

POLITICS AND POLICY CHANGE IN AMERICAN ADMINISTRATIVE LAW

Richard Murphy*

I. INTRODUCTION

In American administrative law, agency policy decisions—whether developed through adjudication or rulemaking—are generally subject to a very weak form of *stare decisis*—perhaps one not worthy of the name. Oversimplifying a bit, so long as an agency uses the right procedures, it can abandon an earlier discretionary policy choice (which might be styled as a construction of law) so long as the agency acknowledges the change and explains why it is reasonable.¹ Thus, the agency need not explain why changing course is the *only* reasonable thing to do; the agency need only explain why changing course is *a* reasonable thing to do.

Two classic themes of administrative law underlie this relatively lax approach to agency change. The first and more straightforward theme relates to agency expertise—as agencies learn more about the way the world works, they should be able to make policy changes to reflect their new knowledge.² The second and more contestable theme relates to political accountability—agencies should enjoy a measure of policymaking flexibility because they are answerable to elected officials.³

This notion that political accountability justifies administrative discretion is easy to question. Certainly, presidents and Congress wield vast formal and informal influence over agencies, but a great deal of agency action must escape control by elected officials if only because the federal bureaucracy is so very vast. Worse, where political officials do wield influence, they may under some circumstances taint rather than legitimate agency action. For instance, one might think that experts at the EPA, not the president or a senator from West Virginia, should determine limits on pollution from coal-fired plants under the rulemaking authority of the Clean Air Act.⁴

* AT&T Professor of Law, Texas Tech University School of Law. Many thanks to all of the participants at the Administrative Law Forum in Quebec who commented on this essay, and special thanks to Professor Linda Jellum for critiquing a more preliminary draft.

¹ See, e.g. *Smiley v. Citibank (South Dakota)*, N.A., 517 U.S. 735, 742 (1996) (observing that an agency can change its statutory construction subject to *Chevron* deference provided it gives a reasonable explanation for the change and takes into account any legitimate reliance on its prior construction).

² *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 863-66 (1984).

³ See *id.* at 865-66 (“While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices . . .”).

⁴ Cf. *Sierra Club v. Costle*, 657 F.2d 298, 406-10 (D.C. Cir. 1981) (holding that contacts between EPA and executive officials and Senator Byrd of West Virginia did not invalidate a rule governing

This abiding concern that political preferences—broadly construed to include value judgments—can improperly affect agency policymaking featured prominently in the Supreme Court’s recent exploration of the force of agency precedent in *FCC v. Fox Television Stations, Inc.*, in which broadcast firms challenged the FCC’s decision to abandon its “fleeting expletives” policy.⁵ A five-justice majority led by Justice Scalia concluded that the agency had given an explanation for its action that was reasonable enough to survive judicial review for arbitrariness.⁶ A different five-justice majority led by Justice Breyer, however, intimated strong concerns that the agency’s decision had been unduly politicized. In an effort to curb such influence, Justice Breyer insisted that an agency, to give a reasonable explanation for abandoning an old policy, must do more than merely explain why its new policy, considered on its own, is reasonable. In addition, the agency must explain why it was reasonable *to change* from its old policy to the new one.⁷ Writing for the four most conservative justices in this regard, Justice Scalia rejected this contention. In his view, the answer to the question “Why change?” always has an obvious answer: An agency changes course when it *likes* its new policy better than its old one.⁸ For Justice Scalia, it is perfectly proper for an agency’s likes and dislikes (*i.e.* its political preferences) to motivate its policy choices so long as those choices are otherwise reasonable.

This brief essay uses Justice Breyer’s and Scalia’s dueling opinions as a vehicle for exploring this contested relationship between politics and policy change in American administrative law.⁹ Underlying its analysis is the

emissions of coal-fired plants where EPA had supplied a reasonable explanation based on substantial record evidence for that rule).

⁵ 129 S. Ct. 1800 (2009).

⁶ *Id.* at 1812-13.

⁷ *Id.* at 1830 (Breyer, J., dissenting); *see also id.* at 1822 (Kennedy, J., concurring in part and concurring in the judgment) (stating agreement with Justice Breyer that “the agency must explain why ‘it now reject[s] the considerations that led it to adopt that initial policy’”).

⁸ *Id.* at 1811.

⁹ For three notable, recent, and more extensive discussions of this relationship, see Nina A. Mendelson, *Disclosing “Political” Oversight of Agency Decision Making*, 108 MICH. L. REV. 1127 (2010) (contending that determining the legitimacy of political reasons for agency action requires transparent disclosure of political influence; contending that agencies should be required to publicly disclose summaries of White House influence on significant rulemaking decisions); Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L. J. 2 (2009) (discussing the evolution of the relationship between politics and expertise in supporting agency action; proposing that transparent reliance on certain political preferences should count as a legitimate reason for agency action in the context of arbitrariness review); Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 SUP. CT. REV. 51 (2007) (contending that in a string of recent, major cases, the Supreme Court, concerned by excessive politicization of agency action during the Bush administration, has pushed agencies to rely on expertise rather than political preferences). *See also* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2246 (2001) (extolling the virtues of increased presidential control over rulemaking); Peter L. Strauss, *Presidential Rulemaking*, 72 CHI.-KENT L. REV. 965, 984 (1997)

premise that in a representative democracy that places political appointees in charge of regulatory agencies with broad, vague mandates, political preferences *should* affect some regulatory choices. Still, such preferences should not *distort* expert administrative judgments—as the old saw goes, we have a right to our own opinions but not to our own facts. In exercising judicial review, courts should do their best to police against such distortion.

