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Searching for Proportionality in U.S. Administrative Law

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Searching for Proportionality in U.S. Administrative Law

Jud Mathews¹

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Introduction

Officially, there is no such thing as “proportionality review” in American administrative law. The Administrative Procedure Act (APA) of 1946, the framework statute governing administrative law, does not recognize proportionality as a general head of review. Nor have American courts ever developed a judge-made doctrine of proportionality as such, either prior to or following the APA’s enactment. While the immense scholarly literature on proportionality continues to grow by leaps and bounds, virtually nothing has been written about proportionality in American administrative law, no doubt in part because it is assumed there is nothing to write.²

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² Perhaps the closest thing is historical scholarship on nineteenth-century understandings of the states’ police power. William Novak’s important book has shown how state police

Why, then, include a chapter about the United States in a book about proportionality review in administrative law? In lieu of proportionality, American administrative law features a congeries of doctrines that courts deploy to evaluate agency exercises of discretion under different circumstances, in ways described in detail below. In some respects, these frameworks for review resemble proportionality in operation, but there are also notable differences. For these reasons, the contrast between proportionality review and American approaches to the review of discretion is potentially illuminating, highlighting what may be distinctive features of both.³

Looking at the doctrines governing judicial review of administrative discretion in the United States, three features stand out. First, American judicial review is characterized by a high degree of unpredictability. Of course, law is rarely perfectly predictable, but I would contend that judicial review of discretion is in a special class. Not only is it often

powers could curb private property rights and other private interests, under conditions of “necessity.” See William J Novak, *The People’s Welfare: Law and Regulation in Nineteenth-Century America* (University of North Carolina Press, 1996).

³ In some respects, the closest analogue to proportionality analysis in American administrative law is in the regulatory review process, which is carried out not by courts, but within the executive branch. Early in his first term, President Ronald Reagan issued an executive order instructing agencies, to the extent permitted by law, to undertake regulatory action only when “the potential benefits to society for the regulation outweigh the potential costs;” to choose objectives “to maximize the net benefits to society;” and when considering alternative approaches to an objective, to choose the one “involving the least net cost to society.” Exec Order No 12291, 46 Fed Reg 13193. For major rules, the order further requires agencies to submit to the Office of Information and Regulatory Affairs (OIRA), which is located within the Executive Office of the President, a regulatory impact analysis that demonstrates the rule’s cost-benefit justification and its superiority to alternatives. President Reagan’s successors have continued regulatory review but tweaked it, broadening the set of values that agencies should consider in their analysis to include equity, human dignity, fairness, and distributive impacts. Thus, at the behest of the White House, agencies themselves now are expected to conduct a sort of proportionality review in-house. But because this volume focuses on proportionality review of administrative action as practiced by courts, regulatory review falls outside of the scope of this chapter.

difficult to predict the outcome of judicial review in particular cases, but the uncertainty runs deeper. In a considerable number of cases, there is substantial uncertainty even as to what framework of review the court will apply, and even when it is nominally clear which standard governs, there often remains substantial uncertainty over what kind of analysis the court will perform, and how intensively it will scrutinize the challenged agency action.

The second point speaks directly to a contrast with proportionality. Classical proportionality review is designed to detect and correct a particular kind of administrative failure: an overreach, in which the government uses measures that are excessive in relation to the ends they are designed to achieve. Judicial control of discretion in American administrative law is more symmetrical, in that the agency is required to explain its actions whether the claim is that they go too far, or that they do not go far enough. However, as described further below, there are countervailing doctrines in American administrative law that make judicial redress more likely for agency failures of commission than for failures of omission.

Third, reviewing courts in American administrative law tend to “proceduralize” substantive review, focusing more on the agency’s failures to thoroughly ventilate the relevant issues than the merits of the agency’s conclusions.⁴ The end result may often be the same, in terms of what agency actions are blocked. But proceduralizing substantive review may have other consequences, both for the burdens agencies face before reviewing courts (which may be more substantial), and for the ultimate ability of agencies to realize favored policy options (which may be greater).

This chapter develops these points in the course of a discussion of the judicial review of agency exercises of discretion under American administrative law. The next section sets

⁴ Jerry L Mashaw and David L Harfst, ‘Regulation and Legal Culture: the Case of Motor Vehicle Safety’ (1986) 4 Yale J on Reg 257.

the stage for that discussion by sketching the doctrinal lay of the land. The Administrative Procedure Act (APA) looms large here, as this statute defines the basic categories of agency action and the standards of judicial review. The APA makes review broadly available, but a number of exceptions, both statutory and judge-made, shield much of what agencies do from the scrutiny of courts. When review is available, the scope of review under the APA may turn on a series of distinctions: whether the agency acts through adjudication or rulemaking; whether it uses formal or informal procedures; and whether the challenge addresses a determination of fact, law, or policy.

The following section focuses sustained attention on the review standard most closely associated with agency discretion: arbitrary and capricious review. I work in detail through the reasoning employed in three important arbitrary and capricious review cases, decided over a span of almost forty years: *National Tire Dealers and Retreaders v. Brinegar*, *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, and *FCC v. Fox Television Stations, Inc.* The detailed analyses of these cases build a platform for considering both how arbitrary and capricious review may be changing, and for ways in which it is similar to and different from proportionality review.

Agencies also exercise significant discretion in the course of interpreting the statutes they administer, and the penultimate section of the chapter considers how courts review agency interpretations of statutes. In spite of judicial and scholarly engagement with this topic, this section shows that it is not entirely clear how the standards of review employed in this context relate to arbitrary and capricious review. A brief, final section concludes.

Judicial Review in American Administrative Law: An Overview

Although all American states have their own agencies that are also subject to judicial review, this chapter concerns federal administrative law exclusively.⁵ The focus here is squarely on the federal Administrative Procedure Act, which lays out the default rules of administrative law, although Congress can dictate agency-specific alternatives by statute.⁶ The APA lays out both the procedures that agencies must follow in carrying out their mandates under the statutes that they administer, and the standards that courts apply in reviewing agency action. The courts that review administrative actions in the United States are ordinary federal courts, as opposed to specialized administrative tribunals.

The Availability of Review

The APA contains generous provisions for judicial review, accompanied by generous exceptions. First, the APA defines “agency” broadly to include “each authority of the Government of the United States, whether or not it is within or subject to review by another agency,” except for Congress, the courts, territorial governments, and a few other exceptions.⁷ The APA further provides that “[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review.”⁸ Courts have read this provision to establish a general presumption

⁵ The majority of states have adopted or been influenced by model administrative procedure acts that resemble the APA in important respects. Arthur Earl Bonfield, ‘The Federal APA and State Administrative Law’ (1986) 72 Va L Rev 297; Ronald M Levin, ‘Rulemaking Under the 2010 Model State Administrative Procedure Act’ (2010) 20 Widener LJ 855.

⁶ See, for instance, Occupational Safety and Health Act, 29 USC § 655(f) (providing that substantial evidence review, rather than the APA default of arbitrary and capricious review, will apply to health and safety rules promulgated by the Occupational Safety and Health Commission).

⁷ 5 USC §§ 551(1) (defining agencies for purposes of the APA’s requirements), 701(b) (defining agencies for purposes of judicial review). The Supreme Court has also held that the President does not qualify as an agency for purposes of the APA. *Franklin v Massachusetts*, 505 US 788, 801 (1992).

⁸ 5 USC § 704.

that final agency action is subject to judicial review.⁹ “Agency action,” in turn, is defined in expansive terms, to include “the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.”¹⁰ Notably, this provision extends judicial review to include agency rules, which are the chief instruments of agency policymaking. In principle, then, the APA empowers courts to sit in judgment over agency policy choices and the design of regulatory programs, to a degree that administrative lawyers in other legal systems might find surprising.¹¹

The APA is also generous in granting rights to initiate judicial review. A different provision of the APA permits any person “adversely affected or aggrieved by agency action within the meaning of a relevant statute” to initiate judicial review.¹²

However, judicial review is not as widely available as a quick read of the APA might suggest. First, as already noted, the APA is only a default statute, and it recognizes that an agency’s organic statute may preclude judicial review entirely (although few do).¹³

Second, the APA expressly precludes review to the extent that “agency action is committed to agency discretion by law.”¹⁴ The question inevitably follows: what does it mean for agency action to be “committed to agency discretion by law”? In *Citizens to Preserve Overton Park*, the Supreme Court approvingly quoted the legislative history of the APA for the proposition that the exception covers “those rare instances where

⁹ *Citizens to Preserve Overton Park v Volpe*, 401 US 402 (1971). See also Nicholas Bagley ‘The Puzzling Presumption of Reviewability’ (2014) 127 Harv L Rev 1285 (challenging the presumption).

¹⁰ 5 USC § 551(13).

¹¹ Susan Rose-Ackerman *Controlling Environmental Policy: the Limits of Public Law in Germany and the United States* (Yale University Press, 1995).

¹² 5 USC § 702.

¹³ 5 USC § 701(a)(1).

¹⁴ 5 USC § 701(a)(2).

