NOTES

JUDICIAL REVIEW OF AGENCY CHANGE

The Supreme Court has offered little guidance on a critical issue in administrative law: how courts should identify whether an agency has changed a rule[1] or departed from precedent. The academic literature has similarly overlooked this issue. Yet defining the federal judiciary's role in identifying agency change has significant implications. Any standard for identifying change must negotiate the relationship between flexibility and consistency — two entrenched but conflicting values in administrative law. Agencies have a critical stake in knowing whether a court will decide that a change has occurred. And a court's decision that an agency has changed its policy often controls the outcome of a case.

This Note tackles the unaddressed "change-identification" issue. Part I situates the problem of identifying agency change in established administrative law doctrine, with a careful eye toward the values of flexibility and consistency. Part II then sets forth a taxonomy of types of cases that present the change-identification problem. Part III analyzes judicial review in these cases and proceeds in three sections: First, it explores the standards, or lack thereof, that courts have traditionally applied in change-identification cases. Next, it argues that judicial standards for analyzing this issue have been ambiguous because these cases implicate unique rule-of-law concerns and institutional division-of-power dynamics. Finally, the Part concludes by identifying two possible standards that courts can use to resolve these cases and contending that a more deferential approach is preferable.

I. CONSISTENCY AND CHANGE

Flexibility and consistency coexist uneasily in administrative law. Allowing for flexibility recognizes that "[r]egulatory agencies do not establish rules of conduct to last forever . . . . They are neither required nor supposed to regulate the present and the future within the inflexible limits of yesterday."[2] But flexibility comes at a cost. Consistent rules and decisions ensure that parties are treated equally, reinforce the legal system's integrity and core due process values, and settle the

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[1] This Note uses the term "rule" to mean both final rules enacted through rulemaking and precedential rules announced in formal and informal adjudication.

[2] Am. Trucking Ass'ns v. Atchison, Topeka & Santa Fe Ry. Co., 387 U.S. 397, 416 (1967); *see also* Massachusetts v. EPA, 549 U.S. 497, 524 (2007) (noting that agencies "whittle away at [problems] over time, refining their preferred approach as circumstances change and as they develop a more nuanced understanding of how best to proceed").

expectations of regulated parties.[3] Too much flexibility can harm these bedrock rule-of-law values.

As a result, courts and commentators have struggled to balance these competing concerns. Courts have faced this struggle in at least two contexts: review of an agency's explanation for its policy choices[4] and review of an agency's statutory authority to act.[5] In the former, *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*[6] established a narrow "hard look" review of agency decisions, which prevents courts from "set[ting] aside an agency rule that is rational, based on consideration of the relevant factors, and within the scope of the authority delegated to the agency by statute."[7] In the Supreme Court's most recent pronouncement on the subject, *FCC v. Fox Television Stations*,[8] a 5–4 majority decided that changes to agency rules are not "subject[] to more searching review" than are first-instance policy decisions.[9] Still, this commitment to flexibility is not uniform: while an "agency need not always provide a more detailed justification," "[s]ometimes it must" — for example, when "its prior policy has engendered serious reliance interests."[10]

Regarding the latter, when reviewing an agency's statutory authority to act, the framework established by *Chevron U.S.A. Inc. v. Natural Resource Defense Council, Inc.*[11] instructs courts to defer to an agency's reasonable interpretation of a statute it administers.[12] The fact that an interpretation has changed is not, by itself, "a basis for declining to analyze the agency's interpretation under the *Chevron* framework."[13] However, courts apply varying levels of deference to different administrative interpretations, depending on a host of contextual factors.[14] Consistency is one such factor that courts consider when cali-

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[3] *See* Yoav Dotan, *Making Consistency Consistent*, 57 ADMIN. L. REV. 995, 996 (2005).

[4] *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983).

[5] *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

[6] 463 U.S. 29.

[7] *Id.* at 42. As many commentators have noted, courts generally have construed 5 U.S.C. § 706(2)(A)'s arbitrary and capricious review and § 706(2)(E)'s substantial evidence review to be "the same substantive standard of review," *Bangor Hydro-Elec. Co. v. FERC*, 78 F.3d 659, 663 n.3 (D.C. Cir. 1996). *See, e.g.*, STEPHEN G. BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY 384 (6th ed. 2006). This Note embraces both forms of review within the term "hard look" review.

[8] 129 S. Ct. 1800 (2009).

[9] *Id.* at 1810.

[10] *Id.* at 1811.

[11] 467 U.S. 837 (1984).

[12] *See id.* at 842.

[13] Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981 (2005). Indeed, *Chevron* itself was an example of agency change. *See Chevron*, 467 U.S. at 853, 857.

[14] *See, e.g.*, United States v. Mead Corp., 533 U.S. 218, 234–35 (2001).

brating both the level of deference[15] and the reasonableness of the agency's interpretation.[16]

Questions about the amount of scrutiny that new policies and interpretations should receive presuppose that a change has occurred. After all, a court can scrutinize an agency's *new* interpretation only if it has identified that there is, in fact, a new interpretation to review. Similarly, a court has to identify a new agency policy in order to decide whether that policy's explanation withstands hard look review.

In reality then, judicial review of agency action requires an initial investigation into whether the agency has changed its policy — the change-identification issue. If the court finds no change, it may only take a hard look at the *application* of the existing policy.[17] However, if the court finds that the agency changed its policy, it will review the new policy, like in *Fox*, or the interpretation, like in *Chevron*. This inquiry is broader in scope than a hard look at the application of existing policy, giving courts more ground to strike down an agency action.[18]

The change-identification issue is therefore quite significant for agencies. When an agency knows it is making a change, it can announce that shift and prepare a record to satisfy judicial review of the new policy or interpretation. But an agency may not always be able to predict how a court will rule. An unexpected judicial finding of change will often mean that the agency has not explained a new policy or interpretation. As a result, courts will generally be required to find the shift arbitrary and capricious.[19] While the agency may revisit the issue and reach the same result,[20] it will need to recommit resources to the matter and craft an explanation for the new policy.[21]

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[15] *See* Good Samaritan Hosp. v. Shalala, 508 U.S. 402, 417 (1993) ("[T]he consistency of an agency's position is a factor in assessing the weight that position is due."); Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) ("The weight of such a judgment in a particular case will depend upon . . . its consistency with earlier and later pronouncements . . . ."). *But see* City of Arlington v. FCC, 133 S. Ct. 1863 (2013).

[16] *See* Judulang v. Holder, 132 S. Ct. 476, 483 n.7 (2011). The Court's ambivalence over the relationship between consistency and flexibility has generated a wellspring of scholarly commentary. *See, e.g.*, Evan J. Criddle, Chevron*'s Consensus*, 88 B.U. L. REV. 1271, 1280 (2008); Jonathan T. Molot, *Ambivalence About Formalism*, 93 VA. L. REV. 1, 49 (2007).

[17] A party can also challenge the existing rule, but that challenge may be limited by precedent upholding the policy.

