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## Depoliticizing Judicial Review of Agency Rulemaking

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## DEPOLITICIZING JUDICIAL REVIEW OF AGENCY RULEMAKING

Scott A. Keller\*

*Abstract:* Administrative law doctrines for reviewing agency rulemaking, such as the Supreme Court’s dicta in *Motor Vehicle Manufacturers Ass’n v. State Farm Mutual Automobile Insurance Co.*<sup>1</sup> and the D.C. Circuit’s hard look doctrine, give judges significant discretion to invalidate agency rules. Many commentators recognize that this discretion politicizes judicial review of agency rulemaking, as judges appointed by a president of one political party are more likely to invalidate agency rules promulgated under the presidential administration of a different political party. Unelected judges, though, should not be able to use indeterminate administrative law doctrines to invalidate agency rules on the basis that they disagree with the policy decisions of a presidential administration.

This Article argues that the Supreme Court’s recent decision in *FCC v. Fox Television Stations, Inc.*<sup>2</sup> implicitly eliminated *State Farm*’s dicta and the D.C. Circuit’s hard look doctrine. In place of these paternalistic doctrines, courts should establish a doctrine for reviewing agency rulemaking that examines only the agency’s purpose in regulating and the means used by the agency to achieve that purpose—instead of giving courts leeway to impose additional procedures on agencies and to nitpick rulemaking records. Constitutional doctrines for reviewing legislation already focus on a government actor’s purpose and means, so these doctrines should also be used for reviewing agency rules, which are legislative-like pronouncements that are binding with the force of law.

Ultimately, this Article proposes that courts should review agency rulemaking under the standard for reviewing legislation known as “rational basis with bite.” Rational basis with bite would require the agency, at the time it promulgates a rule, to articulate its actual statutory purpose in promulgating the rule and explain how the rule is rationally related to that purpose. Not only would rational basis with bite significantly limit the ability of judges to invalidate agency rules based on policy disagreements, but the standard fits well with the Supreme Court’s precedents on APA arbitrary and capricious review.

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1. 463 U.S. 29 (1983).

2. 556 U.S. \_\_ (Apr. 28, 2009), 129 S. Ct. 1800 (2009).

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INTRODUCTION

The Obama Administration’s largest impact on federal policy may very well come from institutions that are not usually on the public’s radar screen: administrative agencies. Federal agencies create a

substantial majority of the country's new laws,<sup>3</sup> and “[t]here is going to be a huge amount of action in the regulatory arena after years of deregulation under President Bush.”<sup>4</sup> Weeks into office, President Obama directed the Environmental Protection Agency (EPA) to reconsider two Bush Administration decisions: (1) preventing states from setting auto emission and fuel efficiency standards that are more stringent than federal standards,<sup>5</sup> and (2) adopting less stringent controls on mercury pollution from power plants.<sup>6</sup> Similarly, as soon as President Obama took office, the Food and Drug Administration (FDA) approved “the world’s first test in people of a therapy derived from human embryonic stem cells”—a clinical trial that had been rejected by the Bush Administration.<sup>7</sup> Moreover, the Obama Administration’s Interior Department reversed the Bush Administration’s plan to allow offshore oil drilling.<sup>8</sup> Some also believe that the Federal Communications Commission (FCC) under the Obama Administration could reinstitute the controversial “fairness doctrine.”<sup>9</sup>

The Bush Administration anticipated that the Obama Administration would overhaul the country’s administrative regulations, so in the final months of President Bush’s tenure, his Administration took a series of administrative actions to deregulate various consumer and

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3. See *INS v. Chadha*, 462 U.S. 919, 985–86 (1983) (White, J., dissenting) (“[T]he sheer amount of law . . . made by [administrative] agencies has far outnumbered the lawmaking engaged in by Congress through the traditional process.”).

4. Brian C. Mooney, *Harvard’s Sunstein to Oversee Regulation*, BOSTON GLOBE, Jan. 9, 2009, at A12 (quoting Jeffrey Rosen).

5. John M. Broder & Peter Baker, *Obama’s Order Likely to Tighten Auto Standards*, N.Y. TIMES, Jan. 26, 2009, at A1.

6. Tom Goldstein, *EPA Moves to Dismiss Clean Air Act Case, Reversing Bush Administration Policies*, SCOTUSBLOG.COM, Feb. 6, 2009, <http://www.scotusblog.com/wp/epa-moves-to-dismiss-clean-air-act-case-reversing-bush-administration-policies/>.

7. Andrew Pollack, *Milestone In Research In Stem Cells*, N.Y. TIMES, Jan. 23, 2009, at B1.

8. *Bush-Era Offshore Drilling Plan Is Set Aside*, MSNBC.COM, Feb. 10, 2009, <http://www.msnbc.com/id/29119940>.

9. See John Eggerton, *Citing Obama Opposition, McDowell Warns Against Fairness Doctrine*, MULTICHANNEL NEWS, Jan. 28, 2009, [http://www.multichannel.com/article/print/162933-Citing\\_Obama\\_Opposition\\_McDowell\\_Warns\\_Against\\_Fairness\\_Doctrine.php](http://www.multichannel.com/article/print/162933-Citing_Obama_Opposition_McDowell_Warns_Against_Fairness_Doctrine.php); George F. Will, *Broadcast ‘Fairness’ Fouls Out*, WASH. POST, Dec. 7, 2008, at B7; see generally *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 369 (1969) (“The Federal Communications Commission has for many years imposed on radio and television broadcasters the requirement that discussion of public issues be presented on broadcast stations, and that each side of those issues must be given fair coverage. This is known as the fairness doctrine . . .”).

environmental industries.<sup>10</sup> Most would assume that the administrative actions of an outgoing president could be overturned by an incoming presidential administration that wants to reverse course on federal regulatory policy. After all, the electorate holds presidents accountable for their actions, and presidential administrations react to the public's perception of the administration's regulatory policies.<sup>11</sup>

But administrative law doctrines for judicial review of agency rulemaking have become a "judicially created obstacle course"<sup>12</sup> that gives judges far too much leeway to reach results based on their partisan policy preferences.<sup>13</sup> This, in turn, allows unelected judges to prevent

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10. See R. Jeffrey Smith, *A Last Push to Deregulate*, WASH. POST, Oct. 31, 2008, at A1 ("The White House is working to enact a wide array of federal regulations, many of which would weaken government rules aimed at protecting consumers and the environment, before President Bush leaves office in January."); see also Note, *The Mysteries of the Congressional Review Act*, 122 HARV. L. REV. 2162, 2162 (2009) ("And as President Bush's term came to an end, his staff took steps widely viewed as intended to ensure the Obama Administration would have a more difficult time undoing Bush's rules than the Bush Administration had undoing Clinton's eight years earlier. The pattern is familiar, dating to the first hostile presidential transition from John Adams to Thomas Jefferson." (footnotes omitted)).

11. See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2337 (2001) ("The Presidency is by nature a public institution, and almost no presidential exercise of authority, however masked or oblique, long can escape public notice; this scrutiny then will bring to bear on the President the pressures associated with a national constituency.").

12. *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 248 (D.C. Cir. 2008) (Kavanaugh, J., concurring in part, concurring in the judgment in part, and dissenting in part).

13. See, e.g., CASS R. SUNSTEIN ET AL., *ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY* (2006) [hereinafter SUNSTEIN, *ARE JUDGES POLITICAL?*] (providing statistical analyses of judicial voting behavior); Frank B. Cross, *Shattering the Fragile Case for Judicial Review of Rulemaking*, 85 VA. L. REV. 1243, 1270-74 (1999) (discussing the "evidence of judicial ideological decisionmaking" in administrative law); Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeal*, 107 YALE L.J. 2155, 2168-69 (1998) (noting that D.C. Circuit panels controlled by judges appointed by Republican presidents reached conservative decisions in 54% of cases, and panels controlled by Democratic appointees reached liberal decisions in 68% of cases); Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U. CHI. L. REV. 761, 807 (2008) [hereinafter Miles & Sunstein, *Arbitrariness Review*] (recognizing, under the arbitrary and capricious review standard, that "judicial policy preferences do play a significant role, and in the difficult cases, it does seem to be driving actual outcomes"); Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823, 827 (2006) ("[T]he application of the *Chevron* framework . . . shows a significant effect from the political convictions of federal judges."); Richard J. Pierce, Jr., *Two Problems in Administrative Law: Political Polarity on the District of Columbia Circuit and Judicial Deterrence of Agency Rulemaking*, 1988 DUKE L.J. 300 (1988); Richard Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717 (1997). See generally Cass R. Sunstein, *Does Red Lion Still Roar? Keynote Address*, 60 ADMIN. L. REV. 767, 769-70 (2008) (discussing the statistical analyses of judicial voting behavior reported in SUNSTEIN, *ARE JUDGES POLITICAL?* and noting that "[t]here

many shifts in regulatory policy favored by an incoming president. President Bush therefore could have expected that his final deregulatory acts would “be difficult for his successor to undo.”<sup>14</sup>

Of course, this is nothing new for modern presidential administrations. President Reagan campaigned on a major shift in federal regulatory policy,<sup>15</sup> but the deregulatory changes his Republican administration enacted were met with staunch resistance by the courts—which were freshly packed with judges appointed by Democratic President Carter.<sup>16</sup> Indeed, the administrative law doctrines adopted in the late 1970s and early 1980s allowed judges to use their policy preferences to invalidate agency action.<sup>17</sup> These doctrines are still used today, and they could prevent the Obama Administration from shifting regulatory policy as President Obama has promised.<sup>18</sup> Like President Reagan, President Obama will have to get his regulatory changes through courts that are full of judges who were appointed by his predecessor.<sup>19</sup>

It would be a mistake, however, for judges to continue using indeterminate administrative law doctrines to invalidate agency rules on the basis that they disagree with the policy decisions of a presidential administration.<sup>20</sup> This argument does not turn on the prudence of the

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is a statistically significant difference between the overall liberal voting rate of Democratic and Republican appointees”).

14. Smith, *supra* note 10, at A1.

15. See Abner J. Mikva, *Deregulating Through the Back Door: The Hard Way to Fight a Revolution*, 57 U. CHI. L. REV. 521, 527 (1990) (“Carter’s successor, Ronald Reagan, had been campaigning for years against big government and bureaucratic excess and entered office pledged to strong, swift action against ‘overregulation.’” (quoting MARTHA DERTHICK & PAUL J. QUIRK, *THE POLITICS OF DEREGULATION* 29–30 (Brookings Institution, 1985))).

16. See, e.g., Michael D. Schattman, *Picking Federal Judges: A Mysterious Alchemy*, 96 MICH. L. REV. 1578, 1593 (1998) (noting that during President Carter’s tenure, Congress created 117 new federal trial judges and 35 new federal appellate judges).

17. See *supra* note 13.

18. See *supra* notes 3–9 and accompanying text.

19. See Eric A. Posner, *Does Political Bias in the Judiciary Matter?: Implications of Judicial Bias Studies for Legal and Constitutional Reform*, 75 U. CHI. L. REV. 853, 866 (2008) (“[F]or judges with lifetime tenure, at any given time their policy preferences may well lag behind those of the public and of existing parties.”).

20. See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984) (“Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges’ personal policy preferences. In contrast, an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the

Obama Administration's policies; rather, it is driven by the Constitution's requirement for the separation of powers and the need to respect institutional competence. The courts can just as easily invalidate the agency rulemaking of a Democratic President as a Republican President. For example, even in President Bush's final year of office, courts struck down his administration's regulations related to global warming and to the broadcast of indecent material.<sup>21</sup> Quite simply, administrative law doctrines need to be modified to prevent unelected judges from using their policy preferences to invalidate agency rulemaking.

The Supreme Court's recent decision in *FCC v. Fox Television Stations, Inc.*<sup>22</sup> may be the watershed precedent that charts a new course for administrative law. The doctrinal culprits that have allowed judges to use their policy preferences to invalidate agency rulemaking are the Supreme Court's dicta on the Administrative Procedure Act's (APA) arbitrary and capricious standard of review in *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*<sup>23</sup> and the D.C. Circuit's hard look doctrine. While *Fox Television* did not explicitly reject the *State Farm* dicta and the hard look doctrine, the way *Fox Television* engaged in APA arbitrary and capricious review implicitly rejected both.

Consequently, after *Fox Television*, courts should replace *State Farm*'s dicta and the hard look doctrine with a doctrine for reviewing agency rulemaking that examines the agency's purpose in regulating and the means used by the agency to achieve that purpose—instead of requiring the agency to use additional procedures and scouring the rulemaking record to make up insignificant problems with that record. Constitutional doctrines for reviewing legislation already focus on the purpose and means of a governmental actor.<sup>24</sup> By tying review of agency rulemaking to the doctrines for reviewing legislation, courts could provide a limiting principle to justify their review of agency rulemaking.

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incumbent administration's views of wise policy to inform its judgments.”).

21. See *Ctr. for Biological Diversity v. NHTSA*, 538 F.3d 1172, 1182 (9th Cir. 2008) (striking down Bush Administration fuel emissions standards on the basis of global warming); *CBS Corp. v. FCC*, 535 F.3d 167, 171 (3d Cir. 2008), *vacated*, 129 S. Ct. 2176 (2009) (invalidating the Bush Administration's rule that penalized the broadcast of indecent material).

22. 556 U.S. \_\_ (Apr. 28, 2009), 129 S. Ct. 1800 (2009).

23. 463 U.S. 29 (1983).

24. See *infra* notes 223–232 and accompanying text.

This limiting principle would also recognize that precedents on reviewing legislation from the past century have used trial and error to find the most effective doctrines for reviewing legislative-like pronouncements, such as agency rules. Moreover, this shift would coincide with the modern Court's insistence that the APA be interpreted as it was understood when Congress enacted it in 1946.<sup>25</sup>

Ultimately, this Article proposes that courts should review agency rulemaking under the APA's arbitrary and capricious standard, 5 U.S.C. § 706(2)(A), according to the standard for reviewing legislation that has become known as "rational basis with bite."<sup>26</sup> This is the standard that emerges from *Fox Television*.<sup>27</sup> Rational basis with bite would require the agency, at the time it promulgates a rule, to articulate its actual statutory purpose in promulgating the rule and explain how the rule is rationally related to that purpose.<sup>28</sup> This should not be a heavy burden on agencies as the APA already requires them to provide a "concise general statement of [the rule's] basis and purpose."<sup>29</sup> Courts therefore would not be permitted to come up with hypothetical purposes or explanations to justify the agency's rule, as courts are allowed to do under traditional rational basis review (known also as "minimum rationality review"). Not only would rational basis with bite significantly reduce the ability of judges to veto agency rules based on policy disagreements, but the Supreme Court's precedents on APA arbitrary and capricious review fit quite well with the rational basis with bite doctrine.

Rational basis with bite is also preferable to the other standards used in reviewing legislation. To eliminate the chances of judges using their policy preferences in reviewing agency rulemaking, some might be tempted to adopt minimum rationality review, the traditional rational

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25. See *infra* note 268 and accompanying text.

26. This Article focuses on agency informal (notice-and-comment) rulemaking. See 5 U.S.C. § 553 (2006). The APA's arbitrary and capricious review standard applies when courts review agency informal rulemaking. See 5 U.S.C. § 706(2)(A). The arbitrary and capricious standard, though, also applies when courts review other forms of agency action, such as informal adjudication. See, e.g., *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971). It could be prudent for courts to use the same rational basis with bite standard in reviewing those other forms of agency action under APA arbitrary and capricious review. This Article, however, does not address this issue because part of the rationale for proposing the rational basis with bite standard is the connection between agency rulemaking and legislation. See *infra* Part I.A.

27. See *infra* notes 201–203, 296–297 and accompanying text.

28. See *infra* notes 67–71, 235–238 and accompanying text.

29. 5 U.S.C. § 553(c).



basis test for reviewing most legislation—which is extremely deferential.<sup>30</sup> However, there are strong reasons for using a heightened standard for review of agency rulemaking as compared to review of legislation: Agencies are comprised of unelected officials and are not required to use the rigorous procedures that the Constitution requires of Congress, and the Supreme Court underenforces the nondelegation doctrine.<sup>31</sup> At the same time, intermediate or strict scrutiny would only make it easier for judges to use their policy preferences to invalidate agency rules, because those doctrines give judges much more latitude to do so than does rational basis with bite.<sup>32</sup> Rational basis with bite drastically reduces the ability of judges to infuse their policy preferences into review of agency rulemaking, but still subjects agency rules to a heightened standard of review compared to review of most legislation.

This Article proceeds in three parts. Part I traces the Supreme Court's evolving doctrine for reviewing agency rulemaking by comparing how the Court's changing doctrine for reviewing agency rulemaking differs from the Court's doctrines for reviewing legislation. In hindsight, this may seem like an obvious way to evaluate the doctrine for reviewing agency rulemaking, but no court or commentator has written of the link between these doctrines. Part I thus also shows how judges got into the business of invalidating agency rules on the basis of policy disagreements in the first place, and it explains how the Supreme Court left lower courts with little guidance on how to review agency rulemaking until *Fox Television* was recently decided. This allowed the D.C. Circuit—the federal court that reviews most agency rulemaking—to invalidate a significant number of agency rules under its hard look doctrine.

Part II argues that doctrines for judicial review of legislation should be used in creating doctrines for judicial review of agency rulemaking, because this will shift the focus back to reviewing an agency's purpose in regulating and the means used to further that purpose. Unelected judges have been overruling the substantive policy decisions made by expert agencies because courts in the 1970s and 1980s began divorcing doctrines for reviewing agency rulemaking from doctrines for reviewing legislation. Without any theoretical limitations on judicial review of

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30. See *infra* note 72 and accompanying text.

31. See *infra* notes 52–67 and accompanying text.

32. See *infra* notes 279–280 and accompanying text.

agency rulemaking, arbitrary and capricious review under the APA before *Fox Television* had essentially become a mechanism for courts to veto agency rulemaking.

Part III then proposes that the rational basis with bite doctrine be used for APA arbitrary and capricious review of agency rulemaking. This Part concludes by applying rational basis with bite review to two recent court of appeals cases to show how the doctrine fits with existing Supreme Court precedent and can prevent judges from using their policy preferences to uphold or invalidate agency rulemaking.

The arguments in Parts II and III are conceptually distinct: One could accept that doctrines for reviewing legislation should be used in creating doctrines for reviewing agency rulemaking (agreeing with Part II), while arguing that a level of scrutiny other than rational basis with bite should be used in reviewing agency rulemaking (disagreeing with Part III). This distinction is important because neither courts nor commentators have suggested that the doctrines for reviewing agency rulemaking should be based on the doctrines for reviewing legislation. Thus, even if there is disagreement over this Article's ultimate proposal that the rational basis with bite doctrine should be used in reviewing agency rulemaking, the decades-long debate regarding the justifications and doctrines for judicial review of agency rulemaking would be greatly clarified by tethering the doctrines for reviewing agency rulemaking to the doctrines for reviewing legislation.

### I. THE SUPREME COURT'S EVOLVING DOCTRINE FOR JUDICIAL REVIEW OF AGENCY RULEMAKING

The courts have gone through various phases in reviewing agency rulemaking. Most accounts of these phases focus on the different degrees of faith that judges have had in administrative agencies, without examining the underlying doctrinal shifts.<sup>33</sup> This Part makes that

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33. The typical account of the changes in deference to agencies goes something like this: Courts gave broad deference to agencies immediately after President Roosevelt's New Deal in 1930s; courts retracted the deference accorded to agencies by the 1970s when courts became skeptical that agencies had been captured by the regulated industries; and, while that 1970s view largely holds true today, some modern courts have re-expanded the deference to agencies based on a textualist view that the APA should be interpreted as it was understood when it was enacted in 1946. *See generally* Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1191–94, 1207, 1224, 1252–53, 1264–67, 1286–95, 1308–09, 1315–18, 1325–26 (1986), *as reprinted in* PETER L. STRAUSS ET AL., *GELLHORN AND BYSE'S ADMINISTRATIVE LAW* 13–23 (10th ed. 2003).

examination by comparing the Supreme Court's evolving doctrines for judicial review of agency rulemaking with its doctrines for judicial review of legislation. This novel analysis provides a more complete picture of why courts began according agency rulemaking less deference and how judicial review of agency rulemaking has become so politicized.

As the rest of Part I will show, the Supreme Court at first treated agency rulemaking exactly the same as it treated legislation. Soon, though, the Court recognized the differences between agency rules and legislation, and started subjecting agency rulemaking to a slightly higher standard of review. By the 1970s, the D.C. Circuit became extremely wary that administrative agencies had been captured by the industries they regulated. It therefore created the hard look doctrine, which gave courts the power to invalidate agency rulemaking for a whole host of reasons—for example, because the agency did not afford interested parties enough procedure or the agency did not sufficiently analyze alternatives. The Supreme Court's reaction to the D.C. Circuit's hard look doctrine was anything but a model of clarity, and it left the doctrine for reviewing agency rulemaking in shambles. Indeed, administrative law textbooks today still ponder how the Court's three major arbitrary and capricious review cases—*Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*,<sup>34</sup> *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*,<sup>35</sup> and *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*<sup>36</sup>—

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34. 435 U.S. 519 (1978). See Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505, 529 (1985) (explaining that *Vermont Yankee* was limited to rejecting procedural hard look); Antonin Scalia, *Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345, 356 (1978) (noting that *Vermont Yankee* was decided on the basis of "inadequacy of procedures" and not "inadequacy of record support"); Matthew Warren, Note, *Active Judging: Judicial Philosophy and the Development of the Hard Look Doctrine in the D.C. Circuit*, 90 GEO. L.J. 2599, 2631 (2002) (stating that *Vermont Yankee* rejected procedural hard look).