‘statutes are drawn in such broad terms that in a given case there is no law to apply.’¹⁵ For instance, the National Security Act provided that the Director of the CIA “may, in his discretion, terminate employment of any officer or employee of the Agency whenever he shall deem such termination necessary or advisable in the interest of the United States.”¹⁶ Finding that the language “fairly exudes deference to the Director,” the Supreme Court in 1988 held that the decision to fire a covert electronics technician on account of his sexual orientation was committed to the agency’s discretion, and hence unreviewable, except insofar as it was the basis for constitutional claims.¹⁷

Although the “committed to agency discretion” exception permits relatively few agency actions to evade judicial review, its greater impact may be blocking review of agency *inaction*. The Supreme Court has analogized agency discretion over bringing enforcement actions to prosecutorial discretion, and found “a general presumption of unreviewability of decisions not to enforce.”¹⁸ For instance, executions by lethal injections in the United States are carried out using drugs that are regulated by the Food and Drug Administration (FDA). Death row inmates petitioned the FDA to investigate the use of these drugs in executions as the “unapproved use of an approved drug” in violation of the Federal Food, Drug, and Cosmetics Act, which the FDA administered. The agency declined to do so, and the inmates sued. The Supreme Court found for the agency, holding that “an agency’s decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency’s absolute discretion.”¹⁹ An agency, with finite resources for enforcement, must make choices about how to deploy them, and these choices “often involve[] a complicated balancing of a

¹⁵ *Overton Park* (n 9) 410 (quoting S Rep No 752, 79th Cong, 1st Sess, 26) (1945).

¹⁶ 50 USC § 403(c) (1988).

¹⁷ *Webster v Doe*, 486 US 592 (1988). Justice Scalia, in dissent, proposed a broader reading of the exception, which would encompass the pre-APA “common law” of unreviewable executive discretion. *ibid* 608-10 (Scalia, J., dissenting).

¹⁸ *Heckler v Chaney*, 470 US 821 (1985).

¹⁹ *ibid* 831.

number of factors which are peculiarly within its expertise.”²⁰ The matter is different when a statute mandates certain enforcement actions.

Moreover, the requirement that agency action be “final” means that even consequential agency actions can be shielded from review altogether where agency choices are given legal effect by other governmental actors. For instance, in *Dalton v. Specter*,²¹ the Supreme Court found the Secretary of Defense’s order to close the Philadelphia Naval Shipyard unreviewable. Under the governing statute, a commission with input from military leaders makes recommendations to the President on which military bases should be closed or realigned, and the President must either accept or reject the commission’s recommendations in their entirety. Petitioners alleged procedural and substantive problems with the commission’s work as well as actions of the Secretaries of the Navy and Defense. The Supreme Court, however, found the decision to close the base unreviewable. The commission’s recommendations did not constitute a final agency action, since they lacked legal effect before the President acted on them, and the President’s endorsement of the recommendations was not subject to review, because the President is not an agency within the meaning of the APA.

In addition, notwithstanding the APA’s statement that a “failure to act” is reviewable, judicial restrictions on what kinds of failures to act are reviewable have come close to rendering this provision a dead letter. In *Norton v. Southern Utah Wilderness Alliance*, an environmental group sought to challenge the Environmental Protection Agency’s (EPA) failure to take steps to protect a Wilderness Study Area against environmental degradation, as required by federal law.²² The Supreme Court turned back the challenge without reaching its merits, holding that the only failures to act made reviewable by the APA are failures to take a *discrete* agency action that is *mandated* by law.

²⁰ *ibid.*

²¹ 511 US 462 (1994).

²² 542 US 54 (2002).

Furthermore, broad exceptions from the notice-and-comment rulemaking procedures for military and foreign affairs functions, interpretative rules, general statements of policy, and other matters where the agency finds “good cause” decreases the potency of judicial review where they apply by exempting agency activity from the procedural standards that agencies would otherwise have to observe.²³ Moreover, agencies may be able to delay review or evade it entirely by using interpretative rules, guidance documents, and policy statements to make consequential policy choices. So-called “nonlegislative” rules are generally subject only to collateral challenge incident to agency enforcement actions against regulated parties. To the extent nonlegislative rules *favor* regulated parties, or their in terrorem effect induces compliance, they will not face judicial review at all.²⁴ Lastly, as discussed further below, restrictive judicial rulings on who has standing to bring suit in federal court as a constitutional matter have undercut somewhat the APA’s broad provisions for access to judicial review.

The Scope of Review

If the rules governing the availability of judicial review in American administrative law are somewhat difficult to navigate, the same can be said of the scope of review. According to the Attorney General’s Manual to the Administrative Procedure Act, long considered the most reliable contemporaneous guide to the intentions of the statute’s drafters, the APA was meant to restate and codify existing practices with respect to the scope of judicial review.²⁵ Prior to the enactment of the APA, judges had developed a variety of standards for reviewing administrative actions, including abuse of discretion, arbitrary and capricious, and not supported by substantial evidence. Given that these

²³ 5 USC § 553(a)(1), (b)(3)-(4).

²⁴ David L Franklin, ‘Legislative Rules, Nonlegislative Rules, and the Perils of the Short Cut,’ (2010) 120 *Yale LJ* 276.

²⁵ *Attorney General’s Manual on the Administrative Procedure Act* (1947) 108.

standards of review had been developed piecemeal by different courts over a period of years, it is no surprise that, in the words of some leading scholars, “§ 706 [the scope of review section] is not a model of linguistic clarity or coherence.”²⁶

Which framework for review applies may depend on the form of agency action at issue, the level of procedural formality involved, and also the nature of the agency determination that is being contested. With respect to the form of agency action, the APA generally requires agencies to act through one of two processes: adjudication and rulemaking. The APA also establishes two levels of procedural formality—formal, a.k.a. “on-the-record,” and informal—that statutes may require agencies to observe.

On-the-record adjudications resemble trials, complete with an impartial decision maker presiding, the presentation of evidence, and opportunities for the direct and cross-examination of witnesses. On-the-record adjudications are typically employed to decide individual claims within a statutory framework administered by an agency. So, for instance, individuals’ applications for disability benefits and foreign nationals’ petitions for asylum are both handled through formal adjudications, conducted by the Social Security Administration and the Executive Office of Immigration Review, respectively. Agencies also tend to use formal adjudications when they put individuals or entities “on trial” for statutory violations, as when the Federal Trade Commission brings charges against a business for using unfair or deceptive acts or practices.

Rulemakings paradigmatically involve the formation of agency policy, rather than the resolution of individual claims or charges. The APA contemplates that rules will have prospective effect and “implement, interpret, or prescribe law or policy.”²⁷ When the EPA promulgates national ambient air quality standards under the Clean Air Act, for

²⁶ Ronald A Cass and others, *Administrative Law: Cases and Materials* (6th edn, Aspen 2011) 113.

²⁷ 5 USC § 551(4).

instance, it does so by making a rule. In contrast to adjudications, rulemakings are more often conducted using informal procedures, which dispense with the trappings of a trial, but afford public notice of the agency's plans and an opportunity for interested individuals to comment (hence, "notice-and-comment rulemaking").²⁸

A further set of distinctions can be drawn between agency actions that involve determinations on matters of fact, matters of law, and matters of policy or discretion. The fact that the compartments dividing issues of fact, law, and policy are by no means watertight has not stopped Congress and the courts from outlining and elaborating judicial review doctrines that rely on these distinctions.²⁹ Although adjudication is modeled on judicial trials and rulemaking is modeled on the legislative process, as a practical matter, either process can involve all these types of determinations.

Putting the pieces together now, what framework courts use to review an administrative action may depend on (1) the process used (rulemaking or adjudication), (2) the level of formality (formal or informal), and (3) the kind of agency determination at issue (fact, law, or policy). For instance, the APA specifies that factual findings made in on-the-record proceedings are subject to "substantial evidence" review. In other words, they will be upheld unless the reviewing court finds them to be "unsupported by substantial evidence" in the record as a whole.³⁰ As a practical matter, these on-the-record proceedings are almost always adjudications.³¹

²⁸ While these generalizations about the uses of adjudication and rulemaking generally hold, they are not ironclad. The Supreme Court has ruled that agencies with authority to conduct both rulemakings and adjudications can use either to make policy, and the National Labor Relations Board in particular has historically favored the use of adjudication as a policymaking tool. See *NLRB v Wyman-Gordon Co*, 394 US 759 (1969).

²⁹ Christopher Edley, *Administrative Law: Rethinking Judicial Control of Bureaucracy* (Yale UP 1992).

³⁰ 5 USC 70(2)(E). See also *Universal Camera Corp v NLRB*, 340 US 474 (1951) (making clear, in the context of the similarly worded scope of review provision of the

With respect to legal questions, the APA provides that “the reviewing court shall decide all relevant questions of law, [and] interpret constitutional and statutory provisions.”³² In fact, when reviewing agency actions courts have never decided all questions of law de novo, but have instead devised a number of deference formulas, some of which are discussed further below. The APA also seems to contemplate some de novo judicial fact-finding: it commands the reviewing court to set aside agency action “unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.”³³ Commentators have differed on whether courts should resort to de novo review of facts when the agency has compiled no record,³⁴ but in any event, the Supreme Court has given a narrow construction to the de novo review provision.³⁵

Most relevant for present purposes is the provision of the APA that permits courts to hold unlawful and set aside agency action, findings, and conclusions found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”³⁶ This provision governs agency determinations that are neither questions of law nor questions of fact decided in on-the-record proceedings, and so sweep in the bulk of agency

National Labor Relations Act, that the substantiality of evidence must be determined on the basis of the record as a whole).

