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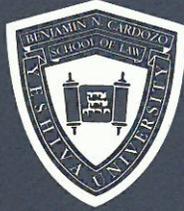
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CARDOZO LAW REVIEW



Constituencies and Contemporaneousness in Reason-Giving:
Thoughts and Direction After *T-Mobile*

Donald J. Kochan

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CONSTITUENCIES AND CONTEMPORANEOUSNESS IN REASON-GIVING: THOUGHTS AND DIRECTION AFTER *T-MOBILE*

Donald J. Kochan[†]

This Article presents a framework for reason-giving requirements in administrative law that includes a demand on agencies that reasons be produced contemporaneously with an agency's decisions where multiple constituencies (including regulated entities), not just the courts (and judicial review), are served and respected as consumers of the reasons. The Article postulates that the January 2015 U.S. Supreme Court decision in T-Mobile South, LLC v. City of Roswell may prove to be groundbreaking and stir this framework to the forefront of administrative law decision-making. There are some fundamental, yet very understated, lessons in the T-Mobile opinion that prompt further attention and the fuller justification that this Article's analysis provides.

The predominate focus in reason-giving by courts and scholars has been on when the agency must generate or develop reasons, not necessarily on when they must share them with the public. And courts and scholars have focused significantly on how reasons facilitate judicial review, but not necessarily so much on who else can demand the contemporaneous production of reasons associated with an agency's decision. This Article's framework seeks to broaden the focus. It calls for rules that mandate contemporaneous generation and contemporaneous revelation of reasons for immediate review by all interested constituencies at the time of decision.

The two primary conditions on reason-giving recognized in T-Mobile should receive broad implementation across the field of administrative law. Contemporaneous production of reasons with an eye toward cooperatively informing multiple constituencies who require, demand, or simply benefit from being able to access an agency's reasons works to better serve the administration of our laws and improve the quality of the rules generated.

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INTRODUCTION

Reason-giving and the demand for reasons are both ubiquitous in this world. Whenever we make a decision in life, there are bound to be a variety of people asking why we made that decision (our constituencies) and those people quite often will want to know those reasons immediately (the inevitability of the demand for contemporaneity in our production, or giving, of reasons). This Article is about those two categories of concerns: constituencies and contemporaneity in reason-giving. And, while reason-giving pervades much of our communication in life writ large, there is a particular concern for it in administrative law,¹ and that will be the focus here. If one were to ask why this Article is being written and why now, the answers are also relatively evident: The Article is being written because the two aforementioned concerns play a key role in the functioning of administrative law, yet have not been a focused target in the literature on reason-giving. It is being written now because the January 2015 U.S. Supreme Court decision (together with the divergent Justices' opinions) in *T-Mobile South, LLC v. City of Roswell* (*T-Mobile*)² provides a rich

¹ Robin J. Effron, *Reason Giving and Rule Making in Procedural Law*, 65 ALA. L. REV. 683, 712 (2014) ("The project of administrative law is instructive because 'explicit reason-giving [is] a major part of the industry of the administrative state' . . ."); Margaret B. Kwoka, *Deference, Chenery, and FOIA*, 73 MD. L. REV. 1060, 1092 (2014) (explaining the uniqueness of administrative law as being the only field of governmental activity where courts require reasons to uphold action, calling it "administrative exceptionalism").

² 135 S. Ct. 808 (2015).

backdrop against which these two parts of the reason-giving enterprise were tested and can be further analyzed.

Reason-giving requirements circulate through much of administrative law.³ Although the literature on reason-giving is certainly extensive,⁴ the full understanding is not yet complete.⁵ *T-Mobile* is a case about reason-giving requirements, but the most interesting features in the case are the disagreements between the Justices on the issues of constituency and timing for giving reasons.⁶ And what prompts particular attention in this Article is the incomplete dialogue on those issues contained in the majority and dissenting opinions.⁷ These opinions lack sufficient depth to appreciate these core concerns of constituencies for, and contemporaneousness of, reason-giving.

In previous work, I have explained that “[t]he judicial standard in administrative law requires that the reasons and rationale for an agency decision be stated by the *right entity*—the agency itself and not the court. The reasons can be found in the *right place*—the record for review

³ See, e.g., Jodi L. Short, *The Political Turn in American Administrative Law: Power, Rationality, and Reasons*, 61 DUKE L.J. 1811, 1813 (2012) (describing reason-giving as “central to U.S. administrative law and practice”); Kevin M. Stack, *The Constitutional Foundations of Chenery*, 116 YALE L.J. 952, 957 (2007).

⁴ See, e.g., David Dyzenhaus & Michael Taggart, *Reasoned Decisions and Legal Theory*, in COMMON LAW THEORY 134, 138–40 (Douglas E. Edlin ed., 2007); Harold J. Krent, *Ancillary Issues Concerning Agency Explanations*, in A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES 197 (John F. Duffy & Michael Herz eds., 2005); MARTIN SHAPIRO & ALEC STONE SWEET, ON LAW, POLITICS AND JUDICIALIZATION (2002); MARTIN SHAPIRO, WHO GUARDS THE GUARDIANS?: JUDICIAL CONTROL OF ADMINISTRATION (1988); Effron, *supra* note 1; Henry J. Friendly, *Chenery Revisited: Reflections on Reversal and Remand of Administrative Orders*, 1969 DUKE L.J. 199, 206–22 (1969); Kwoka, *supra* note 1; Gary Lawson, *Outcome, Procedure and Process: Agency Duties of Explanation for Legal Conclusions*, 48 RUTGERS L. REV. 313, 315, 332 (1996); Jerry L. Mashaw, Essay, *Reasoned Administration: The European Union, the United States, and the Project of Democratic Governance*, 76 GEO. WASH. L. REV. 99 (2007) [hereinafter Mashaw, *Reasoned Administration*]; Jerry L. Mashaw, Lecture, *Small Things Like Reasons Are Put in a Jar: Reason and Legitimacy in the Administrative State*, 70 FORDHAM L. REV. 17 (2001) [hereinafter Mashaw, *Small Things*]; Martin Shapiro, *Administrative Discretion: The Next Stage*, 92 YALE L.J. 1487 (1983) [hereinafter Shapiro, *Administrative Discretion*]; Sidney A. Shapiro & Richard E. Levy, *Heightened Scrutiny of the Fourth Branch: Separation of Powers and the Requirement of Adequate Reasons for Agency Decisions*, 1987 DUKE L.J. 387 (1987); Martin Shapiro, *The Giving Reasons Requirement*, 1992 U. CHI. LEGAL F. 179, 193 (1992) [hereinafter Shapiro, *The Giving*]; Short, *supra* note 3; Stack, *supra* note 3; Matthew C. Stephenson, *A Costly Signaling Theory of “Hard Look” Judicial Review*, 58 ADMIN. L. REV. 753, 755–67 (2006).

⁵ Mashaw, *Reasoned Administration*, *supra* note 4 at 101 (“[T]he right to reasons and the practice of administrative reason giving . . . is a common and important feature of both E.U. and U.S. administrative law and [arguably] a somewhat under-theorized one.”).

⁶ See generally *T-Mobile*, 135 S. Ct. 808.

⁷ The majority in *T-Mobile* fails to adequately explain where it grounds a contemporaneousness condition on reason-giving requirements, and the dissent fails to appreciate the existence of broad constituencies that believe that reasons are meant to aid and reason-giving requirements are meant to protect. This incomplete analysis hides the greater importance of the decision. See discussion *infra* Part I.

created with the agency decision.”⁸ I then continued the triumvirate by explaining that those “reasons [also] must be generated at the *right time*—prior to or contemporaneous with the agency decision not at some later date by agency personnel or counsel or anyone else.”⁹ It is this timing element on which this Article will elaborate in light of the developments on that element in *T-Mobile*. This Article will also extend previous work by focusing not only on when the reasons must be *generated*, but also when they must be *produced* and *for whom* we develop these timed demands for production—the interested and affected constituencies (which we could coterminously refer to as stakeholders in the reasons, clients for the reasons, consumers of the reasons, or audience, receptors, or receivers expecting the reasons to be offered). Stated differently, in addition to the three main categories previously discussed in earlier works, this Article adds a fourth matter for discussion regarding *producing reasons at the right point in time* and a fifth concern that the *right people* have access to the reasons at the right time.

Part I outlines the divergent opinions rendered in *T-Mobile*. Part II examines why the reason-giving enterprise is important, including why it plays a critical role in administrative law. Part III focuses on the issue of multiple constituencies for reason-giving in administrative law. The predominant focus regarding reason-giving in most of the literature and in the language of administrative law opinions is on how reason-giving serves the function of judicial review.¹⁰ Thus, most of the time, when judges and scholars discuss reason-giving requirements, they are concentrating solely on a single constituency for the reasons: the courts.¹¹ Part III will argue that this was a myopic error made by the dissent in *T-Mobile* as well. Reason-giving serves constituencies other than the judiciary, and failure to appreciate this fact leads to weaker reason-giving requirements that fail to serve the greater purposes for which reason-giving is designed.

In no small measure, the failure to understand this fact of multiple constituencies—including the targeted regulated entity’s interest in reasons—results in a failure to appreciate the importance of the requisite timing that we should require for publicly producing reasons. Thus, Part IV focuses on the necessity of contemporaneous generation *and* contemporaneous revealing of reasons for immediate review by all

⁸ Donald J. Kochan, *The “Reason-Giving” Lawyer: An Ethical, Practical, and Pedagogical Perspective*, 26 GEO. J. LEGAL ETHICS 261, 275 (2013). It should be noted that, while there are some important discussions related to administrative law within this piece, it is much more of a broader, more generalist, analysis of reason-giving and its utility and ethical implications within the practice of law.

⁹ *Id.*

¹⁰ See discussion *infra* Part III.

¹¹ See discussion *infra* Part III.

interested constituencies of the reason-giver. The importance of these contemporaneousness concerns was lost on the *T-Mobile* dissent and inadequately explained by the majority.

In its decision, the *T-Mobile* majority seems to have articulated a general principle that reasons must be given contemporaneously with the decision on a permit application, particularly when the decision is one denying permission.¹² In a somewhat tortured way, the majority tries to claim that it is grounding its requirement in the statute.¹³ This Article's analysis concludes in Part V with a further evaluation of *T-Mobile* in light of the prior Parts, offering some options for possibly embracing—with even greater vigor—reason-giving requirements understood to include broad constituencies and contemporaneous production. This final Part will posit that the *T-Mobile* decision may signal the Court's willingness to impose a somewhat generally applicable contemporaneous reason-giving requirement on many agency actions. The source of authority for such a requirement may lie in interpretations of organic statutory directives, interpretations of the Administrative Procedure Act (APA), inherent judicial authority, judge made rules, or limitations on an agency's own behavior through its own regulations. Regardless of the source of authority, this Article concludes that we should aim to find ways to infuse greater appreciation for broad constituencies and contemporaneous production of reasons for public inspection into administrative law's reason-giving requirements.

As Kevin Stack has convincingly confirmed, “One ‘fundamental’ and ‘bedrock’ principle of administrative law is that a court may uphold an agency's action only for the reasons the agency expressly relied upon when it acted.”¹⁴ That means that an agency must know why it acted when it acted, which means there should be no reason it cannot tell us why it is acting when it acts.

I. BACKGROUND: *T-MOBILE SOUTH, LLC v. CITY OF ROSWELL*

In *T-Mobile*, the U.S. Supreme Court tackled the task of determining whether an agency was required to provide reasons for a permit denial—and if so, in what form and at what time—in association with that denial decision.¹⁵ Writing for a six-member majority of the Court, Justice Sotomayor approached the question primarily as one of statutory interpretation,¹⁶ although as the discussion that follows will

¹² See *T-Mobile S., LLC v. City of Roswell*, 135 S. Ct. 808, 814–18 (2015).

¹³ See *id.*

¹⁴ Stack, *supra* note 3, at 955.

¹⁵ See *T-Mobile*, 135 S. Ct. 808, 812–13.

¹⁶ See *id.* at 814–15.

point out, there may be some extra-statutory components and qualities of general administrative law that played a role in the opinion as well. At issue was a provision in section 332 of the Telecommunications Act of 1996 (1996 Act) that provides that “[a]ny decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities *shall be in writing* and supported by substantial evidence contained in a written record.”¹⁷

The Court articulated the primary issues quite succinctly, determining that it must decide whether localities must give their reasons for rejecting cell tower construction applications at the time of the denial.¹⁸ The Court’s holding was also rather clear and direct, explaining that it interpreted the phrase “in writing” in section 332 as a reason-giving requirement.¹⁹ It therefore held that, under the section 332 “in writing” requirement, (1) reasons must be provided for a decision and those reasons must be made publicly available, (2) reasons can be provided and made available in some writing other than the actual denial or notice letter, and (3) the reasons must be “provided or made accessible to the applicant essentially contemporaneously with the written denial letter or notice.”²⁰ It is this third point where the greatest disagreement lies between the majority and the dissenters, and it is also that point where this Article places its primary focus.

The challenge in *T-Mobile* involved a 2010 application by T-Mobile to construct a 108-foot-tall cell phone tower on nearly three acres of vacant residential land in the city of Roswell, Georgia.²¹ Roswell has aesthetic regulations designed to ensure that cell phone towers blend in, conform, and are compatible with the surroundings in which they will be placed. As such, cell towers are often disguised in what are called “alternative tower structures” in which the tower is made to resemble, for example, “an artificial tree, clock tower, steeple, [] light pole,” or similar camouflage.²² T-Mobile proposed making their cell tower look like a tree.²³

¹⁷ See *id.* at 811 (emphasis added) (quoting 47 U.S.C. § 332(c)(7)(B)(iii) (2012)).

¹⁸ *Id.* (“The question presented is whether, and in what form, localities must provide reasons when they deny telecommunication companies’ applications to construct cell phone towers.”).

¹⁹ See *id.* at 814.

²⁰ *Id.* at 811–12 (“We hold that localities must provide or make available their reasons, but that those reasons need not appear in the written denial letter or notice provided by the locality. Instead, the locality’s reasons may appear in some other written record so long as the reasons are sufficiently clear and are provided or made accessible to the applicant essentially contemporaneously with the written denial letter or notice.”); see also *id.* at 818–19.

²¹ *Id.* at 812.