Neither of the leading approaches in *Fox* seems to hit quite the right note regarding this problem of political preferences distorting discretionary judgment. Justice Scalia’s opinion ignores the potential problem. Justice Breyer’s insistence that agencies answer the “Why change?” question seems too formalistic and disingenuous as a solution. The FCC did, in fairness, explain why it was changing its policy—the problem was that Justice Breyer, perhaps quite wisely, did not think very much of the FCC’s explanation.

One good path forward lies in combining Justice Scalia’s simpler framework with Justice Breyer’s more jaundiced attitude. We all know that strong preferences can distort judgment. Where a reviewing judge has reason to think that strong political preferences (or pressure) are affecting agency judgment, that judge should scrutinize the agency’s explanation for a decision with a sharper eye—or dare one say—a harder look. Taking a cue from Justice Frankfurter, the courts should respond to the potential for excessive politicization of agency policymaking not with a doctrine, but with a “mood.”¹⁰

II. BEFORE *FOX*

To set the stage for *Fox*, this section will briefly explain the major doctrines that the federal courts have developed for reviewing the sufficiency of an agency’s explanation for a decision to abandon a previous policy choice. (Readers who would rather undergo dental surgery than read about *State Farm* and *Chevron* again may wish to skip ahead.)

A. Review of changes in policy that we put in the “policy” pigeonhole

The leading case governing the sufficiency of agency explanations for policy changes is that pillar of American administrative law, *Motor Vehicles Mfgs. Ass’n v. State Farm Automobile Ins. Co.*¹¹ This case arose out of the National Highway and Traffic Safety Administration’s long effort to develop a rule governing passive safety restraints in automobiles. During the Carter administration, the agency adopted an iteration of the rule, MS 208, which allowed automobile manufacturers to choose to install either airbags or

(contending that increased presidential control of rulemaking threatens excessive politicization of administration and erosion of the constraint of law on politics).

¹⁰ *Cf.* *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487 (1951) (observing that legislative enactment of the “substantial evidence” standard of review expressed a congressional “mood” that the courts should scrutinize agency findings of fact more vigorously than they had before).

¹¹ 463 U.S. 29 (1983).

passive seat belts.¹² At the time, agency officials believed that manufacturers would choose airbags for 60% of vehicles and passive seat belts for 40%.¹³

The Reagan administration then rode into office on a deregulatory agenda. Under new leadership, the agency rescinded MS 208, explaining that the agency had discovered that the manufacturers would likely install airbags in only 1% of vehicles and that the benefits of passive seatbelts were not sufficient to justify significant costs to industry and consumer backlash.¹⁴

Before the Supreme Court, the petitioner Motor Vehicle Manufacturers Ass'n (MVMA) contended that the agency's decision to rescind should be subject to the same type of extremely lax review that would have applied to a decision by the agency not to promulgate any rule in the first place.¹⁵ The Court rejected this argument, noting:

Revocation constitutes a reversal of the agency's former views as to the proper course. 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.¹⁶

To rebut this presumption, the agency had to give an explanation for the rescission sufficient to satisfy arbitrariness review by the reviewing courts. Elaborating on what this standard requires, the Court explained that

... the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made. In reviewing that explanation, we must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. Normally, an agency rule would be arbitrary and capricious if 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.¹⁷

In other words, the agency must demonstrate that, in reaching its decision, it thought about the right stuff (the "relevant factors") and, having done so, did not adopt a manifestly irrational position. Judicial review of whether an

¹² *Id.* at 37.

¹³ *Id.* at 38.

¹⁴ *Id.* at 38-39.

¹⁵ *Id.* at 41.

¹⁶ *Id.* at 41-42 (citation and quotation marks omitted; italics added).

¹⁷ *Id.* at 43 (citations omitted).

agency choice is manifestly irrational requires, at bottom, a discretionary judgment call by the reviewing court—in other words, it requires courts to engage in the kind of practical, reasoned decisionmaking that courts expect of agencies.¹⁸

Applying the Court's gloss on the arbitrariness standard, all nine justices concluded that the agency had arbitrarily failed to explain why, rather than abandon MS 208 entirely, the agency did not instead amend it to impose an airbags-only standard.¹⁹ Five justices concluded, more tenuously, that the agency's assessment of the value of passive safety belts arbitrarily failed to consider the effects of inertia—*i.e.*, that people might be too lazy to detach passive belts even though they do not care to wear them.²⁰

In *State Farm*, the agency's change of position was obvious, and, because MS 208 had not yet been implemented, there were no major reliance concerns to worry about. Many cases reiterate, however, that for a policy change to survive rationality review, an agency's explanation must at least acknowledge the fact of change.²¹ Also, agencies must assess the significance of any reliance interests to the rationality of that change.²²

As it relates to *Fox*, one notable aspect of the majority opinion in *State Farm* was its failure to discuss the significance of policy preferences. The majority opinion did recount how NHTSA's approach to passive safety restraints changed as presidents took and left power.²³ None of the justices were born yesterday, and all knew that political preferences were strongly in play. Nonetheless, the majority did not give any express weight to this political history in assessing the legality of NHTSA's abandonment of MS 208. Instead, the majority opinion focused purely on the agency's supposed technocratic failures.

