



# Political values in independent agencies

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## Abstract

Despite that independent agencies are typically justified in terms of technical efficiency, they inevitably have to make political judgments. How can political reasoning be legitimate in such institutions? This paper starts by investigating the merits of two prominent models. The “avoidance model” asks agency reasoning to stick to empirical facts and as far as possible stay clear of political values. By contrast, the “specification model” recognizes the need for constructive normative work, but confines it to the refinement of given statutes. This paper challenges both models and defends a third alternative. The “public reason model” requires agencies to ground their value judgments in a publicly accessible framework of reasoning, which is here interpreted as their overarching mandate. The paper argues that agency mandates should be conceived as distinct domains of reasoning, and it delineates three institutional virtues that enable agencies to track this domain.

**Keywords:** accountability, independent agencies, legitimacy, political values, public reason.

## 1. Introduction

Independent agencies are paradigm institutions of expert authority; the basis of their public power is founded on appeals to technical competence rather than on direct democratic responsiveness. Nevertheless, regulatory practice always involves trade-offs and interpretive issues. This paper seeks a model that captures the conditions of normative or political reasoning in independent agencies. What should public-oriented expert agencies strive to achieve in their interpretation of political values? That is, how can expert agencies be political in the right way?

Before explaining this enterprise in any more detail, it is worth highlighting how the very quest for such a model of political reasoning contradicts typical official discourse. For example, the agencies of the European Union (EU) are justified as sources of “purely technical evaluations of very high quality and are not influenced by political or contingent considerations” (European Commission 2002, p. 5). But hardly any analyst agrees with this claim, as there is widespread recognition in the academic literature on EU agencies that the technical assessments of agencies are intertwined with political values.<sup>1</sup> As Martin Shapiro puts it, it is an affront to ideas of transparency and participation to justify agencies by “insisting that ‘information’ and ‘technical decisions’ somehow lie in a cradle of scientific harmony above and beyond the clash of interests and the exercises of discretion in the face of uncertainty that we call politics” (Shapiro 1997, p. 289). Even prominent advocates of increased delegation agree that agencies have a political nature, their work cannot be seen as *merely* technical or constrained to “win-win” regulation (e.g. Majone 1996, p. 11). Moreover, the political aspect of their authority does not simply concern the redistributive effects of the decisions. The authority is also political in the sense that their decisions take a stand on the *meaning* of political values. Public conceptions of safety, stability, and fairness are shaped by risk assessments and cost–benefit analyses conducted by agencies. Such analyses are not governed by mechanical procedures; they involve interpretive decisions on what should matter to the public (Beck 2007, ch. 2; Pildes & Sunstein 1995, pp. 51–52).

While the empirical literature is ripe with examples of how agencies perform political tasks masked as technical operation, normative theorists have paid too little attention to how these influential public bodies should engage with value questions. There are some exceptions, however, and the paper begins by assessing two existing models: “the avoidance model” and “the specification model.” Both of these models are intuitively attractive in

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the sense that they highlight modes of reasoning that resonate with basic conceptions of separation of powers and democratic autonomy. Nevertheless, it is argued that this resonance is superficial. As will be explained in the next section, an adequate model must both possess justificatory force and fit the existing institutional framework. Ultimately, both models fail in these regards. But extended discussion of them is necessary in order to better understand what we need in an adequate model.

In response, a third model is articulated and defended: “the public reason model.” This model builds loosely on John Rawls’s (2005) theory of legitimate authority as grounded in a publicly available and reasonably acceptable framework reasoning. Unlike the other models, the public reason model recognizes political agency reasoning as a distinct normative domain or space of reasons. Although this domain interacts dynamically with other domains – especially law, democratic politics, and science – it is distinct in its commitment to carry out political objectives in accordance with professional standards. In order to clarify what it means for an agency to orient itself in this domain, the paper articulates three virtues of public reason (integrity, independence, and inclusiveness). What makes each of these institutional traits virtues is that they enable agencies to make value judgments in ways that respect reasonable disagreement about political values.

## 2. What do we want in a model?

Before discussing the specific models, it is worth briefly considering the general desiderata of a normative model of political agency reasoning. We cannot compare models unless we know what they are supposed to achieve. This section presents three criteria against which we can make assessments: particularity, justificatory force, and institutional fit.

First, the model should capture how political reasoning in independent agencies is bound by a set of standards that differentiates it from other types of public institutions. That is, the model should clarify both how the reasoning is subject to constraints beyond generic public requirements (e.g. nondiscrimination and rule of law) and also how these constraints are informed by the specific problem of values in expertise-based agencies.

Second, the model should have justificatory force in the sense that it highlights how the distinct mode of value engagement is desirable from the public’s point of view. That is, it should explain how the distinct engagement serves the common good in a responsible way. There are many empirical theories of the motivating reasons of agencies (e.g. strategic pursuit reputation or a more tacit logic of appropriateness), but the model we seek deals with normative reasons.

But these normative reasons should be accessible from within actual institutional settings. That is why we need the third condition; the model should address agencies in the context of their typical missions and not according to some hypothetical practice of delegation.<sup>2</sup> Revisionary models of legitimacy that presuppose a wholly different set of institutions or highly idealized conditions are not engaged in the same theoretical enterprise.

## 3. The avoidance model

The first candidate model treats value political judgment as an inevitable evil. The avoidance model recognizes that agencies cannot refrain from making political judgments, but they should be constrained as much as possible. This model is systematically applied in Frank Vibert’s *The Rise of the Unelected* (2007), where it is cautioned that the more agencies “move into the territory of interpreting the substantive values of society, the more they are likely to encroach on the territory of the legislature and the political process” (Vibert 2007, p. 119). On this account, the legitimacy of the unelected experts rests on a rigorous approach to empirical knowledge, dissemination of information, and acknowledgment of uncertainty (Vibert 2007, p. 168). The account highlights the value of agencies being “constrained by facts’ and attempting to be transparent about value judgments” (Vibert 2007, p. 122).

On the face of it, this model presents an attractive way to place expert agencies within a system of separated powers. However, this section will explain why the avoidance model faces two serious problems. The first is that avoidance does not secure neutrality. The second is that the model gives agencies an incentive to disguise their actual political judgments.

