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ARBITRARINESS REVIEW MADE REASONABLE: STRUCTURAL AND CONCEPTUAL REFORM OF THE "HARD LOOK"

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ABSTRACT

As Representative John Dingell remarked in the best sentence ever said on the power of procedure over substance, "I'll let you write the substance . . . you let me write the procedure, and I'll screw you every time."[1] *Accordingly, designing procedures for legislative rulemaking, a dominant feature of modern governance, has spawned one of the most contentious debates in all of administrative law. Compounding the stakes, over the last fifty years, the courts, with help from Congress and presidents, have relentlessly made rulemaking procedures more burdensome, impeding efforts to preserve the environment, protect workers, and forestall financial collapse, among other important agency missions.*

Review for "arbitrariness" is the source of most of the burdens that courts have imposed on agency rulemaking. Modern doctrine, often called "hard look review," requires an agency to have, at the moment it adopts a rule, a justification strong enough to satisfy the demands of "reasoned decisionmaking." As a corollary, an agency can never rely on post hoc justifications to save a rule. This requirement of reasoned decisionmaking might itself sound eminently reasonable. As implemented in rulemaking, however, its demands are highly artificial, force agencies to waste time and resources on developing impenetrable explanations for their rules, encourage regulated parties to bloat the process, and increase the risk of judicial vacation of reasonable rules.

To correct these problems, courts should allow agencies to defend their rules based on post hoc justifications—so long as they are based on information exposed to public scrutiny during the rulemaking process itself. This proposal may sound like administrative law heresy, but it has surprisingly strong roots both in historical and current practice. Adopting it would enhance agency effectiveness without undermining other important values, notably including accounta-

* Frank U. Fletcher Chair of Administrative Law, Wake Forest University School of Law. Professors Shapiro and Murphy extend many thanks to the participants at the Administrative Law Discussion Forum held in June 2015 at University of Luxembourg for valuable comments on an earlier draft of this Article. The authors extend particular thanks to Professor Jeffrey S. Lubbers for his review.

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1 *Regulatory Reform Act: Hearings on H.R. 2327 Before the Subcomm. on Admin. Law and Governmental Relations of the H. Comm. on the Judiciary*, 98th Cong. 312 (1983) [hereinafter *Hearings*] (statement of Rep. John Dingell).

bility, fairness, and accuracy, served by current doctrine. The proposal also highlights a better, more flexible conception of "arbitrariness" review. As they discharge this ambiguous task, courts have an ongoing duty to recognize and balance the various competing values served by both rulemaking and its judicial review. Courts should abandon their current rigid orthodoxy and adopt the proposal because, in short, it strikes a better balance among these values.

"Explain all that," said the Mock Turtle.
"No, no! The adventures first," said the Gryphon in an impatient tone: "explanations take such a dreadful time."[2]

INTRODUCTION

Just last year, in *Perez v. Mortgage Bankers Association*, the Supreme Court reiterated the forty-year-old *Vermont Yankee* principle, insisting that courts have no authority to impose rulemaking procedures on agencies to serve judicial "notion[s] of which procedures are 'best' or most likely to further some vague, undefined public good."[3] Given the central role of agency rulemaking in modern American governance, the importance of this stance is hard to exaggerate. In terms of sheer quantity, the Code of Federal Regulations is far longer than the United States Code.[4] Many agency rules, such as the Obama Administration's recently promulgated Clean Power Plan, determine critical policies with massive national or even global impacts.[5] The power to write procedures for these rules carries with it a great deal of power to impact substance because, as Representative John Dingell remarked in the best sentence ever said on this subject, "I'll let you write the substance . . . you let me write the procedure, and I'll screw you every time."[6]

Considered in this light, the Court's categorical refusal to allow judicial usurpation of control over rulemaking procedures has a noble, even majestic, air. It is also pretty hilarious, proving that the Justices are masters of that obscure and underappreciated art: administrative law comedy. In point of well-known fact, the courts, led by the D.C. Circuit in the late 1960s and 1970s, essentially rewrote the statutory procedures for notice-and-comment rulemaking, which is the default method for promulgating legislative rules under the Administrative Procedure Act (APA).[7] Thanks to this judicial transformation, the marvelously simple and speedy rulemaking procedures of 1946, when the APA was adopted, bear about as much resemblance to the

2 LEWIS CARROLL, ALICE'S ADVENTURES IN WONDERLAND & THROUGH THE LOOKING GLASS 89 (Modern Library Paperback ed. 2002) (1865).

3 Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1207 (2015) (quoting Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 549 (1978)).

4 *See* Tom Cummins, *Code Words*, 5 J.L. 89, 98 (2015) (documenting that, as of 2012, the Code of Federal Regulations was over three times the length of the United States Code).

5 Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60) (setting state-by-state targets for reducing carbon emissions).

6 *Hearings*, *supra* note 1, at 312 (statement of Rep. John Dingell).

7 For a summary of this judicial transformation, see *infra* subsections I.B.1–6.

rulemaking procedures of 2016 as an acorn does to a mighty seventy-year-old oak.

One of the most important elements of the judicial transformation of rulemaking involved a radical shift in how courts review agency rules for arbitrariness under section 706 of the APA.[8] Back in 1946, a plaintiff challenging a rule on this ground needed to demonstrate to a court that no plausible, reasonable set of facts could be conceived to support the rule.[9] By contrast, under modern "hard look" review for arbitrariness, an agency must establish that, at the time it took its action, it had a contemporaneous rationale sufficient to satisfy the requirements of "reasoned decisionmaking."[10] This approach imposed on rulemaking the *Chenery* principle that courts should determine whether to uphold an agency's discretionary action based on the actual reasons that motivated the agency at the time that it acted.[11] Applying this principle, a post hoc rationale, no matter how sensible, should not be able to save an agency action from condemnation as arbitrary.

In the abstract, nothing could sound more reasonable than for courts to insist that agencies actually base their actions on good reasons. As implemented, however, modern arbitrariness review has made the rulemaking process unduly onerous and time-consuming, with important rules often taking many years to complete.[12] Once completed, these rules are then subject to judicial review that can be political and unpredictable,[13] making it difficult for agencies to guess whether an explanation for a rule will be upheld under hard look review. This state of affairs is all the more problematic given agencies' notorious lack of sufficient resources to carry out their assigned statutory missions.

What, if anything, should be done to correct this situation has been widely debated among administrative law scholars, who have proposed a range of solutions from the elimination of hard look review to retaining it pretty much in its present form, with most proposals focusing on modulating

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8 *See* 5 U.S.C. § 706(2) (2012) (instructing courts to vacate agency actions determined to be "arbitrary, capricious, [or] an abuse of discretion").

9 Pac. States Box & Basket Co. v. White, 296 U.S. 176, 185–86 (1935).

10 *E.g.*, Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 52 (1983) (approving hard look style review of legislative rules).

11 SEC v. Chenery Corp., 318 U.S. 80, 95 (1943) (declaring 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"). For discussion of the courts' imposition of *Chenery*'s contemporaneous rationale principle on notice-and-comment rulemaking during the 1970s, see *infra* subsection I.B.5.

12 For discussion of the problem of rulemaking "ossification" (i.e., that rulemaking has become unduly slow and costly due to accumulating procedural requirements), see *infra* subsection I.C.4. For discussion of manipulation of the rulemaking process by special interests, see generally Thomas O. McGarity, *Administrative Law as Blood Sport: Policy Erosion in a Highly Partisan Age*, 61 DUKE L.J. 1671 (2012).

13 *See* Sidney A. Shapiro & Richard Murphy, *Politicized Judicial Review in Administrative Law: Three Improbable Responses*, 19 GEO. MASON L. REV. 319, 323–31 (2012) (summarizing studies on the ideological nature of judicial review of agency action).

the strictness of judicial review for rationality—e.g., making "hard looks" into something softer.[14] Notwithstanding all this criticism, hard look review has been extremely stable since the Supreme Court gave its stamp of approval over thirty years ago in *Motor Vehicles Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*[15]

This lack of success suggests that a different and more structural approach is appropriate. In this spirit, this Article proposes a simple reform that may, on first hearing, sound heretical but that proves to have surprisingly strong roots in both the history of administrative law and current judicial practice. Specifically, courts should relax their bar on post hoc rationales, allowing agencies to rely upon them so long as they are based on information exposed to outside scrutiny during the notice-and-comment process.[16] Adopting this proposal would correct distortions in the rulemaking process that make agencies' task of defending their rules needlessly costly and difficult. Most notably, it would reduce the incentive that the current system creates for agencies to pour excessive time and energy into developing exhaustive, impenetrable explanations for rules sufficient to answer any question that a generalist (and perhaps ill-disposed) judge might deem material years later.[17] It would also curb the incentives of special interests to bloat the rulemaking process with excessive comments and to seek judicial review on relatively trivial grounds.[18] In addition, adopting the proposal would decrease the danger of courts vacating rules that further agency statutory missions, based on readily curable defects in official explanations.

Still, a practically-minded reader might well wonder: Why might anyone think that the courts would consider abandoning application of the contemporaneous rationale principle, a core doctrine of modern administrative law, to notice-and-comment rulemaking? This very good question happens to have a very interesting answer: courts, although they do not seem quite ready to admit, *already* ignore the contemporaneous rationale principle in a class of important cases. The primary evidence of this impulse comes from the

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14 *See infra* Section II.A (discussing "modulation" proposals).

15 463 U.S. at 43. For the Court's most recent significant opinion confirming the contours of review for reasoned decisionmaking under *State Farm*, 463 U.S. at 57, see FCC v. Fox Television Stations, Inc., 556 U.S. 502, 513–16 (2009).

16 This Article's project might be fairly characterized as a full-length elaboration and defense of an excellent suggestion that Judge Wald of the D.C. Circuit made in a 134-word paragraph almost twenty years ago. Patricia M. Wald, *Judicial Review in the Time of Cholera*, 49 ADMIN. L. REV. 659, 666 (1997). For a more recent, concise argument along these lines, *see* Note, *Rationalizing Hard Look Review After the Fact*, 122 HARV. L. REV. 1909, 1924–29 (2009) (contending that courts should relax *Chenery*'s bar on post hoc rationales because the purported benefits of saving judicial decision costs, reducing judicial discretion, and improving the quality of agency rules are outweighed by costs of delaying agency action due to vacation of rules and strengthening agency status quo bias).

17 *See infra* subsection I.C.2 (discussing the bloating of the "concise general statements" required by the APA).

18 *See infra* subsection I.C.3 (discussing the incentives for regulated parties to bloat the comment process).

practice of remand without vacation. Applying this remedy, a court, after determining that an agency action suffers from a defective explanation, does not throw it out but instead leaves the action in effect while the agency takes post hoc steps to correct it.[19] Our proposal thus seeks to encourage courts to follow, in a more open and systematic way, an impulse that they already display—if one knows where to look.

Our proposal recognizes and builds on the fact that Congress's command to courts to set aside "arbitrary" agency actions is fundamentally ambiguous. To implement this command responsibly, courts must identify and balance the various legitimate and competing interests that rulemaking and its judicial review should serve. When they reformed notice-and-comment rulemaking procedures, the courts advanced legitimate administrative law values, including accountability, accuracy, and fairness, but with a loss of agency effectiveness and efficiency, which are also administrative law values of the first rank. The courts can restore some of this lost effectiveness and efficiency by adopting our proposal to relax the *Chenery* ban on post hoc justifications—and they can do so without significantly undermining other important values served by modern arbitrariness review.

To assess properly this Article's proposal for reforming the structure of modern arbitrariness review, one must understand in some detail the nature of the current system as well as how courts created it through aggressive construction of the APA to serve various policy interests. Part I therefore recounts the judicial transformation of notice-and-comment rulemaking from its simple past to its complex present. Part II will summarize previous proposals to reform modern arbitrariness review and comment on their generally unhappy fate. Part III seeks to legitimize the heresy of allowing agencies to rely on post hoc rationales to support their rules by emphasizing the deep roots of this practice in older administrative law as well as its consistency with the modern practice of remand without vacation. This Part then elaborates on the proposal's advantages and defuses notable objections. And then, consistent with custom, the Article concludes.

I. Reforming Rulemaking: Changes and Consequences

Courts transformed notice-and-comment rulemaking to serve values such as accountability, fairness, and accuracy. These values are, beyond question, good things, but one can have, as they say, too much of a good thing.

19 *See, e.g.*, Allied-Signal, Inc. v. Nuclear Regulatory Comm'n, 988 F.2d 146, 150–51 (D.C. Cir. 1993) (establishing a framework for determining whether to apply remand without vacation to an inadequately supported rule). For the leading academic article on remand without vacation, see generally Ronald M. Levin, *"Vacation" at Sea: Judicial Remedies and Equitable Discretion in Administrative Law*, 53 Duke L.J. 291 (2003) (justifying remand without vacation as an exercise of equitable judicial discretion to leave legally defective actions temporarily in force). For further discussion of this remedy, including a novel justification of its legality, see *infra* Section III.B.

Another important value of administrative law is agency effectiveness.[20] After all, if courts impose procedures that unduly impede an agency from accomplishing its regulatory mission, then those procedures, by hypothesis, become instruments for blocking rather than effecting the legislative will. As we develop below, the courts' transformation of rulemaking has undermined agency effectiveness in significant and unnecessary ways, necessitating a rebalancing of administrative law values.

A. Notice-and-Comment Rulemaking Was So Easy When the APA Was Young

The passage of the APA in 1946 was the culmination of a long contest between New Dealers and business and conservative interests.[21] The latter sought to limit and control administrative action by requiring extensive procedures; the New Dealers, concerned with ensuring effective government action,[22] sought to preserve agency flexibility. The APA resolved this clash, after a fashion, by saying "yes" to both sides, establishing templates for what are commonly called "formal" and "informal" actions by agencies. Formal actions involve extensive, trial-type procedures based on a well-defined, judicial-style record.[23] Informal actions form a vast residual category not subject to these requirements.[24] The APA did not attempt to categorize by one heroic statutory effort those agency actions that would be formal and those that would be informal. Instead, the APA contemplates that Congress will specify in an agency's enabling act whether it should use formal or informal procedures for either rulemaking or adjudication.[25]

The APA's default mechanism for informal rulemaking is the notice-and-comment process.[26] Under the APA as written, notice of a proposed rule can be quite general, amounting to merely a "description of the subjects and issues involved."[27] The APA instructs agencies to accept comments on proposed rules, but it does not tell agencies what to do with them other than

20 *See* Paul R. Verkuil, *The Emerging Concept of Administrative Procedure*, 78 COLUM. L. REV. 258, 279 (1978) ("It is equally important . . . to provide mechanisms that will not delay or frustrate substantive regulatory programs.").

21 Sidney A. Shapiro, *A Delegation Theory of the APA*, 10 ADMIN. L.J. AM. U. 89, 97 (1996).

22 *See generally* JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS (1938) (making the canonical New Deal case for administrative government).

23 *See* 5 U.S.C. §§ 553, 556–57 (2012) (setting forth requirements for formal adjudications and rulemakings).

24 *See id.* § 553 (detailing procedural requirements for informal rulemaking); Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 655–56 (1990) (noting that the APA requires only the "minimal requirements" of 5 U.S.C. § 555 for informal adjudication).

25 *See* § 553(c) (providing that the formal rulemaking procedures of 5 U.S.C. §§ 556–57 apply where "rules are required by statute to be made on the record after opportunity for an agency hearing"); *id.* § 554(a) (providing that formal adjudication procedures apply "in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing").

26 *Id.* § 553.

