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UNFOXING JUDICIAL REVIEW OF AGENCY POLICY REVERSALS OR “WE WERE TOLD TO LIKE THE NEW POLICY BETTER” IS NOT A GOOD REASON TO CHANGE

Richard W. Murphy *

“Where does, and why would, the APA grant agencies the freedom to change major policies on the basis of nothing more than political considerations or even personal whim?”¹

INTRODUCTION

The Trump administration has been conducting a scorched-earth campaign to reverse the regulatory handiwork of the Obama administration.² This spectacular change in direction did not occur because federal agencies suddenly gained new information and expertise on the day of President Trump’s inauguration. Instead, the driving motivation has been political and ideological—e.g., to put it mildly, the current administration strikes a different balance between business and environmental/health concerns than its predecessor.³ In one obvious sense, this change in administrative direction is nothing new—the Obama administration reversed Bush

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1. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 552 (2009) (Breyer, J., dissenting).

2. See, e.g., Eric Lipton, Steve Eder & John Branch, *President Trump’s Retreat on the Environment Is Affecting Communities Across America*, N.Y. TIMES (Dec. 27, 2018), <https://www.nytimes.com/interactive/2018/12/26/us/politics/donald-trump-environmental-regulation.html> (characterizing the Trump administration as “unleash[ing] a regulatory rollback . . . with little parallel in the past half-century”) [<https://perma.cc/T9J8-CN4W>]; see also Michael Greshko, Laura Parker, Brian Clark Howard, Daniel Stone, Alejandra Borunda & Sarah Gibbens, *A Running List of How President Trump Is Changing Environmental Policy*, NAT’L GEOGRAPHIC (May 3, 2019), <https://www.nationalgeographic.com/news/2017/03/how-trump-is-changing-science-environment/> (maintaining a timeline of Trump administration environmental policy changes) [<https://perma.cc/KZ22-5ZXQ>].

3. See generally Lipton et al., *supra* note 2.

administration policies, and the Bush administration reversed Clinton administration policies, etc. That said, the scope and intensity of the Trump administration's efforts to roll back the Obama years—combined with what might reasonably be called a general assault by political forces on expert administration⁴—provides a natural occasion to reflect on how administrative law ensures the legality and rationality of agency policy reversals with political motivations.

4. Across a substantial grey zone, determining what constitutes an “assault” by political forces on expertise is a matter of judgment about which reasonable people might disagree. That said, some reporting suggests that the term may be appropriate. See, e.g., CTR. FOR SCI. & DEMOCRACY AT THE UNION OF CONCERNED SCIENTISTS, SCIENCE UNDER TRUMP: VOICES OF SCIENTISTS ACROSS 16 FEDERAL AGENCIES 2 (Aug. 2018), <https://www.ucsusa.org/sites/default/files/imagess/2018/08/science-under-trump-report.pdf> (reporting results of a survey of 63,000 scientific experts employed by the federal government and finding “widespread political interference in the science policy process,” a “hollowing out” of the federal scientific workforce, low morale, and censorship) [<https://perma.cc/Y4C8-P9WH>]; Editorial, *Researchers Must Unite Against US Environment Agency's Attack on Scientific Evidence*, NATURE (Nov. 20, 2019), <https://www.nature.com/articles/d41586-019-03526-z> (decrying the EPA proposal to refuse to consider scientific studies for environmental regulations unless scientists supply raw data that often includes confidential information) [<https://perma.cc/25PL-LXZ7>]; Niina H. Farah, Kevin Bogardus & Michael Doyle, *Trump Order Targets Advisory Committees*, E&E NEWS (June 17, 2019), <https://www.eenews.net/stories/1060612379> (reporting that “[m]ore than half of EPA's science advisory committees could be vulnerable to repeal by the end of the fiscal year” under a recently issued Trump executive order and noting that EPA advisory committees have already been substantially changed by Administrator Pruitt's decision to preclude membership for scientists with EPA grants) [<https://perma.cc/3SDV-X45B>]; Ben Guarino, *USDA Science Agencies' Relocation May Have Violated Law*, *Inspector General Report Says*, WASH. POST (Aug. 6, 2019, 12:30 PM EDT), <https://www.washingtonpost.com/science/2019/08/05/usda-science-agencies-relocation-may-have-violated-law-inspector-general-report-says/> (reporting that the White House Chief of Staff praised the sudden relocation of agencies “for encouraging federal scientists to quit their jobs”) [<https://perma.cc/94WG-N2JA>]; Brad Plumer & Coral Davenport, *Science Under Attack: How Trump Is Sidelining Researchers and Their Work*, N.Y. TIMES (Dec. 28, 2019), <https://www.nytimes.com/2019/12/28/climate/trump-administration-war-on-science.html> (reporting on manipulation and disregarding of scientific studies, elimination of research projects, censorship of scientists, manipulation of membership on scientific advisory boards, and hollowing out of scientific workforce) [<https://perma.cc/LJ8K-2QX4>]; Stuart Shapiro, *The White House Is Upending Decades of Protocol for Policy-Making*, CONVERSATION (Aug. 2, 2019, 8:22 AM EDT), <http://theconversation.com/the-white-house-is-upending-decades-of-protocol-for-policy-making-120392> (“[T]he public record shows that Trump's team has either ignored, manipulated or subverted the requirements for analysis and participation on numerous policy actions that range from addressing climate change to the division of waiters' tips.”) [<https://perma.cc/LZ6H-NG9L>]; Ben Terris, *Experts Agree: Trump Has Made Washington Hostile to Experts*, WASH. POST (Mar. 28, 2018, 7:00 AM EDT), https://www.washingtonpost.com/lifestyle/style/experts-agree-trump-has-made-washington-hostile-to-experts/2018/03/27/1cb60912-3138-11e8-8abc-22a366b72f2d_story.html (“Experts are worried . . . about a version of dystopia that is already becoming real to them: a world where no one listens to what they have to say.”) [<https://perma.cc/MND3-SRH7>].

For the last ten years, the leading Supreme Court authority on this point has been *FCC v. Fox Television Stations, Inc.*⁵ In *Fox*, all nine Justices agreed that the *State Farm* standard for arbitrariness review, which requires an agency to give a reasoned and contemporaneous justification for its policy choices,⁶ applies with its usual strength to policy reversals.⁷ Justice Scalia, writing for a five-Justice majority, further explained that an agency, to give an adequate justification for a policy change, must give “good reasons” for it—i.e., demonstrate that the new policy falls within a zone of reasonable responses to the agency’s underlying factual and legal analysis.⁸ The agency need not, however, explain what, if anything, was wrong with the old policy that warranted its replacement.⁹ In effect, this gloss on arbitrariness review allows an agency to change policies within a discretionary zone just because the agency *likes* a new policy better.¹⁰ As Justice Scalia saw the matter, agencies should be able to make such policy shifts to please their newest political masters as this practice furthers political accountability and democratic values.¹¹ For ease of reference, let us call this authority to shift among reasonable policies based solely on new political preferences the “*Fox* power.”

5. 556 U.S. 502 (2009) (upholding the FCC’s decision to abandon its fleeting expletives policy against a challenge that it was arbitrary). In later litigation, the Court held that retroactive application of the Commission’s new policy allowing it to sanction fleeting expletives violated the due process rights of the complaining networks as the Commission had not provided adequate notice of the change. *FCC v. Fox Television Stations, Inc. (Fox II)*, 567 U.S. 239, 257–58 (2012).

6. See *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (providing the Court’s canonical statement of the standard for arbitrariness review of agency policy decisions for reasoned decisionmaking).

7. See *Fox*, 556 U.S. at 514–16 (holding that *State Farm* principles apply to review of agency policy changes for arbitrariness); *id.* at 548–50 (Breyer, J., dissenting) (same). All nine Justices also agreed that, to provide a reasoned explanation for a policy reversal, an agency must (a) acknowledge the fact that it is changing course; (b) give due consideration to reliance interests generated by the old policy; and (c) if the agency is changing course because of a new understanding of the relevant facts, explain this new understanding. *Id.* at 515 (majority opinion); *id.* at 549–51 (Breyer, J., dissenting).

8. *Id.* at 514–15 (majority opinion).

9. *Id.* at 515.

10. See *id.* (explaining that, for an agency explanation of a policy reversal to survive arbitrariness review, “it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better”).

11. See *id.* at 524–25 (plurality opinion) (explaining that, assuming the FCC is an “agent” of Congress, pressure by an oversight committee provided an “adequate explanation” for the FCC to abandon its fleeting expletives policy).

Justice Scalia's assertion of the *Fox* power prompted a sharp rejoinder from Justice Breyer, who, rather remarkably, seems to have written for five Justices, too.¹² For Justice Breyer, merely demonstrating that new policy *Y* falls within a zone of reasonable policy discretion is not enough to justify abandoning old policy *X*, which, absent an explanation to the contrary, should also be regarded as reasonable given that the agency at one time decided to adopt it.¹³ Relying on the rationale, "our newest political bosses have told us to prefer new policy *Y*," to fill this explanatory gap would defy the fundamental principle of administrative law that bars administrators from taking action based purely on personal preferences.¹⁴ It follows that, to justify the shift, the agency must provide some sort of information or analysis that disqualifies old policy *X*. Or, put another way, the agency must invoke its expertise to answer the query, "Why did you change?" in a way that goes beyond mere political preferences.¹⁵

Later cases have resolved *Fox*'s rare (and generally unnoticed) 5-5 split by treating Justice Scalia's framework as controlling.¹⁶

12. Justice Kennedy complicated the count by both joining Justice Scalia's majority opinion and authoring a solo concurrence in which he declared that he agreed with Justice Breyer that an agency, to justify a policy reversal, "must explain why 'it now reject[s] the considerations that led it to adopt that initial policy.'" *Id.* at 535 (Kennedy, J., concurring in part and concurring in the judgment) (quoting *id.* at 550 (Breyer, J., dissenting)); cf. Randy J. Kozel & Jeffrey A. Pojanowski, *Administrative Change*, 59 UCLA L. REV. 112, 129–32 (2011) (noting the interpretive difficulties presented by Justice Kennedy's concurrence and characterizing it as striking a middle road between the Scalia and Breyer opinions); Ronald M. Levin, *Hard Look Review, Policy Change, and Fox Television*, 65 U. MIAMI L. REV. 555, 565–66 (2011) (parsing Justice Kennedy's concurrence as indicating that an "agency has less need to make a direct comparison between the old and new policy" where the change is based on a value judgment).

13. *Fox*, 556 U.S. at 550 (Breyer, J., dissenting) (explaining that the existence of an earlier policy indicates that, at one time, the agency made an informed judgment that this policy represented the best means for carrying out the agency's statutory mission).

14. *Id.* at 548 (observing that the "venerable legal tradition" of requiring that agency decisionmaking be "based upon more than the personal preferences of the decisionmakers" extends "back at least to the days of Sir Edward Coke and the draining of the English fens" (citing *Rooke's Case* (1598) 77 Eng. Rep. 209, 210; 5 Co. Rep. 99b, 100b (observing that sewer commissioners were "limited and bound with the rule of reason and law . . . and [cannot act] according to their wills and private affections"))).

15. *Id.* at 567. It bears noting that, at one point in his dissent, Justice Breyer did indicate that a value judgment can suffice to answer his "Why change?" query. *Id.* at 550. Later in the opinion, he qualified this hedge, expressly insisting that the rationale "We like the new policy better" cannot justify "a major change of an important policy where much more might be said." *Id.* at 567.

16. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125–26 (2016) (reiterating Justice Scalia's *Fox* framework); see also *id.* at 2128 (Ginsburg, J., concurring) (specifically invoking Justice Scalia's stance in *Fox* that an agency need not explain why it prefers a new

This outcome is unfortunate given that his premise that it enhances democracy to allow agencies to make policy changes based solely on new political preferences rests on a wholly implausible account of the nature of political accountability in a mass democracy and its significance for administrative policymaking.¹⁷ By authorizing policy changes that neither further democratic values nor technical expertise, the *Fox* power sends the message that, at least within a limited domain, the “law” is whatever an agency wants it to be just because that is what the agency wants. In the absence of any good reason to allow agencies to exercise this sort of arbitrary political discretion, it should be regarded as illegal and illegitimate.¹⁸

An additional reason to abandon the *Fox* power relates to balancing the roles of politics and expertise in agencies. The right way to strike this balance is not, of course, self-evident, but one need not be an enthusiastic fan of the “deep state” to think that now might be a good time for administrative law to nudge this balance towards the experts.¹⁹

Part I of this Article provides context for the debate over the *Fox* power by tracing the evolution of leading efforts over the last century to legitimize agency policymaking and close the “democracy deficit” that it purportedly creates. Part I focuses in particular on the courts’ development of arbitrariness review as a means of controlling agency policymaking,²⁰ and it also pays particular attention to the “presidentialist” model that White House control of agency policymaking democratizes and legitimizes it.²¹ Part II

policy to an old one). *But see* William W. Buzbee, *The Tethered President: Consistency and Contingency in Administrative Law*, 98 B.U. L. REV. 1357, 1360 (2018) (providing detailed analysis of the hurdles that impede agency policy change and concluding that “[c]hanges cannot be unjustified, purely political, or unacknowledged”).

17. *See infra* section III.A (making the case that the political accountability justification for the *Fox* power rests on a potent but false “folk theory” of democracy).

18. *Cf. Fox*, 556 U.S. at 552 (querying why Congress would allow agencies to govern by “whim”).

19. *See supra* note 4 (collecting examples of what might be called attacks on expertise).

20. *See infra* sections I.C–D (discussing the evolution of judicial review of agency policy decisions for arbitrariness).

21. *See infra* section I.E (discussing the political control and presidentialist models for controlling agency policymaking). For a leading discussion of the presidentialist model, see especially Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001). *See also, e.g.*, Peter L. Strauss, *Legislation That Isn’t—Attending to Rulemaking’s “Democracy Deficit.”* 98 CALIF. L. REV. 1351, 1360 (2010) (characterizing those favoring strong presidential control over agency rulemaking authority as believing “that the President’s election

takes a close look at the *Fox* litigation itself. This discussion reveals that Justice Scalia's *Fox* power, like presidentialism, presupposes that extra-statutory political influences wielded by elected officials and their proxies can legitimize agency policy changes. Part III criticizes this framework for resting on an unrealistic understanding of democratic governance and electoral accountability, and it explains why Justice Breyer was right to insist that agencies should give (expert) answers to his "Why change?" query.

I. THE DEMOCRACY DEFICIT AND EFFORTS TO DISSOLVE IT

Administrative policymaking requires agencies to make values-based trade-offs among costs and benefits of alternative courses of action that are inherently political.²² Allowing agencies to promulgate binding policies is thus in tension with our political system's premise that the task of turning value judgments into binding law lies with Congress.²³ At the level of constitutional doctrine, the Supreme Court has finessed this problem by developing the Nondelegation Doctrine, which bars Congress from delegating its legislative power in theory but not in practice.²⁴ This constitutional evasion has not, however, eliminated a lingering perception in

cures any 'democracy deficit'"); Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 35–37 (2009) (discussing evolution of "political control" model for legitimating administrative policymaking, both in its "presidential" and "congressional" styles).