³¹ On-the-record rulemakings are notoriously inefficient policymaking tools. An egregious and oft-cited example is the FDA rulemaking to determine the minimum peanut content of peanut butter, which lasted nine years and produced a transcript 7,736 pages long. Robert W Hamilton, ‘Rulemaking on a Record By the Food and Drug Administration’ (1972) 50 Tex L Rev 1132, 1143-45.

³² 5 USC § 704.

³³ 5 USC § 706(2)(D).

³⁴ Compare Nathaniel L Nathanson, ‘Probing the Mind of the Administrator: Hearing Variations and Standards of Judicial Review Under the Administrative Procedure Act and Other Federal Statutes,’ (1975) 75 Colum L Rev 721 (supporting de novo review in this circumstance), with Stephanie Hoffer and Christopher J Walker, ‘The Death of Tax Court Exceptionalism,’ (forthcoming 2015) 99 Minn L Rev (urging remand to the agency to produce a record).

³⁵ *Overton Park* (n 9) 415.

³⁶ 5 USC § 706(2)(A).

discretionary decisions, including “informal adjudications”: the countless, run-of-the-mill agency decisions that are neither rule makings nor formal adjudications.³⁷ The next section is devoted to an examination of arbitrary and capricious review.³⁸

Arbitrary and Capricious Review

Drawing on the language of older judicial opinions, the APA permits courts to set aside actions that are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” but courts have never taken pains to distinguish among the various grounds for reversal listed in 5 U.S.C. § 706(2)(A). Instead, courts characteristically refer to “arbitrary and capricious” review as a single standard. In three respects, arbitrary and capricious review probably occupies the position in American administrative law closest to the position occupied by proportionality review in some other administrative law systems.

First, while arbitrary and capricious review is not exactly a general head of review in American administrative law, it is something very close.³⁹ Although certain kinds of agency decisions are subject to different standards of review—as noted above, for

³⁷ *Overton Park* (n 9) 410.

³⁸ The APA also establishes other heads of review that are of great importance to administrative law, but limited relevance to judicial control of agency discretion. Specifically, reviewing courts have the power to set aside agency actions that are unconstitutional (5 USC § 706(2)(B)), ultra vires (§ 706(2)(C)), or procedurally defective (§ 706(2)(D)).

³⁹ Proportionality is a general criterion of review in EU law, see Takis Tridimas, *The General Principles of EU Law* (2nd edn, OUP 2006) 132, and in German *Polizei- und Ordnungsrecht*, a body of law dealing not only with the police, but the regulation of threats to public welfare more generally, see Volkmar Götz, *Allgemeines Polizei- Und Ordnungsrecht: Ein Studienbuch* (15th edn, CH Beck 2012) 129-30. A debate continues in England over whether proportionality should be treated as a general head of review in administrative law. See Paul Craig, *Administrative Law* (7th edn, Sweet & Maxwell 2012) 668-75.

instance, on-the-record factual determinations are reviewed under the substantial evidence standard—in the words of then-Judge Scalia, arbitrary and capricious review “is a catchall, picking up administrative misconduct not covered by the other more specific paragraphs.”⁴⁰ Also, because “[t]he ‘scope of review’ provisions of the APA . . . are cumulative,” every agency action subject to judicial review must satisfy the arbitrary and capricious standard, whatever other tests it might have to survive.

Second, arbitrary and capricious review applies to much of the discretionary decisionmaking of agencies. Other scope of review provisions on the APA govern questions of fact (in on-the-record proceedings) and questions of law. Arbitrary and capricious review covers what is left over. While acknowledging again the imprecision of the fact-law-policy distinction, a good part of the agency decisions that raise neither issues of fact nor issues of law could plausibly be described as policy choices, or as exercises of agency discretion.

Third and finally, unlike the other bases of review recognized in § 706, arbitrary and capricious review authorizes courts to evaluate and overturn agency actions on the basis of their substance, as opposed to procedural shortcomings,⁴¹ jurisdictional overreaching,⁴² or lack of conformity with the Constitution.⁴³ Arbitrary and capricious review is a form of merits review, in which the policy choice made the agency is evaluated on its merits.⁴⁴ However, as discussed below, there is a strong tendency in American administrative law,

⁴⁰ Ass’n of Data Processing Serv Orgs, Inc v Bd of Governors of the Fed Reserve Sys, 745 F 2d 677, 683 (DC Cir 1984).

⁴¹ 5 USC § 706(2)(B).

⁴² 5 USC § 706(2)(C).

⁴³ 5 USC § 706(2)(D).

⁴⁴ On merits review, which is a central organizing category of Australian administrative law in particular, see Peter Cane, ‘Judicial Review and Merits Review: Comparing Administrative Adjudication By Courts and Tribunals’ in Susan Rose-Ackerman and Peter L Lindseth (eds), *Comparative Administrative Law* (Edward Elgar 2010) 426.

even in arbitrary and capricious review, to describe problems with agency policy choices in terms of procedural failings.

The Advent of “Hard Look” Review

Exactly what is “arbitrary and capricious” review? Its meaning has evolved over time, and even now, it remains something of a moving target. This section recounts its origins, and then explores in some depth its use in three cases—*National Tire Dealers and Retreaders v. Brinegar*, *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, and *FCC v. Fox Television Stations, Inc.*—to illustrate the varied modes of analysis that modern arbitrary and capricious review can entail.

At the time the APA was enacted, arbitrary and capricious review was understood to be highly deferential to agency exercises of discretion. Arbitrary and capricious review was animated by the same spirit of deference to the policy choices of non-judicial actors as the “rational basis” review of legislation.⁴⁵ *National Broadcasting Co. v. United States*,⁴⁶ an important pre-APA Supreme Court case, illustrates the point. In that case, the NBC broadcasting network brought a number of challenges to radio regulations promulgated by the Federal Communications Commission. After dispensing with the petitioners’ claims that the agency had exceeded its authority under the governing statute, the Court turned to their argument that the regulations were nonetheless unlawful with the following words:

The Regulations are assailed as “arbitrary and capricious”. If this contention means that the Regulations are unwise, that they are not likely to succeed in accomplishing what the Commission intended, we can say only that the appellants have selected the wrong forum for such a plea.

⁴⁵ See *Wickard v Fillburn*, 317 US 111, 129-130 (turning back a challenge to the Agricultural Adjustment Act of 1938 as arbitrary and capricious).

⁴⁶ 319 US 190 (1943).

What was said in *Board of Trade v. United States* is relevant here: “We certainly have neither technical competence nor legal authority to pronounce upon the wisdom of the course taken by the Commission.” Our duty is at an end when we find that the action of the Commission was based upon findings supported by evidence, and was made pursuant to authority granted by Congress. It is not for us to say that the “public interest” will be furthered or retarded by the Chain Broadcasting Regulations. The responsibility belongs to the Congress for the grant of valid legislative authority and to the Commission for its exercise. . . . If time and changing circumstances reveal that the “public interest” is not served by application of the Regulations, it must be assumed that the Commission will act in accordance with its statutory obligations.⁴⁷

Things began to change in the 1960s, thanks largely to the D.C. Circuit Court of Appeals, the influential appellate court that handles the lion’s share of administrative law litigation. At a time when agencies were increasingly turning to notice-and-comment rulemaking as a policy-making tool,⁴⁸ the judges of the D.C. Circuit began ratcheting up the scrutiny paid to agency choices through increasingly stringent application of arbitrary and capricious review. This more aggressive form of arbitrary and capricious review became known as “hard look” review.

The name “hard look review” is itself instructive, if often misunderstood. Many assume that it refers to the court’s vigorous scrutiny of the agency, but the phrase originated to describe the kind of close attention *an agency* must give to the issues at hand.⁴⁹ To quote from the seminal opinion, authored by Judge Harold Leventhal,

Its supervisory function calls on the court to intervene not merely in case of procedural inadequacies, or bypassing of the mandate in the legislative charter, but more broadly if the court becomes aware, especially from a combination of danger signals, that the agency has not really taken a “hard

⁴⁷ *ibid* 224-25.

⁴⁸ Reuel E Schiller, ‘Rulemaking’s Promise: Administrative Law and Legal Culture in the 1960s and 1970s,’ (2001) 53 Admin L Rev 1139.

