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Hard Look Review, Policy Change, and *Fox Television*

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I. INTRODUCTION

The assigned topic for the symposium of which this essay is an outgrowth was “What Change May Come: The Obama Administration and the Future of the Administrative State.” “Change” was, of course, a prominent theme in Barack Obama’s campaign for the presidency, and the advent of his Administration has indeed brought new goals and policies to the fore, although the pace of change has undoubtedly not been as rapid as many supporters had hoped.

I interpret the theme of the symposium as an invitation to explore how administrative law can facilitate or retard the capacity of a presidential administration to implement policies of a kind that it was elected to promote. More specifically, I intend to devote this essay to an examination of the role of judicial review. How might the courts influence the ability of an incoming administration to pursue an agenda for change? And how should they exercise this influence? The discussion will center on the implications of the Supreme Court’s recent decision in *FCC v. Fox Television Stations, Inc.*¹ The basic argument of the essay is that *Fox* will at least slightly broaden the capacity of an administration to pursue an agenda of change and that this development is, on the whole, salutary.

This focus comes naturally to me in the sense that judicial review has been the subject of much of my past scholarship. In this particular context, however, it presents some difficulties. The courts are, after all, supposed to be *independent*. Judges are not supposed to have an agenda to promote or impede the administration’s policies (as distinguished from promoting Congress’s). Even if we believe that some judges do covertly possess such an agenda, they aren’t likely to disclose it to us. The upshot is that, although the courts affect the administrative process enormously, they also do so obliquely. We need to pay attention to their impact, but we have to tease out their contributions through inference as best we can.

A related, but more classically academic, purpose of the essay is to

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1. 129 S. Ct. 1800 (2009).

explore certain aspects of the doctrines that govern judicial review of agency discretion. In the language of the Administrative Procedure Act, the inquiry relates to review for “arbitrary” or “capricious” action, or “abuse of discretion,”² but the more popular name for this mode of review is the “hard look” doctrine. For present purposes, all of these terms are interchangeable. Arbitrariness review has gotten relatively little attention during the past two decades or so, because both courts and commentators have devoted themselves instead to exploring, somewhat obsessively, the intricacies of judicial review of issues of law rather than discretion, primarily through elaboration of the so-called *Chevron* doctrine and its various exceptions.³ However, recent judicial and scholarly treatments of arbitrariness doctrine invite renewed attention to that phase of judicial review.

In undertaking to write about doctrine—specifically, judicial review doctrine that may affect the ability of a new presidential administration to effectuate policy change—I do not overlook the recent profusion of empirical literature suggesting that judges’ political ideology can go far to explain why court challenges to agency action come out as they do.⁴ These studies tell us that doctrine isn’t the whole story, but I will proceed on the premise that it is *part* of the story. After all, most of the huge literature on *Chevron* makes the same working assumption. I’ll return to this question of the relevancy of doctrine, when seen against the background of the empirical literature, at the end of this essay.

II. FOX AND POLICY CHANGE

The *Fox* case grew out of a ruling by the Federal Communications Commission (FCC) that a television or radio station can be found liable for “indecentcy,” and potentially be subject to heavy fines, if it broadcasts a program on which someone uses what the Court delicately called “the F-Word,” even in a fleeting and unplanned way.⁵ The specific litigation arose out of Fox’s broadcast of a Golden Globes award ceremony in which Cher said this about receiving her award: “I’ve also had critics for the last 40 years saying that I was on my way out every year. Right. So f*** ‘em.”⁶ Similarly, on another Golden Globes broadcast, Nicole

2. 5 U.S.C. § 706(2)(A) (2006).

3. See *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984).

4. See, e.g., William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083 (2008); Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U. CHI. L. REV. 761 (2008); Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823 (2006).

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

6. *Id.* at 1808.

Richie was describing the rural life depicted on her reality show, “The Simple Life,” and asked: “Have you ever tried to get cow s*** out of a Prada purse? It’s not so f***ing simple.”⁷ The FCC found that these broadcasts violated the prohibition of “indecent” language in the Communications Act,⁸ although it let Fox off without a monetary penalty this time.⁹

In adopting this ruling, the FCC was departing from a policy that it had followed for some thirty years. In *FCC v. Pacifica Foundation*,¹⁰ the Supreme Court had upheld the Communications Act ban on “indecent” speech as applied to a radio station that had broadcast George Carlin’s expletive-laden *Filthy Words* monologue. For years afterwards, the FCC described its enforcement policy in this area as applicable only to broadcasts that, like the Carlin monologue, involved repeated use of graphic language for shock value. Programs that contained fleeting, isolated expletives were uniformly tolerated.¹¹ The *Fox* proceeding was one of a series of cases in which, beginning in 2004, the FCC took a significantly stricter view.¹²

The Second Circuit reversed the Commission and, in doing so, held that this change of direction put a special burden of explanation on the agency.¹³ The court said that the FCC decision could not be sustained unless the agency explained “‘why the original reasons for adopting the [former] rule or policy are no longer dispositive,’” and also “‘why the new rule effectuates the statute as well as or better than the old rule.’”¹⁴ Without such an explanation, the Commission’s finding would be arbitrary and capricious.

The Supreme Court reversed the lower court by a 5–4 vote and upheld the FCC order under review.¹⁵ In his majority opinion, Justice Scalia specifically disagreed with the Second Circuit’s position regarding the extent to which an agency must explain a change in prior policy.¹⁶ He agreed that the Commission’s action would have been arbitrary if it had departed from prior policy without acknowledging that it was

7. *Id.*

8. 18 U.S.C. § 1464 (2006).

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

10. 438 U.S. 726 (1978).

11. *Fox*, 129 S. Ct. at 1806–07.

12. *Id.* at 1807–10.

13. *Id.* at 1810.

14. *Id.* (quoting *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 456–57 (2d Cir. 2007), *rev’d*, 129 S. Ct. 1800 (2009)).

15. *Id.* at 1819.

16. *Id.* at 1810.

doing so, or without explaining why it favored the new policy.¹⁷ But, he said, the agency

need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one; 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. This means that the agency need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate.¹⁸

The following pages will be devoted to exploring and evaluating the Court's position on this issue. This will by no means be a comprehensive analysis of the *Fox* case. The Court also addressed a variety of other aspects of arbitrariness review, and five other Justices filed concurring or dissenting opinions that contributed further to the overall dialogue.¹⁹ I will, however, discuss these additional aspects of the case only insofar as they bear on the main theme.

