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The Science of Administrative Change

BARRY SULLIVAN & CHRISTINE KEXEL CHABOT

Donald Trump repeatedly vowed to reduce regulation during the 2016 presidential campaign. Indeed, one of his key advisors promised to “deconstruct” the administrative state. Since taking office, President Trump has attempted to make good on his promises, spurring federal agencies to brush aside countless regulations that previous administrations had promulgated based on scientific, technological, or economic evidence. Those efforts, which some have dubbed a “war on science,” implicate a long-contested question in administrative law: to what extent should a change in presidential administrations excuse agencies from any obligation to justify changes in policy with expert, reasoned analysis of relevant data? Perhaps surprisingly, the Trump Administration’s efforts align with views that have dominated administrative law scholarship in recent decades. By the time President Trump took office, many leading administrative law scholars had already championed enhanced presidential control over agency decisions, dismissed expert analysis as an anachronistic relic of the New Deal, and suggested that the considered judgments of previous administrations should be amenable to quick and easy change.

This Article takes a contrary view and asserts a renewed role for expert, reasoned analysis in the face of politically motivated administrative change. Unlike earlier work, this Article identifies change as a fundamental and essential aspect of much expert decision making, and it explains that regulatory statutes often call for an exercise of expert judgment capable of incorporating frequently changing bodies of scientific, technological, or economic knowledge. This positive procedural account of agency decision making shows that the reasoned analysis contributed by agency expertise is far from superfluous, but helps give legitimacy and transparency to administrative government. By identifying the value of expertise within the context of politically directed policy changes, this Article addresses an under-theorized aspect of judicial review of agency decisions and reinforces the need for agencies to support changes in policy with reasoned, expert analysis.

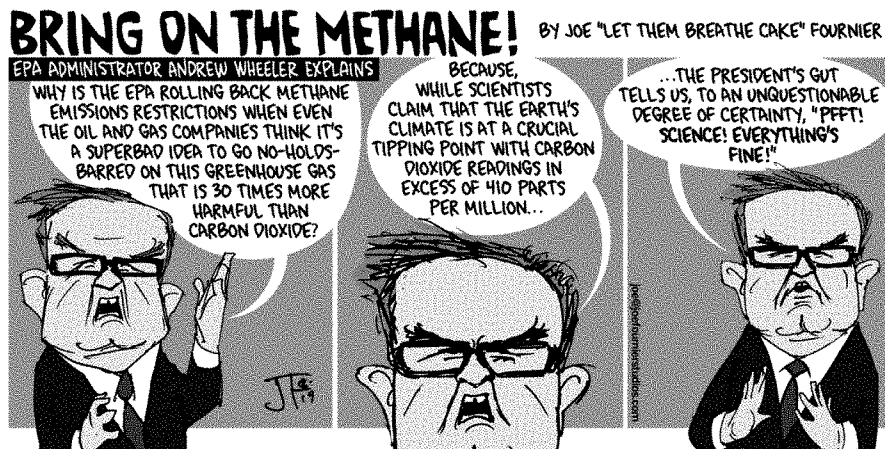
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BARRY SULLIVAN* & CHRISTINE KEXEL CHABOT**



INTRODUCTION

By spurring administrative agencies to roll back a spate of important regulations, the Trump Administration has followed through on its 2016 campaign promises. These rollbacks seek to undo regulations that were put in place to achieve a range of significant public benefits—from slowing the

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pace of global warming¹ to eliminating water pollution² and ensuring net neutrality.³ In carrying out its deregulatory program, one of the hallmarks of the Trump Administration's approach has been to summarily reject relevant economic or scientific information, claiming that the harm calling for regulation does not exist.⁴ This strategy, which has been described as a "war on science," manifests a "reflexively antiregulatory mind-set" and a belief that scientific evidence of phenomena such as global warming is, in the President's own words, a "hoax."⁵ To further this strategy, the President has appointed agency heads eager to implement his deregulatory philosophy, whatever the facts might be. These aggressive deregulatory efforts provide a salient example of government as the exercise of raw political will and implicate a long-contested issue in administrative law: to what extent may the exercise of political will justify immediate policy change and eliminate the need for agencies to engage in expert, reasoned analysis of relevant scientific, technological, or economic evidence before altering existing policy? This Article addresses the conflict between political will and informed expert analysis in the context of judicial review of administrative change. It argues that expert analysis has a positive, distinctive, and essential role to play.

Of course, President Trump's desire to bend regulatory outcomes to political goals is hardly unique. Nor is that desire one that manifests itself only in Republican administrations.⁶ Perhaps surprisingly, an early proponent of "political supremacy"—a strong, centralized executive power to effectuate regulatory change—was none other than now-Justice Elena Kagan.⁷ In a 2001 article, then-Professor Kagan praised the degree of control

¹ Exec. Order No. 13,783, 82 Fed. Reg. 16,093 (Mar. 28, 2017) (calling for a rulemaking to undo the Clean Power Plan's limitations on carbon emissions and "immediate[] review" of regulations that may "burden the development or use of domestically produced energy"); Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions From Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations, 84 Fed. Reg. 32,520 (July 8, 2019) (to be codified at 40 C.F.R. pt. 60).

² Also in response to an Executive Order, the EPA embarked on a series of rulemakings to undo water pollution limitations established by the Obama Administration's 2015 Waters of the United States rule. See *infra* notes 78–99 and accompanying text.

³ Restoring Internet Freedom, 33 FCC Rcd. 311, 353, ¶ 263 (2018).

⁴ See *infra* discussion in Part II. Another key strategy has been to limit the overall scope of agency regulatory power. See generally Gillian E. Metzger, *The Supreme Court, 2016 Term — Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 7 (2017); Cass R. Sunstein & Adrian Vermeule, *The Morality of Administrative Law*, 131 HARV. L. REV. 1924, 1963 (2018).

⁵ Opinion, *President Trump's War on Science*, N.Y. TIMES (Sept. 9, 2017), <https://www.nytimes.com/2017/09/09/opinion/sunday/trump-epa-pruitt-science.html>.

⁶ Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2281 (2001) (describing President Clinton's efforts to shape regulatory policy).

⁷ See *id.* at 2246. Justice Kagan has not spoken about this subject in extra curial remarks since her appointment to the Court. Christopher Edley was another early proponent of this view. See CHRISTOPHER F. EDLEY, JR., *ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREAUCRACY* 183 (1990).

that President Clinton exercised over administrative agencies: “[Clinton] developed a set of practices that enhanced his ability to influence or even dictate the content of administrative initiatives.”⁸ While leading scholars have argued for⁹ and against¹⁰ enhanced presidential control over administrative decisions, scholars on both sides have dismissed expert analysis as an anachronistic relic of the New Deal.¹¹ In addition, the Supreme Court has failed to form a stable majority on the essential question whether political will or expert analysis should take precedence, or on how the two values should be harmonized in the context of administrative change.¹² Some Justices have emphasized the importance of “expert discretion”¹³ in administrative decision making, while others have focused on unfettered political control.¹⁴ While the latter group of Justices aligns with the dominant administrative law theory of recent decades (presidential control),¹⁵ those Justices who value expertise will find in the scholarly literature only an

⁸ Kagan, *supra* note 6, at 2282.

⁹ See EDLEY, *supra* note 7, at 183; Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 2 (2009); cf. Randy J. Kozel & Jeffrey A. Pojanowski, *Administrative Change*, 59 UCLA L. REV. 112, 160 (2011) (arguing for greater deference to policy change which does not involve interpretation of law); see generally Daniel A. Farber, *Presidential Administration Under Trump 1–5* (Aug. 9, 2017) (gathering sources in an unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3015591.

¹⁰ In response to Kathryn Watts’s 2009 article, several commentators have advocated a continued role for reasoned decision making as a check on political decisions. See Mark Seidenfeld, *The Irrelevance of Politics For Arbitrary and Capricious Review*, 90 WASH. U. L. REV. 141, 153 (2012) (“Review for reasoned decision-making . . . is best explained by the interest group model of the administrative state.”); Jodi L. Short, *The Political Turn in American Administrative Law: Power, Rationality, and Reasons*, 61 DUKE L.J. 1811, 1816 (2012) (rejecting political control in favor of a “sociological theory” that “demonstrates how reason giving shapes agencies through their organizational structures”); Glen Staszewski, *Political Reasons, Deliberative Democracy, and Administrative Law*, 97 IOWA L. REV. 849, 852 (2012) (advancing a “deliberative theory of administrative legitimacy”). A more recent article argues for checks based on the rule of law value of consistency. See William W. Buzbee, *The Tethered President: Consistency and Contingency in Administrative Law*, 98 B.U. L. REV. 1357, 1358 (2018).

¹¹ See, e.g., Seidenfeld, *supra* note 10, at 148 (supporting “reasoned decision-making review” on the ground that it “is not a vestige of the expertise model”); Watts, *supra* note 9, at 13 (critiquing reasoned decision making review as resting on “an outmoded model of ‘expert’ decision-making”).

¹² *Compare Motor Vehicle Mfrs. Ass’n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 54 (1983) (NHTSA failed to “bring its expertise to bear on the question” when rejecting safety benefits of automatic detachable seatbelts), with *id.* at 59 (Rehnquist, J., dissenting in part) (a “change in administration . . . is a perfectly reasonable basis for an executive agency’s reappraisal” of these safety benefits).

¹³ In *State Farm*, Justice White’s majority opinion recognized that “[e]xpert discretion is the lifeblood of the administrative process.” *Id.* at 48 (internal quotation marks omitted). Similarly, Justice Kennedy’s concurrence in *FCC v. Fox Television Stations, Inc.* noted that agency decisions turning on “discoveries in science” must be “informed by the [agency’s] experience and expertise.” 556 U.S. 502, 535–36 (2009) (Kennedy, J., concurring).

¹⁴ *State Farm*, 463 U.S. at 58 (Rehnquist, J., dissenting in part).

¹⁵ Adrian Vermeule, *Bureaucracy and Distrust: Landis, Jaffe, and Kagan on the Administrative State*, 130 HARV. L. REV. 2463, 2478 (2017) (*Presidential Administration* is one of the most “prominent articles in administrative-law theory in recent decades”); see also Short, *supra* note 10, at 1815 (noting the “intellectual vogue for presidentialism”).

“impoverished understanding of expertise”¹⁶ and a failure to identify an important role for expertise in the face of administrative change.

This Article offers a different approach, namely, a positive procedural account that focuses on the indispensable value of agency expertise in the alteration of administrative policy. While previous scholarly work has conceptualized change in terms of the President’s political energy,¹⁷ this Article argues that change is also an essential attribute of much expert decision making. Expert decisions often turn, not on the mastery of static bodies of information, but on the assessment of evolving scientific, technological, or economic knowledge. Indeed, Congress has often acknowledged this fact by requiring agencies to make dynamic expert decisions in a broad array of regulatory statutes, including those that require environmental protection measures to reflect the “latest scientific knowledge”¹⁸ or the “best technology available.”¹⁹

A positive procedural account of agency decision making also demonstrates that administrative agencies, amongst all government decisionmakers, are uniquely situated to incorporate evolving scientific, technological, or economic information into sound regulatory decisions; they are also well-positioned to balance the fits and spurts of advancing knowledge against traditional rule of law values such as stability and predictability.²⁰ When a change in agency policy is considered, therefore, the exercise of expert judgment is not a meaningless procedural obstacle to achieving politically desired ends. Instead, agencies that exercise expert discretion and weigh relevant data add legitimacy and transparency to the dynamic expert determinations mandated by Congress.

¹⁶ Sidney A. Shapiro, *The Failure to Understand Expertise in Administrative Law: The Problem and the Consequences*, 50 WAKE FOREST L. REV. 1097, 1097 (2015). Other contemporary works that support agency expertise focus on the importance of transparency or the challenges of regulating in the face of scientific uncertainty. See generally RESCUING SCIENCE FROM POLITICS: REGULATION AND THE DISTORTION OF SCIENTIFIC RESEARCH 1 (Wendy Wagner & Rena Steinzor eds., 2006); Holly Doremus, *The Purposes, Effects, and Future of the Endangered Species Act’s Best Available Science Mandate*, 34 ENVTL. L. 397, 447 (2004); Sidney Shapiro et al., *The Enlightenment of Administrative Law: Looking Inside the Agency for Legitimacy*, 47 WAKE FOREST L. REV. 463, 463–66 (2012); Wendy E. Wagner, *A Place for Agency Expertise: Reconciling Agency Expertise with Presidential Power*, 115 COLUM. L. REV. 2019, 2019 (2015) [hereinafter Wagner (2015)].

¹⁷ Kagan, *supra* note 6, at 2341–43.

¹⁸ Clean Air Act, 42 U.S.C. § 7408(a)(2) (2012).

¹⁹ Clean Water Act, 33 U.S.C. § 1326(b) (2012). Of course, such regulatory schemes do not represent the entire universe of significant regulatory decisions or address distinct moral concerns raised in areas such as immigration. See *Regents of the Univ. of Cal. v. U.S. Dep’t of Homeland Sec.*, 908 F.3d 476, 510 (9th Cir. 2018) (rescission of DACA was “arbitrary and capricious” because it was based on “an erroneous view of what the law required”), *cert. granted sub nom.*, *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 139 S. Ct. 2779 (2019). Still, agency decisions involving scientific, technological, and economic analysis remain a crucial part of the work of the modern administrative state.

²⁰ For a discussion of why Congress, the President, and the courts cannot perform the same functions as agencies, see *infra* Part II.

The “reasoned analysis” that agencies must provide in support of changes in policy²¹ provides the public with an otherwise unavailable window into the actual basis for regulatory decisions and the tradeoffs that government necessarily makes.²² This type of reasoned, expert analysis stands apart from the exercise of raw political will, which may be entirely arbitrary and opaque.²³ To be sure, political direction remains important,²⁴ and it may sometimes be necessary, among other reasons, for overcoming the “slow pace” that has often plagued regulatory efforts.²⁵ In addition, ultimate solutions to some regulatory problems may be “underdetermined by scientific data” and leave agencies free to consider political factors in reaching a final policy decision.²⁶ Nevertheless, expert analysis remains “crucial”²⁷ to an agency’s reasoned decision making obligations. A process that gives appropriate effect to both political and expert considerations cannot be equated with a purely political process, or to one that fails to inform the public as to where science ends and politics begins. The Trump Administration’s aggressive deregulatory stance incarnates the danger that political objectives may displace expert analysis and produce results that defy justification by reasoned analysis of relevant scientific or economic evidence.²⁸

The Trump Administration’s current deregulatory efforts echo those of the Reagan Administration in the 1980s. Because the Reagan Administration attempted to undo key regulations in a variety of areas, including environmental protection and automobile safety, the Supreme Court had occasion, in resolving challenges to those initiatives, to consider the proper

²¹ *Motor Vehicle Mfrs. Ass’n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983).

²² Administrative agencies must give reasoned explanations for their decisions and thus meet a higher standard than the “minimum rationality a statute must bear in order to withstand analysis under the Due Process Clause.” *Id.* at 43 n.9.

²³ See Staszewski, *supra* note 10, at 860 (noting that pure “political preferences” may include campaign promises or executive preferences).

²⁴ See Seidenfeld, *supra* note 10, at 197 (explaining that politics may motivate reasoned agency decisions).

²⁵ Wendy E. Wagner, *The Science Charade in Toxic Risk Regulation*, 95 COLUM. L. REV. 1613, 1677 (1995) [hereinafter Wagner (1995)].

²⁶ Doremus, *supra* note 16, at 447. Political considerations may ultimately, and legitimately, tip the balance between competing solutions to a particular regulatory problem. Staszewski, *supra* note 10, at 899; cf. Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 464 (2003) (noting that, historically, agencies were only thought to “execute technocratic judgments”).

²⁷ Doremus, *supra* note 16, at 436.

²⁸ See, e.g., *Air All. Hous. v. EPA*, 906 F.3d 1049, 1067 (D.C. Cir. 2018) (rejecting delay of Chemical Disaster Rules based on cursory conclusions that harm caused by chemical explosions was “speculative”); *S.C. Coastal Conservation League v. Pruitt*, 318 F. Supp. 3d 959, 967 (D.S.C. 2018) (order granting summary judgment) (holding that it was “arbitrary and capricious” for the EPA to issue a binding delay of the 2015 Waters of the United States rule without any consideration of the rule’s merits).

scope of agency power to alter regulations issued under congressional mandates. On the one hand, the Court emphasized in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*²⁹ that “[a]n initial agency interpretation [of an ambiguous statute] is not instantly carved in stone,” and that an agency, “within the limits of [Congress’s] delegation,” may “rely on the incumbent administration’s views of wise policy to inform its judgments.”³⁰ On the other hand, in *Motor Vehicle Manufacturers Ass’n v. State Farm Mutual Automobile Insurance Co.*,³¹ the Court delineated important limitations on the power of the National Highway Traffic Safety Administration (NHTSA) to alter discretionary automobile safety policies for political reasons.

While the Court noted the importance of deferring to “expert discretion” in both cases,³² the concept was especially relevant to the arbitrary and capricious standard of review that the Court applied to NHTSA’s decision in *State Farm*. This standard of review, which is mandated by section 706 of the Administrative Procedure Act (APA),³³ requires a reviewing court to “hold unlawful” agency actions that are “arbitrary and capricious.”³⁴ In *State Farm*, the Court distinguished arbitrary political choices from reasoned decisions that could plausibly be attributed to “a difference in view or *the product of agency expertise*.”³⁵ Applying this standard, all nine Justices rejected NHTSA’s decision to rescind a prior administration’s automobile airbag regulations,³⁶ where the Agency failed to offer even “one sentence” to explain why it had come to reject the safety benefits of airbags.³⁷

The Court split in a five-to-four vote, however, on NHTSA’s summary rejection of data that associated safety benefits with an alternative technology, namely, detachable automatic seatbelts. Justice White’s majority opinion rejected the Agency’s explanation as arbitrary and capricious, holding that the explanation was too superficial to constitute “the

²⁹ *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

³⁰ *Id.* at 863, 865.

³¹ *Motor Vehicle Mfrs. Ass’n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).

³² *Id.* at 48 (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 167 (1962)); *Chevron*, 467 U.S. at 865 (recognizing that judges “are not experts in the field” as one reason for deferring to agencies).

³³ 5 U.S.C. § 706 (2019).

³⁴ *Id.*

³⁵ *State Farm*, 463 U.S. at 43 (emphasis added).

³⁶ This holding also aligns with dictionaries that define “arbitrary” as reflecting “individual preference” or “tyranny” and capricious as “impulsive.” Merriam-Webster, *Capricious*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/capricious> (last visited Feb. 9, 2019) (arbitrary definitions 1.b.–2.b.).

³⁷ *State Farm*, 463 U.S. at 48–49; *id.* at 57–58 (Rehnquist, J., concurring in part and dissenting in part) (agreeing that the Agency erred when it “gave no explanation at all” for “eliminating the airbags and continuous spool automatic seatbelt”).

product of reasoned decisionmaking.”³⁸ On the other hand, Justice Rehnquist argued in a partial dissent that the Agency had engaged in a rational “assess[ment of] administrative records,” and that its cursory analysis was sufficient in light of political concerns raised by a “change in administration.”³⁹

The Supreme Court has not resolved the lingering tension between Justice Rehnquist’s call for greater deference to political will and Justice White’s insistence on reasoned decision making. The Court’s next major decision on agency change, *FCC v. Fox*,⁴⁰ which involved the prohibition of “fleeting expletives” from the airwaves, may suggest to some that the Court has moved to a more relaxed standard. But *Fox* did not involve the same type of “empirical evidence” as *State Farm*,⁴¹ and Justice Scalia’s lead opinion in *Fox* studiously avoided any reference to Justice Rehnquist’s partial dissent in *State Farm*.⁴² In *Department of Commerce v. New York*,⁴³ the Court’s most recent decision in the area, shifting coalitions of Justices likewise failed to settle on a single arbitrary and capricious standard of review. The Justices’ five-to-four decision to invalidate the Trump Administration’s addition of a citizenship question to the 2020 census revealed continued disagreement over the respective roles of political will and expert analysis in agency decisions.⁴⁴ Moreover, the broad rationale for expert agency decision making, which once commanded widespread support, has rested on shaky ground in recent decades.

Agency expertise was long considered an important justification for delegating decision making authority to agencies, and even early agencies such as the Interstate Commerce Commission were understood to exercise expert discretion within the narrow limits of legislatively established ends.⁴⁵ During the Progressive Era, Congress established the Federal Trade Commission, which gave the Commission very broad discretion and was thus consistent with Woodrow Wilson’s vision of a much broader role for agency expertise.⁴⁶ By the time of the New Deal, agency expertise had become the new orthodoxy, and, at least in the view of such luminaries as James Landis, it was agency expertise that justified Congress’s delegation of power to administrative agencies. While conceptions of the role of agency expertise varied during this time, all variations assumed that agencies would

³⁸ *State Farm*, 463 U.S. at 52; see also Doremus, *supra* note 16, at 423 (explaining that *State Farm* requires analysis of relevant scientific evidence even “in the absence of an explicit legislative science mandate”).

³⁹ *State Farm*, 463 U.S. at 59 (Rehnquist, J., concurring in part and dissenting in part).

⁴⁰ *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009).

⁴¹ *Id.* at 519.

⁴² Justice Scalia spoke for a plurality of the Justices when he rejected the view that “significant political pressure from Congress” justified heightened scrutiny of the Agency’s decision. *Id.* at 523.

⁴³ *Dep’t of Commerce v. New York*, 139 S. Ct. 2251 (2019).

⁴⁴ *Id.* at 2571.

⁴⁵ See *infra* Part I and discussion surrounding notes 159–67.

⁴⁶ *Id.*

exercise expert discretion objectively and free from political influence. More recently, that has changed.

The idea that objective expertise supplies an adequate justification for delegations of broad power to administrative agencies has been under attack for various reasons since the late 1930s. Calls by the legal and business communities for increased procedural controls over administrative agencies culminated in the passage of the Administrative Procedure Act in 1946. By the 1960s and the 1970s, concerns over agency capture had further eroded support for the agency expertise rationale. Although Congress continued to delegate expert questions to agencies in new environmental and safety legislation in the 1970s, by then the objective expertise rationale for agency decision making had largely been discredited. Without any strong theoretical basis for the exercise of agency expertise, leading scholars began to argue that the justification for agency discretion rested in its capacity for advancing political concerns, especially those of the President.⁴⁷ As a result of this larger theoretical shift away from expertise and toward politics, it is not surprising that leading administrative law scholars have questioned *State Farm*'s majority holding and voiced support for regulatory change justified only by a new President's political priorities.⁴⁸ This Article takes a contrary view and argues that expertise and reasoned analysis of relevant evidence still serve an essential purpose in agency decision making, even when they cannot point to a single, objective answer in a particular case.

The Article develops its argument for the importance of agency expertise in administrative change as follows. Part I recounts the extent to which raw politics have replaced expert analysis under the Trump Administration. Part II outlines the historical rise and fall of expertise as a general theoretical justification for delegations of power to administrative agencies. Part III introduces the science of administrative change. It offers a positive procedural account of administrative change and identifies the unique advantages of agency decision making. No other actor in our system is equally qualified to formulate regulatory policy involving dynamic questions of science, technology, or economics. Part IV describes the Justices' divergent views on the importance of expertise in administrative change. Part V discusses the ongoing debate about the extent to which political will should be allowed to supplant expertise as a justification for an agency's change in policy and shows how expert justifications for change provide a unique opportunity to increase the legitimacy and transparency of regulatory decision making. The Article concludes by arguing that courts should continue to insist on expert decision making and reasoned analysis of relevant record evidence to support changes in policy, regardless of whether the changes are intended to rollback or enhance the general level of

⁴⁷ See Kagan, *supra* note 6, at 2320 (arguing that statutes giving discretion to executive branch officials should be interpreted as granting final decision making authority to the President).

⁴⁸ See *supra* notes 9–11.

regulation. If, on the other hand, courts allow politics to supplant expert discretion, they will strip the regulatory system of the transparency and legitimacy that agency expertise provides.

I. THE TRUMP ADMINISTRATION HAS SUBSTITUTED POLITICAL WILL FOR EXPERT ANALYSIS

In the 2017 presidential transition, the Obama Administration prepared extensive briefing materials on the workings of the federal government and offered to make its officials available to meet with the Trump transition team.⁴⁹ It is now well known that the Trump transition team ignored those materials, spurned opportunities to meet with Obama Administration officials, and displayed little interest in learning about the inner workings of the agencies they were about to begin running.⁵⁰ Having campaigned against federal regulation, President Trump remained hostile to the agencies' basic missions during the transition.⁵¹

On President Trump's first day in office, his Chief of Staff directed executive agency heads to freeze all pending, non-finalized regulations.⁵² In addition, the Chief of Staff urged a presumptive delay for all recently published rules with future effective dates to allow the new Administration to reconsider all "questions of fact, law, or policy" that the Obama Administration had decided in promulgating those regulations.⁵³ Ten days later, President Trump issued an Executive Order directing agencies to

⁴⁹ Russell Berman, *The Most Important Takeover of Any Organization in History: Inside the Years-Long Push to Perfect the Presidential Transition*, ATLANTIC (Apr. 22, 2016), <https://www.theatlantic.com/politics/archive/2016/04/improving-the-presidential-transition-2016/477528/>.

⁵⁰ Few Trump transition officials appear to have made contact with outgoing officials. See MICHAEL LEWIS, *THE FIFTH RISK* 40 (2018) ("We had tried desperately to prepare them," said Tarak Shah, chief of staff for the DOE's \$6 billion basic-science program. "But that required them to show up. . . . [T]hey didn't [show up or] ask for even an introductory briefing.").

⁵¹ Meg Jacobs, *Trump is Appointing People Who Hate the Agencies They Will Lead*, CNN (Dec. 12, 2016), <https://www.cnn.com/2016/12/10/opinions/government-is-the-problem-jacobs/index.html>.

⁵² Reince Priebus, *Memorandum for the Heads of Executive Departments and Agencies*, WHITE HOUSE (Jan. 20, 2017), <https://www.whitehouse.gov/presidential-actions/memorandum-heads-executive-departments-agencies/>. Such directives have become common. The Clinton, George W. Bush, and Obama Administrations also moved promptly to freeze non-finalized regulations. See Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 4435 (Jan. 26, 2009) (instructing President Obama's appointees and designees to withdraw, review, and approve unpublished pending or final rules before permitting publication in the Federal Register Notice); Memorandum for the Heads and Acting Heads of Executive Departments and Agencies, 66 Fed. Reg. 7702 (Jan. 24, 2001) (instructing agency heads to withdraw new or pending regulations); Regulatory Review Notice, 58 Fed. Reg. 6074 (Jan. 25, 1993) (instructing President Clinton's appointees to review and approve any regulations that had been submitted to the Federal Register but not yet published). President Reagan issued a more limited freeze order. See Ronald Reagan, *Memorandum Postponing Pending Federal Regulations*, RONALD REAGAN PRESIDENTIAL LIBR. & MUSEUM (Jan. 29, 1981), <https://www.reaganlibrary.gov/research/speeches/12981e> (postponing rulemaking for sixty days).

⁵³ Priebus, *supra* note 52.

eliminate two existing regulations for every new regulation they intended to promulgate, thus focusing regulatory efforts on the elimination of costs.⁵⁴ Only a few months into his term, President Trump ordered agencies to rescind or revise the “most important Obama era rules” on environmental protection,⁵⁵ including the carbon emissions limitations in the Clean Power Plan⁵⁶ and the regulation of water pollution in the so-called Waters of the United States (WOTUS) Rule.⁵⁷ The Administration also worked with Congress to permanently rescind fourteen recently adopted Obama-era regulations under the Congressional Review Act.⁵⁸

President Trump’s agency heads embraced these policy directives. Many, such as former EPA Administrator Scott Pruitt, came to office with a history of hostility to the very laws and regulations they would be charged with enforcing.⁵⁹ Other incoming Trump Administration officials also voiced hostility to the regulatory missions of the agencies they would be directing,⁶⁰ and the low value they placed on professional analysis seems to have contributed to an early “exodus” of expert staff.⁶¹

President Trump’s agency heads made numerous decisions that prioritized political goals over expert analysis of data.⁶² Lisa Heinzerling has described these initial regulatory rollbacks as a “display of autocracy,

⁵⁴ Exec. Order No. 13,771, 82 Fed. Reg. 9339 (Jan. 30, 2017).

⁵⁵ Daniel A. Farber, *Trump, EPA, and the Anti-Regulatory State*, REG. REV. (Jan. 24, 2018), <https://www.theregreview.org/2018/01/24/farber-trump-epa-anti-regulatory-state/>.

⁵⁶ Exec. Order No. 13,783, 82 Fed. Reg. 16,093 (Mar. 28, 2017) (directing executive agencies to “immediately review existing regulations that potentially burden the development or use of domestically produced energy” and as “soon as practicable . . . publish for notice and comment proposed rules suspending, revising, or rescinding” the Clean Power Plan).

⁵⁷ Exec. Order No. 13,778, 82 Fed. Reg. 12,497, § 2 (Feb. 28, 2017) (directing governing agencies to “publish for notice and comment a proposed rule rescinding or revising” the WOTUS Rule, “as appropriate and consistent with law”).