27 *Id.* § 553(b)(3).

to require that rules be based on "the relevant matter presented."[28] Also, when an agency promulgates its final rule, it must offer a "concise general statement of [its] basis and purpose."[29]

These spare requirements did not mark a radical shift from the pre-APA regime. It had long been the practice of many agencies to seek public comment when developing rules.[30] The goal of the APA's drafters in codifying and generalizing this best practice was to ensure that agencies take an obvious and relatively easy step to gather information from the public before adopting regulations with the force of law.[31] Most certainly, the goal was not to impose a sort of adversarial, judicial-like process on rulemaking.

The APA instructs courts to review the factual and policy underpinnings of informal rules for arbitrariness.[32] In 1946, this standard of review was understood to be extremely deferential. Just eleven years earlier, in the 1935 case *Pacific States Box & Basket Co. v. White*, the Supreme Court had described arbitrariness review as determining whether "any state of facts reasonably can be conceived that would sustain" a rule.[33] Professor Richard Pierce has observed that "[t]his version of the arbitrary and capricious test demands virtually nothing of an agency except a lawyer with enough creativity to identify a plausible justification for a rule based on a plausible pattern of facts."[34] Federal courts reviewing agency rules for arbitrariness continued to apply this generous approach into the 1960s.[35]

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28 *Id.* § 553(c).

29 *Id.*

30 U.S. DEP'T OF JUSTICE, FINAL REP. OF THE ATT'Y GEN.'S COMM. ON ADMIN. PROCEDURE 103–05 (1941) [hereinafter FINAL REP.].

31 S. DOC. NO. 79-248, at 20 (1946) (noting public comments are "essential [not to the fairness of a regulation per se, but rather] . . . to permit administrative agencies to inform themselves"); *see also* Pac. Coast European Conference v. United States, 350 F.2d 197, 205 (9th Cir. 1965) ("It is apparent that in rule making hearings the purpose is to permit the agency to educate itself and not to allow interested parties to choose the issues or narrow the scope of the proceedings.").

32 5 U.S.C. § 706(2)(A).

33 Pac. States Box & Basket Co. v. White, 296 U.S. 176, 185 (1935); *see also* Thompson v. Consol. Gas Utils. Corp., 300 U.S. 55, 69 (1937) (holding that, to rebut the presumption of facts sufficient to justify the rule, the plaintiff would need to demonstrate that the rule bore no reasonable relation to legislative purposes motivating delegation); FINAL REP., *supra* note 30, at 116 (explaining that courts conducting review of rules merely assess whether there is a "rational relation of the regulation to the statute").

34 1 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 7.4 (5th ed. 2010).

35 *See* N.Y. Foreign Freight Forwarders & Brokers Ass'n v. Fed. Mar. Comm'n, 337 F.2d 289, 296–97 (2d Cir. 1964) (upholding the agency rule as reasonable without referencing agency rationale); Superior Oil Co. v. Fed. Power Comm'n, 322 F.2d 601, 619 (9th Cir. 1963) (opining that courts must accept the factual premises of general rulemaking); Bigelow-Sanford Carpet Co. v. FTC, 294 F.2d 718, 722 (D.C. Cir. 1961) (upholding agency rule based on what agency "may have decided" that "the public might need to know" and what the agency "may have thought" the appellant sought to achieve); *see also* William Funk, *Rationality Review of State Administrative Rulemaking*, 43 ADMIN. L. REV. 147 (1991) (documenting that many state courts continued to apply *Pacific States Box*-style review).

B. The Great Judicial Transformation of Notice-and-Comment Rulemaking

Until the 1960s, most regulation had been economic (e.g., ratemaking) and implemented through the case-by-case process of adjudication rather than through quasi-legislative rulemaking procedures.[36] The 1960s and 1970s, however, marked the creation of a raft of new, powerful social regulatory agencies, such as the Occupational Health and Safety Administration (OSHA) and the Environmental Protection Agency (EPA). Because Congress did not specify formal rulemaking for these agencies, they were able to take advantage of the relatively modest procedural demands of notice-and-comment rulemaking to issue regulations furthering their statutory mandates in relatively short order. For example, on January 30, 1971, the EPA published in the *Federal Register* a notice of proposed rulemaking for the original primary and secondary air quality standards promulgated under the Clean Air Act Amendments of 1970.[37] Three months later, the agency published the final rule, which was accompanied by an explanation that was one page long (albeit in the *Federal Register*'s triple columns and small font).[38] For another compelling example, consider that in 1972, OSHA promulgated a major rule governing asbestos in just six months.[39]

These two remarkably "speedy" major rules came at the end of an era. Starting in the late 1960s, courts radically changed notice-and-comment rulemaking, transforming it into a kind of paper hearing. The mix of impulses that led to these changes was complex. Corporate interests sought to forestall regulatory burdens.[40] Public interest groups sought to control capture of agencies by regulated interests.[41] Courts, presented with the task of reviewing highly complex, consequential, and technical rules, imposed familiar adjudicative models on the quasi-legislative process of rulemaking by, among other moves, limiting ex parte contacts and expanding notice

36 Richard E. Levy & Sidney A. Shapiro, *Administrative Procedure and the Decline of the Trial*, 51 U. KAN. L. REV. 473, 482 (2003).

37 National Primary and Secondary Ambient Air Quality Standards, 36 Fed. Reg. 1502 (1971).

38 National Primary and Secondary Ambient Air Quality Standards, 36 Fed. Reg. 8186 (1971); *see* Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1387 (1992) (citing this example as evidence for the thesis that notice-and-comment rulemaking has "[o]ssifi[ed]").

39 *See* Elinor P. Schroeder & Sidney A. Shapiro, *Responses to Occupational Disease: The Role of Markets, Regulation, and Information*, 72 GEO. L.J. 1231, 1305–09 (1984) (listing publication dates of health standards).

40 *See* Richard J. Pierce, Jr., *Which Institution Should Determine Whether an Agency's Explanation of a Tax Decision Is Adequate?: A Response to Steve Johnson*, 64 DUKE L.J. ONLINE 1, 9–10 (2014) (describing how regulated firms gamed new procedures by submitting "lengthy and detailed comments . . . often accompanied by consultants' reports" to hamper agency rulemaking efforts).

41 Thomas W. Merrill, *Capture Theory and the Courts: 1967–1983*, 72 CHI.-KENT L. REV. 1039, 1050–52 (1997).

requirements.[42] With a whiff of paradox, courts and commentators justified this judicialization of rulemaking with an "interest representation model."[43] According to this view, ensuring that outside pressure groups all had seats at the rulemaking table—and that agencies had to pay sufficient heed to their arguments and evidence—helped to cure the democracy deficit associated with legislation by unelected bureaucrats.[44]

Details concerning the major judicial "amendments" to notice-and-comment rulemaking follow.

1. Pre-Enforcement Review Becomes Generally Available

Before the judicial transformation of rulemaking, review generally took place in the context of judicial review of an agency enforcement action applying a rule.[45] The enforcement action itself provided additional information and context for determining the rule's legality and rationality. Then, in 1967 in *Abbott Laboratories v. Gardner*, the Supreme Court adopted an approach to reviewability and ripeness that made pre-enforcement review of rules presumptively available.[46] Shifting the dominant model for review of rules to pre-enforcement challenges naturally encouraged regulated parties to challenge rules more frequently. In such pre-enforcement proceedings, a court cannot, by hypothesis, obtain information from a record created by agency enforcement proceedings. This placed great pressure on courts, especially circuit courts, to find a substitute basis for their decisions.[47] As the following subsections discuss, courts solved this problem by greatly increasing agencies' obligations under the notice-and-comment process.

2. Notice Obligations Refashioned for an Adversarial Process

Recall that the APA states that notice of a proposed rule may consist of merely "a description of the subjects and issues involved."[48] This type of

42 *See* Jack M. Beermann & Gary Lawson, *Reprocessing* Vermont Yankee, 75 GEO. WASH. L. REV. 856, 883–900 (2007) (discussing these elements of the judicial transformation of rulemaking).

43 *See generally* Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1669 (1975) (describing and critiquing the judicial transformation of administrative law toward an "interest representation" model).

44 *See* Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505, 578 (1985) (describing reformed rulemaking "as a means of fostering a substitute political process in which all affected interests would be represented and considered").

45 *See* Pierce, *supra* note 40, at 7 (noting the general unavailability of pre-enforcement review prior to the judicial transformation of rulemaking).

46 Abbot Labs. v. Gardner, 387 U.S. 136, 148–54 (1967) (holding that a legislative rule promulgated by the FDA constituted "final agency action" presumptively subject to review under the general terms of the APA, and explaining that the "ripeness" of rules for pre-enforcement review depends on a two-prong inquiry that examines the "fitness" of the issues for review and whether the party seeking review would suffer undue "hardship" if the court withholds pre-enforcement review).

47 *See* Pierce, *supra* note 40, at 8 (discussing this dynamic).

48 5 U.S.C. § 553(b) (3) (2012).

spare notice may have been sufficient for a system that uses notice and comment as a convenient means to gather some relevant information from interested outsiders. It cannot, however, provide an adequate foundation for a serious adversarial critique of an agency's information, analysis, methods, and plans. As a result, courts have "interpreted" the APA aggressively to require that a notice of proposed rulemaking reveal all the scientific and technical data and methodologies underlying the proposal.[49] If the agency decides to rely on significant new information that becomes available after issuance of the notice, the agency must issue a supplemental notice and provide an additional comment period.[50] The net result of these requirements is that "[n]otices can easily run tens of tiny-typed pages in the Federal Register and incorporate by reference hundreds or thousands of pages of supporting documentation."[51]

3. Courts Adopt a Closed-Record Model for Review

The APA expressly defines a "record" for formal proceedings as having the trappings of a trial—e.g., transcript of testimony, exhibits, etc.[52] It does not impose such a requirement on informal proceedings, including notice-and-comment rulemaking.[53] Indeed, the absence of a formal record requirement is why such actions are characterized as "informal" in the first place. Freeing agencies from the constraint of a formal record in rulemaking enables them to rely on internally available information and expertise when making a decision, in addition to relying on whatever information might have been shared as part of the rulemaking process.[54]

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49 *See, e.g.*, United States v. N.S. Food Prods. Corp., 568 F.2d 240, 251 (2d Cir. 1977) (explaining that a court cannot ensure an agency action was not "arbitrary" unless the agency notified interested persons of the scientific research on which it was relying); *cf.* Beermann & Lawson, *supra* note 42, at 892 (observing that "[t]he notion that a modern agency could issue a notice of proposed rulemaking that simply announces a general subject and calls for information is unthinkable").

50 *See* Chamber of Commerce v. SEC, 443 F.3d 890, 900 (D.C. Cir. 2006) (explaining that an agency must share the "most critical factual information" on which it relies and that this obligation can trigger a requirement of additional notice and comment). *But cf.* Building Ass'n of Superior Cal. v. Norton, 247 F.3d 1241, 1246 (D.C. Cir. 2001) (holding that additional notice and comment was not necessary where an agency relied upon a study received during the comment period that "did not reject or modify the [agency's original] hypothesis").

51 Beermann & Lawson, *supra* note 42, at 894.

52 *See* 5 U.S.C. § 556(e) (defining administrative records for formal proceedings).

53 *See generally id.* §§ 553, 555 (imposing no "record" requirements for informal rulemaking or adjudication); *see also* S. DOC. NO. 79-248, at 39 (1946) (indicating that administrative records, as such, only exist where Congress "has required . . . [a formal] administrative hearing in which [such an] . . . administrative record may be made").

54 U.S. DEP'T OF JUSTICE, ATT'Y. GEN.'S MANUAL ON THE APA 31–32 (1947) (noting that, for informal rulemaking, "an agency is free to formulate rules upon the basis of materials in its files and the knowledge and experience of the agency, in addition to the materials adduced in public rule making proceedings").

Nonetheless, the Supreme Court has held that informal agency actions are indeed subject to a "record," which the Court broadly defined as including all the relevant material that the decisionmaker actually considered before taking its action.[55] Obviously, this very broad approach can create difficulties for complex rulemakings, which may take years to conduct and involve many agency officials. Several decades after this change, courts, agencies, and commentators still have not worked out settled, uniform practices for determining the proper contents of records for informal rulemaking.[56]

It is clear, however, that the record closes upon the signing or publication of a rule in its final form.[57] Once this closure happens, it is generally too late for the agency to add new information to the record, such as a helpful study, to aid in judicial review.[58] Supplementation of the record is strongly disfavored and allowed only in very limited situations, e.g., where necessary to explain highly technical terms.[59] In short, if an agency wants information to be available for consideration during judicial review, then this information should be developed, shared, and considered during the rulemaking process.

4. Concise General Statements Become Ventilators

Recall that the APA requires an agency to publish a "concise general statement of [ ] basis and purpose" when it adopts a final rule after notice and comment.[60] Before the judicial transformation, such a "concise general statement" could actually be "concise." For example, as noted above, the concise general statement for EPA's first rule promulgating air quality standards under the Clean Air Act Amendments of 1970 was a single page long.[61]

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55 Citizens to Pres. Overton Park v. Volpe, 401 U.S. 402, 419–20 (1971). *See generally* LELAND E. BECK, AGENCY PRACTICES AND JUDICIAL REVIEW OF ADMINISTRATIVE RECORDS IN INFORMAL RULEMAKING 10 (2013) (collecting authority).

56 *See generally* BECK, *supra* note 55, at 9 (noting, based on agency survey responses, that "[a]gency practice in the development of administrative records for purposes of judicial review of regulations varies widely").

57 *Id.* at 54.

58 As the judicial transformation of rulemaking unfolded, a few courts resisted ignoring post-promulgation evidence bearing on the correctness of an agency's decision. *See* Ass'n of Pac. Fisheries v. EPA, 615 F.2d 794, 812 (9th Cir. 1980) ("If the studies showed that the Agency proceeded upon assumptions that were entirely fictional or utterly without scientific support, then post-decisional data might be utilized by the party challenging the regulation."); Amoco Oil Co. v. EPA, 501 F.2d 722, 729 n.10 (D.C. Cir. 1974) ("Rule-making is necessarily forward-looking, and by the time judicial review is secured events may have progressed sufficiently to indicate the truth or falsity of agency predictions. We do not think a court need blind itself to such events . . . ."). For a much later echo of this approach, see Delta Air Lines, Inc. v. Export-Import Bank of the U.S., 85 F. Supp. 3d 387, 402 (D.D.C. 2015) (citing *Amoco* with approval).

59 Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv., 450 F.3d 930, 943 (9th Cir. 2006) (identifying limited exceptions to the bar on supplementation).

60 5 U.S.C. § 553(c) (2012).

61 *See supra* text accompanying note 38 (discussing this example of a one-page concise general statement supporting an important, complex rule).