Ultimately, the Court remanded the case to the Second Circuit for consideration of constitutional issues, which it had not examined on this appeal.²⁰ About a year later, the court of appeals held that the FCC's new policy on fleeting expletives was too vague to survive scrutiny under the First Amendment.²¹ Fox and its allies in the broadcast industry have, therefore, apparently prevailed in the fight over fleeting expletives, at least for the present. The Supreme Court's administrative law teachings, however, promise to be more enduring and deserve careful analysis.

III. THE MAJORITY'S RATIONALE

A. *Antecedents*

Whatever else may be said about it, the majority's rationale was a new wrinkle in scope-of-review doctrine. The Second Circuit's view was typical of the teachings of other lower court opinions prior to *Fox*.

17. *Id.* at 1811.

18. *Id.*

19. *See id.* at 1819–22 (Thomas, J., concurring) (joining the majority but adding that he would be willing to reconsider, *inter alia*, *Pacifica* in a proper case); *id.* at 1822–24 (Kennedy, J., concurring in part and concurring in the judgment) (joining most of the majority opinion and articulating a position similar to the majority's on the issue of review of policy changes); *id.* at 1824–28 (Stevens, J., dissenting) (arguing that the FCC's policy change was arbitrary and that the Commission had read *Pacifica* too broadly); *id.* at 1828–29 (Ginsburg, J., dissenting) (highlighting the “long shadow the First Amendment casts over what the Commission has done”); *id.* at 1829–41 (Breyer, J., dissenting) (arguing at length that the FCC order was arbitrary and capricious).

20. *Id.* at 1819 (majority opinion).

21. *Fox Television Stations, Inc. v. FCC*, 613 F.3d 317, 319 (2d Cir. 2010).

The general assumption was that when an agency departs from past policies, a reviewing court should expect it not only to acknowledge the departure, but also to give a good reason for it.²² This proposition also seemed to find support in some of the Supreme Court's own past pronouncements, notably including this frequently quoted language from *Atchison, Topeka & Santa Fe Railway Co. v. Wichita Board of Trade*:²³ "There is . . . at least a presumption that [congressional] policies will be carried out best if [a] settled rule is adhered to. From this presumption flows the agency's duty to explain its departure from prior norms."²⁴ In *Fox*, however, Justice Scalia appeared to regard the *Atchison* "presumption" as imposing on the agency only a burden "to provide *some* explanation for a change."²⁵

Justice Scalia's refusal to interpret this duty of explanation expansively should not have surprised anyone. He had made his views clear in a well-known lecture on the *Chevron* doctrine that he had published more than a decade prior to *Fox*:

If Congress is to delegate broadly, as modern times are thought to demand, it seems to me desirable that the delegatee 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. All this is lost if "new" or "changing" agency interpretations are somehow suspect. There are of course well established restrictions upon sudden and irrational changes of interpretation through adjudication, and statutorily prescribed procedures (including a requirement of reasoned justification) for changes of interpretation through rulemaking. And at some point, I suppose, repeated changes back and forth may rise (or descend) to the level of "arbitrary and capricious," and thus unlawful, agency action. But so long as these limitations are complied with, there seems to me no reason to value a new interpretation less than an old one.²⁶

The *Fox* case provided Scalia an opportunity to prevail on his col-

22. Section of Admin. Law & Regulatory Practice, Am. Bar Ass'n, *A Blackletter Statement of Federal Administrative Law*, 54 ADMIN. L. REV. 1, 42-43 (2002) [hereinafter *ABA Blackletter Statement*] ("Commonly applied bases for reversal [under the arbitrary and capricious test] include . . . [a showing that an agency] action is, without legitimate reason and adequate explanation, inconsistent with prior agency policies or precedents."). The accompanying report collected case law support for this claim. See Lisa Schultz Bressman, *Judicial Review of Agency Discretion*, in A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES 177, 189-90 (John F. Duffy & Michael Herz eds., 2005).

23. 412 U.S. 800 (1973).

24. *Id.* at 808.

25. *Fox*, 129 S. Ct. at 1810 n.2.

26. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 518 (1989) (footnotes omitted).

leagues—or at least enough of them to compose a majority—to embrace this more accommodating attitude toward agencies' changing their minds.

The *Fox* holding was also foreshadowed by the Court's 2006 decision in *National Cable & Telecommunications Ass'n v. Brand X Internet Services*.²⁷ There, in another FCC case, the Court held that when an agency adopts one interpretation of an ambiguous regulatory statute and the interpretation is judicially upheld, the agency remains free to adopt a different interpretation later, if the second interpretation would otherwise be entitled to *Chevron* deference.²⁸ The fact that the first interpretation had been upheld in court does not prevent the agency from changing its mind.²⁹ The *Brand X* holding did not completely predetermine the *Fox* analysis, because in *Fox* the issue was what kind of explanation must accompany a revised interpretation, not whether the agency was barred "as a matter of law" from altering its past policy at all. In a broader sense, however, the thrust of both cases was similar: The agency should be free to revise its position without being unduly impeded by either judicial precedent (*Brand X*) or the agency's own prior views (*Fox*).

To be sure, the Scalia lecture and the *Brand X* opinion were written about *Chevron* and phrased in the language of statutory interpretation. I have argued in past scholarship that the second step in the *Chevron* formula overlaps, if it does not entirely coincide with, the arbitrary-capricious standard of review,³⁰ and this view is now widely accepted.³¹ In other words, *Chevron* asks whether an agency's "interpretation" conflicts with the unambiguous meaning of a statute and, if not, whether it is reasonable; but in practice this "reasonableness" inquiry is primarily an inquiry into whether the interpretation is "reasoned," which is the

27. 545 U.S. 967 (2005). For a pre-*Brand X* defense of the conclusions the Court later reached, see Kenneth A. Bamberger, *Provisional Precedent: Protecting Flexibility in Administrative Policymaking*, 77 N.Y.U. L. Rev. 1272 (2002).

28. *Brand X*, 545 U.S. at 981–82.