35. 463 U.S. 29 (1983). See, e.g., Garland, *supra* note 34, at 543 ("On one level, the *State Farm* decision is a ringing endorsement of the quasi-procedural hard look."); *id.* at 545 (recognizing that both elements of the substantive hard look—scrutiny of the agency's record and a heightened standard of review going beyond minimum rationality—appeared in *State Farm*); Kagan, *supra* note 11, at 2372 (explaining that courts regularly review "agencies' decisionmaking processes under the 'hard look' standard exemplified in *Motor Vehicle Manufacturers Ass'n of the United States v. State Farm Mutual Automobile Insurance Co.*"); Warren, *supra* note 34, 2631 ("[T]he Supreme Court finally used the substantive hard look standard to overturn an agency action in [*State Farm*].").

36. 467 U.S. 837 (1984).

fit together, and those cases were all decided at least twenty-five years ago.<sup>37</sup> However, the Court’s recent decision in *FCC v. Fox Television Stations, Inc.* significantly limits the ability of judges to invalidate agency action. This Article argues that *Fox Television* implicitly rejected the D.C. Circuit’s hard look doctrine and eliminated the criteria for overturning agency action listed in dicta in *State Farm*.

A. *Equating Agency Rulemaking with Legislation*

Because the Supreme Court has essentially abandoned the nondelegation doctrine, agencies are permitted to make rules that generally function as if they were statutes enacted by Congress itself. According to the nondelegation doctrine, “Congress may not constitutionally delegate its legislative power to another branch of Government.”<sup>38</sup> The Court, however, has interpreted the nondelegation doctrine such that it virtually never prevents Congress from delegating legislative power to agencies.<sup>39</sup> Consequently, Congress can delegate “authority to the agency generally to make rules carrying the force of law,”<sup>40</sup> and agency rules that are binding with the force of law basically function as congressional legislation. So when an agency promulgates a rule that is binding with the force of law (for example, through informal rulemaking—which is also known as notice-and-comment rulemaking), it is acting as a proxy for Congress in the lawmaking process.<sup>41</sup>

It would therefore make sense to develop doctrines for judicial review of agency rulemaking with regard to the doctrines developed for judicial review of legislation, as both deal with review of legislative-like

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37. See STRAUSS ET AL., *supra* note 33, at 989 (leaving open the question of “[w]hat analytical pattern” *Overton Park*, *State Farm*, and *Chevron* “exhibit”).

38. *Touby v. United States*, 500 U.S. 160, 165 (1991); see also *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892) (“That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution.”).

39. See *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 472–76 (2001) (noting that the nondelegation doctrine requires Congress to provide agencies with an intelligible principle, and that such intelligible principles require very little specificity).

40. *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001).

41. See *id.* at 230 (“It is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force. . . . Thus, the overwhelming number of our cases applying *Chevron* deference have reviewed the fruits of notice-and-comment rulemaking or formal adjudication.”).

pronouncements that carry the force of law. In fact, when Congress codified the arbitrary and capricious standard for reviewing agency action in the APA in 1946,<sup>42</sup> it was actually adopting the “rational basis” standard used by the Supreme Court to review most pieces of congressional legislation.<sup>43</sup> Under rational basis review, the Court asks (1) whether the law at issue furthers a legitimate governmental purpose, and (2) whether the law is rationally related to that purpose.<sup>44</sup> As applied to agencies, this rational basis test would ask whether the agency acted in accordance with a legitimate *statutory* purpose—not just any governmental purpose—as agencies’ powers are limited by the statutory delegations made by Congress.

*Pacific States Box & Basket Co. v. White*<sup>45</sup> provides the most frequently cited pre-APA example of equating arbitrary and capricious review to rational basis review. The Court stated:

With the wisdom of such a regulation we have, of course, no concern. We may enquire only whether it is *arbitrary or capricious*. That the requirement is not arbitrary or capricious seems clear. That the type of container prescribed by Oregon is an *appropriate means* for attaining *permissible ends* cannot be doubted.<sup>46</sup>

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42. The phrase “arbitrary or capricious” appears in the U.S. Reports 141 times before 1946: A Westlaw search on July 8, 2009, of “arbitrar! /3 capricious! & da(bef 1946)” in the Supreme Court opinion database retrieved 141 documents. Congress therefore was not trying to reinvent the wheel by using the phrase “arbitrary or capricious,” but was rather adopting a standard for judicial review of agency actions that the Supreme Court had been using in other contexts for years.

43. See, e.g., *Wickard v. Filburn*, 317 U.S. 111, 129–30 (1942) (“An Act of Congress is not to be refused application by the courts as arbitrary and capricious and forbidden by the Due Process Clause merely because it is deemed in a particular case to work an inequitable result.”); *Nebbia v. New York*, 291 U.S. 502, 525 (1934) (“[T]he guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious . . . .”); *Dent v. West Virginia*, 129 U.S. 114 (1889) (“[D]ue process of law . . . exclude[s] everything that is arbitrary and capricious in legislation affecting the rights of the citizen.”). See also Jack M. Beermann & Gary Lawson, *Reprocessing Vermont Yankee*, 75 GEO. WASH. L. REV. 856, 870 (2007) (“[T]he passage in § 706(2)(A) instructing courts to hold unlawful any agency action that is ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law’ was probably intended in 1946 to reflect something like the ‘rational basis’ test in post-1937 substantive due process law.” (citations omitted)); Cross, *supra* note 13, at 1246 n.7 (“The original understanding of [arbitrary or capricious] was that courts would reverse rules only when an agency ‘acted like a lunatic.’” (quoting Martin Shapiro, *APA: Past, Present, Future*, 72 VA. L. REV. 447, 454 (1986))).

44. See *infra* notes 229–232 and accompanying text.

45. 296 U.S. 176 (1935).

46. *Id.* at 182 (emphases added).

*Pacific States Box* even “expressly equated agencies with legislatures for purposes of judicial review.”<sup>47</sup> So when Congress used the phrase “arbitrary or capricious” in the APA, it intended for courts to focus on the agency’s purpose in regulating and the means used to achieve that purpose, by applying the deferential rational basis standard used for evaluating most congressional acts.<sup>48</sup> Such a conclusion also coincides with the historical context because the post-New Deal Congress was weary of courts striking down portions of the regulatory state,<sup>49</sup> as the Supreme Court had done during the *Lochner v. New York*<sup>50</sup> era that had lasted until 1937.<sup>51</sup>

B. *Recognizing the Differences Between Agency Rulemaking and Legislation*

Of course, there are substantial reasons for subjecting agency action to heightened standards of judicial review compared to legislation. An agency promulgating rules is hardly the equivalent of Congress legislating. Members of Congress are elected and are therefore accountable to their constituents, while agencies are comprised of appointed officials and civil servants who are not directly accountable to

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47. Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505, 532 (1985); *see id.* at 532 n.146 (quoting *Pacific States Box*, 296 U.S. at 186 (“[W]here the regulation is within the scope of authority legally delegated, the presumption of the existence of facts justifying its specific exercise attaches to statutes, to municipal ordinances, and to orders of administrative bodies.”)).

48. As then-Professor Scalia pointed out, however, Congress probably expected the arbitrary or capricious standard of review for informal rulemaking to apply to a much smaller set of cases than it currently applies to. Antonin Scalia, Vermont Yankee: *The APA, The D.C. Circuit, and The Supreme Court*, 1978 SUP. CT. REV. 345, 375–78. That is because Congress could not have predicted that, after the APA was enacted, the Court would greatly expand the circumstances when agencies could use informal rulemaking instead of adjudication. *Id.* at 375–77. Nor could Congress have predicted that the Court would establish “the principle that rules could be challenged in court directly rather than merely in the context of an adjudicatory enforcement proceeding against a particular individual.” *Id.* at 377.

49. *See generally* Matthew Warren, *Active Judging: Judicial Philosophy and the Development of the Hard Look Doctrine in the D.C. Circuit*, 90 GEO. L.J. 2599, 2601 (2002) (“During the New Deal era, the specter of *Lochner v. New York* and the fear of judicial invalidation of the regulatory state loomed largely over administrative law.” (citation omitted)).

50. 198 U.S. 45 (1905) (invalidating a New York law that limited the working hours for bakers).

51. *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (upholding, under the Commerce Clause, Congress’s power to regulate labor relations); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (upholding Washington’s minimum wage law and rejecting a *Lochner*-based, substantive due process freedom of contract rationale).

the citizens of the United States.<sup>52</sup> Moreover, when Congress legislates, it must follow a “single, finely wrought and exhaustively considered, procedure”:<sup>53</sup> Presentment of congressional acts to the President could result in a presidential veto, and the bicameral structure of Congress requires “full study and debate in separate settings.”<sup>54</sup> In contrast, agencies can promulgate rules using the minimal set of informal procedures listed in APA section 553: The agency must simply provide a “[g]eneral notice of proposed rulemaking,” an opportunity for interested persons to comment on the proposed rule through written submissions to the agency, a “concise general statement” of the final rule’s “basis and purpose,” and “publication” of the final rule.<sup>55</sup> Undoubtedly, one of the greatest advantages of agencies is their ability to quickly and efficiently engage in informal rulemaking,<sup>56</sup> but this also significantly undermines the basis for treating agency rulemaking as the equivalent of legislation.

Heightened standards for reviewing agency rulemaking can also be justified on the premise that there is not as much at stake in invalidating an agency’s rule compared to striking down congressional legislation. Congress can always amend its delegation to allow the agency to promulgate the rule at issue (or Congress can just pass the rule through legislation), so the “costs” of incorrectly applying heightened standards are “drastically reduced when the consequence is simply to ‘remand’ the question back to Congress instead of categorically prohibiting Congress or agencies from acting.”<sup>57</sup>

On a more fundamental level, though, seeing the nondelegation doctrine as an underenforced constitutional norm<sup>58</sup> could provide a

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52. See Jonathan R. Macey, *Transaction Costs and the Normative Elements of the Public Choice Model: An Application to Constitutional Theory*, 74 VA. L. REV. 471, 517 (1988) (“[L]egislators who want to avoid controversial or indeterminate decisions as to which interest groups to favor can forfeit vast amounts of discretion (and thus responsibility and accountability) to administrative agencies, which function outside of the tripartite legislative process envisioned by our constitutional structure.”).

53. *INS v. Chadha*, 462 U.S. 919, 951 (1983).

54. *Id.*

55. 5 U.S.C. § 553 (2006).

56. See KENNETH CULP DAVIS, *ADMINISTRATIVE LAW TREATISE* § 6.15 (1970) (describing APA informal rulemaking as being among the “greatest inventions of modern government”).

57. Scott A. Keller, *How Courts Can Protect State Autonomy from Federal Administrative Encroachment*, 82 S. CAL. L. REV. 45, 88 (2008) (quoting Ernest A. Young, *The Rehnquist Court’s Two Federalisms*, 83 TEX. L. REV. 1, 91 (2004)).

58. See *Mistretta v. United States*, 488 U.S. 361, 415 (1989) (Scalia, J., dissenting) (“[W]hile the doctrine of unconstitutional delegation is unquestionably a fundamental element of our

constitutional basis for requiring heightened judicial review of agency rulemaking compared to legislation.<sup>59</sup> The Court rejects the nondelegation doctrine largely because it wants to give Congress adequate power to deal with an ever-increasing workload<sup>60</sup> and because it is unable to create a manageable nondelegation doctrine test—not because the Court believes there are no problems with allowing Congress to delegate legislative power to agencies.<sup>61</sup> In light of these “questions of propriety or capacity” relating to the Court’s abilities, the Court has created a “judicial concept of [the] constitutional concept [embodied by the nondelegation doctrine]” that is different from the “[constitutional] concept itself.”<sup>62</sup>

But this does not mean that the “understanding of [the nondelegation

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constitutional system, it is not an element readily enforceable by the courts.”); Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 338 (2000) (“The difficulty of drawing lines between prohibited and permitted delegations makes it reasonable to conclude that for the most part, the ban on unacceptable delegations is a judicially underenforced norm, and properly so.”). *See generally* Keller, *supra* note 57, at 57–59 (discussing how the nondelegation doctrine is an underenforced constitutional norm).

59. *See* Miles & Sunstein, *Arbitrariness Review*, *supra* note 13, at 762 (“[T]he hard look doctrine might be seen as a second-best substitute for the original constitutional safeguards against the uncontrolled exercise of discretion.”); Richard W. Murphy, *The Limits of Legislative Control Over the “Hard-Look,”* 56 ADMIN. L. REV. 1125, 1134–39 (2004) (suggesting that a congressional amendment to the APA that restored *Pacific States Box*’s minimum rationality approach to judicial review of agency action may be unconstitutional); 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, 425 (arguing that “separation of powers principles” require “heightened scrutiny of agency decisions”).

60. *See* FCC v. Fox Television Stations, Inc., 556 U.S. \_\_\_ (Apr. 28, 2009), 129 S. Ct. 1800, 1823 (2009) (Kennedy, J., concurring in part and concurring in the judgment) (“The Federal Government could not perform its duties in a responsible and effective way without administrative agencies.”); *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 407–08 (1928) (permitting Congress to delegate legislative power on the grounds that “common sense” allows Congress to delegate what it cannot practicably do itself).

61. *See* *Fox Television*, 129 S. Ct. at 1817 (plurality opinion) (“There is no reason to magnify the separation-of-powers dilemma posed by the Headless Fourth Branch by letting Article III judges—like jackals stealing the lion’s kill—expropriate some of the power that Congress has wrested from the unitary Executive.” (citation omitted)); Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1374 (2001) (explaining that the Court’s reluctance to enforce the nondelegation doctrine “appears to stem from the judiciary’s limited institutional competence rather than any fundamental disagreement with the doctrine’s goal.”); Murphy, *supra* note 59, at 1134 (stating that the courts could not “devise a stable, workable, desirable form of the nondelegation doctrine”).

62. *See* Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1217–18 (1978).



doctrine] itself”<sup>63</sup> cannot be enforced through other means, such as applying heightened standards of judicial review of agency rulemaking compared to legislation.<sup>64</sup> In other words, if the Court had enforced the constitutional concept of the nondelegation doctrine—that Congress cannot delegate legislative power—agencies would never have been permitted to exercise legislative power by promulgating rules carrying the force of law.<sup>65</sup> Due to the limits on the institutional competence of courts, though, the Court has not enforced that constitutional concept and has instead created the judicial concept of the nondelegation doctrine: the intelligible principle test, which simply requires Congress to provide some intelligible principle in the statutory delegation to cabin the agency’s authority.<sup>66</sup> Nevertheless, the Court could still impose heightened standards of judicial review of agency rulemaking “as a second-best surrogate” for the substantive enforcement of the nondelegation doctrine.<sup>67</sup>

Given the inherent difference between agencies and Congress plus the underenforcement of the nondelegation doctrine, it is no surprise that the Supreme Court quickly began treating agency rulemaking differently from congressional legislation. Just one year after the APA was enacted, *SEC v. Chenery*<sup>68</sup> reaffirmed a pre-APA ruling that a court should only examine the *actual* purposes “invoked by the agency” instead of “substituting what it considers to be a more adequate or proper basis.”<sup>69</sup>

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63. *Id.* at 1218.

64. See Ernest A. Young, *The Rehnquist Court’s Two Federalisms*, 83 TEX. L. REV. 1, 126 (2004) (“[A]s Larry Sager has demonstrated, the fact that a norm is ‘under-enforced’—that is, enforced through something short of a strong invalidation norm—does not mean the norm lacks grounding in the Constitution.”); *id.* at 101 (arguing that courts should be permitted “to impose *some* restraint in areas where constitutional norms would otherwise be ‘underenforced.’”).

65. See *INS v. Chadha*, 462 U.S. 919, 985 (1983) (White, J., dissenting) (“This Court’s decisions sanctioning such [administrative] delegations make clear that Art. I does not require all action with the effect of legislation to be passed as law.”).

66. See *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 472–76 (2001) (noting that the nondelegation doctrine requires Congress to provide agencies with an intelligible principle, and that such intelligible principles require very little specificity). For further discussion regarding the dichotomy between constitutional concepts and judicial concepts, see Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 51–60 (2004).

67. Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2112 (1990).

68. *SEC v. Chenery (Chenery II)*, 332 U.S. 194, 196 (1947).

69. *Id.* at 196. Four years earlier, when *SEC v. Chenery* was before the Supreme Court for the first time, the Court required the agency “to give clear indication that it has exercised the discretion with which Congress has empowered it.” *SEC v. Chenery (Chenery I)*, 318 U.S. 80, 94–95 (1943).

This marked a split from how the Court reviewed congressional action: In 1946 (and through at least 1980), it was unclear whether rational basis review allowed courts to consider any hypothetical, conceivable purpose that Congress may have had in enacting a law, or only Congress's actual purpose.<sup>70</sup> The former approach (consideration of any hypothetical, conceivable purpose) is usually called "minimum rationality"; the latter approach (consideration of actual purpose only) has become known as "rational basis with bite."<sup>71</sup> Recently, the Supreme Court has clarified that rational basis review of congressional acts entails the former approach, such that courts can examine hypothetical, conceivable purposes when reviewing congressional action.<sup>72</sup> But since *Chenery*, the Court has implicitly used the rational basis with bite approach in reviewing agency action.

Of course, this observation about *Chenery* is made much easier in hindsight: There is no indication that the Court thought about how *Chenery* affected the rational basis test previously adopted in *Pacific States Box*, and to this day the Court has not formally recognized the rational basis with bite doctrine even in the context of judicial review of legislation. To compound the ambiguity, *Chenery* never even cited the APA or the arbitrary and capricious standard. The *Chenery* Court did not view its decision as a groundbreaking precedent: It thought it was reciting "[a] simple but fundamental rule of administrative law," and it

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*Chenery I* therefore held "that an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained." *Id.* at 95. (Note that this Article primarily refers to *Chenery I* and *Chenery II* simply as "*Chenery*," as both cases stand for the same proposition. Throughout, the cases are distinguished only as needed for clarity.)

70. Compare, e.g., *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980) ("It is, of course, 'constitutionally irrelevant whether this reasoning in fact underlay the legislative decision,' because this Court has never insisted that a legislative body articulate its reasons for enacting a statute." (citation omitted)), with *id.* at 180–81 (Stevens, J., concurring in the judgment) ("I therefore believe that we must discover a correlation between the classification and either the actual purpose of the statute or a legitimate purpose that we may reasonably presume to have motivated an impartial legislature."), and *id.* at 188 (Brennan, J., dissenting) ("A challenged classification may be sustained only if it is rationally related to achievement of an *actual* legitimate governmental purpose.").

71. See *infra* note 235.

72. See, e.g., *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313–15 (1993) (stating that courts could consider any "conceivable" purpose under rational basis review, and "because we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature").

merely adopted one variant of the rational basis test over another.<sup>73</sup> But *Chenery* is the first sign that the Supreme Court would treat judicial review of agency action differently than judicial review of congressional action.

*Citizens to Preserve Overton Park v. Volpe*,<sup>74</sup> the first Supreme Court case to invoke the APA's arbitrary and capricious standard explicitly in striking down an agency action, introduced a standard for judicial review of agency action that looked nothing like the minimum rationality review typically used for reviewing legislation.<sup>75</sup> While *Overton Park* dealt with an informal adjudication as opposed to the rulemaking that *Chenery* addressed, it still should have been an easy case under *Chenery* because *Chenery* implicitly embraced a more heightened standard than minimum rationality.<sup>76</sup> In particular, the analysis in *Overton Park* should have been simple given the facts of the case: the Secretary of Transportation had authorized the use of federal funds for building Interstate 40 through Overton Park (a 342-acre city park near the center of Memphis, Tennessee) without providing an explanation for this authorization.<sup>77</sup> According to the statutory delegation, though, the Secretary could only have authorized these funds if no "feasible and prudent" alternative route existed and there had been "all possible planning to minimize harm" to the park.<sup>78</sup> Because the Secretary "did not indicate why he believed there were no feasible and prudent alternative routes or why design changes could not be made to reduce the harm to the park,"<sup>79</sup> the Court could have just cited *Chenery* and remanded for the agency to provide an explanation.

Instead, *Overton Park* contains six pages that infused all sorts of ambiguity into the APA's arbitrary and capricious standard. On one hand, *Overton Park* cited *Pacific States Box* for the proposition that an agency's "decision is entitled to a presumption of regularity,"<sup>80</sup> and it described arbitrary and capricious review as a "narrow" standard

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73. *Chenery*, 332 U.S. at 196.

74. 401 U.S. 402 (1971).

75. *Id.*

76. *Chenery*, 332 U.S. at 196.

77. 401 U.S. at 408.

78. *Id.* at 405 (quoting 49 U.S.C. § 1653(f) (1964 ed., Supp. V)); 23 U.S.C. § 138 (1964 ed., Supp. V)).

79. *Id.* at 408.

80. *Id.* at 415 (citing *Pac. States Box & Basket Co. v. White*, 296 U.S. 176, 185 (1935)).

through which “[t]he court is not empowered to substitute its judgment for that of the agency.”<sup>81</sup> But then the Court erratically described arbitrary and capricious review as “thorough, probing, in-depth review,”<sup>82</sup> which was supposed to be “searching and careful.”<sup>83</sup> So while *Overton Park* paid lip service to *Pacific States Box*’s rational basis approach, *Overton Park* ultimately explained that arbitrary and capricious review required courts to “consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.”<sup>84</sup> It also directed courts to examine the agency’s “construction of the evidence” if the agency did “not disclose the factors that were considered.”<sup>85</sup>

Given that the statutory delegation at issue required the Secretary to address alternatives and plan to minimize the harm to parks, *Overton Park*’s requirement that the agency consider all “the relevant factors” probably only meant that the agency had to explain how these *statutory* predicates for exercising its delegated authority were met. That is precisely what *Chenery* had already held. However, lower courts—in particular the D.C. Circuit—would read *Overton Park* much more broadly.