⁵⁸ Stephen Dinan, *GOP Rolled Back 14 of 15 Obama Rules Using Congressional Review Act*, WASH. TIMES (May 15, 2017), <https://www.washingtontimes.com/news/2017/may/15/gop-rolled-back-14-of-15-obama-rules-using-congres/>.

⁵⁹ Doina Chiacu, *Trump to Nominate Pruitt to Lead U.S. Environmental Agency: Statement*, REUTERS (Dec. 8, 2016, 6:21 AM), <https://www.reuters.com/article/us-usa-trump-epa-idUSKBN13X15S> (“Pruitt . . . has launched multiple lawsuits against regulations put forward by the agency he is now poised to lead, suing to block federal measures to reduce smog and curb toxic emissions from power plants.”); Valerie Volcovici & Timothy Gardner, *Trump Picks Foe of Obama Climate Agenda to Run EPA*, SCI. AM. (Dec. 7, 2016), <https://www.scientificamerican.com/article/trump-picks-foe-of-obama-climate-agenda-to-run-epa/>.

⁶⁰ LEWIS, *supra* note 50, at 42 (noting that incoming Trump staff mocked regulatory work as “stupid”).

⁶¹ *Id.* at 50 (noting loss of expert staff); Short, *supra* note 10, at 1869 (predicting that a “political” framework could drive out “professional” or “expert” agency staff by “undermin[ing]” their “motivation” to work in a system that values expertise).

⁶² Cf. Coral Davenport, *In the Trump Administration, Science is Unwelcome. So is Advice*, N.Y. TIMES (June 9, 2018), <https://www.nytimes.com/2018/06/09/climate/trump-administration-science.html> (“The lack of traditional scientific advisory leadership in the White House is one example of a significant change in the Trump administration: the marginalization of science in shaping United States policy.”).

impulsivity, and jerry-rigged reasoning” that gave “little attention” to legal requirements of “process” or “reason giving.”⁶³ In a number of early regulatory rollbacks, Trump Administration officials essentially made up their minds in advance by announcing mandatory delays without the deliberation required by standard rulemaking procedures.⁶⁴ These standard procedures, known as notice-and-comment rulemaking, are a staple of introductory administrative law courses and are mandated by section 553 of the APA. Under the APA, agencies that wish to change an existing rule (or propose a new one) must (1) provide advance notice of the rule they are proposing,⁶⁵ (2) “give interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments,”⁶⁶ and (3) thereafter provide a “general statement” of the rule’s “basis and purpose” (responsive to relevant and vital comments)⁶⁷—all before publishing a binding final rule in the Federal Register.⁶⁸

A rule that rolls back an existing regulation without going through the notice-and-comment procedure deprives the public of an opportunity to learn the reasons for an agency’s decision, let alone weigh in on their persuasiveness. The Second Circuit recently emphasized this point when it invalidated an NHTSA rule because the Agency did not follow notice-and-comment procedures before indefinitely delaying regulations that increased civil penalties for violating fuel economy standards.⁶⁹ Those procedures, the court observed, “serve the public interest by providing a forum for the robust debate of competing and frequently complicated policy considerations having far-reaching implications” and by “foster[ing] reasoned decisionmaking.”⁷⁰

Not surprisingly, the first round of Trump Administration rollbacks has not fared well in the courts.⁷¹ In numerous cases, judges have struck down

⁶³ Lisa Heinzerling, *Unreasonable Delays: The Legal Problems (So Far) of Trump’s Deregulatory Binge*, 12 HARV. L. & POL’Y REV. 13, 15–16 (2018).

⁶⁴ *Id.* at 34 (discussing how many Trump Administration delays are an unlawful “end run around the notice and comment process”); *id.* at 16 (discussing decisions that “involved delaying or suspending the effective dates” of Obama era rules).

⁶⁵ 5 U.S.C. § 553(b)(3) (2012). Courts have also required agencies to disclose outside scientific studies for comment in rulemaking. *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240, 251 (2d Cir. 1977).

⁶⁶ 5 U.S.C. § 553(c) (2012).

⁶⁷ *Id.*; see *Nova Scotia Food Prods. Corp.*, 568 F.2d at 253 (requiring the Agency to respond to comment questioning the viability of the canned whitefish industry under the proposed rule).

⁶⁸ 5 U.S.C. § 553(d) (2012). The APA requires publication “not less than 30 days before [a rule’s] effective date.” *Id.*

⁶⁹ *Nat. Res. Def. Council v. Nat’l Highway Traffic Safety Admin.*, 894 F.3d 95, 115 (2d Cir. 2018).

⁷⁰ *Id.*

⁷¹ Connor Raso, *Trump’s Deregulatory Efforts Keep Losing in Court—and the Losses Could Make it Harder for Future Administrations to Deregulate*, BROOKINGS (Oct. 25, 2018), <https://www.brookings.edu/research/trumps-deregulatory-efforts-keep-losing-in-court-and-the-losses-could-make-it-harder-for-future-administrations-to-deregulate/> (noting a five percent “win rate” on cases

overtly political rollbacks in which agencies have unlawfully bypassed notice-and-comment rulemaking.⁷² Courts have also invalidated rollbacks in which agencies “acted against [the agency’s] own scientific findings” without explanation,⁷³ botched substantive legal requirements,⁷⁴ or acted arbitrarily and capriciously by “entirely fail[ing] to consider the benefits” of rules they postponed.⁷⁵ In at least one case, the Administration “tacitly conceded[ed]” its error by initiating notice-and-comment procedures after its actions were challenged.⁷⁶ Still, the agencies’ recent loss of scientists and other expert personnel may make it difficult for them to improve their analyses in the future.⁷⁷

Many rollbacks in which the Trump Administration has used notice-and-comment procedures to change existing rules have only recently been finalized by the agencies.⁷⁸ The Administration’s initial attempts to repeal two major environmental regulations—the Clean Power Plan and

challenged in court). While the District of Columbia Circuit generally affirmed the FCC’s rollback of net neutrality regulations, the court found that the FCC’s “anemic analysis” of alternative legal protections for competition “barely survive[d] arbitrary and capricious review.” *Mozilla Corp. v. FCC*, 940 F.3d 1, 59 (2019). The court also held that the FCC flunked arbitrary and capricious review based on its “disregard of its duty,” “scattered and unreasoned observations,” and “non-sequiturs” with respect to public safety concerns, pole attachments, and Lifeline subsidies for low-income consumers. *Id.* at 63, 65, 69, 86 (remanding without vacatur for reasoned analysis of these issues).

⁷² See, e.g., *Nat. Res. Def. Council*, 894 F.3d at 115 (rejecting argument that NHTSA had “good cause” to circumvent notice and comment procedure when it indefinitely delayed increase in civil penalties); *Clean Air Council v. Pruitt*, 862 F.3d 1, 9 (D.C. Cir. 2017) (vacating the EPA’s attempt to stay a Clean Air Act regulation without “comply[ing] with” the APA’s “requirements for notice and comment”); *California v. U.S. Bureau of Land Mgmt.*, 277 F. Supp. 3d 1106, 1121 (N.D. Cal. 2017) (holding that the “Postponement Notice” issued without notice and comment procedures “was improper”); see also *Buzbee*, *supra* note 10, at 1413 n.327 (listing court “rejections of deregulatory actions” involving procedural shortcuts).

⁷³ See, e.g., *League of United Latin Am. Citizens v. Wheeler*, 899 F.3d 814, 829 (9th Cir. 2018) (remanding matter “to the EPA with directions to revoke all tolerances [for the pesticide] chlorpyrifos,” after the EPA acted “against its own scientific findings”), *reh’g en banc granted*, 914 F.3d 1189 (9th Cir. 2019) (mem.) (indicating that “three-judge panel disposition in this case shall not be cited as precedent by or to any court of the Ninth Circuit”). Before the en banc panel could decide whether the court had subject matter jurisdiction over the EPA’s arguably non-final order, the EPA issued a subsequent order finalizing its determination, and the matter was referred back to the original three-judge panel. *League of United Latin Am. Citizens v. Wheeler*, 940 F.3d 1126, 1127 (9th Cir. 2019).

⁷⁴ The Ninth Circuit invalidated the Administration’s rescission of DACA on these grounds. See *Regents of the Univ. of Cal. v. U.S. Dep’t of Homeland Sec.*, 908 F.3d 476, 510 (9th Cir. 2018) (“The rescission of DACA—based as it was solely on a misconceived view of the law—is reviewable, and plaintiffs are likely to succeed on their claim that it must be set aside under the APA.”), *cert. granted sub nom.*, *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 139 S. Ct. 2779 (2019).

⁷⁵ *U.S. Bureau of Land Mgmt.*, 277 F. Supp. 3d at 1122; see also *Air All. Hous. v. EPA*, 906 F.3d 1049, 1067–69 (D.C. Cir. 2018) (holding the EPA acted arbitrarily and capriciously when it failed to adequately explain its delay of the Chemical Disaster Rule by dismissing safety benefits as “speculative” and omitting discussion of factual findings related to harm the rule would prevent).

⁷⁶ *U.S. Bureau of Land Mgmt.*, 277 F. Supp. 3d at 1121.

⁷⁷ *LEWIS*, *supra* note 50, at 92, 115 (noting that new agency staff lacked “credentials” and displayed a “seeming commitment to scientific ignorance”).

⁷⁸ See *supra* notes 1–2.

jurisdictional rules under the Clean Water Act—manifested an intention to impose swift regulatory rollbacks with minimal analysis. For both of these proposed repeals, the agencies’ opening notices outlined a bifurcated process in which the initial decision to rescind a rule would precede a promised rulemaking addressing the merits of substantive policy questions.⁷⁹ These opening notices were only eleven to fifteen pages long, focused exclusively on the immediate rescission of the existing rules, and expressly invoked the authority of Executive Orders calling for regulatory rollbacks.⁸⁰ The notices also emphasized the relevant agencies’ discretion to alter policies based on a “change in administrations” under either *Chevron*⁸¹ or a recent District of Columbia Circuit opinion that relied on Justice Rehnquist’s partial dissent in *State Farm*.⁸² Final decisions on these proposed rollbacks have only recently been issued.⁸³ As some early efforts to delay existing regulations face judicial review, however, it is clear that even agencies employing notice-and-comment procedures have sometimes taken shortcuts, skipping over inconvenient scientific or economic data to achieve politically chosen ends.

These shortcuts have plagued the Administration’s leading deregulatory initiatives, including the EPA’s rule delaying the Obama Administration’s 2015 interpretation of the Clean Water Act in its “Waters of the United States” Rule (2015 Rule). The Clean Water Act, which is intended to restore and maintain “the chemical, physical, and biological integrity of the Nation’s waters,”⁸⁴ requires the EPA Administrator to work with relevant state and federal agencies to regulate water pollution and set “criteria for water quality accurately reflecting the latest scientific knowledge” on “all identifiable” health and welfare effects.⁸⁵ The scope of the relevant federal agencies’ authority to address water quality and pollution under the Clean

⁷⁹ Definition of “Waters of the United States”—Recodification of Pre-Existing Rules, 82 Fed. Reg. 34,899, 34,901 (proposed July 27, 2017) (to be codified at 33 C.F.R. pt. 328) (proposing to repeal Clean Water Act rule as “the first step in a two-step response to the Executive Order” that reserved “substantive review” for a “second step” in the process); Repeal of Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 82 Fed. Reg. 48,035, 48,038 (proposed Oct. 16, 2017) (to be codified at 40 C.F.R. pt. 60) (noting that the Agency “does not solicit comment” on a replacement for the Clean Power Plan); Buzbee, *supra* note 10, at 1388 (noting that the Administration’s “initial wave of actions engaged minimally with previous agency reasoning justifying the preceding actions, . . . provided scant information on environmental effects, and divided their regulatory steps”).

⁸⁰ Definition of “Waters of the United States”—Recodification of Pre-Existing Rules, 82 Fed. Reg. at 34,901; Repeal of Carbon Pollution Emission Guidelines, 82 Fed. Reg. at 48,037.

⁸¹ Repeal of Carbon Pollution Emission Guidelines, 82 Fed. Reg. at 48,039.

⁸² Definition of the “Waters of the United States”—Recodification of Pre-Existing Rules, 82 Fed. Reg. at 34,901 (quoting *Nat’l Ass’n of Home Builders v. EPA*, 682 F.3d 1032, 1043 (D.C. Cir. 2012)).

⁸³ *See* Revisions to Emission Guidelines Implementing Regulations, 84 Fed. Reg. 32,520 (July 8, 2019) (to be codified at 40 C.F.R. pt. 60); Definition of “Waters of the United States”—Recodification of Pre-Existing Rules, 84 Fed. Reg. 56,626 (Oct. 22, 2019).

⁸⁴ 33 U.S.C. § 1251 (2012).

⁸⁵ *Id.* § 1314(a)(1).

Water Act has long been unclear, and in 2006 a divided Supreme Court was unable to resolve the proper scope of federal jurisdiction over the pollution of tributaries and wetlands having some connection to “navigable waters.”⁸⁶ Seeking to provide needed clarity, the 2015 Rule relied on relevant “legal precedent,” “the best available peer-reviewed science,” and “the agencies’ technical expertise and extensive experience in implementing the CWA over the past four decades.”⁸⁷

President Trump issued an Executive Order targeting the 2015 Rule shortly after taking office. The Order urged the EPA and the Army Corps of Engineers to review the 2015 Rule to ensure that the goals of “promoting economic growth” and “minimizing regulatory uncertainty” were considered in addition to concerns about water pollution.⁸⁸ President Trump directed the agency heads to “publish for notice and comment a proposed rule rescinding or revising” the 2015 Rule “as appropriate and consistent with law.”⁸⁹ As William Buzbee has noted, the Order “went further” than an attempt to “tilt the agencies” against regulation;⁹⁰ it attempted to direct the substantive outcome by ordering the “agencies to ‘consider interpreting the’ underlying statutory language ‘in a manner consistent with the opinion of Justice Antonin Scalia’ in *Rapanos v. United States*.”⁹¹

The EPA and Army Corps of Engineers followed the President’s direction and initiated rulemaking proceedings to reconsider the merits of the 2015 Rule.⁹² The agencies’ initial March and July 2017 notices appeared to comply with the President’s directive, but failed to “grapple[] with . . . past science” or to “proffer any analysis of the environmental impacts of dropping the Clean Water Rule.”⁹³ In addition, while those merits proceedings were ongoing, the agencies used notice-and-comment procedures to promulgate a separate rule delaying the 2015 Rule’s applicability date (Delay Rule). The Delay Rule suggested that the agencies had already decided to reject the 2015 Rule on the merits, as it delayed the “applicability date” of the 2015 Rule until February 6, 2020.⁹⁴

The agencies emphasized that their Delay Rule was “separate” from the rulemaking proceeding designed to “revise” the “definition of ‘waters of the

⁸⁶ *Rapanos v. United States*, 547 U.S. 715, 723 (2006) (plurality opinion); *id.* at 759 (Kennedy, J., concurring).

⁸⁷ Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. 37,054, 37,055 (June 29, 2015) (to be codified at 33 C.F.R. pt. 328).

⁸⁸ Exec. Order No. 13,778, 82 Fed. Reg. 12,497, § 1 (Feb. 28, 2017).

⁸⁹ *Id.* § 2.

⁹⁰ Buzbee, *supra* note 10, at 1383.

⁹¹ *Id.* (quoting Exec. Order No. 13,778, 82 Fed. Reg. 12,497, § 1 (Feb. 28, 2017)).

⁹² Definition of “Waters of the United States”—Recodification of Preexisting Rule, 83 Fed. Reg. 32,227 (proposed July 12, 2018) (to be codified at 33 C.F.R. pt. 328).

⁹³ Buzbee, *supra* note 10, at 1384.

⁹⁴ Definition of “Water of the United States”—Addition of an Applicability Date to 2015 Clean Water Rule, 83 Fed. Reg. 5200, 5200 (Jan. 31, 2018) (to be codified at 33 C.F.R. pt. 328).

United States,”” and that its purpose was to maintain the “status quo.”⁹⁵ But they also acknowledged that the immediate effect of the Delay Rule was to return the law to that which existed *before* the 2015 Rule was promulgated: the EPA and Army Corps will administer the “scope of CWA jurisdiction . . . exactly . . . as it was administered *prior to the promulgation of the 2015 Rule*.”⁹⁶ When implementing this suspension of the governing regulatory regime, the agencies made no attempt “to address . . . the scientific record supporting the 2015 Rule.”⁹⁷ Instead, the analysis underlying the Delay Rule omits any analysis of this scientific and economic information, cites the Executive Order calling for agencies to “minimiz[e] regulatory uncertainty” in their review of the 2015 Rule,⁹⁸ and focuses on an immediate need for “clarity, certainty, and consistency” in the law.⁹⁹

Environmental groups challenged the Delay Rule as arbitrary and capricious in *South Carolina Coastal Conservation League v. Pruitt*,¹⁰⁰ and, in August 2018, the district court held that the agencies’ refusal to “consider the merits of the [2015] rule” was arbitrary and capricious and lacked the “reasoned analysis” required by *State Farm*.¹⁰¹ The court determined that the agencies’ truncated notice-and-comment process showed a failure to consider the merits of the 2015 Rule before suspending it. The court explained that the 2015 Rule “received over one million comments” over a 200-day comment period, and that the rulemaking process itself involved “over four years of reviewing thousands of peer-reviewed scientific studies.”¹⁰² The Delay Rule, on the other hand, “received over 680,000 public comments in the few weeks that public comment was open.”¹⁰³ The Delay Rule was “promulgated in mere months in a process that involved instructing the public to withhold substantive comments and did not consider any scientific studies.”¹⁰⁴ The court found that the agencies’ refusal “to allow public comment and consider the merits of the WOTUS rule” precluded a ““meaningful opportunity” to comment.”¹⁰⁵

The court also rejected the agencies’ stated rationale for delay, which echoed the February 28, 2017 Executive Order’s call to minimize regulatory uncertainty. The agencies asserted “that the WOTUS rule has been ensnared

⁹⁵ *Id.* at 5200–01.

⁹⁶ *Id.* at 5202 (emphasis added).

⁹⁷ *Id.* at 5204 (responding to comments pointing out the EPA’s failure to address the scientific record).

⁹⁸ *Id.* at 5201 (citing Exec. Order No. 13,778, 82 Fed. Reg. 12,497, § 1 (Feb. 28, 2017)).

⁹⁹ *Id.* at 5202.

¹⁰⁰ *S.C. Coastal Conservation League v. Pruitt*, 318 F. Supp. 3d 959, 967 (D.S.C. 2018).

¹⁰¹ *Id.* at 967.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* The short time period appeared to preclude meaningful review of comments or scientific studies.

¹⁰⁵ *Id.*

in litigation and its suspension would reduce ‘uncertainly [sic] and confusion’ in the regulated community [arising] from that litigation.”¹⁰⁶ The court rejected this argument, holding that the lack of “reasoned analysis” and “meaningful opportunity” to comment on the merits rendered the Delay Rule arbitrary and capricious.¹⁰⁷ The Trump Administration’s losses in court (perhaps coupled with new leadership at the EPA) also seem to have prompted the agencies to supplement the scope of issues considered in the merits docket seeking to undo the 2015 Rule.¹⁰⁸ Not until a Supplemental Notice issued in the summer of 2018 did the agencies offer to “delve[] in more than a cursory manner into issues of science” raised by the 2015 Rule.¹⁰⁹ The Administration took similar steps to supplement its analysis in the rulemaking designed to repeal the Clean Power Plan.¹¹⁰

An insufficiently explained policy change also undermined the Trump Administration’s efforts to add a citizenship question to the 2020 decennial census. In *Department of Commerce v. New York*,¹¹¹ the Supreme Court found that Secretary of Commerce Wilbur Ross, to whom Congress has delegated significant authority over the decennial census, did not “adequately explain[]” his decision to add a citizenship question to the 2020 census.¹¹² Because of that failure, the Court held that the Secretary had acted arbitrarily and capriciously, and that the “District Court was warranted in remanding” the issue “to the agency.”¹¹³

The Constitution requires that a decennial “enumeration” be made of the “whole number of persons in each State,”¹¹⁴ and the Census Bureau conducts the census through written questionnaires delivered to every known housing

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 967–68 (imposing a nationwide injunction against enforcement of the Delay Rule).

¹⁰⁸ Buzbee, *supra* note 10, at 1424 (noting that the agencies’ response to “judicial rejections” may be “reflected in the EPA’s more substantial proposals published in late 2018”).

¹⁰⁹ *Id.* at 1385; Supplemental Notice of Proposed Rulemaking, Definition of “Waters of the United States,” 83 Fed. Reg. 32,227, 32,240–44 (July 12, 2018).

¹¹⁰ Buzbee, *supra* note 10, at 1422; *see, e.g.*, Revisions to Emission Guidelines Implementing Regulations, 84 Fed. Reg. 32,520, 32,561 (July 8, 2019) (to be codified at 40 C.F.R. pt. 60) (demonstrating “Projected CO₂, SO₂, and NO_x Electricity Sector Emission Impacts”).

¹¹¹ *U.S. Dep’t of Commerce v. New York*, 139 S. Ct. 2551 (2019).

¹¹² *Id.* at 2575.

¹¹³ *Id.* at 2576. The New York District Court held that Secretary Ross acted arbitrarily and capriciously because his decision contradicted record evidence and was pretextual. *Id.* at 2564. By the time the Supreme Court issued its decision, district courts overseeing parallel litigation in Maryland and California had also found Secretary Ross’s decision arbitrary and capricious on the same grounds. *Kravitz v. U.S. Dep’t of Commerce*, 366 F. Supp. 3d 681, 744–51 (S.D. Md. 2019); *California v. Ross*, 358 F. Supp. 3d 965, 1040–44 (N.D. Cal. 2019). On July 16, 2019, the Trump Administration “agreed to a court order that will formally block it from asking about citizenship on the 2020 Census.” Bob Von Voris, *Trump Administration Agrees to Order Ending Census Fight*, BLOOMBERG L. (July 16, 2019), <https://news.bloomberglaw.com/us-law-week/trump-administration-agrees-to-final-order-ending-census-fight>.

¹¹⁴ U.S. CONST. art. I, § 2, cl. 3; *id.* amend. XIV, § 2.

unit.¹¹⁵ When households do not respond to the questionnaires, the Bureau must incur additional costs and resort to less accurate measures and extrapolated data.¹¹⁶ Historically, census questionnaires have included questions about the people to be counted as well as their number.¹¹⁷ Citizenship questions appeared on early questionnaires, but have not been universally distributed for over fifty years.¹¹⁸

Secretary Ross's decision to reinstate a citizenship question was not required by a presidential executive order and was tainted by procedural irregularities. These irregularities were not obvious on the face of the Secretary's March 2018 memo in which he publicly announced the addition of the citizenship question. That memo explained that he "was acting at the request of the [DOJ], which sought improved data about citizen voting-age population for purposes of enforcing the Voting Rights Act."¹¹⁹ The memo discussed several ways to gather improved citizenship data and recited that the Secretary weighed the option to "reinstate a citizenship question on the decennial census" alongside the option to model citizenship data from existing administrative records.¹²⁰ According to the Secretary, he "carefully considered" the possibility that the citizenship question would depress the response rate, but determined that the existence of "limited empirical evidence" prevented him from "determin[ing] definitively" that the question would have this effect.¹²¹ He concluded that the "need for accurate citizenship data . . . outweigh[s] fears about a potentially lower response rate."¹²²

Secretary Ross's decision to include a citizenship question was contrary to the expert recommendation of the "Census Bureau, a statistical agency housed within the Department of Commerce."¹²³ The Bureau predicted that a citizenship question would reduce the accuracy of citizenship data in two ways: First, approximately 500,000 noncitizens "would answer the question falsely."¹²⁴ Second, "more than 13 million . . . people . . . would not answer the citizenship question even if it were asked."¹²⁵ The Secretary discounted these predictions as uncertain projections based on limited empirical evidence. Although the Secretary could have obtained additional evidence

¹¹⁵ *U.S. Dep't of Commerce*, 139 S. Ct. at 2561; *New York v. U.S. Dep't of Commerce*, 351 F. Supp. 3d 502, 514–15 (S.D.N.Y. 2019).

¹¹⁶ *U.S. Dep't of Commerce*, 351 F. Supp. 3d at 521 (finding that "[Non-Response Follow-Up] data is less accurate than self-response data").

¹¹⁷ *U.S. Dep't of Commerce*, 139 S. Ct. at 2561.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 2562.

¹²⁰ *Id.* at 2563.

¹²¹ *Id.* (quoting March 2018 memo).

¹²² *Id.*

¹²³ *Id.* at 2561.

¹²⁴ *Id.* at 2591 (Breyer, J., concurring in part and dissenting in part).

¹²⁵ *Id.* at 2592.

by following “the Bureau’s ordinary practice of extensively testing proposed changes to the census questionnaire,”¹²⁶ he did not do so. As the district court noted, the testing that the Secretary decided to forego reflects standard protocol under the Bureau’s Statistical Quality Guidelines, and it allows the Bureau “to assess” a new “question’s impact on self-response rates” for both general and subpopulations within the United States.¹²⁷

After multiple groups sued to block the citizenship question,¹²⁸ it became clear that Secretary Ross’s 2018 memo failed to tell the whole story. At the “DOJ’s urging,” the government supplemented the administrative record with a new memo from the Secretary, “‘intended to provide further background and context regarding’ his March 2018 memo”; the new memo showed that the Secretary “‘had begun considering whether to add the citizenship question in early 2017.’”¹²⁹ Plaintiffs argued that the new memo “‘indicated that the Government had submitted an incomplete record of the materials considered by the Secretary.’”¹³⁰ The district court allowed Plaintiffs’ motions to compel the government “to complete the administrative record” and to take “discovery outside the administrative record.”¹³¹

The most surprising development occurred after the oral arguments before the Supreme Court, when Plaintiffs called the Court’s attention to “‘newly discovered evidence.’”¹³² According to Plaintiffs, this new evidence showed that “‘Dr. Thomas Hofeller, a longtime redistricting specialist, played a significant role in orchestrating the addition of the citizenship question to the 2020 Decennial Census,’” with the purpose of “‘creat[ing] a structural electoral advantage” for “‘Republicans and Non-Hispanic Whites.’”¹³³ Hofeller’s role also suggested an undisclosed evidentiary basis for reinstating the citizenship question. Plaintiffs recounted that Hofeller conducted a 2015 study in which he concluded “‘that adding a citizenship question to the 2020 Census” would be “‘advantageous to Republicans and Non-Hispanic Whites’ in redistricting.’”¹³⁴ In addition, Plaintiffs asserted

¹²⁶ *Id.* at 2590.

¹²⁷ *New York v. U.S. Dep’t of Commerce*, 351 F. Supp. 3d 502, 526 (S.D.N.Y. 2019).

¹²⁸ *U.S. Dep’t of Commerce v. New York*, 139 S. Ct. 2551, 2563 (2019).

¹²⁹ *Id.* at 2564.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² Letter from Dale E. Ho, Counsel, Am. Civil Liberties Union, to Hon. Scott S. Harris, Clerk of the Court, Supreme Court of the U.S. (May 30, 2019), https://www.supremecourt.gov/DocketPDF/18/18-966/101439/20190530142417722_2019.05.30%20NYIC%20Respondents%20Notice%20of%20Filing%20--%20Final.pdf [hereinafter Letter to Clerk of the Court].

¹³³ *Id.* The new evidence came to light after Hofeller died and his estranged daughter discovered census-related materials in files on his hard drives. Michael Wines, *Deceased G.O.P. Strategist’s Hard Drives Reveal New Details on the Census Citizenship Question*, N.Y. TIMES (May 30, 2019), <https://www.nytimes.com/2019/05/30/us/census-citizenship-question-hofeller.html>.

¹³⁴ Letter to Clerk of the Court, *supra* note 132.

that Hofeller orchestrated the DOJ's request for a citizenship question, and that "the letter that DOJ eventually sent to Commerce in December 2017 . . . bears striking similarities to Dr. Hofeller's 2015 study."¹³⁵

While the Court did not address this new evidence in its decision, it broke the arbitrary and capricious standard of review inquiry into two discrete parts regarding Secretary Ross's explanation for his action.¹³⁶ The first was whether the Secretary's "course of action was . . . supported by the evidence before him," and the second was whether "his stated rationale was pretextual."¹³⁷ Different coalitions of Justices reached different conclusions on the two questions. Chief Justice Roberts, joined by Justices Kavanaugh, Gorsuch, Thomas, and Alito, found that Secretary Ross's decision was not arbitrary and capricious because it had sufficient evidentiary support: "The Secretary justifiably found the Bureau's analysis" and recommendation against the citizenship question "inconclusive" and reasonably "determined that reinstating a citizenship question was worth the risk of a potentially lower response rate."¹³⁸ Justice Breyer, joined by Justices Kagan, Sotomayor, and Ginsburg, dissented, finding that the Secretary "failed to consider" many "important aspect[s] of the problem."¹³⁹ In particular, the dissent found that the Secretary erred by discounting evidence that a citizenship question would "harm the accuracy of citizenship data"¹⁴⁰ and by making an "immediate decision rather than wait[ing] for testing" that would provide further evidence on the question's likely effects.¹⁴¹

On the second issue, Chief Justice Roberts found that Secretary Ross acted arbitrarily and capriciously because the stated rationale for his decision was pretextual. In a part of the opinion joined by Justices Breyer, Kagan, Sotomayor, and Ginsburg, Chief Justice Roberts held that the Secretary's "sole stated reason" for his action—the Voting Rights Act "enforcement rationale"—appears "to have been contrived."¹⁴² In particular, the Secretary's stated rationale conflicted with evidence showing that he "was determined to reinstate a citizenship question from the time he entered office," and that he "adopted the Voting Rights Act rationale late in the

¹³⁵ *Id.*

¹³⁶ Justices Thomas, Alito, Gorsuch, and Kavanaugh also joined the Chief Justice's opinion holding that the citizenship question did not violate the Enumeration Clause of the Constitution. *U.S. Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2576, 2596 (2019). Justice Alito wrote a separate partial dissent arguing that Secretary Ross's decision was an unreviewable decision "committed to agency discretion" under APA section 701(a)(1). *Id.* at 2597 (Alito, J., concurring in part and dissenting in part).