### 3.1. Agencies deal with essentially contested concepts

While transparency about value judgments is clearly desirable, it is unlikely that this transparency will reveal judgments of sufficient quality if they are to refrain from “interpreting the substantive values of society” (Vibert 2007, p. 119). Although terms like social impact and proportionality are typically used in policy papers as if they are self-evident, they cannot translate into practice without application that draws on controversial evaluative standards.

Let us consider a concrete case here. Vibert claims that an economic regulator trying to quantify the costs of proposed legislation will be guided by the “normative assumption” of the social value of competitive markets (Vibert 2007, p. 122). Building on that, let us suppose the European Securities and Markets Authority (ESMA) is tasked with preparing advice to the European Commission on how to realize the end of promoting “social business.” This end concerns the promotion of enterprise that has the common good and social justice as primary mission.<sup>3</sup>

It will be impossible for ESMA to identify relevant businesses, policy options, and criteria for cost-benefit analysis without taking a stand on what social justice means. Although this calls for responsible political reasoning, agencies may be predisposed to unreflectively apply the political value according to a partisan or sectarian logic. As Julia Black notes, financial regulators are often criticized for being dominated by liberal economic ideology (Black 2008, p. 142). How could ESMA execute its task in a way that avoids this charge? The first step would be to acknowledge that social justice does not have a fixed and readily applicable meaning. A non-interpretive approach to the issue of social justice would involve a category mistake on the part of the agency, because it is a clear example of what W. B. Gallie famously called “essentially contested concepts” (1956). That is, social justice is an evaluative concept of which there are many competing conceptions that agree only on paradigm cases.

The task for a normative model of political reasoning is to explain how agencies can arrive at a specific evaluative stand in a responsible way. The avoidance model sounds a warning against expert agencies taking a politically activist or partisan stance, but provides no positive instructions. The model suggests that agencies should execute essentially political tasks without engaging in value interpretation, but that will not make decisions more neutral nor will it make it easier for agencies to be transparent about their evaluative stand. To the contrary, it will produce decisions that are political yet not acknowledged as such.

### 3.2. Avoiding or disguising?

The solution cannot be that agencies should refrain from making value judgments and simply be transparent about the ineradicable remainders. Transparency about value judgments is of little worth if we do not know what a responsible value judgment looks like in the agency context. This points to an inherent tension in the avoidance model. On the one hand, it holds that agencies should stick to the technical facts and avoid value judgments. This is motivated by a view of value judgments as mere “normative assumptions” (or worse). On the other hand, it urges experts to be transparent about the value judgments they actually make. But if value judgments inevitably have this taint of illegitimacy, why would experts *want* to reveal them? A more promising approach would surely be to ensure that value judgments are more than assumptions, interests, and ideologies. Insofar as value judgments are made in a responsible way, experts would be more likely to be transparent about them.

Furthermore, it is unlikely that experts *can* be transparent about value judgments insofar as they are treated as mere normative assumptions rather than a field of disciplined reasoning. Profession-specific value biases are prone to make contested evaluative concepts appear like self-evident facts. That is, when uncertainties and value judgments are draped in an “objectifying cloak” of standardized analysis (Sinclair 2005, p. 34), this may not be an intentional act of deceiving stakeholders but rather due to lack of self-reflectiveness on the part of the practitioners themselves. Consider this claim from an academic economist who served on the staff of the U.S. Department of Interior: “Economists tend to view their professional role in the governing process as that of experts separate from politics, value judgments, and other subjective and normative factors” (Nelson 1987, p. 55).<sup>4</sup> Often, value judgments do not become salient unless there are procedures designed to confront agencies with competing conceptions and calls for justification (e.g. notice-and-comment rulemaking).

Moreover, the general problem of *déformation professionnelle* may be especially acute in agencies whose work is framed exclusively in technical terms and narrow policy objectives. A dangerous myopia with regards to

broader evaluative considerations may develop unless the political role is recognized as such. For example, the European Food and Safety Authority, with its focus on accuracy in food labeling, has been said to run “the danger of operating in a vacuum – neglecting potentially redistributive effects of its decisions on entire businesses” (Ossege 2015, p. 108). The avoidance model cannot even diagnose this as a problem, because sticking rigorously to formal rules and steering clear of more complex evaluative judgments is precisely what it recommends. Hence, it fails to respond to the criticism of those who see current expert regimes as fostering closure to the broader political space and imperviousness to the contestedness of political values (Quack 2016, p. 380).

This is a kind of criticism that points to the need for a new model; it carries implicit standards for a more democratically responsive model agency reasoning. The next section considers a model that recognizes the need for an active form of political agency reasoning.

#### 4. The specification model

Henry Richardson’s *Democratic Autonomy* (2002) seeks to deliver a model of political agency reasoning that explains how political decisions made by unelected experts can be responsive to basic democratic principles. The book mounts an attack on the idea that agency reasoning can be limited to the technical selection of means to the ends set by elected legislatures. Unavoidably, democratically specified ends will involve a significant degree of vagueness, which means that important evaluative decisions will have to be made by agencies charged with executing policy. The basic idea of the specification model is that the legislature does not have to set all the ends, as long as the reasoning about ends done by agencies is limited to specifying the statutory directives:

This, then, is what we must require or expect of administrative rulemaking: that it limit itself to specifying legislation; and this is the ideal of rationality that we must hold agencies up to: that they find defensible and appropriate ways of specifying the directives embodied in the legislation they are charged with implementing. (Richardson 2002, p. 218; see also Richardson 1999, pp. 328–329).

The specification constraint on political agency reasoning is supposed to preclude illegitimate political domination by the unelected. Richardson provides the example of the Department of Transportation having to interpret the broad idea of making transportation systems available to the disabled. Implementing this democratically established intention requires reasoning about how to understand the end itself, not merely determining the means. For example, availability could be interpreted as requiring reform of the mainstream system, but one could also create a separate system for the disabled. This forces the agency to weigh considerations of cost-effectiveness against considerations of nondiscrimination. Richardson argues that the role of expert agencies in such cases is to refine the broad mission into some more concrete and tractable idea while being “appropriately constrained and guided by the statutes passed by democratically elected legislatures” (2002, p. 217). In a later defense of the model, Richardson compares agencies to taxi drivers and legislators to passengers (Richardson 2005, p. 227). The passenger may decide upon some vaguely specified destination (“somewhere nice for a picnic”) and the driver must give this some more determinate content.