In some cases, courts were satisfied with even less in the way of explanation. For instance, the D.C. Circuit rejected a procedural attack on a rule for failure to include a separate concise general statement because (a) Congress had already specified the purpose by statute; and (b) the terms of the rule itself made its "source, basis, and purpose" plain enough.[62] One can even find instances of courts characterizing omission of a concise general statement as a "purely technical flaw" that could not justify voiding a rule.[63]

As judicial review of rules shifted to pre-enforcement proceedings, however, concise general statements naturally became an object of far greater attention by courts struggling to understand the bases for agency rules. Along these lines, in the seminal 1968 case of *Automotive Parts & Accessories Association v. Boyd*, the D.C. Circuit admonished agencies

> against an overly literal reading of the statutory terms "concise" and "general." These adjectives must be accommodated to the realities of judicial scrutiny, which do not contemplate that the court itself will, by a laborious examination of the record, formulate in the first instance the significant issues faced by the agency and articulate the rationale of their resolution. We do not expect the agency to discuss every item of fact or opinion included in the submissions made to it in informal rule making. We do expect that, if the judicial review which Congress has thought it important to provide is to be meaningful, the "concise general statement of . . . basis and purpose" . . . will enable us to see what major issues of policy were ventilated by the informal proceedings and why the agency reacted to them as it did.[64]

Building on this "ventilation" theme, courts have frequently declared that it is arbitrary for an agency to fail to respond in its concise general statement to significant comments raised during notice and comment.[65] Agencies naturally therefore try to stuff into concise general statements their answers to any comments that they fear a reviewing court might deem significant months or years later. While this has created a nice business opportunity for contractors that are hired to undertake this onerous task, it also means that ventilation has made "concise general statements" extraordinarily long and specific.[66]

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62 Bigelow-Sanford Carpet Co. v. FTC, 294 F.2d 718, 721 n.10 (D.C. Cir. 1961); *see also* N.Y. Foreign Freight Forwarders & Brokers Ass'n v. Fed. Mar. Comm'n, 337 F.2d 289, 296 (2d Cir. 1964) (concluding that rules satisfied the concise general statement requirement by identifying the statute they implemented and stating that they "have for their purpose the establishment of standards and criteria to be observed and maintained").

63 Hoving Corp. v. FTC, 290 F.2d 803, 807 (2d Cir. 1961).

64 Auto. Parts & Accessories Ass'n v. Boyd, 407 F.2d 330, 338 (D.C. Cir. 1968) (quoting 5 U.S.C. § 553(c)).

65 *See, e.g.*, Lilliputian Sys., Inc. v. Pipeline & Hazardous Materials Safety Admin., 741 F.3d 1309, 1312 (D.C. Cir. 2014) ("The arbitrary and capricious standard . . . includes a requirement that the agency . . . respond to 'relevant' and 'significant' public comments" (internal quotation marks and citations omitted)); Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 394 (D.C. Cir. 1973) (establishing the principle that agencies must respond to material comments).

66 *See infra* subsection I.C.2 (discussing the bloating of concise general statements).

5. Contemporaneous Rationale Principle Imposed on Rulemaking

The requirement that concise general statements demonstrate "ventilation" of all material issues would not have any bite if agencies were able to supplement them freely after the fact with improved, post hoc explanations of their actions. Their ability to do so, however, is sharply limited by application of *Chenery*'s contemporaneous rationale principle to informal rulemaking. Just as the closed-record approach discussed above generally blocks agencies from relying on post-promulgation *information* to defend their rules, so the *Chenery* principle generally blocks them from relying on post-promulgation *rationales*.

In 1943, several years before enactment of the APA, the Supreme Court declared in *SEC v. Chenery*, "[A]n 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."[67] Accordingly, the Supreme Court often remarks that courts should not rely on post hoc rationales to uphold an agency's discretionary action.[68] The *Chenery* Court supported this principle, for which it offered very little precedential support, with the somewhat counterintuitive argument that it blocks courts from usurping agency authority.[69] The theory here is that, after learning from a court that its rationale for an action was legally defective, an agency might wish, after mature consideration, to take some different action. A court therefore does not actually "help out" an agency, as it were, when it supplies an acceptable, legal rationale for an agency action after the agency's own rationale fails. Rather, the court risks intruding on the agency's authority to alter course.[70] In addition, the *Chenery* Court observed that the contemporaneous rationale principle supports orderly judicial review, enabling parties to reasonably assess whether to challenge agency actions, and enabling courts to review challenges based on a well-defined set of arguments.[71]

Chenery itself arose out of the type of proceeding most obviously suited to application of its contemporaneous rationale principle. The case involved review of what might be characterized in modern terms as a formal adjudication that resolved a discrete policy issue in an extensive agency opinion.

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67 SEC v. Chenery Corp., 318 U.S. 80, 95 (1943).

68 *See, e.g.*, Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 50 (1983) ("[C]ourts may not accept appellate counsel's *post hoc* rationalizations for agency action." (citing Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962))); Citizens to Pres. Overton Park v. Volpe, 401 U.S. 402, 419 (1971) (describing post hoc rationalizations as "an inadequate basis for review" (citing *Burlington*, 371 U.S. at 1689–69; *Chenery*, 318 U.S. at 87)).

69 *Chenery*, 318 U.S. at 88, 94–95.

70 *See, e.g.*, Women Involved in Farm Econ. v. USDA., 876 F.2d 994, 998–99 (D.C. Cir. 1989) ("By adopting a specific argument in support of agency action offered by counsel in the litigating process—but not relied on by the agency—the courts might actually restrict improperly the agency's future freedom of action to make policy under a particular statute.").

71 *Chenery*, 318 U.S. at 94–95.

Under such circumstances, it was plausible to expect the agency to explain its contemporaneous rationale in findings sufficient to discuss all material points. It took several decades for *Chenery* to expand its reach beyond this natural domain to informal proceedings. Of particular note, informal rules continued to be subject to review under *Pacific States Box*, which *Chenery* never mentioned, much less purported to overrule.[72]

As pre-enforcement review of rules became the norm, however, courts began, as we have seen, to place greater focus on the "concise general statements" that the APA requires as part of the notice-and-comment process. At about the same time, the Supreme Court announced in *Citizens to Preserve Overton Park v. Volpe* that *Chenery*'s contemporaneous rationale principle applies to informal adjudications.[73] This confluence naturally suggested that courts might extend the *Chenery* principle still further to judicial review of rules promulgated through notice and comment by treating concise general statements as authoritative explanations of agencies' contemporaneous rationales. Writing in 1974, Paul Verkuil, a leading administrative law scholar, made this connection explicit, observing that the effect of judicial decisions transforming rulemaking procedures had "been to energize, perhaps unconsciously, the *Chenery*-type requirements of decisionmaking based on reasons and supported by facts."[74] He suggested that "overt adoption of the *Chenery*-type standards as the basis for rulemaking review" seemed to be on the horizon.[75]

As the 1970s progressed, Verkuil's prediction came true as courts both extended *Chenery* to informal rulemaking[76] and, moreover, emphasized that agencies' contemporaneous rationales should be explained in their concise general statements.[77] The D.C. Circuit's 1977 decision in *Tabor v. Joint Board*

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72 *See supra* notes 33–35 and accompanying text (discussing the *Pacific States Box* regime for review).

73 *Overton Park*, 401 U.S. at 420.

74 Paul R. Verkuil, *Judicial Review of Informal Rulemaking*, 60 VA. L. REV. 185, 234 (1974).

75 *Id.*

76 For early lower court opinions stating that *Chenery* applies to informal rulemaking, see for example *Nat'l Ass'n of Food Chains, Inc. v. ICC*, 535 F.2d 1308, 1313–14 (D.C. Cir. 1976); *South Terminal Corp. v. EPA*, 504 F.2d 646, 655 (1st Cir. 1974); *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 402 (D.C. Cir. 1973); *City of Chicago v. FPC*, 458 F.2d 731, 744 (D.C. Cir. 1971).

77 *See* William F. Pedersen, Jr., *Formal Records and Informal Rulemaking*, 85 YALE L.J. 38, 71 (1975) (observing that, as of 1975, "a fairly rigorous approach prevail[ed], under which the necessary articulation of reasons must appear in the preamble to the promulgated rule or in some other document of equally formal standing"). It bears noting that *Chenery* does not, by its own terms, demand that agencies give contemporaneous *explanations* of their contemporaneous *rationales* for their actions. In theory, if a concise general statement provides an incomplete account of the agency's contemporaneous rationale, an agency could offer supplemental evidence to fill in the missing details consistent with *Chenery*. The Supreme Court flagged this possibility in *Overton Park*, observing that, where an agency fails to offer a contemporaneous explanation for an action, a court can require affidavits or testimony to allow reconstruction of the agency's contemporaneous rationale.

for Enrollment of Actuaries provides an especially nice discussion of these points.[78] The agency had used notice and comment to promulgate a rule governing qualifications for actuaries. Contrary to the requirements of section 553, the agency did not issue a concise general statement explaining the rule on its publication. During judicial review, the agency attempted to fill this gap by attaching an unpublished "statement of reasons" to its motion to dismiss. The agency contended that the court could consider this explanation because *Chenery* did not apply to informal rulemaking.[79] This argument, however, came five to ten years too late, and the court responded with a series of reasons both for applying the contemporaneous rationale principle to informal rulemaking and for insisting that this rationale generally appear in the concise general statement. First, if *Chenery* were inapplicable, then agencies would have no practical reason to comply with their statutory obligation to explain their rules in concise general statements, and "regulations would be affirmed whenever the reviewing court could divine a reasonable explanation for their adoption."[80] Second, *Chenery*'s underlying rationale, that it protects agencies from judicial usurpation of their authority, applies with just as much force to informal rulemaking as to informal adjudication.[81] Absent *Chenery*, a court might affirm a regulation on grounds that the agency itself, given proper time and procedures for reflection, would reject. Third, as established in *Automotive Parts*, a concise general statement should enable a reviewing court "to see what major issues of policy were ventilated by the informal proceedings and why the agency reacted to them as it did."[82] Post hoc affidavits are not an acceptable substitute.[83]

Seven years later, in *Motor Vehicles Manufacturers Association v. State Farm Mutual Automobile Insurance Co.,* the Supreme Court confirmed with essentially no discussion that the *Chenery* contemporaneous rationale principle

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Overton Park, 401 U.S. at 419–21. Two years later, the Court emphasized in *Camp v. Pitts* that this sort of intrusion into agency operations is disfavored and should be used only where "there was such failure to explain administrative action as to frustrate effective judicial review." 411 U.S. 138, 142–43 (1973). Lower courts occasionally allow agencies to submit supplemental evidence regarding their contemporaneous rationales through post hoc affidavits, but these courts insist that such evidence should merely explain "the original record and should contain no new rationalizations." Yale-New Haven Hosp. v. Leavitt, 470 F.3d 71, 82 (2d Cir. 2006) (quoting Envtl. Def. Fund v. Costle, 657 F.2d 275 (1981)). The upshot of these limitations is that a wise agency promulgating a rule through notice and comment will definitely not exclude bits of its contemporaneous *rationale* from its contemporaneous *explanation* with the thought that it might be able to dodge *Chenery* by supplementing the latter with evidence of the former.

78 Tabor v. Joint Bd. for Enrollment of Actuaries, 566 F.2d 705 (D.C. Cir. 1977).

79 *Id.* at 710.

80 *Id.* This, of course, was precisely the law that prevailed during the era of *Pacific States Box*. *See supra* notes 33–35 and accompanying text (discussing this standard and its application through the 1960s).

81 *Tabor*, 566 F.2d at 710.

82 *Id.* (quoting Auto. Parts & Accessories Ass'n v. Boyd, 407 F.2d 330, 338 (1968)).

83 *Id.* at 711 (citing Rodway v. USDA., 514 F.2d 809, 817 (D.C. Cir. 1975)).

applies to informal rulemakings—apparently regarding this conclusion as obviously true.[84]

6. Judicial Review Takes on a Hard Look

The preceding changes relating to pre-enforcement review, notice, closed records, concise general statements, and the contemporaneous rationale principle were bound up with a major change in judicial attitudes—or at least judicial rhetoric—regarding the proper intensity of arbitrariness review. This judicial task came to involve "hard looks." At first, agencies were supposed to take these hard looks; later, the hard looks became the courts' job. In either event, it has been commonly understood that this form of review "is generally quite rigorous and imposes a substantial burden on both agencies and courts."[85]

The idea of "hard look" review has roots in Judge Harold Leventhal's influential dicta in *Greater Boston Television Corp. v. FCC*.[86] In this foundational case, Judge Leventhal, using rhetoric that would have shocked judges and lawyers before the twentieth century, characterized courts and agencies as "collaborative instrumentalities of justice" that work together in a "'partnership' in furtherance of the public interest."[87] In reviewing an agency's discretionary decision, the court's task is to ensure that the agency gave "reasoned consideration to all the material facts and issues."[88] This task requires insistence that an agency "articulate with reasonable clarity its reasons for decision, and identify the significance of the crucial facts."[89] A court should intervene where, based on its review of these materials, it "becomes aware . . . that the agency has not really taken a 'hard look' at the salient problems" and thus has failed its duty to engage in "reasoned decision-making."[90]

Although Judge Leventhal conceived of hard look review as requiring courts to check whether *agencies* have taken "hard looks," it rather quickly became associated with the idea that *courts* should take "hard looks" at

84 Motor Vehicles Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 50 (1983).

85 Beermann & Lawson, *supra* note 42, at 880–81. For a revisionist view on this issue, see Jacob Gersen & Adrian Vermeule, *Thin Rationality Review*, 114 MICH L. REV. 1355 (2016). Based largely on affirmance rates, Professors Gersen and Vermuele contend that the notion that courts have imposed a strict, "hard look" form of substantive review on agencies is essentially a myth, especially at the Supreme Court, where agencies almost always win on the arbitrariness issue. *Id.* at 1356–60. They concede, however, that lower court decisions present a more "mixed" picture and that selection effects at least complicate analysis. *Id.* at 1364, 1367.

86 Greater Bos. Television Corp. v. FCC, 444 F.2d 841, 851–52 (D.C. Cir. 1970) (emphasis supplied by Judge Leventhal).

87 *Id.* (first citing Niagara Mohawk Power Corp. v. FPC, 379 F.2d 153, 160 n.24 (D.C. Cir. (1967); then quoting United States v. Morgan, 313 U.S. 409, 422 (1941)).

88 *Id.* at 851.

89 *Id.*

90 *Id.* (citation omitted).

agency explanations.[91] Writing in 1980, Judge Wald, another leading light of the D.C. Circuit, explained that, as the judicial transformation of informal rulemaking took hold, agencies had to offer far more detailed notices and explanations for their rules, which meant that courts had a much richer set of "record" materials to review. As a result, the duty to take a "'hard look' . . . began to appear more judicial than administrative, blurring the original meaning of that phrase."[92]

The Supreme Court confirmed that hard look review for reasoned decisionmaking applies to rules promulgated via notice and comment in 1983 in *Motor Vehicles Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*[93] The rule at issue rescinded a forthcoming regulatory requirement that automotive manufacturers install passive restraints in new motor vehicles—a requirement that manufacturers could satisfy by installing either passive safety belts or airbags.[94] After a change in administration, the agency rescinded the rule because it had become clear that most manufacturers would comply by installing passive safety belts, which consumers might detach, leading the agency to conclude that it could not predict that the rule would generate sufficient safety benefits to justify its costs. In language that has become canonical, the Court explained:

> 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.[95]

Applying this standard, all nine Justices agreed that the agency had arbitrarily failed to consider the obvious solution of fixing the rule by amending it to require airbags, which agency records indicated would save about 10,000 lives per year.[96]

More importantly for the present purpose, however, five Justices concluded that the rescission was arbitrary on the additional ground that the agency did not consider the potential effect of "inertia" on use of detachable safety belts—i.e., the agency did not discuss the problem that usage rates might be higher than otherwise expected because some people, once strapped in by an automatic safety belt, might find it too much bother to

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91 *See* Nat'l Lime Ass'n v. EPA, 627 F.2d 416, 451–52 n.126 (D.C. Cir. 1980) (discussing how the task of taking "hard looks" rapidly shifted from agencies to courts).

92 *Id.*

93 Motor Vehicles Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). Notably, the Supreme Court relied solely on precedents governing review of adjudications to support application of hard look style review to informal rulemaking. *Id.*

94 *Id.* at 34.

95 *Id.* at 43.