29. *Id.* The Court said that the ruling in the first case binds the agency "only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." *Id.* at 982. Under those circumstances, the agency would not have been entitled to *Chevron* deference in the first place. Thus, the effect of *Brand X* is to make any judicial deference to the agency that may have occurred in the first case irrelevant as a brake on *Chevron* deference in the second case.

30. Ronald M. Levin, *The Anatomy of Chevron: Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253 (1997).

31. ABA *Blackletter Statement*, *supra* note 22, at 38. For recent discussions to similar effect, see, for example, *Shays v. FEC*, 414 F.3d 76, 96–97 (D.C. Cir. 2005); Matthew C. Stephenson & Adrian Vermeule, *Chevron Has Only One Step*, 95 VA. L. REV. 597 (2009). *But see* Kenneth A. Bamberger & Peter L. Strauss, *Chevron's Two Steps*, 95 VA. L. REV. 611 (2009) (suggesting qualifications to the Stephenson and Vermeule account).

traditional basis of arbitrariness review.³² The overlap between these two nominally discrete standards of review suggests that the ground rules operating under them should be roughly similar.

B. Normative Considerations

Regardless of how one reads the antecedents that arguably militated in favor of or against the Court's holding in *Fox*, I believe that much can be said in support of the Court's relatively receptive attitude toward policy changes at the administrative level. The most salient argument tending in that direction proceeds from the premise that elections should have consequences. The best-known articulation of this proposition in the administrative law literature is Justice Rehnquist's partial dissent in *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*³³ Rehnquist would have upheld the rescission by the National Highway Traffic Safety Administration (NHTSA) of a rule that required automobile manufacturers to install automatic seatbelts in all new cars. He added that the rescission appeared to be related to Ronald Reagan's election as President and 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."³⁴

Applying the logic of Rehnquist's argument to the facts of *Fox*, one can argue that if the people elect George W. Bush to be President (however contested that particular election may have been), they are to some extent inviting, and should expect to get, the kinds of policy changes that would naturally be pursued by the kind of people whom President Bush would appoint.³⁵ But at the same time, this stance is also condu-

32. Levin, *supra* note 30, at 1263–77.

33. 463 U.S. 29, 57–59 (1983) (Rehnquist, J., concurring in part and dissenting in part).

34. *Id.* at 59.

35. This line of reasoning may seem shaky, if not entirely flawed, because the FCC is an "independent" agency, which is subject to less control over time by the president than an "executive" agency is. Indeed, that distinction gave rise to debate in *Fox*. Justices Breyer and Stevens, in dissent, suggested that, because of the FCC's status as an independent agency, it should be relatively apolitical, and courts should hold it to an exceptionally high standard of reasoned decisionmaking. *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1824–26 (2009) (Stevens, J. dissenting); *id.* at 1829–30 (Breyer, J. dissenting.). Justice Scalia (speaking for four Justices in a portion of his opinion that Justice Kennedy did not join) rejected this reasoning, remarking that the "independent agencies are sheltered not from politics but from the President, and it has often been observed that their freedom from presidential oversight (and protection) has simply been replaced by increased subservience to congressional direction." *Id.* at 1815–17 (plurality opinion). For a review of this aspect of the case, and an argument that independent agencies should indeed receive less judicial deference than executive agencies do, see Randolph J. May, *Defining Deference Down, Again: Independent Agencies, Chevron Deference, and Fox*, 62 ADMIN. L. REV. 433 (2010).

I do not feel obliged to enter into this debate. Apparently, no court has ever embraced this

cive to allowing an incoming administration like President Obama's to institute policies with which it is more comfortable. The logic of the *Fox* case suggests that, if the Obama Administration appoints commissioners who are less worried about expletives on the airwaves than the FCC of 2006 was, the pendulum could well swing back in the opposite direction. From this standpoint, the thrust of the *Fox* principle is, at least in this respect, neither regulatory nor deregulatory. Rather, it serves to *reduce the inertia* of regulatory policies. In a quite straightforward sense, this holding could be expected, over time, to buttress the capacity of an incoming presidential administration to pursue an agenda for change.

Professor Kathryn Watts elaborates on this theme in a recent article entitled *Proposing a Place for Politics in Arbitrary and Capricious Review*.³⁶ As the title suggests, she takes up the challenge of asking whether and how judicial review doctrine could be reformulated so as to give agencies an enhanced opportunity to pursue political priorities. She calls attention to the fact that *Chevron* expressly argues for judicial deference to administrative authorities on the basis that they are politically accountable for their decisions, and judges are not; and that understanding of the rationale for the doctrine has become widely accepted.³⁷ So, Watts argues, it is curious that this same line of reasoning has been much less prominent in discussions of hard look review, which is more often regarded as a largely technocratic, apolitical mode of review. Recognition of a "place for politics" in arbitrariness review would alleviate this disparity.³⁸ Given my view that *Chevron* and arbitrariness review overlap in significant ways, as discussed above, I naturally find this normative argument congenial.

Actually, the latitude that might ensue from a comparatively relaxed approach to arbitrariness review can serve other ends besides the facilitation of political agendas. It might, for example, serve to ameliorate what has come to be known as the "ossification" of the rulemaking process, as Professor Watts also recognizes.³⁹ The ossification concept

distinction, see *Fox*, 129 S. Ct. at 1817 ("Nor does any case of ours express or reflect . . . 'heightened scrutiny' [for rulemaking by independent agencies]"); May, *supra*, at 436, although the Court's newest member has suggested that she might favor it. See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2376–77 (2001). For the present, the legal system seems content to proceed without it, presumably in the belief that the similarities between executive and independent agencies, including the susceptibility of the latter to some political control, are sufficient to outweigh their differences.

36. Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2 (2009).

37. *Id.* at 35–38.

38. *Id.* at 39. For another recent, probing inquiry into the proper role of political influences in the regulatory process, see Nina A. Mendelson, *Disclosing "Political" Oversight of Agency Decision Making*, 108 MICH. L. REV. 1127 (2010).