⁴⁹ Nat’l Lime Assoc v EPA, 627 F 2d 416, 451 n 126 (DC Cir 1980).

look” at the salient problems, and has not genuinely engaged in reasoned decision-making.⁵⁰

For much of the 1970s, some judges on the D.C. Circuit took the view that reviewing courts should prescribe additional procedures, such as hearings, to remedy agencies’ failures to consider issues thoroughly.⁵¹ The Supreme Court put an end to this practice in the 1978 *Vermont Yankee* case,⁵² which held that courts may not impose procedural requirements not contained in the APA. But even when courts do not mandate specific procedures for agencies to follow, hard look review often casts substantive review in procedural terms. It is not the agency’s policy choices that are themselves inherently arbitrary and capricious; rather, what is arbitrary and capricious is the agency’s failure to justify its choices adequately in the face of the totality of the arguments and evidence before it. The agency is faulted not so much for its decision as for how it came to its decision. For a better sense of classical hard look review in action, we begin with a closer look at one of the D.C. Circuit’s cases, *National Tire Dealers and Retreaders Association, Inc. v. Brinegar*.⁵³

Hard Look Review in Action: National Tire Dealers

The National Traffic and Motor Vehicle Act of 1966 grants the Secretary of Transportation the authority to “establish by order appropriate Federal motor vehicle safety standards.”⁵⁴ The statute requires that each standard “shall be practicable, shall meet the need for motor vehicle safety, and shall be stated in objective terms.”⁵⁵ In addition, the Act imposes the duty to establish standards on some specific matters. It

⁵⁰ *Greater Boston Television Corp v FCC*, 444 F 2d 841 (DC Cir 1970).

⁵¹ For a detailed discussion of the debates over hard look review within the DC Circuit, see Schiller (n 48).

⁵² *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 US 519 (1978).

⁵³ 491 F 2d 31 (DC Cir 1974).

⁵⁴ Public Law 89-563, Sept 9, 1966, 80 Stat 718, 719 §103(a).

⁵⁵ *ibid.*

specifies, among other things, that all safety standards for tires “shall require that tires . . . be permanently and conspicuously labeled with such safety information as [the Secretary] determines to be necessary to carry out the purposes of this Act.”⁵⁶ The statute further requires that tire labels shall include, at a minimum, the number of plies in a tire, the maximum permissible load, and certain other information.

The agency promulgated by regulation a tire safety standard in 1972. The regulation required that all retreaded passenger tires be permanently molded with the ply and load information specifically required by the statute, as well as the tire size, maximum inflation, and the words “tubeless” or “tube-type” and “belted” or “radial,” as applicable. The standard was challenged by a trade association of tire dealers and retreaders. Specifically, the challengers denied that the agency had demonstrated that the needs of motor vehicle safety could only be met through a *permanent* label containing the specified information.⁵⁷

The court noted that a permanent label was plainly not necessary to protect the original purchaser of retreaded tires, who could equally well be informed by a nonpermanent, affixed label at the point of sale. But, as the court acknowledged, the agency justified the requirement of a permanent label with reference to used retreaded tires. The preamble to the standard stated:

Tires may be subject to many applications during their useful life. They are transferred from wheel to wheel and from vehicle to vehicle, and each time this takes place the information on the tire sidewall becomes important. Permanent labeling is therefore required if the information is to perform its function, as it can be readily assumed that affixed labels will last little longer than the first time the tire is mounted.⁵⁸

⁵⁶ *ibid* § 201.

⁵⁷ 491 F 2d 36.

⁵⁸ 491 F 2d 36.

Still, the court argued, this did not go far enough to justify requiring permanent labels: “The Secretary has supplied no illustrations or references to the record to amplify these observations.”⁵⁹ The court itself imagined two scenarios in which the lack of a permanent label could impair safety: when an original purchaser of retreaded tires needed to replace one or more with matching tires, and when a driver wishes to purchase used retreaded tires for his vehicle. Still, according to the court, the agency had not provided sufficient information to justify the conclusion that the permanent labeling requirement was appropriate:

There is no suggestion in the record or briefs of how frequently these hypothetical situations arise. They might occur so rarely that a costly and burdensome permanent labeling requirement geared to ensure safety in such situations is unreasonable. Furthermore, it is not clear that a second-hand purchaser of retreads or an original owner who seeks replacements is dependent on the tires’ labeling for information necessary to proper match-ups, inflation, and loading. The Secretary’s brief observes that an expert can determine many of the critical characteristics of a tire by mere inspection.⁶⁰

The court went on to note that the “apparently remote relationship between the permanent labeling requirement . . . and the goal of motor vehicle safety might be tolerable if those standards imposed no significant burden on the tire retreading industry.”⁶¹ In fact, however, evidence in the record suggests that permanent labeling would place a heavy burden on retreaders, and the agency meets this evidence with “mere assertions, unsupported by any citations to the record, that the requirements are practicable.” To develop the point, the court proceeded to undertake a deep dive into the mechanics of tire labeling.

⁵⁹ *ibid.*

⁶⁰ *ibid.* 37.

⁶¹ *ibid.*

For approximately 2/3 of the tire casings used by retreaders, the information required by the standard is not already printed in a location that would be visible after retreading. The retreading process involves removing the old tire tread, buffing the surface, affixing a new rubber tread with adhesive, and then vulcanizing it to the casing. To permanently label tires during this process, according to the court,

“it would be necessary for an employee to work with hand-tools on a mold that would have a temperature somewhere between 250 and 300 degrees F. exposing him to the danger of burns in an effort to change the varied plates with this information on it as each tire is changed in the mold.” Altering the mold plates in this fashion would be necessary for almost every tire run through the production lines, since the size, number of plies, construction, maximum pressure, and other characteristics vary from tire to tire. Thus, permanent labeling of retreads with the various items specified in Standard No. 117 might be loosely analogized to personalizing a set of wedding invitations by engraving each one with the name of the individual invitee: the engraving plate would have to be changed for each invitation printed.⁶²

Although the comments “raise serious doubts” about the regulation, the court found the agency’s response inadequate. The agency noted that manufacturers are already required to imprint information on each tire they retread under a different regulation, but the court found that the existing regulation is substantially less onerous, because the information it requires does not change from tire to tire.

As practiced in *National Tire Dealers*, hard look review shares substantial similarities to proportionality review. At the heart of the court’s analysis is what amounts to a necessity test: to serve the legitimate purpose of promoting motor vehicle safety, is it really necessary that tires be labeled *permanently* with this information? In application here, the test is quite demanding, because the court places the burden of establishing the necessity of its measure squarely on the shoulders of the agency. In the preamble to the rule, the

⁶² *ibid* 39 (quoting a comment from a tire retreader to NHTSA).

agency articulated a plausible reason why the information needed to be permanently affixed to the tire—to make the information available after the point of sale to those who might need it to select or match tires—but this is not enough for the court. The court further requires the agency to establish that “these hypothetical situations” arise frequently enough to justify the requirement.

The opinion suggests, however, that the intensity of its necessity analysis is not a constant but a variable, to be adjusted based on the magnitude of the burden the challenged measure imposes. As the court notes, the looseness of fit between the permanent labeling requirement and the goal of auto safety might not be fatal were the challenged measure less burdensome on tire retreaders. The court seems to be endorsing variable intensity review, along lines similar to those suggested by some scholars of proportionality.⁶³ This kind of analysis, which pegs the intensity of necessity review to the burden a challenged measure imposes, permits the court to roughly balance benefits and harms from the measure: the greater the burden, the more intensive the review, and therefore, the lower the measure’s chances of surviving. This approach gives the court a way to consider the weights of competing interests without engaging in an explicit balancing analysis. This kind of “stealth balancing” may hold particular appeal to judges in the United States, where judicial balancing of values can be controversial.⁶⁴

A Hard Look from the Supreme Court: State Farm

⁶³ Julian Rivers, ‘Proportionality and Variable Intensity of Review’ (2006) 65 Cambridge LJ 174.

The United States Supreme Court hears only a handful of administrative law cases each term,⁶⁵ and for more than a decade, it was not clear how the high court would receive the D.C. Circuit's experiment with hard look arbitrary and capricious review. The *Vermont Yankee* decision of 1978,⁶⁶ which took appeals courts to task for imposing on agencies procedural requirements not contained in the APA, suggested to many scholars that the Court would look with disfavor on the D.C. Circuit's upgrade to the historically deferential arbitrary and capricious review. In fact, however, the Supreme Court surprised many in 1983 with its decision in *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*,⁶⁷ while gave a full-throated endorsement to the hard look version of arbitrary and capricious review.

Like *National Tire Dealers*, *State Farm* concerned a protracted rulemaking process conducted by the hapless NHTSA, this one involving passenger restraint safety standards. The Department of Transportation first issued a rule requiring seatbelts in passenger vehicles in 1967, but seatbelts could only work if worn, and the majority of motorists in the late 1960s declined to buckle up. In 1969, the agency responded by proposing a standard requiring passive restraints, which as a practical matter meant either automatic seatbelts or airbags. After much wrangling, the agency adopted a final rule in 1977, which required manufacturers to equip all new cars with passive restraints by model year 1984. Then in 1981, the agency reopened the rulemaking process, and after a comment period, rescinded the passive restraint requirement altogether. An insurance company and trade association for insurers sued to challenge the rescission as arbitrary and capricious. They won in the appeals court, and the Motor Vehicle Manufacturers Association, an intervenor in the case, petitioned for review in the Supreme Court.