The virtue of the specification model is that it highlights the possibility of combining democratic determination of ends with political reasoning in agencies. However, this section will discuss two problems this model faces as a general theory of agency reasoning. First, the model ignores how agencies may play a legitimate role in the legislative process (as opposed to mere interpreters of finished legislation). Second, the model fails to cover the political reasoning that takes place at a level above statutes.

##### 4.1. Agencies as part of the legislative process

The first objection highlights how the specification model relies on remnants of the “transmission belt” view, where legislators set the ends and only afterward give agencies the task of implementation. That is, the specification model is misleadingly linear in the way construes the agency mandate as being exclusively geared to the realization of finished pieces of legislation. This reduces normative agency reasoning to statutory interpretation and application and thereby misses much of the action.

Agencies are typically closely involved in the initial framing of legislation as well as its execution. Consider ESMA as case again. Its founding regulation states that it should “serve as an independent advisory body to the

European Parliament, the Council and the Commission in the area of its competence.”<sup>5</sup> Sticking to statutory specification will not be a useful constraint in this advisory role; the task is to deliberate on what the future statute should be. Moreover, the founding regulation also states that a “Board of Supervisors composed of the heads of the relevant competent authorities in each Member State, and chaired by the Chairperson of the Authority, should be the principal decisionmaking organ of the Authority.” What this means is that national financial regulators are implementing standards that they have participated in legislating at the supranational level.<sup>6</sup> The national legislative powers enabled by the networked supranational agencies are completely obscured by the specification model.

Naturally, some current practices of agencies informing primary legislation may be dubious in democratic terms. Agencies may respond to information requests in the legislative process in ways that may give them undue amount of what Daniel Carpenter calls “conceptual power” (2010, p. 33). For example, responses to consultation documents provide an opportunity to frame the values at stake in biased ways. Agencies threaten to usurp the political space when they seek to reduce complex legislative questions to a single professional metric. Nevertheless, the specification model goes too far in cutting agencies off from the legislative phase.

There are two related normative considerations that count in favor of including agencies in the legislative process. First, as Phillip Pettit (2004), see also Seidenfeld 1992) has argued, agencies can be a valuable source of political judgment that is unbound by immediate electoral interests. When appropriately designed, they can provide input that is structured by public deliberation by staff and relevant stakeholders. Although we have no guarantee that agencies are genuinely oriented toward public interests, at least they have an institutional duty that imposes a liability in this regard. They are bound by their mandate to give reasons for their decisions in terms that are amenable to review and public scrutiny.

Second, as Jerry Mashaw (2005); see also Strauss 1990) has argued, agencies that are privy to both formal and informal legislative negotiations may be particularly suited to act as guardians of the legislative scheme as enacted. Their privileged access to the drafting process helps them understand legislative intent. By contrast, Richardson’s specification model requires agencies to stick exclusively to statute wording (1999, p. 329). But this robs agencies of a key weapon against those who want to bend the statute to their preferences at a later stage: “For a faithful agent to forget this content, to in some sense ignore its institutional memory, would be to divest itself of critical resources in carrying out congressional designs” (Mashaw 2005, p. 511).

To some extent, Richardson may be right to deplore appeals to “unstated, ‘underlying’ purposes” of statutes (1999, p. 329), because this may simply be a way of interjecting political preferences that lack democratic backing. Nevertheless, this constraint ignores how purposes may have been stated and consensually agreed upon outside the statute. They may have been stated in an unopposed way in the legislative process and insisting that agencies stick strictly to the wording of the statute and ignore the facts of legislative history beyond the enacted language may not serve the project of realizing democratic intentions. By construing political agency reasoning as a matter of refining predecided ends, the specification model excludes the normative potential of the ongoing relationship between legislators and agencies. We need a model that does not foreclose the possibility that agencies play a legitimate part in shaping political ends and that this has consequences for the standards of statutory interpretation.

#### 4.2. Agencies as required to reason beyond statutes

The second problem with the specification model is that it ignores the extent to which political agency reasoning situated at an *interpretive level above statute specification*. Even if we disregard the co-legislative role of agencies, many political considerations are external to statutes. One such consideration concerns *which* statute to enact. This is what Alex Acs calls “inter-statutory discretion”: “even if Congress can constrain regulation to a narrow set of options *within* a given statute, regulators still have the discretion to choose from policies *across* statutes” (Acs 2016, p. 494, italics original). The democratic ideals that Richardson seeks to safeguard with an *intra-statutory* model are threatened when there are decades between statute enactment and relevant implementation. Acs finds that the 12 of the most prolific U.S. social regulatory agencies implement *past* laws in a way that is systematically responsive to *contemporary* partisan power and that statutory deadlines do little to ensure that statutes generate a burst of regulatory activity shortly upon enactment and then fade away.

In effect, this inter-statutory aspect of discretion also involves taking a stand on the meaning of political values. Politics is said to be the determination of “who gets what, when, how” (Lasswell 1936), but “when” people get something partly defines the “what” they get. That is, inter-statutory discretion is not simply political in its distributive effects but also in terms of shaping the meaning of what is pursued. The meaning of food safety or pollution changes rapidly with technology. The U.S. Environmental Protection Agency is a prominent example with its controversial efforts to use the several decades old Clean Air Act to regulate climate threats that were not on the original legislative agenda (Acs 2016, p. 493).

This feature of agency discretion will perhaps be shrugged off by proponents of the specification model as a matter of flawed delegation. However, it is not so clear that it simply boils down to that. Although *expansive* inter-statutory discretion may be an aberration, some discretion in this regard could be necessary in many cases. Legislators may see a need for flexible adaptation to new circumstances and a need for professional judgment to unite the concern of one statute with the concerns of other statutes. Furthermore, legislators may have failed to respond explicitly to urgent regulatory issues, making it legitimate to “teach an old law new tricks” (Wallach 2013).