39. Watts, *supra* note 36, at 41–42.

refers to the possibility that the burdens of preparing detailed explanatory preambles to accompany rules, due to the expectations of reviewing courts (among others), causes agencies to shy away from resorting to the rulemaking process as readily as they should.⁴⁰ Ossification is not directly relevant to the *Fox* case, which, after all, grew out of agency adjudication, not rulemaking. On a broader level, however, impediments to policy change at the administrative level have been criticized for many years, outside the rulemaking context as well as within it. This more global critique is reflected in now-Justice Elena Kagan's article *Presidential Administration*, which notes that "bureaucracy . . . has inherent vices (even pathologies), foremost among which are inertia and torpor. The standard rhetoric of administrative law, which talks of the need to control agency action, obscures this danger."⁴¹ Justice Kagan's proposed solution in her article—a statutory presumption whereby a grant of authority to an executive officer should be construed as permitting the president to direct that officer to make a particular decision, unless the statute expressly specifies otherwise⁴²—has not yet gained traction in real-world practice. It seems evident, however, that an adjustment in the standard of review by which policy changes are judged in court could be responsive to this critique.

IV. POSSIBLE DOUBTS AND QUALIFICATIONS

Thus far, however, my argument in support of the *Fox* opinion's lenient attitude toward policy change is entirely one-sided. At most, it is a *prima facie* case. To consider more seriously whether that position was well taken, I will need to juxtapose it with what the dissenters said on the same issue. Justice Breyer wrote the principal dissent and offered a contrasting perspective on this issue. He said:

To explain a change requires more than setting forth reasons why the new policy is a good one. It also requires the agency to answer the question, "Why did you change?" And a rational answer to this question typically requires a more complete explanation than would prove satisfactory were change itself not at issue.⁴³

He drove this argument home in his discussion of the substantive argu-

40. See, e.g., Richard J. Pierce, Jr., *Waiting for Vermont Yankee III, IV, and V?: A Response to Beermann and Lawson*, 75 GEO. WASH. L. REV. 902, 909–10 (2007); Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1410–26 (1992). For a more skeptical perspective, see William S. Jordan, III, *Ossification Revisited: Does Arbitrary and Capricious Review Significantly Interfere with Agency Ability to Achieve Regulatory Goals Through Informal Rulemaking?*, 94 NW. U.L. REV. 393, 403–07 (2000).

41. Kagan, *supra* note 35, at 2263.

42. *Id.* at 2320, 2327.

43. *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1830 (2009) (Breyer, J., dissenting).

ments that the FCC used to justify its new fleeting expletives policy. For example, he acknowledged the FCC's argument that "the expletives here in question always evoke a coarse excretory or sexual image," but replied that "[t]he problem with this answer is that it does not help to justify the *change* in policy. The FCC was aware of the coarseness of the 'image' the first time around."⁴⁴ Similarly, noting the Commission's finding that "the new policy was better in part because . . . [it] better protects children against what it described as 'the first blow'" (an unanticipated expletive), he responded that "[t]he difficulty with this argument . . . is that it does not explain the *change*."⁴⁵ The FCC had long considered the "first blow" theory to be compatible with its previous enforcement policy, in which fleeting expletives had been tolerated. Justice Breyer thus asked: "What, in respect to the 'first blow,' has changed?"⁴⁶

Breyer declared that he was not proposing a "heightened" standard of review, but rather an "application of the *same standard* of review"—the arbitrariness test—"to different circumstances It requires the agency to focus upon the fact of change where change is relevant, just as it must focus upon any other relevant circumstance."⁴⁷ This formulation is helpful insofar as it dispensed with the somewhat elusive notion of a heightened standard, but it leads directly to the challenge of identifying circumstances in which change would be relevant and the reasons that would make it relevant.

A. *Where the Majority and Dissenters Agreed*

Up to a point, the Justices were in agreement about circumstances in which a policy change would have to be explained carefully, and I will try to highlight these areas before turning to their disagreements. Justice Scalia noted that an agency must explain a change in direction if "its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account. It would be arbitrary

44. *Id.* at 1838.

45. *Id.* at 1839 (internal quotation marks omitted). The Commission was referring to language from *FCC v. Pacifica Foundation*, 438 U.S. 726, 748–49 (1978): "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."

46. *Fox*, 129 S. Ct. at 1839 (Breyer, J., dissenting).

47. *Id.* at 1831. The notion of a "heightened standard" entered into the discussion because some pre-*Fox* case law in the lower courts had suggested that such a standard of review comes into play when an agency changes course. See, e.g., *NAACP v. FCC*, 682 F.2d 993, 998 (D.C. Cir. 1982). Like Justice Breyer, the majority in *Fox*, of course, rejected this notion. *Fox*, 129 S. Ct. at 1810.

and capricious to ignore such matters.”⁴⁸ Justice Kennedy, in a concurring opinion, agreed that the need to explain a change in policy would depend on the circumstances and that an agency would need to do so under the circumstances that Scalia had mentioned.⁴⁹

The Justices in the majority had little choice but to concede that it would be arbitrary for an agency to base a change in policy on factual premises that contradicted findings that it had used to support its prior policy. As Kennedy recognized, they otherwise would have had trouble explaining away the holding in *State Farm*.⁵⁰ In that case NHTSA initially had adopted a rule that required car manufacturers to install automatic seatbelts or airbags in new motor vehicles.⁵¹ Upon determining that the benefits of the seatbelt option did not justify its costs, the department rescinded the entire rule.⁵² The Court held that the rescission had been arbitrary because the department had not even attempted to explain why it had eliminated the airbags portion of the prior rule.⁵³ This omission was erroneous, the Court said pointedly, “[g]iven the effectiveness [previously] ascribed to airbag technology by the agency”⁵⁴ Similarly, NHTSA had rejected the option of requiring manufacturers to install non-detachable seatbelts because they would “complicate the extrication of [an] occupant from his or her car.”⁵⁵ The Court found that this conclusion was also arbitrary, in part because the agency did not explain why it had changed its mind after concluding three years earlier that such belts allowed easy extricability.⁵⁶ On both of these issues, the Court in *State Farm* was unanimous.⁵⁷

Seen in this light, one lesson that seems to emerge from *Fox* is that when courts evaluate the rationality of an agency’s change in policy, the nature of the agency’s explanation for its decision can be crucial. If the agency chooses to adopt (or the underlying statute requires it to adopt) a factually grounded explanation for a rule or policy, a contradiction between the agency’s previous and current view of the facts would cry out for explanation. However, the majority and concurrence seem to

48. *Fox*, 129 S. Ct. at 1811 (citing *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 742 (1996)).

49. *Id.* at 1822–24 (Kennedy, J., concurring in part and concurring in the judgment).

50. *Id.* at 1824.