96 *Id.* at 46 ("The first and most obvious reason for finding the rescission arbitrary and capricious is that NHTSA apparently gave no consideration whatever to modifying the Standard to require that airbag technology be utilized.").

press a button to detach it.[97] Dissenting on this point, four Justices rejected the inertia objection as too thin to justify condemning the rule as arbitrary, concluding that, although the agency's explanation on this point was "by no means a model," it did establish a rational connection between the facts found and decision reached.[98] Together, these two clashing opinions confirm the obvious point that reasonable minds often differ about what amounts to "reasoned decisionmaking."[99]

7. Congress and Presidents Pile On

Although courts played the leading role in transforming notice-and-comment rulemaking, no portrait of its relentless evolution toward complexity could be remotely complete without adverting to the roles that the political branches have eagerly played. In the 1980s, critics of regulation emphasized concerns that agency regulation was irrational because it failed cost-benefit analysis or because agencies failed to consider significant impacts of their rules on small businesses or other favored entities.[100] These claims begat what Deborah Stone has aptly named the "rationality project" to reform regulation through "the nexus of rational choice theory, microeconomic efficiency models, and cost-benefit analysis."[101] The goal, in other words, was for agencies to achieve a "comprehensive analytical rationality," carefully examining all conceivable aspects of a rule before it was adopted.[102]

The rationality project helped produce a series of statutes and executive orders that have imposed additional analytical requirements on the rulemaking process. For instance, the Regulatory Flexibility Act requires agencies to consider the impact of proposed rules on "small entities" (e.g., small businesses).[103] The Unfunded Mandates Reform Act requires regulatory impact analysis for proposed rules likely to cause private or public entities, other than the federal government, to spend more than $100 million per year

97 *Id.* at 54.

98 *Id.* at 58 (Rehnquist, J., dissenting in part).

99 *Id.* at 52.

100 *See* Sidney A. Shapiro, *Administrative Law After the Counter-Reformation: Restoring Faith in Pragmatic Government*, 48 U. KAN. L. REV. 689, 697–703 (2000) (describing and documenting these criticisms). For rebuttals of these claims, see generally Lisa Heinzerling, *Five-Hundred Life-Saving Interventions and Their Misuse in the Debate Over Regulatory Reform*, 13 RISK 151 (2002); Richard W. Parker, *Grading the Government*, 70 U. CHI. L. REV. 1345 (2003).

101 Deborah A. Stone, *Clinical Authority in the Construction of Citizenship*, *in* PUBLIC POLICY FOR DEMOCRACY 45, 46 (Helen Ingram & Stephen Rathgeb Smith eds., 1993).

102 *See* THOMAS O. MCGARITY, REINVENTING RATIONALITY: THE ROLE OF REGULATORY ANALYSIS IN THE FEDERAL BUREAUCRACY 10–13 (1991).

103 Pub. L. No. 96-354, 94 Stat. 1164, 1164 (1980) (codified at 5 U.S.C. §§ 601–12 (2012)); *see also* Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, 110 Stat. 847, 857 (1996) (codified as amended at 5 U.S.C. § 601). For more on this, see generally JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 133–39 (5th ed. 2012) (discussing the requirements of the Regulatory Flexibility Act and the Small Business Regulatory Enforcement Fairness Act).

(adjusted for inflation).[104] Most notably of all, every president since Reagan has used executive orders to require agencies to conduct formal cost-benefit analyses of significant proposed and final rules.[105] These analyses are subject to an internal executive review process administered by a super-agency, the Office of Information and Regulatory Affairs (OIRA), which is housed in the White House.[106]

C. Unfortunate Consequences of the Transformation of Notice and Comment

It is not difficult to identify worthwhile goals served by the judicial transformation of notice-and-comment rulemaking outlined above. Expanded notice requirements give interested persons a better opportunity to submit responsive, informed comments regarding proposed rules. One might reasonably think that expanded notice thus both enhances the "fairness" of the rulemaking process and improves the ultimate quality of agency analysis. Developing exhaustive "concise general statements" to explain their rules requires agencies to be thorough, which may also improve accuracy. Thorough explanations also demonstrate responsiveness to commenters, which arguably enhances accountability, fairness, and thus legitimacy. Imposing the contemporaneous rationale principle on a closed rulemaking record enables courts to review agency action using a familiar appellate model that is, at least from the courts' point of view, efficient. It also avoids the problem of parties sandbagging each other with post-promulgation evidence and arguments that could have been raised earlier, thus enhancing fairness, efficiency, and perhaps accuracy. Various attractions of the modern system are, in short, obvious.

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104 Pub. L. No. 104-4, 109 Stat. 48 (1995) (codified at 2 U.S.C. § 1501 (2012)). For other statutes bearing on rulemaking, see for example Paperwork Reduction Act of 1980, Pub. L. No. 96-511, 94 Stat. 2812 (1980) (codified at 44 U.S.C. §§ 3501–20 (2012)) (establishing a clearance procedure for rules that collect information); Consolidated Appropriations Act of 2001, Pub. L. No. 106-554, § 515, 114 Stat. 2763, 2763A-153–54 (2000) (requiring issuance of guidelines governing the quality of information disseminated by agencies).

105 *See* Rena Steinzor, *The Case for Abolishing Centralized White House Regulatory Review*, 1 MICH. J. ENVTL. & ADMIN. L. 209, 238–68 (2012) (discussing evolution of executive orders controlling agency action through cost-benefit analysis).

106 The basic architecture for these cost-benefit analysis requirements continues to be provided by an executive order issued by President Clinton. Exec. Order No. 12,866, 3 C.F.R. §§ 638, 649 (1994), *reprinted as amended in* 5 U.S.C. § 601 app. at 126–29 (2006 & Supp. V 2011); *see also* Exec. Order No. 13,563, 3 C.F.R. § 215 (2012), *reprinted in* 5 U.S.C. § 601 app. at 131–32 (supplementing Exec. Order No. 12,866). For additional executive orders imposing requirements on rulemaking, see for example Exec. Order No. 13,132, 3 C.F.R. § 153, 206–11 (2000) (requiring consideration of federalism); Exec. Order No. 12,988, 3 C.F.R. § 157 (1997) (requiring consideration of impacts on civil justice and litigation); Exec. Order No. 12,898, 3 C.F.R. § 859 (1995) (requiring identification of rules that should be revised in the interests of environmental justice); Exec. Order No. 12,875, 3 C.F.R. § 669 (1994) (requiring consultation with state, local, and tribal governments); Exec. Order No. 12,630, 53 Fed. Reg. 8859 (Mar. 15, 1988), *reprinted in* 5 U.S.C. § 601 (1988) (requiring consideration of impact of rules on property rights).

We submit, however, that these benefits come at needless cost to other values, most notably agency effectiveness, which should also be served by agency rulemaking procedures and their judicial review. Some of the more notable costs include the following.

1. Notice-and-Comment Rulemaking as Show (Quasi) Trial

Somewhat perversely, expanded notice requirements constrict the degree to which agencies can actually respond to comments. The underlying problem is that, where a final rule differs too much from the proposed rule, the proposed rule could not have provided outsiders with an adequate basis for submitting informed comments for "ventilating" the final rule. In response to this problem, courts require that an agency's final rule be a "logical outgrowth" of the proposed rule.[107] As a result, agencies are reluctant to change a rule in response to comments lest a change render the original notice inadequate and trigger the requirement of another round of notice and comment.[108] On the other hand, if the agency does not change the rule, its rule may prove arbitrary because the agency cannot justify it in light of the comments it received. Either prong of this Hobson's choice impedes agency effectiveness.

To avoid this quandary, agencies try to ensure that notice and comment will not reveal information that requires them to make significant changes to their proposed rules before finalizing them. This in turn requires agencies to determine facts and make their genuine policymaking decisions *before* they ever issue a notice of proposed rulemaking or begin notice and comment.[109] Expanded notice requirements intended to improve and shed sunlight on a public process of policymaking thus actually tend to shove it back into the shadows.

2. Terrifically Long and Impenetrable "Concise General Statements"

Recall that the D.C. Circuit has warned agencies preparing "concise general statement[s]" that judicial expectations for this rulemaking requirement are not consistent with "an overly literal reading of the statutory terms 'concise' and 'general.'"[110] This is a marvelous understatement in light of the

107 Chocolate Mfrs. Ass'n of the U.S. v. Block, 755 F.2d 1098, 1105 (4th Cir. 1985); *see also* Beermann & Lawson, *supra* note 42, at 895–99 (discussing the growth of the "logical outgrowth" principle).

108 *Cf.* Beermann & Lawson, *supra* note 42, at 899 (observing that the "logical outgrowth" doctrine "forc[es] agencies to grapple with just how much change is allowed before a court will declare that the final rule is a material alteration and no longer a logical outgrowth of the proposal").

109 *See* Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L.J. 1321, 1367 (2010) (observing that courts' insistence that rules appear in "essentially final form at the proposed rule stage" has the effect of "inadvertently encourag[ing] agencies to work with affected parties in the shadows [before notice is issued] rather than in the sunlight as anticipated by the APA").

110 Auto. Parts & Accessories Ass'n v. Boyd, 407 F.2d 330, 338 (D.C. Cir. 1968).

incredibly long, impenetrable statements of basis and purpose that emerge from complex and controversial rulemakings. It is common to find concise general statements in the *Federal Register* that have "metastasize[d] into . . . book-length treatises."[111] Agencies' concise general statements are often hundreds of pages long and filled with technical arcana—impenetrable to all but insiders.[112]

These explanations are not, of course, designed for anyone actually to read in order to understand the basic approach and concerns of a rule. Rather, they are massive lines of defense that agencies construct to protect their rules from judicial challenges—often from well-heeled corporate interests. Of course, constructing these lines of defense is not easy—as Professor Pierce observes, "It takes the agency staff or its consultants a long time to draft the 200–1000-page statement of basis and purpose that a court may, or may not, consider an adequate response to the 10,000–1,000,000 pages of comments."[113] And like the Maginot Line, these explanations, despite their length, can fail as a line of defense.[114]

3. Bloated Comments

On a very closely related point, the expanded duty that courts have imposed on agencies to respond to material comments in their concise general statements gives outsiders an incentive to manipulate the process to make the agency's job even more difficult. Professor Wendy Wagner describes the resultant dynamic as fostering both information excess and filter failure.[115] Lawyers for regulated parties lard the rulemaking record with as much information as they can to create the potential for judicial remands based on an agency's failure to respond.[116] In response, rather than attempt

111 Jerry L. Mashaw, *Administration and "The Democracy": Administrative Law from Jackson to Lincoln, 1829–1861*, 117 YALE. L.J. 1568, 1656 (2008); *see also* Richard W. Parker, *The Empirical Roots of the "Regulatory Reform" Movement: A Critical Appraisal*, 58 ADMIN. L. REV. 359, 395 (2006) (describing common experience "wad[ing] through a preambular explanation and a final rule" only to encounter "five or six pages of rule, preceded by fifty or more Federal Register pages setting forth detailed agency explanations and/or responses to the most technical and arcane comments").

112 *See* Parker, *supra* note 111, at 397 (discussing the impenetrability of modern "concise general statement[s]"; noting that practical inaccessibility of information to the public contributes to a democracy deficit).

113 Richard J. Pierce, Jr., *Waiting for* Vermont Yankee *III, IV, and V? A Response to Beermann and Lawson*, 75 GEO. WASH. L. REV. 902, 920 (2007).

114 *See, e.g.*, Bus. Roundtable v. SEC, 647 F.3d 1144 (D.C. Cir. 2011). The Securities and Exchange Commission (SEC) reports that it spent 21,000 hours on the rule that the *Business Roundtable* decision refused to enforce because the statement of basis and purpose was inadequate, including responding to 600 comments, at a cost of $2.2 million. Rachel A. Benedict, Note, *Judicial Review of SEC Rules: Managing the Costs of Cost-Benefit Analysis*, 97 MINN. L. REV. 278, 278 (2012).

115 *See* Wagner, *supra* note 109, at 1364–65.

116 *See id.* at 1365 (quoting Nat. Res. Def. Council, Inc. v. SEC, 606 F.2d 1031, 1052 (D.C. Cir. 1979) (describing 10,000 page record as "a sump in which the parties have

to filter this information, agencies engage in "defensive overkill" in justifying and explaining their rules.[117]

This type of regulatory combat, or rulemaking as "blood sport," does not favor all comers equally.[118] The judicial transformation of rulemaking has created greater opportunities for outsiders to influence agency outcomes. Exercising this influence, however, takes resources—consultants' reports cost money. It therefore should come as little surprise that those with more resources have come to dominate participation in rulemaking.[119] Available empirical evidence demonstrates that corporate interests participate at a far greater rate than public interest groups in rulemaking procedures—both in terms of the number and volume of rulemaking comments and the number of meetings with regulatory agencies.[120] This imbalance in resources and attendant participation undermines the effectiveness of modern rulemaking insofar as it depends on a quasi-adversarial clash of information and views. After all, as Justice Marshall observed in another context, "mere access to the courthouse doors does not by itself assure a proper functioning of the adversary process."[121]

4. Ossification of Rulemaking

Academic critics have long claimed that the judicial transformation of rulemaking has made this procedure too slow, expensive, and cumbersome.[122] The courts have, to use administrative law's favored term, "ossified"

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deposited a sundry mass of materials that have neither passed through the filter of rules of evidence nor undergone the refining fire of adversarial presentation")); *see also* Pierce, *supra* note 40, at 9 (explaining that lawyers for regulated parties rapidly learned to take advantage of judicially imposed explanatory requirements, submitting "lengthy and detailed comments that criticized the rule, often accompanied by consultants' reports").

117 *See, e.g.*, R. Shep Melnick, *Administrative Law and Bureaucratic Reality*, 44 ADMIN. L. REV. 245, 247 (1992) ("Since agencies do not like losing big court cases, they reacted defensively [to the courts' requirements], accumulating more and more information, responding to all comments, and covering all their bets.").

118 McGarity, *supra* note 12, at 1745 (discussing "[i]nfluence [a]symmetries" in modern rulemaking).

119 *See generally* Sidney Shapiro & Richard Murphy, *Public Participation Without a Public: The Challenge for Administrative Policymaking*, 78 MO. L. REV. 489 (2013) (discussing the importance of resources in the rulemaking process).

120 *See* Sidney A. Shapiro, *The Complexity of Regulatory Capture: Diagnosis, Causality, and Remediation*, 17 ROGER WILLIAMS U. L. REV. 221, 237–38 (2012) (describing studies of industry dominance).