[18] This Note will focus primarily on cases decided under hard look review, although similar principles for identifying agency change may apply in the *Chevron* context.

[19] This remains true even if the issue is a change to the agency's interpretation of a statute. *See* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981 (2005) ("Unexplained inconsistency is, at most, a reason for holding an interpretation to be an arbitrary and capricious change from agency practice under the Administrative Procedure Act.").

[20] *See id.*; *see also* Alphonsus v. Holder, 705 F.3d 1031, 1046 (9th Cir. 2013).

[21] *See* Dotan, *supra* note 3, at 1002–03 (noting that judicially created consistency requirements may "ossify administrative initiatives," *id.* at 1002, and "intensify the already existing bureaucratic tendencies towards conservatism," *id.* at 1003).

II. CATEGORIES OF CHANGE CASES

Not all changes are created equal. Agencies operate in an expansive universe of statutory and factual settings. Their regulations reflect congressionally mandated factors, the agency's expert judgments, and the complexities of the real world. Part I identified a preliminary step in judicial review of agency action: change identification. While this concept is clear at a theoretical level, it may appear in many different, subtle forms in practice. This Part will identify five general categories of cases that raise agency change issues.[22]

A. Announced Agency Change

There is a black-letter law narrative about when a court should invalidate an agency's actions as an impermissible change in policy or departure from precedent. The Supreme Court succinctly outlined this narrative in *Fox*: When an agency changes its policy it must acknowledge the change and "show that there are good reasons for the new policy."[23] The agency may not fail to acknowledge the change and, in doing so, "depart from a prior policy sub silentio or simply disregard rules that are still on the books."[24] This black-letter law framework also applies in cases where a court reviews the agency's decision under *Chevron*.[25]

One category of cases within this framework involves decisions where the agency changes its policy, forthrightly announces that change, and justifies its new position. In these cases, there is no dispute that a change has occurred, and courts focus on whether the agency's new policy is arbitrary or outside the agency's authority. *Fox* is a prime example. In *Fox*, the orders at issue explicitly disavowed prior low-level agency decisions that "fleeting expletives" were not actionable.[26] "[T]he FCC forthrightly acknowledged that its recent actions ha[d] broken new ground."[27] On review, the Supreme Court scrutinized the new policy and concluded that it was not arbitrary.[28]

This category of cases — involving announced agency change — has historically drawn substantial attention. For years before *Fox*, judges and scholars debated whether *State Farm* required a more

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[22] To the authors' knowledge, no similar taxonomy exists in the academic literature.

[23] FCC v. Fox Television Stations, 129 S. Ct. 1800, 1811 (2009).

[24] *Id.* (emphasis omitted); *see also* Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade, 412 U.S. 800, 808 (1973) ("Whatever the ground for the departure from prior norms . . . it must be clearly set forth so that the reviewing court may understand the basis of the agency's action and so may judge the consistency of that action with the agency's mandate.").

[25] *See Brand X*, 545 U.S. at 981.

[26] *Fox*, 129 S. Ct. at 1808–10.

[27] *Id.* at 1812.

[28] *Id.* at 1812–13.

extensive justification for changes in agency policy than it did for an agency's initial approach.[29] But these discussions have all focused on the level of deference on review of the new interpretation and explanation. Any analysis of whether an agency made a change in the first place is absent, and for good reason — the change is clear.

B. Unannounced Reversal of Clear Agency Precedent

A second category of cases that falls squarely within the black-letter law framework involves situations in which the agency acts contrary to an existing policy or precedent, but does not acknowledge or explain that change. In these cases, the agency has some announced policy or precedent *X* and makes a decision *not X* without commenting further. This category is the inverse of the one described above: the change is undeniable, but neither explicit nor justified.

In 2009, the D.C. Circuit issued an opinion in *Dillmon v. National Transportation Safety Board*[30] that exemplifies this category. At issue was whether the Federal Aviation Administration (FAA) acted arbitrarily by ignoring an Administrative Law Judge's (ALJ) credibility determination.[31] The D.C. Circuit found the agency's decision to be an unexplained reversal of its existing precedent. The court noted that the FAA had an "unwavering" precedent of deferring to the ALJ's credibility determinations.[32] But in this case, the FAA had refused to credit the ALJ's "explicit credibility finding" and "essentially concede[d]" that it had "deviated from its precedent."[33] The court found this action to be a clear, sub silentio divergence from policy, which required invalidating the FAA's decision.[34]

Cases similar to *Dillmon* abound.[35] As in Category A, courts should rarely struggle with identifying a change in these cases. While the agency does not announce or acknowledge a shift in policy, the

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[29] *See, e.g.*, Yale-New Haven Hosp. v. Leavitt, 470 F.3d 71, 79 (2d Cir. 2006) (noting that review of agency change is "particularly searching"); NAACP v. FCC, 682 F.2d 993, 998 (D.C. Cir. 1982) (observing that hard look review is "heightened somewhat" when an agency changes course), *abrogated by Fox*, 129 S. Ct. 1800 (2009); *see also* Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505, 520–25 (1985).

[30] 588 F.3d 1085 (D.C. Cir. 2009).

[31] *Id.* at 1090.

[32] *Id.*

[33] *Id.* at 1091.

[34] *See id.*

[35] *See, e.g.*, Alphonsus v. Holder, 705 F.3d 1031, 1045–47 (9th Cir. 2013) (finding the determination of the Board of Immigration Appeals (BIA) that a crime was "particularly serious" to be arbitrary, *id.* at 1046, because BIA relied on the rationale that the crime was a threat to the "orderly pursuit of justice," which it had never before found sufficient for such a decision, *id.* (internal quotation mark omitted)); Galvez-Vergara v. Gonzales, 484 F.3d 798, 801–03 (5th Cir. 2007) (finding change because BIA failed to address ineffective assistance of counsel as an "exceptional circumstance," *id.* at 802, justifying failure to appear at a hearing, despite contrary precedent).

presence of a clear precedent makes it easy for litigants to point out the agency's previous policy and identify that there has been a change. But unlike in Category A, the agency has failed to explain the departure. The proper result is therefore reversal.

C. Consistent Agency Action

Of course, agency action often does not involve any shift in policy. In some cases, the agency's decision is controlled (or at least supported) by a directly on-point precedent. The change issue is rarely litigated in this category, but when the question is raised, courts analyze and ultimately dismiss the issue.[36]

Categories A, B, and C nicely map onto the black-letter law framework described in *Fox*. In Category A, the agency acknowledges a change and explains it, like in *Fox* itself. In Category B, the agency changes its policy and does not acknowledge any shift, a classic sub silentio departure as described in *Fox*. And in Category C, no explanation is necessary because no change has occurred.