51. *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 34–35 (1983).

52. *Id.* at 38.

53. *Id.* at 46–51.

54. *Id.* at 46.

55. *Id.* at 56 (citation omitted) (internal quotation marks omitted).

56. *Id.* at 55–56.

57. Despite his partial dissent, see *id.* at 57–59 (Rehnquist, J., concurring in part and dissenting in part), Justice Rehnquist agreed with the majority’s decision with respect to these regulatory options. *Id.* at 57–58.

maintain, if the agency changes its policy for reasons that could be better described as a value judgment (and the enabling statute permits it to do so), the same logic does not come into play, and the agency has less need to make a direct comparison between the old and new policy.⁵⁸

Another of Justice Scalia's off-the-bench writings provides a tangible illustration of this distinction, building on the facts of *State Farm*. In the actual case, as already noted, the Court overturned NHTSA's passive restraints rule. This decision affirmed a D.C. Circuit decision to similar effect.⁵⁹ The agency's failure to explain its abandonment of the airbags option, described above, was one basis for this holding.⁶⁰ Another was that NHTSA's prediction of the inefficacy of automatic seatbelts rested on inadequate analysis (specifically, it did not take enough account of the fact that the belts would automatically operate unless the consumer took affirmative steps to disable them).⁶¹ In a commentary on the court of appeals' decision, then-Professor Scalia suggested that a less technocratic explanation could simplify the agency's burden of explanation by adopting a more openly normative (and in a sense political) justification:

More needs to be done to bring the political, accommodationist, value-judgment aspect of rulemaking out of the closet. When NHTSA comes to reconsider the passive-restraint rule recently remanded by the D.C. Circuit, and if it chooses to adhere to its prior course, it would be refreshing and instructive if, instead of (or at least in addition to) blowing smoke in our eyes with exhaustive technical and economic data, it said flat-out: "It is our judgment that people should not be strapped in cars if they don't want to be; nor should they have to spend substantial sums for air-bags if they choose otherwise." A political judgment, the retribution or reward for which will be meted out by Congress, or at the polls, but not in the courts.⁶²

The distinction that I am extracting from this hypothetical is not clear-cut. Naturally, even the fictional explanation that Scalia envisioned would have required *some* factual support, policy discussion, and response to public comments. But the basic lesson remains: A decision based squarely on an explicit (and statutorily authorized) value judgment would probably require less explanation than a more technocratic rationale.

The second situation mentioned by Scalia and Kennedy as calling for explanation of a policy change would be one in which reliance inter-

58. Justice Kennedy made this point particularly explicit in his separate opinion. *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1823–24 (2009) (Kennedy, J., concurring in part and concurring in the judgment).

59. *State Farm Mut. Auto. Ins. Co. v. Dep't of Transp.*, 680 F.2d 206 (D.C. Cir. 1982).

60. *Id.* at 230.

61. *Id.*

62. Antonin Scalia, *Rulemaking as Politics*, 34 ADMIN. L. REV. v, xi (1982).

ests were seriously implicated. This also was an unsurprising assertion, because ample case law, in both the Supreme Court and lower courts, has established that an agency that departs from its past practices may be held to have acted in an arbitrary and capricious manner if the unfairness to regulated persons outweighs the government's interest in applying its new view to those persons.⁶³ From this premise one can easily conclude that if an agency does propose to alter a policy on which private persons have reasonably relied, it will need to set forth a cogent explanation for that choice. The FCC's decision not to impose any monetary penalty on Fox Television, notwithstanding its finding that the network had violated the Communications Act,⁶⁴ indicated plainly that the Commission had internalized the teachings of these cases.

This case law would seem to provide an appropriate lens through which to consider a hypothetical that Justice Breyer used to illustrate his thesis that agencies must explain why they change their policies:

An (imaginary) administrator explaining why he chose a policy that requires driving on the right-side, rather than the left-side, of the road might say, "Well, one side seemed as good as the other, so I flipped a coin." But even assuming the rationality of that explanation for an *initial* choice, that explanation is not at all rational if offered to explain why the administrator *changed* driving practice, from right-side to left-side, 25 years later.⁶⁵

Surely, that explanation would be arbitrary and capricious.⁶⁶ However, the problem in Breyer's hypothetical case would grow primarily out of impaired reliance interests. Drivers, pedestrians, manufacturers, and highway officials would have reasonably made investments and developed habits based on the right-side system. Factors like these had nothing to do with the problem in *Fox*, because transition costs resulting from reliance on the former fleeting-expletives policy were not significantly involved in that case.⁶⁷

63. See, e.g., *Heckler v. Cmty. Health Servs.*, 467 U.S. 51, 60 n.12 (1984) ("[A]n administrative agency may not apply a new [case-law] rule retroactively when to do so would unduly intrude upon reasonable reliance interests."); *Miguel-Miguel v. Gonzales*, 500 F.3d 941, 951 (9th Cir. 2007); *Epilepsy Found. v. NLRB*, 268 F.3d 1095, 1102 (D.C. Cir. 2001); *Microcomputer Tech. Inst. v. Riley*, 139 F.3d 1044, 1050 (5th Cir. 1998).

64. *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1813 (2009).

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

66. An even more clear-cut example, however, would be the hypothetical scenario that I once heard used to illustrate the hazards of gradualism: "The British government announced today that the nation will switch from driving on the left side to driving on the right. To minimize disruption, however, the change will be phased in. In year one, only the trucks will move."

67. Justice Breyer did draw attention to the risk that the new policy would force small broadcasters to have to invest in expensive bleeping-out equipment, *id.* at 1835–37, but that objection related to forward-looking compliance costs rather than the risk that broadcasters would

B. *The Nub of the Disagreement*

Now that I have examined areas in which the majority and dissenters seemed to be in accord as to the need for explanation of a policy change, I can home in on the areas of disagreement. Justice Breyer contended that, to justify a new policy, an agency must not only acknowledge that it is doing something different, but also make a direct comparison between the two policies. Thus:

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?⁶⁸

This formulation seems much more expansive than that of Justices Scalia and Kennedy. Justice Breyer's reasons for endorsing it are not spelled out, however. He agrees that sometimes the only explanation is that "[w]e . . . weigh the . . . considerations differently."⁶⁹ So the question is: Under what circumstances, other than those acknowledged by the majority, would this explanation be inadequate? His opinion offers scant generalizable criteria.