By contrast, Justice Rehnquist, writing for four justices in a partial dissent and partial concurrence, directly addressed the issue of politics in administration. He explained:

The agency's changed view of the standard seems to be related to the election of a new President of a different political party. It is readily apparent that the responsible members of one administration may consider public resistance and uncertainties to be more important

¹⁸ Cf. DANIEL A. FARBER & SUZANNA SHERRY, JUDGMENT CALLS 40-42 (2009) (observing that courts, when exercising constrained discretion to implement a vague legal command, should be subject to the same requirements of reasoned decisionmaking as agencies).

¹⁹ Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 46 (1983).

²⁰ *Id.* at 54.

²¹ See, e.g., National Cable & Telecomm. Ass'n v. Brand X Internet Services, 545 U.S. 967, 981 (2005) (identifying unexplained inconsistency as a reason to condemn an agency interpretation as arbitrary).

²² Smiley v. Citibank (South Dakota), N.A., 517 U.S. 735, 742 (1996)

²³ *State Farm*, 463 U.S. at 35-38.

than do their counterparts in a previous administration. 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.²⁴

The gist of this passage is that political preferences can provide a sufficient justification for an agency to shift from one reasonable policy to another reasonable policy. This embrace of politics as a justification for deference was not, strictly speaking, inconsistent with the *State Farm* majority's analysis insofar as all the justices would agree that political preferences cannot justify a policy choice with fatal technocratic flaws. Politics can justify a choice among reasonable choices, not unreasonable ones.

There is, nonetheless, a difference in tone between the majority's and Justice Rehnquist's treatment of the role of political preferences. The majority's careful recounting of how the agency's policy ping-ponged back and forth as administrations changed suggests a suspicion that politics were distorting technocratic judgment. On this view, courts should tolerate rather than celebrate the effects of political preferences in agency policy change, and they should demand technocratic, not political explanations from agencies.²⁵ Justice Rehnquist's opinion amounted to a partial rejoinder to the majority's implicit criticism. In essence, he was advising courts to consider that the effects of political preferences on policy change sometimes amount to democracy in action rather than illegitimate distortions of an expert-driven regulatory process.

B. Review of changes in policy that we put into the "law" pigeonhole

Aspiring Supreme Court justices are required to deny three times ere the rooster crows that construction of vague law requires policymaking (a/k/a lawmaking). American administrative law's *Chevron* doctrine nonetheless recognizes that an agency engages in policymaking when it chooses among reasonable constructions of a statute it administers.²⁶ Given this recognition, it should not be surprising that the law governing changes in administrative

²⁴ *Id.* at 59 (Rehnquist, J., concurring in part; dissenting in part).

²⁵ *Cf.* Watts, *supra* note 11, 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"); Kevin M. Stack, *The President's Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263 307 n.191 (2006) (describing *State Farm* as requiring agencies to "rationalize their decisions in terms of statutory criteria" and blocking agencies from relying on a change in administration as "a sufficient basis for agency action").

²⁶ *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984) (characterizing ambiguous statutes as implicit delegations of policymaking authority).

statutory constructions subject to *Chevron* deference bears a striking resemblance to *State Farm*.

When reviewing a federal agency's construction of a statute it administers, a reviewing court must first determine whether to apply *Chevron* deference at all. The metaphysics addressing this point are regrettably confusing, but they largely boil down to the propositions that *Chevron* should apply: (a) where an agency develops a statutory interpretation through legislative rulemaking or formal adjudication; or (b) where, based on the totality of the circumstances, the court concludes it would be reasonable to apply *Chevron*'s style of reasonability review.²⁷

Where *Chevron* does not apply, courts purport to be in primary charge of determining statutory meaning and will adopt an agency statutory construction only if they find it to be the most "persuasive."²⁸ This stance would seem to minimize the role of agency political preferences in affecting statutory construction (but might be expected to increase the role of *judicial* political preferences).²⁹

Where *Chevron* does apply, courts apply its famous two-step (which some insist has only one-step—but let's not wander too far into the *Chevron* weeds).³⁰ At the first step, the court checks whether Congress has spoken to the precise statutory question at issue. If Congress has done so, then the court should simply implement Congress's preferred construction. If not, the court proceeds to the second step and checks whether the agency's construction was "permissible" or "reasonable."³¹ Commentators have debated for a long time what this second step actually entails, but Professor Ron Levin long ago gave the best answer: Step two checks whether the agency gave a reasoned explanation for its statutory construction.³² Step two, in short, is *State*

²⁷ See *United States v. Mead Corp.*, 533 U.S. 218, 229-30 (2001) (indicating that statutory interpretations produced via formal adjudication or notice-and-comment rulemaking should usually net *Chevron* deference); *Barnhart v. Walton*, 535 U.S. 212 (2002) (indicating that determination of whether *Chevron* deference should apply to a statutory interpretation should be a function of the totality of the relevant circumstances).

²⁸ *Mead*, 533 U.S. at 234-35 (declaring that courts should apply *Skidmore* deference where *Chevron* is inapplicable; pursuant to *Skidmore*, a court should adopt an agency's statutory construction only if the court finds that construction persuasive).

²⁹ But perhaps not—see generally William Eskridge & Lauren Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1142 (2008) (concluding, after extensive survey of the Supreme Court's application of various deference regimes, that the Court's affirmation rates when applying *Chevron* are only about 3% higher than when the Court invokes *Skidmore*).

³⁰ Matthew 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).

³¹ *Chevron*, 467 U.S. at 842-43.