However, the only way to responsibly repurpose an old statute to address new issues is by explaining how the new purpose flows from the broader mandate of the agency. That is, if it aspires to be more than partisan activism, it must be somehow part of the responsibility entrusted to the agency. This horizontal dimension of agency reasoning (shaping ends by seeing statutes as part of a broader mission) gets lost in the specification model’s focus on the vertical dimension (the process of receiving isolated statutes that require refinement). What we need, then, is a model that allows the political reasoning of agencies to move up one level, from the particular statute to the broader agency mandate. The next section frames this as a matter of constraining political judgment to the domain of public reason.

## 5. The public reason model

The point of engaging extensively with two existing models has not simply been to emphasize their shortcomings. Rather, the goal has also been to extract pointers for the construction of a new model. The discussion so far has brought out the need to treat the political reasoning of agencies as more than a set of unfortunately ineliminable normative assumptions, which are somehow to be made transparent to outsiders. Moreover, an appropriate model should be open to the possibility that the evaluative engagement of agencies reaches beyond statutory interpretation and into legislative discourse and inter-statutory reasoning. This section seeks to establish a third model that builds on the preceding discussion.

### 5.1. Reasoning with a public mandate

The public reason model begins with the idea that public institutions must engage with political values in a way seeks to be justifiable to all reasonable members of the relevant community. Following the tradition of public reason today most prominently associated John Rawls, the argument here is that agencies are political in the right way when their decisions flow from a “public framework of thought” (2005, p. 110). The emphasis here is on how conceptions of political values are worked out from the public premises that constitute the institution as opposed to premises that belong to some other social sphere (e.g. partisan politics or private morality). It will be argued here that the public premises of agency reasoning should be understood in terms of their interpretive mandate. However, it is worth first considering public reason as a more general mode of reasoning with political values.

Rawls saw supreme courts as paradigm institutions of public reason because they “have no other reason and no other values than the political” (Rawls 2005, p. 235). By “political” values, Rawls meant that the values are shareable across more comprehensive or sectarian views on the true and the good. Public institutions cannot rightfully declare allegiance to values that scorn the equal standing of citizens or that can only be arrived through inaccessible guidelines of inquiry (2005, p. 224). Reasoning in the name of a public institution requires an aspiration to ground decisions on conceptions of value that respect reasonable pluralism of religious and moral views.

It may of course turn out that what was held to be part of a shared evaluative framework was in fact a sectarian view that reasonable citizens may reject. An institution may unwittingly be systematically biased toward a comprehensive doctrine (e.g. partisan ideology or unduly narrow professional metrics of evaluation). But institutions owe citizens a good faith attempt to draw on a collective framework of value interpretation. How does this translate to the agency context?

## 5.2. An institutionally sensitive approach to political values

So far, the notion of public reason has presented us with something closer to a theoretical *task* rather than a substantive model for normative agency reasoning. Rawls presented a highly abstract and formal idea that requires substantive work in application to agencies. This is not a criticism, it is rather something explicitly acknowledged in Rawls's development of public reason. He highlighted how the idea raises questions both in terms of content and scope: "the appropriate limits of public reason vary depending on historical and social conditions" (2005, p. 251). Rawls was open to the idea that public reason could apply beyond the designated domain of "constitutional essentials" and "questions of basic justice." His initial restriction was framed in terms of capturing paradigm cases and leaving it open how to proceed to less fundamental matters (2005, p. 215).

Methodologically, this is part of Rawls's "institutional" or "practice-sensitive" approach to political theory (cf. James 2005; Sangiovanni 2008). Rawls saw it as essential to consider differences in the structure and social role of institutions when specifying the appropriate principles of reasoning (Rawls 2005, p. 262). For our purposes, it is useful to expand on this approach. Take the example of social justice again. According to some, a political party has reason to refine a distinct conception of social justice that works as a signpost for the electorate and that can play an adversarial role in debate (White & Ypi 2011, p. 386; Bonotti 2017, p. 113). The reasoning of a reviewing court, by contrast, approaches the question of social justice as a matter of coherence with procedural principles of legality and basic constitutional values (Jordao & Rose-Ackerman 2014). Its role is to indicate the bounds of reasonableness, not to implement any specific conception of political values.

Agencies cannot take either of these approaches. They do not compete for votes nor do they guard the constitution. For agencies, political values are something they are entrusted with and must put into practice. Unlike political parties, agencies have no *direct* route of appeal to contested conceptualizations of political values. A political party is democratically entrusted with power because of its particular vision for the community and this act of trust warrants direct appeal to controversial (yet reasonable) conceptualizations of value. By contrast, given the technical rationale for its work, agency engagement with political values takes the *indirect* route of shaping values through procedures, professional norms, institutional commitments, and ongoing deliberative attunement with political authorities and stakeholders. This indicates how agency reasoning with political values can be distinguished from the reasoning of other public institutions. Naturally, both legislative intentions forged through partisan contestation and judicial opinions on the application of legal principles will impinge on agency reasoning.<sup>7</sup> However, they serve as normative input to be translated to a distinct domain of reasoning.

The idea of a "distinct" domain of reasoning does not refer to a space of reasons that is detached or purified of the claims of other domains. As T.M. Scanlon puts it in his theory of normativity, it is not necessary for a domain-centered view to "hold that first-order domains are entirely autonomous, and that nothing beyond the (evolving) standards of a domain can be relevant to the truth of statements within it" (Scanlon 2014, p. 21). The autonomy of domains comes in degrees. Some make highly distinct kinds of claims, such as the claims about numbers made in mathematics. By contrast, the domain of reasoning that governs independent agencies *integrates* truth conditions from several other domains. As understood in the tradition of science and technology studies, "'regulatory science' denotes an intermediary or in-between domain of scientific practice, apart from both research and policy-making, which aims to fill gaps in the knowledge base relevant to regulation, to provide knowledge syntheses, and to make predictions" (Demortain 2017, p. 146). The notion of an "intermediary domain" highlights how regulatory work is engaged with material from other domains that has to be intelligently applied to the distinct questions agencies face. In their entrusted task of advising on and realizing political ends, agencies can neither be politically adversarial nor stick to the demanding standards of accuracy that characterize science. Their distinct form of reasoning is best encapsulated in the idea of *fidelity to mandate*.

