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Factual Premises of Statutory Interpretation in Agency Review Cases

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Factual Premises of Statutory Interpretation in Agency Review Cases

Todd S. Aagaard*

Abstract

This Article examines factual premises of statutory interpretation in cases reviewing administrative agency action. It proposes an approach that would better integrate the treatment of such factual premises into the overall structure of administrative law. Judicial interpretation of statutes administered by agencies follows the well-known Chevron framework, which construes statutory ambiguity as an implicit delegation of primary interpretive authority to the agency charged with implementing the statute. The Chevron framework has not been applied, however, to the factual premises of statutory interpretation, despite the pervasiveness of such premises in legal reasoning. Courts frequently encounter questions of statutory interpretation that depend on underlying factual background, context, and implications. When they do, however, courts tend not to follow the Chevron framework. Instead, courts assume that they retain the authority to decide factual premises and, it follows, authority to answer questions of statutory interpretation that depend on factual premises. This is especially problematic because courts often lack the information or expertise necessary to assess these underlying facts. Consequently, often courts fail to understand the implications of their interpretive options. This Article proposes a new approach to premise facts in agency review cases. In particular, when courts encounter a question of statutory interpretation that depends on a factual premise, courts should recognize that the statute itself does not answer the precise question; under the Chevron framework, primary interpretive authority therefore rests with the administrative agency. This means that, among other things, agencies are not bound by prior judicial precedent interpreting statutes based on factual premises, and that agencies have the authority to reconsider such premise facts—and the statutory interpretation based on those facts—in subsequent proceedings. This reconsideration process would allow agencies to bring their superior information-gathering and -analyzing capacity to bear on premise facts, thereby improving statutory interpretation.

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Introduction

Judges like to invoke the ideals of humility and modesty.¹ But what that means in practice often is unclear. Indeed, “[j]udicial modesty, standing alone, is not a method of deciding cases; it is a political slogan.”² If judicial modesty means anything, however, it at least must include a recognition that courts are fallible human institutions.³ This

¹ See, e.g., *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 667 (1943) (Frankfurter, J., dissenting); *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005) (statement of John G. Roberts, Jr., Nominee to be C.J. of the United States); see also *Miss. Poultry Ass’n v. Madigan*, 31 F.3d 293, 310 (5th Cir. 1994) (en banc) (Higginbotham, J., dissenting) (noting that “[i]n recent years, [the] language of judicial modesty with its focus on text has become widespread”).

² Michael J. Gerhardt, *Constitutional Humility*, 76 U. CIN. L. REV. 23, 42 (2007).

³ See *id.* at 43, 53.

Article addresses an area in which such recognition has been sorely lacking: factual premises of statutory interpretation in cases reviewing administrative agency actions. I propose a new approach to such factual premises that, by acknowledging the limits of judicial competence and enhancing the role of agencies in the interpretive process, would better comport with the aims of judicial humility and modesty.

Courts reviewing an administrative agency's action for compliance with governing statutes and with the Administrative Procedure Act ("APA")⁴ frequently encounter questions of statutory interpretation for which the underlying factual background, context, and implications are relevant, and perhaps even determinative.⁵ But, in many such cases, courts lack the information or capability necessary to assess these underlying facts. Consequently, courts fail to understand the implications of their interpretive options.

To take one high-profile example, in 2006, the Supreme Court decided a landmark case interpreting the Clean Water Act ("CWA"),⁶ *Rapanos v. United States*,⁷ based in part on a factual assertion—one that had not been raised by any of the parties—that dredged and fill material placed in waterways "does not normally wash downstream."⁸ *Rapanos* addressed the validity of regulations issued by the Army Corps of Engineers and the Environmental Protection Agency ("EPA") that defined the scope of the CWA's prohibition against placing "dredged or fill material" into "waters of the United States" without a permit.⁹ Writing for a four-Justice plurality, Justice Scalia concluded that "waters of the United States" includes some wetlands, but only those with a "continuous surface connection" to "a relatively permanent body of water connected to traditional interstate navigable waters."¹⁰ The plurality cited a variety of authorities for this interpre-

4 Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

5 See, e.g., *infra* notes 6–15, 22–26 and accompanying text.

6 Clean Water Act, 33 U.S.C. §§ 1251–1387 (2006).

7 *Rapanos v. United States*, 547 U.S. 715 (2006).

8 *Id.* at 744 (plurality opinion).

9 *Id.* at 723–24. The CWA prohibits discharges of pollutants except as in compliance with specified provisions of the statute. 33 U.S.C. § 1311(a). The CWA defines a discharge of a pollutant as "any addition of any pollutant to navigable waters from any point source." *Id.* § 1362(12)(A). The statute further defines pollutant to include "dredged spoil, . . . rock, sand, [and] cellar dirt," *id.* § 1362(6), and navigable waters as "the waters of the United States," *id.* § 1362(7). The Army Corps of Engineers and the EPA adopted essentially identical regulatory definitions of "waters of the United States." See 33 C.F.R. § 328.3(a) (2007) (Army Corps of Engineers); 40 C.F.R. § 230.3(s) (2007) (EPA).

10 *Rapanos*, 547 U.S. at 742 (plurality opinion).

tation, but the core narrative was a cautionary tale of federal agencies dramatically overreaching their authority.¹¹ According to the plurality, the Army Corps of Engineers and the EPA had defined “waters of the United States” so as to extend federal jurisdiction beyond what legitimately could be called water pollution.¹² Indeed, the plurality noted, regulators were using the Clean Water Act as a basis for exerting “federal regulation of land use.”¹³ A central element of this narrative, and a factual premise of the plurality’s justification for its standard, was that its test would not impede enforcement of the CWA against what the plurality believed were the legitimate targets of the CWA’s proscriptions: “traditional water polluters.”¹⁴ The plurality reasoned that, because dredged or fill material “does not normally wash downstream,” depositing fill material in areas excluded from the plurality’s definition generally would not pollute rivers, streams, and lakes.¹⁵

Both Justice Kennedy’s opinion concurring in the judgment and Justice Stevens’s opinion for the four-Justice dissent disputed the plurality’s “agencies gone wild” narrative, including the accuracy of the factual assertion that fill material does not wash downstream.¹⁶ Nothing in the record of the case apparently addressed this factual issue, the accuracy of which was important to the plurality’s distinction between legitimately preventing water pollution and what it perceived as overreaching by the Corps and the EPA.¹⁷ The plurality’s assertion rested solely on statements made in three amicus briefs;¹⁸ those amici primarily relied on a single package of training materials, available on

¹¹ See, e.g., *id.* at 722, 738.

¹² See *id.* at 722.

¹³ *Id.* In this spirit, the plurality contended that “the Corps has stretched the term ‘waters of the United States’ beyond parody.” *Id.* at 734. The plurality derided the statutory interpretation of the Corps as a “‘Land Is Waters’ approach,” *id.*, and characterized the Corps as asserting the powers of “a local zoning board,” *id.* at 738. Several commentators have criticized the plurality’s analysis. See, e.g., Robert V. Percival, *Environmental Law in the Twenty-First Century*, 25 VA. ENVTL. L.J. 1, 13–14 (2007) (suggesting that the plurality in *Rapanos* misguidedly opted for a reactive rather than precautionary approach to environmental regulation); Joseph L. Sax, *The Unfinished Agenda of Environmental Law*, 14 HASTINGS W.-NW. J. ENVTL. L. & POL’Y 1, 7 (2008) (describing the plurality in *Rapanos* as “unable or unwilling” to interpret the CWA “in terms of ecological connections”).

¹⁴ See *Rapanos*, 547 U.S. at 742 (plurality opinion).

¹⁵ See *id.* at 744. The plurality distinguished dredged or fill material from “traditional water pollutants” inasmuch as dredged or fill material “are solids that do not readily wash downstream.” *Id.* at 723.

¹⁶ *Id.* at 774–75 (Kennedy, J., concurring); *id.* at 806–07 (Stevens, J., dissenting).

¹⁷ See *id.* at 742–45 (plurality opinion).

¹⁸ *Id.* at 744 n.11.

a private corporation's web site,¹⁹ which contained no indication of the extent to which the scientific community had tested or accepted the assertion.²⁰ Justice Kennedy's opinion and the dissent relied on their own suppositions.²¹ As demonstrated, differing factual understandings of how water pollution works informed the Justices' differing interpretations of the CWA, and none of the opinions could cite a reliable basis for the opinion it expressed as to those facts.

To use another example, the Supreme Court in 2007 decided *Ledbetter v. Goodyear Tire & Rubber Co.*,²² addressing how the time limit for bringing a sex discrimination claim under Title VII of the Civil Rights Act of 1964²³ applies to a claim of discriminatory pay.²⁴ Justice Alito's opinion for the five-Justice majority held that the limitations period for filing a charge begins to run when the employer begins paying the employee a discriminatory wage, and the period does not restart with each subsequent discriminatory paycheck.²⁵ The majority reasoned that several of the Court's prior decisions compelled this result because the Court previously had found that a plaintiff could not challenge an earlier, allegedly discriminatory employment decision by pointing to subsequent effects of that earlier decision that fell within the period for bringing a charge.²⁶

¹⁹ Brief for Foundation for Environmental and Economic Progress et al. as Amici Curiae in Support of Petitioners at 29 n.53, *Rapanos*, 547 U.S. 715 (Nos. 04-1034 & 04-1384), 2005 WL 3322931, at *29; Brief of Pulte Homes, Inc. et al. as Amici Curiae in Support of Petitioners at 20, *Rapanos*, 547 U.S. 715 (Nos. 04-1034 & 04-1384), 2005 WL 3308790, at *20; see also Brief for International Council of Shopping Centers et al. as Amici Curiae in Support of Petitioners at 26, *Rapanos*, 547 U.S. 715 (Nos. 04-1034 & 04-1384), 2005 WL 3294931, at *26 (citing same source for different proposition).

²⁰ The fact that these amicus briefs primarily relied on one unpublished document raises suspicion that the assertion is not generally accepted in the scientific community.

²¹ *Rapanos*, 547 U.S. at 774 (Kennedy, J., concurring) ("It seems plausible that new or loose fill, not anchored by grass or roots from other vegetation, could travel downstream through waterways adjacent to a wetland; at the least this is a factual possibility that the Corps' experts can better assess than can the plurality."); *id.* at 807 (Stevens, J., dissenting) ("While more [dredged and fill] material will probably stay put than is true of soluble pollutants, the very existence of words like 'alluvium' and 'silt' in our language suggests that at least some fill makes its way downstream." (citation omitted)). Justice Stevens's dissent also cited a Fourth Circuit decision asserting, without citation, that "[a]ny pollutant or fill material that degrades water quality in a tributary . . . has the potential to move downstream and degrade the quality of the navigable waters themselves." *Id.* at 807 (Stevens, J., dissenting) (quoting *United States v. Deaton*, 332 F.3d 698, 707 (4th Cir. 2003)).

²² *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162 (2007).

²³ 42 U.S.C. §§ 2000e to e-17 (2006).

²⁴ *Ledbetter*, 127 S. Ct. at 2165.

²⁵ *Id.* at 2169.

²⁶ *Id.* at 2167-69 (discussing *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977), Del.

Justice Ginsburg's dissent contended that the majority's interpretation relied on an unrealistic expectation of victims of pay discrimination, who may not realize immediately that they are receiving discriminatory pay.²⁷ The dissent explained:

Pay disparities often occur . . . in small increments; cause to suspect that discrimination is at work develops only over time. Comparative pay information, moreover, is often hidden from the employee's view. Employers may keep under wraps the pay differentials maintained among supervisors, no less the reasons for those differentials. Small initial discrepancies may not be seen as meet for a federal case, particularly when the employee, trying to succeed in a nontraditional environment, is averse to making waves.²⁸

The majority's attempt to analogize to earlier cases interpreting Title VII's limitations period was inapt, the dissent opined, because those earlier cases involved immediately identifiable discrete acts of discrimination.²⁹ The dissent would have distinguished these earlier precedents and held that each discriminatory paycheck restarts the limitations period.³⁰ Thus, differing factual understandings of how pay discrimination works informed the Justices' differing interpretations of Title VII.

As *Rapanos* and *Ledbetter* illustrate, courts often interpret statutes based on factual premises that are outside of the judges' expertise and experience. In doing so, courts are vulnerable to serious misjudgment. Although motivated by a salutary goal to make their decisions reflect reality, judges frequently overestimate their ability to understand what can be complex scientific, economic, sociological, and psychological phenomena and relationships.³¹ Courts are prone to

State Coll. v. Ricks, 449 U.S. 250 (1980), *Lorance v. AT&T Techs., Inc.*, 490 U.S. 900 (1989), and *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002)).

²⁷ *Id.* at 2178–79 (Ginsburg, J., dissenting). Others have echoed Justice Ginsburg's criticism. See, e.g., Martha C. Nussbaum, *The Supreme Court, 2006 Term—Foreword: Constitutions and Capabilities: "Perception" Against Lofty Formalism*, 121 HARV. L. REV. 4, 80–82 (2007); Editorial, *Court Ruling on Pay Discrimination Flawed*, KALAMAZOO GAZETTE, June 1, 2007, at A8; Clarence Page, Op-Ed., *Ledbetter Decision Ignores Realities of the Workplace*, PRESS-REG. (Mobile, Ala.), June 5, 2007, at 7A.

²⁸ *Ledbetter*, 127 S. Ct. at 2178–79 (Ginsburg, J., dissenting).

²⁹ *Id.* at 2182–83. Justice Ginsburg explained that "[p]ay disparities are . . . significantly different from adverse actions 'such as termination, failure to promote, . . . or refusal to hire,' all involving fully communicated discrete acts, 'easy to identify' as discriminatory." *Id.* at 2179 (quotations omitted).

³⁰ *Id.* at 2179.

³¹ See Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 813–15 (2001) (explaining how the cognitive problem of egocentric

oversimplify complicated issues, to take facts out of context, to overlook countervailing evidence, or simply to assume facts without any inquiry at all. In short, courts can and do make a mess of the factual premises of their statutory interpretation decisions.

This problem of factual premises is both more acute and potentially more easily mitigated in the context of cases in which the court is reviewing a decision of an administrative agency (“agency review cases”). The problem is more acute because the types of premise facts that crop up when courts review agency action tend to be more complex—and further outside the realm of judges’ personal expertise and experience—than the types of premise facts that often are relevant to run-of-the-mill nonagency litigation. Still, opportunities to mitigate the problem of premise facts arise in agency review cases because of the presence of administrative agencies—the congressionally created and delegated experts.

This Article proposes and defends a new approach to addressing premise facts in agency review cases. The approach rests on two insights, one functional and one doctrinal. The functional insight observes that judicial review of agency action, in light of the tremendous advantages agencies have over courts in gathering and analyzing information, could improve significantly if agencies had a greater role in resolving disputes involving factual premises that underlie judicial interpretations of statutes administered by agencies. The doctrinal insight derives from two Supreme Court decisions: *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,³² which famously gave agencies—and not courts—the lead role in interpreting the statutes they administer;³³ and the related decision in *National Cable & Telecommunications Ass’n v. Brand X Internet Services*,³⁴ which held that agencies are not bound by prior judicial interpretations of ambiguous statutory provisions.³⁵ The doctrinal insight posits that, in light of the crucial role that factual premises play in reviewing agency decisions, *Chevron* and *Brand X* should be understood to give agencies the au-

biases likely prevents judges from being aware of their limitations and consequently leads judges to overestimate their decisionmaking abilities); cf. Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 480 (1989) (“The problem of unintended or perverse side-effects [in regulation] is pervasive. Courts should understand the sometimes counterintuitive systemic consequences of different interpretations of regulatory statutes.”).

³² *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

³³ *Id.* at 845.

³⁴ *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).

³⁵ *Id.* at 982–83.

thority to revisit factual premises underlying judicial decisions interpreting statutes administered by agencies.

Although premise facts are critical ingredients of statutory interpretation, neither courts nor academics have paid attention to the role of premise facts in the *Chevron* framework—a framework designed to govern interpretation of statutes administered by agencies. Courts generally assume that they have almost complete discretion in addressing premise facts, at least where a premise fact was not addressed in the administrative record under review. Thus, for example, Justice Scalia’s plurality opinion in *Rapanos* did not hesitate to make a finding—really, more of an assumption—that fill material does not wash downstream,³⁶ without considering whether such an issue was addressed more appropriately by the Army Corps of Engineers and the EPA. Yet one of the foundational teachings of *Chevron* is that judicial interpretation of statutes administered by agencies does not follow the conventional framework for statutory interpretation.³⁷

This Article proposes an approach that would move the treatment of premise facts more in line with the administrative law model. Premise facts are an essential aspect of statutory interpretation, and the administrative law principles guiding statutory interpretation, as set forth in *Chevron* and its progeny, should govern how premise facts are resolved in agency review cases. Under those administrative law principles, agencies should have the primary authority to decide premise facts relevant to the interpretation of the statutes they administer, even if a court already has addressed the premise facts in a prior decision. Moreover, because of agencies’ advantages over courts in analyzing factual issues within agencies’ areas of expertise, giving agencies primary authority over premise facts would improve significantly interpretation of agency-administered statutes.

Part I of this Article begins by describing the relationship between administrative agencies and courts as contemplated under the APA’s statutory framework and the judicially created doctrines that flesh out that framework. These doctrinal principles provide that courts generally should review agency actions on the basis of the administrative record created before the agency, should review the agency’s factual findings with considerable deference, and should defer to the agency’s reasonable interpretation of the statutes it administers.³⁸ These forms of deference reflect the important functional

³⁶ See *Rapanos v. United States*, 547 U.S. 715, 723 (2006) (plurality opinion).

³⁷ See *Chevron*, 467 U.S. at 842–44.

³⁸ See *infra* text accompanying notes 50–57.

advantages that agencies have over courts in analyzing issues that are within agencies' expertise and experience, as well as Congress's delegation to agencies of authority to administer statutes.³⁹

Part II defines the problem that factual premises pose for judicial review of administrative agency action. The conventional model of judicial review, which posits deferential judicial review of agency decisions based on an administrative record, falls apart for premise facts. Because any legal issue can be framed in numerous ways, and how an issue is framed determines what underlying facts will be relevant, the relevancy of premise facts often does not become apparent until the court begins its analysis. As a result, factual premises that have not been addressed in the administrative record (through no fault of the agency) frequently arise during the court's review. Moreover, because factual premises tend to involve evaluations and predictions, they are precisely the type of factual questions that courts are least able to analyze effectively. Together, these considerations illustrate the problem—courts often make judgments about crucial factual premises without access to reliable information.