²² *Id.*

²³ *Id.*

After debate and review, the City's Planning and Zoning Division recommended approval of the application with three conditions that were agreeable to T-Mobile.²⁴ Next up in the approval process, then, was a two-hour City Council public hearing on April 12, 2010 to review T-Mobile's application and the Planning and Zoning Division's recommendation. At the hearing, a number of concerns were raised—first by residents and then by councilmembers themselves—ranging from complaints about aesthetic incompatibility and excessive height to claims that T-Mobile was planning to use inferior or unnecessary technology.²⁵ A transcript was kept of the hearing so that there was a written record of these complaints (or, as the substance of the “complaints” would later be called, reasons for denial).²⁶ After several members of the City Council voiced their concerns, one councilmember moved to deny the application.²⁷ Another councilmember seconded that motion, which led to a unanimous vote in favor of the denial.²⁸ A letter followed two days later advising T-Mobile that their application was denied and that it could obtain minutes of the hearing from the city clerk, but the letter did not list any reasons for the denial.²⁹ Moreover, the City did not approve and publish the minutes until May 10—twenty-six days after the application was denied.³⁰ Importantly, the denial letter marked the beginning of a thirty-day window within which T-Mobile could appeal the denial.³¹

T-Mobile filed suit in U.S. district court on May 13, 2010—three days after it received the minutes and twenty-nine days after the initial denial—alleging that the denial of its application was not supported by substantial evidence in the record and thus violated the 1996 Act, including the writing requirement in section 332.³² The district court interpreted the writing requirement as requiring the denial letter or notice to sufficiently explain the reasons for the decision, and since the City had failed to do so, the court granted summary judgment for T-Mobile.³³ The Eleventh Circuit reversed, finding that reasons need not be provided in the same document as the denial (although recognizing a split in the circuit courts on that issue), and that it was sufficient that the City had provided T-Mobile with the reasons for denial in the City

²⁴ *Id.*

²⁵ *Id.* at 812–13.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 813.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 816.

³² *Id.* at 813.

³³ *Id.*

Council's hearing minutes.³⁴ However, as the U.S. Supreme Court pointed out, the Eleventh Circuit "did not consider *when* the City provided its written reasons to [T-Mobile]."³⁵

The first question that the Supreme Court addressed was whether the 1996 Act required the giving of reasons associated with a denial of a cell tower application, and the Court answered that question in the affirmative.³⁶ In fact, all of the Justices agreed on this interpretation of the statute, including the dissenting Justices.³⁷ Focusing on the 1996 Act's "writing" requirement, as well as on the minimum information required to conduct judicial review, the Court stated that it must be able to analyze the reasons for a denial in order to be able to judge whether such denial was warranted.³⁸ The Court also conducted a review of the entire statute, finding that other provisions in the 1996 Act supported its finding of a reason-giving requirement.³⁹ Finally, the Court explained that its conclusion was not just supported by common sense, but flowed from an understanding of Congress' use of the term "substantial evidence"—a "term of art" in administrative law describing how "an administrative record is to be judged by a reviewing court."⁴⁰ Thus, the Court held that by using that term of art, Congress intended that a "cluster of ideas" attach to the term, and part of that cluster of administrative law ideas is a reason-giving requirement to effectuate clear disclosure of "the grounds upon which the administrative agency acted" and to advise the courts of "the considerations underlying the action under review."⁴¹ The Court concluded by cautioning that the reasons provided "need not be elaborate or even sophisticated" reasons and that the focus is on whether reasons are "simply clear enough to enable judicial review."⁴²

³⁴ *Id.*

³⁵ *Id.* at 814 (emphasis added).

³⁶ *Id.*

³⁷ See *id.* at 819 (Alito, J., concurring); *id.* at 820 (Roberts, J., dissenting).

³⁸ *Id.* at 814 (majority opinion).

³⁹ *Id.* ("In order to determine whether a locality's denial was supported by substantial evidence, as Congress directed, courts must be able to identify the reason or reasons why the locality denied the application.")

⁴⁰ *Id.* at 815.

⁴¹ *Id.* ("By employing the term 'substantial evidence,' Congress thus invoked, among other things, our recognition that 'the orderly functioning of the process of [substantial-evidence] review requires that the grounds upon which the administrative agency acted be clearly disclosed,' and that 'courts cannot exercise their duty of [substantial-evidence] review unless they are advised of the considerations underlying the action under review.'" (citing *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943); *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *Beaumont, S.L. & W. Ry. Co. v. United States*, 282 U.S. 74, 86 (1930) ("Complete statements by the [agency] showing the grounds upon which its determinations rest are quite as necessary as are opinions of lower courts setting forth the reasons on which they base their decisions."))).

⁴² *Id.*

The second resolution the Court reached was one that, again, all members of the Court ultimately agreed upon: The reasons provided do not need to “appear in the same writing that conveys the locality’s denial of an application.”⁴³ Given the statutory text, this is not an exceptional holding and this Article will not dissect it. Put simply, the statute dictates no format for the providing of reasons (and the locality may in fact have very good reasons for providing the reasons in a separate document). Furthermore, the majority stressed that the 1996 Act enumerated an “exclusive list” of limitations and requirements elsewhere in the statute and the Court was powerless to graft on additional requirements,⁴⁴ an assertion the dissent argued was later contradicted by the majority when it added a timing requirement to the statutory directive.⁴⁵ Nevertheless, the Court immediately cautioned that its “no format” holding did not resolve whether the reasons must come temporally together, or contemporaneously with, the agency’s decision.⁴⁶ That matter was addressed separately as the Court’s final concern.

The Court concluded by addressing the timing of providing reasons as its third issue, the most important issue for this Article’s focus, and arguably the most significant for purposes of the progressive development of administrative law.⁴⁷ The Court opened this discussion by cautioning that the provision of reasons cannot be delayed in a way that stymies or burdens judicial review.⁴⁸ In that statement, the Court focused on the judiciary as the primary constituency of the reason-giving. However, in further analysis, the Court seemed to accept a broader constituency for the given reasons, including the regulated parties, recognizing that a regulated entity needed to have access to the reasons in order for that entity to decide whether to contest the decision.⁴⁹ Considering that T-Mobile had only thirty days to decide whether it would seek judicial review of its application denial,⁵⁰ the Court reasoned that not only is a court unable to review the denial

⁴³ *Id.* at 815–16 (“[W]hile the text and structure of the Act render it inescapable that localities must provide reasons in writing when they deny applications, we can locate in the Act no command—either explicit or implicit—that localities must provide those reasons in a specific document.”); *id.* at 819 (Alito, J., concurring); *id.* at 822 (Roberts, J., dissenting).

⁴⁴ *See id.* at 816 (majority opinion).

⁴⁵ *Id.* at 823 (Roberts, J., dissenting). The majority also recognized its limitations in footnote 4, saying it was without power to claim that the clock to challenge a denial tolled until the reasons are given because that would require rewriting the text of the statute. *Id.* at 817 n.4 (majority opinion) (“The City urges us to hold that the clock does not begin to run until after the reasons are given. We cannot so hold, however, without rewriting the statutory text.”).

⁴⁶ *Id.* at 816.

⁴⁷ *Id.* at 816–17. Note that the dissent faults the majority for even addressing this issue, which it claims is one not properly before the Court. *Id.* at 821 (Roberts, J., dissenting).

⁴⁸ *Id.* at 816 (majority opinion).

⁴⁹ *Id.*

⁵⁰ *Id.* (citing § 332(c)(7)(B)(v)).

without knowing the locality's reasons, similarly, "an entity [such as T-Mobile] may not be able to make a considered decision whether to seek judicial review without knowing the reasons for the denial of its application."⁵¹

As a result, the Court adopted a type of near-contemporaneous requirement between the decision announcement and the production (or, "giving") of a reason, holding that "the locality must provide or make available its written reasons at essentially the same time as it communicates its denial."⁵² One can wonder whether an "essentially the same time" standard is strong or clear enough. For example, the Court never clarified how much time the locality had to produce reasons for its denial, between the initial denial and the end of the thirty-day appeal window. All we know is that twenty-six days is too long. In its express holding, the Court concluded that "[t]he City . . . did not provide its written reasons essentially contemporaneously with its written denial."⁵³ Beyond that, we are left to guess about what constitutes "essentially the same time" or "essentially contemporaneously."⁵⁴ Would, for example, five days after denial be acceptable, or would that be too long after the date of decision? Twelve days? Seventeen days? Nonetheless, for now it is important to note that the Court has identified some sort of near-contemporaneousness requirement, at least under the 1996 Act, and perhaps more broadly applicable in other areas of agency decision-making and administrative law. One should note that the Court instructed localities that, if the reasons are not ready when they want to make a decision, then localities can and should delay the decision until the decision and reasons can be provided together.⁵⁵

In my view, this is where the Court had an opportunity to expand upon and better explain the sources and purposes of this timing requirement. It is the Court's failure to do so that leaves an analytical and prescriptive gap that this Article seeks to fill. The Court never makes a clear statement of where it finds the authority to impose the timing requirement. Presumably, it is one of either statutory interpretation or general principles accompanying reason-giving, or perhaps it is within the "cluster" that accompanies Congress' use of the term of art "substantial evidence."⁵⁶ But none of these are explicitly

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 818.

⁵⁴ *See id.* at 822 (Roberts, J., dissenting) ("The Court's 'essentially contemporaneous' requirement presumably means the town must produce its reasons within a matter of days (though the majority never says how many).").

⁵⁵ *Id.* at 817 (majority opinion) ("If a locality is not in a position to provide its reasons promptly, the locality can delay the issuance of its denial . . . and instead release it along with its reasons once those reasons are ready to be provided.").

⁵⁶ *See* discussion *supra* notes 40–41 and accompanying text.

stated as the grounds for this part of the Court's holding. The closest that the Court came to an explanation for its timing requirement was in a footnote.⁵⁷ There, the majority (in a way) defended its stance through the back door as a response to the dissent. Responding to a dissent argument for allowing reasons to be given after the thirty-day window but before judicial review, the majority gave two reasons why providing reasons at that later time would be unacceptable: (1) it would require the entity to "guess" when drafting its complaint and thus run the risk of "being sandbagged" by reasons provided in litigation, and (2) it would offend, at least in spirit, the general prohibition on post hoc rationalizations, which the majority briefly alluded to.⁵⁸ The former is important because it shows a sensitivity of the Court to more than just the judiciary as the consumer (or constituency) of an agency's reasons. The latter is important because the strongest arguments for a general contemporaneousness component attached to any reason-giving requirement lie in the rationale that we already use to justify the general prohibition on post hoc rationalizations: reasons generated after a decision lack indicia of rational deliberation prior to a decision and therefore cannot be satisfactory justifications to legitimize an agency's choice and cannot prove its adherence to minimum procedural safeguards against arbitrary decision-making.⁵⁹ What is unfortunate and confusing in the *T-Mobile* majority opinion, however, is its failure to draw on the already rich jurisprudence, and literature, related to the advantages of contemporaneousness in reason-giving and the dangers of after-the-fact statements of justification for an agency's decisions.

Justice Alito wrote a concurrence seemingly to guide the district court on remand. Alito agreed that: administrative law principles apply as a result of Congress' use of the term "substantial evidence;" the statute does not create an "opinion-writing requirement" and that a succinct statement of the discernable reasons (without demanding "ideal clarity") is sufficient to satisfy the reason-giving requirements of the 1996 Act; "harmless error" might apply on remand; and the district court should remember that just because there was error in the denial does not mean that the City must approve the cell tower.⁶⁰

⁵⁷ See *T-Mobile*, 135 S. Ct. at 816 n.3.

⁵⁸ *Id.* ("[T]he dissent would fashion a world in which a locality can wait until a lawsuit is commenced and a court orders it to state its reasons. The entity would thus be left to guess at what the locality's written reasons will be, write a complaint that contains those hypotheses, and risk being sandbagged by the written reasons that the locality subsequently provides in litigation after the challenging entity has shown its cards. The reviewing court would then need to ensure that those reasons are not post hoc rationalizations, see *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156 ... (1962), but the dissent offers no guidance as to how a reviewing court that has never seen near-contemporaneous reasons would conduct that inquiry." (italics added)).

⁵⁹ See discussion *infra* Part IV.

⁶⁰ *T-Mobile*, 135 S. Ct. at 819 (Alito, J., concurring).

Chief Justice Roberts wrote a dissenting opinion, joined in full by Justice Ginsburg and in part by Justice Thomas, with Justice Thomas filing a separate dissenting opinion as well.⁶¹ The essence of Roberts's dissent rested on his interpretation of the statutory requirements, which he asserted the agency complied with in full; the remainder of the majority's demands were not required by the statute, including the contemporaneousness part of the reason-giving requirement.⁶² The dissent pointed out that all of the Justices agreed that, under the 1996 Act, the notice of decision did not itself need to include an explanation, but reasons nonetheless needed to be somewhere in the record even if they did not accompany the decision document.⁶³ In this case, there was a decision, and it was in writing.⁶⁴ That part of the 1996 Act was clearly satisfied and nothing about "the term 'decision' inherently demands a statement of reasons. Dictionary definitions support that conclusion."⁶⁵

Where the majority and dissent diverged was on whether the reasons must coincide with the notice of decision and whether they must be supplied contemporaneously.⁶⁶ On those matters, the dissent first argued that the timing requirement is not mentioned anywhere in the statute.⁶⁷ Second, it argued that if the reasons requirement is for judicial review purposes—i.e., if the constituencies of the reasons are the courts—then the timing must be before judicial review occurs, but not necessarily before the petition for review is filed.⁶⁸ The dissent rejected the majority's claim that the Court's timing requirement is necessary for judicial review by explaining that "[a] reviewing court . . . can carry out its function just as easily whether the record is submitted four weeks or four days before the lawsuit is filed—or four days *after*, for that matter."⁶⁹ That is undoubtedly true, and it is one of the reasons Part III of this Article explains the need for a broader understanding of the constituencies involved in a contemporaneous reason-giving requirement. It is also why the majority opinion in *T-Mobile* is regrettably thin in its justification for the contemporaneousness requirement. The dissent was dismissive of the existence of these other constituencies and the majority inadequately stressed their importance.

The dissent also attempted to refute the majority's claim that regulated entities need to be provided contemporaneous reasons.⁷⁰

⁶¹ *Id.* at 819, 823 (Roberts, J., dissenting).

⁶² *Id.* at 819–23.

⁶³ *Id.* at 820.

⁶⁴ *Id.*

⁶⁵ *Id.* (citing *Decision*, BLACK'S LAW DICTIONARY (6th ed. 1990)).

⁶⁶ *See id.* at 819.

⁶⁷ *Id.*

⁶⁸ *Id.* at 820.

⁶⁹ *Id.*

⁷⁰ *Id.*

Here, the dissent seemed too case-specific and tunnel-visioned in its approach, weak in rationale, and otherwise unpersuasive. The dissent argued that the regulated entities of the 1996 Act cannot complain of unfairness in delay because they are sophisticated parties that know whether they will challenge a denial the minute it is handed down regardless of the reasons provided.⁷¹

Citing several examples of statutes where Congress has demanded that an agency provide explanations, the dissent contended that “when Congress wants decisionmakers to supply explanations, it says so,” and it has not done so in the 1996 Act.⁷²

This conclusion might be accurate, and if so, it would support the assertion in Part V of this Article regarding the prudence of Congress more often and more clearly articulating reason-giving requirements for decision documents. The dissent contended that “resolving that interpretive question in the City’s favor also resolves the case as it stands in this Court.”⁷³ It should be noted that all of the Justices appeared to agree that this was never a case about the adequacy of the written record or whether substantial evidence exists to support the City’s denial. Those issues had yet to be decided in the lower court.