C. *Analyzing Judicial Review of Agency Rulemaking Without Reference to Doctrines for Judicial Review of Legislation*

The solid basis for subjecting agency rulemaking to heightened standards of judicial review compared to legislation does not necessarily mean that doctrines for review of agency rulemaking should completely ignore the doctrines for review of legislation. Similar modes of analysis could be used for both, and the precedent on judicial review of legislation could support courts’ interpretation of arbitrary and capricious review—even if courts want to impose a heightened standard of review for agency rulemaking.

It would have made sense for courts to place the APA’s arbitrary and capricious standard somewhere on the tiers-of-scrutiny sliding scale used for judicial review of legislation. Unfortunately, instead of linking

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81. *Id.* at 416.

82. *Id.* at 415.

83. *Id.* at 416.

84. *Id.*

85. *Id.* at 420.

judicial review of agency rulemaking to judicial review of legislation, courts began concocting an ever-growing list of ways to invalidate agency action under APA arbitrary and capricious review. It started with the D.C. Circuit creating the “hard look” doctrine in the 1970s under the guise of arbitrary and capricious review, and continued because the Supreme Court’s reaction to the D.C. Circuit’s hard look doctrine provided little guidance to lower courts. This resulted in an unclear, arbitrary doctrine for judicial review of agency action with no link to the doctrines for judicial review of legislation. The Court’s recent decision in *FCC v. Fox Television Stations, Inc.*, though, may have changed all of this.

1. *The D.C. Circuit Replaced “Arbitrary and Capricious” with “Hard Look”*

By 1971, when *Overton Park* was decided, many believed that agencies were no longer “acting in the public interest” because they “had been captured by the industries and private interests that they regulated.”<sup>86</sup> Against this backdrop, the D.C. Circuit—the court that reviews most federal agency actions<sup>87</sup>—became skeptical of agency action, and it used *Overton Park* as an opening to implement the “hard look” doctrine under arbitrary and capricious review.<sup>88</sup>

Originally, the hard look doctrine required courts to ensure that the agency had taken a hard look at the regulatory issues.<sup>89</sup> Over time, however, the D.C. Circuit morphed the hard look doctrine “into one that required a hard look not just by the agency, but by the court as well.”<sup>90</sup> As now-D.C. Circuit Judge Garland recognized, the D.C. Circuit developed three iterations of its hard look doctrine: procedural, quasi-procedural, and substantive hard look.<sup>91</sup> Regardless of who was required to do the hard looking, in each of these three iterations, the D.C.

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86. Warren, *supra* note 49, at 2602 (citing Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1681–88 (1975)).

87. See Scalia, *supra* note 48, at 348 (explaining that the D.C. Circuit “handles the vast majority of significant rulemaking appeals”).

88. The phrase “hard look” was first coined in the administrative law context by Judge Harold Leventhal. See *Pikes Peak Broad. Co. v. FCC*, 422 F.2d 671, 682 (D.C. Cir. 1969) (Leventhal, J.).

89. See *Nat’l Lime Ass’n v. EPA*, 627 F.2d 416, 451 n.126 (D.C. Cir. 1980) (“[A]s originally articulated the words ‘hard look’ described the agency’s responsibility and not the courts’.”).

90. Garland, *supra* note 47, at 526 (citing *Nat’l Lime Ass’n*, 627 F.2d at 451–52 n.126).

91. *Id.* at 525, 530, 534.

Circuit’s hard look doctrine gave courts much more authority to invalidate agency action than the rational basis review originally contemplated by the APA—and no variant of the hard look doctrine was linked to the doctrines for judicial review of congressional action.<sup>92</sup>

*Procedural* hard look, the original version of the hard look doctrine, ensured that the “agency itself had taken a hard look at the relevant issues before reaching its decision,” by requiring the agency to use various procedures—not otherwise required by statute—that expanded the ability of interested parties to present their arguments to the agency.<sup>93</sup> For instance, using procedural hard look, the D.C. Circuit required “adjudicatory-type hearing procedures” such as cross-examination and oral hearings for informal rulemaking,<sup>94</sup> even though APA section 553<sup>95</sup> enumerates which procedures are required for informal rulemaking and says nothing about cross-examination and oral hearings.<sup>96</sup> D.C. Circuit Judge David Bazelon championed procedural hard look as “the best way for courts to guard against unreasonable or erroneous administrative decisions,” instead of “scrutiniz[ing] the technical merits of each decision.”<sup>97</sup>

*Quasi-procedural* hard look required the agency to adopt various procedures with which the agency itself had to comply in reaching its substantive decision.<sup>98</sup> These requirements therefore had a “procedural tinge” and yet a “substantive aspect.”<sup>99</sup> In other words, quasi-procedural

92. Credit has been given to the D.C. Circuit as a whole for adopting the hard look doctrine under the guise of arbitrary and capricious review. See Scalia, *supra* note 48, at 348 n.13 (suggesting that the hard look doctrine had, “on one occasion or another, received the explicit support of most of the [D.C. Circuit’s] members”). However, specific judges, such as Judges Harold Leventhal and David Bazelon, are widely recognized as having the greatest influence on the development of the hard look doctrine. See Warren, *supra* note 49, at 2607–26 (discussing the different approaches to the hard look doctrine espoused by Judges Leventhal and Bazelon).

93. See Garland, *supra* note 47, at 525.

94. Scalia, *supra* note 48, at 348; accord Garland, *supra* note 47, at 529 & n.123 (citing *Mobil Oil Corp. v. Fed. Power Comm’n*, 483 F.2d 1238, 1259, 1262–63 (D.C. Cir. 1973); *Int’l Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 649 (D.C. Cir. 1973)).

95. See 5 U.S.C. § 553 (2006) (requiring informal rulemaking to include a “[g]eneral notice of proposed rulemaking,” an opportunity for “interested persons” to comment on the proposed rule through written submissions to the agency, a “concise general statement” of the final rule’s “basis and purpose,” and “publication” of the final rule).

96. Garland, *supra* note 47, at 529 & n.123.

97. *Ethyl Corp. v. EPA*, 541 F.2d 1, 66 (D.C. Cir. 1976) (en banc) (Bazelon, J., concurring).

98. Garland, *supra* note 47, at 530.

99. *Id.*

hard look “requir[ed] specification of the agency’s policy premises, its reasoning, and its factual support.”<sup>100</sup> These requirements went to the “internal thought process by which an agency decisionmaker reaches a rational decision”—as opposed to procedural hard look, whose requirements went to the “the external process by which litigants present their arguments to the agency.”<sup>101</sup> Yet, quasi-procedural hard look did not directly address the agency’s substantive policy choice. Rather, quasi-procedural hard look required agencies to “respond[] to significant points made during the public comment period,” consider “significant alternatives,” and examine “all relevant factors.”<sup>102</sup>

Under *substantive* hard look, the D.C. Circuit reviewed the agency’s ultimate policy conclusions by “infusing greater rigor into the traditional ‘rational basis’ test,”<sup>103</sup> and it began “intensive[ly]” scrutinizing the “record support for agencies’ findings of fact.”<sup>104</sup> The seeds for substantive hard look were sown as early as 1970, when Judge Harold Leventhal’s dicta in *Greater Boston Television Corp. v. FCC*<sup>105</sup> referred to a “hard look” doctrine that “call[ed] on the court[s] to intervene not merely in case of procedural inadequacies” but anytime the agency had “not genuinely engaged in *reasoned decision-making*.”<sup>106</sup> Note the shifting standard: “arbitrary and capricious” became “hard look,” which became “reasoned decision-making.” “[R]easoned decision-making” is a

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100. *Id.* at 526 (citing *Nat’l Lime Ass’n v. EPA*, 627 F.2d 416, 453 (D.C. Cir. 1980); *Columbia Gas Transmission Corp. v. Fed. Energy Regulatory Comm’n*, 628 F.2d 578, 593 (D.C. Cir. 1979)).

101. *Id.* at 530 (quasi-procedural hard look sets forth “the kind of decisionmaking record the agency must produce to survive judicial review”—not the “kind of procedure that an agency must use to generate a record . . .”).

102. *Id.* at 527 (citing *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35 (D.C. Cir. 1977)); William H. Rodgers, Jr., *A Hard Look at Vermont Yankee: Environmental Law Under Close Scrutiny*, 67 GEO. L.J. 699, 704–08 (1979); see also *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 244 (D.C. Cir. 2008) (Tatel, J., concurring) (“In previous informal rulemaking cases, we ordered additional agency disclosures to facilitate meaningful arbitrary and capricious review . . .”).

103. Garland, *supra* note 47, at 534 (citing *Recording Indus. Ass’n v. Copyright Royalty Tribunal*, 662 F.2d 1, 8 (D.C. Cir. 1981); *Nat’l Lime Ass’n v. EPA*, 627 F.2d 416, 451 n.126 (D.C. Cir. 1980); *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1027 (D.C. Cir. 1978)).

104. *Id.* at 535 (citing *Ariz. Pub. Serv. Co. v. United States*, 742 F.2d 644, 651–52 (D.C. Cir. 1984); *Int’l Bhd. of Teamsters v. United States*, 735 F.2d 1525, 1531–34 (D.C. Cir. 1984); *Public Citizen v. Steed*, 733 F.2d 93, 99, 102–03, 105 (D.C. Cir. 1984); *Farmers Union Cent. Exch., Inc. v. Fed. Energy Reg. Comm’n*, 734 F.2d 1486, 1515–16, 1519 (D.C. Cir. 1984); *ILGWU v. Donovan*, 722 F.2d 795, 818–26 (D.C. Cir. 1983)).

105. 444 F.2d 841 (D.C. Cir. 1970) (Leventhal, J.).

106. *Id.* at 851 (emphasis added).

much more open-ended standard of review than the rational basis test contemplated by *Pacific States Box*. This equivocation on the term “reasonable” even caused Judge Bazelon to criticize Judge Leventhal’s substantive hard look as an inquiry that “inevitably invites judges of opposing views to make plausible-sounding, but simplistic, judgments of the relative weight to be afforded various pieces of technical data.”<sup>107</sup> Eventually, the Supreme Court joined this debate, which had been brewing in the D.C. Circuit for nearly a decade, but the Court’s reaction did not bring the debate to an end.

2. *The Supreme Court’s Reaction to the D.C. Circuit’s Hard Look Doctrine*

To this day, the Supreme Court has not definitively addressed all three iterations of the D.C. Circuit’s hard look doctrine.<sup>108</sup> The Supreme Court clearly rejected procedural hard look in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*<sup>109</sup> While some

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107. *Ethyl Corp. v. EPA*, 541 F.2d 1, 66 (D.C. Cir. 1976) (en banc) (Bazelon, J., concurring). Judge Leventhal responded by arguing that “Congress has been willing to delegate its legislative powers broadly and courts have upheld such delegation because there is court review to assure that the agency exercises the delegated power within statutory limits, and that it fleshes out objectives within those limits by an administration that is not irrational or discriminatory.” *Id.* at 68–69 (Leventhal, J., concurring).

108. The Supreme Court has described the extra procedures imposed by the National Environmental Policy Act (NEPA) as requiring the agency to take a “‘hard look’ at environmental consequences.” *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976) (quoting *Natural Res. Def. Council, Inc. v. Morton*, 458 F.2d 827, 838 (D.C. Cir. 1972)), *quoted in* *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. \_\_ (Nov. 12, 2008), 129 S. Ct. 365, 376 (2008); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989); *Balt. Gas & Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87, 97 (1983); *see also* *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 374 (1989) (“NEPA does require that agencies take a ‘hard look’ at the environmental effects of their planned action . . .”), *quoted in* *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 72 (2004). This “hard look” has no bearing on the APA’s arbitrary and capricious standard of review, and only applies in environmental cases under NEPA. Because a statute other than the APA (i.e., NEPA) is imposing additional procedures, this line of cases does not conflict with *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978), which held that courts could not impose additional procedures on agencies beyond those required by statute. Moreover, this hard look under NEPA has nothing to do with substantive review, as “it is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process.” *Robertson*, 490 U.S. at 350.

109. 435 U.S. 519 (1978). *See* *Garland*, *supra* note 47, at 529 (explaining that *Vermont Yankee* was limited to rejecting procedural hard look); *Scalia*, *supra* note 48, at 356 (noting that *Vermont Yankee* was decided on the basis of “inadequacy of procedures” and not “inadequacy of record support”); *Warren*, *supra* note 49, at 2631 (stating that *Vermont Yankee* rejected Judge Bazelon’s procedural hard look).



commentators have posited that the Court accepted quasi-procedural and substantive hard look in *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*,<sup>110</sup> that is an over-reading of *State Farm*. Rather than adopting any part of the hard look doctrine, *State Farm* merely gave an amorphous list of criteria for invalidating agency action—in dicta. And then *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*<sup>111</sup> created a large escape hatch from *State Farm*.

a. *Vermont Yankee Rejected Procedural Hard Look*

A unanimous Supreme Court came down hard on the D.C. Circuit in *Vermont Yankee* by rejecting procedural hard look. *Vermont Yankee* held that APA section 553<sup>112</sup> “established the maximum procedural requirements which Congress was willing to have the courts impose upon agencies in conducting rulemaking procedures.”<sup>113</sup> The agency in *Vermont Yankee* had not allowed the interested parties to use discovery or cross-examination during the rulemaking proceedings, neither of which is required by APA section 553.<sup>114</sup> The D.C. Circuit “refrained from actually ordering the agency to follow any specific procedures,”<sup>115</sup> and claimed that it did not want to “intrude on the agency’s province by dictating to it which, if any, [procedures not required by APA section

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110. 463 U.S. 29 (1983). *See, e.g.*, *Garland*, *supra* note 47, at 543 (“On one level, the *State Farm* decision is a ringing endorsement of the quasi-procedural hard look.”); *id.* at 545 (recognizing that both elements of the substantive hard look—scrutiny of the agency’s record and a heightened standard of review going beyond minimum rationality—appeared in *State Farm*); Kagan, *supra* note 11, at 2372 (explaining that courts regularly review “agencies’ decisionmaking processes under the ‘hard look’ standard exemplified in *Motor Vehicle Manufacturers Ass’n of the United States v. State Farm Mutual Automobile Insurance Co.*”); Warren, *supra* note 49, at 2631 (“[T]he Supreme Court finally used the substantive hard look standard to overturn an agency action in [*State Farm*].”).

111. 467 U.S. 837 (1984).

112. 5 U.S.C. § 553 (2006).

113. *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 524 (1978).

114. Scalia, *supra* note 48, at 353; *see Vermont Yankee*, 435 U.S. at 541 (noting that the intervenors argued that they should have been afforded the opportunity for “discovery or cross-examination”); *id.* at 535 (“[D]espite the fact that it appeared that the agency employed all the procedures required by 5 U.S.C. § 553 (1976 ed.) and more, the court determined the proceedings to be inadequate and overturned the rule.”).

115. *Vermont Yankee*, 435 U.S. at 541 (citing *Natural Res. Def. Council, Inc. v. U.S. Nuclear Regulatory Comm’n*, 547 F.2d 633, 653–54 (D.C. Cir. 1976)).

553] it must adopt to flesh out the record.”<sup>116</sup> Nevertheless, the Supreme Court construed the D.C. Circuit’s opinion as holding that the procedures used during the rulemaking “were inadequate,” and the Court reversed on the basis that the D.C. Circuit had required the agency to use extra-statutory procedures.<sup>117</sup> Rebuking the D.C. Circuit, the Supreme Court explained that “[t]he fundamental policy questions appropriately resolved in Congress and in the state legislatures are *not* subject to reexamination in the federal courts under the guise of judicial review of agency action.”<sup>118</sup>

*Vermont Yankee* has been read to have virtually no bearing on the APA’s arbitrary and capricious standard. That is because *Vermont Yankee* separated the issue of whether courts could impose extra-statutory procedures for informal rulemaking from the issue of whether the agency had acted arbitrarily or capriciously: The Court stated that, on remand, the D.C. Circuit was “entirely free” to find that the rule adopted by the agency was “arbitrary and capricious.”<sup>119</sup>

*Vermont Yankee* therefore rejected the D.C. Circuit’s procedural hard look without addressing the validity of the quasi-procedural or substantive hard looks. This is because neither the quasi-procedural nor substantive hard look doctrine purports to impose extra-statutory procedures in violation of *Vermont Yankee*. Rather, both involve reference to the record of an agency’s rulemaking process to determine whether an agency has acted arbitrarily or capriciously. *Vermont Yankee* did not explicitly answer whether courts could review “the inadequacy of the record to support the agency decision.”<sup>120</sup> The inadequacy of support in the record may implicate the amount of procedure used “if one chooses to regard certain evidence as inherently unreliable unless it has been subjected to particular procedural tests.”<sup>121</sup> Stated another way, a court could find that an agency acted arbitrarily or capriciously by not establishing a record for appellate review that adequately responded to public comments, considered alternatives, or examined relevant factors—even though APA section 553 does not require the agency to

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116. *Natural Res. Def. Council, Inc. v. U.S. Nuclear Regulatory Comm’n*, 547 F.2d 633, 653 (D.C. Cir. 1976), *rev’d sub nom. Vermont Yankee*, 435 U.S. at 558.

117. *Vermont Yankee*, 435 U.S. at 542.

118. *Id.* at 558.

119. *Id.* at 535 n.14 (citing 5 U.S.C. § 706 (1976)).

120. Scalia, *supra* note 48, at 354.

121. *Id.*

create a contemporaneous record or respond to public comments.<sup>122</sup> So while *Vermont Yankee* came down hard on the D.C. Circuit, it was still unclear whether the D.C. Circuit's quasi-procedural and substantive hard look doctrines survived *Vermont Yankee*.<sup>123</sup>

*b. State Farm Lists Criteria for Invalidating Agency Action, Without Addressing Quasi-Procedural or Substantive Hard Look*

Finally, in 1983, the Supreme Court provided some gloss on the APA's arbitrary and capricious standard in *State Farm*, which remains the Court's definitive case on arbitrary and capricious review. Most of this gloss, however, was dicta. Moreover, the parties were focused on whether the arbitrary and capricious standard was equivalent to minimum rationality review or no review at all in the context of agency deregulation; they were not focused on the precise contours of a heightened standard for judicial review of agency rulemaking that went beyond the standard applied to legislation.<sup>124</sup>

*State Farm* held that the Court would not treat agency rulemaking as the equivalent of legislation, thereby rejecting the minimum rationality approach to arbitrary and capricious review.<sup>125</sup> And *State Farm* nixed the argument that deregulation should be treated like agency inaction, which

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122. Cf. *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240, 251–52 (2d Cir. 1977) (requiring an agency to create a contemporaneous record during informal rulemaking and to respond to any cogent public comments).

123. See Garland, *supra* note 47, at 529 & n.128 (“The critical question for the hard look doctrine was whether *Vermont Yankee*'s proscription of ‘extra procedural devices’ applied to the requirements that an agency explain itself, examine objections and relevant factors, and consider alternatives. Opponents of the doctrine argued it did.” (citing *Public Sys. v. Fed. Energy Reg. Comm'n.*, 606 F.2d 973, 983, 984, 986 (Robb, J., dissenting))); *id.* at 530 (“The Supreme Court's own view regarding the validity of the quasi-procedural requirements was unclear.”).

124. See, e.g., Brief of Respondents *State Farm Mutual Automobile Insurance Co., et al.*, at 12–19, *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983) (No. 82-354), available at LEXIS 1982 U.S. Briefs 354 (U.S. Feb. 7, 1983), at \*27–36 (arguing against the Federal Parties' position that the arbitrary and capricious standard meant rational basis review and against the petitioners' view that agency deregulation was unreviewable because it was more like agency inaction).

125. See *State Farm*, 463 U.S. at 43 n.9 (“The Department of Transportation suggests that the arbitrary and capricious standard requires no more than the minimum rationality a statute must bear under the Due Process Clause. We do not view as equivalent the presumption of constitutionality afforded legislation drafted by Congress and the presumption of regularity afforded an agency in fulfilling its statutory mandate.”).

would have made deregulation basically unreviewable.<sup>126</sup> But the contours of the heightened standard adopted in *State Farm* largely remain a mystery.

In *State Farm*, the National Highway Traffic Safety Administration had rescinded its regulation that had required new cars to include passive restraints—airbags, detachable automatic seatbelts, or nondetachable automatic seatbelts.<sup>127</sup> The agency explained that it could no longer conclude that the safety benefits from the passive restraint regulation would outweigh the approximately \$1 billion it would cost the automobile industry to comply with this regulation.<sup>128</sup> According to the agency, when it initially promulgated the passive restraint regulation, it estimated that sixty percent of new cars would be equipped with airbags and forty percent would be equipped with automatic seatbelts; however, by 1981, when it rescinded the regulation, the industry planned to comply with the passive restraint regulation by installing detachable automatic seatbelts in ninety-nine percent of new cars.<sup>129</sup> While detachable automatic seatbelts did comply with the regulation, the agency reasoned that achieving compliance in this manner would not result in significant safety benefits because the detachable belts required “the same type of affirmative action that is the stumbling block to obtaining high usage levels of manual belts.”<sup>130</sup> The Court unanimously invalidated the rescission of the airbag and nondetachable seatbelt alternatives, and, by a 5–4 vote invalidated the rescission of the detachable seatbelt alternative.<sup>131</sup>

Just like *Overton Park*, *State Farm* began its exposition on arbitrary and capricious review by noting that the standard was “narrow,” but explained that “the agency must examine the relevant data and articulate a satisfactory explanation for its action.”<sup>132</sup> Instead of simply deciding that some heightened standard applied and then providing only the dispositive factor for deciding the case, *State Farm* rattled off a list of criteria—in dicta—that courts could use to find agency action arbitrary

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126. *Id.* at 41–42.

