

## Administrative Change

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### ABSTRACT

For nearly three decades, the U.S. Supreme Court has struggled with the proper treatment of administrative action that departs from agency precedent. Moving toward a stronger theoretical account of administrative change requires exploring an underappreciated feature of all administrative action: the agency's chosen mode of reasoning. Agencies sometimes execute their regulatory mandates by weighing evidence, utilizing technical expertise, and making value judgments in a process reflecting what we refer to as prescriptive reasoning. At other times, agencies employ a more expository form of reasoning grounded in analysis of congressional intent or the constraints imposed by relevant judicial opinions. While prescriptive reasoning yields conclusions about optimal and responsive policy, expository reasoning exhibits a driving concern with what the law is. That distinction, combined with modern administrative agencies' powers to render official pronouncements about the meaning of legal texts, activates fundamental rule-of-law interests that should limit an agency's discretion to deviate from precedent by invoking expository arguments—in other words, by declaring that a legal pronouncement which meant X yesterday means Y today. This Article proposes a new theory and doctrine of administrative change that affords substantial deference where change is driven by prescriptive reasoning, but requires *de novo* scrutiny of reversals grounded in expository reasoning. The proposal strikes an appropriate balance between the need for agency flexibility and the paramount importance of a stalwart, vibrant rule of law.

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For helpful questions and comments, both authors thank Benjamin Beaton, Rev. Bill Dailey, Oona Hathaway, Hon. Raymond Kethledge, Elizabeth Magill, John Manning, Scott Martin, Tom Miles, Trevor Morrison, Kevin Stack, Matthew Stephenson, and Amanda Tyler. Special thanks to A.J. Bellia for including this Article at the inaugural Notre Dame Conference on the Separation of Powers.

## TABLE OF CONTENTS

INTRODUCTION .....	114
I. MECHANISMS AND REVIEW OF ADMINISTRATIVE CHANGE .....	116
A. Agency Action and Agency Change .....	116
B. Principles of Judicial Review .....	118
C. The Agency's Place in the Constitutional Structure .....	120
II. ADMINISTRATIVE CHANGE AND THE SUPREME COURT .....	123
A. Modest Beginnings: <i>State Farm</i> and <i>Chevron</i> .....	123
B. The Road to <i>FCC v. Fox</i> .....	125
C. <i>FCC v. Fox</i> as Doctrinal Boiling Point .....	129
D. The Enduring Puzzle of Administrative Change .....	132
III. TOWARD A THEORY OF ADMINISTRATIVE CHANGE .....	135
A. Agencies and Precedent .....	135
1. Precedent in Judicial Decisionmaking .....	135
2. Precedent in the Administrative State .....	137
a. Findings of Fact .....	138
b. Reliance Interests .....	139
B. Modes of Reasoning and Change Over Time .....	141
1. Prescriptive Reasoning and Expository Reasoning .....	141
2. Prescriptive Change and Expository Change .....	146
a. Prescriptive Change .....	146
b. Expository Change .....	148
3. Expository Reasoning and the Costs of Change .....	155
IV. REVIEWING ADMINISTRATIVE CHANGE .....	159
A. General Approach .....	160
1. Prescriptive Change .....	160
2. Expository Change .....	161
B. Complexities in Practice .....	162
1. Crossover Justifications .....	162
2. Mixed Justifications .....	163
3. Dynamic Effects .....	165
CONCLUSION: <i>FOX REDUX</i> .....	167

## INTRODUCTION

Calibrating the standard of review for administrative action has captured the judicial and scholarly imagination like few other topics in modern law. The attention seems simple enough to explain. With their wide-ranging authority to interpret statutes, promulgate regulations, and adjudicate disputes, administrative agencies pose a challenge to conventional understandings of the separation of powers. At the same time, agencies wield immense influence in shaping the conduct of individuals and organizations.

Notwithstanding the extensive debates over the scope of judicial review, far less consideration has been given to the unique features of agencies' deviations from their own precedents. Like all decisionmakers, agencies operate against the backdrop of their previous rulings. Some of those rulings may have been issued when the agency was staffed with personnel different, in both identity and worldview, from those who currently populate it. But even as personnel turn over, the agency's prior positions remain relevant. The question becomes how best to think about administrative deviations from precedent. Should they be viewed within the same framework as agency action that is consistent with precedent? Or is there something unique about administrative change that warrants a modified approach?

Over the past three decades, the U.S. Supreme Court has struggled to find an answer. At some points, it has treated the fact of administrative change as an important consideration in evaluating the legality of agency action. At other times, it has described change as essentially irrelevant. Only in 2009 did administrative change finally take center stage, sparking a fascinating debate that divided the Court and underscored the profound uncertainty that surrounds the issue.

In this Article we examine the puzzle of administrative change. By change, we mean "a reversal of the agency's former views as to the proper course."<sup>1</sup> We trace the lineage of administrative change in the Supreme Court and analyze features that distinguish agency reversals from other administrative actions. In particular, we contend that because modern agencies possess authority to make official pronouncements about the intrinsic meaning of legal texts, their changes of direction can carry significant consequences for the rule of law.

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1. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41 (1983).

This claim highlights an underappreciated feature of agency action: the agency's chosen mode of reasoning. An agency that exercises its discretion to implement a legislative directive by weighing evidence, utilizing technical expertise, and making policy choices engages in what we describe as prescriptive reasoning. In the context of administrative change, the critical feature of prescriptive reasoning is that it is relatively unlikely to create material rule-of-law costs when an agency reverses course. Because the agency's prior rationale was predicated upon policy judgments, it is neither surprising nor destabilizing for new agency personnel with their own worldviews to revise agency policy—provided that the agency acknowledges its shift, considers the implicated reliance interests, and respects the procedural and substantive requirements applicable to all forms of agency action.

Prescriptive reasoning accounts for only part of what administrative agencies do. Sometimes the operative mode of reasoning looks much different: It is driven by the agency's determination of what Congress actually intended with respect to a particular issue or what the relevant judicial precedents dictate the proper answer to be. An agency engaging in this expository form of reasoning is not simply applying its technical expertise and issuing policy judgments. It is making a statement about what the law *is*. That consideration activates fundamental rule-of-law interests that should limit the agency's discretion to announce that the same document means X today, Y tomorrow, and Z the day after.

When an agency embraces novel expository arguments despite a static legal backdrop,<sup>2</sup> a reviewing court should afford less deference than it would give in cases of policy-based, prescriptive change. We suggest that the best approach to expository change is no deference at all, meaning *de novo* review. A doctrine of administrative change that preserves substantial deference for prescriptive reasoning but requires vigorous scrutiny of expository reasoning strikes an appropriate balance between the need for agency flexibility and the paramount importance of a stable rule of law.

We begin in Part I by surveying the basic mechanisms through which agency change can occur. We then highlight the enduring puzzle of administrative change by analyzing the Supreme Court's vacillating treatment of the issue. After drawing out the conceptual tension that has emerged from the Court's decisions, we proceed to offer our own theoretical and doctrinal framework for thinking about administrative change.

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2. For a discussion of situations in which the legal backdrop actually has changed, see *infra* Part III.B.3.

## I. MECHANISMS AND REVIEW OF ADMINISTRATIVE CHANGE

### A. Agency Action and Agency Change

The most powerful vehicles of administrative action, as well as administrative change, are legislative rulemaking and formal adjudication.

Legislative rules—which include administrative regulations—usually are general, forward-looking statements of “law or policy” that an agency issues in the course of executing a regulatory regime.<sup>3</sup> For example, when the Environmental Protection Agency (EPA) was charged with ensuring that new or modified “stationary sources” of pollution satisfied stringent emissions standards, the agency issued a statute-like regulation describing the “stationary sources” subject to the requirements.<sup>4</sup> Generally, agencies can issue legislative rules only after giving the public an opportunity to comment.<sup>5</sup> An agency with authority to issue these regulations acts as a delegate of Congress, and a lawfully enacted legislative rule binds the public, the courts, and the agency itself with the force of a statute.

Legislative rules serve as instruments of administrative change in three notable contexts. First, an agency may use a legislative rule to revise or repeal an existing regulation.<sup>6</sup> Second, an agency that previously administered a statutory regime through case-by-case adjudication or nonbinding guidance may issue a legislative rule that not only standardizes agency procedure, but also adopts a substantively different approach.<sup>7</sup> Third, an agency may issue a legislative rule in an area in which it once believed it could not or should not regulate.<sup>8</sup>

Agencies also have substantial discretion to expound and revise their regulatory regimes through case-by-case adjudication.<sup>9</sup> A number of agencies,

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3. 5 U.S.C. § 551(4) (2006).

4. *See* *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 840–41 (1984); 40 C.F.R. § 51.18(j)(1)(i)–(ii) (1983).

5. 5 U.S.C. §§ 553(c), 554(c), 556–57.

6. *See, e.g., Chevron*, 467 U.S. at 858–59 (“These conclusions [rejecting the prior rule] were expressed in a proposed rulemaking in August 1981 that was formally promulgated in October.”); *State Farm*, 463 U.S. at 38 (“After receiving written comments and holding public hearings, NHTSA issued a final rule that rescinded the passive restraint requirement contained in [the prior rule].”).

7. *See, e.g., Heckler v. Campbell*, 461 U.S. 458 (1983).

8. *See, e.g., FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

9. *See* *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 293–94 (1974); *SEC v. Chenery Corp.*, 318 U.S. 80, 84–86 (1943). *See generally* M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383 (2004); John F. Manning, *Nonlegislative Rules*, 72 GEO. WASH. L.

such as the National Labor Relations Board and U.S. Immigration and Customs Enforcement, are well known for this practice.<sup>10</sup>

Finally, an agency may choose less formal instruments of administrative action known collectively as nonlegislative rules.<sup>11</sup> The Administrative Procedure Act (APA) divides these rules into two classes: “interpretative rules” and “general statements of policy.”<sup>12</sup> An interpretative rule “merely spell[s] out or explain[s] positive legal substance that was already inherent” in the statute or regulation, whereas a policy statement “creates a new [agency] position,” albeit in nonbinding form.<sup>13</sup> While interpretative rules do not purport to “make positive law,” they add to the regulatory regime by “suppl[ying] crisper and more detailed lines than the authority being interpreted.”<sup>14</sup> Thus, even an interpretative rule may resolve an ambiguity and thereby create “a change in the legal norm” at issue.<sup>15</sup> And though interpretative rules and policy statements are more open to revision and receive less deference from courts than do regulations and adjudications, parties often treat them as authoritative in order to avoid conflict with regulators.<sup>16</sup> By deploying these nonlegislative devices, agencies can affect the behavior of regulators and the regulated alike.<sup>17</sup>

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REV. 893 (2004) (exploring limits on judges’ ability to require agencies to make policy through rules).

10. See, e.g., *INS v. Cardoza-Fonseca*, 480 U.S. 421, 423 (1987); *Bell Aerospace*, 416 U.S. at 295.
11. See generally Manning, *supra* note 9.
12. See 5 U.S.C. § 553(b) (2006); *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 587–88 (D.C. Cir. 1997) (discussing the difference between interpretative rules and legislative rules); *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1109 (D.C. Cir. 1993); Robert A. Anthony, *A Taxonomy of Federal Agency Rules*, 52 ADMIN. L. REV. 1045, 1046 (2000) (distinguishing nonlegislative rules from legislative rules); William Funk, *A Primer on Nonlegislative Rules*, 53 ADMIN. L. REV. 1321 (2001) (cataloguing types and features of nonlegislative rules).
13. Anthony, *supra* note 12, at 1046–47; see also *Syncor Int’l Corp. v. Shalala*, 127 F.3d 90, 94 (D.C. Cir. 1997) (“The legal norm is one that Congress has devised; the agency does not purport to modify that norm, in other words, to engage in lawmaking.”).
14. *Syncor*, 127 F.3d at 94; *Am. Mining Cong.*, 995 F.2d at 1112. Interpretative rules are understood as unpacking preexisting meaning from texts. See, e.g., *Syncor*, 127 F.3d at 94 (“[T]he distinction between an interpretative rule and substantive rule . . . likely turns on how tightly the agency’s interpretation is drawn linguistically from the actual language of the statute.” (internal quotation marks omitted)).
15. *Syncor*, 127 F.3d at 94.
16. See generally Randolph J. May, *Ruling Without Rules—Or How to Influence Private Conduct Without Really Binding*, 53 ADMIN. L. REV. 1303 (2001).
17. Similarly, an agency can implement—and change—policy through orders in so-called “informal adjudications,” which often lack the procedural trappings of formal adjudications. See 5 U.S.C. § 554(a) (defining informal adjudications as those not “required by statute to be determined on the record after opportunity for an agency hearing”).

## B. Principles of Judicial Review

Synthesizing the modern approach to administrative change is a complicated task we undertake in Parts II and III below. Before doing so, it will be helpful to sketch the baseline principles of judicial review that govern administrative action whenever it occurs.

Agencies spend a great deal of time responding to statutory directives from Congress. The proper standards for evaluating agencies' interpretations of statutes are byzantine,<sup>18</sup> but there are a few broad generalizations that offer rough guidance. Some agency interpretations qualify for substantial judicial deference under the two-step process set forth in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*<sup>19</sup> Under *Chevron*, a court will use ordinary tools of statutory construction to determine whether Congress has spoken clearly on the question presented. If it has, the meaning recognized by the court governs, irrespective of the agency's proffered interpretation. If, however, the statute is silent or ambiguous on the question, the court will defer to any agency interpretation that is reasonable, even if the court might have arrived at a different interpretation through de novo review.<sup>20</sup>

The *Chevron* Court embraced the proposition that when Congress delegates lawmaking authority to an agency, judges should be reluctant to interfere.<sup>21</sup> Of course, congressional delegation may be explicit.<sup>22</sup> But *Chevron's* extensive impact comes from its teaching that ambiguities—just like explicit delegations—should also be viewed as invitations for agencies to exercise their discretion, based on a background assumption about Congress's intent in leaving statutory gaps.<sup>23</sup>

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18. For bleaker depictions, see, for example, Lisa Schultz Bressman, *How Mead Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443 (2005); Adrian Vermeule, *Introduction: Mead in the Trenches*, 71 GEO. WASH. L. REV. 347 (2003).

19. 467 U.S. 837 (1984).

20. *Id.* at 842–43.

21. *Id.* at 843–44; see also Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 YALE J. ON REG. 1 (1990) (arguing that *Chevron's* justification and scope are grounded in congressional delegation of authority to agencies); Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833 (2001) (same).

22. See, e.g., *Chevron*, 467 U.S. at 846.

23. See, e.g., *Smiley v. Citibank (S.D.)*, N.A., 517 U.S. 735, 740–41 (1996); *Chevron*, 467 U.S. at 843; Jeffrey A. Pojanowski, *Reason and Reasonableness in Review of Agency Decisions*, 104 NW. U. L. REV. 799 (2010) (analyzing *Chevron's* assumptions about legal interpretation); Laurence H. Silberman, *Chevron—The Intersection of Law and Policy*, 58 GEO. WASH. L. REV. 821, 823 (1990) (same); Cass R. Sunstein, *Beyond Marbury: The Executive's Power to Say What the Law Is*, 115 YALE L.J. 2580 (2006) (same).

Underlying this assumption about congressional intent are two signature features that distinguish administrative agencies from courts. First, as a technical matter, an agency's topical expertise and ability to engage with the factual record make it better equipped for the task of delegated lawmaking.<sup>24</sup> Second, an agency's democratic pedigree and political responsiveness lend it legitimacy as a policymaker<sup>25</sup> capable of "resolving the struggle between competing views of the public interest."<sup>26</sup> The lever of political accountability stands agencies in stark opposition to federal courts, which "have no constituency."<sup>27</sup>

The scope of judicial review also depends in part on the process an agency uses to interpret a statute. Agency interpretations issued via legislative rules and formal adjudications presumptively qualify for *Chevron's* reasonableness review.<sup>28</sup> By contrast, interpretations announced in nonlegislative rules, policy statements, and informal adjudications presumptively receive a weaker brand of deference,<sup>29</sup> as determined by the multifactor test set forth in *Skidmore v. Swift & Co.*<sup>30</sup> In reviewing this latter category of interpretations, the Supreme Court historically has considered the persuasiveness of the agency's rationale in light of criteria including the thoroughness of its investigation, the validity of its reasoning, and—most relevant to the study of administrative change—the consistency of the interpretation over time.<sup>31</sup>

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24. See *Chevron*, 467 U.S. at 865; see also Ronald J. Krotoszynski, Jr., *Why Deference?: Implied Delegations, Agency Expertise, and the Misplaced Legacy of Skidmore*, 54 ADMIN. L. REV. 735 (2002) (arguing that expertise is the superior justification for deference).

25. See *Chevron*, 467 U.S. at 865; see also, e.g., Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2373 (2001) ("As first conceived, the *Chevron* deference rule had its deepest roots in a conception of agencies as instruments of the President, entitled to make policy choices, within the gaps left by Congress, by virtue of his relationship to the public.").

26. *Chevron*, 467 U.S. at 866.

27. *Id.* The interplay of the accountability rationale and the expertise rationale can sometimes generate interesting tensions. See Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 SUP. CT. REV. 51 (arguing that the Supreme Court is increasingly worried about the politicization of administrative expertise); Pojanowski, *supra* note 23, at 842–46 (discussing courts' hesitance to defer to agency interpretations of common law and constitutional questions, as well as jurisdictional, "major," and "pure" questions of statutory interpretation).

28. See, e.g., *United States v. Mead Corp.*, 533 U.S. 218 (2001).

29. See *id.* at 229–31, 234; *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000).

30. 323 U.S. 134 (1944); see also *Mead*, 533 U.S. at 234–35. One exception is an agency's interpretation of its own regulations. Such nonlegislative interpretative rules may receive a form of deference similar to *Chevron* review. See *Auer v. Robbins*, 519 U.S. 452 (1997); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945).

