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## REASON-GIVING, RULEMAKING, AND THE RULE OF LAW

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### ABSTRACT

The requirement that agencies give reasons for their actions and in support of their interpretations in administrative law serves important Rule of Law values. It forces agencies to consider how and whether their actions can be justified and provides a means of accountability, allowing the public to judge the agency actions by the reasons offered. One of the areas where reason-giving is most debated is in the face of a new administration that seeks to alter, amend, or repeal a rule that has already gone through the strenuous notice and comment rulemaking process. Administrative law allows such changes so long as the new interpretation is reasonable and so long as the new rule follows the same notice and comment processes to replace the old.

If there is not a single unambiguous interpretation of a statute, then *Chevron* necessarily opens the door to the possibility of multiple reasonable interpretations which means that an agency might still be reasonable even if it adopts different interpretations at different times. Thus, a shift in agency interpretation is not per se invalid, but it is still subject to reason-giving hurdles. Curiously, the courts have generally not required a heightened standard of reason-giving to change a rule from an earlier adopted one. The agency need not prove that its new rule is better, just that it is reasonable as much as the first rule only had to show that it flowed from a reasonable interpretation (not necessarily proving itself as the best interpretation).

The recent U.S. Supreme Court case of *Encino Motorcars, LLC v. Navarro* revisited these standards. This Article examines that case and how its holdings fit within existing precedent to remind us of the standards at play for reason-giving in administrative law. If it had not been clear before, *Encino* starkly places reason-giving in its rightful place as a fundamental prerequisite to a complete and lawful notice-and-comment rulemaking process. If an agency does not fulfill the reason-giving requirement then it has not completed the process necessary for its action to carry the force of law. But the Article concludes that it is unlikely that *Encino* heightened the reason-giving standards, including for changes in policy precipitated by new presidential administrations.

Nevertheless, the Article advocates for a greater agency sensitivity to the benefits of going beyond what is legally required in reason-giving to add credibility to agency decision-making. Robustly providing reasons and thoroughly explaining changes does a long way to increasing legitimacy for agency rules and for encouraging public buy-in for the regulations offered. Those are outcomes that agencies should strive to achieve even if the law is not mandating such a higher level of persuasion.

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## I. INTRODUCTION

Imagine that you are a child in a household where your mother makes the laws and instructs your father to administer them. One of those mandates to the father is to generate rules to “set a healthy diet that maintains the children’s good health.” Your first father interprets “healthy diet” to mean a hearty, meat-filled carnivore diet. But then your mother divorces Father 1 and immediately marries Father 2. Father 2 now has the authority to make the rules. Father 2 thinks a healthy diet is a Vegan one and, much to your chagrin, changes the household’s interpretation of “healthy diet” and is now imposing it at the dinner table. For both the initial decision by Father 1 and the new decision by Father 2, you wanted to know why. And, if your father were an administrative agency, he’d be required to give you reasons rather than simply relying on “because I said so.”

When Father 2 comes in after you’ve accepted the old Father 1 rules, the reason for the change might be even more confusing than the dictate from Father 1. Does Father 2 have an extra burden to give *better* reasons than the prior Father 1? Well, maybe if the point is to persuade. But if the hurdle is that he must just give reasons, then Father 2 need not prove they are better reasons than the old Father 1 and instead just needs to explain why he feels “Vegan = healthy.” So long as the new Father 2 has *some* reasons that fall within a reasonable interpretation of your Mother’s law—not necessarily ones that you think are better—he’s still the one who gets to set the rules and put dinner on your plate.

Now your mother could make clearer rules, but until she does, a “healthy diet” might reasonably mean different things to different reasonable people. So long as the new Father 2 gives *some* reasons, you need to follow his rules and cannot challenge the legality of his new order. At best, you can challenge the wisdom of the new Father 2’s decision in the court of public opinion, or what you might call the family dinner table. For the sake of garnering respect and to convince you of the validity of his decision, however, Father 2 would be wise to go beyond what he must do and add additional credibility to his decision by working to persuade and bring you along on his vision for a healthy family.

Now replace child with citizenry, Mother with Congress, Father 1 with an outgoing Executive, and Father 2 with a new Executive and his or her administration. This article tracks that tale, and that tale tracks the major lessons in recent caselaw on the role of reason-giving in agency rulemaking. This article will give particular emphasis to the guidance provided by the U.S. Supreme Court in its latest decision on these issues— *Encino Motorcars, LLC v. Navarro* (hereinafter “*Encino*”).<sup>1</sup>

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<sup>1</sup> 136 S.Ct. 2117 (2016).

An administration cannot get away with simply “because I said so” and simply appeal to its authority. This is why Professor Mila Sohoni explains that “Administrative law requires agencies to elucidate the reasons why they are taking an action—not merely why the action they have determined to take is within legal bounds.”<sup>2</sup> Yet it need not objectively prove that its reasons are the best ones.

Reason-giving requirements are at the heart of the administrative process and have been the subject of extensive study.<sup>3</sup> *Encino* deepens that conversation, and the lower courts grappling with reason-giving requirements particularly in the face of changes in administrative interpretations from prior rulemakings) will need to incorporate *Encino*’s teachings into their analysis.<sup>4</sup>

One of the major constraints on presidential powers, especially for a new administration eager to push its new regulatory agenda, is the fact that they do not start with a tabula rasa regulatory state. There are regulations in place, and we rely

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<sup>2</sup> Mila Sohoni, *The Administrative Constitution in Exile*, 57 WM. & MARY L. REV. 923, 954 (2016).

<sup>3</sup> See, e.g., MARTIN SHAPIRO & ALEC STONE SWEET, ON LAW, POLITICS AND JUDICIALIZATION (2002); MARTIN SHAPIRO, WHO GUARDS THE GUARDIANS? JUDICIAL CONTROL OF ADMINISTRATION (1988); David Dyzenhaus & Michael Taggart, *Reasoned Decisions and Legal Theory*, in COMMON LAW THEORY 134, 138-40 (Douglas E. Edlin ed., 2007); Harold J. Krent, *Ancillary Issues Concerning Agency Explanations*, in A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES 197 (John F. Duffy & Michael Herz eds., 2005); Robin J. Effron, *Reason Giving and Rule Making in Procedural Law*, 65 ALA. L. REV. 683, 712 (2014); Henry J. Friendly, *Chenery Revisited: Reflections on Reversal and Remand of Administrative Orders*, 1969 DUKE L.J. 199, 206-22 (1969); Donald J. Kochan, *Constituencies and Contemporaneity in Reason-Giving: Thoughts and Direction after T-Mobile*, 37 CARDOZO L. REV. 1 (2015); Donald J. Kochan, *The “Reason Giving” Lawyer: An Ethical, Practical, and Pedagogical Perspective*, 26 GEORGETOWN J. LEGAL ETHICS 261 (2013); Margaret B. Kwoka, *Deference, Chenery, and FOIA*, 73 MD. L. REV. 1060, 1091 (2014); Gary Lawson, *Outcome, Procedure and Process: Agency Duties of Explanation for Legal Conclusions*, 48 RUTGERS L. REV. 313, 315, 332 (1996); Jerry L. Mashaw, *Small Things Like Reasons Are Put in a Jar: Reason and Legitimacy in the Administrative State*, 70 FORDHAM L. REV. 17 (2001) [hereinafter Mashaw, *Small Things*]; Jerry L. Mashaw, *Reasoned Administration*, 76 GEO. WASH. L. REV. 99 (2007) [hereinafter Mashaw, *Reasoned Administration*]; Martin Shapiro, *Administrative Discretion: The Next Stage*, 92 YALE L.J. 1487 (1983); Martin Shapiro, *The Giving Reasons Requirement*, 1992 U. CHI. LEGAL F. 179, 193 (1992) [hereinafter “Shapiro, *The Giving*”]; Sidney A. Shapiro & Richard E. Levy, *Heightened Scrutiny of the Fourth Branch: Separation of Powers and the Requirement of Adequate Reasons for Agency Decisions*, 1987 DUKE L.J. 387 (1987); Jodi L. Short, *The Political Turn in American Administrative Law: Power, Rationality, and Reasons*, 61 DUKE L.J. 1811, 1813 (2012) (discussing reason giving as “central to U.S. administrative law and practice”); Kevin M. Stack, *The Constitutional Foundations of Chenery*, 116 YALE L.J. 952, 957 (2007); Glen Staszewski, *Reason-Giving and Accountability*, 93 MINN. L. REV. 1253, 1285 (2009); Matthew C. Stephenson, *A Costly Signaling Theory of “Hard Look” Judicial Review*, 58 ADMIN. L. REV. 753, 755-67 (2006).