⁶⁵ Peter L. Strauss, 'One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action' (1987) 87 Colum L Rev 1093.

⁶⁶ *Vermont Yankee* (n 52).

⁶⁷ 463 US 29 (1983).

Writing for the Court, Justice Byron White laid out the arbitrary and capricious standard as follows:

The scope of review under the “arbitrary and capricious” standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a “rational connection between the facts found and the choice made.” In reviewing that explanation, we must “consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.” Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.⁶⁸

The Supreme Court’s decision put the agency’s explanation for changing course squarely at the center of its analysis. In a statement accompanying the rescission, the agency explained that new information undermined its earlier projections about the safety benefits of the passive restraint requirement. Initially, the agency had anticipated that roughly 60% of vehicles would meet the new requirements with airbags, but as the auto industry began finalizing its compliance plans, it became clear that around 99% of new cars would feature automatic seatbelts instead. Moreover, the vast majority of automatic seatbelts would be detachable belts, which, once detached, would remain disabled until rebuckled by the motorist. Because detachable belts require “the same kind of affirmative action that is the stumbling block to obtaining high usage levels of manual belts,” according to the agency, it was no longer clear that the standard would significantly increase motor vehicle safety.⁶⁹

⁶⁸ *ibid* 43.

⁶⁹ *ibid* 39.

Justice White subjected the agency's reasoning to a demanding examination. The Court took issue not only with how the agency considered the issues, but its failure to consider all the alternatives. "The first and most obvious reason for finding the rescission arbitrary and capricious," according to the Court, "is that NHTSA apparently gave no consideration whatever to modifying the Standard to require that airbag technology be utilized."⁷⁰ The Court noted that the agency's original rule proposal would have required installing airbags in all new cars, and that when an automatic seatbelt option was later proposed, the use of detachable seatbelts was approved only with manufacturers' assurances that they would not compromise the standard's safety goals. The Court stops short of insisting that the agency should have returned to an all-airbag standard. Rather, if the agency believed an all-airbag standard was unworkable, it had a duty to explain why:

Given the effectiveness ascribed to airbag technology by the agency, the mandate of the Act to achieve traffic safety would suggest that the logical response to the faults of detachable seatbelts would be to require the installation of airbags. At the very least this alternative way of achieving the objectives of the Act should have been addressed and adequate reasons given for its abandonment. But the agency not only did not require compliance through airbags, it also did not even consider the possibility in its 1981 rulemaking. Not one sentence of its rulemaking statement discusses the airbags-only option.⁷¹

Although concerns about an airbag-only standard emerged in the briefs and oral arguments before the Supreme Court, the Court disregarded them, noting that "the courts may not accept appellate counsel's *post hoc* rationalizations for agency action."⁷²

The Court also concluded that the agency was "too quick to dismiss the safety benefits of automatic seatbelts."⁷³ The agency dismissed the results of a study showing a substantial

⁷⁰ *ibid* 46.

⁷¹ *ibid* 48.

⁷² *ibid* 50.

⁷³ *ibid* 51.

increase in seatbelt use in vehicles with passive belts, on the grounds that participants in the study were not typical: they had purchased vehicles with extra safety features not required by law. The Court accepted that “it is within the agency’s discretion to pass upon the generalizability of these field studies.”⁷⁴ However, the Court rejected the train of reasoning that led the agency to conclude that the use of detachable belts would not necessarily lead to even a five percentage point increase in seatbelt usage, because the agency “apparently take no account of the critical difference between detachable automatic belts and current manual belts.”⁷⁵ The Court elaborated:

A detached passive belt does require an affirmative act to reconnect it, but—unlike a manual seatbelt—the passive belt, once reattached, will continue to function automatically unless again disconnected. Thus, inertia—a factor which the agency’s own studies have found significant in explaining the current low usage rates for seatbelts—works in favor of, not against, use of the protective device. Since 20% to 50% of motorists currently wear seatbelts on some occasions, there would seem to be grounds to believe that seatbelt use by occasional users will be substantially increased by the detachable passive belts. Whether this is in fact the case is a matter for the agency to decide, but it must bring its expertise to bear on the question.⁷⁶

In other words, the Court has a different theory from the agency about how occasional seatbelt users might respond to detachable belts. While the Court does not assert its own theory is superior to the agency’s, it does demand that the agency at least consider the alternate theory and reject it explicitly.

Lastly, the Court found fault with the agency for failing to explain why it had not required *nondetachable* automatic belts in the safety standard. Specifically, the Court was not satisfied with the agency’s reasons for not requiring a continuous passive seatbelt, which the user can spool out to create the slack necessary to enter and exit the carseat. In

⁷⁴ *ibid* 53.

⁷⁵ *ibid* 54.

⁷⁶ *ibid*.

its rule, the agency explained that requiring passive belts with use-compelling features, such as continuous belts and ignition interlocks (which prevent ignition if the driver's belt is not fastened), would be "counterproductive." The agency noted "a widespread, latent and irrational fear in many members of the public that they could be trapped by the seat belt after a crash," and concluded that "it would be highly inappropriate to impose a technology which by its very nature could heighten or trigger that concern."⁷⁷ Moreover, the agency added, it "would be unable to find the cause of safety served by imposing any requirement which would further complicate the extrication of any occupant from his or her car, as some use-compelling features would."⁷⁸

The Court was not satisfied. The agency gave no reasons to justify its conclusion that the continuous belt option would be popular with the public, as the ignition interlock was. Nor had the agency cited any grounds for departing from its earlier conclusion that nondetachable belts with spool releases were no less safe than detachable belts. "While the agency is entitled to change its view on the acceptability of continuous passive belts," the Court concluded, "it is obligated to explain its reasons for doing so."⁷⁹

To those familiar with proportionality review, the *State Farm* decision is notable in several respects. First, the case does not concern administrative overreaching, as in the paradigm proportionality case, in which the administration has taken measures that are excessive in context. Rather, the claim is that the agency has *underreached*: its regulation does not go far enough to promote auto safety. This is not so much a matter of the authorities shooting at sparrows with cannons, in Fritz Fleiner's memorable phrase, as of shooting at condors with a peashooter.⁸⁰ In general, arbitrary and capricious review is symmetrical in a way that classic proportionality review is not: administrative action is

⁷⁷ 46 Fed Reg 53419.

⁷⁸ *ibid.*

⁷⁹ *State Farm* (n 67) 56.

⁸⁰ Fritz Fleiner, *Institutionen Des Deutschen Verwaltungsrechts* (Mohr, 1928) 404.

subject to challenge, and the agency's reasons for its choices must stand up to the same scrutiny, whether the claim is that the agency has done too much or that it has not done enough.⁸¹

That being said, there are doctrines in American administrative law that, as a practical matter, mean that arbitrary and capricious review is more often available to challenge agency overreach than agency underreach. First, although American standing doctrines are fairly liberal by international standards, they are generally more favorable to the targets of regulation than to the beneficiaries of regulation. The requirement that plaintiffs suffer an injury that is "concrete and particularized" and "actual or imminent" can pose obstacles for the advocates of more vigorous regulation in areas where the benefits of agency action are diffuse.⁸² Second, notwithstanding the APA's instance that the "failure to act" qualifies as agency action, courts are generally very reluctant to review agencies' exercise of discretion not to take action., as noted above.⁸³ *State Farm* is something of a special case, because the agency had first passed, and then rescinded, a passive restraint requirement. Had the agency never itself raised the possibility of passive restraints, it seems unlikely that the courts would have required the agency to mandate them. All that being said, reviewability doctrines are sufficiently malleable that courts may permit would-be beneficiaries of regulation to challenge agency inaction as arbitrary and capricious when they wish to. Notably, in 2007 a narrow majority of the Supreme Court chose to entertain, and ultimately upheld, the state of Massachusetts' claim that it was arbitrary and capricious for the EPA to fail to determine whether greenhouse gas emissions contribute to global warming.⁸⁴

⁸¹ See *Riverkeeper Inc v EPA*, 475 F 3d 83 (2d Cir 2007) (sustaining an arbitrary and capricious challenge to environmental regulations for power plant cooling towers brought by an environmental advocacy group), *overturned by* *Entergy Corp v Riverkeeper*, 556 US 208 (2009).

⁸² *Lujan v Defenders of Wildlife*, 504 US 555, 561 (1992).

⁸³ See text to notes 18 to 24.

⁸⁴ *Massachusetts v EPA*, 549 US 497 (2007).

As in proportionality analysis, the agency's consideration of alternative measures is relevant to hard look review, but in hard look review, the obligation to consider alternatives extends farther, because it is not tethered to the question of whether the chosen measure is excessive. An actor subject to proportionality is required to consider whether the government's objective could be equally well pursued using alternative measures that infringed less on the interests of others. The failure to consider less restrictive alternatives would be grounds for finding agency action arbitrary and capricious under hard look review, but so might the failure to consider *more effective* alternatives.