Part III undertakes a comparative institutional analysis, evaluating agencies' and courts' relative advantages and disadvantages in addressing premise facts. Both agencies and courts operate in a context of bounded rationality, subject to constraints of limited information, limited cognitive capacity, and limited time and resources, as well as other sources of bias and limitation. But these constraints, limitations, and biases affect agencies and courts differently, and thus each has relative advantages and disadvantages in evaluating premise facts. Overall, agencies are at a comparative advantage: they have greater expertise and experience as to the factual matters addressed in agency review cases; more resources to address complicated factual issues; more open and flexible factfinding processes; a valuable ability to test factual hypotheses; a prodemocratic rather than antidemocratic bias; and a reduced likelihood of hindsight bias.⁴⁰ Despite agencies' advantages over courts in these regards, however, there is reason to think that courts could have a constructive role in addressing factual premises. Agencies face their own difficulties in deciding facts; for example, agencies suffer from a greater susceptibility to biases that come with expertise.⁴¹ Moreover, previous institutional analyses suggest that judicial review may improve agency decisionmaking even if agen-

³⁹ See *infra* text accompanying notes 63–64.

⁴⁰ See discussion *infra* Part III.A.

⁴¹ See *infra* notes 172–74 and accompanying text.

cies on their own tend to make better decisions than courts on *their* own.⁴² The best approach to addressing premise facts would thus be to allocate authority between agencies and courts in a way that would take advantage of their institutional strengths and mitigate their weaknesses.

Part IV attempts such an allocation by proposing a new approach to addressing premise facts in agency review cases. This approach is founded on the observation that judicial review of agency action is not simply a unidirectional process whereby courts review agency decisions. Rather, it is an iterative relationship whereby policy decisions emerge from a cycle of agency-court interactions.⁴³ My approach to premise facts builds on this iterative model of the agency-court relationship. Where a court, in interpreting a statute administered by an administrative agency, relies either explicitly or implicitly on a factual premise that was not addressed in the agency's decision,⁴⁴ the agency would have the authority to reconsider the premise fact in a subsequent proceeding. The agency would not be bound by the court's initial factual finding in the prior litigation, or by the court's statutory interpretation based on that premise fact. Rather, the agency could develop an administrative record addressing the factual issue in question and make its own finding based on its analysis of that record. This reconsideration process would allow the agency to bring to bear on the premise fact the agency's superior capacity for gathering and analyzing information. A court could review the agency's determination of the factual premise (and the interpretation resting on the premise) in a subsequent case; there, the court would review the agency's finding under the deferential standard of review that generally applies to agency factfinding and statutory interpretation.

Part V answers four potential objections to this new approach: (1) that it ignores the possibility that courts employ premise facts as legal fictions reflecting normative (as opposed to descriptive or empirical) concerns; (2) that it would allow agencies to disregard judicial precedent; (3) that it would erode stare decisis; and (4) that it would duplicate a response to adverse precedent that agencies already can achieve through nonacquiescence. The first potential objection actually ends up favoring the proposed approach because treating legal fictions as genuine factual premises would give courts a strong incen-

⁴² See *infra* Part III.D.

⁴³ See *infra* notes 202–07 and accompanying text.

⁴⁴ Where a factual premise of the court's decision already has been addressed by the agency, the court must give deference to the agency's findings. See *infra* Part I.A.

tive to be more candid and transparent about the true role of factual premises in their decisions. The second potential objection fails because the Supreme Court's cases applying the *Chevron* principle already establish that judicial interpretation of ambiguous statutory provisions administered by agencies is not authoritative.⁴⁵ Nor would the proposed approach undermine stare decisis. Although the approach would cause agencies and courts to revisit judicial precedent, the benefit of allowing agencies to address unreliable or uncertain factual premises would in the long term create more stable precedent (despite some limited instability in the law in the near term). Finally, agency nonacquiescence, the practice by which agencies can choose to decline to conform their actions to an otherwise precedential court ruling, does not provide an adequate substitute for this new approach to premise facts. Although this proposed approach and nonacquiescence both give agencies some flexibility in responding to adverse judicial decisions, this new approach does so pursuant to the *Chevron* principle, which identifies agencies—and not courts—as the primary authority for interpreting ambiguous provisions in the statutes they administer. Accordingly, this new approach likely would be better received both by courts and by those who are concerned that nonacquiescence thwarts the separation of powers and subverts the rule of law.

I. Statutory and Doctrinal Foundations of the Agency-Court Relationship

The problem that premise facts pose for courts reviewing agency actions, and this Article's proposed approach for addressing that problem, arise from fundamental administrative law principles governing the agency-court relationship. Accordingly, this Part outlines the basic structure and purposes of the agency-court relationship to build a foundation for the discussion that follows.

A. Basic Structure

Courts review administrative agencies' decisions pursuant to the APA, which creates a cause of action by which a person adversely affected or aggrieved by an agency action can sue to have a court hold unlawful and set aside the agency action.⁴⁶ Agency action is most commonly set aside on the ground that it is "arbitrary, capricious, an

⁴⁵ See, e.g., *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005).

⁴⁶ 5 U.S.C. §§ 702, 706 (2006).

abuse of discretion, or otherwise not in accordance with law.”⁴⁷ Under the “arbitrary and capricious” standard, the court’s review is deferential to the agency, but the court must be satisfied that the agency has examined the relevant data and explained the basis for its action.⁴⁸ An agency action is thus arbitrary and capricious

if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.⁴⁹

Judicial review of factual questions under the APA differs markedly from factfinding in nonagency litigation. In APA cases, the court reviews the agency’s action based on the administrative record, not on a new record created in the court.⁵⁰ There is thus generally no discovery and no trial. Instead of making its own factual findings, the court reviews the agency’s factual conclusions in light of the evidence in the administrative record and must accept the agency’s findings if they are supported by substantial evidence.⁵¹ Whether an agency’s conclusions are arbitrary and capricious or otherwise contrary to law is a question of law.⁵² Thus, the procedure for reviewing agency decisions in many ways resembles appellate review of a trial court decision.⁵³

Because agencies and their missions are creatures of statutes, almost all administrative law is, at some level, a matter of statutory interpretation.⁵⁴ Administrative law prescribes the bounds, both procedural and substantive, of agencies’ delegated authority, and the task of the court is to ensure that the agency has exercised its discretion consistently with the terms of the governing statutes. Accord-

⁴⁷ *See id.* § 706(2)(A).

⁴⁸ *Motor Vehicle Mfrs. Ass’n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

⁴⁹ *Id.*

⁵⁰ *Camp v. Pitts*, 411 U.S. 138, 142 (1973).

⁵¹ *Arkansas v. Oklahoma*, 503 U.S. 91, 113 (1992).

⁵² *See, e.g., Nat’l Ass’n of Home Builders v. U.S. Army Corps of Eng’rs*, 417 F.3d 1272, 1282 (D.C. Cir. 2005) (purely legal question of whether decision of U.S. Army Corps of Engineers to increase permit acreage thresholds under CWA was arbitrary and capricious); *Verizon Cal. Inc. v. Peevey*, 413 F.3d 1069, 1075 (9th Cir. 2005) (purely legal question of whether California Public Utilities Commission’s interim rate order was arbitrary and capricious).

⁵³ The Tenth Circuit has gone so far as to hold that agency review cases in the district courts must be processed as appeals and governed by the Federal Rules of Appellate Procedure. *See Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1580 (10th Cir. 1994).

⁵⁴ A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES 54 (John F. Duffy & Michael Herz eds., 2005).

ingly, courts reviewing challenges to agency actions often are called upon to review an agency's interpretation of the statute it administers. In such situations, the court is to "employ[] traditional tools of statutory construction [to] ascertain[] [whether] Congress had an intention on the precise question at issue."⁵⁵ If the court's analysis finds the statutory language clear and unambiguous, that clear meaning answers the interpretive question.⁵⁶ Where a statute's meaning is ambiguous, on the other hand, the court gives some deference to the agency's interpretation.⁵⁷

The degree of deference the court gives to the agency's interpretation of an ambiguous statutory provision depends on the circumstances in which the agency states its interpretation.⁵⁸ If the agency has stated its interpretation authoritatively, such as by issuing a regulation or a decision with binding and precedential effect within the agency, courts will give the interpretation controlling weight as long as the interpretation is reasonable.⁵⁹ This is known as *Chevron* deference.⁶⁰ If the agency has issued merely a nonbinding interpretation, such as in an opinion letter, courts will defer to the interpretation only to the extent it is persuasive, taking into account the context in which the interpretation was made.⁶¹ This is known as *Skidmore* deference, after *Skidmore v. Swift & Co.*⁶²

The rationale for judicial deference to agency statutory interpretation is twofold. First, where Congress has given an agency jurisdic-

⁵⁵ *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843 n.9 (1984).

⁵⁶ *Id.* at 842–43.

⁵⁷ *See id.* at 843.

⁵⁸ *United States v. Mead Corp.*, 533 U.S. 218, 229–30 (2001).

⁵⁹ *Id.* at 229 (noting that this type of deference applies where Congress has "expressly delegated authority or responsibility to implement a particular provision or fill a particular gap" or where it is "apparent from the agency's generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law").

⁶⁰ *See Chevron*, 467 U.S. at 843–44. The Court in *Mead* declared that express congressional authorization for an agency to promulgate binding regulations and render adjudications with precedential value is a "very good indicator of delegation meriting *Chevron* treatment." *Mead*, 533 U.S. at 229.

⁶¹ *Christensen v. Harris County*, 529 U.S. 576, 587 (2000).

⁶² *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). The extent to which a court defers to the agency's interpretation under *Skidmore* depends on factors such as the thoroughness of the agency's consideration, the validity of its reasoning, and the consistency of its interpretation over time. *Id.* at 140. In some situations, agencies may lack statutory authority to issue an interpretation that warrants *Chevron* deference and can only receive *Skidmore* deference. *See, e.g.*, *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 140–46 (1976) (holding that because Title VII did not give the Equal Employment Opportunity Commission ("EEOC") authority to promulgate rules or regulations, the EEOC's interpretations of Title VII were not due "great" deference).

tion to administer a statute, and a provision of such a statute is ambiguous, that ambiguity is best understood as a delegation of authority to the agency to interpret the ambiguous provision, within reasonable limits.⁶³ In essence, this rationale sets forth a presumption of congressional intent to delegate interpretive authority to the agency and thereby supports the doctrinal legitimacy of deference. The second rationale, by contrast, is functional. It contends that courts should defer to agency interpretations of statutory ambiguity because agencies are in a better position than courts to make the difficult policy choices that necessarily come into play in interpreting an ambiguous statutory provision.⁶⁴

Just as not every agency review case involves a question of agency statutory interpretation, not every case involving agency statutory interpretation is an agency review case. In some cases, the agency may not be a party, even though the court, in deciding the case, must decide whether to accept or reject the agency's interpretation of a statute it administers. *Ledbetter* was such a case. Although the Equal Employment Opportunity Commission ("EEOC") was not a party, the Supreme Court had to interpret Title VII and in doing so decide whether to accept or reject the EEOC's interpretation of Title VII.⁶⁵ Such cases could be termed *indirect agency review* cases; the court is indirectly reviewing the agency's interpretation by virtue of having to interpret the agency's statute, even though the court is not reviewing an agency action pursuant to the APA. Although this Article addresses primarily agency review cases, many of the analyses and prescriptions apply equally to indirect agency review cases.

Until recently, there was some question about how to reconcile the principle of judicial deference to agency statutory interpretation with the general principle of stare decisis. Particularly unclear was the effect on agencies of prior judicial statutory interpretation. Put differently, if a court already had interpreted a statutory provision in the course of a prior judicial decision, was the agency charged with administering that statute then bound by the court's interpretation as a

⁶³ *Mead*, 533 U.S. at 229; *Chevron*, 467 U.S. at 865–66. The *Chevron* Court held that ambiguity should be read as a delegation to the administering agency even if Congress did not consciously decide to delegate to the agency, but either "simply did not consider the question [of statutory interpretation] at this level" or "was unable to forge a coalition on either side of the question." *Chevron*, 467 U.S. at 865.

⁶⁴ *Chevron*, 467 U.S. at 843–44.

⁶⁵ *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162, 2177 n.11 (2007) (finding no ambiguity in the statute and declining to defer to the EEOC's interpretation of Title VII).

matter of precedent? Or could the agency adopt a different interpretation to which courts would defer?⁶⁶

The Supreme Court answered that question in *National Cable & Telecommunications Ass'n v. Brand X Internet Services*,⁶⁷ holding that “[a] court’s prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.”⁶⁸ The Court derived this principle “from *Chevron* itself.”⁶⁹ *Chevron* rested on the understanding that agencies, not courts, have primary responsibility for resolving ambiguity in the statutes they administer.⁷⁰ Allowing judicial precedent to foreclose an agency from interpreting an ambiguous statute would therefore contravene *Chevron* because it would permit the interpretation of a court to override that of an agency.⁷¹ “Only a judicial precedent holding that the statute unambiguously forecloses the agency’s interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction.”⁷² Indeed, the Court explained:

A contrary rule would produce anomalous results. It would mean that whether an agency’s interpretation of an ambiguous statute is entitled to *Chevron* deference would turn on the order in which the interpretations issue: If the court’s construction came first, its construction would prevail, whereas if the agency’s came first, the agency’s construction would command *Chevron* deference.⁷³

Several years before the Supreme Court decided *Brand X*, Kenneth Bamberger advocated the principle that the Court ultimately

⁶⁶ See Kenneth A. Bamberger, *Provisional Precedent: Protecting Flexibility in Administrative Policymaking*, 77 N.Y.U. L. REV. 1272, 1273–76 (2002); Richard J. Pierce, Jr., *Reconciling Chevron and Stare Decisis*, 85 GEO. L.J. 2225, 2225 (1997).

⁶⁷ Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs., 545 U.S. 967 (2005).

⁶⁸ *Id.* at 982.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* at 982–83.

⁷³ *Id.* at 983. Justice Scalia dissented, characterizing the Court’s principle as a “bizarre” and “probably unconstitutional” rule that would allow administrative agencies to reverse rulings by Article III courts. *Id.* at 1017 (Scalia, J., dissenting). See *infra* Part V.B for further explanation of and rebuttal to Justice Scalia’s objections to the *Brand X* principle. Justices Souter and Ginsburg joined the remainder of Justice Scalia’s dissent, but not his disagreement with the majority’s holding as to the authority of agencies to revisit ambiguous statutory provisions previously interpreted by courts. *Brand X*, 545 U.S. at 1005 (Scalia, J., dissenting) (noting that Justices Souter and Ginsburg joined only Part I of Justice Scalia’s dissenting opinion).

adopted. The *Brand X* principle essentially establishes what Bamberger called a rule of “provisional precedent,” whereby a court’s construction of an ambiguous statutory provision has stare decisis effect only until the agency administering the statute makes its own interpretation.⁷⁴

B. Purposes of Judicial Review

Thinking about how to improve judicial review of agency action requires identification, first, of the purpose of judicial review. Judicial review of agency action provides a check on agencies’ enormous power over the operation of our government. Maintaining oversight of agency action through judicial review is important to the constitutional system of checks and balances.⁷⁵ Agencies are accorded considerable discretion to exercise their expertise and make policy choices, but courts are charged with making sure that agencies act within the bounds set by law. “Broad delegations of power to regulatory agencies have been allowed largely on the assumption that courts would be available to ensure agency fidelity to whatever statutory directives have been issued.”⁷⁶ To some extent, this goal reflects a distrust of agencies.⁷⁷ Several factors, such as agencies’ often close relationships with interested groups, may lead agencies to become unduly biased in their decisionmaking and be “captured” by the entities they are supposed to be regulating.⁷⁸ Even where bias and capture are not involved, agencies’ inherent orientation toward policymaking and problem solving may lead them to act consistently with how they think the law should be, rather than how it is.⁷⁹

⁷⁴ Bamberger, *supra* note 66, at 1310–11.

⁷⁵ 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, 430–31, 440 (contending that courts have a constitutional responsibility to ensure the rationality of agency decisionmaking and thereby check administrative error and abuse); Patricia M. Wald, *The “New Administrative Law”—with the Same Old Judges in It?*, 1991 DUKE L.J. 647, 652–53 (arguing that “[t]he more social and economic power we give government agencies, the more essential judicial review becomes as a safety valve to insure that they do not abuse it,” and noting the commonly held view among judges that judicial review of agency action is “vitally necessary to an accountable government”).

⁷⁶ Sunstein, *supra* note 31, at 446.

⁷⁷ *See id.*

⁷⁸ *See* PAUL J. QUIRK, *INDUSTRY INFLUENCE IN FEDERAL REGULATORY AGENCIES* 4 (1981); Michael E. Levine & Jennifer L. Forrence, *Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis*, 6 J.L. ECON. & ORG. 167, 169 (1990) (surveying the capture literature).

⁷⁹ *See, e.g.,* North Carolina v. EPA, 531 F.3d 896, 910–11 (D.C. Cir. 2008) (per curiam) (setting aside EPA’s Clean Air Interstate Rule on the ground that it conflicted with the man-

That judicial review of agency action is both substantive and procedural is another backstop against agency overreaching. Substantively, courts examine whether agencies have based their decisions on the criteria set forth in the governing statutes and regulations.⁸⁰ Procedurally, judicial review ensures that agencies base their decisions on a considered analysis of the issues at hand and abide by any specific procedures required by regulation, statute, or the Constitution.⁸¹

Effective judicial review of agency action thus enforces the democratic will. On the other hand, when a court incorrectly decides an administrative law case, the democratic will is thwarted, either by the court's failure to give effect to constitutional or statutory mandates, or by the court's application of constitutional and statutory mandates that do not exist.⁸² Courts thus fulfill their democratic function only when they correctly interpret agencies' constitutional and statutory mandates.

II. *The Problem of Premise Facts*

Part I identified the general principles and objectives of the relationship between agencies and courts and established the administrative law backdrop against which the problem of premise facts arises in agency review cases. This Part turns to the task of defining the problem of premise facts.

A. *Premise Facts in General*

Premise facts present a particularly thorny type of factual issue that lurks, often hidden, in virtually every judicial decision. Typically, where reference is made to the relevant "facts of a case," what springs to mind is adjudicative facts—the facts of the particular case to which the law is applied to decide the case.⁸³ But another type of fact also plays a crucial role in judicial decisionmaking: "facts that explicitly or

dates of the Clean Air Act and noting that, despite the EPA's strong policy rationale for the Rule, "[a]ll the policy reasons in the world cannot justify reading a substantive provision out of a statute").