<sup>4</sup> For recent cases citing and discussing *Encino*, see, for example, *American Wild Horse Preservation Campaign v. Perdue*, 873 F.3d 914 (D.C. Cir. 2017); *Estes v. U.S. Dept. of Treasury*, 219 F.Supp.3d 17 (D.D.C. 2016); *National Labor Relations Board v. Lily Transp. Corp.*, 853 F.3d 31 (1<sup>st</sup> Cir. 2017); *North America’s Building Trades Unions v. Occupational Safety & Health Admin.*, 878 F.3d 271 (D.C. Cir. 2017); *National Ass’n of Fixed Annuities v. Perez*, 217 F.Supp.3d 1 (D.D.C. 2016).

on continuity of rules and adherence to set processes for changing them as a matter of the Rule of Law. Among the existing regulations on the books when a new president takes office, there will almost always be some, even many, with which the new administration might disagree. Yet, until they are changed through carefully delineated processes, the new administration will have a responsibility to enforce and apply the existing regulations while the President takes care that the laws are faithfully executed.

In many ways, *Encino* was not an extraordinary case. But it did make some important clarifications and further ground some principles of reason-giving review. There are some who think it could herald a shift in judicial review of agency changes in regulatory interpretations and policies. Perhaps that will happen, but if there are signals for such a change in the *Encino* opinion, they are weak.

Nonetheless, the Trump administration is likely to generate ample opportunities to determine whether the *Encino* Court meant more than it directly stated about the status of judicial review of changes in agency policy (including amending, reversing, or repealing rulemakings) and the standards applicable to justify such changes. In other words, if *Encino* constitutes a departure from the traditional reason-giving standards, we may know in the next few years because the new Administration has promised some dramatic reversals in agency policy.

In a time of transition and the advent of a new administration determined to revisit so many recent and longstanding agency decisions, the way the courts will scrutinize changes in agency position becomes critical. Thus, regardless of whether *Encino* altered the judicial review standards for agency changes in position, it at a minimum did not relax the standards. Thus, *Encino* will undoubtedly have substantial significance in the next few years on these questions.

At the very least, *Encino* summarizes the law on agency change in position, applying past precedent on the issue including from *National Cable & Telecommunications Assn. v. Brand X Internet Services*,<sup>5</sup> and *FCC v. Fox Television Stations, Inc.*<sup>6</sup> That alone means that the case will play a role in the anticipated challenges to Trump Administration changes in agency positions.<sup>7</sup> This article will examine the case and these immediate implications.

Part II provides the general background of the *Encino* case. Part III identifies three categories of holding in *Encino* that are instructive for understanding reason-giving in rulemaking and its place in a supporting role for the Rule of Law. These holding categories include that reason-giving is a fundamental prerequisite to rules carrying the force of law, the scope of the general reason-giving requirement, and the understanding that little changes in the reason-giving requirement simply because an agency is making an interpretation that is

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<sup>5</sup> 545 U.S. 967, 981 (2005).

<sup>6</sup> 556 U.S. 502, 515 (2009).

<sup>7</sup> *Encino*, 136 S.Ct. at 2126.

inconsistent with an existing one or is amending or revoking a previously promulgated rule. Part IV then advocates for a greater agency sensitivity to the benefits of going beyond what is legally required in reason-giving to add credibility to agency decision-making. Robustly providing reasons and thoroughly explaining changes does a long way to increasing legitimacy for agency rules and for encouraging public buy-in for the regulations offered. Those are outcomes that agencies should strive to achieve even if the law is not mandating such a higher level of persuasion.

Particularly when a new agency position reflects a change from prior interpretation, the public will be more comfortable and have greater confidence in the Rule of Law when agencies take on the responsibility of persuasion (even if not always successful in persuading) because it will be an important acknowledgement of accountability to public opinion and to their duty to advance sound regulatory policy. Whenever a new administration amends, repeals, or otherwise alters an interpretation of a prior administration, there is a risk of weakening confidence in the Rule of Law because on the surface the change may seem to reflect a high level of indeterminacy in the law and interpretations of it. By accepting a higher standard of care in providing justifications for interpretive shifts, new administrations can minimize that disruption in confidence by explaining why their shifts are improving the interpretation, better serving regulatory policy, and advancing the best interests rather than simply reflective of political motivations alone.

## II. BACKGROUND ON *ENCINO MOTORCARS, LLC v. NAVARRO*

*Encino* involved a lawsuit where service advisors at a Mercedes-Benz automobile dealership complained that their employer was not paying them overtime wages as required by the Fair Labor Standards Act (FLSA).<sup>8</sup> The employer dealership, however, contended that an exception to overtime pay requirements applied to these types of workers (whose compensation was dependent not on hourly rates or a fixed salary but on the commissions received from services sold).<sup>9</sup> The employer argued that an exemption in FLSA § 213(b)(10)(A) should apply to these workers because the character and position of their duties made them the type of employees not entitled to overtime compensation under the FLSA.<sup>10</sup> As the Supreme Court explained, the *Encino* case “turn[ed] on the interpretation of this exemption,”<sup>11</sup> which, in turn, involved examining the Department of Labor’s regulations surrounding the terms in the exemption and the level of interpretive deference the Court was willing to afford the agency.

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<sup>8</sup> 29 U.S.C. §201 et seq.

<sup>9</sup> *Encino*, 136 S.Ct. at 2122, 2124.

<sup>10</sup> *Id.* at 2122.

<sup>11</sup> *Id.*

Amendments to the FLSA in 1966 changed what was a blanket exemption from the FLSA minimum wage and overtime provisions for all automobile dealership employees to a much more limited one.<sup>12</sup> As of the 1966 amendments, automobile dealership employees were no longer exempt from minimum wage and “limited the exemption from the overtime compensation requirement to cover only certain employees—in particular, ‘any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trailers, trucks, farm implements, or aircraft’ at a covered dealership.”<sup>13</sup> In a 1970 interpretive rule (done outside notice and comment procedures), the Department of Labor defined “salesman” as limited to those involved in actually selling vehicles or farm implements, and excluding service advisors.<sup>14</sup> A court of appeals decision rejected that interpretation in 1973, and then Congress amended the exemption again in 1974 to read as it does today. The 1974 amendments exempt “any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements,”<sup>15</sup> and exempt “any salesman primarily engaged in selling trailers, boats, or aircraft,” at a covered dealership.<sup>16</sup> The Supreme Court explained in *Encino*, “The statute thus exempts certain employees engaged in servicing automobiles, trucks, or farm implements, but not similar employees engaged in servicing trailers, boats, or aircraft.”<sup>17</sup> Thus, whether the service advisors litigating in the *Encino* case were entitled to overtime compensation or whether they fit inside this list of employees exempted under the present language of the FLSA was the core issue in the controversy.

In a 1978 opinion letter, the Department of Labor departed from its previously stated 1970 interpretation and concluded that service advisors would be exempt; they reiterated that position several times including in a 1978 *Field Operations Handbook*.<sup>18</sup> In each such departure, it acknowledged that its new interpretation was in line with prevailing court decisions and the newly amended congressional language. In 2008, the Department of Labor issued a notice of a proposed rulemaking, proposing to adopt a rule that would define service advisors as exempt and align with “every court that had considered the question.”<sup>19</sup> Nonetheless, the final rule in 2011 inexplicably “changed course yet again,”<sup>20</sup> with the final rule adopting the 1970 interpretation that service advisors are not exempt because the agency was interpreting “salesman” to mean “only an employee who

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<sup>12</sup> *Id.*

<sup>13</sup> *Id.* (citing Fair Labor Standards Amendments of 1966, § 209, 80 Stat. 836).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 2123 (citing 29 U.S.C. § 213(b)(10)(A)).