22. See, e.g., *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2573 (2019) (observing and accepting that agency policymaking is "routinely informed by unstated considerations of politics, the legislative process, public relations, interest group relations, foreign relations, and national security concerns (among others)"); *Sierra Club v. Costle*, 657 F.2d 298, 408 (D.C. Cir. 1981) (explaining that informal rulemaking should not be regarded as "a rarified technocratic process, unaffected by political considerations or the presence of Presidential power"); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1684 (1975) (observing that the task of implementing "the often nebulous or conflicting policies" underlying legislative directives to agencies "is an inherently discretionary, ultimately political procedure"); Strauss, *supra* note 21, at 1359 (noting that, since the New Deal, "any thought of rationalizing administration as simply the exercise of expertise—as if the necessary judgments could be reached by calculation and without the intrusion of values—has vanished").

23. U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.").

24. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472–74 (2001) (explaining that Congress does not violate the Nondelegation Doctrine by granting discretionary authority to an agency so long as Congress limits this discretion with an "intelligible principle," and identifying a series of precedents in which extremely broad delegations of authority survived application of this principle).

some quarters that policymaking by unelected agency officials is democratically illegitimate.²⁵

After offering a quick account of the Nondelegation Doctrine, this Part examines various strategies that courts and commentators have developed at the level of administrative law to cope with this perceived “democracy deficit.” Two strategies that were prominent during the first half of the twentieth century sought to narrow this deficit by minimizing the role of agency value judgments in administrative governance.²⁶ Over time, the scope of agency discretion made this type of defense impossible to sustain. Partially in response to this difficulty, later strategies, notably including the “political control” and “presidentialist” models, have tried to legitimize agency discretion by “democratizing” it in various ways.²⁷ As will be discussed in Part II, Justice Scalia’s *Fox* power can be best understood as an expression of these political control and presidentialist models.²⁸

A. *The Nondelegation Doctrine Opens a “Democracy Deficit”*

Federal agencies, as creatures of statute, possess only those powers that Congress, our fundamental democratic institution, grants them. One might suppose that the fact that Congress has, in its political wisdom, chosen to create and empower an agency lends it all the democratic legitimacy that it might need to exercise delegated policymaking powers.²⁹ This view, however, runs afoul of the

25. See *Gundy v. United States*, 139 S. Ct. 2116, 2133–34 (2019) (Gorsuch, J., dissenting) (explaining that permitting the executive branch “to adopt generally applicable rules of conduct governing future actions by private persons” (i.e., to legislate) makes the Vesting Clauses of the Constitution meaningless, encourages excessive lawmaking, eliminates democratic deliberation, threatens minority interests, and undermines political accountability).

26. See *infra* section I.B (discussing the transmission belt and expertise models).

27. See *infra* sections I.C–E (discussing democratization strategies in several flavors).

28. See *infra* section II.D (discussing Justice Scalia’s *Fox* opinion).

29. See, e.g., Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345, 377 (2019) (contending that concerns over the democratic legitimacy of agencies are misplaced given that “[a]gencies are themselves the products of a democratic process, one in which Congress and the president have jointly resolved that delegating to an agency is the best way to serve the public interest”); Adrian Vermeule, *What Legitimacy Crisis?*, CATO UNBOUND (May 9, 2016), <https://www.cato-unbound.org/2016/05/09/adrian-vermeule/what-legitimacy-crisis> (observing that “any argument for Congress’s special capacities [as a legislator] is an argument that it should be entrusted with the power to delegate” authority to agencies) [<https://perma.cc/7LRW-STEC>]. There are two notable academic arguments for abandoning the Nondelegation Doctrine. See Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1723–24 (2002) (contending that, when agencies

Supreme Court's reading of Article I, Section 1, which provides "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States."³⁰ On its face, this Vesting Clause does not bar Congress from delegating legislative authority to other entities. But John Locke, a favorite philosopher of the Framers and various Supreme Court Justices, would not have approved of such a move. Writing over three hundred years ago, he insisted that the legislative power, which is "derived from the people by a positive voluntary grant and institution," includes only the power "to make laws, and not to make legislators."³¹ Consistent with this Lockean bar, the Supreme Court has held many times that the Nondelegation Doctrine forbids congressional delegations of legislative authority.³²

No modern, effective government can, however, function reasonably while barring delegations of policymaking power in any strong sense. For instance, Congress, in anything like its current structure, lacks the time, expertise, or incentives to make optimal determinations regarding what levels of particulate matter should be permissible in the ambient air.³³ Accordingly, Congress has delegated authority to promulgate national ambient air quality standards ("NAAQS") governing particulate matter to the Environmental Protection Agency with its scientists, engineers, managers, and lawyers.³⁴

For about a century, the Supreme Court has resolved the tension between constitutional formalism and practical necessity by frequently holding that Congress can, consistent with the Nondelega-

exercise delegated power, it is necessarily executive in nature); Kathryn A. Watts, *Rulemaking as Legislating*, 103 GEO. L.J. 1003, 1019 (2015) (arguing in favor of a "Candid Approach" that abandons the Nondelegation Doctrine as dishonest).

30. U.S. CONST. art. I, § 1.

31. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 87 (Richard Howard Cox ed., Harlan Davidson 1982) (1690).

32. *E.g.*, *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001) (noting that the constitutional text granting legislative authority to Congress, Article I, Section 1, "permits no delegation of those powers").

33. *Cf.* Strauss, *supra* note 21, at 1354 (observing, trenchantly, that "in general, we would not think that assessing precisely what levels of arsenic make drinking water acceptably safe is appropriate for determination as a matter of political will" (footnote omitted)).

34. *See* 42 U.S.C. § 7409(b) (instructing the EPA to set national ambient air quality standards that are "requisite to protect the public health" with "an adequate margin of safety"); *Whitman*, 531 U.S. at 472-76 (upholding NAAQS governing particulate matter against a nondelegation challenge).

tion Doctrine, grant discretion to an agency to create binding policies so long as the terms of the delegation impose an “intelligible principle” that limits the agency’s discretion.³⁵ The Supreme Court has rejected a delegation of policymaking authority to an agency for failure to include an “intelligible principle” on just two occasions, both in 1935.³⁶ Since that time, the Court has affirmed extremely broad delegations that, *inter alia*, authorize agencies to allocate public broadcasting licenses in the “public interest,”³⁷ to require “fair and equitable” prices during wartime,³⁸ and to set air pollution standards “‘requisite to protect the public health’ with ‘an adequate margin of safety.’”³⁹

This longstanding legal equilibrium looks newly vulnerable given 2019’s *Gundy v. United States*, in which Justice Gorsuch, joined by the Chief Justice and Justice Thomas, penned a dissent that characterized the ninety-one-year-old “intelligible principle” doctrine as a “misadventure” and proposed tighter constitutional controls on agency policymaking.⁴⁰ For the moment, however, the bottom line remains that the Nondelegation Doctrine permits Congress to grant vast swaths of policymaking authority to unelected agency officials, and this longstanding practice has, to many

35. *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928) (“If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power.”).

36. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 535, 537 (1935) (striking delegation of authority to the President to approve binding codes of “fair competition” devised by trade or industrial groups); *Pan. Ref. Co. v. Ryan*, 293 U.S. 388, 418, 430 (1935) (striking delegation of authority to the President to bar interstate transportation of “hot oil” produced in excess of state limits); *cf.* Edward L. Rubin, *Law and Legislation in the Administrative State*, 89 COLUM. L. REV. 369, 388 n.63 (1989) (explaining that, in *Schechter*, “the Court may really have been holding that Congress could not enact the economic policies of Mussolini. That is probably an excellent principle, but it hardly serves as a general theory of legislation”).

37. *Nat’l Broad. Co. v. United States*, 319 U.S. 190, 225–26 (1943) (upholding delegation of authority to the Federal Communications Commission to allocate broadcast licenses).

38. *Yakus v. United States*, 321 U.S. 414, 420, 423–26 (1944) (approving wartime price controls).

39. *Whitman*, 531 U.S. at 465, 472–76 (quoting 42 U.S.C. § 7409(b)(1) (2000)) (upholding authority of the Environmental Protection Agency to establish national ambient air quality standards).

40. 139 S. Ct. 2116, 2141 (2019) (Gorsuch, J., dissenting); *see also id.* at 2130–31 (Alito, J., concurring in the judgment) (expressing sympathy for the view that the “intelligible principle” doctrine should be reexamined, but declining to use *Gundy* as a vehicle for doing so); *Dept’t of Transp. v. Ass’n of Am. R.R.s*, 575 U.S. 43, 70 (2015) (Thomas, J., concurring in the judgment) (insisting that agencies cannot constitutionally exercise the legislative power to create “generally applicable rules of private conduct”).

minds, opened a yawning “democracy deficit” that demands justification.

B. Minimizing the Democracy Deficit with Transmission Belts and Experts

Around the turn of the nineteenth to twentieth centuries, proponents of administrative power sometimes defended it from charges of democratic illegitimacy by minimizing the scope of agency discretionary judgments. Along these lines, in his seminal article, *The Reformation of American Administrative Law*, Professor Stewart explained that “[t]he traditional model of administrative law . . . conceives of the agency as a mere transmission belt for implementing legislative directives in particular cases.”⁴¹ Under this transmission-belt model, the exercise of agency authority by unelected bureaucrats is not problematic insofar as these officials merely perform the ministerial function of following legislative orders.⁴²

However persuasive the transmission-belt model might have been in the earliest days of the modern administrative state, it could not survive the New Deal’s creation of a vast array of agencies with obvious and vast discretionary power.⁴³ It is, for instance, difficult to say with a straight face that the Federal Communications Commission (“FCC” or the “Commission”) is merely carrying out congressional instructions with value-free judgments when it doles out licenses to the airwaves in the “public interest.”⁴⁴ In response, defenders of agency authority fell back on the notion that technocratic expertise cabins agency discretion to implement

41. Stewart, *supra* note 22, at 1675 (citing, *inter alia*, A.A. Berle, Jr., *The Expansion of American Administrative Law*, 30 HARV. L. REV. 430, 431 (1917)); see also Berle, Jr., *supra*, at 434 (“The administrative machinery—the whole government, under this view—is not unlike the machinery which is used in mechanics to transmit power, from its motor source, to the point where it is brought into contact with the raw material requiring its application.”).

42. Stewart, *supra* note 22, at 1673–74 (“The requirement that agencies conform to specific legislative directives . . . legitimates administrative action by reference to higher authority.”).

43. Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 471 (2003) (“The transmission belt model, however adequate in theory, was inadequate in practice. It simply did not describe the government we had after about 1930.”).

44. See 47 U.S.C. § 303 (granting to the FCC various powers to regulate broadcasts as “public convenience, interest, or necessity requires”); cf. *Nat’l Broad. Co. v. United States*, 319 U.S. 190, 225–26 (1943) (upholding delegation to the FCC to act in the “public interest” against a nondelegation challenge).

broad, vague statutory grants of authority.⁴⁵ In Professor Seidenfeld's nice description, this "model posits that agency decisions are not political because if everyone had the same knowledge and experience as the agency, all would agree that the agency's solution was best for the public interest."⁴⁶ Thus, Congress sets statutory goals, and then agencies, run by apolitical technocrats, use their expertise to figure out how to achieve these goals in a value-neutral way.

Over time, the defense of administration as merely an exercise in apolitical expertise, which always had its critics,⁴⁷ fell out of favor—in part, no doubt, because it is as obviously wrong as the transmission-belt story. Factual expertise, by itself, is never enough to determine a discretionary policy choice, which requires an agency to decide *what to do* in light of the facts it has found. This exercise of discretion requires an agency to choose among alternative courses of action, each with its own expected consequences. This choice among consequences requires trade-offs among various good and ill effects, and these trade-offs require value judgments.⁴⁸

C. "Democratizing" with Interest Representation

The 1960s and 1970s marked explosive growth in agency rule-making authority as Congress empowered new agencies such as the Environmental Protection Agency ("EPA"), the Occupational Safety and Health Administration, and the Consumer Product

45. See JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 98–99 (1938) (contending that "professionalism of spirit" among expert administrators ensures "informed and balanced judgments"); see also Reuel E. Schiller, *The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law*, 106 MICH. L. REV. 399, 417 (2007) (stressing the prevalence within the Roosevelt administration of the belief in "an objectively correct solution to the country's problems" that could be identified by neutral expertise).

46. Mark Seidenfeld, *A Syncopated Chevron: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV. 83, 90–92 (1994).

47. Stewart, *supra* note 22, at 1678–79 ("[M]any lawyers remained unpersuaded, and attacked the delegation of broad discretion to administrators as violative of the principles of separation of powers and formal justice which the traditional model was designed to serve.").

48. See Strauss, *supra* note 21, at 1359 ("[A]ny thought of rationalizing administration as *simply* the exercise of expertise—as if the necessary judgments could be reached by calculation and without the intrusion of values—has vanished.").

Safety Commission, among others.⁴⁹ During roughly this same period, a new model for legitimating agency rulemaking evolved that, rather than try to hide or minimize agency discretion, instead sought to improve its democratic bona fides. The thrust of the “interest representation” model was to ensure that all interested parties have a proper chance to participate in the rulemaking process—thus both “democratizing” this process (after a fashion) and improving it as a means for agencies and courts to obtain relevant information.⁵⁰

This transformation built on the notice-and-comment process for legislative rulemaking that Congress enacted in 1946 in the Administrative Procedure Act (“APA”).⁵¹ The actual language of the APA suggests that this process was supposed to function as a simple, efficient means of gathering relevant information from interested persons.⁵² A couple of decades later, the courts, motivated at least in part by concerns that regulated parties had “captured” the agencies that were supposed to regulate them,⁵³ interpreted the APA’s sparse requirements for notice-and-comment rulemaking with extreme aggression to enable greater and more meaningful public participation.⁵⁴ For instance, notwithstanding the plain text of the APA’s minimal notice requirements, an agency must, as part of the rulemaking process, expose all significant scientific and technical information on which it has relied to develop a proposed

49. See Sidney A. Shapiro & Rena Steinzor, *Capture, Accountability, and Regulatory Metrics*, 86 TEX. L. REV. 1741, 1741 (2008) (describing expansion in the regulatory state that followed in the aftermath of the Civil Rights Movement and Vietnam War).

50. See generally Stewart, *supra* note 22, at 1711–60 (providing the leading account and an early critique of the courts’ “reformation” of administrative law along the lines of the interest representation model). For earlier commentary on special interest representation as a means to democratize the rulemaking process, see Frederick M. Watkins, *Administrative Regulation: A Study in Representation of Interests*, 56 HARV. L. REV. 150, 151 (1942) (book review).

51. See Administrative Procedure Act, Pub. L. No. 79-404, § 4, 60 Stat. 237, 238–39 (1946) (codified as amended at 5 U.S.C. § 553) (setting forth the APA’s default requirements for legislative rulemaking).

52. *Id.*

53. See, e.g., Thomas W. Merrill, *Capture Theory and the Courts: 1967–1983*, 72 CHI.-KENT L. REV. 1039, 1065 (1997) (discussing the influence of capture theory at the D.C. Circuit).

54. See, e.g., Jack M. Beerbaum & Gary Lawson, *Reprocessing Vermont Yankee*, 75 GEO. WASH. L. REV. 856, 864 (2007) (describing the D.C. Circuit’s reshaping of notice-and-comment rulemaking).

rule.⁵⁵ Also, courts have construed the APA's requirement of a "concise general statement of . . . basis and purpose" as requiring agencies to give exhaustive, specific explanations for their final rules that respond to all significant comments submitted by the public.⁵⁶

These reforms had intellectual roots in a pluralistic vision that regards democracy as a means for moderating a struggle among interest groups for resources.⁵⁷ On this view, if rulemaking provides an adequate vehicle for all interested persons to participate, it can provide a legitimate "democratic" substitute for legislation.⁵⁸

D. Democratizing (Deliberatively) with Hard Looks

During the same general period that courts were tightening the procedural requirements of rulemaking well beyond what the text of the APA might suggest, they were also toughening their scrutiny of significant agency policy decisions for arbitrariness, adopting what came to be called "hard look" review.⁵⁹ Under the old model

55. See *United States v. N.S. Food Prods. Corp.*, 568 F.2d 240, 251 (2d Cir. 1977); *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 394 (D.C. Cir. 1973).

