the agency another chance. For instance, if the *State Farm* court took itself to be capable of determining whether airbag technology actually was necessary given the relevant engineering and economic reasons, it could have invalidated the rule.<sup>6</sup> Courts are thus aware of the expert reasoning of administrative agencies, which even they, as entities that interact with agencies on a regular basis, do not deign to perform.

The composition of agencies, their complex output, and their relationship with courts all strongly suggest that they do not adhere to public reason when selecting policies to implement. As noted above, it would be peculiar for agencies to hire individuals with specialized backgrounds but for these individuals not to use their specializations when formulating agency policy. We should expect the actuaries employed by HHS to use their specialized actuarial knowledge when formulating health insurance policy. But, as we argued in the previous section, the demands of public reason require that the scientific reasons used in public justification – including actuarial reasons – be shared among all those who will be subject to such policies. Yet it is extremely implausible that most ordinary citizens without at least a post-secondary education in mathematics, economics, or actuarial science understand the relevant considerations. So HHS does not reason with considerations all citizens accept when justifying healthcare policy. The demands of public reason thus prohibit HHS from appealing to such considerations when justifying the relevant policy. But how could exceedingly complex health insurance policies like the rules implementing the PPACA be justified *except* by reference to such complex and inaccessible considerations? It could not. Given the paucity of scientific public reasons that exist to justify policies, there is no way to justify important policies like these rules using strictly public reasons. The silence of public reason blocks most health insurance policies. Conversely, if agencies take into account more than very simple reasons – as they must, given the complexity of the problems they address – then they will violate the requirements of public reason. It follows that such (highly desirable) policies will fail to be publicly justified.

Note that our argument here is neutral with respect to justifications for having an administrative state in the first place. In particular, it does not presuppose the strong claim, most

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<sup>6</sup> It also could have upheld the rule if it took itself to be capable of determining that the agency was right for the wrong reasons.

often associated with New Deal administrative law scholars like James Landis (1938), that the administrative state is justified because it places decision-making power in the hands of capable and independent experts. This view has been criticized by administrative law scholars, and does not have many adherents today.<sup>7</sup> Our argument rests on a much weaker claim, namely that *if* there is to be an administrative state making highly consequential and detailed regulations *then* it should be staffed by experts employing expert reasoning. This is consistent with the New Deal view, and also with more recent “civic republican” justifications of the administrative state, such as those of Henry Richardson (2002) and Mark Seidenfeld (1992), that emphasize agencies’ roles in deliberative decision-making. Indeed, Richardson believes it is *uncontroversial* that agencies should have scientific and social scientific expertise (Richardson 2002: 224). To be inconsistent with the requirements of public reason, all that need be true is that administrative agencies use expert reasoning. As a matter of fact, this is the case. And, if agencies are to be effective, it ought to be.

Finally, the problems we have observed with the administrative state thus far reflect only ignorance failure – agencies employ complex reasoning in promulgating rules that nearly all persons subject to such rules do not understand. They thus do not accept or endorse them. Indeed, we believe this is the most significant problem for the administrative state because, for any given policy, the vast majority of persons are non-experts in the relevant fields. But controversy failure is also a serious worry. This is because complex science and social science are often just as controversial as complex philosophical positions, and agencies must choose which considerations to rely on when making policy. Inevitably, this will entail drawing on controversial consideration that, while perhaps *understood* by all experts in the relevant field, are not *accepted* by all of them.<sup>8</sup> The requirements of public reason would then prohibit the agency from using those reasons to justify the policy *even if* the ignorance problem did not obtain (which it most certainly does). As Adrian Vermeule notes in his recent book on administrative law: “Increasingly, agencies operate at a policymaking frontier where settled science and expert consensus have run out. When agencies do face serious uncertainty of this sort, reasons themselves have run out as well” (Vermeule 2016: 126). Public reason, Vermeule agrees, falls silent.

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<sup>7</sup> For a good summary of some of the major criticisms, see Gifford (1984: 312-19).