As it will be used here, fidelity to mandate goes beyond official mission statements and legal documents. While the formal legal mandates are important, they are typically born out of negotiations and compromises that fail to produce adequate action-guiding clarity (Levi-Faur 2011, p. 816). They are “multi-interpretable” (Groenleer 2014, p. 264), and it is the task of agencies to produce publicly justifiable interpretations. Hence, the broader idea of the mandate refers to the overarching normative framework within which singular statutes, institutional expectations, international standards, and other sources of agency reasons are embedded and interpreted.

In other words, this framework is not public in the sense of having been promulgated and codified into rules, but rather in the sense that it constitutes a shared space of reasons in which the merits of decisions are assessed. The broad categories of reasons in this space are efficiency, moral and democratic justifiability, due process, and expertise (cf. Carpenter 2010, pp. 45–47; Baldwin et al. 2012, pp. 26–34). Inspired by political philosophy’s talk of the “currencies of justice,” we may call this the “currency set” of political agency reasoning, seeing as these are the main categories of reasons that have currency as justificatory values of the mandate.

In brief outline, here are the conditions associated with each category: *Efficiency*: Agencies are liable to be held answerable for their ability to reach goals with reasonable use of resources and time. *Moral and democratic justifiability*: The content of agency decisions must be defensible according to basic moral principles and be in harmony with democratically settled intentions. *Due process*: Agencies must pursue aims in compliance with fair and accessible procedures. *Expertise*: Agency decisions must be informed by the pertinent expert knowledge in the field. Importantly, the mandate only issues these currencies in an institutionally constrained way. They are not valid insofar as they are used in ways that lack grounding in broadly recognized regulatory practice or could reasonably fit the relevant legislative material.

To see how agency values are structured by the mandate, consider an agency dedicated to food safety. In general, food safety is valuable in ways that depend on considerations of health, environment, animal treatment, economic feasibility, and more. The food safety agency must be attuned to this complex idea, but it must also take the further interpretive step of fitting the political value to its particular institutional setting. In this regard, a normative item like the Codex Alimentarius is not simply a collection of guidelines to promote some *independently* specified idea of food safety. Rather, it partly constitutes the meaning of this value for food safety agencies. In other words, the general value of food safety must be exchanged into to the institutionally constrained currency set of the mandate.

This does not imply that the meaning of values for agencies is detached from their meaning in the ordinary public sphere or that they are *sui generis* in any substantive sense. They are the same values, but they are dressed in “workclothes” (Postema 1997). That is, the values are entrusted to the agencies robed in a configuration of institutional standards – the overarching mandate – that constitute a public framework of reasoning.

### 5.3. A procrustean framework?

The point of the previous section was to connect the idea of public reason to the concept of the mandate as a distinct evaluative schema for agency reasoning. This section aims to further clarify the model in light of two possible objections. Both objections question whether the public reason model can preserve sufficient unity without unwarrantedly wishing away cognitive divisions of labor or differentiated modes of political discourse.

First, one could object that the idea of fidelity to mandate ignores the differentiated and compartmentalized nature of agencies. Tasks are separated both vertically and horizontally. Only the higher levels decide on the strategic priorities, while lower-level departments are specialized in terms of legal issues, risk analysis, supervision, and so on. The public reason model might give the impression that all role holders are subject to the same kinds of institutional constraints. In order to clarify what the model actually entails in this regard, it is worth distinguishing between compartmentalization and firewalling.

When an agency is compartmentalized, the different units work together in a coherent way. For example, the unit responsible for impact assessment may be sensitive to the salience of certain redistributive effects as communicated by stakeholder groups or it may take into account the legal department’s view of permissibility. It may of course also oppose the other units, but then for reasons that are grounded in the overarching mandate. Perhaps that stakeholder group overstated certain interests or the legal department is too timid. These are normative claims that can only be made by abstracting from specialized tasks and interpreting the broader mission. In other



words, although each unit has a specialized evaluative task, they proceed through mutual attunement and thereby seek joint fidelity to mandate.

Compare this with firewalling, which is a form of institutional segregation that seeks efficiency at the cost of evaluative judgment: “Firewalls [...] explicitly avoid considering the relative importance of conflicting values, recognizing that the effort to do so can be downright paralyzing” (Thacher & Rein 2004, p. 469). The public reason model does not reject the claim that attempts to produce responsible evaluative judgment *can* be paralyzing, but it resists the conclusion that this warrants an institutional design that lets agency units operate in disregard for each other’s values. Each unit acts in the name of the agency and shares the responsibility of executing the overarching mandate in a coherent and justifiable way.

A second potential objection to the public reason model is that it does not fit the differentiated nature of the justificatory relationships agencies stand in. Courts, parliaments, auditors, stakeholder organizations, and other institutions may address the same issues from radically different perspectives. In this regard, some emphasize how diverging understandings of value emerge through the specific interaction between forums. Black, for example, argues that each accountability relationship “is an interpretive and discursive schema through which the participants in the accountability relationship make sense of their own and each other’s roles” (Black 2008, p. 152).

Consider an agency that must respond to pressure from one cluster of accountability holders (e.g. political majorities and nongovernmental organizations) to pursue greater precautionary measures. It must simultaneously respond to contrary pressure from another cluster (e.g. business stakeholder groups and auditing institutions) to respect proportionality (i.e. use only the least trade restrictive measures) and base restrictions on scientifically adequate evidence. This presents the agency with contrary “cultures of rationality” (Jasanoff 2000) that lay the ground for diverging “styles of regulation” (Vogel 1986); one says that we should “err on side of caution” because there are so many uncertainties, the other logic says we cannot intervene in the market without grounding decisions in risk assessments and cost–benefit analysis. In light of this, it might appear as if the public reason model is seeking to impose uniformity in ways that are both practically impossible and normatively undesirable. There are no arguments that are acceptable to all relevant cultures of rationality.

