Reasons for Reason-Giving: The Obamacare Debates

Robert E. Goodin
Australian National University

Abstract The demanding and giving of reasons for their actions are core business for public policy makers in a democracy. But there are many different reasons for asking *why* questions, and correspondingly many different responses that might count as adequate answers. Seven different reasons for reason-giving are here distinguished and categorized along two dimensions: political moralism versus political realism, and high versus low politics. All of those were in play in the enactment and adjudication of the Affordable Care Act. The attempts at repealing it were characterized by low-politics and political-realist modes of reason-giving more exclusively.

Keywords reason-giving, accountability, Obamacare, political moralism, low politics

The essence of morality arguably lies in the right of moral agents to demand they account to one another for their actions (Watson 2004; Darwall 2006; Forst 2011). Even more surely, the essence not only of deliberative democracy (Gutmann and Thompson 1996: chap. 1; Rawls 1997; Forst 2001) but also of responsible government as such consists in the duty of public officials to account—to sovereigns, to superiors, to the public at large—for what they have done (Birch 1964; March and Olsen 1995: chap. 5; Bovens, Goodin, and Schillemans 2014). The question of why is ubiquitous in life, both personal and political (Scott and Lyman 1968; Tilly 2006; Geuss 2016: chap. 13).

Yet there are many different reasons for asking that question and correspondingly many different ways of satisfactorily answering it. Here I distinguish seven, first illustrating them with examples drawn from

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diverse spheres of life and then showing each at work in recent US debates over health care reform. Taken together, these two exercises demonstrate that these practices of reason-giving are both broad and deep.

My own analytic aims are descriptive rather than prescriptive. My primary goal is to taxonomize the sorts of reasons people demand of and give to one another. Some of the demands I discuss may have been well grounded; others, not. The reasons proffered may sometimes have been sound and sincere and other times unsound or disingenuous. But no matter—for purposes of this article, what matters is the existence of and interplay among all those types of reason-giving.

Reason-giving practices differ along two dimensions. One is political moralism versus political realism; the other is high versus low politics. In US health care debates, President Obama was a political moralist who, to accomplish anything, had to be a political realist as well, engaging in low as well as high politics. He gave reasons of all the sorts I here identify. But other parties to those debates, ranging from Democratic Senator Ben Nelson in 2010 to Republican President Donald Trump in 2017, behaved more purely as political realists, trading in reasons of a more exclusively low-politics sort.

Focusing on the forms of reasons demanded of and given by the various parties to those debates not only brings those contrasts into stark relief but also offers a window onto the nature of the processes involved first in enacting and then in attempting to repeal the Affordable Care Act (ACA). Without passing direct judgment on the substantive merits of either Obamacare or its repeal, one can nonetheless suppose that a higher-quality product is more likely to emerge from a higher-quality process. And the enactment of the ACA was certainly characterized by higher-quality reason-giving than were the attempts at its repeal.

Why Ask Why?

When asking why, we may have at least seven different reasons for asking.

Demand for Reasons 1: Answerability (Talk to Me)

Sometimes asking why really just amounts to a simple demand for recognition (Honneth 1992: 193; Taylor 1992). In the limiting case, I am not demanding to be treated as an equal reasoner, or even a reasoner at all. I am merely demanding to be treated as a human presence. "I am a person, not a stone: talk to me!"

That is what the English House of Commons was demanding, and was denied, when King Henry IV slammed the door in the face of their auditors,

saying "kings do not render accounts" (Maitland 1908: 184). That is what Primo Levi (1958: 29) was demanding, and was denied, in Auschwitz: "Driven by thirst, I eyed a fine icicle outside the window, within hand's reach. I opened the window and broke off the icicle but at once a large, heavy guard prowling outside brutally snatched it away from me. 'Warum?' I asked him in my poor German. 'Hier ist kein warum' (there is no why here), he replied, pushing me inside with a shove." Levi asked why less out of a concern for ascertaining the guard's reason for acting and more out of a concern for recognition of his sheer humanity—which is precisely what the guard's callous reply so chillingly denied.

The distinctive thing about this sort of demand is how very little is required to satisfy it. A response of any sort—a nod, a grunt, an incomprehensible gesture—can be adequate for that very narrow purpose. In everyday discourse, when someone has said something to you, you must out of courtesy say something in return.[1] That is a basic principle of conversational etiquette. To meet that minimal demand, you need only to say something, anything. Your response need not engage in any substantive way with (or be engaged with by) the person making the demand.