127. *Id.* at 37–38.

128. *Id.* at 38–39.

129. *Id.* at 38.

130. *Id.* at 39 (quoting 46 Fed. Reg. 53,419, 53,421 (Oct. 29, 1981)).

131. *Id.* at 54; *id.* at 58 (Rehnquist, J., concurring in part and dissenting in part).

132. *Id.* at 43 (majority opinion).

or capricious<sup>133</sup>:

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.<sup>134</sup>

Because *State Farm*'s dicta criteria for invalidating agency action look quite similar to some of the reasons given by the D.C. Circuit for invalidating agency action, many have posited that *State Farm* endorsed both the quasi-procedural and substantive hard look doctrines.<sup>135</sup> Plus, the Court distinguished *Vermont Yankee* on the basis that *State Farm*'s arbitrary and capricious test did not "require . . . any specific procedures" for the agency to use, which was a rationale frequently invoked under the D.C. Circuit's quasi-procedural hard look.<sup>136</sup> Distinguishing *State Farm* from *Vermont Yankee* on the basis that *State Farm* was not requiring any specific procedures is especially peculiar because *Vermont Yankee* had rejected that precise rationale.<sup>137</sup> Moreover, in the portion of *State Farm* that only five Justices joined, the Court stated that agency action must be "supported by the record and reasonably explained," such that the Court could conclude that the agency engaged in "reasoned decisionmaking."<sup>138</sup> And these same five Justices even quoted the D.C. Circuit's seminal substantive hard look decision, *Greater Boston*, approvingly.<sup>139</sup>

But multiple facets of *State Farm* suggest that the Supreme Court was

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133. See Garland, *supra* note 47, at 545 (describing *State Farm* as "[r]eciting a veritable litany of [quasi-procedural] requirements").

134. *State Farm*, 463 U.S. at 43.

135. See, e.g., Garland, *supra* note 47, at 543 ("On one level, the *State Farm* decision is a ringing endorsement of the quasi-procedural hard look."); *id.* at 545 (recognizing that both elements of the substantive hard look—scrutiny of the agency's record and a heightened standard of review going beyond minimum rationality—appeared in *State Farm*); Warren, *supra* note 49, 2631 ("[T]he Supreme Court finally used the substantive hard look standard to overturn an agency action in [*State Farm*].").

136. *State Farm*, 463 U.S. at 50–51.

137. See *supra* notes 113–118 and accompanying text.

138. *State Farm*, 463 U.S. at 52.

139. *Id.* at 57 (quoting *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1971)).

not completely signing on to the D.C. Circuit’s quasi-procedural and substantive hard look doctrines. For one thing, the Supreme Court has not used the label “hard look” to describe APA arbitrary and capricious review after *State Farm*, whereas the Court does use “hard look” to explain the additional procedures required by the National Environmental Policy Act.<sup>140</sup> *State Farm* also clarified that, contrary to quasi-procedural hard look, it was not requiring an agency “to consider all policy alternatives in reaching [a] decision.”<sup>141</sup> Rather, the Court made it abundantly clear that the deregulatory posture of the case required the agency to consider the rescinded alternatives.<sup>142</sup> In other words, the agency needed to consider the rescinded alternatives only because it had previously made the factual finding that airbags and automatic seatbelts were a cost-effective way of savings lives.

Once one accepts this unique rule that an agency must consider a rescinded alternative based on a previous factual finding made by the agency, most of *State Farm* becomes a simple case under *Chenery*. The agency’s explanation of the rescission did not address airbags or nondetachable automatic seatbelts. The obvious flaw in the agency’s reasoning for rescinding the *entire* regulation is that airbags or nondetachable seatbelts may have improved car safety, even if detachable seatbelts would not have. Combining *State Farm*’s deregulation rule that an agency must consider the rescinded alternatives based on a previous factual finding, with *Chenery*’s requirement that the agency must provide the explanation for its actions, shows why the agency in *State Farm* should have explained why a regulation requiring new cars to have airbags or nondetachable seatbelts would not have resulted in significant safety benefits. Because the agency did not address airbags or nondetachable automatic seatbelts whatsoever, the rescission of those alternatives was illogical and would have failed under *Chenery*’s rational basis with bite approach.<sup>143</sup> Indeed, all nine

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140. *See supra* note 108.

141. *State Farm*, 463 U.S. at 51.

142. *See id.* at 51 (“But the airbag is more than a policy alternative to the passive restraint standard: it is a technological alternative within the ambit of the existing standard. We hold only that given the judgment made in 1977 that airbags are an effective and cost-beneficial life-saving technology, the mandatory passive-restraint rule may not be abandoned without any consideration whatsoever of an airbags-only requirement.”).

143. By way of analogy, assume a cook put pepperoni, sausage, and mushrooms on your frozen pizza. Before putting it into the oven, the cook asks you whether you want all three of those toppings. You respond, “I don’t like mushrooms, so please take off the mushrooms, pepperoni, and

Justices—including Justice Rehnquist who wrote *Vermont Yankee*—held that the rescission of the airbag and nondetachable seatbelt alternatives was arbitrary and capricious.<sup>144</sup>

*State Farm's* 5–4 split over the detachable seatbelt alternative<sup>145</sup> was the significant dispute in the case that could not be resolved simply by *Chenery*, because the agency did explain why it rescinded this alternative.<sup>146</sup> As the agency indicated, “[o]nce a detachable automatic belt is detached, it becomes identical to a manual belt.”<sup>147</sup> Thus, if a person detaches the automatic belt, “its use thereafter requires the same type of affirmative action that is the stumbling block to obtaining high usage levels of manual belts.”<sup>148</sup> Justice White’s majority opinion held the agency acted arbitrarily or capriciously because it did not account for “inertia” favoring seatbelt use based on the fact that “the passive belt, once reattached, will continue to function automatically unless again disconnected.”<sup>149</sup> Justice Rehnquist’s dissent, which was joined by three other Justices, acknowledged that the agency’s explanation was “by no means a model.”<sup>150</sup> Yet it found the explanation “adequate” because it articulated a “rational connection between the facts found and the choice made.”<sup>151</sup>

Regardless of who has the better of that debate, note that Justice White’s majority opinion did not actually use or endorse the D.C. Circuit’s hard look doctrine and it did not use most of the criteria for

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sausage.” That is the same form of illogical reasoning used by the agency in *State Farm*.

144. See *State Farm*, 463 U.S. at 58 (Rehnquist, J., concurring in part and dissenting in part) (“In particular, I agree that, since the airbag and [nondetachable] automatic seatbelt were explicitly approved in the standard the agency was rescinding, the agency should explain why it declined to leave those requirements intact. In this case, the agency gave no explanation at all. Of course, if the agency can provide a rational explanation, it may adhere to its decision to rescind the entire standard.”).

145. See *id.* at 58 (“I do not believe, however, that NHTSA’s view of detachable automatic seatbelts was arbitrary and capricious.”).

146. 46 Fed. Reg. 53,419, 53,421–54,326 (Oct. 29, 1981), cited in *State Farm*, 463 U.S. at 58–59 (Rehnquist, J., concurring in part and dissenting in part).

147. 46 Fed. Reg. at 53,421.

148. *Id.*, quoted in *State Farm*, 463 U.S. at 39.

149. *State Farm*, 463 U.S. at 54; see also Brief of Respondents, *supra* note 124, at 40, available at LEXIS 1982 U.S. Briefs 354, at \*70 (“Since detachable automatic belts overcome these causes and put inertia on the side of wearing belts, the assumption that detachables would do no better than manual belts is contrary to the record.”).

150. *State Farm*, 463 U.S. at 58 (Rehnquist, J., concurring in part and dissenting in part).

151. *Id.* at 58–59 (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)).

invalidating agency action that it had previously listed in dicta—i.e., it did not make reference to the agency “rel[ying] on factors which Congress has not intended it to consider” or “offer[ing] 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.”<sup>152</sup> The majority’s dispositive holding basically turned on the criterion of the agency’s “fail[ure] to consider an important aspect of the problem”<sup>153</sup>—inertia, a real-world aspect about the nature of detachable automatic seatbelts. While Justice White referenced the rulemaking record material, he explicitly noted that the agency had the discretion to ignore the empirical evidence at issue.<sup>154</sup> The majority’s holding did not turn on a requirement that the agency produce additional data, respond to more comments, or consider other statutory purposes—as the hard look doctrine would have required. Moreover, it did not foreclose the agency from providing an explanation of why the inertia from detachable seatbelts actually would not result in increased seatbelt usage.<sup>155</sup>

To be sure, the *State Farm* majority used a stricter standard for reviewing agency rulemaking than the dissent, but the precise contours of that stricter standard remained unclear. What emerged from *State Farm* was not that the Supreme Court adopted any part of the D.C. Circuit’s hard look doctrine wholesale. Rather, *State Farm* (1) established that agency *deregulation* is reviewed under the APA’s arbitrary and capricious standard, (2) rejected the minimum rationality approach to arbitrary and capricious review, and (3) required an agency to consider a rescinded alternative based on a previous factual finding made by the agency. Of course, one year later, the Supreme Court in *Chevron* changed these rules of APA arbitrary and capricious review in

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152. *Id.* at 43 (majority opinion).

153. *Id.*

154. Both Justice White’s majority opinion and Justice Rehnquist’s dissenting opinion agreed that the agency had the discretion to ignore a survey of drivers showing that detachable seatbelts were used twice as much as manual belts, because that study had sample problems and the conditions differed from typical cars. *See State Farm*, 463 U.S. at 53 (“We believe that it is within the agency’s discretion to pass upon the generalizability of these field studies.”); *id.* at 58 (Rehnquist, J., concurring in part and dissenting in part) (“It is reasonable for the agency to decide that this study does not support any conclusion concerning the effect of automatic seatbelts . . .”).

155. *See id.* at 54 (majority opinion) (whether inertia from detachable seatbelts would increase seatbelt usage “is a matter for the agency to decide, but it must bring its expertise to bear on the question”).



cases involving an agency's statutory interpretation.

*c. Chevron Creates a Large Exception to State Farm*

Most see *Chevron* as solely a case about deference to agency statutory interpretations. But *Chevron* actually involved a specific type of arbitrary and capricious review—review of an agency's interpretation of a statute it administers.<sup>156</sup> *Chevron* referred to the arbitrary and capricious standard<sup>157</sup> while never mentioning *State Farm*.<sup>158</sup> After viewing *Chevron* as an arbitrary and capricious review case, one can also see that *Chevron* created a large escape hatch from *Chenery*'s requirement that an agency must explain its actions and from *State Farm*'s list of criteria in dicta for invalidating agency rulemaking.<sup>159</sup>

*Chevron* announced a two-step inquiry for reviewing an “agency’s construction of the statute which it administers.”<sup>160</sup> First (“*Chevron* Step One”), courts “must give effect to the unambiguously expressed intent of Congress.”<sup>161</sup> Second (“*Chevron* Step Two”), “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.”<sup>162</sup> So, for purposes of *Chevron*, an agency need not

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156. See, e.g., *North Carolina v. EPA*, 531 F.3d 896, 906 (D.C. Cir. 2008) (stating that *Chevron* Step Two was *State Farm*'s arbitrary and capricious standard); *Arent v. Shalala*, 70 F.3d 610, 615 (D.C. Cir. 1995) (“*Chevron* review and arbitrary and capricious review overlap at the margins. But it would be a mistake to view this case as one involving typical *Chevron* review.”). See also Garland, *supra* note 47, at 550 (“But the line between reviewing the validity of an agency’s statutory interpretations and reviewing the reasonableness of its policies is often a fine one . . . . The teachings of *Chevron*, therefore, cannot be dismissed as inapplicable to the arbitrary and capricious test.”); Ronald M. Levin, *The Anatomy of Chevron: Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253, 1254 (1997) (proposing that *Chevron* Step Two and the APA’s arbitrary and capricious test “be deemed not just overlapping, but identical”).

157. See *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) (stating that reasonable agency interpretations warranted deference unless they were “arbitrary, capricious, or manifestly contrary to the statute”).

158. See Garland, *supra* note 47, at 550 (“The Court treated *Chevron* purely as a case of statutory construction—neither *State Farm* nor the APA was even mentioned—and arguably the two cases can be distinguished on that ground.”).

159. Compare *Nat’l R.R. Passenger Corp. v. Boston & Me. Corp.*, 503 U.S. 407, 418–20 (1992) (deferring to the agency under *Chevron*), with *id.* at 425–27 (White, J., dissenting) (arguing that the agency action was invalid under *State Farm*).

160. *Chevron*, 467 U.S. at 842.

161. *Id.* at 843.

162. *Id.*

articulate the connection between its interpretation and the statutory language, as “a court may not substitute its own construction of a statutory provision for a *reasonable* interpretation made by the administrator of an agency.”<sup>163</sup>

*Chevron* therefore revitalized the minimum rationality approach to arbitrary and capricious review in the context of agency statutory interpretation.<sup>164</sup> By not requiring the agency to explain why it interpreted a statute in a certain manner, *Chevron* implicitly created an exception to *Chenery*’s holding that the agency must provide the explanation to justify its act. On the other hand, how one interprets the term “reasonable” determines whether the *Chevron* test looks more like rational basis review of legislation (i.e., minimum rationality review) or the D.C. Circuit’s hard look doctrine. If *Chevron* Step Two is interpreted as a return to minimum rationality review in the narrow context of agency statutory interpretation, *Chevron* creates at least one escape hatch from the more stringent *State Farm* inquiry. *Chevron* seemed to suggest that this was in fact how to interpret *Chevron* Step Two, as the Court went to great lengths to emphasize the deference that should be accorded to agencies.<sup>165</sup>

Then again, the Supreme Court recently added another prong to the *Chevron* inquiry—“*Chevron* Step Zero.” *Chevron* Step Zero reduces deference to agency statutory interpretations made through less formal means than notice-and-comment rulemaking (such as guidance documents and ruling letters) by examining factors that look a lot like the D.C. Circuit’s hard look doctrine.<sup>166</sup> The Court, however, has

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163. *Id.* at 844 (emphasis added); see also *Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (reasonable agency interpretation still accorded deference even if it contradicts a court’s previous interpretation). Of course, a change in agency position (like deregulation) made through statutory interpretation could still be invalidated pursuant to *State Farm*, even though the position would be reasonable under *Chevron*.

164. See Paul R. Verkuil, *The Wait is Over: Chevron as the Stealth Vermont Yankee II*, 75 GEO. WASH. L. REV. 921, 922–23 (2007) (“[*Chevron*’s] connection to the *State Farm* dissent implies that hard-look review should have been moderated by *Chevron*’s broad acceptance of the role of the political branches in determining policy. After *Chevron*, in effect, hard-look review was supposed to be more bark than bite.”).

165. See *Chevron*, 467 U.S. at 844 (“We have long recognized that considerable weight should be accorded to an executive department’s construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations.” (footnote omitted)).

166. See Keller, *supra* note 57, at 68–69 (discussing *Chevron* Step Zero and explaining that *Chevron* deference could be rejected if the agency lacked expertise, changed positions, did not carefully consider the relevant issues, or was addressing an important issue) (citing *Gonzales v.*

explained that agency notice-and-comment rulemaking will always pass the *Chevron* Step Zero doctrine for deference, so that development has basically not affected judicial review of agency rulemaking.<sup>167</sup>

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*State Farm* and its *Chevron* exception represent the Court's reaction to the D.C. Circuit's hard look doctrine, and thus the two cases became the definitive precedents on APA arbitrary and capricious review. But *State Farm* and *Chevron* left lower courts without much guidance on how to review agency action. *State Farm* opened the door for courts to scrutinize the substantive policy decisions made by agencies, but then *Chevron* instructed lower courts to apply minimum rationality review to agency statutory interpretation. As many, including then-Judge Breyer, noted, that combination set up a doctrine for review of agency action that seemed completely backwards: Courts were to defer to agencies on questions of law relating to statutory interpretation, but were to nitpick substantive agency policy conclusions on matters in which judges lacked institutional competence.<sup>168</sup> In the twenty-five years after *State Farm* and *Chevron* were decided, the Court offered virtually no other guidance on APA arbitrary and capricious review. But the Court's recent decision in *FCC v. Fox Television Stations, Inc.* has finally provided lower courts with additional guidance on how to review agency action. *Fox Television* has replaced *State Farm* as the Court's definitive precedent on APA arbitrary and capricious review.

3. *FCC v. Fox Television Stations, Inc. Implicitly Rejects the D.C. Circuit's Hard Look Doctrine and Eliminates State Farm's Criteria for Invalidating Agency Action*

The Supreme Court's April 2009 decision in *FCC v. Fox Television Stations, Inc.* significantly limited the discretion of courts to invalidate agency action.<sup>169</sup> In doing so, the Court implicitly rejected the D.C.

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Oregon, 546 U.S. 243, 267–68 (2006); *Barnhart v. Walton*, 535 U.S. 212, 222 (2002); *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001); *Christensen v. Harris County*, 529 U.S. 576, 587 (2000)).

167. *See id.* at 67–68 & nn.117–18 (explaining that *Chevron* Step Zero will not reduce the deference accorded to agencies when the agencies engage in informal rulemaking).

168. Steven Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 388–94 (1986).

169. *Fox Television* did not involve an informal rulemaking, but rather an adjudication. *FCC v. Fox Television Stations, Inc.*, 556 U.S. \_\_\_ (Apr. 28, 2009), 129 S. Ct. 1800, 1807–08 (2009).

Circuit’s hard look doctrine and the *State Farm* dicta criteria for invalidating agency action.

While enforcing the statutory ban on broadcasting “any . . . indecent . . . language,”<sup>170</sup> the FCC had taken the position that it would not penalize broadcasters who aired a fleeting expletive—the nonliteral use of language describing sexual or excretory activities, which was also not “deliberate [or] repetitive.”<sup>171</sup> More simply, the FCC had not penalized the broadcasting of a single use of the “F-Word” or “S-Word” that was made in passing.<sup>172</sup> In 2004, the FCC changed its position and stated that it would start penalizing the broadcasting of fleeting expletives.<sup>173</sup> The agency explicitly acknowledged and overruled its prior position.<sup>174</sup> In supporting this change, the FCC explained that “any use of [the F-Word] . . . inherently has a sexual connotation,” such that the word is “patently offensive” because “[i]ts use invariably invokes a coarse sexual image.”<sup>175</sup> The agency also stated that categorical exemptions for fleeting expletives would “likely lead to more widespread use,” and technological advances had made it easier to “bleep out” single uses of vulgar words.<sup>176</sup> In 2006, the FCC issued an order finding that Fox Television Stations had broadcast indecent language by airing two different programs that both included fleeting expletives.<sup>177</sup> The agency further explained that its pre-2004 position on fleeting expletives “d[id] not make sense in light of the fact that an ‘expletive’s’ power to offend derives from its sexual or excretory meaning.”<sup>178</sup> And the FCC noted that an exemption for fleeting expletives “‘unfairly forces viewers (including children)’ to take ‘the first blow’ and would allow broadcasters ‘to air expletives at all hours of

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Nevertheless, *Fox Television* still addressed the APA arbitrary and capricious standard that applies to agency rulemaking, including informal rulemaking.

170. 18 U.S.C. § 1464.

171. *Fox Television*, 129 S. Ct. at 1807.

172. *Id.* at 1806–08.

173. *Id.* at 1807 (citing *In re Complaints Against Various Broadcast Licensees Regarding Their Airing of the “Golden Globe Awards” Program*, 19 FCC Rcd. 4975, 4975–76 (2004) [hereinafter *Golden Globes Order*]).

174. *Id.* at 1808.

175. *Id.* at 1807–08 (quoting *Golden Globes Order*, 19 FCC Rcd. at 4978, 4979).

176. *Id.* at 1808 (quoting *Golden Globes Order*, 19 FCC Rcd. at 4979, 4980).

177. *Id.* at 1808–09 (citing *In re Complaints Regarding Various Television Broadcasts Between February 2, 2002, and March 8, 2005*, 21 FCC Rcd. 13,299 (2006) [hereinafter *Remand Order*]).

178. *Id.* at 1809 (quoting *Remand Order*, 21 FCC Rcd. at 13,308).

a day so long as they did so one at a time.’”<sup>179</sup>

In a 5–4 decision, the Supreme Court held that the FCC’s change in position regarding fleeting expletives was not arbitrary or capricious under the APA.<sup>180</sup> More importantly, the Court implicitly rejected the *State Farm* dicta criteria for invalidating agency action. Neither Justice Scalia’s majority opinion nor Justice Kennedy’s concurring opinion ever mentioned the *State Farm* dicta criteria for invalidating agency action, and both opinions adopted quite limited readings of *State Farm*. Justice Scalia explained that an agency’s change in position is not subjected to more heightened review than an agency acting in the first instance,<sup>181</sup> and that *State Farm* “said only” that an agency’s rescission of a prior regulation was reviewable (unlike an agency’s decision not to act in the first instance).<sup>182</sup> Justice Kennedy, who provided the fifth vote for the *Fox Television* majority, even limited *State Farm* to cases involving an agency that made prior factual findings.<sup>183</sup> Consequently, the majority quoted *State Farm* merely for the proposition that APA arbitrary and capricious review is “narrow,” it requires an agency to “examine the relevant data and articulate a satisfactory explanation for its action,” and it does not allow a court “to substitute its judgment for that of the agency.”<sup>184</sup>

Adding additional support for the proposition that the majority implicitly rejected the *State Farm* dicta criteria, Justice Breyer’s dissent quoted the *State Farm* dicta<sup>185</sup> and would have invalidated the FCC’s change in position on the basis that the agency failed to “consider . . .

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179. *Id.* (quoting *Remand Order*, 21 FCC Rcd. at 13,309).

180. *Id.* at 1819.