¹³⁷ *Id.* at 2569 (majority opinion).

¹³⁸ *Id.* at 2571.

¹³⁹ *Id.* at 2584 (Breyer, J., concurring in part and dissenting in part) (quoting *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

¹⁴⁰ *U.S. Dep't of Commerce*, 139 S. Ct. at 2592 (Breyer, J., concurring in part and dissenting in part).

¹⁴¹ *Id.* at 2593 (Breyer, J., concurring in part and dissenting in part).

¹⁴² *Id.* at 2575.

process.”¹⁴³ Based on the Secretary’s failure to adequately explain the true reason for his decision, the Court affirmed the district court’s decision to remand the matter to the Secretary.¹⁴⁴ Justices Kavanaugh, Gorsuch, and Thomas dissented to that part of the decision.¹⁴⁵

In sum, the Trump Administration’s regulatory changes reflect the President’s attempt to effectuate his campaign promises and exert strong political control over regulatory policies. Although extreme, these efforts align with a model of administrative decision making that accords greater legitimacy to agency decisions when made under the direct control of an elected President. Under the “political control” model, the primary remedy for disheartened citizens is thought to rest in the ballot box. The Trump Administration’s efforts at politically driven change clash, however, with the courts’ initial applications of mandatory procedural rules and arbitrary and capricious review. Many of the Administration’s outright refusals to consider the merits of existing regulations are so extreme that they run afoul of the unanimous holding of *State Farm*. Other judicial decisions have rejected policies that were supported by incomplete or cursory analyses. These decisions illustrate the importance of a competing theoretical model in which agency decisions gain broader legitimacy and transparency from expert analysis of relevant economic, scientific, or technological evidence.

II. THE HISTORY OF AMERICAN ADMINISTRATIVE LAW REFLECTS CHANGING VIEWS OF AGENCY EXPERTISE

This Article is principally concerned with administrative change. But that topic presupposes the existence of agencies, and it also raises questions about the nature of agencies, their proper role, and their claims to legitimacy. Those questions, in turn, raise issues about the nature of technical and scientific expertise and the place of such expertise in democratic government. This Section briefly describes the history of administrative agencies in the theory and practice of American government and the persistent, but changing role that technical and scientific expertise has played in it.

Most, if not all, theories of government recognize that laws are not self-interpreting or self-executing, but require interpretation and execution. Madison made this point well in *Federalist* 37:

All new laws, though penned with the greatest technical skill,
and passed on the fullest and most mature deliberation, are
considered as more or less obscure and equivocal, until their

¹⁴³ *Id.* at 2574.

¹⁴⁴ *Id.* at 2576. Justice Thomas’s partial dissent disagreed with both the majority’s decision to consider “materials outside” of the administrative record and its conclusion that these materials established pretext. *Id.* at 2581 (Thomas, J., concurring in part and dissenting in part).

¹⁴⁵ *Id.* at 2576.

meaning be liquidated and ascertained by a series of particular discussions and adjudications. Besides the obscurity arising from the complexity of objects, and the imperfection of the human faculties, the medium through which the conceptions of men are conveyed to each other adds a fresh embarrassment.¹⁴⁶

Like judges, public officials must routinely “liquidate” and ascertain the meaning of laws.¹⁴⁷ Sometimes their conclusions will be subject to judicial review, but often the officials will have the last word.¹⁴⁸

The Constitution speaks directly to the execution of the laws when it charges the President with the duty to “take [c]are that the [l]aws be faithfully executed.”¹⁴⁹ The Constitution makes no specific provision for executive branch offices, except for those of the President and the Vice President, but the Founders clearly contemplated that the work of government would require Congress to create various departments and executive offices.¹⁵⁰ Indeed, the Constitution specifically acknowledges that understanding by providing that the President “may require the [o]pinion, in writing, of the principal [o]fficer in each of the executive [d]epartments, upon any [s]ubject relating to the [d]uties of their respective [o]ffices”¹⁵¹ and by establishing appointment requirements for “officers” and “inferior officers.”¹⁵² The First Congress immediately created several executive departments,¹⁵³ and later Congresses created additional executive

¹⁴⁶ THE FEDERALIST NO. 37 (James Madison).

¹⁴⁷ Barry Sullivan, *On the Borderlands of Chevron's Empire: An Essay on Title VII, Agency Procedures and Priorities, and the Power of Judicial Review*, 62 LA. L. REV. 317, 317 (2002) (“Like courts . . . administrators also interpret law.”).

¹⁴⁸ For example, the Office of Legal Counsel of the Department of Justice often provides legal advice to the executive branch, but much of that advice will never be tested in court. See H. JEFFERSON POWELL, CONSTITUTIONAL CONSCIENCE: THE MORAL DIMENSION OF JUDICIAL DECISION 134 n.2 (2008) (“Though these tasks remain vested as a formal matter in the attorney general, they are now performed in practice almost exclusively by subordinate officials within the Justice Department, in particular by the assistant attorney general who heads the Office of Legal Counsel.”).

¹⁴⁹ U.S. CONST. art. II, § 3.

¹⁵⁰ George Washington wrote that, because of “[t]he impossibility that one man should be able to perform all the great business of the State,” the Constitution provides for executive officers to “assist the supreme Magistrate in discharging the duties of his trust.” *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 483 (2010) (quoting 30 THE WRITINGS OF GEORGE WASHINGTON 334 (John C. Fitzpatrick ed., 1939)).

¹⁵¹ U.S. CONST. art. II, § 2, cl. 1.

¹⁵² U.S. CONST. art. II, § 2, cl. 2.

¹⁵³ See GERHARD CASPER, SEPARATING POWER: ESSAYS ON THE FOUNDING PERIOD 42 (1997) (describing the creation of executive departments); DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD 1789–1801, at 36–41 (1997) (same).

departments and agencies,¹⁵⁴ charging them with specific statutory duties.¹⁵⁵ In 1887, Congress created the Interstate Commerce Commission, which is generally thought to mark “the first institutionalization of the regulatory state.”¹⁵⁶

It was generally understood that those who execute the laws, whether positioned within the executive branch or in an independent agency, should have some degree of relevant specialized knowledge. The Secretary of the Treasury must understand the world of finance and banking, just as members of the Interstate Commerce Commission could not have been effective unless they understood the railroad industry. One difference, of course, is that the Secretary of the Treasury reports to the President and serves at his pleasure, while members of independent agencies like the Interstate Commerce Commission do neither.¹⁵⁷ From the beginning, questions were raised about the fit of such agencies into the tripartite structure of American constitutional government.

Institutionally, agencies raise important issues concerning the relationship of expertise and political power in our form of government. On the one hand, political power derives from the people and must be exercised for their benefit by their elected representatives and agents, within the framework established by the Constitution and laws. On the other hand, government does not exist solely to give effect to the will of the people, but to provide for the general welfare, which requires such things as a sound economy, an effective national defense, clean air and water, healthful living conditions, and the recognition of human dignity. Securing those benefits requires technical expertise and rational, fact-based decision making. Decisions that are based on false factual premises or faulty theories may inure to the benefit of certain stakeholders, but they are more likely to frustrate than further the general welfare. And many of the most important decisions regarding the general welfare cannot be made on merely technical

¹⁵⁴ See ERIC FONER, RECONSTRUCTION 68–69 (1988) (discussing the Bureau of Refugees, Freedmen, and Abandoned Lands, or Freedmen’s Bureau, which was established in 1865 in aid of Reconstruction); see also JOHN HOPE FRANKLIN, RECONSTRUCTION AFTER THE CIVIL WAR 36–39 (1961) (same).

¹⁵⁵ Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 25 (1995) (“[I]f Congress has conferred the relevant authority on an agency head,” then “the President has no authority to make the decision himself”); see also Thomas O. Sargentich, *The Administrative Process in Crisis—The Example of Presidential Oversight of Agency Rulemaking*, 6 ADMIN. L.J. 710, 716 (1993) (“[T]he agency head ultimately is to decide what to do.”).

¹⁵⁶ See MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY 216 (1992). For a sampling of literature concerning the ICC, see Paul Stephen Dempsey, *The Rise and Fall of the Interstate Commerce Commission: The Tortuous Path from Regulation to Deregulation of America’s Infrastructure*, 95 MARQ. L. REV. 1151, 1181 (2012); James W. Ely, Jr., *The Troubled Beginning of the Interstate Commerce Act*, 95 MARQ. L. REV. 1131, 1132 (2012); Bruce Wyman, *The Rise of the Interstate Commerce Commission*, 24 YALE L.J. 529, 532 (1915).

¹⁵⁷ See, e.g., *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 625 (1935) (noting that the Commission was not subject to direction by anyone in government).

grounds. They often involve polycentric problems that necessarily involve value judgments and allocations of scarce resources amongst competing goods. When that is the case, the democratic deficit of agencies comes to the fore. For that reason, and over time, American public law has been concerned with giving effect both to the political will of the people's representatives and agents and to the people's fundamental interest in having governmental decisions made on a rational basis supported by the best evidence available.¹⁵⁸ Theories that justify governance by unelected agencies have assigned different weights to these competing concerns over time.

The Interstate Commerce Act exemplifies one of the earliest justifications for administrative agencies. When the Interstate Commerce Commission was established in 1887, the prevailing view was that "the legislature would decide all questions of policy and establish clear standards and goals," while "[t]he essential task of bureaucratic officials was to find the most efficient means to implement clear, legislatively elaborated ends."¹⁵⁹ In other words, the role of administration was to give concrete effect to the will of Congress. This view of administration has been called the "rule of law," "delegation," or "transmission-belt" theory.¹⁶⁰ Ernst Freund, an early proponent of this view, thought that the "most important point in the development of administrative law is the reduction of discretion."¹⁶¹ Consequently, the "appropriate sphere of delegated authority is where there are no controversial issues of policy or . . . opinion."¹⁶² Freund did not think that the actual delegation of authority to the Interstate Commerce Commission was consistent with the "transmission-belt" theory: it was "anomalous," he thought, "to delegate powers to set reasonable rates; in such areas, resolution of distinct issues should be incorporated in statutory provisions."¹⁶³ His reservations were not unfounded. "[T]he subsequent experience of railroad regulation cast severe doubt on the ability of general

¹⁵⁸ Compare JEREMY WALDRON, *THE DIGNITY OF LEGISLATION* 1–6 (1999) (emphasizing the importance of public participation in governance), and Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2006), with Aileen Kavanagh, *Participation and Judicial Review: A Reply to Jeremy Waldron*, 22 L. & PHIL. 451, 452–53 (2003) (noting that good governance is a higher order value than mere participation in the political process).

¹⁵⁹ HORWITZ, *supra* note 156, at 216.

¹⁶⁰ Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1675 (1975).

¹⁶¹ ERNST FREUND ET AL., *THE GROWTH OF AMERICAN ADMINISTRATIVE LAW* 24 (1923).

¹⁶² ERNST FREUND, *ADMINISTRATIVE POWERS OVER PERSONS AND PROPERTY* 218 (1928); see also FRANK J. GOODNOW, *THE PRINCIPLES OF THE ADMINISTRATIVE LAW OF THE UNITED STATES* 67–68 (1905) (distinguishing political choices amongst social ends from "scientific" or "technical" administration); HORWITZ, *supra* note 156, at 224 (noting that Goodnow admired "the professional expert whose skill, neutrality, and impartiality formed an alternative to both the demagoguery and corruption of American democratic politics").

¹⁶³ Louis L. Jaffe, *The Illusion of the Ideal Administration*, 86 HARV. L. REV. 1183, 1185 (1973) [hereinafter Jaffe (1973)].

rules or standards to provide serious guidance for the detailed and complex tasks involved in administrative regulation.”¹⁶⁴ It became clear, for example, that ratemaking simply involved “too many variables to be effectively limited by general criteria.”¹⁶⁵ More generally, “[t]he delegation doctrine soon came to be regarded as too crude and formalistic to serve the function of limiting administrative discretion. It depended on a theory of language and legal reasoning that supposed that general propositions could actually decide concrete cases.”¹⁶⁶ Nonetheless, as Morton Horwitz has noted, the “delegation [or transmission-belt] theory of administrative law” would provide the formal basis for “legitimat[ing] the exercise of bureaucratic power” for the next fifty years.¹⁶⁷

Even in 1887, however, Woodrow Wilson was already championing a different approach. Contrary to Freund’s “narrow discretion” theory, Wilson thought that “large powers and unhampered discretion” were “the indispensable conditions of [administrative] responsibility,” and, indeed, the very “essence of administration.”¹⁶⁸ By 1914, Wilson’s view seems to have won out in practice, as Congress created the Federal Trade Commission and gave it “a blank check . . . to eliminate unfair competition.”¹⁶⁹ The Supreme Court soon weighed in on such broad grants of discretion by formulating a new non-delegation doctrine—one that simply required Congress to specify an “intelligible principle” to guide the exercise of administrative or executive discretion.¹⁷⁰

By the time of the New Deal, “the scope of federal administrative regulation [had] increased geometrically,”¹⁷¹ and proponents of the administrative state were no longer justifying delegations of authority under

¹⁶⁴ HORWITZ, *supra* note 156, at 216.

¹⁶⁵ *Id.* at 223. The complexity and importance of the Interstate Commerce Commission’s work is underscored by the care with which Presidents chose members of the Commission. As one commentator has noted, Presidents chose commissioners “almost as carefully as they [chose] Justices of the United States Supreme Court.” Dempsey, *supra* note 156, at 1181.

¹⁶⁶ HORWITZ, *supra* note 156, at 223.

¹⁶⁷ *Id.* at 216.

¹⁶⁸ Jaffe (1973), *supra* note 163, at 1185 (quoting Woodrow Wilson, *The Study of Administration*, 2 POL. SCI. Q. 197, 213 (1887)). With the advantage of much hindsight, Jaffe found both Wilson’s and Freund’s views unsatisfactory. *Id.* at 1183, 1186 (concluding that Wilson’s concept depended on an overly broad and underdetermined concept of “‘regulating’ in the ‘public interest,’” while Freund’s view of “a more or less insulated, nonpolitical, expert hierarchy acting pursuant to an authoritative statement of ends and means” was “very ill-conceived”).

¹⁶⁹ HORWITZ, *supra* note 156, at 216. Woodrow Wilson was the President who signed the Federal Trade Commission Act.

¹⁷⁰ *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928) (“If Congress shall lay down . . . an intelligible principle to which the [executive] is directed to conform, [that] is not a forbidden delegation of legislative power.”); *accord Yakus v. United States*, 321 U.S. 414, 423–24 (1944).

¹⁷¹ HORWITZ, *supra* note 156, at 223.

the “transmission-belt” theory.¹⁷² In his Storrs Lectures, James Landis¹⁷³ articulated a vision of administrative government much closer to Wilson’s model of “large powers and unhampered discretion.” According to Landis, regulation required both specialization and “a method that calls upon other sciences to provide the norms.”¹⁷⁴ It was agency expertise that gave “unelected administrators legitimacy to engage in regulatory tasks[.]”¹⁷⁵ In “a joyous celebration of the virtues of ‘expertness,’”¹⁷⁶ Landis argued that, “[w]ith the rise of regulation, the need for expertness became dominant.”¹⁷⁷ This regulatory expertise was not limited to “knowledge of the details of [the industry’s] operation.”¹⁷⁸ It also included accommodation of changing conditions through the “ability to shift requirements” and “the pursuit of energetic measures upon the appearance of an emergency.”¹⁷⁹ Landis further extolled the virtues of “‘practical’ judgment which is based upon all the available considerations and which has in mind the most desirable and pragmatic method of solving that particular problem.”¹⁸⁰

The Supreme Court’s validation of agency expertise and independence bolstered Landis’s view. In *Humphrey’s Executor v. United States*, the Court found that:

[T]he language of the [Federal Trade Commission] act, the legislative reports, and the general purposes of the legislation as reflected by the debates, all combine to demonstrate the

¹⁷² Stewart, *supra* note 160, at 1677 (“[A]fter the delegation by New Deal Congresses of sweeping powers to a host of new agencies under legislative directives cast in the most general terms, the broad and novel character of agency discretion could no longer be concealed behind . . . labels [such as quasi-legislative or quasi-judicial].”).

¹⁷³ Louis L. Jaffe, *James Landis and the Administrative Process*, 78 HARV. L. REV. 319, 319–20 (1964) [hereinafter Jaffe (1964)] (“Landis . . . had served successively as a member of the Federal Trade Commission, member of the Securities and Exchange Commission, and Chairman of the Securities and Exchange Commission . . . [His Storrs lectures were] a celebration, a defense, and a rationalization of the magnificent accomplishment in which he had played so brilliant a part.”). Landis also served as Dean of Harvard Law School. *Id.*

¹⁷⁴ JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 31 (1938). See also HORWITZ, *supra* note 156, at 214–15 (noting that Landis also criticized “the inefficiency of the judicial process” and the “inability of judges trained in common law methods” to bring “either consistency or deep social understanding to the task of regulation”).

¹⁷⁵ HORWITZ, *supra* note 156, at 216.

¹⁷⁶ *Id.*

¹⁷⁷ LANDIS, *supra* note 174, at 23.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 23–24. Landis’s understanding of expertise does not reflect the contemporary view that many policy questions cannot be decided by expertise alone. See *infra* text surrounding notes 368–70 (discussing Williamson’s decision-tree analysis wherein he notes that the harmful effects of certain carcinogens found in foods may be outweighed by the benefits).

¹⁸⁰ LANDIS, *supra* note 174, at 33. Landis insisted that “resort to the administrative process is not, as some suppose, simply an extension of executive power.” *Id.* at 15. Instead, “the administrative differs” because the “scope of its powers . . . presents an assemblage of rights normally exercisable by government as a whole.” *Id.*

Congressional intent to create a body of experts who shall gain experience by length of service—a body which shall be independent of executive authority, *except in its selection*, and free to exercise its judgment without the leave or hindrance of any other official or any department of the government.¹⁸¹

According to the *Humphrey's Executor* Court, Congress intended for the Commission to “act with entire impartiality”; it was “charged with the enforcement of no policy except the policy of the law.”¹⁸² In addition, “[the Commission’s] duties are neither political nor executive,” its members “are called upon to exercise the trained judgment of a body of experts ‘appointed by law and informed by experience,’” and it “should not be open to the suspicion of partisan direction.”¹⁸³ The Court concluded that the commissioners did not serve at the pleasure of the President.¹⁸⁴

Big businesses and their lawyers soon challenged the expertise model. An American Bar Association committee chaired by Roscoe Pound¹⁸⁵ sounded the alarm about “administrative absolutism”—“a highly centralized administration . . . under complete control of the executive . . . relieved of judicial review and making their own rules.”¹⁸⁶ The committee thought the administrative state was eroding ancient rights, particularly procedural rights; displacing the courts from their proper role;¹⁸⁷ and threatening the rule of law itself.¹⁸⁸ They were not entirely wrong. As Professor Horwitz has observed, “between 1910 and 1940, the expertise justification of authority resulted in the elimination of elaborate procedural protections in judicial

¹⁸¹ *Humphrey's Ex'r v. United States*, 295 U.S. 602, 625–26 (1935).

¹⁸² *Id.* at 624.

¹⁸³ *Id.* at 624–25.

¹⁸⁴ *Id.* at 632 (explaining that an officer could only be removed for a cause “named in the applicable statute”).

¹⁸⁵ Pound was one of the foremost legal scholars of the era. See ARTHUR E. SUTHERLAND, *THE LAW AT HARVARD: A HISTORY OF IDEAS AND MEN, 1817–1967*, at 236–38 (1967) (providing an overview of Pound’s life and accomplishments).

¹⁸⁶ Roscoe Pound, *Report of the Special Committee on Administrative Law*, 63 REP. A.B.A. 331, 343 (1938). Interestingly, Pound places agencies within the “complete control of the executive,” notwithstanding their ostensible legal independence. Pound aligned with the legalism of A.V. Dicey, who “perceived [administrative law] as a hotbed of discretion and coercion, [which] posed a major threat to the rule of law ideal.” HORWITZ, *supra* note 156, at 221.

¹⁸⁷ As of 1938, “the Supreme Court likened agencies to legislatures for purposes of judicial review,” applying a minimal standard akin to “rationality review.” Watts, *supra* note 9, at 15 (citations omitted); see also RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW* 81 (2d ed. 2008) (“[A]n agency need[s] no evidence, no record, and no statement of reasons to support a rule.”).

¹⁸⁸ That view was also popular among classical liberal economists, such as Friedrich Hayek, who characterized the rule of law in formalist terms, as “mean[ing] that government in all its actions is bound by rules fixed and announced beforehand—rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one’s individual affairs on the basis of this knowledge.” FRIEDRICH A. HAYEK, *THE ROAD TO SERFDOM* 72 (1944) (citation omitted).

proceedings.¹⁸⁹ As procedures were simplified, the elite bar not only perceived a threat to the interests of their wealthy business clients, who were often at odds with New Deal policies, but also feared their own possible redundancy.¹⁹⁰ As one recent commentator has noted, “[p]rimarily, politics motivated the reform attempts, not scientific truth. The battle over administrative reform was a fight for the life of the New Deal”¹⁹¹ Much more was at stake, however, than the frustrations and self-interest of elite lawyers and their wealthy clients. Also at play was “[a] declining faith in the ability of experts to produce scientific, neutral, and apolitical solutions to social and legal questions.”¹⁹²

The Pound Committee’s 1938 Report was only the opening salvo in the war against expert agencies. In December 1940, Congress attempted to place substantial limits on agency power when it passed the Walter-Logan Bill, which President Roosevelt promptly vetoed.¹⁹³ During this time, “disputes over questions of administrative law became thoroughly intertwined with raging political struggles over the legitimacy of the regulatory state.”¹⁹⁴ The ultimate passage of the APA in 1946 reflected a truce that accommodated Pound’s legalist mentality as well as “the dialectical relationship between expertise theory and proceduralism in twentieth-century American legal thought.”¹⁹⁵ In other words, the APA recognized the importance of expertise, but also provided procedures to discipline agency action.

Among other things, the APA introduced notice-and-comment rulemaking, which K.C. Davis thought was one of the greatest inventions of modern government.¹⁹⁶ Although the APA required that rules include a

¹⁸⁹ HORWITZ, *supra* note 156, at 233.

¹⁹⁰ See George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. L. REV. 1557, 1572 (1996) (“Lawyers feared that they had value only in the calm order of the courtroom . . .”). When President Roosevelt vetoed the Walter-Logan Bill in December 1940, he called out both the legal establishment and big business for their self-interest. *Id.* at 1625–26.

¹⁹¹ *Id.* at 1595.

¹⁹² HORWITZ, *supra* note 156, at 233.

¹⁹³ President Roosevelt pointed out that the bill would have forced administrative agencies “into a single mold which is so rigid, so needlessly interfering, as to bring about a widespread crippling of the administrative process.” PRESIDENT OF THE U.S., PROVIDING FOR THE EXPEDITIOUS SETTLEMENT OF DISPUTES WITH THE UNITED STATES, H.R. DOC. NO. 986, at 4 (1940). In addition, “[w]herever a continuing series of controversies exist between a powerful and concentrated interest on one side and a diversified mass of individuals, each of whose separate interests may be small, on the other side, the only means of obtaining equality before the law has been to place the controversy in an administrative tribunal.” *Id.* at 3. Congress was unable to override the veto. Shepherd, *supra* note 190, at 1630.

¹⁹⁴ HORWITZ, *supra* note 156, at 231.

¹⁹⁵ *Id.* at 233. Walter Gellhorn, who participated in these events, has observed that, “what was forestalled was more significant than what was enacted.” Walter Gellhorn, *The Administrative Procedure Act: The Beginnings*, 72 VA. L. REV. 219, 232 (1986).

¹⁹⁶ See KENNETH CULP DAVIS, ADMINISTRATIVE LAW IN THE SEVENTIES, at ix, xvii (1976) (noting that even when the APA did not require a notice and comment procedure, the common law may have done so, and praising “judge-made administrative law”); Kagan, *supra* note 6, at 2262 (remarking that the APA was intended to “curtail[] the sway of administrative officials by subjecting . . . rulemakings

“concise . . . statement of . . . basis and purpose,”¹⁹⁷ “thereby providing courts with a basis for striking down agency rules as arbitrary or capricious under section 706(2)(A) of the APA,” agencies continued to receive an “extraordinary level of deference.”¹⁹⁸ As late as 1958, the procedural demands on rulemaking were “not great,” reflecting an understanding that “agency action was ‘expert’” and somewhat “remove[d] from politics.”¹⁹⁹

In the 1960s and 1970s, concerns about “agency capture” brought the agency expertise model into question once more.²⁰⁰ Even Landis began to express doubts,²⁰¹ and Louis Jaffe offered a sober response to Landis’s previously exuberant defense of the New Deal. First, Jaffe recounted the New Deal’s “paradigm of broad delegation” in which agencies derived legitimacy from an “assumed comprehensive body of expertise . . . informed by the values of the New Deal.”²⁰² Jaffe then noted, ironically, that, “[a]s long as New Dealers were in control and . . . public opinion supported them, the new agencies performed very well as judged by those who created them.”²⁰³ He concluded by noting that the failures of existing agencies had made them prey to “agency capture”—a theory positing that agencies become the “captives” of the industries they are charged with regulating.²⁰⁴

and (especially) adjudications — to stringent procedural requirements”); Harold Leventhal, *Review: Administrative Law of the Seventies*, 44 U. CHI. L. REV. 260, 264 (1976) (rulemaking is “extremely useful” and typically preferable “to adjudicatory trial-type procedures”).

¹⁹⁷ Administrative Procedure Act, 5 U.S.C. § 553(c) (1970).

¹⁹⁸ Watts, *supra* note 9, at 15 (citation omitted).

¹⁹⁹ Peter L. Strauss, *From Expertise to Politics: The Transformation of American Rulemaking*, 31 WAKE FOREST L. REV. 745, 752–53 (1996) (“[T]he new APA procedures for legislative rulemaking, although apparently undemanding and so intended at the time, enlarged both agency responsibilities and possibilities of judicial control.” (footnote omitted)); Watts, *supra* note 9, at 15 (“After the APA was enacted in 1946, things did not change much.”).

²⁰⁰ See Wagner (2015), *supra* note 16, at 2025 (“During that time, Congress found itself dependent on the agencies to set standards . . . implementing the new wave of social legislation. Unfortunately, this increased responsibility coincided with worries that, in their exercise of technical discretion, some agencies had been ‘captured’ by the parties they regulated . . .”).

²⁰¹ See STAFF OF S. COMM. ON THE JUDICIARY, 86TH CONG., REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT 1–2 (Comm. Print 1960) (submitted by James M. Landis, who expressed his concerns about the “expansion of the role, power and duties of the agencies”); see also Jaffe (1964), *supra* note 173, at 322 (explaining that “planning the regulation of an industry” is not the same as “planning the policies of an industry”); Louis L. Jaffe, *The Effective Limits of the Administrative Process: A Reevaluation*, 67 HARV. L. REV. 1105, 1107 (1954) [hereinafter Jaffe (1954)] (suggesting the need for reevaluating the administrative process); Stewart, *supra* note 160, at 1686 (explaining Landis’s change of heart).

²⁰² Jaffe (1973), *supra* note 163, at 1187 (noting that Landis’s model may have shared some similarities with “the Weberian model of a bureaucracy thoroughly motored and controlled by rational elaboration,” but the Landis model, unlike Weber’s, did not derive “content and authority” from “legislative” dictates).

²⁰³ *Id.*

²⁰⁴ *Id.* at 1187. Nonetheless, Jaffe saw some danger in overstating the importance of agency capture, as the theory “grossly exaggerat[es] the germ of truth which it does indeed embody” and excludes other “significant inputs” from bureaucracy including “expertness.” *Id.* at 1187–88.