<sup>16</sup> *Id.* (citing 29 U.S.C. § 213(b)(10)(B)).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

sells automobiles, trucks, or farm implements.”<sup>21</sup> The *Encino* Court concluded its explanation of the regulatory background by stating that: “The Department gave little explanation for its decision to abandon its decades-old practice of treating service advisors as exempt under § 213(b)(10)(A),” while also imprecisely drafting its final rule because it defined salesman but seemingly forgot to also expressly state that the Department of Labor’s new definition meant that service advisors were not exempt (despite intending that effect).<sup>22</sup>

In *Encino*, when the service advisors sued for the overtime compensation they felt they were entitled under the FLSA, the district court granted the dealership’s motion to dismiss holding that service advisors were covered by the statutory exemption and not due overtime compensation.<sup>23</sup> The Court of Appeals for the Ninth Circuit reversed, giving *Chevron* deference to the 2011 Department of Labor regulation and holding that service advisors were not exempt under the relevant FLSA provisions (recognizing as it did that a number of other courts had disagreed with their interpretation).<sup>24</sup>

The majority opinion by the U.S. Supreme Court vacated the Ninth Circuit’s decision.<sup>25</sup> It found that *Chevron* deference was improper because the rule was not backed by reason-giving so it did not satisfy the procedural requirements of validity necessary before *Chevron* could apply, and—although the agency was free to change its interpretive position upon giving reasons—there were really no reasons (let alone adequate ones) advanced for the agency’s decision.<sup>26</sup> Thus, the majority remanded the case to the Ninth Circuit to interpret the statute on its own without deference.<sup>27</sup>

Justice Ginsburg’s concurring opinion, joined by Justice Sotomayor, was written for the purpose of stressing that the case did not establish any new legal standards.<sup>28</sup> Justices Thomas, joined by Justice Alito, dissented on grounds not particularly relevant to the focus of this article.<sup>29</sup> They agreed with the assessment leading to each of the three holdings identified in this article, but they believed that the Supreme Court should have then interpreted the statute itself rather than

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<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 2123-2124.

<sup>23</sup> *Id.* at 2124.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 2127

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* On remand, the Ninth Circuit interpreted the statute as entitling car dealership service advisors to overtime compensation. *Navarro v. Encino Motorcars, LLC*, 845 F.3d 925 (9<sup>th</sup> Cir. 2017). The case then ended up in the U.S. Supreme Court again, this time as a statutory interpretation case, and the Court reversed, holding in a April 2018 opinion that car dealership service advisors are exempt from the FLSA’s overtime-pay requirement. *Encino Motorcars, LLC v. Navarro*, 138 S.Ct. 1134 (2018).

<sup>28</sup> *Encino*, 126 S.Ct. at 2128 (Ginsburg, J., concurring).

<sup>29</sup> *Encino*, 126 S.Ct. at 2129-2131 (Thomas, J., dissenting).

remanding to the court of appeals for an interpretation.<sup>30</sup> Thus, theirs is a technical dissent because they would have reversed the Ninth Circuit rather than remanding to that court for further interpretation.

The U.S. Supreme Court's *Encino* opinions collectively are very short. The majority opinion is just over 3,500 words (and all opinions—majority, concurring, and dissent—total less than 5,800 words). There is reason to believe, however, that this short opinion could have a big long-term impact.<sup>31</sup> The next Part explores the three categories of holdings that result from the opinion and places them in context of existing precedent and policy.

### III. *ENCINO'S IMPACT ON THE STATE OF REASON-GIVING REQUIREMENTS*

Our understanding of the meaning and character of the reason-giving requirement in administrative law was enhanced by the *Encino* opinion. This Part examines *Encino's* influence and further summarizes the state of the reason-giving standards in administrative law as vital to the rulemaking exercise within a system committed to the Rule of Law. Particular emphasis will be placed on the enduring reason-giving requirement in the face of changes in agency interpretation precipitated by changes in administrations or other triggers.

#### A. *Encino's Holding Category 1: Reason-Giving as a Fundamental Procedural Requirement*

*Encino* has solidified a new layer of consequences for failure to adequately provide reasons—refusal of *Chevron* deference. While this may have been implied in the past, making it explicit strengthens the role of reason-giving analysis, gives it an even more solid jurisprudential grounding, and provides some hints as to the sometime elusive location of the judicial authority to invalidate actions unsupported by reasons.

In an opinion by Justice Kennedy, the *Encino* Court evaluated the level of deference due to the Department of Labor's interpretation of the categorization of service advisors. The opinion began with the typical reference to "the two-step analysis set forth in *Chevron*."<sup>32</sup> What was perhaps most noteworthy in its decision,

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<sup>30</sup> *Id.*

<sup>31</sup> For a brief debate at the *Yale Journal on Regulation: Notice & Comment Blog* on whether *Encino* makes a significant precedential mark, see Adrian Vermeule, *Encino is Banal*, YALE J. ON REG.: NOTICE & COMMENT (June 23, 2016), <http://www.yalejreg.com/blog/encino-is-banal-by-adrian-vermeule/>; Michael Pollack & Daniel Hemel, *Chevron Step 0.5*, YALE J. ON REG.: NOTICE & COMMENT (June 24, 2016), <http://www.yalejreg.com/blog/chevron-step-0-5-by-michael-pollack-and-daniel-hemel>.

<sup>32</sup> *Id.* at 2124.

however, was the Court's focus on what happens with traditional rules of interpretation if proper procedures are not followed. The *Encino* Court stated quite clearly that “*Chevron* deference is not warranted where the regulation is ‘procedurally defective’—that is, where the agency errs by failing to follow the correct procedures in issuing the regulation.”<sup>33</sup> Furthermore, “where a proper challenge is raised to the agency procedures, and those procedures are defective, a court should not accord *Chevron* deference to the agency interpretation”<sup>34</sup> in part because such a rule “cannot carry the force of law.”<sup>35</sup> This conclusion is why *Encino* might be characterized as a “*Chevron* Step Zero” or perhaps more precisely as a “*Chevron* Step 0.5” case.<sup>36</sup>

The *Encino* Court then proceeded to hold that the failure to satisfy the reason-giving requirement in administrative law counts as a procedural defect—hence disqualifying a statutory interpretation in a rule promulgated without adequate reasons from receiving *Chevron* deference.<sup>37</sup> After all, as the Court stated, “One of the basic procedural requirements of administrative rulemaking is that an agency must give adequate reasons for its decisions.”<sup>38</sup> This should be noted as the first major holding of *Encino*,<sup>39</sup> and one we see courts following since the decision.<sup>40</sup> The Court's analysis of the *scope* of the reason-giving requirement can be classified as the second holding category in the case, which will be discussed in Section B.

Before moving to those scope issues, however, a few more words on the gravity of the first category holding are useful. If it had not been clear before, *Encino* starkly places reason-giving in its rightful place as a fundamental prerequisite to a complete and lawful notice-and-comment rulemaking process. If an agency does not fulfill the reason-giving requirement then it has not completed the process necessary for its action to carry the force of law.

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<sup>33</sup> *Id.* at 2125.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 2127.

<sup>36</sup> See, e.g., Michael Pollack & Daniel Hemel, *Chevron Step 0.5*, YALE J. ON REG.: NOTICE & COMMENT (June 24, 2016), <http://www.yalejreg.com/blog/chevron-step-0-5-by-michael-pollack-and-daniel-hemel>.

<sup>37</sup> *Id.* at 2125.

<sup>38</sup> *Id.*

<sup>39</sup> Bethany A. Davis Noll & Denise A. Grab, *Deregulation: Process and Procedures that Govern Agency Decisionmaking in an Era of Rollbacks*, 38 ENERGY L.J. 269, 279 (2017) (“the Supreme Court recently explained in *Encino Motorcars, LLC v. Navarro* that the “reasoned explanation” requirement is a procedural requirement and that a regulation which fails to comply with this requirement “is itself unlawful and receives no *Chevron* deference.”).