Even if the Supreme Court accepted NHTSA's conclusion that its passive restraint standard would not significantly improve auto safety, that would not justify the agency's rescission under hard look review. Rather, the agency had an obligation to consider an airbag-only alternative that might be more effective in meeting the statute's goals. Significantly, hard look review does not merely impose an obligation to consider alternatives generated through the notice-and-comment process, although agencies have an obligation to address these as well.⁸⁵ Instead, in its contemporaneous explanation of its policy choices, the agency is responsible for anticipating and responding to alternative possibilities that a reviewing court might later dream up. In *State Farm*, it appears that the possibility of an airbags-only rule was first raised by the Court of Appeals,⁸⁶ not by commenters on the agency's proposal.⁸⁷

Furthermore, under hard look review as practiced in *State Farm*, the agency is on the hook not only for considering alternative policy choices, but alternative empirical predictions. As described above, NHTSA's projection that the use of detachable belts

⁸⁵ See *Nova Scotia Food Prods Corp v United States*, 568 F2d 240 (2d Cir 1977).

⁸⁶ 680 F 2d 206 at 236-38.

⁸⁷ 46 Fed Reg 53419, 53427-29.

would not significantly enhance auto safety was based on a prediction about motorist behavior. The agency assumed that motorists who usually do not use manual belts would disconnect detachable belts and then leave them disconnected. The Court countered that even motorists who usually do not use manual belts habitually do buckle up some of the time, and suggested that such motorists might well end up leaving their automatic buckles attached. The Court expected the agency to explain why its theory of seatbelt use is more plausible.

Another factor to mention here is the open-endedness of hard look review. While proportionality challenges predictably feature some version of the claim that the agency has used disproportionate measures, under hard look review, an agency's action is vulnerable if there is *any* respect in which it is not rationally justifiable. And given the plasticity of the arbitrary and capricious challenge, judicial review does not reliably proceed according to a pre-defined series of tests, as proportionality does. It may be very difficult for an agency to anticipate all of the faults that an aggrieved person may find with its actions, not to mention the ways in which the reviewing court may probe its reasoning.

In these respects, hard look review might appear to be even more demanding than proportionality review. Indeed, starting in the 1980s, many administrative law scholars claimed that unduly intensive judicial review was “ossifying” rulemaking, and pointed to hard look review as a chief culprit.⁸⁸ Writing about NHTSA, Jerry Mashaw and David Harfst conclude that “[t]he result of judicial requirements for comprehensive rationality has been a general suppression of the use of rules.”⁸⁹ Still, concerns over ossification seem to have faded over the past decades, perhaps in part because it is by no means clear

⁸⁸ See Mashaw and Harfst (n 4); Richard J Pierce, ‘Unruly Judicial Review of Rulemaking’ (1990) 5 *Natural Res & Env’t* 23. Writing in 1990, Pierce wrote that “[i]ncreasingly, agencies are abandoning rulemaking because of the extraordinary burdens courts have imposed on the rulemaking process.” *ibid* at 23.

⁸⁹ Jerry L Mashaw and David L Harfst, *The Struggle for Auto Safety* (Harvard UP 1990).

that hard look review is still the dominant approach to arbitrary and capricious review, as discussed further below.⁹⁰

In another respect, though, hard look review is more forgiving than proportionality analysis, precisely because of its emphasis on the agency's reasoning process. It is difficult, if not impossible, to redeem a measure that has been reviewed on its merits and deemed disproportionate. By contrast, because hard look review focuses on the agency's reasoning, rather than the substance of its action itself, it leaves agencies that fail the test more latitude to achieve their desired results, if they can only give a better account of their choices. While some observers are skeptical that the focus on agency's reasoning is more than window dressing for judicial judgments about the content of agency choices, one empirical study suggests that agencies generally do eventually win judicial approval of policies first announced in rules found to be arbitrary and capricious.⁹¹

The Twilight of Hard Look? Fox Television

How widely is the “hard look” version of arbitrary and capricious review actually practiced by American courts? A firm answer is not easy to come by, but there are reasons to expect that *State Farm* may be an outlier in terms of its intensity of review. Although the Supreme Court has never repudiated *State Farm*, Michael Herz noted in 2004 that “the Supreme Court has cited *State Farm* only twenty-five times since Rehnquist became Chief Justice [in 1986] and then almost always in a dissent, or only to

⁹⁰ It is also clear that, notwithstanding Professor Pierce's concerns, agencies have not given up on rulemaking. See Anne Joseph O'Connell, 'Political Cycles of Rulemaking: an Empirical Portrait of the Modern Administrative State' (2008) 94 Va L Rev 889, 964-65 (noting extensive use of rulemaking from the 1980s through the early 2000s).

⁹¹ William S Jordan III, 'Ossification Revisited: Does Arbitrary and Capricious Review Significantly Interfere With Agency Ability to Achieve Regulatory Goals Through Informal Rulemaking' (1999) 94 Nw UL Rev 393.

be distinguished, or for a pabulum proposition, or in a mild and revisionist manner.”⁹² This stands in stark contrast to the *Chevron v. Natural Resources Defense Council* decision, handed down the year after *State Farm*, which the Supreme Court has cited favorably scores of times. *Chevron*, which applies to agency interpretations of statutes, embodies a more deferential form of scrutiny than the hard look variant of arbitrary and capricious review, as discussed below.⁹³

The *FCC v. Fox Television Stations, Inc.* case from 2009 illustrates a more recent, and far more forgiving, application of arbitrary and capricious review.⁹⁴ The case played out against a backdrop of prodigiously profane celebrity appearances on award shows broadcast on American network television. Cher dropped a choice four-letter word into her acceptance speech at the 2002 Billboard Music Awards, and Nicole Ritchie used a few more at the following year’s ceremony. Although federal law prohibits the broadcast of “obscene, decent, or profane language,” the broadcasters were not initially subject to penalties, because staff rulings of the Federal Communications Commission (FCC) had established a safe harbor for “fleeting expletives”—nonliteral and nonrepetitive utterances of offensive words. But when Bono used a vulgar intensifier to underline his excitement over winning an award at the 2003 Golden Globes, the FCC changed course. Reversing a staff ruling that the Golden Globes broadcast was not indecent, the FCC in 2004 issued an order declaring that fleeting expletives could violate broadcasting laws and be a basis for penalties. Relying on its Golden Globes order, in 2006 the agency declared that the 2002 and 2003 Billboard broadcasts also were indecent, but declined to impose fines. Fox challenged the indecency findings as arbitrary and capricious.

A central issue for the Supreme Court was whether, and how, it was relevant to arbitrary and capricious analysis that the agency was changing its policy. Writing for a 5-4

⁹² Michael Herz ‘Rehnquist Court and Administrative Law’ [2004] 99 Nw UL Rev 314.

⁹³ See text at 100 to 104.

⁹⁴ 556 US 502.

majority on this point, Justice Scalia concluded that the agency's past position had limited relevance:

[The agency] need not demonstrate to a court's satisfaction that the reasons for the new policy are better than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better, which the conscious change of course adequately indicates.⁹⁵

Writing for the four dissenters, Justice Breyer denied that the agency's switch dictated a heightened level of scrutiny, but insisted that it was nonetheless relevant to the analysis. The action that the agency must justify is a change in policy, and so the agency must give an adequate account of that change. That requires "the agency here to focus upon the reasons that led the agency to adopt the initial policy, and to explain why it now comes to a new judgment."⁹⁶

The majority wasted little time in concluding that the agency's new approach to fleeting expletives was not arbitrary or capricious. According to the Court:

it was certainly reasonable to determine that it made no sense to distinguish between literal and nonliteral uses of offensive words, requiring repetitive use to render only the latter indecent. As the Commission said with regard to the expletive use of the F-Word, 'the word's power to insult and offend derives from its sexual meaning.'⁹⁷

Moreover, the agency's conclusion that a safe harbor for fleeting uses of words would lead to more widespread use of offensive language was "surely rational (if not inescapable)."⁹⁸ The majority's application of the arbitrary and capricious standard to the facts of this case consumed all of two pages in the case reporter.

⁹⁵ *ibid* 516.

⁹⁶ *ibid* 550 (Breyer, J., dissenting).

⁹⁷ *ibid* 512.

⁹⁸ *ibid* 518.

In a portion of the opinion that commanded only four votes, Justice Scalia dismissed arguments made in dissent that the FCC, like the Department of Transportation in *State Farm*, had failed to address important aspects of the problem before it. Justice Breyer's dissent noted that the FCC had initially justified its policy on fleeting expletives to avoid running afoul of First Amendment protections for free expression. Against that backdrop, according to Justice Breyer, the agency had not explained why the constitutional calculus had changed. Justice Scalia, for his part, denied that the agency had any obligation to perform a constitutional analysis, but pointed out that the agency's order did justify the regulation of indecency in general (if not this policy in particular) as constitutional.

Justice Breyer also faulted the agency for failing to consider the policy's chilling impact on small broadcasters, who would likely be unable to afford the pricey equipment needed to "bleep" bad language. The FCC had said nothing about this issue, but Justice Scalia stepped into the breach with some arguments of his own. Justice Scalia first posits that the "down-home local guests [on locally produced programming] probably employ vulgarity less than big-city folks; and small-town stations generally cannot afford or cannot attract foul-mouthed glitteratae from Hollywood."⁹⁹ Moreover, small broadcasters had little to fear, since the FCC's order stated that it might be inequitable to penalize expletives that surface during the live broadcast of a public event, and in any case, the agency had the discretion to craft appropriate remedies that took account of relevant circumstances.