A striking example of reason-giving in this most minimalist mode came during the Spanish conquest of the Americas. Conquistadores were required to read out a document, *El Requerimiento*, warning the natives of dire consequences unless they acknowledged the king of Spain as sovereign over their lands (Charles I 1510). That document was typically read out in Castilian or Latin, languages incomprehensible to the native peoples. Sometimes it was read to empty beaches, sometimes from the deck of a galleon far out to sea (Las Casas [1552] 1992: 33; Todorov 1984: 148; Thomas 2003: 341–42). The crucial thing was that the reasons were enunciated—not that they were understood, or even heard.

Demand for Reasons 2: Nonarbitrariness (Show There Was Some Reason)

When asking why, we might simply be seeking evidence that there was some reason behind an action. We want reassurance merely that the action is not completely arbitrary or utterly frivolous (Sunstein 1984: 1689).

That is the *why* of "why me?," asked when you are singled out for some seemingly arbitrarily ill treatment. That is the *why* of "why me, Lord?" when some seemingly undeserved fate befalls a believer.

1. As the Red Queen admonishes Alice, "Speak when spoken to!" (Carroll 2011: chap. 9).

What counts as an adequate response to this second sort of *why* question is simple reassurance that there was a reason. That suffices to establish that the treatment was nonarbitrary. Thus, the believer can be satisfied with the response that "the Lord acts in mysterious ways"[2]—which is to say, "the Lord had His reasons" even if those are unfathomable to us mere mortals (Isaiah 55: 8–9).

The sheer fact that "there was a reason" suffices to show that an action was not completely arbitrary. To be reassured on that score, we do not need to know what the reason was, exactly (Clayton 2006: 95). We merely need to know that there was one.

Demand for Reasons 3: Explanation (Show This Was the Real Reason)

Sometimes when asking why, we want to know not just that there was some possible reason for the act in question (demand 2) but what was the person's real reason (demand 3).

We often take a keen interest in the real reasons and true motives behind another person's actions (Mills 1940). Sometimes we do so for moralistic purposes. Other times, more pragmatically, we merely want to know people's real reasons so we can better anticipate their future actions.

When US courts review administrative actions of the executive branch, they demand reasons of this sort. Whereas courts typically defer to the legislative branch and its broad power to legislate in any way in which it chooses, courts are much less deferential toward administrative agencies. The legislature is not legally required to give reasons for its actions.[3] Administrative agencies are required to give reasons, and courts invalidate administrative rulings unless they are accompanied by a statement of reasons of the right sort (Stack 2007).

Demand for Reasons 4: Justifiability (Show There Is a Good Reason)

Yet other times when asking why, we are seeking not so much an explanation as a justification for the act in question. In this fourth sense,

2. President Obama (2015) invoked this phrase, from a 1774 hymn by William Cowper, in his eulogy for victims of the Charleston, South Carolina, shootings.

3. Although the legislature typically does, in the preamble to and the legislative record surrounding any given enactment. In interpreting statutes courts use those stated reasons, as described in the next section.

we are asking not "why did you do that?" but instead "why should you have done that?"

When seeking an explanation for a person's action per demand 3, we are asking about the actor's internal motivational set. When seeking a justification for a person's action per demand 4, we are asking why it was good to have done it from an external perspective (Williams 1981: 101–13).

A justification rationalizes a person's action, giving it "on a rational basis." But sometimes that is merely a rationalization, explaining or justifying the action "with plausible but specious reasons" (*Oxford English Dictionary* 2017: 1b, 1c). The proffered reason is plausible insofar as it would have been a good reason for so acting. But it is specious insofar as it was not the actor's own real reason. Thus, for example, congressmen from tobacco-producing states opposed restrictions on cigarette advertising ostensibly on the grounds of testimony that smoking does not cause cancer (Thompson 1987: 111–12). The generic effect of such disingenuous rationalizations is to misrepresent external reasons as internal ones (Goodin 1989: 407).

Still, sometimes all we want to know is whether there exists a good reason for an action, regardless of whether that was the actor's own reason for acting. Then a rationalization tells us precisely what we want to know.

This is the approach US courts take when determining the constitutionality of legislative enactments through a "rational-basis review."[4] The test here is whether the enactment is "rationally related" to some legitimate government purpose. That inquiry merely establishes that some such purpose could have been behind the enactment, not whether it actually was.[5]

Demand for Reasons 5: Defensibility (Give a Reason I Will Accept)

Yet a fifth sort of *why* asks, why would I accept that? When seeking an explanation of someone else's action (demand 3), we are asking about reasons internal to the motivational set of the person performing the action. When asking "why would I accept that?" (demand 5), we are asking about

4. In the absence of anything that would trigger a heightened level of scrutiny, such as racial or other "discrete and insular minorities." Traditionally sourced to Thayer (1893), this approach is arguably much older (compare Kramer 2012; Posner 2012).