31. *Skidmore*, 323 U.S. at 140. For a recent reaffirmation of this principle, see *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1335 (2011) (highlighting the consistency over time of an agency's views).

Finally, in addition to the specialized doctrines governing agencies' statutory constructions, the APA requires courts to set aside any agency action, finding, or conclusion that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."<sup>32</sup> A court applying arbitrary-and-capricious review will not "substitute its judgment for that of the agency," but it will look to the record for indications that the agency considered the relevant evidence and arguments before making its decision.<sup>33</sup>

### C. The Agency's Place in the Constitutional Structure

The principles of judicial review set forth in the previous section are fairly simple to recite, but their application is another matter. The complexity stems in large part from the extensive yet uncertain domain of modern administrative agencies. It is possible to imagine an administrative state that poses few problems for the conventional concept of American separation of powers. Under this model, an agency issues fines and grants licenses according to Congress's detailed instructions, and aggrieved parties contest decisions in court on equal footing with the agency, either through an original proceeding or de novo review. While agencies exercise some policymaking discretion through their enforcement powers, Congress retains primary responsibility for sweeping changes in the law's direction, and courts serve as exclusive arbiters of the law's meaning.

That world—in which separation-of-powers concerns are relatively minor given the agencies' limited lawmaking and interpretive authority<sup>34</sup>—is not our own, nor has it been since at least the New Deal.<sup>35</sup> In the modern era, "the amorphous character of the administrative agency in the constitutional system

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32. 5 U.S.C. § 706(2)(A) (2006).

33. See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *Greater Bos. Television Corp. v. FCC*, 444 F.2d 841, 850 (D.C. Cir. 1970).

34. Cf. Matthew Lewans, *Rethinking the Diceyan Dialectic*, 58 U. TORONTO L.J. 75, 90 (2008) (stating that, under the approach of English separation-of-powers theorist A.V. Dicey, "the administrative institution would not possess any measure of legal authority under the constitution, because its actions would be determined by another branch of government").

35. See Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1192 (1986) (describing the "policing model" of regulation prominent before the New Deal).

escapes simple explanation.”<sup>36</sup> For better<sup>37</sup> or for worse,<sup>38</sup> the modern agency possesses substantial legislative and interpretive powers, and the resulting duality often rankles a legal system that nevertheless legitimizes it. Some judges may think this “fourth branch of the Government . . . has deranged our three-branch legal theories much as the concept of a fourth dimension unsettles our three-dimensional thinking,”<sup>39</sup> and members of Congress have occasionally attempted to rein in agencies’ authority.<sup>40</sup> But in general, the rival branches have adopted a strategy of coping with, and even encouraging, the expansion of the administrative state.<sup>41</sup>

Practical accommodations aside, a well of disquiet remains. The tension is apparent in the prolific debates over judicial review of agencies’ constructions of statutes.<sup>42</sup> As noted above, one leading justification for substantial deference presumes that interpretation of unclear legal texts is essentially a legislative act, or at least is often intertwined with value judgments. On that view, statutory ambiguities should be understood as delegations of lawmaking power to agencies, which exceed courts in both policymaking competence and political

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36. *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1823 (2009) (Kennedy, J., concurring in part and concurring in the judgment); cf. Alan B. Morrison, *Administrative Agencies Are Just Like Legislatures and Courts—Except When They’re Not*, 59 ADMIN. L. REV. 79, 80 (2007) (describing the article’s title as containing the “twelve magic words that may help unlock the mystery of administrative law”).
  37. See generally JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* (1938); see also Cass R. Sunstein, *Is Tobacco a Drug? Administrative Agencies as Common Law Courts*, 47 DUKE L.J. 1013, 1019 (1998) (“[A]gencies have become modern America’s common law courts, and properly so . . . [A]gencies have, as they should, considerable power to adapt statutory language to changing understandings and circumstances.”).
  38. See Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1241 (1994) (criticizing “the demise of the nondelegation doctrine, which allows the national government’s now-general legislative powers to be exercised by administrative agencies”).
  39. *FTC v. Ruberoid Co.*, 343 U.S. 470, 487 (1952) (Jackson, J., dissenting in part).
  40. See, e.g., S. 1080, 97th Cong., 2d Sess. (as amended), 128 CONG. REC. S2717 (daily ed. Mar. 24, 1982) (proposing the so-called “Bumpers Amendment” amending the Administrative Procedure Act to ensure that courts “independently decide all relevant questions of law”).
  41. See, e.g., *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457 (2001) (reversing a lower court decision that a portion of the Clean Air Act violates the nondelegation doctrine); Davis Polk, *Client Memorandum: Summary of the Dodd-Frank Wall Street Reform and Consumer Protection Act*, at ii (July 21, 2010), available at [http://www.davispolk.com/files/Publication/7084f9fe-6580-413b-b870-b7c025ed2ecf/Presentation/PublicationAttachment/1d4495c7-0be0-4e9a-ba77-f786fb90464a/070910\\_Financial\\_Reform\\_Summary.pdf](http://www.davispolk.com/files/Publication/7084f9fe-6580-413b-b870-b7c025ed2ecf/Presentation/PublicationAttachment/1d4495c7-0be0-4e9a-ba77-f786fb90464a/070910_Financial_Reform_Summary.pdf) (tallying the financial reform statute’s authorization of eleven different agencies to undertake 243 rulemakings, 67 studies, and 22 periodic reports).
  42. See *supra* Part I.B.

responsiveness.<sup>43</sup> The opposing position champions the principle that it is the task of courts to interpret the law authoritatively and evenhandedly.<sup>44</sup> Too much deference to agencies, the argument goes, abdicates the judicial duty and violates the separation of powers.<sup>45</sup>

A similar concern animates complaints about agencies' discretion to implement policy through case-by-case adjudication rather than legislative rulemaking. Adjudicative policymaking challenges the traditional dichotomy in which legislators promulgate substantive, forward-looking norms and courts apply existing rules and principles. Nevertheless, agencies receive wide leeway to implement policy through adjudication.<sup>46</sup>

The puzzle of administrative change is yet another manifestation of the agency's uncertain place in the constitutional order and its dual mandate to promote effective, politically responsive policy while acting in a way that is "rational, neutral, and in accord with the agency's proper understanding of its authority."<sup>47</sup> In the next Part, we turn to the Supreme Court's efforts to oversee this delicate task.

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43. See *supra* Part I.B; see also *Homemakers N. Shore, Inc. v. Bowen*, 832 F.2d 408, 411 (7th Cir. 1987) ("An ambiguous legal rule does not have a single 'right' meaning; there is a range of possible meanings; the selection from the range is an act of policymaking."); Silberman, *supra* note 23, at 822 ("*Chevron's* rule . . . is simply a sound recognition that a political branch, the executive, has a greater claim to make policy choices than the judiciary. Therefore Congress is presumed to delegate, to the Executive, authority to make those choices within certain bounds."); Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 205–06 (2006) (arguing that *Chevron's* shift from "judge-made law" toward "administrative regulation" was "spurred by dual commitments to specialized competence and democratic accountability—and also by an understanding of the need for frequent shifts in policy over time, with fresh understandings of fact as well as new values").
44. See, e.g., THE FEDERALIST NO. 78 (Alexander Hamilton) ("The interpretation of the laws is the proper and peculiar province of the courts."); cf. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).
45. See, e.g., Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 498 (1989) ("If Congress chooses to delegate regulatory authority to agencies, part of the price of delegation may be that the court, not the agency, must hold the power to say what the statute means."). Deference can also abet tilted legal decisionmaking, as a court privileges the arguments of one of the disputants—the administrative agency—based on its status rather than the strength of its position. Cf. Joseph Vining, *Authority and Responsibility: The Jurisprudence of Deference*, 43 ADMIN. L. REV. 135, 138 (1991) (stating that deference entails that "the court's decision is made not purely on the substance of the issue but in part on the ground that it is the agency that has said this is what [the law] means").
46. See *SEC v. Chenery Corp.*, 318 U.S. 80 (1943).
47. *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1823 (2009) (Kennedy, J., concurring in part and concurring in the judgment); cf. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 19 (1959) ("A principled decision . . . is one that rests on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved.").

## II. ADMINISTRATIVE CHANGE AND THE SUPREME COURT

### A. Modest Beginnings: *State Farm* and *Chevron*

Judicial review of administrative change has long been on the Supreme Court's radar.<sup>48</sup> But to understand the state of the modern doctrine, one need only go back to the early 1980s.

*Motor Vehicle Manufacturers Ass'n of the United States v. State Farm Mutual Automobile Insurance Co.*<sup>49</sup> dealt with the federal government's efforts to alleviate safety risks posed by automobiles. At issue was the Secretary of Transportation's administration of the National Traffic and Motor Vehicle Safety Act of 1966. The lead-up to the case was lengthy and winding; the regulation in question had, "[o]ver the course of approximately 60 rulemaking notices," been "imposed, amended, rescinded, reimposed, and now rescinded again."<sup>50</sup> Nonetheless, the immediate issue in *State Farm* was relatively straightforward. In 1977, a regulation was issued "manda[ting] the phasing in of passive restraints" such as airbags and automatic seatbelts.<sup>51</sup> Four years later, the National Highway Traffic Safety Administration reversed course, beginning a process that led eventually to rescission of the passive-restraint requirement.<sup>52</sup>

The Supreme Court invalidated the agency's reversal. The Court framed its analysis by explaining that an agency "changing its course" must "supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance."<sup>53</sup> While acknowledging that agencies "must be given ample latitude to 'adapt their rules and policies to the demands of changing circumstances,'"<sup>54</sup> the Court instructed that "[i]f Congress established a presumption from which judicial review should start, that presumption . . . [is] *against* changes in current policy that are not justified by the rulemaking record."<sup>55</sup>

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48. See, e.g., *Sec'y of Agric. v. United States*, 347 U.S. 645, 653 (1954) (holding that an agency's reasons for its decision are inadequate when it "has not adequately explained its departure from prior norms"); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (holding that judicial respect for agency action depends upon, inter alia, "consistency with earlier and later pronouncements" by the agency).

49. 463 U.S. 29 (1983).

50. *Id.* at 34.

51. *Id.* at 37.

52. *Id.* at 38.

53. *Id.* at 42.

54. *Id.* (quoting *In re Permian Basin Area Rate Cases*, 390 U.S. 747, 784 (1968)).

55. *Id.*

In a partial dissent, Justice Rehnquist (joined by three others) candidly acknowledged the underlying political realities. “The agency’s changed view,” Justice Rehnquist posited, “seems to be related to the election of a new President of a different political party.”<sup>56</sup> So long as the bounds of rational decisionmaking were respected, that motivation was entirely proper: “A change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency’s reappraisal of the costs and benefits of its programs and regulations.”<sup>57</sup>

The relationship between administrative policy, changed circumstances, and judicial review reemerged the very next year. *Chevron*,<sup>58</sup> as discussed above,<sup>59</sup> is most noted for its teachings on judicial deference to agencies’ interpretation of statutes. But it also carried significant ramifications for the doctrine of administrative change.

Pursuant to the Clean Air Act Amendments of 1977, certain states were required to “establish a permit program regulating ‘new or modified major stationary sources’ of air pollution.”<sup>60</sup> The key question in *Chevron* was whether the term “stationary sources” could refer to an entire plant as opposed to an individual component like a smokestack. If a “stationary source” could refer to a facility as a whole, a plant operator would be allowed to “install or modify one piece of equipment” without triggering the permitting regime (and its stricter emission requirements) as long as it made offsetting modifications elsewhere at the facility.<sup>61</sup> The EPA had issued a regulation allowing states to adopt such an approach.<sup>62</sup>

The Supreme Court upheld the EPA’s regulation as reflecting a “permissible construction of the statute which seeks to accommodate progress in reducing air pollution with economic growth.”<sup>63</sup> The Court rejected the argument that the EPA’s current view was “not entitled to deference because it represents a sharp break with prior interpretations of the Act.”<sup>64</sup> Most

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56. *Id.* at 59 (Rehnquist, J., concurring in part and dissenting in part); *see also id.* (“It is readily apparent that the responsible members of one administration may consider public resistance and uncertainties to be more important than do their counterparts in a previous administration.”).

57. *Id.*

58. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

59. *See supra* Part I.B.

60. *Chevron*, 467 U.S. at 840.

61. *Id.*

62. *Id.*

63. *Id.* at 866.

64. *Id.* at 862.

prominently, in 1980 the EPA had adopted an interpretation that treated an individual component of a plant as a “source” for purposes of activating the permitting regime.<sup>65</sup> It was only after “a new administration took office and initiated a ‘Government-wide reexamination of regulatory burdens and complexities’” that the agency had changed its mind.<sup>66</sup> Explaining its reversal, the EPA noted that the prior approach had “caused confusion” and could “act as a disincentive to new investment and modernization by discouraging modifications to existing facilities.”<sup>67</sup>

The *Chevron* Court dismissed the complaints about administrative inconsistency, responding that “[a]n initial agency interpretation is not instantly carved in stone. On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis.”<sup>68</sup> The EPA sensibly had interpreted the relevant legislation “not in a sterile textual vacuum, but in the context of implementing policy decisions in a technical and complex arena.”<sup>69</sup> At the same time, the Court absolved the EPA of blame for the flip-flop. The real culprit, *Chevron* suggested, was the Court of Appeals for the D.C. Circuit, which had issued two opinions that formed the basis for the EPA’s prior interpretation.<sup>70</sup> In a precursor of the ambiguity to follow, *Chevron* described this point as “[s]ignificant[ ]” but did not indicate whether the result would have been different had the agency been responsible for its own detour.<sup>71</sup>

## B. The Road to *FCC v. Fox*

After *Chevron*, the Supreme Court did not give sustained attention to the question of administrative change until 2009, when it decided *FCC v. Fox Television Stations, Inc.*<sup>72</sup> Though the Court’s engagement in *Fox* was a welcome development, the splintered decision yielded more questions than answers. This ambiguity was nothing new: The Court’s briefer treatments of administrative

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65. *Id.* at 857.

66. *Id.* (quoting 46 Fed. Reg. 16281 (Mar. 12, 1981)).

67. *Id.* at 858 (quoting 46 Fed. Reg. 16281).

68. *Id.* at 863–64.

69. *Id.* at 863.

70. *Id.* at 864.

71. *Id.*

72. 129 S. Ct. 1800 (2009).

change during the twenty-five years between *Chevron* and *Fox* exhibit a meandering approach marked by an abiding lack of clarity.<sup>73</sup>

In *INS v. Cardoza-Fonseca*,<sup>74</sup> for example, the Court rejected the Board of Immigration Appeals's (BIA) construction of a statute governing asylum. The Court's discussion of administrative change and regulatory consistency was limited to a footnote stating that a revised agency interpretation "is 'entitled to considerably less deference' than a consistently held agency view."<sup>75</sup> Given the Court's conclusion that the BIA's interpretation was "inexorably" at odds with the "plain language" and history of the statute,<sup>76</sup> it is unclear how much weight the Court gave this "additional reason"<sup>77</sup> of administrative inconsistency.

Four years later, the Court held in *Rust v. Sullivan*<sup>78</sup> that the Department of Health and Human Services could prohibit abortion-related counseling by entities that received government funding. One issue raised by the prohibition's opponents was that the Department's policy departed from past practice.<sup>79</sup> The Supreme Court was unmoved, referring to its rejection in *Chevron* of "the argument that an agency's interpretation 'is not entitled to deference because it represents a sharp break with prior interpretations' of the statute in question."<sup>80</sup> The Court also invoked *State Farm's* statement that agencies must be permitted to revise their views as circumstances evolve.<sup>81</sup>

Notwithstanding this apparent setback, the doctrine of administrative change reemerged two years later in *Good Samaritan Hospital v. Shalala*.<sup>82</sup> The dispute arose from another statute administered by the Secretary of Health and Human Services, this time involving Medicare. Acknowledging that the Secretary had "embraced a variety of approaches" to the statute over the

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73. Cf., e.g., David H. Becker, *Changing Direction in Administrative Agency Rulemaking: "Reasoned Analysis," the Roadless Rule Repeal, and the 2006 National Park Service Management Policies*, 30 ENVIRONS: ENVTL. L. & POL'Y J. 65, 73 (2006) ("Although *State Farm* is the leading case on agency change of direction in rulemaking, the Court has analyzed regulatory revisions in several other cases without conclusively stating how persuasive an agency's explanation of a change of course must be to survive judicial review."); *id.* at 79 ("Although the *State Farm* reasoned analysis test remains valid, the Court has not provided any clear standard for how adequate an agency's explanation of a change of course must be.").

74. 480 U.S. 421 (1987).

75. *Id.* at 447 n.30 (quoting *Watt v. Alaska*, 451 U.S. 259, 273 (1981)).

76. *Id.* at 449.

77. *Id.* at 447 n.30.

78. 500 U.S. 173 (1991).

79. *Id.* at 186.

80. *Id.* (quoting *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 862 (1984)).

81. *See id.* at 187.