⁸⁰ See, e.g., *Massachusetts v. EPA*, 127 S. Ct. 1438, 1462 (2007).

⁸¹ See, e.g., *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 417, 419–20 (1971).

⁸² See Cass R. Sunstein, *On the Costs and Benefits of Aggressive Judicial Review of Agency Action*, 1989 DUKE L.J. 522, 525 (noting that "courts have been criticized for adhering to statutory text at society's expense, and at the same time for promoting social welfare at the expense of the statutory text").

⁸³ See FED. R. EVID. 201(a) advisory committee's note ("Adjudicative facts are simply the facts of the particular case.").

implicitly serve as premises used to decide issues of law.”⁸⁴ Judge Robert Keeton termed such facts *premise facts*.⁸⁵ They also could be called *judicially found legislative facts*.⁸⁶ Although they tend to receive far less attention in judicial decisions than adjudicative facts, premise facts pervade legal reasoning.⁸⁷ As Judge Jack Weinstein observed,

whether we explore the economic, political or social settings to which the law must be applied explicitly, or suppress our assumptions by failing to take note of them, we cannot apply the law in a way that has any hope of making sense unless we attempt to visualize the actual world with which it interacts.⁸⁸

Assumptions about how people live and how the world works—some well founded, some not—underlie virtually all judicial decisions.

⁸⁴ Robert E. Keeton, Lecture, *Legislative Facts and Similar Things: Deciding Disputed Premise Facts*, 73 MINN. L. REV. 1, 8 (1988).

⁸⁵ *Id.*

⁸⁶ Traditionally, facts are classified as either adjudicative facts or legislative facts. See FED. R. EVID. 201(a) advisory committee’s note. Legislative facts “are those which have relevance to legal reasoning and the lawmaking process, whether in the formulation of a legal principle or ruling by a judge or court or in the enactment of a legislative body.” *Id.* Keeton further broke down the category of legislative facts into facts that legislatures use as premises to enact statutes and facts that courts use as premises to formulate legal principles. Keeton, *supra* note 84, at 9. Keeton’s term *premise fact* is more helpful analytically than *legislative fact*—or, more specifically, *judicially found legislative fact*—because *premise fact* more readily and less clumsily conveys the role that such facts play in judicial decisionmaking.

Whether a particular fact is an adjudicative fact or a premise fact depends not on an inherent characteristic of the fact, but rather on the purpose to which the court puts the fact. *Id.* at 17, 21. The same fact may be an adjudicative fact in one case and a premise fact in another. Still, premise facts tend to be more generalized and evaluative or predictive. *Id.* at 16. Adjudicative facts, by contrast, tend to be historical and specific to particular events.

⁸⁷ See JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 279 (Augustus M. Kelley 1969) (1898) (“In conducting a process of judicial reasoning, as of other reasoning, not a step can be taken without assuming something which has not been proved.”); Vince Blasi, *The Newsman’s Privilege: An Empirical Study*, 70 MICH. L. REV. 229, 235 (1971) (“One component of every legal decision . . . is a set of factual premises.”); Kenneth Culp Davis, *A System of Judicial Notice Based on Fairness and Convenience*, in PERSPECTIVES OF LAW: ESSAYS FOR AUSTIN WAKEMAN SCOTT 69, 73 (Roscoe Pound et al. eds., 1964) (“Every case decided by any court or other tribunal involves the use of hundreds or thousands of extra-record facts.”); Peggy C. Davis, *“There Is a Book Out . . .”: An Analysis of Judicial Absorption of Legislative Facts*, 100 HARV. L. REV. 1539, 1542 (1987) (“[L]egislative facts do have a dramatic and broad effect upon the development of law.”); David L. Faigman, *To Have and Have Not: Assessing the Value of Social Science to the Law as Science and Policy*, 38 EMORY L.J. 1005, 1015 (1989) (“Virtually every legal judgment is composed of both factual premises and normative principles, though the latter may depend on still more factual premises.”); Keeton, *supra* note 84, at 14 (“Underlying every decision of an issue of law is a set of factual premises.”).

⁸⁸ *Bulova Watch Co. v. K. Hattori & Co.*, 508 F. Supp. 1322, 1328 (E.D.N.Y. 1981).

Take, for example, *United States v. Kras*.⁸⁹ In *Kras*, the Supreme Court held that filing fees for bankruptcies did not deny due process even for the very poor,⁹⁰ noting that the required payments were “less than the price of a movie and little more than the cost of a pack or two of cigarettes.”⁹¹ Justice Marshall’s dissent, citing census data suggesting that a significant number of households were too poor to pay the fees without a significant burden,⁹² lamented that “it is disgraceful for an interpretation of the Constitution to be premised upon unfounded assumptions about how people live.”⁹³ In that case, a factual disagreement about how the world works underlay a disagreement among the Justices about the meaning of a constitutional provision.

Premise facts determine how general principles, such as rules of statutory interpretation, apply to create more specific legal principles: Are two situations similar enough in relevant respects that treating them differently would be arbitrary and capricious or irrational, or are they different enough to warrant, or even require, differing treatment?⁹⁴ Are two factual circumstances sufficiently alike that a settled principle governing one of the circumstances should extend to the other circumstance as well?⁹⁵ Will the agency’s interpretation effectuate or undermine the statutory goals of the program it is administering?⁹⁶ Is the plaintiff’s alternative interpretation unworkable?⁹⁷

⁸⁹ *United States v. Kras*, 409 U.S. 434 (1973).

⁹⁰ *Id.* at 449–50.

⁹¹ *Id.* at 449.

⁹² *Id.* at 459–60 (Marshall, J., dissenting).

⁹³ *Id.* at 460.

⁹⁴ *See, e.g.*, *Nat’l Fed’n of the Blind v. FTC*, 420 F.3d 331, 347 (4th Cir. 2005) (whether FTC’s regulations applying to professional “telefundraisers” but not to nonprofessional “in house” charity solicitors violates the First Amendment depends in part on whether professional telefundraisers “more aggressively pursue residents” than nonprofessional solicitors); *Immigrant Assistance Project v. INS*, 306 F.3d 842, 872 (9th Cir. 2002) (whether court order instructing INS to adjudicate pending legalization applications under specific burden-shifting mechanism has a rational basis depends on whether foreign students who violated their visas by not taking a required number of class hours and foreign students who had violated their visas by remaining in the United States after they graduated are similarly situated).

⁹⁵ Keeton, *supra* note 84, at 11 & n.30.

⁹⁶ *See, e.g.*, *San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm’n*, 449 F.3d 1016, 1028, 1034–35 (9th Cir. 2006) (Nuclear Regulatory Commission’s determination that National Environmental Policy Act did not require consideration of environmental effects of potential terrorist attacks undermined twin statutory goals of information gathering and public participation), *cert. denied*, 127 S. Ct. 1124 (2007); *Garcia v. Dep’t of Homeland Sec.*, 437 F.3d 1322, 1350 (Fed. Cir. 2006) (Dyk, J., dissenting) (describing conflict between INS jurisdictional determination and statutory purpose); *see also* Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 577 (1985) (noting that, because the “enactor” likely will not have contemplated the specific situation confronted by the “interpreter,” the interpreter must consider “the behavioral consequences of adopting particular interpretations” to

In addition to determining how interpretive rules apply, premise facts also help determine which interpretive rules are relevant. For example, a canon of statutory construction holds that, even where the plain meaning of the statutory language seems clear, the plain meaning interpretation may not be conclusive if it produces a result clearly contrary to the purpose of the statute.⁹⁸ When a court construes a statute by the superficially clear meaning of its language, the court is at least implicitly assuming that the interpretation will not produce a result contrary to the statutory purposes.⁹⁹ And, what's more, *factfinding* is something of a misnomer where premise facts are concerned. When a court is presented with evidence from the parties and makes an explicit determination as part of its resolution of the case, many premise facts are *assumed* rather than *found*.¹⁰⁰ And premise facts often are hidden in how the court chooses not to decide the case, in addition to the reasoning it offers to support its conclusion.

Whether under the general rules of civil procedure and evidence or under principles of administrative law, there is a relatively clear procedure for determining adjudicative facts; by contrast, there is no settled procedure or method for deciding premise facts.¹⁰¹ For example, courts may look outside the record to decide a premise fact.¹⁰² Courts need not provide any evidentiary support for their premise fact determinations.¹⁰³ This absence of a formal structure for deciding pre-

choose the interpretation that will fulfill the enactor's intent); Adrian Vermeule, *Interpretive Choice*, 75 N.Y.U. L. REV. 74, 76 (2000) ("The interpreter faces a number of candidate doctrines that might promote the specified end and must decide which doctrine does so most effectively.").

⁹⁷ See, e.g., *Torrington Co. v. United States*, 156 F.3d 1361, 1364 (Fed. Cir. 1998).

⁹⁸ See *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (1989).

⁹⁹ Cf. Note, *The Indian Bill of Rights and the Constitutional Status of Tribal Governments*, 82 HARV. L. REV. 1343, 1354 n.50 (1969) (noting that, where courts are working outside of areas of "general experience," their ignorance of the factual context may prevent them from even recognizing interpretive problems). Alternatively, the court may be implicitly rejecting the canon that allows statutory purpose to trump apparently clear statutory language. Still, most courts are troubled when their reading of statutory language conflicts with statutory purpose; where a court says nothing about effectuating the statutory purposes, the most reasonable inference is that the court is implicitly assuming its plain-language interpretation will effectuate the statutory purposes.

¹⁰⁰ See Kenneth Culp Davis, *supra* note 87, at 74 (noting that judges "assume facts without mentioning that they do so"); Tracey L. Meares, *Three Objections to the Use of Empiricism in Criminal Law and Procedure—and Three Answers*, 2002 U. ILL. L. REV. 851, 856 (noting that the Supreme Court often supports its legal conclusions with statements that are "obviously empirical," but makes "absolutely no attempt to assess relevant empirical evidence").

¹⁰¹ Keeton, *supra* note 84, at 31–32.

¹⁰² *Id.* at 30.

¹⁰³ 1 RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* § 7.5, at 464 (Aspen Law & Bus. 4th ed. 2002) (discussing legislative facts).

mise facts is a necessary consequence of the pervasiveness of factual premises in legal reasoning; it would be impossible to go through a full adjudicatory process for every underlying fact that is potentially relevant to a court's review, both because of the number of premise facts that arise directly in judicial decisionmaking, and because each premise fact in turn implicates other subsidiary facts.¹⁰⁴ As a result, however, courts have virtually unfettered discretion in how to handle factual premises. Equally troubling, perhaps, are the "unsystematic and impressionistic" processes in which premise facts are formulated, and the subsequent inattention their empirical validity receives—once formulated, premise facts are "seldom tested in operation."¹⁰⁵ It is up to judges to select what, if any, information to consider in deciding a premise fact and whether and how to search for such information. It is up to judges to decide when a factual premise is sufficiently important or potentially subject to dispute that it bears mentioning in the court's opinion.

The unique rules (or lack thereof) governing the determination of premise facts in judicial decisionmaking are a consequence of the unique role that premise facts play in a court's resolution of a case. Whereas the adjudicative facts of a case are endogenous to the case—indeed, they define the case—premise facts are exogenous generalizations. Premise facts provide reference points by which a court can assess the case.

Consider, for example, the case of *Ecology Center, Inc. v. Austin*,¹⁰⁶ in which the Ninth Circuit considered whether the Forest Service's methodology for identifying the impacts of a timber-thinning project was arbitrary and capricious.¹⁰⁷ The court found the Forest Service's methodology, which relied principally on modeling, lacking because the agency had not tested the methodology with on-the-ground analysis.¹⁰⁸ The court equated the Forest Service's approach, predicated on what the court considered to be an unverified hypothesis, to a pharmaceutical company's marketing of a drug to the public without first conducting a clinical trial to verify that the drug is safe

¹⁰⁴ Cf. Kenneth Culp Davis, *supra* note 87, at 73–74 (describing impossibility of finding all facts on record evidence given the requirement that judges must bring their general background knowledge to bear on the "significance of the ideas expressed" either by, for example, pleadings or witness testimony).

¹⁰⁵ Blasi, *supra* note 87, at 235.

¹⁰⁶ *Ecology Ctr., Inc. v. Austin*, 430 F.3d 1057 (9th Cir. 2005), *overruled by* *Lands Council v. McNair*, 537 F.3d 981 (9th Cir. 2008).

¹⁰⁷ *Id.* at 1063–64.

¹⁰⁸ *Id.* at 1064.

and effective.¹⁰⁹ By adopting the premise that the Forest Service and a pharmaceutical company stand in similar circumstances, the court obtained a reference point by which to gauge the reliability of the Forest Service's methodology—that is, whether the Forest Service's methodology resembled a pharmaceutical company's clinical trial.¹¹⁰ The court made sense of the case for itself by drawing a comparison between something unsettled (what the Forest Service must do to establish the reliability of its methodology) and something settled (namely that, in the pharmaceutical context, clinical trials are required).¹¹¹

Another peculiar characteristic of premise facts bears noting for this discussion: whereas a determination of an adjudicative fact is binding only to the extent of the rules of preclusion—law of the case, *res judicata*, or collateral estoppel—a premise fact becomes embedded in the principle of law it supports and therefore becomes, either explicitly or implicitly, binding precedent.¹¹² A court in a subsequent case cannot disregard binding precedent announcing a legal principle merely because that principle is based on an erroneous factual premise.¹¹³

In sum, the way in which courts deal with factual premises gives them great discretion. At the same time, the consequences of an erroneous factual premise can be much greater than an erroneous finding of adjudicative fact. The combination of these characteristics should be cause for concern, especially because, as Part III explains, there are strong reasons to doubt courts' capabilities in evaluating premise facts.

B. *Premise Facts in Agency Review Cases*

The preceding Section showed that premise facts present a recurring and thorny problem for courts. This Section addresses how the problem of premise facts plays out in the specific context of agency review cases. Many agency review cases pose questions of statutory

¹⁰⁹ *Id.*

¹¹⁰ The dissenting judge criticized the majority opinion for invoking and relying on this premise, noting that pharmaceutical companies and the Forest Service operate under very different legal regimes. *Id.* at 1077 (McKeown, J., dissenting). Judge McKeown concluded that “[t]o import the notion of clinical trials from the FDA context to soil sampling in federal forests is a leap too far.” *Id.*

¹¹¹ The problem, however, is that the court did not necessarily understand Forest Service land management (or clinical drug trials) well enough to know whether the comparison it drew was appropriate. See *infra* note 136 and accompanying text.

¹¹² Keeton, *supra* note 84, at 26.

¹¹³ *Id.* at 28.

interpretation, and premise facts are a critical component of statutory interpretation.¹¹⁴ Premise facts thus play an important role in many agency review cases.

Initially, it might seem that courts should be able to treat premise facts in agency review cases the same as they do the adjudicative facts of the case. Because courts review agency actions based on the administrative record, one might expect that courts always should be able to look to the administrative record for premise facts. If the agency has made a finding of fact that reasonably is supported by record evidence, then the court can adopt the agency's finding as its factual premise.¹¹⁵ If the record does not support the agency's finding, then the court can hold the agency action unlawful and remand to the agency,¹¹⁶ or find for the agency on an alternative ground.¹¹⁷ So far, this is just a standard application of the APA framework governing judicial review of agency action.¹¹⁸

But what if the record does not address a fact the court considers relevant to its analysis? In such a situation, one might assume that the court also could set aside the agency action and remand to the agency on the ground that the agency has an obligation to explain the available relevant evidence and how the evidence supports its decision.¹¹⁹ That line of reasoning, however, incorrectly presupposes that the agency is required to address in the administrative record any factual issue that could potentially be relevant to a court's evaluation of the agency's action, and that agency decisions are unlawful to the extent they do not address a potentially relevant factual issue.

The agency's obligation to make findings about factual issues that may underlie interpretations of the statute it administers is actually much more limited; that obligation extends only to the facts that underlie the agency's rationale for its position, and perhaps to the factual premises of its defenses against objections to the agency action that are specifically raised during the administrative proceeding. This is

¹¹⁴ See *supra* text accompanying notes 87–97.

¹¹⁵ Cf. *Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 97, 103 (1983) (suggesting that courts treat expert agencies' determinations deferentially and only set aside such determinations for procedural or substantive reasons as mandated by statute).

¹¹⁶ See, e.g., *Westar Energy, Inc. v. Fed. Energy Regulatory Comm'n*, 473 F.3d 1239, 1242–43 (D.C. Cir. 2007).

¹¹⁷ Cf. *GTE S., Inc. v. Morrison*, 199 F.3d 733, 741–42, 749 (4th Cir. 1999) (relying on *SEC v. Chenery Corp.*, 318 U.S. 80 (1943), to apply FCC rules where Virginia State Corporation Commission did not, and reaching same result on alternative ground).

¹¹⁸ See *supra* Part I.A.

¹¹⁹ See *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983).

the proper interpretation of what the Supreme Court meant in *Motor Vehicle Manufacturers Ass'n of the United States, Inc. v. State Farm Mutual Automobile Insurance Co.* when it said that an agency must explain how the agency's decision is consistent with the evidence before it.¹²⁰

The obligation to address premise facts cannot extend, on the other hand, to every factual issue that might be relevant to a court's analysis of the agency's action. It would be impossible for agencies to foresee every fact that might be relevant to the court's reasoning. The relevance of a premise fact will be clear only if it has "an established place in a pre-existing legal framework" that clearly applies to the agency's action.¹²¹ But in many cases the court is at least to some extent creating the legal framework in its decision, and so the relevance and import of a fact is unpredictable in advance of the court's decision.¹²² It may not be clear what legal issues will arise if an action is challenged, and there may be numerous combinations of facts that could be relevant for each legal issue, depending on how the court's analysis proceeds. Even if agencies could predict every factual issue, they could not create an administrative record addressing every last one. Such a burden would bring agency decisionmaking to a standstill.

For example, in *Rapanos*, the Army Corps of Engineers and the EPA did not have an obligation to determine whether dredged or fill material generally washes downstream. That issue only became relevant when the plurality decided to rely on it as a basis for rejecting the agencies' interpretation of the statute.¹²³ Accordingly, the Supreme Court could not have remanded the case to the agency level for reconsideration of the regulations on the ground that the agencies had not explained the relevant evidence by failing to address the issue whether dredged or fill material washes downstream.¹²⁴

¹²⁰ See *id.* at 43.