The dissent did concede that the use of the phrase “substantial evidence” made some difference (even if not enough of a difference to side with T-Mobile), agreeing that, as a matter of statutory interpretation of the 1996 Act, reasons must be provided at *some time and in some form*.⁷⁴ The fault of the majority, the dissent contended, was going “a step further and creat[ing] a timing rule” that is “nowhere to be found in the text of Section 332(c)(7)(B)—text that expressly establishes other time limits, both general and specific.”⁷⁵ The dissent thereby claimed that Congress knew when and how to create timing rules in the 1996 Act when it wanted to do so, and that the Court was adding to the “exclusive list” of “enumerated limitations” by “finding” another one in Section 332—something that the majority itself said was a forbidden

⁷¹ *Id.* (“[C]ell service providers are not Mom and Pop operations . . . [T]hey participate extensively in the local government proceedings, and do not have to make last-second, uninformed decisions on whether to seek review.”).

⁷² *Id.* at 820–21 (“Given the commonplace nature of express requirements that reasons be given—and the inclusion of such provisions in the Administrative Procedure Act, the original Communications Act, and another provision of the Telecommunications Act—the absence of one in Section 332(c)(7)(B)(iii) is telling, and supports reading ‘decision . . . in writing’ to demand nothing more than what it says: a written document that communicates the town’s denial.”).

⁷³ *Id.* at 821.

⁷⁴ *Id.* at 822 (“And like the majority, I agree that substantial evidence review requires that a decisionmaker’s reasons be identifiable in the written record. If a reviewing court cannot identify any of a town’s reasons for denying an application, it cannot determine whether substantial evidence supports those reasons, and the town loses.”).

⁷⁵ *Id.*

task.⁷⁶ Instead, the dissent would have limited the constraints on the locality to those in the statutory text.⁷⁷

Finally, the dissent argued against the majority's rationale for the timing requirement. First, it asserted that the judicial review justification "makes little sense" because "a reviewing court does not need to be able to discern the town's reasons within mere days of the decision," and "[t]he fact that a court cannot conduct review without knowing the reasons simply means that if the town has not already made the record available, it must do so by whatever deadline the court sets."⁷⁸

The dissent then attempted to refute the second reason that it claimed the majority was using to support the timing requirement: a fairness concern for applicants who will need to know the reasons early enough to determine whether to appeal a decision and to formulate a plan of attack.⁷⁹ Roberts claimed that the typical regulated entity under the 1996 Act, or at least T-Mobile in this case, is "no babe to the legal woods" and "the local zoning board or town council is not the Star Chamber."⁸⁰ Roberts contended that the players involved in this regulatory environment are sophisticated and do not need advance explanation of the reasons for a denial in order to know whether they will challenge a decision.⁸¹ Thus, receiving the reasons in some contemporaneous fashion is not necessary to allow such sophisticated players to adequately evaluate whether they will appeal an agency's decision within the thirty-day window.⁸² Even if there were a risk of "sandbagging," the dissent claimed that an agency engaging in such action would "not be supported by substantial evidence in the record" and therefore lose, "[a]nd if the company's initial complaint mistakes the town's reasoning, the company will have no difficulty amending its allegations."⁸³ Thus, the dissent saw no need to graft on what it saw as an extra-statutory timing requirement in order to protect the interests of the regulated because the threat to those interests was both small and correctable within the existing system, without adding the contemporaneousness mandate. As the dissent concluded, "[d]emanding 'essentially contemporaneous' written reasons adds a

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* at 823 ("I strongly doubt that a sophisticated, well-lawyered company like T-Mobile—with extensive experience with these particular types of proceedings—would have any trouble consulting its interests and deciding whether to seek review before it had received a written explanation from the town.").

⁸² *Id.* at 822–23.

⁸³ *Id.* at 823.

requirement that Congress has included expressly in many other statutes, but not in this one,” and the majority should have followed its own good analysis that, where the 1996 Act makes “no command—either explicit or implicit”—the courts are powerless to create one.⁸⁴

In a separate dissent, Justice Thomas concurred with the Chief Justice’s opinion that the majority went beyond what was necessary to decide the case, and wrote “separately to express [his] concern about the Court’s eagerness to reach beyond the bounds of the present dispute to create a timing requirement that finds no support in the text or structure of the statute.”⁸⁵ He noted that the Court has generally been “unwilling to impose procedural requirements on federal agencies in the absence of statutory command,” and that the Court has refrained from doing so even when it meant that regulated parties faced a burden because the agency acted without simultaneously making its decisions known.⁸⁶ Consequently, Thomas argued that the Court treated municipalities differently from federal agencies without justification, thus handling “them as less than conscripts in ‘the national bureaucratic army.’”⁸⁷

Both the majority and the dissent completely missed the opportunity to discuss a third, and one of the most appropriate, justifications for linking a timing requirement to a reason-giving requirement: to ensure that the reasons given are not pretextual and do not suffer from the problems the Court associates with post hoc rationalizations.⁸⁸ This and other justifications for a contemporaneousness requirement are explored in the heart of this Article. Although these justifications might not have persuaded Chief Justice Roberts and his fellow dissenters, the Court, in failing to inject them into its decision, lost the opportunity to expose all of this material to further judicial debate.

⁸⁴ *Id.*

⁸⁵ *Id.* at 823 (Thomas, J., dissenting)

⁸⁶ *Id.* at 823–24 (citing *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 653–55 (1990)).

⁸⁷ *Id.* at 824 (quoting *FERC v. Mississippi*, 456 U.S. 742, 775 (1982) (O’Connor, J., concurring in part and dissenting in part)).

⁸⁸ *See, e.g., Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212–13 (1988) (discussing the unreliability of post hoc rationalizations as self-serving, convenient litigating positions rather than reflections of considered judgment worthy of deference); *see also infra* Part IV (discussing the various problems associated with post hoc rationalizations).

II. WHY REASON-GIVING MATTERS, GENERALLY AND IN ADMINISTRATIVE LAW

When we provide reasons to others for our choices, we add some heft to our decisions and begin the process of legitimizing our actions against charges that we are being impulsive or witless, arbitrary or capricious.⁸⁹ This act of reason-giving begins the process of insulating decisions from critique, at least from a critique that we lack *any* care in reaching a conclusion. Reasons create a reference point for discussing the wisdom of actions or conclusions. They are a starting volley in the debate over justification. Once one lobs a reason for a decision across the net, that act, at the very least, creates an obligation on the other side to hit back at the reason if they are to try to defeat the credibility or legitimacy of the decision. Put simply, reasons are really quite important to effective dialogue over action.

People care about why other people or entities do things, especially if what those others are doing affects them, and particularly if it affects them adversely. As a general matter, people have a natural tendency to demand and expect the provision of reasons—whether they use the term or not. We assume that actions that cannot be supported by reasons are irrational, illegitimate, unreliable, or otherwise without sufficient justification.⁹⁰ We do not like unsupported conclusions. As Frederick Schauer notes, “To characterize a conclusion as an *ipse dixit*—a bare assertion unsupported by reasons—is no compliment.”⁹¹ Nor do we, as a general matter, tolerate the avoidance of reason-giving when it is requested. And we expect follow-through, where one’s actions conform to their stated reasons for acting. Rob Atkinson explains that, “In a culture that values giving reasons for one’s conduct, as ours has at least since Socrates’s time, acting in disregard of the reasons one gives is, in and of itself, discrediting and thus costly.”⁹²

Glen Staszewski has explained that, almost paradoxically, we do not even need reasons for why we expect reasons.⁹³ We just do—and everyone (including agencies) needs to accept that fact. Staszewski explains that reason-giving is innate in the human condition, as is the need to rationally evaluate and justify actions, and thus “we do not

⁸⁹ Effron, *supra* note 1, at 713 (“A reasoned decision is harder to characterize as the product of a decisionmaker’s whim or fancy.”).

⁹⁰ Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 633–34 (1995) (“Results unaccompanied by reasons are typically castigated as deficient on precisely those grounds. In law, and often elsewhere, giving reasons is seen as a necessary condition of rationality.” (footnote omitted)).

⁹¹ *Id.* at 634.

⁹² Rob Atkinson, *Connecting Business Ethics and Legal Ethics for the Common Good: Come, Let Us Reason Together*, 29 J. CORP. L. 469, 527 (2004).

⁹³ Glen Staszewski, *Reason-Giving and Accountability*, 93 MINN. L. REV. 1253, 1285 (2009).

necessarily need to give reasons to anyone for reason-giving to carry intrinsic meaning.”⁹⁴ Nonetheless, the literature is rich with justifications for reason-giving requirements, with rationales grounded in philosophical, psychological, moral, ethical, or legal footings, as well as practical, prudent, or instrumental concerns, and the overall utility of reasons to the interpersonal enterprise.⁹⁵

Of course, not just any old reason will do. Providing a reason gets one past the threshold of the demand, but both social obligations and legal commands need to wrestle with the quality of the reason too.⁹⁶ This includes questions regarding whether the reasons offered are complete, adequate, satisfactory, substantial, supported, good, or some other like idea allowing both recipients and evaluators-at-large to conclude that the reasons offered are acceptable or sufficient.⁹⁷ This Article maintains that part of this qualitative evaluation that we all conduct when evaluating the acceptability and sufficiency of reasons includes the timing of the reasons.

Reason-giving has almost become, as Cass Sunstein puts it, “a presumptive requirement” in the expected explanation of law,⁹⁸ and the demanded justification for choices made by legal regimes creates the duty of answering questions regarding “why” choices are made by proffering reasons.⁹⁹ As Sunstein further asserts, “any position about law and politics, in order to be worth holding, must be justified by reference to reasons . . . [and] a view unsupported by reasons is unlikely to deserve serious consideration.”¹⁰⁰

For the purposes of this Article, there is no need to replay in whole the vast literature that already exists on the issue of reason-giving and

⁹⁴ *Id.* (“Social scientists and philosophers have recognized that reason-giving is an innate characteristic of human beings that is associated with our ability to rationally evaluate and justify our actions.”).

⁹⁵ See, e.g., Susan G. Kupfer, *Authentic Legal Practices*, 10 GEO. J. LEGAL ETHICS 33, 90–93 (1996) (detailing reasons for giving reasons in ethical practice, including “the act of giving reasons may potentially uncover the faulty or fallacious reasoning of the proponent by exposing the reasons to further argument and evaluation”); see also generally CHARLES TILLY, *WHY?: WHAT HAPPENS WHEN PEOPLE GIVE REASONS . . . AND WHY* (2006) (describing the pervasiveness of reason giving and the various rationales people give, demand, and expect reasons); Schauer, *supra* note 90 (providing a background section on the general purposes of reason giving). For a number of other sources cataloging these rationales, see sources cited *supra* note 4.

⁹⁶ *Id.* at 90–93, 98–101.

⁹⁷ *Id.*

⁹⁸ Cass R. Sunstein, Commentary, *Incompletely Theorized Arguments*, 108 HARV. L. REV. 1733, 1756 (1995) [hereinafter Sunstein, *Incompletely Theorized*] (“[A] special quality of most legal systems is a presumptive requirement of reasons for legal outcomes.”).

⁹⁹ Mashaw, *Small Things*, *supra* note 4, at 18 (2001) (explaining that “[r]eason has become the modern language of law in a liberal state” with “enforceable demand[s] for justification” for the actions of authorities).

¹⁰⁰ Cass R. Sunstein, Commentary, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 779 n.130 (1993).

the law.¹⁰¹ This Article does not discuss areas where the law usually does not impose formal or strict reason-giving demands,¹⁰² such as legislative or presidential action.¹⁰³ Nor does it spend much time on the areas outside of administrative law where reason-giving plays a role and is often customary, even if it is not strictly demanded. One example of this is judicial opinion-writing, where the inclusion of reasons adds weight and authority and where the existence of such reasons aids in the opinion's utility within a system of precedent. But even in areas where there may not be a legal *requirement* for reasons, reason-giving still lingers and demand for it remains strong, reflecting the natural human desires and tendencies described above for reason giving generally.

Individuals respect and value the reason-giving enterprise. Regardless of whether we always require it by law, reason-giving is seen as useful to effective communication and interaction.¹⁰⁴ We respect each other and talk in more informed ways if we are trying to make each other understand the reasons for our positions. Of course, the level and degree of our demands and the pickiness of our review will depend on relational circumstances,¹⁰⁵ but the desire for reasons is commonplace nonetheless.¹⁰⁶ Administrative law follows this lead. So much of it is about requiring an agency to explain why, how, for what purpose, and

¹⁰¹ See, e.g., HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 383–403 (William N. Eskridge, Jr. & Phillip P. Frickey eds., 1994) (discussing the role of reason-giving in judicial decisions in furthering its appearance as principled and legitimate); Paul P. Craig, *The Common Law, Reasons and Administrative Justice*, 53 *CAMBRIDGE L.J.* 282, 283–84 (1994) (discussing duties of public officials to provide reasons for decisions); Schauer, *supra* note 90, at 638 (examining reason-giving, primarily in the context of judicial decision making); Staszewski, *supra* note 93, at 1279.

¹⁰² Schauer, *supra* note 90, at 634, 637 (“Even within the law itself, decisionmaking devoid of reason-giving is more prevalent than might at first be apparent.”).

¹⁰³ See, e.g., Kwoka, *supra* note 1, at 1092 (explaining that Congress need not provide a rationale for its actions in order for legislation to be upheld); Mashaw, *Small Things*, *supra* note 4, at 19–26 (comparing and contrasting judicial review of an agency's action, legislation, and judicial decisions and the relative importance of reasons for decision); *Id.* at 20 (“[T]he legitimacy of legislative or judge-made law draws on sources other than rationality or reason-giving.”); Schauer, *supra* note 90, at 636–37 (explaining statutes are distinguishable from administrative decisions in terms of reason-giving); Shapiro, *The Giving*, *supra* note 4, at 193 (“Legislatures are not seen as subject to a formal giving reasons requirement.”); Staszewski, *supra* note 93, at 1298–99 (“There are no comparable structural safeguards that consistently require the President to give reasoned explanations for his decisions, but congressional oversight and modern media coverage may provide some selective opportunities for his policy decisions to be subject to deliberative accountability.” (footnote omitted)).

¹⁰⁴ Schauer, *supra* note 90, at 648 (“The conclusion that, in law, giving reasons commits the giver is also supported by the fact that quotations directly justifying a result have considerable purchase in legal argument.”); see also Sunstein, *Incompletely Theorized*, *supra* note 98, at 1755 (cautiously noting that “well-functioning legal systems [usually] value the enterprise of reason-giving”).

¹⁰⁵ Mashaw, *Reasoned Administration*, *supra* note 4, at 102.

¹⁰⁶ See generally TILLY, *supra* note 95 (showing how social relations in everyday life continuously involve demand for reasons); EXPLAINING ONE'S SELF TO OTHERS: REASON-GIVING IN A SOCIAL CONTEXT (Margaret L. McLaughlin et al. eds., 1992).

on what bases that agency reaches its conclusions and determines its regulatory actions.¹⁰⁷ The provision of reasons accompanying an administrative agency's decisions has firmly rooted itself as an expected and often required practice in modern administrative law,¹⁰⁸ where validity of an agency's action is tested by the agency's ability to explain why it is taking action, do so contemporaneously, and base those reasons on the record before the agency.¹⁰⁹ As Michael Livermore and Richard Revesz posit, "Some of the classic justifications for reason-giving include limiting the scope of agency discretion, promoting transparency in government, and legitimating the exercise of administrative discretion."¹¹⁰

Administrative law is rather unique in its development of largely non-discretionary rules and unavoidable practices regarding reason-giving requirements.¹¹¹ A large swath of administrative decision-making can only be upheld as lawful if it is specifically and consciously—and as this Article maintains, contemporaneously—supported by reasons.¹¹² In fact, the most effective avenue for getting a court to invalidate an administrative decision is to attack it on the agency's failure to satisfy reason-giving requirements.¹¹³

¹⁰⁷ See Richard B. Stewart, Essay, *Administrative Law in the Twenty-First Century*, 78 N.Y.U. L. REV. 437, 438–39 (2003) (describing the general purposes of modern administrative law).