³² Ronald M. Levin, *The Anatomy of Chevron: Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253, 1254 (1997) (suggesting courts regard step two and arbitrariness review as "identical"); Mark Seidenfeld, *A Syncopated Chevron: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV. 83, 128-29 (1994) (arguing that step two should require

Farm—which makes conceptual sense given that *Chevron* recognizes that construction of unclear statutes requires policymaking. (It also makes a kind of historical sense given that *State Farm* was issued in 1983 and *Chevron* was handed down just a year later in 1984).

A quick read of *Chevron* itself confirms this identity. Simplifying somewhat, the statutory issue revolved around figuring out what should count as a “stationary source” subject to extensive permitting requirements. At step one of its *Chevron* analysis in *Chevron* itself, the Court canvassed all the relevant statutory text and legislative history and concluded that Congress had not communicated any clear intent with regard to the precise issue at stake.³³

Revealingly, much of the Court’s step-two analysis appeared in a subsection of its opinion that was captioned “Policy.”³⁴ The Court observed that Congress had plainly wanted the agency to give weight both to environmental concerns and to economic concerns as well.³⁵ In the language of *State Farm*, both concerns were “relevant factors.” The Court then observed that EPA’s rulemaking record demonstrated that the agency had, indeed, given reasoned consideration to both these factors, explaining how adoption of the “bubble concept” might actually have positive environmental effects and be more economically efficient.³⁶ In the language of *State Farm*, the agency had not made a “clear error in judgment” in striking this policy balance.

On the way to affirming the agency, the Court minimized the importance of the fact that the agency had repeatedly changed its mind about the meaning of “stationary source.”³⁷ It is an easy matter to find Supreme Court cases indicating that courts should be quicker to defer to consistent agency statutory constructions.³⁸ This proposition suggests that courts should review agency

an agency to “explain why its interpretation is good policy in light of the purposes and concerns underlying the statutory scheme”).

³³ *Chevron*, 467 U.S. at 859-64.

³⁴ *Id.* at 864.

³⁵ *Id.* at 863.

³⁶ *Id.* at 863-64.

³⁷ *Id.*

³⁸ For cases in which the Court seemed inclined to apply a somewhat stronger form of stare decisis to agency statutory constructions than *Chevron* contemplates, see e.g., *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 274-75 (1974) (noting that “a court may accord great weight to the longstanding interpretation placed on a statute by an agency charged with its administration”); *United States v. Chicago, North Shore & Milwaukee R.R. Co.*, 288 U.S. 1, 13 (1933) (stating “the rule that settled administrative construction is entitled to great weight and should not be overturned except for cogent reasons”); *United States v. Finell*, 185 U.S. 236, 244 (1902) (holding that, in case of “doubt,” the longstanding interpretation of “the department charged with the execution of the statute should be respected, and not overruled except for cogent reasons”); *Edward’s Lessee v. Darby*, 25 U.S. (12 Wheat) 206, 210 (1827) (“In the construction of a doubtful and ambiguous law, the contemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect.”).

flip-flops with a sharper eye. The *Chevron* Court nonetheless advised that initial agency statutory constructions are “not instantly carved in stone” and stressed that agencies in fact *should* change their statutory constructions to fit new learning.³⁹

In justifying its deferential approach to EPA’s flip-flop, the Supreme Court invoked both technocratic and political concerns that are utterly familiar in judicial review of agency policymaking. Courts should defer to agencies because they are the experts—EPA, not a federal judge, knows how to make the Clean Air Act work.⁴⁰ Courts should also defer to agencies because they are answerable to elected officials.⁴¹

Some have noted a tension between *State Farm* and *Chevron* with regard to the proper role of political preferences in agency policymaking. The gist of this critique is that *Chevron* expressly admits that political accountability justifies deference to political preferences, whereas the majority in *State Farm*—unlike Justice Rehnquist—insisted on framing review in purely technocratic terms.⁴² This tension dissolves to some extent when one remembers that in *State Farm* the justices did not need to offer any special justification for deferring on an issue that everyone recognized fell into the “policy” pigeonhole. After all, everyone knows that judicial deference is in order on matters of agency policy. In *Chevron*, by contrast, the justices needed to explain why they were ceding interpretive authority on an issue denominated as “law.” Thus, the *Chevron* Court had a reason to invoke the justification of political accountability that the *State Farm* majority lacked. Still, it remains the case that *Chevron*, unlike the majority in *State Farm*, actively embraced political accountability (and thus political preferences) as a basis for deference.

III. ALONG COMES A FOX

In 2009, *FCC v. Fox Television Stations, Inc.* gave the justices a vehicle for revisiting the role of political preferences in administration and the meaning of *State Farm*. Five justices in writings scattered across three opinions expressed concerns about undue politicization in *Fox*.⁴³ The four

³⁹ *Chevron*, 467 U.S. at 863.

⁴⁰ *Id.* at 865.

⁴¹ *Id.*

⁴² See, e.g., Watts, *supra* note 11, at 38-39 (noting that *Chevron* actively embraced a political-control model for legitimating agency action whereas *State Farm*-style hard-look review “continues to insist on technocratic rather than political decisionmaking when it comes to agencies’ reason-giving duties”).