In reality, the public reason model respects differentiated forms of discourse, while enabling us to distinguish between tactical pandering and fidelity to mandate. Naturally, it would be convenient for the agency to simply accept the claims of those deemed to be most strategically important, for example in terms of political support or market influence. But insofar as such tactical considerations constitute the grounds for decisionmaking, it might be reasonable for the losing party to object to the legitimacy of the decision.

But instead of tactical pandering, the agency could ask what its mandate really calls for. Suppose it reaches a decision by testing which option gains the most purchase in terms of the currency set of the mandate. That is, it tests for fit with the relevant standards of efficiency, moral and democratic support, due process, and expertise. This will of course be an interpretive procedure that requires controversial judgment. Nevertheless, the test might reveal to a satisfactory degree that those who call for accurate scientific backing underestimate the scope and weight of the precautionary principle in the regulatory field in question. In this case, it would be unreasonable to object to the legitimacy of the decision on the grounds that it rests on an evaluative judgment, given that this judgment flows from a reasonable interpretation of the institution’s public framework of thought.

## 6. The three virtues of agency public reason

As Rawls put it, the move from private conviction to public reason requires a good faith attempt at interpreting the political values in question in way that rational and reasonable citizens might reasonably be expected to endorse (2005, p. 236). The previous section delineated the contours of an interpretive framework for generating acceptable value judgments. But what disposes agencies to adopt appropriate intentions in this regard? That is, what capacities must agencies have in order to function as fiduciaries of the framework? This section explores this in terms of what will be called the three virtues of agency public reason: *integrity*, *independence*, and *inclusiveness*. These virtues support agencies in the task of converting general political values to the currency set of their mandate. Each of these virtues will be delineated in order to capture ways in which the public reason model applies to diverse aspects of agency reasoning.

### 6.1. Integrity

The first virtue – integrity – emphasizes the desirability of having agencies that stick to their principles. Integrity is often considered a personal virtue, but the importance seeing it as an institutional virtue is receiving increased attention (Huberts 2014, pp. 2–4). That is, although the integrity of an agency ultimately depends on the dispositions of individual role holders, there is a sense in which the standards of integrity apply directly at the institutional level. There are of course many diverging conceptions of what integrity means, but Martin Benjamin seems to capture the core meaning in his triadic formulation:

- (i) a reasonably coherent and relatively stable set of highly cherished values and principles; (ii) verbal behavior expressing these values and principles; and (iii) conduct embodying one's values and principles and consistent with what one says. (Benjamin 1990, p. 51)

Each of these points is directly relevant to the public reason model:

- i, The first element refers to the idea of unwavering commitment in the face of unwarranted political pressure. Agencies are sometimes pressured to distort scientific evidence and promulgate rules in favor of economic considerations (Virelli III 2013). This is in effect an attempt to make agencies abandon their distinct institutional approach to political values and take on the reasoning of partisan politics. Bending to this pressure means infidelity to the entrusted principles and thereby undermining the public framework of reasoning.
- ii, The second element calls for giving reasons to the public and thereby enabling transparency in agency affairs. This transparency is undermined when agency justifications deal exclusively with technical reasons and ignore political reasons regarding how the agency balances public interests (Shapiro 1997). Agencies may have strong incentives to downplay the extent of political factors in their reasoning, but the public acceptability of their decisions remains concealed unless they attempt to articulate these factors.
- iii, The third element is about aligning agency behavior with the reasons offered to the public. Agencies sometimes fail to act in congruence with the rules they have promulgated. This is considered a breach of their “inner morality” (Sunstein & Vemuele 2018, pp. 1956–1960), but we should also recognize it as a breach of broader principles of legitimacy. The failure of congruence between public announcements and actual conduct fails to respect those affected as entitled to justifications that flow from a public and principled framework. Hence, agency integrity is not simply about being consistent and predictable, it includes morally substantive considerations of respect and sincerity.

### 6.2. Independence

The second virtue of agency public reason – independence – highlights how agencies should engage with political values in a way that is not bound by the same logic as other institutions. In terms of institutional design, the formal and organizational independence of agencies is widely seen as a central principle of good governance (Geradin 2005, p. 230). However, the model of public reason highlights how organizational independence must be complemented by independence in normative reasoning. Similarly to the way legal reasoning is independent in the sense that it deals with different premises and constraints than the other branches of government (Powell 2004, p. 611), agency reasoning orients itself in a distinct domain of considerations. The notion of independence highlights that agencies fail to reason publicly when they rely on partisan or private premises concerning the interpretation of political values. How can this be achieved without falling back on the avoidance model?

Consider the case of ESMA being asked to help make market practices promote sustainable or “green” growth.<sup>8</sup> Seeing as there are many competing conceptions of how this should be done, ESMA may appear bound to reach a controversial conclusion. For example, there may be a choice between advocating rigid codification of investor duties and settling for broad guidance principles on best practice. Some see rigid codification as overly intrusive in the market, others see guidance principles as too lenient (Baldwin et al. 2012, p. 302). Nevertheless, the agency can exhibit independence from partisan or ideological premises by structuring its reasoning according to its overall institutional mandate.

The question of whether to impose rigidly codified rules or guidance principles is not a matter of simply combining a preexisting political goal (“green and sustainable finance”) with a technical solution plus some arbitrary value assumptions to fill in the gaps. Instead, it is a matter of transposing the value of sustainable finance to a

domain governed by the interlocking constraints of performance, moral justifiability, technical accuracy, and legal-procedural compliance. For example, the political authorities may have indicated a high level of urgency and moral concern, which can legitimately influence the agency's assessment of whether it should err on the side of strictness (i.e. rules that intervene and may have unintended consequences) or leniency (i.e. principles where market actors devise their own systems in nondisruptive ways). While a sense of moral urgency may count in favor of intrusive precautionary measures, the agency is still bound by requirements of providing technical rationales appropriately shaped by the overarching agency goal of market integrity and respecting the pertinent procedural constraints on the formulation of legislative proposals.

As this indicates, the independence of political agency reasoning involves a commitment to demonstrating that the complete currency set of the mandate has been taken into due consideration. Even though the conclusions of such reasoning may align with the conclusions of partisan or private reasoning, it is hostage to forms of criticism that are distinctly grounded in the mandate.