5. In a leading case on the matter, the US Supreme Court holds that, "on rational-basis review, . . . it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature" and the court's decision "may be based on rational speculation unsupported by evidence or empirical data" as regards the legislature's actual motives (Thomas 1993: 315).

reasons internal to our motivational set.[6] In both cases, the reasons are internal rather than external ones. But they are internal to the motivational sets of different people.

Your reasons and mine need not be the same. You might have performed the action for one reason, and I might accept it for quite another. Cecil Rhodes left his bequest for white supremacist purposes; young black South Africans today accept scholarships funded by it to help build a multiracial society.

Not only might your action be defensible to me for reasons other than those for which you performed it, but you also might yourself proffer those other reasons, rather than your own true reasons, when defending your action to me (Gaus 2011: 276–92; cf. Habermas 1996: 339; Rawls 1997: 786; Schwartzman 2011). Politicians themselves might permit refugees to enter their country out of humanitarian concerns but defend that to their constituents on economic grounds (e.g., averting a demographic crisis and ensuring that their pensions will be paid).

Consider in this connection the peculiar meaning given to the phrase *meeting of minds* in contract law (ALI 1981: §17). There, our minds are deemed to have "met" in the relevant respect as long as both of us agree that the contracted exchange should occur. We each agree for reasons of our own: I because of what you will give to me; you because of what you will get from me. Yet it is enough that we agree, each for our very different reasons, that the exchange should take place. Political logrolling and compromise rest on precisely the same premises (Thompson 1987: 113; Lepora 2012: 10–12; Gutmann and Thompson 2012).

Demand for Reasons 6: Shared Defensibility (Give a Reason All Will Accept)

Sometimes we ask why from a more collective perspective, seeking reasons that all of us actually accept. Here, we are seeking not just convergence on the same conclusion but convergence on reasons as well.

If we are to engage in "joint action" or exercise "collective agency" at all, then a single set of intentions must arguably stand behind any joint, collective acts (Bratman 1993, 2009; Velleman 1997). That can be accomplished

6. Thus, for "would" we might substitute "could, given my internal motivational set." "Could reasonably" or "could not reasonably reject" (Rawls 1997; Scanlon 1998) adds an extra layer to that which, while perhaps philosophically important, is less often empirically observed. The latter is of course the focus of this article.

(best, if not uniquely) if all members of the group act with the same intentions and share the same reasons.

To that more principled reason for wanting convergence on reasons, we can add another more purely pragmatic one: if you act from one reason and I from another we might converge on the same conclusion on *this* occasion, but our differing reasons may point in different directions on future occasions. Convergence on reasons can serve as a guarantor of coherence and stability over time in our joint pursuit of some policy or course of action, which is useful for all concerned (Chwe 2001; Macedo 2010).

Demand for Reasons 7: Shared Justifiability (Give a Reason All Should Accept)

A yet further type of *why* question, collective once again, is prescriptive rather than explanatory. This seventh type of *why* question asks not just "why will we" but "why should we accept that?"

Demand 6's collective *why* question was seeking shared internal reasons for accepting the proposition under consideration. Those are reasons internal to, and common across, the motivational sets of everyone within the collectivity in question. Demand 7's collective *why* question seeks instead good *external* reasons why all of us should accept the proposition.

With demand 6, it is a contingent (and hence unreliable and potentially unstable) fact that everyone happens to harbor the same internal reason. There is particular reason that they should do so. Demand 7's external reasons, in contrast, are objective and the same for everyone.[7]

Of course, people do not necessarily internalize objectively correct external reasons, even if they should. So satisfying demand 7 for shared justifiability does not guarantee that demand 6 for "shared defensibility" will be met as well. Still, insofar as people do internalize the external reasons that objectively they should, sharing same external reason provides the social consensus with yet more solidity and stability than when people share internal reasons that lack any external grounding.

Varieties of Reason-Giving in the US Health Care Reform Debate

Each of these sorts of reason-giving practices figured in the debates over the 2010 US health care reforms and attempts at repealing them seven years

7. Insofar as they are, demand 7 might in truth be no different from demand 4 for "justifiability" simpliciter. I nevertheless offer them as distinct models because of the "same for all" aspect, which is explicit and emphasized in demand 7 but only implicit in demand 4.

later. Analyzing those familiar events though this new lens helps us see them in a different perspective.

Obamacare, as the ACA came colloquially to be known (initially prejudicially by its critics, later proudly by its defenders), made health insurance universally available at affordable prices for the first time for all Americans. It was something that progressives had been attempting since Teddy Roosevelt. It was something that had already been accomplished in all the rest of the Organisation for Economic Co-operation and Development member states, in one form or another.[8]

Yet in the United States debates over the ACA were bitterly partisan. No single Republican voted for the bill, and the campaign of vilification against its proponents was unprecedented—culminating in Representative Joe Wilson shouting "you lie!" at President Obama during his 2009 speech on health care reform to a joint session of Congress (Obama 2009c; Jacobs and Skocpol 2010: 77). Seven years later, Democrats were equally unanimous in opposing its full repeal, which was averted only by the defection of three Republican senators.