<sup>8</sup> To see that this occurs, one need only read a small number of the more than 3,000 comments submitted by members of the public in the notice and comment process for the two proposed rules implicated by the HHS regulatory impact analysis quoted above.

## §5 Egalitarianism versus Public Reason

Since public reason is inconsistent with the administrative state, it is also inconsistent with forms of political organization that require the administrative state. This point is obvious, but should be troubling for most proponents of public reason. This is because most proponents of public reason advocate some kind of egalitarian distribution, but achieving such a distribution requires an administrative state that we have just shown to be inconsistent with public reason. We do not claim that it is conceptually or logically impossible to achieve an egalitarian distribution without violating the demands of public reason. But we do claim that the demands of public reason prohibit every major Rawlsian-egalitarian proposal in the existing literature. Since it is impractical to evaluate every proposal here, we focus in on Rawls's proposal for achieving material equality in particular, and show why it violates the demands of public reason. We believe the argument generalizes, *mutatis mutandis*, to other institutional proposals for achieving an egalitarian distribution.

Every complete proposal for achieving material equality involves some combination of specific administrative components. While Rawlsians and egalitarians more generally differ on the exact combination of administrative components, they generally favor a large and diverse set of agencies to redistribute goods in different ways so as to achieve equality. Rawls is a paradigm example. In speculating about the institutions of a just society he proposes (1) the *allocation branch*, which ensures competitive prices and healthy market competition through taxes, subsidies, and the redefinition of property rights; (2) the *stabilization branch*, which focuses on keeping unemployment at a minimum and increasing aggregate demand; (3) the *transfer branch*, which sets and distributes the social minimum; and (4) the *distribution branch*, which imposes taxes, redistributes shares, and redefines property title in order to achieve justice (Rawls 1971: §42).

It should be easy to see that the administrative agencies Rawls proposes will employ methods of reasoning likely at odds with the demands of public reason. In fact, the demands of public reason likely prohibit *each and every branch* of Rawls's ideal bureaucratic state. Ordinary citizens do not share the economic considerations that would justify intervention in the market through taxes, subsidies, and redefinition of property rights in order to ensure competitive prices. This can be seen by simply doing a brief survey of the optimal taxation and public finance literature more generally (e.g., Tuomala 2016). Likewise, citizens do not know the models and measurement

techniques that would be used to reduce unemployment while simultaneously increasing aggregate demand. The difficulties here can be seen from a quick glance at the literature on welfare economics and market failures (e.g., Salanie 2000), as well as by examining the debate surrounding Keynesian economic stimulus (e.g., Friedman 1957). These debates also show that experts disagree on the relevant social scientific considerations. Because of this, it seems like both Rawls's allocation branch and stabilization branch will employ methods of reasoning at odds with the demands of public reason: such bureaucracies will not justify policies by relying on shared reasons. Faced with this fact the Rawlsian must decide which is more important: justification through public reason, or an egalitarian distribution?

It might be suggested that Rawls's transfer branch runs into less trouble than the allocation and stabilization branches, because the central goal here is to simply set a social minimum. More generally, a universal basic income seems less objectionable from the point of view of public reason than other proposals because it does not depend, at least as much, on predicting the effects of large-scale regulation – there is simply much less regulation to think about, so fewer complex and controversial considerations will enter the justification of policy. One sets a baseline income for persons and then lets the market process take hold. While admittedly less objectionable, even so simple a distributive policy as a universal basic income will be at odds with public reason for several reasons. First, it will be necessary to model and measure the economic incentives – particularly in the labor market – of providing individuals with a universal basic income in order to determine the appropriate income to provide. This requires using complex economic models, statistical methods, and quantitative analysis, most of which will be drawn from non-public reasons. Second, it will be necessary to determine how to collect the wealth to be distributed, consistent with other important considerations like economic efficiency. This requires choosing from among many possible taxation rates of many different kinds of wealth (personal income, corporate income, consumption, gift, inheritance, etc.), which in turn requires understanding the interdependencies among different kinds of tax systems – again, something of which ordinary citizens have little to no grasp. There will also be interactive effects between the incentive question and the taxation question, further taking matters out of the intellectual capacities of most citizens. And all of this is undoubtedly controversial among experts. Public reason simply runs out here.