82. 508 U.S. 402 (1993).

years—a fact the Secretary attributed to “erroneous interpretations” in the lower courts followed by a correction at the Supreme Court<sup>83</sup>—*Good Samaritan* echoed cases such as *Chevron* and *Rust* in explaining that the “Secretary is not estopped from changing a view she believes to have been grounded upon a mistaken legal interpretation.”<sup>84</sup> Yet the Court also reaffirmed that “the consistency of an agency’s position is a factor in assessing the weight that position is due.”<sup>85</sup> Evaluating an agency’s revised approach ultimately requires case-specific balancing: “How much weight should be given to the agency’s views in such a situation, and in particular where its shifts might have resulted from intervening and possibly erroneous judicial decisions and its current position from one of its own rulings, will depend on the facts of individual cases.”<sup>86</sup> The Court did not specify how much weight those considerations should receive in the case at hand, but it signaled its conclusion by declaring that “[i]n the circumstances of this case, where the agency’s interpretation of a statute is at least as plausible as competing ones, there is little, if any, reason not to defer to its construction.”<sup>87</sup>

*Smiley v. Citibank (South Dakota), N.A.*,<sup>88</sup> prompted a more definitive, if similarly brief, discussion of agency consistency. There, the Court considered whether the National Bank Act allowed banks to charge late-payment fees to credit card holders when those fees were “lawful in the bank’s home State but prohibited in the States where the cardholders reside.”<sup>89</sup> The Court approved the Comptroller of the Currency’s determination that the fees were permissible. In so holding, it rejected the argument that the Comptroller had broken from prior agency practice.<sup>90</sup> And even if the Comptroller had reversed course, it did not follow that the new approach was necessarily suspect. Justice Scalia’s majority opinion acknowledged that “[s]udden and unexplained change . . . or change that does not take account of legitimate reliance on prior interpretation” may be unlawful.<sup>91</sup> But so long as those “pitfalls are avoided, change is

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83. *See id.* at 416.

84. *Id.* at 417.

85. *Id.*

86. *Id.*

87. *Id.*

88. 517 U.S. 735 (1996).

89. *Id.* at 737.

90. *See id.* at 742.

91. *Id.*

not invalidating, since the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency.”<sup>92</sup>

Despite *Smiley*'s minimization of the importance of administrative change, debate carried over into the next decade. *FDA v. Brown & Williamson Tobacco Corp.*<sup>93</sup> rejected the Food and Drug Administration's assertion of jurisdiction to regulate tobacco products pursuant to the Food, Drug, and Cosmetic Act.<sup>94</sup> The Court's ruling highlighted congressional reliance on the FDA's prior disclaimer of authority, reasoning that “Congress' tobacco-specific statutes have effectively ratified the FDA's long-held position.”<sup>95</sup> Because “Congress has affirmatively acted to address the issue of tobacco and health, relying on the representations of the FDA that it had no authority to regulate tobacco,” the FDA was precluded from changing course and asserting jurisdiction.<sup>96</sup>

In contrast to *Brown & Williamson*, the 2002 case of *Barnhart v. Walton*<sup>97</sup> dealt with an agency that stayed the course. *Barnhart* upheld certain interpretations of the Social Security Act that had been adopted by the Social Security Administration.<sup>98</sup> The Court briefly revisited the relevance of longstanding administrative constructions, noting that the approach under review had a lengthy lineage and that “this Court will normally accord particular deference to an agency interpretation of ‘longstanding’ duration.”<sup>99</sup> Justice Scalia's partial concurrence criticized this statement, calling it “an anachronism—a relic of the pre-*Chevron* days, when there was thought to be only one ‘correct’ interpretation of a statutory text.”<sup>100</sup> Given the Court's acceptance in *Chevron* that “there is a range of permissible interpretations, and that the agency is free to move from one to another,” an interpretation's “antiquity should make no difference.”<sup>101</sup> For Justice Scalia, the question was simply whether the agency's “most recent interpretation is reasonable.”<sup>102</sup>

Justice Scalia's sentiments were echoed by a majority of the Court in 2005, albeit in an opinion he declined to join on other grounds. In *National*

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92. *Id.*

93. 529 U.S. 120 (2000).

94. *Id.* at 126.

95. *Id.* at 144.

96. *Id.* at 156.

97. 535 U.S. 212 (2002).

98. *Id.* at 215.

99. *Id.* at 220 (quoting *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 522 n.12 (1982)).

100. *Id.* at 226 (Scalia, J., concurring in part and concurring in the judgment).

101. *Id.*

102. *Id.*

*Cable & Telecommunications Ass'n v. Brand X Internet Services*,<sup>103</sup> the Court considered the Federal Communications Commission's (FCC) oversight of internet services provided by cable companies. The Court upheld the agency's approach, deeming it a reasonable construction of an ambiguous statute.<sup>104</sup> It did so notwithstanding the arguments of some opponents that the FCC's position represented a break from past practice. Justice Thomas's opinion for the Court harkened back to *Chevron*, as well as to Justice Rehnquist's partial dissent in *State Farm*, for the proposition that agencies must be allowed to reconsider and revise their policies in light of considerations including "changed factual circumstances" and "a change in administration[ ]."<sup>105</sup> With *Brand X*, the relevance of administrative change seemed to have reached its nadir.

### C. *FCC v. Fox* as Doctrinal Boiling Point

The dynamics of administrative change finally commanded the attention of the entire Court in *FCC v. Fox Television Stations, Inc.*<sup>106</sup> The result was both thought provoking and deeply enigmatic. A majority in *Fox* refused to subject an administrative reversal to heightened scrutiny, but a different coalition of five Justices indicated that at least some agency reversals require more rigorous review.

*Fox* dealt with the statutory prohibition against broadcasting "indecent" language.<sup>107</sup> At issue was whether the FCC adequately explained its conclusion that even isolated, nonliteral uses of certain offensive words—so-called "fleeting expletives"—can rise to the level of indecency.<sup>108</sup> Complicating matters was the Commission's prior treatment of fleeting expletives. The Supreme Court's 1978 opinion in *FCC v. Pacifica Foundation*<sup>109</sup> upheld the FCC's decision to treat as indecent a routine by comedian George Carlin that was broadcast over the radio. Drawing on the opinion of the Court as well as Justice Powell's partial concurrence, the Commission originally interpreted

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103. 545 U.S. 967 (2005).

104. *Id.* at 997.

105. *Id.* at 981.

106. 129 S. Ct. 1800 (2009).

107. 18 U.S.C. § 1464 (2006) ("Whoever utters any obscene, indecent, or profane language by means of radio communication . . .").

108. *Fox*, 129 S. Ct. at 1805, 1809.

109. 438 U.S. 726 (1978).

*Pacifica* to mean that (among other things) when offensive words are used in a nonliteral sense, only repeated occurrences violate the statutory ban.<sup>110</sup>

The FCC expressly abandoned this position in 2004,<sup>111</sup> concluding that *Pacifica* “explicitly left open the issue of whether an occasional expletive could be considered indecent.”<sup>112</sup> It also noted that technological advances had given broadcasters enhanced ability to “bleep” even fleeting vulgarities, and that permitting a safe harbor for fleeting expletives “would likely lead to more widespread use of the offensive language.”<sup>113</sup> Its revised position soon gave rise to actions against Fox Television Stations based on offensive language during two broadcasts of the Billboard Music Awards.<sup>114</sup> The Second Circuit Court of Appeals rejected the FCC’s new approach,<sup>115</sup> but the Supreme Court sided with the agency. With the Court split five to four, Justice Scalia’s majority opinion confronted head-on the doctrine of administrative change. The majority stated that there is “no basis in the Administrative Procedure Act or in our opinions for a requirement that all agency change be subjected to more searching review.”<sup>116</sup> To the contrary, the APA “mentions no such heightened standard. And our opinion in *State Farm* neither held nor implied that every agency action representing a policy change must be justified by reasons more substantial than those required to adopt a policy in the first instance.”<sup>117</sup> An agency reversing its position generally need only “display awareness that it *is* changing position” and “show that there are good reasons for the new policy.”<sup>118</sup>

Notwithstanding this unequivocal language, uncertainty remained. Justice Kennedy joined the key parts of the majority opinion, but he wrote separately to suggest that the issue was more nuanced than Justice Scalia let on: “The question whether a change in policy requires an agency to provide a more-reasoned

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110. *Fox*, 129 S. Ct. at 1806; see also *In re Application of WGBH Educ. Found.*, 69 F.C.C.2d 1250, 1254 ¶ 10 (1978).

111. *Fox*, 129 S. Ct. at 1807.

112. *In re Complaints Against Various Broad. Licensees Regarding Their Airing of the “Golden Globe Awards” Programs*, 19 FCC Rcd. 4975, 4982 ¶ 16 (2004).

113. *Id.* at 4979 ¶ 9.

114. *Fox*, 129 S. Ct. at 1808.

115. See *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444 (2d Cir. 2007).

116. *Fox*, 129 S. Ct. at 1810.

117. *Id.*

118. *Id.* at 1811. In her earlier academic work, now-Justice Kagan staked out an approach to administrative change that would seem parallel to that of Justice Scalia and the *Fox* majority. See Kagan, *supra* note 25, at 2378 (“[I]f courts should give increased deference to agency actions linked to the President, then new administrative interpretations following new presidential elections should provide a reason to think deference appropriate rather than the opposite. *Chevron* and *Rust* alike present prototypical examples.”).

explanation than when the original policy was first announced is not susceptible . . . to an answer that applies in all cases.”<sup>119</sup> Justice Breyer’s dissent, joined by three others, went further, contending that “[t]o explain a change requires more than setting forth reasons why the new policy is a good one. It also requires the agency to answer the question, ‘Why did you change?’”<sup>120</sup>

The crux of the Justices’ disagreement in *Fox* is most evident in their respective starting presumptions. The majority began from the premise that an agency wishing to reverse course “need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate.”<sup>121</sup> Only in discrete situations, such as cases involving “serious reliance interests” or “factual findings that contradict those which underlay” the agency’s prior policy, will something more be required.<sup>122</sup>

The dissenters began from the opposite presumption. For them, explaining why the new policy is superior to the old one is generally necessary to justify an agency’s reversal of course. “After all,” Justice Breyer asked, “if it is *always* legally sufficient for the agency to reply to the question ‘why change?’ with the answer ‘we prefer the new policy’ . . . then why bother asking the agency to focus on the fact of change?”<sup>123</sup> Accepting that sort of explanation would be tantamount to granting “agencies the freedom to change major policies on the basis of nothing more than political considerations or even personal whim.”<sup>124</sup> It is only in a limited set of situations—like Justice Scalia, Justice Breyer relied on the word “sometimes” to describe the universe of exceptions to his rule—that an agency should be permitted to justify its new policy merely by saying “[w]e now weigh the relevant considerations differently.”<sup>125</sup>

As for Justice Kennedy, he rejected any one-size-fits-all solution. In his view, the administrative-change inquiry must be case-specific and wide-ranging, and it must focus on whether “the new policy rests upon principles that are

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119. *Fox*, 129 S. Ct. at 1822–23 (Kennedy, J., concurring in part and concurring in the judgment).

120. *Id.* at 1830 (Breyer, J., dissenting). Justice Stevens also addressed the issue of administrative change in his dissent, but he wrote only for himself, and Justice Breyer’s analysis of the topic was more extensive. *See id.* at 1826 (Stevens, J., dissenting) (“There should be a strong presumption that the FCC’s initial views . . . also reflect the views of the Congress that delegated the Commission authority to flesh out details not fully defined in the enacting statute.”).

121. *Id.* at 1811 (majority opinion).

122. *Id.*

123. *Id.* at 1832 (Breyer, J., dissenting).

124. *Id.*

125. *Id.* at 1831.

rational, neutral, and in accord with the agency's proper understanding of its authority."<sup>126</sup>

#### D. The Enduring Puzzle of Administrative Change

Until *Fox*, the Supreme Court's treatment of administrative change had been uneven and, we respectfully submit, fairly cursory. Even so, a body of academic commentary has begun to emerge. One common approach has been to read *Chevron* as cutting against heightened review of administrative change: Agency positions are not "carved in stone,"<sup>127</sup> and *Chevron's* assumption of capacious administrative discretion to interpret statutes applies to revisions just as it does to initial rulings.<sup>128</sup> Similarly, Ronald Levin has defended the permissive approach to change adopted by the *Fox* majority as desirable for reasons including political responsiveness and the avoidance of regulatory ossification.<sup>129</sup> More generally, recent scholarship by commentators including Kathryn Watts has urged greater acceptance of the interplay between certain political influences and regulatory decisionmaking (so long as transparency is preserved),<sup>130</sup>

126. *Id.* at 1823 (Kennedy, J., concurring in part and concurring in the judgment).

127. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 863 (1984).

128. See Jack M. Beerermann, *Presidential Power in Transitions*, 83 B.U. L. REV. 947, 1012 (2003) ("Requiring a high level of justification for alterations in administrative statutory construction may be inconsistent with the *Chevron* doctrine's strong emphasis on administrative power to construe ambiguous statutes."); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517 ("[T]here is no longer any justification for giving 'special' deference to 'long-standing and consistent' agency interpretations of law. . . . [I]t makes no sense when we acknowledge that the agency is free to give the statute whichever of several possible meanings it thinks most conducive to accomplishment of its statutory purpose."); Russell L. Weaver, *A Foolish Consistency Is the Hobgoblin of Little Minds*, 44 BAYLOR L. REV. 529, 557–58 (1992); David M. Gossett, Comment, *Chevron, Take Two: Deference to Revised Agency Interpretations of Statutes*, 64 U. CHI. L. REV. 681, 706–07 (1997); accord Harold J. Krent, *Reviewing Agency Action for Inconsistency With Prior Rules and Regulations*, 72 CHI.-KENT L. REV. 1187, 1220–21 (1997) (arguing that *State Farm* and *Cbenery* afford agencies wide latitude to revise policies).

129. See Ronald M. Levin, *Hard Look Review, Policy Change, and Fox Television*, 65 U. MIAMI L. REV. 555, 561 (2011) ("I believe that much can be said in support of the Court's relatively receptive attitude toward policy changes at the administrative level. The most salient argument tending in that direction proceeds from the premise that elections should have consequences."); *id.* at 555 ("*Fox* will at least slightly broaden the capacity of an administration to pursue an agenda of change and . . . this development is, on the whole, salutary."); *id.* at 562–63.

130. See Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 8 (2009) ("[W]hat count as 'valid' reasons under arbitrary and capricious review should be expanded to include certain political influences from the President, other executive officials, and members of Congress, so long as the political influences are openly and transparently disclosed in the agency's rulemaking record."); *id.* at 71 ("Some rule rescissions—rather than

which might be taken as suggesting a relatively permissive view toward administrative change in response to presidential elections.

Other scholars have acknowledged the need for administrative flexibility while nevertheless contending that some additional degree of judicial scrutiny is warranted.<sup>131</sup> And Yoav Dotan has offered an alternative approach that would focus on factors including the procedures used to reach the initial decision<sup>132</sup> as well as the subject matter at issue.<sup>133</sup>

Of course, *Fox* might be held up as resolving matters once and for all.<sup>134</sup> But the pronounced division in *Fox* suggests that the issue remains very much in flux.<sup>135</sup> This assessment is reinforced by way of historical analogy: Though *Chevron* unmistakably declared that an agency must be free to reconsider

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relying entirely on factual conclusions about the ineffective or obsolete nature of a rule—might appropriately reflect the fact that a change in administration has taken place and that the new administration does not wish to administer or enforce rules that run contrary to its own political choices, goals, and policies.”); see also Nina A. Mendelson, *Disclosing “Political” Oversight of Agency Decision Making*, 108 MICH. L. REV. 1127, 1159 (2010) (“[T]here is a space in which we might legitimately expect to see presidential influence, and in which—if we accept President-centered theories—presidential involvement could increase the legitimacy of the decision and the administrative state by potentially increasing its democratic responsiveness, its democratic accountability, or both.”); *id.* (“The lack of adequate transparency . . . makes it less likely that the electorate will perceive that there *is* meaningful presidential supervision of agency decision making, making the agency actions less legitimate. The lack of adequate transparency also reduces the chance of the electorate understanding the *content* of that presidential supervision, further reducing the accountability of the President for those decisions.”).

131. See Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 1019 (1992) (“Courts can accommodate the need for change by imposing a higher burden of explanation on an agency reversing its own longstanding precedent than otherwise would be the case.”); Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2104 (1990) (“[A]gencies should be allowed to depart from interpretations by prior administrations, certainly in the face of changed conditions, but also to reflect new views about policy . . . . [But] new departures should be accorded somewhat less deference than longstanding interpretations, for reasons analogous to those that justify stare decisis in the judicial context.”).
132. See Yoav Dotan, *Making Consistency Consistent*, 57 ADMIN. L. REV. 995, 1059–62 (2005).
133. *Id.* at 1063–65. Professor Dotan cautions, however, that a court’s view of the legal merits of the agency decision generally should not inform its consistency analysis. See *id.* at 1057–59.
134. See, e.g., *Nat’l Cable & Telecomms. Ass’n v. FCC*, 567 F.3d 659, 669 (D.C. Cir. 2009) (“[T]he existence of contrary agency precedent gives us no more power than usual to question the Commission’s substantive determinations. We still ask only whether the Commission has adequately explained the reasons for its current action and whether those reasons themselves reflect a clear error of judgment.” (citation omitted) (internal quotation marks omitted)).
135. See Yehonatan Givati & Matthew C. Stephenson, *Judicial Deference to Inconsistent Agency Statutory Interpretations*, 40 J. LEGAL STUD. 85, 90 (2011) (“[A] close reading of *Fox Television* suggests that, as in the case of inconsistent agency statutory interpretations, the Court may have left itself room to review changed agency policy more aggressively in some circumstances.”).

“the wisdom of its policy on a continuing basis,”<sup>136</sup> decades of post-*Chevron* case law have shown the Court struggling to pin down the precise role and relevance of administrative change.<sup>137</sup>

The Court’s uneven approach through the years cannot be explained by reference to the form of agency action under review. The complexities of administrative change have arisen in cases involving regulation and adjudication alike.<sup>138</sup> Nor can the ebbs and flows be attributed to the vagaries of *Chevron* deference. The Court recently indicated that although an agency’s consistency over time remains relevant in some contexts, consistency is inapposite in cases decided under the *Chevron* rubric.<sup>139</sup> Yet the Court previously has discussed administrative consistency and *Chevron* in the same opinions without suggesting any such rule.<sup>140</sup> In other cases, the Court has described change as carrying little or no import in broad terms that extend beyond *Chevron*’s purview.

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136. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 864 (1984).

137. *See supra* Part II.B.

138. *Compare* *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41–42 (1983) (regulation), *with* *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1810–11 (2009) (adjudication).