This concern illuminated the weaknesses of Landis's model of agencies immune from any influence except for expert knowledge:

[T]he Landis model, if taken as a generalization for all administrative agencies at all times, makes certain untenable assumptions: the existence in each case of relevant, value-free concepts, and an administration located at any given moment of time outside the political process . . . or insulated from the power structure.²⁰⁵

Jaffe's extended reconsideration of Landis's "broad delegation" model not only came in the midst of debates about agency capture, but also at a time of renewed concern about broad agency discretion and the effectiveness of various mechanisms for combatting it. It was widely recognized that discretion was necessary to give proper scope to the exercise of expert judgment, but it was also understood that limits were necessary if the basic values of representative government and the rule of law were to be respected. "[T]he prevalent 'expertise-based' model of agency decisionmaking, view[ing] agencies as professional, apolitical experts charged with pursuing the public interest, began to fade away."²⁰⁶ As that happened, the courts perceived the need to guard against capture by ensuring broader public participation and a more muscular form of judicial review—one aimed at ensuring that agencies faithfully exercised the discretion that Congress had granted to them.²⁰⁷ As Kathryn Watts has explained:

[V]arious prominent judges on the D.C. Circuit crafted a ramped up version of "arbitrary and capricious" review—called "hard look" review—that enabled courts to scrutinize agency decisions and to ensure that the public interest was being served. . . . Applying this more stringent level of review, courts began to scrutinize the substantive elements of agency decisions to ensure that agencies gave adequate consideration to the relevant data and gave reasoned explanations to support their decisions.²⁰⁸

Courts and scholars struggled to find ways to limit agency discretion and ensure agency legitimacy. In addition to substantive review, the courts began to impose additional procedural requirements designed to test whether an

²⁰⁵ *Id.* at 1187.

²⁰⁶ Watts, *supra* note 9, at 15–16 (alteration in original).

²⁰⁷ See ALFRED C. AMAN, JR., ADMINISTRATIVE LAW IN A GLOBAL ERA 33–35 (1992) (explaining that reasoned decision making requirements of hard-look review were an "important source of . . . legitimacy and a demonstration that [the agency] was a responsible agent of Congress").

²⁰⁸ Watts, *supra* note 9, at 16.

agency had actually done the work that Congress had required it to do.²⁰⁹ These additional rulemaking requirements included directives that agencies disclose the significant relevant data in their possession; that they submit draft rules for a second round of comment if significant changes were made; and that they provide statements of basis and purpose that addressed all significant comments and disclosed in some detail the agency's reasoning.²¹⁰ Although the Supreme Court ultimately held, in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, that the courts had no authority to impose procedural requirements in addition to those prescribed by the APA and other relevant statutes,²¹¹ the remaining substantive requirements of "hard look review" still "exact[ed] a price." "[P]aper hearings' generated mammoth records and 'concise general statement[s] of basis and purpose' expanded into the hundreds of pages to meet the demands of 'hard look review.' As a result, rulemaking became more and more expensive to complete"²¹²

In addition, the sheer cost of participation in such potentially expensive rulemaking proceedings undercut the possibility of broad public participation.²¹³ Without regard to whether wealthy business interests could actually "capture" an agency, it was clear that their well-financed voices could at least drown out all but their most well-resourced opponents. The courts no longer imposed additional rulemaking procedures, but the Supreme Court embraced hard look review in *State Farm* in 1983.²¹⁴ *State Farm*'s "burden of explanation" demands that agencies disclose their reasoning with greater transparency than did past conceptions of judicial review.²¹⁵

Some scholars, including Louis Jaffe, thought that the solution to excessive agency discretion was for Congress to legislate with greater specificity. To show that Congress was capable of doing so, Jaffe pointed to

²⁰⁹ AMAN, *supra* note 207, at 34–35 (imposing a higher standard of review upon agencies, "requiring that agencies explain the links between the congressionally expressed belief in progress and the reasonableness of the regulation being reviewed").

²¹⁰ Strauss, *supra* note 199, at 756–57.

²¹¹ *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 524–25 (1978).

²¹² See Strauss, *supra* note 199, at 760. Kenneth Culp Davis and Judge Henry J. Friendly championed an alternative requirement that agencies promulgate rules to narrow their statutory discretion. Jaffe (1973), *supra* note 163, at 1190; see also notes 35–36 and accompanying text (discussing *State Farm* and the definitions of "arbitrary" and "capricious"). The Supreme Court rejected this solution in *Whitman v. Am. Trucking Ass'n, Inc.*, 531 U.S. 457, 486 (2001).

²¹³ See, e.g., Stewart, *supra* note 160, at 1712 ("The viability in practice of such a pluralist theory of legitimacy is challenged at the outset by the predominant contemporary critique of the administrative process: that agencies are biased in favor of regulated and client groups, and are generally unresponsive to unorganized interests." (footnote omitted)).

²¹⁴ Seidenfeld, *supra* note 10, at 153–54.

²¹⁵ *Id.* at 155 (noting that new demands of review required that an agency justify its decisions by addressing factors relevant to its decision).

the “monumental detail of the tax code.”²¹⁶ But Jaffe failed to recognize that the limited resources available to Congress made “monumental detail” unattainable in more than a few areas. In addition, some regulatory problems may be more scientifically or technically complex and dynamic than tax policy, and Congress may lack the ability to legislate with the expertise and frequency required for “monumental detail” in those areas.²¹⁷ In any event, Congress made no effort to take up Jaffe’s invitation.²¹⁸

If tax policy once represented the zenith of technical complexity in government regulation, it was soon displaced by the health and safety legislation of the 1960s and 1970s. Administering this legislation presented even more difficult questions of science and technology, as well as equally difficult questions of public policy and resource allocation. These issues were controversial because of the huge private costs associated with the alleviation of risks, the scientific uncertainty and difficulty of quantifying the precise benefits that might flow from various regulatory approaches, and the fact that resolutions of these questions were necessarily provisional and might be rendered obsolete by future advances in knowledge.²¹⁹ Congress lacked the kind of in-house expertise necessary to address the myriad scientific, technical, and economic fields implicated by this new generation of regulatory statutes.²²⁰ Nor could Congress monitor the rapid and frequent changes in relevant scientific knowledge, let alone amend legislation quickly enough to address these changes in an effective way. To accomplish Congress’s objectives, a broad delegation of authority seemed necessary. Thus, for example, the Occupational Safety and Health Act directed the Secretary of Labor to adopt regulations that would ensure, to the extent feasible, that exposure to hazards in the workplace does not harm workers’

²¹⁶ Jaffe (1973), *supra* note 163, at 1189–90 (“The monumental detail of the tax code suggests that Congress can, and does, legislate with great specificity when it regards a matter as sufficiently important.”).

²¹⁷ When Jaffe was writing in 1973, the seniority system was still largely entrenched in Congress, and committee members, especially chairs and ranking members, often had substantial expertise in the substantive policy areas within their jurisdictions. See George Goodwin, Jr., *The Seniority System in Congress*, 53 AM. POL. SCI. REV. 412, 412 (1959).

²¹⁸ See STAFF OF S. COMM. ON GOV’T OPERATIONS, 95TH CONG., STUDY ON FEDERAL REGULATION 6–7, 67–81 (Comm. Print 1977) (considering but rejecting arguments for greater executive control over independent administrative agencies).

²¹⁹ See Doremus, *supra* note 16, at 450 (discussing the additional regulatory changes Congress should make).

²²⁰ See Jathan Sadowski, *The Much-Needed and Sane Congressional Office that Gingrich Killed Off and We Need Back*, ATLANTIC (Oct. 26, 2012), <https://www.theatlantic.com/technology/archive/2012/10/the-much-needed-and-sane-congressional-office-that-gingrich-killed-off-and-we-need-back/264160/> (discussing the elimination of Congress’s Office of Technology Management).

health.²²¹ Other statutes contained similarly broad mandates,²²² which posed new problems for those concerned with broad delegations of authority to administrative agencies.

Ironically, just as new agencies began to implement the broad mandates contained in this new generation of regulatory statutes,²²³ Congress and the President started to undo earlier regulatory schemes, including the Interstate Commerce Act and the Civilian Aviation Act.²²⁴ The push for deregulation came from scholars as well as influential business leaders who preferred not having to do business under the eyes of regulators. They found a receptive audience in the White House.²²⁵ For some, that push reflected a widely shared view that economic regulation of transportation industries no longer worked.²²⁶ For others, however, the push was part of a more fundamental shift and the emergence of a new set of federal regulatory principles: that free market principles should usually prevail over regulation; that regulation should generally be disfavored as an improper interference with the market; that proponents of regulation should carry the burden of demonstrating the need for regulation; and that the ultimate questions of whether to regulate, how much to regulate, and the form that the regulation should take require a careful evaluation of costs and benefits.²²⁷ In a broader sense, the

²²¹ 29 U.S.C. § 655(b)(5) (1988).

²²² See, e.g., Wagner (1995), *supra* note 25, at 1618 n.15 (“Science-based regulations are typically based on a vague statutory mandate that requires the agency to set standards or take action at the point at which a chemical substance presents or will present an unreasonable risk of injury to health or the environment.” (internal quotation marks omitted)).

²²³ See, e.g., *Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 490 (1981) (OSHA cotton dust standard); *Indus. Union Dep’t v. Am. Petroleum Inst.*, 448 U.S. 607, 625–26 (1980) (OSHA benzene standard); *United Steelworkers of Am. v. Marshall*, 647 F.2d 1189, 1202 (D.C. Cir. 1980) (OSHA lead standard); *Lead Indus. Ass’n, Inc. v. EPA*, 647 F.2d 1130, 1135 (D.C. Cir. 1979) (EPA lead ambient air standard).

²²⁴ Deregulation began in earnest with President Carter’s deregulation of the trucking and airline industries and accelerated under President Reagan.

²²⁵ See AM. BAR ASS’N COMM’N ON LAW & ECON., *FEDERAL REGULATION: ROADS TO REFORM* 79–80 (1979) (calling for greater presidential oversight to avoid duplication and decrease regulatory costs); Lloyd N. Cutler & David R. Johnson, *Regulation and the Political Process*, 84 YALE L.J. 1395, 1399, 1409, 1417 (1975) (advocating for presidential intervention and oversight of agencies).

²²⁶ See Cutler & Johnson, *supra* note 225, at 1396 n.4 (1975) (noting that the “Council of Economic Advisors’ Annual Report suggested that the deregulation of transportation might have to be considered ‘a matter of urgent national priority’”).

²²⁷ Cost-benefit analysis had long been a prominent feature in other areas of law. See EDWARD M. GRAMLICH, *A GUIDE TO BENEFIT-COST ANALYSIS* 2, 3 (2d ed. 1990) (noting the use of cost-benefit analysis by many Presidents and in a variety of different areas of regulation). Its use in regulation has been extensively documented by Cass Sunstein. See CASS R. SUNSTEIN, *SIMPLER: THE FUTURE OF GOVERNMENT* 167–68 (2013) (providing examples of the government’s use of cost-benefit analysis in enacting new regulations); Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838, 1858 (2013) (explaining that “[i]n popular and academic discussions of the OIRA process, a great deal of attention is devoted to cost-benefit analysis” (footnote omitted)); Cass R. Sunstein, *Empirically Informed Information*, 78 U. CHI. L. REV. 1349, 1364 (2011) (noting that the problem with the current system is that most regulations are only subject to cost-benefit

requirement that regulations be justified in terms of their respective costs and benefits would provide another means by which to limit broad statutory grants of discretion to agencies. Indeed, by the late 1970s, some proponents of cost-benefit analysis argued that this analysis should be treated as an implied term in federal regulatory statutes.²²⁸ This move toward quantification would also call into question the individual agencies' resolution of regulatory matters and embellish the credentials of a competing decisionmaker: the Office of Management and Budget (OMB). As a separate entity within the Executive Office of the President (EOP), the OMB had special expertise in cost-benefit analysis and provided a means for subjecting agencies to more centralized presidential control.²²⁹

The drive for presidential control of agency policymaking has been the most important development in administrative law in recent decades.²³⁰ In 1996, Peter Strauss noted that, "the Carter, Reagan, and Bush administrations were characterized by increasingly stringent efforts to gain presidential control over rulemaking in the agencies."²³¹ More recently, in 2010, Strauss wrote that, "[t]he development of aggressively centralized presidential oversight, even control, of executive agency rulemaking has given . . . new prominence" to the clash between technocratic and political views of agency action.²³² Thus, at the same time that recent Presidents have issued executive orders requiring agencies to engage in cost-benefit analysis,

analysis before they are implemented). *But see* RICCARDO REBONATO, *TAKING LIBERTIES: A CRITICAL EXAMINATION OF LIBERTARIAN PATERNALISM* 1, 2 (2012) (offering libertarian paternalism as a "Third Way").

²²⁸ See, e.g., *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 639 (1980) (rejecting the view of "industry representatives" that Congress's use of the terms "reasonably necessary" and "feasible" in the Occupational Safety and Health Act to describe required safety standards should be disregarded or reinterpreted to require "the Agency to quantify both the costs and the benefits of a proposed rule").

²²⁹ See Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (Feb. 17, 1981) (President Reagan required executive agencies to submit cost-benefit analyses of major rule proposals to the OMB); Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993) (President Clinton imposed similar cost-benefit requirements). Alternatively, then-Judge Stephen Breyer proposed the creation of an elite cadre of administrators, much like that envisioned by James Landis, who would be responsible for ordering administrative policy around rational cost-benefit analyses. See STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* 61–62 (1993) (suggesting the implementation of a "specific kind of group" and explaining why it would be successful); see also Barry Sullivan, *Democracy, Bureaucracy, and Science: Making the Trains Run on Time*, 89 NW. U. L. REV. 166 (1994) (reviewing Breyer's book).

²³⁰ See, e.g., Robert V. Percival, *Who's in Charge? Does the President Have Directive Authority over Agency Regulatory Decisions?*, 79 FORDHAM L. REV. 2487, 2487 (2011) (discussing how many Presidents advocated for regulatory review); see Robert V. Percival, *Checks without Balance: Executive Office Oversight of the Environmental Protection Agency*, 54 L. & CONTEMP. PROBS. 127, 128–29 (1991) ("White House concern over the potential impact of [certain] regulations on industry stimulated the creation of the regulatory review programs.").

²³¹ Strauss, *supra* note 199, at 760.

²³² Peter L. Strauss, *Legislation that Isn't—Attending to Rulemaking's "Democracy Deficit"*, 98 CALIF. L. REV. 1351, 1359 (2010).

presumably putting rulemaking on a firmer analytical basis, the same Presidents have increasingly sought to insert their own policy views, usually through OMB's Office of Information and Regulatory Affairs (OIRA), into specific rulemaking proceedings. The two moves may be consistent, from the viewpoint of maximizing executive power, but they seem inconsistent at another level because of the conflict between the "expertise" and "political" models of decision making.

From the very beginning, the Trump Administration has been particularly aggressive both in asserting centralized control over agency decision making and in insisting that science take second seat to politics.²³³ But the principal theorist for this view of presidential control of administrative action was then-Professor Elena Kagan. Following her time in the Clinton White House, Kagan wrote a lengthy justification for President Clinton's control of administrative policy.²³⁴ In *Presidential Administration*, Kagan provides an account of the history of the American administrative state as "[t]he history of competition among different entities for control of its policies."²³⁵ She writes:

All three branches of government—the President, Congress, and the Judiciary—have participated in this competition; so too have the external constituencies and internal staffs of the agencies. Because of the stakes of the contest and the strength of the claims and the weapons possessed by the contestants, no single entity has emerged finally triumphant, or is ever likely to do so. But at different times, one or another has come to the fore and asserted at least a comparative primacy in setting the direction and influencing the outcome of administrative process. In this time, that institution is the Presidency.²³⁶

Kagan notes that President Nixon sought to control a hostile bureaucracy "by creating a 'counter-bureaucracy' within the EOP, with a White House staff more than double the size of Lyndon Johnson's, a new White House-centered Domestic Council to formulate policy positions on domestic issues, and an expansive OMB,"²³⁷ but that "[t]he sea change began with Ronald

²³³ See *supra* Part I (discussing the Trump Administration's regulatory changes).

²³⁴ See Kagan, *supra* note 6, at 2246 (providing an overview of Kagan's article justifying President Clinton's control of administrative policy).

²³⁵ *Id.*

²³⁶ *Id.* Kagan further notes that, "[e]ach kind of administrative control that this account highlights—congressional control (through bureaucratic experts), and interest group control—achieved its heyday at roughly the appointed time, but each also survives in some form today, well past its purported demise." *Id.* at 2254.

²³⁷ *Id.* at 2276.

Reagan's inauguration."²³⁸ In the first month of his administration, President Reagan issued Executive Order 12,291, which "effectively gave OMB a form of substantive control over rulemaking: under the order, OMB had authority to determine the adequacy of an impact analysis and to prevent publication of a proposed or final rule, even indefinitely, until the completion of the review process."²³⁹ The centralization of administration continued under President George H.W. Bush and reached its zenith under President Clinton.²⁴⁰ Kagan writes:

President Clinton treated the sphere of regulation as his own, and . . . made it his own, in a way no other modern President had done. Clinton came to view administration as perhaps the single most critical—in part because the single most available—vehicle to achieve his domestic policy goals. He accordingly developed a set of practices that enhanced his ability to influence or even dictate the content of administrative initiatives. He exercised this power with respect to . . . rulemakings, more informal means of policymaking, and even certain enforcement activities.²⁴¹

Indeed, Clinton went far beyond Reagan in his assertions of authority to direct administrative policy. As Kagan notes, "Presidents before Reagan . . . usually had shunned direct EOP involvement in any administrative rulemaking, and even Reagan, in creating a mechanism for this involvement, had disclaimed any authority ultimately to displace the judgment of agency officials."²⁴² Clinton, on the other hand, "implied precisely this power—presidential directive authority over discretionary decisions assigned by Congress to specified executive branch officials (other than the President)."²⁴³ The agencies "were *his* and so too were their decisions."²⁴⁴

Kagan acknowledges that Congress may grant discretionary authority to agency officials alone and that the President must respect the limits of such

²³⁸ *Id.* at 2277.

²³⁹ *Id.* at 2278. Kagan also notes that "the order and the legal opinion supporting it explicitly disclaimed any right on the part of OMB, or the President himself, to dictate or displace agency decisions." *Id.* That might have been true in theory, but the power granted to OMB suggested a different reality. In addition to "the delay created by OMB review," critics were concerned about delay as well as "the secrecy with which President Reagan's regulatory oversight system operated." *Id.* at 2280 (observing that "[m]ost of OMB's communications with the agencies . . . never appeared in the public record").

²⁴⁰ See *id.* at 2344 (noting that "[b]oth Reagan and Clinton used their methods of administrative control to drive a resistant bureaucracy and political system." (emphasis added)). The "resistant" political system apparently refers to Congress. *Id.*

²⁴¹ *Id.* at 2281–82 (footnote omitted).

²⁴² *Id.* at 2289–90 (footnote omitted).

²⁴³ *Id.* at 2290.

²⁴⁴ *Id.*

delegations, but she also argues that Congress seldom specifically precludes the President from directing the official to whom Congress has delegated the discretion.²⁴⁵ Thus, “most statutes granting discretion to executive branch—but not independent—agency officials should be read as leaving ultimate decisionmaking authority in the hands of the President.”²⁴⁶ Kagan’s controversial interpretive principle seemingly aligns with the Supreme Court’s decision in *Chevron*, which endorsed the EPA’s reliance “upon the [Reagan] administration’s views of wise policy” in granting deference to the EPA’s changed interpretation of the Clean Air Act.²⁴⁷

Kagan argues for presidential administration on two grounds: accountability and effectiveness. With respect to the first, she argues that presidential administration enhances transparency, “enabling the public to comprehend more accurately the sources and nature of bureaucratic power,” and “establishes an electoral link between the public and the bureaucracy, increasing the latter’s responsiveness to the former.”²⁴⁸ Presidential administration is also more effective. Being a unitary actor, the President presumably “can act without the indecision and inefficiency that so often characterize the behavior of collective entities,” and “because his ‘jurisdiction’ extends throughout the administrative state (or at least, the executive branch), he can synchronize and apply general principles to agency action in a way that congressional committees, special interest groups, and bureaucratic experts cannot.”²⁴⁹ For Kagan, the ultimate measure of success is effectiveness “in establishing new priorities for agencies and in advancing a broad domestic policy agenda.”²⁵⁰ The “capacity for action and reaction” is more important than “never mak[ing] an error.”²⁵¹

Kagan acknowledges that her conclusion “would be less sound to the extent that the political and administrative systems fail to impose adequate

²⁴⁵ *Id.* at 2320.

²⁴⁶ *Id.* She adds: “This rule of statutory construction appropriately derives from an effort to determine congressional intent as well as, given some uncertainty in doing so, an effort to promote good lawmaking practices.” *Id.* Kagan notes that when she refers to the President, she is, of course, speaking “of a more institutional actor—the President *and* his immediate policy advisors in OMB and the White House.” *Id.* at 2338. Kagan does not extend this rule to independent agencies. *Id.* at 2327.

²⁴⁷ *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984); Kagan, *supra* note 6, at 2373 (endorsing this aspect of *Chevron* and encouraging a deference doctrine that supports “presidential control over administrative action”).

²⁴⁸ *Id.* at 2331–32.

²⁴⁹ *Id.* at 2339 (footnote omitted). In this regard, Kagan relies on Alexander Hamilton’s view as to the desirability of “energy” in the executive. *See id.* at 2341–43 (quoting THE FEDERALIST NO. 70, at 402 (Alexander Hamilton) (Isaac Kramnick ed., 1987) (“A feeble executive implies a feeble execution of government. A feeble execution is but another phrase for bad execution; and a government ill executed . . . must be, in practice, a bad government.”)).

²⁵⁰ *See id.* at 2345 (describing “Clinton’s brand of presidential administration” as “highly effective” in this regard).

²⁵¹ *Id.*

limits on the President's exercise of administrative power."²⁵² While she also acknowledges the continued importance of agency expertise, she justifies her approach by arguing that politics will not impinge on agency expertise in many cases.²⁵³ Because "not all agency action entails the application of expertise," "presidential dictation of agency action" does not always displace agency action.²⁵⁴ Further, Kagan argues, Presidents will often have incentives to "encourage the application of expertise to administrative problems."²⁵⁵ In that vein, she notes President Clinton's inclination to "steer clear" of many environmental regulations.²⁵⁶

These theories of executive accountability and energy emphasize the benefits of a unitary actor—the President. But the President obviously relies on others to assist him in executing the laws. He may depend on political appointees or civil servants in the various departments and agencies. Most important, he may rely on members of the EOP, who now number about 4000, and, for the most part, are not subject to Senate confirmation or readily amenable to congressional oversight. Although the President can familiarize himself personally with only a relatively small number of the issues with which the EOP deals, many staff members will purport to speak for the President when dealing with federal agencies on issues of substantial importance, and their views usually will carry the day, regardless of whether they really represent positions that the President himself has actually considered, let alone adopted.

Given the limited role that Kagan envisions for agency expertise, it is not surprising that she ultimately urges greater latitude for agencies to change discretionary policies for political reasons.²⁵⁷ Those views align well with the Trump Administration's assertions of power to alter policies based on a "change in administrations" under *Chevron* and Justice Rehnquist's partial dissent in *State Farm*.²⁵⁸ Such deference to political change makes sense only in light of the larger current of understanding that expertise no longer justifies broad delegations to administrative agencies. If expertise has fallen out of the larger picture of theoretical justifications for the

²⁵² *Id.*

²⁵³ *Id.* at 2352 (arguing that "the apparent tradeoff between politics and expertise" is "overdrawn").

²⁵⁴ *Id.* at 2354.

²⁵⁵ *Id.*

²⁵⁶ *Id.* at 2356.

²⁵⁷ See *infra* discussion surrounding notes 503–08 (explaining Justice Kagan's argument that Presidents should have greater authority to influence the policies of administrative agencies).

²⁵⁸ See *supra* discussion surrounding notes 84–91 (detailing the Trump Administration's efforts to change existing rules, such as by repealing two major environmental regulations). As previously explained, the Trump Administration's complete refusals to consider the merits of certain issues are so extreme that they violate the unanimous holding of *State Farm*. See *supra* discussion surrounding notes 100–01 (describing a district court holding that an agency's failure to consider the merits of a repealed rule lacked the "reasoned analysis" required by *State Farm*). Kagan's argument does not question the unanimous portion of *State Farm*.

administrative state, it may also be unnecessary to continue insisting that agencies engage in expert analysis when changing policies.

Many contemporary regulatory problems involve complicated questions of policy and resource allocation as well as scientific or technical questions. Science may tell us within a reasonable degree of certainty about the varying degrees of risk that come with different levels of exposure to various toxic substances, and science can provide an informed judgment about what levels of risk are advisable. But science alone cannot tell us how much society should ultimately spend to lower, from one level to another, the risk of exposure to one toxic substance, as opposed to what we should spend to reduce the risk of exposure to another toxic substance, from one level to another. That, ultimately, is a normative or political question—the answer to which can be aided by science, but not dictated by science alone. Because of their expertise, agencies are well positioned to make judgments about these hybrid questions of science-policy, but we expect them to do so in a transparent way, showing candor with respect to the various elements of the problem, the processes by which their judgments were formed, and the ways in which their judgments may be limited.

Much is typically at stake, politically and economically, in technical and science-intensive rules. It is not surprising, therefore, that the President, whose perspective theoretically encompasses the fullest range of governmental issues, should wish to have a voice in the resolution of such issues. At the same time, it seems necessary that the political and scientific parts of the problem should be kept separate, and the relationship between the two should be made transparent. For example, decisions dictated by resource allocation demands or other political choices should not be passed off as having been dictated by science. But Wendy Wagner has identified “a growing body of evidence reveal[ing] that the White House may regularly (and surreptitiously) suggest change to the technical details of agency analyses.”²⁵⁹ This practice can only undermine confidence in agency expertise.²⁶⁰ The task for administrative law today is to accommodate the respective claims of agency expertise and presidential power in a manner that is transparent and also promotes rational decision making.²⁶¹

Past scholarship has articulated a variety of theories aimed at legitimating or de-legitimizing the administrative state. Great battles have been fought over those theories, and, even now, the question remains whether any theory can satisfactorily ground administrative agencies within the context of our constitutional system.²⁶² Those fires erupt from time to time, die down, and erupt again. The ultimate outcome of disputes over the

²⁵⁹ Wagner (2015), *supra* note 16, at 2022 (footnote omitted).

²⁶⁰ *See id.* (describing the “institutional fork in the road” that results from this practice).

²⁶¹ *Id.*

²⁶² *See, e.g.,* Vermeule, *supra* note 15, at 2478 (describing different theoretical bases to legitimize the administrative state within the constitutional scheme).

legitimacy of the administrative state remains to be seen. Fortunately, the scope of our undertaking is more limited: to explain what values should apply to agency changes in policy. While many scholars have found fault with expertise as a justification for delegations of power to administrative agencies in recent decades, the Justices have largely continued to demand that administrative change reflect expert judgment and the consideration of relevant scientific, technological, or economic evidence. The remainder of this Article offers a positive procedural account of the role of expertise in administrative change. It then explains how this understanding supports existing requirements that agencies engage in reasoned, expert analysis before changing policies.

III. THE SCIENCE OF ADMINISTRATIVE CHANGE: A POSITIVE PROCEDURAL ACCOUNT OF EXPERT AGENCY DECISION MAKING

A. *Congress's Delegation of Authority to Make Expert Decisions*

This Article does not attempt the Herculean feat of legitimizing the entire administrative state. Instead, this Article addresses the narrower, but critical question of what role expertise should play when policy changes are made. Traditional accounts align the making of agency policy changes with currently dominant theories of political accountability and the notion of an “energetic” executive.²⁶³ This Article takes a different tack, based on the understanding that the accommodation of change is a fundamental aspect of expert decision making. It then provides a positive procedural account of the capacity of agencies to adjust policies in light of change. This account shows that agencies are uniquely situated to fulfill congressional mandates that call for expert decision making in changing circumstances.

To start with, regulatory statutes often call for expert analysis that is capable of incorporating new scientific or technological knowledge. Statutory provisions range from explicit directives to ground decisions on particular types of scientific data to open-ended mandates that agencies must fulfill by using their expertise.²⁶⁴ For example, the Endangered Species Act requires agencies to list or delist endangered and threatened species “solely on the basis of the best scientific and commercial data available.”²⁶⁵ Likewise, the Clean Water Act requires that the EPA ensure that certain

²⁶³ Kagan, *supra* note 6, at 2341–43. The executive’s energy may also be exercised by political appointees who head agencies or officers or aides within the Executive Office of the President.

²⁶⁴ See Doremus, *supra* note 16, at 405–06 (describing the “best available science mandate” of the Endangered Species Act).

²⁶⁵ Endangered Species Act of 1973, 16 U.S.C. § 1533(b)(1)(A) (2012). See Doremus, *supra* note 16, at 418–36 (describing potential motivations for Congress’s best available science mandate); see also 42 U.S.C. § 300g-1(b)(3)(A)(i) (2012) (detailing how, under the Safe Drinking Water Act, administrators must use the “best available, peer-reviewed science and supporting studies conducted in accordance with sound and objective scientific practices”).

power plant structures implement the “best technology available for minimizing adverse environmental impact.”²⁶⁶ Other statutes, such as the Toxic Substances Control Act, advance more general, scientifically informed goals of regulating chemicals that “present . . . an unreasonable risk of injury to health or the environment.”²⁶⁷ And still other statutes such as the Federal Reserve Act identify agency goals that require the exercise of financial expertise. That is the case, for example, with respect to Congress’s direction that the Federal Reserve Board and the Federal Open Markets Committee “maintain long run growth of the monetary and credit aggregates . . . so as to promote effectively the goals of maximum employment, stable prices, and moderate long-term interest rates.”²⁶⁸ Even such open-ended statutes as the Federal Trade Commission Act require the agency’s application of economic expertise when deciding whether a particular business practice amounts to an “unfair method of competition.”²⁶⁹ Of course, agencies carrying out these various directives still have a great deal of discretion, and promulgating new regulations in the face of scientific uncertainty, industry resistance, or pressures from non-governmental organizations often proves a daunting task.²⁷⁰ Still, when agencies choose to expend resources on policy change under these statutes, they act pursuant to congressional mandates, which, directly or indirectly, charge agencies with incorporating expert analysis into their decision making processes.