<sup>40</sup> See, e.g., *People for the Ethical Treatment of Animals v. U.S. Dept. Agriculture*, 861 F.3d 502 (4<sup>th</sup> Cir. 2017) (citing *Encino* to explain that “an agency must meet certain threshold procedural requirements before courts may address *Chevron* deference, particularly notice and comment rulemaking”).

This statement regarding reason-giving's foundational place in rulemaking is consistent with commentary on the importance of reason-giving in previous work by this Author<sup>41</sup> and others.<sup>42</sup> Professor Jud Mathews, for example, has underscored the idea that “[t]he reason-giving requirement is foundational to modern administrative law,”<sup>43</sup> and Professor Jodi Short has explained that reason-giving is “central to U.S. administrative law and practice.”<sup>44</sup> The fact that a court cannot uphold a rulemaking lacking reasons is consistent with Professor Kevin Stack’s observation that “One ‘fundamental’ and ‘bedrock’ principle of administrative law is that a court may uphold an agency’s action only for the reasons the agency expressly relied upon when it acted.”<sup>45</sup>

That bedrock principle regarding reason-giving as an essential component of legitimate rulemaking dates to the beginning of the rise of the administrative state. The 1943 decision in *SEC v. Chenery* (“*Chenery I*”) held that “The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based.”<sup>46</sup> In the subsequent opinion after remand known as “*Chenery II*,” the U.S. Supreme Court in 1947 explained:

When the case was first here, we emphasized a simple but fundamental rule of administrative law. That rule is to the effect that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action *solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis.* To do so would propel the court into the domain which Congress has set aside exclusively for the administrative agency.<sup>47</sup>

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<sup>41</sup> See generally Kochan, *Constituencies*, *supra* note 3; Kochan, *The “Reason-Giving” Lawyer*, *supra* note 3.

<sup>42</sup> See, e.g., Effron, *supra* note 3, at 712 (“The project of administrative law is instructive because ‘explicit reason-giving [is] a major part of the industry of the administrative state’”); Kwoka, *supra* note 3, at 1091 (explaining the uniqueness of administrative law as being the only field of governmental activity where courts require reasons to uphold action, calling it “administrative exceptionalism”).

<sup>43</sup> Jud Mathews, *Minimally Democratic Administrative Law*, 68 ADMIN. L. REV. 605, 650-651 (2016).

<sup>44</sup> Jodi L. Short, *The Political Turn in American Administrative Law: Power, Rationality, and Reasons*, 61 DUKE L.J. 1811, 1813 (2012) (discussing reason giving as “central to U.S. administrative law and practice”); see also Kevin M. Stack, *The Constitutional Foundations of Chenery*, 116 YALE L.J. 952, 957 (2007).

<sup>45</sup> Stack, *supra* note 3, at 955.

<sup>46</sup> *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943) [hereinafter “*Chenery I*”]. See also Kwoka, *supra* note 3, at 1089-90 (summarizing *Chenery*).

<sup>47</sup> 332 U.S. 194, 196 (1947) [hereinafter “*Chenery II*”] (emphasis added).

*Chenery II* further noted that “an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its actions can be sustained.”<sup>48</sup>

Under this *Chenery* principle, the Supreme Court has made clear that an agency had to be judged by what the agency itself offered in defense of its actions. In *Chenery I*, the Court stated that an agency’s “action must be measured by what the [agency] did, not by what it might have done,” and “[i]t is not for [the court] to determine independently” what is a good or proper reason to adopt regulatory position or another.<sup>49</sup> Stack describes this *Chenery* principle as one focused on the agency and its own proffered reasons, explaining that “once any given standard of review is joined with the *Chenery* principle, the *Chenery* principle limits judicial review to the explanation the agency relied upon when it acted.”<sup>50</sup> Stack further explains that, “agencies [must] specifically explain their policy choices, their consideration of important aspects of the problem, and their reasons for not pursuing viable alternatives.”<sup>51</sup>

The *Chenery* principle and cases that embrace have not always been clear about where it is grounded—perhaps on general principles of judicial review, separation of powers, or administrative law, or maybe even the APA (even though *Chenery* itself predates the APA, it may have been incorporated into the APA).<sup>52</sup> Whatever the basis, as *Encino* again recognizes, there is a real and powerful requirement to give reasons and for the court to be able to find them in the record of the agency at the time of its decision.<sup>53</sup> Sohoni summarized it well: “By forcing agencies to shoulder the burden of supplying a reasoned decision, *Chenery* ‘[made] agencies into reason-giving institutions.’”<sup>54</sup> Reason-giving operates as a

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<sup>48</sup> *Chenery I*, 318 U.S. at 95.

<sup>49</sup> *Id.* at 94. See also Kwoka, *supra* note 3, at 1091 (“To supplant reasons or rely on rationales not provided by the agency itself when it made the decision would, in effect, be overreaching on the part of the judiciary.”).

<sup>50</sup> Stack, *supra* note 3, at 972.

<sup>51</sup> *Id.*

<sup>52</sup> Kwoka, *supra* note 3, at 1091 (decrying the “Supreme Court’s somewhat cursory explanation of the rationale behind the *Chenery* principle”); Stack, *supra* note \_\_, at 957, 976 (explaining that there is a “curious uncertainty concerning [the *Chenery* principle’s] basis”); Shapiro, *The Giving*, *supra* note 3, at 184-86 (explaining how the APA and reason giving requirements are connected); Shapiro & Levy, *supra* note 3, at 390, 427-28 (discussing separation of powers rationale for the reason giving requirement in administrative law); *Church of Scientology v. IRS*, 792 F.2d 153, 165 (D.C. Cir. 1986) (Silberman, J., concurring) (“The precept that the agency’s rationale must be stated by the agency itself stems from proper respect for the separation of powers”). See also generally Stack, *supra* note 3 (providing a separation of powers and non-delegation justification for the *Chenery* principal).

<sup>53</sup> *Encino*, 126 S.Ct. at 2125; see also, e.g., *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 654 (1990); Stack, *supra* note 3, at 956-57.

<sup>54</sup> Mila Sohoni, *The Administrative Constitution in Exile*, 57 WM. & MARY L. REV. 923, 941 (2016).

meaningful constraint on agency action and ties it to Rule of Law values that require some minimum level of institutional accountability for agencies to explain their reasons for action so that those reasons are transparent and subject to judgment by both courts and the public at large. The scope of the reasons required to withstand judicial review are taken up next.

***B. Encino’s Holding Category 2: The Scope and Substance of Basic Reason-Giving Requirements that Attach to Rulemakings***

*Encino* has arguably invited the incorporation of the full body of reason-giving law into a court’s analysis when conducting judicial review of an agency’s first impression interpretations as well as an agency’s change in position. The reason-giving requirement’s scope is not particularly deep or demanding, but an agency does have some very specific duties that must be met if its rules are to be enforced.

On the parameters of the reason-giving requirement and what constitutes an “adequate reason,” the *Encino* Court seemed not to break new ground—although, as will be mentioned below, others believe it may have been projecting a future tightening of the standards. The Court reiterated the *State Farm* standard (which applied and expanded upon *Chenery*) 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.’”<sup>55</sup> And, the *Encino* Court stressed—as opinions in many cases before it have similarly done—that this is no more demanding than requiring that the “agency’s explanation is clear enough that its ‘path may reasonably be discerned.’”<sup>56</sup> But there is still a threshold that must be met and “where the agency has failed to provide even that minimal level of analysis, its action is arbitrary and capricious and so cannot carry the force of law.”<sup>57</sup>

*Encino* reinforced what we have also known about the limited role of the courts in judicial review of agency action ever since *Chenery II*—the courts will not intervene to assist an agency by providing reasons for the agency’s action when the agency has not itself provided those reasons for itself.<sup>58</sup> Lower courts have

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<sup>55</sup> *Id.* (citing *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983)).

<sup>56</sup> *Id.* (citing *Bowman Transp., Inc. v. Arkansas–Best Freight System, Inc.*, 419 U.S. 281, 286 (1974)).

<sup>57</sup> *Id.* (citing 5 U.S.C. § 706(2)(A); *State Farm*, 463 U.S. at 42–43).

