The Science of Administrative Change

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I. 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 pace of global warming[1] to eliminating water pollution[2] 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 are, 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 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

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[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"); Rule on Emission Guidelines for Greenhouse Gas Emissions, 83 Fed. Reg. 44,726, 44,748 (proposed Aug. 31, 2018) (offering the "Affordable Clean Energy . . . rule as a replacement" for the Clean Power Plan).

[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 73-77 and 83-98 and accompanying text.

[3] Restoring Internet Freedom, Declaratory Ruling, Rep. and Order, 33 FCC Rcd. 311, ¶ 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); Adrian Vermeule & Cass R. Sunstein, *The Morality of Administrative Law*, 131 HARV. L. REV. 19, 24 (2018).

[5] *President Trump's War on Science*, N.Y. TIMES, Sept. 9, 2017 at SR10.

[6] Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2381 (2001) (describing President Clinton's efforts to shape regulatory policy).

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, Kagan praised the degree of control 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 for[9] and against[10] enhanced presidential control over administrative decisions, proponents of both sides have dismissed expert analysis as an anachronistic relic of the New Deal.[11] In addition, the Supreme Court has not formed a stable majority on the essential question whether political will or expert analysis should take precedence, or 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 an "impoverished understanding of expertise"[16] and a failure to articulate an important role for expertise in the face of administrative change.

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[7] Kagan, *supra* note 6, at 2381. Justice Kagan has not spoken about this subject in extra curial remarks. Christopher Edley was another early proponent of this view. *See* CHRISTOPHER F. EDLEY, JR., ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREAUCRACY 183 (1990).

[8] Kagan, *supra* note 6, at 2381.

[9] *See* Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2 (2009); EDLEY, *supra* note 7; Daniel A. Farber, *Presidential Administration Under Trump*, U.C. BERKLEY PUB. L. RES. PAPER (2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3015591; *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).

[10] In response to Kathryn Watts' 2009 article, several commentators advocate a continued role for reasoned decision making as a check on political decisions. *See* Glen Staszewski, *Political Reasons, Deliberative Democracy, and Administrative Law*, 97 IOWA L. REV. 849, 852 (2012) (advancing a "deliberative theory of administrative legitimacy"); Mark Seidenfeld, *The Irrelevance of Politics to Arbitrary and Capricious Review*, 90 WASH. U. L. REV. 141, 197 (2012) ("[r]eview for reasoned decision-making . . . is best explained by the interest group model of the administrative state"); *and* 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"). 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 (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 31 (critiquing reasoned decision-making review as resting on "an outmoded model of 'expert' decision-making.").

[12] *Compare* Motor Vehicle Manufacturers Association v. State Farm, 463 U.S. 29, 54 (1983) (NHTSA "failed to bring its expertise to bear" 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." 463 U.S. at 48 (1983) (internal quotation omitted). Likewise, Justice Kennedy's concurrence in *Federal Communications Commission v. Fox Television Stations* 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 (2008).

[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").

[16] Sidney A. Shapiro, *The Failure to Understand Expertise in Administrative Law: The Problem and the*

This paper 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 evolving state of 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, for example, laws 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 decision makers, 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.

The "reasoned analysis" that agencies must provide in support of changes in policy[21] provides the public with an otherwise unavailable window into the actual basis for regulatory decisions and the tradeoffs that government makes.[22] This type of reasoned, expert analysis stands apart from the exercise of raw political will, which may be purely arbitrary and lack transparency.[23] To be sure, political direction remains important[24] and may sometimes be necessary for

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Consequences, 50 WAKE FOREST L. REV. 1097, 1097, 1099 (2015). Other contemporary works which support agency expertise focus on the importance of transparency or challenges of regulating in the face of scientific uncertainty. *See* Wendy E. Wagner, *A Place for Agency Expertise: Reconciling Agency Expertise with Presidential Power*, 115 COLUM. L. REV. 2019 (2015); Sidney Shapiro, Elizabeth Fisher, and Wendy Wagner, *The Enlightenment of Administrative Law: Looking Inside the Agency for Legitimacy*, 47 WAKE FOREST L. REV. 463 (2012); Holly Doremus, *The Purposes, Effects, and Future of the Endangered Species Act's Best Available Science Mandate*, 34 ENVTL. L. 397, 447 (2004); *and* RESCUING SCIENCE FROM POLITICS (Wendy Wagner & Rena Steinzor eds., 2006).

[17] Kagan, *supra* note 6, at 2341-43.

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

[19] The Clean Water Act, 33 U.S.C. § 1326(b). These 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 v. 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"). Still, agency decisions involving scientific, technological, and economic analysis remain a crucial part of the modern administrative state.

[20] For an explanation of why Congress, the President, and courts cannot perform the same functions as agencies, see *infra* Part III.

[21] *State Farm*, 463 U.S. at 42.

[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." *State Farm*, 463 U.S. 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).

overcoming the "slow pace" that has often plagued regulatory efforts.[25] In addition, ultimate solutions to 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, and a process that gives appropriate effect to both political and expert considerations cannot be equated with a purely political process, or one without the transparency needed to inform the public where science ends and politics begins. The Trump administration's aggressive deregulatory stance demonstrates 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 to consider the proper 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 Res. Def. Council, Inc.*[29] that agency interpretations of ambiguous statutes are "not carved in stone" and may be altered to reflect the priorities of a new administration.[30] On the other hand, in *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co*.,[31] the Court delineated important limitations on the power of the National Highway Traffic 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 critical to the arbitrary and capricious standard of review that the Court applied to the 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"

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[25] Wendy E. Wagner, *The Science Charade in Toxic Risk Regulation*, 95 COLUM. L. REV. 1613, 1677 (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 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.*, League of United Latin American Citizens v. Wheeler, 899 F.3d 814, 829 (9th Cir. 2018) (directing the EPA "to revoke all tolerances [for the pesticide] chlorpyrifos," after the EPA acted "against its own scientific findings"); Air Alliance Houston v. Envtl. Prot. Agency, 2018 WL 4000490 at *13 (D.C. Cir. Aug. 17, 2018) (rejecting delay of Chemical Disaster Rules based on cursory conclusions that harm caused by chemical explosions was "speculative"); South Carolina Coastal Conservation League v. Pruitt, No. 2-18-cv-330-DCN at 14 (D. S.C. Aug. 16, 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); New York v. U.S. Dep't of Commerce, __ F.Supp.3d ___, 2019 WL 190285, at *39 (S.D. N.Y. Jan. 5, 2019) (blocking Secretary of Commerce from adding citizenship question to the 2020 census over the unanimous objections "of experts in the field" of statistics).
[29] 467 U.S. 837 (1984).
[30] *Id.* at 863.
[31] 463 U.S. 29 (1983).
[32] *State Farm*, 463 U.S. at 48 (quoting Burlington Truck Lines v. United States, 371 U.S. 156, 167 (1962)); *Chevron*, 467 U.S. at 865 (listing fact that judges "are not experts in the field" as one reason for deferring to agencies).
[33] 5 U.S.C. § 706.

"arbitrary and capricious" agency actions.[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 the 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 now come to reject the safety benefits of airbags. [37]

The Court split in a 5-4 vote, however, on the 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 product of reasoned decision-making."[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, *Federal Communications Commission 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. Still, *Fox* did not involve the same type of "empirical evidence" as *State Farm*,[41] and Justice Scalia's opinion studiously avoided any reference to Justice Rehnquist's partial dissent in *State Farm*.[42] Moreover, Justice Kennedy provided the necessary fifth vote in *Fox*, but he specifically endorsed stronger analytical requirements for cases involving "discoveries in science."[43] In light of Justice Kennedy's recent retirement, it remains to be seen whether his successor will embrace the same rationale. As a theoretical matter, however, the broad rationale for expert agency decision-making, which once commanded widespread support, has rested on shaky grounds 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

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[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) (agreeing that the agency erred when it "gave no explanation at all" for "eliminating the airbags and continuous spool automatic seatbelt").
[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., dissenting in part).
[40] 556 U.S. 502 (2008).
[41] *Id.* at 519.
[42] The plurality portion of Scalia's opinion rejected "significant political pressure from Congress" as a justification heightened scrutiny of the FCC's decision. *Id.* at 523.
[43] *Fox*, 556 U.S. at 535 (Kennedy, J., concurring).

established ends.[44] 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.[45] 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 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.[46] 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 by a new president's political agenda.[47] 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 if 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 II recounts the extent to which raw politics have replaced expert analysis under the Trump administration. Part III outlines the historical rise and fall of expertise as a general theoretical justification for delegations of power to administrative agencies. Part IV 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 similarly qualified to formulate regulatory policy involving dynamic questions of science, technology, or economics. Part V describes the Justices' divergent views on the importance of expertise in administrative change. Part VI discusses the ongoing debate about the extent to which political will should 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. Part VII concludes 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 roll back or enhance

[44] *See infra* part II, *and* discussion surrounding notes 162-170.
[45] *Id.*
[46] *See* Kagan, *supra* note 6.
[47] *See supra* note 39.

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

II. The Trump Administration Has Substituted Political Will for Expert Analysis

In anticipation of the 2017 presidential transition, the Obama administration prepared extensive briefing materials on the workings of the federal government and later made its officials available to meet with the Trump transition team during the transition period. 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 agencies they were about to run.[48] Having campaigned against federal regulation, President Trump remained hostile to the agencies' basic missions during his transition into office.

On President Trump's first day as President, his Chief of Staff directed executive agency heads to freeze all pending, non-finalized regulations.[49] 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 those regulations.[50] Ten days later, President Trump issued an Executive Order directing agencies to eliminate two existing regulations for every new regulation they intended to promulgate, thus focusing regulatory efforts on the elimination of costs.[51] And only a few months into his term, President Trump ordered agencies to rescind or revise the "most important Obama era rules" on environmental protection,[52] including the carbon emissions limitations in the Clean Power Plan[53] and the regulation of water pollution in the so-called Waters of the United States Rule.[54] The President also worked with Congress to permanently rescind fourteen recently adopted, Obama-era regulations under the Congressional Review Act.[55]

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[48] Few Trump Transition officials appear to have made contact with outgoing officials. *See generally* MICHAEL LEWIS, THE FIFTH RISK 40 (2018) ("'We had tried desperately to prepare them,' said chief of staff for a $6 billion DOE science program. '. . . [B]ut they didn't [show up or] ask for even an introductory briefing.'").

[49] Reince Priebus, *Memorandum for the Heads of Executive Departments and Agencies* (Jan. 20, 2017).

[50] *Id.*

[51] Exec. Order No. 13,771, 82 Fed. Reg. 9,339 (Jan. 30, 2017).

[52] Daniel A. Farber, *Trump, EPA, and the Anti-Regulatory State*, THE REGULATORY REVIEW (Jan. 24, 2018), https://www.theregreview.org/2018/01/24/farber-trump-epa-anti-regulatory-state/.

[53] Exec. Order No. 13,783, 81 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)

[54] Exec. Order No. 13,778, 82 FR 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").

[55] Stephen Dinan, *GOP rolled back 14 of 15 Obama rules using Congressional Review Act*, THE WASHINGTON TIMES (May 15, 2017), http://www.washingtontimes.com/news/2017/may/15/gop-rolled-back-14-of-15-obama-rules-using-congres/.

President Trump appointed agency heads who embraced these policy directives. Many, such as former Environmental Protection Agency ("EPA") Administrator Scott Pruitt, came to office with a history of hostility to the very laws and regulations they would be charged with enforcing.[56] Other incoming Trump administration officials voiced hostility to the regulatory missions of the agencies they would be directing,[57] and the low value they placed on professional analysis seems to have contributed to an early "exodus" of expert staff.[58]

President Trump's agency heads made numerous decisions that prioritize executive goals over expert analysis of data. Lisa Heinzerling has described these initial regulatory rollbacks as a "display of autocracy, impulsivity, and jerry-rigged reasoning" that gave "little attention" to legal requirements of "process" or "reason giving."[59] In a number of early regulatory rollbacks, Trump administration officials essentially made up their minds in advance by announcing binding delays without the deliberation required by standard rulemaking procedures.[60] These procedures, known as notice and comment rulemaking, are a staple of introductory administrative law courses and are mandated under 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;[61] (2) "give interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments,"[62] and (3) thereafter provide a "general statement" of the rule's "basis and purpose" (responsive to relevant and vital comments)[63]—all before publishing a binding final rule in the Federal Register.[64]

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 or weigh in on their persuasiveness. The Second Circuit 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.[65] Those procedures, the court observed, "serve the public interest by providing a forum for the robust debate of competing and frequently

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[56] Valerie Volcovici & Timothy Gardner, *Trump Picks Foe of Obama Climate Agenda to Run EPA*, SCIENTIFIC AMERICAN https://www.scientificamerican.com/article/trump-picks-foe-of-obama-climate-agenda-to-run-epa/ (last visited Feb. 11, 2019) (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.").

[57] LEWIS, *supra* note 48, at 42 (noting that incoming Trump staff mocked regulatory work as "stupid").

[58] 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 which values expertise); LEWIS, *supra* note 48, at 50 (noting loss of expert staff).

[59] Lisa Heinzerling, *Unreasonable Delays: The Legal Problems (So Far) of Trump's Deregulatory Binge*, 12 HARV. L. & POL'Y REV. 13, 15-16 (2018).

[60] *Id.* at 37 (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).