Critically, the expert decisions called for by these statutory mandates incorporate scientific or technological understandings that are premised on the necessity and inevitability of change. As Holly Doremus has explained, even scientific conclusions with a “fairly broad consensus” at one point in time may later prove “wrong,” when “incorrect interpretations will be corrected as inconsistent data accumulates.”²⁷¹ Thus, “in the long run, the scientific process produces extremely robust information about the world,” because “tentative conclusions remain open to challenge” and always

²⁶⁶ 33 U.S.C. § 1326(b) (2012). The Supreme Court held that the “best technology available” standard allowed the EPA to factor in the costs of its regulation. *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 226 (2009).

²⁶⁷ Toxic Substances Control Act, 15 U.S.C. § 2605(a) (2012). *See also* Occupational Safety and Health Act, 29 U.S.C. § 655(b)(5) (2012) (requiring that exposure to toxins should be set at a level “which most adequately assures, to the extent feasible . . . that no employee will suffer material impairment of health or functional capacity”); Clean Air Act, 42 U.S.C. § 7409(b)(1) (2012) (noting that standards for commonplace “criteria” air pollutants must “allow[] an adequate margin of safety . . . requisite to protect the public health”).

²⁶⁸ 12 U.S.C. § 225a (2012).

²⁶⁹ *See* 15 U.S.C. § 45 (2012) (delineating the scope of the Federal Trade Commission’s authority to enforce violations of the Act).

²⁷⁰ *See* Wagner (1995), *supra* note 25, at 1616–17 (detailing the difficulties agencies face in promulgating regulations in light of the “science charade”).

²⁷¹ Doremus, *supra* note 16, at 411.

present “the opportunity to refine understanding.”²⁷² On a similar note, Joel Mokyr has charted the course of technological progress by comparing it to evolution.²⁷³ He rejects a linear notion of technological progress, instead positing that technology advances by “continuous and smooth sequences” of incremental growth that are punctuated by “leaps and bounds” of new inventions that lack “clear-cut parentage” and represent a “clear break from previous technique.”²⁷⁴

These theories of scientific and technological change are consistent with the dynamic that is characteristic of more discrete regulatory questions. Annual updates to FDA-approved influenza vaccinations, for example, reflect the fact that “[f]lu viruses are constantly changing.”²⁷⁵ Each year’s new “vaccine composition” reflects updated scientific analysis based on the receipt and “testing [of] thousands of influenza virus samples,” on the “results of surveillance, laboratory, and clinical studies,” and on the “availability” of suitable “vaccine viruses.”²⁷⁶ Another example, with respect to evolving technology, is the Energy Department’s updated 2015 Wind Vision Report, which was produced by an “elite team of researchers, academics, scientists, engineers, and wind industry experts,”²⁷⁷ who were tasked with documenting how “[c]ontinued advancements in land-based turbines and offshore wind technologies enhance wind power opportunities in every geographic region of the United States.”²⁷⁸ The Department indicated its intent to update the team’s findings periodically,²⁷⁹ and future reports will incorporate the latest technological advances in connection with the generation of wind power.²⁸⁰ In *FCC v. Fox*, Justice Scalia credited the fact that the Commission’s “stepped-up enforcement policy” against broadcasts of fleeting expletives was made possible by “technological advances.”²⁸¹ New technology made “it easier for broadcasters” to censor

²⁷² *Id.*

²⁷³ JOEL MOKYR, *THE LEVER OF RICHES* 273 (1990).

²⁷⁴ *Id.* at 291, 295–96; *see also id.* at 291 (describing incremental changes as “microinventions” and large changes as “macroinventions”).

²⁷⁵ *Selecting Viruses for the Seasonal Influenza Vaccine*, CTRS. FOR DISEASE CONTROL & PREVENTION (Sept. 4, 2018), <https://www.cdc.gov/flu/about/season/vaccine-selection.htm>.

²⁷⁶ *Id.*

²⁷⁷ *Wind Vision*, OFF. ENERGY EFFICIENCY & RENEWABLE ENERGY, <https://www.energy.gov/eere/wind/wind-vision> (last visited Feb. 11, 2019).

²⁷⁸ U.S. DEP’T OF ENERGY, *WIND VISION: A NEW ERA FOR WIND POWER IN THE UNITED STATES* ch. 2 at 5 (2015), https://www.energy.gov/sites/prod/files/wv_chapter2_wind_power_in_the_united_states.pdf.

²⁷⁹ *Wind Vision*, *supra* note 277.

²⁸⁰ David Roberts, *These Huge New Wind Turbines Are a Marvel. They’re Also the Future*, VOX (May 20, 2019, 12:36 PM), <https://www.vox.com/energy-and-environment/2018/3/8/17084158/wind-turbine-power-energy-blades>.

²⁸¹ *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 518 (2009).

programming and “bleep out offending words” that “foul-mouthed glitteratae” were wont to utter.²⁸²

To be sure, the relevant technological or scientific knowledge will ultimately become fixed, at least for current regulatory purposes, by an agency’s decision to impose certain regulatory requirements at a given point in time. This fact may prevent agencies from incorporating cutting edge research that is not yet sufficiently conclusive to support a particular regulatory requirement.²⁸³ Still, as Holly Doremus explains, regulation, like underlying research, “is not set in stone” and is “always subject to reexamination and refinement as the information base improves.”²⁸⁴ Agencies are therefore able to make policy based on the best available scientific or technological data today and update that policy as underlying data evolves. Certainly, Congress did not intend for agencies to promulgate regulations based on the best available evidence that was available at the time of the rulemaking and then close their eyes to subsequent scientific or technological advances. Still less did Congress intend for agencies to fix regulatory requirements based only on what Congress knew when it enacted the underlying statute. If Congress had intended to do either of those things, it could have fixed the requirements itself, and it would not have delegated to agencies the power to revisit their regulations. For example, Congress did not intend the Endangered Species Act to protect only those species that were recognized as endangered when the Act was passed in 1973.²⁸⁵ Other statutes calling for expert inquiry require the same dynamic understanding.

Admittedly, ease of change may not be the first thing that comes to mind when one thinks of administrative agencies, and the degree to which inaction has plagued some regulatory efforts is well known.²⁸⁶ The special value of agency capacity for updating expert judgments becomes obvious, however, when one considers a positive procedural account of agency capacity for implementing change relative to that of other governmental actors. As previously noted, Congress has chosen to delegate expert decisions to agencies in a wide variety of regulatory contexts. Even where Congress could theoretically muster the resources and expertise to legislate a specific legislative solution to a particular problem, it would be difficult for Congress

²⁸² *Id.* at 518, 527. Justice Breyer argued in dissent that the Commission had failed to give adequate consideration to whether smaller broadcasters could afford bleeping technology. *Id.* at 556–57 (Breyer, J., dissenting).

²⁸³ Clifford Grobstein, *Saccharin: A Scientist’s View*, in *THE SCIENTIFIC BASIS OF HEALTH AND SAFETY REGULATION* 117, 126 (Robert W. Crandall & Lester B. Lave eds., 1981) (noting that agencies cannot incorporate knowledge at the forefront of scientific research because it presents uncertain “concepts still being evaluated”).

²⁸⁴ Doremus, *supra* note 16, at 414.

²⁸⁵ 16 U.S.C. §§ 1531–32 (1976).

²⁸⁶ Wagner (1995), *supra* note 25, at 1677 (describing the slow pace of agencies in setting toxic standards).

to update legislation quickly or frequently, particularly if Congress were required to do so with respect to every substantive area within the aegis of the administrative state.²⁸⁷

The President may change policies quickly, but it is doubtful that a single executive actor could even attempt to master the sheer volume of issues that require decision in the modern administrative state. This last point may not be obvious, given President Trump's recent attempts to curtail regulation through a series of executive orders.²⁸⁸ Ultimately, however, regulatory outcomes cannot be imposed by executive decree, as Congress has charged agencies, and not the President, with the responsibility for making final decisions in most regulatory programs.²⁸⁹ Nor may agencies implement the President's agenda without any explanation of the facts or issues that congressional mandates have made relevant to those decisions.²⁹⁰ Thus, given the undeniable requirement that agencies offer *some* explanation for regulatory changes, the question becomes whether expert agency analysis adds value to administrative decision making. The positive procedural account of administrative change, which is discussed in Part C, below, illustrates how expert analysis can enhance regulatory decisions and serve a broader function than mere implementation of executive policy preferences. Further, the ultimate issue reflects more than a tradeoff between executive and agency decision making, because Congress could always leave specific policy decisions to courts rather than agencies.²⁹¹ The following sections will compare the relative capacities of courts and agencies for updating policy in light of scientific or technological changes.

B. *The Courts' Comparative Disadvantage in Updating Expert Decisions*

Congress is not required to delegate technical or scientific decisions to administrative agencies. Courts can also resolve scientific questions left

²⁸⁷ See *supra* Part II and text accompanying notes 217–22 (discussing limits of Congress's ability to legislate with specificity).

²⁸⁸ In addition to orders directing rollbacks of particular regulations, the President has also mandated that agencies eliminate two existing regulations for every new regulation they promulgate. See *supra* text accompanying note 54.

²⁸⁹ Peter L. Strauss, *Foreword: Overseer, or "The Decider"?* *The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 759–60 (2007) ("[I]n the ordinary world of domestic administration, where Congress has delegated responsibilities to a particular governmental actor it has created, that delegation is a part of the law whose faithful execution the President is to assure" by "[o]versight, and not decision . . .").

²⁹⁰ In *State Farm*, all nine Justices rejected NHTSA's completely unexplained rescission of airbag requirements. See *supra* text accompanying notes 36–38. Nor have any scholars advocating political control challenged this aspect of *State Farm*'s decision. See *supra* notes 6–9.

²⁹¹ The tradeoffs between agency and judicial decisions may soon assume greater importance than in the past, given that jurists such as Justice Gorsuch have begun to assert a greater decisional role for judges seeking to check regulatory decisions based on "policy whim." Buzbee, *supra* note 10, at 1358–59.

open by Congress, and, in areas such as antitrust law, judges decide complex economic issues (or questions of social science) without affording significant deference to administrative agencies.²⁹² Still, generalist judges lack the kind of expertise that agencies have. Although nothing prevents the President from appointing a judge with specific expertise in a particular field,²⁹³ a single expert decision maker cannot replicate the combined expertise present across all the agencies in our system;²⁹⁴ and such a decision maker would have only limited influence in an adjudicatory system comprised of almost a thousand federal judges in any event.²⁹⁵ Moreover, agency experts draw on knowledge from fields that run the gamut from economics to medicine to engineering. Judges can sometimes add to their knowledge base by hiring specialized clerks²⁹⁶ or relying on the expertise embodied in briefs,²⁹⁷ but those resources pale in comparison to an agency's ability to hire large expert staffs or consult outside experts free from the ethical constraints imposed on judges.²⁹⁸

Even if judges could muddle through technical or scientific issues and arrive at a reasonable decision, courts are also poorly positioned to update judicial decisions to reflect new learning and changed circumstances. To begin with, *stare decisis* imposes a substantial impediment to change.²⁹⁹ At the federal level, even if an individual district judge were inclined to set aside a particular precedent, vertical *stare decisis* would prevent her from disregarding precedent established by the relevant court of appeals or the Supreme Court. Vertical *stare decisis* also compels the courts of appeals to follow Supreme Court precedent.³⁰⁰

²⁹² Spencer Weber Waller, *Antitrust and Democracy*, 45 FLA. ST. L. REV. 807, 837–40 (2019).

²⁹³ Adrian Vermeule, *Should We Have Lay Justices?*, 59 STAN. L. REV. 1569, 1570 (2007).

²⁹⁴ *Id.* at 1587.

²⁹⁵ See *Introduction to the Federal Court System*, U.S. DEP'T JUST.: OFF. U.S. ATT'YS, <https://www.justice.gov/usao/justice-101/federal-courts> (last visited Aug. 7, 2019) (indicating the number of judges in the different levels of the federal court system).

²⁹⁶ Kenneth Culp Davis, *Judicial, Legislative, and Administrative Lawmaking: A Proposed Research Service for the Supreme Court*, 71 MINN. L. REV. 1, 17 (1986) (proposing the creation of an expert body to assist the Supreme Court); Carl Kaysen, *An Economist as the Judge's Law Clerk in Sherman Act Cases*, 12 A.B.A. SEC. ANTITRUST L. 43, 46 (1958) (economist Kaysen described working "as a law clerk" to Judge Wyzanski, in *United States v. United Shoe Machinery Company*); Harold Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. PA. L. REV. 509, 550 (1974) (suggesting need for judges to hire expert adjuncts to better understand scientific or technological facts).

²⁹⁷ But see Allison Orr Larsen, *The Trouble with Amicus Facts*, 100 VA. L. REV. 1757, 1757 (2014) (explaining that factual assertions in Supreme Court amicus briefs may cause the Court to adopt "unreliable evidence").

²⁹⁸ Adrian Vermeule, *The Parliament of the Experts*, 58 DUKE L.J. 2231, 2239 (2009) (noting that Congress mandates expert panels for "important cases," including the EPA's revisions to National Ambient Air Quality Standards).

²⁹⁹ Kozel & Pojanowski, *supra* note 9, at 135–37.

³⁰⁰ See Amy Coney Barrett, *Stare Decisis and Due Process*, 74 U. COLO. L. REV. 1011, 1015 (2003).

Horizontal *stare decisis* makes change even more difficult. Federal appellate panels are bound to follow rulings of earlier panels, unless the en banc court overrules the panel.³⁰¹ The Supreme Court will also follow its earlier precedent unless a majority of the Court decides that the earlier decision should be overruled. That will not happen in most cases: the small number of cases that the Court agrees to hear each year affords few opportunities to overrule even outdated precedents.³⁰² In addition, some Justices may be reluctant to overrule precedents except in the clearest cases, not only because of the institutional value of stability, but also because of a fear that overruling precedent may encourage the public to give less credence to the Court's objectivity.³⁰³ Finally, litigants wishing to overturn precedents cannot jump straight to the Supreme Court or even to the court of appeals. Litigants must instead be willing to endure the cost of lengthy litigation that starts with a series of unfavorable lower court decisions and may ultimately prove futile. In administrative law cases, the long march may actually begin with lengthy administrative proceedings.

Moreover, district and circuit court judges neither set their own agendas nor have much control over the legal issues they will be required to decide. As Justice Scalia noted in his dissent in *United States v. Windsor*:³⁰⁴

[D]eclaring the compatibility of state or federal laws with the Constitution is not only not the “primary role” of this Court, it is not a separate, free-standing role *at all*. We perform that role incidentally—by accident, as it were—when that is necessary to resolve the dispute before us. Then, and only then, does it become “the province and duty of the judicial department to say what the law is.”³⁰⁵

Judges are charged with deciding only the issues that are brought to them by litigants, and they are constrained to base their decisions on the record evidence compiled by the district court or the agency whose determinations they are reviewing.³⁰⁶ While the Supreme Court (unlike the lower federal

³⁰¹ *Id.* at 1018.

³⁰² See *infra* notes 327–31 and accompanying text.

³⁰³ See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 943 (1992) (Blackmun, J., concurring in part and dissenting in part) (recognizing that confirmation hearings may focus on political issues instead of legal objectivity).

³⁰⁴ 570 U.S. 744 (2013).

³⁰⁵ *Id.* at 781 (Scalia, J., dissenting).

³⁰⁶ *Mitchell v. JCG Indus., Inc.*, 745 F.3d 837, 849 (7th Cir. 2014) (Wood, C.J., dissenting) (arguing that it would be startlingly improper for court of appeals judges to resolve a dispute over the length of time it took employees to “don and doff” work apparel “based on a post-argument experiment conducted in chambers by a judge” and his clerks); Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 385 (1978) (“[A]djudicative process should normally not be initiated by the tribunal itself.”); *id.* at 388 (noting need for “congruence” between “grounds for the decision” and “the framework of the argument” presented in court).

courts) has discretion over its docket, it is similarly constrained in the sense that it must generally select cases and issues from the pool of cases and issues that have already been litigated in the lower federal courts, the federal agencies, or the state courts.³⁰⁷ These constraints limit the Court's ability to resolve significant issues. For example, the Court has never had occasion to directly overrule *Korematsu v. United States*,³⁰⁸ and even last term, in *Trump v. Hawaii*, Chief Justice Roberts was constrained to note that *Korematsu* had only "been overruled in the court of history."³⁰⁹

Even when litigants have a substantial basis for asking the courts to alter legal rules because of changed circumstances, the judicial process is not well equipped to address evolving understandings of science and technology. Judges tend to decide issues narrowly, incrementally, and based on rules that have been applied in the past.³¹⁰ This backward-looking framework tethers judges to past decisions with similar facts. Consider Lon Fuller's classic description of adjudication. As Fuller observes, a judge deciding whether a horse belongs to its original owner or a party who has procured the horse by fraud will consider how other courts have addressed similar issues (perhaps ownership of a horse procured by physical theft) in the past.³¹¹ A judge would not apply a brand new rule to a recurring situation unless he or she were willing (and able) to overrule a precedent the judge deemed erroneous.³¹² Judicial remedies are also incremental insofar as they apply only to the parties to a particular lawsuit,³¹³ operate retroactively,³¹⁴ and produce a definitive statement of rights and duties.³¹⁵

These gradual, backwards-looking, and definitive features of adjudicative decisions may contribute to a stable rule of law, but they are ill-equipped to produce decisions that must accommodate scientific or technological change. By nature, such advances tend to upend past practice and may occur in fits and starts rather than incrementally.³¹⁶ Moreover, for matters of science or technology, the impetus to capitalize on improvements resulting from change is fundamental: it is unthinkable, for example, that

³⁰⁷ The Court has original jurisdiction in a handful of cases. For a collection of original jurisdiction cases before 1959, see *The Original Jurisdiction of the United States Supreme Court*, 11 STAN. L. REV. 665, 701–19 (1959).

³⁰⁸ 323 U.S. 214 (1944).

³⁰⁹ *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018).

³¹⁰ Fuller, *supra* note 306, at 374 (incremental); *id.* at 380 (previously applicable rules). In *Youngstown Sheet & Tube Co. v. Sawyer*, Justice Jackson pointed out that the "judicial practice of dealing with the largest questions" of executive power "in the most narrow way" contributed to a "poverty of really useful and unambiguous authority." 343 U.S. 579, 634–35 (1952) (Jackson, J., concurring).

³¹¹ Fuller, *supra* note 306, at 375–77.

³¹² Edward H. Levi, *Introduction to Legal Reasoning*, 15 U. CHI. L. REV. 501, 501–02 (1948).

³¹³ Fuller, *supra* note 306, at 392.

³¹⁴ *Id.*

³¹⁵ *Id.* at 404.

³¹⁶ MOKYR, *supra* note 273, at 295–96.

any physician would advise a cancer patient in 2019 to undergo treatment based on the best medical treatment available in 2009. Lawyers, on the other hand, typically make arguments based on longstanding precedent and past practice, while avoiding arguments that may seem overly imaginative, creative, or novel. Wishing to avoid reversal, judges likewise avoid the appearance of “[c]reativity and imagination,” which are “valued qualities” in science.³¹⁷

Lon Fuller also thought that courts could not handle polycentric problems—the sort of multidimensional and interrelated problems that are often the meat of administrative proceedings. Fuller analogized these polycentric problems to a “spider[’s] web,” in which a “pull on one strand will distribute tensions after a complicated pattern throughout the web as a whole.”³¹⁸ In his time, Fuller thought those problems were exemplified by governmentally imposed price controls.³¹⁹ When the United States imposed certain price controls during World War II, for example, “the agencies charged with allocative tasks did not attempt to follow the forms of adjudication.”³²⁰ This was a situation, Fuller suggested, that presented “too strong a polycentric aspect to be suitable for adjudication.”³²¹

Fuller based his analysis on the need for allocative determinations in problem areas that antedated the kind of technological and scientific questions that Congress has delegated to agencies in more recent decades.³²² Still, Fuller’s example of wage and price controls implicates an economic problem that is not difficult solely because it is multidimensional and interrelated or requires expert judgment. Critically, it is also difficult because it is *dynamic*. Indeed, with respect to wage and price controls, Fuller notes that “courts move too slowly to keep up with a rapidly changing economic scene,” *and* that they “cannot encompass and take into account the complex repercussions that may result from any change in prices or wages.”³²³

The reasons are obvious. Dynamic circumstances present a crucial obstacle to the application of an incremental and backwards-looking adjudicative process: relevant inputs, such as the number of qualified workers and the demand for particular products, will change over time. Further, changes in underlying facts may be accompanied both by changes in economic theory on how to measure demand and by changed policy views on questions like the percentage of profits that should be allocated to workers. All of these variables make questions of wage or price control

³¹⁷ See Doremus, *supra* note 16, at 410.

³¹⁸ Fuller, *supra* note 306, at 395.

³¹⁹ *Id.* at 394–95, 400.

³²⁰ *Id.* at 400.

³²¹ *Id.*

³²² Fuller does note that polycentric problems such as “building bridges of structural steel” may still follow “rational principles” that are not merely left to managerial discretion. *Id.* at 403.

³²³ *Id.* at 394.

unsuitable for judicial resolution. In addition, the multidimensional and interrelated nature of many polycentric problems will unfold over time, as solutions to particular problems create unintended consequences. For example, a parent who keeps his or her children inside to protect them from abduction may find that their lack of exercise and increased screen time decreases their physical fitness. A static mechanism that attempts to resolve safety issues early on cannot adjust for unintended consequences of this sort.³²⁴

Given the judicial branch's many limitations with respect to polycentric disputes involving technical or scientific questions, it should not surprise that Congress has largely chosen to delegate questions of this sort to agencies. When there have been exceptions, most notably in the area of antitrust, courts have struggled to keep legal rules up to date. For example, most cases arising under the federal antitrust laws require courts to make economically-informed competition policy determinations when deciding claims brought by private parties, the Department of Justice, or the FTC.³²⁵ But courts have lagged behind developments in economic thought. The Supreme Court, for example, has lagged far behind the rise and fall of the Chicago School as a dominant theory for assessing competition policy. Starting in the 1960s, the Chicago School critiqued antitrust decisions for failing to recognize that markets would often self-correct or that antitrust liability would often stifle efficient business practices.³²⁶ The Supreme Court accepted some of the Chicago School's theoretical arguments in the 1970s when it adopted a rule of reason test (and thus allowed an efficiency defense) for territorial distribution restraints in *Continental T.V., Inc. v. GTE Sylvania, Inc.*³²⁷ Although the available theoretical arguments also supported a relaxed rule for distributional restraints involving resale price,³²⁸ the Court did not change the rule of per se illegality for resale price maintenance for the next twenty years.

Thus, even by the late 1990s—almost twenty years after *GTE Sylvania*—Judge Richard A. Posner of the Seventh Circuit was still obliged

³²⁴ Doremus, *supra* note 16, at 412 (“Unlike research science, courtroom science is a short-term project with consequences that are understood to be both important and irreversible.”).

³²⁵ Waller, *supra* note 292, at 834–41. Although the FTC decides a small percentage of cases in the first instance, courts do not extend great deference to the FTC's competition policy judgments on appeal. *Id.* at 34–36; see also Daniel A. Crane, *Technocracy and Antitrust*, 86 TEX. L. REV. 1159, 1188–89 (2008) (discussing Justice Breyer's use of “technocratic solutions”).

³²⁶ ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* (1978).

³²⁷ 433 U.S. 36, 57 (1977).

³²⁸ *Id.* at 69–70 n.10 (White, J., concurring) (discussing argument for extending the rule of reason to resale price maintenance); see also Richard A. Posner, *Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions*, 75 COLUM. L. REV. 282, 292–93 (1975) (“[R]esale price maintenance . . . is simply another method of dealing with the free-rider problem” that undermines the ability of manufacturers to ensure point of sale services at the retail level.).

to follow precedent rendering maximum resale price maintenance illegal per se when he wrote the panel opinion in *Khan v. State Oil Co.*³²⁹ While the Supreme Court later overruled the per se rule against *maximum* resale price maintenance in *State Oil Co. v. Khan*,³³⁰ that decision did not undo controlling precedent applying a per se rule to *minimum* resale price maintenance—that only came a decade later in *Leegin Creative Leather Products v. PSKS, Inc.*³³¹ Thus, the lower federal courts were precluded from considering the Chicago School’s theoretical justifications for all categories of distribution restraints until thirty years after the Court’s initial acceptance of these arguments in 1977.

Ironically, by about the time that the Supreme Court incorporated Chicago School theory into its entire line of distribution restraint decisions, leading scholars had questioned the Chicago School’s theoretical assumptions as ill-conceived and badly out of date.³³² As Justice Breyer pointed out in his dissent in *Leegin*, empirical evidence showed that, contrary to the Chicago School’s predictions, there were significant retail price increases in states where federal and state law authorized resale price maintenance for a limited period of time.³³³ Since *Leegin*, scholars have identified a growing body of empirical evidence associating resale price maintenance agreements with anticompetitive increases in consumer prices.³³⁴ Moreover, while the Chicago School assumed the desirability of protecting the ability of manufacturers to guarantee in-store, point of sale services, more recent internet sellers like Amazon have wooed countless customers by forsaking these very point of sale services. The specific fact patterns before the Court in *GTE Sylvania* addressed a plausible need for point of sale services for television sets in the 1970s, and in *Leegin* the weakly plausible (at best) need for point of sale services for women’s accessories in 2007. By their nature, these decisions could not consider different types of products, such as books, for which point of sale services may be irrelevant. Nor could the final judicial pronouncements in *GTE Sylvania* and *Leegin* adjust to accommodate new market conditions or the

³²⁹ 93 F.3d 1358, 1363 (7th Cir. 1996).

³³⁰ 522 U.S. 3, 7 (1997).

³³¹ 551 U.S. 877, 882 (2007).

³³² Amanda P. Reeves & Maurice E. Stucke, *Behavioral Antitrust*, 86 IND. L.J. 1527, 1586 (2011) (“The Supreme Court’s economic thinking, as reflected in . . . *Leegin*, still lags.”).

³³³ *Leegin*, 551 U.S. at 912–13 (Breyer, J., dissenting) (arguing that “most economists today agree” that “resale price maintenance tends to increase consumer prices” (citation omitted)).

³³⁴ This evidence ranges from admissions to anticompetitive use of resale price maintenance by horizontal cartel participants to market comparisons showing significant price increases in states where the rule of reason applied post-*Leegin*. See Jonathan B. Baker, *Taking the Error Out of “Error Cost” Analysis*, 80 ANTITRUST L.J. 1, 18 (2015) (“[A] recent study of a sample of convicted contemporary international cartels concludes that at least one quarter used vertical restraints to support collusion.”); *id.* at 21 (noting that, in a study done after *Leegin*, states following the rule of reason had “higher” prices and “lower” output than states that retained the per se rule as a matter of state law).

fact that point of sale services seem to be growing irrelevant for more and more categories of products, which probably now include televisions and women's accessories.

Although antitrust scholars continue to debate rules of antitrust liability for distribution restraints, proponents of both theories should find judicial antitrust decisions ill-equipped to keep pace with advances in economic learning. From the Chicago School perspective, the Court allowed an outdated precedent to proscribe potentially efficient resale price maintenance agreements for at least thirty years. From a post-Chicago or behavioral perspective, the Court's *Leegin* decision condoned at least a decade of increased consumer prices, premised on unrealistic assumptions about the desirability of point of sale services. Even astute judges can only do so much.³³⁵ Because courts have limited ability to update their decisions, Congress cannot expect judges to incorporate new economic learning either quickly or thoroughly when it delegates expert decisions to them.

C. *The Superior Capacity of Agencies to Accommodate Change*

Agencies can update policies to reflect advances in scientific learning or expertise better than courts. Courts are constrained to issue orders on a case-by-case basis, resolve only the particular disputes that litigants bring to them, and decide only the legal issues that cannot be avoided if the dispute is to be resolved. Agencies, on the other hand, are not limited to issuing adjudicatory orders. Agencies can also resolve a broad range of questions through the promulgation of binding rules and a panoply of less formal actions, including advisory opinions, guidance documents, information gathering concerning industry problems or policy issues, and the publication of studies and reports.³³⁶ Decisions made outside of the formal adjudication process are not limited by an official record requirement,³³⁷ and, in some cases, agencies may also consult expert panels when making decisions.³³⁸

Rulemaking offers agencies the broadest and most stable manner of changing policy, and agencies may alter existing rules so long as they use an appropriate rulemaking procedure to do so.³³⁹ This procedural

³³⁵ See *Sierra Club v. Costle*, 657 F.2d 298, 410 (D.C. Cir. 1981) (noting that the court had "given the agency the benefit of the doubt out of deference for the terrible complexity of its job" and the task it faced in resolving expert issues fit for "engineers, computer modelers, economists or statisticians").