<sup>58</sup> *Id.* Sohoni has explained:

A related but distinct role played by judicial review is to enforce reason-giving by agencies. In *Motor Vehicle Manufacturers Ass’n v. State Farm Mutual Automobile Insurance Co.*, the Supreme Court interpreted *SEC v. Chenery Corp.*

already begun citing *Encino* for this important proposition.<sup>59</sup> As noted already, the *Encino* Court was also dealing with a rulemaking that included a change in agency interpretation. If there is not a single unambiguous interpretation of a statute, then *Chevron* necessarily opens the door to the possibility of multiple reasonable interpretations which means that an agency might still be reasonable even if it adopts different interpretations at different times. Thus, a shift in agency interpretation is not per se invalid, but it is still subject to reason-giving hurdles, as the next section will discuss.

### ***C. Encino’s Holding Category 3: Reason-Giving in the Face of Change in Position or New Administrations***

For rules generated by notice and comment and interpretations included therein, an agency can only change its position to alter, amend, or repeal such a rule and its underlying interpretation if it completes a new notice and comment rulemaking in which it acknowledges its change and provides reasons for it.<sup>60</sup> Professor Anne Joseph O’Connell explains this standard: “A proposed but unfinished rule usually can be withdrawn for any reason, without an opportunity for comment on the withdrawal;” however, “completed legislative rule typically can be rescinded only after notice and comment.”<sup>61</sup> Every new presidential administration becomes quickly aware that this is a speedbump to their regulatory change agenda. Even once a new administration comes into office, its agencies must follow old rules because an agency “is obligated to apply [its] own regulation, unless and until it is rescinded after [the agency] affords notice and an opportunity to comment.”<sup>62</sup> Thus, we must consider what *Encino* teaches us about how an

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to lay down the principle that a court conducting judicial review “may not supply a reasoned basis for the agency’s action that the agency itself has not given.”

Sohoni, *supra* note 2, at 941.

<sup>59</sup> See, e.g., *Zen Magnets LLC v. Consumer products Safety Commission*, 841 F.3d 1141 (10<sup>th</sup> Cir. 2016) (citing *Encino* when holding that agency safety standard was defective because it failed to explain *why* the data upon which it chose to reply supported its conclusions for its standards, rather than “cloak[ing] its findings in ambiguity and imprecision” and expecting the court to speculate on the reasons); *Center for Biological Diversity v. Jewell*, 248 F.Supp.3d 946 (D. Ariz. 2017) (citing *Encino*, inter alia, for the proposition that courts may not speculate on the reasons an agency has acted but instead must require the agency to itself provide reasons).

<sup>60</sup> See generally *The Commenting Power: Agency Accountability through Public Participation*, 70 OKLA. L. REV. 601 (2018).

<sup>61</sup> Anne Joseph O’Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 VA. L. REV. 889, 959-960 (2008).

<sup>62</sup> *National Wildlife Federation v. Watt*, 571 F. Supp. 1145 (D.D.C. 1983) (citing *Service v. Dulles*, 354 U.S. 363 (1957)); see also, e.g., *Natural Res. Def. Council, Inc. v. Abraham*, 355 F.3d 179, 204-06 (2d Cir. 2004) (agency cannot suspend effective date of final rule without completing notice and comment to alter it); *Public Citizen v. Steed*, 733 F.2d 93, 99-105 (D.C. Cir. 1984) (indefinite

agency goes about getting out from under an old rule or interpretation with which it disagrees.

*Encino* involved a new agency interpretation inconsistent with an existing interpretation. Agencies change their mind for a variety of reasons. As long as a new administration's regulatory position is allowable by underlying statutes, they are generally permitted to adopt a new interpretation as long as they provide an explanation for the change.<sup>63</sup> Explanations can be based on different ways of interpreting data, competing policy preferences, or different philosophical or economic assumptions, for example. The "reasoned explanation" standard does not give judges an opportunity to judge which policy choice—the old or the new—is better.

But agencies may not change their mind in any legally binding way without following the proper process. Rules generated by notice and comment—a relatively rigorous process—are durable for a reason—Rule of Law values demand a certain amount of stability and predictability in rules and if they are to change then they must do so in set, identifiable ways.

Considering this legal backdrop, the *Encino* Court predictably held that "Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change."<sup>64</sup> In doing so, it followed the standards most notably set out in the Court's *Brand X* and *Fox Television* decisions. For example, the Court explained that it does not normally demand a higher standard for changes in agency interpretation than that applied for first instances of agency interpretation: "When an agency changes its existing position, it 'need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate.'"<sup>65</sup> Instead, the agency must meet a two pronged test: (1) "at least 'display awareness that it is changing position'" and (2) "'show that there are good reasons for the new policy.'"<sup>66</sup> If there are serious reliance interests that could be adversely affected by a change in position, then the Court claims there still does not demand "further justification" beyond what would be required of an initial interpretation, but "'a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy.'"<sup>67</sup> Thus, while the Court is still claiming (as it did in *Brand X*) that there is not usually a higher standard, nonetheless "an '[u]nexplained inconsistency' in agency policy is 'a reason for

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suspension of final rule did not comply with APA requirements for altering regulation already in effect).

<sup>63</sup> *Encino Motorcars, LLC v. Navarro*, 136 S.Ct. 2117, 2125 (2016) (citing, for example, *National Cable & Telecommunications Assn. v. Brand X Internet Services*, 545 U.S. 967, 981–982 (2005)).

<sup>64</sup> *Id.* (citing, *inter alia*, *National Cable & Telecommunications Assn. v. Brand X Internet Services*, 545 U.S. 967, 981–982 (2005)).

<sup>65</sup> *Id.* at 2125–2126 (citing *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)).

<sup>66</sup> *Id.* at 2126.

<sup>67</sup> *Id.* (quoting *Fox Television*, 556 U.S. at 515–516).

holding an interpretation to be an arbitrary and capricious change from agency practice.”<sup>68</sup>

Citing *Mead*, the *Encino* Court then tied the reason-giving test to the procedural deficiency consequences discussed in its first holding: “An arbitrary and capricious regulation of this sort is itself unlawful and receives no *Chevron* deference” because it is unsupported by reasons.<sup>69</sup> The *Encino* Court concluded that the 2011 regulation at issue in the case failed the procedural sufficiency test because it lacked adequate reasons and was therefore not entitled to *Chevron* deference:

Applying those principles here, the unavoidable conclusion is that the 2011 regulation was issued without the reasoned explanation that was required in light of the Department’s change in position and the significant reliance interests involved. In promulgating the 2011 regulation, the Department offered barely any explanation. A summary discussion may suffice in other circumstances, but here—in particular because of decades of industry reliance on the Department’s prior policy—the explanation fell short of the agency’s duty to explain why it deemed it necessary to overrule its previous position.<sup>70</sup>

Furthermore, the *Encino* Court held that “The retail automobile and truck dealership industry had relied since 1978 on the Department’s position that service advisors are exempt from the FLSA’s overtime pay requirements. . . . In light of this background, the Department needed a more reasoned explanation for its decision to depart from its existing enforcement policy.”<sup>71</sup> Indeed, “when it came to explaining the ‘good reasons for the new policy,’ the Department said almost nothing.”<sup>72</sup>

Perhaps the most potentially confusing part of the *Encino* opinion lies in this mixed language. Did the Department of Labor fail because it did not provide a “more reasoned” explanation that might be required when the agency changes interpretation and risks upsetting reliance interests or did it fail because it “said nothing” and therefore did not meet the standard test. The Court was not entirely clear whether it was the *absence of any reasons* that hurt the Department most such that it would have failed under even the basic reason-giving test or whether the decision rested instead on inadequate as insufficiently detailed reasons because of the presence of reliance interests. It seems to say both, but either way it did not clearly announce any standard higher than prior caselaw required. It is most likely

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<sup>68</sup> *Id.* (quoting *Brand X*, 545 U.S. at 981) (emphasis added).