56. 5 U.S.C. § 553; see, e.g., *Lilliputian Sys., Inc. v. Pipeline & Hazardous Materials Safety Admin.*, 741 F.3d 1309, 1312 (D.C. Cir. 2014) (explaining an agency must "respond to 'relevant' and 'significant' public comments" (quoting *Pub. Citizen, Inc. v. FAA*, 988 F.2d 186, 197 (D.C. Cir. 1993))).

57. See Stewart, *supra* note 22, at 1712 (observing that courts' reformation of administrative law during the 1960s and 1970s had roots in a "pluralist theory of legitimacy"). On the general nature of pluralism, see Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 32 (1985). "Under the pluralist view, politics mediates the struggle among self-interested groups for scarce social resources. Only nominally deliberative, politics is a process of conflict and compromise among various social interests." *Id.*

58. Stewart, *supra* note 22, at 1712 (explaining the pluralist view that "[a]gency decisions made after adequate consideration of all affected interests would have, in microcosm, legitimacy based on the same principle as legislation"). One problem worth noting with the pluralist approach is that it leaves some interests so much more "equal" than others. Cary Coglianese, Heather Kilmartin & Evan Mendelson, *Transparency and Public Participation in the Federal Rulemaking Process: Recommendations for the New Administration*, 77 GEO. WASH. L. REV. 924, 932 (2009) ("Agency officials too often hear mainly from politically popular or well-organized interests, which may make up only a subset of the overall interests that will be affected by many regulatory decisions."). On a closely related point, corporate interests dominate participation in administrative rulemaking. Wendy Wagner, Katherine Barnes & Lisa Peters, *Rulemaking in the Shade: An Empirical Study of EPA's Air Toxic Emission Standards*, 63 ADMIN. L. REV. 99, 128 (2011) (documenting that, over the course of ninety EPA rulemakings, industrial interests filed over eighty-one percent of the comments submitted); see also Sidney A. Shapiro, *The Complexity of Regulatory Capture: Diagnosis, Causality, and Remediation*, 17 ROGER WILLIAMS U. L. REV. 221, 235–37 (2012) (summarizing studies of industry dominance of rulemaking proceedings).

59. For the seminal discussion of the "hard look," see *Greater Bos. Television Corp. v. FCC*, 444 F.2d 841, 851–52 (D.C. Cir. 1970), explaining that a court reviewing an agency's

for arbitrariness review, courts merely checked whether sufficient factual support for a rule was reasonably conceivable.⁶⁰ Under the new model, courts instead review an agency's contemporaneous rationale for an action to determine whether the agency engaged in "reasoned decisionmaking."⁶¹ In other words, review focuses not on whether somebody *could* have given a reasonable justification for a rule; rather, review focuses on whether the agency, at the time it acted, *actually had* a reasonable justification.

The Supreme Court gave its definitive stamp of approval to hard look review in 1983's *Motor Vehicle Manufacturers Ass'n of the United States, Inc. v. State Farm Mutual Automobile Insurance Co.*, in which the Court rejected a decision by the National Highway Traffic and Safety Administration ("NHTSA") during the early Reagan administration to roll back a rule requiring passive safety restraints that had been adopted during the Carter administration.⁶² The Court explained that, for an agency's discretionary policy choice to survive arbitrariness review, the agency must demonstrate that it based this choice on consideration of the "relevant factors"—i.e., the factors that Congress had, through its legislation, indicated it wished the agency to consider.⁶³ Also, the agency's explanation must demonstrate that it avoided any "clear error" in substantive judgment.⁶⁴ Although the Court's majority opinion did

discretionary decision should ensure that the agency gave "reasoned consideration to all the material facts and issues" and should intervene if the court concludes that "the agency has not really taken a 'hard look' at the salient problems" and has not based its decision on "reasoned decision-making."

60. See *Pac. States Box & Basket Co. v. White*, 296 U.S. 176, 185 (1935) (prescribing this standard for arbitrariness review).

61. See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 52 (1983); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). See generally Sidney A. Shapiro & Richard W. Murphy, *Arbitrariness Review Made Reasonable: Structural and Conceptual Reform of the "Hard Look,"* 92 NOTRE DAME L. REV. 331, 344–47 (2016) (explaining imposition of the contemporaneous rationale principle on agency rule-making in context of development of hard look review).

62. *State Farm*, 463 U.S. at 37–39, 57.

63. *Id.* at 43 (first quoting *Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc.*, 419 U.S. 281, 285 (1974); and then quoting *Volpe*, 401 U.S. at 416).

64. *Id.* (first quoting *Ark.-Best*, 419 U.S. at 285; and then quoting *Volpe*, 401 U.S. at 416). Elaborating on the requirements of reasoned decisionmaking, the Court added that normally an agency rule should fail arbitrariness review where the agency

has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

not speak to this point directly, commentators have generally read *State Farm* as requiring that agencies frame their reasons for policy choices in technocratic rather than political terms.⁶⁵

Scholars have praised the combination of expanded participation rights with hard look review as advancing a “deliberative” model of democracy.⁶⁶ Deliberative democratic theory, as its name suggests, contemplates that democracy is not just a matter of voting but instead should “combine accountability with a commitment to reflection and reason-giving.”⁶⁷ Seen from this angle, agency rulemaking is a “democratic” process because, after giving all interested persons a chance to influence the process (consistent with the interest representation model), it requires that an agency ultimately support its policy choice with a reasonable and public rationale.

Certainly, the term “democracy” is protean enough to accommodate both the “interest representation” and “deliberative” models, which find extensive support in political theory.⁶⁸ Still, it seems fair to suggest that the strong impulse to characterize procedures

Id.

65. See, e.g., Kagan, *supra* note 21, at 2381 (characterizing *State Farm* as requiring an agency to “justify its decision in neutral, expertise-laden terms to the fullest extent possible”); Levin, *supra* note 12, at 574 (observing that, pre-*Fox*, “conventional doctrine maintain[ed] that the agency must explain why its action is reasonable in relation to the underlying statute, the facts in the record, the arguments of participants in the proceeding, and—in at least some sense—the agency’s past policies and decisions”); Mark Seidenfeld, *The Irrelevance of Politics for Arbitrary and Capricious Review*, 90 WASH. U. L. REV. 141, 144 (2012) (agreeing that courts decline to weigh political influence when determining whether an agency action survives hard look review but also explaining that they are correct to do so); Kevin M. Stack, *The President’s Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263, 307 n.191 (2006) (characterizing *State Farm* as requiring agencies to explain their decisions solely in terms of statutory criteria rather than political factors); Watts, *supra* note 21, at 5 (noting that *State Farm* has been read to clarify that “agencies should explain their decisions in technocratic, statutory, or scientifically driven terms, *not* political terms”).

66. See, e.g., Glen Staszewski, *Political Reasons, Deliberative Democracy, and Administrative Law*, 97 IOWA L. REV. 849, 885–92 (2012) (“[H]ard-look judicial review is perhaps the prime example of a well-established legal doctrine that has firmly embraced and squarely adopted the most fundamental principles of deliberative democratic theory.”); Cass R. Sunstein, *The Most Knowledgeable Branch*, 164 U. PA. L. REV. 1607, 1624 (2016) (opining that the modern rulemaking process “might not live up to the very highest ideals, but much of the time, it is worthy of the idea of deliberative democracy”); cf. Jud Mathews, *Minimally Democratic Administrative Law*, 68 ADMIN. L. REV. 605, 628–29 (2016) (noting critiques of civil republicanism and deliberative democracy for failing to reflect actual political discourse or a realistic understanding of the role of reason-giving).

67. Sunstein, *supra* note 66, at 1619.

68. *Id.* (collecting authorities).

in which relatively few people ever participate as “democratic” indicates lingering concerns to boost the legitimacy of empowering unelected agency officials to make binding policies (a/k/a “laws”).⁶⁹

E. *“Democratizing” with Political Control (Especially Presidentialism)*

The judicial reform of administrative law just summarized leaves agencies with residual discretion to choose among policies for which they can offer a reasonable justification. The “political control” model of administrative law holds, broadly speaking, that elected officials should be able to control how agencies exercise this residual discretion to choose among reasonable policy options.⁷⁰ The “presidentialist” version of this model, as its name suggests, contends that this power should be concentrated in the presidency for a mix of constitutional, pragmatic, and democratic reasons.⁷¹ Administrative law scholars have characterized “presidentialism” as the dominant theory for legitimizing agency policymaking discretion over the last several decades.⁷²

69. See, e.g., CHRISTOPHER H. ACHEN & LARRY M. BARTELS, *DEMOCRACY FOR REALISTS: WHY ELECTIONS DO NOT PRODUCE RESPONSIVE GOVERNMENT* 301 (2016) (“Whatever else deliberation in its more refined and philosophically approved forms may have going for it, it is very likely to be distinctly *undemocratic* in practice, since ‘many people do not have much desire to engage in political debate to begin with’ and are intensely averse to political disagreement.” (citations omitted)).

70. See, e.g., Staszewski, *supra* note 66, at 856 (noting that the “political control model” focuses on the ability of elected officials to supervise and control the discretionary policy choices of regulatory agencies as the basis for democratic legitimacy”); Watts, *supra* note 21, at 35–39 (describing the evolution of the political control model from the 1980s forward).

71. See, e.g., Lisa Schultz Bressman & Michael P. Vandenberg, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47, 54–55 (2006) (discussing the rise of and debates over the “presidential control” model); Watts, *supra* note 21, at 35–36 (“Most scholars see political control of the administrative state as resting with the President due to the unique role he plays in overseeing agency action.”).

72. Bressman, *supra* note 43, at 492 (characterizing presidentialism as the “dominant” model of the administrative state); Seidenfeld, *supra* note 65, at 157 (“The presidential control model has replaced the interest group model as the predominant justification for the administrative state.”); Staszewski, *supra* note 66, at 858 (noting, in 2012, that “it is generally understood that the prevailing theory of legitimacy in administrative law for the past quarter century has been the ‘presidential control model’”); Matthew C. Stephenson, *Optimal Political Control of the Bureaucracy*, 107 MICH. L. REV. 53, 56–58, 60 (2008) (identifying leading administrative law scholars subscribing to the view that “the political responsiveness of bureaucratic policy to the preferences of the national electorate correlates strongly with presidential control of the administration”).

The most aggressive legal justification for presidentialism is the strong unitary executive theory, which insists that Article II of the Constitution, which vests the “executive power” in the single figure of the President, overcomes statutory language that purports to vest administrative discretion in other officers.⁷³ On this view, although Congress may have meant for the Clean Air Act to vest discretionary power to choose among reasonable air quality standards in the EPA Administrator, the Constitution, read the right way, vests this power in the President.

For nearly forty years, the most significant institutional expression of presidentialism has been a system for centralized review of significant rules by the White House through the Office of Information and Regulatory Affairs (“OIRA”).⁷⁴ Presidents of both parties since the Reagan administration have issued or adhered to executive orders requiring this centralized review.⁷⁵ Until recently, the most controversial aspect of OIRA review has been a requirement that agencies submit highly formal cost-benefit analyses for significant rules.⁷⁶ The Trump administration has imposed a further requirement of “regulatory budgeting” that, subject to various caveats, forbids agencies from adopting rules that impose regulatory costs on private entities beyond a “budgeted” amount.⁷⁷ Regardless of these recent innovations and complications, the important point for the present purpose is that this system of review

73. U.S. CONST. art. II, § 1; *see, e.g.*, Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 595–96 (1994) (“Because the President alone has the constitutional power to execute federal law, it would seem to follow that, notwithstanding the text of any given statute, the President must be able to execute that statute, interpreting it and applying it in concrete circumstances.”). *But see* Stack, *supra* note 65, at 267 (discussing historical controversies regarding the scope of the President’s “directive” power and concluding that statutes should be construed as granting this authority over agency action “only when the statute expressly grants power to the President in name”).

74. For discussion of centralized White House review of regulations as “[p]erhaps the most significant manifestation of the turn toward presidential administration,” *see* Thomas W. Merrill, *Presidential Administration and the Traditions of Administrative Law*, 115 COLUM. L. REV. 1953, 1970–72 (2015).

75. The two foundational executive orders that have governed this process are the Reagan order, Exec. Order No. 12,291, 3 C.F.R. 127 (1981), and the Clinton order that modified and superseded it, Exec. Order No. 12,866, 3 C.F.R. 638 (1993), *reprinted in* 5 U.S.C. § 601 note.

76. *See, e.g.*, Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1265–67 (2006) (discussing controversies over centralized review by OIRA of cost-benefit analysis).

77. Exec. Order No. 13,771 §§ 2(b), 3(d), 3 C.F.R. 284 (2017).

represents a long-term, robust institutional effort to centralize in the White House rulemaking authority that Congress has, on the face of many statutes, spread across agencies.⁷⁸

Justice Kagan, before joining the bench, marshaled the most prominent scholarly case for a nuanced form of presidentialism in her magisterial article, *Presidential Administration*.⁷⁹ Drawing on her experience working in the Clinton administration, she both described the mechanisms by which Presidents have centralized control over the administrative state and made a normative case for such control.⁸⁰ This normative case relied in substantial part on the theme that democratic accountability justifies centralized presidential control.⁸¹ In support of this argument, Justice Kagan made two broad claims: “First, presidential leadership enhances transparency, enabling the public to comprehend more accurately the sources and nature of bureaucratic power. Second, presidential leadership establishes an electoral link between the public and the bureaucracy, increasing the latter’s responsiveness to the former.”⁸²

Regarding the first of these virtues, transparency, Justice Kagan observed that the administrative state presents a severe problem because its bureaucracy tends to be an impenetrable “black box” that “in its proportions, its reach, and its distance—is impervious to full public understanding, much less control.”⁸³ It is imperative to work against this tendency and make bureaucracy as transparent as practicable.⁸⁴ Presidential control furthers this end because “[t]he Presidency’s unitary power structure, its visibility,

78. Merrill, *supra* note 74, at 1970–72.

79. Kagan, *supra* note 21, at 2331.

80. *See id.* at 2272–303 (describing methods of presidential control, including OIRA review, express directives from Presidents to agencies, and presidential “appropriation” of agency action); *id.* at 2319–63 (assessing the legality and policy merits of presidential administration).

81. In addition to arguing for presidential control based on democratic accountability, Justice Kagan also made a pragmatic case on managerial grounds, contending that the vast administrative state, to function well, requires a centralized coordinating body to ensure virtues such as “cost-effectiveness, consistency, and rational priority-setting.” *Id.* at 2339–40.

82. *Id.* at 2331–32.

83. *Id.* at 2332.