121 Ake v. Oklahoma, 470 U.S. 68, 77 (1985).

122 For a few examples from the literature, see JERRY L. MASHAW & DAVID L. HARFST, THE STRUGGLE FOR AUTO SAFETY 9–25 (1990) (discussing abandonment of rulemaking by the National Highway Traffic & Safety Administration); Frank B. Cross, *Pragmatic Pathologies of Judicial Review of Administrative Rulemaking*, 78 N.C. L. REV. 1013, 1020–27 (2000) (blaming judicial review for impeding rulemaking); McGarity, *supra* note 38, at 1387–436 (surveying evidence and causes of ossification); Richard J. Pierce, Jr., *Rulemaking Ossification Is Real: A Response to* Testing the Ossification Thesis, 80 GEO. WASH. L. REV. 1493 (2012) (contending that recent empirical work discounting the ossification thesis is misdirected);

notice-and-comment rulemaking. Given how the courts have massively expanded agencies' duties of notice and explanation, the ossification critique is perfectly intuitive.[123] It is also child's play to thumb through the *Federal Register* to find lengthy, impenetrable notices and concise general statements that support this critique.[124]

The ossification thesis has been subject to two basic types of pushback. One view stresses the benefits of hard look review, suggesting that they outweigh the costs of increased difficulty. Professor Mark Seidenfeld, for instance, has turned to psychological literature to support the claim that hard look review encourages more careful rulemaking by curbing "cognitive loafing" by agencies.[125] Professor Matthew Stephenson has argued that the very difficulty of hard look review makes it an effective signaling device that enables expert agencies to communicate the substantive quality of their decisions to non-expert courts—i.e., an agency's willingness to issue a rule that satisfies the demands of the hard look demonstrates the strength of its policy commitment.[126]

A second critique has been led by Professors Jason and Susan Yackee, who contend the empirical "evidence that ossification is either a serious or widespread problem is mixed and relatively weak."[127] Based on a study of thousands of rules promulgated by the Department of the Interior between 1950 and 1990, they concluded: (a) rules issued during the latter half of this period did not take significantly longer to promulgate than rules issued during the earlier half; and (b) the vast majority of rules were promulgated in less than two years.[128] Thanks to this type of research, a meme seems to have

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cf. Connor Raso, *Agency Avoidance of Rulemaking Procedures*, 67 ADMIN. L. REV. 65, 110 (2015) (discussing the difficulties of empirical analysis of ossification claims; concluding that "[t]he APA notice-and-comment process may contribute to ossification given that agency avoidance of that requirement is significantly lower, particularly for rules with greater litigation risk").

123 *See supra* subsections I.B.2, I.B.4, I.C.1–2 (discussing expanded notice and explanation requirements as well as their effects).

124 *See supra* note 111 (discussing examples of lengthy "concise general statements").

125 *See* Mark Seidenfeld, *Cognitive Loafing, Social Conformity, and Judicial Review of Agency Rulemaking*, 87 CORNELL L. REV. 486, 547 (2002) (explaining that hard look review discourages agency staff from "careless or improper reliance" on "habitual decision rules and other rules of thumb as [cognitive] shortcuts").

126 *See* Matthew C. Stephenson, *A Costly Signaling Theory of "Hard Look" Judicial Review*, 58 ADMIN. L. REV. 753, 755 (2006) (observing that a "court can reason that the expert government decisionmaker's willingness to produce a high-quality explanation signals that the government believes the benefits of the proposed policy are high").

127 Jason Webb Yackee & Susan Webb Yackee, *Testing the Ossification Thesis: An Empirical Examination of Federal Regulatory Volume and Speed, 1950–1990*, 80 GEO. WASH. L. REV. 1414, 1421 (2012).

128 *Id.* at 1456–58; *see also* Stephen M. Johnson, *Ossification's Demise? An Empirical Analysis of EPA Rulemaking from 2001–2005*, 38 ENVTL. L. 767, 770–71 (2008) (concluding that rules issued by EPA between 2001 and 2005 generally were finalized within one-and-one-half to two years; observing, however, that his study did not examine the amount of time spent preparing proposed rules for publication or the degree to which procedural require-

taken root in some quarters that administrative law scholars have greatly exaggerated the ossification problem.[129]

The debate over whether ossification exists is, on some level, a reflection of the fact that rulemaking by federal agencies is a vast and varied enterprise. As a practical matter, it is very difficult to study in a systematic way. Worsening this problem, a great deal of the real work of rulemaking, in part due to judicial requirements, occurs hidden from public view before the agency publishes an official notice of proposed rulemaking.[130] Empirical studies that measure the time it takes rules to proceed from published notice to finalization miss this pre-notice period entirely. The varied nature of rulemaking also lends itself to confusion over the precise topic of discussion. In this vein, Professor Pierce has fairly conceded that proponents of the ossification thesis should be more precise—it is not directed in general at all rules; rather, it focuses on complicated rules that implicate "high stakes controversies."[131] It is these major rules that attract outside interests keen to use all the tools at their disposal to block, slow, or bend regulation.

The ultimate resolution of the ossification debate—or even the meaning of its terms—is beyond the scope of this Article. For the present purposes, it is enough to make two observations that are beyond reasonable controversy: (a) promulgation of an important, high-stakes rule is a resource-intensive process that often takes many years of exhaustive work, and (b) agencies are commonly starved for resources and should not waste them on expensive rulemaking procedures that do not demonstrably improve either the substantive quality of rules or their perceived legitimacy.

5. Rational Rules at Risk

Given the complex, interconnected, uncertain, and dynamic impacts that important rules have across society, any agency explanation for an important rule, no matter how encyclopedic, is likely to be vulnerable to a charge that it misapprehended or did not discuss some material issues. The Supreme Court's inability or unwillingness to provide a more precise definition of what constitutes a satisfactory explanation magnifies this problem by

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ments encourage avoidance of notice and comment); Anne Joseph O'Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 VA. L. REV. 889, 932 (2008) (concluding, based on the actual number of rules agencies produce via notice and comment, that "[t]he administrative state, at least on a macro level, does not seem to be substantially ossified"; conceding, however, that such counts cannot resolve the ossification debate).

129 *See* Gersen & Vermeule, *supra* note 85, at 1369 (referring to agency ossification as one of the "mini-myths" associated with the "myth of rigorous *State Farm* review"; citing as evidence the Yackee, O'Connell, and Johnson studies referenced *supra* at notes 127–28).

130 *See* Pierce, *supra* note 122, at 1495; Raso, *supra* note 122, at 110; *see also supra* note 109 and accompanying text (discussing how judicial reforms have shoved real rulemaking into the shadows of the pre-notice period).

131 Pierce, *supra* note 122, at 1495.

inviting judges to vary their approaches to review of rules according to their own perceptions and inclinations.

This room for maneuver naturally leaves space for the courts' political attitudes to infect arbitrariness review in ideologically charged cases.[132] Decades ago, responding to concerns over "agency capture" by corporate forces, public interest groups helped lead the charge for the judicial transformation of rulemaking.[133] The ideological valence of hard look review, however, depends on the judge deploying it. Conservative judges, often acting in the name of comprehensive rationality to block over-regulation, can and do use the *State Farm*-style requirement of adequate reasons to curb agency regulation.[134] The polycentric nature of agency regulation, which requires agencies to address webs of intertwined issues, ensures that courts taking such actions, regardless of their ideological stripes, do so without appreciating the degree to which they are disrupting agency regulatory efforts.[135]

II. Proposals to Reform Hard Looks

Academics have been criticizing the judicial reformation of arbitrariness review for decades, and it is fair to say that their reactions have been mixed but largely negative. Some scholars, such as Professor Mark Seidenfeld, guardedly conclude that, for the most part, modern arbitrariness review strikes a good balance among the competing values that judicial review of rules should serve.[136] Extreme critics, such as Professor Frank Cross, have argued for abandoning judicial review of rules for arbitrariness altogether

132 *See* Shapiro & Murphy, *supra* note 13, at 323–31 (summarizing studies on ideological judicial review of agency action).

133 *See* Merrill, *supra* note 41, at 1065–66 (discussing the influence of capture theory at the D.C. Circuit).

134 *See* Rena Steinzor & Sidney Shapiro, The People's Agents and the Battle to Protect the American Public: Special Interests, Government, and Threats to Health, Safety, and the Environment 165 (2010) (discussing how judges since 1980 have used the adequate reasons requirement to retard, rather than promote, regulation); Cass R. Sunstein & Adrian Vermeule, *Libertarian Administrative Law*, 82 U. Chi. L. Rev. 393, 434–40, 446–52 (2015) (criticizing judges on the D.C. Circuit who "overreached" in applying their libertarian version of arbitrariness review to rules promulgated by the Securities and Exchange Commission).

135 *See* Cross, *supra* note 122, at 1029.

136 *See* Seidenfeld, *supra* note 125; Mark Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking*, 75 Tex. L. Rev. 483 (1997) (defending hard-look review but also suggesting operational changes to help "deossify" rulemaking) [hereinafter Seidenfeld, *Demystifying Deossification*]. For recent discussions of the benefits of the hard look, see Emily Hammond Meazell, *Super Deference, The Science Obsession, and Judicial Review as Translation of Agency Science*, 109 Mich. L. Rev. 733, 738, 778–84 (2011) (contending that this approach enables generalist judges to serve as translators of science for "Congress, the public, the media, and interest groups"); Katherine A. Trisolini, *Decisions, Disasters, and Deference: Rethinking Agency Expertise After Fukushima*, 33 Yale L. & Pol'y Rev. 323, 327 (2015) (contending that aggressive judicial review of decisions by the Nuclear Regulatory Commission is needed to protect against a large-scale catastrophe).

both because it requires courts to make political decisions and because it is a primary cause of ossification.[137] Professor Richard Pierce, another leading skeptic, has argued that this type of review should be shifted to the Office of Information and Regulatory Affairs in the executive branch, which is better suited than the courts for this function both in terms of political accountability and expertise.[138]

Most prescriptions for reform of the reformation, however, have been less structurally ambitious. Many scholars, including the authors of this Article, have focused on reducing the intensity of the "hard looks" with which courts purportedly examine agency rationales. After briefly surveying many of these modulation proposals, this Part will examine reasons for their lack of actual or potential success. Encouraging courts to strike the right attitude or "mood" when they review agency action is an entirely appropriate thing for law professors and other interested observers to do, and it might, if successful, do some good.[139] Greater benefits, however, can be obtained by reforming the structure of modern arbitrariness review, and Part III will discuss and defend a proposal for doing so.

A. Modulating the Hard Look

1. Soften the Look

One broad group of proposals seeks to improve judicial review for arbitrariness by weakening its intensity across the board. For instance, a judge reviewing a rule might act like a "'pass-fail prof' who must determine whether a research paper . . . meets the minimum standards for passable work" on a subject with which the professor is only vaguely familiar.[140] The agency (student) would receive an "F" and be ordered to try again only if there were "an inexcusable gap in the analysis, an obvious misquote, or evidence of intellectual dishonesty."[141]

Other scholars have expressed concern that some form of heightened scrutiny, though not as strict as hard look review, may be necessary to ensure the rationality of agency decisions.[142] Along these lines, courts might treat

137 *See* Frank B. Cross, *Shattering the Fragile Case for Judicial Review of Rulemaking*, 85 VA. L. REV. 1243, 1333–34 (1999); *see also* Richard J. Pierce, Jr., *Rulemaking and the Administrative Procedure Act*, 32 TULSA L.J. 185, 200 (1996) (recommending statutory reform to eliminate judicial review for arbitrariness).

138 *See* Pierce, *supra* note 40, at 13–16 (discussing OIRA's institutional advantages over courts for conducting review of reasoned decisionmaking); *see also supra* subsection I.B.7 (discussing OIRA's role in centralized White House review of agency rulemaking).

139 *Cf.* Universal Camera Corp. v. NLRB, 340 U.S. 474, 487 (1951) (explaining that Congress in the APA legislated a "mood" regarding how courts should review agency action and that this "mood must be respected").

140 McGarity, *supra* note 38, at 1453.

141 *Id.*

142 *See, e.g.*, 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, 425–40 (contending "hard look" review should be understood as a separation of pow-

arbitrariness review as equivalent to the "rational basis with a bite" standard that they use to determine the constitutionality of certain types of legislation, such as content-neutral restrictions on speech.[143]

An alternative approach seeks to improve modern arbitrariness review by returning to its pure source, the work of Judge Harold Leventhal.[144] Recall that Judge Leventhal originally characterized the court's proper function as checking whether the *agency* had taken a "hard look" at the pertinent regulatory issues.[145] As the hard look doctrine evolved, it quickly became associated with the idea that *courts* should take "hard looks" at agency explanations.[146] According to proponents, returning to the original Leventhal formulation would help relax the scrutiny that cloistered, generalist judges inappropriately apply when they direct their "hard looks" at rules produced after years of collective effort by expert agencies.[147] Arbitrariness review might shift away from reviewing the substance of agency judgments and toward ensuring that agencies follow a "rigorous, analytical, staged decision-making process."[148]

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ers principle that preserves rule of law values reflected in the Constitution); Sidney A. Shapiro, *Substantive Reform, Judicial Review, and Agency Resources: OSHA as a Case Study*, 49 ADMIN. L. REV. 645, 654–55 (1997) (contending that judicial review stricter than minimal rationality is necessary to promote agency fidelity to statutory mandates).

143 Scott A. Keller, *Depoliticizing Judicial Review of Agency Rulemaking*, 84 WASH. L. REV. 419, 425, 460 (2009); *see also* Heath A. Brooks, American Trucking Associations v. EPA*: The D.C. Circuit's Missed Opportunity to Unambiguously Discard the Hard Look Doctrine*, 27 HARV. ENVTL. L. REV. 259, 273 (2003) (arguing for an intermediate level of review under which courts would affirm agency decisions "supported by at least a modicum of evidence or indirectly buttressed by rational inferences from the best available evidence, so long as opponents offer no affirmative evidence that clearly refutes the agency's support").

144 *See* Sidney A. Shapiro, *The Failure to Understand Expertise in Administrative Law: The Problem and the Consequences*, 50 WAKE FOREST L. REV. 1097, 1102 (2015) (proposing that courts return to the original approach to "hard look" review that Judge Leventhal proposed over forty years ago).

145 *See* Greater Bos. Television Corp. v. FCC, 444 F.2d 841, 851 (D.C. Cir. 1970) (explaining that a rule is arbitrary where an "agency has not really taken a 'hard look' at the salient problems, and has not genuinely engaged in reasoned decision-making" (footnote omitted)).

146 *See* Nat'l Lime Ass'n v. EPA, 627 F.2d 416, 451–52 n.126 (D.C. Cir. 1980) (Wald, J.) (discussing reallocation of the task of taking hard looks from agencies to courts).

147 *See* Shapiro, *supra* note 144, at 1144–46; *see also* Charles H. Koch, Jr., *Judicial Review of Administrative Policymaking*, 44 WM. & MARY L. REV. 375, 394 (2002) (contending that the Leventhal formulation of hard look review "serve[ed] as an instructive expression for the special judicial restraint in analyzing administrative policy decisions").

148 Elizabeth Fisher, Pasky Pascual & Wendy Wagner, *Rethinking Judicial Review of Expert Agencies*, 93 TEX. L. REV. 1681, 1717 (2015) (describing how this dynamic already exists in connection with judicial review of certain EPA rules). Associating Judge Leventhal's work with a more process-oriented texture for arbitrariness review carries a certain amount of irony. In the famous debate during the 1970s between him and Judge Bazelon over the correct role of arbitrariness review, Judge Leventhal insisted that courts should conduct properly limited review of the substance of agency decisions, even if they are highly technical. *See* Ethyl Corp. v. EPA, 541 F.2d 1, 69 (D.C. Cir. 1976) (en banc) (Leventhal, J., con-

2. Clarify the Look

Another type of proposal seeks not so much to soften the hard look as to clarify its demands. The underlying theory is that the more ambiguous the language describing the scope of review, the more freedom a judge has to follow her ideology in applying it.[149] To reduce this space for ideological maneuver, Professors Shapiro and Levy proposed that Congress limit arbitrariness review to application of the four criteria that the Court listed in its canonical *State Farm* decision.[150] Thus, a rule would be arbitrary only

> 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.[151]

3. Adjust the Look to Fit Context

A third group of proposals seeks to improve arbitrariness review by varying its scrutiny according to context. Some would treat greater political accountability as a substitute for aggressive judicial review. For example, before she joined the Supreme Court, Justice Kagan suggested that judges might apply more deferential review where the president has taken a public and active role in shaping a rule, thus accepting responsibility for it.[152] Others look more directly to the public for additional accountability and legitimacy. Rules produced after robust participation by varied interests could be treated as presumptively valid, whereas rules produced after proceedings dominated by narrow economic or political interests could be subject to stricter review.[153] Judges might reward agencies with relaxed review

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curring). Judge Bazelon, by contrast, contended that generalist judges should focus on whether an agency has followed sound decisionmaking processes when reviewing matters involving "great technological complexity." *Id.* at 66 (Bazelon, C.J., concurring) (quoting Int'l Harvester Co. v. Ruckelshaus, 478 F.2d 615, 652 (D.C. Cir. 1973) (Bazelon, C.J., concurring)).