[61] 5 U.S.C. § 553(b)(3). Courts have also required agencies to disclose outside scientific studies for comment in rulemaking. United States v. Nova Scotia Food Products Corp., 568 F.2d 240, 251 (2d Cir. 1977).

[62] 5 U.S.C. § 553(c).

[63] *Id.*; *Nova Scotia*, 568 F.2d at 253 (requiring agency to respond to comment questioning the viability of the canned whitefish industry under the proposed rule).

[64] 5 U.S.C § 553(d). The APA requires publication "not less than 30 days before [a rule's] effective date." *Id.*

[65] Nat. Res. Def. Council v. Nat'l Highway Traffic Safety Admin., 894 F.3d 95, 115 (2nd Cir. 2018).

complicated policy considerations having far reaching implications"[66] and "foster reasoned decision-making."[67]

Not surprisingly, the first round of Trump administration rollbacks has not fared well in the courts. In numerous cases, judges have struck down political rollbacks in which agencies have unlawfully bypassed notice and comment rulemaking;[68] "acted against [an agency's] own scientific findings" without explanation;[69] or acted pursuant to erroneous understandings of substantive legal requirements.[70] In at least one case, the administration has "tacitly conced[ed]" its error by initiating notice and comment procedures after its actions were challenged.[71] Still, the agencies' recent loss of scientists and other expert personnel may make it difficult for them to improve their analyses in the future.[72]

Many cases in which the Trump administration has begun to use notice and comment procedures to change existing rules are still pending in the agencies.[73] The administration's initial attempts to repeal two major environmental regulations – the Clean Power Plan and jurisdictional rules under the Clean Water Act – manifest 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.[74] These opening notices were only 11-15 pages long, focused exclusively on the immediate rescission of the existing rules, and expressly invoked the authority of Executive Orders calling for regulatory rollbacks.[75] The notices also emphasized the relevant agencies' discretion to alter policies based on a "change in

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[66] *Id.*

[67] *Id.*

[68] *See, e.g.,* 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"); *NRDC*, 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); California v. U.S Bureau of Land Management, 227 F.Supp.3d 1106, 1121 (N.D. Cal. 2017) (holding that "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).

[69] *See, e.g., LULAC*, 899 F.3d at 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").

[70] The Ninth Circuit invalidated the administration's rescission of DACA on these grounds. *See supra* note 19.

[71] *California v. U.S. Bureau*, 227 F.Supp. 3d at 1121.

[72] LEWIS, *supra* note 48 at 92 and 115 (noting that new agency staff lacked "credentials" and displayed a "seeming commitment to scientific ignorance").

[73] *See supra* notes 1-2.

[74] Definition of ''Waters of the United States''— Recodification of Pre-Existing Rules 82 Fed. Reg. 34,899, 34,901 (proposed July 27, 2017) (proposing to repeal Clean Water Act rule as "the first step in a two-step response to the Executive Order," which 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) (noting that the agency "does not solicit comment" on a replacement for the CPP); Buzbee, *supra* note 10, at 13 (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 . . . regulatory steps").

[75] Definition of "Waters of the United States,"82 Fed. Reg. at 34,901; Repeal of Carbon Pollution Emission Guidelines, 82 Fed. Reg. at 48,037.

administrations" under either *Chevron*[76] or a recent District of Columbia Circuit opinion relying on Justice Rehnquist's partial dissent in *State Farm*.[77] Final decisions on these proposed rollbacks remain pending before the agencies. As some early efforts to delay existing regulations face judicial review, however, it is clear that agencies employing notice and comment procedures have sometimes taken shortcuts, skipping over inconvenient scientific or economic data to achieve politically chosen ends.

In *California v. U.S. Bureau of Land Management*, for example, a United States Magistrate Judge vacated the Bureau's attempt to postpone compliance dates for a rule that addressed royalties and environmental harm stemming from natural gas production.[78] The Bureau initially bypassed notice and comment procedures and issued a proposed delay rule "only belatedly" and after plaintiffs had challenged its procedural shortcut.[79] In addition, the magistrate judge held that the Bureau's notice of postponement was "arbitrary and capricious" because the agency "entirely failed to consider the benefits" of the original rule.[80] The court rejected the Bureau's argument that the postponement was nevertheless justified by "changed circumstances," including the President's issuance of "an executive order directing the executive agencies to reevaluate regulations that affect the energy industry."[81] As the court explained, "[n]ew presidential administrations are entitled to change policy positions, but to meet the requirements of the APA they must give reasoned explanations" for doing so.[82]

Similar problems 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,"[83] 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.[84] The scope of the relevant federal agencies' authority to address water quality and pollution under the Clean Water Act has long been unclear, and in 2006 a divided Supreme Court failed to resolve the scope of jurisdiction over the pollution of tributaries and wetlands having some connection to "navigable waters."[85] Seeking to provide needed clarity, the 2015 Rule relied on relevant "legal precedent," "the best available peer-

[76] *Id*. at 48,039.
[77] Definition of the "Waters of the United States", 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)).
[78] 227 F.Supp. 3d 1106 (N.D. Cal. 2017).
[79] *Id.* at 1121.
[80] *Id.* at 1122.
[81] *Id.*
[82] *Id.*
[83] 33 U.S.C. §1251.
[84] 33 U.S.C. § 1314(a)(1).
[85] Rapanos v. United States, 547 U.S. 715 (2006) (Scalia, J, plurality, joined by Roberts, Thomas, and Alito); *id.* at 759 (Kennedy, J., concurring in the judgment).

reviewed science," and "the agencies' technical expertise and extensive experience in implementing the CWA over the past four decades."[86]

President Trump issued an Executive Order targeting the 2015 Rule shortly after taking office. The Order urged the EPA and 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.[87] 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."[88] As William Buzbee has noted, the Order "went further" than an attempt to "tilt the agencies" against regulation;[89] it tried 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*."[90]

The EPA and Army Corps of Engineers followed the president's direction and initiated rulemaking proceedings to reconsider the merits of the 2015 Rule.[91] 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."[92] 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.[93]

The agencies emphasized that their Delay Rule was "separate" from the rulemaking proceeding designed to "revise" the "definition of 'waters of the United States,'" and that its purpose was to maintain the "status quo."[94] 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*."[95] When implementing this suspension of the governing regulatory regime, the agencies made no attempt "to address the scientific record supporting the 2015 rule."[96] Instead, the analysis underlying the Delay Rule omits any analysis of this scientific and economic information, cites the Executive Order calling for

[86] Clean Water Rule: Definition of ''Waters of the United States", 80 Fed. Reg. 30,754, 30,755 (2015).
[87] Exec. Order No. 13,778, 82 Fed. Reg. 12,497, § 1 (Feb. 28, 2017)
[88] *Id.* at § 2.
[89] Buzbee, *supra* note 10, at 1383.
[90] *Id.* (quoting Exec. Order No. 13,778).
[91] *See* Supplemental Notice of Proposed Rulemaking, Definition of ''Waters of the United States''—Recodification of Preexisting Rule, 83 Fed. Reg. 32,227 (proposed July 12, 2018).
[92] Buzbee, *supra* note 10 at 1384-85.
[93] Final Rule, Definition of "Water of the United States"—Addition of an Applicability Date to 2015 Clean Water Rule, 83 Fed. Reg. 5200 (Jan. 31, 2018).
[94] 83 Fed. Reg. 5201-02.
[95] *Id.* at 5202 (emphasis added).
[96] *Id.* at 5204 (responding to comments pointing out the EPA's failure to address the scientific record).

agencies to "minimiz[e] regulatory uncertainty" in their review of the 2015 Rule,[97] and focuses on an immediate need for "clarity, certainty, and consistency" in the law.[98]

Environmental groups challenged the Delay Rule as arbitrary and capricious in *South Carolina Coastal Conservation League v. Pruitt*,[99] 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*.[100] 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 the rule making process itself involved "over four years of reviewing thousands of peer reviewed scientific studies."[101] The Delay Rule, on the other hand, "received over 680,000 public comments in the few weeks that public comment was open."[102] 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."[103] 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."[104]

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 in litigation and its suspension would reduce 'uncertainly and confusion' in the regulated community [arising] from that litigation."[105] 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.[106] The Trump administration's losses in court (perhaps coupled with new leadership at the EPA)[107] also seem to have prompted the agencies to supplement the scope of issues considered in the merits docket seeking to undo the 2015 Rule. 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.[108] The Administration has taken similar steps to supplement its analysis in the rulemaking designed to repeal the Clean Power Plan.[109]

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[97] *Id.* at 5201 (citing 2/28/2017 E.O).
[98] *Id.* at 5202.
[99] *S.C. Coastal Conservation League*, No. 2-18-cv-330-DCN.
[100] *Id.* at 14.
[101] *Id.* at 12.
[102] *Id.* at 13.
[103] *Id.*
[104] *Id.* at 13.
[105] *Id.* at 14.
[106] *Id.* at 14 (imposing a nationwide injunction against enforcement of the Delay Rule)
[107] 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).
[108] Buzbee, *supra* note 10, 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).
[109] Buzbee, *supra* note 10, at 1422.

In *Air Alliance Houston v. EPA*,[110] the District of Columbia Circuit found a similar flaw in the EPA's delay in enforcing the safety requirements established by the Chemical Disaster Rule.[111] Unlike the administration's total refusals to analyze the merits of a regulation in previous cases, here the agency touched on the merits of the Chemical Disaster Rule by rejecting its safety benefits as "speculative."[112] Still, according to the court, the EPA's cursory and illogical analysis of possible reasons for delaying the enforcement of otherwise binding legal requirements did not adequately address evidence relating to the rule's safety benefits. The Obama administration promulgated the Chemical Disaster Rule under the Clean Air Act Amendments, which direct the EPA to adopt measures that would prevent deaths and other injuries caused by chemical accidents.[113] After President Trump took office, however, the EPA decided to "delay the effective date of [its] Chemical Disaster Rule . . . for twenty months."[114]

The *Air Alliance Houston* court found the EPA's changed "position on appropriate effective" dates arbitrary and capricious for several reasons.[115] Most important for present purposes, the court found that the Delay Rule did not adequately address factual findings concerning the harm that the Rule would prevent. It was not enough for the EPA to note that it now viewed the harm associated with chemical accidents as "speculative,"[116] or that one of the events that the EPA relied on in promulgating the Rule (the West Texas chemical explosion) was caused by arson rather than accident.[117] As the court explained, the Texas explosion was not the only accident leading the EPA to promulgate the Rule. The EPA had also based its rule on chemical explosions in Hawaii, Colorado, Washington, California, and Louisiana.[118] In addition, the court noted that the Chemical Disaster Rule's emergency-response and information-sharing provisions might well have prevented fatalities to first responders in Texas, even if that particular explosion involved arson.[119]

Most recently, in *New York v. U.S. Dep't of Commerce*,[120] a district court found that Secretary of Commerce Wilbur Ross, to whom Congress has delegated significant authority over the decennial census, acted arbitrarily and capriciously by adding a citizenship question to the 2020 census questionnaire.[121] The Constitution requires that a decennial "enumeration" be made of the "whole number of persons in each State,"[122] and the Census Bureau conducts the census through written questionnaires delivered to every known housing unit.[123] When households do not

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[110] 2018 WL 4000490 (D.C. Cir. Aug. 17, 2018).
[111] *Id.* at *13 (citing 82 Fed. Reg. 27,139) (per curiam); id. at n* (the panel included then-Judge Kavanaugh, who "did not participate" in the decision).
[112] *Id.* at *13.
[113] *Id.* at *103-08.
[114] *Id.* at *1.
[115] *Id.* at *12. The panel also rejected the EPA's arguments that it needed to delay an effective date in order to reconsider existing rules and ignore earlier findings that established a compliance timeline. *Id.* at *12-13.
[116] *Id.* at *13 (citing 82 Fed. Reg. 27,139).
[117] *Id.* at *13.
[118] *Id.* at *13.
[119] *Id.* at *13.
[120] 2019 WL 190285 (S.D. N.Y. 2019).
[121] *Id.* at *103.
[122] U.S. CONST. art. I, § 2, cl. 3 & amend. XIV, § 2.
[123] *New York v. U.S. Dep't of Commerce*, 2019 WL 190285 at *6.

respond to the questionnaires, the Bureau must incur additional costs and resort to less accurate measures and extrapolated data.[124] Historically, census questionnaires have included questions about the people to be counted as well as their number.[125] Citizenship questions appeared on early questionnaires, but have not been universally distributed for over 50 years.[126]

Modern understandings of "statistics and survey design" have led "the Census Bureau to approach any changes to the questionnaire with great care."[127] When the Bureau considered adding a question on Social Security Numbers ("SSNs") to the 1990 census, for example, it tested the question first in a randomized trial "to assess the question's impact on self-response rates" for both general and discrete subsets of populations within the U.S. [128] This type of testing also considers the accuracy of responses provided and is standard protocol under the Bureau's Statistical Quality Standards.[129]

After Ross raised the possibility of adding a citizenship question to the census questionnaire, the Bureau prepared several comparative analyses of various ways in which citizenship data could be gathered.[130] Bureau staff eventually recommend against adding a citizenship question to the questionnaire, based on their prediction that the change would lower response rates, increase costs, and cause a high number of non-citizens to erroneously report themselves as citizens.[131] In particular, the Bureau estimated that it would be unable to verify 22.2 million positive citizenship responses and that 9.5 million respondents would submit citizenship reports that would be inconsistent with administrative records.[132] Members of the scientific community and six former Directors of the Bureau also objected to the change based on concerns with "integrity" and "data quality," and because a new question could not be adequately tested in the time available.[133]