181. *See id.* at 1810 (“*State Farm* neither held nor implied that every agency action representing a policy change must be justified by reasons more substantial than those required to adopt a policy in the first instance.”).

182. *Id.*

183. *See id.* at 1824 (Kennedy, J., concurring in part and concurring in the judgment) (arguing *State Farm* articulated the principle that “an agency’s decision to change course may be arbitrary and capricious if the agency ignores or countermands its earlier *factual findings* without reasoned explanation for doing so” (emphasis added)); *see also id.* at 1811 (majority opinion) (“This means that the agency need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate. Sometimes it must—when, for example, its new policy rests upon *factual findings that contradict those which underlay its prior policy*; or when its prior policy has engendered serious reliance interests that must be taken into account.” (emphasis added)).

184. *Id.* at 1810 (majority opinion) (quoting *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

185. *Id.* at 1832 (Breyer, J., dissenting).

important aspect[s] of the problem.”<sup>186</sup> Justice Breyer’s dissent would have required the agency to address (1) “the First-Amendment-related need to avoid ‘censorship’” because the “FCC had *explicitly* rested its prior policy in large part upon the need to avoid treading too close to the constitutional line,”<sup>187</sup> and (2) the “potential impact of its new policy upon local broadcasting coverage.”<sup>188</sup> Additionally, Justice Breyer would not have accepted the reasons that the FCC did give for its change in position (these expletives “always invoke a coarse excretory or sexual image,”<sup>189</sup> viewers would suffer the “first blow,”<sup>190</sup> and broadcasters could air expletives at all hours “so long as they did so one at a time”<sup>191</sup>), because the FCC would have been aware of all these rationales “the first time around” when it adopted its initial policy.<sup>192</sup>

Unlike Justice Breyer, the majority did not treat the *State Farm* dicta as an obstacle to upholding the agency’s action. In the portion of Justice Scalia’s opinion that was not joined by Justice Kennedy, the plurality responded to Justice Breyer’s arguments based on the *State Farm* dicta, but the plurality never cited the *State Farm* dicta approvingly.<sup>193</sup> Justice Kennedy’s concurring opinion completely ignored the *State Farm* dicta by not even addressing these arguments made by Justice Breyer.<sup>194</sup> The fact that Justice Kennedy, who provided the dispositive fifth vote, did not even address the arguments premised on the *State Farm* dicta criteria confirms that *Fox Television* implicitly rejected the *State Farm* dicta criteria.

In addition to implicitly rejecting the *State Farm* dicta criteria, *Fox Television* also implicitly rejected the D.C Circuit’s hard look doctrine. The majority did acknowledge “the requirement that an agency provide *reasoned explanation* for its action,”<sup>195</sup> but the majority’s analysis clarified that its idea of “reasoned explanation”<sup>196</sup> required much less

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186. *Id.* (quoting *State Farm*, 463 U.S. at 43).

187. *Id.* at 1833.

188. *Id.* at 1835.

189. *Id.* at 1838.

190. *Id.* at 1812 (quoting *Remand Order*, 21 FCC Rcd. 13,299, 13,309 (2006)).

191. *Id.* at 1839 (quoting *Remand Order*, 21 FCC Rcd. at 13,309).

192. *Id.* at 1838.

193. *Id.* at 1815–19 (plurality opinion).

194. *Id.* at 1822–24 (Kennedy, J., concurring in part and concurring in the judgment).

195. *Id.* at 1811 (majority opinion) (emphasis added).

196. *Id.*

than the “reasoned decision-making” contemplated by the D.C. Circuit’s hard look doctrine.<sup>197</sup> Recall that the substantive hard look doctrine required courts to scrutinize the record intensively,<sup>198</sup> and the quasi-procedural hard look doctrine required agencies to use additional procedures to produce better explanations.<sup>199</sup> Instead of intensively scrutinizing the record, the *Fox Television* majority simply asked whether the agency’s reasons were “rational.”<sup>200</sup> The majority did not force the agency to use additional procedures to produce a better explanation. Indeed, the majority did not require the agency “to adduce empirical data” when that data could not readily be obtained<sup>201</sup> or when “the agency’s predictive judgment . . . makes entire sense.”<sup>202</sup>

Ultimately, APA arbitrary and capricious review after *Fox Television* simply asks whether the agency’s reasons were “rational”—it does not require courts to take a hard look at agency action or go through the *State Farm* dicta criteria for invalidating agency action.<sup>203</sup> Additionally, Justice Kennedy’s concurring opinion confirms that the agency itself still must provide the explanation, as *Chenery* required. Justice Kennedy explained that the APA imposes “the *duty of agencies* to find and formulate policies that can be justified by neutral principles and a reasoned explanation.”<sup>204</sup> The “duty of agencies” language confirms the *Chenery* principle that the agency itself must provide the explanation, as opposed to allowing courts to come with hypothetical explanations after the fact. In fact, when Justice Kennedy quoted *Overton Park* for the proposition that APA arbitrary and capricious review is “searching and careful,” he was distinguishing administrative agencies’ unique

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197. *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970) (Leventhal, J.); see *supra* notes 103–104 and accompanying text.

198. See *supra* notes 103–107 and accompanying text.

199. See *supra* notes 98–101 and accompanying text.

200. *Fox Television*, 129 S. Ct. at 1812–13; see *id.* at 1812 (“It was certainly reasonable to determine that it made no sense to distinguish between literal and nonliteral uses of offensive words . . .”); *id.* at 1812–13 (“It is surely rational (if not inescapable) to believe that a safe harbor for single words would ‘likely lead to more widespread use of the offensive language.’” (quoting *Golden Globes Order*, 19 FCC Rcd. 4975, 4979 (2004))); *id.* at 1813 (“The Commission could rationally decide it needed to step away from its old regime . . .”).

201. *Id.* at 1813

202. *Id.* at 1814

203. *Id.* at 1812–13.

204. *Id.* at 1822–23 (Kennedy, J., concurring in part and concurring in the judgment) (emphasis added).

“constitutional position” compared to Congress,<sup>205</sup> whose acts are only reviewed for minimum rationality, meaning that Congress itself does not have to provide an explanation for its action.

Lower courts could start seizing on Justice Kennedy’s “neutral and rational principles” language to establish yet another hook for infusing their policy preferences into APA arbitrary and capricious review, but that would be a gross over-reading of Justice Kennedy’s concurrence.<sup>206</sup> Justice Kennedy signed on to the majority opinion that merely required the agency’s explanation to be “rational,”<sup>207</sup> calling the majority’s discussion a “careful and complete analysis.”<sup>208</sup> Just as Justice Rehnquist had noted in *State Farm*,<sup>209</sup> Justice Kennedy explained that the agency’s explanation in *Fox Television* was sufficient even though it was “not so precise, detailed, or elaborate as to be a model for agency explanation.”<sup>210</sup>

*Fox Television* significantly reduces the ability of courts to impose their policy preferences on agencies and to invalidate agency action. However, because the majority did not establish a doctrine underlying APA arbitrary and capricious review and Justice Kennedy did not sign on to the entire majority opinion, lower courts may still have difficulties in applying *Fox Television*. The Supreme Court and lower courts may very well have to articulate a comprehensive, thorough doctrine for APA arbitrary and capricious review before courts stop using their policy preferences to invalidate agency rulemaking.

## II. COURTS REVIEWING AGENCY RULEMAKING SHOULD USE THE DOCTRINES FOR JUDICIAL REVIEW OF LEGISLATION

Before *Fox Television*, the law on arbitrary and capricious review was in shambles and had given judges too much leeway to impose their

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205. *Id.*

206. *Id.*

207. *Id.* at 1812–13 (majority opinion).

208. *Id.* at 1824 (Kennedy, J., concurring in part and concurring in the judgment).

209. *See Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 58 (1983) (Rehnquist, J., concurring in part and dissenting in part) (noting that the agency’s explanation was sufficient even though it was “by no means a model”).

210. *Fox Television*, 129 S. Ct. at 1824 (Kennedy, J., concurring in part and concurring in the judgment).



policy preferences on agencies. That was largely due to the fact that courts had not recognized the principles underlying their review of agency rulemaking and they stopped using the doctrines for judicial review of legislation when reviewing agency rulemaking. Essentially, when courts recognized that agency rulemaking differed in significant respects from legislation,<sup>211</sup> they went too far in severing the connection between the doctrines for review of agency rulemaking and legislation.<sup>212</sup> Without a theoretical grounding, arbitrary and capricious review of agency rulemaking became highly politicized. The most direct remedy for this problem is doctrinal innovations that will limit the ability of judges to use their policy preferences to invalidate agency rules.<sup>213</sup>

While *Fox Television* provided guidance to courts regarding what they cannot do, there is still a void as to what doctrine or underlying principles courts should use in conducting APA arbitrary and capricious review. This Article argues that, after *Fox Television*, courts should place APA arbitrary and capricious review on the tiers-of-scrutiny sliding scale used for review of legislation, even though courts should not equate arbitrary and capricious review with the minimum rationality test used for reviewing most legislation. The significant differences between agency rulemaking and legislation do warrant a more nuanced doctrine than merely treating agency rulemaking as the equivalent of legislation.<sup>214</sup> This observation, though, does not entail an either-or proposition: Courts can—and should—develop doctrines for judicial review of agency rulemaking by using doctrines for review of legislation, even if courts should not treat agency rulemaking as the equivalent of legislation.

This Part begins with background information on the tiers of scrutiny, which is the current doctrine for judicial review of legislation. It then proceeds to give both practical and theoretical reasons why arbitrary and

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211. See *supra* Part I.B.

212. See *supra* Part I.C.

213. See Thomas J. Miles & Cass R. Sunstein, *Depoliticizing Administrative Law* 24 (Univ. of Chicago Pub. Law Working Paper No. 223, Univ. of Chicago John M. Olin Law & Econ. Working Paper No. 143, Harvard Pub. Law Working Paper No. 08-16, 2008), available at <http://ssrn.com/abstract=1150404> (“And if arbitrariness review is being conducted in a way that shows a significant effect from judicial policy preferences, then the most obvious response would be to reduce the intensity of such review. What is now a ‘hard look’ on the part of reviewing courts might be transformed into a ‘soft look.’”).

214. See *supra* notes 52–67 and accompanying text.

capricious review should be tied to the tiers of scrutiny. Practically, arbitrary and capricious review under *State Farm* has left lower courts in disarray and has politicized judicial review of agency rulemaking. Theoretically, the Supreme Court is signaling that the APA's arbitrary and capricious standard should be interpreted as it was understood by Congress when it passed the APA. This would entail a return to *Pacific States Box*'s focus on an agency's purpose in regulating and the means used to achieve that purpose, even if agency rulemaking is not treated as the equivalent as legislation. The doctrines for review of legislation already provide a nuanced framework—based on over a century of trial-and-error—for evaluating the purpose and means used in creating legislative-like pronouncements.

A. *The Tiers of Scrutiny for Reviewing Legislation*

It is settled constitutional law that judicial review of legislation is based on the tiers of scrutiny, but it took over a century to solidify the precedent underlying the tiers of scrutiny. The tiers of scrutiny require courts to analyze the means and the ends of legislation by asking whether the governmental purpose rises to the requisite level (the ends) and whether the legislation has the requisite connection to that purpose (the means).<sup>215</sup> Currently, the Court recognizes three different levels of scrutiny.<sup>216</sup> In determining which level of scrutiny to use, courts look to various factors: the original understanding of the Constitution,<sup>217</sup> the institutional competence of courts to second-guess legislatures,<sup>218</sup> whether courts in future cases would be required to apply heightened scrutiny in an unprincipled manner that would open a “Pandora’s box,”<sup>219</sup> whether a deficiency in the political process exists,<sup>220</sup> and

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215. See Shapiro & Levy, *supra* note 59, at 425 (Under the tiers of scrutiny, courts analyze “the rationality of legislative purposes and means chosen to achieve them.”).

216. See R. Randall Kelso, *Standards of Review Under the Equal Protection Clause and Related Constitutional Doctrines Protecting Individual Rights: The “Base Plus Six” Model and Modern Supreme Court Practice*, 4 U. PA. J. CONST. L. 225, 225–26 (2002) (“[T]raditional black-letter law continues to discuss three basic standards of review—minimum rationality review, intermediate or mid-level review, and strict scrutiny . . .”). See generally ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 529 (Aspen Law & Bus. Publishers 1997).

217. See Kelso, *supra* note 216, at 229 n.19 (citing *Bowers v. Hardwick*, 478 U.S. 186, 194 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003)).

218. See *id.* (citing *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 443 (1985)).

219. *Id.* (citing *City of Cleburne*, 473 U.S. at 445–46).

220. See *id.* at 229 n.20 (citing *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4

whether the legislation affects an immutable characteristic<sup>221</sup> or “burdens an individual for something not the product of that individual’s choice.”<sup>222</sup>

A small proportion of legislation will be reviewed under “strict scrutiny,” which requires that the legislation serve a *compelling* governmental purpose and be *narrowly tailored* to serve that purpose.<sup>223</sup> Strict scrutiny applies to “[c]lassifications based on race or national origin and classifications affecting fundamental rights.”<sup>224</sup>

“Intermediate scrutiny” is more deferential to legislation than strict scrutiny, but courts can still easily invalidate legislation under this standard. Under intermediate scrutiny, the legislation must serve an *important* governmental purpose and be *substantially related* to that purpose.<sup>225</sup> Intermediate scrutiny applies to content-neutral restrictions of speech,<sup>226</sup> classifications based on illegitimacy,<sup>227</sup> and classifications based on sex.<sup>228</sup>

“Rational basis” review is the most deferential doctrine for reviewing legislation, as it merely requires that the legislation has a *legitimate* governmental purpose and is *rationally related* to that purpose.<sup>229</sup> Unlike strict and intermediate scrutiny, the Supreme Court has held that courts reviewing legislation for a rational basis can consider any conceivable, hypothetical governmental purpose that the legislature could have had in mind;<sup>230</sup> this approach to rational basis review has become known as

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(1938)).

221. *See id.* (citing *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973)).

222. *Id.* (citing *Plyler v. Doe*, 457 U.S. 202, 220 (1982)).

223. *See, e.g., Abrams v. Johnson*, 521 U.S. 74, 82 (1997) (describing “strict scrutiny” as requiring legislation to be “narrowly tailored to achieve a compelling governmental interest”).

224. *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (citation omitted). *See, e.g., Roe v. Wade*, 410 U.S. 113 (1973) (applying strict scrutiny to the fundamental right of privacy); *Loving v. Virginia*, 388 U.S. 1 (1967) (applying strict scrutiny to racial classifications).

225. *See, e.g., Craig v. Boren*, 429 U.S. 190, 197 (1976) (stating that intermediate scrutiny requires the legislation to “serve important governmental objectives and . . . be substantially related to achievement of those objectives”).

226. *See, e.g., Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 662 (1994).

227. *See, e.g., Mills v. Habluetzel*, 456 U.S. 91, 98–99 (1982).

228. *See, e.g., Craig*, 429 U.S. at 197.

229. *See, e.g., Lyng v. Int’l Union*, 485 U.S. 360, 370 n.8 (1988) (explaining that the “rational-basis test” requires legislation to be “rationally related to any legitimate governmental objective”).

230. *See, e.g., FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 313–15 (1993) (stating that courts could consider any “conceivable” purpose under rational basis review, and “because we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for

“minimum rationality” review.<sup>231</sup> Most legislation will be reviewed for a rational basis, as anything not triggering strict or intermediate scrutiny is subject to rational basis review.<sup>232</sup>

While the Supreme Court has only articulated these three levels of scrutiny,<sup>233</sup> many commentators have suggested that there are really other levels of scrutiny for reviewing legislation.<sup>234</sup> Most importantly, the Court’s precedents suggest a heightened variant of rational basis review, which this Article will call “rational basis with bite.”<sup>235</sup> Under rational basis with bite, courts use the rational basis standard, which examines whether the purpose is legitimate and the means are rationally related to that purpose.<sup>236</sup> Rational basis with bite, however, does not adopt the minimum rationality approach that examines any conceivable, hypothetical purposes<sup>237</sup>—rather, rational basis with bite only examines the actual purpose motivating the legislature, as evidenced by the record created by the legislature.<sup>238</sup>

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constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature”).

231. See Kelso, *supra* note 216, at 230 (describing “minimum rationality” review as examining any “conceivable legitimate interest to support the statute”).

232. See *Beach Commc’ns*, 508 U.S. at 313 (“In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.”).

233. See, e.g., *District of Columbia v. Heller*, 128 S. Ct. 2783, 2821 (2008) (stating that the three “traditionally expressed levels” of scrutiny are “strict scrutiny, intermediate scrutiny, [and] rational basis”).

234. See, e.g., Kelso, *supra* note 216, at 226 (arguing that the Supreme Court should recognize seven levels of scrutiny, but that the Court has applied ten different levels of scrutiny). The other levels of scrutiny proposed by Kelso are hybrid standards that use portions of the intermediate scrutiny standard and portions of the strict scrutiny standard. See *id.* at 258 (“Appendix”). As this Article ultimately rejects applying intermediate or strict scrutiny, it will not consider the hybrid variations based on those two levels of scrutiny.

235. The term rational basis “with bite” stems from its use by Gerald Gunther in *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 21 (1972). Gunther explained that the Court could put “new bite into the old equal protection” by not “supply[ing] justifying rationales by exercising its imagination.” *Id.*; see also GUNTHER & SULLIVAN, CONSTITUTIONAL LAW 486-87 (16th ed., Foundation Press 2007) (discussing rational basis with bite); see generally *infra* note 238.

236. See *supra* note 229 and accompanying text.

237. See *supra* note 230 and accompanying text.

238. See *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 448 (1985) (“[T]he record does not reveal any rational basis . . . .”); see, e.g., *Romer v. Evans*, 517 U.S. 620, 632–35 (1996) (examining the actual legislative purpose instead of creating a hypothetical, conceivable purpose);

The Court has not yet recognized the existence of rational basis with bite, much less defined when rational basis with bite applies instead of minimum rationality in the context of reviewing legislation.<sup>239</sup> Generally speaking, rational basis with bite has applied in cases with two features: (1) they involve a classification to which the Court does not want lower courts applying intermediate or strict scrutiny, given institutional competence concerns and the fear of opening a Pandora's box;<sup>240</sup> (2) but the law at issue nevertheless blatantly "burdens an individual for something not the product of that individual's choice."<sup>241</sup> In other words, rational basis with bite has been applied when there was both a plausible argument for applying heightened scrutiny and also reasons for the Court to worry about subjecting the law at issue to heightened scrutiny—that is, because lower courts could over-use their power of judicial review to strike down other pieces of legislation that the Court would consider valid.<sup>242</sup>

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*Plyler v. Doe*, 457 U.S. 202, 207 (1982) (same); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 535, 538 (1973) (same); *see also* *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 188 (1980) (Brennan, J., dissenting) ("A challenged classification may be sustained only if it is rationally related to achievement of an *actual* legitimate governmental purpose."); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 426 F.3d 1162, 1194 (9th Cir. 2005) (en banc), *rev'd* 551 U.S. 701 (2007) (Kozinski, J., concurring) ("By rational basis, I don't mean the standard applied to economic regulations, where courts shut their eyes to reality or even invent justifications for upholding government programs, but robust and realistic rational basis review, where courts consider the actual reasons for the plan in light of the real-world circumstances that gave rise to it." (citations omitted)). *See generally* Neelum J. Wadhvani, Note, *Rational Reviews, Irrational Results*, 84 TEX. L. REV. 801, 803, 814–15 (2006) (explaining "the Court's schizophrenic oscillation" between minimum rationality and rational basis with bite).

239. Some commentators have questioned whether courts can justifiably look to Congress's legislative record in determining the constitutionality of a statute. *See, e.g.*, A. Christopher Bryant & Timothy J. Simeone, *Remanding to Congress: The Supreme Court's New "On the Record" Review of Federal Statutes*, 86 CORNELL L. REV. 328, 375 (2001); William W. Buzbee & Robert A. Schapiro, *Legislative Record Review*, 54 STAN L. REV. 87, 140 (2001).

240. *See* Kelso, *supra* note 216, at 229 n.19 (citing *City of Cleburne*, 437 U.S. at 443, 445–46).

241. *Id.* at 229 n.20 (citing *Plyler* at 220); *see also* *Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring in the judgment) (stating that rational basis with bite applies "[w]hen a law exhibits . . . a desire to harm a politically unpopular group" (citing *Romer*, 517 U.S. at 632; *City of Cleburne*, 473 U.S. at 446–47; *Moreno*, 413 U.S. at 534)).

242. In the context of criminal sentencing, federal courts of appeals may very well be treating district courts as if they were expert "agencies," ever since the Supreme Court found that the mandatory Sentencing Guidelines were unconstitutional. Courts of appeals now essentially apply a rational basis with bite standard to appellate review of a district court's sentence that is outside the Sentencing Guidelines range. Congress has required district courts to give a written explanation for all sentences given outside the Guidelines range. 18 U.S.C. § 3553(c)(2). The courts of appeals then review this explanation and the sentence under a reasonableness standard. *See* *United States v.*

B. *Judicial Review of Agency Rulemaking Should Be Based on the Tiers of Scrutiny*

It took the Court over a century to solidify the tiers of scrutiny<sup>243</sup> because the development of doctrines for review of legislative-like pronouncements needed to account for many factors, including the institutional competence of courts to review policy decisions made by governmental bodies entrusted with such decisions. One large limitation inherent in the tiers of scrutiny is that courts can only evaluate the purpose and means of a piece of legislation. Courts, for example, cannot require Congress to hold more hearings or examine different aspects of the underlying problem. Similar concerns regarding institutional competence surround judicial review of agency rulemaking, as unelected judges are reviewing the policy decisions made by the government body entrusted with making such decisions.