³³⁶ 5 U.S.C. §§ 553–57 (2012); GELLHORN & BYSE, *ADMINISTRATIVE LAW: CASES AND COMMENTS* 66–67 (11th ed. 2011) (describing informal information gathering activities); Mark H. Grunewald, *The NLRB's First Rulemaking: An Exercise in Pragmatism*, 41 *DUKE L.J.* 274, 277–82 (1991); M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 *U. CHI. L. REV.* 1383, 1386 (2004).

³³⁷ 5 U.S.C. § 553 (2012).

³³⁸ Vermeule, *supra* note 298, at 2239.

³³⁹ Agencies do not need to promulgate rules before announcing a new standard in an adjudication, *SEC v. Chenery Corp.*, 332 U.S. 194, 202 (1947), and they do not need to engage in rulemaking to change

requirement has sometimes raised concerns over ossification, that is, an institutional reluctance to alter possibly outmoded rules because of the time and effort required to promulgate new ones.³⁴⁰ Recent research suggests that ossification concerns may have been overstated,³⁴¹ however, and ossification does not “bind” an agency in the same way that *stare decisis* binds courts in any event. Further, while expert decision making necessarily requires a slower decision making process than policy changes based on whim or political preference alone, agencies that invest the time necessary to change rules can alter policy on a broad and uniform national scale.³⁴² While agency decision making may be time consuming, the months or years that an agency may invest in rulemaking will often pale in comparison to the decades it may take to litigate a complete set of issues through the judicial system to final decision by the Supreme Court.

Unlike courts, agencies can also alter standards contained in existing rules, orders, or guidance statements without waiting for private parties to initiate a proceeding.³⁴³ In addition, agencies may choose to update existing policies on their own initiative, based on internal agency analysis or prompts from the President or Congress.³⁴⁴ Whatever the source of the nudge, however, the ultimate decision must be taken by the agency that Congress has placed in charge of making applicable policy.

Nor do traditional rules of *stare decisis* limit agencies in reconsidering existing decisions. To understand that issue, one must appreciate two different “mode[s] of reasoning” involved in agency decisions,³⁴⁵ which Randy Kozel and Jeff Pojanowski have helpfully described as “expositive” and “prescriptive.”³⁴⁶ An agency engages in prescriptive reasoning when it “exercises its discretion to implement a legislative directive by weighing evidence, utilizing technical expertise, and making policy choices.”³⁴⁷ Expositive reasoning, on the other hand, occurs when an agency seeks to

policy that was initially adopted in informal guidance, *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1203 (2015).

³⁴⁰ See Wendy Wagner et al., *Dynamic Rulemaking*, 92 N.Y.U. L. REV. 183, 188, 199 (2017) (discussing the process of regulation review that occurs at the agency level and noting the fact that different agencies may be subject to “different rulemaking procedures”).

³⁴¹ *Id.* at 259.

³⁴² 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, 1094–96 (1987).

³⁴³ See *id.* at 1116–17 (acknowledging the “increasing[] . . . complex[ity]” of the legal system and “limited resources” of the Supreme Court).

³⁴⁴ 5 U.S.C. § 555(a)–(e) (2012). See also Kagan, *supra* note 6, at 2254 (describing how three types of administrative control “bleed” into one another).

³⁴⁵ Kozel & Pojanowski, *supra* note 9, at 141–46.

³⁴⁶ *Id.* at 141–42.

³⁴⁷ *Id.*

determine “what Congress actually intended with respect to a particular issue.”³⁴⁸

Neither form of agency reasoning is subject to traditional rules of *stare decisis*. Courts review expositive decisions, in which agencies ascertain statutory meaning, under a variety of deference doctrines.³⁴⁹ These deference doctrines place varying degrees of weight on consistency with past interpretive decisions made by agencies³⁵⁰ and courts,³⁵¹ but none rise to the level of uniformity required by *stare decisis*.³⁵² On the other hand, courts address changes in prescriptive decisions under the “arbitrary and capricious” standard of review, which focuses on the agency’s reasoning process and allows an agency to alter its policies so long as it adequately explains its reasons for doing so.³⁵³

Unlike courts, agencies are not tied to backwards looking standards when setting regulatory policy. Instead, advances in expert or scientific knowledge have often enabled agencies to adopt new regulatory responses to recurring and evolving problems. For example, when Federal Reserve Chairman Ben Bernanke was confronted with the 2008 financial crisis, he was able to avoid the policy mistakes that are now thought to have

³⁴⁸ *Id.*

³⁴⁹ 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, 1099 tbl. 1 (2008) (listing various deference doctrines such as Consultative Deference, *Skidmore*, *Beth Israel*, *Chevron*, etc.).

³⁵⁰ Compare *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 863 (1984) (holding that the fact that the EPA has “from time to time changed its interpretation” does not lead to a conclusion that “no deference should be accorded to the agency’s interpretation of the statute” at issue), with *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (holding that the validity of an agency’s judgments, such as rulings, interpretations, and opinions, will “depend upon . . . [their] consistency with earlier and later pronouncements”).

³⁵¹ *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (“Some of the respondents dispute this conclusion, on the ground that the Commission’s interpretation is inconsistent with its past practice. We reject this argument. Agency inconsistency is not a basis for declining to analyze the agency’s interpretation under the *Chevron* framework. Unexplained inconsistency is, at most, a reason for holding an interpretation to be an arbitrary and capricious change from agency practice under the Administrative Procedure Act.”).

³⁵² See *supra* notes 350–51.

³⁵³ 5 U.S.C. § 706 (2012); *Motor Vehicle Mfrs. Ass’n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 34 (1983) (applying the arbitrary and capricious standard). To be sure, the line between expository and prescriptive reasoning may not always be clear: scientific questions could either be addressed directly by Congress or left to agencies with an open-ended delegation of authority. See Catherine M. Sharkey, *Cutting in on the Chevron Two-Step*, 86 FORDHAM L. REV. 2359, 2438 (2018) (noting that while agency expertise is at the center of a court’s analysis, courts will still require agencies to prove “reasoned decisionmaking” under the *Chevron-State Farm* model). Nevertheless, given Congress’s widespread use of open-ended administrative statutes, see Christine Chabot, *Selling Chevron*, 67 ADMIN. L. REV. 481, 510–12 (2015), and its concomitant grant of large swaths of agency discretion on matters that turn on scientific or other forms of expertise, the principal concern of this Article is with the role of expert discretion in agency alterations of prescriptive decisions. This analysis also sets to one side the growing debate over *Chevron* deference in judicial review of agency decisions.

exacerbated the Great Depression.³⁵⁴ Instead, Bernanke was able to facilitate “innovations” that “resulted in large increases in the amount of Federal Reserve credit extended to the banking system.”³⁵⁵ Similarly, when laws encouraging good motoring behavior failed to stem the flood of fatalities caused by automobile accidents, NHTSA was able to implement a new approach,³⁵⁶ namely technology-forcing performance standards that required vehicle manufacturers to implement safer motor vehicle design.³⁵⁷ Although it took time to secure improvements such as seatbelts and airbags, NHTSA estimates that its vehicle safety technology requirements have saved over 500,000 lives.³⁵⁸ In other instances, scientific advances have prompted agencies to update health policies such as vaccination recommendations³⁵⁹ and dietary recommendations for pregnant women.³⁶⁰ Sometimes these advances have even required agencies to confront new regulatory problems such as the relationship between greenhouse gas emissions and climate change.³⁶¹

Problems involving science or other forms of expertise also tend to be polycentric and can therefore benefit from analytical procedures that break down their multifaceted and interrelated issues into manageable units of

³⁵⁴ Gary Richardson, *The Great Depression*, FED. RES. HIST. (Nov. 22, 2013), https://www.federalreservehistory.org/essays/great_depression (describing how the Federal Reserve inadvertently “hurt the economy” when it decided to raise interest rates in 1928, 1929, and 1931 and failed to act as a lender of last resort in response to banking panics).

³⁵⁵ Ben S. Bernanke, Chairman, Fed. Reserve, Address at the Greater Austin Chamber of Commerce: Federal Reserve Policies in the Financial Crisis (Dec. 1, 2008), available at <https://www.federalreserve.gov/newsevents/speech/bernanke20081201a.htm>.

³⁵⁶ Jerry L. Mashaw, *The Story of Motor Vehicle Manufacturers Association of the U.S. v. State Farm Mutual Automobile Insurance Co.: Law, Science and Politics in the Administrative State*, in ADMINISTRATIVE LAW STORIES 335, 337–39 (Peter L. Strauss ed., 2006).

³⁵⁷ *Id.* at 339.

³⁵⁸ NAT’L HIGHWAY TRAFFIC SAFETY ADMIN., U.S. DEP’T OF TRANSP., DOT HS 812 069, LIVES SAVED BY VEHICLE SAFETY TECHNOLOGIES AND ASSOCIATED FEDERAL MOTOR VEHICLE SAFETY STANDARDS, 1960 TO 2012: PASSENGER CARS AND LTVs xii (2015), <https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/812069> (“The report estimates that vehicle safety technologies saved 613,501 lives from 1960 through 2012, including 27,621 in 2012.”); see also Karen Wiswall, *Safety Standards Make an Impact*, REG. REV. (Mar. 25, 2015), <https://www.theregreview.org/2015/03/25/wiswall-safety-impact/> (“Since 1960, car safety technologies, like the seat belts, air bags, and braking systems to which these standards apply, have helped save more than half a million lives.”).

³⁵⁹ The CDC now recommends only two HPV shots for younger adolescents. *CDC Recommends Only Two HPV Shots for Younger Adolescents*, CTRS. FOR DISEASE CONTROL & PREVENTION (Oct. 19, 2016), <https://www.cdc.gov/media/releases/2016/p1020-HPV-shots.html> (noting that the CDC previously recommended three doses to protect against cancers caused by HPV).

³⁶⁰ *FDA and EPA Issue Final Fish Consumption Advice*, U.S. FOOD & DRUG ADMIN. (Jan. 18, 2017), <https://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm537362.htm>.

³⁶¹ See *Massachusetts v. EPA*, 549 U.S. 497, 505 (2007) (“Calling global warming ‘the most pressing environmental challenge of our time,’ a group of States, local governments, and private organizations alleged in a petition for certiorari that the Environmental Protection Agency (EPA) has abdicated its responsibility under the Clean Air Act to regulate the emissions of four greenhouse gases, including carbon dioxide.”).

analysis. In many cases, for example, science may provide limited information upon which to base a policy decision, especially at the frontiers of knowledge.³⁶² Oliver Williamson, the 2009 Nobel Laureate in Economic Sciences,³⁶³ has proposed a helpful “decision process approach” that regulators may apply in cases of scientific uncertainty.³⁶⁴ Williamson’s approach makes use of a decision tree to order and identify discrete choices and break down the costs and benefits relevant to each choice.³⁶⁵ As explained below, this approach plays to the strengths of the regulatory process. It is quite different from the procedure that leads courts to develop a binary and permanent decision based on arguments made by a limited group of parties.

To illustrate Williamson’s proposal, consider a regulatory scheme that focuses on the elimination of health hazards associated with food additives. Sometimes, for example, a food dye that might pose a serious but unquantified health risk will have a close substitute that does not pose the same risk. In this case, it is not necessary to confront uncertainty over the precise level of risk presented by the initial dye, because the regulator can simply steer consumers toward the dye that does not present the risk.³⁶⁶ If there is not a ready substitute, however, a regulator should further calibrate different costs of limiting consumer access to a potentially risky product. For example, would removal of the dye eliminate countervailing health benefits for some users or cut off significant economic benefits to the manufacturer of the product?³⁶⁷ Williamson also notes that risks posed by a weak carcinogen like saccharin may be outweighed by weight control benefits,³⁶⁸ and that even potent carcinogens like the aflatoxins found in peanut butter may be necessary to offer an “inexpensive form of protein.”³⁶⁹

It may also be the case that health risks associated with certain products are borne only by particular users, or that the costs of certain regulations are borne disproportionately by particular industries.³⁷⁰ With respect to the former problem, a regulator may be able to craft a limited regulatory solution aimed at protecting a particular group of users. Thus, a warning that pregnant women should not consume alcoholic beverages might provide a better

³⁶² Grobstein, *supra* note 283, at 126 (noting that science is “rarely decisive in policy making,” and that research at the forefront of knowledge presents uncertain “concepts still being evaluated and possibly yet to be modified”).

³⁶³ Oliver E. Williamson – Facts, NOBELPRIZE.ORG, <https://www.nobelprize.org/prizes/economic-sciences/2009/williamson/facts/> (last visited Sept. 11, 2019).

³⁶⁴ Oliver Williamson, *Saccharin: An Economist’s View*, in THE SCIENTIFIC BASIS OF HEALTH AND SAFETY REGULATION 131, 142 (Robert W. Crandall & Lester B. Lave eds., 1981).

³⁶⁵ *Id.* at 145.

³⁶⁶ *Id.* at 147–48.

³⁶⁷ *See id.* at 145.

³⁶⁸ *Id.* at 148.

³⁶⁹ *Id.* at 149.

³⁷⁰ Williamson, *supra* note 364, at 145.

solution than an absolute ban on the sale of alcoholic beverages. Regulators might also be expected to refrain from promulgating general rules that do not adequately address disproportionate effects on a single industry.³⁷¹

In addition, Williamson's recommendation that agencies break down decisions into discrete sub-issues could provide a helpful framework for agencies to address the problem of change as scientific or technological knowledge grows. Thus, a complete ban on dye supported by research establishing some level of health risk might be ripe for revision if new research clarified that health risks existed only for children under a certain age or that new manufacturing processes could cheaply remove the ingredient associated with health risks. This capacity for change allows an agency to regulate with confidence in the present despite the necessarily uncertain state of scientific knowledge. Williamson's approach allows the agency to acknowledge the provisional nature of its initial findings and gives it the flexibility to adjust policies as scientific knowledge progresses.

To the extent that an agency is willing to make its particular regulatory priorities transparent, Williamson's analytical framework will also enhance political accountability. An agency might identify the current state of scientific knowledge, the scope of uncertainty surrounding that knowledge, and the policy priorities it will apply in the face of uncertainty.³⁷² This granular analysis could clarify, for example, whether a particular administration prioritizes eliminating cost to industry or protecting children or perhaps even less quantifiable concerns such as human dignity. These factors may gain importance where scientific knowledge remains uncertain. Conversely, as scientific knowledge becomes more certain, agencies should have less room to prioritize discretionary factors or to adopt a policy contrary to scientific evidence.³⁷³

Williamson's framework appropriately recognizes that many scientific and technical problems are complex and unlikely to present a single objective answer to important policy problems. To be sure, Williamson seems to call for a level of analytical transparency that may be difficult to obtain.³⁷⁴ Nevertheless, the tradeoffs acknowledged by Williamson's procedural framework are well within the ken of regulators. Williamson's

³⁷¹ *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240, 253 (2d Cir. 1977) (invalidating the general rule which failed to address the possibility that its standards would render canned whitefish unmarketable).

³⁷² Williamson notes, for example, that non-health benefits or efficiency benefits can also be considered in the decision making framework. Williamson, *supra* note 364, at 145.

³⁷³ In *State Farm*, it was "surely . . . not enough" for NHTSA to ignore evidence on safety benefits of airbags on the ground "that the regulated industry . . . eschewed" airbags. *Motor Vehicles Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48–49 (1983).

³⁷⁴ See Wagner (1995), *supra* note 25, at 1677 ("Since the task of determining levels of toxins that are 'safe' is misidentified as one that must be answered by science, and is typically in the first instance assigned to agency scientists, it is not surprising that few answers come forward.").

framework also plays to the particular procedural strengths of agencies. They can regulate around uncertain levels of risk, incorporate political factors, and adjust their policies as scientific knowledge evolves. Courts, on the other hand, do not generally issue provisional decisions that acknowledge uncertainty;³⁷⁵ they also avoid overt reference to political factors³⁷⁶ and do not generally consider the interests of non-parties who may be affected by their rulings.

One of us has previously written about cases arising out of the AIDS epidemic as an illustration of the problems that courts face when they decide cases “at the frontiers of scientific knowledge.”³⁷⁷ In the early 1990s, courts were required to decide whether persons with HIV posed a “significant risk” of transmitting HIV to others in work, school, or healthcare environments.³⁷⁸ Rather than refining the “significant risk” test “through common law development,”³⁷⁹ later courts essentially “redefin[ed] . . . the test” as one that would be satisfied by “the existence of *any* risk rather than the existence of a *significant* risk.”³⁸⁰ While this test was easier for courts to apply, it failed to protect persons with HIV from unwarranted discrimination.³⁸¹

That article attributed the courts’ failures to the difficulties of using adjudication to solve a polycentric problem.³⁸² Although courts approached the issue of “significant risk” as “raising only factual issues,”³⁸³ assessment of risk ultimately implicated normative concerns as well as scientific knowledge,³⁸⁴ which was initially limited and “provisional.”³⁸⁵ From the vantage point of 2018, it seems that the potentially provisional nature of scientific knowledge may have posed overwhelming challenges for these courts. The possibility that scientific knowledge would change may have driven courts to adopt an overly precautionary standard in the 1990s. If subsequent studies identified higher or different transmission risks of HIV

³⁷⁵ See *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 900 (2007) (concluding that “[s]tare decisis . . . does not compel . . . continued adherence to the *per se* rule against vertical price restraints”).

³⁷⁶ “It is said that ‘[m]ost judges would sooner admit to grand larceny than confess a political interest or motivation.’” Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 NW. U. L. REV. 251, 262 (1997) (alteration in original) (quoting ROBERT A. CARP & RONALD STIDHAM, *THE JUDICIAL PROCESS IN AMERICA* 301 (3d ed. 1996)).

³⁷⁷ Barry Sullivan, *When the Environment is Other People: An Essay on Science, Culture, and the Authoritative Allocation of Values*, 69 NOTRE DAME L. REV. 597, 603 (1994).

³⁷⁸ *Id.* at 599–600.

³⁷⁹ *Id.* at 640.

³⁸⁰ *Id.* at 641.

³⁸¹ *Id.*

³⁸² *Id.* at 641 n.121.

³⁸³ *Id.* at 644.

³⁸⁴ *Id.* at 647.

³⁸⁵ *Id.* at 651.

(which was at the time a life-threatening virus), the risk assessment in initial cases would not have left an appropriate balance in place.

The article also argued that handing off part of the decision to an administrative agency could improve risk analysis. Although courts would still be required to ensure that persons with HIV were protected from discrimination, agencies could assist courts in the underlying determination of whether there was a “significant risk” of transmission.³⁸⁶ An expert agency would be better positioned to apply Williamson’s decision making framework and consider substitute measures (perhaps precautionary measures instead of an outright ban on clinical work by dental students with HIV, for example) and indirect consequences (including the overall impact on the supply of dentists).³⁸⁷

Of course, merely involving an agency capable of evaluating relevant costs and benefits provides no guarantee of success, and that was especially true in the politically and emotionally charged climate that characterized the early years of the AIDS epidemic. Indeed, the article recounts that early attempts by the Centers for Disease Control (CDC) to address the risks of HIV transmission from and to health care workers ultimately failed,³⁸⁸ and difficult decisions were simply passed on to the health care industry.³⁸⁹ This may illustrate that there are no perfect solutions to the most difficult problems. The CDC, however, was ultimately able to update its policies to better reflect scientific knowledge.³⁹⁰

As these examples suggest, agencies apply technical and scientific knowledge to a variety of difficult issues. The difficulty of the questions that agencies confront, together with the often-uncertain state of relevant knowledge, means that many questions will not yield indisputably clear answers. Indeed, as underlying science or technical knowledge changes, the best answer today may well become suboptimal, dated, or patently wrong tomorrow. Agencies are uniquely situated to adjust policies and replace inferior, dated, or incorrect conclusions with findings that better reflect the state of underlying knowledge.

To be sure, the benefits of an agency’s ability to change policies are not limited to scientific or technical decisions within an agency’s area of expertise. One might also favor the ability of an agency to effectuate change

³⁸⁶ See *id.* at 689–90 (advocating a procedure whereby courts take guidance from agencies without “abdicate their responsibilities to administration”).

³⁸⁷ *Id.* at 665.

³⁸⁸ *Id.* at 684–85.

³⁸⁹ *Id.*

³⁹⁰ See Ctrs. for Disease Control & Prevention, *HIV Transmission*, U.S. DEP’T HEALTH & HUM. SERVS., <https://www.cdc.gov/hiv/basics/transmission.html> (last updated July 22, 2019) (clarifying that HIV is not spread by air, water, saliva, sweat, or tears and that even for health care workers, the “main risk of HIV transmission . . . from being stuck with an HIV-contaminated needle . . . is less than 1%”).

from the viewpoint of transparency and political accountability.³⁹¹ The important point here, however, is that the ability to change favors *both* the expertise and political rationales for administrative agencies. Insofar as Congress has required agencies to base decisions on an expert analysis of scientific or technical evidence, one cannot simply eliminate agency expertise and allow agencies to regulate based on political considerations alone. The unique ability of agencies to effectuate change makes them specially positioned to improve policies by accommodating advances in science or technology. Thus, a rule requiring agencies to exercise expert discretion when changing policies helps advance this goal. On the other hand, a rule allowing agencies to substitute raw political preferences for expert discretion eliminates a significant advantage that agencies can provide in the policymaking arena and discounts the value that expert analysis may provide in the realm of policy change.

IV. THE SUPREME COURT HAS STRUGGLED TO STRIKE AN APPROPRIATE BALANCE BETWEEN AGENCY EXPERTISE AND POLITICAL WILL

Courts have struggled for decades to strike an appropriate balance between agency expertise and political will. Under section 706 of the Administrative Procedure Act, courts review agency policy decisions, including changes in policy, under the arbitrary and capricious standard of review.³⁹² Although section 706 itself does not specifically mention agency expertise, it requires reviewing courts to “set aside” agency action found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”³⁹³ Section 706 also directs courts to make this determination based on a review of “the whole record or those parts of it cited by a party.”³⁹⁴ In its 1971 decision in *Citizens to Protect Overton Park v. Volpe*,³⁹⁵ the Supreme Court emphasized the importance of an agency’s decisional record to a reviewing court’s ability to ensure that the agency actually considered “the relevant factors” that Congress identified.³⁹⁶

The Court’s application of the arbitrary and capricious standard of review has long assumed a baseline of deference to agency exercise of expert discretion in cases where the agency’s reasoned analysis reveals that such discretion has been exercised. In *Baltimore Gas & Electric Co. v. Natural*

³⁹¹ Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 81–82 (1985).

³⁹² Administrative Procedure Act, 5 U.S.C. § 706 (2012).

³⁹³ *Id.*

³⁹⁴ *Id.*

³⁹⁵ 401 U.S. 402 (1971).

³⁹⁶ *Id.* at 416.

Resources Defense Council, Inc.,³⁹⁷ a unanimous Court³⁹⁸ deferred to necessarily predictive scientific determinations underlying a Nuclear Regulatory Commission rulemaking.³⁹⁹ The Court noted that the Commission's predictions regarding the environmental impact of nuclear waste were "within its area of special expertise, at the frontiers of science."⁴⁰⁰ According to the Court, "this kind of scientific determination" generally requires a reviewing court to be at its "most deferential."⁴⁰¹

A. *State Farm: Politics Versus Expertise*

In *State Farm*, the Reagan Administration asked the Court to extend *Baltimore Gas*'s paradigm of strong deference to cases in which agencies substitute political concerns for expert analysis.⁴⁰² The Court refused to capitulate to the Reagan Administration's swift regulatory rollbacks and instead adopted the "hard look" standard of arbitrary and capricious review.⁴⁰³ All nine Justices invalidated NHTSA's decision to eliminate existing automobile safety requirements without any explanation whatsoever. The Court split in a five-to-four vote, however, on NHTSA's cursory rejection of data that associated safety benefits with alternative automobile safety requirements. The majority held that NHTSA's rejection was too superficial to constitute "the product of reasoned decisionmaking,"⁴⁰⁴ whereas the dissent deemed NHTSA's analysis sufficient in light of political concerns raised by a "change in administration."⁴⁰⁵

The history leading up to the *State Farm* decision illustrates the daunting nature of NHTSA's regulatory mandate. In 1966, Congress began using an epidemiological approach that supported its decision to make the interiors of cars safer for occupants during inevitable automobile accidents.⁴⁰⁶ To that end, it delegated to the Secretary of Transportation and NHTSA broad

³⁹⁷ 462 U.S. 87 (1983).

³⁹⁸ Justice Powell recused himself in *Baltimore Gas*. The remaining seven Justices joined Justice O'Connor's decision without writing separately.

³⁹⁹ *Balt. Gas & Elec. Co.*, 462 U.S. at 104; see also Emily Hammond Meazell, *Super Deference, the Science Obsession, and Judicial Review as Translation of Agency Science*, 109 MICH. L. REV. 733, 741–42 (2011) (discussing the *Baltimore Gas* decision).

⁴⁰⁰ *Balt. Gas & Elec. Co.*, 462 U.S. at 103.

⁴⁰¹ *Id.*

⁴⁰² *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42–43 (1983).

⁴⁰³ *Id.* at 41; Doremus, *supra* note 16, at 423 (explaining that, in *State Farm*, "the Court endorsed a form of hard look").

⁴⁰⁴ *State Farm*, 463 U.S. at 52; see also Doremus, *supra* note 16, at 423 (noting that *State Farm* requires analysis of relevant scientific evidence "even in the absence of an explicit legislative science mandate").

⁴⁰⁵ *State Farm*, 463 U.S. at 59 (Rehnquist, J., concurring in part and dissenting in part).

⁴⁰⁶ *Id.* at 33 (majority opinion).

discretion to adopt automobile safety standards that “shall be practicable, shall meet the need for motor vehicle safety, and shall be stated in objective terms.”⁴⁰⁷ The adoption of appropriate safety standards called for “considerable expertise” and required the Agency to force the creation of new “technology for building safer cars.”⁴⁰⁸ NHTSA initially required manufacturers to incorporate manual seatbelts, but that failed to produce the desired safety benefits because few motorists chose to buckle up.⁴⁰⁹ From the late 1960s into the early 1970s, NHTSA undertook additional efforts to require passive occupant restraints.⁴¹⁰ These efforts spanned several administrations and were met with great resistance: the automobile industry railed against these innovations based on costs and practicability,⁴¹¹ and the public also resisted change.⁴¹² A particularly unpopular interim effort to force seatbelt usage through ignition interlock technology engendered extreme public opposition and was overruled by Congress.⁴¹³

By the time of the Carter Administration, however, evidence showed that passive restraints were technologically and economically feasible, that they would save over 9000 lives annually,⁴¹⁴ and that they would prevent tens of thousands of injuries.⁴¹⁵ As a result, NHTSA promulgated a new rule, Modified Standard 208, which required car manufacturers to phase in passive restraint protections by the early to mid-1980s.⁴¹⁶ Modified Standard 208 operated as a safety performance standard and allowed manufacturers to achieve the required safety benefits by choosing between airbags and automatic seatbelts.⁴¹⁷

The political landscape changed with the 1980 election. Drew Lewis, President Reagan’s new Secretary of Transportation, directed NHTSA to open a new rulemaking docket to reconsider Modified Standard 208. Lewis cited “changed economic circumstances” and the “difficulties of the automobile industry” as reasons for reconsideration.⁴¹⁸ NHTSA ultimately rescinded Modified Standard 208 on the ground that recent manufacturer initiatives precluded passive restraints from achieving the “significant safety

⁴⁰⁷ *Id.* (quoting 15 U.S.C. § 1392(a)).

⁴⁰⁸ *Id.*

⁴⁰⁹ Mashaw, *supra* note 356, at 351.

⁴¹⁰ *Id.*

⁴¹¹ *Id.* at 352 (noting usual industry objections of “cost, lead times, and production feasibility”).

⁴¹² *Id.* at 367 (discussing “public . . . doubts concerning the effectiveness and costliness of the technology”).

⁴¹³ *State Farm*, 463 U.S. at 35–36.

⁴¹⁴ Federal Motor Vehicle Safety Standards, Occupant Restraint Systems, 42 Fed. Reg. 34,289, 34,291 (July 5, 1977).

⁴¹⁵ *Id.* at 34,298 tbl.II.

⁴¹⁶ *State Farm*, 463 U.S. at 37.