Nevertheless, on March 26, 2018, Ross announced his decision to include a citizenship question, with a stated goal of "obtaining complete and accurate data."[134] Although Ross addressed each alternative data collection method the Bureau had provided, the district court found that his decision was arbitrary and capricious because his explanations "ran counter to the evidence" before the agency, "failed to consider several important aspects of the problem," and "failed to justify" departures from the Bureau's standard testing practices.[135] The court reached these conclusions

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[124] *Id.* (finding that Non-Response Follow Up Data "data is less accurate than self-response data").
[125] *Id* at *2.
[126] *Id.* at *8.
[127] *Id.* at *10.
[128] *Id.* at *10.
[129] *Id.* at * 110; *see also* Jeffrey Mervis, *How Commerce Secretary Ross Got the Science Behind the Census So Wrong – And Why It Matters*, SCIENCE (Jan.17, 2019), http://www.sciencemag.org/news/2019/01/how-commerce-secretary-ross-got-science-behind-census-so-wrong-and-why-it-matters.
[130] *New York v. U.S. Dep't of Commerce*, 2019 WL 190285 at *14-19.
[131] *Id.* at *18.
[132] *Id.* at *19.
[133] *Id.* at *21.
[134] *Id.* at *23.
[135] *Id.* at *103-08.

based on inadequacies in the administrative record, without deciding whether the decision was influenced by undisclosed political considerations.[136]

Two aspects of Ross's analysis could not be attributed to "the product of agency expertise" under *State Farm*. First, Ross rejected the Bureau's recommendation based on professed "uncertainty" over the decline in response rates that would be caused by inclusion of a citizenship question.[137] Response rates were critical to Ross's stated goal of obtaining "complete *and* accurate data," because data based on surveys in which households answer a more complete set of questions *will not be accurate* if select subsets of the population refuse to complete surveys. Ross's doubts about a decline in response rates contradicted the record evidence, which demonstrated that "addition of a citizenship question" would "materially reduce response rates among immigrant and Hispanic households."[138]

Second, Ross's "uncertainty" was not inevitable. Instead, Ross failed to consider an important aspect of the problem and bypassed routine testing protocols that would have predicted the effects of a citizenship question on response rates.[139] Ross's finding that the citizenship question was "well tested" based on historical use[140] did not justify his failure to consider "standard rigorous testing" based on recent advances in the fields of statistics and survey design.[141] Ross's refusal to consider testing ignored the unanimous conclusions "of experts in the field," including "six former Census Bureau Directors, in both Republican and Democratic Administrations," "three leading national associations of professional and academic statisticians, sociologists and demographers," and, most notably, his "own expert."[142] These experts agreed that the citizenship question "was not well — or even adequately — tested for purposes of the decennial census questionnaire."[143] Ross offered no other explanation for his departure from current testing protocol, and the court rejected excuses offered in "belated concoction[s] of counsel."[144]

Standard testing of proposed questions may also have addressed another shortcoming in Ross's analysis: false positives resulting when non-citizens claim that they are citizens. Ross assumed that comparison of "decennial census responses with administrative records will permit the Census Bureau to determine the inaccurate response rate for citizens and non-citizens alike using the entire population."[145] As noted above, however, the "entire population" will not complete census questionnaires, citizenship questions can be expected to generate false positives, and the Bureau predicts that existing administrative data will not address the accuracy of responses

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[136] *Id.* at *4 ("The Court reaches [its] conclusions based exclusively on the materials in the official "Administrative Record" submitted by Defendants.).
[137] *Id.*; *see also id.* at ¶ 55 (noting that Ross stated that "no empirical data existed on the impact of a citizenship question on responses").
[138] *Id.* at *103.
[139] *Id.* at *112-13 (rejecting counsel's post-hoc explanations for Ross's refusal to test the new question).
[140] *Id.* at *23 (noting that Ross found the question "well tested" based on "long-standing practice" of asking about citizenship on decennial censuses up until 1950).
[141] I*d.* at * 21 (finding that the American Sociological Association and former directors urged "standard rigorous testing" before the question was added to the census).
[142] *Id.* at * 39 (emphasis added).
[143] *Id.* at *39.
[144] *Id.* at *110.
[145] *Id.* at *25 (quoting Ross's March 26, 2018 Memorandum).

submitted by over 22 million persons.[146] Ross's failure to account for inaccuracies inherent in universally requested census data led him to reject superior alternatives in which "missing citizenship data would be imputed from a more accurate source."[147] The court concluded: "Secretary Ross acted arbitrarily and capriciously by selecting an option that will produce *less* accurate and *less* complete citizenship data."[148]

In sum, the Trump administration's regulatory rollbacks reflect the President's attempts to effectuate his campaign promises and exert strong political control over agency 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 rests in the ballot box. The Trump administration's efforts at politically driven change clash, however, with the lower 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*. Courts have also rejected other decisions that were supported by incomplete or cursory analyses. These decisions align with a competing theoretical model in which agency decisions gain broader legitimacy and transparency from expert analysis of relevant economic, scientific, or technological evidence.

III. 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 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.[149]

[146] *See supra* note 132.
[147] *New York v. U.S. Dep't of Commerce*, 2019 WL 190285 at *105.
[148] *Id.* at *106.
[149] THE FEDERALIST NO. 37 (James Madison).

Public officials, like judges, must routinely "liquidate" and ascertain the meaning of laws.[150] Sometimes their conclusions will be subject to judicial review, but often the officials will have the last word.[151]

The Constitution speaks directly to the execution of the laws when it charges the president with the duty "to take care that the laws be faithfully executed."[152] The Constitution makes no specific provision for executive branch offices, except for those of the president and vice-president, but the founders clearly contemplated that the work of government would require Congress to create various departments and executive offices.[153] Indeed, the Constitution specifically acknowledges that understanding by providing that the president "may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices,"[154] and by establishing appointments requirements for "officers" and "inferior officers."[155] The First Congress immediately created several executive departments,[156] and later Congresses created additional executive departments and agencies,[157] charging them with specific statutory duties.[158] A later innovation was the creation of independent – or non-executive-branch – administrative agencies, beginning with the Interstate Commerce Commission, whose creation in 1887 is generally thought to mark "the first institutionalization of the regulatory state."[159]

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

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[150] 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.").

[151] For example, the Office of Legal Counsel may give the executive advice that is never tested in court. See H. JEFFERSON POWELL, CONSTITUTIONAL CONSCIENCE: THE MORAL DIMENSION OF JUDICIAL DECISION 134 n.2 (2008).

[152] U.S. CONST. art. II, § 2, cl.1.

[153] 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 Enterprise Fund v. Pub. Co. Accounting Bd., 561 U.S. 477, 483(2010) (quoting 30 WRITINGS OF GEORGE WASHINGTON 334 (John C. Fitzpatrick ed. 1939)).

[154] U.S. CONST., art. II, §2, cl.2.

[155] *Id*.

[156] *See* DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789-1801, 36-41 (1997); GERHARD CASPER, SEPARATING POWERS: ESSAYS ON THE FOUNDING PERIOD 42 (1997).

[157] *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).

[158] 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).

[159] *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 James W. Ely, Jr., *The Troubled Beginning of the Interstate Commerce Act*, 95 MARQUETTE L. REV. 1131, 1132 (2012); Paul Stephen Dempsey, *The Rise and Fall of the Interstate Commerce Commission: The Tortuous Path from Regulation to Deregulation of America's Infrastructure*, 95 MARQUETTE L. REV. 1151, 1181 (2012); Bruce Wyman, *The Rise of the Interstate Commerce Commission*, 24 YALE L.J. 529, 532 (1915).

reports to the president and serves at his pleasure, while members of the independent agencies like the Interstate Commerce Commission do neither.[160] From the beginning, questions were raised about the fit of such agencies into the tri-partite 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 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.[161] Theories that justify governance by unelected agencies have given different weight 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."[162] 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.[163] 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."[164] Consequently, the "appropriate sphere of delegated authority is where there are no controversial issues of policy … or … opinion."[165] 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

[160] *See, e.g.*, Humphrey's Ex'r v. United States, 295 U.S. 602 (1935).

[161] *Compare* JEREMY WALDRON, THE DIGNITY OF LEGISLATION (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 (2003) (noting that good governance is a higher order value than mere participation in the political process).

[162] HORWITZ, *supra* note 159, at 216.

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

[164] ERNST FREUND, THE GROWTH OF AMERICAN ADMINISTRATIVE LAW 24 (1923)).

[165] *Id.*; *see also* FRANK GOODNOW, THE PRINCIPLES OF THE ADMINISTRATIVE LAW OF THE UNITED STATES 8 (1905) (distinguishing political choices amongst social ends from "scientific" or "technical" administration); HORWITZ, *supra* note 159, at 224 (noting that Goodnow admired "the political expert whose skill, neutrality, and impartiality formed an alternative to both the demagoguery and corruption of American democratic politics")

provisions."[166] His reservations were not unfounded. "[T]he subsequent experience of railroad regulation cast severe doubt on the ability of general rules or standards to provide serious guidance for the detailed and complex tasks involved in administrative regulation."[167] It became clear, for example, that ratemaking simply involved "too many variables to be effectively limited by general criteria."[168] More generally, the 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."[169] Nonetheless, as Morton Horwitz has noted, the "delegation [or transmission-belt] theory of administrative law" would provide the formal basis for legitimating "the exercise of bureaucratic power" for the next fifty years.[170]

Even in 1887, 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."[171] 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."[172] 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.[173]

By the time of the New Deal, "the scope of federal administrative regulation [had] increased geometrically,"[174] and proponents of the administrative state were no longer justifying delegations of authority under the "transmission-belt" theory.[175] In his Storrs Lectures, James Landis[176] articulated a vision of administrative government much closer to Wilson's model of "large powers and unhampered discretion." According to Landis, regulation required both

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[166] *Id.*
[167] *Id.*
[168] *Id.* at 223.
[169] *Id.*
[170] *Id.* at 216.
[171] Louis L. Jaffe, *The Illusion of the Ideal Administration*, 86 HARV. L. REV. 1183, 1185 (1973) (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 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").
[172] *Id.* at 216. Woodrow Wilson was the President who signed the Federal Trade Commission Act.
[173] J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928) ("[I]f 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 (1944).
[174] HORWITZ, *supra* note 159, at 223.
[175] Stewart, *supra* note 163, at 1676-77. ("[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].").
[176] Louis L. Jaffe, *James Landis and the Administrative Process*, 78 HARV. L. REV. 319, 319-20 (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 . . . . [Storr's lectures were] a celebration, a defense, and a rationalization of the magnificent accomplishment in which he had played so brilliant a part.").

specialization and "a method that calls upon other sciences to provide the norms."[177] It was agency expertise that gave "unelected administrators legitimacy to engage in regulatory tasks."[178] In "a joyous celebration of the virtues of 'expertness'"[179] Landis argued that, '[w]ith the rise of regulation, the need for expertness became dominant."[180] This regulatory expertise was not limited to "knowledge" of "the details of [industry's] operation."[181] 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. . . ."[182] 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."[183]

The Supreme Court's validation of agency expertise and independence bolstered Landis's view. In *Humphrey's Executor v. United States*,[184] the Court found that, "the 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 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."[185] According to the 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."[186] 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."[187] The Court concluded that the commissioners did not serve at the pleasure of the president.

Big businesses and its lawyers soon challenged the expertise model. An American Bar Association committee chaired by Roscoe Pound[188] 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."[189] The committee thought the

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[177] JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS 31 (1938). *See also* HORWITZ, *supra* note 159, at 214-15 (noting that Landis also criticized "the inefficiency of the judicial process" and "inability of judges trained in common law methods" to bring "either consistency or deep social understanding to the task of regulation").

[178] HORWITZ, *supra* note 159at 216.

[179] *Id*.

[180] LANDIS, *supra* note 177, at 23-24.

[181] *Id*.

[182] *Id.* Landis's understanding of expertise does not reflect the contemporary view that expertise cannot offer a decisive answer to many policy questions. *See infra* text surrounding notes 359-361.

[183] LANDIS, *supra* note 177, 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.*

[184] 295 U.S. 602 (1935).

[185] *Id*. at 625-26.

[186] *Id*. at 624.

[187] *Id*. at 624-25.

[188] Pound was one of the foremost legal scholars of the era. *See* ARTHUR E. SUTHERLAND, JR., THE LAW AT HARVARD: A HISTORY OF IDEAS AND MEN, 1817 -1967 p. 236-38 (1967)

[189] Roscoe Pound, *Report of the Special Committee on Administrative Law*, 63 REP. AM. BAR ASS'N 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 159, at 221.

administrative state was eroding ancient rights, particularly procedural rights; displacing the courts from their proper role;[190] and threatening the rule of law itself.[191] They were not entirely wrong. As Horwitz has observed, "between 1910 and 1940, the expertise justification of authority resulted in the elimination of elaborate procedural protections in judicial proceedings."[192] 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,[193] but also feared their own possible redundancy. As one recent commentator has noted, "Primarily, politics motivated the reform efforts, not scientific truth. The battle over administrative reform was a fight for the life of the New Deal . . . ."[194] 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 questions."[195]

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.[196] During this time, "disputes over questions of administrative law became thoroughly intertwined with raging political struggles over the legitimacy of the regulatory state." [197] 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."[198] In other words, the APA recognized the importance of expertise, but also provided procedures to discipline agency action.