Plainly, *Fox Television* presents a brand of arbitrary and capricious review that is substantially less searching than the hard look review of *National Tire Dealers* and *State Farm*. The core of the Court's analysis resembles a fairly casual reasonableness review, in which the agency's action is sustained because it is "reasonable" and "rational." And

⁹⁹ *ibid* 527.

the fact that the agency once rejected the policy it now embraces out of concerns that it could unduly chill constitutionally-protected expression hardly enters the picture. The agency is not required to explain why these concerns now hold no sway, and indeed, the Court itself supplies arguments on the agency's behalf to fend off the First Amendment objections. To the extent that *Fox Television Stations* is the shape of things to come, it signals a departure from the aggressive scrutiny of hard look review.

The Court's review in *Fox Television* is also notably less stringent than proportionality review. From a proportionality perspective, the central question is whether, in pursuing its goal of keeping the airwaves free from indecency, the FCC chose a policy that went too far, and unduly burdened free expression. Framed in this way, the agency's justification must focus on explaining why the policy's adverse impact on free expression would be limited, and acceptable in light of the gains made in pursuing the statute's objective of keeping indecency off the air. The Court's analysis, by contrast, does not require the FCC to justify its policy in these terms, or to explain why its choice strikes the balance between these competing considerations better than alternative approaches. Indeed, the agency has almost nothing to say on its policy's impact on expression. Because the Court stops after evaluating the agency's policy on its own terms and pronouncing it reasonable, it never squarely engages with the other interests at stake.

Agency Discretion and Statutory Interpretation

As a practical matter, many of the important discretionary choices that agencies make are reflected in their interpretations of the statutes that they administer. A formidable body of law has grown up to address the sort of deference that courts owe to agency interpretations of statutes under different circumstances. This is not the place for a comprehensive analysis of these doctrines, but a discussion of judicial control of agency discretion would be incomplete without some reference to them.

The centerpiece of the Supreme Court's deference jurisprudence is the famous *Chevron* decision from 1984.¹⁰⁰ In *Chevron*, the Court devised a two-step analysis for evaluating agency interpretations of statutes:

When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.¹⁰¹

Chevron is important conceptually not least because it explicitly recognizes agency statutory interpretation as a means by which agencies exercise discretionary decision-making power delegated by Congress. The Court draws a connection between the actions agencies take pursuant to express grants of discretion, which are subject to arbitrary and capricious review, and the policy choices agencies make pursuant to implicit delegations in the form of statutory ambiguities, which are subject to *Chevron* reasonableness review:

If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit, rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.¹⁰²

¹⁰⁰ *Chevron USA, Inc v Nat'l Res Def Council*, 467 US 837, 842-43 (1984).

¹⁰¹ *ibid*

¹⁰² *ibid* 843-44 (emphasis added).

In the *Chevron* case itself, the key interpretive question concerned the “bubble concept”: whether the EPA would be permitted to treat an entire industrial facility as a “stationary source” of pollution for purposes of the pollution permitting regime of the Clean Air Act. The EPA’s interpretation would allow polluters to modify their facilities without obtaining new permits so long as total emissions did not rise. Environmental groups protested that the interpretation would undercut the statute’s goal of pollution reduction, while the agency maintained its interpretation would encourage facilities to favor technologies that polluted less. The Court concluded that “Congress did not have a specific intention on the applicability of the bubble concept in these cases,” and that “the EPA’s use of that concept here is a reasonable policy choice for the agency to make.”¹⁰³ The Court concluded the agency’s choice was reasonable largely because it represented a “reasonable accommodation” of the competing economic and environmental goals animating the Clean Air Act.¹⁰⁴

As prominent as it is, *Chevron* does not occupy the whole field of statutory interpretation. *Chevron* does not apply to all agency interpretations of statutes, and exactly when it applies remains a source of some confusion and controversy even now.

In a 2001 case, *United States v. Mead Corporation*,¹⁰⁵ the Supreme Court explained that *Chevron* applied whenever “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.”¹⁰⁶ A congressional grant of rulemaking or formal adjudication power is “a very good indicator of delegation meriting *Chevron* treatment,” but it is not dispositive.¹⁰⁷ In the event that an agency interpretation does not merit *Chevron* review, it will be afforded

¹⁰³ *ibid* 844.

¹⁰⁴ *ibid* 865.

¹⁰⁵ 533 US 218 (2001).

¹⁰⁶ *ibid* at 229.

¹⁰⁷ *ibid*.

the “sliding-scale” deference mandated by *Skidmore v. Swift & Co.*¹⁰⁸ Under *Skidmore*, the weight a reviewing court will give to an agency’s interpretation “will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.”¹⁰⁹

The mixed deference regime inaugurated by *Mead* has drawn criticism from some prominent scholars for providing poor guidance to agencies and lower courts.¹¹⁰ In particular, it is not obvious how courts are to determine whether Congress would expect agencies to speak to a given issue with the force of law. The presumption that notice-and-comment rulemakings and formal adjudications are *Chevron*-eligible turns out not to hold up in practice, at least as far as the Supreme Court is concerned: an empirical study by William Eskridge and Lauren Baer finds that, through 2006, the Supreme Court evaluated only a minority of these statutory interpretations under *Chevron* or a more deferential standard.¹¹¹

A Convergence of Standards?

How does judicial review of agency statutory interpretations compare to arbitrary and capricious review? There are really two questions here. First, what is the difference between an agency interpreting a statute and an agency exercising discretion under a statute? Second, what are the substantive differences, if any, between the standards of review courts apply in these two situations? The answer to neither question is completely clear.

¹⁰⁸ 323 US 132 (1944).

¹⁰⁹ *ibid* 140.

¹¹⁰ Thomas W Merrill, “The Mead Doctrine: of Rules and Standards, Meta-Rules and Meta-Standards,” (2002) 54 Admin L Rev 807.

¹¹¹ William N Eskridge and Lauren E Baer, ‘The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from *Chevron* to *Hamdan*’ (2008) 96 Geo LJ 1083.

In some cases, an agency is clearly either interpreting a statute or exercising discretion, and of course the parties' pleading can help to clarify the questions before the court. In other cases, however, the distinction will not be so obvious, with the result that it is also not obvious how the court should review the agency's action. Jack Beermann, for instance, makes a convincing argument that the Supreme Court could have approached *Fox Television* as a statutory interpretation case, the central question being whether the agency permissibly interpreted the statute's prohibition on "obscene, indecent, or profane language."¹¹² This would counsel reviewing the agency under the *Chevron* framework. In actuality, *Chevron* is mentioned nowhere in *Fox Television's* five opinions.

The Court faced a choice between these two frameworks directly in *Judulang v. Holder*, from 2011.¹¹³ This case concerned a Bureau of Immigration Appeals policy restricting relief from deportation for noncitizen criminals to those who would have had comparable grounds for relief under a provision of immigration law that had since been repealed. Arguing on the agency's behalf, the Solicitor General maintained that the agency's "comparable grounds" doctrine was entitled to deference under *Chevron* step two, as a reasonable interpretation of an ambiguous provision of federal law. The Court rejected this contention, and instead reviewed the agency under the arbitrary and capricious standard. In a footnote, the Court suggested that the choice was immaterial, since the standards are equivalent: "Were we to apply *Chevron*, our analysis would be the same, because under *Chevron* step two, we ask whether an agency interpretation is "arbitrary or capricious in substance."¹¹⁴

¹¹² Jack Beermann, 'Chevron At the Roberts Court: Still Failing After All These Years,' (2014) 83 Fordham L Rev 114.

¹¹³ 132 S Ct 476 (2011).

¹¹⁴ *Judulang*, 132 S Ct at 483 n 7. The Court went on to conclude that the case did not present a question of statutory interpretation, so its comment on the equivalence of *Chevron* and arbitrary and capricious review was dicta.

Judalung was not the only time the Supreme Court has suggested that *Chevron* step two reasonableness review is the same as arbitrary and capricious review,¹¹⁵ and a number of appeals courts have made this claim for years.¹¹⁶ They are joined by some legal scholars who have also argued that *Chevron* step two either is, or should be, identical to arbitrary and capricious review.¹¹⁷ One argument in favor of harmonizing *Chevron* step two and arbitrary and capricious review is that it would seem anomalous to subject agencies to more intensive review for discretionary policy choices than for statutory interpretations—that is, an intensive hard look review for the former, and a more relaxed reasonableness review for the latter.¹¹⁸ If substantial deference to the agency is warranted in *Chevron* step two because Congress has implicitly left a matter up to the agency to decide, should not at least as much deference be given when the agency is exercising discretionary authority that Congress has plainly granted it?

But apart from the question of what courts *should be* doing, there is the question of what they *are* doing. Are arbitrary and capricious review and *Chevron* step two, as applied by courts, actually the same thing?