<sup>69</sup> *Id.* (citing *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001)).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 2127 (quoting *Fox Television*, 556 U.S. at 515).

that the Court's repeated references to reliance interests meant that the Court saw the slightly higher standard from *Brand X* at play here (even though the ultimate conclusion probably supports the idea that the Department would have lost even if the standard reason-giving rule, without the presence of reliance interests concerns, applied). Undoubtedly, the fact that the Court found basically no reasons made *Encino* an easier case to find inadequacy of reasons under any threshold for reason-giving.

The Court reiterated that it must find reasons *provided by the agency* and, consistent with reasons of separation of powers articulated in other cases, the *Encino* Court counseled that "It is not the role of the courts to speculate on reasons that might have supported an agency's decision."<sup>73</sup> In the *Encino* case, "Whatever potential reasons the Department might have given, the agency in fact gave almost no reasons at all. In light of the serious reliance interests at stake, the Department's conclusory statements do not suffice to explain its decision" meaning that its rule "cannot carry the force of law" which also means it cannot receive *Chevron* deference.<sup>74</sup> Thus, "Because the decision below relied on *Chevron* deference to this regulation," the Court vacated the lower court decision and remanded the case "for the Court of Appeals to interpret the statute in the first instance."<sup>75</sup>

Some have argued that *Encino* foretells a new, higher standard for review of the adequacy of reasons in the face of changed interpretations. For example, Professor Richard Pierce has commented that "In *Encino Motors*, I think the Justices are sending the message that you've got to give reasons. You can't just get away with another of these political flip-flops."<sup>76</sup> Similarly, Gilliam Metzger described *Encino* as an example of a case where the Court has "displayed increasing skepticism about changed agency interpretations."<sup>77</sup> They could be correct, but the text of the case itself does not move us in that direction.

Although a change to a rule promulgated through notice and comment must itself go through notice and comment, the courts have given agencies wide latitude when evaluating their statement for reasons for such change. There is nothing directly stated in the *Encino* opinion that changes that approach. In fact, Justices Ginsburg joined by Justice Sotomayor wrote separately to stress this fact. The concurrence wrote "separately to stress that nothing in today's opinion disturbs well-established law. In particular, where an agency has departed from a prior

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<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Dialogue, The Future of Administrative Law*, 47 ENVTL. L. REP. NEWS & ANALYSIS 10186, 10193 (March 2017).

<sup>77</sup> Gilliam Metzger, *Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 27 (2017); see also Nicholas R. Bednar & Kristin E. Hickman, *Chevron's Inevitability*, 85 GEO. WASH. L. REV. 1392, 1396-97 (2017) ("the Court gave *Chevron's* second step greater heft by incorporating *State Farm's* reasoned decisionmaking requirement [in *Encino Motorcars*].").

position, there is no ‘heightened standard’ of arbitrary-and-capricious review.”<sup>78</sup> Of course, the fact that the concurring justices had to write separately to make the statement could support the speculation of some that the majority was unwilling to narrow its decision with such language. Only time will tell. In the meantime, it is useful to further elaborate on these pre-existing reason-giving standards with which *Encino* is at least consistent.

Some key excerpts from the U.S. Supreme Court’s decision in *Fox Television* are instructive. There, the Court made clear that there is “no basis in the Administrative Procedure Act or in our opinions for a requirement that all agency change be subjected to more searching review”<sup>79</sup> when it changes its position or interpretation of an ambiguous statute. Put simply, the APA “mentions no such heightened standard.”<sup>80</sup> And the *Fox Television* Court continued by explaining that prior cases did not create a heightened standard for agency change either. It explained, “our opinion in *State Farm* neither held nor implied that every agency action representing a policy change must be justified by reasons more substantial than those required to adopt a policy in the first instance.”

In other words, both initial rulemakings and later procedurally valid reversals of, or amendments to, interpretations made in such earlier rulemakings are to be treated essentially the same. The APA “makes no distinction . . . between initial agency action and subsequent agency action undoing or revising that action.”<sup>81</sup> As the *Encino* Court noted, the agency must simply meet the two part test of recognition that it is changing and providing reasons for the change:

To be sure, the requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it is changing position. An agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books. And of course the agency must show that there are good reasons for the new policy.<sup>82</sup>

What the *Fox Television* Court also made clear was that there would not be comparative scrutiny between the old and the new. The Court opined that an 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

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<sup>78</sup> *Encino*, 126 S.Ct. at 2128 (Ginsburg, J., concurring).

<sup>79</sup> *Fox Television*, 556 U.S. at 514.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 515

<sup>82</sup> *Id.*

believes it to be better.”<sup>83</sup> Importantly, courts may infer that the agency believes the new rule is better from the very fact that the agency pursued a new rule.<sup>84</sup>

Following *Fox Television*, the *Encino* Court noted that “the agency need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate,”<sup>85</sup> but it rare cases it does face a stricter test:

Sometimes it must—when, for example, 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 or capricious to ignore such matters. In such cases it is not that further justification is demanded by the mere fact of policy change; but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy.<sup>86</sup>

Even when such reliance interests are present, the standard affords great deference to the agency’s prerogative to decide what is best. This is clear from many of the cases applying *Fox Television*, including the critical and instructive 2012 decision from the U.S. Court of Appeals for the D.C. Circuit in *National Association of Home Builders v. E.P.A.* (“*NAHB*”)<sup>87</sup>

In *NAHB*, the D.C. Circuit made it clear that agencies are empowered to change position.<sup>88</sup> That court also acknowledged that there is a greater agency responsibility to provide reasons when disregarding pre-existing facts upon which prior policy was set.<sup>89</sup> But the D.C. Circuit stressed that the reasoned evaluation required can rest entirely on a simple re-evaluation of policy priorities.<sup>90</sup> As the court noted, in the *NAHB* controversy “EPA did not rely on new facts, but rather on a reevaluation of which policy would be better in light of the facts. . . . *Fox* makes clear that this kind of reevaluation is well within an agency’s discretion.”<sup>91</sup> Consequently, in the *NAHB* case, “it was hardly arbitrary or capricious for EPA to issue an amended rule it reasonably believed would be more reliable, more effective, and safer than the original rule.”<sup>92</sup> Thus, even if *Encino* applied the

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<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 515 (“the conscious change of course adequately indicates” that the agency thinks the new direction is better).

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 515-16.

<sup>87</sup> 682 F.3d 1032 (D.C. Cir. 2012).

<sup>88</sup> *Id.* at 1036 (citing *Fox Television*, 556 U.S. at 514; *State Farm*, 463 U.S. at 42; Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C.Cir.1970); *Am. Trucking Ass’ns v. Atchison, Topeka & Santa Fe Ry. Co.*, 387 U.S. 397, 416 (1967)).

<sup>89</sup> *Id.* at 1037.

<sup>90</sup> *Id.* at 1037.

<sup>91</sup> *Id.* at 1038.

<sup>92</sup> *Id.* at 1039.

slightly higher reason-giving standard *Fox Television* advises is appropriate when reliance interests are present, nothing in *Encino* immediately signals a departure from the relative ease with which an agency can meet this test, such as articulated in *NAHB*.

#### IV. THE DIFFERENCE BETWEEN “MUST” AND “SHOULD” – THE WISDOM OF EXTRA RIGOR IN REASON-GIVING WHEN CHANGING AGENCY INTERPRETATION

*Chenery* combined with *Fox Television* and *Encino*, along with related cases, counsel that the bar is not really that high for an agency to change its interpretation or shift policy—no matter whether the change results because a new administration has taken charge or simply because an agency has changed its mind. On paper, it is a pretty low threshold to survive judicial review. Nonetheless, this Part proposes that agencies are unwise if they only do enough to get by, or only so much as they think is required to theoretically meet the standards as stated by the courts.

Instead, it is wise for an agency to provide more than is legally necessary, for at least two reasons. First, there are standards and then there’s application. Standards identified by the courts that give wide berth in changing agency position with seemingly limited, non-heightened reason-giving requirements make it seem like a low bar, but then there is evidence from application of those standards in practice that illustrates that agency policy shifts are more vulnerable to adverse court rulings. Second, administrations should consider whether they might develop habits of giving deeper and more robust reasons as a matter of better persuading observers of the wisdom of their position and furthering the legitimacy of their actions and of their agencies more generally. This Part explores each of those points in turn.