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[190] As of 1938, "the Court likened agencies to legislatures for purposes of judicial review," applying a minimal standard akin to "rationality review." Watts, *supra* note 9, at 15; *see also* RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW 81 (2008) ("An agency need[s] no evidence, no record, and no statement of reasons to support a rule.").

[191] 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 HAYEK, THE ROAD TO SERFDOM 72 (1944).

[192] *Id.*

[193] *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. *See id.* at 1625-26.

[194] Shepherd, *supra* note 193, at 1595-96.

[195] HORWITZ, supra note 159, at 233.

[196] 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's Veto Message, 86 Cong. Rec. 13,943 (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.* Congress was unable to override the veto. Shepard, *supra* note 193, at 1625-32.

[197] HORWITZ, *supra* note 159, at 231.

[198] *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).

Among other things, the APA introduced "notice-and-comment" rulemaking, which K.C. Davis thought "one of the greatest inventions of modern government."[199] Although the APA required that rules include a "concise … statement of... basis and purpose,"[200] thereby "providing courts with a basis for striking down agency rules as arbitrary and capricious under section 706(2)(A) of the APA," agencies continued to receive an 'extraordinary level of deference."[201] 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."[202]

In the 1960s and 1970s, concerns about "agency capture" once more brought the agency expertise model into question.[203] Even Landis began to express doubts, [204]and Louis Jaffe made 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 body of expertise informed by the values of the New Deal."[205] 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." He concluded by noting how the failures of existing agencies had made them prey to "agency capture," a theory asserting that agencies become the "captives" of the industries they are charged with regulating.[206] 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

[199] See KENNETH CULP DAVIS, ADMINISTRATIVE LAW IN THE SEVENTIES ix, xvii (1976); Harold Leventhal, *Book Review*, 44 U. CHI. L. REV. 260, 264 (1976) (rulemaking is "extremely useful" and typically preferable "to adjudicatory trial-type procedures."); Kagan, *supra* note 6, at 2262 (remarking that the APA was intended to "curtail[] the sway of administrative officials by subjecting . . . rulemakings and (especially) adjudications . . . to stringent procedural requirements").

[200] Administrative Procedure Act, 5 U.S.C. § 553(c).

[201] Watts, *supra* note 9 at 15 (quoting GARY LAWSON, FEDERAL ADMINISTRATIVE LAW 558 (4th ed. 2007)).

[202] 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."); Watts, *supra* note 9, at 15 ("After the APA was enacted in 1946, things did not change much.").

[203] *See* Wagner, *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 . . . .").

[204] *See* James Landis, *Report on Regulatory Agencies to the President-Elect*, reprinted in Sen. Comm. On the Judiciary, 86th Cong., 2d Sess. (Comm. Print 1960); *see also* Stewart, *supra* note 163, at 1868 (explaining Landis's change of heart); Louis L. Jaffe, *The Effective Limits of the Administrative Process: A Reevaluation*, 67 HARV. L. REV. 1105 (1954) (suggesting the need for reevaluation of the administrative process); Jaffe (1964), *supra* note 176, at 322 (explaining that "planning the regulation of an industry" is not the same as "planning the policies of an industry").

[205] Jaffe (1964), *supra* note 176, at 324 (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).

[206] Jaffe (1973), *supra* note 171, at 1187-88. 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.

> relevant, value-free concepts, and an administration located at any given moment of time outside the political process [or] insulated from the power structure. [207]

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. "The prevalent 'expertise-based' model of agency decision-making, viewing agencies as professional, apolitical experts charged with pursuing the public interest, began to fade away."[208] 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.[209] 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.[210]

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 show whether an agency had actually done the work that it was required to do. 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.[211] Although the Supreme Court ultimately held, in *Vermont Yankee v. NRDC*,[212] that the courts had no authority to impose procedural requirements in addition to those prescribed by the APA and other relevant statutes, 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

[207] *Id.* at 1187-88.
[208] Watts, *supra* note 9, at 15-16.
[209] ALFRED AMAN, JR., ADMINISTRATIVE LAW IN A GLOBAL ERA 33-35 (1992) (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.").
[210] *Id.*
[211] Strauss, *supra* note 202, at 756-77.
[212] 435 U.S. 519, 525 (1978).

"hard look review." As a result, rulemaking became more and more expensive to complete.[213]

In addition, the sheer cost of participation in such potentially expensive rulemaking proceedings undercut the possibility of "broad public participation."[214] 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.[215] *State Farm*'s "burden of explanation" demands that agencies disclose their reasoning with greater transparency than did past conceptions of judicial review.[216]

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 the "monumental detail of the tax code."[217] 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.[218] In any event, Congress made no effort to take up Jaffe's invitation.[219]

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.[220] 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. Nor could Congress monitor the rapid and frequent changes in relevant scientific knowledge, let alone amend legislation quickly enough to address

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[213] *See* Strauss, *supra* note 202, 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 171, at 1190; *see also* notes 35-36, *and* accompanying text. The Supreme Court rejected this solution in *Whitman v. American Trucking Ass'n, Inc.*, 531 U.S. 457 (2001).

[214] *See, e.g.*, Stewart, *supra* note 163, at 1712-15 ("The viability in practice of such a pluralist theory of legitimacy is challenged at the outset by the contemporary critique of the administrative process: that agencies are biased in favor of regulated and client groups, and are generally unresponsive to unorganized interests.").

[215] Seidenfeld, supra note 10, at 154.

[216] *Id.* at 155, 151-53 (noting that new demands of judicial review had moved away from earlier conceptions of trust in expert administrators).

[217] Jaffe (1973), *supra* note 172, 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.").

[218] 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).

[219] *See* 5 Study on Federal Regulation, Senate Comm. On Governmental Affairs, 95th Cong., 1st Sess. 6-7, 67-81 (1977) (considering but rejecting arguments for greater executive control over independent administrative agencies).

[220] Doremus, *supra* note 16, at 450.

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' 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] That push can now be seen to represent an evolving consensus concerning appropriate 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.[226] In a broader sense, the 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 all federal regulatory statutes. This move toward quantification would also call into question the individual agencies' resolution of regulatory matters and embellish the credentials of a competing decision-maker: 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.[227]

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[221] 29 U.S.C. § 655(b)(5).

[222] *See, e.g*., Wagner, *supra* note 25, at 1618 and 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.").

[223] *See, e.g*., Am. Textile Mfrs. Inst., Inc. v. Donovan, 452 U.S. 490 (1981) (OSHA cotton dust standard); Indus. Union Dep't v. Am. Petroleum Inst., 448 U.S. 607 (1980) (OSHA benzene standard); United Steelworkers of Am. v. Marshall, 647 F.2d 1189 (D.C. Cir. 1980) (OSHA lead standard); Lead Indus. Ass'n, Inc. v. Envtl Prot. Agency, 647 F.2d 1130 (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* ABA COMMISSION ON LAW AND THE ECONOMY, FEDERAL REGULATION: ROADS TO Reform (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 (1975).

[226] Cost-benefit analysis had long been a prominent feature in other areas of law. *See* EDWARD M. GRAMLICH, A GUIDE TO COST-BENEFIT ANALYSIS (2d ed. 1990).Its use in regulation has been extensively documented by Cass Sunstein. *See* CASS R. SUNSTEIN, SIMPLER: THE FUTURE OF GOVERNMENT 167-68 (2013); Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838 (2013); Cass R. Sunstein, *Empirically Informed Information*, 78 U. CHI. L. REV. 1349 (2011). *But see* RICCARDO REBONATO, TAKING LIBERTIES: A CRITICAL EXAMINATION OF LIBERTARIAN PATERNALISM (2012).

[227] *See* Exec. Order No. 12,291, 3 C.F.R. 127 (1981) (President Reagan required executive agencies to submit cost-benefit analyses or major rule proposals to the OMB); Exec. Order No. 12,866, 3 C.F.R. 638 (1993) (President Clinton imposed similar cost-benefit requirements). Alternatively, then-Judge Stephen Breyer proposed the creation of an elite

The drive for presidential control of agency policymaking has been the most important development in administrative law in recent decades.[228] Writing 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."[229] 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."[230] Thus, at the same time that recent presidents have issued executive orders requiring agencies to engage in cost-benefit analysis, 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.[231] 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.[232] In *Presidential Administration*, Kagan recounts the history of the American administrative state as "the history of competition among different entities for control of its policies."[233] 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.[234]

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cadre of administrators, much like that envisioned by James Landis, who would be responsible ordering administrative policy around rational cost-benefit analyses. *See* STEPHEN BREYER, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION (1993); *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).

[228] *See, e.g.*, Robert V. Percival, *Who's in Charge: Does the President Have Directive Authority over Agency Regulatory Decisions?*, 78 FORDHAM L. REV. 2487 (2011); Robert V. Percival, *Checks without Balance: Executive Office Oversight of the Environmental Protection Agency*, 54 LAW & CONTEMP. PROBS. 127 (1991).

[229] Strauss, *supra* note 202, at 760.

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

[231] *See supra* Part II.

[232] *See* Kagan, *supra* note 6.

[233] *Id.* at 2246.

[234] *Id.* Kagan further notes that, "Each 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.*

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,[235] but that "[t]he sea change began with Ronald Reagan's inauguration."[236] In the first month of his administration, Reagan issued Executive Order 12291, 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."[237] The centralization of administration continued under President George H.W. Bush and reached its zenith under President Clinton.[238] Kagan writes:

> President Clinton treated the sphere of regulation as his own, and … made it his own as 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 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 … rulemaking, more informal means of policymaking, and even certain enforcement activities….[239]

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."[240] 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)."[241] The agencies "were *his* and so too were their decisions."[242]

Kagan acknowledges that Congress may grant discretionary authority to agency officials alone and that the President must respect the limits of such delegations; but she also argues that Congress seldom specifically precludes the President from directing the official to whom Congress has delegated the discretion. Thus, "most statutes granting discretion to the executive branch – but not independent – agency officials should be read as leaving ultimate decision-making authority in the hands of the President."[243] Kagan's controversial interpretive principle seemingly aligns

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[235] *Id.* at 2276.
[236] *Id.* at 2277.
[237] *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 oversight system operated." *Id.* at 2280 (observing that "[m]ost of OMB's communications with the agencies never appeared in the public record").
[238] Kagan notes that "[b]oth Reagan and Clinton used their methods of administrative control to drive a resistant bureaucracy *and political system*." *Id.* at 2344 (emphasis added). The "resistant" political system apparently refers to Congress. *Id.*
[239] *Id.* at 2282.
[240] *Id.* at 2289-90.
[241] *Id.* at 2290.
[242] *Id.*
[243] *Id.* at 2320. 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

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.[244]

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 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."[245] 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." [246] For Kagan, the ultimate measure of success is effectiveness "in establishing new priorities for agencies and in advancing a broad domestic policy agenda." [247] The "capacity for action and reaction" is more important than "never mak[ing] an error."[248]

Kagan acknowledges that her conclusion "would be less sound to the extent that the political and administrative systems fail to impose adequate limits on the President's exercise of administrative power."[249] 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.[250] Because "not all agency action entails the application of expertise," "presidential dictation of agency action" does not always displace agency action.[251] Further, Kagan argues, presidents will often have incentives to "encourage the application of expertise to administrative problems."[252] In that vein, she notes President Clinton's decisions to "steer clear" of many environmental regulations."[253]

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 4,000, 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

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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.

[244] *Chevron*, 467 U.S. at 865; Kagan, *supra* note 6, at 2373 (endorsing this aspect of *Chevron* and encouraging a deference doctrine that supports "presidential control over administrative action").

[245] *Id.* at 2331-32

[246] *Id.* at 2339. In this regard, Kagan relies on Hamilton's view as to the desirability of "energy" in the executive. *Id.* at 2341-43.

[247] *Id.* at 2345.

[248] *Id.*

[249] *Id.*

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

[251] *Id.* at 2354.

[252] *Id.*

[253] *Id.* at 2356.

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 great importance, and their views usually will carry the day, regardless of whether they actually represent positions that the President himself has carefully considered and 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.[254] 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*.[255] 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 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 allocations 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, 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."[256] This practice can only undermine confidence in agency expertise.[257] The task for administrative law today is to accommodate the

[254] *See infra* discussion surrounding notes 484-485.
[255] *See supra* discussion surrounding notes 76-77. As explained above, the Trump administration's complete refusals to consider merits of certain issues are so extreme that they violate the unanimous holding of *State Farm*. Kagan's argument does not question the unanimous portion of *State Farm*.
[256] Wagner (2015), *supra* note 16, at 2021; Wagner (1995), *supra* note 25.
[257] *Id.*

respective claims of agency expertise and presidential power in a manner that is transparent and also promotes rational decision-making.[258]

Past scholarship has articulated a variety of theories aimed at legitimating or de-legitimating 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.[259] Those fires erupt from time to time, die down, and erupt again. The ultimate outcome of disputes over the 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.