⁴¹⁷ *Id.*

⁴¹⁸ *Id.* at 38.

benefits” that had been predicted earlier.⁴¹⁹ NHTSA gave two primary reasons for discounting the benefits of this regulation. First, because ninety-nine percent of manufacturers opted to install automatic seatbelts rather than airbags, the “life-saving potential of airbags would not be realized.”⁴²⁰ Second, because most manufacturers had opted for automatic seatbelts that could be detached, the Agency expressed substantial doubt that this passive restraint technology would significantly enhance seatbelt usage and therefore safety benefits.⁴²¹

On review, the District of Columbia Circuit found NHTSA’s rescission arbitrary and capricious under section 706 of the APA,⁴²² and the Supreme Court affirmed.⁴²³ All nine Justices rejected an extreme version of political deference and agreed that NHTSA’s rescission of airbag and non-detachable automatic seatbelt requirements was arbitrary and capricious.⁴²⁴ In their view, NHTSA failed to show that it exercised expert discretion because it gave no explanation for these rescissions, even though both technologies had previously been found to enhance safety and supported a final rule mandating passive restraint technology.⁴²⁵ According to Justice White’s majority opinion, “[n]ot one sentence” of NHTSA’s “rulemaking statement discusses the airbags-only option,” and it was “surely . . . not enough that the regulated industry . . . eschewed” this safety device.⁴²⁶ Further, the Agency also failed to consider the alternative of non-detachable automatic seatbelts with continuous spooling technology “in its own right.”⁴²⁷

The Supreme Court premised its analysis on the understanding that “[e]xpert discretion is the lifeblood of the administrative process.”⁴²⁸ Thus, rescission of an existing rule requires the same “reasoned analysis for the change” that applies when an agency promulgates a new rule.⁴²⁹ Further, while a court may not “substitute its judgment for that of the agency,” a court must carefully consider whether the agency has “examin[ed] the relevant data and articulat[ed] a satisfactory explanation” that connects the policy

⁴¹⁹ *Id.*

⁴²⁰ *Id.*

⁴²¹ *Id.* at 38–39.

⁴²² *Id.* at 39–40.

⁴²³ *Id.* at 41.

⁴²⁴ *Id.* at 31, 41, 46.

⁴²⁵ *Id.* at 48–49, 56; *id.* at 57–58 (Rehnquist, J., concurring in part and dissenting in part).

⁴²⁶ *Id.* at 48–49 (majority opinion).

⁴²⁷ *Id.* at 56; *id.* at 57–58 (Rehnquist, J., concurring in part and dissenting in part) (noting that the Agency erroneously “gave no explanation at all” for eliminating “the airbags and continuous spool automatic seatbelt,” even though these technologies were “explicitly approved in the standard the agency was rescinding”).

⁴²⁸ *Id.* at 48 (majority opinion) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 167 (1962)). Justice Rehnquist joined the Court’s discussions of expertise in parts III and V-A of Justice White’s opinion. *Id.* at 57 (Rehnquist, J., concurring in part and dissenting in part).

⁴²⁹ *Id.* at 42 (majority opinion).

choices made to the facts found, therefore demonstrating the exercise of expert discretion.⁴³⁰ The Court's "hard look" standard thus imposes "strict and demanding" requirements that the agency "cogently explain why it has exercised its discretion in a given manner."⁴³¹

The Court's examples of arbitrary decision making underscore its insistence upon the hallmarks of expert discretion: decisions must be thoroughly reasoned and account for relevant evidence. Thus, in addition to addressing "factors" "not intended" by Congress, an agency could flunk arbitrary and capricious review if it (1) "entirely failed to consider an important aspect of the problem"; (2) explained its decision on grounds "counter to the evidence before the agency"; or (3) made an "implausible" choice that "could not be ascribed to a difference in view or the product of agency expertise."⁴³² If the decision were purely political, as the dissenters suggested, it is not clear these last three criteria should matter. As long as the agency stays "within the bounds established by Congress,"⁴³³ a court could instead defer to the administration's new policy choice as one of the spoils of the election. If the public is dissatisfied with the administration's policies, its remedy rests at the ballot box.

In *State Farm*, the Justices disagreed on how much expert analysis an agency must supply in the face of political change, and only five Justices voted to invalidate NHTSA's elimination of automatic detachable seatbelt requirements. When the Agency eliminated these requirements, it offered a cursory explanation that re-weighed earlier evidence on predicted levels of seatbelt usage. NHTSA doubted that automatic detachable seatbelts would result in increased usage, as the predicted increase was based on field studies considering cars with automatic *non-detachable* seatbelts and ignition interlock systems.⁴³⁴ However, the Agency did not address the likelihood that inertia would cause drivers to leave seatbelts engaged. That was important because inertia was thought to be a primary reason that motorists did not buckle up to begin with.

Writing for the majority, Justice White rejected the Agency's decision as arbitrary and capricious. The Court started from the premises that "the

⁴³⁰ *Id.* at 43. Deference will not shelter agencies that fail to exercise expert discretion in the first instance. *Id.* at 50 (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947) and noting that courts will not accept "appellate counsel's *post hoc* rationalizations" for an agency decision).

⁴³¹ *Id.* at 48 (quoting *Burlington Truck Lines*, 371 U.S. at 167) (noting that, without these explanatory requirements, "expertise, the strength of modern government, can become a monster which rules with no practical limits on its discretion" (internal citation omitted)).

⁴³² *Id.* at 43. Here, NHTSA's refusal to consider evidence of the safety benefits of airbags also seemed to violate its statutory obligation to "consider relevant available motor vehicle safety data," 15 U.S.C. § 1392(f)(1), (3), (4) (1976), and to go against congressional intent that the Agency support its decisions with "substantial evidence," S. REP. NO. 89-1301, at 8 (1966), as reprinted in 1966 U.S.C.C.A.N. 2709, 2715-16.

⁴³³ *State Farm*, 463 U.S. at 59 (Rehnquist, J., concurring in part and dissenting in part).

⁴³⁴ *Id.* at 53 (majority opinion).

safety benefits of wearing seatbelts are not in doubt” and that Congress intended safety to be the “pre-eminent factor” in regulatory decisions made under the Motor Vehicle Safety Act.⁴³⁵ The Court recognized that NHTSA had some leeway to act without “direct evidence in support” of its position that detachable automatic seatbelts would not lead to a “substantial increase” in seatbelt usage.⁴³⁶ It also held that it was “within the agency’s discretion” to dispute the “generalizability” of studies that supported the earlier findings of increased seatbelt usage.⁴³⁷ Ultimately, however, the majority believed that the Agency had failed to offer sufficient explanation for its belief that detachable automatic belts would not yield a substantial increase in seatbelt usage. Indeed, evidence from field studies supported the Agency’s earlier finding that automatic seatbelts would increase safety as well as the policy choice based on it.⁴³⁸

NHTSA also failed to “bring its expertise to bear” on an important aspect of the problem when it failed to discuss why inertia—a key factor limiting manual seatbelt usage—would not also bolster usage rates for detachable automatic seatbelts.⁴³⁹ Automatic seatbelts, after all, remain in use unless the occupant overcomes inertia and takes positive action to disconnect them.⁴⁴⁰ In addition to the omissions that the Court noted, the Agency’s initial analysis identifying safety benefits and increased usage under Modified Standard 208 already was predicated on an assumption that thirty to forty percent of automatic seatbelts would be disabled.⁴⁴¹ The new rescission order confessed to a “lack of directly relevant data” to substantiate the Agency’s hunch that drivers would disable detachable seatbelts often enough to undermine their safety benefits.⁴⁴²

Justice Rehnquist dissented on this issue; he would have upheld NHTSA’s decision to eliminate passive detachable seatbelts.⁴⁴³ He found it “reasonable” for the Agency to discount safety benefits premised on an earlier study that may have incorporated unrealistic assumptions inapplicable to many drivers.⁴⁴⁴ Thus, the Agency’s “explanation” of

⁴³⁵ *Id.* at 52, 55.

⁴³⁶ *Id.* at 52–53.

⁴³⁷ *Id.* at 53.

⁴³⁸ *Id.*

⁴³⁹ *Id.* at 54.

⁴⁴⁰ *Id.*

⁴⁴¹ Federal Motor Vehicle Safety Standards, Occupant Restraint Systems, 42 Fed. Reg. 34,289, 34,298 (July 5, 1977); *see also* Mashaw, *supra* note 356, at 383 (noting that “[c]ontinuous-spool belts were removable with a pair of scissors”).

⁴⁴² Federal Motor Vehicle Safety Standards; Occupant Crash Protection, 46 Fed. Reg. 53,419, 53,422 (Oct. 29, 1981) (“[C]ommenters . . . did not present any new factual data that could have reduced the substantial uncertainty confronting the agency.”).

⁴⁴³ *State Farm*, 463 U.S. at 57–58.

⁴⁴⁴ *Id.* at 58. Consumer choice and ignition interlock technology may have made usage rates in the study higher than in the real world.

“substantial uncertainty” as to the benefits of detachable seatbelts was “adequate” to support the Agency’s decision.⁴⁴⁵ Further, and most important, Justice Rehnquist emphasized that a “change in administration . . . is a perfectly reasonable basis for an executive agency’s reappraisal of the costs and benefits” of existing regulations.⁴⁴⁶ According to Justice Rehnquist, a new administration is entitled to assert its distinct, (de)regulatory “philosophy,” so long as its decisions stay “within the bounds established by Congress” and rationally “assess administrative records.”⁴⁴⁷

Thus, none of the Justices found that political change would provide a complete justification for NHSTA to eliminate passive restraint requirements altogether. A change in administration did not license the Agency to utterly disregard evidence that airbags or non-detachable automatic seatbelts enhanced safety. Justice Rehnquist and three other Justices found political change sufficient only when the Agency exercised *some* discretion by re-weighing record evidence on automatic seatbelts in light of the new administration’s deregulatory philosophy. A majority of the Court found that deregulation was not supported by a sufficient analysis of the existing administrative record.

B. *Recent Cases Fail to Resolve the State Farm Division*

Subsequent Supreme Court decisions applying arbitrary and capricious review have failed to command a stable majority on the issues that divided the Court in *State Farm*. The Court has failed to resolve the tension between Justice White’s insistence on decisions supported by an adequate record of expert analysis and evidence and Justice Rehnquist’s emphasis on deference to a new President.⁴⁴⁸ Moreover, the recent retirement of Justice Kennedy, who provided the deciding vote in the most highly contested cases, adds to the general uncertainty about the Court’s future direction in this area.

⁴⁴⁵ *Id.*

⁴⁴⁶ *Id.* at 59.

⁴⁴⁷ *Id.*

⁴⁴⁸ The Court addressed *State Farm* in passing when it addressed changed policies in *Smiley v. Citibank (S.D.)*, 517 U.S. 735 (1996), and *National Cable & Telecommunications Ass’n v. Brand X Internet Services*, 545 U.S. 967 (2005). In *Smiley*, the Court distinguished the Comptroller’s new rule defining “interest” from the “sudden and unexplained” policy change invalidated in *State Farm*. *Smiley*, 517 U.S. at 742. In *Brand X*, the Court reaffirmed that changes in statutory interpretation qualify for *Chevron* deference and cited Justice Rehnquist’s *State Farm* dissent for the proposition that a “change in administrations” may prompt such a change. *Brand X*, 545 U.S. at 981; *see also* *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 189 (2000) (Breyer, J., dissenting) (citing Justice Rehnquist’s *State Farm* dissent to support the FDA’s assertion of jurisdiction over tobacco products based on a change in administration and more expansive interpretation of the governing statute). For a helpful discussion on the application of *State Farm*, *see* JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 509–13 (6th ed. 2018).

Signs of continued disagreement have been obvious in cases such as the Court's 2007 decision in *Massachusetts v. EPA*.⁴⁴⁹ Although that case, which was decided by a five-to-four vote, involved the EPA's failure to initiate a rulemaking, rather than an actual change in policy,⁴⁵⁰ the question of deference to a politically-based decision not to regulate or exercise expert discretion loomed large. In an opinion by Justice Stevens, the majority held that the EPA was required to exercise expert judgment and decide whether "greenhouse gas emissions from new motor vehicles" would cause or contribute to the harm associated with climate change, and that its failure to do so was arbitrary and capricious.⁴⁵¹ Justice Kennedy joined Justices Stevens, Breyer, Souter, and Ginsburg in the majority.⁴⁵² Jody Freeman and Adrian Vermeule have noted that *Massachusetts v. EPA* may amount to *State Farm* for a new generation, as it facilitates judicial review and forces agencies to exercise expertise when making another type of deregulatory decision that "allegedly injected politics into an expert judgment."⁴⁵³

Justice Kennedy switched sides in the Court's next significant opportunity to clarify *State Farm*. In its 2009 decision in *FCC v. Fox Television Stations, Inc.*, the Court reviewed the FCC's decision to extend existing prohibitions of "indecent speech" to ban broadcasts of "fleeting expletives."⁴⁵⁴ The case involved a factual and regulatory setting dramatically different from that of *State Farm*, as the Commission had crafted its indecent speech policy around First Amendment concerns and the Court's earlier decision in *FCC v. Pacifica Foundation*.⁴⁵⁵ In *Fox*, the Second Circuit had found the Commission's new indecent speech policy arbitrary and capricious.⁴⁵⁶ One of the court of appeals's primary critiques focused on the absence of evidence to support the new, higher enforcement standard.⁴⁵⁷ According to the court of appeals, the Commission lacked "evidence that . . . a fleeting expletive is harmful."⁴⁵⁸ The court of appeals also cited this lack of evidence as the reason it "found unconvincing" the Commission's prediction that a fleeting expletive exemption "would lead to increased use of expletives."⁴⁵⁹

⁴⁴⁹ 549 U.S. 497 (2007).

⁴⁵⁰ *Id.* at 505.

⁴⁵¹ *Id.* at 505, 534.

⁴⁵² Justices Scalia, Thomas, Alito, and Chief Justice Roberts dissented. *Id.* at 501.

⁴⁵³ Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 SUP. CT. REV. 51, 53–54.

⁴⁵⁴ 556 U.S. 502, 506–07, 522 (2009).

⁴⁵⁵ *Id.* at 507–08; *FCC v. Pacifica Found.*, 438 U.S. 726, 748–49 (1978).

⁴⁵⁶ *E.g. Fox*, 556 U.S. at 518–19 (discussing the Second Circuit's ruling).

⁴⁵⁷ One of its grounds focused on inconsistency inherent in the Commission's indecency policy: the Commission failed to impose a categorical ban on all broadcasts of expletives and excepted broadcasts of films such as *Saving Private Ryan*. *E.g. id.* at 520 (discussing the Second Circuit's ruling).

⁴⁵⁸ *Id.* at 519 (quoting *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 461 (2d Cir. 2007)).

⁴⁵⁹ *Id.* at 521.

When the case reached the Supreme Court, the Justices struggled to find common ground, writing six different opinions.⁴⁶⁰ Four Justices, including Justice Kennedy, aligned themselves with Justice Scalia in holding that the Commission's change in policy was not arbitrary and capricious or governed by *State Farm*.⁴⁶¹ Justice Kennedy wrote separately, however, to emphasize that he would continue to follow *State Farm*'s arbitrary and capricious standard in cases (unlike *Fox*) that involved scientific or technical expertise.⁴⁶² Justice Breyer, joined by three other Justices, dissented on the ground that the Commission's action was arbitrary and capricious under *State Farm*.⁴⁶³

In his opinion for the majority, Justice Scalia first rejected the argument that the arbitrary and capricious standard imposes a heightened standard of review for cases in which an agency has changed policy. Instead, the agency must only "display awareness" of its change and "show that there are good reasons for the new policy."⁴⁶⁴ While the Court did not require that reasons for the new policy be "better than the reasons for the old [policy],"⁴⁶⁵ it distinguished the FCC's indecent speech policy from policy changes that implicate reliance interests or are based on "factual findings that contradict those which underlay its prior policy."⁴⁶⁶ The Court went on to explain that the harm at issue in *Fox* could not be proved or disproved by "empirical evidence" because "[o]ne cannot demand a multiyear controlled study, in which some children are intentionally exposed to indecent broadcasts . . . and others are shielded from all indecency."⁴⁶⁷

The Court majority cited the fact that the subject of the regulation was not susceptible to objective verification as a key consideration in its

⁴⁶⁰ Justice Scalia wrote a majority opinion joined by Chief Justice Roberts, Justice Thomas, and Justice Alito, and joined in part by Justice Kennedy. *Id.* at 504. Justice Thomas concurred separately, writing that he agreed with the majority's administrative law analysis and holding; he also raised First Amendment concerns relevant to the proceedings on remand. *Id.* at 530 (Thomas, J., concurring). In his concurrence, Justice Kennedy agreed with the majority's holding and with its opinion in part, but he also agreed with part of the reasoning offered in Justice Breyer's dissent. *Id.* at 535 (Kennedy, J., concurring in part and concurring in the judgment). Justices Ginsburg, Souter, and Stevens also joined the administrative law analysis in Justice Breyer's dissent. *Id.* at 546–47 (Breyer, J., dissenting). Justice Ginsburg wrote separately to emphasize First Amendment concerns. *Id.* at 545 (Ginsburg, J., dissenting). Justice Stevens wrote separately to emphasize concerns based both on administrative law and on the First Amendment. *Id.* at 539 (Stevens, J., dissenting).

⁴⁶¹ Chief Justice Roberts and Justices Alito, Thomas, and Kennedy joined the parts of Justice Scalia's majority opinion finding that the Commission's change in policy was not arbitrary and capricious and distinguishing *State Farm*. *Id.* at 514–15, 517.

⁴⁶² *Id.* at 535 (Kennedy, J., concurring in part and concurring in the judgment).

⁴⁶³ *Id.* at 546–47 (Breyer, J., dissenting).

⁴⁶⁴ *Id.* at 515 (majority opinion).

⁴⁶⁵ *Id.*

⁴⁶⁶ *Id.*

⁴⁶⁷ *Id.* at 519. The Court also found that that new bleeping technology would help networks censor fleeting expletives broadcast on live shows. *Id.* at 518.

decision.⁴⁶⁸ On the other hand, the dissenting Justices rejected the majority's view that the Commission's decision was not amenable to proof, arguing that the Commission could have addressed some evidence of harm to children⁴⁶⁹ and, most important, that the majority's analysis could allow agencies to "change major policies on the basis of nothing more than political considerations or even personal whim."⁴⁷⁰

Justice Scalia's opinion studiously avoided any reference to Justice Rehnquist's partial dissent in *State Farm*, and he did not address political considerations except in the part of his opinion that responded to the dissents of Justices Breyer and Stevens.⁴⁷¹ As previously noted, Justice Kennedy declined to join in this part of Justice Scalia's opinion, which therefore commanded the votes of only four Justices. Justice Scalia's plurality opinion rejected calls for heightened scrutiny because the Commission's policy change "was spurred by significant political pressure from Congress."⁴⁷² And because the Commission is an independent agency, its politically motivated policy decision did not reflect the presidential control involved in *State Farm*.

Justice Kennedy agreed that the Commission's change in policy was not arbitrary and capricious, but he wrote separately to emphasize "background principles," and to express his concern with respect to policy changes in areas of scientific or technical expertise. According to Justice Kennedy, a "more reasoned explanation" may be appropriate when "discoveries in science" or technological advances alter reasons for a longstanding policy.⁴⁷³ In these instances, "a substantial body of data and experience can shape and form the new rule," and the agency's decision must be "explained in light of available data" and be "informed by the agency's experience and expertise."⁴⁷⁴

Justice Kennedy described the agency's obligation in apolitical terms, and explained that the APA imposes on agencies a "duty . . . to find and formulate policies that can be justified by neutral principles and a reasoned explanation."⁴⁷⁵ This standard precludes an agency from "simply disregard[ing] contrary or inconvenient factual determinations that it made in the past."⁴⁷⁶ Justice Kennedy thus indicated that he would follow *State*

⁴⁶⁸ *Id.* at 519 (citing *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 46–56 (1983)).

⁴⁶⁹ *See id.* at 564 (Breyer, J., dissenting) (noting that the Commission could have addressed studies suggesting that children are too young to comprehend sexual innuendo, but failed to do so).

⁴⁷⁰ *Id.* at 551–52.

⁴⁷¹ *Id.* at 523–29 (majority opinion).

⁴⁷² *Id.* at 523–24. As the Commission is an independent agency, political pressure may be more likely to come from Congress than the President.

⁴⁷³ *Id.* at 535.

⁴⁷⁴ *Id.* at 536.

⁴⁷⁵ *Id.* at 537.

⁴⁷⁶ *Id.*

Farm in cases where the agency's initial policy was supported by factual findings,⁴⁷⁷ but *Fox* did not raise the same concerns because the Commission based its prior "policy on [the Supreme Court's opinion in] . . . *FCC v. Pacifica Foundation*" rather than on "factual findings."⁴⁷⁸

In sum, *Fox* seems to raise more questions than it answers about the proper standard of review for an agency's change in policy. The Justices not only disagreed on the lawfulness of the FCC's change in policy, but they also disagreed on how broadly *State Farm*'s test should apply.⁴⁷⁹ The reasoned awareness standard from Justice Scalia's majority opinion might be read to align with Justice Rehnquist's opinion in *State Farm*, but only three Justices joined the part of Justice Scalia's opinion that supported a policy outcome that seemed to reflect congressional pressure.⁴⁸⁰ Justices Kennedy, Breyer, Stevens, Souter, and Ginsburg expressed reservations about this diluted standard and about the propriety of change grounded in political considerations alone. These Justices noted that they would adhere to *State Farm*, at least when the agency changed fact-based policies or where technical or scientific expertise is relevant.⁴⁸¹

The Court's most recent decision, *Department of Commerce v. New York*, reveals the Justices' continued disagreement over the arbitrary and capricious standard of review. As noted above, the Secretary of Commerce's controversial decision to add a citizenship question drew shifting coalitions of five Justices, with Chief Justice Roberts providing the deciding vote on both issues. The four "more conservative" Justices joined the Chief Justice's opinion on the initial determination that the Secretary's action was not arbitrary and capricious because it was "supported by the evidence before him."⁴⁸² On a second inquiry into the adequacy of the Secretary's explanation for his decision, however, the four "more liberal" Justices joined the Chief Justice in holding that the Secretary acted arbitrarily and capriciously because his stated rationale was "pretextual."⁴⁸³ The Court

⁴⁷⁷ *Id.* at 538.

⁴⁷⁸ *Id.*

⁴⁷⁹ Ronald Levin asserts that the difference between the dissent and majority approaches is the dissent's requirement that the "agency" must "make a direct comparison between" the old and new policies. Ronald M. Levin, *Hard Look Review, Policy Change, and Fox Television*, 65 U. MIAMI L. REV. 555, 568 (2011). The difference seems to turn on the degree of comparison required: all of the Justices in *State Farm* agreed that NHTSA was required to consider old policies requiring airbags alongside its new policy of no passive restraints, and Justice Scalia's opinion in *Fox* requires the agency to establish that it "believes" the new policy to be better (even if a reviewing court does not agree with the agency's reasons for this belief).

⁴⁸⁰ *Fox*, 556 U.S. at 518–19.

⁴⁸¹ The Court's 2016 decision on agency change, *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117 (2016), turns on a changed legal interpretation and provides little guidance as to how the Court would address policy change in a regulatory context involving technical or scientific agency expertise.

⁴⁸² U.S. Dep't of Commerce v. New York, 139 S. Ct. 2551, 2569 (2019).

⁴⁸³ *Id.* at 2573.

affirmed the district court's remand to the Agency based on its finding of pretext.⁴⁸⁴

Chief Justice Roberts's initial assessment of evidentiary support for the Secretary's decision implicitly favored Justice Rehnquist's more deferential approach in *State Farm*. Although the Chief Justice did not mention Justice Rehnquist's partial dissent, he evaluated the decision of a *political appointee* with the same deference due to a predictive scientific determination: Secretary Ross's explanation needed only to lie "within the bounds of reasoned decisionmaking" under *Baltimore Gas*.⁴⁸⁵ Under this deferential version of arbitrary and capricious review, it was "reasonable" for the Secretary to conclude "that reinstating a citizenship question was worth the risk of a potentially lower response rate," particularly in light of the long history of the citizenship question being posed on earlier versions of the census.⁴⁸⁶ Chief Justice Roberts dismissed the dissent's more searching review as an intrusive decision that effectively subordinated "the Secretary's policymaking discretion to the Bureau's technocratic expertise."⁴⁸⁷ Instead, the majority held that the Secretary was entitled to discount the Bureau's expert predictions of lowered response rates as "inconclusive."⁴⁸⁸ Still, the majority failed to address the Secretary's refusal to supplement the Bureau's analysis and gather additional empirical evidence through routine testing. Nor did the majority on that issue address Justice Scalia's earlier suggestion, in *FCC v. Fox*, that "failure to adduce empirical data that can readily be obtained" might render a policy change arbitrary and capricious.⁴⁸⁹

The dissent's contrary view relied heavily on the majority opinion from *State Farm*. As Justice Breyer noted in an opinion joined by Justices Kagan, Ginsburg, and Sotomayor, *State Farm* set important limits on an agency's ability to "exercise its judgment in moving from the facts and probabilities on the record to a policy conclusion."⁴⁹⁰ An agency cannot "merely recite the terms 'substantial uncertainty' as a justification for its actions,"⁴⁹¹ and it typically must explain a decision to take action without "engaging in a search for further evidence."⁴⁹² The Secretary's explanation failed to satisfy these requirements. Not only did his decision contradict evidence showing

⁴⁸⁴ *Id.* at 2576.

⁴⁸⁵ *Id.* at 2569. For an argument that the Court's recent decisions have effectively adopted more deferential review under *Baltimore Gas*, see Jacob Gersen & Adrian Vermeule, *Thin Rationality Review*, 114 MICH. L. REV. 1355, 1361 (2016).

⁴⁸⁶ *U.S. Dep't of Commerce*, 139 S. Ct. at 2571.

⁴⁸⁷ *Id.*

⁴⁸⁸ *Id.*

⁴⁸⁹ *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 519 (2009).

⁴⁹⁰ *U.S. Dep't of Commerce*, 139 S. Ct. at 2590 (Breyer, J., concurring in part and dissenting in part) (citing *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983)).

⁴⁹¹ *Id.*

⁴⁹² *Id.*

that the citizenship question would likely reduce the accuracy of citizenship data,⁴⁹³ but it avoided routine tests designed to gather and provide additional evidence on the question's likely effect. Reliance on the citizenship question's historical pedigree failed to address more recent evidence based on the use of a citizenship question in a survey provided to a small sample of the population. This evidence revealed disparate "no answer" rates for certain segments of the population and suggested that a universal citizenship question was "likely [to] cause a disproportionate number of noncitizens and Hispanics to go uncounted."⁴⁹⁴ The majority's deferential approach glossed over these omissions.

If the Court had resolved the case on this first issue alone, the decision might have signaled a shift toward greater accommodation of political discretion in agency decisions. However, procedural irregularities provided a rare occasion for the Court to consider the Secretary's subjective motivations. The five-to-four split on this second issue muddled the waters regarding the proper role of political motivation. Chief Justice Roberts's majority opinion focused on the "significant mismatch between the decision the Secretary made and the rationale he provided."⁴⁹⁵ The Chief Justice emphasized that this case turned on "unusual circumstances,"⁴⁹⁶ and noted that a "court may not set aside an agency's policymaking decision solely because it might have been . . . prompted by an Administration's priorities."⁴⁹⁷ Based on that fact, the dissent expressed the hope that Chief Justice Roberts's decision would prove "a ticket good for this day and this train only,"⁴⁹⁸ but the dissent also argued that the majority's approach would encourage future litigants to challenge administrative decisions that reflected political pressure from the White House.⁴⁹⁹ Thus, the Court's five-to-four ruling on pretext fails to clarify the appropriate role of political influence.

In a case limited to a traditional administrative record, the Justices' deferential approach to arbitrary and capricious review under *Baltimore Gas* would likely govern. None of the opinions expressly mentioned the late-breaking evidence documenting Dr. Hofeller's clandestine role in orchestrating a racially-motivated citizenship question. This new evidence not only involved unlawful discrimination,⁵⁰⁰ but also raised significant questions about the deference owed to Secretary Ross's evaluation of record evidence. In particular, Dr. Hofeller's 2015 study suggests that the Secretary may have already credited secret evidence that a citizenship question would

⁴⁹³ *Id.* at 2592.

⁴⁹⁴ *Id.* at 2584.

⁴⁹⁵ *Id.* at 2575 (majority opinion).

⁴⁹⁶ *Id.* at 2576.

⁴⁹⁷ *Id.* at 2753.

⁴⁹⁸ *Id.* at 2584 (Thomas, J., concurring in part and dissenting in part).

⁴⁹⁹ *Id.* at 2583.

⁵⁰⁰ The issue of unlawful discrimination was not before the Supreme Court. *Id.* at 2583 n.4.

depress responses by Hispanics. The majority's finding of pretext implicitly addressed this concern in the immediate case, and happenstance is unlikely to again expose similar influences operating behind the scenes of agency decisions.

Still, the Court missed a legitimate and important opportunity to limit agency use of undisclosed evidence in future cases. By applying a deferential standard under *Baltimore Gas*, the majority glossed over the fact that the Secretary *chose* to base his decision on limited empirical evidence, and resulting uncertainty, when he bypassed the testing routinely employed for new census questions. Hofeller's study suggests a sinister explanation for the Secretary's choice. That is, it is possible that Hofeller's study had already convinced the Secretary of the desirability of the citizenship question based on its predicted effects on "Non-Hispanic Whites"⁵⁰¹ and that the Secretary evaded routine testing to suppress additional public evidence on this point. While it is not realistic to expect administrators to confess their true motives for regulatory action, especially the kind of motives that seem to be involved here, a decision to exclude readily obtainable evidence from an administrative record should be highly suspect. Here, a decision that the Secretary acted arbitrarily and capriciously by evading standard testing procedures would eliminate the need to consider subjective motivation. At the same time, it would prevent an administrator from basing his decision on secret evidence when relevant public evidence could readily be had. Justice Breyer's call for greater scrutiny under the majority approach in *State Farm* would promote policy decisions based on public consideration of reasonably available evidence and check private agendas supported by hidden studies.