149 *See* Sidney A. Shapiro & Richard E. Levy, *Judicial Incentives and Indeterminacy in Substantive Review of Administrative Decisions*, 44 DUKE L.J. 1051, 1052 (1995) (arguing that indeterminacy in the scope of review encourages aggressive, ideologically-tinged judicial review).

150 *Id.* at 1074. *But see* Thomas O. McGarity, *On Making Judges Do the Right Thing*, 44 DUKE L.J. 1104, 1108–09 (1995) (contending codification of the *State Farm* factors would not actually narrow effective judicial discretion).

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

152 Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2380 (2001).

153 *See* Wagner, *supra* note 109, at 1407–08 (proposing application of "[s]oft [g]lance" review where a "diverse and balanced group of affected parties" participated in a rulemaking; application of "clear error" review to challenges brought by parties that dominated rulemaking proceedings, and application of "hard look" review where the challenger "was unable to engage in the rulemaking process because it lacked sufficient resources or specialized knowledge, but its members took a great interest in the consequences of the rule"

where they take creative steps to ensure public representation, such as employing administrative juries—large panels of randomly selected citizens—to inform policy decisions.[154]

Other scholars have proposed allowing an agency to earn greater deference by committing to ongoing review of a rule's efficacy. On this approach, "minimum rational basis review" would apply where an agency establishes that its rule will cause no irreparable injury and the agency promises to gather additional information concerning the rule's effects for continuing reappraisal.[155]

Yet another approach involves looking for danger signals that an issue is important enough to merit a hard look. Courts might reserve aggressive review for issues that seem especially significant because: (a) an outsider has invested substantial resources in raising the issue through the comment process; (b) the agency's own explanation for the rule indicates that the issue is important; or (c) the issue directly implicates "relevant factors" that Congress has emphasized in the agency's enabling act.[156] Such an approach would enable agencies to allocate their limited resources during rulemaking with a clearer sense of which issues a reviewing court might regard as significant during judicial review.

B. The Limited Prospects of Modulation Strategies

We are broadly sympathetic with the proposals sketched above to modulate the intensity of arbitrariness review of agency rules—indeed, had we sufficient magical powers, there are several that we would require the courts to adopt.[157] Courts themselves, however, have shown no inclination to do so of their own accord, and, even if they did, these modulation proposals ultimately have limited potential for altering the operation of rulemaking and its judicial review.

Judges may find these modulation proposals unattractive for a variety of reasons. One threshold problem is that, in theory, the current regime already calls for a type of rationality review. Lowering this standard in some

(alteration in original)); *see also* David Fontana, *Reforming the Administrative Procedure Act: Democracy Index Rulemaking*, 74 FORDHAM L. REV. 81, 82 (2005) (suggesting that judges could increase deference where submission of a large number of relevant comments shows greater public involvement); Jon D. Michaels, *Of Constitutional Custodians and Regulatory Rivals: An Account of the Old and New Separation of Powers*, 91 N.Y.U. L. REV. 227, 275 (2016) (deemphasizing merits-based review where a rulemaking actively involves administrators, civil servants, and interest groups).

154 *See* David J. Arkush, *Direct Republicanism in the Administrative Process*, 81 GEO. WASH. L. REV. 1458, 1462–63 (2013).

155 *See* McGarity, *supra* note 38, at 1459–60; *see also* Daniel A. Farber, *Environmental Protection as a Learning Experience*, 27 LOY. L.A. L. REV. 791, 806 (1994) (proposing that courts reduce the intensity of review where an agency commits to monitoring the implementation of a rule and to making appropriate modifications).

156 Seidenfeld, *Demystifying Deossification*, *supra* note 136, at 516–19.

157 *See, e.g.*, Shapiro, *supra* note 144, at 1102 (proposing a return to Judge Leventhal's original formulation for "hard looks").

or all contexts could therefore be construed as requiring judges to uphold agency actions that they otherwise would conclude are irrational. In a related context, Justice Scalia, while a circuit court judge, observed that arbitrariness review could not call for less scrutiny than rationality review under the substantial evidence test because, if this were so, arbitrariness review would require judges to uphold irrational agency actions.[158] Another problem of many of these modulation proposals is that they would further complicate a review system that, on its face, already seems far too complex.[159] In addition, there is the *realpolitik* point that weakening judicial review, were it to work, would take power away from judges—a result that they might find unappealing regardless of ideology.

A deeper problem is that scholarship has made it increasingly clear that the vague phrases the courts use to specify varying standards of review have less effect than one might expect on how judges actually decide cases. The suspicion that this may be so is longstanding. Forty years ago, Professors Gellhorn and Robinson acerbically observed that "the rules governing judicial review have no more substance at the core than a seedless grape."[160] They characterized debates over the meanings of these rules as "a testament to lawyers' awe of words."[161] Decades on, empirical studies, although they do not prove anything so strong as the "seedless grape" thesis, certainly suggest that judges do not implement fine-grained distinctions among various intensities of rationality review in a way that measurably affects outcomes. Summarizing and adding to this empirical work, Professor David Zaring has observed that, regardless of which ostensible standard of review courts apply, they affirm agencies about two-thirds of the time.[162] To be sure, one might argue that this consistent affirmance rate reflects selection effects—i.e., an agency might take a more aggressive stance in litigation where it has the benefit of a lax standard of review, and vice versa. Still, as the empirical studies pile up, this "abstract possibility ceases to impress."[163]

We do not mean to concede that the doctrinal words that courts use to limit judicial review are meaningless; nor do we mean to suggest that efforts to change judicial behavior by changing these words are pointless. As the Supreme Court recognized long ago in *Universal Camera*, standards of review are to a degree a matter of "mood," and moods can matter—and not just because they might affect outcomes.[164] Moreover, it is intuitively plausible

158 *See* Ass'n of Data Processing Serv. Orgs., Inc. v. Bd. of Governors of Fed. Reserve Sys., 745 F.2d 677, 683–84 (D.C. Cir. 1984) (Scalia, J.).

159 For a critique of these complexities and a proposal for simplification, see generally David Zaring, *Reasonable Agencies*, 96 VA. L. REV. 135 (2010) (contending that various standards of review obscure the relatively simple, underlying reality that courts generally review agency actions for reasonableness).

160 Ernest Gellhorn & Glen O. Robinson, *Perspectives on Administrative Law*, 75 COLUM. L. REV. 771, 780 (1975).

161 *Id.*

162 Zaring, *supra* note 159, at 186–87 (canvassing empirical studies of affirmance rates).

163 Gersen & Vermeule, *supra* note 85, at 1368.

164 Universal Camera Corp. v. NLRB, 340 U.S. 474, 487 (1951).

that courts' description of their task as "hard look review" encouraged a mood shift toward greater scrutiny of agency action. Still, the accumulating empirical evidence suggests that those seeking to reform modern arbitrariness review of rulemaking should examine targets other than its purported intensity.

Along these lines, note that, in addition to purporting to modify its intensity, the judicial transformation of arbitrariness review also *restructured* this process in ways that made it far easier for plaintiffs to challenge the rationality of agency rules while simultaneously making it more difficult for agencies to answer these challenges. Before the transformation, agencies were under very little obligation during rulemaking to share information that might be used to assess the rationality of their rules.[165] As their rules were not subject to pre-enforcement review, agencies could shift the terms of judicial review in their favor by choosing their enforcement targets wisely.[166] Moreover, agencies were free to rely on post hoc rationales developed during judicial review.[167] Post-transformation, all of these dynamics flipped. By design, the duty that courts imposed on agencies to share information during rulemaking gave plaintiffs far greater practical capacity to challenge the rationality of rules.[168] The availability of pre-enforcement review enhanced incentives to bring such challenges.[169] Agencies' ability to respond, by contrast, was constricted by expanded duties of explanation coupled with reduced agency budgets.[170] We now turn to a proposal for altering this structure in a way that retains its core benefits while reducing its burdens.

III. Restructuring Arbitrariness Review with Post Hoc Rationales

Plainly, the meaning of "arbitrariness" in the context of judicial review is ambiguous. This ambiguity implies that courts have the policymaking task of structuring arbitrariness review to best serve the legitimate goals associated with this practice. There are many possible ways to balance these goals, and

165 *See supra* subsection I.B.2 (contrasting the scant notice requirements imposed by the APA itself on notice-and-comment rulemaking with the very thorough requirements imposed by the courts via the transformation).

166 *See* Pierce, *supra* note 40, at 7 (observing that agencies generally aimed their enforcement actions at targets that had engaged in conduct that was "particularly egregious and obviously harmful" and that "the record in such proceedings frequently included evidence that the rule was necessary to prevent serious harm").

167 *See supra* notes 33–35 and accompanying text (discussing arbitrariness review under *Pacific States Box & Basket Co. v. White*, 296 U.S. 176, 179 (1935)).

168 *See supra* subsection I.B.2 (discussing expansion of notice requirements as means of transforming rulemaking into a quasi-adversarial process to aid courts in assessing the rationality of rules).

169 *See* Pierce, *supra* note 40, at 7 (discussing how presumptive availability of pre-enforcement review enhanced incentives for regulated parties to challenge agency rules).

170 *See supra* subsections I.C.2–3 (discussing the burdens on agency rulemaking created by the expanded duty of contemporaneous explanation); *see also* Shapiro, *supra* note 144, at 1150–52 (noting that agency budget constraints amplify the ossification difficulties created by hard look review).

judgments will naturally differ regarding which balance is best. One familiar balance maximizes the goal of efficient rulemaking by adopting the minimalist approach of *Pacific States Box* in place at the time of the APA's adoption.[171] American administrative law will not be returning all the way to this policy balance anytime soon—and it probably should not. In 1935, when that case was decided, legislative rulemaking, though important, had not yet become one of the central defining features of American governance. It may bear noting that the rule at issue in *Pacific States Box* itself regulated crate sizes for berries.[172] It is hardly surprising that courts would find this lax model inadequate for review of the EPA's national ambient air quality standards, NHTSA's regulations of auto safety, or OSHA's workplace safety rules.

Modern arbitrariness review, by comparison, strikes a balance that gives greater emphasis to promoting values including agency thoroughness, accuracy, fairness, and accountability. As we have seen, courts accomplished this shift by moving rulemaking toward an adversarial model. One basic change required agencies to expose all the technical and scientific information on which they rely to outside scrutiny during the rulemaking process.[173] A second basic change required agencies, on promulgating a legislative rule, to publish simultaneously a contemporaneous explanation of the rule's basis and purpose sufficient to respond to all material objections submitted during the notice-and-comment process.[174]

We now propose an alternative balance that would preserve the ability that challengers enjoy under modern arbitrariness review to contest rules but at the same time make the task of agency response somewhat easier. Specifically, courts should allow agencies to defend the rationality of their rules based on post hoc rationales first raised during judicial review so long as the underlying information supporting these arguments was disclosed to outside scrutiny during the rulemaking process. Under this approach, challengers would continue to have the information they need to intelligently participate in the rulemaking process as well as to provide an informed, adversarial point of view to courts during judicial review. At the same time, the added flexibility that the proposal concedes to agencies would reduce the excessive costs of manufacturing exhaustive explanations for rules, reduce the incentives of regulated parties to bloat their comments, and reduce the risk that courts will vacate rules that, as a substantive matter, actually advance agency statutory missions.

The biggest roadblock to adoption of this reform is likely a perception that abandonment of the *Chenery* contemporaneous rationale principle in this context is simply out of bounds. The next two Sections show that this move is not so heretical as it might at first sound—*Chenery* is a poor and almost accidental fit with rulemaking, and courts give in to an impulse to

171 *See supra* notes 33–35 and accompanying text (discussing arbitrariness review under *Pacific States Box*, 296 U.S. at 179).

172 296 U.S. at 179.

173 *See supra* subsection I.B.2 (discussing expanded notice requirements).

174 *See supra* subsections I.B.4–5 (discussing expanded agency duties of explanation).

avoid applying it with some frequency. The third Section explains how adoption of this proposal to allow agencies to rely on post hoc rationales could improve both the rulemaking process and its judicial review. The fourth and last Section responds to some objections that might be leveled against this proposal.

A. Chenery*'s Poor Fit with Notice-and-Comment Rulemaking*

The most obvious reason to question the necessity of applying the contemporaneous rationale principle to arbitrariness review of notice-and-comment rulemaking is its historical pedigree. At the time of the APA's adoption in 1946, courts applied arbitrariness review according to the terms of *Pacific States Box*, which allowed reliance on post hoc rationales.[175] Courts continued this practice well into the 1960s.[176]

The extension of *Chenery* to notice-and-comment rulemaking during the 1970s had an almost accidental quality to it. In the 1971 *Overton Park* decision, the Supreme Court applied the *Chenery* doctrine to an informal adjudication, holding that the validity of such decisions hinges on their contemporaneous rationales.[177] At about the same time, lower courts were encountering the problem of making sense of complex, overwhelming rulemaking "records" generated by their transformation of the notice-and-comment process. Under these circumstances, it was convenient for the courts to extend *Overton Park*'s extension of *Chenery* still further to cover legislative rules produced via notice and comment and also to require that the contemporaneous rationales of such rules appear in the "concise general statements" that agencies must publish when promulgating them.[178] Agencies, not courts, paid the price for this judicial convenience, most obviously in the form of a grossly expanded duty of explanation that contradicts the APA's command that explanations for such rules be "concise" and "general."[179] Courts, perhaps not surprisingly, seem to have given little systematic thought to how they might adjust this new review regime to reduce the costs that they externalized onto agencies.

Another obvious reason to question the migration of the contemporaneous rationale principle to notice-and-comment rulemaking relates to the sheer difficulty of its demands for rules of even modest complexity. Judging actions based on a contemporaneous explanation of a contemporaneous rationale reflects a reasonable and intuitive expectation for relatively simple

175 *See supra* notes 33–35 and accompanying text (describing *Pacific States Box*-style review and documenting its persistence).

176 *See supra* note 35 (documenting the persistence of *Pacific States Box*).

177 Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971) (discussed in the text accompanying note 73).

178 *See supra* subsection I.B.5 (discussing the extension of *Chenery* to informal rulemaking).

179 *See supra* subsection I.B.4 (discussing the transformation of concise general statements into ventilators); subsection I.C.2 (discussing the consequence of bloated concise general statements).

adjudications that determine legal rights based on findings of particularized, "adjudicative facts," i.e., facts regarding who did what to whom, where, when, how, and why.[180] We do not want immigration judges, for instance, determining whether persons may stay in the United States by rolling dice—even if the dice sometimes happen to hit "correct" answers that can be justified after the fact.