However, rather than acknowledge and take advantage of the “[y]ears of refinement” that went into creating the tiers of scrutiny,<sup>244</sup> the Court has not considered the use of the tiers of scrutiny to address these concerns regarding judicial review of agency rulemaking. Courts have not been limiting themselves to reviewing the agency’s purpose in regulating and the means used to achieve that purpose. Rather, *State Farm*’s dicta established a vague, open-ended list of criteria that essentially gives courts carte blanche to validate or invalidate agency rules.<sup>245</sup> The courts of appeals have cited these *State Farm* criteria

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Booker, 543 U.S. 220, 261–62 (2005). In fact, the same dispute in administrative law regarding how to define procedural versus substantive requirements, *see supra* notes 119–123 and accompanying text, is arising in the context of determining whether a criminal sentence should be reviewed as being “procedurally” versus “substantive[ly] reasonable[.],” *Gall v. United States*, 128 S. Ct. 586, 597 (2007). *Compare* *Rita v. United States*, 127 S. Ct. 2456, 2473 (2007) (Stevens, J., concurring) (stating that an explanation for a sentence based on disliking Yankees fans would go to substantive reasonableness), *with id.* at 2483 n.6 (Scalia, J., concurring in part and concurring in the judgment) (stating that such an explanation would go to procedural reasonableness).

243. *See supra* note 43.

244. Charles Fried, *The Artificial Reason of the Law or: What Lawyers Know*, 60 TEX. L. REV. 35, 40 (1981); *see id.* (discussing the process by which the common law refines legal doctrines over many years in the context of contract and tort law).

245. *See* Paul R. Verkuil, *Judicial Review of Informal Rulemaking: Waiting for Vermont Yankee II*, 55 TUL. L. REV. 418, 419–21 (1981) (arguing that the Court should prevent courts from invalidating agency rules because of minor gaps or defects in the agency’s reasoning for the same reasons articulated in *Vermont Yankee*).

hundreds of times.<sup>246</sup> While *Fox Television* took a step in the right direction by eliminating these *State Farm* criteria, it did not place the standard for reviewing agency rulemaking on the tiers-of-scrutiny sliding scale. For both practical and theoretical reasons, courts should take this additional step and place the APA's arbitrary and capricious standard on the tiers-of-scrutiny sliding scale.

Practically, the lower courts' application of the APA's arbitrary and capricious standard has proven that its doctrine for review of agency rulemaking is unprincipled and unmanageable. Within a decade after *State Farm* and *Chevron*, "the *Chevron* framework [had] broken down, and *State Farm* [had] been all but ignored by agencies and the courts, including the Supreme Court."<sup>247</sup> At times, the Supreme Court and the courts of appeals cite the *State Farm* criteria in applying the arbitrary and capricious standard, but the criteria are more often ignored.<sup>248</sup> At the other extreme, the D.C. Circuit continues to use its hard look doctrine,<sup>249</sup> although it often hides this fact by not using the magic words "hard look" in invalidating agency action.<sup>250</sup> Other circuits, as well, have routinely invoked the hard look doctrine.<sup>251</sup> Confirming the disarray,

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246. A simple Westlaw search on July 8, 2009, just for the phrase "failed to consider an important aspect of the problem," *State Farm*, 463 U.S. at 43, returned 300 cases in the federal courts of appeals.

247. Sidney A. Shapiro & Richard E. Levy, *Judicial Incentives and Indeterminacy in Substantive Review of Administrative Decisions*, 44 DUKE L.J. 1051, 1051–52 (1995).

248. *Id.* at 1067.

249. *See, e.g.*, *El Conejo Americano of Texas, Inc. v. DOT*, 278 F.3d 17, 19–20 (D.C. Cir. 2002) (invoking the "hard look" standard under arbitrary and capricious review).

250. *See, e.g.*, *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 241 (D.C. Cir. 2008) ("[T]he Commission offered no reasoned explanation for its dismissal of empirical data that was submitted at its invitation.").

251. *See, e.g.*, *Long Island Head Start Child Dev. Servs. v. NLRB*, 460 F.3d 254, 257 (2d Cir. 2006) ("applying *State Farm* 'hard look' standard to NLRB adjudication"); *Citizens Coal Council v. EPA*, 447 F.3d 879, 914 (6th Cir. 2006) (en banc) (Martin, J., dissenting) ("In conducting our review, we '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 look' at the salient problems, and has not genuinely engaged in reasoned decision-making.'" (quoting *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851–52 (D.C. Cir. 1970))); *Simms v. Nat'l Highway Traffic Safety Admin.*, 45 F.3d 999, 1004 (6th Cir. 1995) ("Rather the court must 'ensure that the agency took a 'hard look' at all relevant issues and considered reasonable alternatives . . .'" (quoting *Neighborhood TV Co., Inc. v. FCC*, 742 F.2d 629, 639 (D.C. Cir. 1984))); *Frisby v. U.S. Dep't of Hous. & Urban Dev.*, 755 F.2d 1052, 1055 (3d Cir. 1985) ("This presumption does not, however, prevent a reviewing court from taking a probing, 'hard look' at the agency's action."); *Citizens State Bank of Marshfield, Mo. v. FDIC*, 718 F.2d 1440, 1445 (8th Cir. 1983) ("We are not satisfied that the Board took a 'hard

lower courts often selectively quote from *Overton Park* or *State Farm* for the proposition that arbitrary and capricious review is either “narrow” or more “probing”—but not both.<sup>252</sup> D.C. Circuit Judge Kavanaugh may have summed it up best:

Courts have incrementally expanded those APA [§ 553] procedural requirements well beyond what the text provides. And courts simultaneously have grown *State Farm*’s “narrow” § 706 arbitrary-and-capricious review into a far more demanding test. Application of the beefed-up arbitrary-and-capricious test is inevitably if not inherently unpredictable—so much so that, on occasion, the courts’ arbitrary-and-capricious review itself appears arbitrary and capricious.<sup>253</sup>

*Chevron* did not fare much better. Most lower courts interpreted *Chevron* as a return to minimum rationality review in cases involving agency statutory interpretation,<sup>254</sup> although a significant number of D.C.

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look’ at the relevant issues . . . .” (citing *Greater Boston*, 444 F.2d at 852–53)). *But see* Nw. Envtl. Def. Ctr. v. Bonneville Power Admin., 477 F.3d 668, 687 n.15 (9th Cir. 2007) (“Because the Supreme Court has never explicitly embraced the ‘hard look’ approach to judicial review under the arbitrary and capricious standard of the APA, we adhere to the Supreme Court’s explicit guidance in *State Farm* that an agency must cogently explain its actions and demonstrate a rational connection between the facts it found and the choice it made.” (citation omitted)).

252. A quick search on Westlaw in December 2008 revealed that *Overton Park* was cited 1642 times in the federal courts of appeals. Eight hundred seventeen times, the court quoted *Overton Park* for the proposition that arbitrary and capricious review is narrow or that the court could not substitute its judgment for the agency’s judgment—but did not state that this review was thorough, probing, or in-depth. The opposite happened 107 times. The search was limited to federal courts of appeals cases citing *Overton Park*, and the locate terms of the search were <narrow substitute % (thorough probing in-depth)>. Similarly, *State Farm* was cited 1149 times in the federal courts of appeals. Three hundred eighty-three times, the court quoted *State Farm* for the proposition that arbitrary and capricious review is narrow or that the court could not substitute its judgment for the agency’s judgment—but did not list the *State Farm* criteria for invalidating agency action, thus failing to indicate that review is also “probing.” The opposite happened 134 times. The search was limited to federal courts of appeals cases citing *State Farm*, and the locate terms of the search were <narrow substitute % (“re! on factors” “fail! to consider” “counter to the evidence” “implausible”)>. *Fox Television* may have settled that *State Farm* stands for “narrow” but not “probing” review, though, as the majority quoted *State Farm* for the proposition that arbitrary and capricious review is “narrow” without quoting *State Farm* for the proposition that it is also probing. *FCC v. Fox Television Stations, Inc.*, 556 U.S. \_\_ (Apr. 28, 2009), 129 S. Ct. 1800, 1810 (2009).

253. *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 248 (D.C. Cir. 2008) (Kavanaugh, J., concurring in part, concurring in the judgment in part, and dissenting in part).

254. *See* Levin, *supra* note 156, at 1266 n.59 (“[U]nder current law step two is so deferential as to be almost inconsequential . . . .” (citing Mark Seidenfeld, *A Syncopated Chevron: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV. 83, 96 (1994))).



Circuit cases infused the hard look doctrine into *Chevron*<sup>255</sup> by continuing to equivocate on the term “reasonable.”<sup>256</sup> However, to compound the ambiguity, the Supreme Court’s recent *Chevron* Step Zero doctrine reduced *Chevron* deference through factors that look a lot like the D.C. Circuit’s hard look doctrine.<sup>257</sup>

Empirical studies confirm that under *State Farm* and *Chevron*, the political policy preferences of judges significantly affects whether judges invalidate agency action.<sup>258</sup> With such a muddled doctrine, this comes as no surprise, as there was leeway to apply individual policy preferences under indeterminate doctrines. Nevertheless, much of the commentary supporting the hard look doctrine and *State Farm*’s dicta has taken it on faith that judges would not let their political policy preferences cloud their judgments.<sup>259</sup> Evidence to the contrary confirms that the Supreme Court was right in *Fox Television* to implicitly eliminate both the *State Farm* dicta criteria for invalidating agency action and the D.C. Circuit’s hard look doctrine. Indeed, the major reason why Congress creates agencies is so that an expert set of decisionmakers—not judges—can set national policy.<sup>260</sup> When judges overrule expert agencies because of judicial policy preferences, they

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255. *See id.* at 1263 (“An important line of cases from the D.C. Circuit has implemented step two of the *Chevron* test through lines of argument that originated in abuse of discretion doctrine, often under banners such as ‘reasoned decisionmaking’ or the judicial ‘hard look.’”).

256. *See id.* (“In effect, the [D.C. Circuit] has transformed the *Chevron* step two question of whether the agency action was ‘reasonable’ into a question of whether it was ‘reasoned.’”).

257. *See Keller, supra* note 57, at 67–69 (discussing *Chevron* Step Zero and explaining that *Chevron* deference could be rejected if the agency lacked expertise, changed positions, did not carefully consider the relevant issues, or was addressing an important issue) (citing *Gonzales v. Oregon*, 546 U.S. 243, 267–68 (2006); *Barnhart v. Walton*, 535 U.S. 212, 222 (2002); *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001); *Christensen v. Harris County*, 529 U.S. 576, 587 (2000)).

258. *See supra* note 13 and accompanying text.

259. *See, e.g., Garland, supra* note 47, at 558 (“[H]ard look review may be too hard because it may permit a court to substitute its judgment for the agency’s on the pretext of determining whether a policy outcome is ‘reasonable.’ . . . It is hard to rebut this charge directly, beyond asserting the good faith of the judiciary.”); *Shapiro & Levy, supra* note 59, at 438 (“It would, of course, be naive to suppose that [substantive hard look] can completely avoid the problem of judges finding flaws in agency reasoning because they dislike the result.”).

260. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984) (“Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges’ personal policy preferences. In contrast, an agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration’s views of wise policy to inform its judgments.”).

eliminate the major advantage of having an administrative state in the first place.

After *Fox Television*, these practical concerns about an unworkable doctrine for APA arbitrary and capricious review may disappear. But because the Supreme Court did not explicitly eliminate the *State Farm* criteria or the hard look doctrine and because lower courts could misinterpret Justice Kennedy's *Fox Television* concurrence,<sup>261</sup> lower courts might continue invalidating agency action based on their policy preferences. If so, the Supreme Court or lower courts will need to adopt a more robust doctrine, such as application of the tiers of scrutiny, that limits what criteria courts can look to, instead of merely setting a few examples on how to perform APA arbitrary and capricious review.

In addition to these practical concerns, there are theoretical reasons for placing APA arbitrary and capricious review of agency rulemaking on the tiers of scrutiny. Most importantly, courts need to return to focusing solely on the agency's *purpose* in regulating and the *means* used by the agency to achieve that purpose. There is statutory support in the APA for this: APA Section 553, which establishes the procedures agencies must use during informal rulemaking, provides that the agency's record only needs to include a "concise general statement of [the rule's] *basis* and *purpose*."<sup>262</sup> When courts are given the leeway to require that agencies use additional procedures to formulate a more lengthy record for appellate review, judges can use their policy preferences to invalidate agency rulemaking under the guise of merely asking for a more thorough record. However, the ability of judges to use their policy preferences in reviewing agency rulemaking would be significantly constrained if judges could only examine the agency's explanation about its purpose and means. Such an inquiry would focus simply on whether the agency invoked a regulatory purpose contained within its statutory delegation and whether the agency adequately explained how the rule it promulgated was sufficiently connected to that purpose.

The hard look doctrine itself was basically "a surrogate for motivation analysis"<sup>263</sup>—that is, an analysis of the agency's purpose to see whether

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261. See *supra* notes 206–210 and accompanying text.

262. 5 U.S.C. § 553(c) (2006) (emphasis added).

263. Garland, *supra* note 47, at 555.

an “improper motive has intruded into the decisionmaking process.”<sup>264</sup> Courts’ main concern in reviewing agency rulemaking is the agency’s purpose, so the doctrines for judicial review of agency rulemaking should be simplified to focus directly on the agency’s purpose instead of proxies that do not necessarily implicate that purpose. Using the tiers of scrutiny in reviewing agency rulemaking would restore this direct focus on the agency’s purpose in rulemaking.

Another theoretical concern is that courts applying the *State Farm* criteria and the D.C. Circuit’s hard look doctrine neglected to justify their doctrines for judicial review of agency rulemaking, as did the Supreme Court in *Fox Television*.<sup>265</sup> There was no limiting principle to the D.C. Circuit’s requirement that courts give agency action a hard look—a hard look requirement can result in any outcome that a judge wants. Similarly, *State Farm*’s adoption in dicta of a non-exhaustive list of criteria for invalidating agency action allowed lower courts to overrule agencies whenever an agency “failed to consider” something that a court deemed to be “an important aspect of the problem.”<sup>266</sup> *Fox Television* is a big improvement, but its fact-specific example of how to conduct APA arbitrary and capricious review could easily be distinguished by lower courts—even though *Fox Television*’s particular example of arbitrary and capricious review shows just how restrained courts must be when reviewing agency rulemaking. The tiers of scrutiny, though, provide judicial standards employed by courts in many other contexts, such as an objective reasonableness standard under rational basis review. One of the greatest advantages of adopting a tiers-of-scrutiny approach to reviewing agency rulemaking is that courts could take advantage of cross-doctrinal precedents, which give content to the various standards contained within the tiers of scrutiny.

Indeed, that is precisely what Congress was trying to do when it codified the arbitrary and capricious standard in the APA. Courts had been using the arbitrary and capricious standard in reviewing legislation, so Congress wanted courts to use that same, deferential standard when

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264. *Id.* at 553.

265. See Cross, *supra* note 13, at 1244 (“[T]he justification for *some* measure of [judicial review of rulemaking] is widely taken for granted.”).

266. Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983); see, e.g., Ky. Waterways Alliance v. Johnson, 540 F.3d 466, 492 (6th Cir. 2008) (Cook, J., concurring); CBS Corp. v. FCC, 535 F.3d 167, 195 n.25 (3d Cir. 2008); Prometheus Radio Project v. FCC, 373 F.3d 372, 420–21 (3d Cir. 2004).

reviewing agency action.<sup>267</sup> This is extremely relevant to the modern Supreme Court, which has explained that the APA should be interpreted in accordance with the understanding of the APA when Congress passed it in 1946.<sup>268</sup> The modern Court's shift to interpreting the APA in accordance with the original understanding of the APA provides substantial support for applying the tiers of scrutiny used for reviewing legislation when reviewing agency rulemaking.

Thus, for both practical and theoretical reasons, courts should place the APA's arbitrary and capricious standard on the tiers of scrutiny. Courts reviewing agency rules would return to focusing solely on the agency's purpose in regulating and the means used to achieve that purpose. Granted, there could still be some room for examining the agency's rulemaking record or second-guessing the agency's ultimate policy decision under a tiers-of-scrutiny approach to reviewing agency rulemaking. However, the degree to which courts would be able to do that depends on where arbitrary and capricious review is placed on the tiers of scrutiny. The next Part will address that question. Regardless of where arbitrary and capricious review is placed on the tiers of scrutiny, the doctrines for reviewing legislation should be used in reviewing agency rulemaking because they would significantly clarify and improve the doctrines for reviewing agency rulemaking.

### III. COURTS REVIEWING AGENCY RULEMAKING UNDER THE APA SHOULD USE THE RATIONAL BASIS WITH BITE STANDARD

Ultimately, this Article argues that courts should equate APA arbitrary and capricious review of agency rulemaking to the rational basis with bite standard used in reviewing legislation,<sup>269</sup> an approach that

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267. *See supra* note 43 and accompanying text.

268. *See Dickinson v. Zurko*, 527 U.S. 150, 155 (1999) (“A statutory intent that legislative departure from the norm must be clear suggests a need for similar clarity in respect to grandfathered common-law variations. The APA was meant to bring uniformity to a field full of variation and diversity.”); *id.* at 165 (“Congress has set forth the appropriate standard in the APA.”); *Dir., Office of Workers’ Comp. Programs v. Greenwich Collieries*, 512 U.S. 267, 275 (1994) (interpreting the APA’s use of the term “burden of proof” in accordance with 1930s and 1940s sources, and “presum[ing] Congress intended the phrase to have the meaning generally accepted in the legal community at the time of enactment”).

269. This Article does not take a position on whether the rational basis with bite approach should be used when reviewing informal adjudication or subformal rulemaking (e.g., rules made through interpretive decisions or action letters—not through APA Section 553’s informal rulemaking

is supported by the Court's recent decision in *FCC v. Fox Television Stations, Inc.* Under this rational basis with bite approach, courts would ask (1) whether the agency's rule conforms to a legitimate statutory purpose and (2) whether the rule is rationally related to that purpose.<sup>270</sup> Importantly, courts would not be permitted to examine any conceivable, hypothetical statutory purposes, but only the actual purpose invoked by the agency in the rulemaking record.<sup>271</sup> This Part first provides an argument for adopting rational basis with bite instead of the other standards on the tiers of scrutiny.<sup>272</sup> It then applies the rational basis with bite approach to two recent court of appeals cases to show how the standard can bring clarity to this area of the law, which has been "more Rorschach than rule of law."<sup>273</sup>

A. *Rational Basis with Bite Should be Used in Reviewing Agency Rulemaking—Instead of Minimum Rationality, Intermediate Scrutiny, or Strict Scrutiny*

Equating APA arbitrary and capricious review of agency rulemaking to the rational basis with bite approach has two primary advantages compared to other levels of scrutiny: (1) it balances the justification for heightened review of agency rulemaking with the need to limit judges'

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procedures) under the APA's arbitrary and capricious standard.

270. See *supra* notes 235–238 and accompanying text.

271. Some commentators have argued that courts should also be able to examine reasons given by the agency after the rulemaking process has finished (such as reasons provided during subsequent litigation). See, e.g., Note, *Rationalizing Hard Look Review After the Fact*, 122 HARV. L. REV. 1909, 1919 (2009). This argument is based primarily on the APA's harmless (or prejudicial) error standard. See 5 U.S.C. § 706 (2006) ("[D]ue account shall be taken of the rule of prejudicial error."). Other commentators, though, justify the requirement that an agency must provide reasons in the rulemaking record as a means of providing some enforcement of the underenforced nondelegation doctrine. See, e.g., Kevin M. Stack, *The Constitutional Foundations of Chenery*, 116 YALE L.J. 952, 996–1000 (2009). This Article does not take a position on the precise timing of when the agency must provide the reasons. Rather, it assumes, consistent with *Chenery*, that courts can only examine the agency's reasons that were made in the rulemaking record.

272. This Article does not take a position on whether adoption of this rational basis with bite approach would overrule *Chevron*. As previously mentioned, *Chevron* created an exception from the typical arbitrary and capricious standard of review applied under *State Farm* that applies when courts review agencies' interpretation of statutes that they are delegated to administer. See *supra* notes 164–167 and accompanying text. *Chevron* could easily remain as an entrenched exception to this rational basis with bite approach that applies when courts review agency statutory interpretation.

273. *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 247 (D.C. Cir. 2008) (Kavanaugh, J., concurring in part, concurring in the judgment in part, and dissenting in part).

abilities to use their policy preferences to invalidate agency rulemaking, and (2) rational basis with bite fits comfortably within the Supreme Court’s precedents on APA arbitrary and capricious review.

This first major advantage—adopting a standard that is not too stringent yet not too lenient—is what motivated the Court to use rational basis with bite in reviewing legislation. The Court did not want judges to have the latitude to strike down much legislation, but it believed minimum rationality review was too lenient.<sup>274</sup> Minimum rationality review and strict scrutiny—the two extreme standards for reviewing legislation—can therefore be eliminated easily as inappropriate standards for review of agency rulemaking. The significant differences between agencies and Congress, as well as the underenforced nondelegation doctrine,<sup>275</sup> provide a strong basis for subjecting agency rulemaking to a more heightened standard than the minimum rationality review used for reviewing most legislation.<sup>276</sup> In fact, Justice Kennedy’s concurrence in *Fox Television* made this observation in recognizing the differences between Congress and agencies and noting that agencies could not be given “unbridled discretion.”<sup>277</sup> At the same time, under strict scrutiny, judges would be even more likely to use their policy preferences when reviewing agency rulemaking than they have been

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274. See *supra* notes 240–241 and accompanying text.

275. See *supra* Part I.B; see also *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 n.9 (1983) (“The Department of Transportation suggests that the arbitrary-and-capricious standard requires no more than the minimum rationality a statute must bear under the Due Process Clause. We do not view as equivalent the presumption of constitutionality afforded legislation drafted by Congress and the presumption of regularity afforded an agency in fulfilling its statutory mandate.”).