¹⁰⁸ Shapiro, *The Giving*, *supra* note 4, at 179 ("Giving reasons . . . is densely packed with past legal and constitutional experience and replete with potential for development.").

¹⁰⁹ Stack, *supra* note 3, at 955 ("One 'fundamental' and 'bedrock' principle of administrative law is that a court may uphold an agency's action only for the reasons the agency expressly relied upon when it acted.").

¹¹⁰ Michael A. Livermore & Richard L. Revesz, *Rethinking Health-Based Environmental Standards*, 89 N.Y.U. L. REV. 1184, 1233 (2014).

¹¹¹ Shapiro, *The Giving*, *supra* note 4, at 196 (explaining that legislatures have no legal duties to respond to demands for reasons); Shapiro & Levy, *supra* note 4, at 429 ("As stated by the Court in *State Farm* and *Bowen*, administrative agencies, unlike legislatures, are not entitled to the same presumption of correctness because they are neither politically accountable nor directly subject to checks and balances." (footnotes omitted)); Stack, *supra* note 3, at 955 (describing differences in reason-giving requirements between administrative agencies and Congress or the courts).

¹¹² Mathilde Cohen, *Sincerity and Reason-Giving: When May Legal Decision Makers Lie?*, 59 DEPAUL L. REV. 1091, 1091 (2010) [hereinafter Cohen, *Sincerity*] ("The lawfulness of state actors' decisions frequently depends on the reasons they give to justify their conduct, and a wide range of statutory and constitutional law renders otherwise lawful actions unlawful if they are not justified by reasons or are justified by the wrong reasons."); Daniel J. Rohlf, *Avoiding the 'Bare Record': Safeguarding Meaningful Judicial Review of Federal Agency Actions*, 35 OHIO N. U. L. REV. 575 (2009).

¹¹³ Richard J. Pierce, Jr., *Judicial Review of Agency Actions in a Period of Diminishing Agency Resources*, 49 ADMIN. L. REV. 61, 72 (1997) ("[I]nadequate reasoning is the most frequent basis for judicial rejection of agency decisions."); Peter H. Schuck & E. Donald Elliott, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 1034 tbl.6 (1990) (showing that 20.7% of remands in 1985 were based on an inadequate agency rationale); Stack, *supra* note 3, at 973 ("[D]espite the industry of agency justification that the *Chenery* principle has helped to create, inadequate explanation is still among the most common grounds for judicial reversal and remand."); see also Shapiro & Levy, *supra* note 4, at 390, 442–

Reason-giving and what has come to be known as the *Chenery* principle¹¹⁴ have now permeated almost all aspects of agency decision-making.¹¹⁵ When the agency engages in informal rulemaking, for example, the APA requires the agency to provide a “concise general statement of [the rule’s] basis and purpose,”¹¹⁶ and when the agency engages in formal adjudication or formal rulemaking, the APA requires the agency to state “findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record.”¹¹⁷ Conclusions must be supported by the record, and the record must contain a reasoned review.¹¹⁸ Reasoned review also mandates that an agency consider comments and alternatives accompanied by reasons for how and why such comments or alternatives are rejected or incorporated into the decision.¹¹⁹

Some consider the way modern courts impose reason-giving requirements as a type of record requirement.¹²⁰ Although originating in formal rulemaking, primarily as a record requirement,¹²¹ the scope of the requirement for reason-giving has grown over the years and now clearly includes informal rulemaking and its records.¹²² Judicial review under the APA is “on the record” review, meaning that the reasons must be somewhere in the record.¹²³ While that phrase “on the record” is usually a sufficient shorthand for what is required, this Article contends that it is a bit incomplete. As the reasoning of the *T-Mobile* dissent

54 (describing an appendix with “results [that] demonstrate the current significance of the reasons requirement, and the emergence of the rationalist model of judicial review”).

¹¹⁴ See *infra* text accompanying notes 138–48.

¹¹⁵ Kwoka, *supra* note 1, at 1090 (“[T]he *Chenery* principle has grown in scope and is now held to apply to agency actions in almost every context.”); Stack, *supra* note 3, at 962 (“[T]he Supreme Court has extended the demand for explicit reason-giving to virtually every form of agency action and every conceivable type of deficiency in an agency’s stated justification for its action.”).

¹¹⁶ 5 U.S.C. § 553(c) (2012); see also Mashaw, *Small Things*, *supra* note 4, at 24–25 (“The modest suggestion in section 553 of the APA that agencies must file a ‘concise statement of the basis and purpose’ of a regulation has developed into the requirement of a comprehensive articulation of the factual basis, methodological presuppositions, and statutory authority that justifies any exercise of rulemaking.”); Kevin M. Stack, *Interpreting Regulations*, 111 MICH. L. REV. 355, 360 (2012) (examining the basic obligation of agencies when issuing regulations “to publish a detailed explanation of the grounds and purposes of the regulation”).

¹¹⁷ 5 U.S.C. § 557(c)(3)(A) (2012).

¹¹⁸ Shapiro, *The Giving*, *supra* note 4, at 185–86.

¹¹⁹ *Id.* Shapiro describes what he calls the “dialogue” requirement in notice and comment rulemaking, the evolution and strengthening of reason-giving requirements, and where “the obligation to give reasons becomes the obligation to . . . offer every reason needed to resolve every issue of fact, value, and choice among alternative policies that could arise in making the optimal rule.” *Id.*

¹²⁰ See, e.g., *Id.*

¹²¹ Rohlif, *supra* note 112, at 580–85.

¹²² Shapiro & Levy, *supra* note 4, at 417–25 (surveying the trail of cases establishing the reason-giving requirements we see today).

¹²³ 5 U.S.C. § 706 (2012).

reveals, this type of shorthand could lead one away from the contemporaneousness elements of reason-giving-requirements, because the official record may not be fully constructed at the point of decision.¹²⁴ As such, the more precise characterization, if we are to impose a contemporaneousness limit on the provision of reasons, would be that the reasons must be in the record, produced to the public, and available for inclusion in the record at the time of decision.

Together with these provisions, one independent—or sometimes concurrent—justification for reason-giving lies in the APA’s command that an agency’s action must be set aside if it is, among other things, “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”¹²⁵ At other times, courts and scholars stress the origins and support for the administrative reason-giving requirements in an independently created judicial doctrine where the courts impose the requirements so that there is something to effectively evaluate when conducting judicial review.¹²⁶

Consider *Citizens to Preserve Overton Park, Inc. v. Volpe* (*Overton Park*), for example, where the Supreme Court explained that “the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment”¹²⁷ when reviewing an agency’s action. To do so requires the existence of reasons against which that review can be accomplished and upon which judgment on the legitimacy of the agency’s action can be made.

In *Overton Park*, the Secretary of Transportation made a decision regarding the location of a highway, but did not provide a contemporaneous statement of reasons for that decision.¹²⁸ The Court recognized that there was no statutory or constitutional requirement for the Secretary to give any reason at the time of the agency’s decision.¹²⁹ Nonetheless, the Court found the absence of reasons given at the time of the decision enough to refuse to approve the agency’s action.¹³⁰ The Court also refused to consider statements of reasons provided only after the point of decision.¹³¹ The agency offered affidavits to justify the route

¹²⁴ See *T-Mobile S., LLC v. City of Roswell*, 135 S. Ct. 808, 820 (2015) (Roberts, J., dissenting).

¹²⁵ 5 U.S.C. § 706; see also Shapiro, *The Giving*, *supra* note 4, at 184–86 (explaining how the APA and reason-giving requirements are connected); Short, *supra* note 3, at 1815 (describing how APA’s “arbitrary and capricious” review “demand[s] rational reasons and evidence developed by an agency”).

¹²⁶ Efron, *supra* note 1, at 712–13 (“The reason-giving requirements in administrative law stem from explicit statutory requirements and case law development.”).

¹²⁷ *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971), *abrogated on other grounds*, *Califano v. Sanders*, 430 U.S. 99 (1977).

¹²⁸ *Id.* at 408.

¹²⁹ *Id.* at 416–17.

¹³⁰ *Id.* at 420–21.

¹³¹ *Id.* at 419–20.

chosen for the highway, but the Court explained that “[t]hese affidavits were merely ‘post hoc’ rationalizations, which have traditionally been found to be an inadequate basis for review” because only reasons accompanying the decision—that is, those that were contemporaneous with the final decision—have the indicia of legitimacy necessary to validate an agency’s action as sufficiently thoughtful.¹³²

Overton Park is influential in this reason-giving area of administrative law, but *SEC v. Chenery (Chenery I)*¹³³ is perhaps the most important precedent for the reason-giving requirement in administrative law and the concomitant prohibition on post hoc rationalizations identified in *Overton Park*.¹³⁴

Chenery I held that “[t]he grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based.”¹³⁵ In a subsequent opinion after remand, known as *Chenery II*, the U.S. Supreme Court explained:

When the case was first here, we emphasized a simple but fundamental rule of administrative law. That rule is to the effect that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action *solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis.* To do so would propel the court into the domain which Congress has set aside exclusively for the administrative agency.¹³⁶

Chenery I clarified the rules by explaining that “an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained.”¹³⁷

Therefore, one of the primary lessons, as the Supreme Court stated in *Chenery I*, is that an agency’s “action must be measured by what the [agency] did, not by what it might have done. It is not for [the court] to determine independently” what is a good or proper reason to adopt one

¹³² See *id.* at 419 (citation omitted).

¹³³ *SEC v. Chenery Corp. (Chenery I)*, 318 U.S. 80 (1943).

¹³⁴ Effron, *supra* note 1, at 723 (discussing *Chenery* as a source of the reason-giving requirements in administrative law); Kwoka, *supra* note 1, at 1090 (discussing *Overton Park* and concluding that “the Court, without much explanation, located the *Chenery* principle in the APA and extended it to constrain judicial review of both formal and informal adjudications”).

¹³⁵ *Chenery I*, 318 U.S. at 87; see generally Kwoka, *supra* note 1, at 1089–90 (summarizing *Chenery*).

¹³⁶ *SEC v. Chenery Corp. (Chenery II)*, 332 U.S. 194, 196 (1947) (emphasis added).

¹³⁷ *Chenery I*, 318 U.S. at 95.

regulatory position or another.¹³⁸ This takes the identification of reasons justifying an agency's action out of the realm of speculation on the part of judges, takes it away from a judge's substitution of his policy preferences over that of the agency, and prevents judges from searching to find independent support for an agency's action. The onus for providing reasons is on the agency. Stack further summarizes what we have come to know as the *Chenery* principle as one emphasizing the necessity of explanation on the part of agencies, explaining that "once any given standard of review is joined with the *Chenery* principle, the *Chenery* principle limits judicial review to the explanation the agency relied upon when it acted."¹³⁹ Note that the focus is on the explanation presented at the time of the agency's decision and not on some rationale that could be conjured up at a later date. Stack continues that, "agencies [must] specifically explain their policy choices, their consideration of important aspects of the problem, and their reasons for not pursuing viable alternatives."¹⁴⁰

Chenery I and *Chenery II* predate the APA, and each decision rested on general principles of judicial review, separation of powers, and administrative law,¹⁴¹ yet parts of the APA also reflect the core of the *Chenery* principle as it is applied today. Even after the APA's enactment, we still see the *Chenery* principle invoked and sometimes working in conjunction with APA principles.¹⁴² Under any of these justifications, the ideas embraced by the legal reason-giving standards are that agencies should be required to provide reasons for action. Once they do, the judiciary should take a relatively hands-off approach.¹⁴³ Once reasons are available to a court, it should evaluate only the reasons proffered rather than conducting its own search for the reasons for or against the agency's choice of action.¹⁴⁴ In that sense, the reason-giving

¹³⁸ *Id.* at 93–94; see also Kwoka, *supra* note 1, at 1092 ("To supplant reasons or rely on rationales not provided by the agency itself when it made the decision would, in effect, be overreaching on the part of the judiciary.").

¹³⁹ Stack, *supra* note 3, at 972.

¹⁴⁰ *Id.*

¹⁴¹ Kwoka, *supra* note 1, at 1093 (decriing "[t]he Supreme Court's somewhat cursory explanation of the rationale behind the *Chenery* principle"); Stack, *supra* note 3, at 957 (explaining that there is a "curious uncertainty concerning [the *Chenery* principle's] basis").

¹⁴² Kwoka, *supra* note 1, at 1091 (discussing *Chenery* and its grounding in separation of powers principles); Shapiro, *The Giving*, *supra* note 4, at 184–86 (explaining how the APA and reason-giving requirements are connected); Stack, *supra* note 3, at 976 (articulating the basis for *Chenery*).

¹⁴³ Shapiro & Levy, *supra* note 4, at 390, 427–28 (discussing a separation of powers rationale for the reason-giving requirement in administrative law); see also *Church of Scientology of Cal. v. IRS*, 792 F.2d 153, 165 (D.C. Cir. 1986) (Silberman, J., concurring) ("The precept that the agency's rationale must be stated by the agency itself stems from proper respect for the separation of powers among the branches of government.").

¹⁴⁴ Shapiro & Levy, *supra* note 4, at 390, 427–28; see also Stack, *supra* note 3 (providing a separation of powers and non-delegation justification for the *Chenery* principal).

requirement becomes a procedural one initially, identifying when and where the justification, if any, for an agency's action that is subject to judicial review will be located: in the record and as stated by the agency at the time of the agency's decision.¹⁴⁵

Stack very effectively summarizes that “[t]he persistence and extension of the *Chenery* principle have had tremendous practical significance for administrative government.”¹⁴⁶ It is a principle that “[a]t its core” focuses judicial review on “what the agency has said on behalf of its action, not simply toward the permissibility or rationality of its ultimate decision.”¹⁴⁷ In other words, it is not about the wisdom of the action. It is about forcing the agency to explain its reasons for the action, which accomplishes better decision-making because it “links permissibility to the agency’s articulation of the grounds for its action,” which then disciplines agencies by giving “agency officials strong incentives to attend to the justifications they provide for their actions.”¹⁴⁸

One of the strongest arguments for the reason-giving requirement in each of these administrative law contexts is that reasons facilitate effective judicial review of an agency’s action within our separation of powers system.¹⁴⁹ As Part III will emphasize, however, judges are not and should not be considered the only constituents, clients, or stakeholders of administrative law’s reason-giving requirements. Part III will explain why the over-emphasized focus on judicial review gives us a too shallow understanding of the requirement and how that under-appreciation leads to the type of incomplete reasoning seen in the dissenting—and to a lesser extent even the majority—opinion in *T-Mobile*.