##### A. Evidence-Based Assessment Regarding Judicial Treatment of Agency Shifts in Position

Studies have consistently shown that the most frequent cause for invalidation of agency action has been the insufficiency of the reasons provided.<sup>93</sup> Recent

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<sup>93</sup> Richard J. Pierce, Jr., *Judicial Review of Agency Actions in a Period of Diminishing Agency Resources*, 49 ADMIN. L. REV. 61, 72 (1997) (“inadequate reasoning is the most frequent basis for judicial rejection of agency decisions”); Peter H. Schuck & E. Donald Elliott, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 1035 table 6 (1990) (20.7% of remands in 1985 were based on an inadequate agency rationale); Stack, *supra* note 3, at 956-57 (“despite the industry of agency justification that the *Chenery* principle has helped to create, inadequate explanation is still among the most common grounds for judicial reversal and remand.”). See also Shapiro & Levy, *supra* note 3, at 390, 442-454 (describing appendix with

evidence from a study by Professors Ken Barnett and Chris Walker also provide recent and granular data that suggests that agencies are at particular risk of invalidation of their decisions when they are based on changed interpretations.<sup>94</sup> An agency that reviews all of this data combined may not want to gamble on providing what it thinks are “enough” to get by to meet the bare minimum level of reasons for a rule, especially if changing interpretation.

The main takeaway from the studies on agency success rates is that agencies enjoy less success when changing administrations and adopting new rules inconsistent with existing ones—even when formalistically not required to meet a higher threshold to withstand judicial review than an interpretation of agency first impression. Thus, there is at least some reason to suspect that courts may be implicitly imposing de facto higher standards for reason-giving in order for an agency to survive when the agency is changing position. Examining all circuit court administrative law decisions between 2002 and 2013, Barnett and Walker identified several informative trends.

Included in their findings was that “long-standing agency interpretations prevailed under all deference regimes combined at a much higher rate (82.3%) than those that were new and replaced no earlier interpretation (65.9%), those that were inconsistent with a prior interpretation (59.8%), and those whose duration we could not discern from the decision (67.8%).”<sup>95</sup> This occurred even when the same *Chevron* deference standard was formally being applied. Barnett and Walker continue: “The circuit courts, consistent with Supreme Court doctrine but not practice, applied *Chevron* consistently to long-standing and new interpretations, and—to our surprise—at an even higher rate to inconsistent interpretations. But inconsistent agency interpretations prevailed under *Chevron* much less frequently (65.6%) than recent (74.7%) and long-standing interpretations (87.6%).”<sup>96</sup> The authors of that study found that this lower success rate for inconsistent agency interpretations as compared to other first-impression or consistent interpretations was present “under every review standard except de novo review.”<sup>97</sup>

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“results demonstrate the current significance of the reasons requirement, and the emergence of the rationalist model of judicial review.”).

<sup>94</sup> Kent Barnett & Christopher J. Walker, *Chevron in the Circuit Courts*, 116 MICH. L. REV. 1 (2017).

<sup>95</sup> *Id.* at 8.

<sup>96</sup> *Id.* Barnett and Walker later explain:

Interpretive continuity has a complex role in deference doctrines and judicial interpretation generally. . . .Our data indicate that long-standing interpretations prevailed more frequently than other interpretations. Of all long-standing interpretations regardless of deference regime, agencies prevailed 82.3% of the time--far ahead of ones that were evolving (59.8%), recent (65.9%), or of unknown duration (67.8%).

*Id.* at 62-63.

<sup>97</sup> *Id.* at 8.

Also instructive from the data was a revelation that an agency was at double trouble risk levels if it was taking a position inconsistent with past interpretation and it was doing so as a new administration. Barnett and Walker explain that “inconsistent interpretations based on new political administrations or unclear reasons were the least likely to prevail.”<sup>98</sup> In fact, there is a sharp drop between the success rate upon judicial review in categories of change based on new or amended statutes, new issues emerging, changed facts or judicial decisions that prompt the change, and changes made through the application of “the agency’s practical expertise” versus some other categories including the one that included changes based on “new presidential administration..”<sup>99</sup> Consequently, agencies should beef up their records in a way that gets them *Chevron* deference and seeks to provide a persuasive case for the change.<sup>100</sup> Whatever *Encino*, *Fox Television*, *NAHB*, and other cases say about the floor for surviving judicial review even when administrations change, agencies would be wise to listen to Barnett and Walker’s summary of the lessons that can be drawn from their data:

[E]ven with *Chevron* deference, agencies should carefully consider the reasons for the change. Changes based on differing political administrations or unclear changes suffered significantly lower win rates. When changing interpretations, agencies will likely place themselves on better footing by clearly pointing to changed facts and their experience to support the change.

Although several other factors could be at play in these cases beyond the change in administration, there is a clear risk to a new administration shooting for the formalistic floor regarding the reason-giving expectation. There are undoubtedly other prejudices at play that make courts suspicious of agencies changing position, especially simply because of a new administration’s contrary policy preference.

As mentioned earlier, Rule of Law values regarding continuity of governance and predictability of standards are always in the background. As a matter of prudence and in the self interest of an agency invested in the validation of its rules, agencies may want to strengthen their case for an interpretive change if they want their rules to survive. As the next section argues, such a predisposition also serves to improve the agency’s position with the public and adds legitimacy to the process.

### ***B. Perceived Legitimacy of Agency Action is Stronger When Reason-Giving is Robust***

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<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 63.

<sup>100</sup> *Id.*

The reason giving requirements, including those for agency change of position, should be understood as a floor, not a ceiling. Beyond what is legally required, the content and depth of the reasons given can have beneficial legitimizing effects for action. As Professors Michael Livermore and Richard Revesz counsel, “[s]ome of the classic justifications for reason giving include limiting the scope of agency discretion, promoting transparency in government, and legitimating the exercise of administrative discretion.”<sup>101</sup> These should also be justifications for boldness in reason-giving beyond what might formally be required. A new administration would be well advised to give deeper reasons and more information than the minimum legally-required content for satisfying *Encino* and its predecessor precedents. After all, as Professor Robin Effron notes, the reason-giving component is a key step toward facilitating “transparency, democratic accountability, and the regulation of delegated discretion.”<sup>102</sup>

Similarly, Professor Martin Shapiro explains that reason-giving does not usually constrain the agency against what it wants to do. He posits that when we say that reasons must be provided “[a]dministrators may still arrive at whatever decisions they think best; they must merely give reasons for the decision at which they did arrive.”<sup>103</sup> The minimum reason-giving requirement is not much about telling an agency what it is *allowed* to do.

So, if an agency is going to be able to get its preferred result, why not use the reason giving exercise for something more meaningful than just passing judicial muster? It could be used for persuasion too. The mandatory reason giving threshold is purposefully low, but administrative agencies should take on a best-practices responsibility to persuade. Agencies hold tremendous power and are relatively insulated from direct political controls, and the reason-giving exercise is one of the few vehicles through which the public can hold agencies accountable.<sup>104</sup> It is, as Professor Jerry Mashaw has noted, a way to check the raw exercise of power:

[T]o be subject to administrative authority that is unreasoned is to be treated as a mere object of the law or political power, not a subject with independent rational capacities. Unreasoned coercion denies our moral agency and our political standing as citizens entitled to respect as ends in ourselves, not as mere means in the effectuation of state purposes. This sort of explanation begins to illuminate why

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<sup>101</sup> Michael A. Livermore & Richard Revesz, *Rethinking Health-Based Environmental Standards*, 89 N.Y.U. L. REV. 1184, 1233 (2014).

<sup>102</sup> Effron, *supra* note 3, at 714.

<sup>103</sup> Shapiro, *The Giving*, *supra* note 3, at 181.

<sup>104</sup> Staszewski, *supra* note 3, at 1279 (2009) (“public officials in a democracy can be held deliberatively accountable by a requirement or expectation that they give reasoned explanations for their decisions”); Shapiro, *The Giving*, *supra* note 3, at 181 (“the very concept of . . . any kind of authority, implies the capacity to give reasons.”).

we might think of reasoned administrations as an individual right, indeed a fundamental individual right, not just as a contingent feature of accountability regimes.<sup>105</sup>

As such, even if not technically required under existing legal standards, the Rule of Law is strengthened if agencies take on voluntary commitments to impose controls upon themselves and to set expectations for accountability that include providing as much information about the rationale for decisions—particularly ones that reverse previous, supposedly “expert” agency decisions—as practicable.