IV. 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.[260] 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 change policies. 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 fulfill by using their expertise. [261] For example, the Endangered Species Act requires agencies to list or delist endangered and threatened species based "solely on the basis of the best

[258] *Id.*
[259] *See, e.g.*, Vermeule, *supra* note 15, at 2478.
[260] Kagan, *supra* note 6, at 2341-43. The executive's energy may also be exercised by political appointees to head agencies or officers or aides within the Executive Office of the President.
[261] Doremus, *supra* note 16, at 405-06.

scientific and commercial data available."[262] Likewise, the Clean Water Act requires the EPA to ensure that certain power plant structures implement the "best technology available for minimizing adverse environmental impact."[263] 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."[264] 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."[265] Even such open-ended statutes as the FTC Act require the agency's application of economic expertise when deciding whether a particular business practice amounts to an "unfair method of competition."[266] 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 or industry resistance or pressures from non-governmental organizations often proves a daunting task.[267] 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," as "incorrect interpretations will be corrected as inconsistent data accumulates."[268] Thus, "in the long run, the scientific process produces extremely robust information about the world," because "tentative conclusions remain open to challenge," and always present "the opportunity to refine understanding."[269] On a similar note, Joel Mokyr has charted the course of technological progress by comparing it to evolution.[270] He rejects a linear notion of technological progress, positing, instead, 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."[271]

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[262] Endangered Species Act of 1973, 16 U.S.C. §§ 1532(b)(1)(A). *See* Doremus, *supra* note 16, at 418-32 (2004) (describing potential motivations for Congress's best available science mandate); *see also* 42 U.S.C. § 300g-1(b)(3)(A) (2012) (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 . . . .").

[263] 33 U.S.C. § 1326(b). 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).

[264] Toxic Substances Control Act § 6(a), 15 U.S.C. § 2605(a) (2016); Clean Air Act § 109(b)(1), 42 U.S.C. § 7409(b)(1) (1988) (noting that standards for commonplace "criteria" air pollutants must "allow[ ] an adequate margin of safety ... requisite to protect the public health"); *see also* Occupational Safety and Health Act § 6(b)(5), 29 U.S.C. § 655(b)(5) (1988) (dictating 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").

[265] 12 U.S.C. § 225a.

[266] 15 U.S.C. § 45.

[267] *See generally* Wagner (1995), *supra* note 25.

[268] Doremus, *supra* note 16.

[269] *Id*.

[270] JOEL MOKYR, THE LEVER OF RICHES 273 (1990).

[271] MOKYR, *supra* note 270, at 295-96; *see also id.* at 291 (describing incremental changes as "microinventions" and large changes as "macroinventions").

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."[272] 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."[273] Another example, with respect to evolving technology, is the Energy Department's updated, 2015 Wind Vision Report, which was the work product of an "elite team of researchers, academics, scientists, engineers, and wind industry experts,"[274] 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."[275] The Department indicated its intent to update its findings periodically,[276] and future reports will incorporate the latest technological advances in connection with the generation of wind power.[277] And in *Federal Communications Commission 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." [278] New technology made "it easier for broadcasters" to censor programming and "bleep out offending words" that "foul-mouthed glitteratae" were wont to utter.[279]

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.[280] 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."[281] 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

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[272] National Center for Immunization and Respiratory Diseases, *Selecting Viruses for the Seasonal Influenza Vaccine*, CENTERS FOR DISEASE CONTROL AND PREVENTION (Sept. 4, 2018), https://www.cdc.gov/flu/about/season/vaccine-selection.htm.

[273] *Id.*

[274] Wind Energy Technologies Office, *Wind Vision*, OFFICE OF ENERGY EFFICIENCY & RENEWABLE ENERGY (last visited Feb. 11, 2019), https://www.energy.gov/eere/wind/wind-vision.

[275] Wind Energy Technologies Office, *Wind Vision: A New Era for Wind Power in the United States* Ch. 2, p. 4, OFFICE OF ENERGY EFFICIENCY & RENEWABLE ENERGY (last visited Feb. 11, 2019), https://www.energy.gov/sites/prod/files/wv_chapter2_wind_power_in_the_united_states.pdf.

[276] Wind Energy Technologies Office, *Wind Vision*, OFFICE OF ENERGY EFFICIENCY & RENEWABLE ENERGY (last visited Feb. 11, 2019), https://www.energy.gov/eere/wind/wind-vision.

[277] David Roberts, *These huge new wind turbines are a marvel. They're also the future,* VOX (Oct. 23, 2018), https://www.vox.com/energy-and-environment/2018/3/8/17084158/wind-turbine-power-energy-blades.

[278] *FCC v. Fox*, 556 U.S. at 518.

[279] *Id.* at 518, 527. In dissent, Justice Breyer argued that the Commission failed to adequately consider whether smaller broadcasters could afford bleeping technology. *Id.* at 556-57.

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

[281] Doremus, *supra* note 16, at 414.

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. 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.[282] The 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 in the system. 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 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.[283]

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.[284] 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.[285] 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.[286] Thus, given the undeniable requirement that agencies offer *some* explanation for regulatory changes, the question becomes whether expert agency analysis adds value to the administrative decision-making. The positive procedural account of administrative change, in part C, below, illustrates how expert analysis can enhance regulatory decisions and serve a broader role 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

[282] Wagner (1995), *supra* note 25, at 1677 (describing "agencies' slow pace in setting toxic standards").
[283] *See supra* part III and discussion surrounding notes 218-222 (discussing limits of Congress's ability to legislate with specificity).
[284] In addition to orders directing rollbacks of particular regulations, the President has also ordered agencies to eliminate two existing regulations for every new regulation they promulgate. *See* discussion surrounding note 51.
[285] 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.").
[286] In *State Farm*, all nine Justices rejected NHTSA's completely unexplained rescission of airbag requirements. *Supra* discussion surrounding notes 37-38. Nor have any scholars advocating political control challenged this aspect of *State Farm*'s decision. *See supra* notes 6-9.

rather than agencies.[287] 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 scientific decisions to administrative agencies. Courts can also resolve scientific questions left open by Congress, and, in areas such as antitrust law, judges decide complex economic issues (or questions of social science) without significant deference to administrative agencies.[288] 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,[289] a single expert decision-maker cannot replicate the combined expertise present across all agencies in our system; [290] and such a decision-maker would have only limited influence in a system comprised of almost a thousand federal judges in any event. Moreover, agency experts draw on knowledge from fields that run the gamut from economics to medicine to engineering. Judges can add to their knowledge base by hiring specialized clerks[291] or relying on the expertise embodied in briefs,[292] but those resources pale in comparison to an agency's ability to hire large expert staffs or consult outside experts without the ethical constraints imposed on judges.[293]

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. To begin with, *stare decisis* imposes a substantial impediment to change.[294] At the federal level, even if an individual district judge were inclined to set aside a particular precedent, vertical *stare decisis* would prevent him or her from disregarding precedent established by the relevant court of appeals or the Supreme Court. Vertical *stare decisis* also compels a court of appeals to follow Supreme Court precedent.[295]

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[287] 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 "bureaucratic whim." Buzbee, *supra* note 10, at 1359-60.
[288] Spencer Weber Waller, *Democracy and Antitrust*, 45 FLORIDA ST. L. REV. __, *34-36 (2019).
[289] Adrian Vermeule, *Should We Have Lay Justices?* 59 STAN. L. REV. 1569 (2007).
[290] *Id.* at 1587.
[291] Carl Kaysen, *An Economist As the Judge's Law Clerk in Sherman Act Cases*, 12 ABA SECTION OF ANTITRUST LAW, April 10-11, 1958 at 43-49 (economist Kaysen described working "as a law clerk" to Judge Wyzanski, in *U. S. v. United Shoe Machinery Company*).
[292] Allison Orr Larsen, *The Trouble with Amicus Facts*, 100 VA. L. REV. 1757 (2014) (explaining that factual assertions in Supreme Court amicus briefs may cause the Court to adopt "unreliable evidence"); *see also* Kaysen, *supra* note 291, at 45-46, 48-49 (questioning fairness of off-record consultation on questions of economic fact and proposing that the Justice Division make greater use of economic expertise to counterbalance similar efforts by private defendants).
[293] 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).
[294] Kozel & Pojanowski, *supra* note 9, at 135-37.
[295] 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.[296] 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.[297] In addition, some Justices may be reluctant to overrule except in the clearest cases, not only because of the 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.[298] Finally, litigants wishing to overturn precedent 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 do not set their own agendas or have much control over the legal issues they will decide. As Justice Scalia noted in his dissent in *United States v. Windsor*,[299] "declaring 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.'"[300] Judges decide 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.[301] While the Supreme Court (unlike the lower federal 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.[302] 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*,[303] and even last term, in *Hawaii v. Trump*, Chief Justice Roberts was constrained to note that *Korematsu* had only "been overruled in the court of history."[304]

Even when litigants have a substantial basis for asking the courts to alter legal rules based on changed circumstances, the judicial process is not well equipped to address changing

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[296] *Id.* at 1018.
[297] *See infra* notes 322-326 *and* accompanying text.
[298] *See, e.g.*, Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 943 (1992).
[299] 570 U.S. 744 (2013).
[300] *Id.* at 781.
[301] Mitchell v. JCG Indus., Inc., 745 F.3d 837, 849 (7th Cir. 2014) (Wood, 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).
[302] The Court has original jurisdiction in a handful of cases.
[303] 323 U.S. 214 (1944).
[304] Trump v. Hawaii, 585 U.S. __ (Slip. Op. at 38) (2018).

understandings of science and technology. Judges tend to decide issues narrowly, incrementally, and based on rules that have been applied in the past.[305] 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.[306] A judge would not apply a brand new rule to a recurring situation unless he or she were willing (and able) to overrule precedent.[307] Judicial remedies are also incremental insofar as they apply only to the parties to a particular lawsuit,[308] operate retroactively,[309] and produce a definitive statement of rights and duties.[310]

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.[311] Moreover, for matters of science or technology, the impetus to capitalize on improvements resulting from change is fundamental: it is unthinkable, for example, that 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.[312]

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."[313] In his time, Fuller thought those problems exemplified by governmentally imposed price controls.[314] 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."[315] This was a

[305] Fuller, *supra* note 301, 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" on executive power "in the most narrow way" contributed to a "poverty of really useful and unambiguous authority." 343 U.S. 579, 634 (1952) (Jackson, J., concurring).
[306] Fuller, *supra* note 301, at 375-76.
[307] Edward H. Levi, *Introduction to Legal Reasoning*, 15 U. CHI. L. REV. 501, 501-02 (1948).
[308] Fuller, *supra* note 301, at 392.
[309] *Id.*
[310] *Id.* at 404.
[311] MOKYR, *supra* note 270, at 295-96.
[312] Doremus, *supra* note 16, at 410.
[313] Fuller, *supra* note 301, at 395.
[314] *Id.* at 400, 394.
[315] *Id.* at 400.

situation, Fuller suggested, that presented "too strong a polycentric aspect to be suitable for adjudication."[316]

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.[317] Still, Fuller's example of price and wage 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* they cannot "cannot encompass and take into account the complex repercussions that may result from any change in prices or wages."[318]

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 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.[319]

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.[320] 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

[316] *Id.* at 400.

[317] Fuller does note that polycentric problems such as "building bridges of structural steel" may still follow "rational principles" which are not merely left to managerial discretion. *Id.* at 403.

[318] *Id.* at 400.

[319] 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.").

[320] Waller, *supra* note 288. 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 (2008).

would often stifle efficient business practices.[321] 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*.[322] Although the available theoretical arguments also supported a relaxed rule for distributional restraints involving resale price, [323] the Court did not change the rule of per se illegality for resale price maintenance for the next 20 years.

Thus, even by the late 1990s – almost twenty years after *GTE Sylvania* – Judge Richard Posner of the Seventh Circuit was still obliged to follow precedent rendering maximum resale price maintenance illegal per se when he wrote the panel opinion in *State Oil Co. v. Kahn*.[324] While the Supreme Court later overruled the per se rule against *maximum* resale price maintenance in *Kahn*, [325] 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 Prods. v. PSKS, Inc.* [326] Thus, the lower federal courts were precluded from considering the Chicago School's theoretical justifications for all categories of distribution restraints until 30 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 badly out of date.[327] 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.[328] Since *Leegin*, scholars have identified a growing body of empirical evidence associating resale price maintenance agreements with anticompetitive increases in consumer prices.[329] 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

[321] ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF (1978).
[322] Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977).
[323] *Id.* at 69-70 n.10 (White, J., concurring and discussing argument for extending the rule of reason to resale price maintenance); *see also* Richard 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" which undermines manufacturers' ability to ensure point of sale services at the retail level.).
[324] 93 F.3d 1358, 1363 (7th Cir. 1996).
[325] State Oil Co. v. Khan, 522 U.S. 3 (1997)
[326] 551 U.S. 877 (2007).
[327] Amanda P. Reeves & Maurice E. Stucke, *Behavioral Antitrust*, 86 INDIANA L. J. 1527, 1586 (2011) ("The Supreme Court's economic thinking, as reflected in . . . *Leegin*, still lags.").
[328] Leegin, 551 U.S. at 912-13 (Breyer, J., dissenting) ("[M]ost economists today agree" that resale price maintenance tends to increase consumers prices.).
[329] 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 Baker, *Taking the Error Out of "Error Cost" Analysis*, 80 ANTITRUST L. J. 1, 18 (2015). ("[R]ecent study of a sample of convicted contemporary international cartels concludes that at least one quarter used vertical restraints to support collusion"); *id.* at 22 (noting that, in a study done after *Leegin*, states following the rule of reason had to "higher" prices and "lower" output than states which retained the per se rule as a matter of state law).