¹²¹ See Ann Woolhandler, *Rethinking the Judicial Reception of Legislative Facts*, 41 VAND. L. REV. 111, 117 (1988).

¹²² *Id.* at 117.

¹²³ See *Rapanos v. United States*, 547 U.S. 715, 742–45 (2006) (plurality opinion) (addressing regulators' concerns that the Court's statutory interpretation would cabin the scope of the CWA's permitting requirement). The *Rapanos* dissent noted that "no party or amicus" had proposed the two-condition statutory test for jurisdiction under the CWA that the plurality adopted. *Id.* at 800 (Stevens, J., dissenting).

¹²⁴ If, on the other hand, an agency *has* made findings about facts that turn out to be relevant as *premise facts*, courts are required to give those findings considerable deference. See *Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983) (where agency "is making predictions, within its area of special expertise, . . . as opposed to simple findings of fact,

In sum, innumerable factual questions may arise in agency review cases that are relevant to the court's review, but which the agency was not obligated to address in the administrative record. This places the reviewing court in the position of having to formulate a legal principle, including underlying factual premises, without much information in the administrative record on which to decide the factual premises. In such situations, the court cannot simply set aside the agency action and remand to the agency to gather and analyze the factual premises, because the agency had no initial responsibility to address these facts. So the court does as it does in most cases, whether agency review or not, and decides the issue based on its limited understanding of the limited information to which it has access.

III. Comparative Institutional Analysis

In thinking about how to address the problematic role of premise facts in agency review cases, it is crucial to consider the institutional limitations facing both agencies and courts in their efforts to evaluate premise facts. Because human reasoning is fallible, human institutions such as agencies and courts necessarily operate in a context of bounded rationality.¹²⁵ The interrelated constraints of limited information, limited cognitive capacity, and limited time and resources, as well as other sources of bias and limitation, all combine to constrain how well both agencies and courts make decisions. But agencies and courts are quite different institutions acting in very different contexts, and so these constraints, limitations, and biases affect agencies and courts differently. Each has relative advantages and disadvantages in decisionmaking that may reflect on its appropriate role in the policymaking process in general, and on its role in evaluating premise facts in particular. This Part evaluates those advantages and disadvantages with a comparative institutional analysis, assessing which alter-

a reviewing court must generally be at its most deferential"); *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 594–96 (1981) (noting that agencies have “expert knowledge” and “institutional competence” to make judgments about facts underlying policy decisions).

¹²⁵ Cf. RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* 101 (2003) (describing philosopher John Dewey's contention that science's ability to produce “useful knowledge” is attributable to its willingness to accept “the possibility that many of one's beliefs are false”); Sidney A. Shapiro, *Administrative Law After the Counter-Reformation: Restoring Faith in Pragmatic Government*, 48 U. KAN. L. REV. 689, 743 (2000) (describing Charles Lindblom's contention that regulatory incrementalism, whereby administrators “adjust decisions over time,” “is the most rational way to proceed”).

native institutional arrangement would best address the premise facts that arise in agency review cases.¹²⁶

A. Agency Advantages

Agencies have several overwhelming advantages, as compared to courts, in assessing the types of factual issues that arise in agency review cases as premise facts. Agencies have (1) greater expertise and experience as to the factual matters addressed in agency review cases; (2) more resources to address complicated factual issues; (3) more open and flexible factfinding processes; (4) a valuable ability to test factual hypotheses; (5) a prodemocratic rather than antidemocratic bias; and (6) a reduced likelihood of hindsight bias.

1. Expertise and Experience

Agencies can develop expertise and experience in a way that courts of general jurisdiction cannot:

Because the agencies specialize, they can be staffed with knowledgeable personnel with the relevant expertise to evaluate complex technical issues. Similarly, agencies and their staff gain practical experience through ongoing involvement in the field, which means agencies can make more informed policy decisions concerning technical standards for their areas. By contrast, . . . the courts must address a wide array of issues and cannot develop the same kind of expertise in particular technical fields.¹²⁷

Courts' lack of expertise and experience severely impair their capacity to analyze and to understand the evidence before them in an agency review case.

¹²⁶ For introductions to the tool of comparative institutional analysis, see NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* 3 (1994); ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION* 1, 15–18 (2006); Harold Demsetz, *Information and Efficiency: Another Viewpoint*, 12 J.L. & ECON. 1, 1 (1969).

¹²⁷ Richard E. Levy & Sidney A. Shapiro, *Administrative Procedure and the Decline of the Trial*, 51 U. KAN. L. REV. 473, 476 (2003). Agencies also are quite adept—often more so than courts—in predicting consequences of alternative rules. Pierce, *supra* note 66, at 2239 (“Judges typically have little knowledge of the complicated regulatory and benefit programs that agencies administer. Moreover, they typically have little understanding of the disciplines relevant to predicting the consequences of announcing alternative decisional rules applicable to disputes that arise in the process of administering those programs. Such disciplines span a broad spectrum that includes economics, engineering, chemistry, physics, toxicology, meteorology, and medicine.”).

Because of their lack of expertise in the substantive areas in which they rule, “[f]rom the psychological perspective, the courts are probably the institution least well-suited to making policy decisions that avoid cognitive traps.”¹²⁸ Agencies’ experience and expertise, on the other hand, generally make them less susceptible to systematic errors in judgment.¹²⁹ Complementing their specialized substantive knowledge, experts within administrative agencies have professional training and experience that give them tools for avoiding cognitive traps.¹³⁰ Experience allows decisionmakers to “determine when the mental strategies upon which they rely produce positive results” and “to see commonalities across problems and to recognize new relationships between the characteristics of a problem and a sensible choice.”¹³¹ Experts have professional training that often includes methods that have evolved to keep cognitive illusions from impairing professional judgment.¹³² Judges’ lack of expertise and experience, on the other hand, prevents them from recognizing when they should not rely on mental shortcuts.¹³³ And the structure of judicial review—deciding issues within the context of a specific case—likely renders judges more susceptible to certain cognitive illusions. For example, judges are more likely to “overvalue and overgeneralize” the specific facts of the case before them, thereby evidencing cognitive illusions referred to as availability and representativeness heuristics.¹³⁴

One way in which courts attempt to compensate for their lack of expertise and experience is to compare the facts of the case before them with the facts in prior cases. Courts undertake these comparisons to determine whether the instant case should be resolved in a

¹²⁸ Jeffrey J. Rachlinski & Cynthia R. Farina, *Cognitive Psychology and Optimal Government Design*, 87 CORNELL L. REV. 549, 577 (2002). Rachlinski and Farina also refer to courts as “overworked perpetual amateurs likely to rely on erroneous heuristics.” *Id.* at 582.

Research in cognitive psychology has found that humans, in an attempt to make the most of their limited cognitive abilities, rely on mental shortcuts (*heuristics*), and organizing principles (*schema*). *Id.* at 555. These devices “serve people well most of the time,” but they also “can lead to systematic errors in judgment” (*cognitive illusions*). *Id.* at 556. Cognitive illusions affect all human decisionmaking; agency and judicial decisionmaking are not immune. Yet the effects of cognitive illusions on agency and judicial decisionmaking differ, and those different effects stem from differences between the institutions.

¹²⁹ *Id.* at 579.

¹³⁰ *Id.* at 572.

¹³¹ *Id.* at 559.

¹³² *Id.* at 560.

¹³³ *Id.* at 571–72.

¹³⁴ William N. Eskridge, Jr. & John Ferejohn, *Structuring Lawmaking to Reduce Cognitive Bias: A Critical View*, 87 CORNELL L. REV. 616, 631 (2002).

manner similar to or different from the prior cases.¹³⁵ Where a court is faced with complex or technical factual issues, however, it may not be able to accurately identify appropriate analogies and distinctions.¹³⁶

2. Resources

Agencies generally have more resources than courts to examine factual evidence. Agencies often spend many thousands of person-hours over several years examining an issue before making a major decision.¹³⁷ Courts do not have anything approaching that capacity and tend to operate under tighter deadlines.¹³⁸ Indeed, to manage their dockets, courts often have no choice but to enforce tight limits on the amount of information that the parties can present to the court.¹³⁹ Even where courts do not set such limits, their limited resources impose a de facto limit.

3. Open Process

The structure of administrative processes is much more open than that of judicial processes, and this openness gives agencies a significant advantage in gathering information about the issues they address.¹⁴⁰ This advantage manifests itself in numerous different ways. Faced with a difficult factual question, agencies can solicit public comment,¹⁴¹ sponsor new studies,¹⁴² convene advisory panels,¹⁴³ and issue

¹³⁵ Rachlinski & Farina, *supra* note 128, at 578.

¹³⁶ *Id.*

¹³⁷ Stuart Minor Benjamin, *Spectrum Abundance and the Choice Between Private and Public Control*, 78 N.Y.U. L. REV. 2057–58 (2003) (explaining that drawn-out agency decision-making is often due to “procedural hurdles”); Richard J. Pierce, Jr., *Judicial Review of Agency Actions in a Period of Diminishing Agency Resources*, 49 ADMIN. L. REV. 61, 71 (1997) (same).

¹³⁸ Cf. Peter J. Smith, *New Legal Fictions*, 95 GEO. L.J. 1435, 1449 (2007) (explaining that “[j]udges will not generally be able to defer resolution of difficult questions simply because the litigation calendar has moved more quickly than the research calendar”).

¹³⁹ See, e.g., S.D. ALA. R. 7.1(b) (“A brief filed in support of or in opposition to any motion shall not exceed thirty (30) pages in length.”); S.D. FLA. R. 7.1(C)(2) (“[N]o party shall file any legal memorandum exceeding twenty (20) pages in length.”); C.D. ILL. GEN. & CIV. R. 7.1(4)(a) (“A memorandum in support of and in response to a motion . . . shall not exceed 15 pages in length.”).

¹⁴⁰ See Pierce, *supra* note 66, at 2239 (explaining how “agencies have access to a decision-making procedure—notice and comment rulemaking—that is vastly superior to judicial decision-making procedures for the purpose of predicting the future consequences of alternative decisional rules”).

¹⁴¹ 5 U.S.C. § 553(c) (2006).

¹⁴² See, e.g., *Earth Island Inst. v. Hogarth*, 494 F.3d 757, 762 (9th Cir. 2007) (agency expanded dolphin research program and conducted new studies).

¹⁴³ See *Pub. Citizen v. U.S. Dep’t of Justice*, 491 U.S. 440, 443 (1989).

notices of proposed (and revised proposed) rules.¹⁴⁴ Courts, on the other hand, generally get their information only from what the parties have presented.¹⁴⁵ In agency review cases, courts' familiar mechanisms for resolving factual disputes—most notably trials in which live witnesses are examined and cross-examined—are not available; instead, courts review agencies' decisions based on the administrative record.¹⁴⁶ Even if traditional judicial factfinding procedures were available, they are not well suited to legislative facts such as premise facts.¹⁴⁷ And many agency decisions must be challenged by filing a petition for review directly in the courts of appeals,¹⁴⁸ which are particularly ill equipped to resolve factual disputes.

In addition, the adversarial system tends to narrow the information presented to the court by dichotomizing the arguments. The adversarial system usually guarantees that courts see more than one side

¹⁴⁴ 5 U.S.C. § 553(b).

¹⁴⁵ Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 389 (1986) (“[C]ourts work within institutional rules that deliberately disable them from seeking out information relevant to the inquiry at hand. . . . [I]n factual matters [a judge] is limited to review of a cold record created by those over whom he has no control and who may have strong biases.”); Abner J. Mikva, *Why Judges Should Not Be Advicegivers: A Response to Professor Neal Katyal*, 50 STAN. L. REV. 1825, 1829 (1998) (“Judges are precluded from expressing any prior views about the matter to be decided. They get their information solely from the briefs and records prepared for the case sub judice. They are prohibited from seeking outside advice (except by way of amici curiae briefs). Only the parties to the case may be heard in each matter, and any public participation in the process, whether by letter-writing or by demonstration, is very much discouraged. The decision is made by the judges in a private, indeed secret, deliberation, and is final, subject only to a very formal appellate process.”); see also Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65, 108 (1983) (“Not only do courts lack the administrator’s presumed investigative resources, analytic competence, and technical literacy, but they view social policy issues through the refracting prism of judicial review. Resolving competing claims about the precision of rules in the context of enforcement proceedings requires courts to extrapolate from a single known application of a rule to a universe of imagined applications.”).

¹⁴⁶ See *supra* note 50 and accompanying text.

¹⁴⁷ Eleanor D. Kinney, *Administrative Law and the Public’s Health*, 30 J.L. MED. & ETHICS 212, 218 (2002) (“Cross-examination and other judicial-type procedures are not especially effective in determining the veracity of legislative facts.”); cf. William Burnett Harvey, *Private Restraint of Expressive Freedom: A Post-PruneYard Assessment*, 69 B.U. L. REV. 929, 965 (1989) (noting courts’ “limited ability to ascertain reliably and with adequate generality ‘legislative facts’”).

¹⁴⁸ See, e.g., 5 U.S.C. § 7703(b)(1) (petitions to review final decisions of Merit Systems Protection Board to be filed in United States Court of Appeals for the Federal Circuit); 8 U.S.C. § 1252(a)(2)(5) (2006) (petitions to review final orders of removal by the Attorney General to be filed in appropriate court of appeals); 16 U.S.C. § 825l(b) (2006) (petitions to review orders of Federal Power Commission to be filed in courts of appeals); 28 U.S.C. § 2342 (2006) (giving federal courts of appeals exclusive jurisdiction to determine validity of final orders of various agencies).

of an issue; by the same token, however, it frequently prevents courts from seeing more than two sides.¹⁴⁹ As a result, courts are not presented with the full range of options available for resolving the issue in dispute, and each side is likely to present only the information that supports its position.¹⁵⁰ If a court finds itself favoring an approach that differs even somewhat from the positions the parties have advanced, it may be on its own, without knowing what additional information relevant to that approach exists. All these factors limit the information available to courts in agency review cases.

4. *Ability to Test Hypotheses*

Agencies have substantial advantages over courts in addressing factual issues by virtue of their ability to test hypotheses. In developing a response to an uncertain situation, the ability to test a hypothesis before reaching a firm conclusion is extraordinarily valuable. A beneficial strategy for proceeding under conditions of bounded rationality is to recognize that an initial conclusion may be wrong, and so prior judgments must be revisited and potentially revised in light of newly acquired experience and knowledge.¹⁵¹ On this count, an agency may substantially reduce the likelihood that its internal biases will affect agency decisionmaking when it exposes its hypotheses to scrutiny by persons outside of the agency.¹⁵²

Agencies have a variety of mechanisms, both informal and formal, to test factual hypotheses before making a decision. Agencies constantly receive feedback on their policies and potential policies from a variety of sources through correspondence, meetings, press coverage, and so forth. More formally, the APA's notice-and-comment rulemaking requirements establish a process by which agencies can test factual hypotheses by soliciting comments on proposed rules.¹⁵³ Of course, the process of gathering and considering information, or changing course in response to additional information, can be difficult or costly for agencies, but at least effective mechanisms for testing proposals are available to agencies. Courts, on the other hand, have an extremely limited ability to hypothesize and test facts before

¹⁴⁹ See Mikva, *supra* note 145, at 1829.

¹⁵⁰ Cf. Abraham D. Sofaer, *The Science Court: Unscientific and Unsound*, 9 ENVTL. L. 1, 20–21 (1978) (contending that the adversary process is ill suited for resolving scientific issues).

¹⁵¹ See sources cited *supra* note 125.

¹⁵² Cf. Rachlinski & Farina, *supra* note 128, at 559 (noting the importance of feedback to improve decisionmaking).

¹⁵³ See 5 U.S.C. § 553.

announcing a rule or principle.¹⁵⁴ Judges can direct parties to brief particular questions,¹⁵⁵ or judges can issue a proposed decision for the parties' comment,¹⁵⁶ but those are weak tools relative to what an agency has at its disposal.

5. *Prodemocratic Bias*

Public choice theory posits that agencies will attempt to maximize their authority and importance by aligning with powerful interest groups.¹⁵⁷ Courts, on the other hand, are more insulated than agencies from overt political influence. Indeed, some commentators, pointing out that courts can police agency decisionmaking for inappropriate political bias, have invoked public choice theory as a rationale for judicial review of agency action.¹⁵⁸ But, although characteristics of judicial office such as life tenure and irreducible salary may insulate judges from political pressures, it does not necessarily follow that courts are unbiased.¹⁵⁹ Rather, insulation from the political process may instead merely "free[] current judges to implement whatever values they happen to hold."¹⁶⁰ Indeed, evidence from studies of judicial decisionmaking suggests that political bias and "attitudinal blinders" have a significant effect on how judges decide cases.¹⁶¹ If the choice is not between biased agencies and unbiased courts, but rather between biased agencies and biased courts, then there are strong democratic reasons to favor the bias of agencies; that is, one would expect agency bias, rather than the personal bias of life-tenured judges, to be more reflective of current prevailing political sentiment.

¹⁵⁴ Cf. Blasi, *supra* note 87, at 235 (contending that "probably the greatest single shortcoming of American law as a decisionmaking process is its failure to institute any sort of systematic auditing procedure"); Sofaer, *supra* note 150, at 21 (contrasting the adversary process of courts with a proper scientific methodology, which would include "testing to achieve objectively verifiable results").

¹⁵⁵ See, e.g., *Spencer Enters., Inc. v. United States*, 345 F.3d 683, 687 (9th Cir. 2003).

¹⁵⁶ See, e.g., *Peterson v. Highland Music, Inc.*, 140 F.3d 1313, 1325 (9th Cir. 1998).

¹⁵⁷ Rachlinski & Farina, *supra* note 128, at 568–69 (arguing that embedded within agency decisions, which often are responsive to "the preferences of influential legislators," is the residue of legislative vulnerability to interest group lobbying efforts).

¹⁵⁸ *Id.* at 570; Mark Seidenfeld, *Bending the Rules: Flexible Regulation and Constraints on Agency Discretion*, 51 ADMIN. L. REV. 429, 466–67 (1999).

¹⁵⁹ VERMEULE, *supra* note 126, at 210.

¹⁶⁰ *Id.*

¹⁶¹ See Chris Guthrie, *Misjudging*, 7 NEV. L.J. 420, 438–44 (2007) (summarizing and evaluating empirical evidence).