276. This, of course, would contradict *Pacific States Box*, which expressly equated agency rulemaking with congressional legislation. See *supra* notes 45–51 and accompanying text. But the courts are long past treating agency rulemaking the same as congressional legislation. See *supra* Parts I.B, I.C. Moreover, in the same year that *Pacific States Box* was decided (1935), the Court used the nondelegation doctrine twice to invalidate congressional delegations to agencies. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 542 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388, 433 (1935). Those are the only two times the Court has invoked the nondelegation doctrine to invalidate congressional delegations of power. It is therefore unclear whether *Pacific States Box*’s holding was premised on the view that the Court would be actively enforcing the nondelegation doctrine, as the nondelegation doctrine could prevent Congress from delegating large amounts of legislative power. Had the *Pacific States Box* Court known that the modern Court would basically not enforce the nondelegation doctrine, *Pacific States Box* may very well have treated agency rulemaking differently from legislation.

277. *FCC v. Fox Television Stations, Inc.*, 556 U.S. \_\_ (Apr. 28, 2009), 129 S. Ct. 1800, 1823 (2009) (Kennedy, J., concurring in part and concurring in the judgment).

under the *State Farm* dicta criteria. Even staunch advocates of reducing deference to agencies would probably not evaluate agency rulemaking under strict scrutiny, as that would imply that almost all agency action is suspect and illegitimate.<sup>278</sup>

That, of course, leaves intermediate scrutiny as the alternative to rational basis with bite. Under intermediate scrutiny, the Court would also look at the agency's actual statutory purposes; but instead of merely requiring the agency's rule to be *rationaly* related to a *legitimate* purpose, intermediate scrutiny would require the rule to be *substantially* related to an *important* purpose. This more indeterminate phrasing of the intermediate scrutiny standard would probably allow courts to retain the D.C. Circuit's hard look doctrine, which has resulted in unmanageable, politicized doctrines for reviewing agency rulemaking. Tellingly, the Supreme Court recently stated that intermediate scrutiny for reviewing legislation required a "hard look."<sup>279</sup>

Intermediate scrutiny would give courts at least as much leeway to invalidate agency rulemaking as the D.C. Circuit's hard look doctrine. For example, if a statutory delegation contained more than one policy directive, a court reviewing under intermediate scrutiny could favor one policy over another—by stating that one statutory purpose was *important* while another was not—and invalidate agency action that relied on the less-favored policy. In fact, most delegations direct agencies to do some form of cost-benefit analysis, so a reviewing court could invalidate agency action on the grounds that the agency should have given other, more important statutory purposes greater weight than the agency gave to cost-benefit analysis.<sup>280</sup> As another example, an agency could promulgate a rule that sets a standard at a certain level.

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278. Cf. *Indus. Union Dep't, AFL-CIO v. Am. Petrol. Inst.*, 448 U.S. 607, 695 n.9 (Marshall, J., dissenting) ("There is also room for especially rigorous judicial scrutiny of agency decisions under a rationale akin to that offered in *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n. 4 (1938)." (citing *Env'tl. Def. Fund v. Ruckelshaus*, 439 F.2d 584 (D.C. Cir. 1971))); *Env'tl. Def. Fund*, 439 F.2d at 598 ("[C]ourts are increasingly asked to review administrative action that touches on fundamental personal interests in life, health, and liberty. These interests have always had a special claim to judicial protection, in comparison with the economic interests at stake in a ratemaking or licensing proceeding.").

279. *United States v. Virginia*, 518 U.S. 515, 541 (1996).

280. *But see* John D. Graham, *Saving Lives Through Administrative Law and Economics*, 157 U. PA. L. REV. 395, 403 (2008) ("My central argument is that [cost-benefit analysis], while easy to criticize because of its transparency, has compelling philosophical and practical advantages over other suggested approaches to lifesaving regulation." (citation omitted)).

Under intermediate scrutiny, a court could then find that the standard is not stringent enough to qualify as *substantially* related to the important statutory purpose relied upon.

It would be much harder to invalidate agency action under rational basis with bite than under intermediate scrutiny. That is not to say that rational basis with bite leaves no room for judges to invalidate agency action: an agency's rule must be rationally related to a legitimate statutory purpose actually invoked by the agency. Judges could therefore find the agency's rule was not rationally related or the purpose was not legitimate. The labels "rationally related" and "legitimate" are not rock-solid limitations that completely cabin the discretion of judges. However, rational basis with bite does make it more difficult to invalidate agency action. Any purpose contained in a statutory delegation will be a legitimate governmental purpose. As long as the agency invokes a purpose enumerated by the statute, courts will not be able to invalidate agency action under the purpose prong of rational basis with bite. And the rationally related prong implies a standard of objective reasonableness, where a judge asks whether an objectively reasonable person would be compelled to conclude that the agency rule was not related to the statutory purpose.<sup>281</sup> Judges can manipulate review under an objective reasonableness standard, but it is much more difficult to get away with erroneously calling a rule "irrational" than with deciding that the agency's purpose is not "important" or the rule is not "substantially" related to that purpose.

The rational basis with bite standard is therefore important if for no other reason than it can highlight when courts are egregiously overstepping their mandate of conducting arbitrary and capricious review without being swayed by judicial policy preferences. One of the reasons the Supreme Court rarely addresses arbitrary and capricious review is that, because there is no metric for determining when a judge decides a case based on policy preferences, such cases are largely insulated from review.<sup>282</sup> The rational basis with bite doctrine will

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281. *Cf. INS v. Elias-Zacarias*, 502 U.S. 478, 481 & n.1 (1992).

282. *See* Scalia, *supra* note 34, at 372 (stating that agency rulemaking is largely insulated from Supreme Court review because courts frequently offer "dicta, alternate holdings, and confused holdings"); *see also* Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1131 (1987) ("As long as the practice of hard-look review continues to be accepted, an uncorrected lower court error of this dimension, however costly to the particular enterprise being challenged, presents less of a claim on the Court's limited resources.").



illuminate when courts of appeals let policy preferences dictate their results, as it will require judges to employ an objective reasonableness standard—and the Supreme Court is quite comfortable reviewing under objective reasonableness standards.<sup>283</sup>

Moreover, the perceived stringency of the standard for reviewing agency rulemaking affects whether agencies, *ex ante*, will choose to engage in rulemaking in the first place. Before studies in the past decade found that judges were infusing their policy preferences into arbitrary and capricious review,<sup>284</sup> the most cited argument against *State Farm* was that it ossified rulemaking.<sup>285</sup> Agencies would not engage in new rulemaking and existing rules would never be changed because agencies feared that the resources they would devote to the rulemaking would be wasted if a court invalidated the rule.<sup>286</sup> If all agency rulemaking were to

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283. For example, the Supreme Court frequently uses an objective reasonableness standard in reviewing state court judgments in Antiterrorism and Effective Death Penalty Act (AEDPA) habeas cases and Fourth Amendment search and seizure cases. *See, e.g.*, *Waddington v. Sarausad*, 129 S. Ct. 823, 831 (2009) (AEDPA habeas review); *Scott v. Harris*, 550 U.S. 372, 381 (2007) (Fourth Amendment).

284. *See supra* note 13 and accompanying text.

285. *See, e.g.*, JERRY L. MASHAW & DAVID L. HARFST, *THE STRUGGLE FOR AUTO SAFETY* 225 (1990) (“The result of judicial requirements for comprehensive rationality has been a general suppression of the use of rules.”); Thomas O. McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 DUKE L.J. 1385, 1386 (1992) (explaining that “many observers from across the political spectrum” saw the “ossification” of the rulemaking process as “one of the most serious problems . . . facing regulatory agencies”); Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 66 (1995) (“Judicial ossification of rulemaking is a function of two variables: (1) judicial imposition of decisionmaking procedures that are costly and time-consuming; and, (2) the high risk of judicial invalidation of a rule on either procedural or substantive grounds.”); Paul R. Verkuil, *Rulemaking Ossification—A Modest Proposal*, 47 ADMIN. L. REV. 453, 457 (1995) (“Pierce correctly identifies the social costs of rulemaking ossification . . .”). *But see* William S. Jordan, III, *Ossification Revisited: Does Arbitrary and Capricious Review Significantly Interfere with Agency Ability to Achieve Regulatory Goals Through Informal Rulemaking?*, 94 NW. U. L. REV. 393, 444–45 (2000) (“Judicial review under the hard look doctrine is the price we pay for delegating highly complex important public policy decisions to unelected administrative agencies. The ossification critique has long suggested that the price is too high . . . . This research suggests otherwise.”); Mark Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking*, 75 TEX. L. REV. 483, 523 (1997) (“Critics of hard look review are on solid ground in concluding that aggressive judicial review of agency reasoning has contributed to ossification of the rulemaking process. Their assertion, however, that merely easing the standard of review will deossify this process is more tenuous.”).

286. *See, e.g.*, *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 248 (D.C. Cir. 2008) (Kavanaugh, J., concurring in part, concurring in the judgment in part, and dissenting in part) (remarking that *State Farm* has “gradually transformed rulemaking—whether regulatory or deregulatory rulemaking—from the simple and speedy practice contemplated by the APA into a

be viewed like a suspect classification that triggers intermediate scrutiny,<sup>287</sup> agency rulemaking would probably become even more ossified as agencies would not even be able to argue that arbitrary and capricious review is “narrow.”<sup>288</sup> Yet the primary reason Congress delegates authority to agencies is to increase government efficiency and adaptability.<sup>289</sup> Plus, if agencies cannot plausibly engage in informal rulemaking, this will result in the unintended consequence of forcing agencies to use even less formal (and less transparent) methods of regulation. In fact, the recent spike in *Chevron* Step Zero cases addressing these less formal methods is probably a direct result of the ossification of informal rulemaking.<sup>290</sup> This ossification would continue under intermediate scrutiny review of agency rulemaking because that standard implies that courts could quite plausibly strike down a significant amount of agency rulemaking. In contrast, rational basis with bite would uphold most rules.

The second major advantage of adopting the rational basis with bite approach for reviewing agency rulemaking is that it accommodates the Supreme Court’s APA arbitrary and capricious review precedents amazingly well.<sup>291</sup> Only in the past few decades have courts and commentators recognized that rational basis with bite was a different form of rational basis review than minimum rationality review.<sup>292</sup> But before anyone had a label for rational basis with bite, *Chenery* implicitly implemented this doctrine in reviewing agency action—just one year after the APA was enacted.<sup>293</sup> *Chenery* held that a court had to review the actual purposes “invoked by the agency” instead of “substituting what it considers to be a more adequate or proper basis.”<sup>294</sup> And the

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laborious, seemingly never-ending process”).

287. See *supra* notes 225–228 and accompanying text.

288. *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971).

289. See *supra* notes 52–56 and accompanying text.

290. See *supra* note 166 and accompanying text.

291. Justice O’Connor explained that rational basis with bite doctrine for reviewing legislation is a “searching” form of judicial review, *Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O’Connor, J., concurring in the judgment), which parallels *Overton Park*’s observation that APA arbitrary and capricious review is “searching,” *Overton Park*, 401 U.S. at 416.

292. See *supra* note 235 and accompanying text.

293. See *supra* notes 73–77 and accompanying text.

294. *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947) (*Chenery II*); see also *Massachusetts v.*

requirement that courts examine the actual purposes instead of hypothetical purposes is precisely what makes rational basis with bite a heightened standard compared to minimum rationality review.<sup>295</sup>

*Fox Television* explicitly recognized both prongs of the rational basis with bite standard. As Justice Kennedy's concurrence confirmed, it is the "duty of agencies" to provide an explanation that justifies their rules, as opposed to allowing courts to come up with hypothetical explanations.<sup>296</sup> And Justice Scalia's majority opinion clarified that courts should review agency rulemaking to determine whether the agency's rule was "rational."<sup>297</sup>

Furthermore, even *Overton Park* and most of *State Farm* can easily be reconciled with the rational basis with bite approach. The agency in *Overton Park* gave no explanation of how the statutory predicates at issue were met, so the agency had not even tried to invoke a legitimate statutory purpose.<sup>298</sup> Similarly, the agency in *State Farm* did not give any explanation for why it was rescinding the requirement that new cars have airbags or nondetachable automatic seatbelts—alternatives required under then-existing regulations.<sup>299</sup> The agency therefore did not even attempt to invoke the legitimate statutory purpose of increasing car safety while accounting for the costs of implementing car safety features.

Beyond these watershed precedents, other recent Supreme Court cases also support applying the rational basis with bite approach when reviewing agency rulemaking. A number of cases before *Fox Television* signaled that the Court wanted to retreat from the *State Farm* dicta conception of a stringent standard for arbitrary and capricious review. *United States Postal Service v. Gregory* described arbitrary and

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EPA, 549 U.S. 497, 534 (2007) ("If the scientific uncertainty is so profound that it precludes EPA from making a reasoned judgment as to whether greenhouse gases contribute to global warming, EPA must say so."); *Camp v. Pitts*, 411 U.S. 138, 143 (1973) ("The explanation may have been curt, but it surely indicated the determinative reason for the final action taken . . ." (citing *SEC v. Chenery Corp.*, 318 U.S. 80 (1943) (*Chenery I*)).

295. See *supra* note 238 and accompanying text.

296. *FCC v. Fox Television Stations, Inc.*, 556 U.S. \_\_ (Apr. 28, 2009), 129 S. Ct. 1800, 1823 (2009) (Kennedy, J., concurring in part and concurring in the judgment).

297. *Id.* at 1812 (majority opinion).

298. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 408 (1971). See *supra* notes 77–79 and accompanying text.

299. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 38–39 (1983). See *supra* notes 142–144 and accompanying text.

capricious review as “extremely narrow.”<sup>300</sup> And seven Justices in *Verizon Communications, Inc. v. FCC* limited *State Farm*’s “more searching judicial review” to cases that “involved review of an agency’s ‘changing its course.’”<sup>301</sup> Even Justice Breyer, the one Justice who did not sign on to the majority opinion,<sup>302</sup> described arbitrary and capricious review as a form of “‘rational basis’ review.”<sup>303</sup>

These signals supporting the use of rational basis with bite in arbitrary and capricious review cases align with the Court’s more general trend of interpreting the APA as it was understood when Congress enacted it in 1946.<sup>304</sup> In 1946, the arbitrary and capricious standard was the equivalent of the rational basis standard used for reviewing legislation.<sup>305</sup> However, at that time, it was unclear whether the rational basis standard was the minimum rationality approach that allowed courts to examine any conceivable purpose that Congress may have had, or the rational basis with bite approach that limited courts to looking at only the actual purpose stated by Congress.<sup>306</sup> The rational basis with bite approach to reviewing agency rulemaking may therefore be perfectly in line with what Congress understood arbitrary and capricious review to mean in 1946. At the very least, Congress in 1946 did not think of the arbitrary and capricious standard as a level of review (such as intermediate scrutiny) that was reserved for suspect classifications.

While all of these precedents support the rational basis with bite approach for reviewing agency rulemaking, there is only one Supreme Court precedent—rather, one-third of a precedent—that could support the case for intermediate scrutiny: *State Farm*’s 5–4 holding that the agency acted arbitrarily or capriciously by rejecting the detachable automatic seatbelt regulation. The debate over detachable automatic seatbelts boiled down to how much these seatbelts would increase seatbelt usage, which affected the cost-benefit analysis permitted by the agency’s statutory delegation.<sup>307</sup> Recall that the majority, in an opinion

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300. 534 U.S. 1, 7 (2001) (citing *Overton Park*, 401 U.S. at 416). Cf. *State Farm*, 463 U.S. at 43 (arbitrary and capricious review is “narrow”); *Overton Park*, 401 U.S. at 416 (same).

301. 535 U.S. 467, 502 n.20 (2002).

302. Justice O’Connor was recused. *Id.* at 474.

303. *Id.* at 562 (Breyer, J., concurring in part and dissenting in part).

304. See *supra* note 268 and accompanying text.

305. See *supra* notes 42–51 and accompanying text.

306. See *supra* note 70 and accompanying text.

307. See *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 33 (1983)

by Justice White, determined that the agency invalidly rescinded the detachable automatic seatbelt regulation because the agency did not consider the “inertia” favoring seatbelt use based on the fact that “the passive belt, once reattached, [would] continue to function automatically unless again disconnected.”<sup>308</sup> Justice Rehnquist disagreed in his dissent, stating that the “agency acknowledged that there would probably be some increase in belt usage, but concluded that the increase would be small and not worth the cost of mandatory detachable automatic belts.”<sup>309</sup>

The rational basis with bite approach to reviewing agency rulemaking supports Justice Rehnquist’s position. Cost-benefit analysis was a legitimate statutory purpose,<sup>310</sup> which the agency invoked to justify its rescission of the detachable seatbelt regulation<sup>311</sup>—thereby satisfying its obligation under rational basis with bite and *Chenery* to explain its actual purpose.<sup>312</sup> The remaining question was whether the agency had explained how its rescission of the detachable seatbelt regulation was rationally related to the cost-benefit analysis performed by the agency.<sup>313</sup> As Justice Rehnquist’s dissent noted, the agency provided a “rational connection” between the two<sup>314</sup> by explaining that detachable seatbelts required an affirmative act to use once detached and it was likely that many people would detach their seatbelt at some point as many people were not using manual seatbelts.<sup>315</sup> That observation is at the very least reasonable; even if a court could think otherwise, one could see how a

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(stating that the statutory delegation directed the agency to “issue motor vehicle safety standards that ‘shall be *practicable*, shall meet the need for motor vehicle safety, and shall be stated in objective terms’” (emphasis added) (quoting 15 U.S.C. § 1392(a)); *see also id.* (directing the agency to consider “whether the proposed standard ‘is reasonable, practicable and appropriate’” (quoting 15 U.S.C. § 1392(f)(1))).

308. *Id.* at 54.

309. *Id.* at 58–59 (Rehnquist, J., concurring in part and dissenting in part).

310. *See supra* note 307 and accompanying text.

311. *See State Farm*, 463 U.S. at 38–39 (positing that the agency concluded that it could no longer find that detachable seatbelts “would produce significant safety benefits,” so the detachable seatbelt regulation was “no longer . . . reasonable or practicable in the agency’s view” given the “\$1 billion” it would cost to implement the regulation).

312. *See supra* notes 69, 238 and accompanying text.

313. *See supra* note 229 and accompanying text.

314. *State Farm*, 463 U.S. at 59 (Rehnquist, J., concurring in part and dissenting in part) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 146, 168 (1962)).

315. *See id.* at 54 (majority opinion) (“A detached passive belt does require an affirmative act to reconnect it . . .”).

reasonable agency could look at the human behavior associated with seatbelts and conclude that people not inclined to use manual seatbelts would be inclined to detach automatic seatbelts at least once and then never reattach them.

Justice White's majority opinion, though, was more in line with an intermediate scrutiny-type standard that requires the agency rule to be *substantially related* to an *important* statutory purpose.<sup>316</sup> First, the *State Farm* majority wanted the agency to provide a more direct explanation of how the rescission of the detachable seatbelt regulation was related to the agency's cost-benefit analysis. The five-Justice majority did not evaluate whether the agency's explanation was reasonable. Instead, it second-guessed the expert agency's conclusion on an empirical matter by raising the "inertia" point.<sup>317</sup> To be sure, Justice White's argument on inertia is a plausible view of how people would use detachable automatic seatbelts, and it may even have been more plausible than the agency's. But the agency's view was within the realm of reason. Consequently, the *State Farm* majority implicitly required the agency to explain how its rule was substantially related—as opposed to merely rationally related—to its cost-benefit analysis. Second, Justice White stated in dicta that car safety was a more important statutory purpose than cost-benefit analysis.<sup>318</sup> Thus, even if the agency had accounted for Justice White's inertia argument, the *State Farm* majority may still have invalidated the rescission of the detachable seatbelt regulation by prioritizing the statutory purpose of car safety over the statutory purpose of requiring regulations to be practicable. This, of course, is precisely how courts could use intermediate scrutiny to strike down large amounts of agency action.<sup>319</sup>

This narrow debate in *State Farm* should not prevent courts from adopting the rational basis with bite approach for reviewing agency rulemaking. Most importantly, *Fox Television* implicitly limited *State Farm*,<sup>320</sup> and it did not apply the "failed to consider an important aspect" criterion for invalidating agency action<sup>321</sup> that was used in *State Farm* to

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316. See *supra* note 225 and accompanying text.

317. See *supra* note 149 and accompanying text.

318. See *State Farm*, 463 U.S. at 55 ("In reaching its judgment, NHTSA should bear in mind that Congress intended safety to be the pre-eminent factor under the [Motor Vehicle Safety] Act . . .").

319. See *supra* notes 279–280 and accompanying text.

320. See *supra* notes 180–184 and accompanying text.

321. See *supra* notes 193–194 and accompanying text.

invalidate the rescission of the detachable automatic seatbelt regulation.<sup>322</sup> Indeed, *Fox Television* confirmed that courts should only ask whether the agency's rule was "rational"<sup>323</sup>—a holding that may very well contradict and overrule the approach the *State Farm* majority opinion used to invalidate the detachable automatic seatbelt alternatives.<sup>324</sup> Plus, *State Farm* itself was never focused on the contours of a heightened standard of review for agency rulemaking. The briefing and argument in *State Farm* was focused on other issues<sup>325</sup>—namely, on whether rescission of a rule was to be reviewed as if the agency had not acted in the first instance.<sup>326</sup> And *State Farm* split 5–4 on the detachable automatic seatbelt issue, so the precedential value of this holding is significantly limited.<sup>327</sup>

On the other hand, an argument against the rational basis with bite approach to reviewing agency rulemaking is that this standard is still too indeterminate and manipulable to prevent judges from politicizing administrative law.<sup>328</sup> Admittedly, rational basis with bite includes standards that could allow judges to base their judgments on their policy preferences by equivocating on the term "rational" as the D.C. Circuit has done.<sup>329</sup> Further, various scholars have noted how the three main tiers of scrutiny (minimum rationality, intermediate scrutiny, and strict scrutiny) are not applied consistently even in reviewing legislation—although that is largely due to the Court's refusal to formally recognize the rational basis with bite standard.<sup>330</sup>

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322. See *supra* note 153 and accompanying text.