D. Inconsistent Application of Precedent or Policy to New Factual Circumstances

Beneath the clear categories lies a murkier set of cases in which it is difficult to determine whether the agency has made a change. These cases are, by their very nature, highly fact dependent. This Note suggests that they fall into two rough categories: cases in which the agency has applied a broad precedent or policy in a way that is inconsistent with past applications, and cases in which the agency's consistent application of a policy has departed from the plain meaning of that announced policy. In both of these categories, courts must grapple with the agency's attempt to reconcile its decision with precedent.

Regarding the former category (Category D), agency policies may involve broad language that the agency concretizes in particular circumstances. Doing so is not necessarily problematic — agencies may need expansive standards to regulate across a variety of scenarios.[37] As agencies apply their policies to new circumstances, they will inevitably distinguish from and analogize to past decisions. Unlike cases described in Category B, the agency in these cases "purports to stick to [its prior course of action] . . . . The agency in essence is declaring:

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[36] *See, e.g.*, NetCoalition v. SEC, 615 F.3d 525, 535–37 (D.C. Cir. 2010) (holding SEC action not arbitrary after distinguishing allegedly conflicting agency actions and identifying precedent for the agency's present action); S. Shore Hosp., Inc. v. Thompson, 308 F.3d 91, 102–03 (1st Cir. 2002) (noting challenger bears burden of "demonstrat[ing] administrative inconsistency" before court will require explanation for a shift, *id.* at 103). Even when a court finds that the agency has not changed its policy, parties can still challenge its application of the policy. *See supra* p. 2072.

[37] *See* cases cited *supra* note 2.

Under our existing principles, we should not, or at the very least may not, reach the same outcome in this case as we did in previous cases."[38] Courts in these cases must wade into the agency's precedent and draw conclusions about prior decisions in order to reach a judgment. The agency's own precedent provides a "solid point of origin . . . to which [the court] should refer when examining the decision at hand,"[39] but the precedent itself does not resolve the question.

Castillo v. Attorney General,[40] a Third Circuit decision, is such a case. In *Castillo*, the Board of Immigration Appeals (BIA) denied Bernardo Castillo's petition to cancel his pending removal from the United States.[41] According to the BIA, he was not eligible for cancellation because of a prior shoplifting conviction — classified as a "disorderly persons offense" under New Jersey law.[42] On appeal, both parties agreed that the BIA's earlier decision in *In re Eslamizar*[43] governed the decision about whether a disorderly persons offense constituted a "conviction." However, while the BIA read *Eslamizar* and subsequent cases to require only a "formal judgment of guilt under the 'reasonable doubt' standard of proof . . . [with imposition of] some form of punishment," Castillo argued that the decisions demanded a more complex, multifactor inquiry.[44]

Though acknowledging the administrability of the agency's rule, the Third Circuit invalidated the BIA's decision as an unexplained policy change.[45] It decided that a multifactor test was a "more persuasive interpretation of *Eslamizar*."[46] Because the court found that the BIA's approach diverged from precedent, it decided that the agency needed to announce and justify a reasonable doubt–based interpretation of "conviction" if it wished to use that standard.[47]

Castillo is not unique.[48] As a whole, this category is distinct from the earlier ones because the agency acknowledged and reasoned from

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[38] Dotan, *supra* note 3, at 1038.

[39] *Id.*

[40] 729 F.3d 296 (3d Cir. 2013).

[41] *Id.* at 298.

[42] *Id.* at 299.

[43] 23 I. & N. Dec. 684 (B.I.A. 2004) (en banc).

[44] *Castillo*, 729 F.3d at 306; *see also id.* at 305–06.

[45] *Id.* at 309–10.

[46] *Id.* at 306.

[47] *See id.* at 311. For another example in the immigration context, see *Alphonsus v. Holder*, 705 F.3d 1031 (9th Cir. 2013). In a different part of *Alphonsus* than that cited in note 35, *supra*, the majority and dissent split on whether, under BIA precedent, resisting arrest was a sufficiently grave crime for a finding of "meaningful risk" to the community. *See Alphonsus*, 705 F.3d at 1049; *id.* at 1050 (Graber, J., concurring in part and dissenting in part).

[48] *See, e.g.*, Cal. Trout v. FERC, 572 F.3d 1003, 1024 (9th Cir. 2009) (determining whether FERC's invocation of a "good cause" exception to its filing requirements departed from precedent); Cal. Trucking Ass'n v. ICC, 900 F.2d 208, 211–13 (9th Cir. 1990) (addressing whether the

past cases before concluding that its decision was consistent with precedent. Since the agency attempted to reconcile its decision with precedent, the court cannot readily answer "yes" or "no" to the change issue. Instead, it must conduct a more elaborate inquiry into whether a change occurred at all. The black-letter law framework outlined in *Fox* is silent on the appropriate level of deference to apply to the agency's attempt to harmonize its decisions in these situations.

E. Consistent Application of a Policy that Conflicts with the Announced Standard

Whereas Category D involves agencies' purporting to apply a broad rule to new circumstances, Category E involves agencies' purporting to apply a rule while relying on precedent that arguably *conflicts* with that rule. The difference is subtle but noticeable for at least two reasons: First, in this category, an agency decision may be consistent with precedent, but that line of precedent may nonetheless be at odds with the language of the rule. Second, cases in Category D consist of one-off, unique applications of a general rule to particular factual circumstances. Category E, in contrast, tends to involve a longstanding gloss on, or forward-looking characterization of, a rule — a gloss the agency intends to maintain in future cases.

1. The NLRB's Withdrawal-of-Recognition Rule. — One situation in which this type of case may arise is when an agency systematically evaluates evidence in a way that creates a gap between its announced rule and the practical requirements imposed on regulated parties. A salient example of this situation arose in the context of the National Labor Relations Board's (NLRB) withdrawal-of-recognition rule. Under NLRB precedent, if an employer wishes to withdraw recognition from a union or conduct an internal poll of employee support for that union, the employer must show that it has "a 'good-faith reasonable doubt' about the union's majority support" based on objective considerations.[49]

While maintaining this framework, the NLRB decided cases by developing policies for weighing evidence. For instance, the NLRB decided that employers should not treat "[e]mployee statements of dissatisfaction with a union"[50] as the "equivalent of withdrawal of support,"[51] and should view "employee statements purporting to represent the

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ICC deviated from its past decisions defining when the storage of goods constitutes the "continuation of an interstate shipment," *id.* at 211 (internal quotation mark omitted)).

[49] Allentown Mack Sales & Serv., Inc. v. NLRB, 522 U.S. 359, 361 (1998); *see* NLRB v. Curtin Matheson Scientific, Inc., 494 U.S. 775, 778 (1990).

[50] Torch Operating Co., 322 N.L.R.B. 939, 943 (1997) (quoting Briggs Plumbingware, Inc. v. NLRB, 877 F.2d 1282, 1288 (6th Cir. 1989)) (internal quotation mark omitted).