III. WHY REASON-GIVING HAS MULTIPLE CONSTITUENCIES

Just as many people expect to hear reasons for decisions in everyday life, multiple interests demand and benefit from receiving reasons in administrative law. There should be no doubt that a primary constituency for reason-giving in administrative law is the judiciary.

¹⁴⁵ See *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 654 (1990).

¹⁴⁶ Stack, *supra* note 3, at 956.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 956–57 (noting also that “the inadequacy of an agency’s contemporaneous explanation for its decisions remains one of the most common grounds for judicial reversal and remand”).

¹⁴⁹ Shapiro & Levy, *supra* note 4, at 412–25 (discussing the “evolution of the reasons requirement and the models of judicial review”); Sharon B. Jacobs, *The Administrative State’s Passive Virtues*, 66 ADMIN. L. REV. 565, 613 (2014) (“A court cannot assess whether an agency considered relevant factors or made a clear error of judgment in doing so if the agency has not explained which factors were considered.”).

Nor should there be any doubt that the strongest justification for finding a general reason-giving requirement in administrative law—in line with the *Chenery* principle—lies with its facilitation of judicial review. However, this Part stresses that the judiciary should not be considered the only constituency, both because of policy concerns and because legal standards themselves may require consideration of other constituencies when interpreting legally binding reason-giving requirements. This Part begins with a brief explanation of the judicial constituency and concludes by outlining the multiple constituencies served by reason-giving requirements in administrative law. The main objective is to demonstrate that the dissenters in *T-Mobile* (and some other judges and scholars that have analyzed the purposes of reason-giving requirements) are shortsighted in their exclusive focus on facilitation of judicial review when defining the contours of reason-giving requirements.

A. *The Judiciary (or the Judicial Review Process) as a Constituency of Agency Reason-Giving*

The explanations of reason-giving as serving judicial review purposes and the importance of the court constituency are well-tread and will only briefly be summarized here. Many defenders of reason-giving requirements insist that judicial review cannot be effective without a locatable, definitive, and closed set of reasons to be judged.¹⁵⁰ This is undoubtedly true. One of the leading arguments in favor of reason-giving requirements in administrative law is that the provision of reasons aids in—indeed is usually necessary to—effective judicial review.¹⁵¹ A judge cannot evaluate the legality and sufficiency of an agency's action unless she knows what the agency did and why the agency did it. Reasons are not only a reference point for evaluation, they also limit the scope of judicial review to only those reasons stated by the agency—which in fact enforces proper limits on judicial interference with the agency's action. That is, if a judge can only consider the reasons offered by an agency in evaluating whether the agency had authority and conducted adequate analysis to reach a decision, then the judge is evaluating the agency and not merely substituting her preferences for that of the agency.¹⁵² Judicial review is further limited to the record that

¹⁵⁰ Mashaw, *Reasoned Administration*, *supra* note 4, at 105 (explaining that giving reasons protects rights and facilitates judicial review); Shapiro, *The Giving*, *supra* note 4, at 181 (“[G]iving reasons has been deeply entangled with judicial review.”).

¹⁵¹ Mashaw, *Reasoned Administration*, *supra* note 4, at 109–11.

¹⁵² *Id.* at 111 (“With respect to general regulations or rulemaking, reason giving is demanded as a facilitator of judicial review.”).

the agency compiles, such that a judge is not allowed to create her own record or do her own research to decide whether the agency's policy is meritorious.¹⁵³ If the judge is limited to an evaluation of the rationale provided by the agency, she is concomitantly precluded from finding her own rationale for or against the agency's decision.

Regardless of whether the court, on its own investigation, might be able to determine whether the agency has the authority to act, the rules are such that the agency must determine and articulate the bases for its decision, including its authority. It is the agency's responsibility to support its decision with a record in order to permit a court to find the reasons that existed at the time of its decision¹⁵⁴ and which served as bases for that decision.¹⁵⁵ Where the agency cannot provide reasons within the record, "[i]t will not do for a court to be compelled to guess at the theory underlying the agency's action."¹⁵⁶ The agency's action must be sustained on the administrative record, or not at all.¹⁵⁷ Thus, the reason for the decision, as stated in the record, must be the reason on which the court sustains the action,¹⁵⁸ and the agency must draw a "discernable path" between the reasons the agency states to justify the decision and the agency's decision itself.¹⁵⁹ If a reason cannot be found in the record or the reason offered is not adequate, then an agency's decision will be vacated and remanded.¹⁶⁰

¹⁵³ *Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 539 n.73 (1981) ("There is evidence in the record that might support such a determination. . . . However, the courts will not be expected to scrutinize the record to uncover and formulate a rationale explaining an action, when the agency in the first instance has failed to articulate such rationale.").

¹⁵⁴ *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 51-52 (1983); *Am. Textile Mfrs.*, 452 U.S. at 539; *Fed. Power Comm'n v. Texaco Inc.*, 417 U.S. 380, 397 (1974); *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168-69 (1962).

¹⁵⁵ Even if an agency has authority to act, it is often not a valid exercise of that authority if the act is unaccompanied by reasons because such a deficiency can signify that the act was potentially arbitrary or capricious. See Mashaw, *Small Things*, *supra* note 4, at 22 ("[W]hile statutory authority is a necessary condition for legitimate administrative action, it is far from sufficient. Authority must be combined with reasons, which usually means accurate fact-finding and sound policy analysis. Otherwise, an administrator's rule or order will be declared 'arbitrary,' perhaps even 'capricious.'").

¹⁵⁶ *SEC v. Chenery Corp.*, 332 U.S. 194, 196-97 (1947).

¹⁵⁷ *Flo. Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985) (describing on the record review).

¹⁵⁸ Rohlfs, *supra* note 112, at 576 ("With narrow exceptions, federal courts base their review of agency decisions solely on a record compiled and presented to the court by the agency itself.").

¹⁵⁹ *Hall v. McLaughlin*, 864 F.2d 868, 873 (D.C. Cir. 1989) (holding that an agency's explanation must "only be sufficient to permit the court to discern the path [the agency] has taken").

¹⁶⁰ *Camp v. Pitts*, 411 U.S. 138, 143 (1973) ("The validity of [an agency's] action must . . . stand or fall on the propriety of that finding, judged, of course, by the appropriate standard of review. If that finding is not sustainable on the administrative record made, then the . . . decision must be vacated and the matter remanded . . . for further consideration.").

Critically, and as will be discussed in more detail in Part IV, the judiciary also prohibits what are called post hoc rationalizations, thereby requiring that an agency state and provide the bases for its decision or conclusion before or contemporaneously with its action.¹⁶¹ As the U.S. Supreme Court explained in *American Textile Manufacturers Institute, Inc. v. Donovan*, even if an agency's post hoc explanations "have merit . . . the *post hoc* rationalizations of the agency or the parties to [the] litigation cannot serve as a sufficient *predicate* for agency action."¹⁶² The word "predicate" is important because it captures the fact that an agency's reasons must pre-date the agency's decision and must not simply be a justification generated later for the purposes of defending the agency's action.¹⁶³ A court needs to know the agency's rationale for a decision (and that the agency had a rationale at all) at the time the agency made its decision. Otherwise, the judiciary cannot evaluate whether the agency's action was lawful as it was processed and when it was taken.

The concentration solely on reasons in the record is designed to relieve judges of the need to "intuit" what the agency "may have been thinking."¹⁶⁴ Instead, judges can "run through, replay, or reconstruct the decisionmaking process that led to the policy decision under review[,] . . . retracing the administrators' decisionmaking process," because there is a set of reasons upon which judges can focus.¹⁶⁵ As a result, a court has a manageable reference point from which to base its review and, at the same time, the judge is constrained from making policy herself. Judicial activism is less likely if courts are prohibited from generating their own reasons or subjectively guessing at an agency's reasons.

As the Supreme Court explained in *Interstate Commerce Commission v. Brotherhood of Locomotive Engineers*, a court "may not affirm on a basis containing any element of discretion—including

¹⁶¹ See *infra* Part IV (articulating the intersection between the ban on post hoc rationalizations and the need for the contemporaneous offering of reasons for an agency's decisions, as well as explaining the disciplinary effect that a contemporaneousness requirement can have on disingenuous post hoc production of justificatory excuses for an agency's decisions).

¹⁶² *Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 539 (1981) (emphasis added).

¹⁶³ See, e.g., *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983) ("Not having discussed the possibility, the agency submitted no reasons at all. The short—and sufficient—answer to petitioners' submission is that the courts may not accept appellate counsel's *post hoc* rationalizations for agency action."); see also *Fed. Power Comm'n v. Texaco Inc.*, 417 U.S. 380, 397 (1974); *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168–69 (1962).

¹⁶⁴ *Bray v. Comm'r of Soc. Sec. Admin.*, 554 F.3d 1219, 1225 (9th Cir. 2009) ("Long-standing principles of administrative law require us to review the ALJ's decision based on the reasoning and factual findings offered by the ALJ—not post hoc rationalizations that attempt to intuit what the adjudicator may have been thinking.").

¹⁶⁵ Shapiro, *The Giving*, *supra* note 4, at 183.

discretion to find facts and interpret statutory ambiguities—that is not the basis the agency used, since that would remove the discretionary judgment from the agency to the court.”¹⁶⁶ Similarly, in *Federal Power Commission v. Texaco Inc.*, the Supreme Court explained that even when a court might find that an order would have been valid if it were based on the position taken by an agency in litigation, the court “cannot ‘accept appellate counsel’s post hoc rationalizations for agency action’; for an agency’s order must be upheld, if at all, ‘on the same basis articulated in the order by the agency itself.’”¹⁶⁷ The way reason-giving rules and judicial review have developed, courts have become impotent to evaluate anything but the reasons originally presented by the agency.

So long as the agency articulates reasons supporting its decision that are meaningful, substantive, and have sufficient depth to sustain the agency’s decision, a court will confine its review to those reasons that are already sufficient and will thereafter validate that action.¹⁶⁸ However, within these confines of acceptable judicial review, courts cannot act as counsel for the agency by helping them find a supporting rationale—even from within the agency’s own record—beyond those reasons that the agency found and articulated itself.¹⁶⁹

Importantly, under *Chenery*, this restraint means that the judge is even prohibited from finding and using an otherwise legitimate reason in the record that could have validated the agency’s action, but which was not put forth by the agency itself as support for its action.¹⁷⁰ As the D.C. Circuit has explained, “[w]e cannot sustain an action merely on the basis of interpretive theories that the agency *might* have adopted and findings that (perhaps) it *might* have made.”¹⁷¹ The agency must find the reason and then rely upon it all by itself. A court may not find an alternative reason, or substitute a reason not generated by the agency, or fill a void where an agency’s reason is absent. Even if there are legitimate, deep, substantive, and meaningful reasons that exist, and that the court could conceive of, if they were absent from the record as reasons for the agency’s decision at the time of its decision, then the court may not consider those reasons when deciding whether to sustain

¹⁶⁶ *ICC v. Bhd. of Locomotive Eng’rs*, 482 U.S. 270, 283 (1987).

¹⁶⁷ *Fed. Power Comm’n*, 417 U.S. at 397.

¹⁶⁸ *Id.*

¹⁶⁹ *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168–69 (1962) (explaining that courts cannot step into the role of providing reasons); *see also* Shapiro & Levy, *supra* note 4, at 437–38 (discussing the unwillingness of courts to substitute their judgment for that of an agency or to generate reasons to assist an agency’s justification).

¹⁷⁰ Stack, *supra* note 3, at 964 (explaining that *Chenery* now generally demands “reversals for inadequate explanation of reasons, unsupported reasons, and insufficient or erroneous findings of fact”).

¹⁷¹ *Env’tl. Def. Fund v. Adm’r of the U.S. EPA*, 898 F.2d 183, 189 (D.C. Cir. 1990) (emphasis added).

the agency's action on review.¹⁷² As one court articulated, a court “cannot defer to what [it] cannot perceive,” and it can only perceive what is on the record before it.¹⁷³

The dissent in *T-Mobile* was correct, then, to note that reason-giving aids in judicial review.¹⁷⁴ The gap in the dissent's analysis is that the dissent stopped with judicial review, failing to acknowledge or appreciate the broader constituencies interested in the City of Roswell's reasons—particularly T-Mobile, the applicant.¹⁷⁵ That failure to consider the applicant as a constituent blinded the dissent to the need for contemporaneous production of reasons to accompany a decision. When the dissent found that there was no prejudice to the process of judicial review from a delayed provision of reasons, it determined that there was, therefore, no violation of any reason-giving requirement.¹⁷⁶ If, however, the dissent had recognized a broader constituency of interests, it would likely have better understood the prejudice caused by delay, which would have justified a finding of noncompliance with the reason-giving demand, under both the 1996 Act and general principles of administrative law. The dissent should have considered the broader purposes and broader constituencies of the reasons demanded by the law, including the regulated parties and their ability to react effectively to any decision as it is rendered. To be sure, even this might not have persuaded any dissenting Justices. Even if they could have been convinced that it is valuable to consider broader constituencies, the dissenting Justices may have nonetheless believed that the judicial reason-giving requirement cannot be expanded beyond what is necessary to protect the judicial interest in the reasons.

There are some institutional and judicial restraint issues involved in that thinking which deserve greater attention, and will be further addressed in Part V. For now, as addressed in Section B, the most immediate concern is to explain that—as a policy matter, and perhaps also as a matter of statutory interpretation or judicial recognition—

¹⁷² *Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 539 (1981) (“Whether these arguments have merit, and they very well may, the *post hoc* rationalizations of the agency or the parties to this litigation cannot serve as a sufficient predicate for agency action.” (footnote omitted)).

¹⁷³ *Int'l Longshoremen's Ass'n, AFL-CIO v. Nat'l Mediation Bd.*, 870 F.2d 733, 735–36 (D.C. Cir. 1989) (“The basis for an administrative decision, of course, must be clear enough to permit effective judicial review. . . . Whatever deference is owed to the Board under *Chevron* . . . is not due when the NMB has apparently failed to apply an important term of its governing statute. We cannot defer to what we cannot perceive.” (citations omitted)).

¹⁷⁴ *T-Mobile S., LLC v. City of Roswell*, 135 S. Ct. 808, 820–22 (2015) (Roberts, J., dissenting).

¹⁷⁵ *See id.*

¹⁷⁶ *Id.* at 822–23 (“It is hard to see where the harm is here. . . . [N]othing about Roswell's failure to meet the ‘contemporaneously’ requirement delayed, much less ‘stymied,’ judicial review.”).

reason-giving requirements serve more than one master. Persons and entities other than the judiciary require the ability to identify the reasons. Subsequently, Part IV will examine why both the judiciary and other constituencies must be able to identify the relevant reasons at the moment of the decision.