Agency rulemaking has quite a different character. As Ken Davis, an architect of the APA, pointed out several years before that statute's adoption, rulemaking primarily involves "legislative" facts, which are broadly applicable propositions that underlie policy determinations.[181] Examples include, among infinite possibilities, the effects on global climate of doubling carbon dioxide levels and determining the health effects of inhaling particulate matter. Legislative facts are often extraordinarily complex, involving cutting-edge issues of science and substantial uncertainty. Compounding uncertainty, many legislative facts implicate predictions of dynamic and "polycentric" effects that implementation of a rule could have across society.[182] Thus, generally speaking, it is far harder for an agency to develop and publish an exhaustive "contemporaneous rationale" for a complex rule than for a run-of-the-mill adjudication.[183]

As a result, the business of applying the contemporaneous rationale principle to complex rulemakings has a highly artificial air. Again, no single person on the planet, certainly not an agency head, will have read, much less entirely absorbed and accepted, a "concise general statement of . . . basis and purpose"[184] that marches across scores or even hundreds of pages in the *Federal Register*.[185] What the agency "thinks" about its rule is a legal construct—just an "official story" written by agency staffers and contractors to satisfy

180 *See* Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 402 (1942).

181 *See id.* at 402–03.

182 *See* Paul R. Verkuil, *Jawboning Administrative Agencies: Ex Parte Contacts by the White House*, 80 COLUM. L. REV. 943, 974 (1980) (observing that the record expectations of *Overton Park* are more suited to informal adjudications than to the "polycentric policy questions found in rulemaking").

183 This dichotomy between complex rulemakings and relatively straightforward adjudications is not, of course, absolute. Complex adjudications, too, can put great pressure on the contemporaneous rationale principle. Along these lines, it bears noting that, just a year after issuing its first *Chenery* decision, the Supreme Court, without perhaps recognizing it had done so, carved out a seldom-recognized exception for cost-of-service ratemakings, which are notoriously complex. *See* Duquesne Light Co. v. Barasch, 488 U.S. 299, 317 (1989) (Scalia, J., concurring) (declaring that judicial review of ratemaking should look to the "consequences a governmental authority produces rather than the techniques it employs"); Fed. Power Comm'n v. Hope Nat. Gas Co., 320 U.S. 591, 602 (1944) (holding that, for cost-of-service ratemaking, "it is the result reached not the method employed which is controlling").

184 5 U.S.C. § 553(c) (2012).

185 *See supra* notes 113–14 and accompanying text (explaining that interminable "concise general statements" are means of protecting rules during judicial review rather than means for explaining them).

bureaucratic and legal demands. This point by itself does not, of course, show that it is a bad idea to require agencies to publish exhaustive contemporaneous explanations that purport to detail their contemporaneous rationales. It highlights, however, that application of this approach should depend on its consequences rather than a tacit acceptance that it constitutes some "natural" way of reviewing what an agency "thought."[186]

B. Dodging the Bar on Post Hoc Rationales Via Remand Without Vacation

Rigid application of the contemporaneous rationale principle to rulemaking can create a perverse environment in which a court must reject a rule as arbitrary even though there is an argument available that demonstrates that the rule reasonably implements the agency's statutory mission. Judges have not been entirely blind to this problem. Along these lines, writing in 1997, after decades of experience conducting modern arbitrariness review, Judge Patricia Wald of the D.C. Circuit suggested relaxing "the 'post hoc rationalization' ban prohibiting government counsel from proffering any additional explanation for the agency action . . . even though the explanation may be a winner and everyone knows that the agency would be happy to accept it."[187]

Courts have not seen fit, on a doctrinal level, to alter the bar on post hoc rationales along the lines of Judge Wald's suggestion. Judicial conduct, if not doctrine, however, has long reflected her desire to avoid vacating reasonable rules based on curable explanatory defects. Since 1972, the courts, in particular the D.C. Circuit, have sometimes deployed the remedy of remand without vacation to avoid such outcomes even though this practice is best understood as allowing violations of the bar on post hoc rationales.[188]

Remarkably, the first judge to deploy remand without vacation in this way was none other than the father of the "hard look" himself, Judge Leventhal. By 1972, the judicial transformation of notice-and-comment rulemaking was in full swing, radically increasing the burden on agencies to explain the bases for their rules. Taking advantage of this shift, Kennecott Copper Corporation challenged the EPA's adoption under the Clean Air Act of national secondary ambient air quality standards limiting emissions of sulfur oxides.[189] The company contended, among other charges, that the air

186 The view that *Chenery*'s contemporaneous rationale principle is a creature of judicially-constructed common law that should be judged based on its pragmatic consequences is not universally shared. For an argument that this aspect of *Chenery* has deeper, constitutional roots, see Kevin M. Stack, *The Constitutional Foundations of* Chenery, 116 YALE L.J. 952, 992–98 (2007) (arguing that the *Chenery* contemporaneous rationale rule should be regarded as an element of the nondelegation doctrine). *But see* Richard Murphy, Chenery *Unmasked: Reasonable Limits on the Duty to Give Reasons*, 80 U. CIN. L. REV. 817, 852–57 (2012) (critiquing Professor Stack's argument that *Chenery*'s contemporaneous rationale rule should be regarded as an element of the nondelegation doctrine).

187 Wald, *supra* note 16, at 666 (footnote omitted).

188 *See infra* note 197 and accompanying text.

189 Kennecott Copper Corp. v. EPA, 462 F.2d 846 (D.C. Cir. 1972) (Leventhal, J.).

quality standards "were not adequately supported" in the agency statement of basis and purpose.[190] The court, in an opinion authored by Judge Leventhal, agreed that the EPA had failed to explain its grounds for the precise air quality standards that it had chosen.[191] The court did not, however, vacate the rule as arbitrary. Instead, "[i]n the interest of justice," the court merely remanded to the agency to allow it to provide the required explanation.[192] Thus, the same judge who helped lead the charge on expanding agencies' duties of explanation also installed a type of pressure valve in the system, allowing a measure of flexibility regarding the timing of agency explanations.

Since 1972, this remedy of remand without vacation has had its ups and downs. Initially, its use remained rare. A detailed study recently prepared for the Administrative Conference of the United States (ACUS) could identify only four instances in the 1970s and four more in the 1980s in which the D.C. Circuit deployed it.[193] The need to rely on this remedy became stronger, however, after the Supreme Court effectively barred agencies from issuing retroactive legislative rules in 1988 in *Bowen v. Georgetown University Hospital*,[194] which increased the regulatory havoc that vacation of rules could create. As a result, use of remand without vacation increased in the early 1990s.[195]

In 1993, the D.C. Circuit announced the leading framework for determining whether to order remand without vacation of an "inadequately supported rule."[196] The reviewing court should consider both: (a) "the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly)," as well as (b) "the disruptive consequences of

190 *Id.* at 847.

191 *Id.* at 849–50 (citing Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 416, 420 (1971); SEC v. Chenery Corp., 318 U.S. 80, 94 (1943)).

192 *Id.* at 851 n.21 (stating that standards would "remain in effect pending amplification of basis on remand and further review by this court").

193 STEPHANIE J. TATHAM, THE UNUSUAL REMEDY OF REMAND WITHOUT VACATUR 2 n.15, 58 app. (2014) (citing Nat'l Treasure Emps. Union v. Horner, 854 F.2d 490 (D.C. Cir. 1988); Nat'l Coal. Against the Misuse of Pesticides, 809 F.2d 875 (D.C. Cir. 1987); Maryland People's Counsel v. FERC, 761 F.2d 780 (D.C. Cir. 1985); American Fed'n of Gov't Emps., AFL-CIO v. Block, 655 F.2d 1153 (D.C. Cir. 1981); Greyhound Corp. v. ICC, 551 F.2d 414 (D.C. Cir. 1977); Concerned About Trident v. Rumsfeld, 555 F.2d 817 (D.C. Cir. 1977); Rodway v. USDA, 514 F.2d 809 (D.C. Cir. 1975); *Kennecott*, 462 F.2d at 846)).

194 488 U.S. 204 (1988). Strictly speaking, *Georgetown* merely requires a clear statement of authorization from Congress for retroactive legislative rulemaking. In practice, the effect of this clear statement rule has been to bar such retroactivity. *See* William V. Luneburg, *Retroactivity and Administrative Rulemaking*, 1991 DUKE L.J. 106, 110 ("*Bowen*'s practical impact . . . may indeed be great as agencies choose to avoid the risk of invalidation of their actions by refusing to act or by opting for the adjudicatory process for policymaking.").

195 TATHAM, *supra* note 193, at 5; *see* Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 75–78 (1995) (connecting the rise in use of remand without vacation to *Georgetown*'s limitation on retroactive rulemaking).

196 Allied-Signal, Inc. v. NRC, 988 F.2d 146, 150 (D.C. Cir. 1993).

an interim change that may itself be changed."[197] The first of these prongs leaves space for a court to avoid vacating a rule that the hard look would regard as "arbitrary" due to some explanatory mistake or gap. The second prong, logically enough, instructs courts to consider the policy implications of vacation in deciding whether to order it. A year later, in 1994, Judge Wald described remand without vacation as her court's "general practice" where an agency has failed to supply adequate reasons in support of its action.[198] A number of scholars, notably including Professor Pierce, welcomed this remedy for its potential to ameliorate the problem of ossification of rulemaking.[199]

Notwithstanding Judge Wald's enthusiastic characterization, remand without vacation did not remain the court's "general practice"—if, indeed, it ever was. Writing about a decade later in 2003, Professor Ronald Levin observed that the D.C. Circuit "used the device fairly selectively, probably in part because of the questions that have been raised about its propriety."[200] Eleven years later, Stephanie Tatham, writing in a report for ACUS, confirmed Levin's assessment, documenting that the D.C. Circuit uses this remedy "only a few times a year" and that other circuits do so very infrequently.[201]

Concerns over the legality of remand without vacation found their leading expressions in opinions by two judges of the D.C. Circuit, Judges Randolph and Sentelle. Both of these judges have emphasized that the plain text of section 706(2) of the APA instructs courts to "set aside" agency actions that they determine are "arbitrary, capricious, or otherwise unlawful."[202] Accordingly, once a court determines an action is "arbitrary," it must ultimately order vacation. Most D.C. Circuit judges, however, employ this remedy with little apparent concern for this legal objection.[203] Still, its relatively rare use

197 *Id.* at 150–51 (internal quotation marks omitted) (quoting Int'l Union, United Mine Workers of Am. v. Fed. Mine Safety and Health Admin., 920 F.2d 967 (D.C. Cir. 1990)).

198 Patricia M. Wald, *Regulation at Risk: Are Courts Part of the Solution or Most of the Problem?*, 67 S. CAL. L. REV. 621, 638 n.72 (1994).

199 Pierce, *supra* note 195.

200 Levin, *supra* note 19, at 295 n.11.

201 TATHAM, *supra* note 193, at 29.

202 Comcast Corp. v. FCC, 579 F.3d 1, 10–12 (D.C. Cir. 2009) (Randolph, J., concurring) ("I continue to believe that whenever a reviewing court finds an administrative rule or order unlawful, the Administrative Procedure Act requires the court to vacate the agency's action."); Honeywell Int'l Inc. v. EPA, 374 F.3d 1363, 1373–74 (D.C. Cir. 2004) (Sentelle, J., writing for the panel) (holding that the judicial review provision of the Clean Air Act, 42 U.S.C. § 7607(d)(9) (2012), bars remand without vacation of illegal rules), *withdrawn in relevant part by* 393 F.3d 1315 (D.C. Cir. 2005); Milk Train, Inc. v. Veneman, 310 F.3d 747, 757 (D.C. Cir. 2002) (Sentelle, J., dissenting) (insisting that, once a court has determined that an agency's explanation for its action is inadequate, the APA requires vacation); Checkosky v. SEC, 23 F.3d 452, 490–91 (D.C. Cir. 1994) (Randolph, J.); *see also In re* Core Commc'ns, Inc., 531 F.3d 849, 862 (D.C. Cir. 2008) (Griffith, J., concurring) (questioning "the wisdom of the open-ended remand without vacatur").

203 TATHAM, *supra* note 193, at 7.

may, as Professor Levin has suggested, reflect lingering doubts over whether courts should leave rules that are, by hypothesis, "illegal" in effect for indefinite periods as agencies address their flaws.[204]

Continued deployment of remand without vacation, notwithstanding legal objections, is certainly attributable to the compelling policy reasons supporting its use. Vacation due to a readily curable defect is unreasonable where it would cause severe disruption to a regulatory program. It is also attributable to Professor Levin's thorough analysis in *"Vacation" at Sea: Judicial Remedies and Equitable Discretion in Administrative Law*.[205] That article documents a long history of courts invoking equitable remedial discretion to justify leaving government actions in force even after a court has determined that they are legally defective.[206] In Levin's view, the section 706(2) command that courts "set aside" "arbitrary" actions does not overcome a "longstanding judicial presumption that militates against a finding that Congress has placed curbs on the courts' remedial discretion."[207] The upshot of this analysis is that a court has legal authority under the APA (or similarly worded statutes) to determine that an agency rule is "arbitrary" but to nevertheless leave it in place while an agency works to cure its defects. Given the importance of remand without vacation, Professor Levin's development of a rationale for upholding this practice that a willing judicial mind might follow is a significant and highly praiseworthy accomplishment of legal scholarship. Following his lead, ACUS has recently adopted an official recommendation that "[r]emand without vacatur should continue to be recognized as within the court's equitable remedial authority."[208]

We nonetheless submit that there is a more illuminating way to think about the courts' use of remand without vacation that avoids the problematic premise that this remedy upholds agency actions that have been found to be "arbitrary." Functionally speaking, this remedy allows a rule to remain in force *after* a court has determined that its contemporaneous rationale is legally defective. Viewed from this angle, remand without vacation would seem plainly to violate *Chenery*'s bar on post hoc rationales.[209] It also, how-

204 Levin, *supra* note 19, at 295.

205 *Id.*

206 *See generally id.* at 315–44.

207 *Id.* at 310.

208 ADMIN. CONF. OF THE U.S., RECOMMENDATION NO. 2013-6, REMAND WITHOUT VACATUR 5 (2013).

209 Professor Levin avoids this result by explaining that, where a court orders remand without vacation, it does not substitute its own rationale to justify upholding the agency's original action on a permanent basis. Rather, the court, based on equitable considerations, exercises its own judicial authority and discretion to leave the agency action in place temporarily, allowing the agency itself to determine whether to permanently rehabilitate it. Levin, *supra* note 19, at 371–73. At the end of the day, however, remand without vacation, according to the mainstream characterization, leaves an illegal agency policy in place—one that a court would lack authority to order on its own authority—because a court, not the agency, thinks it is a good idea to do so. It therefore violates the *Chenery* rationale that, where courts uphold discretionary agency actions based on judicial rationales, they run the

ever, indicates that courts, on some level, think that these violations are justified in light of the policy implications of outright vacation. In other words, remand without vacation occurs where a court concludes that it is better, on balance, to leave a rule in force while the agency develops a post hoc fix rather than to disrupt the agency's regulatory program by vacating a rule.

A first step to putting this approach on a sound legal footing is to give proper attention to the obvious historical fact that courts have adjusted the meaning of "arbitrariness" over time to reflect evolving policy concerns relating to rulemaking and its judicial review.[210] These concerns include, among other interrelated goals, ensuring legality, rationality, accuracy, thoroughness, accountability, broad participation, and fairness. Of course, agency efficiency and effectiveness are also critical and legitimate factors—Congress, after all, creates agencies to get things done.

Modern, "hard look" review for arbitrariness struck one particular balance among these interrelated factors. One key element of this balance has been a judicial insistence that an agency rule is "arbitrary" unless it is accompanied on promulgation by an exhaustive explanation of the agency's contemporaneous rationale that includes a response to any comments that a court deems significant.[211] This expanded burden of explanation furthers legitimate values that include, among others, agency accountability, accuracy, and fairness. It also, however, creates difficulties where an agency rule is "arbitrary," in the limited sense that it suffers from a notable explanatory flaw, but this flaw does not seem so serious as to justify the regulatory havoc of vacation.