[51] *Id.* (quoting *Briggs*, 877 F.2d at 1288).

views of other employees" with "suspicion and caution."[52] Although the NLRB did not formally announce and justify these presumptions, it applied them consistently.[53]

In *Allentown Mack Sales and Service, Inc. v. NLRB*,[54] the Supreme Court addressed whether this practice, while consistent, created an unannounced shift in agency policy away from the "good-faith reasonable doubt" standard.[55] Justice Scalia, writing for the majority, upheld the "good-faith reasonable doubt" standard but invalidated the NLRB's decision under hard look review.[56] The Court decided that, in the case at hand, it was "quite impossible for a rational factfinder to avoid the conclusion that Allentown had reasonable, good-faith grounds to doubt . . . the union's retention of majority support."[57]

But Justice Scalia did not restrict his opinion to the facts of this case. "It is certainly conceivable," he added, "that an adjudicating agency might consistently require a particular substantive standard to be established by a quantity or character of evidence so far beyond what reason and logic would require as to make it apparent that the *announced* standard is not *really* the effective one."[58] Such a practice, even if consistent, is a "violent breach" of the principle that agency action must be "logical and rational";[59] it prevents "consistent application of the law" and frustrates "effective review . . . by the courts."[60]

Justice Scalia then turned his gaze to the NLRB's broader practice of weighing evidence in light of policy considerations. Notwithstanding the agency's consistency, he found this practice improper because it "impos[es] a more stringent requirement" than "[good-faith] reasonable doubt" suggests.[61] The agency can certainly craft a tougher policy or "forthrightly and explicitly adopt counterfactual evidentiary presumptions" subject to review for consistency with the statute and the stan-

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[52] Wallkill Valley Gen. Hosp., 288 N.L.R.B. 103, 109 (1988).

[53] As precedents accumulated, it became increasingly clear that "good-faith doubt" was impossible to show in practice. Joan Flynn, *The Costs and Benefits of "Hiding the Ball": NLRB Policymaking and the Failure of Judicial Review*, 75 B.U. L. REV. 387, 394–95 (1995); *cf.* Johns-Manville Sales Corp. v. NLRB, 906 F.2d 1428, 1432–33 (10th Cir. 1990).

[54] 522 U.S. 359.

[55] *Id.* at 364.

[56] *Id.* at 367–68. Since the Court reviewed the agency's factual determinations, it assessed whether the NLRB's conclusions were "supported by substantial evidence on the record as a whole." *Id.* at 366. While this standard is nominally different from arbitrary and capricious review, there is little difference in practice. *See supra* note 7.

[57] *Allentown Mack*, 522 U.S. at 371.

[58] *Id.* at 373.

[59] *Id.* at 374.

[60] *Id.* at 375.

[61] *Id.* at 374.

dard.[62] But it cannot accomplish an unannounced policy shift while purporting to uphold its old policy.[63]

2. The BIA's "Particular Social Group" Exception. — This type of case also arises when an agency purports to refine or clarify its rule in a way that, in effect, departs from its initial position. This situation occurred in a series of appellate decisions addressing the phrase "particular social group" in the Immigration and Nationality Act[64] (INA). The INA defines the class of persons eligible for asylum to include those persecuted "on account of . . . membership in a particular social group."[65] In its 1985 decision, *Matter of Acosta*,[66] the BIA construed that phrase to mean a group that "share[s] a common, immutable characteristic."[67]

In 2006, the BIA "added additional considerations to its definition of 'particular social group'" — in particular, a requirement that members of the particular social group be "social[ly] visibl[e]."[68] In a precedential opinion, *In re C-A-*,[69] the BIA offered an explanation for its use of social visibility and applied social visibility to exclude the group before it.[70] But the BIA was opaque regarding whether it changed its rule. It noted that it "continued to adhere to the *Acosta* formulation,"[71] observed that it had historically "considered [social visibility] as a relevant factor,"[72] and listed social groups it had previously recognized as socially visible.[73] In referring to social visibility, the BIA called it a "consideration," not a requirement.[74]

Courts of appeals have disagreed over whether the BIA's Delphic use of "social visibility" constitutes a change of policy that requires a justification. For example, the Seventh Circuit decided that social

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[62] *Id.* at 378.

[63] *See id.* Justice Breyer authored a scathing opinion, targeting the majority's lack of deference to the agency. Rather than reading the NLRB's evidentiary presumptions as departures from the announced policy, he interpreted them as reasonable use "of the kind of discretionary authority that Congress placed squarely within the Board's administrative and factfinding powers and responsibilities." *Id.* at 393 (Breyer, J., concurring in part and dissenting in part). From this vantage point, the majority committed the cardinal sin of substituting its own judgment for that of the agency, "transform[ing] the actual legal standard." *Id.* at 397.

[64] 8 U.S.C. §§ 1101–1537 (2012).

[65] *Id.* § 1101(a)(42)(A).

[66] 19 I. & N. Dec. 2011 (B.I.A. 1985).

[67] *Id.* at 233.

[68] Valdiviezo-Galdamez v. Att'y Gen., 663 F.3d 582, 599 (3d Cir. 2011).

[69] 23 I. & N. Dec. 951 (B.I.A. 2006).

[70] *See id.* at 959–61.

[71] *Id.* at 956.

[72] *Id.* at 957.

[73] *Id.* at 959–60.

[74] *Id.* at 951. Subsequent BIA cases have perpetuated the opacity regarding whether social visibility is a factor or a requirement. *See, e.g.*, *In re* A-M-E- & J-G-U-, 24 I. & N. Dec. 69, 75 & n.7 (B.I.A. 2007).

visibility cases "cannot be squared" with the BIA's earlier decisions under *Acosta*.[75] Therefore, since "a court cannot pick one of the inconsistent lines [of precedent] and defer to that one," the agency's use of "social visibility" was invalid.[76] The Third Circuit agreed with this position,[77] with one judge explicitly stating that the BIA "ha[d] failed to acknowledge a change in course and forthrightly address how that change affects the continued validity of conflicting precedent."[78] Both courts acknowledged that the BIA could explicitly change its test to require social visibility and justify that new policy.

By contrast, the First Circuit has rejected the argument that social visibility constitutes a shift in policy. Calling the inconsistency argument "more cry than wool," the court decided that the requirement that an agency explain changes in its policies "has no application here": "The social visibility criterion does not signal an abandonment of the common and immutable characteristic requirement. Rather, it represents an elaboration of how that requirement operates."[79] The Fifth Circuit has agreed: in *Orellana-Monson v. Holder*,[80] it ruled that the "social visibility test is not a radical departure from prior interpretation, but rather a subtle shift that evolved out of the BIA's prior decisions on similar cases and is a reasoned interpretation."[81] To that court, the social visibility "requirement" was merely an "adjustment[]" generated by the BIA's use of adjudication to construe its statute.[82]

The circuit split remains unresolved. On one view, *Acosta* required an asylum applicant to show only that the applicant's putative group shared an immutable characteristic; because an applicant must now also show that the applicant's group is socially visible, the BIA's rule has changed. On the other, *Acosta* remains the rule, and social visibility is a factor — important, necessary, but still merely a factor — that has evolved from and colors the BIA's longstanding rule.