### 6.3. Inclusiveness

The final virtue to support execution of the public reason model – inclusiveness – emphasizes the need to avoid unwarranted elimination of political concerns. In this regard, it is useful to draw on John Dryzek's critique of "administrative rationalism" (2013, ch. 4). This is an ideal-type of version of a discourse that focuses on expert-led problem solving and institutionalizing epistemic hierarchies (Dryzek 2013, p. 75). Administrative rationalism reflects ways in which agency reasoning can become unacceptably insensitive to the pluralistic and multi-factorial nature of political concerns. Dryzek applies this ideal-type mainly to the environmental policy area, but his model is useful for the broader application of the standards of public reason. That is because his critique of administrative rationalism articulates three pitfalls of agency reasoning and each of these pitfalls help explain what the public reason model requires.

The first pitfall is exclusion of nonquantitative modes of valuing. This manifests itself in an over-readiness to translate political values into cash equivalents. As Dryzek asks: "How does one value in monetary terms the loss of a free-flowing river?" (2013, p. 84). Agencies may be required to conduct cost-benefit analysis with respect to many kinds of values, including human lives. This may be done by tracking people's willingness to pay and testing what kind of policy this would cover. The public reason model is especially suited to illuminate the dangers here. It highlights that decisions should be governed by a public framework of reasoning. In this regard, "willingness to pay" will often be an inappropriate operationalization of the framework. The moral or democratic support for an option will sometimes only be misleadingly reflected in people's economic priorities. Crude cost-benefit analysis threatens to replace democratic input of value interpretation with context-insensitive preference aggregation (Anderson 1995, ch. 9). Public reason requires that agencies include modes of valuing beyond market rationality.

The second pitfall is undue exclusion of multi-factor problems. As Dryzek notes, "risk assessment is not very good at dealing with the interaction effects of multiple environmental hazards" (2013, p. 87). As a consequence, some agencies prefer to narrow their scope of concern in order to be able to claim certainty for their assessment. Even when their mandate is broad enough to cover complex interaction effects, they use their conceptual power to define multi-factor issues as political and thereby beyond their remit (Paskalev 2017, p. 210). A reluctance to move beyond standardized tests and models has been interpreted as driven by practitioner concerns for professional jurisdiction (Demortain 2013). In terms of public reason, the danger here is that agencies come to represent an undue segregation of problems (i.e. the large scale version of firewalling) and thereby uncoupled from any coherent justificatory response to issues of public concern. Agencies betray their mandate when they reduce the entrusted goals (e.g. market integrity or food safety) to whatever fits traditional methods. Avoiding multi-factor problems in order to preserve professional jurisdiction creates a mismatch between the political values at stake and the regulatory modes of addressing the problems. Agency reasoning can counter this by utilizing the scope of their mandate and seeking to make methods fit problems.

The third pitfall is exclusion of drastic alternatives in setting out alternatives for political decision-makers. As Dryzek describes administrative rationalism, its stance is that "[e]nvironmental problems are serious enough to warrant attention, but not serious enough to demand fundamental change in the way society is organized" (2013, p. 89). This attitude expresses a status quo preference in the guise of neutrality. The governing political preferences become taken

for granted in considerations of risks and options. This attitude is sometimes compounded by constraining the perceived feasibility and range of policy options by reliance on traditional procedures and a desire for ease of implementation (Peters 1989, pp. 186–187). In terms of public reason, this is problematic because it may distort the distinction between technical and political feasibility. That is, the justificatory burden of policy-makers who do not want serious reform is alleviated by a deceptive collapse of political and technical reasons. This threatens to rob the public of the chance to consider whether the political reasons for an option are acceptable.

Naturally, avoidance of a status quo preference does not require that agencies *advocate* drastic change in political ends. Rather, it means that their policy recommendations do not prejudge the matter by foreclosing alternatives through anticipation of political receptiveness or allegiance to partisan framings of the problem. Roger S. Pielke, Jr., has described this ideal as “the honest broker of policy alternatives,” defined by “an effort to expand (or at least clarify) the scope of choice for decisionmaking in a way that allows for the decision maker to reduce choice based on his or her own preferences and values” (Pielke Jr. 2007, pp. 2–3). Agencies can only serve this function if they abstain from marginalizing options and values outside the political mainstream (cf. Seidenfeld 1992, p. 1558). This kind of open-mindedness may be served by interdisciplinarity and broad stakeholder involvement.

## 7. Holding agencies accountable to their public reason

The previous section set out three virtues that serve the public reason of independent agencies. The main emphasis was on their justificatory force, as it was clarified how these institutional traits enhance the legitimacy of political agency reasoning. But something more should be said about their fit with institutional reality. In particular, under what conditions can we expect these virtues to govern agencies as opposed to figuring as mere hortatory ideals? The extent to which agencies are institutionally obligated to pursue the virtues will depend on whether they are answerable for them. That is, there needs to be an appropriate accountability regime in place (Holst & Molander 2017). This section briefly outlines three key features of an accountability regime that promotes the virtues of public reason.

The first feature is *sensitivity to the interpretive mandate*. Given that the public reason of agencies is structured by the mandate, it is crucial that accountability forums make an adequate effort at interpreting any given issue in light of its place within the normative framework agencies are entrusted to uphold. In their demands for justification, a focus on particular rules or procedures must be in the service of establishing whether the agency has shown adequate fidelity to the broader mission. Lack of interpretive sensibility, either in the guise of legalistic formalism or one-sided fixation, makes oversight mechanisms into pathways away from public reason. Naturally, different accountability forums have distinct areas of focus, but just as the internal structure of agencies should be compartmentalized rather than firewalled, the different forums cannot ignore the broader context. In the case of European accountability forums, studies indicate room for improvement in this regard. For example, the political oversight by the European Parliament has been criticized for being “patchy” and out of tune with “broad picture,” and the budgetary process has been criticized for focusing exclusively on regularity and procedures while being disconnected from performance aspects (Busuioac 2013, pp., 133, 188). Similarly, the European Court of Justice has been accused of failing to see the interconnections between technical and moral-political considerations, preferring to focus on matters of technical accuracy and ignoring considerations of public interest (Mendes 2016, and compare her contrary assessment of the European Ombudsman).