A definitive answer is not in reach, but some empirical data provide tentative grounds for concluding that they are not. At least as practiced by the Supreme Court, *Chevron* step

¹¹⁵ See *Household Credit Services, Inc v Pfennig*, 541 US 232, 242 (2004); *Astrue v Capato ex rel BNC*, 132 S Ct 2021, 2034 (2012).

¹¹⁶ See *Nat'l Assn of Reg Utility Comm'rs v ICC*, 41 F3d 721 (DC Cir 1994); *Nat'l Org of Veterans Advocates, Inc v Sec'y of Veterans' Affairs*, 669 F3d 1340 (Fed Cir 2012).

¹¹⁷ Mark Seidenfeld, 'A Syncopated *Chevron*: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes' (1994) 73 *Tex L Rev*; Ronald M Levin, 'The Anatomy of *Chevron*: Step Two Reconsidered', (1996) 72 *Chi.-Kent L. Rev.* 1253; see also *Verizon Commc'ns, Inc v FCC*, 535 US 467 (2002) (adopting a similar approach).

¹¹⁸ Then-Judge (now Justice) Stephen Breyer flagged the anomaly in a law review article almost thirty years ago. Stephen Breyer 'Judicial Review of Questions of Law and Policy' (1986) 38 *Admin L Rev* 363.

two appears to be a more deferential form of review. According to the data collected by Eskridge and Baer, of the 54 cases decided between 1984 and 2006 in which the Supreme Court applied *Chevron* step two, the Court concluded the agency's interpretation was reasonable in 53.¹¹⁹ By way of contrast, in a study of all cases in which actions of the EPA or National Labor Relations Board are subjected to arbitrariness review in the appeals courts between 1995 and 2006, Thomas Miles and Cass Sunstein find that the agencies won 64% of the time.¹²⁰ Although these studies involve different courts, different years, and (in the case of the latter) only a small sample of agencies, they provide some reason to think that, as actually practiced by courts, *Chevron* step two review is substantially less intensive than arbitrary and capricious review.

To the extent that we expect courts to continue to favor the hard look variant of arbitrary and capricious review, these findings should not come as a surprise. *Chevron* step two does not require the agency to demonstrate the superiority of its policy choice to the alternatives, but courts applying hard look review may well expect such a showing from agencies. However, to the extent that the Supreme Court has signaled a pullback from the intensity of hard look review in *Fox Television*, we may witness something like a convergence between *Chevron* step two and arbitrary and capricious review in years to come.¹²¹

¹¹⁹ Eskridge and Baer (n 111).

¹²⁰ Thomas J Miles and Cass R Sunstein, 'The Real World of Arbitrariness Review' (2008) 75 U Chi L Rev 761. The Miles and Sunstein data includes both arbitrary and capricious review and substantial evidence review.

¹²¹ Another topic of ongoing debate concerns how the intensity of arbitrary and capricious review compares to substantial evidence review. The various courts of appeals have staked out different positions on the issue. The DC Circuit has concluded that the "quantum of factual support . . . demanded by the substantial evidence provision of the APA . . . [is] no different from that demanded by the arbitrary or capricious standard." *Data Processing* (n 40) 686. The Eleventh Circuit, by contrast, decided that substantial evidence review requires a "harder look" than "the more deferential arbitrary and capricious standard." *AFL-CIO v OSHA*, 965 F 2d 962 (11th Cir 1992). Nor is the confusion confined to the lower federal courts. In the words of the current edition of the

Conclusion

The intricacies and vagaries of American administrative law doctrine, coupled with the difficulty of reliably assessing empirically what courts are doing in practice, make it hazardous to generalize about judicial review. Still, as I suggested at the outset, a few points stand out.

One of these is closely related to the intricacies and vagaries of doctrine: namely, that judicial review is unpredictable. As this chapter demonstrates, the unpredictability operates on more than one level. For instance, it is not always clear whether a court will treat an agency's exercise of discretion as a policy choice, to be evaluated under the arbitrary and capricious standard, or as a construction of an ambiguous statute, to be evaluated within the *Mead/Chevron/Skidmore* framework. But even assuming that the court applies the arbitrary and capricious standard, how intensively will it scrutinize the agency action? Will the court apply hard look review, à la *State Farm*, or reasonableness review, à la *Fox Television*? If, on the other hand, the court treats the agency action as a statutory interpretation, will it apply the *Chevron* two-step approach or *Skidmore's* sliding scale of deference? More fundamentally, how do the method and intensity of review under the different approaches compare? I have argued elsewhere that some forms of uncertainty in administrative law can have value as levers for shaping agency behavior under some circumstances.¹²² But no one, I think, would argue that the level of unpredictability that pervades American judicial review doctrine is optimally calibrated to serve any end.

venerable Gellhorn and Byse casebook, "If one looks for it, one can find Supreme Court statements that seem to suggest that the 'arbitrary and capricious' standard is less demanding than the 'substantial evidence' test; that the two standards are the same; and even perhaps that the 'arbitrary and capricious' standard is more demanding." Peter Strauss and others, *Gellhorn and Byse's Administrative Law, Cases and Comments* (11th edn, Foundation Press 2011) 960.

¹²² Jud Mathews, 'Deference Lotteries,' (2013) 91 Tex L Rev 1349.

One consequence of the confusions in judicial review doctrine may be that they create more space for the play of politics in the judicial review of discretionary decisions by agencies. To take one example, the Miles and Sunstein study of arbitrariness review cases notes a statistically significant relationship between the political party of the President who appoints a judge and how that judge votes. Miles and Sunstein find that Democratic panels of judges approve liberal agency decisions at higher rates than they approve conservative agency decisions, and they find the opposite pattern for Republican panels.¹²³ Doctrinal uncertainty may abet politically-motivated judging, by creating decision environments in which judges can in fact be guided by policy considerations, and still credibly claim to find support for their approaches in one or another strand of doctrine. It may also be the case, of course, that the causal arrow points the other way as well: that the politics of judging may themselves generate some of the puzzles and inconsistencies we find in the doctrine.

A second key point is that judicial review in American administrative law is symmetrical in a way that traditional proportionality review is not. Whether proceeding under the arbitrary and capricious rubric, *Chevron*, *Skidmore*, or a different standard, American courts can hear claims not only that the agency has adopted measures that infringe too much on private interests, but also that the agency's chosen means are not sufficiently potent to achieve policy objectives. This was the nature of the challenge in *State Farm*, as well as in several of the D.C. Circuit's influential hard look precedents.¹²⁴ This equal opportunity scrutiny presents a significant contrast with traditional proportionality review, the subtests of which are all squarely trained on detecting government overreach. The symmetry of review may also be among the factors that often make it difficult for

¹²³ Miles and Sunstein (n 120).

¹²⁴ See *Industrial Union Dep't, AFL-CIO v. Hodgson*, 409 F 2d 467 (1974) (remanding portions of an asbestos regulation deemed insufficiently protective of workers' health).

agencies to anticipate what will transpire in court. Relative to proportionality, the American approach opens new angles of attack from which parties can challenge agency choices, and—especially when coupled with the hard look insistence that an agency’s record comprehensively justifies its choice—can make judicial review a harrowing and unpredictable experience.

In principle, it makes sense for a judicial review regime to hold agencies to account for doing too little with their discretionary powers as well as too much. One-sided scrutiny runs the risk of creating a systematic anti-regulatory bias in judicial review. In practice, however, it is not entirely clear that the American approach successfully avoids this result. Ironically, it is possible that penalizing agencies for doing too little gives them an incentive to do nothing at all. As noted already, it is very difficult in the American system to obtain judicial review of agency inaction. Shielding agencies from judicial review when they do nothing, but subjecting them to aggressive scrutiny reversal when they take discretionary actions they do not go far enough, gives agencies interested in avoiding judicial reversal an added reason simply not to act at all. This observation feeds into the broader critique, discussed above, that aggressive judicial review can lead to the ossification of the rulemaking process. In this context, though, relaxing the scrutiny of judicial review is not the only option for reducing perverse incentives for agencies not to act: lowering the barriers to judicial review of agency inaction could also have an effect.

I close with the observation that there is a tendency in American administrative law to proceduralize substantive review. Even though the Supreme Court in *Vermont Yankee* stopped courts from imposing on agencies additional procedural requirements, such as hearings, reviewing courts still have a tendency to describe the faults they find with agency choices in terms of the agency’s decision-making process. So the Supreme Court in *State Farm* does not hold that NHTSA’s failure to impose an airbag-only requirement was inherently irrational, but instead faults the agency for failing to adequately consider an airbag-only option.

The proceduralization of review may serve as a judicial defense mechanism of sorts. Required to sit in judgment over agencies' sensitive policy choices, judges would understandably seek to conduct their review in a way that anticipates and diffuses the charge that they are simply substituting their own judgment for agencies'. Shifting the analytic focus from the policy's merits to the agency's justification is one way to do this. One consequence may be to hamper agency action, by requiring agencies to shoulder burdens of justification that may sometimes verge on the unreasonable. But as noted, another may be to create more space for second attempts in administrative law. A judicial remand of agency policy is not necessarily a dead end if agencies can come back to court with justifications for their policies that pass judicial muster.