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 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 30 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. 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.[330] Decisions made outside of the formal adjudication process are not limited by an official record requirement,[331] and, in some cases, agencies may also consult expert panels when making decisions.[332]

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.[333] This procedural requirement has sometimes raised concerns over ossification, that is, an

[330] 5 U.S.C. §§ 553-557; M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383 (2004); Mark H. Grunewald, *The NLRB'S First Rulemaking: An Exercise in Pragmatism*, 41 DUKE L. J. 277-82 (1991); GELLHORN & BYSE, ADMINISTRATIVE LAW: CASES AND COMMENTS 66-67 (11th ed. 2011) (describing informal information gathering activities).
[331] 5 U.S.C. § 553.
[332] Vermeule, *supra* note 293, at 2239.
[333] Agencies do not need to promulgate rules before announcing a new standard in an adjudication, *SEC v. Chenery Corp. II*, 332 U.S. 194, 202-03 (1947), and they do not need to engage in rulemaking to change policy that was initially adopted in informal guidance. *Perez v. Mortgage Bankers Ass'n*, 135 S.Ct. 1199, 1203 (2015).

institutional reluctance to alter possibly outmoded rules because of the time and effort required to promulgate new ones. Recent research suggests that ossification concerns may have been overstated,[334] 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.[335] 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 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. 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.[336] 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,[337] which Randy Kozel and Jeff Pojanowski have helpfully described as "expositive" and "prescriptive."[338] 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."[339] Expositive reasoning, on the other hand, occurs when an agency seeks to determine "what Congress actually intended with respect to a particular issue."[340]

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.[341] These deference doctrines place varying degrees of weight on consistency with past interpretive decisions made by agencies[342] and courts,[343] but none rise to the level of uniformity required by *stare decisis*.[344] On the other hand, courts address changes in prescriptive decisions under the "arbitrary and capricious" standard of review, which focuses on the agency's

[334] Wendy Wagner, William West, Thomas McGarity & Lisa Peters, *Dynamic Rulemaking*, 92 N.Y.U. L. REV. 183 (2017).
[335] 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).
[336] 5 U.S.C. § 555(e). See also Kagan, *Presidential Administration*, supra note 6, at 2254.
[337] Kozel & Pojanowski, *supra* note 9, at 141-46.
[338] *Id*.
[339] *Id*.
[340] *Id*.
[341] 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).
[342] *Compare Chevron*, 467 U.S. 837 *with* Skidmore v. Swift & Co., 323 U.S. 134 (1944).
[343] Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Srvcs., 545 U.S. 967 (2005).
[344] Kozel & Pojanowski, supra note 9.

reasoning process, and allows an agency to alter its policies so long as it adequately explains its reasons for doing so.[345]

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 exacerbated the Great Depression.[346] He was able, instead, to facilitate "innovations" that "resulted in large increases in the amount of Federal Reserve credit extended to the banking system."[347] 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,[348] namely technology-forcing performance standards that required vehicle manufacturers to implement safer motor vehicle design.[349] 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.[350] In other instances, advances in science have prompted agencies to update health policies such as vaccination recommendations[351] and dietary recommendations for pregnant women.[352] Sometimes these advances have even required

[345] 5 U.S.C. § 706, *State Farm*, 463 U.S. 29 (1983). 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. __ (2018) (forthcoming). Nevertheless, given Congress's widespread use of open-ended administrative statutes, *see* Christine Chabot, *Selling* Chevron, 67 ADMIN L. REV., 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.

[346] Gary Richardson, *The Great Depression*, FEDERAL RESERVE HISTORY (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).

[347] Chairman Ben S. Bernanke, *Federal Reserve Policies in the Financial Crisis* (Dec. 1, 2008), available at https://www.federalreserve.gov/newsevents/speech/bernanke20081201a.htm

[348] 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).

[349] *Id*.

[350] Kahane, C. J., *Lives Saved by Vehicle Safety Technologies and Associated Federal Motor Vehicle Safety Standards, 1960 to 2012*, – Passenger Cars and LTVs – With Reviews of 26 FMVSS and the Effectiveness of their Associated Safety Technologies in Reducing Fatalities, Injuries, and Crashes, National Highway Traffic Safety Association (Jan. 2015), https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/812069; *see also* Karen Wiswall, *Safety Standards Make an Impact*, THE REGULATORY REVIEW (Mar. 25, 2015), https://www.theregreview.org/2015/03/25/wiswall-safety-impact/.

[351] The CDC now recommends only two HPV shots for younger adolescents. Centers for Disease Control and Prevention, *CDC recommends only two HPV shots for younger adolescents*, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES (Oct. 19, 2016), https://www.cdc.gov/media/releases/2016/p1020-HPV-shots.html.

[352] U.S. Food and Drug Administration, *FDA and EPA issue final fish consumption advice*, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES (Jan. 18, 2017), https://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm537362.htm.

agencies to confront new regulatory problems such as the relationship between greenhouse gas emissions and climate change.[353]

Problems involving science or other forms of expertise also tend to be polycentric and can therefore benefit from analytical procedures that break their multifaceted and interrelated issues down into manageable units of analysis. In many cases, for example, science may provide limited information upon which to base a policy decision, especially at the frontiers of knowledge.[354] Oliver Williamson, the 2009 Nobel Laureate in Economic Sciences, has proposed a helpful "decision process approach" that regulators may apply in cases of scientific uncertainty.[355] 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.[356] 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 some level of 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 level of risk presented by the initial dye, because the regulator can simply steer consumers toward the dye that does not present the risk.[357] 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?[358] Williamson also notes that risks posed by a weak carcinogen like saccharin may be outweighed by weight control benefits,[359] and that even potent carcinogens like the aflatoxins found in peanut butter may be necessary to offer an "inexpensive form of protein."[360]

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.[361] 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 solution than an absolute ban on the sale of alcoholic beverages. Regulators might also be expected to refrain from

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[353] *See* Massachusetts v. EPA, 549 U.S. 497 (2007).

[354]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 science is "rarely decisive in policy making," and at the forefront of research presents uncertain "concepts still being evaluated and possibly yet to be modified").

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

[356] *Id.* at 145.

[357] *Id.* at 147.

[358] *Id.* at 145.

[359] *Id.* at 148.

[360] *Id.* at 149.

[361] *Id.* at 145.

promulgating general rules that do not adequately address disproportionate effects on a single industry.[362]

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 state of current scientific knowledge, the scope of uncertainty surrounding that knowledge, and the policy priorities it will apply in the face of uncertainty.[363] 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 adopt a policy contrary to scientific evidence.[364]

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.[365] Nevertheless, the cost-benefit tradeoffs invoked by Williamson's procedural framework are well within the ken of regulators. Williamson's 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;[366] they also avoid overt reference to political factors[367] and do not generally consider the interests of non-parties who may be affected by their rulings.

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[362] *Nova Scotia*, 568 F.2d at 253 (invalidating general rule which failed to address possibility that its standards would render canned whitefish unmarketable).

[363] Williamson, for example, notes that non-health benefits or efficiency benefits can also be considered in the decision-making framework. Williamson, *supra* note 355, at 145.

[364] In *State Farm*, for example, it was "surely . . . not enough" for NHTSA to ignore evidence on safety benefits of airbags on the ground "that the regulated industry . . . eschewed" airbags. 463 U.S. at 48-49.

[365] Wagner, *supra* note 25.

[366] *See supra* note 319.

[367] "[M]ost judges would sooner admit to grand larceny than confess a political interest or motivation." Frank Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 NW. U. L. REV. 251 (1997) (quoting ROBERT A. CARP & RONALD STIDHAM, THE JUDICIAL PROCESS IN AMERICA 301 (1996)).

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."[368] 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 medical environments.[369] Rather than refining this test "through common law development,"[370] 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."[371] While this test was easier for courts to apply, it failed to protect persons with HIV from unwarranted discrimination.[372]

That article attributed the courts' failures to the difficulties of using adjudication to solve a polycentric problem.[373] Although courts approached the issue of "significant risk" as "raising only factual issues,"[374] assessment of risk ultimately implicated normative concerns as well as scientific knowledge,[375] which was necessarily limited and "provisional."[376] 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 (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 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. 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) and indirect consequences (including the overall impact on the supply of dentists).[377]

Of course, merely involving an agency capable of undertaking cost benefit analysis provides no guarantee of success, especially 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,[378] and difficult decisions were simply passed on to the health care industry.[379] This may illustrate that there are no perfect solutions to the most difficult

[368] Sullivan, *supra* note 150, at 603.
[369] *Id.* at 599-600.
[370] *Id.* at 640.
[371] *Id.* at 641.
[372] *Id.* at 641.
[373] *Id.* at 643 n.121.
[374] *Id.* at 644.
[375] *Id.* at 647.
[376] *Id.* at 651.
[377] Sullivan, *supra* note 150, at 665.
[378] *Id.* at 684-85.
[379] *Id.*

problems. The CDC, however, was ultimately able to change and update its policies to better reflect scientific knowledge.[380]

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 suited 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 from the viewpoint of transparency and political accountability.[381] The important point here, however, is that 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 policy making arena and discounts the value that expert analysis may provide in the realm of policy change.

V. 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.[382] 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."[383] Section 706 also directs courts to make

[380] *See* Centers for Disease Control and Prevention, *How HIV is Passed from One Person to Another*, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES (Oct. 31, 2018), https://www.cdc.gov/hiv/basics/transmission.html (clarifying that , that HIV is not spread by air, water, salvia, sweat, or tears); *see also* Centers for Disease Control and Prevention, *Are Health Care Workers at Risk of Getting HIV on the Job*?, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES (Oct. 31, 2018), https://www.cdc.gov/hiv/basics/transmission.html (Even for health care workers, the "main risk of HIV transmission . . . from being stuck with an HIV-contaminated needle . . . is less than 1%.").
[381] Jerry Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J. L. ECON. & ORG. 81 (1985).
[382] A.P.A. § 706.
[383] *Id.*

this determination based on a review of "the whole record or those parts of it cited by a party. . ."[384] In its 1971 decision in *Citizens to Protect Overton Park v. Volpe*,[385] the Supreme Court emphasized the importance of an agency's decisional record, to a court's ability to ensure that the agency actually considered "the relevant factors" that Congress has identified. [386]

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 Resources Defense Council, Inc.*,[387] a unanimous Court deferred to necessarily predictive scientific determinations underlying a Nuclear Regulatory Commission rulemaking. [388] 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."[389] According to the Court, this "kind of scientific determination" generally requires a reviewing Court to be at its "most deferential."[390]

A. *State Farm*: Politics Versus Expertise

In *State Farm*,[391] 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. 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. All nine Justices invalidated NHTSA's decision to eliminate existing automobile safety requirements without any explanation whatsoever. The Court split in a 5-4 vote, however, on the NHTSA's cursory rejection of data that associated safety benefits with alternative automobile safety requirements. The majority held that the NHTSA's rejection was too superficial to constitute "the product of reasoned decision-making,"[392] whereas the dissent deemed the NHTSA's analysis sufficient in light of political concerns raised by a "change in administration. . . ."[393]

In *State Farm*, President Reagan's newly appointed Secretary of Transportation ordered NHTSA to initiate a rulemaking designed to abrogate existing automobile safety regulations, which would soon require manufacturers to install automatic seatbelts or airbags in new cars. Although these regulations were predicted to reduce accident-related deaths and injuries under the National Traffic and Motor Vehicle Safety Act of 1966, [394] they also generated great controversy.

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[384] *Id.*
[385] Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971).
[386] *Id.*
[387] 462 U.S. 87 (1983); *see generally* Emily Hammond Meazell, *Super Deference, the Science Obsession, and Judicial Review as Translation of Agency Science*, 109 MICH. L. REV. 733 (2011).
[388] Justice Powell recused himself in *Baltimore Gas*. The remaining seven Justices joined Justice O'Connor's decision without writing separately.
[389] *Id.* at 103.
[390] *Id.*
[391] 463 U.S. 29 (1983).
[392] *State Farm*, 463 U.S.at 52; see also Doremus, supra note 16, at 423 (*State Farm* requires analysis of relevant scientific evidence even "in the absence of an explicit legislative science mandate").
[393] *Id.* at 59 (Rehnquist, J., dissenting in part).
[394] Mashaw, *supra* note 348, at 338.