⁴³ See *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1823 (2009) (Kennedy, J., concurring) (policy changes must rest on principles that are “rational, neutral, and in accord with the agency’s proper understanding of its authority”); *id.* at 1825-26 (Stevens, J.) (stressing that Congress wished broadcast regulation “should be as free from political influence or arbitrary control as possible”); *id.* at 1829 (Breyer, J., dissenting; joined in pertinent part by Justices Stevens, Kennedy, Ginsburg, and Souter) (insisting that independent agencies may not make decisions based on “purely political reasons”).

most conservative justices, led by Justice Scalia, did not seem to harbor such doubts.⁴⁴

The *Fox* matter arose out the FCC's efforts to carry out its thankless statutory mission of blocking the broadcast of "indecent" language. Decades ago, the FCC interpreted the statutory term "indecent" to cover:

language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs, at times of the day when there is a reasonable risk that children may be in the audience.⁴⁵

In the 1978 case of *FCC v. Pacifica Foundation*, a fractured Supreme Court rejected a First Amendment challenge to the use of this interpretation to sanction a broadcaster for airing George Carlin's *Filthy Words* monologue.⁴⁶ The narrow majority made much of the fact that Carlin's monologue repeated seven especially bad words over and over again.⁴⁷

After *Pacifica*, the FCC, aware that it was operating in sensitive First Amendment territory, adopted an enforcement policy under which it declined to bring actions against broadcasters for "fleeting expletives." Under this policy, a broadcaster did not need to worry for its pocketbook or its license if an interviewee during a live broadcast suddenly made quick, non-literal use of a bad word.⁴⁸

But then came Bono, Cher, and Nicole Ritchie. Bono, terrifically pleased to win a Golden Globe for the music for *Gangs of New York*, described the experience as "f***** brilliant" during NBC's live broadcast of the award ceremony.⁴⁹ During a live broadcast of the 2002 MTV Music Awards, Cher, displeased by critics who had suggested for some decades that her career was over, suggested that it would be good to "f***'em."⁵⁰ Nicole Ritchie, during a live broadcast of the 2003 MTV Music Awards, advised audience members that it is "not so f***** simple" to get "s****" out of a Prada Purse⁵¹—which is probably true but also not a nice thing to say with several million children watching.

⁴⁴ See generally *id.* at 1812-13 (explaining, in just a few paragraphs, that the FCC had given a reasoned explanation for abandoning the fleeting expletives policy).

⁴⁵ *Pacifica Foundation*, 56 F.C.C.2d 94, 98 (1975).

⁴⁶ *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978).

⁴⁷ *Id.* at 729 & 751-55 (emphasizing that Carlin repeated his offending words over and over again); see also *id.* at 757 (Powell, J., concurring) (describing Carlin monologue as "verbal shock treatment").

⁴⁸ See *Fox*, 129 S. Ct. at 1807 (explaining evolution of FCC's fleeting expletives policy).

⁴⁹ *Id.*

⁵⁰ *Id.* at 1808.

⁵¹ *Id.*

These outbursts prompted two congressional subcommittee hearings during January and February 2004 at which various members of Congress raked the Commission over the coals for failing to enforce the indecency ban. Of special note, at the January meeting, members specifically advised the Commission to overturn a ruling by its enforcement staff that NBC was not liable for Bono's "f***** brilliant" remark.⁵²

Most dogs, if you kick them hard enough, will move. In March 2004, the full Commission reversed its staff and concluded that the Bono broadcast had violated the indecency ban.⁵³ The Commission held that the fleeting nature of Bono's remark was not dispositive because allowing this type of safe harbor would "likely lead to more widespread use" of bad words.⁵⁴ Such an outcome would mark a failure to "safeguard the well-being of the nation's children from the most objectionable, most offensive language."⁵⁵ The Commission added that Bono's non-literal use of his offending word was immaterial given that any use of the "F-Word ... inherently has a sexual connotation."⁵⁶ The broadcast was patently offensive because the "F-Word," alas, "is one of the most vulgar, graphic and explicit descriptions of sexual activity in the English language."⁵⁷ Notwithstanding its conclusion that the Bono broadcast was indecent, however, the Commission declined to sanction NBC because "existing precedent [governing fleeting expletives] would have permitted this broadcast."⁵⁸

In a later order, the Commission gave a similar treatment to Fox's broadcasts of the Cher and Nicole Ritchie remarks.⁵⁹ In this order, the FCC described its fleeting expletives policy as a product of staff rulings and Commission dicta.⁶⁰ It made clear that, going forward, there would be no safe harbor for fleeting expletives, though a lack of repetition would weigh against a finding of indecency.⁶¹

⁵² See "Can You Say That On TV?": An Examination of the FCC's Enforcement with respect to Broadcast Indecency, Hearing before the Subcommittee on Telecomm. and the Internet of the House Committee on Energy and Commerce, 108th Cong., 2d Sess., 2, 17, 19 (Jan. 28, 2004). See generally *Fox*, 129 S. Ct. at 1816 n.4 (discussing pressure inflicted by members of Congress on the FCC at the Jan. 28 hearing as well as at a Feb. 11, 2004 hearing held by the same subcommittee).

⁵³ *In re Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, 19 FCC Rcd. 4975, 4978-80 (2004).

⁵⁴ *Id.* at 4979, para. 9.

⁵⁵ *Id.*

⁵⁶ *Id.* at 4978, para. 8.

⁵⁷ *Id.* at 4979, para. 9.

⁵⁸ *Id.* at 4981-82, para. 15.

⁵⁹ *In re Complaints Regarding Various Television Broadcasts Between February 2 2002, and March 8, 2005*, 21 FCC Rcd. 13299 (2006) (hereinafter, "*Remand Order*").

⁶⁰ *Id.* at 13307, para. 21.

⁶¹ *Id.* at 13325, para. 61.