139. *See* *Mayo Found. for Med. Educ. & Research v. United States*, 131 S. Ct. 704, 712 (2011) (“We have repeatedly held that [a]gency inconsistency is not a basis for declining to analyze the agency’s interpretation under the *Chevron* framework.” (quoting *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005))); *see also* *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 742 (1996) (“[C]hange is not invalidating, since the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency.”).

140. *See* *Barnhart v. Walton*, 535 U.S. 212, 219–20, 222 (2002) (upholding agency interpretation under *Chevron* because, inter alia, it was consistent with the agency’s longstanding interpretation); *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402 (1993); *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987); *cf.* *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 698 (1991) (“[T]he case for judicial deference is less compelling with respect to agency positions that are inconsistent with previously held views.” (citing *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212–13 (1988))). There is also some evidence that agency change is negatively correlated with Supreme Court deference as a general matter. An exhaustive study of the Supreme Court’s review of agency action since *Chevron* concluded that longstanding interpretations are among those most likely to be upheld, while agency changes of position are among those most likely to be reversed. *See* William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations From Chevron to Hamdan*, 96 GEO. L.J. 1083, 1148–50 (2008). *But cf.* Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107 COLUM. L. REV. 1235, 1286 (2007) (concluding based on a study of decisions from federal courts of appeals that “despite its numerous opinions in judicial opinions, ‘consistency’ seems less dispositive than other *Skidmore* factors . . . [which] suggests that courts are willing to accept changes in agencies’ policies so long as the agency accompanies those shifts with procedures and reasoning that alleviate concerns about arbitrariness and unfairness to regulated parties”).

*Fox* is perhaps the best example of the latter category: The Court based its decision on fundamental principles of administrative law, explaining that “[w]e find no basis in the Administrative Procedure Act or in our opinions for a requirement that all agency change be subjected to more searching review.”<sup>141</sup> *Chevron* was not offered as any sort of a limiting principle.

Ultimately, the Court’s wavering view of administrative change seems to be driven by a lack of comprehensive debate over the doctrine’s theoretical foundations. Fortunately, that debate was foreshadowed in *Brand X*<sup>142</sup> and commenced in earnest in *Fox*. In the next Part, we take a closer look at the common ground and tension points lurking within the *Fox* opinions en route to constructing a more developed theory and doctrine of administrative change.

### III. TOWARD A THEORY OF ADMINISTRATIVE CHANGE

#### A. Agencies and Precedent

##### 1. Precedent in Judicial Decisionmaking

The notion that it is often preferable to resolve a pending dispute in a manner consistent with the prior resolution of similar disputes enjoys widespread acceptance in various models of decisionmaking.<sup>143</sup> In the judicial context, the most salient application of this principle is the doctrine of stare decisis. As we use the term here, stare decisis refers to a court’s choice to adhere to a previous decision notwithstanding suspicions about, or even disagreement with, the result of that decision on the merits.<sup>144</sup> The operation of stare decisis in American

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141. *Fox*, 129 S. Ct. at 1810.

142. Justice Thomas’s opinion for the Court in *Brand X* was illuminating in its attempt to situate agency change within the broader contours of administrative law, *see Brand X*, 545 U.S. 967, but the issue did not command the attention of the full Court as it did in *Fox*.

143. *See, e.g.*, Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 572 (1987).

144. *See, e.g.*, LAURENCE H. TRIBE, *THE INVISIBLE CONSTITUTION* 208 (2008) (characterizing stare decisis as reflecting “a resolution to stand by [prior] rulings, at least presumptively, in the face of one’s belief that one probably would have decided differently”). This definition describes what is sometimes referred to as “horizontal” stare decisis, meaning a court’s deference to its own precedents. By comparison, “vertical” stare decisis refers to a lower court’s decision, usually by compulsion rather than as a matter of discretion, to abide by the decision of superior courts. *See, e.g.*, Amy Coney Barrett, *Stare Decisis and Due Process*, 74 U. COLO. L. REV. 1011, 1015 (2003).

courts is ultimately a matter of judicial discretion<sup>145</sup> that often stirs debate.<sup>146</sup> The doctrine nevertheless carries profound importance for the judicial system, serving as a pillar of stability, trustworthiness, and integrity.<sup>147</sup> Indeed, stare decisis is commonly described as nothing short of integral to the rule of law.<sup>148</sup>

Courts and commentators have articulated numerous justifications for deference to judicial precedent. A presumption against upsetting settled decisions enhances predictability and enables stakeholders to organize their affairs with greater confidence.<sup>149</sup> Stare decisis likewise provides a mechanism for respecting the reliance costs that stakeholders have incurred in attempting to comply with preexisting law,<sup>150</sup> thus promoting norms of fairness and justice.<sup>151</sup>

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145. See, e.g., *Payne v. Tennessee*, 501 U.S. 808, 828 (1991) (describing stare decisis as a “principle of policy” as opposed to an “inexorable command” (citation omitted) (internal quotation marks omitted)).
146. See, e.g., *id.* at 844 (Marshall, J., dissenting) (criticizing the majority’s choice to overrule the relevant precedents as demonstrating that “[p]ower, not reason” is the “currency of [the] Court’s decisionmaking”); Randy J. Kozel, *Stare Decisis as Judicial Doctrine*, 67 WASH. & LEE L. REV. 411, 413–14 (2010).
147. See, e.g., *Payne*, 501 U.S. at 827.
148. See, e.g., *Citizens United v. FEC*, 130 S. Ct. 876, 920–21 (2010) (Roberts, C.J., concurring); *Welch v. Tex. Dep’t of Highways & Pub. Transp.*, 483 U.S. 468, 494 (1987).
149. See Schauer, *supra* note 143, at 597 (“When a decisionmaker must decide this case in the same way as the last, parties will be better able to anticipate the future. The ability to predict what a decisionmaker will do helps us plan our lives, have some degree of repose, and avoid the paralysis of foreseeing only the unknown.”).
150. See, e.g., *Hilton v. S.C. Pub. Rys. Comm’n*, 502 U.S. 197, 202 (1991) (noting that the Court will be reluctant to overrule precedent when “the legislature, in the public sphere, and citizens, in the private realm, have acted in reliance on a previous decision, for in this instance overruling the decision would dislodge settled rights and expectations or require an extensive legislative response”); *Payne*, 501 U.S. at 828 (“[C]onsiderations in favor of stare decisis are at their acme in cases involving property and contract rights, where reliance interests are involved.”); *id.* at 834–35 (Scalia, J., concurring) (“Th[e] doctrine [of stare decisis], to the extent it rests upon anything more than administrative convenience, is merely the application to judicial precedents of a more general principle that the settled practices and expectations of a democratic society should generally not be disturbed by the courts.”); *Walton v. Arizona*, 497 U.S. 639, 673 (1990) (Scalia, J., concurring in part and concurring in the judgment) (“The doctrine [of stare decisis] exists for the purpose of introducing certainty and stability into the law and protecting the expectations of individuals and institutions that have acted in reliance on existing rules.”); Kozel, *supra* note 146, at 452–64 (advocating a systematic focus on reliance considerations in stare decisis jurisprudence).
151. Cf. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994) (“Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted.”); Schauer, *supra* note 143, at 596 (“The idea of fairness as consistency forms the bedrock of a great deal of thinking about morality.”).

In a broader sense, a strong doctrine of stare decisis is consistent with a judiciary characterized by steadiness and gradualism rather than erratic change.<sup>152</sup> Maintaining a relatively stable legal regime helps to establish the law as transcending the identities and preferences of individual judges.<sup>153</sup> Though few would argue for an inexorable commitment to reaffirming precedent in all cases, the judiciary's general predisposition toward stare decisis contributes to the integrity of the legal system. As the Supreme Court has explained, stare decisis is "a basic self-governing principle within the Judicial Branch, which is entrusted with the sensitive and difficult task of fashioning and preserving a jurisprudential system that is not based upon 'an arbitrary discretion.'"<sup>154</sup>

## 2. Precedent in the Administrative State

Notwithstanding the virtues of following precedent, it is an accepted principle of American law that courts need some discretion to reconsider erroneous rulings and update their decisions in light of evolving circumstances. That need for flexibility is even more pronounced when the decisionmaker is not a court but an administrative agency. Agencies are charged by Congress and the President with leveraging their expertise and reacting to a changing world. To fulfill these mandates and remain politically responsive to the citizenry, they need the flexibility to reflect public opinion as well as elected officials' direction and oversight.<sup>155</sup> For these reasons, the role of precedent plays a different and, to some extent, diminished role in the administrative context relative to the judiciary. But it would be an overstatement to assert that precedent carries no import for agencies.<sup>156</sup> The existing doctrine of administrative change recognizes

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152. See, e.g., *Citizens United*, 130 S. Ct. at 920–21 (Roberts, C.J., concurring); cf. Jill E. Fisch, *The Implications of Transition Theory for Stare Decisis*, 13 J. CONTEMP. LEGAL ISSUES 93, 108 (2003).

153. See, e.g., BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 150 (1921) ("The situation would . . . be intolerable if the weekly changes in the composition of the court were accompanied by changes in its rulings.")

154. *Patterson v. McClean Credit Union*, 491 U.S. 164, 172 (1989) (quoting *THE FEDERALIST* NO. 78, at 490 (Alexander Hamilton) (H. Lodge ed., 1888)).

155. Cf. Schauer, *supra* note 143, at 604 ("[A]t least one version of the ideal of the administrative process holds that an agency should be free to consider the fullness of certain problems without the constraints of following its or another agency's prior handling of a different array of highly complex facts."); Weaver, *supra* note 128, at 558 ("The agency is entitled to use its authority and expertise, factors that do not disappear merely because the agency has changed its mind regarding a provision's meaning. On the contrary, the agency's change of position may be attributable to enhanced expertise.")

156. See, e.g., Dotan, *supra* note 132, at 1063 ("[C]onsistency is a value that needs to be balanced against other competing values and, in particular, administrative flexibility and efficiency."); Trevor

two precedent-based considerations that affect the lawfulness of agency action: the consistency of factual findings over time and effects on reliance expectations. To those considerations we would add a third, which we view as equal in importance: the type of reasoning an agency has employed.

**a. Findings of Fact**

In *Fox*, the majority rejected the idea that administrative change is always a relevant factor in evaluating the lawfulness of agency action.<sup>157</sup> Even so, it added a caveat by contemplating certain situations in which an agency would need to “provide a more detailed justification than what would suffice for a new policy created on a blank slate.”<sup>158</sup> One such situation arises when the agency’s “new policy rests upon factual findings that contradict those which underlay its prior policy.”<sup>159</sup> Justice Kennedy echoed this point in his partial concurrence, noting that “an agency’s decision to change course may be arbitrary and capricious if the agency ignores or countermands its earlier factual findings without reasoned explanation for doing so.”<sup>160</sup> His statement suggests that an agency’s prior findings become part of the evidentiary record it must confront in revisiting its previous approach: “An agency cannot simply disregard contrary or inconvenient factual determinations that it made in the past, any more than it can ignore inconvenient facts when it writes on a blank slate.”<sup>161</sup>

Justice Breyer’s dissent was in accord on this point. He described factual contradictions between an agency’s current rationale and its prior rationale as requiring the agency to “say more” than might otherwise be required.<sup>162</sup> Specifically, if an “agency rested its previous policy on particular factual findings,” one “would normally expect the agency to focus upon those earlier views of fact . . . and explain why they are no longer controlling.”<sup>163</sup> The takeaway is that while agencies must reconsider their policies “in response to changed

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W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448, 1449 (2010) (“Yet just as legal interpretation in general is not the exclusive province of the judiciary, so too do questions of precedent extend beyond the courts.”).

157. *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1810–11 (2009).

158. *Id.* at 1811.

159. *Id.*

160. *Id.* at 1824 (Kennedy, J., concurring in part and concurring in the judgment).

161. *Id.*

162. *Id.* at 1831 (Breyer, J., dissenting).

163. *Id.*

factual circumstances,<sup>164</sup> they also must explain themselves adequately if they reject factual conclusions previously reached.

### b. Reliance Interests

Like all legal changes, administrative reversals risk disrupting legitimate reliance interests. Accordingly, an agency that is considering a new position must first evaluate the potential consequences for those who have relied upon its former approach.

The significance of reliance interests represents the second non-controversial aspect of the modern law of administrative change,<sup>165</sup> accepted by all three major opinions in *Fox*. The majority explained that a “more detailed justification” for agency action would be required when an agency’s “prior policy has engendered serious reliance interests.”<sup>166</sup> Justice Kennedy was of a similar mind.<sup>167</sup> And while Justice Breyer did not address reliance expressly, he suggested its importance through a hypothetical: Even if an agency were permitted to use a coin-flip to determine which side of the road cars should drive on in the first instance, such an approach would be irrational if employed to “change[ ] driving practice . . . 25 years later.”<sup>168</sup> The force of the hypothetical turns on reliance interests that presumably would arise over the span of some two decades.<sup>169</sup> If the scenario were revised to eliminate reliance implication by stipulating that the subsequent coin-flip occurred after twenty-five *minutes*, the second flip would be no less defensible than the first.

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164. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005). For analogous statements in the context of judicial stare decisis, see, for example, *Randall v. Sorrell*, 548 U.S. 230, 244 (2006) (opinion of Breyer, J.) (“We cannot find in the respondents’ claims any demonstration that circumstances have changed so radically as to undermine *Buckley’s* critical factual assumptions.”); *Planned Parenthood v. Casey*, 505 U.S. 833, 855 (1991) (including among the relevant factors “whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application”); cf. W. Barton Leach, *Revisionism in the House of Lords: The Bastion of Rigid Stare Decisis Falls*, 80 HARV. L. REV. 797, 803 (1967) (“[W]hen it is obvious that one’s previous actions turned out badly, or that circumstances are essentially different, the intelligent human being reviews the problem anew . . .”).

165. See, e.g., *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 742 (1996) (noting that “change that does not take account of legitimate reliance” may be unlawful).

166. *Fox*, 129 S. Ct. at 1811.

167. *Id.* at 1823 (Kennedy, J., concurring in part and concurring in the judgment) (“Reliance interests in the prior policy may also have weight in the analysis.”).

168. *Id.* at 1830–31 (Breyer, J., dissenting).

169. See Levin, *supra* note 129, at 567 (“[T]he problem in Breyer’s hypothetical case would grow primarily out of impaired reliance interests.”).

The Justices' concerns about reliance implications are sensible. Agency rules, practices, and directives command enormous respect and shape the conduct of private actors<sup>170</sup> as well as government officials.<sup>171</sup> When agencies reverse their prior positions, they—no less than courts<sup>172</sup>—can upset expectations that their previous actions encouraged or compelled.<sup>173</sup> In evaluating the pros and cons of a change of course, it is incumbent upon an agency to account for these disruptions.<sup>174</sup> An agency analyzing the relative utility of competing policies must evaluate the costs likely to accrue to those who relied on its previous position just as it must evaluate the costs to other parties, such as those who would be subject to more onerous regulatory requirements following the proposed action.

Inevitably, there will be differences of opinion over the extent and importance of reliance implications in any given situation. Similar debates frequently arise over the application of *stare decisis* to judicial precedent.<sup>175</sup> But at a

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170. See, e.g., Eskridge & Baer, *supra* note 140, at 1170 (“Longstanding agency rules or interpretations are more likely to have generated private as well as public reliance. Changing those rules or interpretations undermines those specific reliance interests, which is a nontrivial rule-of-law cost of deference.”); John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 614–15 (1996) (“[R]egulations frequently play a more direct role than statutes in defining the public’s legal rights and obligations.”).
171. See, e.g., *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 144 (2000) (“Congress’ tobacco-specific statutes have effectively ratified the FDA’s long-held position.”); cf. Morrison, *supra* note 156, at 1494 (discussing interagency reliance on opinions of the Office of Legal Counsel).
172. Cf. *Hubbard v. United States*, 514 U.S. 695, 716 (1995) (Scalia, J., concurring in part and concurring in the judgment) (“The doctrine of *stare decisis* protects the legitimate expectations of those who live under the law.”); *Hilton v. S.C. Pub. Rys. Comm’n*, 502 U.S. 197, 202 (1991) (noting the role of *stare decisis* in protecting “settled rights and expectations”).
173. See, e.g., Dotan, *supra* note 132, at 1000 (“The requirement of consistency . . . is fundamental both for bureaucratic decisionmaking and for legal systems at large. It has strong intuitive appeal to our sense of justice, and is intertwined with the notion of fairness.”); cf. *Alaska Prof’l Hunters Ass’n v. FAA*, 177 F.3d 1030, 1035 (D.C. Cir. 1999) (“Those regulated by an administrative agency are entitled to ‘know the rules by which the game will be played.’” (quoting Oliver Wendell Holmes, *Holdsworth’s English Law*, 25 LAW Q. REV. 412, 414 (1909))).
174. See, e.g., Kenneth A. Bamberger, *Provisional Precedent: Protecting Flexibility in Administrative Policymaking*, 77 N.Y.U. L. REV. 1272, 1317 (2002) (“If a party may not rely on the constancy of the construction of a regulatory statute, [the expectation of a stable legal backdrop] is disturbed.”).
175. See, e.g., *Citizens United v. FEC*, 130 S. Ct. 876, 920 (2010) (Roberts, C.J., concurring) (“When considering whether to reexamine a prior erroneous holding, we must balance the importance of having constitutional questions *decided* against the importance of having them *decided right*.”); *id.* (“As Justice Jackson explained, this requires a ‘sober appraisal of the disadvantages of the innovation as well as those of the questioned case, a weighing of practical effects of one against the other.’” (quoting Robert H. Jackson, *Decisional Law and Stare Decisis*, 30 A.B.A. J. 334, 334 (1944))).

general level, there seems to be broad agreement that reliance considerations have some role to play in determining the lawfulness of agency action.