Justice Stevens, in a separate dissent, was no less emphatic: "There should be a strong presumption that the FCC's initial views, reflecting the informed judgment of independent commissioners with expertise in the regulated area, also reflect the views of the Congress that delegated the Commission authority to flesh out details not fully defined in the enacting statute."⁷⁰ This declaration is also difficult to interpret. It would be hard to defend this "strong presumption" on a literal level, because it does not seem likely that the FCC of 1978 and 1985 understood the position of the 1934 Congress better than the FCC of 2004 did. Perhaps, therefore, it rests on a broader notion that initial interpretations or policy judgments tend to be relatively reliable, and departures from these interpretations should be somewhat suspect or mistrusted. Like Breyer, Justice Stevens would in effect read the "presumption" in *Atchison* broadly. However, his reasons for doing so are again somewhat obscure.

In one additional passage, Justice Stevens did approach the issue a bit more concretely by referring briefly to the broadcasters' "substantial interest in regulatory stability."⁷¹ In concept, that interest could logically

be penalized for past investment decisions if they failed to comply quickly enough with the new regime.

68. *Id.* at 1831.

69. *Id.* (internal quotation marks omitted).

70. *Id.* at 1826 (Stevens, J., dissenting).

71. *Id.*

provide some support for a definition of arbitrariness that would make policy changes relatively difficult to institute. However, that argument would appear to prove too much. Stability and innovation are both important to the sound development of a regulatory program. Indeed, Justice Stevens himself argued eloquently on other occasions that the Communications Act and other regulatory statutes should be construed flexibly to allow the responsible agency to revise its policies in order to adapt to changes in society.⁷²

In the judicial context, of course, *stare decisis* is considered a strong norm, and departures from precedent are thought to call for “special justification.”⁷³ One would expect a court to explain cogently, not just perfunctorily, what is wrong with one of its own precedents before abandoning it; an explanation of why the new holding is defensible on its own terms would obviously not suffice. It is possible that the *Fox* dissenters’ attitude toward changes in agency policy was influenced to some degree by the way they would view a *court’s* departure from precedent.⁷⁴ However, judicial and administrative *stare decisis* are not equivalent. *Stare decisis* in the judicial sphere is closely bound up with the aspiration (or if you prefer, the myth) of the rule of law. Agencies, however, act in a quasi-legislative capacity as acknowledged policymakers, and the issues of legitimacy that arise when they jettison a precedent are simply not the same. Justice Scalia’s lecture on *Chevron* is again instructive:

It has always seemed to me utterly unrealistic to believe that when an agency revises . . . one of the legal rules that it applies in its adjudications . . . the agency was admitting that it had “got the law wrong.” And it has thus seemed to me inappropriate to look askance at such changes Rather, the agency was simply “changing the law,” in

72. See *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.* 512 U.S. 218, 235 (1994) (Stevens, J., dissenting); *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 151–52 (1990) (Stevens, J., dissenting).

73. *Dickerson v. United States*, 530 U.S. 428, 443 (2000); *Arizona v. Ramsey*, 467 U.S. 203, 212 (1984). See generally Richard H. Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 NYU L. REV. 570 (2001); Michael J. Gerhardt, *The Irrepressibility of Precedent*, 86 N.C. L. REV. 1279 (2008); Randy J. Kozel, *Stare Decisis as Judicial Doctrine*, 67 WASH. & LEE L. REV. 411 (2010).

74. Indeed, one could speculate that the debate over policy change in *Fox* served as something of a proxy for a larger tension within the Court itself over *stare decisis*. In strong dissents, Breyer and Stevens have made no secret about their discontent with what they regard as their colleagues’ abandonment of longstanding constitutional precedents in a wide variety of contexts. See *Citizens United v. FEC*, 130 S. Ct. 876, 938–42 (2010) (Stevens, J., concurring in part and dissenting in part); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 866 (2007) (Breyer, J., dissenting). They have made this reaction even clearer in less formal interviews and comments. See JEFFREY TOOBIN, *THE NINE* 334–36 (2007) (Breyer); Jeffrey Rosen, *The Dissenter, Justice John Paul Stevens*, N.Y. TIMES, Sept. 23, 2007, <http://www.nytimes.com/2007/09/23/magazine/23stevens-t.html> (Stevens).

light of new information or even new social attitudes impressed upon it through the political process—all within the limited range of discretion to “change the law” conferred by the governing statute.⁷⁵

A scope-of-review formula that defines the constraining force of administrative *stare decisis* should, therefore, rest on an analysis that is distinctive to the administrative process. In those terms, the *Fox* dissenters’ theory seems to have swept more broadly than their arguments could sustain.

C. *A Few Kind Words Regarding Hard Look Review*

The analysis that I have developed in the preceding pages is a limited one, and I do not want it to be over-read. I have addressed a relatively narrow question regarding the circumstances under which one line of inquiry should remain in the judge’s (and, therefore, the litigant’s) toolbox as a basis for challenging agency actions. I do not, however, intend the essay as an assault on the role that arbitrariness review generally plays in forcing agencies to defend and be accountable for their policy positions in light of statutory mandates, a factual record, and the arguments tendered by contesting parties. That judicial function remains pertinent regardless of whether or not an agency action can be seen as emanating from a political mandate or agenda. Even where a statute does permit an agency to base a particular decision on politically charged value judgments, judicial review can serve the beneficial purpose of forcing the agency to acknowledge its reliance on those judgments. By operating to debunk the neutral-sounding but insupportable explanations that agencies sometimes advance in order to conceal politically charged value judgments, judicial review can directly promote political accountability.

Some leading examples of this dynamic are familiar enough that they need little elaboration. For instance, I have drawn attention above to Justice Rehnquist’s argument, in his separate opinion in *State Farm*, that an incoming administration has legitimate reason to reappraise agency policies in light of its governing philosophy.⁷⁶ That argument

75. See Scalia, *supra* note 26, at 518–19; see also *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 766 (1969) (plurality opinion) (noting the “qualified role of *stare decisis* in the administrative process”). An emerging principle in civil litigation is that when a court overrules prior precedent, it must apply the new precedent to cases that arose before the new decision, at least if it also applies the new precedent to the litigation in which it was announced. The applicability of this principle to agencies is dubious for essentially the same reasons discussed in the text, i.e., because *stare decisis* principles have less force in the administrative sphere than in the judicial sphere, and the agencies’ “legislative” role is implicated. See *Laborers’ Int’l Union v. Foster Wheeler Corp.*, 26 F.3d 375, 385–89 (3d Cir. 1994); Ronald M. Levin, “*Vacation*” at Sea: *Judicial Remedies and Equitable Discretion in Administrative Law*, 53 *DUKE L.J.* 291, 358 n.304 (2003).