B. *Multiple Constituencies Other than the Judiciary are Served by Reason-Giving Requirements*

Reason-giving requirements not only aid judicial review, but also facilitate other public and private processes and serve multiple constituencies.¹⁷⁷ These other constituents can include: regulated entities, contractors for regulated entities, financiers of regulated entities, competitors to regulated entities, private sector allies of the agency, other governmental units, and a variety of others including the public at large. In *T-Mobile*, for example, the other constituencies most certainly included not only T-Mobile, the regulated entity, but also: the Federal Communications Commission, Congress, other regulated entities that may seek to site their own towers, T-Mobile's competitors, residential neighbors of the proposed cell tower site, entities engaging in the construction of cell towers, entities financing T-Mobile's operations, other cities that may face similar decisions, businesses near the proposed construction site that may have generated collateral revenue from the tower siting, and other citizens of Roswell—just to name a few. Not to mention the “general public,” who are constituents of government agencies and have a right to know and understand governmental processes and decisions.

In *T-Mobile*, the majority did not adequately articulate the argument for directing reasons at a constituency other than the judiciary, and the dissent too quickly ignored the argument altogether, if they ever even saw it. This Section is devoted to identifying this broader set of constituencies for which reason-giving requirements exist, and in relation to which the parameters of those requirements should be shaped.

Reason-giving rules are designed to channel and firmly place the responsibility for the development of reasons on the agency (rather than on judges) in a transparent manner so that the regulated, the litigants, and those observing the administrative process will have greater

¹⁷⁷ Efron, *supra* note 1, at 713 (describing how “[t]he benefits of reason-giving inure to different parties”).

confidence and trust in the system and can know to whom to assign responsibility for the reasons.¹⁷⁸

Reason-giving is not about outcomes.¹⁷⁹ It is about fostering a process that spurs informed decision-making that benefits the public, providing information for the evaluating judiciary and for the public, and very importantly, protecting those most directly affected (usually the regulated parties or the targets of the regulation) by giving them the information they need to challenge—when appropriate—the agency’s decision.¹⁸⁰ This multitude of concerns is further reason to believe that the umbrella of reason-giving rules has broader concerns to protect than just aiding judicial review. As Robin Effron explains, reasons “assure the public and interested parties that, not only are the decisions rational and transparent, but that the process and outcome are available to the public in a predictable and uniform manner.”¹⁸¹ Deviations from expected limits or the articulation of unjustifiable reasons are more likely exposed when reason-giving requirements are widespread and enforceable. This reasons-as-a-check concept assists “rule of law” values¹⁸² and alleviates accountability concerns that pervade much of administrative procedure law.¹⁸³

If an agency’s decisions must be public because the public demands them and our law obliges, the same should be true of the reasons for a

¹⁷⁸ *Id.* at 704 (“[R]eason-giving rules in administrative law developed, in part, as a response to the problem of delegated discretion. . . . [and work to] assure litigants and observers that these procedural areas are subject to transparent and organized principles rather than opaque and less predictable actions of individual judges.” (footnote omitted)).

¹⁷⁹ Shapiro, *The Giving*, *supra* note 4, at 181 (“Administrators may still arrive at whatever decisions they think best; they must merely give reasons for the decision at which they did arrive.”).

¹⁸⁰ Shapiro and Levy describe the importance of the distinction between results and reasons as follows:

State Farm makes clear that the proper focus for review is not the *result* reached by an agency, but rather the *reasons* given to support that result. This distinction is important because it reminds judges that they are not to substitute their judgment for the policy choices of an agency and that the agency’s reasoning may withstand scrutiny even if a judge disagrees with the result.

Shapiro & Levy, *supra* note 4, at 437–38 (describing *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983)).

¹⁸¹ Effron, *supra* note 1, at 715.

¹⁸² James W. Torke, Lecture, *What is This Thing Called the Rule of Law?*, 34 IND. L. REV. 1445, 1450 (2001) (“The rule of law does not promise results so much as it promises an approach, a process, a practice of reason-giving, a set of argumentative conventions.”).

¹⁸³ Shapiro, *The Giving*, *supra* note 4, at 181 (“[T]he very concept of . . . any kind of authority, implies the capacity to give reasons.”); Staszewski, *supra* note 93, at 1279 (“[P]ublic officials in a democracy can be held deliberatively accountable by a requirement or expectation that they give reasoned explanations for their decisions.”).

decision.¹⁸⁴ Multiple players will want to evaluate the grounds for an agency's decision, not just the courts.¹⁸⁵ Governmental abuse and potential jurisdictional overreach can be contained if an agency knows that its actions will not only be in the fish bowl, but also that it must describe why it has chosen to swim in one direction and not the other, or why it has the authority to move at all.¹⁸⁶

Reasons are the metrics by which we can judge the giver's conclusions, decisions, or performance.¹⁸⁷ Across multiple decisions, reasons can be a way to test equal treatment.¹⁸⁸ The targets of an agency's orders look to the reasons articulated to determine their willingness to comply and to evaluate the trust they have in the authority asserted.¹⁸⁹ As Judge Henry Friendly put it, "[a] statement of reasons may even make a decision somewhat more acceptable to a losing claimant."¹⁹⁰

The targets of regulatory action and the public are more likely to buy in to an agency's decision if they can at least see the reasons behind the decision articulated. This buy in is even more likely if those that are regulated, and the public at large, can understand and accept those reasons. But how can these parties ever understand and accept the reasons if the reasons are not produced for their evaluation and if the reasons are not constructed with those parties' interests in mind at the time that the nature and content of the agency's decision is shaped?

Moral and other legitimacy concerns are served best when reasons accompany decisions. The affected members of the public (as interested stakeholders) are the beneficiaries of the reasons because those individuals must comply with the orders for which those reasons are given or must at least accept the consequences of the agency's decision.¹⁹¹ As a result, power can be constrained, accountability can be

¹⁸⁴ Effron, *supra* note 1, at 713 ("When a decisionmaker delivers a reasoned justification for a decision, it signals that the grounds for decision are public and could be verified or replicated by an external source.").

¹⁸⁵ *Id.*

¹⁸⁶ Mashaw, *Small Things*, *supra* note 4, at 23–24 (discussing the goal of "exercis[ing] power on the basis of knowledge"); Shapiro & Levy, *supra* note 4, at 395 ("[J]udicial review and the legitimacy of administrative government are inextricably intertwined.").

¹⁸⁷ Staszewski, *supra* note 93, at 1281, 1293.

¹⁸⁸ *Id.* at 1281.

¹⁸⁹ Hanoch Dagan, *The Realist Conception of Law*, 57 U. TORONTO L. J. 607, 631 (2007) ("Because law is a coercive mechanism backed by state-mandated power, legal discourse—our public conversation about state-mandated coercion—must be a justificatory discourse, an exercise in reason-giving."); Schauer, *supra* note 90, at 658.

¹⁹⁰ Henry J. Friendly, "Some Kind of Hearing", 123 U. PA. L. REV. 1267, 1292 (1975).

¹⁹¹ Cohen, *Sincerity*, *supra* note 112, at 1091 (discussing "sincerity" as a component of legitimate reason-giving); Mathilde Cohen, *The Social Epistemology of Public Institutions*, in NEW WAVES IN PHILOSOPHY OF LAW 185, 186 (Maksymilian del Mar ed., 2011) [hereinafter Cohen, *Social Epistemology*] (focusing on "reasons in their justificatory or normative role, not in their motivating or explanatory role").

provided, and arbitrary decision-making can be controlled when we effectively impose and enforce reason-giving requirements. Jerry Mashaw explains that requiring or providing reason-giving avoids the raw exercise of power, and

to be subject to administrative authority that is unreasoned is to be treated as a mere object of the law or political power, not a subject with independent rational capacities. Unreasoned coercion denies our moral agency and our political standing as citizens entitled to respect as ends in ourselves, not as mere means in the effectuation of state purposes. This sort of explanation begins to illuminate why we might think of reasoned administrations as an individual right, indeed a fundamental individual right, not just as a contingent feature of accountability regimes.¹⁹²

Democratic governance, indeed, is dependent on the provision of reasons for action because it binds the government to the governed,¹⁹³ adding legitimacy and creating a venue through which the governed can identify deviations from given reasons and demand even further explanation for that incongruence.¹⁹⁴ Different audiences will have different uses for the given reasons, but it is up to those constituencies to decide how to evaluate the reasons and how to evaluate the agency's compliance with the reason-giving demand.¹⁹⁵ Without reasons produced with that broad audience in mind, those constituencies are disempowered.

Thus, the public itself is a consumer-client of reasons, not just the courts.¹⁹⁶ Reason-giving promotes educated deliberation by the agencies and transparency for the regulated entities and the public at large. It also facilitates greater public participation because it generates reference

¹⁹² Mashaw, *Reasoned Administration*, *supra* note 4, at 104–05.

¹⁹³ Some assert that “reason-giving’s most fundamental function [is] the creation of authentic democratic governance,” *see, e.g., id.* at 101, but we also cannot ignore the instrumental utility reasons provide to judicial review. *Id.* at 118.

¹⁹⁴ Staszewski, *supra* note 93, at 1282.

¹⁹⁵ Mashaw, *Reasoned Administration*, *supra* note 4, at 101–102 (describing a relational account of reason-giving and how there are different purposes for giving reasons depending on the audience). Consider also Cohen’s thoughts on audience and the level of sincerity involved:

The scope of sincerity may vary with the differing needs and expectations of one’s audiences. State actors may give reasons for different audiences, and they often do so for more than one audience at a time. Reasons may be addressed to other public officials (be they immediate colleagues or members of other institutions or other branches of government), legal professionals (including lawyers, professors, and law students), the public at large, or sometimes the very individuals directly affected by the decision. The need for more or less sincere reasons may differ depending on the characteristics of the recipient. Everyone may not have an equal right to the same degree of sincerity.

Cohen, *Sincerity*, *supra* note 112, at 1149–50.

¹⁹⁶ Shapiro, *The Giving*, *supra* note 4, at 181 (arguing that reason-giving requirements are not only for the benefit of judges, but also for benefit of the public).

points upon which debate can occur.¹⁹⁷ Additionally, reason-giving accomplishes all of this because we can discuss and debate that which is open in ways that we can never do with reasons that are hidden.¹⁹⁸

Accountability is a powerful force in motivating responsible agency decision-making and is a value championed in reason-giving requirements.¹⁹⁹ One is more likely to reflect on his options and alternatives to action before acting if he knows that he must supply reasons for his choice. Agencies are forced to be more responsive if the public can provide the types of specific critique, protest, or support that can only be formulated if that public has a set of reasons to evaluate and identifiable reasons against which that public can frame its comments on an agency's action.²⁰⁰ Of course, accountability can only be effective if reasons are transparent and accessible, further underscoring the need for contemporaneous production. That is the subject of Part IV.

Reasons also allow all affected entities to rely more confidently on the decisions made because reasons ground the decisions and clothe them with a sense of finality.²⁰¹ This is especially true for targets of regulatory action. Regulated parties are particularly interested in, and deserving of, reasons for an agency's action that most directly affects their interests.²⁰² The regulated lack the effective and functional capacity to challenge that which they cannot fully understand. When reasons are withheld or delayed, that capacity is further prejudiced. Therefore, the majority in *T-Mobile* got it right when it determined that the City of Roswell violated the 1996 Act by delaying the production of its reasons and thereby prejudicing T-Mobile's ability to prepare its legal challenge to the denial²⁰³—even if its explanation was light.

The rights of participants in rulemaking and as targets in hearings are affected by the lack of reasons. As Mashaw notes, demand for

¹⁹⁷ Shapiro explains some of the benefits as follows:

Giving reasons requirements are a form of internal improvement for administrators. A decisionmaker required to give reasons will be more likely to weigh pros and cons carefully before reaching a decision than will a decisionmaker able to proceed by simple fiat. In another aspect, giving reasons is a device for enhancing democratic influences on administration by making government more transparent.

Id. at 180.

¹⁹⁸ Effron, *supra* note 1, at 714 (explaining the benefits of reason-giving, including “transparency, democratic accountability, and the regulation of delegated discretion”).

¹⁹⁹ Shapiro, *The Giving*, *supra* note 4, at 181 (discussing the discipline-inducing effects of “public surveillance” of agencies’ decisions that is fostered by reason-giving).

²⁰⁰ Mashaw, *Reasoned Administration*, *supra* note 4, at 111.

²⁰¹ Nestor M. Davidson & Ethan J. Leib, *Regleprudence—At OIRA and Beyond*, 103 GEO. L.J. 259, 303 (2015) (“Reason-giving, of course, enables meaningful reliance on the decision made, helps justify binding agencies in the future, and provides an organized way to depart from precedent when that is salutary.”).

²⁰² *Id.* (explaining that with reason-giving, “[t]here is also arguably a dignitary interest at play as well for those affected by a legal process”).

²⁰³ *T-Mobile S., LLC v. City of Roswell*, 135 S. Ct. 808, 816 (2015).

reasons “reinforces participatory rights concerning general regulations in the same fashion that reason giving protects individualized hearing rights concerning particularized decisions.”²⁰⁴

Finally, there is also the idea that an agency owes itself a duty to self-reflect on reasons before making a decision.²⁰⁵ In this sense, one constituency of an agency is itself. Cass Sunstein, for example, has explained that “[w]hat is asserted to be a capacity for perception may in fact be a product of bias or confusion, and reason-giving helps diminish this risk.”²⁰⁶ We ask that agencies develop and widely produce reasons so that their reasons are subject to analysis and critique, which motivates greater care in the preparation of reasons and in arriving at prudent decisions. As Nestor Davidson and Ethan Leib have concluded, “[p]ublic reason-giving . . . by exposing legal decisionmaking to question and contestation, stands to improve that decisionmaking.”²⁰⁷

Reason-giving is grounded in the idea of agency engagement with a broad swath of interested stakeholders and observers.²⁰⁸ One cannot accomplish such engagement if the agencies believe that they owe reasons to only one source—the judiciary. The emphasis on multiple constituencies makes agencies more aware of their need to engage broadly and to better understand those parties that have an expectation of being given reasons, or of being capable of discovering those reasons, once the agency reaches its final decision.

IV. WHY CONTEMPORANEOUS PRODUCTION OF REASONS IS IMPORTANT

If an agency has a good reason for its decision, then it has a reason, knows the reason, and should be able to articulate and produce that reason to the public at the time of the decision. And, if the agency can do so, then it should do so—and after *T-Mobile*, it arguably must do so.²⁰⁹ Contemporaneous *production* of reasons is a necessary component

²⁰⁴ “Hence, a demand for reason giving is also in some practical sense a demand for responsiveness to the submissions of affected parties. It therefore reinforces their rights of participation as provided by the APA.” Mashaw, *Reasoned Administration*, *supra* note 4, at 111.

²⁰⁵ Effron, *supra* note 1, at 714 (“[D]ecisionmakers themselves benefit from reason giving insofar as it clarifies one’s own thinking and illuminates facts or conclusions that might need additional support.”).

²⁰⁶ Sunstein, *Incompletely Theorized*, *supra* note 98, at 1756; *see also* Donald J. Kochan, *Thinking Like Thinkers: Is the Art and Discipline of an “Attitude of Suspended Conclusion” Lost on Lawyers?*, 35 SEATTLE U. L. REV. 1, 44–61 (2011) (discussing cognitive biases and the way they act as barriers to effective decision-making).

²⁰⁷ Davidson & Leib, *supra* note 201, at 303.