Died-in-the-wool opponents of the ACA demanded first and foremost to be shown that there was any reason at all for it. Some seem genuinely to have doubted that. Tea Party advocates of small government viewed the bill as a purely arbitrary exercise of state power (Skocpol and Williamson 2012: chap. 2). Demanding to be shown that there is some reason for an action—that it is not purely arbitrary—corresponds to demand 2 in the above taxonomy.

Of course, demand 2 is routinely met in a legislative setting. The very title of a bill typically points to reasons for it, as does the full title of "The Patient Protection and Affordable Care Act." Those reasons are invariably further elaborated through speeches, debates, and testimony. In legislative settings, therefore, demand 2 is usually a hyperbolic stand-in for demands of some slightly different sort. Sometimes what people really doubt is not whether there are any reasons at all but, rather, whether those are good reasons for the enactment (demand 4) or whether the stated reasons are the real motives of those responsible for enacting the legislation (demand 3).

Some of the latter sort of skepticism over health care reform might have arisen from suspicion of some sort of hidden agenda. People's real

8. At 24.7 percent, the United States had the lowest proportion of the population covered by public-sector-funded health care programs anywhere in the Organisation for Economic Co-operation and Development (OECD). Across the rest of the old OECD, the rate was at or near 100 percent, and even in Mexico and Turkey it was double that of the United States (OECD 2004: 51–52).

reasons are often pretty inscrutable to outside observers, and in an age of rampant conspiracy theories that creates space for some awfully fevered imaginations to set to work. Sometimes, however, there might be credible reasons for wondering whether legislation really is being enacted entirely on the strength of its own merits or at least in part for some other purposes altogether.

Ongoing advocacy coalitions notoriously coalesce around an issue and, instead of disbanding when the original objective has been accomplished, move on to press other vaguely related concerns regardless of their own independent merits. For example, a "safety coalition" initially formed around issues of auto safety, inspired by Ralph Nader's 1965 book *Unsafe at Any Speed*. Having secured legislation to deal with that, the same coalition then moved on to tackle first coal mine safety and then occupational health and safety. Though crashing cars, collapsing tunnels, and hazardous chemicals were clearly very different from one another, the same political coalition approached them rather as if they were all of the same cloth (Walker 1977; Sabatier and Jenkins-Smith 1993).

Some thought something similar at least partly lay behind the Democrats' health care reform agenda. Universal health insurance, on this interpretation, was just a matter of "completing the New Deal agenda." A *Wall Street Journal* (2009) editorial excoriating the ACA claimed as much: "The overriding liberal ambition is to finish the work began decades ago as the Great Society of converting health care into a government responsibility." True enough, the ACA did serve to complete the New Deal agenda. Here is the history that warrants that conclusion:

> As Franklin Delano Roosevelt contemplated the end of World War II, he cast around for another crusade to lead. He alighted on "cradle to grave" national health insurance. Roosevelt tasked his long-time aide Sam Rosenman with drafting a health plan. . . . By the time the plan was ready, Roosevelt had died and the Rosenman draft passed on to President Harry S Truman, who seized it with fervor. From Truman, national health insurance passed down through the Democratic generations—the last, elusive, social democratic bequest from the New Deal. (Monroe 2011: 375)

In September 2009, Senator Ted Kennedy—whose early endorsement had been crucial in winning him the Democratic nomination—wrote to President Obama saying that "health care reform . . . is the great unfinished business of our society. For me this cause stretched across decades. . . . It

was the cause of my life. And in the past year [ravaged by cancer], the prospect of victory sustained me."[9]

Speaking a few days later at a Minnesota rally, President Obama (2009b) said, "I may not be the first President to take up the cause of health care reform, but I am determined to be the last." Reemphasizing the point, President Obama began his address on health care to the September 2009 Joint Session of Congress by recalling that "a bill for comprehensive health reform was first introduced by John Dingell Sr. in 1943," adding, "sixty-five years later, his son continues to introduce that same bill at the beginning of each session" (Obama 2009c).

Such language does rather suggest policy making in a rut. It raises reasonable doubts whether the legislation was being enacted purely for the right sort of reasons—reasons to do entirely with its own intrinsic merits rather than its relation to political payback or completing some grand historical project.