V. EXPERT ANALYSIS ADVANCES THE GOALS OF TRANSPARENT, DYNAMIC, AND EVIDENCE-BASED DECISION MAKING

While the Justices have expressed divergent views on the proper role of agency expertise, the academic community has also failed to develop a modern framework that acknowledges the value of agencies' expert analysis in the face of policy change.⁵⁰² Three leading approaches to agency change focus on political control, deliberative democracy, and the rule of law. The political control approach reflects a recently dominant general theory of administrative law, favors Justice Rehnquist's dissent in *State Farm*, and would allow agencies greater latitude to substitute political concerns for expert analysis. The deliberative democracy and rule of law approaches

⁵⁰¹ In the study, Hofeller analyzed data from surveys of a small portion of the population and concluded that addition of a citizenship question would be "advantageous to Republicans and Non-Hispanic Whites in redistricting." See Letter to Clerk of the Court, *supra* note 132, at 4.

⁵⁰² Shapiro, *supra* note 16, at 1097, 1099 (noting the "impoverished understanding of expertise" in rulemaking and describing "craft expertise" which operates alongside traditional scientific or economic analysis).

favor the majority holding in *State Farm* and retain more demanding requirements of expert analysis. As explained below, expert analysis affords more transparency than the political control approach and also supports and enhances the deliberative democracy and rule of law approaches.

A. *The Political Control Model Undermines Transparent and Evidence-Based Decision Making Informed by Expertise*

In *Presidential Administration*, Elena Kagan argued that Presidents should have increased authority to influence the policies of administrative agencies.⁵⁰³ To that end, Kagan rejected the doctrine's "ideal vision of the administrative sphere as driven by experts" and called for relaxation of the *State Farm* doctrine.⁵⁰⁴ Kagan does not reject expertise entirely, but she would place the ultimate responsibility for expert decision making in the President,⁵⁰⁵ while relying on the President's sense of self-restraint as the principal means for avoiding unwise intrusions in highly technical areas such as environmental protection.⁵⁰⁶ In place of a system based on technical expertise, Kagan urges a "revised doctrine" that would apply arbitrary and capricious review in a way that "center[s] on the political leadership and accountability provided by the President."⁵⁰⁷ Kagan's position aligns most closely with Justice Rehnquist's partial dissent in *State Farm*, that is, she agrees that a "rescission emanat[ing] from regulatory views held by the President" need not be "justif[ied] . . . in neutral, expertise-laden terms to the fullest extent possible."⁵⁰⁸

Kathryn Watts has echoed Kagan's approach in an article that advocates greater deference to political considerations in arbitrary and capricious review.⁵⁰⁹ According to Watts, *State Farm*'s hard look review "currently hinges on an outmoded model of 'expert' decisionmaking."⁵¹⁰ She notes that a change "enabling courts to credit openly political judgments would help to bring hard look review . . . into harmony with other major administrative law doctrines that embrace the more current 'political control' model."⁵¹¹ But neither Watts nor Kagan concurs fully in Justice Rehnquist's partial dissent in *State Farm*. Instead, both argue that the Reagan Administration did not

⁵⁰³ Kagan, *supra* note 6, at 2380.

⁵⁰⁴ *Id.*

⁵⁰⁵ For a critique arguing that the President cannot "displace the agency head's discretion to make decisions vested in that officer by law," see Thomas O. Sargentich, *The Emphasis on the Presidency in U.S. Public Law: An Essay Critiquing Presidential Administration*, 59 ADMIN. L. REV. 1, 7 (2007).

⁵⁰⁶ Kagan, *supra* note 6, at 2354–56.

⁵⁰⁷ *Id.*

⁵⁰⁸ *Id.* at 2381.

⁵⁰⁹ See Watts, *supra* note 9, at 2 ("[T]his Article argues for expanding current conceptions of arbitrary and capricious review. . . .").

⁵¹⁰ *Id.* at 33.

⁵¹¹ *Id.*

sufficiently explain the political reasons for rescinding automatic detachable seatbelt requirements. According to Kagan, NHTSA's decision lacked "candid and public acknowledgement of the presidential role in shaping an administrative decision."⁵¹² Watts likewise faults NHTSA for failing to openly discuss political factors such as "its reliance on the Administration's overall priorities."⁵¹³ Had NHTSA emphasized these political concerns, Watts continues, its "explanation should have been enough (combined with its focus on facts and logic) to constitute a reasonable and adequate explanation for the rescission" of the previous administration's requirements.⁵¹⁴

The problem with this approach, however, is that political actors often prefer opaque explanations, or, in the words of Alexander Hamilton, "secrecy."⁵¹⁵ Nina Mendelson has addressed the transparency problems created by "silence" about the "content of White House influence" on agency rules,⁵¹⁶ explaining that "Presidents (and OIRA) have often chosen to lie low with respect to particular agency decisions."⁵¹⁷ For that reason, Mendelson has argued, arbitrary and capricious review cannot bring about adequate disclosures, and congressionally mandated disclosure rules are therefore necessary to prompt transparency.⁵¹⁸

Likewise, OIRA review of proposed rules tends to be opaque, creating "unrestricted and nontransparent opportunities for political oversight and editing of agency technical analyses."⁵¹⁹ Even when political actors give reasons for their actions, they may not be candid, and an administration that wishes to conceal the influence of a special interest group, for example, would likely "couch its decision as being based on opposition to intrusive and needless government regulation."⁵²⁰ The fortuitous discovery of clandestine political motives in the census case further illustrates the inherent problems with a framework that expects agencies to divulge political reasons for their decisions.⁵²¹ This tendency to conceal political

⁵¹² Kagan, *supra* note 6, at 2382.

⁵¹³ Watts, *supra* note 9, at 72.

⁵¹⁴ *Id.*

⁵¹⁵ THE FEDERALIST NO. 70, *supra* note 249, at 402–03 (describing secrecy as an attribute of the energetic executive).

⁵¹⁶ Nina A. Mendelson, *Disclosing "Political" Oversight of Agency Decision Making*, 108 MICH. L. REV. 1127, 1130 (2010). *See also id.* at 1159 (noting that "agencies usually submerge executive influence or control" when explaining policy decisions).

⁵¹⁷ *Id.* at 1166.

⁵¹⁸ *See id.* (stating that an "approach that is more receptive to political reasons likely would be insufficient to prompt" more disclosure).

⁵¹⁹ Wagner (2015), *supra* note 16, at 2046.

⁵²⁰ Seidenfeld, *supra* note 10, at 178. The Trump Administration, however, has openly referred to the industry interests protected by its policies. *See also* Heinzerling, *supra* note 63, at 36 ("Agencies have also cited the interests of regulated industry in justifying their failure to conduct notice and comment . . .").

⁵²¹ *See supra* discussion surrounding notes 499–500.

motives prevents voters from holding the President accountable for agency policy choices, even though accountability is a fundamental justification that scholars like Elena Kagan advance for favoring presidential control to begin with.

Expert analysis has far more potential to enhance transparency within a politically motivated framework. Transparent analyses of scientific, technological, or economic evidence can legitimize agency decisions by demonstrating consistency with both congressional mandates and generally accepted scientific norms.⁵²² Such analyses serve to show whether an agency has complied with its statutory mandate or succumbed to political pressure to ignore relevant facts or disregard the public interest.⁵²³ Moreover, as Sidney Shapiro, Elizabeth Fisher, and Wendy Wagner have recently explained, independent expert analysis can “speak[] truth to power” by pointing out how political goals may be “inconsistent with scientific and policy evidence.”⁵²⁴ Even when expert agency conclusions ultimately yield to political concerns (such as the potential cost of regulation), expert analysis will add transparency to the process and illuminate the political tradeoffs that are being made.⁵²⁵ In some cases, expert analysis may also constrain agency discretion and limit politically driven results at the agency level. William Buzbee notes that even under the Trump Administration, for example, the Federal Energy Regulatory Commission “unanimously declined a request by the Department of Energy to change policies to support the coal industry, finding it legally and factually without merit.”⁵²⁶ Expert analysis of relevant evidence may also support a middle ground between the polarized positions staked out by pro- and anti-regulatory zealots.⁵²⁷ Finally, expert analysis can facilitate judicial review to check overly politicized agency decisions that fail to supply adequate expert analysis. As previously noted, courts have repeatedly struck down regulatory rollbacks when Trump

⁵²² Wagner (2015), *supra* note 16, at 2028–29 (noting that expert regulation in the United States is marked by “[t]ransparency, peer and public scrutiny”).

⁵²³ Mendelson, *supra* note 516, at 1142–44 (stating that a President may “pressure[] an agency to disregard the facts” or disregard the public interest to the benefit of private persons such as the President’s “brother-in-law”).

⁵²⁴ Shapiro et al., *supra* note 16, at 490.

⁵²⁵ *Id.* at 500–01. Expert analysis may also serve a “discursive” role by giving greater voice to less powerful individuals or organizations. *Id.* at 490–91.

⁵²⁶ Buzbee, *supra* note 10, at 1423 (citing *Order Terminating Rulemaking Proceeding, Initiating New Proceeding, and Establishing Additional Procedures*, 162 FERC Par. 61,012 (Jan. 8, 2018)); Freeman & Vermeule, *supra* note 453, at 99–100 (noting that the EPA would be hard-pressed to cite significant uncertainties regarding the relationship between greenhouse gases and global warming).

⁵²⁷ Doremus, *supra* note 16, at 415 (The “precautionary principle” and “sound science” approaches, which offer “competing theories” for and against regulation, may be “driven more by ideology than by data or careful reflection”).

Administration officials had failed to discuss inconvenient facts or show that their conclusions were supported by expert analysis.⁵²⁸

Arbitrary and capricious review also has the potential to bolster both the transparency and the quality of expert agency analysis. Under the deliberative process privilege, for example, agencies may withhold internal scientific recommendations provided to political agency heads.⁵²⁹ If an agency fails to communicate its ultimate conclusions on these recommendations, however, it may flunk arbitrary and capricious review because it will have failed to consider an important aspect of the problem. Further, the arbitrary and capricious review provisions of APA section 706 may bolster notice-and-comment rulemaking procedures by requiring agencies to provide the courts with the “whole record” of scientific studies or other materials that were considered by the agency.⁵³⁰

A final problem is that agencies tend to disclose expert analysis to a fault: they are so much more comfortable disclosing expert analysis that they may sometimes generate such analyses to mask unseemly political influences.⁵³¹ Arbitrary and capricious review places some limits on an agency’s ability to manufacture a scientific charade, however, because an agency ultimately cannot offer “an explanation for its decision that runs counter to the evidence before” it.⁵³² All in all, a system premised on expert analysis promotes transparency and the consideration of scientific, technological, or economic evidence mandated by Congress far better than one premised on politics. And without sufficient transparency, it is doubtful that the political control model can achieve its ultimate goal of holding the President electorally accountable for an agency’s policy choices.⁵³³

⁵²⁸ See *supra* Part I.

⁵²⁹ Holly Doremus, *Using Science in a Political World*, in *RESCUING SCIENCE FROM POLITICS* 143, 163 (Wendy Wagner & Rena Steinzor eds., 2006) (noting this disclosure issue).

⁵³⁰ *Am. Radio League v. FCC*, 524 F.3d 227, 243 (D.C. Cir. 2008) (Tatel, J., concurring).

⁵³¹ Wagner (1995), *supra* note 25, at 1617 (describing circumstances in which agencies “camouflag[e] controversial policy decisions as science”).

⁵³² *Motor Vehicle Mfrs. Ass’n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). As Wendy Wagner argues, it may also be that the system needs further reforms in order to isolate scientific and policy judgments. Wagner (1995), *supra* note 25, at 1709, 1714, 1719. In addition, other reforms may be needed to reveal OIRA and the executive branch’s involvement in revisions of agency technical findings. Mendelson, *supra* note 516, at 1145. While these analyses show that expert analysis may not be perfect, on balance it remains superior to politically-oriented reforms that could eliminate expert analysis entirely. Seidenfeld, *supra* note 10, at 182–83 (eliminating expert analysis to avoid a science charade would be the same as eliminating real estate disclosures to avoid lies told by some sellers).

⁵³³ Of course, electoral accountability is itself imperfect. See Staszewski, *supra* note 10, at 868 (noting that election results will not influence all executive decisions or those made during a President’s second term).

B. *The Exercise of Expertise Furthers Transparent Deliberative Democracy and Can Add Legitimacy to the Decision Making Process in Circumstances When Agencies Must Act Without Public Deliberation*

An important response to the political control approach questions the legitimacy of agency decisions that are based primarily on the President's political goals. Glen Staszewski's 2012 article argues that the political control model is inferior to an approach based on deliberative democracy. Deliberative democracy "focuses on the obligation of public officials to engage in reasoned deliberation on which courses of action will promote the public good."⁵³⁴ It checks the "tyranny of the majority," encourages agencies to include minority interests in the weighing of competing viewpoints, and promotes the goal of "reach[ing] the best decisions on the merits in light of the available information."⁵³⁵ Only grounds that "could reasonably be accepted by free and equal citizens with fundamentally competing perspectives" will satisfy the "reasoned explanation" requirement.⁵³⁶

Basic tenets of deliberative democracy align with *State Farm*'s requirement of expert analysis. *State Farm* requires agencies to consider all "important aspect[s]" of a problem, explain decisions in a manner consistent with the "evidence before the agency," and reach a conclusion that can plausibly "be ascribed to a difference in view or the product of agency expertise."⁵³⁷ Notions of deliberative democracy also align with Justice Kennedy's concurrence in *Fox*, which called for agency decisions that are explained "in light of the data available," are "informed by the experience and expertise of the agency," and "can be justified by neutral principles and a reasoned explanation."⁵³⁸ The approach taken in Justice Rehnquist's partial dissent in *State Farm*, on the other hand, eviscerates these deliberative standards and gives expert analysis second seat to executive preferences.⁵³⁹

Mark Seidenfeld's related critique develops a helpful synthesis that captures the relationship between political influence and *State Farm*'s apolitical, reasoned decision making requirement. Seidenfeld distinguishes motivations from justifications and notes that judicial review focuses solely on the latter. As a result, "hard-look review does not second guess legitimate policy decisions by agencies that are motivated by raw politics."⁵⁴⁰ Instead, it simply "prohibit[s] decisions that cannot be justified by anything other

⁵³⁴ *Id.* at 857. See also Short, *supra* note 10, at 1816 (arguing that Watts's approach will undermine incentives to make reasoned decisions using expert staff).

⁵³⁵ Staszewski, *supra* note 10, at 858.

⁵³⁶ *Id.* at 857.

⁵³⁷ *State Farm*, 463 U.S. at 43; Staszewski, *supra* note 10, at 912 (concluding that deliberative democracy is best served by "retain[ing] the existing version of the arbitrary and capricious standard of judicial review").

⁵³⁸ *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 536–37 (2009) (Kennedy, J., concurring).

⁵³⁹ *State Farm*, 463 U.S. at 57–58 (Rehnquist, J., concurring in part and dissenting in part).

⁵⁴⁰ Seidenfeld, *supra* note 10, at 151.

than raw politics.”⁵⁴¹ This distinction and accommodation of political influence is crucial. It provides for reasoned decision making within a framework that addresses a central, political control critique of agency decision making, namely, that agencies lack the President’s political energy to bring about policy change.⁵⁴² Seidenfeld’s explanation accommodates change initiated at the President’s bidding, so long as the agency’s ultimate policy decision can be justified by more than raw politics and incorporates the kind of reasoned analysis of relevant evidence contemplated by *State Farm*.

Further, as Seidenfeld notes, attempts to legitimize the substitution of political motivations for reasoned justifications will undermine transparency and relieve “the agency of its obligation to reveal the full implications of its rulemaking.”⁵⁴³ Thus, in addition to checking raw political decisions that cannot be justified by record evidence, expert analysis promotes transparent decision making. This sort of transparency may enhance political accountability and better inform voters.⁵⁴⁴ In addition, disclosure of expert analysis may inform scientific or expert communities about important areas of regulatory inquiry and therefore facilitate advances in scientific or other fields of knowledge.

What deliberative democracy may not explain, however, are cases in which agencies appropriately engage in dynamic decision making outside of a more formal and public deliberative process. The Federal Reserve Open Market Committee’s “exceptionally rapid and proactive” expert policy response to the 2007–08 financial crisis⁵⁴⁵ is but one example of the many significant but informal actions that agencies can implement without notice-and-comment rulemaking or more formal procedures.⁵⁴⁶ Indeed, the APA even specifies certain circumstances in which agencies may make *binding rules* without the deliberation required by notice-and-comment procedures. For example, under section 553(b),⁵⁴⁷ an agency may publish a binding policy decision without notice-and-comment procedures if it has and cites record evidence of “good cause” for immediate action. This exception calls

⁵⁴¹ *Id.*

⁵⁴² Kagan, *supra* note 6, at 2252 (recognizing “the increased ossification of federal bureaucracies,” and a “new presidentialization of administration [that] renders the bureaucratic sphere more transparent and responsive to the public”).

⁵⁴³ Seidenfeld, *supra* note 10, at 197.

⁵⁴⁴ Bressman, *supra* note 26, at 503–04 (noting transparency’s traditional role as the “handmaiden of majoritarianism”).

⁵⁴⁵ Benjamin S. Bernanke, Chairman, Fed. Reserve, Stamp Lecture at the London School of Economics: The Crisis and the Policy Response (Jan. 13, 2009), <https://www.federalreserve.gov/newsevents/speech/bernanke20090113a.htm>.

⁵⁴⁶ See discussion *supra* notes 346–48.

⁵⁴⁷ See 5 U.S.C. § 553(b)(3)(B) (noting that an agency may bypass notice and comment if it “for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest”).

for streamlined expert judgments—consideration of record facts and a rough cost-benefit analysis of whether immediate public safety or other emergency circumstances outweigh the need for more thorough deliberation.⁵⁴⁸

The good cause exception allows agencies to impose rules summarily, but it cannot be used to circumvent expert analysis in favor of raw politics. The Trump Administration’s attempts to stretch the good cause exception to accommodate immediate political change and “regulated industry” interests have been rejected as “inconsistent with legal precedent on the nature of ‘good cause.’”⁵⁴⁹ Even though exigent circumstances preclude more lengthy deliberation, expert decision making and the consideration of record evidence are still needed to provide a check on arbitrary regulatory change. Expertise adds legitimacy to decisions made without lengthy deliberation, and it aligns with deliberative democracy by providing a reasonable ground for decision that could be acceptable to citizens with competing perspectives.

C. *Expert Analysis Advances the Rule of Law by Stabilizing Policy and Curtailing Administrative Policy Change Based on Whim*

Some of the most recent criticisms of administrative agencies, such as those voiced by Justice Gorsuch, have called for greater limits on the ability of agencies to change policies based on “bureaucratic whim.”⁵⁵⁰ This critique reflects rule of law concerns, especially when agencies invoke *Chevron* deference to justify changed interpretations of regulatory statutes. Randy Kozel and Jeff Pojanowski’s analysis anticipates such objections. They offer a rule of law approach that would limit agency change and give courts greater ability to impose static interpretations of congressional intent.⁵⁵¹ But their analysis does not impose similar rule of law constraints

⁵⁴⁸ See Heinzerling, *supra* note 63, at 34 (noting that courts often limit the good cause exception to “emergency situations”). This discussion also assumes that the deliberative democracy model allows rational limitations on analyses when the benefit of a present decision outweighs the costs of further deliberation. See also Gersen & Vermeule, *supra* note 485, at 1361 (“[T]here is nothing in *State Farm* itself that is incompatible with our approach.”). Cases such as *Business Roundtable v. SEC*, 647 F.3d 1144 (D.C. Cir. 2011), in which the D.C. Circuit arguably expanded agencies’ reasoned decision making obligation, are beyond the scope of this Article.

⁵⁴⁹ See *Nat. Res. Def. Council v. Nat’l Highway Traffic Safety Admin.*, 894 F.3d 95, 115 (2d Cir. 2018) (rejecting argument that NHTSA had “good cause” to circumvent notice and comment procedure when it indefinitely delayed increase in civil penalties). See also *id.* (“That a regulated entity might prefer” regulations that are “less costly to comply with does not justify dispensing with notice and comment.” (internal citation omitted)); Heinzerling, *supra* note 63, at 34–42 (discussing Trump Administration’s meritless attempts to invoke the good cause exception based on “nonsensical” arguments).

⁵⁵⁰ See Buzbee *supra* note 10, at 1368–69 (discussing Gorsuch’s “regulatory whim” theory).

⁵⁵¹ See Kozel & Pojanowski, *supra* note 9, at 163 (“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.”).

on policy decisions that are left open by statute and involve “prescriptive” reasoning based on economic or other expert analysis.⁵⁵²

As William Buzbee recently pointed out, however, it is “exceedingly rare” that statutory “language requires one particular policy action.”⁵⁵³ Buzbee argues that judicial consistency doctrines have also checked bureaucratic whim in policy decisions that Congress has delegated to agencies. He describes *State Farm*’s majority opinion as the “foundational modern case” that establishes a “consistency doctrine.”⁵⁵⁴ Proposals to move away from the *State Farm* majority and facilitate impulsive political change do not adequately account for “the Supreme Court’s persistent doctrinal emphasis” on the need for agency analysis of “underlying facts, science, circumstances, the record, and the agency’s past reasoning” before changing policies.⁵⁵⁵ The Court’s reasoned decision making requirements have a stabilizing effect on policy and provide “a brake on erratic or unexplained sudden change.”⁵⁵⁶

Expert analysis of relevant evidence supports these rule of law values. Although underlying technical or scientific evidence will change, the time it takes to engage in expert analysis tends to promote reasoned analysis, stabilize policy, and limit sudden or adventitious change.⁵⁵⁷ Critically, this consistency doctrine does not operate like *stare decisis*, impose a substantive preference in favor of earlier policy decisions, or restrict agencies to traditional judicial methods of decision making. Buzbee notes, for example, that the Trump Administration “probably” has the power to “substantially revise the many rules” it began to reconsider in 2017–18.⁵⁵⁸ The primary impediments to change are analytical steps that foreclose impulsive policy swings: Presidents cannot direct agencies to “short-circuit the regulatory process” and shirk reasoned decision making “that frankly addresses both supportive and contrary evidence.”⁵⁵⁹

These analytical requirements may create obstacles for the Trump Administration. The EPA’s initial efforts to undo the Waters of the United States Rule and the Clean Power Plan, for example, did not call for more

⁵⁵² *Id.* at 160 (siding with Rehnquist’s partial dissent in *State Farm* and noting that “the agency was within its rights to reverse itself” on detachable seatbelts).

⁵⁵³ Buzbee, *supra* note 10, at 1363.

⁵⁵⁴ *Id.* at 1396.

⁵⁵⁵ *Id.* at 1401.

⁵⁵⁶ *Id.* at 1403. *See also id.* at 1407 (noting that agencies have strong incentives to comply with these requirements initially so that they are not later reversed on appeal).

⁵⁵⁷ The OMB’s emphasis on peer review also supports these rule of law values. *See* Memorandum from John B. Bolton, Dir., Office of the President, to Heads of Dep’ts & Agencies (Dec. 16, 2004), available at https://www.cio.noaa.gov/services_programs/pdfs/OMB_Peer_Review_Bulletin_m05-03.pdf (issuing government-wide guidance aimed at enhancing the practice of peer review of government science documents).

⁵⁵⁸ Buzbee, *supra* note 10, at 1425.

⁵⁵⁹ *Id.* at 1426.

thorough analysis of these major policy changes.⁵⁶⁰ The EPA expanded its analysis only after courts rejected many of the Administration's early attempts to impose immediate change by fiat.⁵⁶¹ As a result, the EPA did not begin more earnest analytical efforts until over a year into Trump's first term and amidst churning leadership at both the Agency and the Executive Office of the President. If the Trump Administration ultimately fails to support its rollbacks with expert analysis of relevant evidence, its policies are unlikely to survive judicial review. And even if inadequately supported policies somehow survived judicial review, they would be especially vulnerable to revision by future administrations. Future administrations would generally be required to analyze contrary evidence supporting decisions made by past administrations, but that would present no obstacle here, as no such evidence would exist.⁵⁶²

CONCLUSION

The Trump Administration has failed to recognize the importance of expert analysis in politically directed policy change. Its position aligns with Justice Rehnquist's partial dissent in *State Farm*,⁵⁶³ as well as with two recently popular views in administrative law scholarship: the desirability of presidential control of administration and the tendency to view expertise as an anachronistic relic of the New Deal. The latter view has posed an especially formidable obstacle to recognizing the continued importance of expertise in government regulation. Even scholars who have opposed strong claims for executive power, and have supported the need for reasoned decision making, have nevertheless under-theorized the role of expert analysis within a regulatory framework that acknowledges the need for political input.

To address that shortcoming, this Article identifies a critical role for expert analysis within a dynamic and politically guided framework. Change is not the exclusive province of the executive; it is also a central aspect of much of the expert decision making that Congress has delegated to agencies. Within our system, agencies possess unique advantages in accommodating changing bodies of scientific, technological, and economic data in the formulation of regulatory policy.

⁵⁶⁰ *Id.* at 1388 (noting that an "initial wave of actions engaged minimally with previous agency reasoning" and did not provide "greater justifications" until summer of 2018 and leadership of a new administrator).

⁵⁶¹ *See id.* ("The Clean Water Rule, the CPP rollback, the replacement proposals, and the final water 'applicability date' rule as described here are only the beginning of lengthy legal battles. Nonetheless, they reveal broad change power claims.").

⁵⁶² *Id.* at 1419 (noting that agencies seeking to change policies generally have a greater burden because they must "address the old justifications" in addition to any new evidence supporting the changed policy).

⁵⁶³ *See supra* note 82 (discussing proposed rules that cite Rehnquist's dissent in *State Farm*).

State Farm's requirement of reasoned, expert analysis also has a distinct capacity for promoting transparent decision making. Transparency in the regulatory context benefits the public and the academic and scientific communities as well as those directly affected by regulation. Further, if agencies must justify policies through reasoned, expert analysis of relevant scientific, technological, or economic evidence, they may also have an incentive to adopt policies that make sense to groups beyond the President's base of support, thereby strengthening public confidence in government. Decisions based on reasoned, public analysis of relevant evidence may afford greater legitimacy than policies that are adopted without explanation and seem to reflect nothing more than the current preferences of an administration's political appointees. Expert analysis may also add legitimacy to expedited agency decisions that are appropriately conducted outside of a public notice-and-comment rulemaking process.⁵⁶⁴

Lower courts have unquestioningly applied *State Farm*'s reasoned decision making test to check the Trump Administration's impulsive and insufficiently reasoned policy changes.⁵⁶⁵ Indeed, in some cases, early losses in court have appeared to motivate the current administration to supplement proposed rulemaking dockets with expert analysis that it originally refused to provide.⁵⁶⁶ These initial judicial decisions also reinforce the value of reasoned, expert analysis on fundamental questions of national policy made within a politically directed framework. Presidential administrations may come and go, but their regulatory legacies will ultimately depend on their ability to support administrative change with reasoned analysis of relevant scientific, technological, or economic evidence.

It is too early, at the time of this writing, to say whether the Supreme Court will be able to resolve its own internal conflicts concerning the proper role of expertise in policy change. But the Court may have become less inclined to defer to executive discretion and control (as shown in the mounting criticism of *Chevron*) and more concerned with the need to check administrative decisions that appear to be based on personal "whim"⁵⁶⁷ or hidden animus. Even early proponents of presidential control, such as now-Justice Kagan, may not have envisioned what may ensue when a President lacks respect for the legal and expert limits within which agencies have been thought to operate.⁵⁶⁸ The Court's limited and divided rulings in

⁵⁶⁴ See *supra* notes 540–43 and accompanying text.

⁵⁶⁵ See *supra* Part I.

⁵⁶⁶ Buzbee, *supra* note 10, at 1385, 1422.

⁵⁶⁷ Concern over "whimsical" decision making has been expressed by Justices Breyer and Gorsuch alike. See *supra* notes 465 and 545.

⁵⁶⁸ President Trump has recently complained that certain of his immigration policies have been blocked by "Obama" judges rather than proper members of an independent judiciary. Katie Reilly, *President Trump Escalates Attacks on 'Obama Judges' After Rare Rebuke from Chief Justice*, TIME (Nov. 21, 2018, 6:32 PM), <https://time.com/5461827/donald-trump-judiciary-chief-justice-john-roberts/>.

Department of Commerce v. New York fail to provide a workable framework with which to address these concerns in future cases. Justices concerned with executive self-indulgence and duplicity may ultimately find comfort by returning to the reasoned decision making requirements of Justice White's majority opinion in *State Farm*.

See also Tony Mauro, *Trump Portrays Supreme Court as Key Player in DACA, Border Wall Fights*, NAT'L L.J. (Jan. 3, 2019, 6:23 PM), <https://www.law.com/nationallawjournal/2019/01/03/trump-portrays-supreme-court-as-key-player-in-daca-border-wall-fights/?slreturn=20190112120134> (stating that the President's predictions that the Supreme Court will condone his DACA policy have been described as displaying "a disgraceful degree of disrespect for the Supreme Court and the role of an independent federal judiciary").