As a whole, Category E — involving the consistent application of a policy that conflicts with the announced standard — is distinct from Category D. In *Allentown Mack*, the NLRB's injection of policy into evidentiary judgments was consistent and longstanding, not merely a

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[75] Gatimi v. Holder, 578 F.3d 611, 615 (7th Cir. 2009).

[76] *Id.* at 616.

[77] Valdiviezo-Galdamez v. Att'y Gen., 663 F.3d 582, 603 (3d Cir. 2011).

[78] *Id.* at 612 (Hardiman, J., concurring in the judgment).

[79] Mendez-Barrera v. Holder, 602 F.3d 21, 26 (1st Cir. 2010).

[80] 685 F.3d 511 (5th Cir. 2012).

[81] *Id.* at 521. In another context, the Supreme Court has also distinguished a departure from general policy, which must satisfy hard look review, from "merely tak[ing] a narrow view of" that policy in a certain context, which was "assuredly rational." INS v. Yueh-Shiao Yang, 519 U.S. 26, 32 (1996).

[82] *Orellana-Monson*, 685 F.3d at 521; *see also* Rivera Barrientos v. Holder, 658 F.3d 1222, 1233 (10th Cir. 2011).

one-off application. And the addition of "social visibility" arguably conflicts with the BIA's initial interpretation of "particular social group." Nevertheless, these two categories are similar in an important respect: in both, a court has to determine whether the agency has made a change in the face of agency arguments to the contrary.

F. Taxonomy

A clear taxonomy might elucidate the differences between the five categories:

> Category A: the agency had a prior rule or precedent X and forthrightly changed X to Y.
>
> Category B: the agency had an applicable prior rule or precedent X and issued a decision based on Y, without acknowledging that $X \neq Y$.
>
> Category C: the agency had a prior rule or precedent X and issued a decision based on X.
>
> Category D: the agency had a prior rule or precedent X and issued a decision purportedly applying X to new but analogous circumstances.
>
> Category E: the agency had a prior rule or precedent X, as well as a contrary set of cases under that rule or precedent that arguably conflicts with X. The agency issued a decision purportedly based on X, but relied on those potentially conflicting cases.

III. JUDICIAL IDENTIFICATION OF AGENCY CHANGE

This Part will argue that, while courts nominally apply hard look review when identifying agency change, their analyses do not consistently match the deference level typically associated with that standard. It proposes that, despite unique policy concerns in change-identification cases, courts should employ a deferential standard akin to hard look review.

A. The Current Approach to Change Identification

Hornbook administrative law requires that courts have a statutory or constitutional basis for invalidating agency action.[83] When courts identify an unexplained agency change, they invalidate it under § 706 of the Administrative Procedure Act[84] (APA) — the same provision generally associated with hard look review. But these opinions are often ambiguous about whether hard look review is the appropriate standard for identifying change. Indeed, courts seem to apply a different, less deferential form of review to decide the change-identification issue.

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[83] *See, e.g.*, Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519 (1978).

[84] 5 U.S.C. §§ 551–559, 701–706 (2012).

Courts are often silent on the form of review they apply to identify agency changes. For example, in *Castillo*, the Third Circuit noted that an agency "acts arbitrarily if it departs from its established precedents without announcing a principled reason for its decision."[85] The word "arbitrary," a hook for hard look review, is familiar from § 706 of the APA.[86] However, the court used the term to note that the *outcome* of an unexplained change is arbitrariness. This reasoning says nothing about the process for deciding whether a change occurred in the first place. The D.C. Circuit was similarly vague in *Dillmon*, stating that it was "unable to reconcile the [agency's] decision with its precedent," but refraining from offering a standard of review.[87]

To the extent that these cases invoke a standard, it appears to be hard look review. *Dillmon* cited *State Farm* when describing the overarching standard of review for the opinion,[88] and *Castillo* discussed arbitrariness. Similarly, in *Allentown Mack,* Justice Scalia reviewed the NLRB's application of its withdrawal-of-recognition rule for "substantial evidence," another § 706 standard that "gives the agency the benefit of the doubt."[89] This standard is generally considered to be the same as that applied in review for arbitrariness.

However, courts simultaneously use language that indicates a less deferential approach than hard look review. Under hard look review, a court should not "substitute its judgment for that of the agency."[90] Agency action need only be "rational," "based on a consideration of the relevant factors," and not a "clear error of judgment."[91] Substantial evidence review is similarly deferential: a court should set aside agency decisions only when the record "clearly precludes" them "from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence."[92]

Despite these pronouncements, judicial decisions identifying agency change seem to lack this level of deference. *Castillo* and *Allentown Mack* both exemplify the phenomenon. In *Castillo*, the Third Circuit never called the BIA's attempt to reconcile its decision with precedent irrational. Instead, it decided that Castillo offered a "more persuasive interpretation" of the past cases.[93] This language does not suggest that the court was "uphold[ing] a decision of less than ideal clarity if the

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[85] Castillo v. Att'y Gen., 729 F.3d 296, 311 (3d Cir. 2013) (quoting Valdiviezo-Galdamez v. Att'y Gen., 663 F.3d 582, 608 (3d Cir. 2011)) (internal quotation marks omitted).

[86] 5 U.S.C. § 706(2)(A), (2)(E).

[87] Dillmon v. NTSB, 588 F.3d 1085, 1091 (D.C. Cir. 2009).

[88] *Id.* at 1089.

[89] Allentown Mack Sales & Serv., Inc. v. NLRB, 522 U.S. 359, 377 (1998).

[90] Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

[91] *Id.*

[92] Universal Camera Corp. v. NLRB, 340 U.S. 474, 490 (1951).

[93] Castillo v. Att'y Gen., 729 F.3d 296, 306 (3d Cir. 2013).

agency's path may reasonably be discerned."[94] In *Allentown Mack*, Justice Scalia emphasized that despite the deference involved in substantial evidence review and the authority to prescribe policy through adjudication, agencies cannot use factfinding to make "rule interpretations."[95] The Court therefore found "irrelevant" even the NLRB's "consistent[]" policy presumptions in factfinding.[96] Reasoning like this departs from the principle that courts should affirm decisions that are justified by the agency's "informed judgment on matters within its special competence."[97]

The lack of clarity about the standard courts apply in these cases maps directly onto gaps in both *State Farm* and *Fox*. *State Farm* famously urged courts to conduct hard look review with reference to whether "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 [] implausible."[98] None of those elements bear on whether the agency has in fact made a change. Similarly, *Fox* clearly provides a standard for cases like *Dillmon* — unexplained agency changes are per se arbitrary and capricious, because there is no basis to decide whether the agency's new policy is rational. But *Fox* is silent on the standard that governs the initial question: whether the agency has changed. Change identification therefore falls directly in the gaps left over by the Court's oft-cited opinions addressing deference to agency reasoning. Rather, the type of analysis in change-identification cases — considering whether a present decision is fairly derived from a past precedent — is reminiscent of a very different context: logical outgrowth cases, which courts do not evaluate under any particularly deferential standard.[99]

B. Policy Differences in Change-Identification Cases

The tension between consistency and flexibility resurfaces during the search for the proper standard for change-identification cases.[100] On the one hand, agencies need the flexibility to tailor their policies and apply them to new factual circumstances. Deferential hard look review offers this flexibility. On the other hand, close judicial supervi-

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[94] *State Farm*, 463 U.S. at 43 (quoting Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc., 419 U.S. 281, 286 (1974)) (internal quotation marks omitted).