Of course, the president and other supporters of the legislation offered reasons aplenty attesting to its substantive merits. But were those *all* that motivated them? There might be room for doubt, which might explain why the health care debates were characterized by recurring instances of demand 3—demands to be told people's "real reasons" for pressing forward with health care reform.

Proponents of health care reforms tended to address themselves not so much to demand 3 as to demand 4. They were more concerned to show that there were genuinely good reasons for those health care reforms. In President Obama's (2009b, 2009c) oft-repeated mantra, those reasons included the following:

- Health care costs were growing at a rate that was not economically sustainable, and the reforms would significantly reduce those costs.[10]
- People who were presently uninsured would be guaranteed access to insurance at a reasonable price, which would be subsidized for those with low incomes.
- People with insurance would be guaranteed that they could not be denied coverage because of a preexisting condition, or have their insurance dropped when they get sick.

9. Speaker Nancy Pelosi recalled these words in the final debate before the House of Representatives passed the bill (Murray and Montgomery 2010).

10. Confirmed by an independent assessment by the Congressional Budget Office (2010).

When offering those as good reasons for the reforms, President Obama was addressing demand 4. And in insisting that those were all reasons that, in his view, everyone could and should accept, he was addressing demand 7 for "shared justifiability" as well.

President Obama did not confine himself to questions of what others could and should accept from an external perspective (demand 7), however. He also argued that the reforms were acceptable from internal perspectives that were shared on both sides of politics. After all, health care reform had been the focus of reform efforts of past presidents of both parties for a very long time.[11] Furthermore, Obama pointed out, most elements of his proposal had been advocated (or, in the case of Governor Mitt Romney's Massachusetts health care reforms, actually enacted) by Republicans in the recent past. Such arguments were designed to meet demand 6, show that the proposals should be acceptable to Republicans even within their own internal motivational sets—ones that Democrats also share.

Further to that attempt to meet demand 6, President Obama (2009b) constantly reiterated his willingness to "incorporate ideas from Democrats and Republicans" and pledged "to keep on seeking common ground." Democrats and Republicans, he said, actually agreed on "about 80 percent" of the contents of the proposed legislation. President Obama (2009b) made that point in his first address to a Joint Session of Congress on Health Care Reform, and he repeated it time and again, stumping for the legislation around the country.

In his letter to congressional leaders summarizing the upshot of the March 2010 "Bipartisan Meeting on Health Care Reform," President Obama (2010a) itemized areas on which all parties agreed:

> One point on which everyone expressed agreement was that the cost of health care is a large and growing problem that, left untended, threatens families, businesses and the solvency of our government itself. . . . We agree on the need to reform our insurance markets. We agree on the idea of allowing small businesses and individuals who lack insurance to join together to increase their purchasing power so they can enjoy greater choices and lower prices. And we agree on the dire need to wring out waste, fraud and abuse and get control of skyrocketing health care costs.

Those, in the president's estimation anyway, were reasons that all actors not only could and should agree to the ACA but were reasons on which

11. In his message to a joint session of Congress on health care, President Obama (2009c) said: "It has now been nearly a century since Theodore Roosevelt first called for health care reform. And ever since, nearly every President and Congress, whether Democrat or Republican, has attempted to meet this challenge in some way."

everyone did actually did agree—thus addressing demand 6 ("shared defensibility").

President Obama engaged not only in such wholesale efforts to recruit support for his health care reforms but also in retail politics, crafting amendments to the legislation designed to win over particular legislators, especially potential defectors within his own party. Those amounted to efforts to satisfy demand 5, by making the legislation "acceptable to you" for enough legislators, one by one. "None of us will get everything we want, and no proposal for reform will be perfect," Obama constantly intoned.[12] Different compromises were necessary to get different people on board. The most notorious was the "cornhusker kickback"—increases in Medicare reimbursements to his home state of Nebraska that Senator Ben Nelson demanded as the price of his Senate vote for the ACA (Monroe 2011: 379–80; Jacobs and Skocpol 2010: 64, 115). Such idiosyncratic reasons for supporting the legislation, different for different individuals, are prime examples of attempts to address demand 5—that the policy is "acceptable to you."

In the end, in 2010 the Democrats pushed the ACA through on reconciliation, a procedural maneuver that circumvented a Senate filibuster. At a "Bipartisan Meeting on Health Care Reform" at Blair House shortly before that, the leading Republican spokesperson, Senator Lamar Alexander (2010), implored the president to "renounce this idea of . . . jamming through, on a . . . partisan vote through a little-used process . . . , your version of the bill." He recalled the late Senator Pat Moynihan's remark that "he couldn't remember a big piece of social legislation that . . . wasn't bipartisan." He implored the president to "start over" and to "work together" with Republicans in crafting new proposals.