76. *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57–59 (1983)

has inherent appeal, but it has to be balanced off against the basic message of the *State Farm* majority opinion, namely that an electoral mandate does not entitle an agency to adopt or rescind a rule on the basis of a superficial analysis.⁷⁷ The most prominent example in our own day is the Court's decision in *Massachusetts v. EPA*,⁷⁸ better known as the global-warming case. The Court there set aside the Bush Administration's refusal to commence a rulemaking proceeding to regulate greenhouse gas emissions from motor vehicles.⁷⁹ The government defended its decision as an outgrowth of the President's political strategy, which emphasized voluntary programs and negotiations with foreign nations, but the Court concluded that this course of action did not rest on the predicate findings contemplated by the Clean Air Act.⁸⁰ The Act, in the Court's view, required the agency to select its program after making a "judgment" as to whether greenhouse gases endangered the environment.⁸¹ EPA had bypassed making this finding, and the Court admonished it that "the use of the word 'judgment' is not a roving license to ignore the statutory text. It is but a direction to exercise discretion within defined statutory limits."⁸² At this level of generality, this standard lore is not in tension with the essay's argument.

Furthermore, despite my defense of the Court's position on the issue of explaining policy changes in *Fox*, I do not mean to endorse the majority opinion in all respects. Aside from the First Amendment problems with the FCC's decision, which led to its invalidation when the case was remanded,⁸³ some aspects of the Court's analysis seem decidedly vulnerable to criticism on administrative law grounds. For one thing, the court of appeals had argued that the question of whether the FCC order was arbitrary and capricious should be analyzed with special solicitude for the First Amendment interests at stake.⁸⁴ The Supreme

(Rehnquist, J., concurring in part and dissenting in part), discussed *supra* notes 33–34 and accompanying text.

77. See *State Farm*, 463 U.S. at 51–55 (majority opinion) (finding that NHTSA's dismissal of the safety benefits of detachable automatic seatbelts did not take account of the fact that the belts would continue to function automatically unless consumers took the affirmative step of disconnecting them).

78. 549 U.S. 497 (2007).

79. *Id.* at 534–35.

80. *Id.* 533.

81. *Id.* at 532–33.

82. *Id.* at 533. See generally Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 SUP. CT. REV. 51 (2008) (analyzing the decision as subordinating political choice to agency expertise).

83. *Fox Television Stations, Inc. v. FCC*, 613 F.3d 317, 319 (2d Cir. 2010), discussed *supra* note 21 and accompanying text.

84. *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 462 (2d Cir. 2007), *rev'd*, 129 S. Ct. 1800 (2009).

Court responded that the doctrine of constitutional avoidance applies only to statutory interpretation, and there was no precedent for applying it to questions of whether the agency had abused its discretion.⁸⁵ This distinction seems artificial, particularly in light of the overlap between statutory interpretation and policy formation. If the Court had framed the issue in *Fox* as a matter of determining whether the word “indecent” in the Communications Act could be “interpreted” to apply to fleeting expletives, constitutional avoidance would presumably have been a factor to consider, although not necessarily dispositive. One would suppose, therefore, that avoidance should also be implicated (though again not necessarily dispositive) where the parties have chosen, as they did in the real case, to frame their contentions as going to whether the agency’s order was arbitrary and capricious. At least the Court should have explained the basis for this distinction, and it did not even try. To my mind this was one of the least convincing links in the Court’s train of reasoning—a submission to the tyranny of labels.⁸⁶

The Court also could have responded more skeptically to the FCC’s contention⁸⁷ that toleration of fleeting expletives on the airwaves would have harmful effects on children. Justice Scalia argued that, although the record did not contain quantitative proof of this causal relationship, the Court had not required the Commission to produce specific proof in *Pacifica*, and there was no reason to demand more here.⁸⁸ One might well consider this argument a weak response to the lower court’s observation that evidence “that this harm is serious enough to warrant government regulation . . . would seem to be particularly relevant today when children likely hear this language far more often from other sources than they did in the 1970s when the Commission first began sanctioning indecent speech.”⁸⁹

These debatable aspects of the Court’s opinion—among others that could be mentioned—correspond to reasons why the Court could credibly have invalidated the Commission’s order even if there had been no contrary prior FCC policy. On the issue of policy change as such, however, the Court’s analysis seems persuasive. In the long run, the *Fox* opinion will benefit both incoming Republican and Democratic adminis-

85. *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1811–12 (2009).

86. Professor Metzger has advanced a more ambitious and fundamental critique. She argues that administrative law has long been, and should be, infused with constitutional values. Thus, she maintains, the courts ought to acknowledge this interplay, and *Fox* erred in denying it. Gillian E. Metzger, *Ordinary Administrative Law as Constitutional Common Law*, 110 COLUM. L. REV. 479, 483–86, 519–25 (2010).

87. *Fox*, 129 S. Ct. at 1809.

88. *Id.* at 1813–14.

89. *Fox Television Stations v. FCC*, 489 F.3d at 461.

trations. The Roberts Court majority had to know, however, that a Democratic administration would be the beneficiary of its forthright position in the short run. It seems to have risen above politics at least to that extent.