Various broadcasters petitioned for review, claiming that: (a) the new policy violated the First Amendment; and (b) the policy change was arbitrary under the Administrative Procedure Act. The Second Circuit ruled for the broadcasters on the statutory ground and declined to reach the constitutional issue.⁶²

As mentioned above, the Supreme Court by a 5-4 vote reversed the Second Circuit's conclusion that the FCC had failed to offer a reasoned justification for its action.⁶³ In addition to dividing sharply over the sufficiency of the agency's explanation, the justices also clashed over the general nature of arbitrariness review as applied to agency policy shifts.

A. Justice Breyer's majority opinion

Of the six opinions issued in *Fox*, Justice Breyer's opinion appears last and is denominated as a dissent. Justice Kennedy, however, joined Justice Breyer's discussion of the proper framework for arbitrariness review of agency policy shifts, which thus attracted a majority vote.⁶⁴

Near the opening of his opinion, Justice Breyer contended that, although independent administrative agencies have broad policymaking authority, they may not lawfully "make policy choices for purely political reasons nor ... rest them primarily upon unexplained policy preferences."⁶⁵ Particularly at an agency such as the FCC, which is led by commissioners who serve fixed terms of office, are insulated from political control, and are not answerable to the voters, "it [is] all the more important that courts review [agency] decisionmaking to assure compliance with applicable provisions of the law—including law requiring that major policy decisions be based on articulable reasons."⁶⁶

Implementing the duty of reasoned decisionmaking typically requires more from an agency when it abandons an old policy in favor of a new one than when the agency starts from a clean slate. Justice Breyer explained:

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. 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

⁶² FCC v. Fox Televisions Stations, Inc. 489 F.3d 444 (2d Cir. 2008), *rev'd by* 129 S. Ct. 1800 (2009).

⁶³ FCC v. Fox Televisions Stations, Inc., 129 S. Ct. 1800, 1812-13 (2009).

⁶⁴ *See id.* at 1822 (Kennedy, J., concurring).

⁶⁵ *Id.* at 1829 (Breyer, J., dissenting).

⁶⁶ *Id.* at 1830 (Breyer, J., dissenting).

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.⁶⁷

Justice Breyer insisted that requiring an agency to answer the “Why change?” question did not impose a “heightened” standard of arbitrariness review; nor did it require an agency to demonstrate that its new policy was “better” than the old one. Instead,

the law requires application of the *same standard* of review to different circumstances, namely circumstances characterized by the fact that *change* is at issue. 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. It requires the agency here to focus upon the reasons that led the agency to adopt the initial policy, and to explain why it now comes to a new judgment.⁶⁸

Applying this standard, an agency that wishes to abandon an old policy that was based on a particular view of the facts, applicable law, or special policy concerns, should explain why these factors are no longer controlling.

Although he seemed intent on minimizing the role of political preferences in policymaking, Justice Breyer did concede, “*sometimes* the ultimate explanation for change may have to be, ‘We now weigh the relevant considerations differently.’”⁶⁹ Leaving room for agencies to “weigh” unchanged circumstances differently opens the door to political (*i.e.*, value) preferences to come into play. For instance, one might think that this approach would allow FCC Commissioners who particularly dislike bad language to justify abandoning the fleeting expletive policy by declaring something like: “Given that bad language is bad for kids, we don’t think our old policy offers enough protection.”

Justice Breyer’s application of his framework to the FCC in *Fox*, however, suggests that he has a more potent form of review in mind. For instance, as part of its justification for abandoning the fleeting expletives policy, the FCC indicated that it wished to protect children from the “first blow” of profanity.⁷⁰ Justice Breyer contended that the “difficulty with this argument ... is that it does not explain the *change*” given that the FCC “has long used the theory of the ‘first blow’ to justify its regulation of broadcast indecency.” He queried: “What, in respect to the ‘first blow,’ has changed?”⁷¹ The short, implicit answer to his question would seem to be that

⁶⁷ *Id.* at 1830-31 (Breyer, J., dissenting).

⁶⁸ *Id.* at 1831 (Breyer, J., dissenting).

⁶⁹ *Id.* at 1831.

⁷⁰ *Remand Order*, *supra* note 62, at 13309, para. 25.

⁷¹ *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1839 (2009) (Breyer, J., dissenting).

the FCC now “weighs” this consideration differently. It seems fair to hazard, however, that the agency could not have satisfied Justice Breyer by committing to paper a justification something like, “We at the FCC worry a lot more about ‘first blows’ than we used to a couple of decades ago. We can’t imagine what we were thinking back then.”

In sum, Justice Breyer’s approach to the role of political preferences in administrative policy changes seems ambivalent (which, by the way, is both wise and appropriate). He holds to the view that independent regulatory agencies should base their policy choices on technocratic rather than “unexplained” political preferences. Knowing that political concerns cannot sensibly be squeezed out the system, he acknowledges that agency views regarding how to “weigh” relevant considerations may evolve and that this evolution may be reflected by policy changes. His application of his framework to the FCC, however, seemed to give no weight to the agency’s changed views of the significance of controlling the broadcast of bad language.

B. Justice Scalia’s conflicting majority opinion

Justice Scalia and Justice Breyer agree with regard to many of the basics of arbitrariness review. For instance, both claim that an agency change in policy does not trigger a “heightened” standard of review—contrary to any Court of Appeals intimations to the contrary.⁷² Both agree that an agency must acknowledge its policy shifts and take into consideration any reliance interests an old policy may have engendered.⁷³ On either justices’ approach, an agency that bases a policy change on a new understanding of the relevant facts must explain how its views have evolved and why they justify a new policy.⁷⁴

The two justices part company, however, with regard to: (a) the proper role of political preferences in policy change; and (b) how this role affects the agency’s duty to answer the “Why change?” question. The short of the matter is that Justice Scalia and his fellow conservatives believe that political preferences may justify any agency choice among reasonable alternatives. In a portion of his opinion that five justices (including Justice Kennedy) joined, he explained

[O]f course the agency must show that there are good reasons for the new policy. But it 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,

⁷² *Id.* at 1810-11 (Scalia, J.); *id.* at 1831 (Breyer, J., dissenting).