## B. Modes of Reasoning and Change Over Time

### 1. Prescriptive Reasoning and Expository Reasoning

The previous sections explained that reliance effects and factual contradictions have received attention—quite properly, in our view—from the Supreme Court in its discussions of administrative change. Equally important, but much less prominent in the jurisprudence, is the type of reasoning invoked by an agency to justify its reversal. Exploring this issue requires unpacking the diversity and complexity hidden within the concept of “agency interpretation.”<sup>176</sup>

We can understand the modes of agency reasoning as falling into two families of rough resemblance. An agency may employ prescriptive reasoning, in which it applies its policy expertise to make and implement judgments about what actions are best for society. Here we have the traditional image of agencies gathering data and bringing to bear their expertise and policy judgments on issues within their core competencies.<sup>177</sup> Recall, for example, the National Highway Traffic Safety Administration in *State Farm*, which undertook cost-benefit analyses and feasibility studies in deciding whether to require automobile manufacturers to install automatic seat belts.<sup>178</sup>

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176. See, e.g., *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 863–64 (1984) (“An initial agency interpretation is not instantly carved in stone. On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis.”); cf. Elizabeth V. Foote, *Statutory Interpretation or Public Administration: How Chevron Misconceives the Function of Agencies and Why It Matters*, 59 ADMIN. L. REV. 673, 676 (2007) (criticizing the “confusing paradigm” whereby “agency implementation is synonymous with statutory construction”).

177. Cf. Mark Tushnet, *Legislative and Executive Stare Decisis*, 83 NOTRE DAME L. REV. 1339, 1351 (2008) (“Justice Stevens’ opinion in *Chevron* concludes by noting that determining what the law means (in the administrative law setting) implicates a combination of technical competence and political responsiveness. For agencies, the technical competences are associated with substantive matters such as nuclear power or occupational safety and health.” (footnote omitted)).

178. *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983); see also *Chevron*, 467 U.S. at 858 (“In explaining its conclusion, the EPA first noted that the definitional issue was not squarely addressed in either the statute or its legislative history and therefore that the issue involved an agency ‘judgment as how to best carry out the Act.’” (citations omitted)); Foote, *supra* note 176, at 680 (describing *State Farm* as exemplifying “agency actions that implemented statutory provisions in operational ways that are classic for public administrative bodies”); *id.* at 684 (noting that in *Chevron*, “the EPA did not find a

An agency's reasoning can also look very different. Sometimes rather than relying predominantly on policy judgments, agencies justify their decisions based on their understanding of governing legal sources. *Fox* presents a good example of such expository reasoning.<sup>179</sup> Though the FCC extolled the instrumental benefits of its new approach, its reversal was made possible only because it revised its understanding of the First Amendment principles articulated by the Supreme Court in *Pacifica*.<sup>180</sup> The Commission originally viewed *Pacifica* as constraining the regulation of broadcast expletives outside situations involving "repetitive occurrence of the 'indecent' words."<sup>181</sup> Over time, the FCC rethought its position, eventually concluding that *Pacifica* "explicitly left open the issue of whether an occasional expletive could be considered indecent."<sup>182</sup> What had changed was not *Pacifica* itself. It was the Commission's "reading of *Pacifica*."<sup>183</sup>

According to the *Fox* dissenters, the Commission did not adequately explain its new approach to an old text. In Justice Breyer's words, the agency's limited discussions "do not acknowledge that an entirely different understanding of *Pacifica* underlay the FCC's earlier policy; they do not explain why the agency changed its mind about the line that *Pacifica* draws or its policy's relation to that line; and they tell us nothing at all about what happened to the FCC's earlier determination . . . ."<sup>184</sup> The debate in *Fox* helps illustrate that while prescriptive reasoning and expository reasoning are commonly lumped together under the label "agency interpretation," in reality they are distinct both in their referents and their implications.

Expository reasoning is also at work when an agency grounds its position in inferences about congressional intent. A ready illustration comes from *INS*

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fixed, permanent legal meaning in statutory text, nor did it use orthodox legal materials or judicial-style methodology").

179. See *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800 (2009). We use "expository" simply to indicate an attempt to understand and articulate the meaning of a given text.

180. *FCC v. Pacifica Found.*, 438 U.S. 726 (1978).

181. *In re Application of WGBH Educ. Found.*, 69 F.C.C.2d 1250, 1254 (1978); see also *Fox*, 129 S. Ct. at 1806–07; *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 450 (2d Cir. 2007); *In re Pacifica Found., Inc.*, 2 FCC Rcd. 2698, 2699 ¶ 13 (1987) ("If a complaint focuses solely on the use of expletives, we believe that under the legal standards set forth in *Pacifica*, deliberate and repetitive use in a patently offensive manner is a requisite to a finding of indecency.").

182. *In re Complaints Against Various Broad. Licensees Regarding Their Airing of the 'Golden Globe Awards' Program*, 19 FCC Rcd. 4975, 4982 (2004).

183. *Fox*, 129 S. Ct. at 1824 (Kennedy, J., concurring in part and concurring in the judgment).

184. *Id.* at 1834 (Breyer, J., dissenting).

*v. Cardoza-Fonseca*,<sup>185</sup> in which the Court reviewed an administrative interpretation of asylum standards under the Immigration and Nationality Act. Rather than concerns about the immigration or foreign policy ramifications of the competing interpretations, the agency's primary justification for its action was that the text and structure of the statute dictated a certain result.<sup>186</sup>

Not every nod to statutory purpose constitutes expository reasoning in the sense we employ the term. Even a rationale that is manifestly driven by an agency's policy preferences must provide some link to congressional intent in order to survive review under the APA.<sup>187</sup> Alternatively, even when expository rationales for change predominate—as with the administrative orders in *Fox*—agencies tend to bolster their explanations with prescriptive reasons.<sup>188</sup> Expository reasoning and prescriptive reasoning accordingly are best conceptualized as opposing regions on a single continuum. As we explain below, the most significant role for administrative-change doctrine arises when expository justifications represent core features of an agency's rationale, placing it solidly on the “expository” end of the continuum. The FCC's experience in *Fox* and the INS's experience in *Cardoza-Fonseca* are emblematic.

We recognize that our proposed contrast between expository and prescriptive reasoning in some respects flows against the current of modern administrative law, in which the foundational case on statutory interpretation, *Chevron*, is often read as collapsing the distinction between explication and policymaking.<sup>189</sup> Whether *Chevron* truly undermines the notion of expository reasoning is a question we address below. But it is important to note that certain elements of administrative law already support differential treatment of prescription and exposition.

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185. 480 U.S. 421 (1987).

186. *See id.* at 443.

187. *See, e.g.,* *Indep. U.S. Tanker Owners Comm. v. Dole*, 809 F.2d 847, 849 (D.C. Cir. 1987) (“We find that the Secretary was well within her statutory authority in promulgating the rule, but that she failed to provide an adequate account of how the rule serves the objectives set out in the governing statute . . .”); *id.* at 854 (“In exercising her decisionmaking authority, the Secretary is certainly free to consider factors that are not mentioned explicitly in the governing statute, yet she is not free to substitute new goals in place of the statutory objectives without explaining how these actions are consistent with her authority under the statute.”).

188. For additional discussion of “mixed justifications” by administrative agencies, see *infra* Part IV.B.2.

189. *See generally* Sunstein, *supra* note 23 (arguing that *Chevron* recognizes the fusion of interpretation and policymaking in the context of unclear statutes).

Consider first the distinction the APA draws between “interpretative rules” and “general statements of policy.”<sup>190</sup> Expository reasoning as we define the term is similar in content to the APA’s “interpretative rules,” which “spell[ ] out or explain[ ] positive legal substance that was already inherent” in a source of law.<sup>191</sup> Policy statements, by contrast, resemble prescriptive reasoning in that they “step[ ] beyond application or interpretation” to announce new (nonbinding) norms,<sup>192</sup> “prescribe policy,”<sup>193</sup> and describe how the agency will exercise its discretion.<sup>194</sup>

Likewise, courts generally will not defer to agency applications of so-called “normative canons”—rules of statutory interpretation that resolve ambiguities with an eye toward advancing quasi-constitutional and judge-made aims.<sup>195</sup> Thus, in *Akins v. FEC*,<sup>196</sup> the D.C. Circuit Court of Appeals withheld deference from the Federal Election Commission’s interpretation of the term “political committee” because the agency was simply following the Supreme Court’s practice of narrowly construing campaign finance statutes to avoid First Amendment concerns.<sup>197</sup> *Akins* reasoned that “agencies have no special qualifications of legitimacy in interpreting Court opinions” that originate and pursue such an objective.<sup>198</sup> Cases like *Akins* presume that the tools required

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190. See 5 U.S.C. § 553(b) (2006); *supra* Part II.A.

191. Anthony, *supra* note 12, at 1046.

192. *Id.* at 1047.

193. Funk, *supra* note 12, at 1323.

194. *Id.* at 1332. Still, the APA’s concept of “interpretative rules” does not capture the full significance of an agency’s choice to engage in expository reasoning. While the APA treats interpretative rules (as well as “general statements of policy”) as confined to the context of nonlegislative rules—meaning those that lack the force of law—many significant examples of expository reasoning occur within legislative rulemakings and adjudications. See, e.g., *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800 (2009). Moreover, expository reasoning can go beyond giving “crisper and more detailed lines” to a legal authority. See *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993). The chain of reasoning the FCC followed in *Fox* to define “indecent” ran through the Constitution and decades of First Amendment jurisprudence, see *Fox*, 129 S. Ct. at 1806–08, but it nonetheless was expository (as we use the term) because it rested in significant part on conclusions about the proper understanding of legal texts.

195. See Kenneth A. Bamberger, *Normative Canons in the Review of Administrative Policymaking*, 118 YALE L.J. 64 (2008) (addressing deference to normative canons and courts’ disagreement over the question); Stephen F. Ross, *Where Have You Gone Karl Llewellyn? Should Congress Turn Its Lowly Eyes to You?*, 45 VAND. L. REV. 561, 563 (1992) (introducing the concept of “normative canons”).

196. 101 F.3d 731 (D.C. Cir. 1997) (en banc), *vacated on other grounds*, 524 U.S. 11 (1998).

197. *Id.* at 740.

198. *Id.*

for prescriptive reasoning are irrelevant to the task of interpreting and applying judicial opinions.

When regulatory statutes are understood to incorporate common law principles, courts frequently withhold deference on similar grounds.<sup>199</sup> Most famously, the Supreme Court in *SEC v. Chenery Corp.*<sup>200</sup> reviewed an adjudication de novo because the Securities and Exchange Commission (SEC) had decided the case “according to settled judicial doctrines” governing fiduciary duty rather than considerations of administrative policy.<sup>201</sup> This practice has survived even after *Chevron*. For example, the D.C. Circuit reads the common law definition of “employee” in the National Labor Relations Act as reflecting Congress’s choice to give courts, not agencies, primary decisionmaking authority over who is an “employee” under the statute.<sup>202</sup>

Courts also may withhold deference if an agency’s interpretation involves a “pure” question of statutory construction. The canonical example is *INS v. Cardoza-Fonseca*, in which the Court refused to defer to the government’s interpretation of the term “well-founded fear” of persecution.<sup>203</sup> More recently, the Court withheld deference in interpreting the meaning of the Foreign Sovereign Immunities Act.<sup>204</sup> The pure-question rule reflects the proposition that when an agency is trying to discern Congress’s intent, as opposed to filling a policy gap under the *Chevron*-esque assumption that Congress did not have any particular intent, it enters a zone that is “well within the province of the judiciary.”<sup>205</sup> Some judges (Justice Scalia prominent among them) and commentators object that this approach is inconsistent with the principles underlying *Chevron* deference, but the pure-question rule nevertheless “persists.”<sup>206</sup>

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199. See generally Pojanowski, *supra* note 23 (surveying decisions that confront the question of deference to agency applications of common law rules and principles).

200. 318 U.S. 80 (1943).

201. *Id.* at 89–90.

202. See, e.g., *Int’l Longshoremen’s Ass’n, AFL-CIO v. NLRB*, 56 F.3d 205, 212 (D.C. Cir. 1995); *Aurora Packing Co. v. NLRB*, 904 F.2d 73, 74–76 (D.C. Cir. 1990). But see *Nat’l Fuel Gas Supply Corp. v. FERC*, 811 F.2d 1563, 1565–69 (D.C. Cir. 1987) (giving *Chevron* deference to agency interpretations of contracts).

203. 480 U.S. 421, 446–48 (1987).

204. *Republic of Austria v. Altmann*, 541 U.S. 677, 701 (2004).

205. *Cardoza-Fonseca*, 480 U.S. at 446–48; see also Pojanowski, *supra* note 23, at 845 (“[T]he pure-question exception presumes two types of gaps . . . those that require legislative-like policymaking, and those that courts can resolve through distinctively legal technique.”).

206. Claire R. Kelly, *The Brand X Liberation: Doing Away With Chevron’s Second Step as Well as Other Doctrines of Deference*, 44 U.C. DAVIS L. REV. 151, 179 n.135 (2010); see also Anthony, *supra* note 21, at 20–21 (cautioning that courts could “readily” turn any question into a “pure question”); Jack M. Beermann, *End the Failed Chevron Experiment Now: How Chevron Has*

One final illustration comes from the Supreme Court's recent opinion in *Morrison v. National Australia Bank Ltd.*,<sup>207</sup> addressing territorial limitations on the securities laws. In defending its preferred interpretation of the relevant statute, the United States argued (among other things) for deference in light of the SEC's similar view.<sup>208</sup> The Court rebuffed the government's suggestion, explaining that the SEC "did not purport to be providing its own interpretation of the statute, but relied on decisions of federal courts. . . . Since the Commission's interpretations relied on cases we disapprove, which ignored or discarded the presumption against extraterritoriality, we owe them no deference."<sup>209</sup>

## 2. Prescriptive Change and Expository Change

The foregoing discussion illustrates how certain pockets of administrative law recognize the intuitive difference between reaching independent conclusions and following someone else's directives. That difference is particularly resonant in the context of administrative change. "I believed *X* to be the most beneficial course of conduct" is a much different rationale for action than is "I believed myself bound to do *X*." The fact of change—of deviating from one's prior course—adds another layer of intricacy. Now the rationale becomes either (in prescriptive terms) "I no longer believe *X* to be the most beneficial course" or (in expository terms) "I no longer believe myself bound." These justifications for change are analytically and functionally distinct.

### a. Prescriptive Change

Prescriptive reasoning represents an agency's use of policymaking discretion to fill gaps left within overarching legal texts such as congressional enactments.<sup>210</sup>

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*Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779, 806 (2010) ("It is difficult to figure out what to make of the distinctions among agency law making, policy making, and pure questions of statutory construction under *Chevron*."); Kelly, *supra* (citing cases and authorities on the exception).

207. 130 S. Ct. 2869 (2010).

208. *Id.* at 2887.

209. *Id.* at 2887–88; *see also id.* at 2887 ("We need 'accept only those agency interpretations that are reasonable in light of the principles of construction courts normally employ.'" (quoting *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 260 (1991) (Scalia, J., concurring in part and concurring in the judgment))).

210. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984) ("If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.").

That sort of reasoning does not reflect any pronouncement about the meaning of the relevant text beyond the conclusion (whether implicit or explicit) that it is ambiguous on the point at issue. Prescriptive reasoning, then, is directed at furnishing an answer where the clear mandate of Congress or the courts has run out.<sup>211</sup>

Pursuant to *Chevron*, authority for filling gaps through policymaking presumptively resides with administrative agencies.<sup>212</sup> This approach is grounded in an assumption—some would call it a fiction<sup>213</sup>—about congressional intent: Statutory ambiguities are to be viewed as implicit delegations for agencies to “formulat[e] . . . policy.”<sup>214</sup> The assumption is commonly justified on two grounds.<sup>215</sup> Administrative agencies are responsive to political pressures,<sup>216</sup> and they are subject-matter experts.<sup>217</sup> Courts are neither of those things.<sup>218</sup>

The rationales for deference have significant consequences for any theory of administrative change. If one accepts that political responsiveness and subject-matter expertise justify an agency’s extensive authority to fill gaps in legal texts through policymaking, it follows that agencies must possess substantial discretion to change their approaches over time. In the absence of such flexibility, the

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211. *See id.* at 842 (describing the Court of Appeals’s error as having failed to accord deference after “it had decided that Congress itself had not commanded” a certain result).

212. *See supra* Part I.B.

213. Scalia, *supra* note 128, at 517 (“[T]he quest for the ‘genuine’ legislative intent is probably a wild-goose chase anyway . . . . [A]ny rule adopted in this field represents merely a fictional, presumed intent, and operates principally as a background rule of law against which Congress can legislate.”); *cf.* John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 198 (1998) (“A further problem [with *Chevron*] is that the implicit delegation theory lacks any solid basis in actual congressional intent.”).

214. *Chevron*, 467 U.S. at 843 (quoting *Morton v. Ruiz*, 415 U.S. 199, 231 (1974)).

215. *See, e.g.*, Kevin M. Stack, *The Constitutional Foundations of Chevron*, 116 YALE L.J. 952, 1005 (2007) (“It is . . . now widely agreed that *Chevron* rests on a presumption about congressional intent . . . . The core basis for this presumption, as identified by the *Chevron* opinion itself, is that specialist agencies have greater expertise than generalist judges, and agencies’ formulations of policy are more politically accountable than those of judges.” (footnote omitted)).

216. *See Chevron*, 467 U.S. at 865–66 (“While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.”).

217. *See id.* at 865 (“Perhaps [Congress] consciously desired the Administrator to strike the balance at this level, thinking that those with great expertise and charged with responsibility for administering the provision would be in a better position to do so . . . .”).