That sounded very much like a complaint that the Democrats were not listening to Republicans, that they were treating them as ciphers or stones rather than agents. That is precisely the sort of complaint that is expressed through demand 1: "talk to me."

Of course, in context, that complaint was pretty disingenuous. For a start, it was delivered at an explicitly "bipartisan meeting" convened by the president precisely to elicit views of all parties. More important, that Republican plea for bipartisanship came against the backdrop of their relentlessly partisan "just say 'no'" Republican opposition to everything President Obama proposed—a strategy that the Republican leadership explicitly

12. As the president remarked in opening the March 2009 White House Forum on Health Care (Obama 2009d), which he reiterated, for example, after a meeting with Senate Democrats at the end of that year (Obama 2009a).

adopted to destroy his presidency at a private dinner convened by Newt Gingrich the night of Obama's first inauguration (Draper 2012). But remember: the aim of this article is not to assess the merits of the claims, merely to catalog their forms. However disingenuous the plea may have been, the Republican congressional leadership's plea at that point in the proceedings took the form of demand 1.

Congress eventually enacted the ACA, on a straight party-line vote, in March 2010. The enactment was then promptly contested in the courts. The matter was ultimately resolved by the 2012 Supreme Court decision in *National Federation of Independent Business v. Sebelius*, which upheld the constitutionality of the statute.

That was a complex case. For purposes of the present discussion, I focus on one aspect of it alone—the "individual mandate" written into the ACA, requiring all Americans to purchase health insurance or to pay a penalty if they do not. That provision was crucial to the economic viability of the overall plan, to avoid "adverse selection" (good risks opting not to take out insurance, thus driving up the cost for those who do) and "free riding" (those who are not insured having recourse to emergency treatment, with costs being passed on to the community at large) (Jacobs and Skocpol 2010: 129–31; Mach 2015).

The litigation on that point revolved around the question of whether Congress had the power, under the Constitution, to impose such a penalty. The government's brief claimed it did under two provisions in article I, section 8, of the US Constitution: the Commerce Clause and the taxing power. The Supreme Court held that, while the individual mandate did not fall under the terms of the Commerce Clause, it did fall within Congress's taxing power, and the ACA's individual mandate was upheld on those grounds (Roberts 2012).

Two strikingly different modes of reason-giving were involved in that decision, which arose because there was already in the statute books an Anti-Injunction Act dictating that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person" (Roberts 2012: 542). Thus, if the individual mandate was deemed to be a tax, that act would preclude the Court entertaining the case at all until after the tax had actually first been paid. Chief Justice Roberts, writing the opinion of the Court, held that the individual mandate was a tax for purposes of the taxing power but that it was not a tax for purposes of the Anti-Injunction Act. His reasoning invokes precisely the distinction between demands 3 and 4.

In holding that the individual mandate was not a tax for purposes of the Anti-Injunction Act, Chief Justice Roberts made much of the fact of Congress's avowed intentions (response to demand 3). The Democrats who crafted the bill took pains to structure the individual mandate as a "penalty" rather than a "tax" and thus to deny, on the stump, that it was a tax.[13] And, since the Anti-Injunction Act was after all an act of Congress, Congress's own judgment as to whether or not it was a tax should be taken as determinative, the chief justice ruled.[14] In terms of the distinctions developed above, the chief justice ruled that, in interpreting an act of Congress, the focus should be demand 3—Congress's own real reasons for doing as it did.

But, the chief justice ruled, things must be different when interpreting the Constitution itself rather than a mere act of Congress. Congress does not get to decide what the Constitution means—that is the responsibility of the courts.[15] So, it was for the Court to decide whether the individual mandate could legitimately be construed as an exercise of Congress's taxing power—regardless of what Congress may have said on the matter. And on that issue, the chief justice ruled that the individual mandate was indeed a tax, within the scope of the taxing power conferred on Congress by the Constitution.[16] In terms of the distinctions developed above, the

13. Which was the central criticism of the Tea Party (n.d.) movement.

14. "The Anti-Injunction Act and the Affordable Care Act, however, are creatures of Congress's own creation. How they relate to each other is up to Congress, and the best evidence of Congress's intent is the statutory text. . . . Congress . . . chose to describe the 'shared responsibility payment' imposed on those who forgo health insurance not as a 'tax,' but as a 'penalty.' Congress's decision to label this exaction a 'penalty' rather than a 'tax' is significant because the Affordable Care Act describes many other exactions it creates as 'taxes.' Where Congress uses certain language in one part of a statute and different language in another, it is generally presumed that Congress acts intentionally" (Roberts 2012: 544, 543).