[95] Allentown Mack Sales & Serv., Inc. v. NLRB, 522 U.S. 359, 378 (1998).

[96] *See id.* at 379.

[97] *Universal Camera*, 340 U.S. at 490.

[98] *State Farm*, 463 U.S. at 43.

[99] *See, e.g.*, Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 174–76 (2007) (describing the logical outgrowth test without reference to hard look review or deference).

[100] *See supra* pp. 2071–72 (discussing the longstanding tension between the consistency and flexibility within administrative law).

sion of change can guard against potentially unfair treatment of similarly situated parties, surreptitious shifts in policy, or circumvention of judicial review. The resulting pull in opposite directions and the lack of doctrinal clarity in *State Farm* and *Fox* contribute to ambiguity in the standard of review that courts apply in these cases.

In several respects, change identification involves policy concerns typically associated with hard look review.[101] For example, a traditional justification for deferential hard look review is that the agency has unique expertise with the facts that arise in its cases. When an agency creates a policy, it brings to bear a level of subject matter expertise that courts cannot match. Judges, after all, "are not engineers, computer modelers, economists or statisticians."[102]

The same subject matter expertise issues arise in change cases. Agencies may distinguish from or analogize to particular precedents because they have experience with the facts and comparisons that are most relevant. Relatedly, since agencies create their precedent, they are in the best position to interpret and apply it in future cases.[103] Courts lack this expert insight. They therefore are arguably in a worse position than the agency to determine whether a particular decision is consistent with precedent in the most relevant respects.

The second major justification for hard look review is that it balances judicial review's capacity to enhance the quality of agency decisionmaking against its tendency to increase agency decision costs. Administrative decisions may be based on motivated reasoning, outside influence, overconfidence, or a host of other general and specific biases and pathologies.[104] By requiring agencies to justify their decisions, hard look review may expose these errors.[105] This rationale applies with equal force when courts identify agency change. Judicial change identification ensures that agencies are attentive to whether their actions are controlled by precedent. Unexplained departure is a strong indicator that an agency failed to give an issue sufficient attention. As the Court has noted, "[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."[106]

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101 *See generally* Note, *Rationalizing Hard Look Review After the Fact*, 122 HARV. L. REV. 1909 (2009) (providing an overview of the development of hard look doctrine and analyzing its costs and benefits).

102 Sierra Club v. Costle, 657 F.2d 298, 410 (D.C. Cir. 1981).

103 The Supreme Court has recognized this form of expertise when deferring to agency interpretations of the agency's own rules. *See* Auer v. Robbins, 519 U.S. 452 (1997).

104 *See* Matthew C. Stephenson, *A Costly Signaling Theory of "Hard Look" Review*, 58 ADMIN. L. REV. 753, 762 n.32 (2006).

105 *See, e.g.*, Mark Seidenfeld, *Cognitive Loafing, Social Conformity, and Judicial Review of Agency Rulemaking*, 87 CORNELL L. REV. 486, 523 (2002).

106 Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade, 412 U.S. 800, 807 (1973).

But hard look review is also mindful of agency decision costs. Satisfying judicial review is often a resource-intensive task.[107] The high costs associated with rule change lead to "ossification" — a powerful status quo bias.[108] Hard look review at least theoretically tracks the narrow language of the APA, allowing agencies significant room to apply their expertise and keeping judges from imposing their policy preferences. The more invasive the judicial role, the higher the costs for agencies. Supervision of agency policy change is no different. Agencies need leeway to "respond flexibly to changed circumstances and to draw upon their expertise."[109] So while courts police agency consistency, the hard look framework encourages them to leave ample room for agencies to distinguish precedents and conduct meaningful case-by-case analyses.

However, the relevant considerations in change identification also differ significantly from other hard look contexts. Most notably, agency inconsistency creates unique rule-of-law concerns and implicates different institutional division-of-power dynamics. These issues may explain why courts frequently appear to conduct a more searching inquiry than traditional hard look review when identifying change.

The specter of administrative inconsistency raises unique rule-of-law concerns. First, the possibility of inconsistent lines of precedent increases the potential that ALJs or the agency itself will treat parties unfairly. The touchstone of fairness and due process is the maxim that like cases should be treated alike.[110] Inconsistent — or even *potentially* inconsistent — lines of precedent threaten this fundamental value.

Second, close scrutiny of whether a change has occurred guarantees that agencies are not surreptitiously making results-driven choices. Congress imbues agencies with the power to prescribe policy, and courts respect Congress's decision in this regard when they undertake judicial review.[111] But when agencies make decisions based on existing policy and precedent, they are often not purporting to be exercising

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[107] *See, e.g.*, Thomas O. McGarity, *The Courts and the Ossification of Rulemaking: A Response to Professor Seidenfeld*, 75 TEX. L. REV. 525, 535–36 (1997).

[108] *See generally* Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59 (1995).

[109] Gillian E. Metzger, Foreword, *Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293, 1359 (2012); *see* Randy J. Kozel & Jeffrey A. Pojanowski, *Administrative Change*, 59 UCLA L. REV. 112, 137 (2011) ("[T]he role of precedent plays a different and, to some extent, diminished role in the administrative context relative to the judiciary. But it would be an overstatement to assert that precedent carries no import for agencies.").

[110] *See, e.g.*, Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 758 (1982) ("[B]road judicial review is necessary to preserve the most basic principle of jurisprudence that 'we must act alike in all cases of like nature.'" (quoting Ward v. James, [1966] 1 Q.B. 273, 294 (C.A.))).

[111] This judicial deference to "prescriptive" agency decisions is justified on the grounds that "agencies are responsive to political pressures, and they are subject-matter experts." Kozel & Pojanowski, *supra* note 109, at 147.

that policy discretion. Instead, they represent their action as bound by some prior determination.[112] As a general matter, this sort of reasoning is unproblematic; agencies certainly do not need to reinvent the wheel each time they make a decision. However, lax judicial supervision over whether an agency is *actually* applying existing precedent faithfully would raise significant democratic concerns. Unfaithful application of existing policy risks results- or policy-driven decisions unaccompanied by public justification. "Candid reason-giving . . . allow[s] the governed to 'make sense of' the existing legal regime and participate in its future development."[113]

Finally, and relatedly, demanding an explanation for inconsistency protects reliance interests. "Agency rules, practices, and directives command enormous respect and shape the conduct of private actors."[114] Certainly, agencies can change even longstanding policies. But judicial scrutiny of agency change ensures that agencies must be forthright and accountable when they make those decisions. The process of announcing and justifying a new policy attracts greater judicial scrutiny, requires more agency resources,[115] and makes it easier for outside parties to hold the agency or the President accountable for the shift. These increased costs protect reliance interests by making agencies less likely to change their policies and ensuring that future litigants have notice of the new regulatory environment.