²⁰⁸ Effron, *supra* note 1, at 713 (“There is an intuitive appeal to reason giving, and discussions of the virtues of giving reasons has a long and rich intellectual history that engages any number of public and private actors: the philosopher, the legislator, the judge, the administrator, and the citizen-observer.”).

²⁰⁹ *See T-Mobile S., LLC v. City of Roswell*, 135 S. Ct. 808 (2015).

of *giving* reasons. Contemporaneousness is key to useful, legally compliant, and otherwise valid reason-giving.²¹⁰ This is the fundamental and yet *understated* lesson of the holding in *T-Mobile*.

This Part will focus on the contemporaneousness duty in reason-giving and explain that this obligation has two parts. When reason-giving requirements apply: (1) it is only the reasons *held contemporaneously* by an agency that count in evaluating the agency's thinking on any particular act or decision, and (2) there is a duty to publicly *produce those reasons contemporaneously* with the agency's act or decision. On this latter point, *T-Mobile* is instructive about the duty to produce reasons. While many cases have focused on the fact that reasons must be generated and held by the agency at the time of its decision,²¹¹ *T-Mobile* is unique in expressly recognizing that there is a duty (at least under one piece of legislation and perhaps even more broadly) for an agency to not just have reasons in its pocket when it makes a decision, which can be pulled out for later use in litigation, but also a duty to reveal and produce those reasons contemporaneously with the agency's decision.²¹²

Courts and scholars alike have routinely emphasized the contemporaneousness component of reason-giving obligations.²¹³ Less often, however, have either courts or scholars looked beyond the duty of agencies to *have* reasons at the time of decision, to the obligation of those agencies to *produce* those reasons at the time of decision. That is perhaps where a broad reading of *T-Mobile* could make it a very important case in the development of the reason-giving sphere of administrative law.

One of the most basic corollaries to the contemporaneousness requirements in reason-giving lies in the general prohibition on post hoc rationalizations, as previously discussed in Part III.A.²¹⁴ *Chenery* and its progeny have established the rule that courts, when reviewing most administrative agency actions, will not entertain the agency's post

²¹⁰ *Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 539 n.73 (1981).

²¹¹ *See, e.g., Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 654 (1990); *Am. Textile Mfrs.*, 452 U.S. at 539; *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420–21 (1971), *abrogated on other grounds*, *Califano v. Sanders*, 430 U.S. 99 (1977). For additional cases and discussion on this general timing principle, see *supra* notes 114–73 and accompanying text, and *infra* notes 215–29 and accompanying text.

²¹² *See T-Mobile*, 135 S. Ct. at 811–12.

²¹³ *See, e.g., Crickon v. Thomas*, 579 F.3d 978, 988–89 (9th Cir. 2009) (explaining that an agency “must comply with its obligation under the APA to articulate its rationale for exercising such discretion,” and invalidating an agency's decision because the administrative record was “devoid of any contemporaneous rationale for the [agency's] promulgation of a rule” and only justified by government arguments that constituted “impermissible post-hoc rationalizations”); Kwoka, *supra* note 1, at 1091–92 (“[T]he *Chenery* principle requires courts in a wide variety of cases reviewing agency actions to limit their inquiry to the permissibility of the agency's contemporaneous rationale for the decision.”).

²¹⁴ *See supra* Part III.A.

hoc rationalizations in defense of those actions.²¹⁵ The agency's lawyers cannot defend an agency's decisions on grounds that the challenged agency itself did not originally (and expressly) rely upon in support of its decision.²¹⁶

Perhaps one of the most important cases to expand upon *Chenery's* anti-post hoc rationalization doctrine was *Motor Vehicle Manufacturers Association of the United States v. State Farm Mutual Automobile Insurance Co. (State Farm)*.²¹⁷ In *State Farm*, the Court reviewed a decision by the Secretary of Transportation in which the National Highway Traffic Safety Administration failed to consider several alternatives to a seat belt mandate when promulgating a rule on passive restraints.²¹⁸ When the agency entirely failed to consider the possible alternatives, it ipso facto established that it did not generate any reasons for rejecting such alternatives when choosing its preferred and final rule.²¹⁹ Consequently, the agency was foreclosed from providing newly-birthered reasons to explain, during the later litigation, why the never-before-considered alternatives should be rejected.²²⁰ Because the agency could not offer reasons that existed contemporaneously with its decision, it failed in its attempt to inject post hoc rationalizations during litigation as a defense for the agency's action.²²¹

Agencies have a job to do before they make a final decision. The prohibition on post hoc rationalizations simply enforces that duty. As discussed in Part I, it is this prohibition to which the majority in *T-Mobile* very briefly turned in a footnote—seemingly acknowledging the prohibition as one basis for its holdings related to contemporaneousness

²¹⁵ See *Chenery II*, 332 U.S. 194 (1947); see also *Camp v. Pitts*, 411 U.S. 138, 142 (1973) (“[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court.”); *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168–69 (1962) (“The courts may not accept appellate counsel’s post hoc rationalizations for agency action For the courts to substitute their or counsel’s discretion for that of the Commission is incompatible with the orderly functioning of the process of judicial review.”).

²¹⁶ Mashaw, *Small Things*, *supra* note 4, at 25 (“[C]ourts routinely reject ‘post-hoc rationalizations,’ the agency’s use of untested facts outside the rulemaking record, and attempts to rely on unarticulated reservoirs of agency ‘expertise.’” (footnotes omitted)); Stack, *supra* note 3, at 961 (describing *Chenery* as requiring the agency itself to provide the rationale contemporaneously with its action and stating that no post hoc rationalization will suffice even if “the agency’s ultimate action is permissible”).

²¹⁷ 463 U.S. 29 (1983).

²¹⁸ *Id.* at 34.

²¹⁹ *Id.* at 50 (“Not having discussed the possibility, the agency submitted no reasons at all. The short—and sufficient—answer to petitioners’ submission is that the courts may not accept appellate counsel’s *post hoc* rationalizations for agency action.”).

²²⁰ *Id.*

²²¹ *Id.*; see also Kwoka, *supra* note 1, at 1090–91 (discussing *State Farm* and the extension of “the *Chenery* principle to the review of rulemakings”).

duties.²²² Unfortunately, the *T-Mobile* Court did not choose to more forcefully explain this rationale, other than indirectly while rebutting the dissent in that footnote.

Yet the courts are routinely very concerned about the authenticity of reasons and about ensuring that agencies generate reasons before acting.²²³ By putting agencies on notice that courts will not even listen to reasons generated after the fact, courts motivate agencies to develop reasons contemporaneously and dis-incentivize any attempt to act without reasons. Furthermore, if agencies have already developed reasons contemporaneously, it makes sense that the reasons should be disclosed to the public contemporaneously as well, especially if one believes that multiple constituencies deserve access to those reasons.

Let us consider for a moment the logical sequencing of an agency's action and the reasons supporting such an action. As a simple matter of logic, if a decision is made to do X, the reason for that decision necessarily preceded the decision. *Why* an agency chose X had to exist before it *chose* X. Otherwise, any justification for its decision to have done X would not be the reason it *did* X. The reasons why an agency made a choice must immediately precede the decision, conclusion, or action. Logical ordering demands that a statement cannot be a reason *for* action if it is simply a contrived or post hoc rationalization. An agency's outward statement of those reasons could come after the decision to do X, but the actual reason must have existed before the decision. Otherwise, it is not a legitimate reason for the agency's choice at all, but is simply an argument for why doing X, in hindsight, could be justified as a good thing.

Contemporaneous outward explanations can be framed as an agency's statement of "why it *should* do," "why it *will* do," or "why it *is* doing." Each of those phrases shows deliberation before a decision—as required by reason-giving requirements, and more generally, by our system of administrative law—and each shows a commitment to a reason for a decision contemporaneous with the decision, rather than a reason conceived after the fact.²²⁴ Each of these phrases can demonstrate legitimate reason-giving, and each is something which only the agency knows and which only the agency can answer. Agencies would do well to remember this analog to the famous look-before-you-leap caution. They should generate reasons before acting, and then, upon acting, they

²²² See *supra* Part I; see also *T-Mobile S., LLC v. City of Roswell*, 135 S. Ct. 808, 816 n.3 (2015).

²²³ Kwoka, *supra* note 1, at 1103 (“[A] reasons-giving requirement goes hand-in-hand with refusing to consider post-hoc rationalizations proffered by the agency’s lawyers in litigation.”).

²²⁴ Schauer, *supra* note 90, at 643–44 (discussing the ways in which giving reasons includes a commitment to those specific reasons).

should produce those reasons for public inspection as they act.²²⁵ This contemporaneousness creates a framework where reasons must first be generated and thereafter situated within a structure of the decision before the decision is announced.

On the other side of the decision are mere post hoc rationalizations, after-the-fact justifications, confirmations, or advocacy positions that may or may not support the decision as a policy matter, but do not constitute the reasons for the decision that existed at the time the decision was made. If the agency is making a backward-facing statement to justify “why it *did*” or “why it *was* right to do it,” then the agency may be merely providing a defense by using *post hoc* explanations.

It is far more problematic for the courts, the public, and the regulated entities when the agency has an opportunity to act first and to provide reasons later. First, at the very least it is more difficult to trust that an agency’s officials fully deliberated before deciding, rather than just acting on their gut and postponing the necessity of identifying reasons for their action until a later point—namely, when and if their action is challenged such that they are then forced to provide some rationale. The reason-giving requirements are necessary to effectuate the APA’s goal of what Martin Shapiro calls “reasoned elaboration,” something which post hoc rationalizations cannot satisfy because “[t]he question is not ‘Can reasons be given?’ but rather ‘Were reasons given?’”²²⁶ Another way to distinguish post hoc justification is that it is not uniquely within the province or competence of an administrative agency—anyone can make a statement attempting to justify a prior action. But the debate over the wisdom justifying the decision is not the starting concern or the primary purpose of reason-giving requirements.

As the Supreme Court again explained in *Pension Benefit Guaranty Corp. v. LTV Corp.*, the *Chenery* principle includes a contemporaneousness component within which judges must attempt to get into the minds of the agency’s officials at the time of the decision.²²⁷ *Chenery* produced a “general ‘procedural’ requirement of sorts by mandating that an agency take whatever steps it needs to provide an explanation that will enable the court to evaluate the agency’s rationale *at the time of decision*,”²²⁸ which, following the reasoning in *State*

²²⁵ See Patricia M. Wald, Lecture, *Regulation at Risk: Are Courts Part of the Solution or Most of the Problem?*, 67 S. CAL. L. REV. 621, 639 (1994) (explaining “that it is more important to ‘moot’ the drafters of their regulations prior to issuance than the lawyers who go to court to defend those regulations” because it is the drafters who must remember, and have the responsibility for fulfilling, the prerequisite requirement of providing reasons).

²²⁶ Shapiro, *The Giving*, *supra* note 4, at 196.

²²⁷ *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 654 (1990).

²²⁸ *Id.* (emphasis added).

Farm,²²⁹ again stresses the need for agency reasons to exist at the time of the decision. Although the *LTV* Court did not directly address the issue of the timing of reason production, if considered holistically, it is difficult to envision why agencies should be shielded from producing reasons contemporaneously when the Court already demands that agencies generate them at that time.

The contemporaneousness requirement for reason-giving can help to counter the risks associated with agencies shooting first and developing reasons later. Schauer, for example, posits that reasons provide an ethical check, and “when institutional designers have grounds for believing that decisions will systematically be the product of bias, self-interest, insufficient reflection, or simply excess haste, requiring decisionmakers to give reasons may counteract some of these tendencies.”²³⁰ Authenticity in reason-giving is accomplished in large part because we demand that reasons be provided in a discoverable, transparent, and contemporaneous fashion.²³¹ Requiring contemporaneous production of reasons allows for evaluation of the decisionmaker’s conduct—the statement of reasons advantageously focuses and narrows the discussion to a discrete, closed set of data for evaluation. This makes it far more likely that one can identify a faulty decision and discern whether the reasons might be erroneous, not to mention whether they might be fabricated, pretextual, or otherwise disingenuous and unacceptable.²³² It is much harder to trust the sincerity and validity of reasons when they are only offered well after a decision has been announced.²³³

Furthermore, the universe of possible choices for agency action is, in large part, limited as soon as an agency knows that reasons must be provided for any decision. If an agency knows there is an action that they wish to take, but they have no reasons that can withstand scrutiny, some options will be functionally foreclosed and the agency will need to abandon entire sets of possible actions. That alone serves as a valuable constraining—or policing—function on the exercise of an agency’s power.²³⁴ As Judge Henry Friendly once explained, “[t]he necessity for

²²⁹ See *supra* notes 217–21 and accompanying text.

²³⁰ Schauer, *supra* note 90, at 657.

²³¹ Mashaw, *Small Things*, *supra* note 4, at 26 (“Administrators must not only give reasons, they must give complete ones. We insist that they be authentic by demanding that they be both transparent and contemporaneous.”).

²³² Kupfer, *supra* note 95, at 90–93.

²³³ See generally Cohen, *Sincerity*, *supra* note 112 (examining “sincerity” in the giving of reasons).

²³⁴ Cohen, *Social Epistemology*, *supra* note 191, at 203 (“The duty to give reasons is enforced because it also acts as a constraint on the reasons they are allowed to take into account. In strictly defined roles like that of an administrator, a judge or a policeman, only a very restricted set of considerations is supposed to bear on what one decides, while other considerations are ruled out.”).

justification is a powerful preventive of wrong decisions.”²³⁵ Reason-giving requirements channel an agency’s behavior toward better outcomes because reasons become precedential and ground the agency in a way that forces it to make lasting commitments.²³⁶ Knowing that the reasons it provides may bind the agency in the future works as yet another disciplinary tool, forcing the agency to think more carefully about its actions and to produce better quality processes and decisions.²³⁷ This manner of limiting an agency’s choice is itself influential in steering agencies toward better decision-making,²³⁸ in addition to enhancing the effectiveness of the monitoring role that the public plays in encouraging better agency action.²³⁹ The more the agencies realize that accountability and transparency are enhanced—because the contemporaneous articulation and production of reasons creates a metric by which to judge the legitimacy, wisdom, and sincerity of an agency’s action—the more likely it will be that agencies will act prudently and with responsible caution when making choices and taking action.²⁴⁰

An agency should welcome reason-giving in the sense that it helps provide a means for establishing that the agency’s actions are neither arbitrary, capricious, nor otherwise irrational.²⁴¹ When subject to a reason-giving requirement, an agency must explain its choice in order to use its authority, and doing so is generally a prerequisite before a court can uphold the agency’s action.²⁴² It is a question of responsibility because, as Mashaw put it, “the only evidence that this specialized knowledge has in fact been deployed lies in administrators’ explanations or reasons for their actions.”²⁴³ If an agency produces those reasons immediately, there is a corresponding legitimacy boost and an increased

²³⁵ Friendly, *supra* note 190, at 1292.

²³⁶ *Id.*; Schauer, *supra* note 90, at 643–44 (arguing that giving reasons constitutes a commitment to stick to those reasons in future actions).

²³⁷ Effron, *supra* note 1, at 714–15 (“Reason giving is thought to ensure a certain level of quality and uniformity in the decisionmaking process because decisions are made by diffuse administrators on vastly different subjects.”).