15. "It is of course true that the Act describes the payment as a 'penalty,' not a 'tax.' But while that label is fatal to the application of the Anti-Injunction Act . . . , it does not determine whether the payment may be viewed as an exercise of Congress's taxing power. It is up to Congress whether to apply the Anti-Injunction Act to any particular statute, so it makes sense to be guided by Congress's choice of label on that question. That choice does not, however, control whether an exaction is within Congress's constitutional power to tax" (Roberts 2012: 564).

16. "Under the mandate, if an individual does not maintain health insurance, the only consequence is that he must make an additional payment to the IRS when he pays his taxes. . . . Under that theory [urged on the court by the Government], the mandate is not a legal command to buy insurance. Rather, it makes going without insurance just another thing that the Government taxes, like buying gasoline or earning income. And if the mandate is in effect just a tax hike on certain taxpayers who do not have health insurance, it may be within Congress's constitutional power to tax.

The question is not whether that is the most natural interpretation of the mandate, but only whether it is a 'fairly possible' one. . . . As we have explained, 'every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.' . . . The Government asks us to interpret the mandate as imposing a tax, if it would otherwise violate the Constitution. Granting the Act the full measure of deference owed to federal statutes, it can be so read" (Roberts 2012: 562–63, cf. 575).

chief justice ruled that, in interpreting the Constitution, the focus should be on whether there was a good reason, within the Constitution, for allowing the Congress to legislate as it had done. That, in terms of the taxonomy above, would be a response to demand 4.

The dissenting justices were apoplectic. "We cannot rewrite the statute to be what it is not," Justice Scalia and his codissenters fumed (Scalia et al. 2012: 662). But as Chief Justice Roberts (2012: 570) replied, "The joint dissenters argue that we cannot uphold [the individual mandate] as a tax because Congress did not 'frame' it as such. . . . In effect, they contend that even if the Constitution permits Congress to do exactly what we interpret this statute to do, the law must be struck down because Congress used the wrong labels." To say that is simply to mistake responses to demand 3 ("what was Congress's own actual reason?") for responses to demand 4 ("is a good reason for it within the terms of the Constitution?").[17]

Having lost their judicial challenge, opponents of the 2010 health care reforms shifted their strategy to legislative repeal. Republicans campaigned heavily on that issue in the 2010 midterm congressional elections, inflicting losses on the Democrats so severe that President Obama described them as a "shellacking" (Obama 2010b). Throughout subsequent electoral cycles, the promise to "repeal and replace Obamacare" became a dominant Republican mantra. They made some fifty attempts at undermining or repealing the ACA until finally, after winning both houses of the Congress in the 2014 midterm elections, Republicans passed a bill repealing it in 2015—only to see it vetoed by President Obama (2016).

When in 2016 the Republicans won the presidency as well, the stage was set for a full-bore effort to repeal the ACA. Within hours of taking office, President Trump (2017a) signed his very first executive order aimed at "Minimizing the Economic Burden of the Patient Protection and Affordable Care Act Pending Repeal."

Congress set promptly to work to do just that. This time hyperpartisanship was even worse. The Republican leadership, even more than the Democrats about which Senate Majority Leader McConnell had previously complained, set about "working behind the scenes on a plan aimed at jamming this . . . bill through Congress" through the same budget reconciliation

17. Or to wrongly privilege demand 3 over demand 4. Congress cannot get power to do something it would not otherwise have power under the Constitution to do, just by calling it a "tax," nor can Congress lose power to do something it would have power to do under the Constitution just by failing to call it a "tax." As an earlier Supreme Court had held, the "question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise" (*Woods v. Cloyd W. Miller Co.*, 333 U.S. [1948], quoted by Roberts 2012: 570–71).

process (quoted in Kessler 2017). The 2017 legislation not only was drafted in secret by a small group of Republican lawmakers but also bypassed committee stages altogether, thus restricting opportunities for the formal demanding or giving of reasons.[18]

A repeal bill passed the House narrowly but finally failed in the Senate when three Republicans defected and voted against even the "skinny repeal." Among the three defectors, much the most interesting—both politically and for purposes of the present discussion—was Senator John McCain. Explaining his vote, Senator McCain (2017b) reiterated remarks on the "need for bipartisanship" that he had delivered upon returning to the Senate from cancer treatment three days earlier. He again bemoaned the Republican leadership's

> coming up with a proposal behind closed doors . . . , then springing it on skeptical members. . . . The Obama administration and congressional Democrats shouldn't have forced through Congress without any opposition support a social and political change as massive as Obamacare. And we shouldn't do the same with ours. . . . Let the . . . Committee . . . hold hearings, try to report a bill out . . . with contributions from both sides. Then bring it to the floor for amendment and debate, and see if we can pass something that will be imperfect, full of compromises, and not very pleasing to implacable partisans on either side, but that might provide workable solutions to problems Americans are struggling with today. What have we to lose by trying to work together to find those solutions? (McCain 2017a)

What finally sounded the death knell for the attempt at repealing Obamacare was, therefore, Senator McCain's lodging demand 1 ("talk to me") on behalf of his colleagues across the aisle.