Finally, there is the distribution branch, whose function is to achieve a just distribution. By this point it should be clear that this branch will employ methods of reasoning at odds with the

demands of public reason. Take healthcare as an example. Norman Daniels argues that Rawlsian distributive justice requires some form of public healthcare, since this is necessary to achieve fair equality of opportunity. One of Daniels's suggestions is a tiered healthcare system, where the basic tier is financed by a "national health insurance scheme that eliminates financial barriers" (Daniels 1981: 176). But, as discussed above, a health insurance scheme relies on facts about health insurance demand elasticity and the like that are not widely shared. Other types of healthcare, such as single-payer systems, will depend on other complex and controversial financial, economic, and actuarial facts, not to mention unshared facts about medicine and public health. Since there are no public reasons that suffice to justify public healthcare schemes, the demands of public reason block the justification of public healthcare schemes. Of course, the point here generalizes: any kind of complex social engineering done in the name of distributive justice will be blocked by public reason, for such complex social engineering will require an administrative state that relies on complex scientific and social scientific considerations that many do not share.

There is thus good reason to think that the typical proposals for achieving egalitarianism are inconsistent with public reason due to their reliance on administrative agencies and thus expertise. Note, in arguing for this, we are not claiming that *only* egalitarianism is inconsistent with public reason. We merely focus on egalitarianism because it is the substantive theory of distributive justice that most defenders of public reason happen to endorse. Even so-called classical liberalism is probably inconsistent with public reason, as classical liberals such as F.A. Hayek endorse government intervention similar to what Rawls's transfer branch carries out (e.g., Zwolinski 2019). Indeed, the only system of political organization the authors can think of that might not rely on expertise to an objectionable degree would be a *very* minimal libertarianism, where government does nothing more than to protect citizens against violence, theft, and fraud, and to enforce contracts (Nozick 1974: 26). Since past societies have carried out these functions without an expert bureaucracy, we believe they can be carried out in a minimally competent way absent expert



reasoning.<sup>9</sup> Given the arguments of this paper, the Nozickian night-watchmen state may be where the ardent defenders of public reason find themselves.<sup>10</sup>

## §6 Objections

### 6.1 *Scope and Delegation.*

A first objection to our argument rejects our position on the scope of public reason. In §2 we followed Quong (2004) and stipulated that public reason should apply anytime coercive policies are at issue in the public sphere. If public reason has a narrower scope, though, then perhaps we need not worry about expert reasoning employed by administrative agencies. If public reason only applies to constitutional questions (as Rawls suggests), then agencies don't violate public reason's demands when formulating (non-constitutional) regulatory policy with their technical expertise.

Narrowly restricting the scope of public reason without a compelling justification seems objectionably *ad hoc*. Why insist on a publicly justified constitution while ignoring the public justification of specific policies? There are two broad responses. First, perhaps ordinary coercive policies are just not the kind of thing requiring public justification, whereas constitutions are. This response seems obviously incorrect. Indeed, many ordinary policies have a far greater influence on one's life than most constitutional provisions – it would be absurd to say that current firearm policies are not the sort of thing requiring justification, whereas Article V does stand in dire need of justification. A second, more interesting response says that by publicly justifying the constitution,

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<sup>9</sup> That said, these functions would probably be carried out in a maximally competent way aided by expert social science – for instance, by looking at the effects of different kinds of incarceration programs on recidivism. To adhere to public reason, such considerations must be eschewed and thus a less effective scheme of punishment adopted. By contrast, we cannot imagine even minimally competent environmental regulation or macroeconomic engineering absent expert reasoning.