V. CONCLUSION: DOES ANY OF THIS MATTER?

I have suggested here that the majority in *Fox* had the better of its argument with the dissenters on the issue of whether an agency's policy change should, as such, have to be accompanied by an analysis that directly compares the merits of the new policy with the one it is replacing. The Court's position on the issue comes down to this: Unless reliance interests or inconsistent readings of a factual record are involved, open acknowledgment of the change and a defense of the new policy on its own terms should ordinarily suffice. This proposition can be understood as, among other things, a means of enabling an incoming administration—whether President Obama's or any other—to institute programs and policies that can deliver on the promises of change that may have propelled it into office. More broadly, this stance can be understood as suggesting that judicial review has, at least sometimes, put an undue emphasis on maintaining stability in particular regulatory environments. The Court's relatively accommodating attitude toward agencies' rethinking of their policies, even longstanding policies, may ultimately have ripple effects in other contexts.⁹⁰

To some readers, the doctrinal focus of this essay might be a sign of its irrelevancy. As I mentioned in the introduction, an emerging body of empirical scholarship casts doubt on the significance of many familiar scope-of-review teachings.⁹¹ The research suggests that many judicial decisions come out the same way regardless of which of various alternative standards of review the court applies (e.g., *Chevron* versus *Skid-*

90. One such ripple effect might be its potential implications for the doctrine of *Alaska Professional Hunters Ass'n v. FAA*, 177 F.3d 1030 (D.C. Cir. 1999). That case holds that, after an agency has issued an interpretive rule construing a legislative regulation, it may not change that interpretation by issuing a second interpretive rule; rather, it must resort to notice-and-comment rulemaking. *Id.* at 1033–34. The doctrine has, on the whole, met with a hostile reaction from administrative law scholars, who argue that if the first pronouncement was a valid interpretive rule, logically the second one must be equally valid. See Richard W. Murphy, *Hunters for Administrative Common Law*, 58 ADMIN. L. REV. 917, 918–19, 927–28 (2006). After reviewing and rejecting various possible justifications for this principle, Murphy suggests that it might be defended as a means of making it relatively difficult for agencies to alter their interpretations because they tend to undervalue the benefits of stability in regulatory matters. *Id.* at 930–37. *Fox* casts substantial doubt on that premise. Notably, Murphy's explanation of why such a principle might be desirable relies heavily on an analogy to judicial precedent—a comparison that I have questioned above. See *supra* notes 74–75 and accompanying text.

91. See *supra* note 4 and accompanying text.

more v. Swift & Co.,⁹² or substantial evidence versus arbitrariness). In a recent article, Professor David Zaring reviewed these studies and concluded that the familiar formulas should be replaced with the simpler principle that a court should evaluate agency actions for “reasonableness.”⁹³ This step, he argues, would purge a good deal of mystification from judicial opinions, with no actual loss in predictive power of the doctrine. In another article, Professor Richard Pierce examines the same studies and endorses Zaring’s proposal, adding that political ideology appears to have as much, if not more, influence on results than doctrine does.⁹⁴

I think it will be helpful here to distinguish between the “breadth” and “depth” of the scope of judicial review. The “breadth” dimension involves the question of *what aspects of an administrative decision* must be weighed for their persuasiveness or reasonableness. For example, conventional doctrine maintains 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.⁹⁵ The “depth” dimension goes to the question of how reasonable these respective determinations must be.

The findings discussed by Zaring and Pierce were basically concerned with the depth dimension of judicial review, and their iconoclastic project should be seen in that light. For present purposes, I do not take issue with the empirical conclusions. The present essay, however, relates only to the breadth dimension of judicial review. The doctrinal problem that divided the Justices in *Fox* was to determine the circumstances under which an agency must reasonably explain why a new policy compares favorably with its former policy. This issue is logically distinct from the question of whether, if the FCC had been required to argue that its new policy on fleeting expletives was superior to the old one, its position would have been “reasonable enough” to meet the arbitrariness standard (or any other).

I would argue in favor of the utility of doctrines that define the

92. 323 U.S. 134 (1944). See generally David Zaring, *Reasonable Agencies*, 96 VA. L. REV. 135 (2010).

93. See Zaring, *supra* note 92, at 186–97.

94. Richard J. Pierce, Jr., *What Do the Studies of Judicial Review of Agency Action Mean?* (George Wash. Univ. Law Sch. Pub. Law & Legal Theory Working Paper No. 505, 2010), available at <http://ssrn.com/abstract=1604701>.

95. See ABA *Blackletter Statement*, *supra* note 22, at 42–43. For case-law support, see Bressman, *supra* note 22, at 181–95. I have a more than casual interest in the ABA analysis and the kind of research it represents, because I participated in its creation, and also because it was largely based on an earlier project of mine. See Ronald M. Levin, *Scope-of-Review Doctrine Restated: An Administrative Law Section Report*, 38 ADMIN. L. REV. 239 (1986).

breadth of review. Clarity about what bases the agency needs to have touched should facilitate the courts' decisional process and enable judges of differing professional and political backgrounds to reach agreement more easily on the disposition of an appeal. This should tend to dampen (but obviously not eliminate) the relative significance of ideology in the process. Moreover, an appellate decision that is compatible with the case law defining the proper breadth of judicial review will look more legitimate to the public than one that is at odds with the case law.⁹⁶ Litigants need to know what lines of argument will meet with a receptive ear on judicial review. And, by extension, when government counsel advise their agencies as to what actions to take in the first place, they need to know what issues they will need to address if required to defend these actions on appeal.

I doubt that the Zaring-Pierce proposal should be interpreted as discouraging the development of case law delimiting the "breadth" of judicial review. Surely, the legitimacy of appellate review would not be enhanced if courts were to hand down judgments as to whether particular agency actions were "reasonable," making no reference to past cases in which the terms of that inquiry have acquired shape and nuance. Indeed, if the Court were to announce that henceforth the sole test of the validity of an agency action is "reasonableness" (or if Congress were to amend the APA accordingly), it is hardly likely that litigants would cease to rely on or distinguish past cases in their briefs, nor that judges would ignore these authorities in their written decisions.

The reader might disagree with my conclusions regarding the precise issue that divided the majority and dissenters in *Fox*.⁹⁷ At a more general level, however, discussion and analysis of the breadth of judicial review of the merits of agency action should continue. This essay has aspired to make a worthwhile contribution to that enterprise.

96. As I suggested in the preceding section, notwithstanding my support for a relatively relaxed doctrine of administrative stare decisis, I do not intend to cast doubt on the benefits of judicial stare decisis.

97. Professor Murphy has a different assessment of this issue and the *Fox* case. Less sympathetic toward agency actions that appear to be influenced by political considerations, he urges courts to approach such actions with a skeptical "mood." Richard W. Murphy, *Politics and Policy Change in American Administrative Law*, 28 WINDSOR YEARBOOK OF ACCESS TO JUSTICE (forthcoming 2010), available at <http://ssrn.com/abstract=1665437>.