Eventually, the Republicans managed to repeal a crucial component of Obamacare—the individual mandate already discussed—as part of the tax reform legislation passed in December 2017. In a cabinet meeting the next day, President Trump (2017b) boasted of the very failure of reason-giving about which Senator McCain had complained. Trump explained:

> We didn't want to bring it up. I told people specifically, be quiet with the fake news media because I don't want them talking too much about it because I didn't know how people [would react]. . . . But now that it's approved I can say . . . in this bill, not only do we have massive tax cuts

18. The excuse offered by Senate Majority Leader McConnell was, "There have been gazillions of hearings on this subject. . . . We understand this issue pretty well" (quoted in Kessler 2017).

> and tax reform, we have essentially repealed Obamacare. . . . When the individual mandate is . . . repealed, that means Obamacare is being repealed because they get their money from the individual mandate.

Conclusion

What larger patterns in practices of reason-giving might be adduced from all of these examples? One is this: what sorts of reasons we deem it appropriate to demand that people give to one another depend on whether we approach the problem from the perspective of "political moralists" or "political realists." The former look for the normatively best way of proceeding; the latter look for the pragmatically most expeditious. Political moralists, accordingly, suppose that the gold standard of reason-giving would consist in appeals to objectively good reasons (demand 4) that we all should accept (demand 7). Political realists, however, are acutely aware that people do not always accept reasons that objectively they should. When they do not, political realists would content themselves with appealing to reasons that people do actually accept (Thompson 1987: 113–14)—ideally the same reasons for all (demand 6) but differing from one person to the next if necessary (demand 5).

A second larger pattern is this. Modes of reason-giving vary depending upon whether one is engaged in "high politics" or "low politics." Low politics is characterized by accusations of arbitrariness (demand 2) and impugning the motives of others (demand 3). High politics consists in the insistence that we respectfully engage with one another in the exchange and weighing of reasons (demand 1).[19] Practitioners of high politics seek out solutions on which everyone could agree (demand 5), ideally for the same reasons (demand 6) and ideally objectively good reasons (demands 4, 7). In its most heroic form, high politics might even involve a commitment to abjure forcing a matter to a decision unless all can agree. "Trimmers" of old used to behave in that way, or anyway think they should (Sunstein 2009; Lepora 2012: 9–10). Even if those days have long passed, high politics of at least Senator McCain's variety still has its proponents—as well as many opponents, such as President Trump.

Invariably, many different kinds of actors are involved in making and applying laws and policies. Their differing roles and responsibilities and

19. As in President Lyndon Johnson's favorite Biblical verse, "Come now, and let us reason together" (Isaiah 1: 18). He did not quote, but his actions often implied, the following verse: "But if ye refuse and rebel, ye shall be devoured with the sword" (Isaiah 1: 20).

the differing contexts in which they exercise them make certain sorts of reason-giving more incumbent upon some actors than others.[20] Thus, the US Supreme Court seeks different sorts of reasons when examining administrative actions or interpreting statutes it than when interpreting the Constitution (demands 3 and 4). Politicians, lobbyists, journalists, or scholars advocating a policy perfectly appropriately offer reasons why the policy should be adopted (demands 4 and 7) and why even those with differing viewpoints have reasons of their own to agree (demands 5 and 6). It would be less appropriate for those who are supposed to be apolitical administrators to offer the former sorts of reasons calling for others to change their reasons and values, as opposed relying on the latter sorts that respond purely to the their existing ones.

In any system of responsible government, however, it would be an abdication of responsibilities on the part of both politicians and administrators to refuse to give reasons for their actions at all (failing to meet my demand 1) or to fob people off with vague reassurances that "there is a good reason" without telling them what it is (demand 2). Accounting for one's actions with far more robust reason-giving than that is the very essence of responsible government.

■ ■ ■

Robert E. Goodin is Distinguished Professor of Philosophy at the Australian National University. During 2009–10 he was a senior research fellow in the Department of Bioethics at the National Institutes of Health, Bethesda, Maryland. His research focuses on the intersection of political theory and public policy. Recent books include *On Complicity and Compromise* with Chiara Lepora (2013) and *An Epistemic Theory of Democracy* with Kai Spiekermann (2018).
bob.goodin@anu.edu.au

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20. My discussion here is meant purely to describe what those responsibilities actually require: it describes norms that are socially, politically, and legally in place rather than advocating them necessarily.

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