6. *Lack of Hindsight Bias*

Agency decisions depend on predictive judgments about the effects of different policy options, whereas courts generally review an agency's decisions after they have gone into effect, when the actual effects may be known. In this way, judicial review of agency decision-making poses a problem because courts are supposed to evaluate the agency's action from the perspective of the agency at the time it made its decision.¹⁶² One therefore would expect, based on cognitive psychology research, that *hindsight bias*—that is, overestimating the prospective predictability of past events¹⁶³—influences courts' evaluations of agency decisions.

B. *Special Problems with Premise Facts*

These disparities between courts and agencies in their ability to analyze facts are particularly pronounced for premise facts. Premise facts tend to be evaluative or predictive¹⁶⁴ and therefore present the type of question that is more amenable to analysis by processes of agencies than analysis by processes of courts.¹⁶⁵ Agencies have extensive experience with the practical impacts of their programs. And this information frequently is directly relevant to premise facts in formulating the applicable legal principles. Courts should interpret statutes in a manner that accomplishes legislative objectives, but the agency is the one with the experience and expertise to “understand[] the sorts of interpretations needed to ‘make the statute work.’”¹⁶⁶ Indeed, one primary purpose of agencies is to “find[] the facts to define the means by which [the] ends [of the governing legislation] could be achieved.”¹⁶⁷

¹⁶² See *Camp v. Pitts*, 411 U.S. 138, 142 (1973) (holding that courts review an agency decision based on the administrative record before the agency at the time the agency made its decision). But see *Amoco Oil Co. v. EPA*, 501 F.2d 722, 729 n.10 (D.C. Cir. 1974) (“Rule-making is necessarily forward-looking, and by the time judicial review is secured events may have progressed sufficiently to indicate the truth or falsity of agency predictions. We do not think a court need blind itself to such events . . .”).

¹⁶³ Guthrie, *supra* note 161, at 432.

¹⁶⁴ Keeton, *supra* note 84, at 16.

¹⁶⁵ Cf. Daniel A. Farber, *Is the Supreme Court Irrelevant? Reflections on the Judicial Role in Environmental Law*, 81 MINN. L. REV. 547, 563 (1997) (“Unlike courts, . . . agencies can address issues systematically, rather than case-by-case.”); Vermeule, *supra* note 96, at 76–77 (“The empirical questions relevant to interpretive choice frequently strain the limits of judicial information [sic] and predictive capacities. . . . Courts must choose interpretive doctrines on largely empirical grounds, under conditions of severe empirical uncertainty . . .”).

¹⁶⁶ Breyer, *supra* note 145, at 368.

¹⁶⁷ GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 45 (1982).

Compounding the problem, the role of a premise fact in a court's opinion often is hidden or ambiguous. A court's reliance on a premise fact may be entirely implicit.¹⁶⁸ Even the judge may not realize her reliance on a factual assumption; her consideration of a premise fact may be subconscious. The reliability of judges' determinations of premise facts thus depends on their ability to recognize the fallibility of their own understanding of how the world functions.

Unremarkably, these limitations make deciding premise facts difficult. What's worrisome, though, is that these limitations have pernicious effects. The lack of information about premise facts increases the influence of judges' personal biases. Judges likely respond to inadequate factual development of an issue by relying on their own factual assumptions, inferences, and conclusions.¹⁶⁹ This is not to say that additional factual development would necessarily prevent judges' biases from influencing their evaluation of an issue. But the more developed a factual record on an issue, the less judges have to fill in the blanks with their own assumptions and inferences, and the less influence personal bias should have on the judges' assessment of the issue, absent a willful misreading of the record.

The exacerbated disparity between courts and agencies in their ability to address premise facts thus poses a particularly difficult problem for judicial review of agency decisions. Although it frequently falls on courts rather than agencies to address premise facts in the first instance in agency review cases, compared with agencies, courts have rather severe disadvantages in analyzing premise facts.

The conventional model of judicial review of agency action is consistent with skepticism toward judicial factfinding. Courts are to review agency decisions with deference, and courts are not to make their own findings of fact.¹⁷⁰ Premise facts and other legislative facts, however, do not conform to the conventional model. *De novo* judicial factfinding of premise facts is both accepted and, because courts often

¹⁶⁸ Cf. Keeton, *supra* note 84, at 66 ("Often one must read judicial opinions closely, however, in search of implicit indications of exactly whether and how the court used a fact determination in its legal reasoning.").

¹⁶⁹ POSNER, *supra* note 125, at 76 ("Judges often know few facts [constituting the background or context of the dispute] and therefore fall back on hunch, intuition, and personal experiences that may be misleading."); see also Kenneth Culp Davis, *supra* note 87, at 84–85 (observing that the Supreme Court has invoked "common experience" to decide premise facts, and that the Court has done so directly in the face of a dissenter's specific evidence to the contrary (citation omitted)).

¹⁷⁰ See *supra* Part I.

encounter factual premises not previously addressed by the agency, inevitable.¹⁷¹

C. *Avoiding the Nirvana Fallacy*

Given the foregoing discussion, one might well question whether courts have any constructive role to play in deciding premise facts. Despite the considerable advantages that agencies have over courts in addressing premise facts, however, one must not fall prey to the “nirvana fallacy,” a description of analyses which “juxtapose[] a romantic picture of one institution . . . with a jaundiced picture of others.”¹⁷² Indeed, there are strong reasons to be concerned about giving either agencies or courts too much discretion in their factfinding.

For example, expertise, which clearly is an overall advantage for agencies over courts, does not always reduce the effect of cognitive biases, and may exacerbate some.¹⁷³ Experts are less able than others to think differently about a problem or to recognize the limitations of their method of approaching a problem.¹⁷⁴ Agencies accordingly may be “overconfident in their judgment, trapped within particular ways of solving problems that arise from their training, and generally unable to temper their enthusiastic belief in their professions and abilities.”¹⁷⁵

Two salient conclusions derive from the analysis thus far. First, there are strong reasons to doubt the reliability and accuracy of judicial factfinding in agency review cases, and strong reasons to think that agencies will, on the whole, decide premise facts better than courts. Second, both courts and agencies have limitations and biases, and those limitations and biases are different for courts and agencies, so there may be significant advantages to a system that does not rely entirely on judicial or agency factfinding alone. Ideally, decisionmak-

¹⁷¹ See *supra* Part II.

¹⁷² VERMEULE, *supra* note 126, at 10; see also Demsetz, *supra* note 126, at 1 (advocating comparative institutional analysis, which chooses among “alternative real institutional arrangements,” over a “nirvana approach,” which merely chooses between “an existing ‘imperfect’ institutional arrangement” and “an ideal norm”); Eskridge, Jr. & Ferejohn, *supra* note 134, at 630 (contending that “most proposals anchor on the biases of the institution being checked while minimizing the biases of the institution doing the checking”). Vermeule primarily criticizes others for overestimating courts’ capacities relative to administrative agencies. See VERMEULE, *supra* note 126, at 40–59. He has been accused, in turn, of accepting his own nirvana fallacy: taking an overly rosy view of the capacities of administrative agencies. See William N. Eskridge, Jr., *No Frills Textualism*, 119 HARV. L. REV. 2041, 2046 (2006) (reviewing VERMEULE, *supra* note 126).

¹⁷³ Rachlinski & Farina, *supra* note 128, at 560.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 572.

ing authority would be allocated between agencies and courts in a way that takes into account each institution's relative strengths and weaknesses.

D. Previous Institutional Analyses

In deciding how best to structure judicial review, some legal academics have undertaken the kinds of institutional analyses discussed earlier. In his recent book, *Judging Under Uncertainty: An Institutional Theory of Legal Interpretation*, for example, Adrian Vermeule argues that, based on what we know about the relative strengths of agencies and courts, there is strong reason to think that agencies will interpret legislative history far more reliably than courts do.¹⁷⁶ Legislative history is difficult for courts to analyze effectively, Vermeule argues, because it is more voluminous and heterogeneous than most materials courts consider in interpreting statutes.¹⁷⁷ Legislative histories can run into the thousands of pages and involve a wide variety of types of documents.¹⁷⁸ Vermeule contends that the volume and heterogeneity of legislative history not only make it difficult for courts to comb the legislative history for relevant information, but also induce courts to entertain cognitive biases such as preconception (that is, favoring material that suits a judge's preconceptions) and salience (giving undue weight to information that appears more specific, regardless of the reliability of the source).¹⁷⁹ In addition, courts usually rely on the parties to gather and present the relevant information to the court through the adversary process. But with legislative history, the parties may not be in a position to anticipate what information will be relevant to the court's analysis.¹⁸⁰ Even where they can anticipate what information will be relevant, the parties may overlook probative information or misperceive its potential significance.¹⁸¹

Vermeule contrasts the problems that courts face in interpreting legislative history with administrative agencies, whose specialization and experience give them greater expertise and familiarity with which to evaluate legislative history.¹⁸² As compared with courts, agencies

¹⁷⁶ See VERMEULE, *supra* note 126, at 111, 113, 115 (emphasizing agencies' familiarity with particular statutes and legislative histories, and noting that "agencies can amortize the costs of comprehending legislative history over a long series of related cases and rulemaking ventures").

¹⁷⁷ *Id.* at 110–14.

¹⁷⁸ *Id.* at 110, 112–13.

¹⁷⁹ *Id.* at 113–14.

¹⁸⁰ *Id.* at 111.

¹⁸¹ *Id.*

¹⁸² *Id.* at 115, 209, 213.

have better technical competence, a better understanding of the context and compromises surrounding the legislative history, and greater political responsiveness, which “gives them superior information about both public values and policy-relevant facts.”¹⁸³

The characteristics that Vermeule observes for legislative history also aptly describe premise facts, probably even more so than legislative history. The information potentially relevant to premise facts, for example, is even more voluminous and heterogeneous than a legislative history. Indeed, because there are no rules restricting what information courts may consider in deciding premise facts, the potential body of information to which courts could look in considering premise facts is essentially unlimited in volume and heterogeneity; that body of information ranges from the judge’s own hunch to a peer-reviewed scientific study. And there is no question that agencies’ advantages in assessing legislative history—for example, technical expertise and experience—are even more pronounced for assessing premise facts.¹⁸⁴ In sum, Vermeule’s analysis of the problems that legislative history poses for courts also seems to support the idea that courts have great difficulties analyzing premise facts, and that agencies likely are in a better position than courts to analyze premise facts.

On the other hand, Jeffrey Rachlinski and Cynthia Farina as well as Mark Seidenfeld have used institutional analyses drawing on cognitive psychology to argue in favor of judicial review of agency action. Rachlinski and Farina argue that judicial review is an “excellent cure[]” for agencies that are “predictably vulnerable to expert myopia and overconfidence.”¹⁸⁵ Judicial review under the APA forces agencies to articulate the bases for their decisions, to consider alternate courses of action, and to respond to outside comments, all of which are consistent with mechanisms shown by cognitive psychology research to reduce cognitive bias.¹⁸⁶

Seidenfeld offers a more detailed explanation of why cognitive psychology may support judicial review of agency action, based on the claim that agencies may improve their decisionmaking in anticipation

¹⁸³ *Id.* at 213.

¹⁸⁴ *See supra* Part III.A.

¹⁸⁵ Rachlinski & Farina, *supra* note 128, at 588.

¹⁸⁶ *Id.* at 588–89. Rachlinski and Farina acknowledge, however, that if judicial review is to serve this beneficial function, it must maintain deference to agency decisionmaking because much of the gain from delegating decisionmaking to expert agencies is lost if judicial review allows courts to supplant agency judgments. *Id.* at 589, 600.

that a court will hold them accountable for their decisions.¹⁸⁷ He draws on psychological research suggesting that “accountability, if properly structured, can significantly improve the quality of decision-making in the sense of minimizing the extent to which individuals unthinkingly rely on inappropriate decisionmaking rules or fall prey to psychological biases.”¹⁸⁸ Accountability tends to improve the quality of decisionmaking if the decisionmaker (1) is aware in advance that she will have to explain her decision; (2) perceives the reviewer as legitimate; (3) does not know the identity of the reviewer; and (4) believes the review is process oriented rather than outcome oriented.¹⁸⁹ Judicial review of agency action appears to meet these criteria. Agencies, of course, understand that their decisions can be challenged, and they undertake rulemaking in the shadow of judicial review.¹⁹⁰ Judicial review is a core feature of the APA, and agency staffers likely perceive it as legitimate.¹⁹¹ Agencies usually do not know which judge or judges, or sometimes even which court, will review their decisions.¹⁹² And agencies believe, correctly or incorrectly, that judicial review under the APA’s “arbitrary and capricious” standard is more process oriented than outcome oriented.¹⁹³ Seidenfeld argues that judicial review is likely to reduce certain biases that cognitive psychology would expect to arise in agency decisionmaking: biases that result from shortcuts in processing information or an unwillingness to think self-critically.¹⁹⁴

Seidenfeld’s analysis suggests that Vermeule’s argument in favor of structuring judicial review based on agencies’ and courts’ comparative advantages¹⁹⁵ may be too simplistic. Seidenfeld’s insight is that the relationship between agencies and courts may be more complex than it seems,¹⁹⁶ structuring judicial review to improve agency decisionmaking therefore may involve more than just deciding which institution does what better. In particular, Seidenfeld’s analysis suggests that the involvement of courts may lead agencies to improve their ca-

¹⁸⁷ Mark Seidenfeld, *Cognitive Loafing, Social Conformity, and Judicial Review of Agency Rulemaking*, 87 CORNELL L. REV. 486, 522–26 (2002).

¹⁸⁸ *Id.* at 508.

¹⁸⁹ *Id.* at 512–13.

¹⁹⁰ *Id.* at 513–14.

¹⁹¹ *See id.* at 515–16.

¹⁹² *See id.* at 516.

¹⁹³ *Id.* at 518–22.

¹⁹⁴ *Id.* at 522.

¹⁹⁵ *See supra* text accompanying notes 176–83.

¹⁹⁶ *See* Seidenfeld, *supra* note 187, at 488 (challenging as incomplete the conventional wisdom that agencies “adhere to basic principles of rational decisionmaking”).

capacity to generate decisions that effectuate their goals, even if agencies already are better decisionmakers than courts.¹⁹⁷ And this observation might offer a convincing rationale for giving courts an active role even in matters where agencies have a clear comparative advantage.

Having said that, Seidenfeld's analysis, as well as Rachlinski and Farina's, have their own problems. First, neither adequately considers the numerous aforescribed disadvantages that courts have in assessing factual issues arising in agency review cases. Second, although both analyses convincingly support giving courts some role in reviewing agency decisions,¹⁹⁸ their more specific argument in favor of existing doctrine relies on an overly simplistic conception of the relationship between agencies and courts. In particular, their analyses fall into the trap of assuming that choices about how to structure judicial review essentially reduce to a question of how much deference courts should give agencies.

Because judicial review of agency action involves a delicate balance between deference and scrutiny, the natural response to any problem that arises in agency review cases is to advocate either more deference or more scrutiny. With the problem of premise facts, however, neither increased deference nor increased scrutiny yields a satisfactory response.

Increased deference to agency decisions initially might seem an appropriate response to courts' relative inferior competence and capacity to address factual premises underlying questions of statutory interpretation. One might reasonably ask why a court, facing a question of interpretation that depends on a factual premise, should not just affirm the agency's action in the face of uncertainty about the premise fact.

Increased deference to agencies would not adequately or appropriately respond to courts' limited competence and capacity to gather and analyze information regarding premise facts. Judicial review provides an important check on administrative power.¹⁹⁹ And Seidenfeld's analysis suggests that it also improves the quality of agency decisionmaking. Simply deferring to agencies in the face of any uncertainty about a factual premise would significantly curtail

¹⁹⁷ See *id.* at 547–48.

¹⁹⁸ See Rachlinski & Farina, *supra* note 128, at 588–89 (discussing the effects of hard-look review, including the reduction of decisional bias); Seidenfeld, *supra* note 187, at 490 (“[J]udicial review does improve the overall quality of rules.”).

¹⁹⁹ See *supra* Part I.B.

these benefits and thus would not constructively respond to the challenge that premise facts present to judicial review; deferring does not address the causes of the uncertainty and does nothing to improve courts' ability to address premise facts. What would be helpful would be a process for improving courts' capacity whereby an agency develops an administrative record focused on the factual premises that are of concern to the court, thereby allowing the court to address premise facts with more information.

If more deference would not work, what about more scrutiny? Instead of asking why not defer to the agency when the court is uncertain, one could ask why courts should not, in the face of uncertainty, just set aside the agency action and remand to the agency for further explanation. After all, such a decision would express the court's concerns with the underlying factual basis for the agency's position, but preserve the possibility that the agency, with a better explanation of its reasoning, could satisfy the court. But setting aside an agency action when the court is uncertain about an underlying factual premise of the agency decision would effectively resolve all uncertainty in premise facts against the agency. Because agencies for the most part are not obligated to address every potentially relevant factual premise,²⁰⁰ courts lack the authority to remand an agency action merely because they are uncertain about a premise fact. Moreover, because predicting which premise facts might be relevant to judicial review of an agency action is often impossible, requiring agencies to address every potentially relevant fact would bring agency decisionmaking to a standstill. The answer to the problem of premise facts in agency review cases thus does not lie in more deference or more scrutiny.

IV. A New Approach to Premise Facts

By now it should be clear that the problem of premise facts plays a crucial role in judicial review of agency action, that courts reviewing agency actions face enormous obstacles to deciding premise facts effectively, and that there are strong reasons to believe that agencies are more reliable deciders of premise facts. Still, the solution to this problem is not to divest courts of their authority or responsibility to address premise facts. In addition to its impracticality—after all, eventually courts will need to address premise facts that the agency overlooked or, for whatever other reason, simply did not address—

²⁰⁰ See *supra* Part II.B.

such an approach would squander opportunities for courts to play a constructive role in evaluating premise facts.

In this Part, I propose an approach to addressing premise facts in agency review cases that would give agencies primary authority to decide premise facts—and, consequently, primary authority over statutory interpretations that depend on premise facts—while maintaining judicial review. This approach is founded on two claims, one functional and one doctrinal. First, the agency-court relationship is and should be iterative rather than unidirectional. Agencies and courts each respond to one another's decisions, and policies and legal principles emerge as a product of this cycle of agency-court interactions. Second, *Chevron* and *Brand X* reflect and support the application of this iterative structure to statutory interpretation in general, and to premise facts specifically. Applying the *Brand X* principle to premise facts yields the conclusions that agencies have the authority to reconsider prior judicial statutory interpretations that rest on factual premises, and that courts must treat agency determinations of premise facts deferentially, even when prior judicial precedent relied on contrary findings or assumptions.