²³⁸ Cohen, *Social Epistemology*, *supra* note 191, at 203 (“[T]he law is interested in the potential for influencing the reasons governmental agents have, rather than in merely learning what reasons they happen to have.”).

²³⁹ *Id.* at 203 (“The reason-giving requirement serves as a method for monitoring the reasons decisionmakers choose to act on rather than as a mere disclosure strategy.”).

²⁴⁰ *Id.* at 203 (“When decisionmakers are held accountable for their reasons, their propensity to succumb to psychological biases is altered, . . . [and t]he prospect of having to show one’s justification has the epistemic effect of influencing the reasons one has and, hence, it is hoped, the decision one makes.”); Staszewski, *supra* note 93, at 1293–94 (discussing the influence of oversight on encouraging an agency’s self-discipline).

²⁴¹ Sunstein, *Incompletely Theorized*, *supra* note 98, at 1754 (“Reason-giving is usually prized in law Without reasons, there is no assurance that decisions are not arbitrary or irrational, and people will be less able to plan their affairs.”).

²⁴² See, e.g., Pierce, *supra* note 113, at 72.

²⁴³ Mashaw, *Reasoned Administration*, *supra* note 4, at 117.

chance of acceptance by the regulated community and the broader public. However, this utility of reason-giving is diluted if the giving of reasons is not made available contemporaneously with the decision.

The entire analysis again returns to the connection between constituencies and contemporaneousness. It is that connection which requires that we include a production component in the interpretation of contemporaneousness duties. That is, the reasons must be *given* contemporaneously, in part so that the receiver of the reasons can react. The receiver may want to ask for further explanation, may want to know why a different alternative regulatory path was not taken, may ask how the agency reached its reasons, or may wish to better understand the motivating factors behind the reasons. One cannot judge whether an agency's action and the reasons behind it are reasonable—as opposed to arbitrary or capricious—unless, as a predicate to that judgment, there is a reason available to evaluate. Reasons must be provided in advance if one is to evaluate the decision, just as T-Mobile and similarly situated telecommunications companies need to know why their permits were denied if they are to evaluate whether there is a viable challenge to the agency's decision.

Put simply, one primary goal that a contemporaneousness requirement achieves is that it forces the agency to have a reason for action. A production requirement not only provides outward evidence of the contemporaneous existence of a reason for an action, but it also immediately exposes that reason to scrutiny in a way that will incentivize agencies to generate thoughtful and defensible reasons.²⁴⁴ In other words, agencies' deliberations are improved, which can only benefit both the public interest and the regulated entities.²⁴⁵

This Part has argued that reasons must be both generated by the agency and produced contemporaneously if the reason-giving requirements are to operate at full strength. As Justice Thurgood Marshall once commented, “[t]he best evidence of why a decision was made as it was is usually an explanation, however brief, rendered *at the time of the decision*.”²⁴⁶ All constituencies should also be entitled to receive those reasons at that time. Only then can the reason-giving requirements satisfy the full purposes for which they were created.

²⁴⁴ Livermore & Revesz, *supra* note 109, at 1233 (“Reason-giving requirements have also been defended as a means of improving the quality of agency decisionmaking directly, for example, by forcing agencies to examine issues they might otherwise ignore.”).

²⁴⁵ *Id.* at 1235 (discussing the impacts that reason-giving requirements have on the internal operations of agencies); *see also* Davidson & Leib, *supra* note 201, at 303 (describing the benefits from public disclosure of reasons on the quality of decision-making).

²⁴⁶ *Ponte v. Real*, 471 U.S. 491, 509 (1985) (Marshall, J., dissenting) (emphasis added).

V. FURTHER THOUGHTS ON, AND DIRECTIONS AFTER, *T-MOBILE*

It is fair to characterize the *T-Mobile* decision as important mostly for two likely contributions to the interpretation of not just the 1996 Act, but also all reason-giving requirements in administrative law. First, the *T-Mobile* Court recognized that reason-giving requirements exist to serve not just the judiciary's interest in judicial review, but also the interests of regulated entities that are subject to the decision, as well as perhaps a host of other varied constituencies—and the reason-giving rules are shaped in accordance with those concerns.²⁴⁷ Second, the *T-Mobile* Court recognized that reasons must be produced essentially contemporaneously, at least for the benefit of the entities suffering adverse consequences from the agency's decision, if not for the benefit of others as well.²⁴⁸ These are the fundamental, yet understated, lessons of the *T-Mobile* majority's opinion. This Part will briefly elaborate on these holdings and the lessons within.

The *T-Mobile* Court reached the right result, but unfortunately it had an unclear rationale and may have provided inadequate guidance to the courts for future interpretation of reason-giving requirements. This Article has thus far sought to provide a fuller justification than that offered by the *T-Mobile* majority for the proposition that most reason-giving requirements require a contemporaneous production of reasons for public inspection at the time of an agency's decision, and in that light, demand a greater respect for the multiple constituencies served by the giving of reasons for an agency's action. This Part briefly expands the defense of the *T-Mobile* decision and evaluates other improvements in administrative law that might be directed as a result of the fact that the decision invites a new, more rigorous, understanding of reason-giving by agencies.

In *T-Mobile*, the Court correctly held that a set of constituencies broader than just the judiciary—and at least including the regulated applicant—must be taken into account when fashioning the timing components of reason-giving requirements.²⁴⁹ In fact, as Part III defends, the majority's rationale could be extended even further to the full array of multiple constituencies who are interested in the reasons and who should be respected when defining the contours of reason-giving obligations.²⁵⁰ As previously stated, one of the most striking omissions by the dissent is any clear appreciation for the concept that other constituencies besides the judiciary might have a need for the

²⁴⁷ See *T-Mobile S., LLC v. City of Roswell*, 135 S. Ct. 808, 816 (2015).

²⁴⁸ See *id.*

²⁴⁹ See *id.*

²⁵⁰ See *supra* Part III.

reasons and a justifiable desire and demand for those reasons to be produced without delay.

In order to protect the interests of the applicant, the *T-Mobile* decision also adopted the “near contemporaneous” timing requirement for producing reasons (at least under the 1996 Act, and perhaps more broadly applicable in other areas of agency decision-making and administrative law).²⁵¹ The Court stated this contemporaneous production requirement several times in its opinion, including while explaining that the regulator “must provide or make available its written reasons at essentially the same time as it communicates its denial,”²⁵² and later using the words “essentially contemporaneously”²⁵³ and “near-contemporaneous”²⁵⁴ to capture the command. This is probably the most important contribution *T-Mobile* makes to the development of administrative law. As articulated in Part IV, there are a large number of reasons to require such contemporaneous production of reasons, even beyond the concerns of the applicant that were raised in *T-Mobile*.²⁵⁵ Moreover, the reasons provided by the *T-Mobile* Court for allowing the applicant to fully participate in the regulatory process could equally apply to all other constituents who might also alter their behavior as a result of the agency’s decision, and as a result of their understanding and ability to process the agency’s reasons for that decision. The dissent in *T-Mobile* missed the mark on the constituency issue and consequently failed to understand the timing issue as well.²⁵⁶ The dissent failed to see the prejudice to T-Mobile from delay, which warranted invalidating the City’s decision and which justified finding, within administrative law principles, the need for contemporaneous revelations of reasons—at least to the denied applicant.²⁵⁷

The majority opinion in *T-Mobile* was disappointingly unclear about some of the bases for its ultimate holdings and was discouragingly thin in its defense of the bases it was actually using for what appeared to be a rather robust application of reason-giving limitations on an agency’s behavior. So a question remains as to what source the majority relied on to find both the contemporaneousness of production and the multiple constituencies elements of its opinion. Is the source the 1996 Act? Is it the “cluster of ideas” the Court determined were incorporated through Congress’ use of the terms “substantial evidence”?²⁵⁸ Is it some other inherent limitation on an agency’s authority, in line with the

²⁵¹ *See id.*

²⁵² *Id.*

²⁵³ *Id.* at 818.

²⁵⁴ *Id.* at 816 n.3.

²⁵⁵ *See supra* Part IV.

²⁵⁶ *See id.* at 822–23 (Roberts, J., dissenting).

²⁵⁷ *Id.* at 820, 822–23.

²⁵⁸ *Id.* at 815 (majority opinion).

Court's decisions in *Chenery* and *State Farm*?²⁵⁹ Were the reason-giving requirements imposed by the Court on its own authority? Or, is it some combination of these sources?

The words “reason-giving” are not found in the 1996 Act, yet the Court identified reason-giving duties in the Act’s “writing” requirement when reviewing the statute as a whole.²⁶⁰ Thus, if contemporaneousness and concern for multiple constituencies are inherent and necessary components of meaningful reason-giving—something which seems appropriate and wise, as argued in Parts III and IV—then those too should emanate from the statute’s writing requirement.²⁶¹ Alternatively, one might claim that those components are part of the “cluster of ideas” attached to Congress’ choice in using the term “substantial evidence”—a term of art in administrative law.²⁶² Reason-giving, as well as components within it such as contemporaneous production and the concern for multiple constituencies, might be part of the baggage that comes along for the ride with such a cluster.

Importantly, if the majority is merely interpreting the statute, then the Court may clear itself of a possible collision with precedent from *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.* (*Vermont Yankee*).²⁶³ In *Vermont Yankee*, the Court held that, “generally speaking [the APA] established the maximum procedural requirements which Congress was willing to have the courts impose upon agencies,” and that “[a]gencies are free to grant additional procedural rights in the exercise of their discretion, but reviewing courts are generally not free to impose them if the agencies have not chosen to grant them.”²⁶⁴ If the *T-Mobile* Court and other courts following its lead are merely defining statutory terms to include these types of reason-giving components, then those courts are not “imposing” anything new on the agencies and are not running afoul of the *Vermont Yankee* limitations on the judiciary’s authority.

Furthermore, even if these components cannot be found in statutory terms, some commentators already identify much of the reason-giving construction in administrative law as “administrative common law,’ namely judicially created doctrine.”²⁶⁵ It would not be a stretch to claim that the contemporaneousness of production of reasons

²⁵⁹ *Id.* (citing *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943); *Motor Vehicle Mfrs. Ass’n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *Beaumont, S.L. & W. Ry. Co. v. United States*, 282 U.S. 74, 86 (1930)).

²⁶⁰ *Id.* at 814–15.

²⁶¹ See *supra* Parts III–IV.

²⁶² *Id.* at 815.

²⁶³ 435 U.S. 519 (1978).

²⁶⁴ *Id.* at 524.

²⁶⁵ Catherine M. Sharkey, *State Farm “With Teeth”: Heightened Judicial Review in the Absence of Executive Oversight*, 89 N.Y.U. L. REV. 1589, 1612 (2014).

and the sensitivity to multiple constituencies could in fact arise out of the evolving judicial “creation” of reason-giving requirements. Moreover, to the extent that reason-giving requirements are framed as part of the inquiry into the reasonableness of the agency’s action—that is, these requirements determine that an action cannot be reasonable unless accompanied by reasons—then the requirements are not judicially created procedural add-ons subject to the *Vermont Yankee* limits.²⁶⁶ Even if the court is engaged in more than pure statutory interpretation, *Vermont Yankee* has been described as “a relatively soft outer limit” on the standards the court can apply to an agency’s behavior,²⁶⁷ and it may not be too radical of an idea to require agencies to produce reasons contemporaneously for the benefit of multiple constituencies.

Even outside of these judicial interpretation options, there may be room to incorporate the lessons of *T-Mobile* and this Article in administrative law through other channels. For example, if the *T-Mobile* dissent was correct in finding that there is no statutory or general judicial authority to impose reason-giving requirements at the level interpreted by the majority, then Congress could step in. Alternatively, whether the dissent is correct or not, congressional intervention might make sense for clarity’s sake. Congress should more often and more clearly add well-stated reason-giving requirements for decision documents into its agency-based legislation. Congress could certainly write authorizing statutes more clearly to specify that those statutes mandate reason-giving, and more directly specify that contemporaneousness of production and sensitivity to multiple constituencies are requirements of the reason-giving duties created by such legislation. Congress could even amend the APA to better establish reason-giving as a norm of administrative procedure.

Agencies could also take the lead. For example, as Sharon Jacobs has recently suggested, agencies can craft their own reason-giving regulations.²⁶⁸ Even if there are limits on what judges can impose as a matter of administrative law’s generally applicable “common law,” even if there are limits to interpreting some statutes as requiring these reforms, and even when congressional legislation is hard to achieve, an agency itself can nonetheless promulgate regulations governing its own

²⁶⁶ *Id.* at 1613–14 (“[W]hile *Vermont Yankee* sets a maximum standard for judicial analysis of agency procedural requirements, it ostensibly does not affect the permissibility of stringent judicial review of the substance (i.e., the reasonableness) of agency decision-making.”).

²⁶⁷ *Id.* at 1613.

²⁶⁸ Jacobs, *supra* note 149, at 620 (suggesting that agencies could adopt their own reason-giving requirements even when not required to do so by statute, and thus avoid any confrontation with the limits imposed by the *Vermont Yankee* decision under which courts may not “require procedures that go beyond those contained in the APA and an agency’s organic statute”).

behavior. Thus, an agency could insist as a matter of internal operating procedures that reason-giving becomes standard. Likewise, agencies could demand that their personnel not only provide reasons, but that those reasons be produced contemporaneously and with multiple constituencies in mind. Self-regulation would certainly avoid the potential pitfalls of *Vermont Yankee* limitations on judicial impositions.²⁶⁹ In fact, this approach to adding procedural checks on agencies' behavior was specifically contemplated in *Vermont Yankee*.²⁷⁰ With this type of reform, an agency's failure to follow its own regulations could be challenged as prima facie arbitrary or capricious.

Regardless of which approach achieves the outcome in a legally enforceable and legitimate way, the two primary conditions on reason-giving—contemporaneousness in the timing of providing reasons in order to inform and assist multiple constituencies in the evaluation of an agency's decisions, as recognized in *T-Mobile*—should receive broad implementation across the field of administrative law. Contemporaneous production of reasons with an eye toward cooperatively informing multiple constituencies who require, demand, or simply benefit from being able to access an agency's reasons can only work to better serve the administration of our laws and improve the quality of the rules generated.

CONCLUSION

The reason-giving enterprise is fundamentally important to administrative law. Its utility is strengthened when we require contemporaneous production of reasons to the full multitude of constituencies interested in having them revealed. The law on reason-giving is still developing. *T-Mobile* is a very interesting case because it not only provides an occasion to revisit the many benefits of reason-giving in administrative law, but also likely pushes reason-giving to new heights. It will be very exciting to watch how *T-Mobile* will be used as precedent in future litigation. Even without specifically saying so, *T-Mobile* seems to expand and refine the meaning of effective and legally-compliant reason-giving. This Article has come to the defense of the majority opinion and has developed a supporting rationale for these newly recognized contemporaneousness and constituency-based requirements. In time, the merits of these requirements may be more broadly recognized, which will inure to the benefit of all those that are affected by the administrative state.

²⁶⁹ *Id.*

²⁷⁰ See *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 524 (1978).