323. *FCC v. Fox Television Stations, Inc.*, 556 U.S. \_\_\_ (Apr. 28, 2009), 129 S. Ct. 1800, 1812 (2009).

324. See *supra* notes 316–319 and accompanying text.

325. See *supra* note 124 and accompanying text.

326. See *Fox Television*, 129 S. Ct. at 1810 (“[*State Farm*], which involved the rescission of a prior regulation, said only that such action requires ‘a reasoned analysis for the change beyond that which may be required when an agency *does not act* in the first instance.’” (quoting *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.* 463 U.S. 29, 42 (1983))).

327. See, e.g., *Payne v. Tennessee*, 501 U.S. 808, 828–29 (1991) (overruling precedents that “were decided by the narrowest of margins”).

328. See Cross, *supra* note 13, at 1327 (“Numerous judges and scholars have sought over the years to constrain the scope of judicial review or to improve its functioning through a variety of legal standards. Such proposals, however, merely shuffle the buzz words required of an interventionist court.”).

329. See *supra* notes 106–107 and accompanying text.

330. See, e.g., Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481, 485–90 (2004); Jeffrey M. Shaman, *Cracks in the Structure: The Coming Breakdown of the Levels of*

Beyond doctrinal implications, some would object that the rational basis with bite standard would not give courts adequate latitude to cabin the discretion of agencies. In other words, rational basis with bite might uphold too many rules. It is true that rational basis with bite would uphold a significant amount of agency rules, assuming the agency provides a short, yet rational explanation to justify the rule. This concern, though, has to be balanced with the empirical evidence confirming that when judges are given significant discretion to invalidate agency action, their policy preferences affect their decisions.<sup>331</sup> Moreover, Congress made the determination in the APA that judicial review of agency rulemaking should be quite deferential. If Congress now believes that courts should have more authority to invalidate agency rulemaking, it can easily amend the APA to provide for a different standard of judicial review.

Rational basis with bite may not be a perfect standard, but it is still the best doctrine available for reviewing agency rulemaking under the APA. The only way to eliminate any chance of judges using their policy preferences to uphold or invalidate agency rulemaking is to get rid of all judicial review of agency rulemaking.<sup>332</sup> But making agency rulemaking unreviewable would conflict with Congress's codification of the arbitrary and capricious standard in the APA and all of the Supreme Court's precedents on reviewing agency action.<sup>333</sup> In fact, it would subject congressional legislation to standards of review more heightened than those for agency rulemaking, which is completely backwards.<sup>334</sup> So unless Congress repeals the APA's arbitrary and capricious standard of review altogether, judicial review of agency rulemaking is not going anywhere. Rational basis with bite is therefore the best approach for limiting the use of policy preferences by judges when they review agency rulemaking, while still subjecting agency rulemaking to a heightened standard of review compared to legislation.

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*Scrutiny*, 45 OHIO ST. L.J. 161, 173–77 (1984).

331. See *supra* note 13 and accompanying text.

332. See Cross, *supra* note 13, at 1328–29 (“An effort to cobble together a deferential system of judicial review of rulemaking is a fool’s errand. Only clear firebreaks that preclude such review and that render disobedience obvious can be effective.”).

333. See *FCC v. Fox Television Stations, Inc.*, 556 U.S. \_\_\_ (Apr. 28, 2009), 129 S. Ct. 1800, 1823 (2009) (Kennedy, J., concurring in part and concurring in the judgment) (“Congress confined agencies’ discretion and subjected their decisions to judicial review.”).

334. See *supra* Part I.B.



B. *Applying Rational Basis with Bite to Recent Court of Appeals Cases Reviewing Agency Rulemaking*

As discussed previously, *Fox Television* essentially applied the rational basis with bite standard,<sup>335</sup> and the rational basis with bite standard would have produced a different result in *State Farm*.<sup>336</sup> Besides those examples of how the rational basis with bite standard would function in reviewing agency rulemaking, this section briefly applies rational basis with bite to two recent court of appeals cases as additional examples of how courts could apply this standard in a manageable way. As documented in the past, “[b]etween one-third and sixty percent of agency rules that [were] appealed to courts [were] overturned through application of the hard-look doctrine.”<sup>337</sup> The rational basis with bite doctrine would drastically reduce that figure, thereby cabining the discretion of judges to use their policy preferences to invalidate agency rulemaking. For example, in both *American Radio Relay League, Inc. v. FCC*<sup>338</sup> and *Northwest Coalition for Alternatives to Pesticides (NCAP) v. EPA*,<sup>339</sup> the majorities invalidated agency rules, but the rational basis with bite standard would have supported the dissenters’ arguments for upholding the rules.

The D.C. Circuit in *American Radio* invalidated an FCC rule that reestablished a preexisting extrapolation factor for estimating interference caused by regulated technologies including “Broadband over Power Line” (BPL), which allows internet access simply by plugging a computer into an electrical outlet.<sup>340</sup> That extrapolation factor determined whether an operator of any communications apparatus could

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335. See *supra* notes 296–297 and accompanying text.

336. See *supra* notes 310–315 and accompanying text.

337. Richard J. Pierce, Jr., *Waiting for Vermont Yankee III, IV, and V? A Response to Beermann and Lawson*, 75 GEO. WASH. L. REV. 902, 907 n.35 (2007) (citing Peter H. Schuck & E. Donald Elliott, *To the Chevron Station: An Empirical Analysis of Federal Administrative Law*, 1990 DUKE L.J. 984, 1021–22 (1991); Patricia M. Wald, Chief Judge, U.S. Court of Appeals for the D.C. Circuit, Keynote Address at the ABA Section of Administrative Law Fall Meeting: The Contribution of the D.C. Circuit to Administrative Law (Oct. 1987), in 40 ADMIN. L. REV. 507, 528 (1988)).

338. 524 F.3d 227 (D.C. Cir. 2008).

339. 544 F.3d 1043 (9th Cir. 2008).

340. *Am. Radio*, 524 F.3d at 240–41; see *id.* at 240 (“The ‘distance extrapolation factor[ ]’ is the projected rate at which radio frequency strength decreases from a radiation-emitting source, used to estimate signal decay for Access BPL and resulting interference to radio operators at various distances from a source without actually measuring such emissions.”).

get a license to use a regulated technology like BPL, because the FCC would not issue a license if the technology would cause too much interference with radio operators.<sup>341</sup> A federal agency within the Department of Commerce provided data supporting the preexisting extrapolation factor, and one commenter during the rulemaking process determined that the characteristics of BPL interference also favored keeping the preexisting extrapolation factor.<sup>342</sup> Two other commenters, though, recommended a lower extrapolation factor.<sup>343</sup> The agency explicitly recognized these different views and decided to retain the preexisting extrapolation factor given a “lack of conclusive experimental data.”<sup>344</sup> The agency then reconsidered this decision after one commenter submitted new studies, which supported the use of a lower extrapolation factor.<sup>345</sup> The agency noted these various conflicting views and stated that they were accounted for in its initial decision; it concluded that “[n]o new information has been submitted that would provide a convincing argument for modifying [the preexisting extrapolation factor] at this time.”<sup>346</sup>

Citing *State Farm*, the majority in *American Radio* held that this was not a “reasoned explanation” for rejecting the new studies, which supported the use of a lower extrapolation factor.<sup>347</sup> The majority also noted that the agency’s modeling data was “not based on empirical evidence derived from testing or scientific observation.”<sup>348</sup>

Judge Kavanaugh dissented, explaining that the agency “reasonably stated that the evidence submitted by commenters was conflicting [and] that the new evidence submitted on reconsideration was not sufficiently

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341. *Id.* at 232.

342. In the Matter of Amendment of Part 15 Regarding New Requirements and Measurement Guidelines for Access Broadband Over Power Line Systems, 19 F.C.C.R. 21265, 21310 ¶ 109 (2004), cited in *Am. Radio*, 524 F.3d at 247 (Kavanaugh, J., concurring in part, concurring in the judgment in part, and dissenting in part).

343. *Id.*

344. *Id.*

345. In the Matter of Amendment of Part 15 Regarding New Requirements and Measurement Guidelines for Access Broadband Over Power Line Systems, 21 F.C.C.R. 9308, 9317–18 ¶ 26 (2006), cited in *Am. Radio*, 524 F.3d at 241.

346. *Id.* at 9318.

347. *Am. Radio*, 524 F.3d at 241 (citing *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42–43 (1983)).

348. *Id.* at 240.

conclusive to require a change.”<sup>349</sup> He also posited that a short explanation can still be reasoned, as “*State Farm* does not require a word count.”<sup>350</sup>

The rational basis with bite standard supports Judge Kavanaugh’s dissent in *American Radio*. No one disputed that the agency was acting in furtherance of its statutory purpose of setting radio interference standards that are “consistent with the public interest, convenience, and necessity.”<sup>351</sup> The question therefore would be whether the agency explained how its decision to keep the preexisting extrapolation factor was rationally related to that purpose. Admittedly, the agency’s explanation in its reconsideration order hardly addressed the new studies, but rational basis with bite would not require the agency to explain every study presented to the agency. Even under *State Farm*, the agency is required simply to articulate a “rational connection between the facts found and the choice made,”<sup>352</sup> and the Court will “uphold a decision of less than ideal clarity if the agency’s path may be reasonably discerned.”<sup>353</sup> Here, the agency’s reasoning was clear: The agency had already been presented with conflicting studies, the new studies simply added to this scientific split, and the agency cautiously decided to retain its long-standing approach given the disputed scientific evidence.

The *American Radio* majority employed the quasi-procedural hard look doctrine and erred by using a divide-and-conquer approach that required the agency to offer a detailed explanation for rejecting each adverse study.<sup>354</sup> Yet the Supreme Court in *Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.* had clarified that reviewing courts should be “most deferential” when an agency is “making predictions, within its area of special expertise, at the frontiers of science.”<sup>355</sup> And had the agency changed its position by adopting the

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349. *Id.* at 248 (Kavanaugh, J., concurring in part, concurring in the judgment in part, and dissenting in part).

350. *Id.*

351. *Id.* at 231 (majority opinion) (quoting 47 U.S.C. § 302a(a) (2006)).

352. *State Farm*, 463 U.S. at 59 (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

353. *Id.* at 43 (quoting *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974)).

354. *Cf., e.g., Gulla v. Gonzales*, 498 F.3d 911, 920 (9th Cir. 2007) (Fernandez, J., dissenting) (noting that by isolating each piece of evidence through a “divide-and-conquer strategy,” a reviewing court “can make it seem like [it is] deferring when [it is] not actually doing so”).

355. *Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983).

lower extrapolation factor, courts could have criticized the agency under *State Farm* because the agency changed its long-standing extrapolation factor on the basis of disputed evidence. If it is unreasonable for the agency to explain that it was presented with conflicting studies and chose to retain its preexisting standard, the agency simply cannot win and courts will always be able to invalidate agency rulemaking involving disputed scientific issues. The rational basis with bite approach would prevent this by requiring only that the agency explain how its rule is rationally related to a statutory purpose under the agency's statutory delegation.

Like *American Radio*, the Ninth Circuit in *Northwest Coalition for Alternatives to Pesticides (NCAP) v. EPA*<sup>356</sup> invalidated agency rules<sup>357</sup> under *State Farm* because the agency had not “demonstrate[d] a rational connection between the factors that the EPA examined and the conclusions it reached.”<sup>358</sup> Under the Food Quality Protection Act (FQPA), the agency was required to apply a 10x child safety factor (i.e., assume that pesticides were ten times more likely to be toxic to infants and children), unless the agency had “reliable data” to use a different child safety factor.<sup>359</sup> The agency promulgated regulations that set a 3x child safety factor for acetamiprid and pymetrozine and a 1x child safety factor for mepiquat.<sup>360</sup>

The rulemaking record contained multiple documents pertaining to the original promulgation of these safety factors in 2001 and 2002. The agency explained that the “toxicology database” for acetamiprid was complete and a study of the pesticide in animals showed no evidence of “increased susceptibility,” but the results of a developmental neurotoxicity study were still pending.<sup>361</sup> Likewise, there was a “complete toxicity database for pymetrozine” and a study in animals showed “no evidence of increased susceptibility,” but the “FQPA safety factor was not reduced to one due to the need for a developmental

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356. 544 F.3d 1043 (9th Cir. 2008).

357. *Id.* at 1048.

358. *Id.* at 1052 (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

359. 21 U.S.C. § 346a(b)(2)(C)(ii)(II) (2006).

360. *NCAP*, 544 F.3d at 1047.

361. *Id.* at 1054 n.3 (Ikuta, J., concurring in part and dissenting in part) (quoting *Acetamiprid: Pesticide Tolerance*, 67 Fed. Reg. 14,649, 14,655 (Mar. 27, 2002)).

neurotoxicity study.”<sup>362</sup> As for mepiquat, other studies had already determined that the “risk estimates” for a compound nearly identical to mepiquat “were below the Agency’s level of concern.”<sup>363</sup> The rulemaking record also included the agency’s published guidance document for determining FQPA safety factors; this document provided that the agency could reduce the safety factor to 3x if it had evidence that the pesticide was not more dangerous to children, but the results of a key study were missing, which thus created “database deficiencies.”<sup>364</sup> The record indicated that this 3x uncertainty factor was generally accepted by the scientific community.<sup>365</sup>

Additionally, the record included the agency’s 2005 final order establishing the regulations, which rejected the objections made by interested parties to the agency’s decision to reduce the child safety factors for these three pesticides.<sup>366</sup> This final order cited the agency’s explanation in originally promulgating these safety factors, and it again noted that the results of the developmental neurotoxicity studies were pending.<sup>367</sup>

The *NCAP* majority invalidated these three pesticide regulations on the grounds that the 2005 final order was “vague, making it impossible . . . to determine whether the EPA’s deviations from the 10x child safety factor . . . were in fact supported by reliable data.”<sup>368</sup> Citing *State Farm*, the majority stated that “it is entirely unclear why the EPA chose safety factors of 3x . . . and 1x . . . as opposed to 4x or 5x or 8x or 9x.”<sup>369</sup>

Judge Ikuta dissented, finding that the agency’s regulations were not arbitrary because the rulemaking record included much more of an explanation than simply the agency’s 2005 final order responding to

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362. *Id.* (quoting Pymetrozine: Pesticide Tolerance, 66 Fed. Reg. 66,786, 66,791 (Dec. 27, 2001)).

363. *Id.* (quoting Mepiquat: Pesticide Tolerance, 67 Fed. Reg. 3113, 3115 (Jan. 23, 2002)).

364. *Id.* at 1059 (quoting Office of Pesticide Programs, EPA, *Determinations of the Appropriate FQPA Safety Factor(s) in Tolerance Assessment* 10 (Feb. 28, 2002)).

365. *Id.* at 1059 (citing Michael L. Dourson et al., *Evolution of Science-Based Uncertainty Factors in Noncancer Risk Assessment*, 24 REG. TOXICOLOGY & PHARMACOLOGY 108 (1996)).

366. *Id.* at 1047 (majority opinion) (citing Order Denying Objections to Issuances of Tolerances, 70 Fed. Reg. 46,706 (Aug. 10, 2005)).

367. *Id.* at 1051–52.

368. *Id.* at 1051.

369. *Id.* at 1052 (citing *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

objections.<sup>370</sup> She quoted the agency’s explanations from 2001 and 2002 when it originally promulgated these regulations,<sup>371</sup> and she referred to the documents supporting the use of a 3x safety factor when the results of a key study were pending.<sup>372</sup> Given “the EPA’s reliance on [the] long-established and widely accepted protocol” of using a 3x safety factor if the results of one key study were pending, Judge Ikuta reasoned that the court should have “defer[red] to the scientific analysis and judgments made by an agency operating within its area of special expertise.”<sup>373</sup>

The rational basis with bite standard supports Judge Ikuta’s dissent. Like *American Radio*, no one questioned that the agency was acting in furtherance of its statutory purpose of maintaining child safety.<sup>374</sup> So the dispositive question under rational basis with bite would be whether the agency explained, in the rulemaking record, how its decision to set lower child safety standards was rationally related to the purpose of ensuring child safety. Taken in isolation, the 2005 final order itself may not have provided such an explanation, but the 2005 final order cited the explanations given by the agency in 2001 and 2002 when it originally promulgated these regulations.

In addition, the rest of the rulemaking record easily explains how the lower child safety factors are rationally related to the agency’s statutory mandate of lowering the child safety factor below 10x only when it had “reliable data.” The record stated that the databases of studies for acetamiprid and pymetrozine were complete except for the developmental neurotoxicity studies, and that studies in animals did not show an increased risk.<sup>375</sup> The record also stated that the agency chose a 3x factor for these two pesticides given the accepted practice of the scientific community for situations where the results of just one key study are pending.<sup>376</sup> Finally, the record indicated that studies already showed no increased risk in children from exposure to a substance nearly identical to mepiquat. The agency thus had reliable data to reduce that pesticide’s child safety factor to 1x because there was no database

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370. *Id.* at 1053–56, 1058–60 (Ikuta, J., concurring in part and dissenting in part).

371. *Id.* at 1054 n.3.

372. *Id.* at 1059.

373. *Id.* at 1059–60 (citing *Balt. Gas & Elec. Co. v. Natural Resources Def. Council, Inc.*, 462 U.S. 87, 103 (1983)).

374. *See* 21 U.S.C. § 346a(b)(2)(C)(ii)(II) (2006).

375. *See supra* notes 361–362 and accompanying text.

376. *See supra* notes 364–365 and accompanying text.

deficiency for mepiquat.<sup>377</sup> In sum, by examining only the 2005 final order instead of the entire rulemaking record, the majority invoked *State Farm* and ignored the agency's explanation in other portions of the record. Those other portions of the record, though, showed a rational relation between the child safety factor rules and the statutory purpose of ensuring child safety.

Both *American Radio* and *NCAP* show that the rational basis with bite standard would limit the ability of judges to use their policy preferences to invalidate agency rulemaking. This approach would also make it easier to see when judges invalidate agency rules even when the agency has provided a perfectly reasonable explanation to support its decision. At the same time, rational basis with bite would establish a uniform two-step inquiry, which would constrain the ability of judges to nitpick agency records to find some ambiguity that can be squeezed into one of the *State Farm* criteria for invalidating agency rules.

## CONCLUSION

Unelected judges have become some of our nation's most powerful policy wonks. This past year, judges invalidated Bush Administration regulations on high-profile issues like global warming and the broadcast of indecent material.<sup>378</sup> In the coming years, judges could just as easily invalidate Obama Administration regulations on issues like stem cell research, oil drilling, air and water quality standards, or fuel emission regulations.<sup>379</sup>

The Supreme Court's recent decision in *FCC v. Fox Television Stations, Inc.* might prevent judges from continuing to use their policy preferences to invalidate agency rules. But to ensure that judges' policy preferences are not ossifying agency rules, courts need to craft a doctrine for reviewing agency rulemaking that goes beyond setting fact-specific examples of how courts should conduct APA arbitrary and capricious review. This doctrine also needs to give appropriate deference to expert agencies that are charged with setting our nation's policies. It should have a theoretical limitation grounded in the precedents for reviewing legislation, which have been developed over the past century.

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377. See *supra* note 363 and accompanying text.

378. See *supra* note 21 and accompanying text.

379. See *supra* notes 4-9 and accompanying text.

This Article proposes the rational basis with bite doctrine because it is a heightened standard of review that accounts for the differences between agencies and legislatures. Moreover, rational basis with bite would effectively prevent judges from using their policy preferences to invalidate agency rules, and it fits most closely with Supreme Court precedent on APA arbitrary and capricious review.

Our modern administrative state, which does not fall neatly within any one of our three branches of government, is still largely a work in progress.<sup>380</sup> Indeed, the fact that twenty-six years passed before the Supreme Court in *Fox Television* addressed *State Farm's* approach to APA arbitrary and capricious review is an implicit recognition that agencies and lower courts needed latitude to experiment with the proper ways to review agency rulemaking. But as *Fox Television* confirms, that experiment has failed. Judges have been pulled into policy debates in ways that the framers of our Constitution could never have contemplated.

*Fox Television* was correct to scrap the paternalistic doctrines that allow judges to invalidate agency rulemaking by disagreeing with the substantive policy decisions made by administrative agencies. Getting rid of *State Farm's* dicta and the D.C. Circuit's hard look doctrine will allow presidential administrations to respond to the electorate, resulting in a structure of government more in line with constitutional separation of powers principles. This, in turn, may end the regulatory battles that have been waged between presidential administrations of one political party and judges appointed by the other.

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380. See *FCC v. Fox Television Stations, Inc.*, 556 U.S. \_\_\_ (Apr. 28, 2009), 129 S. Ct. 1800, 1823 (2009) (Kennedy, J., concurring in part and concurring in the judgment) (“The dynamics of the three branches of Government are well understood as a general matter. But the role and position of the agency, and the exact locus of its power, present questions that are delicate, subtle, and complex.”); *FTC v. Ruberoid Co.*, 343 U.S. 470, 487 (1952) (Jackson, J., dissenting) (“The rise of administrative bodies probably has been the most significant legal trend of the last century . . . . They have become a veritable fourth branch of the Government, which has deranged our three-branch legal theories . . . .”).