⁷³ *Id.* at 1811 (Scalia, J.); *id.* at 1830 (Breyer, J., dissenting).

⁷⁴ *Id.* at 1811 (Scalia, J.) (declaring that an agency making a policy shift must explain reliance on factual findings that contradict those upon which its prior policy was based); *id.* at 1831 (Breyer, J., dissenting) (declaring that “one would normally expect the agency to focus upon those earlier views of fact, of law, or of policy and explain why they are no longer controlling”).

that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates.⁷⁵

Suppose a reasonable FCC might adopt a safe harbor approach to fleeting expletives or it might not. If both choices are “reasonable”—whatever exactly that means—then the FCC gets to choose which it “believes” to be better. The agency need not explain why it believes this choice to be better—which, on some level, may be no more possible than explaining why one prefers chocolate ice cream to strawberry.

Justice Scalia’s framework thus rejects Justice Breyer’s contention that an agency must explain why it prefers a new (reasonable) policy over an old (reasonable) policy.⁷⁶ On examination, however, the scope of this disagreement seems rather small. All justices expect an agency to provide reasons for any significant policy choice. Where an agency policy change is motivated by changed factual or legal considerations, the agency must say so on any view as part of giving a reasoned explanation.⁷⁷ The doctrinal difference between Justices Scalia and Breyer in *Fox* therefore reduces to how they treat agency decisions to change policy in the absence of any noteworthy change to any relevant considerations of fact or law. In other words, the difference revolves around treatment of policy choices based on evolving political preferences in the absence of any technocratic cover.

Even in this narrow context, moreover, the difference is more one of tone than of doctrine. Justice Scalia believes that an agency need not explain why it “believes” one reasonable policy choice is “better” than another—it is enough that they are both reasonable. Justice Breyer, by contrast, expects an agency to confess on the record where the reason for a policy change is simply, “We now weigh the relevant considerations differently.”⁷⁸ Either approach ostensibly leaves room for political preferences to influence choice. Turning to tone, however, Justice Scalia’s opinion in *Fox*, like the majority opinion in *Chevron* or Justice Rehnquist’s opinion in *State Farm*, demonstrates that the four most conservative justices of the current Court deem this role of politics in administration to be perfectly satisfactory. The remaining five, led by Justice Breyer, seem more inclined to regard the role of political preferences in administration as a necessary evil to be exposed and minimized rather than celebrated.

IV. GOOD JUDGMENT AND CONTROL OF POLITICS

Having dissected *Fox* for a bit, this essay will close by suggesting an alternative way of thinking about the problem of political preferences in administrative policymaking. To start, it is obviously impossible for agencies

⁷⁵ FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1811 (2009).

⁷⁶ See *id.* at 1830-32 (Breyer, J., dissenting) (elaborating on the ‘Why change’ requirement).

⁷⁷ *Id.* at 1811 (Scalia, J.); *id.* at 1831 (Breyer, J., dissenting).

⁷⁸ *Id.* at 1831 (Breyer, J., dissenting).

to implement vague, indeterminate mandates without any regard to political or value preferences. The American system's decision to allocate control over agencies to political appointees accentuates the role of political preferences in administration and suggests that we regard this role as broadly acceptable.

At what point, however, does the effect of political preferences on administration become excessive? To answer this question, it may be helpful to consider the nature of agency decisionmaking and judicial review. Agencies make policies in response to some perceived problem that suggests some range of policy responses. For instance, if there is evidence suggesting that carbon dioxide emissions are harming the planet, an environmental agency may explore potential efforts to curb these emissions. The agency will gather and assess information that seems relevant to this task (*e.g.*, data concerning past temperatures, ocean currents, ice sheets, etc.). Among other influences, the agency's political preferences will affect what it chooses to investigate and how it assesses what it finds out.

In any mildly complex context, the agency's findings will not compel a particular and specific policy response as a matter of logic. For instance, confirming that carbon dioxide emissions are warming the planet in a dangerous way may compel the conclusion that emissions should be reduced, but this information does not compel specific responses with regard to the precise level of reductions, their timing, nor their acceptable expense. The agency's findings will, however, provide grist for practical, intuitive judgments—which the agency's political and value preferences must affect—regarding these specifics. In short, just as administrative law expects, the agency should investigate and consider the “relevant factors,” and, having done so, exercise *good* judgment regarding what to do about them.

When courts review an agency policy choice for arbitrariness, they are supposed to check whether the agency: (a) thought about what it was supposed to think about in fashioning its policy; and (b) made a “clear error” in judgment. Both of these inquiries require judges to make practical, intuitive judgments that are inevitably subject to a judge's own political preferences—an effect well-illustrated by studies showing that conservative judges have a greater tendency to find liberal policies arbitrary and vice versa.⁷⁹ Indeed, one justification for judicial deference to agency decisionmaking is that a deferential attitude should, in theory at least, help minimize the illegitimate force of such *judicial* political preferences.⁸⁰

Another reason courts are supposed to defer to agency policy choices, however, is that agencies are supposed to be experts. The EPA should know a great deal more about environmental policy than the courts; the FCC should

⁷⁹ See Thomas J. Miles and Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U. CHI. L. REV. 761, 777, 788 (2008).