A related feature is appropriate *deference*, which points to the need to have accountability forums that allow agencies the space to foster integrity, independence, and inclusiveness. Deference does not mean blind trust; it is rather about avoiding that distrust becomes a self-fulfilling prophecy. It is well known that overloads of control mechanisms can push agencies toward undesirable strategies such as gaming (Pollitt 2003) and blame shifting (Hood & Rothstein 2001). In response, some argue that “an evolving political culture, administrative ethos, and professionalism may replace the need for periodic reporting, auditing, and other modes of oversight” (Halachmi 2014, p. 570). That may be an overstatement, but it does capture something that resonates with the needs of the public reason model. Given that fidelity to complex agency mandates requires evaluative and professional judgment, we need accountability mechanisms that support a space for responsible reasoning rather than strategic maneuvering to manage mission-insensitive control mechanisms. In this regard, it is significant that agencies are subject to a reason-giving requirement, which emphasizes the public acceptability of the *grounds* for decisionmaking as opposed to mere outward conformity with blunt auditing mechanism (Shapiro 2010, p. 300).

The third feature is the ability to *translate* regulatory discourse into publicly accessible considerations. The difficult technical concepts of regulation in general are typically intertwined with obscure area-specific terms and methodologies. There is no way to ensure that agencies are exhibiting the virtues of public reason unless other public institutions can grasp the basic logic of regulatory decisions. In the guise of its technical language, regulatory practice may disguise uncertainties and value judgments. Hence, through dialogue with agencies, accountability forums should try to unpack the regulatory concepts and thereby bring out their evaluative implications. To some extent, the notion of translation can be taken literally in this regard. David Demortain's account of his initial despair in interviewing and observing practitioners illustrates the point: "All used a highly coded language in the most natural way to describe the regulatory activities in the area. They had a language of their own" (Demortain 2011, p. ix). The paradigm institution of translation to the public and nonspecialized institutions could be the media, but its actual ability to enhance public understanding of the politics of risk regulation and the science involved is weak (Lunt & Livingstone 2008 pp. 4–5; Miller 2004, p. 278). However, some parliamentary committees are serious about understanding the technical language of agencies (e.g. the European Parliament's Committee on Environment, Public Health and Food Safety; see Scholten 2014, pp. 144–145).

As this brief outline indicates, we cannot take for granted that the three features of an appropriate accountability regime are in place. But neither should we see any fundamental mismatch with institutional reality. The criticisms mentioned – patchy oversight, overloads of control mechanisms, and lack of public understanding – concern aspects of accountability that are insufficiently developed and attuned to regulatory practice. Nevertheless, the rudiments of an accountability regime that matches the logic of the public reason model are arguably in place in some contexts.

## 8. Conclusion

On the face of it, the idea of agencies engaging with political values has the smack of illegitimacy. It seems to violate the necessary division of labor between politics and expertise. To some extent, this motivates and explains the appeal of both the avoidance model and the specification model. They share the attitude of *tolerating* political reasoning within strictly confined limits. But avoidance does not secure neutrality and mere specification does not suffice for agencies to execute their entrusted mandates.

By contrast, the public reason model demands interpretive engagement that is more expansive yet nevertheless proceeds within a distinct public framework of thought. Some will perhaps remain unconvinced that the regulatory space is sufficiently coherent and stable to warrant talk of a distinct domain of reasoning. Insofar as the regulatory space is permeable and fluid in its interaction with law, politics, and science, this does add interpretive challenges to the task of identifying distinct boundaries. However, while any specific interpretive claim about the domain may be controversial, we need the public reason model in order to distinguish between strategic pandering and fidelity to mandate. The demands and inputs from various other domains have to be fitted to a principled framework of thought, the unity of which works as a regulative idea for interpretation.

This is not a plea to give unelected professionals more authority to decide on political ends. Rather, the model aims to capture what it means to reason about ends in a way that is appropriately sensitive to agency mandates and that enables a public account of how political considerations have been dealt with. Moreover, the model explains how the virtues of agency public reason – integrity, independence, and inclusiveness – are not just a batch of independent sensitivities. They are governed in unity by the idea of making decisions flow from a publicly entrusted framework of reasoning. When structured in this way, political agency reasoning is not simply to be endured from a democratic standpoint; it is to be fostered and prized.

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## Endnotes

- 1 Analysts frequently say things like: “expert opinions are not purely technical, scientific assessments, but often in fact involve decisions about the acceptability of risk, which are inherently political decisions” (Busuioc 2013, p. 256); “while on paper risk assessment and risk management may be clearly separated, in practice there is often no sharp distinction between science and politics in food regulation” (Groenleer 2014, p. 283); “one should strongly doubt whether distinguishing between ‘technical discretion’ and ‘discretion proper’ is empirically possible and normatively desirable” (Mendes 2016, p. 425).
- 2 Clearly, the merits and constitutionality of delegation of political authority to agencies is contested in both the EU and the US (see for example Tucker 2018, pp. 17–18; Majone & Everson 2001; Posner & Vermeule 2002). Nevertheless, the question of principles of *delegation* should be held distinct from the question of standards of political agency *reasoning*.
- 3 See the consultation paper “ESMA’s Technical Advice to the European Commission on the implementing measures of the Regulations on European Social Entrepreneurship Funds and European Venture Capital Funds.”  
<https://www.esma.europa.eu/sites/default/files/library/2015/11/2014-1182.pdf>
- 4 According to George DeMartino, who has been writing about ethical awareness in the economics profession, this view was also shared by leading academic economists throughout the twentieth century (2011, pp. 94–95).
- 5 Article 45 in Regulation (EU) 1095/2010.
- 6 Thanks to an anonymous reviewer for highlighting this issue. The quote from the founding regulation is from Article 52 in Regulation (EU) 1095/2010.
- 7 For example, as an anonymous reviewer noted, law may affect what kinds of evaluative considerations are relevant through its determination of concepts like “standing” for evidentiary purposes. In the U.S., the widening of the concept leads to a broader range of potential stakeholders and thereby potentially broader set of considerations to address.
- 8 See the European Commission’s “Action Plan: Financing Sustainable Growth” (2018).

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