A. *Reconceptualizing the Agency-Court Relationship*

Most administrative law conceives of judicial review as a unidirectional process: agencies make decisions which, once final, courts then review.²⁰¹ And the previous institutional analyses of agencies and courts considered in Part III.D are no exception. But judicial review is better understood, perhaps, as part of an ongoing iterative process through which policy decisions emerge from a cycle of agency-court interactions.²⁰² Courts review agency actions, but then agencies

²⁰¹ See *Reliable Automatic Sprinkler Co. v. Consumer Prod. Safety Comm'n*, 324 F.3d 726, 731 (D.C. Cir. 2003) (noting that the district court's "authority to review the conduct of an administrative agency is limited to cases challenging 'final agency action'" (quotation omitted)). This rule of finality is codified in the APA. 5 U.S.C. § 704 (2006). Finality is not, moreover, the only limitation on the availability of judicial review. See, e.g., *id.* § 701(a)(1) (providing for express preclusion of judicial review by organic statutes); *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 732 (1998) (judicial review unavailable where issues not ripe for preenforcement resolution); *Lincoln v. Vigil*, 508 U.S. 182, 184 (1993) (judicial review unavailable if agency action is "committed to agency discretion by law" (quotation omitted)); see also *Darby v. Cisneros*, 509 U.S. 137, 154 (1993) (exhaustion of administrative remedies required only where organic statute expressly requires). At times, then, the unavailability of judicial review may render administrative law cases even less than unidirectional.

²⁰² Some judges and commentators have used the idea of dialogue, or similar terms, to describe the iterative character of the relationship between courts and agencies, although often it is unclear whether they are referring merely to a dialogue within a single case, or to a broader

respond to court decisions.²⁰³ When a court sets aside an agency decision and remands, the agency has the opportunity to reconsider its decision in light of the court's ruling.²⁰⁴ Even when a court upholds an agency decision, the agency considers the court's decision as precedent that may be relevant to other agency actions.²⁰⁵ In considering this precedent, the agency is not merely a passive recipient of judicial dictates. The agency must decide, for example, whether to follow the court's precedent. Judicial decisions reviewing agency action are preclusive only as to the specific action under review, and many judicial decisions have little or no binding precedential authority.²⁰⁶ More important, the agency has an opportunity to decide what the judicial precedent means. Judicial decisions inevitably leave many specific questions unaddressed, and agencies acting in the wake of judicial precedent have considerable discretion to decide, at least in the first in-

cycle of agency-court interactions. See, e.g., CHRISTOPHER F. EDLEY, JR., *ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREAUCRACY* 201 (1990) (advocating that courts and agencies engage in "a dialogue about whether and how the political discretion to avoid costly regulation is constrained by law and science"); Harry T. Edwards, *Collegiality and Decision Making on the D.C. Circuit*, 84 VA. L. REV. 1335, 1346 (1998) (noting that judicial review of agency action resulting in remand without vacation "is in some ways a dialogue between the court and the agency"); Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1550 (1992) (advocating judicial review of agency action that "would become a meaningful dialogue between court and agency in which the court stands in for the knowledgeable citizen that the agency must persuade to accept the regulatory policy"); Wald, *supra* note 75, at 647–48 (noting that Judge Harold Leventhal "spoke of agencies and courts as 'collaborative instrumentalities of justice' and a 'partnership in furtherance of the public interest'" (quoting *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851–52 (D.C. Cir. 1970))).

²⁰³ Sometimes there are multiple cycles of remand and judicial review over the course of a single case. See, e.g., *Neighbors of Cuddy Mountain v. Alexander*, 303 F.3d 1059, 1063 (9th Cir. 2002) (reviewing challenge to United States Forest Service decision made on remand following a prior court decision that had set aside the agency's original decision).

²⁰⁴ See, e.g., *Friends of the Boundary Waters Wilderness v. Bosworth*, 437 F.3d 815, 822–23 (8th Cir. 2006) (affirming United States Forest Service's authority to correct an error revealed by a prior judicial decision, even though the prior decision did not direct the agency to correct the error on remand); *Se. Mich. Gas Co. v. Fed. Energy Regulatory Comm'n*, 133 F.3d 34, 38 (D.C. Cir. 1998) (affirming Federal Energy Regulatory Commission's ("FERC") authority to reconsider its entire original decision upon remand from reviewing court where the scope and purpose of remand were limited to FERC clarifying its reasoning).

²⁰⁵ See *Native Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d 1233, 1250–51 (9th Cir. 2005) (reviewing United States Forest Service's compliance with a decision methodology test previously articulated in *Lands Council v. Powell*, 395 F.3d 1019, 1036 (9th Cir. 2005)).

²⁰⁶ See *Indep. Petroleum Ass'n of Am. v. Babbitt*, 92 F.3d 1248, 1261 (D.C. Cir. 1996) (Rogers, J., dissenting) (citing cases in support of the proposition that "[e]ven after one circuit has disagreed with its position, an agency is entitled to maintain its independent assessment of the dictates of the statutes and regulations it is charged with administering, in the hope that other circuits, the Supreme Court, or Congress will ultimately uphold the agency's position").

stance, how a new judicial decision should be construed and applied.²⁰⁷

This iterative model aptly describes some aspects of the agency-court relationship, but it also exposes the weaknesses of how courts currently treat premise facts. Often courts purport to adopt a definitive interpretation of a statute based on a factual premise.²⁰⁸ In doing so, courts fail to consider whether additional information or analysis from the expert agency might better inform interpretation. Likewise, courts fail to consider whether the premise fact might be a source of statutory ambiguity. In this way, courts are truncating the iterative relationship and cutting off dialogue with the agency. Without an iterative process, courts receive little information about the premise facts that arise in agency review cases; courts also have relatively little ability to analyze and understand the information they do receive.²⁰⁹ This short-circuiting of the iterative process, whether intentional or inadvertent, necessarily decreases the quality of the interpretive process.

But just as the more sophisticated, iterative model of the agency-court relationship exposes the weaknesses of how courts currently treat premise facts, the iterative model simultaneously illuminates intriguing opportunities for innovative improvements to judicial review that would draw on the relative strengths of agencies and courts. Just as Mark Seidenfeld has argued that judicial review of agency decisions may mitigate some of the difficulties and limitations that plague agencies,²¹⁰ giving agencies an active role in reconsidering judicial decisions may mitigate some of the difficulties and limitations that courts encounter when they decide premise facts *de novo*. Softening the finality of judicial determinations of premise facts would facilitate a cycle

²⁰⁷ In the wake of the Supreme Court's decision in *Rapanos v. United States*, 547 U.S. 715 (2006), for example, the Army Corps of Engineers and the EPA issued guidance "to ensure that jurisdictional determinations, administrative enforcement actions, and other relevant agency actions being conducted under the [CWA] are consistent with the *Rapanos* decision and provide effective protection for public health and the environment." EPA and Army Corps of Engineers Guidance Regarding Clean Water Act Jurisdiction after *Rapanos*, 72 Fed. Reg. 31,824, 31,824 (June 8, 2007).

Similarly, the Food and Drug Administration issued guidance in response to district court cases interpreting provisions of the Federal Food, Drug, and Cosmetic Act. Guidance for Industry on Court Decisions, ANDA Approvals, and 180-Day Exclusivity Under the Hatch-Waxman Amendments to the Federal Food, Drug, and Cosmetic Act; Availability, 65 Fed. Reg. 16,922 (Mar. 30, 2000).

²⁰⁸ See, e.g., *supra* text accompanying notes 7–21 (discussing *Rapanos v. United States*, 547 U.S. 715 (2006)); *supra* text accompanying notes 106–11 (discussing *Ecology Ctr., Inc. v. Austin*, 430 F.3d 1057 (9th Cir. 2005)).

²⁰⁹ See *supra* Part II.A.

²¹⁰ See *supra* notes 187–94 and accompanying text.

of agency-court interactions deliberating over the relevant premise facts, allowing courts to take advantage of agencies' superior capabilities and authority in addressing premise facts.²¹¹

Fortunately, *Chevron* and its progeny—*Brand X* especially—reflect an iterative model of the agency-court relationship and thereby create a doctrinal opening for improving the way premise facts are developed in agency review cases. *Chevron*, for example, endorses the possibility that an agency can interpret a statutory provision, receive judicial approval of that interpretation, and then subsequently change its interpretation and receive judicial approval of that new interpretation as well.²¹² The meaning of the statutory provision in question, then, evolves as the product of a series of agency-court interactions. *Brand X* extends this principle by holding that agencies are not bound by a court's de novo interpretation of an ambiguous statutory provision.²¹³ With this doctrinal foundation in place, an iterative model framework for determining premise facts in agency review cases becomes possible.

B. Building on the Chevron and Brand X Foundation

Doctrinally speaking, the allocation of authority between agencies and courts to decide premise facts depends largely on how premise facts are treated under the *Chevron* framework. Are premise facts a “traditional tool[] of statutory construction” over which courts have final authority?²¹⁴ Or are premise facts a source of statutory ambiguity that falls within the province of the agency? The answer to this question is crucial. If courts have final authority to decide premise facts, then there is little an agency can do, in the wake of a judicial interpretation resting on a premise fact, to address deficiencies or

²¹¹ Barry Friedman has written analogously of judicial review in constitutional interpretation as a dialogue with the people and democratic institutions. Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 653–55 (1993). Friedman points out that judicial decisions sometimes are not final in the sense that the political branches can test a court decision by, for example, taking action that raises the issue again, thereby forcing courts to revisit, even if only to reaffirm, prior decisions. *Id.* at 647–48 (discussing state legislative attempts to narrow and challenge *Roe v. Wade*, 410 U.S. 113 (1973)). Moreover, the indeterminacy of the Constitution contributes to the lack of judicial finality, because no single interpretation of a constitutional provision is likely to gain permanent acceptance. *Id.* at 651. Friedman observes that a lack of finality in a judicial decision enables and facilitates a productive dialogue between the judiciary and the political branches over constitutional interpretation. *See id.* at 652–53.

²¹² *See Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 863–64 (1984).

²¹³ *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982–83 (2005).

²¹⁴ *See Chevron*, 467 U.S. at 843 n.9.

limitations in the court's reasoning. Such an outcome would be unfortunate, because, as Part III explained, agencies have considerably greater capabilities than courts in assessing premise facts.²¹⁵

Premise facts should be considered a source of statutory ambiguity under *Chevron* and therefore fall within an agency's primary authority. *Chevron* held that statutory ambiguity, and consequently agency interpretive authority, exists where the statutory language does not speak to "the precise question at issue."²¹⁶ Where statutory meaning depends on a legislative fact that the statute itself does not answer, the statute does not answer the precise question at issue. In other words, that premise fact is a source of statutory ambiguity. It follows from *Chevron*, moreover, that the responsibility and authority to decide that fact, and thereby to determine the statutory meaning (or at least to choose among the range of reasonable statutory meanings), rests primarily with the administrative agency that administers the statute, not with the courts.²¹⁷

This is true regardless how certain the court is about the premise fact. The determinative question under *Chevron* is whether Congress spoke to the precise question, not whether the court thinks the question should otherwise be clear. And yet some premise facts may be so clear that, even though the statute is silent as to those premise facts, the agency is not left with a meaningful choice among interpretive options. But in such situations, it is reality itself, rather than the statute, that constrains the agency.

Because premise facts are a source of statutory ambiguity under *Chevron*, it follows that the *Brand X* principle applies to judicial interpretations based on premise facts. *Brand X* holds that agencies may revisit de novo judicial interpretations of ambiguous statutory provisions on the ground that *Chevron* assigns agencies the primary responsibility and authority to interpret ambiguous statutory provisions.²¹⁸ The *Brand X* principle can be applied to the problem of premise facts in agency review cases and should be understood to encompass not only judicial conclusions about the meaning of a statutory provision, but also any subsidiary premise facts as well. It thus follows from *Brand X* that, where a court has adopted an interpretation of a statutory provision based on a premise fact, the agency administering the

²¹⁵ See *supra* Part III.B.

²¹⁶ *Chevron*, 467 U.S. at 842.

²¹⁷ *Id.* at 843.

²¹⁸ *Brand X*, 545 U.S. at 982–83.

statute retains the authority and responsibility to revisit the premise fact, and thereby revisit the court's statutory interpretation.

Ideally, of course, the factual premises of a court's interpretation of a statutory provision will have been addressed by the agency in the course of its decisionmaking. In this scenario, the agency decides a legislative fact in the course of its decision, and the court reviewing the agency's decision evaluates the agency's factfinding under a deferential standard of review.²¹⁹ Often, however, in the course of reviewing an agency decision, a court incorporates a legislative fact that the agency did not reach in the course of its decision.²²⁰ In such situations, the court can and must decide the fact *de novo* because there is no underlying agency factfinding to review. But in that situation, the agency is not bound by the court's factfinding and may revisit the underlying factual premise of the court's decision. As the Court remarked in *Brand X*, to hold otherwise and bind the agency to the court's prior decision would mean that authority to interpret the statutory provision nonsensically depends "on the order in which the judicial and administrative constructions occur."²²¹

Not only is my proposal doctrinally sound, resting squarely on *Chevron* and *Brand X*, but it is functionally sound as well. Part III showed that there are strong reasons to conclude that courts often are in a poor position to evaluate premise facts underlying judicial interpretations of complex regulatory statutes.²²² Because premise facts play a critical role in statutory interpretation, and because courts have great difficulty assessing premise facts *de novo*, one would expect that allowing agencies to revisit judicial interpretations of statutory provisions that rest on factual premises would improve statutory interpretations that arise from judicial review of agency action.

C. Practical Advantages

My proposed approach to premise facts in agency review cases posits the following: where a court interprets a statutory provision based on a factual premise, the agency that administers the relevant organic statute may reconsider the premise fact—and the statutory interpretation on which it relies—in a subsequent proceeding. The agency would not be bound by the court's initial factual finding or assumption in the prior litigation; instead, the agency would be free to

²¹⁹ See *supra* note 51 and accompanying text.

²²⁰ See *supra* notes 119–24 and accompanying text.

²²¹ *Brand X*, 545 U.S. at 983.

²²² See *supra* Part III.B.

develop an administrative record addressing the factual issue in question and make its own finding based on its analysis of that record. The agency's new finding, in turn, would be due deference from a reviewing court if the agency's interpretation were challenged in litigation.

This application of the *Brand X* principle to premise facts would improve statutory interpretation by giving expert agencies a more active and constructive role in assessing premise facts. The agency and other interested parties would have time to work through the practical dimensions of a legal issue. This "working through" would utilize the administrative process, with all of its advantages over judicial processes for legislative factfinding,²²³ to build a better record for both the agency's factfinding and any subsequent judicial review. This approach also would preserve the possibility of revisiting an issue based on the results of this further factual development. This would introduce some additional fluidity into the case law,²²⁴ but the subsequent examinations of the issue, either at the administrative or judicial level, would be more satisfactory as a result of the further development of the issue that occurred in the interim. Thorny questions of statutory interpretation would unfold as a collaboration between courts and agencies, with each branch of government's efforts focused on what it does best: agencies reviewing facts, and courts applying interpretive principles to those facts.

The process of interpretation of a statutory provision through this approach would be both iterative and progressive. It would be iterative in the sense that facts would remain open for reexamination through an ongoing conversation between agencies and courts. Despite this possibility of repeat reconsideration, the process would nevertheless be progressive in the sense that, when an agency or court reexamined a factual premise, its review would have to consider the entire record before the agency, including both (1) new evidence and information that became available and was presented to the agency by interested parties plus (2) any information developed during earlier iterations. Although an issue would remain open for repeated reconsideration, additional information and analysis often would clarify the issue in a way that narrowed the range of reasonable alternative resolutions as the cases progressed.

The process that this approach would entail is superior to the structure of existing approaches to judicial review, which exacerbates

²²³ See *supra* Part III.A.

²²⁴ See *infra* Part V.B (examining this potential objection in more detail).

rather than mitigates limitations on courts' ability to evaluate the factual complexities of the issues raised. Under current doctrine, courts generally feel obligated to resolve a premise fact in the first case in which it is squarely presented, regardless of how poorly developed the record or how poorly the court understands the issue. Courts seldom recognize, moreover, that potential uncertainty about a factual premise is a source of statutory ambiguity over which agencies' interpretive authority is superior to the courts'. Instead, courts seem to assume that statutory ambiguity for *Chevron* purposes should be assessed after the court has settled on its factual premises. That is, if the application of the statute to the court's chosen factual premises is clear, then the court acts as if the statute itself is clear and unambiguous. Failing to recognize premise facts as a source of statutory ambiguity, therefore, improperly allocates primary interpretive authority to the court rather than the agency. Clarifying that the *Chevron* framework and the *Brand X* principle extend to factual premises, by contrast, would give agencies time to develop more of a record about the underlying factual dimension of a legal issue, and courts room to consider such additional information when the issue recurs in a subsequent case. The result would be better statutory interpretation.

This new approach would also have the potential to improve judicial decisionmaking more indirectly. Highlighting agencies' primary authority over premise facts would encourage agencies to consider premise facts more proactively and with confidence that courts would review their analysis deferentially. It also would invite courts to undertake a more searching and thoughtful analysis of questions of statutory interpretation by giving them an incentive to identify, explain, and support the factual premises on which they rely. To influence the agency's future reconsideration of premise facts, courts would face a strong incentive to articulate their interpretive analysis. Where, on the other hand, courts referred in the course of their reasoning to particular facts that they did not consider determinative of the legal issue they were addressing, they would face a strong incentive to make that nondeterminativeness clear as well, and thereby avoid tempting agencies to reconsider the court's statutory interpretation.

Ideally, courts would be frank in assessing their capacity to address the factual premises of their interpretations, and articulating whether more information or more development of the factual premises might support a different interpretation. But the authority of an agency to revisit a court's premise factfinding would not depend on an explicit invitation from the court; nor even would it depend on an ac-

knowledge from the court that its premise fact was uncertain. The very existence of the premise fact renders the statutory provision ambiguous and confers primary interpretive authority on the agency. Moreover, there is reason to doubt that courts have the self-awareness and humility to identify situations in which their factual premises rest on questionable ground—and that courts would be willing to encourage agencies to take an active role in reconsidering courts' factual assumptions is equally questionable. Indeed, the benefits of involving agencies in the reexamination of premise facts may be greatest in the cases where courts are the least aware of their limited understanding of the relevant issues and therefore least likely to call upon agencies.