<sup>10</sup> Some might wonder what the difference is between our thesis and one advanced by Gaus (2010), who argues that justificatory liberalism tilts towards classical liberalism. There are many. First, Gaus does not work within the public reason framework, but rather works within a different justificatory liberalism framework. We discussed this distinction in footnote 2 above. Second, Gaus thinks that his liberal framework tilts towards classical liberalism, not libertarianism. But classical liberalism consists of much more than the night-watchmen state: “classical liberals also typically endorse the provision of public goods and improvements, education, poor relief, as well as financial, health, and safety regulations” (Gaus 2010: 235). As we noted in the paragraph above, this kind of liberalism also relies on expertise, and is thus also blocked by public reason. Finally, Gaus does not argue that his justificatory liberalism blocks egalitarianism, but rather makes this form of political organization “more, not less, difficult to justify than a more limited government authority” (Gaus 2010: 238). By contrast, we have argued that public reason does block egalitarianism, full stop.

any piece of legislation passed under that constitution is *also* publicly justified. In other words, the property *being publicly justified* carries over from the constitution to any policy passed in accordance with its procedures. Thus, if policies issued by administrative agencies are passed in accordance with a publicly justified constitution, then so too are they justified, regardless of the kind of reasoning that underlies them.

There are obvious counterexamples to this view. Constitutions that are plausibly publicly justified often do not prohibit laws that are most certainly not publicly justified, because those constitutions only set very basic rules of governance. Many people, for instance, accept the broad contours of the United States of America's Constitution, but would seriously balk at the idea of policies like a border wall being publicly justified. So it is simply incorrect to say a constitution's public justification *always* carries over to those policies passed under it. A more subtle view would go something like this: for any policy *p* passed under a publicly justified constitution, there is a *presumption* that *p* is publicly justified, but this presumption can be overturned if citizens have sufficient reason for rejecting *p*. So, all policies passed under the Constitution of the United States are presumptively publicly justified, but since objectors have strong reasons to reject a border wall, this *specific* policy is not. Why endorse such a view? One might argue for the presumption by pointing out that, by hypothesis, *p* was enacted democratically and did not violate basic constitutional rights. Citing the literature on democracy's desirable epistemic properties (e.g., Goodin and Spiekermann 2018), perhaps this gives us *pro tanto* reason to accept *p*.

Although we are skeptical about the view that policies passed under a publicly justified constitution are presumptively justified, let us grant it *arguendo*. Whether it can save the administrative state depends on what counts as a sufficient reason to defeat a policy's presumptively justified status. There are likely numerous ways this can happen. Clearly one such way is to simply reject as bad reasons those reasons given in defense of *p*. Consider an example: suppose the main reason given in defense of a border wall is that most illegal immigrants are dangerous criminals. Since it was passed under a publicly justified constitution, the law is presumptively publicly justified. But, since many people reject the proposition that most illegal immigrants are dangerous criminals, it follows that the law's presumptive status is defeated.

If rejecting the reasons in defense of *p* is one way to strip *p* of its presumptive status as publicly justified, then the current proposal cannot solve controversy failure. For controversy failure

occurs just when persons reject the science and social science experts offer in defense of policies. Hence, publicly justifying the constitution will not remedy at least half our problem, *even if* we grant that a publicly justified constitution presumptively justifies policies passed under it. For such presumption can be overcome if one rejects the underlying reasons in defense of a policy, and scientifically competent citizens do this with policies passed by experts at administrative agencies. Hence, these policies are not publicly justified.

Perhaps it is a partial victory, though, if restricting the scope to a publicly justified constitution solves ignorance failure. After all, those subject to ignorance failure cannot reject the reasons given in defense of the presumptively justified  $p$ , because these citizens by definition don't understand them. But rejecting the underlying reasons given in defense of  $p$  is not the *only* way of defeating  $p$ 's status as presumptively justified. Consider an example. Suppose Rowena, wanting to get in shape, hires a personal trainer. Because she freely chose to do this and because the trainer is an expert, it is plausible that everything the trainer tells Rowena to do is presumptively justified – unless she has sufficient reason to reject the trainer's advice, she ought to do what he says. Now suppose the trainer advises Rowena to do something that she reasonably suspects might cause her serious pain. When she asks why she should do this, the trainer launches into complicated kinesiology that Rowena cannot understand. By hypothesis, she cannot reject the trainer's reasons that underly his prescription. Nonetheless, it still seems that Rowena's concerns about the advice itself defeat the trainer's presumptive claim to justification, *even though* she cannot understand his expert reasoning.