Agencies have a self-interest in heightening their legitimacy, which they can do by heightening their standards for delivery of reasons for action. There are not generally statutes that require judges issue detailed opinions giving reasons for and otherwise justifying their decisions in cases, yet they regularly do so to serve justificatory, educational, and legitimization purposes.<sup>106</sup> Their written opinions work to add weight and authority to their decisions for purposes of satisfying the litigants in front of them<sup>107</sup> as well as the public consumers of the opinion who will use the product to guide future actions within a system of precedent. And, we are all better for it, as is the Rule of Law.<sup>108</sup> Legitimacy is strengthened because the process is more transparent and the citizens are given an opportunity to fully evaluate the decisions and the decisionmakers, and to respond when appropriate.<sup>109</sup>

Professor Cary Coglianese and researcher David Lehr recently stressed that “Legitimacy demands that agencies give adequate reasons for their actions,” and “To be sure, administrative law has long compelled reason-giving by agency officials, especially for rulemaking, rendering reasons a cornerstone of an accountable and transparent government.”<sup>110</sup> Reasons help receptors of the reasons

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<sup>105</sup> Mashaw, *Reasoned Administration*, *supra* note 3, at 104-05.

<sup>106</sup> See, e.g., Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 638 (1995) (examining reason giving, primarily in the context of judicial decision making); Paul P. Craig, *The Common Law, Reasons and Administrative Justice*, 53 CAMBRIDGE L.J. 282, 283-84 (1994) (discussing duties of public officials to provide reasons for decisions); HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 383-403 (William N. Eskridge, Jr. & Phillip P. Frickey eds., 1994) (discussing the role of reason-giving in judicial decisions in furthering its appearance as principled and legitimate).

<sup>107</sup> As Judge Henry Friendly put it, “[a] statement of reasons may even make a decision somewhat more acceptable to a losing claimant.” Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1292 (1975).

<sup>108</sup> James W. Torke, *What is This Thing Called Law?*, 34 IND. L. REV. 1445, 1450 (2001) (“The rule of law does not promise results so much as it promises an approach, a process, a practice of reason-giving, a set of argumentative conventions.”)

<sup>109</sup> Mashaw, *Small Things*, *supra* note 3, at 23-24 (discussing the objective of creating even minimal reason giving requirements as ensuring that agencies are exercising “power on the basis of knowledge.”); Shapiro & Levy, *supra* note 3, at 395 (“judicial review and the legitimacy of administrative government are inextricably intertwined.”).

<sup>110</sup> Cary Coglianese & David Lehr, *Regulating By Robot: Administrative Decision Making in the Machine-Learning Era*, 105 GEO. L.J. 1147, 1207 (2017).

better understand why they should follow an agency's directive and make it less open to a critique of lacking basis or being driven by non-public-interested motivation.<sup>111</sup> The public has a right and reason to "surveil" the acts of agencies, and the reason-giving exercise is often their entry point.<sup>112</sup>

If the act of someone else matters to them, people generally want to understand why that person is acting and why they are acting in a particular way. The desire for reasons is commonplace nonetheless.<sup>113</sup> As I have explained elsewhere, agencies must be cognizant of the wide constituencies of their reasons.<sup>114</sup> Although administrative law does not normally require that reasons be persuasive because the judge does not adjudicate whether the reasons are correct or good ones upon judicial review, reasons nonetheless have the ability to accomplish that deeper result and serve an important role in legal discourse on the legitimacy of action.<sup>115</sup> Thus, sometimes an agency should "go out of its way" to make the public understand,<sup>116</sup> i.e. to go beyond what might be required under existing precedent, to explain the superiority of its reasons rather than simply dictating without more that it has reasons and believes they are better than the reasons of a previous administration.

In earlier work, I described the dialogic benefits of reason giving as a facilitator toward accountability and sound policy generation as follows:

Accountability is a powerful force in motivating responsible agency decision-making and is a value championed in reason-giving requirements. One is more likely to be reflective on his options and alternatives to action before acting if he knows that he must supply reasons for his choice. Agencies are forced to be more responsive if the public can provide the types of specific critique, protest, or support that can only be formulated if that public has a set of reasons to evaluate and identifiable reasons against which that public can

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<sup>111</sup> Effron, *supra* note 3, at 713 ("A reasoned decision is harder to characterize as the product of a decisionmaker's whim or fancy.")

<sup>112</sup> Shapiro, *The Giving*, *supra* note 3, at 181 (explaining that "public surveillance" of agency decisions fostered by reason giving helps keep agencies in check).

<sup>113</sup> See generally CHARLES TILLY, WHY?: WHAT HAPPENS WHEN PEOPLE GIVE REASONS . . . AND WHY (2006) (showing how social relations in everyday life continuously involve demand for reasons); EXPLAINING ONE'S SELF TO OTHERS: REASON-GIVING IN A SOCIAL CONTEXT (Margaret L. McLaughlin, et al. eds., 1992).

<sup>114</sup> See generally Kochan, *Constituencies*, *supra* note 3.

<sup>115</sup> Hanoch Dagan, *The Realist Conception of Law*, U. TORONTO L. REV. 607 (2007) ("Because law is a coercive mechanism backed by state-mandated power, legal discourse — our public conversation about state-mandated coercion — must be a justificatory discourse, an exercise in reason giving.")

<sup>116</sup> Shapiro, *The Giving*, *supra* note 3, at 181 (explaining that the public has a stake in the understanding the reasons for agency action, not just judges).

frame its comments on an agency's action. Of course, accountability can only be effective if reasons are transparent and accessible.<sup>117</sup>

There I was discussing even the most basic reason-giving requirement as capable of serving those purposes. It stands to reason that, the more robust the offering of reasons, the more the agency can contribute information that will be useful in the debate over the best formulation of policy and the most accurate interpretation of legal mandates.<sup>118</sup>

I am not advocating here for raising the *legal* threshold for satisfying the reason-giving requirement to withstand judicial review. Raising that threshold comes with substantial risks of judicial overreach and activism, inviting judges to choose which of two competing policies they find better. From a situation of separation of powers and comparative institutional capacity, choosing between two equally valid interpretations or policies is probably better left with the elected branches. Nonetheless, that does not rule out agencies holding themselves to a higher standard of explanation and persuasion—a type of reason-giving “plus.” When the citizenry is especially suspicious whether there are good reasons—as is inevitably the case with a new administration and its efforts to shift away from a predecessor administration of a different ideological predisposition—putting in the extra explanatory effort is bound to force the agency to more carefully consider changes because they will be requiring themselves to defend them at a higher level, improve the image of the agency, increase respect and receptivity to the change, and perhaps even convince a larger audience of the wisdom of the change.

## V. CONCLUSION

Whether it be rules to govern a household or rules to govern a country, the people subject to rules want to feel that they can understand the reasons upon which the rules are based. The requirement that those holding the power to promulgate and impose rules must also explain their actions by providing reasons injects an important check on abuses of power that supports the system's operation under Rule of Law values rather than arbitrary power. These have been longstanding principles in administrative law. With the recent *Encino* decision, the U.S. Supreme Court has reinforced their importance and given us new reasons to discuss the value of reason-giving. We should take that opportunity to remember the power of the question why and the emptiness felt in the shallowness felt when the questioner is left unsatisfied by the response. Law can go a long way toward encouraging agencies to provide reasons, but the agencies can take their

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<sup>117</sup> Kochan, *Constituencies*, *supra* note 3, at 34.

<sup>118</sup> As Nestor Davidson and Ethan Leib have concluded, “[p]ublic reason-giving . . . by exposing legal decisionmaking to question and contestation, stands to improve that decisionmaking.” See Davidson & Leib, *supra* note 3, at 303.

responsibilities even beyond what the courts require. Each time they do, the credibility and legitimacy gap that inevitably exists for the regulatory state will shrink, at least a bit.