Institutional division-of-power dynamics are also at play when courts scrutinize agency decisions for signs of change. Judicial identification of agency change arguably does not involve the same institutional-competency issues as do other contexts. Judges are experts at interpreting opinions and comparing decisions; they can leaf through administrative records to identify past agency practice just as well as agencies. Because of this capacity, courts may feel less of a need to defer to agency arguments reconciling current cases with precedent. This belief, of course, may be problematic: agencies do have greater expertise in relevant factual comparisons and in their own precedents.[116]

Additionally, judicial identification of agency change is critical to ensure vigorous judicial review. Discussing the NLRB's gradual accumulation of policy presumptions in its withdrawal-of-recognition cases, Justice Scalia noted:

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[112] *Id.* at 146 (noting that "'I believed *X* to be the most beneficial course of conduct' is a much different rationale for action than is 'I believed myself bound to do *X*'").

[113] *Id.* at 150 (quoting Jeremy Waldron, Essay, *The Concept and the Rule of Law*, 43 GA. L. REV. 1, 35 (2008)); *cf.* SEC v. Chenery Corp., 318 U.S. 80 (1943) (holding that courts may uphold agency decisions only on grounds specified by the agency during the administrative proceeding).

[114] Kozel & Pojanowski, *supra* note 109, at 140.

[115] For a discussion of the interplay between hard look review, the quality of agency decisionmaking, and costs to agencies, see generally Stephenson, *supra* note 104.

[116] *See supra* p. 2084.

> If revision of the Board's standard of proof can be achieved thus subtly and obliquely, it becomes a much more complicated enterprise for a court of appeals to determine whether substantial evidence supports the conclusion that the required standard has or has not been met. . . . An agency should not be able to impede judicial review, and indeed even political oversight, by disguising policymaking as factfinding.[117]

This observation rings true across the spectrum of agency change cases. If courts are to have a meaningful role in administrative law, they must be able to review agency policies and demand reasonable explanations. Judicial identification of change serves a gatekeeping function, informing whether a court will halt at an agency's insistence that its decision accords with already-established policy, or will proceed to demand an explanation for the change.

C. Judicial Review in Change-Identification Cases

In the absence of doctrinal clarity over the standards that govern change identification, courts must develop a consistent approach.[118] They could take one of two general approaches: In one, courts could scrutinize the stated explanation for the decision's fit with agency precedent and reach an independent determination, much like common law courts do when determining whether a line of precedent controls in a particular case. In the other, courts could accept rational agency explanations that bring the new action within the ambit of the agency's prior policies and precedent.

These approaches would lead to different outcomes only when the agency's decision explicitly addresses potentially conflicting precedent, like Categories D and E from Part II.[119] In those cases, the agency has attempted on the record to reconcile its decision with its precedents. As a consequence, courts could either agree with the reconciliation and find no change or disagree and find a change. Whether courts agree thus depends on the level of deference with which they approach the agency's reconciliation. By contrast, in Category B cases, agency decisions fail to consider the possibility that their decisions conflict with prior

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117 Allentown Mack Sales & Serv., Inc. v. NLRB, 522 U.S. 359, 376 (1998).

118 *See supra* section III.A, pp. 2081–83.

119 One could argue that Categories D and E identify different problems entirely: Inconsistent application of a broad precedent or policy — Category D — risks surprising litigants and confusing agency officials. A consistent application or gloss on policy that arguably conflicts with the announced standard — Category E — should be more predictable for these parties because they either have experience with the agency's practice or can easily research relevant trends. However, these differences are of degree, not kind. First, they may be overstated — for instance, the "social visibility" gloss on the BIA's "particular social group," while consistent, has nonetheless proven to be difficult for litigants and factfinders to parse and has allowed for arguably inconsistent opinions. Moreover, even if they present different fairness concerns, both categories still pose the risk that agencies will pursue policy goals outside public and judicial scrutiny by hiding behind preapproved policies.

cases. Therefore, under either approach, courts will find the decisions to be unexplained departures and hold the agency actions invalid.[120] (Indeed, since the change-identification issue is so straightforward in Category B cases, it might be clearer to say that the issue does not arise and the standards discussed here are inapplicable.)

Under the more exacting approach, courts would evaluate the fit between the agency's decisions and its precedent to determine whether, in the court's judgment, the instant decision aligns with the agency's policy and is supported by precedent. Examples of this type of review include Justice Scalia's opinion in *Allentown Mack* and the Third Circuit's opinion in *Castillo*. In *Allentown Mack*, the majority conducted a "systematic review of the [NLRB]'s decisions,"[121] and in *Castillo*, the Third Circuit selected the "more persuasive interpretation" of the agency's precedent.[122] Another particularly clear example of this type of reasoning appears in Judge Hardiman's concurrence in *Valdiviezo-Galdamez v. Attorney General*.[123] Judge Hardiman reviewed the BIA's characterization of its precedent and conducted an independent review of those cases.[124] He concluded:

> Announcing a new interpretation while at the same time reaffirming seemingly irreconcilable precedents suggests that the BIA does not recognize, or is not being forthright about, the nature of the change its new interpretation effectuates. It also unfairly forces asylum applicants to shoot at a moving target.[125]

For Judge Hardiman, the fatal issue was not that social visibility had been inadequately explained, but that the BIA mistakenly thought that the social visibility requirement was imposed by its prior cases. And in reaching that conclusion, he rejected the BIA's "muddled" reading of its precedent in favor of his independent determinations.[126]

Under the more deferential approach, courts would look at the agency's attempt to reconcile the instant decision with existing policy and precedent, and accept that reconciliation if rational. Some judges already adhere to this approach. For example, in several of the social visibility cases, courts embraced the agency's position without requiring the BIA to fit its past and present doctrine together neatly. Rather, the courts allowed the BIA to reconcile its new requirement with its precedents by refining and "evolv[ing]" them, so long as the agency

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[120] *See* FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800 (2009). The agencies of course could not make new attempts to explain away their prior decisions during litigation. *See* SEC v. Chenery Corp., 318 U.S. 80 (1943).

[121] *See* 522 U.S. at 372.

[122] Castillo v. Att'y Gen., 729 F.3d 296, 306 (3d Cir. 2013).

[123] 663 F.3d 582 (3d Cir. 2011).

[124] *Id.* at 613–15 (Hardiman, J., concurring in the judgment).

[125] *Id.* at 617.