More generally, it seems that another way of defeating presumptive justification occurs when persons do not understand the reasoning in favor of the presumptively justified policy, but nonetheless have significant and reasonable concerns about it. This happens frequently. Though one might not understand the technical details behind Medicare-for-all proposals, one can have reasonably grounded concerns about such a policy given the massive scope of the intervention, the complexity of the relevant market, failures of major healthcare overhauls in the past, and so on. These sorts of cases, though, will allow citizens suffering from ignorance failure to block presumptively justified policies. If Colin has reason to reject  $p$ , then this suffices to strip  $p$  of its presumptive status, *even though* he does not understand the technical reasons given by experts in favor of  $p$ . This is just like the case of Rowena, who defeats the trainer's presumptive claim to justification by having reasonable concerns about his advice, *even though* she didn't understand the expert reasoning behind it.

Note that, on this view, not *all* instances of ignorance failure block administrative policies as would be the case with a conception of public reason that applies to all exercises of political power. On the latter, standard view, all instances of ignorance failure block policies, because there are no shared reasons in defense of them. But if one goes with the narrower view being considered in this section, then ignorance failure only blocks a policy when the citizen who does not understand the reasons supporting the policy *also* has reason to reject the policy. If a citizen does not understand the reasons behind presumptively justified *p*, but also has no strong objection to *p*, then *p* would retain its presumptive justified status on the narrow view. So narrowing the scope of public reason does have some positive impact, but not much.

To sum up: narrowing the scope of public reason will not do much to circumnavigate our conclusions. The best a narrow view can say is that policies passed in accordance with a publicly justified constitution are presumptively justified. This, though, will not prevent controversy failures, and will only prevent *some* ignorance failures.

A related objection to the one just considered concerns the possibility of publicly justifying *delegation*. Delegation refers to a legislative body's handing over some of its decision-making powers to administrations, who then craft policy. The reason legislatures do this is obvious: many policy questions require expertise, which legislatures lack. Though each and every policy an administrative agency passes may not be publicly justified (because public reason falls silent), perhaps it is sufficient to publicly justify the institution of delegation itself. If there are shared reasons justifying delegation, then we need not worry about publicly justifying those policies passed by an agency that power has been delegated to.

The structure of this objection is similar to the one just considered. With both objections, publicly justifying an institution that in some sense leads to policy *p* – be it a constitution or delegation – will then publicly justify *p* itself. Given the structural similarity, the delegation objection fails for the same reasons. If *p* was passed by an agency that authority was delegated to in a publicly justified manner, the best we can say is that *p* is presumptively justified – perhaps, as with the democratic process, because of the administrative state's epistemic properties. One way of defeating *p*'s presumptive status is to reject the reasons given in defense of *p*. Hence, controversy failure still blocks *p*. Another way of defeating *p*'s presumptive status is for persons to reject *p* itself, even if they

do not understand the reasons given in defense of  $p$ . Hence, some instances of ignorance failure will still block  $p$ . As such, publicly justifying delegation will not do much to resolve our problems.

## 6.2 Idealization.

Another objection goes something like this: it is not that citizens must *actually* accept or endorse the scientific and social scientific considerations that are used to justify policy  $p$  in order for  $p$  to be justified. Rather, in order for  $p$  to be justified, it must only be that citizens, were they to engage in a sufficient amount of good reasoning, would come to accept or endorse the scientific and social scientific considerations used in justifying  $p$ . That is, we *idealize*. So on this view, it does not matter that Colin does not understand the partial equilibrium model of a market with asymmetric information sets between firms and consumers that Rowena uses in her justification of policy  $p$ . What matters is that, were Colin to engage in a sufficient amount of good reasoning, he would then come to accept or endorse such a consideration. If this counterfactual test is satisfied, then  $p$  is justified to Colin *even if* actual Colin does not accept the complex economic reasoning that Rowena employs.