Many motorists disliked seat belts, and automobile manufacturers resisted expensive airbag technology.[395]

The history leading up to this decision illustrates the daunting nature of NHTSA's regulatory mandate. Congress had decided to adopt an "epidemiological" model that would make the interior of cars safer for occupants during inevitable automobile accidents.[396] To that end, it delegated to the Secretary of Transportation and NHTSA broad 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.' 15 U.S.C. § 1392(a)."[397] 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."[398] NHTSA initially required manufacturers to incorporate manual seatbelts, but that failed to produce the desired safety benefits because few motorists chose to "buckle up."[399] NHTSA began additional efforts to require passive occupant restraints in the early 1970s.[400] These efforts spanned several administrations and met with great resistance. The automobile industry railed against these innovations based on costs and practicability,[401] and the public also resisted change.[402] A particularly unpopular interim effort to force seatbelt usage through ignition interlock technology engendered extreme public opposition and was overruled by Congress.[403]

By the time of the Carter Administration, however, evidence showed that passive restraints were technologically and economically feasible,[404] that they would save over 9,000 lives, and that they would prevent tens of thousands of injuries.[405] As a result, NHSTA promulgated a new rule, Modified Standard 208, which required car manufacturers to phase in passive restraint protections by the early to mid-1980s.[406] 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.[407]

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.[408] NHTSA ultimately rescinded Modified Standard 208 on the ground that recent manufacturer initiatives precluded passive restraints from

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[395] *Id.*
[396] *Id.*
[397] *State Farm*, 463 U.S. at 33-34.
[398] *Id.* at 33.
[399] Mashaw, *supra* note 348, at 351.
[400] *Id.* at 351.
[401] *Id.* at 352 (noting usual industry objections of "cost, lead times, and production feasibility").
[402] *Id.* at 367 (discussing "public . . . doubts concerning the effectiveness and costliness of the technology").
[403] *State Farm*, 463 U.S. at 35-36.
[404] Federal Motor Vehicle Safety Standards, Occupant Restraint Systems, 42 Fed. Reg. 34,289, 34,291 (July 5, 1977).
[405] *Id.* at Table II.
[406] *State Farm*, 463 U.S. at 37.
[407] *Id.*
[408] *Id.* at 38.

achieving the "significant safety benefits" that were predicted earlier.[409] NHTSA gave two primary reasons for discounting the benefits of this regulation. First, because 99% of manufacturers opted to install automatic seatbelts rather than airbags, the "life-saving potential of airbags would not be realized."[410] 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.[411]

On review, the District of Columbia Circuit found NHTSA's rescission arbitrary and capricious under section 706 of the APA,[412] and the Supreme Court affirmed. 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. 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 had supported a final rule mandating passive restraint technology.[413] According to Justice White's majority opinion, "not 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.[414] Further, the agency also failed to consider the alternative of non-detachable automatic seatbelts with continuous spooling technology "in its own right."[415]

The Supreme Court premised its analysis on the understanding that "'[e]xpert discretion is the lifeblood of the administrative process.'"[416] Thus, rescission of an existing rule requires the same "reasoned analysis for the change" that applies when an agency promulgates a new rule.[417] Further, while a court may not "substitute its judgment for that of the agency," a court must carefully consider whether the agency has demonstrated its exercise of expert discretion by "examin[ing] the relevant data and articulate[ing] a satisfactory explanation" that connects the policy choices made to the facts that were found.[418] The Court's "hard look" standard imposes "strict and demanding" requirements that the agency "cogently explain why it has exercised its discretion in a particular manner."[419]

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[409] *Id.* at 38.
[410] *Id.* at 38-39.
[411] *Id.* at 39.
[412] *Id.* at 40.
[413] *Id.* at 48-49, 56; *id.* at 57-58 (Rehnquist, J., concurring in part).
[414] *State Farm*, 463 U.S. at 48-49.
[415] *Id.* at 56; id. at 57-58 (Rehnquist, J., concurring 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").
[416] *Id.* at 48 (quoting *Burlington Truck Lines*, 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.
[417] *State Farm*, 463 U.S. at 42.
[418] *Id.* at 42-43. Deference will not shelter agencies that fail to exercise expert discretion in the first instance. *State Farm*, 463 U.S. at 50 (citing SEC v. Chenery I, 332 U.S. 194, 196 (1947) and noting that courts will not accept "appellate counsel's post hoc rationalizations" for an agency decision). *Id.* at 48 (quoting *Burlington Truck Lines*, 371 U.S. at167).
[419] *Id.* at 48 (quoting *Burlington Truck Lines*, 371 U.S. at167) (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).

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 (1) if it "entirely failed to consider an important aspect of the problem;" (2) if it explained its decision on grounds "counter to the evidence before the agency;" or (3) if it made an "implausible" choice that "could not be ascribed to a difference in view or the product of agency expertise."[420] If the decision were purely political, on the other hand, it is not clear these last three criteria should matter. As long as the agency stays "within the bounds established by Congress,"[421] 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 with 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 eliminating these requirements, the agency 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.[422] However, the agency did not address the likelihood that inertia would cause drivers to leave seatbelts engaged. Inertia was important because it was thought 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 safety benefits of wearing seatbelts are not in doubt," and that Congress intended safety to be the "preeminent factor" in regulatory decisions made under the Motor Vehicle Safety Act.[423] 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.[424] 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.[425] Ultimately, however, the majority believed that the agency had failed to offer sufficient explanation for its disbelief that detachable automatic belts would 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.

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

[420] *Id.* at 43. Here, NHTSA's refusal to consider evidence of airbag's safety benefits also seemed to violate its statutory obligation to consider "relevant available motor vehicle safety data" and support its decisions with "substantial evidence" 15 U.S.C. 1392(f)(1),(3), (4).
[421] *State Farm*, 463 U.S.at 58 (Rehnquist, J., dissenting in part).
[422] *Id.* at 53.
[423] *Id.* at 52, 56.
[424] *Id.* at 52-53.
[425] *Id.* at 53.

also bolster usage rates for detachable automatic seatbelts.[426] Automatic seatbelts, after all, remain in use unless the occupant overcomes inertia and takes positive action to disconnect them.[427] 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 30-40% of automatic seatbelts would be disabled.[428] 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.[429]

Justice Rehnquist dissented on this issue; he would have upheld the NHTSA's decision to eliminate passive detachable seatbelts. 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.[430] Thus, the agency's "explanation" of "substantial uncertainty" as to the benefits of detachable seatbelts was "adequate" to support the agency's decision.[431] 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.[432] 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 reflect a rational "assess[ment] of administrative records."[433]

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 sufficiently thorough analysis of the existing administrative record.

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

Subsequent Supreme Court decisions 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

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[426] *Id.* at 54.
[427] *Id.* at 54.
[428] Federal Motor Vehicle Safety Standards, Occupant Restraint Systems, 42 Fed. Reg. 34,289 Table II; see also Mashaw, *supra* note 348, at 383 (noting that "continuous-spool belts were removable with a pair of scissors").
[429] Federal Motor Vehicle Safety Standards, Occupant Crash Protection, 46 Fed. Reg. 53,419, 53,422 (1981) ("[C]ommenters …did not present any new factual data that could have reduced the substantial uncertainty confronting the agency.").
[430] *State Farm*, 463 U.S. at 58. Consumer choice and ignition interlock technology may have made usage rates in the study higher than in the real world.
[431] *Id.* at 58.
[432] *Id.* at 59.
[433] *Id.* at 59.

evidence and Justice Rehnquist's emphasis on deference to a new president.[434] Moreover, the recent retirement of Justice Kennedy, who has provided the deciding vote in the most highly contested cases, adds to the general uncertainty about the Court's future direction in this area.

Signs of continued disagreement have been obvious in cases such as the Court's 2007 decision in *Massachusetts v. E.P.A.*[435] Although that case, which was decided by a 5-4 vote, involved the EPA's failure to initiate a rulemaking, rather than an actual change in policy, 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 EPA was required to exercise expert judgment and decide whether "greenhouse gas emissions from new motor vehicles" would cause or contribute to harm associated with climate change, and that its failure to do so was arbitrary and capricious.[436] Justice Kennedy joined Justices Stevens, Breyer, Souter, and Ginsburg in the majority.[437] 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."[438]

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.*,[439] the Court reviewed the FCC's decision to extend existing prohibitions of "indecent speech" to ban broadcasts of "fleeting expletives." The case involved a factual and regulatory setting dramatically different from that of *State Farm*, as the Commission crafted its indecent speech policy around First Amendment concerns and the Court's earlier decision in *FCC v. Pacifica Foundation*.[440] In *Fox*, the Second Circuit had found the Commission's new indecent speech policy arbitrary and capricious. Two of the court of appeals' primary critiques focused on the absence of evidence to support the new, higher enforcement standard.[441] According to the court of appeals, the Commission lacked "evidence that . . . a fleeting expletive is harmful."[442] The court of appeals also cited the lack of evidence as the reason it "found unconvincing" the agency's prediction that a fleeting expletive exemption "would lead to increased use of expletives."[443]

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[434] The Court addressed *State Farm* in passing when it addressed changed policies in *Smiley v. Citibank (S.D.)*, 517 U.S. 735 (1996), and *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 US 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*. 517 U.S. at 742. In *Brand X*, the Court reaffirmed that changes in statutory interpretation qualify for *Chevron* deference and cited Rehnquist's *State Farm* dissent for the proposition that a "new administration" may prompt such change. 545 U.S. at 981.

[435] 549 U.S. 497 (2007).

[436] *Id.* at 504.

[437] Justices Scalia, Thomas, Alito and Chief Justice Roberts dissented.

[438] Jody Freeman & Adrian Vermeule, Massachusetts v EPA: *From Politics to Expertise*, 2007 SUP. CT. REV. 51, 53-54.

[439] 438 U.S. 726, 748-49 (1978)

[440] *Id.*

[441] One of its grounds focused on inconsistency inherent in the Commission's indecency policy: the Commission failed to impose categorical ban on all broadcasts of expletives and excepted broadcasts of shows such as Saving Private Ryan. *Fox*, 556 U.S. at 520.

[442] *Id.* at 519 (quoting 489 F.3d 461).

[443] *Id.* at 521.

When the case reached the Supreme Court, the Justices struggled to find common ground, writing six different opinions.[444] Four Justices, including Justice Kennedy, aligned with Justice Scalia in holding that the Commission's change in policy was not arbitrary and capricious or governed by *State Farm.*[445] 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.[446] Justice Breyer and three other Justices dissented on the ground that the Commission's action was arbitrary and capricious under *State Farm*.

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."[447] While the Court did not require that reasons for the new policy be "*better* than the reasons for the old" policy,"[448] 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."[449] 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."[450]

The Court cited the fact that the subject of the regulation was not susceptible to objective verification as a key consideration in its decision.[451] 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 children,[452] 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."[453]

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[444] Justice Scalia wrote a majority opinion joined by Chief Justice Roberts, Justice Thomas, Justice Alito, and joined in part by Justice Kennedy. *Fox*, 556 U.S. at508-530. 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. 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. Justices Ginsburg, Souter, and Stevens also joined the administrative law analysis in Justice Breyer's dissent. *Id.* Justice Ginsburg wrote separately to emphasize First Amendment concerns, and Justice Stevens wrote separately to emphasize concerns based both on administrative law and on the First Amendment.

[445] 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*. 556 U.S. at 508-522.

[446] *Id.* at 535 (Kennedy, J. concurring in part and concurring in the judgment) ("In those circumstances I agree with the dissenting opinion of Justice BREYER.").

[447] *Id.* at 515.

[448] *Id.*

[449] *Id.*

[450] *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.

[451] Id. at 519 (citing *State Farm*, 463 U.S. 29).

[452] As Justice Breyer noted, the Commission could have addressed studies suggesting that children are too young to comprehend sexual innuendo. *Id.* at 654.

[453] *Id.* at 552.

Justice Scalia's opinion studiously avoided any reference to 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.[454] 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.[455] Justice Scalia's plurality opinion rejected calls for heightened scrutiny because the Commission's policy change "was spurred by significant political pressure from Congress."[456] 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.[457] For issues turning on science or other forms of technical expertise, "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."[458]

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."[459] This standard precludes agencies from "simply disregard[ing] contrary or inconvenient factual determinations it made in the past."[460] Justice Kennedy thus indicated that he would follow *State Farm* in cases where the agency's initial policy was supported by factual findings,[461] 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 "factual findings."[462]

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 as to how broadly *State Farm*'s test should apply.[463] The reasoned awareness standard from Justice Scalia's majority opinion might be read to

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[454] *Id.* at 523-29.
[455] *See supra* note 454.
[456] *Fox*, 556 U.F. at 523-24. As the Commission is an independent agency, political pressure may be more likely to come from Congress than the president.
[457] *Id.* at 535.
[458] *Id.* at 536.
[459] *Id.* at 537.
[460] *Id.* at 537.
[461] *Id.* at 427-28.
[462] Id. at 538.
[463] 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 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

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. 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 in an area in which technical or scientific expertise is relevant.

The Court's most recent decision on agency change, *Encino Motorcars, LLC v. Navarro*,[464] provides little additional guidance as to how the Court would address policy change in a regulatory context involving technical or scientific agency expertise. *Encino* focused on the Department of Labor's legal interpretation of overtime pay requirements and the meaning of the term "salesmen" under the Fair Labor Standards Act.[465] In an opinion by Justice Kennedy, who wrote for six of the eight Justices who participated in the case, the Court held that the Department had acted arbitrarily when it changed certain overtime pay policies with "barely any explanation."[466] The Court reiterated the *State Farm* requirements that an agency provide "a minimal level of analysis," demonstrate that it has "examine[d] the relevant data," and "articulate" a "rational connection between the facts found and the choice made."[467] Under *Fox*, the Court also held, the "reasoned explanation" standard requires an agency to address "reliance interests" as well as the agency's reasons for "disregard[ing]" the "facts and circumstances that underlay … the prior policy."[468] Because the new rule did not meet this standard, the Court remanded the case to the court of appeals.[469] On post-remand review, the Supreme Court held that the new policy contradicted the statute itself.[470] As with earlier cases, the *Encino* decisions to resolve the Justices' conflicting views on the proper relationship of politics and agency expertise in the area of policy change.