218. *See id.* (“Judges are not experts in the field, and are not part of either political branch of the Government.”); *id.* at 866 (“[F]ederal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do.”).

notion of political responsiveness would be a fallacy. Agencies would be stymied in their attempts to make “policy choices” and “resolv[e] the struggle between competing views of the public interest” in light of the prevailing popular will and incumbent political administration.<sup>219</sup> Instead, they would be bound to the past. Likewise, agencies would face substantial obstacles in bringing to bear their subject-matter expertise whenever that expertise indicated the need for a change in approach.

### b. Expository Change

Administrative change based on expository reasoning involves a different dynamic. An agency that explains its action primarily in expository terms is not merely exercising discretion to fill gaps. The agency is subordinating its authority in large part to the guidance it gleans from governing legal texts.<sup>220</sup> With this subordination come certain obligations, among them fidelity of interpretation and sincerity of explanation, that foreclose any legitimate role for political responsiveness. Moreover, notwithstanding their strength in justifying deference to agencies’ prescriptive judgments, arguments from subject-matter expertise fail to justify broad administrative discretion in elucidating meaning from legal texts—a proposition confirmed by *Chevron*. Given the unsuitability of the responsiveness and expertise rationales to the expository context, judges ought to be especially vigilant in reviewing administrative change that revises an agency’s prior, expository conclusions.

One pillar of the rule of law is the ideal that governmental pronouncements about the intrinsic meaning of legal texts should aspire to be impersonal and principled rather than results-oriented and political.<sup>221</sup> Unsurprisingly, this norm

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219. *Id.* at 866; *see also* Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs., 545 U.S. 967, 981 (2005) (noting that a “change in administrations” may warrant an agency reversal of policy); *Chevron*, 467 U.S. at 865 (“[A]n agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration’s views of wise policy to inform its judgments.”); *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 59 (1983) (Rehnquist, J., concurring in part and dissenting in part) (“A change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency’s reappraisal of the costs and benefits of its programs and regulations.”).

220. To borrow from Justice Frankfurter’s language in *Chenery*, the difference is between the “exercise of judgment” and the “determination of law.” *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943).

221. *See, e.g.*, LON L. FULLER, *THE MORALITY OF LAW* 81 (rev. ed. 1969) (stating that legal integrity rejects unprincipled “discrepancy between the law as declared and as actually administered”); *cf.* Tushnet, *supra* note 177, at 1352 (“[E]ven in a moderately post-legal realist

finds its most natural home in the judicial branch, which is closely associated with the expository task.<sup>222</sup> But the theoretical foundations transcend the courts. Rule-of-law concerns do not stop at the Executive's doorstep; they may in fact be most pressing there.<sup>223</sup> As Joseph Raz has observed, the challenge to legality "is most commonly manifested in the making of particular legal orders" by the Executive.<sup>224</sup> The petty official who reads a rule narrowly for the favored and broadly for others is a stock character in illustrative accounts in which the rule of law is lacking. The deficiency remains even when the official's sincere aim is to promote the public interest. Such dangers "are drastically reduced by close adherence to the rule of law."<sup>225</sup>

In a system governed by the rule of law, the necessary corollary of faithful interpretation is candid reason-giving. Absent limited exceptions involving the need for confidentiality, we desire and expect our official decisionmakers to reveal the reasons behind their actions.<sup>226</sup> Again, this value is often associated with the judiciary, but its application extends to government more broadly.

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world where the courts acknowledge that policy views shape the law, judges are unlikely to think that the policy views of the present administration ought to carry any special weight (as such in defining the law's content."); *see also* Charles H. Koch, Jr., *Judicial Review of Administrative Policymaking*, 44 WM. & MARY L. REV. 375, 385 (2002) (noting that to alter its interpretation of a statute's plain meaning, an agency "must in essence confess error [and i]t must admit that its prior interpretation was wrong"). Professor Koch's thoughtful essay also devotes some attention to distinguishing statutory interpretation from administrative policymaking. *Id.* at 378–82. By comparison, the framework we propose suggests a finer distinction that would recognize, for example, that the broad category of "statutory interpretation" can involve expository reasoning or prescriptive reasoning (or both).

222. *See, e.g.*, *Mesa Verde Constr. Co. v. N. Cal. Dist. Council of Laborers*, 861 F.2d 1124, 1146 (9th Cir. 1988) (en banc) (Kozinski, J., dissenting) ("It is emphatically not the function of courts to read policy content into statutes, or to interpret them in a way that will foster a particular political viewpoint."); *id.* ("To be sure, reasonable minds may differ as to what [the statutory] meaning may be . . . . But in performing their proper function, judges must listen for the voice of the legislature, not to the sound of their own heartbeats.").

223. *Cf.* Matthew C. Stephenson, *Statutory Interpretation by Agencies*, in RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW 285, 293–94 (Daniel A. Farber & Anne Joseph O'Connell eds., 2010) ("[A]ny particular judicial interpretation of a statutory provision is more likely to be stable over time than is a comparable interpretation by an administrative agency.").

224. JOSEPH RAZ, *The Rule of Law and Its Virtue*, in THE AUTHORITY OF LAW 210, 224 (2d ed. 2009); *cf.* FULLER, *supra* note 221, at 81 (explaining that there are "serious disadvantages in any system that looks solely to the courts as a bulwark against the lawless administration of the law"); JEREMY WALDRON, *The Concept and the Rule of Law*, 43 GA. L. REV. 1, 11 (2008) ("The Rule of Law is an ideal designed to correct dangers of abuse that arise in general when political power is exercised, not dangers of abuse that arise from law in particular.").

225. RAZ, *supra* note 224, at 224.

226. For a defense of sincere reason-giving in the judicial branch against pragmatic objections, see Micah Schwartzman, *Judicial Sincerity*, 94 VA. L. REV. 987 (2008).

Candid reason-giving by agencies promotes the rule of law by allowing the governed to “make sense of” the existing legal regime and participate in its future development.<sup>227</sup> By contrast, an administrative pronouncement couched in expository terms but driven by other considerations undermines what Jeremy Waldron has called the law’s “susceptibility to rational analysis,” a valuable “public resource that members of the public may make use of—not just for understanding or as an intellectual exercise, but in argument.”<sup>228</sup> The principle of administrative candor would be incoherent in a system that tolerated dissonance between the (exegetic) reasons proffered by an agency and its actual (policy-based) motivations.<sup>229</sup>

Hence the need for meaningful judicial scrutiny in the particularized context of administrative change. A federal judge who disingenuously uses expository reasons to paper over a policy-driven decision is rightfully subject to criticism. Administrative law should not force the courts to stand idly by when there is a danger that administrative agents may be doing the same thing by marshaling expository justifications for a result motivated by policy concerns.<sup>230</sup> Lest these points seem too lofty and theoretical, we note that they already play a critical role in blackletter administrative law. Most saliently, a duty of candor undergirds the *Chenery*<sup>231</sup> rule, which “makes the validity of agency action

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227. Waldron, *supra* note 224, at 35.

228. *Id.* at 35–36; see also Gerald J. Postema, *Positivism and the Separation of Realists From Their Skepticism*, in *THE HART-FULLER DEBATE IN THE TWENTY-FIRST CENTURY* 271 (Peter Cane ed., 2010) (“Law’s directives [must give] reasons that law-subjects generally appreciate and readily understand that others appreciate.”).

229. For analogous arguments in support of administrative candor, see Mendelson, *supra* note 130, at 1161 (“[Increasing transparency] could facilitate a public dialogue where citizens are persuaded that the decision made, though not the first-cut ‘majoritarian preference,’ is still the correct decision for the country. By comparison, submerging presidential preferences undermines electoral accountability for agency decisions and reduces the chances of a public dialogue on policy.”); Watts, *supra* note 130, at 42 (“Encouraging agencies to disclose political factors rather than hiding behind technocratic facades would enable more political influences to come out into the open, thereby enabling greater political accountability and monitoring.”).

230. Our focus on the differing ramifications of expository and prescriptive reasoning explains our departure from those who would contend that the rule-of-law implications of change are minimal in the administrative context. See, e.g., Levin, *supra* note 129, at 569 (“Stare decisis in the judicial sphere is closely bound up with the aspiration (or, if you prefer, the myth) of the rule of law. Agencies, however, act in a quasi-legislative capacity as acknowledged policymakers, and the issues of legitimacy that arise when they jettison a precedent are simply not the same.”). In our view, this claim is overly broad; it has force in instances of prescriptive change, but it underestimates the unique characteristics of expository revisions.

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

depend upon the validity of contemporaneous agency reason-giving.<sup>232</sup> *Chenery* stands for the proposition that in administrative law, the validity of agency action stands or falls based on the reasons the government offered at the time of decision.<sup>233</sup> More broadly, the requirements of sincerity and transparency cohere with the very notion that agencies must provide reasoned explanations to facilitate judicial review of their actions.<sup>234</sup>

What all this means for the study of administrative change is that, to maintain consistency with the rule of law, expository analyses may not be vehicles for concealing undisclosed political will. They must be conducted faithfully and explained honestly. It is thus an overstatement to contend that the need for political accountability among administrative agents requires wide leeway to shift directions based on the prevailing political winds. In light of the distinction between prescriptive reasoning and expository reasoning, such an argument extends only to the former. An agency that engages in prescriptive policymaking to fill a statutory gap exercises its expertise in the shadow of its political superiors. By contrast, an agency that relies primarily on expository reasoning purports to do no such thing. It holds itself out as an arbiter of legislative will or (in a case like *Fox*) judicial mandate. That type of approach leaves no room for political responsiveness given the driving focus on elucidating the legal text under consideration.

Far from being a relic of pre-*Chevron* times, this conclusion is supported by *Chevron* itself. While *Chevron* is most famous for linking policymaking discretion with resolution of textual ambiguity, another notable feature of the case is its reaffirmation of how the meaning of legal texts define and cabin administrative discretion. Critically, an agency has authority to make policy only when statutory meaning is unclear.<sup>235</sup> The antecedent assessment of statutory clarity presents an expository task conducted independently of political considerations.<sup>236</sup> What is more, responsibility for undertaking the expository assessment resides in the judiciary: The courts are “the final authority on issues of

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232. Stack, *supra* note 215, at 956.

233. *Id.* at 956–57 (“At its core, the *Chenery* principle directs judicial scrutiny toward what the agency has said on behalf of its action, not simply toward the permissibility or rationality of its ultimate decision; *Chenery* links permissibility to the agency’s articulation of the grounds for its action.”).

234. See *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57 (1983) (invalidating an action after an “agency . . . failed to supply the requisite ‘reasoned analysis’”).

235. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

236. *Id.* (“If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”).

statutory construction.”<sup>237</sup> Judges, who are “not part of either political branch of the Government,” are called upon to resolve the initial, expository question without resort to “personal policy preferences.”<sup>238</sup> “In contrast,” administrative agencies that discharge their “policy-making responsibilities” through prescriptive reasoning may “properly rely upon the incumbent administration’s views of wise policy to inform [their] judgments.”<sup>239</sup> Deference becomes appropriate only when the agency turns its gaze to prescriptive considerations in pursuing “the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.”<sup>240</sup> On its own logic, *Chevron* undermines the notion that political responsiveness justifies broad administrative discretion to revise expository conclusions.

The alternative to the responsiveness rationale is one based on subject-matter expertise. But that, too, falls short of justifying lax judicial review of expository change. While administrative officials often possess technical expertise and deep knowledge in their fields, there is no reason to assume that their specialty extends to excavating the meaning of legal texts.<sup>241</sup> Again, *Chevron* confounds any assumption to the contrary. Notwithstanding its acknowledgement of the subject-matter expertise possessed by agencies,<sup>242</sup> the *Chevron* Court reaffirmed the primacy of judges in deciphering and articulating the contours of congressional commands. That division of labor would make little sense if agencies possessed superior expertise in comprehending the statutes

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237. *Id.* at 843 n.9.

238. *Id.* at 865.

239. *Id.*; *see also id.* (“While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices.”).

240. *Id.* at 843 (quoting *Morton v. Ruiz*, 415 U.S. 199, 231 (1974)); *see also id.* at 845 (concluding that the EPA’s approach reflected “a reasonable policy choice for the agency to make”); *id.* at 865 (“[T]he Administrator’s interpretation represents a reasonable accommodation of manifestly competing interests and is entitled to deference . . .”).

241. *Cf.* Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 397 (1986) (noting that administrative law “requires courts to defer to agency judgments about *matters of law*, but . . . suggests that courts conduct independent, ‘in-depth’ reviews of agency judgments about *matters of policy*”); *id.* (“Is this not the exact opposite of a rational system?”); Einer Elhauge, *Preference-Estimating Statutory Default Rules*, 102 COLUM. L. REV. 2027, 2147–48 (2002) (arguing that “courts defer to agencies because their policy views are more in tune with prevailing political preferences, not because agencies are better at legal interpretation. . . . [and t]he courts are not looking to agencies for expertise in how best to conduct legal interpretation of administrative statutes”).

242. *See Chevron*, 467 U.S. at 865.

they administer.<sup>243</sup> Of course, to the extent an agency's experience with a given statute provides practical insights that may be helpful to the courts, the agency can still transmit its knowledge through briefing and argument. There is no need for a formalized canon of deference grounded in misguided assumptions about expository superiority.<sup>244</sup>

Stepping back, some might respond that our discussion has posited an unduly simplistic model of expository reasoning. In reality, the argument goes, the process of exposition necessarily entails consideration of factors such as optimal policy<sup>245</sup> and political preferences.<sup>246</sup> Likewise, some interpretive methods incorporate seemingly prescriptive considerations like choosing "the fairest interpretation in light of current policy."<sup>247</sup> If an agency's conclusions regarding congressional purpose or the meaning of judicial precedents

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243. *See id.* at 843 n.9 ("The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.").

244. *Cf. Ransom v. FIA Card Servs., N.A.*, 131 S. Ct. 716, 726 n.7 (2011) (noting that when an agency "creates [standards] referenced in the statute, revises them as it deems necessary, and uses them every day," the agency might "have something insightful and persuasive (albeit not controlling) to say about them"); *Salve Regina Coll. v. Russell*, 499 U.S. 225, 232 (1991) (explaining that federal district courts' interpretations of state law receive no deference, but that "an efficient and sensitive appellate court at least will naturally consider [a district court's] analysis," and that "[a]ny expertise possessed by the district court will inform [the appellate court's] conclusions of law"); *Pojanowski*, *supra* note 23, at 830 (noting that an agency's contextual competence may suggest *Skidmore* deference to its explication of common law rules and principles).

245. *Cf. Sosa v. Alvarez-Machain*, 542 U.S. 692, 729 (2004) ("[W]e now tend to understand common law not as a discoverable reflection of universal reason but, in a positivistic way, as a product of human choice."); H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 614 (1958) ("We can say laws are incurably incomplete and we must decide penumbral cases rationally by reference to social aims."); Randolph D. Moss, *Executive Branch Legal Interpretation: A Perspective From the Office of Legal Counsel*, 52 ADMIN. L. REV. 1303, 1327 (2000) ("[T]he public may elect a President based, in part, on his view of the law, and that view should appropriately influence legal interpretation in the President's administration.").

246. *See, e.g.*, William N. Eskridge, Jr. & Philip P. Frickey, *Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 77 (1994) (claiming that textualism is "a cover for the injection of conservative values into statutes"). *But see* Daniel A. Farber, *Do Theories of Statutory Interpretation Matter? A Case Study*, 94 NW. U. L. REV. 1409, 1410 (2000) ("[T]he cases in which [Judges] Posner and Easterbrook disagree also provide a test of how closely theories of interpretation are linked to outcomes. Somewhat to my surprise, I have concluded that the effect is quite limited.").

247. William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1542 (1987). *But see* Stephen F. Ross, *The Location and Limits of Dynamic Statutory Interpretation in Modern Judicial Reasoning*, in ISSUES IN LEGAL SCHOLARSHIP 6 (2002), available at <http://www.bepress.com/ils/iss3/art6> (arguing that Professor Eskridge's "work can be fairly criticized . . . for failing to emphasize what Eskridge seems to believe—that judges are not supposed to invoke dynamic interpretation simply because they do not agree with the enacting legislature's policy preferences").

invariably will be driven by policy, principles of democratic responsiveness and subject-matter expertise might support significant deference by courts even for administrative reversals described in expository terms.<sup>248</sup>

Yet even if this were an accurate account of the interpretive process—something we seriously doubt—it cannot be squared with the universe of administrative law after *Chevron*. *Chevron* depends on the distinction between extracting meaning through “traditional tools of statutory construction”<sup>249</sup> and making policy choices to fill the gaps that remain. Moreover, even if some ambiguity exists, it is erroneously reductive to assume that the only recourse is application of policy preferences. Disputes over statutory meaning or the trajectory of judicial precedent are more nuanced than that. To be sure, some statutory provisions contain phrases (for example, “in the public interest”) that invite prescriptive policy choices. But in many cases considerations of text, structure, and purpose will suggest a best reading exogenous to the decisionmaker’s ideology.<sup>250</sup> If an agency claims to be revising its prior views in light of congressional or judicial directives, it is that best reading which must be adopted and recited. To play with the skeptical metaphor, “the law runs out”<sup>251</sup> by degree, not off a cliff.

In sum, the justifications for affording substantial deference to prescriptive-based changes are inapplicable to administrative change driven by expository conclusions. Combined with the rule-of-law concerns raised by permitting government actors to flip-flop in their official pronouncements about the

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248. As Yoav Dotan has noted, if “one regards an agency statement as purely an effort to interpret the statute, a change in the agency’s interpretation of the statute raises a genuine question of consistency.” Dotan, *supra* note 132, at 1032–33. Professor Dotan goes on to argue that “*Chevron* has radically transformed the law on this issue” by “discarding the distinction between interpretation and policymaking.” *Id.* at 1033; *cf.* Bamberger, *supra* note 174, at 1318 (“While stare decisis is generally rooted in . . . ‘policy considerations militat[ing] in favor of continuity and predictability in the law,’ administrative policy after *Chevron* is governed by a different directive: An agency ‘must consider varying interpretations and the wisdom of its policy on a continuing basis’ and ‘must be given ample latitude to adapt . . . rules and policies to the demands of changing circumstances.’” (footnotes omitted)). As explained above, we submit that the distinction between exposition and policymaking remains valid after—and was even bolstered by—*Chevron*.

249. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984).

250. See John Gardner, *Concerning Permissive Sources and Gaps*, 8 OXFORD J. LEGAL STUD. 457, 460 (1988) (“Judges may make ‘judgments’ among a finite number of permissive [legal] standards without a resort to any further extra-legal standards.”); Postema, *supra* note 228, at 265 (“[S]ometimes a judge [will] responsibly conclude from consideration of the relevant arguments that one of the eligible options is better supported than any other . . . [T]he language of choice obscures reason-guided decision-making.”).

251. DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION: FIN DE SIÈCLE* 33–35 (1997).

meaning of legal texts, these considerations support vigilant judicial review of expository change.

### 3. Expository Reasoning and the Costs of Change

The foregoing distinction between modes of administrative reasoning raises the more general question whether expository and prescriptive reasoning should be treated differently in all cases, even when change is not involved. Such a position would require a reworking of modern administrative law by withholding *Chevron* deference from all expository-based justifications, including those furnished to justify agency action in the first instance. This prospect strikes us as having considerable appeal. The distinction between expository and prescriptive reasoning is a meaningful one, as we have explained.<sup>252</sup> What is more, the logic of *Chevron*, which treats the exegesis of statutory constraints as independent of policy choice,<sup>253</sup> would make the doctrinal revision less radical than it might initially appear. The Supreme Court's statements in cases like *Cardoza-Fonseca* arguably suggest a comparable recognition of the distinction between the expository and prescriptive tasks.<sup>254</sup>

Nevertheless, whatever one thinks of the proper judicial stance toward expository reasoning in the first instance (or expository reasoning that is consistent with agency precedent), there is reason to believe that judicial scrutiny is especially warranted in instances of expository change.

Most importantly, though a biased exposition of a legal text creates rule-of-law costs whenever it occurs,<sup>255</sup> the costs are exacerbated by inconsistency over time. Administrative vacillation as to the meaning of static texts creates dangers similar to those presented by vacillation within the judiciary. As Cardozo put the point, it would be "intolerable if the weekly changes in the composition of the court were accompanied by changes in its rulings."<sup>256</sup> One element of this

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252. Cf. *supra* text accompanying notes 185–197 (discussing courts' practice of nondeferential review of agencies' expository reasoning in the first instance).

253. See *supra* text accompanying notes 235–240.

254. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446–48 (1987); see also *supra* Part III.B.1.

255. See *supra* text accompanying notes 221–224.

256. CARDOZO, *supra* note 153, at 150; see also, e.g., *Green v. United States*, 355 U.S. 184, 215 (1957) (Frankfurter, J., dissenting) (describing stare decisis as promoting "the wisdom of this Court as an institution transcending the moment"); Lewis F. Powell, Jr., *Stare Decisis and Judicial Restraint*, 47 WASH. & LEE L. REV. 281, 288 (1990) (noting that to endorse "the idea that the Constitution is nothing more than what five Justices say it is" would "undermine the rule of law").

concern is that binding legal texts could come to be viewed as subservient to political movements and personal preferences—to what we might think of as an “arbitrary discretion”<sup>257</sup>—rather than embodying some coherent, integrated meaning that transcends any particular decisionmaker. The critic might respond that we should be less concerned by such effects when those making the pronouncements are administrative officials rather than federal judges. But agencies’ statements about the meaning of legal texts have enormous impact,<sup>258</sup> and we have seen that principles of democratic accountability and subject-matter expertise disappear in the context of expository reasoning,<sup>259</sup> leaving the agency situated similarly to a court of law.

A related justification for enhanced scrutiny in situations of administrative change can be glimpsed in Brandeis’s famous statement that “in most matters it is more important that the applicable rule of law be settled than that it be settled right.”<sup>260</sup> Implicit in this decoupling is the recognition that wrongness and flux carry independent costs. Expository reasoning in the administrative realm lends itself to a similar analytical dichotomy.<sup>261</sup> The American legal system evinces a bias toward continuity and gradualism in the development of legal principles and the exposition of legal rules.<sup>262</sup> This does not reflect a desire for stasis or ossification.<sup>263</sup> What it reflects is a preference for a stable legal

257. THE FEDERALIST NO. 78 (Alexander Hamilton).

258. See, e.g., John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 614–15 (1996); Scalia, *supra* note 128, at 518–19 (arguing that in practical terms, agencies possess the power to “chang[e] the law”).

259. See *supra* notes 241–244.

260. *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting).

261. Cf. *Morrison*, *supra* note 156, at 1472 (“John Crittenden explained in 1851 that although the doctrine of stare decisis ‘belongs more particularly to courts of law[,] . . . in its reasons and principles it has some application to all official public transactions, and tends to give stability, uniformity, and certainty to the administration of law by the executive department of government.” (quoting 5 Op. Att’y Gen. 333, 352 (1851))).

262. See *supra* Part III.A.1; cf. David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 925 (1992) (“The judicial tendency to favor continuity over change is, on the whole, a desirable one. It reflects the essentially conservative role of the courts—conservative not in the political sense of advancing a right-wing ideology, but in the more moderate sense of accommodating change to the larger, essentially stable context in which it occurs.”); *id.* at 942 (“[I]n a society in which revolution is not the order of the day, and in which all legislation occurs against a background of customs and understandings of the way things are done, it deserves the drafters of legislation to take a casual or even a wholly ‘neutral’ attitude towards change.”).

263. Indeed, it has been persuasively argued that the rule of law requires at least the possibility of effecting change through the process of argumentation with governmental decisionmakers. See Waldron, *supra* note 224, at 8 (“The procedural side of the Rule of Law presents a mode of governance that allows people a voice, a way of intervening on their own behalf in confrontations

system,<sup>264</sup> and the recognition that stability usually is best promoted by limiting the frequency and degree of legal change.<sup>265</sup> Expository-based change by administrative agencies should be subject to meaningful judicial oversight as a braking mechanism to prevent an endless string of expository reversals that bend with the shifting political winds.<sup>266</sup>

Of course, prescriptive-based change also creates disruptions for stakeholders. As explained above, however, an agency's reliance on prescriptive reasoning introduces considerations of political responsiveness and subject-matter expertise that serve as countervailing factors cutting in favor of relatively broad discretion to change. The prescriptive context is marked by a stronger tension between the virtues of legal stability and the need for administrative flexibility. Moreover, the rule-of-law concerns raised by administrative vacillation over the meaning of static texts have no analogue in prescriptive-based change. Thus, while any

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with power . . . . But argument can be unsettling, and the procedures we cherish often have the effect of undermining the predictability that is emphasized in the formal side of the ideal.”).

264. See, e.g., Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 HARV. L. REV. 1055, 1106 (1997) (“[T]he government engenders greater respect for its laws and lawmaking institutions if it can commit to the stability of its laws.”).
265. See, e.g., *Citizens United v. FEC*, 130 S. Ct. 876, 920 (2010) (Roberts, C.J., concurring) (“[S]tare decisis is not an end in itself. It is instead ‘the means by which we ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion.’” (quoting *Vasquez v. Hillery*, 474 U.S. 254, 265 (1986))); cf. Fisch, *supra* note 152, at 96 (“A court that is precluded from ignoring or overruling a precedent is limited to more evolutionary forms of lawmaking.”); Stephen R. Perry, *Judicial Obligation, Precedent, and the Common Law*, 7 OXFORD J. LEGAL STUD. 215, 240 (1987) (describing an “adjudicative” theory of law in which “a legal system can change its mind . . . about which principles apply to a given type of case, about what relative weight each possesses, and about what concrete results they collectively point to, but it cannot do so too hastily”); David L. Shapiro, *The Role of Precedent in Constitutional Adjudication: An Introspection*, 86 TEX. L. REV. 929, 942 (2008) (“[I]t is hard to overstate the value of coherence and predictability in the law as a basis for avoiding disputes and for facilitating settlements when disputes do arise.”); *id.* at 947 (“[T]he judiciary plays a vital role in serving as a protector of continuity in the context of incremental change.”).
266. The potential subtlety of the expository/prescriptive distinction in some cases arguably furnishes an additional reason for some judicial deference to an agency's expository reasoning in the first instance. If one were concerned that judges might tend to misclassify prescriptive-based reasons as exposition, institutional values of accountability and expertise might justify deference in the first instance as a safety net. Cf. ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY* (2006) (arguing that judges' limited capacities counsel for limited scope of interpretive freedom). But even if one accepts this argument, the rule-of-law values implicated by vacillating administrative expositions overshadow any utility provided by a deferential margin of safety in circumstances of administrative change.

type of administrative change may have an impact on reliance expectations, the unique characteristics of expository-based change warrant special scrutiny.<sup>267</sup>

Interests in consistency across jurisdictions might also suggest greater deference for expository-based actions in the first instance relative to expository change. *Chevron* fosters national uniformity in interpretation of regulatory statutes at any given time by increasing the likelihood that multiple courts will defer to a single interpretation advanced by an agency rather than undertaking their own, potentially inconsistent analyses.<sup>268</sup> As a result, considerations of uniformity might justify some deference for expository-based reasoning in the first instance. This argument becomes much less resonant when an agency shifts course and thereby destabilizes an interpretive consensus that has begun to emerge. Thus, even if one supports deference to expository-based reasoning in the first instance on grounds of uniformity, there remains a powerful case for greater scrutiny in situations of administrative change.

This discussion of expository reasoning in the first instance raises one final point worth elaborating: how to proceed when the relevant legal texts themselves have changed. The most ready illustration is that of a formal statutory amendment. If an agency's initial decision was based on its interpretation of statutory language that has since been amended by Congress, its attempt to grapple with the revised language does not carry the baggage of expository change. The agency's interpretation accordingly should be treated as a decision in the first instance. The same principle applies to new pronouncements by the Supreme Court. If, for example, the FCC's reconsideration of *Pacifica* had been prompted by a recent Supreme Court opinion setting forth a revised rule, concerns about administrative manipulation of a static text would be negated.<sup>269</sup> The agency's new interpretation in such a case should be treated as if it were issued in the first instance. There remains some prospect of complexity; as noted above, there are pockets of administrative law suggesting that an agency that

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267. Our proposal's more permissive approach to prescriptive change is also consistent with the notion that, in shaping their conduct and developing their expectations going forward, stakeholders should be encouraged to treat prescriptive conclusions as relatively fluid but expository conclusions as less prone to shifting with the political tides.

268. See generally Peter L. Strauss, *One Hundred Fifty Cases per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093 (1987).

269. See *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800 (2009); cf. *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993) (“[I]n the aftermath of [*Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988)], [the Secretary] notes that the agency returned to its earlier position.”).

explains itself in terms of following a judicial opinion should not receive deference.<sup>270</sup> Still, that complexity stems from general principles of administrative law as opposed to the unique characteristics of administrative change.<sup>271</sup>

#### IV. REVIEWING ADMINISTRATIVE CHANGE

Recognizing the distinct forms of agency reasoning is critical to determine the appropriate standard of judicial review in instances of administrative change. An agency that resolves an issue through expert weighing of costs and benefits necessarily relies on policy judgments. Those judgments often will be shaped by a particular worldview—for instance, how strongly one perceives the ills of environmental pollution, or the extent to which one thinks market forces will ensure consumer safety in a given industry. The judgments accordingly will shift over time, often in connection with political trends.<sup>272</sup> Such shifting is not necessarily objectionable. In many cases there will be no universal method for assessing the relative utility of various courses of action. Evaluating the costs and benefits will depend in substantial part on the administrator's ideology and reaction to democratic pressures, and there are well-accepted advantages to preserving a broad sphere of administrative discretion.<sup>273</sup>

By contrast, administrative reasoning that is focused on the parsing of Supreme Court precedents or the divination of congressional intent brings different considerations into the mix. Most prominently, political responsiveness and policy expertise become inapposite, and a reversal of course may affect the integrity of the rule of law.<sup>274</sup> Something more should be required before an agency is permitted to change its approach based on a new reading of a static legal text.

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270. See *supra* Part III.B.1.

271. The determination whether the relevant legal backdrop really has changed should be made de novo by the court, without any lens of deference, for reasons similar to those justifying de novo review in applying *Chevron's* initial step. See *supra* Part III.B.2.b.

272. See, e.g., *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865 (“[A]n agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments.”); Weaver, *supra* note 128, at 559–60 (“Courts might also be reluctant to allow an agency to alter their interpretations when it appears that the changes were politically motivated. From one administration to another, there can be significant policy shifts. As a result, a later administration may interpret a regulatory provision differently than a prior one. . . . *Chevron* suggests that such policy shifts are permissible.”).

273. See *supra* Part III.B.2.a.

274. See *supra* Part III.B.2.b.

## A. General Approach

### 1. Prescriptive Change

For administrative change driven by prescriptive reasoning, we submit that the proper judicial rubric is ordinary arbitrary-and-capricious review,<sup>275</sup> as suggested by the Supreme Court in cases like *Smiley*,<sup>276</sup> *Brand X*,<sup>277</sup> and *Fox*.<sup>278</sup> A reviewing court should ensure that the agency demonstrated awareness of its change, explained any contradictory findings of fact, and adequately considered the implicated reliance interests. Those obligations flow from the reasoned-explanation requirement common to all administrative action governed by the APA. A reasonable agency by definition will consider relevant record data and findings of fact before acting, and the agency's previous considered judgments about the matter—as well as the reliance expectations those judgments engendered—are among the salient factors. Individual cases may raise challenging questions about whether an agency has properly weighed the various considerations, but such is the nature of the arbitrary-and-capricious standard.

The rescission of the passive-restraint requirement chronicled in *State Farm*<sup>279</sup> exemplifies the type of prescriptive-based rationale that should be reviewed under traditional arbitrary-and-capricious analysis. The agency's explanation was not grounded in identifying congressional intent regarding the precise meaning of "reasonable, practical and appropriate"<sup>280</sup> safety devices, nor did it claim to follow judicial precedent. Instead, the agency weighed the economic costs of regulation against the likely benefits to driver safety.<sup>281</sup> It acknowledged that it was changing course and offered policy justifications (however debatable) for its new position, and there did not appear to be any significant reliance expectations disrupted by the change.<sup>282</sup> Thus, under our proposal, the agency was within its rights to reverse itself.

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275. See 5 U.S.C. § 706(2)(A) (2006).

276. *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735 (1996).

277. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).

278. *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800 (2009).

279. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983); see also *supra* Part II.A.

280. 15 U.S.C. § 1392(f)(3) (1988) (repealed 1994).

281. *State Farm*, 463 U.S. at 38–40.

282. See, e.g., 46 Fed. Reg. 53419, 53420 (Oct. 29, 1981) (explaining the "decision to rescind the automatic restraint requirements" as "difficult"). Automotive manufacturers who had invested in preparing to install automatic restraints might have relied, but they advocated for rescission.

## 2. Expository Change

For administrative change driven in significant part by expository reasoning—characterized by declarations about the meanings of legal texts, as with the FCC’s ruminations on *Pacifica* in the recent *Fox* case<sup>283</sup> or the administrative efforts at statutory construction in *Rust v. Sullivan*<sup>284</sup>—the conventional standards of judicial review become inadequate. An unexplained expository change, or one that fails to account for the implicated reliance interests, necessarily is arbitrary and capricious.<sup>285</sup> But even an expository change that is brilliantly and thoroughly presented may exact significant costs on the rule of law.<sup>286</sup> The APA’s general demand for a reasoned explanation does not account for what makes expository reasoning unique.<sup>287</sup>

The scrutiny provided under *Chevron*’s two-step framework likewise is insufficient for reviewing expository reversals of course. Deferring to any administrative construction so long as it is “reasonable” disregards the consequences of vacillations as to the meaning of legal texts.<sup>288</sup> *Skidmore* review, in which an agency’s explanation receives deference depending on its persuasiveness, is a more plausible option. Unlike *Chevron*, *Skidmore* ascribes weight to the consistency of the agency’s interpretation over time.<sup>289</sup> This feature might be viewed as an implicit preference against change, which accords with a bias in favor of legal stability.

Nevertheless, de novo review is preferable even to the *Skidmore* standard. Given the impact that expository-based change can have on the rule of law, the apparatus of judicial review should be fully engaged without any filter of deference. Rather than asking whether an agency’s revised interpretation of, say, a Supreme Court opinion is “persuasive” notwithstanding its deviation from the agency’s prior pronouncements, a court would be better served to grapple with what the opinion actually means. Formally, such de novo scrutiny could be conceptualized as a specialized component of arbitrary-and-capricious review in situations of legal change, reflecting the fact that a shift in expository rationale

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283. See *Fox*, 129 S. Ct. 1800.

284. 500 U.S. 173 (1991).

285. See *supra* Part III.A.2.

286. See *supra* Part III.B.3.

287. See *supra* Part III.B.2.b.

288. See *supra* Part III.B.3; cf. Silberman, *supra* note 23, at 823 (noting that *Chevron* recognizes that agencies are “making good old-fashioned policy in the form of interpreting and applying” statutes).

289. See *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (considering “consistency [of agency interpretation] with earlier and later pronouncements”).

presents a “relevant factor[ ]”<sup>290</sup> in evaluating the reasonableness of agency action under the APA.<sup>291</sup> Such an approach would not foreclose an agency from revising previous interpretations that always were or eventually had become erroneous.<sup>292</sup> It would simply enlist the judiciary to conduct a full inquiry into the validity of the agency’s expository rationale.