⁸⁰ For which we may as well cite *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865 (1984) (noting that agencies, unlike federal judges, are answerable to elected officials).

know more about telecommunications policy, etc. Especially in complex, technical contexts, this information asymmetry can make it difficult for courts to assess the correctness of agency action. Therefore, just as I generally defer to my doctor's expert choice of treatment for whatever ails me, so also courts should defer to agency expert policy choices.

I am less likely to be so trusting of my doctor's recommendation of a test, however, if I know she stands to make a great deal of money from it. In this circumstance, I will respond to the expert's conflict of interest by tending to rely on my own judgment to a greater degree. I may ask more questions about the test; I might ask about other alternatives with greater urgency; I might even be more inclined simply to reject the doctor's advice altogether.

This common-sense reaction translates neatly enough into the realm of judicial review. There is, in short, less reason for courts to be trusting of agency expert judgment where there are grounds for concluding that the agency's policy choice is strongly subject to potential distortion from political preferences or pressure. In such a situation, it makes sense for a judge to probe more deeply into whether the agency has, indeed, adequately investigated, considered, and assessed all of the relevant factors or reached, at the end of the day, a "reasonable" policy judgment that avoids any "serious error" in judgment.

This prescription seems to fit Justice Breyer's behavior in *Fox* rather well. As Justice Scalia himself made plain, the FCC was in hot water with members of Congress with oversight power over the agency.⁸¹ One way out of this hot water was to find NBC and Fox liable for the "fleeting expletives" uttered by Bono, Cher, and Nicole Ritchie. Sure enough, the agency soon abandoned the "fleeting expletives" policy. Under this circumstance, it made perfect sense for Justice Breyer to press hard on the agency's technocratic explanation for the change—querying, for instance, whether the agency had adequately explored empirical literature on the effects of profanity on young children or whether the agency had given short shrift to the concerns of local broadcasters who might have less technical ability than major corporations to control accidental broadcasts of fleeting expletives.⁸²

At least in the context of judicial review, the answer to controlling political preferences in policymaking may not lie so much in fashioning new doctrines or frameworks that might well be easy to manipulate and confusing (*cf.*, our good friend the *Chevron* doctrine). Rather, the appropriate judicial response may lie in cultivating a somewhat less trusting and more suspicious

⁸¹ See generally *FCC v. Fox Televisions Stations, Inc.*, 129 S. Ct. 1800, 1816 n.4 (2009) (collecting quotes from congressional subcommittee hearings at which members of Congress grilled FCC Commissioners for failing to enforce the indecency ban).

⁸² *Id.* at 1835-37, 1839 (Breyer, J., dissenting).

“mood” when reviewing agency actions subject to hot-button political preferences and pressure.⁸³

It bears noting that it is precisely when courts review agency policy changes intertwined with hot-button political preferences that *judges* are most likely to be influenced by *their own* strong preferences—surely Justice Scalia’s and Justice Breyer’s attitudes toward FCC control of indecent broadcasts had *something* to do with their contrasting approaches in *Fox*. Judges with good judicial temperaments should be self-aware enough to try to minimize this problem but obviously cannot eliminate it. Still, even though judges should try to curb the role of their own politics in judicial review, it is only reasonable for them to take notice of the role of politics in agency decisionmaking.

IV. CONCLUSION

The leading cases in American administrative law on the subject of judicial review of agency policymaking—which include *State Farm*, *Chevron*, and now perhaps *Fox*—indicate a certain judicial ambivalence about the proper role of agency political preferences in policy change. Ambivalence is an appropriate response given that it is perfectly appropriate and inevitable that political preferences affect policy change but not good at all where such influence becomes excessive. Agency policymaking must partake of politics, but it should also be constrained by expertise and law.⁸⁴ At bottom, finding the right balance between politics and expertise must be a function of a type of sound judgment that is not easily captured in an all-encompassing, abstract doctrine.

In *Fox* itself, the two leading administrative law scholars of the United States Supreme Court, Justices Scalia and Breyer, dueled over how judicial review should control political preferences. For Justice Scalia, the answer is simple—an agency can follow its politics and values where they lead provided that the agency comes up with a “reasonable” explanation for its policy change. The agency need not explain how its political preferences drove it to choose one reasonable possibility over another. Justice Breyer, by contrast, seeks to control the role of political preferences by forcing agencies to answer the “Why change?” question in a way that may force agencies to “confess” when they are motivated by politics rather than expertise.

This brief essay suggests that one good, honest way forward would be to combine Justice Scalia’s simple framework with Justice Breyer’s suspicious attitude. In short, it is perfectly reasonable for courts, when exercising the discretionary judgment needed to apply arbitrariness review, to eye agency

⁸³ *Cf.* *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487 (1951) (Frankfurter, J.) (explaining that the APA expressed a congressional expectation that courts adopt a tougher “mood” when reviewing agency factual findings).

⁸⁴ *Cf.* Strauss, *supra* note 11, at 985 (“The issue is mediating between politics and law—recognizing the strengths and weaknesses of each and finding ways of promoting their proper contribution—rather than pretending to locate the practice at either pole.”).

policy changes with more suspicion where there are grounds for thinking that the agency's judgment was distorted by strong political preferences. The right judicial response to concerns over excessive administrative politicization may be to embrace a mood, not new doctrine.