No doctrine could force judges to become more self-conscious and open about the limits of their competence to address the issues before them. Nevertheless, knowing that their statutory interpretations would be subject to reconsideration would give courts an incentive to offer more robust explanations, reasoning, and evidence in support of their findings or assumptions of premise fact. Some courts, moreover, might take such a discussion as an opportunity to address more openly their own capacity limitations, the factual premises that underlie their legal reasoning, and the possibility of error that arises as a result.

D. Agency Responses

How an agency might choose to respond to a decision in which a court interpreted a statute based on a factual premise, either explicit or implicit, would depend on the circumstances of the case. Some generalizations, however, are possible. When a court reviews an agency action, and premise facts come into play, four different scenarios, detailed below, are possible. Each scenario is illustrated by reference to hypothetical, simplified variations of the *Rapanos* case discussed in the Introduction.

Scenario One. The court's review of the agency's decision relies on a premise fact that the agency addressed in its decision, and the court concludes that the record sufficiently supports the agency's resolution of the premise fact. For example, the Army Corps of Engineers and the EPA make a finding that discharging dredged and fill material into wetlands affects downstream water quality, the Supreme Court concludes that the record supports the agencies' determination, and on that basis, the Court interprets the CWA to cover discharges of dredged and fill material into upstream wetlands.

A court ultimately may uphold the agency's decision, or it may set it aside on an alternate ground—for example, on the ground that the wetlands at issue in the case are not upstream wetlands. Because the court reviews the agency's action under the deferential arbitrary and capricious standard, the court's determination that the record supports the agency's resolution of the premise fact would not necessarily exclude the possibility that the record also would support another resolution—for example, a subsequent determination, based on new scientific information, that dredged and fill material discharged into wetlands affects downstream water quality only in certain limited circumstances. Accordingly, it follows that the court's decision, whether upholding the agency action or setting it aside on an alternate ground, would not conclusively resolve the premise fact and would not foreclose the agency from revisiting the premise fact in the future.

Scenario Two. The court's review of the agency's decision relies on a premise fact that the agency addressed in its decision, and the court concludes that the record does *not* support the agency's resolution of the premise fact. For example, the Army Corps of Engineers and the EPA make a finding that discharging dredged and fill material into wetlands affects downstream water quality, but the Supreme Court concludes that the record does not support the agencies' determination, and on that basis the Court interprets the CWA not to cover discharges of dredged and fill material into certain upstream wetlands.

A court may set aside the agency action based on the agency's inadequate determination of the premise fact, or it may uphold the agency's decision on an alternate ground—for example, on the ground that the type of wetlands involved in the case threatens downstream water quality. In either circumstance, the court would not be understood to have resolved the premise fact, but merely to have reviewed the adequacy of the agency's determination of the premise fact. On remand to the agency, or in a subsequent action if the court affirms the agency action on an alternate ground, the agency would have to reconsider the premise fact in light of the court's critique. The agency could decide the premise fact differently—for example, agreeing with the court that discharging dredged and fill material into wetlands does not affect downstream water quality. Or, the agency could reach the same decision on the premise fact with a different explanation that addressed the court's critique—for example, by coming forward with additional scientific evidence to buttress its earlier, rejected, determination.

Scenarios Three & Four. In both of these scenarios, the court's review of the agency's decision relies on a premise fact that the agency did not address in its decision. In Scenario Three, the court upholds the agency action based on the premise fact. For example, the Army Corps of Engineers and the EPA do not address whether discharging dredged and fill material into wetlands affects downstream water quality, but the Supreme Court nevertheless reaches its own conclusion that this is the case, and on that basis interprets the CWA to cover discharges of dredged and fill material into upstream wetlands. In Scenario Four, the court sets aside the agency action based in part on the premise fact. For example, the Army Corps of Engineers and the EPA do not address whether discharging dredged and fill material into wetlands affects downstream water quality, and the Supreme Court reaches its own conclusion that it does not have such an effect, and on that basis interprets the CWA not to cover discharges of dredged and fill material into certain upstream wetlands. Here, the crucial insight is that the *Brand X* principle would apply and would clarify the precedential effect of the court's decision. The court's decision, properly understood, would not conclusively resolve the factual premise, and the agency would retain the authority to reconsider the factual premise in a subsequent decision.²²⁵

Although these four scenarios are distinct conceptually, in practice it will not always be clear into which scenario a case falls. The distinctions between the scenarios depend on how factual premises affect the court's interpretation, but courts often are opaque about the role that factual premises play in their reasoning. A court may assume factual premises without stating them. Even where a court states a fact, it may not clearly identify the role of the fact in the court's interpretation. That is, a court interpreting a statute may cite a fact that it considers supportive of its reasoning, but without explaining whether the fact is outcome determinative to the court's interpretation. In these types of circumstances, the court's failure to acknowledge ex-

²²⁵ Each of these scenarios describes a case in which the court relies on the premise fact as a basis for its decision. There may be other cases in which the court reviews the agency action without reaching a fact that formed a premise of the agency's decision. For example, continuing the simplified *Rapanos* hypothetical, the Army Corps of Engineers and the EPA make a finding that discharging dredged and fill material into wetlands affects downstream water quality, but the Supreme Court interprets the CWA as it applies in the case without reaching that factual question. In that circumstance, all options remain open to the agency: to decide the premise fact similarly in a future decision or to reconsider the fact. Of course, the agency's evaluation of the premise fact has not passed judicial muster, and the possibility remains that a court in a subsequent case may find the agency's evaluation inadequate.

pressly that its interpretation rested on a factual premise should not necessarily preclude the agency from reconsidering the premise fact and the interpretation.

An agency's authority to reconsider a prior judicial interpretation of a statute based on a factual premise should not be limited to cases in which the court in the prior case explicitly acknowledged the premise—that is, where the court both identified the premise and its determinativeness to the court's interpretation. Such a narrow construction of agencies' authority to decide premise facts would be significantly underinclusive insofar as it would essentially read all uncertainty against the agencies. Courts often are neither aware of nor transparent about the role of factual premises in their decisions, and so limiting agencies' authority to cases in which courts were explicit about the role of premise facts in their decision would unduly limit agencies' authority. Giving agencies leeway to reconsider implicit factual premises of judicial interpretations would improve statutory interpretation. Indeed, courts would have an incentive to be more transparent about the role of factual premises in their decisions: to constrain agencies' authority to reconsider statutory interpretation to cases in which factual premises were determinative. Still, an agency undertaking a reconsideration of a premise fact and the statutory interpretation on which it may have rested would bear the burden of demonstrating that the prior judicial interpretation did actually rest on the premise fact in question. The more uncertain the role of a premise fact in a prior judicial interpretation, the more risk an agency would incur in reconsidering the judicial interpretation based on additional analysis of the underlying premise fact.

In each of these scenarios, the agency would have two options in the wake of the court's decision: (1) acquiesce in the court's interpretation, or (2) reexamine the factual premise through the agency's processes. If the agency preferred the court's interpretation, presumably, the agency would choose to acquiesce. Even if the agency preferred an alternative interpretation, however, there might be reasons why it would choose to acquiesce. Before asserting its authority to reexamine the factual premises of the court's decision, an agency would have to weigh the advantages and disadvantages. These would include consideration of the likelihood that the agency would be able to persuade a court in a future case to agree that the agency has authority to reconsider the prior judicial interpretation. Such an effort could be difficult in any case, but is especially so if the prior judicial interpretation did not acknowledge the determinative role of the fac-

tual premise in its reasoning or any basis for uncertainty about the premise fact. Even if the agency were confident of its authority to reexamine prior judicially found premise facts, the obstacle of having to convince a court that its (or another court's) prior interpretation left room for other interpretations (based on different factual premises) could be substantial. After overcoming these threshold questions, an agency still would have to convince the court to adopt the agency's interpretation over the prior judicial interpretation. Finally, even if the agency were optimistic about its likelihood of success on these points, the political and financial costs of reexamining a factual premise might lead the agency to choose to acquiesce.

To say that agencies have the authority to reconsider judicial determinations of premise facts is not to argue that agencies could disregard such determinations with impunity. Even a court that recognizes an agency's authority to reconsider a prior judicially found factual premise might be difficult to persuade that an alternative finding is also reasonable. Agencies would be well advised to point to new information or evidence not considered by the prior court. In many cases, agencies would face an additional strong incentive not to reconsider factual premises of prior judicial decisions. Obtaining a prompt and firm resolution of the issue often may be more valuable and more important to the affected interests in a case than getting it right. And in that circumstance, those interests would pressure agencies not to reconsider premise facts.

On the other hand, the agency is not the only interested entity that might respond to a judicial interpretation based on an uncertain premise fact. Where a court interpreted a statute in a manner that the agency preferred, based on a premise fact with which the agency concurred, opponents of the court's interpretation could use the agency's administrative process to build a record to challenge the premise fact. In that circumstance, the agency might have to address whatever information or analysis the opponents presented in order to defend its interpretation. Or, if a court decided to set aside an agency's interpretation, and the agency were inclined to acquiesce, someone who favored the agency's interpretation might offer new information or analysis supporting that interpretation, to which the agency might have to respond.

An agency also could experiment by adhering to the court's interpretation to test how it worked in practice. If the agency found the interpretation unworkable or otherwise unsatisfactory, it could choose in a subsequent decision not to follow the interpretation and then, if

sued, explain to the court why it chose to depart from the prior proposed principle and present the record that supported its explanation.

In each of these types of situations, the agency would face an incentive to develop an administrative record to address any underlying factual premises of its interpretation. Applying the *Brand X* principle to premise facts thus would not just leave legal issues undecided. Instead, it would set into motion a process for developing a better record for the agency, first, and then for the court, to interpret statutory provisions whose meaning depends on factual premises. It would do this in at least two ways. First, it would focus the agency's attention on the premise facts that the court deems relevant but that the agency may have overlooked. Second, it would create strong incentives for agencies to bring to bear their superior information-gathering and -analyzing capacity on premise facts, thereby facilitating the agency's, and eventually the court's, reconsideration of the premise fact and the statutory interpretation on which it relies.²²⁶

E. Scope of Application

This proposed approach would not apply in all agency review cases. Some agency review cases, of course, do not present any undecided legal issue; rather, in such cases, courts merely consider, for example, whether the agency's findings are supported by substantial evidence on the record²²⁷ or are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."²²⁸ And still others may present an undecided legal issue that can be resolved without any reasonable dispute as to factual premises because, for example, the plain language of the statute speaks clearly to the issue or the factual premises are already well developed and clear.²²⁹

In a significant number of cases, however, factual premises are potentially determinative, and more information about the premise facts might affect the interpretation of the statute. In such cases, my

²²⁶ Similarly, Barry Friedman has observed that one of the judiciary's functions in the constitutional system is to facilitate debate. See Friedman, *supra* note 211, at 668. In this function, according to Friedman, courts focus the debate, act as a catalyst for further debate, and shape the further debate. *Id.* at 669–70.

²²⁷ See, e.g., *Kimm v. Dep't of the Treasury*, 61 F.3d 888, 892 (Fed. Cir. 1995) (agency decision not based on substantial evidence where agency ignored administrative law judge's findings and did not explain its decision).

²²⁸ See 5 U.S.C. § 706(2)(A) (2006).

²²⁹ But see *supra* Part III.A–B (noting that courts' informational capacity limitations may prevent them from recognizing factual premises or causes for uncertainty about factual premises).

proposed approach would significantly improve the quality of interpretation. Some factors that would make reconsideration of a premise fact particularly helpful are detailed below.

First, reconsideration of premise facts would be most efficacious in cases where the court relied on a premise fact that the agency did not address thoroughly in the administrative record. Or, the agency addressed the premise fact in the administrative record but the fact nonetheless remains significantly uncertain because, for example, of a lack of empirical data. These are circumstances in which additional analysis by the agency would have the potential to increase the reliability of the relevant premise facts. The additional analysis might just involve gathering and analyzing already available evidence, but it also might involve generating new evidence by, for example, procuring new studies. The extent to which agencies address the legal reasoning relevant to their decisions varies greatly. In some cases, someone who opposes the agency's action has thoroughly presented a legal objection, to which the agency responds in detail in the administrative record. Such a dialogue may lead, in part, to an explicit discussion of potentially relevant premise facts, especially if the commenter and the agency disagree over such premise facts. In other cases, however, the agency and commenters may focus on the particular facts of the agency's decision, and less so on the factual dimensions of potential legal objections. This is where reconsidering a premise fact would be particularly helpful.

Second, the more frequently an issue recurs, the more efficacious reconsideration would tend to be. Where an issue arises often, the agency would know that the issue could come before a court soon, and accordingly would face a strong incentive to complete the reconsideration process quickly. Moreover, if a particular premise fact recurs frequently, reconsidering the fact would have a larger benefit.

Third, premise facts are more salient in the absence of directly relevant legal authority. Courts are experienced and adept at reasoning through precedent.²³⁰ Thoroughly reconsidering the factual dimensions of a legal issue tends to be less important where the issue, or a similar issue, is the subject of substantial prior reported case law. Indeed, where there is established precedent on a similar issue, courts understandably might be more inclined to decide the two issues consistently than to ensure that they have decided an issue correctly. Yet

²³⁰ Cf. *Rogers v. Tennessee*, 532 U.S. 451, 461 (2001) (noting that precedent "is the foundation of the common law system").

a court might not be competent, without additional information, to discern whether two issues were sufficiently factually similar that they should be treated alike, or whether they differed in material respects.

Fourth, the proposed approach would make the most difference in courts, like the federal courts of appeal, whose decisions create binding precedent. For courts like federal district courts, whose decisions do not create binding precedent,²³¹ there is less of a need for a new source of flexibility in deciding agency review cases, because the agency and others affected by the court's decision already are free to try to convince the court in a future case to adopt a different principle. Nevertheless, even nonbinding court decisions are treated as persuasive legal authority,²³² and the inquiry involved in reconsidering premise facts—that is, examining underlying factual dimensions of legal issues and identifying the potential benefits of additional information addressing those factual dimensions—would facilitate the analysis of courts in future cases even if they are not bound by the earlier court's decision.

V. Answering Potential Objections

This Part examines and rebuts four potential objections to my proposed approach to addressing premise facts in agency review cases: (1) that the proposal ignores the possibility that courts employ premise facts as legal fictions reflecting normative rather than descriptive or empirical concerns; (2) that it would allow agencies to disregard judicial precedent; (3) that it would erode stare decisis; or (4) that it would duplicate a response to adverse precedent that agencies already can achieve through nonacquiescence.

A. New Legal Fictions

One might object that the proposed approach to premise facts relies on an unduly optimistic or naive assessment of judicial candor with respect to factual premises. In particular, there may be situations in which a court cites a fact as if it were a premise of a legal rule, but where the court actually would not be willing to abandon the fact or to

²³¹ See *infra* note 258.

²³² See, e.g., *Ballard v. Burton*, 444 F.3d 391, 401 & n.7 (5th Cir. 2006) (considering persuasive, and relying on, one of the court's own unpublished opinions); cf. *Kreuzer v. Am. Acad. of Periodontology*, 735 F.2d 1479, 1490 n.17 (D.C. Cir. 1984) (drawing an analogy to the effect that, just as prior resolutions of legal issues by other courts of appeals are persuasive but not binding authority, so too are prior resolutions of ethical problems by the American Dental Association persuasive, but not binding authority on the American Academy of Periodontology).

consider changing the rule even upon a showing that the factual premise was false. Peter Smith has termed such premises, when they are false, “new legal fictions.”²³³ He identifies several reasons why courts might employ such premises, several of which involve some form of using the fiction to mask normative choices.²³⁴ For example, Smith posits that the Supreme Court’s “reasonable person” test for determining when questioning by law enforcement is custodial, and therefore requires *Miranda* warnings,

is not a descriptive claim about individual views of police coercion, but rather a normative judgment about when the particular legal consequences at issue—the obligation of law enforcement to provide *Miranda* warnings—ought to attach. This normative choice presumably is based on a balancing of liberty and order interests.²³⁵

Smith observes that new legal fictions are an affront to judicial candor,²³⁶ a highly beneficial norm that he and others contend should not be disregarded lightly.²³⁷

The analysis of premise facts presented in this Article has assumed that, when a court identifies a factual premise of its decision, the court is being candid. That is, if the premise fact were shown to be inaccurate, the court would be willing to abandon its factual premise and to reconsider the legal conclusion that relied on that premise. The possibility that courts are intentionally employing new legal fictions, however, challenges that assumption. But whether a premise fact is included in a judicial decision as a genuine factual premise or a new legal fiction used to obscure a normative choice will not generally be apparent on the face of the decision. Except in rare cases in which a court acknowledges that it is employing a new legal fiction rather than a genuine factual premise, new legal fictions are, on the face of the judicial decision in which they are used, just like any other premise fact.

²³³ Smith, *supra* note 138, at 1441. The “new” in *new legal fictions* distinguishes them from classic common law legal fictions. *See id.* at 1465, 1468–70.

²³⁴ *See id.* at 1473–75. Somewhat confusingly, at least for this Article’s purposes, Smith defines new legal fictions to include, in addition to intentional fictions, inaccurate factual premises that arise from a court’s genuine mistake of fact. *See id.* at 1472. As discussed below, such factual errors pose no difficulties for this Article’s proposed approach.

²³⁵ *Id.* at 1474.

²³⁶ *Id.* at 1484.

²³⁷ *See generally id.* at 1480–95 (assessing the virtues of judicial candor and referring to the works of David Shapiro, Lon Fuller, and John Rawls).

This Article's approach necessarily would treat all premise facts alike and not attempt to differentiate between genuine premise facts and new legal fictions. Accordingly, this approach might be faulted for being somewhat overinclusive in reallocating interpretive authority to agencies; the agency would have authority to reconsider premise facts that the court used as a normative, as opposed to descriptive or empirical, statement. But this would be a good thing. First, as a practical matter, because identifying new legal fictions often is difficult or impossible,²³⁸ there may be no alternative to treating new legal fictions as premise facts. Second, and more important, treating premise facts based on how they are objectively employed in the court's reasoning, rather than on the subjective intent of the court, would substantially benefit judicial decisionmaking.