84. *Id.* (explaining that, because the bureaucratic form is so opaque, “the need for transparency, as an aid to holding governmental decisionmakers to account, here reaches its apex”).

and its ‘personality’ all render the office peculiarly apt to exercise power in ways that the public can identify and evaluate.”⁸⁵

Turning to the second of these virtues, the President’s role as an “electoral link” between the public and the bureaucracy, Justice Kagan contended that “because the President has a national constituency, he is likely to consider, in setting the direction of administrative policy on an ongoing basis, the preferences of the general public, rather than merely parochial interests.”⁸⁶

To her great credit, Justice Kagan carefully qualified these claims regarding presidential accountability in several ways. She conceded that particular individual regulatory issues “probably will play a small role in the public’s overall estimation of presidential performance,” which leaves Presidents with slack to respond to more parochial interests.⁸⁷ Also, although the public nature of the presidency generally promotes transparency, Presidents can avoid pressure to respond to broad public interests by keeping their control of administrative decisions hidden.⁸⁸ Further clouding the picture, many decisions credited to the “President” are really made by unelected bureaucrats working deep within the Executive Office of the President.⁸⁹ On the face of the matter, these qualifications would seem seriously to undermine Justice Kagan’s case for presidential political accountability. They did not, however, alter her bottom-line view that Presidents are, ultimately, *more* politically accountable to the public than other government officials, and this

85. *Id.*

86. *Id.* at 2332, 2335.

87. *Id.* at 2335–36 (using President Clinton’s “midnight pardons” as an example of catering to narrow interests).

88. *Id.*; see also Nina A. Mendelson, *Disclosing “Political” Oversight of Agency Decisionmaking*, 108 MICH. L. REV. 1127, 1148–59 (2010) (contending that presidential influence over rulemaking is disturbingly opaque); Seidenfeld, *supra* note 65, at 158 (observing trenchantly that “experience with recent imperial presidents provides ample evidence that, without some mechanism to ensure such strong transparency, the president can obfuscate the extent to which he has influenced rulemaking”).

89. Kagan, *supra* note 21, at 2338 (“Indeed, often when I refer to ‘the President’ in this Article, I am really speaking of a more nearly institutional actor—the President *and* his immediate policy advisors in OMB and the White House.”). The “institutional” President is, of course, a necessity given that the notion of one person “unitarily” monitoring and controlling the entire executive branch is a manifest impossibility. Cf. Sanford Levinson & Jack M. Balkin, *Constitutional Dictatorship: Its Dangers and Its Design*, 94 MINN. L. REV. 1789, 1842 (2010) (“Asserting that the President actually has control over the entire Administration is a bit like the courtiers of King Canute who tried to flatter him by claiming that he could direct even the progress of the ocean’s tides.”).

comparative point, to Justice Kagan's mind, justifies presidential control of administrative discretion.⁹⁰ To effectuate this control, Justice Kagan proposed that courts should be more deferential to agency policy and legal judgments where it is sufficiently clear that the President has played a substantial role in forming them.⁹¹

Turning from a leading legal academic to leading judicial opinions, important strains of presidentialism can be found in two candidates for the title of most important administrative law case of the twentieth century—*Motor Vehicle Manufacturers Ass'n of the United States, Inc. v. State Farm Mutual Automobile Insurance Co.*⁹² and *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*⁹³ Both of these cases, as it happened, involved judicial review of substantial policy reversals with an ideological cast.

As discussed above, in addition to marking the Court's effective adoption of "hard look" review,⁹⁴ *State Farm* is of special interest because of the important 5-4 split that it prompted among the Justices regarding the role that evolving political preferences should play in judicial review of agency policy judgments. Again, the case itself arose out of a challenge to a decision by NHTSA during the Reagan administration to rescind a rule that had been adopted during the Carter administration that would have required installation of passive safety devices in automobiles.⁹⁵ In the course of

90. Kagan, *supra* note 21, at 2338–39.

91. *Id.* at 2377 (suggesting that the *Chevron* doctrine applies "when, but only when, presidential involvement rises to a certain level of substantiality, as manifested in executive orders and directives, rulemaking records, and other objective indicia of decisionmaking processes"); *id.* at 2380 (suggesting courts apply hard look review more deferentially "when demonstrable evidence shows that the President has taken an active role in, and by so doing has accepted responsibility for, the administrative decision in question"). For another leading scholarly case pressing for greater political control over agency discretion, see especially Watts, *supra* note 21, at 8, contending that courts, when they review agency policy decisions for arbitrariness, should allow "certain political influences from the President, other executive officials, and members of Congress" to count as valid reasons for policy change "so long as the political influences are openly and transparently disclosed in the agency's rulemaking record." See also *id.* at 33–35 (explaining that this approach would clarify administrative law by abandoning an outmoded "expertise model" in favor of a "political control" model that "acknowledges that many policymaking decisions made by agencies cannot be resolved through a myopic technocratic lens but rather are highly political decisions that should be made by politically accountable institutions").

92. 463 U.S. 29, 59–60 (1983) (Rehnquist, J., concurring in part and dissenting in part).

93. 467 U.S. 837, 865–66 (1984).

94. See *supra* section I.D (discussing the Supreme Court's approval of hard look review).

95. 463 U.S. at 37–38.

holding that this rescission was arbitrary, five Justices avoided expressly advertent to the obvious political element of the rescission decision. Justice Rehnquist, writing for four Justices, objected to this approach in a two-paragraph opinion notable for its ringing endorsement of what might be called presidentialism. After noting that the Reagan administration had swept into office on a deregulatory agenda, he insisted that

[a] change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations. As long as the agency remains within the bounds established by Congress, it is entitled to assess administrative records and evaluate priorities in light of the philosophy of the administration.⁹⁶

In other words, within the space of reasonable policy options, an administration should be able to choose whichever option it likes best.

Although Justice Rehnquist's presidentialism missed capturing a majority in *State Farm* by a single vote, the Court unanimously adopted a similar approach just one year later in *Chevron*, in which the Court reviewed another deregulatory action by the Reagan administration.⁹⁷ The Clean Air Act Amendments of 1977 imposed strict permitting requirements for "new or modified major stationary sources" of air pollution" in nonattainment states.⁹⁸ Toward the end of the Carter administration, the EPA adopted a definition of "stationary source" that required permitting whenever a modification would result in either an entire plant or one of its components significantly increasing emissions.⁹⁹ Early in the Reagan administration, the EPA reversed course, adopting a "bubble concept" version of the rule that would enable a firm to avoid permitting so long as the combined effect of its modifications to a plant did not increase the plant's overall emissions.¹⁰⁰ In the course of upholding this new statutory construction, the Supreme Court announced the *Chevron* two-step for judicial review of an agency's construction of

96. *Id.* at 59 (Rehnquist, J., concurring in part and dissenting in part).

97. *Chevron*, 467 U.S. at 865–66.

98. *Id.* at 839–40 (quoting Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685).

99. *Id.* at 857.

100. *Id.* at 840, 857–58.

a statute that it administers.¹⁰¹ In essence, this framework requires a court to determine whether an agency's statutory construction is "permissible" or "reasonable."¹⁰²

The most important aspect of *Chevron* for the present purpose is that the Court relied on agency accountability to the President to justify deferential review of agency statutory constructions. Near the end of the *Chevron* opinion, the Court explained:

[A]n agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.¹⁰³

Thus, the Court regarded the task of construing the ambiguous term "stationary source" as a species of policymaking, and, like Justice Rehnquist in *State Farm*, indicated that agency accountability to elected Presidents justifies deferential judicial review of such agency determinations.

One person who was quick to seize on *Chevron*'s support for enhanced political control of policymaking was Justice Scalia. Writing in a law review article soon after arriving at the Supreme Court, Justice Scalia explained that the great advantage of *Chevron* was that it gave agencies the flexibility to choose "whichever of several possible meanings it thinks most conducive to accomplishment of the statutory purpose."¹⁰⁴ Elaborating on the role of political control in justifying this flexibility, Justice Scalia wrote:

If Congress is to delegate broadly, as modern times are thought to demand, it seems to me desirable that the delegee be able to suit its actions to the times, and that continuing political accountability be assured, through direct political pressures upon the Executive and through the indirect political pressure of congressional oversight.¹⁰⁵

101. *Id.* at 842–43.

102. *Id.* at 842–44.

103. *Id.* at 865–66.

104. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517.

105. *Id.* at 518; *see also* Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 742 (1996) (noting that interpretive "change is not invalidating, since the whole point of *Chevron* is to leave

Twenty years later, Justice Scalia entrenched this approach to political control of policy change in his opinion in *Fox*.

II. JUDICIAL REVIEW OF AGENCY POLICY REVERSALS UNDER *FOX*

The genesis of 2009's *FCC v. Fox Television Stations, Inc.*¹⁰⁶ lies in the FCC's largely thankless task of enforcing 18 U.S.C. § 1464, which proscribes "indecent" broadcasts.¹⁰⁷ Before 2004, the agency had for several decades followed a "fleeting expletives" policy under which it would not sanction a broadcaster for airing isolated, non-literal utterances.¹⁰⁸ After several celebrities used foul language during network broadcasts, the agency, following grillings by an oversight committee,¹⁰⁹ abandoned its fleeting expletives policy, prompting about a decade's worth of litigation and two trips to the Supreme Court.¹¹⁰ This Part examines *Fox*'s first trip to the Supreme Court in some detail, paying particular attention to the driving role that political influence played in the FCC's decision to abandon its fleeting expletives policy as well as the debate between Justices Scalia and Breyer over the significance of this political influence for arbitrariness review.

the discretion provided by the ambiguities of a statute with the implementing agency"); Antonin Scalia, *Rulemaking as Politics*, 34 ADMIN. L. REV., at xxv, xxxi (1982) (observing that it would be "refreshing and instructive" for agencies to state "flat-out" the value/political judgments motivating their policies rather than "blowing smoke in our eyes with exhaustive technical and economic data" and indicating that such political judgments should be rewarded or punished by Congress or voters, not judges); Levin, *supra* note 12, at 566 (drawing a connection between Scalia's stated views in *Rulemaking as Politics* and *Fox*).

106. 556 U.S. 502 (2009).

107. 47 U.S.C. § 303 note (instructing the FCC to enforce a statutory ban, 18 U.S.C. § 1464, against "utter[ing] any obscene, indecent, or profane language by means of radio communication").

108. *Fox*, 556 U.S. at 505–10 (recounting briefly the Commission's development of its fleeting expletives policy).

109. *Id.* at 523 n.4 (plurality opinion) (discussing this grilling).

110. *See generally id.* at 530 (holding that the Commission did not act arbitrarily in abandoning its fleeting expletives policy); *Fox II*, 567 U.S. 239, 258 (2012) (holding that the application of the Commission's new policy to networks violated due process as the Commission had failed to give networks fair notice that fleeting expletives or momentary nudity could be actionably indecent).

A. *Pacifica and the Fleeting Expletives Policy*

In 1973, a Pacifica Foundation radio station broadcasted George Carlin's "Filthy Words" monologue.¹¹¹ Carlin's monologue satirized the ban on using various words on the public airwaves by repeating these words—a lot.¹¹² The Commission held that the broadcast of this material during daytime hours violated the statutory ban on indecent broadcasts.¹¹³ In support of this conclusion, the agency explained that

the concept of "indecent" is intimately connected with the exposure of children to language that describes, in terms patently offense [sic] as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience.¹¹⁴

The Supreme Court upheld the Commission's finding of indecency but emphasized the narrowness of its decision.¹¹⁵ The Court explained that two aspects of broadcasting justified the ban, notwithstanding First Amendment concerns. First, the ban was permissible because of the "uniquely pervasive" presence of broadcasting in people's lives.¹¹⁶ Coining a phrase that would play a prominent role in the *Fox* litigation, the Court added, "To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the *first blow*."¹¹⁷ Second, broadcasts are "uniquely accessible to children" and have the unfortunate power to "enlarge[] a child's vocabulary in an instant."¹¹⁸

111. FCC v. Pacifica Found., 438 U.S. 726, 729–30 (1978). For a transcript of the Carlin monologue, see *id.* at 751–55. A quick Google search will also locate various performances of the monologue on YouTube.

112. *Id.* at 729.

113. Citizen's Complaint Against Pacifica Found. Station WBAI (FM), 56 F.C.C.2d 94, 99 (1975) [hereinafter *Citizen's Complaint Against Pacifica*], clarified by later order in "Petition for Clarification or Reconsideration" of a Citizen's Complaint Against Pacifica Found., Station WBAI (FM), 59 F.C.C.2d 892 (1976).

114. *Citizen's Complaint Against Pacifica*, 56 F.C.C.2d at 98.

115. *Pacifica*, 438 U.S. at 750 ("It is appropriate, in conclusion, to emphasize the narrowness of our holding. This case does not involve a two-way radio conversation between a cab driver and a dispatcher, or a telecast of an Elizabethan comedy.")

116. *Id.* at 748.

117. *Id.* at 748–49 (emphasis added).

118. *Id.* at 749.

In the years following *Pacifica*, the FCC, acknowledging First Amendment concerns,¹¹⁹ took a narrow approach to enforcing the indecency ban, assuming that it covered “only material that closely resembled the George Carlin monologue.”¹²⁰ As late as 2001, although the agency emphasized that all indecency determinations depend on overall context, it reiterated that “where sexual or excretory references have been made once or have been passing or fleeting in nature, this characteristic has tended to weigh against a finding of indecency.”¹²¹

B. *The FCC Flip-Flops After Cher, Ritchie, and Bono Said Bad Words on TV*

Just a year later, during a Fox broadcast of the 2002 Billboard Music Awards, the singer Cher declared, “I’ve also had critics for the last 40 years saying that I was on my way out every year. Right. So f*** ’em.”¹²² During the Fox broadcast of the 2003 Billboard Music Awards, Nicole Ritchie, star of a fish-out-of-water television series, *The Simple Life*, queried, “Why do they even call it ‘The Simple Life?’ Have you ever tried to get cow s*** out of a Prada purse? It’s not so f***ing simple.”¹²³ And during NBC’s broadcast of the 2003 Golden Globes, Bono, thrilled to learn he had won the “Best Original Song” award, exclaimed, “[T]his is really, really fucking brilliant.”¹²⁴

119. See, e.g., Application of WGBH Educ. Found. for Renewal of License for Noncommercial Educ. Station WGBH-TV, 69 F.C.C.2d 1250, 1254 ¶ 10 (1978) (discussing the Court’s *Pacifica* decision and noting that “[w]ith regard to ‘indecent’ or ‘profane’ utterances, the First Amendment . . . severely limit[s] any role by the Commission and the courts in enforcing the proscription contained in Section 1464”).

120. Infinity Broad. Corp., 3 FCC Red. 930, 930 ¶ 4930 (1987), *aff’d in part and vacated in part* by Action for Children’s Television v. FCC, 852 F.2d 1332 (D.C. Cir. 1988), *superseded in part* by Action for Children’s Television v. FCC, 58 F.3d 654 (D.C. Cir. 1995) (en banc).

121. Indus. Guidance on the Comm’n’s Case Law Interpreting 18 U.S.C. § 1464 & Enft Policies Regarding Broad. Indecency, 16 FCC Red. 7999, 8003, 8008 ¶¶ 10, 17 (2001).

122. FCC v. Fox Television Stations, Inc., 556 U.S. 502, 510 (2009) (quoting Brief for the Petitioners at 9, *Fox*, 556 U.S. 502 (No. 10-1293)).

123. *Id.* (quoting Brief for the Petitioners, *supra* note 122, at 9–10).

124. Complaints Against Various Broad. Licensees Regarding Their Airing of the “Golden Globe Awards” Program, 19 FCC Rcd. 4975, 4975–76, 4976 n.4 (2004) [hereinafter *Golden Globes Order*].