VI. 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 for agencies' expert analysis in the face of policy change.[471] Three leading approaches to agency change focus on political control, deliberative democracy, and the rule of law. The political control approach reflects the 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

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the agency to establish that it "believes" the new policy to be better (even if a reviewing court does not agree with reasons for this belief).

[464] 136 S.Ct. 2117 (2016).

[465] *Id.*

[466] *Id.* at 2127.

[467] *Id.* at 2125.

[468] *Id.* at 2126.

[469] *Id.* at 2127.

[470] After remand to the Ninth Circuit on the statutory interpretation question, the Court again took the case to clarify that service advisors qualify as "salesmen" under the Act. Encino Motorcars v. Navarro, __ U.S. __ (No. 16–1362, April 2, 2018).

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

for expert analysis. The deliberative democracy and rule of law approaches 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.[472] 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.[473] Kagan does not reject expertise entirely, but she would place the ultimate responsibility for expert decision-making in the President, 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.[474] 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."[475] Kagan's position aligns most closely with Justice Rehnquist's dissent in *State Farm*, that is, she agrees that a "rescission emanat[ing] from regulatory views held by the President" need not be "justified in neutral, expertise-laden terms to the fullest extent possible."[476]

Kathryn Watts has echoed Kagan's approach in an article that advocates for greater deference to political considerations in arbitrary and capricious review.[477] According to Watts, *State Farm*'s hard look review "currently hinges on an outmoded model of 'expert' decision-making."[478] 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."[479] 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 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."[480] Watts likewise faulted NHTSA for failing to openly discuss political factors such as its reliance "on the Administration's overall priorities."[481] Had NHTSA emphasized these political concerns, Watts continues, its "explanation should have been enough (combined with its focus on facts and logic)

[472] Kagan, *supra* note 6, at 2380.
[473] *Id.* at 2380.
[474] *Id.* at 2354-56.
[475] *Id.*
[476] *Id.* at 2381.
[477] Watts, *supra* note 9.
[478] *Id.* at 31.
[479] *Id.* at 31.
[480] *Id.* at 2382.
[481] *Id.* at 72.

to constitute a reasonable and adequate explanation for the rescission" of the previous administration's requirements.[482]

The problem with this approach, however, is that political actors often prefer opaque explanations and sometimes wish to circumvent Congressional mandates requiring them to base decisions on relevant evidence or their understanding of the public interest. Thus, Nina Mendelson has addressed the transparency problems created by "silence" about the "content of White House influence" on agency rules,[483] explaining that "Presidents (and OIRA) have often chosen to lie low with respect to particular agency decisions." [484] 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.[485]

Likewise, OIRA review of proposed rules tends to be opaque, creating "unrestricted and nontransparent opportunities for political oversight and editing of agency technical analyses."[486] 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."[487] The concealment of political 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 legitimate agency decisions by demonstrating consistency with both Congressional mandates and generally accepted scientific norms.[488] 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.[489] 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." [490] Even when expert agency conclusions ultimately yield to political concerns (such as the cost of regulation), expert analysis will add transparency to the process and illuminate the political

[482] *Id.* at 72.
[483] Nina A. Mendelson, *Disclosing "Political" Oversight of Agency Decisionmaking*, 108 MICH. L. REV. 1127, 1130 (2010); *id.* at 1159 ("[A]gencies usually submerge executive influence or control" when explaining policy decisions.).
[484] *Id.* at 1166.
[485] *Id.* An approach "that is more receptive to political reasons likely would be insufficient to prompt" more disclosure. *Id.*
[486] Wagner, supra note 16, at 2046.
[487] Seidenfeld, *supra* note 10, at 178. The Trump Administration, however, has openly referred to the industry interests protected by its policies. Heinzerling, *supra* note 59, at 36 ("Agencies have also cited the interests of regulated industry in justifying their failure to conduct notice and comment.").
[488] Wagner, *supra* 16, at 2018-29 (noting that expert regulation in the U.S. is marked by "[t]ransparency, peer and public scrutiny").
[489] Mendelson, *supra* note 483, at 1142-44 (stating that a President may "pressure[s] 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").
[490] Shapiro et al., *supra* note 16, at 490.

tradeoffs that are being made.[491] 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." [492] Expert analysis of relevant evidence may also support a middle ground between the polarized positions staked out by pro- and anti- regulatory zealots.[493]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 Administration officials had failed to discuss inconvenient facts or show that their conclusions were supported by expert analysis.[494]

Arbitrary and capricious review also has the potential to bolster 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.[495] 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.[496]

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.[497] Arbitrary and capricious review places some limits on an agency's ability to manufacture a scientific charade, however, inasmuch as an agency ultimately cannot offer "an explanation for its decision that runs counter to the evidence before" it.[498] All in

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[491] *Id.* at 500-502. Expert analysis may also serve a "discursive role" by giving greater voice to less powerful individuals or organizations. *Id.* at 491.

[492] 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 438, at 99-100 (noting that the EPA would be hard-pressed to cite significant uncertainties regarding the relationship between greenhouse gases and global warming).

[493] 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.").

[494] *See supra* part II.

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

[496] American Radio League v. FCC, 524 F.3d 237, 243 (D.C. Cir. 2008) (Tatel, J., concurring).

[497] Wagner, *supra* note 25, at 1617 (describing circumstances in which agencies "camouflage[e] controversial policy decisions as science").

[498] *State Farm*, 463 U.S. at 43. As Wendy Wagner argues, it may also be that the system needs further reforms in order to isolate scientific and policy judgments, *supra* note 25 at 1709-19, and other reforms may be needed to reveal OIRA and the executive branch's involvement in revisions of agencies' technical findings. Mendelson, *supra* note 483. While these analyses reveal that expert analysis may not be perfect, on the balance it remains superior to politically-oriented reforms which 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).

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 the political control model can achieve its ultimate goal of holding the President electorally accountable for an agency's policy choices.[499]

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."[500] It checks the "tyranny of the majority," encourages agencies to include minority interests in the weighing of competing viewpoints, and promotes "reach[ing] the best decisions on the merits in light of the available information."[501] Only grounds that "could reasonably be accepted by free and equal citizens with fundamentally competing perspectives" will satisfy the "reasoned explanation" requirement.[502]

Basic tenets of deliberative democracy align with *State Farm*'s requirement of expert analysis. *State Farm* requires agencies to consider all "important aspects" 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."[503] Notions of deliberative democracy also align with Justice Kennedy's concurrence in *Fox*, which called for agency decisions that are "explained in light of available data," "informed by the agency's experience and expertise," and "can be justified by neutral principles and a reasoned explanation."[504] The approach taken in Justice Rehnquist's *State Farm* dissent, on the other hand, eviscerates these deliberative standards and gives expert analysis second seat to executive preferences.

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."[505] Instead, it simply "prohibit[s]

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[499] Of course, electoral accountability is itself imperfect. 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).
[500] *Id.* at 864, 857; *see also* Short, *supra* note 10, at 1816 (arguing that Watts' approach will undermine incentives to make reason-based decisions using expert staff).
[501] *Id.* at 858.
[502] *Id.* at 857.
[503] *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").
[504] *Fox*, 556 U.S. at 537.
[505] Seidenfeld, *supra* note 10, at 151.

decisions that cannot be justified by anything other than raw politics." [506] 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.[507] 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."[508] 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 both enhance political accountability and serve a broader purpose.[509] In addition to informing voters, 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 responses to the 2007-08 financial crisis[510] are but one example of the many significant but informal actions that agencies can implement without notice and comment rulemaking or more formal procedures.[511] Indeed, the APA even specifies certain circumstances in which agencies may make *binding rules* without deliberation or notice and comment procedures. For example, under section 553(b),[512] an agency many publish a binding policy decision without deliberation if it has and cites record evidence of "good cause" for immediate action. This exception calls for streamlined expert judgments – consideration of record facts and a rough cost-benefit analysis of whether immediate public safety or other emergency circumstances outweigh need for more thorough deliberation.[513]

The good cause exception allows agencies to impose rules summarily, but it cannot be used to circumvent expert analysis for raw politics. The Trump Administration's attempts to stretch the good cause exception to accommodate immediate political change and "regulated industry"

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[506] *Id*.
[507] Kagan, *supra* note 6.
[508] *Id*. at 197.
[509] Bressman, *supra* note 26, at 503 (noting transparency's traditional role as the "handmaiden of majoritarianism.")
[510] Chairman Benjamin Bernanke, *The Crisis and the Policy Response* (Jan. 13, 2009), https://www.federalreserve.gov/newsevents/speech/bernanke20090113a.htm.
[511] *See* discussion *supra* notes 330-32.
[512] 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.")
[513] Heinzerling, supra note 59, 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 costs of further deliberation. *See* Jacob Gersen & Adrian Vermeule, *Thin Rationality Review*, 114 MICH. L. REV. 1355, 1386 (2016); *id.* at 1361 ("[T]here is nothing in *State Farm* itself that is incompatible with our approach."). Cases such as *Business Roundtable*, in which the D.C. Circuit arguably expanded agencies reasoned decision-making obligation, are beyond the scope of this paper.

interests have been rejected as "inconsistent with legal precedent on the nature of 'good cause.'"[514] Expert decision-making and the consideration of record evidence are still needed to provide a check on arbitrary regulatory change, even though exigent circumstances preclude more lengthy deliberation. Expertise adds legitimacy to decisions made without public or 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 Neil Gorsuch, have called for greater limits on the ability of agencies to change policies based on "bureaucratic whim."[515] 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.[516] But their analysis does not impose similar rule of law constraints on policy decisions that are left open by statute and involve "prescriptive" reasoning based on economic or other expert analysis." [517]

As William Buzbee has recently pointed out, however, it is "exceedingly rare" that statutory "language requires one particular policy action."[518] 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."[519] 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.[520] The Court's reasoned decision-making requirements have a stabilizing effect on policy and provide "a brake on erratic or unexplained sudden change . . ."[521]

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 change. Critically, this consistency

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[514] *NRDC*, 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); *id.* ("That a regulated entity might prefer" regulations that are "less costly to comply with does not justify dispensing with notice and comment."); Heinzerling, *supra* note 26, at 34-42 (discussing Trump Administration's meritless attempts to invoke the good cause exception based on "nonsensical" arguments).

[515] Buzbee, *supra* note 10, at 1368-69 (discussing Gorsuch's "regulatory whim" theory).

[516] Kozel & Pojanowski, supra note 9.

[517] *Id.* at 160 (siding with Rehnquist's partial dissent: "the agency was within its rights to reverse itself" on detachable seatbelts).

[518] Buzbee, *supra* note 10, at 1363.

[519] *Id.* at 1398.

[520] *Id.* at 1401.

[521] *Id.* at 1403. Buzbee also notes that agencies have strong incentives to comply with these requirements initially so that they are not later reversed on appeal. *Id.* at 1407.

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 power to "substantially revise the many rules" it began to reconsider in 2017-18.[522] 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."[523]

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 Clean Power Plan, for example, did not call for more thorough analysis of these major policy changes. [524] The EPA expanded its analysis only after courts rejected many of the Administration's early attempts to impose immediate change by fiat.[525] As a result, the EPA did not begin more earnest analytical efforts until over a year into the Trump's first term and amidst churning leadership at both the agency and 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 must generally analyze contrary evidence supporting decisions made by past administrations, but here, such evidence would not exist.[526]

VII. 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 dissent in *State Farm*, [527] as well as 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

[522] *Id.* at 1425.
[523] *Id.* at 1426.
[524] *Id.* at (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).
[525] *Id.*
[526] *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).
[527] *See supra* note 77 (discussing proposed rules which cite Rehnquist's dissent in *State Farm*).

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. *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 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 today's appointees. Expert analysis may also add legitimacy to expedited agency decisions that are appropriately conducted outside of a public notice and comment rulemaking process.[528]

Lower courts have unquestioningly applied *State Farm*'s reasoned decision-making test to check the Trump administration's impulsive and insufficiently reasoned changes in policy.[529] None of these early decisions have suggested that the law should change to grant the administration more latitude to change policies for political reasons. 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.[530] These initial judicial decisions also reinforce the value of reasoned, expert analysis on fundamental questions of national policy and within a politically directed framework. Presidential administrations may come and go, but their regulatory legacies will ultimately depend on the 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 based that appear to be based on little more than bureaucratic or personal "whim."[531] 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 expert and legal limits within which agencies have been thought to operate.[532] Instead, Justices concerned with cost of executive

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[528] *See supra* notes 505-508 *and* accompanying text.
[529] *See supra* Part II.
[530] Buzbee, *supra* note 10, at 1385, 1422.
[531] The concern over "whimsical" decision-making has been noted by Justices Breyer and Gorsuch alike. *See supra* notes 448 and 510.
[532] 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. 11, 2018. 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 role of an independent federal judiciary." Tony Mauro, *Trump Portrays Supreme Court as Key Player in DACA, Border Wall Fights*, THE NATIONAL LAW JOURNAL (Jan. 3, 2019), https://www.law.com/nationallawjournal/2019/01/03/trump-portrays-supreme-court-as-key-player-in-daca-border-wall-fights/?slreturn=20190112120134.

self-indulgence to our constitutional order may find comfort in the existing, reasoned decision-making requirements of Justice White's majority opinion in *State Farm*.