There are several issues with this objection. First, we fully grant that a public reason account of justification will likely require *some* kind of idealization if *any* policy is to be justified at all. This is something detractors of public reason love pointing out (e.g., Enoch 2015). But we also firmly hold that, in order for idealization to be consistent with the underlying theoretical goals of public reason in the first place, this idealization will need to be significantly constrained. Our goal, recall, is to justify exercises of political power. Such being the case, surely idealized Colin must in some sense be accessible to actual Colin, for it is actual Colin who power is being exercised over. That is, were actual Colin to reflect on the reasons idealized Colin has, then actual Colin would come to see that he has these reasons too. Indeed, this is the standard of idealization that Gerald Gaus employs: “The reasons you have must be accessible to you, and as a real rational agent in a world in which cognitive activity has significant costs, rationality does not demand one keep on with the quest to discover less and less accessible reasons” (Gaus 2011: 253). But, as we showed in §4, the administrative state employs reasoning of the kind learned in PhD programs or other professional schools. It is hard to see how such considerations would be accessible to the average citizen in a world in which cognitive

activity has significant costs, especially since understanding *all* the reasons used by *all* agencies would require more PhDs than one could acquire in a lifetime.<sup>11</sup>

Second, the proposed idealization-based solution only purports to rescue the administrative state from ignorance failure, not from controversy failure. Recall our distinction from §3. With ignorance failure, the problem is that most citizens do not understand the kinds of reasoning employed by administrative agencies. It thus cannot be said that they accept or endorse such considerations. With controversy failure, however, the problem is that citizens who *do* understand the kinds of reasoning employed by the administrative state could quite reasonably disagree with such reasoning. As Vermeule has noted, agencies often make policy in areas where there is no scientific or social scientific consensus. Because this is the case, a “general” and “well-settled” administrative-law principle is that “when experts disagree, agencies are entitled to rely upon the reasonable opinions of their own qualified internal experts” (Vermeule 2016: 132-133). But of course, other experts can quite reasonably reject such opinions. Thus, *even if* idealization could solve ignorance failure (we doubt that it does), it could not solve controversy failure.

### 6.3 *Learning and Deliberation.*

Another response to our central argument is that, though normal persons with normal cognitive capacities cannot understand the complicated reasoning employed by administrative agencies, perhaps citizens can come to learn these reasons. This could be through engaging with public intellectuals who are experts in the relevant fields (as an example, citizens could read op-eds penned by these intellectuals); participating in the public comment processes on proposed rules; or even spending designated civic holidays deliberating about proposals (Ackerman and Fishkin 2004). According to the proposal under consideration, these processes will ensure that citizens learn the relevant scientific and social scientific reasons. The demands of public reason are thus satisfied.

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<sup>11</sup> Perhaps one could reject our use of Gaussian-style idealization. But then what standard of idealization would one employ? On the standard Rawlsian line, idealization attributes substantive moral values and commitments to persons (they see themselves as free and equal, desire to participate in a fair system of social cooperation, etc). It is possible that idealization could *also* attribute scientific and social scientific views to people as well. But in order for this strategy to work, idealization must attribute to persons several PhD’s worth of knowledge. This seems more controversial than, say, attributing to persons substantive Catholic or Protestant views, which is at odds with the liberal project more generally.

As a first response: while all these processes will surely improve citizens' knowledge in areas outside their expertise, we doubt they are sufficient to solve ignorance failure. This is because the moderate amounts of education they involve are no replacement for the years of study drawn on by experts. For example, we don't doubt that lay readers can improve their knowledge of economic policy by reading Paul Krugman's *New York Times* columns, but that does not make them competent to understand, say, the reasons for or against a certain trade policy that Krugman would employ were he to advise the Department of Commerce. Indeed, if it did, several aspects of the administrative state we discussed in §4 would be inexplicable. This point is not controversial. Moderate amounts of reading and deliberation are not equivalent to sustained education and professional development.