The Parents Television Council complained to the Commission that the Bono broadcast violated the indecency ban, and it requested sanctions against NBC's affiliates.¹²⁵ The Chief of the Enforcement Bureau, applying the Commission's fleeting expletives policy, rejected these complaints.¹²⁶

On January 28, 2004, the House Subcommittee on Telecommunications and the Internet held a hearing devoted to the scourge of broadcast indecency.¹²⁷ In his opening remarks, the chairman, Representative Fred Upton, made his views regarding the Enforcement Bureau's dismissal in the Bono matter quite clear:

I have received hundreds of constituent letters expressing astonishment and outrage over how the FCC's enforcement bureau could have found Bono's use of the "F-word" on TV not indecent in the Golden Globes case. I find the use of the "F-word" on TV to be highly objectionable, and I have called on the full Commission to reverse that decision, and reportedly Chairman Powell and the other commissioners are seeking to do just that.¹²⁸

Other members piled on, criticizing both the dismissal in the Bono matter and the FCC's enforcement of the indecency ban more generally.¹²⁹ In response, the Chief of the Enforcement Bureau explained that the Commission was working on reversing the dismissal.¹³⁰

Two weeks later, on February 11, 2004, the subcommittee held a second hearing during which, as Justice Scalia put it, "[a]ll five Commissioners were present and were grilled about enforcement shortcomings."¹³¹

125. Complaints Against Various Broad. Licensees Regarding Their Airings of the "Golden Globe Awards" Program, 18 FCC Rcd. 19,859, 19,859 (2003).

126. *Golden Globes Order*, 19 FCC Rcd. at 4975-76.

127. *"Can You Say That on TV?": An Examination of the FCC's Enforcement with Respect to Broadcast Indecency: Hearing Before the Subcomm. on Telecomm. & the Internet of the H. Comm. on Energy & Commerce*, 108th Cong. (2004).

128. *Id.* at 2 (statement of Rep. Upton, Chairman, H. Comm. on Energy & Commerce).

129. See, e.g., *id.* at 5 (statement of Rep. Tauzin (castigating the Enforcement Bureau for "splitting hairs" regarding whether the word "fucking" had been used as an adjective)); *id.* at 21 (statement of Rep. Cubin (remarking, "I do know that if anyone in my house walked around expressing how 'F***ing brilliant!' something was, they'd find themselves on my doormat in short order")).

130. *Id.* at 61 (statement of David Solomon, Chief, Enforcement Bureau, FCC).

131. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 523 n.4 (2009) (plurality opinion); *The Broadcast Decency Enforcement Act of 2004: Hearing on H.R. 3717 Before the Subcomm. on Telecomm. & the Internet of the H. Comm. on Energy & Commerce*, 108th Cong.

On March 3, 2004, the full Commission issued the promised reversal, finding that the Bono broadcast violated the indecency ban.¹³² In its order, the Commission explained that abandoning the fleeting expletives policy was proper because such expressions could “enlarge[] a child’s vocabulary in an instant” in ways that “many, if not most, parents would find highly detrimental and objectionable.”¹³³ In light of children’s pervasive exposure to broadcast media, finding the NBC broadcast to be indecent would be “consistent with the ‘well-being of [the country’s] youth.’”¹³⁴

Two years later, on February 21, 2006, the Commission issued an order finding that the Fox broadcasts of Cher and Ritchie were also indecent.¹³⁵ After a remand by the Second Circuit,¹³⁶ the Commission elaborated on its policy rationales for abandoning its fleeting expletives policy.¹³⁷ First, the Commission contended that “any strict dichotomy between ‘expletives’ and ‘descriptions or depictions of sexual or excretory functions’ is artificial and does not make sense in light of the fact that an ‘expletive’s’ power to offend derives from its sexual or excretory meaning.”¹³⁸ Second, the Commission observed that it could be difficult to determine in a given case whether a term was used as an expletive or literally.¹³⁹ Third, the Commission emphasized that “categorically requiring repeated use of expletives in order to find material indecent is inconsistent with our general approach to indecency enforcement, which stresses the critical nature of context.”¹⁴⁰ Fourth, failure to disavow the policy would require the Commission to ignore the “first blow” of indecency struck in any particular broadcast.¹⁴¹ Fifth, categorically permitting fleeting expletives would “permit broadcasters to

78, 83, 93, 97, 101 (2004) (statements of Michael K. Powell, Chairman; Kevin J. Martin, Comm’r; Kathleen Q. Abernathy, Comm’r; Jonathan S. Aldestein, Comm’r; Michael J. Copps, Comm’r).

132. *Golden Globes Order*, 19 FCC Rcd. at 4975, 4979.

133. *Id.* at 4980, 4982 (first quoting *FCC v. Pacifica Found.*, 438 U.S. 726, 749 (1978)).

134. *Id.* at 4982 (alteration in original) (quoting *Pacifica*, 438 U.S. at 749).

135. *Complaints Regarding Various Television Broads. Between Feb. 2, 2002 and Mar. 8, 2005*, 21 FCC Rcd. 2664, 2690–94 (2006).

136. *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 453 (2d Cir. 2007), *rev’d*, 556 U.S. 502 (2009).

137. *See Complaints Regarding Various Television Broads. Between Feb. 2, 2002 and Mar. 8, 2005*, 21 FCC Rcd. 13,299 (2006).

138. *Id.* at 13,308.

139. *Id.*

140. *Id.*

141. *Id.* at 13,308–09.

air expletives at all hours of a day so long as they did so one at a time.”¹⁴² Finally, the Commission stressed that eliminating the fleeting expletives exemption would not unfairly burden broadcasters as they could, and frequently did, use short time delays that enabled them to “bleep” out offending words.¹⁴³

For the present purpose, what is most notable about the FCC’s explanatory efforts is what they did *not* contain. The Commission’s analysis did not contain any empirical discussion of the prevalence of fleeting expletives in broadcasts, changes in their prevalence over time, or their psychological effects on children. Nor did the Commission explain why the various concerns it did identify (e.g., regarding “first blows”) justified a policy reversal given that these concerns were well known at the time the Commission adopted its fleeting expletives policy in the first place. The obvious inference from these explanatory gaps is that the actual justification for the Commission’s policy reversal was a change in the Commissioners’ value and political judgments regarding the supposed harms of indecent broadcasts as opposed to the benefits of free speech—a change presumably pushed along by hostile oversight committee hearings.

C. The Second Circuit Rejects the FCC’s Policy Reversal as Arbitrary

Fox and affiliated stations petitioned for review to the Second Circuit, which expressly held that judicial review of agency policy reversals does not demand a “heightened standard of scrutiny” beyond what *State Farm* demands for policy decisions generally.¹⁴⁴ The court noted, however, that, to give a suitably reasoned explanation for a policy reversal, “*the agency must explain why the original reasons for adopting the rule or policy are no longer dispositive.*”¹⁴⁵ This explanation might invoke agency expertise by relying on “cumulative experience, changed circumstances or judicial criticism.”¹⁴⁶ Alternatively, an agency might explain that its changed

142. *Id.* at 13,309.

143. *Id.* at 13,313–14.

144. *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 456 (2d Cir. 2007) (quoting *N.Y. Council, Ass’n of Civilian Technicians v. Fed. Labor Relations Auth.*, 757 F.2d 502, 508 (2d Cir. 1985)), *rev’d*, 556 U.S. 502 (2009).

145. *Id.* at 456 (quoting *N.Y. Council*, 757 F.2d at 508).

146. *Id.* (quoting *N.Y. Council*, 757 F.2d at 508).

policy reflects new value preferences.¹⁴⁷ In all cases, however, “a flip-flop must be accompanied by a reasoned explanation of why the new rule effectuates the statute *as well as or better than the old rule*.”¹⁴⁸

Applying this gloss, the Second Circuit concluded that the Commission’s abandonment of its fleeting expletives policy was arbitrary.¹⁴⁹ In the court’s view, the lynchpin of the Commission’s rationale was that this policy reversal was necessary to protect children from the “first blow” of hearing indecent words.¹⁵⁰ The Commission had known about this “first blow” problem for decades, however—indeed, the Supreme Court had itself discussed this issue in *Pacifica*.¹⁵¹ The Commission had nonetheless offered no explanation for “why it ha[d] changed its perception that a fleeting expletive was not a harmful ‘first blow’ for the nearly thirty years between *Pacifica* and *Golden Globes*.”¹⁵²

D. Justice Scalia Reverses and Grants Agencies the Fox Power

Justice Scalia, writing for a five-Justice majority, used *Fox* to embed in Supreme Court precedent his longstanding belief that agencies ought to be able to shift among reasonable policies based on evolving political preferences—i.e., agencies can exercise what we have named the “*Fox* power.”¹⁵³ Like the Second Circuit,¹⁵⁴ he started from the proposition that *State Farm* review should apply to policy reversals at its usual level of strictness.¹⁵⁵ He also agreed

147. *Id.* (explaining that an agency might “reweigh[] the competing statutory policies” to justify a policy reversal (quoting *N.Y. Council*, 757 F.2d at 508)).

148. *Id.* at 457 (quoting *N.Y. Council*, 757 F.2d at 508).

149. *Id.* at 458–59.

150. *Id.* at 457–58.

151. *Id.* at 457–58 (citing *FCC v. Pacifica Found.*, 438 U.S. 726, 748–49 (1978)).

152. *Id.* at 458. The court made short work of the Commission’s “passing reference[s]” to other grounds for its policy reversal. *Id.* at 459. It was particularly unimpressed by the Commission’s position that fleeting expletives must be sanctioned to prevent broadcasters from broadcasting expletives “at all hours of the day . . . one at a time” given the absence of any evidence that broadcasters had engaged in such a “barrage[]” when the fleeting expletives policy was in place. *Id.* at 460. This type of prediction required supporting facts, and the Commission had supplied none. *Id.* at 460 n.11.

153. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009); *see also supra* text accompanying and following note 11 (referencing the “*Fox* power”).

154. *Fox*, 489 F.3d at 567–57 (quoting *N.Y. Council, Ass’n of Civilian Technicians v. Fed. Labor Relations Auth.*, 757 F.2d 502, 508 (2d Cir. 1985)), *rev’d*, 556 U.S. 502 (2009).

155. *Fox*, 556 U.S. at 513–14.

with the Second Circuit that a reasonable explanation for a policy reversal must, in some respects, respond to the existence of the earlier policy and its supporting explanation. When an agency reverses an old policy, it must expressly acknowledge that it is doing so—it is arbitrary to “depart from a prior policy *sub silentio*.”¹⁵⁶ Also, where an agency shifts policies based on its new understanding of the facts, it must explain its grounds for adopting this new understanding.¹⁵⁷ In addition, a reasonable explanation for a policy reversal must give due consideration to any “serious reliance interests” that the old policy subject to reversal may have engendered.¹⁵⁸

Justice Scalia emphatically rejected, however, the Second Circuit’s contention that a reasonable explanation for a policy reversal sufficient to survive normal *State Farm* review must explain “why the original reasons for adopting the [displaced] rule or policy are no longer dispositive” as well as “why the new rule effectuates the statute as well as or better than the old rule.”¹⁵⁹ Arbitrariness review, rather than demanding this comparative exercise or any retroactive condemnation of the old policy, merely requires an agency seeking to justify a policy reversal to “show that there are good reasons for the new policy.”¹⁶⁰ Within the space of reasonable policy responses, the agency is free to choose whichever response it “believes” is “better.”¹⁶¹ Moreover, the agency need not expressly state this belief out loud because its “conscious change of course” to adopt a new policy “adequately indicates” that it believes the new policy to be better than the old one.¹⁶² Thus, Justice Scalia’s *Fox* framework creates space for an agency to shift among (reasonable) policies based solely on new political preferences—i.e., because the agency likes a new policy better (or has been told by someone with

156. *Id.* at 515 (citing *United States v. Nixon*, 418 U.S. 683, 696 (1974)); see also *Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (“Unexplained inconsistency is . . . a reason for holding an interpretation to be an arbitrary and capricious change from agency practice.”).

157. *Fox*, 556 U.S. at 515.

158. *Id.* (citing *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 742 (1996)).

159. *Id.* at 514 (alteration in original) (quoting *Fox*, 489 F.3d at 456–57, *rev’d*, 556 U.S. 502 (2009)).

160. *Id.* at 515.

161. *Id.*

162. *Id.*

power to like a new policy better). No update to the agency's understanding of the pertinent facts or law is necessary.

In a four-Justice plurality portion of his opinion, Justice Scalia tied his characterization of arbitrariness review to his longstanding stance that political control of agency discretion improves and legitimates agency policymaking.¹⁶³ Recall that, writing in 1989, Justice Scalia had contended that a key benefit of deferential review under *Chevron* is that it improves agency political accountability by enabling agencies to make policy changes in response to “political pressures upon the Executive and . . . the indirect political pressure of congressional oversight.”¹⁶⁴ Transposing this point to the context of arbitrariness review, he indicated his approval of the FCC's real (albeit unstated) justification for abandoning its fleeting expletives policy, which was to avoid additional grilling by members of an oversight committee eager to protect children from Bono and his bad words.¹⁶⁵ According to Justice Scalia, this extra-statutory political pressure from a handful of members of Congress (not Congress itself) provided an appropriate and democratic motivation for policy change.¹⁶⁶

E. *Justice Breyer Rejects the Fox Power and Poses a Question to the Agency*

In his dissent, Justice Breyer agreed with most of Justice Scalia's framework for arbitrariness review of policy reversals.

163. *Id.* at 523–26 (plurality opinion).

164. *See* Scalia, *supra* note 104, at 518 (discussing the advantages of *Chevron* deference).

165. *Fox*, 556 U.S. at 523–25 & nn.4–5 (2009) (plurality opinion) (“[T]he precise policy change at issue here was spurred by significant political pressure from Congress.”); *see also id.* at 524–25 (observing, in response to Justice Stevens's dissent, that “[i]f the FCC is indeed an agent of Congress, it would seem an adequate explanation of its change of position that Congress made clear its wishes for stricter enforcement”).

166. A qualification of Justice Scalia's support for congressional influence over agency discretion is in order. Justice Scalia observed that the FCC, as an “independent agency,” is shielded from some presidential control, which has the effect of increasing congressional influence. *Id.* at 523. As an adherent of the “unitary executive” theory that holds that all agency policy discretion is vested in the presidency, Justice Scalia seemed to reject the validity of this extra increment of congressional control created by illegitimate agency independence. *See id.* at 526 (referring to Congress “wrest[ing]” control “from the unitary Executive”). Putting to one side this oblique objection, however, Justice Scalia also indicated that he regarded the extra-statutory influence that members of Congress exercise over agencies through oversight and appropriations committees as acceptable and to be expected. *See id.* at 525 n.5 (characterizing as common knowledge that Congress wields “extrastatutory influence” over executive branch agencies via oversight and appropriations committees).

Thus, all nine Justices agreed that review of such a reversal does not implicate a stricter standard of review beyond *State Farm's* demand for reasoned decisionmaking.¹⁶⁷ All nine Justices also agreed that application of this standard to the circumstances of a policy reversal requires that an agency expressly acknowledge its shift in course and explain any new understanding of the pertinent facts.¹⁶⁸

Unlike Justice Scalia, however, Justice Breyer was deeply uncomfortable with the obviously political motivation for the FCC's abandonment of its fleeting expletives policy.¹⁶⁹ Asking the sort of rhetorical question that prompts its own answer, Justice Breyer queried, "Where does, and why would, the APA grant agencies the freedom to change major policies on the basis of nothing more than political considerations or even personal whim?"¹⁷⁰ His answer, as one might expect, is that the APA does no such thing. To the contrary, a primary point of judicial review for arbitrariness is to protect technocratic decisionmaking from politics and ensure that agency decisions are "based upon more than the personal preferences of the decisionmakers."¹⁷¹ To protect against policy changes based on mere "whim," Justice Breyer insisted that arbitrariness review of a policy reversal should require an agency to answer the question, "Why did you change?"¹⁷² Justice Kennedy added a fifth vote for this proposition by explaining in a solo concurrence that he agreed with Justice Breyer that an agency making a policy change "must explain why 'it now reject[s] the considerations that led it to adopt that initial policy.'"¹⁷³

167. *Id.* at 550 (Breyer, J., dissenting).