Treating new legal fictions as premise facts would give courts a significant disincentive to employ new legal fictions, because to employ a new legal fiction in the guise of a factual premise would be to cede primary interpretive authority to the agency. This Article's approach to premise facts, then, would promote judicial transparency and candor. Moreover, by subjecting premise facts to reconsideration by agencies, this Article's approach would create a mechanism for empirically testing premise facts and thereby exposing new legal fictions.²³⁹ In the rare situations in which a new legal fiction may play an important and constructive role in legal interpretation, despite the lack of judicial candor, the agency would face a strong incentive to retain the new legal fiction upon reconsideration, or not to reconsider it at all, despite its empirical invalidity. At bottom, to the extent that new legal fictions arise in agency review cases, it seems unlikely that they would pose a problem for my approach.

B. Judicial Supremacy

Justice Scalia's dissenting opinion in *Brand X* criticized the Court's holding as "bizarre" and "probably unconstitutional," on the ground that the Court's rule allows agencies effectively to overturn a prior judicial decision.²⁴⁰ He regards this as an infringement on judicial supremacy,²⁴¹ the notion that it is the "province and duty" of the

²³⁸ Cf. *id.* at 1438 (acknowledging "room for debate over whether in fact the premises are false").

²³⁹ See *id.* at 1439 ("[W]e can identify a new legal fiction only if we have some way to determine the validity of the factual premises on which judges rely in crafting legal rules.").

²⁴⁰ *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 1017 (2005) (Scalia, J., dissenting).

²⁴¹ See *id.*

judiciary to “say what the law is.”²⁴² Because my proposed approach would allow agencies to revisit judicial statutory interpretations based on premise facts, the same critique might be leveled at my proposal. As the *Brand X* majority noted in response to Justice Scalia’s criticism, however, the agency is not overturning a prior judicial decision, because “*Chevron* teaches that a court’s opinion as to the best reading of an ambiguous statute an agency is charged with administering is not authoritative, [and so] the agency’s decision to construe that statute differently from a court does not say that the court’s holding was legally wrong.”²⁴³

Giving courts final authority to decide premise facts, on the other hand, would mean that the agency’s authority to interpret a statute depended “on the order in which the judicial and administrative constructions occur.”²⁴⁴ If a court had final authority to decide premise facts and just happened to interpret a statutory provision before an agency did, the agency would be stripped of all authority to interpret that statutory provision—a provision of a statute *that the agency administers*.

My approach to premise facts, though, does not leave decisional authority to the mercy of serendipity. First, under existing law, if in the course of deciding to take a particular action, the agency were to make a factual finding (as to either a legislative or adjudicative fact), then a court reviewing the agency’s action in subsequent litigation would review the factual finding under a deferential standard of review.²⁴⁵ If the court determined that the administrative record did not support the agency’s finding, it would remand the action to the agency for reconsideration.²⁴⁶ The court could not, however, simply decide the issue *de novo*, supplanting the agency’s judgment for its own.²⁴⁷ That judicial action would conflict with bedrock principles of administrative law. It follows, then, that if a court interpreting a statute administered by an agency encounters a factual issue that forms a premise of the court’s interpretation, the most the court can conclude is that its understanding of the facts (not confined here to the administrative record, because a legislative fact is involved) does not support the agency’s interpretation. The court’s decision thereby leaves open

²⁴² *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

²⁴³ *Brand X*, 545 U.S. at 983.

²⁴⁴ *Id.*

²⁴⁵ See *supra* notes 47–51 and accompanying text.

²⁴⁶ *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985).

²⁴⁷ *Id.*

to the agency the opportunity to reconsider the premise fact in a future proceeding. My proposed approach to addressing premise facts in agency review cases thus would not infringe on judicial supremacy any more than what is already well established under *Chevron*, *Brand X*, and other general principles of administrative law.

C. *Stare Decisis*

One could object that applying the *Brand X* principle to premise facts would erode the stability and consistency that precedent and stare decisis bring to our legal system. In addition to his concerns that the *Brand X* principle would infringe on judicial supremacy, Justice Scalia also seems to have worried about this effect.²⁴⁸

There is no denying the importance of stability and consistency in the law, for we tend to regard consistency as imperative to fairness.²⁴⁹ Development of a stable body of judicial precedent is particularly important for agency review cases in light of (1) the need for predictability and the strong reliance interests of both the agency and the public, (2) the frequency of recurrence of many types of agency review cases, and (3) the benefits of efficiency. So to the extent that applying the *Brand X* principle to premise facts would reduce consistency, we might question the desirability of this proposed approach.

The potential inconsistency that would arise under my approach, however, is no more than that already dictated by *Chevron* and its progeny. By giving agencies authority to interpret ambiguous statutory provisions, and authority to change their interpretations, *Chevron* itself erodes stare decisis and consistency. My approach merely clarifies the placement of premise facts within the scope of the *Chevron* and *Brand X* framework.

Even without the support of *Chevron*, however, stare decisis concerns would not justify rejecting my proposed approach. Because premise facts are, I have argued, part of the process of statutory interpretation, stare decisis concerns about my proposed approach can be analyzed by reference to the longstanding debate about whether an

²⁴⁸ See *Brand X*, 545 U.S. at 1018–19 (Scalia, J., dissenting).

²⁴⁹ See *Straight v. Wainwright*, 476 U.S. 1132, 1135 (1986) (Brennan, J., dissenting from denial of stay of execution of sentence of death) (describing the “first principles of justice that ultimately define a system of law” as “the principles of uniform application of rules, of consistency, of evenhandedness, of fairness”); Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 595–96 (1987) (linking the idea of fairness as consistency to Kant, Rawls, and The Golden Rule).

absolute, or at least heightened, rule of stare decisis should control for issues of statutory interpretation.²⁵⁰

Advocates of heightened stare decisis for statutory interpretation have offered at least four different theories to justify their position: (1) the congressional acquiescence theory; (2) the resource allocation theory; (3) the separation of powers theory; and (4) the coherence theory. The congressional acquiescence theory asserts that because Congress can overrule statutory interpretations by clarifying the statute, when Congress does not amend a statute in response to a court's interpretation, Congress has acquiesced in and tacitly endorsed that interpretation.²⁵¹ The resource allocation theory contends that courts should not reconsider their statutory interpretations because Congress can clarify a statute more ably than courts can or, alternatively, because Congress does not care how courts interpret its enactments.²⁵² The separation of powers theory holds that heightened statutory stare decisis provides an important incentive for Congress to take responsibility for reviewing and, where necessary, overruling judicial interpretations of statutes.²⁵³ And the coherence theory posits that strong stare decisis in statutory interpretation is necessary to build a stable and coherent statutory regime "against which Congress may legislate

²⁵⁰ Compare *Patterson v. McLean Credit Union*, 491 U.S. 164, 172–73 (1989) ("Considerations of stare decisis have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done."), *Boys Mkts., Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 257–58 (1970) (Black, J., dissenting) ("When the law has been settled by an earlier case then any subsequent 'reinterpretation' of the statute is gratuitous and neither more nor less than an amendment: it is no different in effect from a judicial alteration of language that Congress itself placed in the statute."), and Amanda L. Tyler, *Continuity, Coherence, and the Canons*, 99 NW. U. L. REV. 1389, 1415–18 (2005) (arguing for heightened stare decisis in statutory construction cases), with William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1363–64 (1988) (opposing "super-strong" statutory stare decisis), and Lawrence C. Marshall, "Let Congress Do It": *The Case for an Absolute Rule of Statutory Stare Decisis*, 88 MICH. L. REV. 177, 183 (1989) (arguing for an absolute rule of statutory stare decisis).

²⁵¹ Cf. *Johnson v. Transp. Agency, Santa Clara County, Cal.*, 480 U.S. 616, 629 n.7 (1987) (noting that "[a]ny belief in the notion of a dialogue between the judiciary and the legislature must acknowledge that on occasion an invitation declined is as significant as one accepted"); *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 488 (1940) (explaining that congressional failure to alter the Sherman Act following judicial interpretation of the statute was "persuasive of legislative recognition that the judicial construction [wa]s the correct one").

²⁵² Cf. Daniel A. Farber, *Statutory Interpretation, Legislative Inaction, and Civil Rights*, 87 MICH. L. REV. 2, 11–13 (1988) (explaining how, from legislators' perspectives, the effect of erroneous first-run judicial interpretations is minimized).

²⁵³ See Marshall, *supra* note 250, at 208–15.

and upon which private parties may rely in choosing a course of action.”²⁵⁴ These justifications have met with some criticism.²⁵⁵

My proposed approach to premise facts, however, can be defended without contravening any of these rationales for heightened statutory stare decisis. The coherence justification for statutory stare decisis is concerned with establishing a stable and predictable set of interpretive principles.²⁵⁶ My approach would establish a process for reconsidering factual premises of judicial decisions in agency review cases; it does not propose that courts revise or revisit interpretive principles. My approach would not threaten to upset the stability of interpretive principles. Changing the factual premises to which interpretive principles apply would change some interpretive outcomes, but it would not change the interpretive principles themselves. Accordingly, my approach poses no threat to the coherence justification. The other three theories for heightened statutory stare decisis, which focus on Congress’s ability to overrule erroneous judicial interpretations of statutes, actively favor my approach. The debate over statutory stare decisis has tended to ignore the crucial role that administrative agencies play in lawmaking, particularly in light of the *Chevron* principle construing statutory ambiguity as an implicit delegation of lawmaking authority to agencies.²⁵⁷ Where Congress has delegated lawmaking authority to an expert agency, courts should look to agencies, not just Congress, to correct errors in statutory interpretation. My approach is fully consistent with this prescription because courts would revisit their precedent in response to action by the agency, which is the congressionally authorized lawmaking body.

In any event, even if my approach did somewhat undermine stare decisis, its benefits in terms of improving the quality of judicial decisionmaking would likely outweigh the harm from destabilizing precedent. Benefits would inure in judicial decisionmaking not only because, as this Article has argued, my approach would substantially improve courts’ ability to develop legal principles, but also because the destabilizing effects of my approach would be limited merely to premise facts.

²⁵⁴ Tyler, *supra* note 250, at 1417.

²⁵⁵ See, e.g., William N. Eskridge, Jr., *The Case of the Amorous Defendant: Criticizing Absolute Stare Decisis for Statutory Cases*, 88 MICH. L. REV. 2450, 2453–66 (1990); Marshall, *supra* note 250, at 186–200 (criticizing both the congressional acquiescence and resource allocation theories).

²⁵⁶ See Tyler, *supra* note 250, at 1418 (advocating “a stable regime of known interpretive rules”).

²⁵⁷ See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984).

Moreover, our legal system does not always prioritize consistency and stare decisis, even in statutory interpretation cases. Decisions at the trial court level do not create binding precedent.²⁵⁸ Intermediate appellate court decisions are binding precedent only within the geographic jurisdiction of the court.²⁵⁹ Unpublished decisions generally do not create binding precedent.²⁶⁰ Federal court decisions on issues of state law are not binding on state courts, and state court decisions on issues of federal law are not binding on federal courts.²⁶¹ Even where decisions create binding precedent, “the rule of stare decisis is not an ‘inexorable command,’” and courts can overrule their own prior decisions.²⁶² One of the accepted grounds for overruling precedent is where “facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification,”²⁶³ a circumstance that would include, or at least that resembles, the type of correction of premise facts entailed in my approach. We are willing to live with the inconsistency that results from this set of practices because the benefits of consistency are outweighed by other benefits that accrue from allowing limited inconsistency.²⁶⁴ For similar reasons, we should be willing to live with the limited inconsistency that would result from my approach because it would provide important countervailing benefits.

In the long term, this approach to premise facts would improve consistency, coherence, and stability in judicial decisions. Where a court interprets a statute based on an incomplete or faulty understanding of an underlying factual issue, this puts pressure on the prin-

²⁵⁸ See *Perkins v. Alamo Heights Indep. Sch. Dist.*, 204 F. Supp. 2d 991, 996 (W.D. Tex. 2002) (noting that a “decision [] from a sister federal trial court” is “not binding precedent”); *State v. Bamber*, 592 So. 2d 1129, 1132 (Fla. Dist. Ct. App. 1991) (noting that “[t]rial courts do not create precedent”).

²⁵⁹ See *Minor v. Dugger*, 864 F.2d 124, 126 (11th Cir. 1989) (noting that “the decisions of one circuit are not binding on other circuits”); *Louisville & Nashville R.R. v. United States (In re Tenn. Cent. Ry.)*, 498 F.2d 904, 905 (6th Cir. 1974) (noting that an opinion of the Third Circuit would not bind the Sixth Circuit).

²⁶⁰ See 1ST CIR. R. 32.1.0(a) (“The court will consider [unpublished judicial opinions] for their persuasive value but not as binding precedent.”); 9TH CIR. R. 36-3(a) (“Unpublished dispositions and orders of this Court are not precedent”); 10TH CIR. R. 32.1(A) (“Unpublished decisions are not precedential, but may be cited for their persuasive value.”).

²⁶¹ See *Surrick v. Killion*, 449 F.3d 520, 535 (3d Cir. 2006).

²⁶² *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854 (1992) (quotation omitted).

²⁶³ *Id.* at 855.

²⁶⁴ See *id.* at 854 (“[W]hen this Court reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case.”).

ciple of stare decisis and gives courts in future cases a strong incentive to find a way not to be bound by the prior decision—for example, by finding a factual distinction between the two cases, even of dubious relevance or significance²⁶⁵—in order to avoid continuing the error. My proposed approach is a tool by which courts could hypothesize and test an interpretation of a statute (and its underlying factual premises) without enshrining it as settled law. My approach would assist agencies and courts in finding interpretations that would withstand the test of time. Far better to have agencies and courts revisit and tinker with an interpretation than to have courts either (a) prematurely announce a faulty interpretation that forces other courts to apply the faulty interpretation or (b) attempt to find some questionable factual distinction to avoid applying the faulty principle. Indeed, the more rigorously we want courts to follow settled principles, the more important it is for principles to be thoroughly tested before they become settled. And because the principles will be more tested before they become settled, short-term losses of consistency and stability will, in time, be recouped. The long-term outlook under my approach, then, is one of greater consistency and stability.

Related to the potential criticism that my approach would erode stare decisis is the objection that it would undermine some of the benefits that a strong system of stare decisis provides. Stare decisis promotes principled decisionmaking by forcing courts to treat like cases alike. A court's awareness that its decision will bind, or at least influence, future cases gives the court a stronger incentive to decide the case in a manner that accomplishes the best result across all cases for which the decision will be precedent.²⁶⁶ Aware that their decisions will influence future cases, courts are discouraged from choosing outcomes based on factors that should be irrelevant.²⁶⁷ For example, consider a judge who might be inclined to rule against a plaintiff organization because she does not agree with its politics. The judge may be constrained from, say, holding that the group has waived an argument by not adequately raising it before the agency, if the judge

²⁶⁵ See Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953, 1046 (2005) (noting that “courts sometimes construct seemingly disingenuous distinctions or ambitiously recast old doctrines in a new light” to avoid the constraints of precedent perceived as wrongly decided).

²⁶⁶ Schauer, *supra* note 249, at 589.

²⁶⁷ Cf. John Monahan & Laurens Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law*, 134 U. PA. L. REV. 477, 491 (1986) (noting that precedent reduces the risk of strategic bias, because “judges could not have anticipated all the applications that would be found for their work in the future”).

knows that such a decision could in future cases serve as precedent that would lead a court to rule against a group that the judge might want to prevail. To some extent, because my approach invites courts in future cases to depart from the principle on which an earlier case was decided, my approach would allow courts to sever the connection between the cases they are deciding and future cases. In this way, my approach could reduce the incentive for principled decisionmaking.

If there would be any such effect, however, it would not be significant. Although my approach gives courts in future cases some flexibility in how they treat prior cases, it does not deprive the prior cases of precedential impact. In fact, although the future case would not be bound by the factual premises in the prior case, an agency likely would encounter some resistance to adopting a contrary factual premise unless it can point to some relevant new information or explanation of the issue. Moreover, courts would face an increased incentive to articulate their reasoning, knowing that the reasoning is subject to an agency's reevaluation. That alone would be an independent salutary effect.

D. *Nonacquiescence*

Part III.D explained why merely adjusting the balance of scrutiny and deference in agency review cases will not adequately address courts' difficulties in premise factfinding. Another potential alternative to my approach under existing doctrine is agency nonacquiescence, the practice by which an agency declines to conform its actions to an appellate court ruling.²⁶⁸ Agency nonacquiescence gives agencies some leeway in dealing with an adverse judicial decision. Most important for our purposes, it allows agencies, after receiving an adverse decision that announces an interpretation the agency believes is wrong, to attempt to convince a court in a future case that the prior adverse decision was wrongly decided. In this way, it provides some of the benefit that could result from my proposal to apply the *Brand X* principle to premise facts. But nonacquiescence is not an effective substitute for my proposal. Agency nonacquiescence has been criticized on the ground that it allows agencies to thumb their noses at courts, thereby thwarting the separation of powers and the rule of law.²⁶⁹ This air of illegitimacy makes agencies understandably reluctant to turn to nonacquiescence, either because they are not sure

²⁶⁸ See Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679, 681 (1989).

²⁶⁹ See, e.g., Matthew Diller & Nancy Morawetz, *Intracircuit Nonacquiescence and the*

about its validity or because they want to avoid the accusation that they are willfully violating the law by not following precedent. My approach, on the other hand, is not vulnerable to these criticisms of nonacquiescence because it is founded on *Chevron's* rule, which legitimizes agencies as the primary authority for interpreting ambiguous provisions in the statutes they administer. Moreover, my approach is likely to be perceived as a more legitimate approach than agency nonacquiescence because, whereas nonacquiescence is undertaken unilaterally by the agency, my approach is an inherently collaborative endeavor between the court and the agency.

Conclusion

Giving agencies authority to reconsider judicial interpretations of statutes based on underlying premise facts would not remedy all the problems courts face when reviewing decisions of administrative agencies. It would be susceptible of application in only some agency review cases and, even where it applied, it would only mitigate some of courts' difficulties, not make them disappear. But my proposed approach nevertheless would represent a significant improvement over current doctrine because it would allow agencies constructively to address lurking factual questions by taking advantage of their superior capabilities in gathering and analyzing factual information, without losing the important benefits of judicial review. Moreover, my approach would encourage courts to identify and investigate the underlying factual dimensions of legal issues that arise when reviewing agency decisions; factual dimensions that are all too frequently addressed through implicit, even subconscious, factual assumptions based on little or no actual information in the record before the court. By promoting greater attention to hidden premises and assumptions, this aspect of my approach alone could improve judicial review considerably. The end result would be an approach to judicial review of agency actions that exhibits true judicial modesty by promoting a more open and thorough exchange between agencies and courts and, therefore, better lawmaking.