[126] *Id.* at 616.

offered a "reasoned interpretation."[127] Similarly, Justice Breyer's dissent in *Allentown Mack* emphasized the "settled principles permit[] agencies broad leeway to interpret their own rules."[128] According to Justice Breyer, the gap between the NLRB's stated policy and its evidentiary presumptions was a product of the agency's expertise, entitled to deference so long as it was rational. For Justice Breyer, it is the *agency*, not a reviewing court, that has the authority to act "like a common-law court" in applying its precedents.[129]

Courts should follow this deferential approach. This standard for change-identification cases aligns closely with existing administrative law doctrine. Agencies receive deference both in interpreting their own precedents[130] and in applying law to facts.[131] Change-identification cases present an analogous issue: whether an agency decision is a fair application of its own precedent to the facts of a new case. This analysis similarly requires interpretation of precedent and comparison of facts across cases.

A deferential standard also furthers values traditionally associated with hard look review. Agencies are uniquely situated as experts on the facts and policy issues that matter most in their precedents. For example, in *Allentown Mack,* Justice Breyer rightly suggested that the NLRB's expertise on labor relations put it in a superior position to create evidentiary "rules of thumb" about whether an employer's "doubt" was in fact reasonable and based on good faith.[132] And its familiarity with labor litigation allowed it to know best whether those "rules of thumb" swallowed, or merely refined, the original good-faith reasonable doubt requirement. Moreover, a deferential standard in change-identification cases preserves agency flexibility and guards against regulatory ossification.[133] Agencies may be unable to predict how courts, given free rein, will interpret their precedents. As a result, they may fear being forced to devote additional resources to justify new policies, and thus they may be reluctant to "refin[e] their preferred approach as circumstances change and as they develop a more nuanced understanding of how best to proceed."[134]

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127 Orellana-Monson v. Holder, 685 F.3d 511, 521 (5th Cir. 2012); *see also* Mendez-Barrera v. Holder, 602 F.3d 21, 26 (1st Cir. 2010).

128 Allentown Mack Sales & Serv., Inc. v. NLRB, 522 U.S. 359, 390 (Breyer, J., concurring in part and dissenting in part).

129 *Id.* at 393.

130 *See, e.g.*, Auer v. Robbins, 519 U.S. 452 (1997).

131 Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983); *see also* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

132 *Allentown Mack*, 522 U.S. at 392–93 (Breyer, J., concurring in part and dissenting in part).

133 *See, e.g.*, McGarity, *supra* note 107, at 532–36; Pierce, Jr., *supra* note 108, at 61.

134 Massachusetts v. EPA, 549 U.S. 497, 524 (2007).

Of course, the less deferential approach also has potential advantages: For one, it may enhance agency decision quality by imposing a greater explanatory burden on agencies.[135] In addition, stricter review allocates the task of interpreting agency precedent to judges — experts in analyzing and comparing past cases.[136] But in the context of change identification, this approach risks wringing too much flexibility out of agency decisionmaking. Often, there is no single indisputably correct application of precedent to new facts, nor just one approach to applying a rule. Charting the correct course through these options involves considering a mix of legal and policy factors. The development of the common law is a case in point: new common law doctrines find their basis in existing cases, but ultimately take shape in response to particular problems and policy considerations.[137] Common law does not develop in discrete, inevitable steps. The strict approach takes a wooden view of legal development: either the agency has taken the one, judicially approved, "consistent" path, or it must justify a new policy. There is little room for an agency to reasonably develop its doctrine while keeping it rationally tethered to the past. A deferential approach respects the multiplicity of possible interpretations of precedent and acknowledges that agencies should have the flexibility to choose within that reasonable range.

While some argue that the rule-of-law issues at play in change-identification cases weigh in favor of tough judicial review, those concerns are overstated. To be sure, strict review of agency precedent guards against potential unfairness to litigants from divergent lines of precedent and may enhance agency accountability to the public and the judiciary by encouraging a full-throated explanation of anything that may be considered a policy shift.[138] But, regarding fairness to litigants, courts across the country frequently bind parties to new interpretations of both the common law and statutes. Some ex ante unpredictability is the price of legal development. Moreover, the potential for abuse is limited under even a deferential standard for identifying change: judges can prevent undue surprise to litigants when agencies are unable to rationally reconcile their precedents with their decision or methodology.

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135 *See supra* p. 2084.

136 *See supra* p. 2086.

137 Harlan F. Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 11 (1936) ("With social change comes the imperative demand that law shall satisfy the needs which change has created, and so the problem, above all others, of jurisprudence in the modern world is the reconciliation of the demands . . . that law shall at once have continuity with the past and adaptability to the present and the future.").

138 *See supra* pp. 2085–87.

Regarding accountability, in Category D cases, agencies do explain their choices and methods, even if they do so in terms of past judgments rather than prospective policies.[139] Category E cases have similar internal accountability checks. Agencies have a clear rule and a consistent gloss on that rule, so parties and observers can hold them accountable for their policy choices.[140] And as with the fairness concern, deferential review on the change-identification issue can solve any residual accountability issues. Even under the deferential standard, agencies must develop a record that reconciles their decisions and methodologies with past cases. If agencies stretch their precedents or policies too far, courts can intervene. In fact, an alternative reading of the social visibility cases highlights how rationality can be an effective judicial limit for smoking out threats to agency accountability. For instance, in his opinion in *Gatimi v. Holder*,[141] Judge Posner argued that the BIA's attempt to reconcile the "social visibility" requirement with its past cases "makes no sense."[142] Accountability can be enforced at the line between rational agency interpretation of precedent and policy and irrational leaps of logic.

CONCLUSION

Change-identification cases can and will continue to present challenges for courts, agencies, and regulated parties. Devising a consistent standard to apply in these cases would close a significant gap that remains unresolved after *Fox*. This Note suggests that the standard should be deferential and accept rational agency attempts to reconcile their precedents. Courts may need to adapt this general standard to suit particular regulatory contexts.[143] For example, a lighter touch may be appropriate in areas of administrative law where the parties tend to be sophisticated, and the factual issues are complex. But any deviation by the courts ought to be one of degree, not kind. The change-identification issue is not a rare occurrence amenable to ad hoc solutions, but a recurring problem requiring a standard that comports with established administrative law principles.

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139 *See, e.g.*, Castillo v. Att'y Gen., 729 F.3d 296 (3d Cir. 2013) (assessing agency's argument for reconciling its decision with controlling precedent).

140 *See, e.g.*, Allentown Mack Sales & Serv., Inc. v. NLRB, 522 U.S. 359 (1998) (identifying longstanding agency practice of using policy-based rules of thumb in its factfinding); Flynn, *supra* note 53, at 393–95 (describing NLRB's consistent interpretations of its rules to include policy judgments).

141 578 F.3d 611 (7th Cir. 2009).

142 *Id.* at 615.

143 The strength of these concerns, and therefore the appropriate standards of review, may vary across subject matter areas. *See* Dotan, *supra* note 3.