168. *Id.* at 549–51.

169. *See, e.g., id.* at 548 ("An agency's policy decisions must reflect the reasoned exercise of expert judgment.") (citing *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167 (1962)).

170. *Id.* at 552.

171. *Id.* at 548.

172. *Id.* at 549.

173. *Id.* at 535 (Kennedy, J., concurring) (alteration in original) (quoting *id.* at 550 (Breyer, J., dissenting)). Complicating the Justice-counting, Justice Kennedy also joined the portion of Justice Scalia's majority opinion that discussed general principles for arbitrariness review of agency policy decisions. *Id.* at 535 (indicating that Justice Kennedy joined Part II.A). As discussed above, *supra* text accompanying notes 159–62, Justice Scalia's majority opinion expressly rejected the proposition that an agency must explain why it no longer finds the reasons that motivated its earlier rule to be controlling.

For precedential support, Justice Breyer turned to *State Farm* itself, noting that the Court in that case had observed that an agency policy, “representing a ‘settled course of behavior[,] embodies the agency’s informed judgment that, by pursuing that course, it will carry out the policies . . . best if the settled rule is adhered to.”¹⁷⁴ Abandoning such an initial judgment thus amounts to “a reversal of the agency’s former views as to the proper course.”¹⁷⁵ To rationally explain such a flip-flop,

the agency must explain *why* it has come to the conclusion that it should now change direction. Why does it now reject the considerations that led it to adopt that initial policy? What has changed in the world that offers justification for the change? What other good reasons are there for departing from the earlier policy?¹⁷⁶

Justice Breyer sent mixed signals regarding whether an agency’s explanation for change can rely purely on new value/political preferences. In his general discussion of the framework for arbitrariness review, he accepted that “*sometimes* the ultimate explanation for a change may have to be, ‘We now weigh the relevant considerations differently.’”¹⁷⁷ This passage indicates that, as a last resort, “we like the new policy better” can suffice as a justification for switching from one reasonable policy to another so long as the agency expressly admits to it. Applying this approach, perhaps Justice Breyer would have upheld the FCC’s decision to abandon its fleeting expletives policy if the agency, rather than offer thin and unpersuasive rationalizations for the change, had simply admitted that it now weighed the balance between freedom of speech and protecting children from indecent language differently than it had in previous decades. Viewed in this light, it is hard to see why Justice Breyer’s dissent was worth his effort insofar as it would only force an agency to state its policy preferences expressly even though, as Justice Scalia noted, an agency’s act of consciously choosing a policy makes such a preference self-evident.¹⁷⁸

174. *Id.* at 550 (Breyer, J., dissenting) (quoting *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41–42 (1983)).

175. *Id.* at 549 (quoting *State Farm*, 463 U.S. at 41).

176. *Id.* at 550.

177. *Id.*; see Seidenfeld, *supra* note 65, at 166 (emphasizing that this passage shows that Justice Breyer did not “mean that agency decisions must be free from politics”).

178. *Fox*, 556 U.S. at 515 (majority opinion) (noting that an agency’s “conscious change of course” demonstrates the agency’s policy preferences).

At the end of his dissent, however, Justice Breyer summoned more of the courage of his technocratic convictions. He explained that the fundamental fault in the Commission's explanation for abandoning the fleeting expletives policy was that the agency had known for several decades about the problems it had identified as bases for its policy change.¹⁷⁹ In particular, the Commission had known about the "first blow" problem since *Pacifica*, and it had discussed this problem in agency opinions developing and applying the fleeting expletives policy.¹⁸⁰ The Commission therefore could not rely on the "first blow" theory to justify abandoning the fleeting expletives policy without identifying changed circumstances that made "first blows" more problematic than the agency had thought. The agency's failure to offer such an explanation, together with other shortcomings, convinced Justice Breyer that the Commission's real "answer to the question, 'Why change?' is, 'We like the new policy better.'"¹⁸¹ This type of purely political explanation for a policy change might be "perfectly satisfactory" coming from an elected official who relies directly on the voters for her legitimacy.¹⁸² It does not suffice, however, "when given by an agency, in respect to a major change of an important policy where much more might be said."¹⁸³

F. *Doctrinal Aftermath of Fox*

Although one can make a case that Justice Breyer captured a majority on the issue of whether agencies must give some sort of express answer to his "Why change?" query beyond "We like the new policy better," very few people seemed to notice.¹⁸⁴ Courts have instead consistently followed Justice Scalia's lead, frequently noting that an agency can shift to a new policy that it "believes" to be better so long as the new policy is otherwise legal and supported by "good" reasons.¹⁸⁵ The Supreme Court confirmed this approach

179. *Id.* at 562 (Breyer, J., dissenting).

180. *Id.* at 563.

181. *Id.* at 567.

182. *Id.*

183. *Id.*

184. A Westlaw search conducted on February 22, 2020 for "(Why did you change' or 'why change') /p Breyer /p Fox" yields no cases.

185. *See, e.g., City of Los Angeles v. Barr*, 929 F.3d 1163, 1182 (9th Cir. 2019) (standing for the proposition that an agency can reverse a policy so long as the new policy "is permissible under the statute, . . . there are good reasons for it, and . . . the agency *believes* it to be

in 2016's *Encino Motorcars, LLC v. Navarro*, in which the majority opinion, authored by Justice Kennedy and joined by Justice Breyer, lifted its framework for review of policy changes straight out of Justice Scalia's opinion in *Fox*.¹⁸⁶ We can therefore safely say that, as a matter of black-letter law, "we like the new policy better" suffices to justify shifts within a zone of reasonable policy choices. Agencies have noticed this development in the law of arbitrariness and have cited *Fox* and related authority when claiming a license to shift from an old policy to a new one based on new political preferences.¹⁸⁷

III. JUSTICE BREYER WAS RIGHT ABOUT THAT "WHY CHANGE?" QUERY

Technically speaking, the debate over the *Fox* power between Justices Scalia and Breyer revolved around how to construe the APA's statutory command to courts to set aside agency action that

better" (quoting *Fox*, 556 U.S. at 515)); *Canadian Solar, Inc. v. United States*, 918 F.3d 909, 918 (Fed. Cir. 2019) (same); *Nat'l Env'tl. Dev. Ass'n's Clean Air Project v. EPA*, 891 F.3d 1041, 1052 (D.C. Cir. 2018) (same); *Regents of the Univ. of Cal. v. Price*, 681 F. App'x 5, 7 (D.C. Cir. 2017) (same); *Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1037, 1036 (D.C. Cir. 2012) (same); *Planned Parenthood of N.Y.C., Inc. v. U.S. Dep't of Health & Human Servs.*, 337 F. Supp. 3d 308, 342 (S.D.N.Y. 2018) (same).

186. 136 S. Ct. 2117, 2125–26 (2016). Providing further evidence of the completeness of Justice Scalia's conceptual victory, Justice Ginsburg, who had joined Justice Breyer's dissent in *Fox*, authored a concurrence in which she quoted Justice's Scalia's *Fox* opinion for the proposition that, where an agency reverses a policy, it "suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better." *Id.* at 2128 (Ginsburg, J., concurring) (quoting *Fox*, 556 U.S. at 515). *But see* Buzbee, *supra* note 16, at 1400 (contending that *Encino Motorcars* provided "one quite coherent exegesis" clarifying the confusion created by the multiple opinions in *Fox* but also conceding that "[t]he *Encino Motorcars* Court notably did not quote or refine the *Fox* language about the agency change not needing to be 'better' or that an agency's belief that the new policy was better would be enough, leaving its precedential weight and exact meaning still uncertain").

187. *See, e.g.*, The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021–2026 Passenger Cars and Light Trucks, 83 Fed. Reg. 42,986, 43,213 (proposed Aug. 24, 2018) (to be codified in scattered sections of 40 C.F.R., 49 C.F.R.) (citing *Fox* for the proposition that an agency may shift to a new policy that is otherwise reasonable and legal because the agency "*believes* it to be better"); Definition of "Waters of the United States"—Recodification of Preexisting Rule, 83 Fed. Reg. 32,227, 32,231 (proposed July 12, 2018) (to be codified in 33 C.F.R. pt. 328, scattered sections of 40 C.F.R.) (citing *Fox* as support for the proposition that new policy judgments suffice to support policy changes); Intention to Review and Rescind or Revise the Clean Water Rule, 82 Fed. Reg. 12,532, 12,532 (proposed Mar. 6, 2017) (to be codified in 33 C.F.R. pt. 328, scattered sections of 40 C.F.R.) (citing *Fox* as support for the proposition that an agency can change policies based on new agency preferences and absent changed facts or circumstances). *See generally* Buzbee, *supra* note 16, at 1383–85 (identifying examples of the EPA invoking *Fox* to justify changes in policy).

they find to be “arbitrary.”¹⁸⁸ The vagueness of this term has left courts with interpretive space to vary their construction and application of arbitrariness review over time.¹⁸⁹ This process of transforming the effective meaning of arbitrariness review has been, at bottom, an exercise in judicial policymaking—courts have modulated their review to give effect to their own policy intuitions regarding how administrative policymaking should operate as well as how courts should control it.¹⁹⁰

As outlined in Part I, much of the law that courts have developed to govern arbitrariness review has become well-settled and relatively clear. Judicial review of agency policy choices for arbitrariness, including review of decisions to abandon old policies, checks whether, at the time an agency made its policy decision, it had a sufficiently “reasoned” justification for doing so.¹⁹¹ Where an agency wishes to abandon an old policy, it can certainly satisfy this requirement by offering a rational technocratic explanation demonstrating why “the original reasons for adopting the rule or policy are no longer dispositive.”¹⁹² For instance, it would be reasonable for the EPA to revisit its limitations on emissions of particulate matter were the agency to discover that, rather than killing people prematurely, this air pollutant toughens the lungs and makes them last longer. By identifying something materially wrong with the analysis supporting an old policy, an agency demonstrates the need for a new discretionary policy choice. It also gives an answer to Justice Breyer’s query, “Why did you change?” that goes beyond a purely political, “We like the new policy better.”¹⁹³

188. 5 U.S.C. § 706(2)(A).

189. See *supra* sections II.C–D (discussing the “reformation” of administrative law).

190. See Shapiro & Murphy, *supra* note 61, at 361 (noting that the ambiguity of the term “arbitrariness” naturally “implies that courts have the policymaking task of structuring arbitrariness review to best serve the legitimate goals associated with this practice”).

191. *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41–43 (1983) (holding that same standard of arbitrariness review applies to rescission of rule as to its adoption; elaborating on the requirements of arbitrariness review generally).

192. *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 456–57 (2d Cir. 2007) (emphasis omitted) (quoting *N.Y. Council, Ass’n of Civilian Technicians v. Fed. Labor Relations Auth.*, 757 F.2d 502, 508 (2d Cir. 1985)), *rev’d*, 556 U.S. 502 (2009); *cf. Fox*, 556 U.S. at 514 (contending that requiring an agency to demonstrate “why the original reasons for adopting the [displaced] rule or policy are no longer dispositive” goes *beyond* what the APA requires to justify abandoning an old rule in favor of a new one).

193. *Fox*, 556 U.S. at 549, 567 (Breyer, J., dissenting).

In *Fox*, Justices Scalia and Breyer clashed over whether an agency's new political preferences can, by themselves, provide an *additional* type of acceptable justification for an agency decision to abandon an old policy in favor of a new one that is otherwise reasonable and legal. On the surface, this clash over the *Fox* power might seem a quibble regarding a very fine point of doctrine embedded in a larger framework about which there is broad agreement.¹⁹⁴ On a deeper level, however, this debate reflects a fundamental disagreement regarding the roles of politics and expertise as sources of legitimacy for agency policymaking. The balance of this Part explains why Justice Breyer's gloss on arbitrariness review, notwithstanding its failure to find traction in the courts, provides the better way for thinking about the legitimacy of agency policymaking and its judicial review.

A. *The Fox Power Political Accountability Justification Rests on a Potent Fiction*

Justice Scalia's *Fox* power rests in some respects on an understanding of the roles of expertise and politics in forming agency policy that is obviously true. Expertise can set (fuzzy) boundaries on the scope of agency discretionary policy choice—i.e., for a given factual analysis, some range of policy choices may be reasonable, but others will be beyond the pale. Presidents and members of Congress have many extra-statutory avenues for influencing agency policy choices. Members of Congress, depending on their committee assignments, can influence agencies through oversight and appropriations.¹⁹⁵ The President, among other means of influence, exercises control over appointments and removals of high-ranking officials, agency budget requests, and, through OIRA, significant

194. Cf. Levin, *supra* note 12, at 573–75 (making the case that *Fox*'s change to the “breadth” of review is significant notwithstanding arguments that doctrines governing the “scope” of review may have limited real-world impact).

195. *Fox*, 556 U.S. at 525 n.5 (majority opinion) (noting the importance of this power). *But see* Seidenfeld, *supra* note 65, at 175–76 (footnote omitted) (making the conceptual points that “[t]here are serious problems both with ascribing the influence wielded in committees to the legislature as a whole and with the ability of elections within individual congressional districts to hold committee members accountable to the general national interest”); Mark Seidenfeld, *The Role of Politics in a Deliberative Model of the Administrative State*, 81 GEO. WASH. L. REV. 1397, 1410–11 (2013) [hereinafter Seidenfeld, *Role of Politics*] (noting that congressional extra-statutory power over agency policy is questionable in light of transaction costs of monitoring, information asymmetry, and difficulty of legislation).

agency rulemaking.¹⁹⁶ Given such tools, realistically, we should expect high-profile agency policies to reflect the preferences of elected officials in power at the time of a policy's adoption. It follows that, where a later administration displaces a policy choice of an earlier administration, the later administration is, on one level, necessarily switching out one political choice for another.

For Justice Scalia, within the space allowed by expertise, it is legitimate and preferable for elected officials to make these political choices.¹⁹⁷ If these political choices stray too far from the "will of the people," then the electorate, rather than judges, should hold the appropriate elected officials accountable.¹⁹⁸ Viewed in this light, the *Fox* power, insofar as it enables agencies to shift among policies to please their latest political controllers, can be regarded as an expression of the political accountability theme of the presidentialist and political-control models that have percolated in administrative law for decades.¹⁹⁹

The political accountability story underlying the *Fox* power is, however, remarkably unpersuasive. As a threshold point, it may bear noting that the *Fox* power embraces a type of "democracy" that is not easy to square with certain other types of "democracy" that administrative law has invoked at times to justify various procedural reforms and legitimize agency policymaking. The interest representation model conceives of agency rulemaking as a pluralist device for allowing competing interests to reach policy compromises;²⁰⁰ the deliberative democracy model adds that this process

196. See Aziz Z. Huq, *Removal as a Political Question*, 65 STAN. L. REV. 1, 26–32 (2013) (listing these and other important methods of presidential control over agencies).

197. See *Fox*, 556 U.S. at 515 (explaining that, subject to certain qualifications, an agency should be free to abandon an old policy in favor of a new one it "believes" to be better so long as the agency shows that there are "good reasons for the new policy"); *id.* at 523–25 (plurality opinion) (noting, with apparent approval, that the FCC abandoned its fleeting expletives policy in response to pressure from an oversight committee).