But suppose for the sake of argument that there were sufficient formal and informal mechanisms for all citizens to learn all scientific and social scientific reasons supporting all administrative policies. This, like idealization, would not solve controversy failure. But not only would this purported solution to ignorance failure not *solve* controversy failure, it would likely *exacerbate* it. Citizens who come to learn the relevant scientific and social scientific reasons will likely come to disagree about those reasons, just as experts do. For example, most people who do not know any basic economics likely do not have strong opinions on, say, the effects of regulation on financial markets. But of those citizens who come to understand basic economics through engaging with public intellectuals, some will agree with Paul Krugman on the effects of regulation, and others will side with Milton Friedman. The proposed solution, therefore, will cause many citizens who initially did not understand the justifications for coercive policies to come to reject them, and these policies would therefore remain unjustified. There is no reason to believe that a public reason proponent would view shifting ignorance failures to controversy failures as an improvement.

#### 6.4 *Means vs. Ends.*

A final objection goes something like this: the administrative state is only concerned with the implementation of policy, not the actual crafting of policy. That is, the administrative state is only concerned with the *means* of implementing policy, not the actual *ends* of policy itself. And, one might argue, in order to justify policy *p*, public reason must only be used in justifying the ends of *p*, not the means of achieving *p*. So when it comes to justifying the ends of policy – that we want a single-payer

healthcare system, or a property-owning democracy, or a basic income – we must proceed from shared reasons. But when it comes to the nitty-gritty of implementation – figuring out the demand elasticity of health insurance, for instance – public reason is inapplicable, and we do not need to proceed from shared reasons. Since the administrative state is all about implementation and not the actual crafting of policy, it follows that the administrative state is not subject to the demands of public reason. It does not matter, then, that agencies employ reasoning subject to the ignorance and controversy failures.

Our first response to this objection is that, at least in modern constitutional democracies like the United States, although legislatures can and do constrain agencies to a certain extent, administrative agencies nonetheless play a major role in policymaking that goes beyond mere implementation of democratically decided ends. Agencies get their powers from statutes, provided those statutes are consistent with the Constitution. Thus, there are two possible limits to their authority: statutory and constitutional. In the United States, the constitutional limit is known as the “non-delegation doctrine,” which says that Congress cannot delegate its “legislative power” to an administrative agency. Since 1928, the Supreme Court has held that, as long as Congress lays down an “intelligible principle” to which the agency must conform, it does not unconstitutionally delegate legislative power (*J. W. Hampton, Jr.*, 1928: 409).

But this standard, as it has been developed, is consistent with agencies wielding what most would consider large amounts of policymaking authority that, since agencies’ power is given by statute, also gives a sense of the limited extent to which statutes typically limit agencies’ power. For example, in *Whitman v. American Trucking Associations, Inc.*, the Supreme Court upheld, against a non-delegation challenge, a provision of the Clean Air Act that instructed the Environmental Protection Agency (EPA) to set “ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on [the] criteria [documents of §108] and allowing an adequate margin of safety, are requisite to protect the public health” (*Whitman*, 2001: 472). These “criteria documents” were to be created by the EPA based on certain open-ended considerations established by Congress, which included “any known or anticipated adverse effects on welfare” (42 U.S.C. § 7408(a)(2)(C)). In essence, then, the statute granted the EPA the power to set whatever air quality standards were necessary to protect public health, and gave the EPA essentially full leeway to decide



when public health was protected<sup>12</sup> – based, of course, on “the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of such pollutant in the ambient air, in varying quantities” (42 U.S.C. § 7408(a)(2)). If this isn’t policymaking about ends, we don’t know what is. But if the reader is not convinced by even this, note that *Whitman* observed that, in prior cases, the Supreme Court had found an intelligible principle “in various statutes authorizing regulation in the ‘public interest’” (*Whitman*, 2001: 474). And the Court itself noted that constitutional grants of power to agencies give them a “permissible degree of policy judgment” (*Whitman*, 2001: 474). Clearly, then, administrative agencies focus on both the means *and* ends of policy.<sup>13</sup>