One might wonder why the analogy to judicial *stare decisis* should not be pressed further, allowing an agency to revise its expository conclusions only when there is some “special justification” beyond a belief that the conclusion is incorrect.<sup>293</sup> In practical terms, this approach would collapse into the *de novo* review we propose. An administrative agency seeking to revise its official stance on some issue presumably will believe that its preferred approach is sound as a matter of policy; it is difficult to imagine agencies investing the resources to reverse prior interpretations they view as socially optimal. Likewise, the agency will have determined that the accompanying disruption of reliance interests is justified by the beneficial results of the proposed change.<sup>294</sup> These types of instrumental analyses would furnish the “special justifications” necessary to justify a deviation from precedent. Ultimately, then, a reviewing court would find itself in the position of asking whether the agency’s revised expository justification was valid, which is the same state of affairs that exists under our proposal for *de novo* review.

## B. Complexities in Practice

### 1. Crossover Justifications

Our discussion thus far has assumed that agencies’ chosen modes of reasoning remain uniform over time. This need not be the case. An agency may

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290. *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983).

291. *See* 5 U.S.C. § 706(2)(A) (2006) (directing courts to hold unlawful agency action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”); *id.* § 706(2)(C) (directing courts to hold unlawful agency actions “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right”).

292. *See* *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 190 (2000) (Breyer, J., dissenting) (“The statement, ‘we cannot assert jurisdiction over substance X unless it is treated as a food,’ would not bar jurisdiction if the agency later establishes that substance X is, and is intended to be, eaten.”).

293. *See, e.g.*, *Patterson v. McLean Credit Union*, 491 U.S. 164, 175 n.1 (1989) (“[W]hether or not [the precedent] was correct as an initial matter, there is no special justification for departing here from the rule of *stare decisis*.”).

294. *See supra* Part III.A.2.b.

give expository reasons for changing a position it previously justified through prescriptive reasoning, or vice versa.

A crossover from prescriptive to expository reasoning indicates that an agency currently perceives its decision as directed by congressional intent or judicial mandate, obviating the policymaking discretion the agency formerly believed itself to possess. The new expository rationale is a conclusion about the meaning of legal texts subjecting the agency to *de novo* review.<sup>295</sup>

The converse occurs when an agency's crossover is from expository reasoning to prescriptive reasoning. In that situation, an agency previously indicated that its discretion was meaningfully constrained by some congressional or judicial source, but later concludes that it actually has running room to prescribe policy (again with the background assumption that the relevant legal texts have not changed in any relevant way). The problem here is that after having taken a position on the meaning of legal texts, the agency is seeking to abandon that position. The decision to reject an expository rationale it previously adopted should subject the agency to *de novo* review. Assuming that the agency has offered an explanation of why the previous understanding of its discretion was incorrect, the court's task would be clear: It would evaluate the new explanation *de novo*. In the event that no such explanation was included along with the agency's prescriptive rationale, the most sensible approach—and the one most consistent with the rule limiting review of agency decisions to explanations contained in the administrative record<sup>296</sup>—would be to remand for the agency to articulate its new expository analysis.

## 2. Mixed Justifications

It is worth reiterating that our proposal suggests enhanced scrutiny only when expository reasons play the primary role in an agency's explanation of its

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295. One might interject that the agency's prior, prescriptive justification also implies that the agency did not perceive the legal texts as tying its hands. *See supra* Part III.B.2.a. As discussed above, however, the primary rationale for subjecting an agency's expository reasoning to more exacting scrutiny is that the choice to employ such reasoning can carry significant consequences—consequences that do not follow when an agency's expository conclusions are merely implied from its decision to engage in prescriptive reasoning. In addition, principles of administrative law direct a reviewing court's focus to the rationale that an agency has actually offered for its action. *See SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943).

296. *See Chenery*, 318 U.S. at 87 (“The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based.”).

reversal<sup>297</sup>—for example, when an agency describes its approach as dictated by Supreme Court pronouncements or responsive to congressional intent. The mere mention of an expository justification does not alter the character of agency action that is an obvious exercise in prescriptive gap-filling.<sup>298</sup> Drawing this distinction will not always be easy, but the underlying rationale remains straightforward: Administrative change that is framed mainly in prescriptive terms is different, theoretically and pragmatically, from change framed mainly in expository terms.

But what about situations where both prescriptive and expository reasons are described by the agency as playing a significant role? In *Brand X*, for example, the FCC offered both types of arguments in explaining its treatment of cable companies that provide internet services. As the Supreme Court noted, the FCC parsed the language of the Communications Act and determined that Congress did not intend to subject cable companies to certain requirements.<sup>299</sup> At the same time, the FCC drew on policy considerations such as “market conditions” and the need to promote “investment and innovation” as warranting its stance.<sup>300</sup>

When an agency invokes a mixed justification to depart from an approach it previously justified on expository grounds, the change should be reviewed *de novo* to protect against excessive vacillation regarding the meaning of legal texts.<sup>301</sup> The same applies to the departure from a mixed justification that prominently featured both expository and prescriptive components; the abandonment of an expository rationale requires an adequate explanation whether or not it is supplemented by a prescriptive argument.

That leaves situations in which an initial agency decision was justified mainly on prescriptive grounds, while the administrative change is based on a combination of expository and prescriptive arguments. One option would be to focus solely on the presence of expository reasoning, concluding that any agency explanation framed in expository terms must stand or fall on that basis alone. This approach risks creating an implicit penalty for agencies that grapple with the relevant judicial opinions or indicia of congressional intent. The better approach is a hybrid form of review. A court would uphold the administrative

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297. *See supra* III.B.3.

298. *See supra* text accompany notes 187–188.

299. *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 986–88 (2005) (summarizing the FCC's interpretation).

300. *Id.* at 1001.

301. *See supra* Part III.B.3.

change if (a) the prescriptive rationale satisfied the reasoned-explanation requirement, including acknowledgment of change and consideration of reliance implications;<sup>302</sup> or (b) the expository rationale survived de novo review.

To illustrate, recall *Rust v. Sullivan*, in which the Department of Health and Human Services offered a mixed justification for departing from a prior position justified mainly on prescriptive grounds.<sup>303</sup> The agency broke from precedent in concluding that funding recipients should be prohibited from engaging in activities such as abortion-related counseling. It explained itself in expository terms, defending the new approach as more consistent with the applicable statute's text and purpose.<sup>304</sup> It also couched its rationale in regulatory policy: The previous approach had led to confusion, "variations in practice by grantees," and the performance of abortion-related activities.<sup>305</sup> In a case like *Rust*, even if the agency's expository rationale were deemed to be deficient,<sup>306</sup> the agency's reversal nevertheless would have been permitted so long as its prescriptive reasons were not arbitrary and capricious and the interpretation otherwise fell within the bounds of reasonableness set forth in *Chevron*.

### 3. Dynamic Effects

Standards of judicial review can influence how agencies structure their operations *ex ante*.<sup>307</sup> In that spirit, our proposal might alter incentives regarding an agency's preferred mode of reasoning. On net, the effects are likely to be beneficial.

Perhaps the most pressing question is whether an agency could "game the system" by employing a certain form of reasoning in the first instance in

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302. See *supra* Part IV.A.1.

303. 500 U.S. 173 (1991); see also 53 Fed. Reg. 2922, 2923 (Feb. 2, 1988) ("In 1981, the Department issued revised Title X program guidelines . . . [that] required Title X projects to engage in abortion-related activities under certain circumstances. . . . These guidelines were premised on a view that 'non-directive' counseling and referral for abortion were not inconsistent with the statute and were justified as a matter of policy . . .").

304. 53 Fed. Reg. at 2923.

305. *Id.* at 2923–24 (explaining that even if the prior approach "were not prohibited by the express language" of the relevant statute, the agency would reverse course).

306. Cf. *Rust*, 500 U.S. at 185 ("The parties' attempts to characterize highly generalized, conflicting statements in the legislative history into accurate revelations of congressional intent are unavailing.")

307. See, e.g., Magill, *supra* note 9, at 1442 ("Over time, judicial reactions will influence how an agency chooses its form in the first instance because the [agency's] choice is naturally influenced by the consequences that follow."); Stack, *supra* note 215, at 238 ("If policymaking form constrains the range of interpretive options available to the agency, that constraint may be a significant factor in the agency's choice of policymaking form.")

hopes of giving its decision more staying power following a changeover in presidential administration.<sup>308</sup> For example, an agency might be inclined to employ expository reasoning on the understanding that any subsequent change would need to withstand *de novo* review. This gambit, though, is unlikely to pay off. Whether or not the initial agency interpretation receives some degree of deference,<sup>309</sup> an expository-based change will survive judicial review if it reflects an accurate understanding of the relevant legal texts. When confronted with two interpretations that both fall far short of the best reading of the applicable text, the agency's initial position may preclude a subsequent move grounded in expository reasoning, because the later rationale would fail *de novo* scrutiny. In this sense an agency might have some incentive at Time 1 to employ expository reasoning so as to enhance the sticking power of its views.<sup>310</sup> Still, the agency would not be able to foreclose a subsequent shift to the best reading of the text. Put differently, there is no danger that the best interpretation of the text could be subverted through administrative machinations. While *de novo* review of expository change might encourage an agency to develop persuasive expository arguments, a contrived expository interpretation at Time 1 would have no power to bind the agency at Time 2, should it decide to embrace the best reading of the relevant legal source.

Other administrative actors might view the issue from the opposite direction, valuing regulatory flexibility over policy entrenchment. A relatively apolitical, technocratic agency might prefer to leave room for revision down the road over cementing its legacy. Such an agency likely would rely on prescriptive reasoning to justify its actions, with the goal of minimizing judicial intrusion upon any policy revisions. Thus, the agency would have an incentive to candidly utilize its core policymaking skills. If the governing statute is so broad or unclear as to make expository conclusions elusive, this nudge toward prescriptive

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308. Cf. Beermann, *supra* note 128, at 951 ("Sometimes a prior administration's actions appear to be designed merely to tie the hands of the next administration, for example by imposing rules very late in a term that will place procedural burdens on future administrative action."). Nina Mendelson has discussed the related phenomenon of "agency burrowing," meaning administrative actions taken just before a new administration arrives. See generally Nina A. Mendelson, *Agency Burrowing: Entrenching Policies and Personnel Before a New President Arrives*, 78 N.Y.U. L. REV. 557 (2003).

309. See *supra* Part III.B.3.

310. In the event that an agency attempts to depart from one non-best expository rationale in favor of a different, but still non-best, rationale, we do not suggest that a reviewing court applying *de novo* review may impose the best reading of the relevant text *sua sponte*. Rather, the court's role would be to reject the new interpretation as failing *de novo* review—though we might expect it to include dicta signaling that neither of the interpretations at issue is the best one.

policymaking will be desirable. The effects are more equivocal if an agency could have identified the guiding congressional purpose or judicial directive but declined to mine those sources in order to protect its prescriptive agenda. It is a cost of our proposal that agencies seeking to preserve maximum flexibility might sometimes be discouraged from engaging comprehensively with the legal backdrop. Yet even when an agency's course of action is driven by prescriptive considerations, the overlay of judicial scrutiny through mechanisms such as *Chevron* review will ensure that the agency does not veer beyond the lawful limits of delegated authority,<sup>311</sup> meaning the legal constraints on agency action will remain operative. These considerations suggest that our proposal's benefits will overshadow its costs whether or not an agency seeks to "lock in" its position or rather to preserve its ability to change directions.

#### CONCLUSION: *FOX REDUX*

We close by returning to *Fox*, in which the FCC reversed its previous approach regarding the regulation of broadcast indecency.<sup>312</sup>

In essence, the FCC's justification for change was twofold. First, the agency had come to believe it possessed greater discretion than previously thought to restrict broadcast indecency without creating First Amendment concerns.<sup>313</sup> Second, the agency offered policy reasons to support its more aggressive regulatory stance, including the risk that indecent language would proliferate and the availability of "bleeping" and time-delay technology for broadcasters.<sup>314</sup>

Viewed in terms of the framework we have set forth, the FCC moved from an expository-based rationale—driven by the understanding that *Pacifica*

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311. For a formal model examining the relationship between judicial review and agencies' incentives to adopt moderate, as opposed to extreme, positions, see Givati & Stephenson, *supra* note 135. The authors conclude that "[w]hen courts are very likely to defer to a revised interpretation or are very likely to reject a revised interpretation, the agency's initial interpretation will strongly favor the interests of the incumbent administration . . ." *Id.* at 86. By contrast, "[w]hen the courts take a more intermediate approach—sometimes upholding revised interpretations but sometimes rejecting them—the agency's initial interpretation is more likely to be ideologically moderate." *Id.*

312. See *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800 (2009).

313. See *id.* at 1807.

314. See *Fox Order*, 21 FCC Rcd. 13299, 13309 ¶ 25 (2006) (contending that to allow isolated expletives would "permit broadcasters to air expletives at all hours of a day so long as they did so one at a time"); *id.* at 13313–14 ¶¶ 37–38 (noting that delay technology makes it feasible for broadcasters to bleep out expletives with minimal changes in programming); see also *Fox*, 129 S. Ct. at 1809, 1812–13; *In re Complaints Against Various Broad. Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, 19 FCC Rcd. 4975 (2004).

created stringent First Amendment limitations on the agency's authority to regulate certain indecent speech<sup>315</sup>—to a mixed rationale featuring both expository and prescriptive components. Accordingly, we submit that a court should have begun by reviewing de novo the agency's explanation for its revised reading of *Pacifica*. If the new exegesis of *Pacifica* was incorrect, the agency's attempted reversal would fail even if its prescriptive reasons might be adequate under arbitrary-and-capricious review. By contrast, if the FCC's current reading of *Pacifica* survived de novo scrutiny, the court would consider whether the policy-based, prescriptive justification passed the reasoned-explanation test. This latter inquiry would include the requirements that the agency acknowledge the novelty of its approach and account for any reliance expectations likely to be disrupted.<sup>316</sup>

Justice Scalia's opinion for the Court in *Fox* properly concluded that the FCC's prescriptive reasoning was not rendered suspect simply because it departed from prior practice.<sup>317</sup> The majority's misstep was in neglecting to probe the validity of the FCC's new expository rationale. In this respect Justice Breyer was correct to point out that it is "sometimes" insufficient for an agency to reverse its prior approach simply because it "weigh[s] the relevant considerations differently."<sup>318</sup> *Fox* exemplifies these "sometimes"; the FCC's reversal was based in large part on a new expository approach, which should have triggered an additional component of judicial review. (Of course, we do not impute to Justice Breyer the belief that his "sometimes" depends on recognizing the distinction between expository and prescriptive reasoning we have articulated—though we can at least imagine that such an approach might resound with the Justice given his invocation of Lord Coke to champion the "rule of reason and law" over "will[ ]" in administrative decisionmaking.<sup>319</sup>)

Recognizing the distinction between expository reasoning and prescriptive reasoning could also assist the courts in determining, in Justice Kennedy's

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315. See *In re Application of WGBH Educ. Found.*, 69 F.C.C.2d 1250, 1254 ¶ 10 (1978) ("We intend strictly to observe the narrowness of the *Pacifica* holding. In this regard, the Commission's opinion, as approved by the Court, relied in part on the repetitive occurrence of the 'indecent' words in question.").

316. See *supra* Part IV.A.1.

317. See *Fox*, 129 S. Ct. at 1812–13.

318. *Id.* at 1831 (Breyer, J., dissenting).

319. *Id.* at 1830 (quoting *Rooke's Case*, 77 Eng. Rep. 209, 210 (C.P. 1598)); see also *id.* at 1835 ("[T]he FCC works in the shadow of the First Amendment and its view of the application of that Amendment to 'fleeting expletives' directly informed its initial policy choice."). Likewise, though Justice Breyer would have permitted an agency to revise its prior interpretive judgment in *FDA v. Brown & Williamson Tobacco Corp.*, he emphasized that the applicability of the relevant statute had been altered by newly found facts. See 529 U.S. 120, 188 (2000) (Breyer, J., dissenting).

words, when a “new policy rests upon principles that are rational, neutral, and in accord with the agency’s proper understanding of its authority.”<sup>320</sup> The appeal to “neutral principles” is most apt when an agency engages in expository reasoning by searching for indicia of congressional intent or mining the nuance of a judicial opinion. The legal texts may not themselves be normatively “neutral,” but the agency undertaking an expository analysis is engaged in an effort to draw guidance from sources external to its own policy preferences. As the ultimate interpreters of the law, courts are well suited to apply de novo review to ensure neutrality and accuracy in such circumstances.

By comparison, when agency action is grounded mainly in prescriptive reasoning, substantive neutrality gives way to the more basic requirements of rational decisionmaking and procedural fairness. The judiciary’s role should be limited to ensuring that the agency has accounted for the relevant facts, including reliance effects, and provided a cogent explanation of its *own* reasons for pursuing a given course of action. A doctrine of administrative change designed to ensure neutral, accurate exposition of the law along with rational, procedurally fair considerations of public policy is the best solution for promoting the ideals Justice Kennedy highlighted in *Fox*.<sup>321</sup>

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The puzzle of administrative change can be understood as part of the broader dilemma over how to reconcile the modern administrative state with the traditional, tripartite separation of powers. In this Article, we have contended that an unexamined key to recognizing the implications of administrative change is the mode of reasoning an agency chooses to employ. At its core, the solution we have set forth provides substantial deference to changes driven by administrative policy choices, while requiring diligent judicial oversight of arguments grounded in the meaning of legal texts. In advancing this dichotomy, our proposal seeks to acknowledge the value of administrative flexibility while preserving the unique integrity of legal texts and norms.

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320. *Fox*, 129 S. Ct. at 1823 (Kennedy, J., concurring in part and concurring in the judgment).

321. This is not to say that Justice Kennedy himself would necessarily agree with our prescriptive/expository model. His concurrence suggests that the FCC’s revised “reading of *Pacific*” represents “the sort of reason[ ] an agency may consider and act upon” in reversing course. *Id.* at 1824. Regardless of what Justice Kennedy meant to indicate, our point is that the prescriptive/expository distinction is consistent with the underlying values he enumerated in the context of administrative change.