198. See Scalia, *supra* note 105, at xi (contending that "it would be refreshing and instructive" were agencies to admit the political judgments underlying their rules, leaving it to Congress and voters, rather than the courts, to determine appropriate "retribution or reward" for these political judgments).

199. See *supra* section I.E (discussing the political-control and presidentialist models); see also Jodi L. Short, *The Political Turn in American Administrative Law: Power, Rationality, and Reasons*, 61 DUKE L.J. 1811, 1835–36 (2012) (drawing the connection between Justice Scalia's *Fox* opinion and presidentialism).

200. See *supra* section I.C (discussing the interest representation model).

should, in fine civic republican fashion, involve serious policy reflection and reason-giving.²⁰¹ Neither of these models of administrative democracy seems consistent with one in which the agency, perhaps after hearing from all interested persons and engaging in serious policy deliberation, then bows to raw political pressure, which may be opaque, from elected officials.

More importantly, the vision of political accountability that seems to underlie the *Fox* power rests on a polite fiction of hyper-engaged, hyper-informed, hyper-rational voters that is transparently false—as a number of legal scholars have demonstrated in critiques of presidentialism.²⁰² Pride of place for such critiques, however, should now go to the 2016 opus, *Democracy for Realists*, in which Professors Achen and Bartels make a devastating case against the “folk theory” that mass democracy provides a mechanism for transmuted voter policy preferences into governance.²⁰³ Glaring problems with this folk theory include: The overwhelming majority of voters lack basic understanding of almost all policy issues.²⁰⁴ Partisans do not choose a party by applying policy analysis to party platforms; rather, partisan identity is largely a matter of

201. See *supra* section I.D (discussing the deliberative democracy model).

202. See, e.g., Evan J. Criddle, *Fiduciary Administration: Rethinking Popular Representation in Agency Rulemaking*, 88 TEX. L. REV. 441, 457–64 (2010) (critiquing “three misconceptions about the President’s relationships to voters and to the federal bureaucracy: the fiction of popular authorization, the fiction of popular accountability, and the fiction of presidential management”); Seidenfeld, *Role of Politics*, *supra* note 195, at 1416–26 (surveying intractable problems with various forms of political accountability presupposed by presidentialism); Glen Staszewski, *Reason-Giving and Accountability*, 93 MINN. L. REV. 1253, 1266–76 (2009) (critiquing the political accountability paradigm and observing that the conditions necessary to hold political officials accountable for specific policy decisions will be satisfied only “in the most extraordinary of circumstances”).

203. ACHEN & BARTELS, *supra* note 69, at 1.

204. *Id.* at 36–45 (surveying research demonstrating voter ignorance of politics and policy); see also John A. Ferejohn, *Information and the Electoral Process*, in INFORMATION AND DEMOCRATIC PROCESSES 3 (John A. Ferejohn & James H. Kuklinski eds., 1990) (concluding that most people know “virtually nothing about the public issues that occupy officials from Washington to city hall”); Ilya Somin, *Political Ignorance and the Countermajoritarian Difficulty: A New Perspective on the Central Obsession of Constitutional Theory*, 89 IOWA L. REV. 1287, 1304–06 (2004) (summarizing empirical evidence of political ignorance and observing that “[t]he most important point established in some five decades of political knowledge research is that the majority of American citizens lack even basic political knowledge”); Staszewski, *supra* note 202, at 1266–67 (“The fact that most citizens lack even basic political knowledge has been almost universally accepted by political scientists for decades.”).

“group ties or hereditary loyalties.”²⁰⁵ In large part, partisans determine their views on political issues by taking cues from their party elites.²⁰⁶ Well-informed voters, who tend to be stronger partisans, generally can find a way to rationalize new information to avoid undermining their preexisting beliefs (which, again, are substantially based on party affiliation).²⁰⁷ Economic conditions influence the outcomes of close elections, but voters are generally not equipped to assign economic credit or blame based on actual incumbent stewardship.²⁰⁸ On a related point, voters also have a tendency to punish incumbents at the polls for natural catastrophes obviously outside political control—e.g., droughts, floods, and shark attacks.²⁰⁹ In sum, for most people, voting is an exercise in expressing social identity rather than an exercise in informed policymaking.²¹⁰

Achen and Bartels directed their critique of the “folk theory” of democracy at the notion that voters monitor and control *legislative* policy actions. Of course, given the complex and opaque nature of the administrative state, this critique must apply with all the more force to the notion that voters hold elected officials accountable for exercising influence over *agency* policy decisions. Very few people know what the Federal Register is, much less monitor and analyze many of the countless policymaking decisions made by scores of federal agencies.²¹¹ Surely, for instance, very few people actually know about the Department of Agriculture’s recent policy decision

205. ACHEN & BARTELS, *supra* note 69, at 299; *see also id.* at 307 (“[V]oters choose political parties, first and foremost, in order to align themselves with the appropriate coalition of social groups.”); DREW WESTEN, *THE POLITICAL BRAIN: THE ROLE OF EMOTION IN DECIDING THE FATE OF THE NATION* (2007) (discussing psychological research on the emotional roots of political decisionmaking).

206. ACHEN & BARTELS, *supra* note 69, at 296 (“People tend to adopt beliefs, attitudes, and values that reinforce and rationalize their partisan loyalties.”).

207. *Id.* at 268 (“[T]he more information the voter has, often the better able she is to bolster her [partisan] identities with rational-sounding reasons.”).

208. *Id.* at 146–76.

209. *Id.* at 116–45 (analyzing voter punishment of incumbents for droughts, floods, and shark attacks).

210. *Id.* at 264 (“Even in the context of hot button issues like race and abortion, it appears that most people make their party choices based on who they are rather than on what they think.”).

211. *Cf.* Short, *supra* note 199, at 1849–50 (making the point that disclosure of information in the Federal Register is unlikely, as a matter of information theory, to influence votes given that such disclosure “is likely to be remote in time from when most citizens are focused on electoral decisions and remote from the location where they actually cast their votes”).

to allow more sugar and salt in school lunches.²¹² Of course, voters cannot form well-founded opinions about policies that they do not know about.²¹³ In an ideal world, those voters who do happen to learn about a particular policy decision should presumably try to understand it before judging it. Even a casual perusal of, for instance, proposed rules by the EPA should demonstrate the real-world absurdity of this expectation, at least for complex, technical policies.²¹⁴

Still, strictly speaking, voters do not need to understand a policy to hold someone politically accountable for it. They do, however, need to know whom to credit or blame at election time. As Justice Kagan suggested in *Presidential Administration*, pinning responsibility for a specific policy might present a fairly easy task, at least for especially eager followers of policy news, where a President loudly seizes credit for an agency policy, as they sometimes do at Rose Garden events.²¹⁵ Also, on a more general level, many potential voters (but by no means all) are presumably aware that President Trump, for instance, is “pro-business” and hostile to immigration. For the run of administrative decisions, however, we should expect the influence of the President and his (many) proxies to be somewhere between opaque and invisible.²¹⁶

Suppose, however, that an especially well-informed voter has identified an agency policy and correctly attributed its promulgation to the influence of particular elected officials. Even with these

212. Child Nutrition Programs: Flexibilities for Milk, Whole Grains, and Sodium Requirements, 83 Fed. Reg. 63,775 (Dec. 12, 2018) (codified at 7 C.F.R. pts. 210, 215, 220, 226). See generally Julia Jacobs, *Trump Administration Rolls Back Obama-Era Rules for School Lunches*, N.Y. TIMES (Dec. 8, 2018), <https://www.nytimes.com/2018/12/08/us/trump-school-lunch-usda.html> [<https://perma.cc/R4EA-L6PG>].

213. Staszewski, *supra* note 202, at 1267 (noting this problem with the political accountability story underlying presidentialism).

214. For one example among legion, see National Primary Drinking Water Regulations: Perchlorate, 84 Fed. Reg. 30,524 (proposed June 26, 2019) (to be codified at 40 C.F.R. pts. 14–42).

215. See Kagan, *supra* note 21, at 2283 (noting how President Clinton took public ownership of an FDA rule governing tobacco at a Rose Garden signing ceremony).

216. See, e.g., Bressman & Vandenberg, *supra* note 71, at 81 (documenting that White House interventions in EPA policymaking were rarely reflected in administrative records subject to judicial review); Huq, *supra* note 196, at 62 (emphasizing the opacity of White House actions controlling agency policy and noting that this opacity enhances interest group lobbying); Wendy E. Wagner, *A Place for Agency Expertise: Reconciling Agency Expertise with Presidential Power*, 115 COLUM. L. REV. 2019, 2050–52 (2015) (discussing the non-transparent, unaccountable nature of review of agency rules by OIRA, housed in the White House).

heroic conditions satisfied, as Justice Kagan herself acknowledged, the likelihood of meaningful political accountability for a particular policy remains slim.²¹⁷ A few problems include: A particular agency policy choice, as one element of a broad mix of decisions, will be unlikely to change a given voter's decision regarding whom to support.²¹⁸ Moreover, even if a particular policy change does shift some votes, these shifts are unlikely in any given case to affect congressional election outcomes given that, at least for general elections, most members of Congress occupy extremely safe seats.²¹⁹ Presidents, in theory, might face some slim possibility of accountability for actions taken to influence agency policy during their first term, provided they seek reelection. They face no personal electoral accountability to voters during second terms.²²⁰

None of the preceding analysis is meant to gainsay the vital importance of democratic institutions. Competitive elections, for instance, provide voters some level of agency in forming their governments and a path to civic engagement.²²¹ They create mechanisms for definitively determining who has power and for transferring it peacefully.²²² It is a major virtue of our electoral democracy that no one went to war to determine whether Clinton or

217. See Kagan, *supra* note 21, at 2335–36; *supra* text accompanying note 87.

218. Criddle, *supra* note 202, at 459 (discussing this “bundling” problem and noting that “[w]hen undertaking this calculus of compromise” of determining a presidential vote, “particular questions of regulatory policy tend to have low salience”); Kagan, *supra* note 21, at 2335–36.

219. See Staszewski, *supra* note 202, at 1269.

220. Levinson & Balkin, *supra* note 89, at 1814 (“[A]fter reelection, the Twenty-Second Amendment ensures that a President never has to face that particular form of accountability again.”).

221. ACHEN & BARTELS, *supra* note 69, at 318 (noting the possibility that “participation in democratic processes may contribute to better citizenship, producing both self-reinforcing improvements in ‘civic culture’ and broader contributions to human development” (citation omitted)).

222. *Id.* at 317 (noting the importance of “provid[ing] authoritative, widely accepted agreement about who shall rule” and identifying the “tendency for governmental power to change hands” as a “key indicator of democratic health and stability”); see also Levinson & Balkin, *supra* note 89, at 1818 (“Even the bitterest enemies of the Bush Administration . . . never genuinely worried that the President and Vice-President would try to extend their terms of office by decree or that they would attempt to suspend the constitutionally required election and the inauguration of a successor.”); cf. John Wagner, *Trump Says He Should Be ‘Given Our Stolen Time Back’ After Release of Comey Report*, WASH. POST. (Aug. 30, 2019, 6:50 PM EDT), https://www.washingtonpost.com/politics/trump-says-he-should-be-given-our-stolen-time-back-after-release-of-comey-report/2019/08/30/9cfe8f1e-cb19-11e9-a1fe-ca46e8d573c0_story.html (quoting President Trump’s apparently joking suggestion that he serve an additional ten or fourteen years and noting that the President had retweeted a suggestion that he serve two additional years in compensation for the Mueller investigation)

Trump would be President and that we expect (or at least hope that) future competitions for power will be conducted peacefully. Moreover, periodic transfers of power reduce the likelihood of corruption because those currently in power know that they may be held to account for their actions later.²²³ On a related point, such transfers enhance the rule of law by reducing the ability of one party to stack the judiciary and eliminate its functional independence.

Given such advantages, recognition that voting by a mass electorate is not a serious means for fine-grained, informed policymaking does not suggest the absurd conclusion that we should abandon congressional and presidential elections. In addition to being constitutionally required, these elections, among other virtues, determine who controls the government and for how long. The *Fox* power, however, does not implicate these virtues—i.e., we should know exactly who is President regardless of whether an agency can change policies based solely on new political preferences. Instead, the notion that the *Fox* power advances democratic values depends on the folk theory's fiction that voters hold elected officials accountable for policy decisions. A few moments' candid reflection reveals that this political accountability justification bears only the most tenuous relation to how mass democracy and the administrative state actually function.

B. *The Fox Power Is Unnecessary and Thus Illegitimate*

The preceding section demonstrates that the *Fox* power does not genuinely further political accountability and democratic values. Perhaps, however, agencies should be allowed to exercise this power, not because it advances democratic values, but because it operates in a space where old and new policies should be regarded as equally valid. Where an agency is considering replacing an old policy with a new one, in general, neither can lay claim to better democratic bona fides than the other. Both policies will be “political,” as all policies are.²²⁴ Were the agency to adopt the new policy,

[<https://perma.cc/97EM-G9BV>].

223. ACHEN & BARTELS, *supra* note 69, at 318–19 (noting that, in contrast to democracies, “in dictatorships, moral or financial corruption is more common because public outrage has no obvious, organized outlet”).

224. *See supra* note 22 (citing discussions of the political nature of policymaking).

for reasons outlined above, it would be extremely unlikely to generate real political accountability. The same, however, was true of the old policy when it was adopted. Nor will expertise provide a dispositive ground for choosing one policy over the other insofar as both should be regarded as at least presumptively reasonable—the old policy because the agency adopted it in the first place;²²⁵ the new policy because of *Fox's* requirement that “good reasons” support it.²²⁶ Where an old policy and a new policy are equally valid in both democratic and technocratic terms, perhaps the rationale, “because I say so,” should suffice to justify an agency policy reversal.

Allowing agencies to exercise a “because I say so” power even in this limited domain, however, undermines the source of the legitimacy of agency policymaking, which is bound up in practical necessity and reason.²²⁷ Before proceeding further with this point, it bears noting that, in light of the Supreme Court’s recent decision in *Gundy v. United States*, three to five of the current Justices, led by Justice Gorsuch, apparently reject the premise that agencies can constitutionally exercise significant policymaking authority over private conduct at all because Article I of the Constitution commits this power to Congress.²²⁸ One need not find this effort to give sharper teeth to the Nondelegation Doctrine persuasive, however, to recognize that, in a political system that expressly allocates legislative power to Congress, agency policymaking—and the

225. See *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41–42 (1983) (“A ‘settled course of behavior embodies the agency’s informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress. There is, then, at least a presumption that those policies will be carried out best if the settled rule is adhered to.’” (quoting *Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 807–08 (1973))).

226. See *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

227. See Jerry L. Mashaw, *Small Things Like Reasons Are Put in a Jar: Reason and Legitimacy in the Administrative State*, 70 *FORDHAM L. REV.* 17, 22–23 (2001) (citing MAX WEBER, 3 *ECONOMY AND SOCIETY* 956–1003 (Guenther Roth & Claus Wittich eds., Ephraim Fischhoff et al. trans., 1968)) (explaining that, unlike in legislative and judicial domains, in administrative law, “[a]uthority must be combined with reasons, which usually means accurate fact-finding and sound policy analysis” and characterizing the source of “the legitimacy of bureaucratic activity as its promise to exercise power on the basis of knowledge”).