Of course, we don’t mean to suggest that the current state of constitutional law in the United States is conclusive of agencies’ proper role in a democracy.<sup>14</sup> Perhaps the American system is simply impermissible. Suppose then that the administrative state was not actually involved in crafting policy; it only worked on the implementation side of things. Our second response is simply that, intuitively speaking, justifying a broad, vague “end” of policy is not sufficient to justify the actual, implemented, coercive policy. For example, suppose – borrowing from the case of *Burwell v. Hobby Lobby Stores, Inc.* – that Rowena is a devout Catholic and business owner. Colin argues – using strictly reasons that Rowena accepts – that she ought to accept policy *p*, whose end is affordable healthcare for all. Any coercion stemming from *p* would thus, on the current objection, be justified to Rowena. Yet, when the details of implementation are fleshed out by HHS, Rowena’s business is compelled by law to provide contraceptives to female employees, which is in violation of her faith

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<sup>12</sup> Of course, when a statute limits the reasons an agency can consider, the agency must follow the statute, and one holding of *Whitman* was that the statute prohibited the EPA from considering the economic costs of regulating air pollution. But here it is worth noting that American courts give agencies substantial deference in interpreting statutory terms under the so-called *Chevron* doctrine, which, in practice, gives them even more policymaking power because it allows them to declare, within limits, what the law means, and hence which factors they may consider. See Siegel (2018: 960).

<sup>13</sup> Richardson also rejects a strict ends-means division between legislative and agency functions, and agrees that agencies do and should specify certain ends, but argues that certain forms of public participation in agency rulemaking, combined with legislative oversight, public input into the appointment of agency heads, and the enhancement of agency professionalism allows agency deliberation to “count as a continuation of fair processes of democratic deliberation” (Richardson 2002: 214-230). While this might suffice to solve the problem Richardson seeks to tackle – that of bureaucratic domination – we do not take Richardson to be arguing that this suffices to publicly justify the agencies’ policies in the sense public reason theorists like Rawls are concerned with. Nor would his solutions so suffice. Public participation might slightly mollify ignorance failure, but would not solve it; indeed, it might even exacerbate controversy failure. And none of Richardson’s other solutions address the problems we have been concerned with.

<sup>14</sup> Although conventional wisdom says that the non-delegation doctrine was effectively repudiated by the New Deal, recent research supports the conclusion that “there was never a time in which the courts used the nondelegation doctrine to limit legislative delegations of power” (Whittington and Iuliano 2017: 381).

and conscience. We do not think that such a coercive interference is publicly justified to Rowena (given her religious commitments), *even though* by hypothesis the vaguely-specified end that the regulation serves was justified to her with shared reasons. Thus, *even if* it were true that administrative agencies were strictly about implementation of policy ends (they are not), it still does not seem sufficient to justify only the ends of policies to persons in order to justify all coercive aspects of the policy itself. The devil is often in the details, and these details also stand in need of public justification.

## §7 A Concluding Section

Public reason theorists argue that political power must be justified over those whom it is exercised. This requires that those subject to political power accept or endorse the reasons given for its justification. These reasons include scientific and social scientific considerations. In the modern administrative state, agencies do and must use complex scientific considerations to make policy. This results in ignorance failure and controversy failure. These failures prevent the policies from being justified to most citizens. As a result, public reason condemns the administrative state and political theories that presuppose it, such as egalitarianism, as unjustified exercises of coercive force.

To the extent that theorists advocate public reason as a means of reconciling state power with citizens' freedom, our argument raises a new way that this conception of freedom conflicts with equality. This conception of freedom conflicts with equality because it condemns the only (plausible) way of achieving it. Indeed, it could very well turn out that public reason permits little more than the Nozickian minimal state and the massive distributive inequality that might ensue. If so, properly understanding the demands of public reason could very well change existing fault lines in the current literature. Egalitarians might be driven to reject public reason, and libertarians to accept it.

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