228. 139 S. Ct. 2116, 2136 (2019) (Gorsuch, J., joined by Roberts, C.J., and Thomas, J., dissenting) (contending that Congress may delegate policymaking authority to agencies to govern private conduct only to “fill up the details”); see also *id.* at 2131 (Alito, J., concurring) (expressing willingness to reexamine the Court’s “intelligible principle” doctrine once a majority is willing to do so, but implicitly declining to join a 4-4 split on this point); *id.* at 2130 (noting that Justice Kavanaugh did not participate in the case).

attendant “democracy deficit” it creates—demands *some* special justification. The most obvious and creditable justification for agency policymaking authority has been the need for agency expertise—i.e., effective governance in a complex, modern society requires administrative policymaking by expert agencies.²²⁹ We need an entity like the EPA to investigate and regulate air pollution; we need an entity like the Securities and Exchange Commission to investigate and regulate complex financial markets, and so on. Authorizing these agencies to make policy choices, which are necessarily political, opens a democracy deficit, but this can be justified as a price we pay for the benefit of rational application of their expertise.

Clearly, to carry out expert policymaking functions rationally, an agency must have the capacity to act on the latest information and analysis at its disposal. At the stage of initial policy formation, we expect an agency to learn what it reasonably can about a regulatory problem and then, based on this analysis, adopt its preferred policy choice to address the problem. If an agency, after adopting an initial policy, later develops expert information or analysis that undermines that initial policy choice, then, to give effect to this new learning, the agency may need to shift to a new policy. In this type of circumstance, an agency should be able to give an answer to Justice Breyer’s “Why did you change?” query that goes beyond the raw politics of “We have been told by people in power to like the new policy better.”²³⁰

229. This is not to suggest that Congress delegates policymaking authority to agencies solely to gain the advantage of their focused expertise. Congressional delegations of authority serve a mix of political and technocratic motives. *See, e.g.*, Daniel T. Deacon, *Administrative Forebearance*, 125 *YALE L.J.* 1548, 1565 (2016) (noting that frequently posited reasons for broad delegations include, “for example, the costs associated with drafting detailed legislation, a desire to harness agency expertise in fleshing out policy details, or, more nefariously, a desire to shift blame for hard choices onto others, such as the President”). Agency expertise is, however, the creditable motive for delegations of policymaking authority to agencies that fuels their legitimacy. *See, e.g.*, *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 531 (2010) (Breyer, J., dissenting) (noting that the Court “has recognized the constitutional legitimacy of a justification that rests agency independence upon the need for technical expertise”); *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (explaining that the Court’s nondelegation jurisprudence “has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives”).

230. *Cf. Fox*, 556 U.S. at 551–52 (Breyer, J., dissenting) (contending that the answer to “Why change?” demands “more than political considerations or . . . personal whim”).

Justice Scalia's *Fox* power, by contrast, endows agencies with a type of political discretion that, by hypothesis, is not necessary to implement new learning or expertise. After all, the whole point of this power is to allow an agency, within a zone of reasonable discretion, to shift to a new policy *just because* the agency likes the new policy better.²³¹ Note well, however, that no practical necessity compels agencies to abandon old policies that are both presumptively reasonable and based on the most up-to-date expertise. To put this point another way, where an agency cannot identify anything wrong with adhering to an old policy, the need to replace it with a new policy cannot be that pressing. The FCC's treatment of its fleeting expletives policy in *Fox* itself provides a nice illustration of this point. In the aftermath of *Pacifica*, the FCC developed this policy to balance, among other concerns, the harm caused by "first blows" to children by indecent language against First Amendment values.²³² In 2004, without making any serious effort to identify new facts undermining the fleeting expletives policy or otherwise to explain why it was unreasonable, the Commission, under strong political pressure, abandoned it.²³³ The agency offered no serious analysis explaining why the country could not, as it had for the preceding twenty-five years or so, muddle along with its old policy.²³⁴ The *Fox* power, by granting agencies a type of unjustified political power, thus ironically expands the democracy deficit and undermines the legitimacy of administrative policymaking.

Even worse, the *Fox* power sends a corrosive message about political power. The particular policy change in *Fox* resulted from pressure by members of Congress using their oversight authority.²³⁵ Given the structures of the legislative and executive branches, however, we should expect the President—or, more usually, persons somehow claiming authority to speak for her—to be the primary source of pressure on agencies to change policies for

231. *Id.* at 515 (majority opinion).

232. *See supra* notes 119–21 and accompanying text (discussing the FCC's adoption of its fleeting expletives policy).

233. *See supra* notes 122–43 and accompanying text (discussing the FCC's abandonment of its fleeting expletives policy).

234. *Id.*

235. *See supra* notes 125–34 and accompanying text (discussing pressure by the oversight committee on the FCC to abandon its fleeting expletives policy); *see also Fox*, 556 U.S. at 523 (plurality opinion) ("[T]he precise policy change at issue here was spurred by significant political pressure from Congress.").

political reasons.²³⁶ The *Fox* power thus largely boils down to an expression of an extreme presidentialist claim that agencies should change policies, in the absence of any expert or meaningful democratic justification, just because someone says that the President says so.²³⁷ There are certain constitutional domains where the President's power is close to absolute and likely should be so. For instance, the President gets to nominate members of her cabinet just "because she says so." To carry this type of absolute presidential authority into the domain of agency regulatory policy, even as limited by the scope of the *Fox* power, not only undermines the values of expertise and statutory control that are central to administrative law's legitimacy; it also carries an unpleasant whiff of plebiscitary dictatorship.²³⁸ Moreover, the justification for such presidential authority, insofar as it relies on the theory that the President is the best avatar of the "will of the people" carries unfortunate overtones.²³⁹ Administrative law should avoid this unhealthy habit of mind.

236. See Seidenfeld, *Role of Politics*, *supra* note 195, at 1410–11 (noting that the significance of congressional control of agency discretion is subject to dispute given that "[h]olding oversight hearings on regulatory matters is time consuming, and agencies hold an advantage over Congress in terms of their knowledge about the matters about which they testify," and overturning agency action by statute is expensive).

237. For an expression of this sentiment from someone in a position to act upon it, see BOB WOODWARD, *BUSH AT WAR* 145–46 (2002), which quotes President Bush as saying: "I'm the commander—see, I don't need to explain—I do not need to explain why I say things. That's the interesting thing about being the president."

238. See Levinson & Balkin, *supra* note 89, at 1852–55 (lamenting the slide of the presidency toward plebiscitarian dictatorship and tracing this critique back to the work of Max Weber); see also Peter L. Strauss, Response, *Things Left Unsaid, Questions Not Asked*, 164 U. PA. L. REV. ONLINE 293, 304 (2016), <https://www.pennlawreview.com/wp-content/uploads/2020/05/164-U-Pa-L-Rev-Online-293.pdf> (adverting to the possibility that "presidential constitutional arrogance continuously threatens a movement to a 'supreme authority' state") [<https://perma.cc/9MKC-63V8>].

239. Cf. Robert O. Paxton, *The Five Stages of Fascism*, 70 J. MODERN HIST. 1, 6 (1998) (identifying as one of the "mobilizing passions" of fascism the "[a]uthority of natural leaders (always male) throughout society, culminating in a national chieftain who alone is capable of incarnating the group's destiny"); Umberto Eco, *Ur-Fascism*, N.Y. REV. BOOKS, June 22, 1995, at 8 (explaining that, in "Ur-fascism," "the People is conceived as a quality, a monolithic entity expressing the Common Will" and that "[s]ince no large quantity of human beings can have a common will, the Leader pretends to be their interpreter").

C. *Reject the Fox Power to Strengthen Experts (a Bit)*

Striking a balance between political power and expertise is one of the prime tasks of administrative law, and it implicates judgments about which reasonable minds may disagree. Still, one need not be a committed New Dealer of the expertocratic mold to be concerned that this balance has shifted too far toward politics and away from expertise in a worrisome way.²⁴⁰ For instance, the process of centralized review of significant rules by OIRA shifts policymaking authority away from agencies where subject-area experts work toward an opaque institution that can serve as a clearinghouse for political influence.²⁴¹ For another example, consider that the Trump administration, presumably in an effort to reduce the possibility of inconvenient agency experts producing inconvenient facts, has been hollowing out the professional civil service and sidelining scientists.²⁴²

Rejecting the *Fox* power to make policy changes on purely political grounds should nudge the balance of power between politics and expertise at least a little way toward the latter. To obtain answers to Justice Breyer's query, "Why change?" that go beyond an unacceptably political answer, "because we like the new policy better," agency officials would generally need to turn to subject-area experts, giving them an additional point of leverage in the policy-making process.

D. *But Does Any of This Matter?*

One might well object to this Article's contention that courts should get rid of the *Fox* power on the basis that it ultimately may not matter that much. The existence of this power should change the results of judicial review only where an agency abandons an old policy for a new one, offers sufficient "good" reasons for the new

240. See *supra* note 4 (collecting examples of what might be called attacks on expertise); see also Peter L. Strauss, *The President and the Constitution*, 65 CASE W. RES. L. REV. 1151, 1152–53 (2015) (discussing White House control of rulemaking and distortion of scientific judgments during both the Bush and Obama administrations).

241. See, e.g., Strauss, *supra* note 238, at 300–04 (discussing replacement of the congressionally designed APA process for rulemaking led by agencies with the "highly political and opaque" regime of OIRA review).

242. See *supra* note 4 (collecting examples).

policy to survive *State Farm* review,²⁴³ but nonetheless does not give a suitably technocratic answer to the “Why change?” query.²⁴⁴ Even with the *Fox* power, however, agencies have strong incentives to give good answers to this query given that an agency should expect a reviewing court to be more receptive to a policy change where the agency has given a technocratic explanation demonstrating that its old policy has become unworkable or undesirable.

The *Fox* case itself can be minimized as an outlier as it involved an unusual situation where great political pressure was brought to bear to push through a policy change in a context that is dominated by value judgments and does not lend itself easily to empirical investigation.²⁴⁵ As a result, it was especially difficult for the FCC to gin up an empirical analysis demonstrating that its fleeting expletives policy should be abandoned because it was damaging children with “first blows” of indecency from the likes of Bono.²⁴⁶ As an edge case, *Fox* thus provided an opportunity for Justices Scalia and Breyer to hold an interesting debate on the limits of agency political authority and the sources of agency policymaking legitimacy, but this debate has mostly theoretical influence.²⁴⁷ Certainly, in more practical terms, the *Fox* power has not made judicial review of agency policy changes toothless—a point amply demonstrated by the stunning record of failure that the Trump administration’s regulatory rollbacks have generated in the courts.²⁴⁸

243. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (holding that to uphold a policy reversal against an arbitrariness challenge, “it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates”).

244. *See, e.g., id.* at 567 (Breyer, J., dissenting) (insisting that the FCC’s explanation for its abandonment of its fleeting expletives policy did not properly answer the “Why change?” query).

245. *See id.* at 519 (majority opinion) (excusing the FCC from providing empirical support for its decision to abandon its fleeting expletives policy because “[t]here are some propositions for which scant empirical evidence can be marshaled, and the harmful effect of broadcast profanity on children is one of them”).

246. *Cf. supra* notes 124–34 and accompanying text (discussing Bono’s excited response to winning a Golden Globe, the purportedly outraged response of members of an oversight committee, and the FCC’s flip-flop on enforcement).

247. *See Fox*, 556 U.S. at 513–16 (setting forth a description of arbitrariness review that includes the *Fox* power). *But see id.* at 546–52, 567 (Breyer, J., dissenting) (rejecting the *Fox* power and insisting that, at least for significant policy changes, agencies must give an answer to “Why change?” that goes beyond “We like the new policy better”).

248. *See Roundup: Trump-Era Agency Policy in the Courts*, INST. POL’Y INTEGRITY, N.Y.U. SCH. L., <https://policyintegrity.org/deregulation-roundup> (last updated Jan. 10, 2020) (providing a database indicating that the Trump administration has, at least for the

In truth, it is impossible to know how, precisely, the *Fox* power has changed either agency or judicial behavior. Grant for the sake of argument, then, that the *Fox* power is not doing any readily identifiable, concrete harm. It remains the case that there is no reason to think that it is doing any concrete good, either. The claim that the *Fox* power advances political accountability and democratic values relies on a potent but obviously false “folk theory” of democracy as a vehicle for fine-grained policymaking by voters.²⁴⁹ Moreover, by design, the *Fox* power does not advance expertise or serve any practical necessity.²⁵⁰ In any situation where an old policy is causing identifiable damage, an agency does not need to use the *Fox* power to abandon it. Instead, the agency can identify this damage as a basis for answering the “Why change?” query.

The absence of quantifiable costs and benefits to the *Fox* power leaves us free to make a qualitative judgment based on the message that it sends concerning the nature of agency (and presidential) policymaking power. Justice Breyer neatly captured the corrosive nature of this message with his rhetorical question, “[W]hy would [Congress] grant agencies the freedom to change major policies on the basis of nothing more than political considerations or even personal whim?”²⁵¹ Framed this way, the answer to this question should be obvious: There is no good reason why Congress would do so. To the contrary, granting agencies (and, by extension, the President) a wholly unnecessary power to change policies just because “they want to” undermines the core value of expertise that legitimizes the modern administrative state. As such, we should reject the *Fox* power, which, shorn of its dubious democracy justification, reflects an autocratic and unhealthy way of thinking about—and thus perhaps creating—administrative and presidential power.

time being, lost in sixty-two of sixty-six challenges to its deregulatory actions) [<https://perma.cc/DPY3-7ZU9>]. See generally Buzbee, *supra* note 16, at 1412–17 (discussing constraints that judicial review places on agency policy changes and discussing applications of these constraints to reject Trump administration deregulatory actions).

249. See *supra* notes 200–20 and accompanying text (discussing the implausibility of the political accountability justification for the *Fox* power and focusing in particular on Achen and Bartels’s critique of the “folk theory” of democracy).

250. See *Fox*, 556 U.S. at 515 (explaining that an agency’s unstated belief that a new policy for which it has offered good reasons is better than an old policy can justify policy change).

251. *Id.* at 552 (Breyer, J., dissenting).

CONCLUSION

This Article has used the Trump administration's scorched-earth campaign to roll back Obama administration regulatory policies as an occasion to reexamine the "*Fox* power," which allows an agency, within a zone of reasonable discretion, to abandon an old policy for a new one based upon unspoken political preferences.²⁵² In keeping with the "political control" and "presidentialist" models that have dominated administrative law for decades, Justice Scalia favored this *Fox* power because it enables agencies to shift policies to fit the preferences of elected officials and thus purportedly enhances political accountability and democracy.²⁵³ This political accountability story, however, rests on a potent but obviously false fiction regarding the nature of mass democracy as a device for review and control of policymaking by elected officials.²⁵⁴ Shorn of this justification, the *Fox* power authorizes, albeit in a limited domain, a type of agency political discretion that does not advance democratic values, expertise, or practical necessity. Allowing an agency to abandon an old policy for a new one just because it "likes" the new policy better (or, perhaps more accurately, because someone with power has told the agency to like the new policy better) needlessly undermines the values of reason and expertise upon which the modern administrative state depends. Justice Breyer was thus correct that, to justify such a switch, an agency should have to give an answer to "Why change?" that goes beyond political preferences.²⁵⁵

252. *See id.* at 515 (majority opinion) (describing arbitrariness review in a way that creates this *Fox* power).

253. *See supra* notes 163–66 and accompanying text (discussing the normative underpinning of Justice Scalia's *Fox* opinion).

254. *See supra* notes 200–20 and accompanying text (critiquing the political accountability story underlying the *Fox* power).

255. *Fox*, 556 U.S. at 567 (Breyer, J., dissenting).