Remand without vacation demonstrates that, in this type of situation, courts perceive that the black-letter doctrine of modern arbitrariness review gives too little weight to the critical values of agency effectiveness and efficiency. The fact that the courts themselves designed the system of modern arbitrariness review that strikes this maladjusted balance suggests that they should also be able to alter course to strike a better balance that gives these values more weight. Making this move opens up the possibility that a court can conclude that a rule suffers from explanatory defects significant enough to justify requiring a post hoc agency response—yet not so significant as to justify condemnation as "arbitrary." Seen in this light, remand without vacation is not a matter of a court determining that it would be best for it to use its own authority to impose an arbitrary rule that an agency failed to promul-

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risk of infringing agency discretion. SEC v. Chenery Corp., 318 U.S. 80, 88, 94–95 (1943); *cf.* Milk Train, Inc. v. Veneman, 310 F.3d 747, 758 (D.C. Cir. 2002) (Sentelle, J., dissenting) (rejecting remand without vacation because "when we hold that the conclusion heretofore improperly reached should remain in effect, we are substituting our decision of an appropriate resolution for that of the agency to whom the proposition was legislatively entrusted").

210 *See generally supra* Section I.B (describing the judicial transformation of notice-and-comment rulemaking).

211 *See supra* subsection I.B.4 (describing how the expanded duty to explain rules that courts imposed on agencies turned "concise general statements" into "ventilators").

gate legally. Rather, it involves a court concluding that a rule, notwithstanding some noteworthy and apparently curable flaws, is not "arbitrary" and then upholding it on the condition that the agency develop post hoc fixes for the defects.

Although this model is not the mainstream way of defending the legality of remand without vacation, it does find some support from the first major judicial debate over this remedy in *Checkosky v. SEC*.[212] Judge Randolph, dissenting, insisted that remand without vacation is illegal because actions that are "arbitrary" due to a defective explanation must be "set aside" under section 706(2).[213] Judge Silberman's response denied the premise that a court must "decide that the agency's action is either unlawful or lawful on the first pass, even when the judges are unsure as to the answer because they are not confident that they have discerned the agency's full rationale."[214] Instead, where a court is in doubt concerning the basis for an agency's action, the court can remand without vacating to give the agency a chance to explain itself.[215]

This model for justifying remand without vacation by adjusting the meaning of "arbitrariness" to match judicial conduct is attractive for a series of reasons. First, remand without vacation can leave an agency action in place for an indefinite period that can last years, imposing significant burdens on regulated entities during all that time.[216] Notwithstanding the tradition of equitable remedial discretion, it is odd to contemplate that a court has independent power to impose these sorts of burdens after it has determined that the agency with regulatory authority over the area has failed to exercise its authority legally.[217] Second, characterizing remand without vacation as a device for saving "illegal" agency actions suggests this remedy should be exceptional and disfavored, which may explain its relative rarity.[218] To our minds, however, remand without vacation provides a sensible means of helping to accommodate the explanatory burdens that courts themselves

212 Checkosky v. SEC, 23 F.3d 452 (D.C. Cir. 1994).

213 *Id.* at 490–91 (Randolph, J., dissenting in part).

214 *Id.* at 462 (Silberman, J.).

215 *Id.* It bears noting that Judge Silberman, consistent with *Chenery*, contemplated use of remand without vacation to obtain more complete explanations of agencies' contemporaneous rationales rather than post hoc rationales. *See id.* at 463–64.

216 *See In re* Core Commc'ns, Inc., 531 F.3d 849, 862 (D.C. Cir. 2008) (Griffith, J., concurring) (noting that FCC failed to act on remand without vacation for over six years); Nat. Res. Def. Council v. EPA, 489 F.3d 1250, 1265 (D.C. Cir. 2007) (Rogers, J., dissenting in part) (criticizing delays of ten and fifteen years).

217 The bounds on judicial equitable remedial discretion are not rigid, just as one would expect. Levin, *supra* note 19, at 332. Still, contexts in which it has been applied have often involved technical violations of law, situations where the court contemplates leaving an "illegal" rule or statute in place for a short period, or situations where the court determines that the plaintiff's substantive rights will not be infringed. *Id.* at 326–44. Remand without vacation for an indefinite period of a rule that imposes substantial obligations would thus seem to press the limits of judicial equitable remedial discretion.

218 *See* TATHAM, *supra* note 193, at 22 (discussing the relative rarity of remand without vacation).

have imposed on agencies, and its use should be encouraged. Third, this model corrects a semantic oddity in current usage of the term "arbitrary." Whatever else it might mean, this term should connote strong condemnation—certainly, this is what Congress must have had in mind back in 1946 when it adopted the APA and *Pacific States Box* provided the expected standard for review.[219] By contrast, to call an agency rule "arbitrary" seems inapt where its only fault is failure to include in a "concise general statement" an adequate response to a comment that a reviewing court later happens to deem significant. Fourth, and on a closely related point, the proposed model enables courts to reserve condemnation for arbitrariness to those rules that they conclude should, in fact, be vacated based on all relevant considerations. The model thus allows courts to follow the section 706(2) instruction to "set aside" those agency actions that they find "arbitrary" without complication.[220]

Finally and most importantly, this way of justifying remand without vacation highlights an attractive, more flexible way of thinking about arbitrariness review. Again, the ambiguity of the term "arbitrary" inevitably leaves courts with discretion to construe it in light of the values and goals that they recognize should be served by rulemaking and its judicial review. One can think of the judicial transformation of notice-and-comment rulemaking and the development of modern arbitrariness review as an exercise of this discretion—one that struck a particular policymaking balance that sought to enhance values such as agency accountability, fairness, and broad participation, among others. The practice of remand without vacation suggests that courts themselves have perceived that this balance should be pushed back in the direction of enhancing agency efficiency and effectiveness.

C. Striking a Better Balance with Judge Wald's Twenty-Year-Old Suggestion

The courts' deployment of remand without vacation, best understood and justified, demonstrates that they are, *contra Chenery*, more hospitable to post hoc rationales than they commonly admit. This judicial flexibility, even if generally unacknowledged, is broadly consistent with the historical development of judicial review of agency action. The drafters of the APA used broad, vague language to govern judicial review pursuant to their super-statute, leaving later interpreters the task of determining how best to expound and apply it.[221] Courts have used this implicit policymaking discretion to radically transform notice-and-comment rulemaking and, as part of this process, installed *Chenery* as an element of modern arbitrariness review. Although the application of the *Chenery* doctrine to informal rulemaking has

219 *See supra* notes 33–35 and accompanying text (discussing *Pacific States Box*'s extremely lax standard of review for arbitrariness, which in turn indicates that "arbitrary" is a term of strong condemnation).

220 5 U.S.C. § 706(2) (2012).

221 *See* Levin, *supra* note 19, at 312 (noting that "the draftsmanship of section 706 as a whole suggests that Congress expected courts to flesh out its meaning over time").

now been in place for decades, it need not be regarded as "carved in stone."[222] Instead, the courts' approach to arbitrariness review should continue to evolve in light of new circumstances and learning.

Recognizing these points naturally invites exploration of how else agencies and courts might use post hoc rationales to improve rulemaking and its judicial review. Our own inquiry on this point has led us to a proposal that Judge Wald of the D.C. Circuit sketched in a brief paragraph nearly twenty years ago: courts should allow agencies to raise new, post hoc arguments supporting the rationality of their rules during judicial review so long as those arguments are based on information exposed to public scrutiny during the rulemaking process itself.[223] Adopting this proposal would advance the values of agency effectiveness and efficiency while doing very little to undermine the system's capacity to deliver on other important values served by modern arbitrariness review, such as accountability, fairness, and participation. Put another way, the proposal strikes a better balance than the status quo insofar as it creates real advantages at very little or no cost.

As a threshold matter, it is helpful to emphasize aspects of modern judicial review of rulemaking that the proposal does *not* alter. Again, viewed from a high-level, structural perspective, the judicial transformation of rulemaking made it both easier for outsiders to challenge the rationality of rules and harder for agencies to answer such challenges. The main mechanisms for easing the task of challenging rules were to require that agencies' proposed rules bear a close resemblance to their final rules and that agencies share all relevant scientific and technical information in their possession with outsiders during the rulemaking process.[224] The theory of modern arbitrariness review is that, armed with this information, outsiders can both comment effectively on agency data and reasoning during rulemaking and later, if necessary, mount effective challenges during judicial review that provide generalist courts with information they need to judge complex, technical rules. By requiring that post hoc rationales be based on information shared during the rulemaking process, the proposal preserves the role of these disclosure mechanisms, ensuring that the factual bases of rules will continue to be subject to intense, adversarial scrutiny by interested outsiders. The proposal thus does little if anything to interfere with the benefits of accountability, accuracy, fairness, and broad participation that such scrutiny is supposed to bring.

The proposal's benefits relate to easing agencies' task of answering challenges to their rules. Most obviously, allowing limited use of post hoc rationales would ease the pressure that courts have imposed on agencies to

222 The phrase "not . . . carved in stone" is borrowed from *Chevron*, which teaches that agency statutory constructions should evolve as agencies learn. Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 863–64 (1984). With due regard for the role of stare decisis, this strikes us as good advice for courts as well.

223 *See* Wald, *supra* note 16 (criticizing rigid application of the contemporaneous rationale principle and suggesting relaxation).

224 *See supra* subsections I.B.2, I.C.1 (discussing the expanded notice requirements imposed on agencies by courts).

accompany their rules with "concise general statements" that are exhaustive and lengthy enough to answer any comments that a risk-averse agency fears a generalist court might deem significant enough to merit an answer.[225] For those who think that statutes should be implemented as written, it bears noting that altering the timing of agencies' duty to explain their rules in this way would encourage them to publish explanations that are both more "concise" and more "general"—as Congress told them to do seventy years ago in the APA.[226]

More subtly, adoption of the proposal would change the incentives of potential challengers in positive ways both during the notice-and-comment process and during judicial review. Under the current system, outside parties have the incentive to overwhelm agencies with comments.[227] Responding to complex comments takes time, which slows the regulatory process—to the benefit of those who would rather not be regulated. Also, adding to the comment pile increases the chance that the agency's concise general statement will suffer from some explanatory gap that, notwithstanding occasional deployment of remand without vacation, will lead a court to set aside the rule. Outside parties in a position to manipulate the process in this way will generally, of course, be composed of well-funded, corporate interests, compounding problems of access and inequality.[228]

Allowing agencies to offer post hoc rationales based on record information would change this calculus substantially. For one thing, agencies would not have to expend so much time and energy bullet-proofing their concise general statements against any and all conceivable objections during judicial review. This change would therefore reduce the ability of regulated entities to slow rulemaking through excessive comments.

More significantly, the proposal would reduce the "reward" that petitioners should expect to win by setting up an agency for explanatory failure during the rulemaking process. Rather than vacation, the initial reward for identifying an explanatory gap during judicial review would generally be to obtain a post hoc explanation from the agency filling that gap. By itself, winning a post hoc explanation might be called the litigation equivalent of a Pyrrhic victory, not worth pursuing. Vacation would be the reward only where an agency could not, based on record information, provide a reasonable post hoc explanation. Reducing the expected reward for tripping up agencies would discourage potential challengers from submitting comments

225 *See supra* subsection I.C.3 (discussing the problem of bloated concise general statements).

226 *See* 5 U.S.C. § 553(c) (2012); *cf.* Am. Radio Relay League, Inc. v. FCC, 524 F.3d 227, 246 (D.C. Cir. 2008) (Kavanaugh, J., concurring in the judgment) (observing that, "[p]ut bluntly," the expanded disclosure requirements that courts imposed on agencies to explain rules "cannot be squared with the text of § 553 of the APA").

227 *See supra* notes 115–16 and accompanying text (discussing this problem of "information excess").

228 *Cf.* Wendy Wagner et al., *Rulemaking in the Shade: An Empirical Study of EPA's Air Toxic Emission Standards*, 63 ADMIN. L. REV. 99, 124–29 (2011) (documenting that regulated interests dominate contacts with EPA during rulemaking).

in the first place or seeking judicial review later, except where their objections are so serious that they conclude that the agency cannot offer a rational answer.

In addition, the proposal would protect rules that advance agency statutory missions from vacation based on curable explanatory defects. It would, in other words, provide a more thorough means of carrying out the protective function currently handled somewhat spottily by remand without vacation. Where an agency can provide a reasonable explanation based on record information demonstrating that its rule advances its statutory mission, a court should not order vacation unless doing so demonstrably and substantially serves some other legitimate goal.

Lastly, all of these advantages of allowing post hoc rationales to justify rules must be understood in light of the reality that agencies operate under considerable resource constraints in terms of both budget and personnel. If agencies do not have to perfect their concise general statements, respond to so many comments, or defend so many lawsuits, they will be able to save scarce resources for work on other agency priorities, further promoting agency effectiveness.

D. Defusing Some Objections

Earlier, we set the stage for our proposal to relax the bar on post hoc rationales by arguing generally both that *Chenery*'s contemporaneous rationale principle fits complex rulemaking poorly and that the courts have given little apparent thought regarding how to adjust it for this demanding context. Applying the contemporaneous rationale principle does, however, generate certain advantages—some described in the *Chenery* opinion itself and some identified in later caselaw and commentary. This final subsection explains why these advantages do not provide a sound basis for rejecting the proposal.

1. Avoiding Infringement on Agency Discretion

One of the Court's primary grounds for adopting *Chenery*'s contemporaneous rationale principle was, rather ironically, to protect agency policymaking authority from judicial infringement.[229] Again, the theory here is that, where a reviewing court determines that an agency's discretionary rationale is defective but affirms on the basis of an alternative developed by the court, the court necessarily infringes on the agency's authority to develop its own rationale to support the action or to choose a different action.[230]

229 SEC v. Chenery Corp., 318 U.S. 80, 88, 94–95 (1943).

230 *See id.* at 94 (observing that "[i]t is not for us to determine independently what is 'detrimental to the public interest or the interest of investors or consumers' or 'fair or equitable' within the meaning" of the statute that the SEC was charged with implementing (quoting Public Utility Holding Company Act of 1935 §§ 7, 11, 15 U.S.C. § 79 (repealed 2005)).

The most obvious problem with this purported benefit is that vacation of an agency action is hardly necessary to obtain it. The courts could instead simply insist that agencies clearly signal their acceptance of any post hoc rationale before a court considers it. Moreover, in the case of notice-and-comment rulemaking, such approval should not require any particular process by the agency. Under the APA, as courts have interpreted it, outsiders have the right to comment on a proposed rule that is close in form to the agency's final rule as well as to comment on any supporting information that agency has in its possession.[231] They do not, *as part of the rulemaking itself*, have any statutory right to comment on the rationale that the agency offers in support of the rule on its publication. The APA contemplates that petitioners seeking to challenge such a rationale will do so via judicial review. As such, agencies ought to be able to offer post hoc rationales based on information that they have already disclosed as part of the rulemaking process without, for instance, offering challengers an additional chance to comment.

2. Orderly Judicial Review and the Sandbagging Problem

Chenery's second stated ground for its contemporaneous rationale principle is that it is necessary for orderly judicial review.[232] Certainly, it is true that the *Chenery* principle aids courts by limiting which rationales are subject to review. It is also clear, however, that courts could conduct orderly review and still allow post hoc rationales. Petitioners could continue, as is currently the case, to seek judicial review on issues raised during the notice-and-comment process. Agencies would then be able to respond based on arguments expressed either in a concise general statement (as under current practice) or based on record information to which the petitioners had access. Petitioners would be able to respond to these arguments in their replies.

One might object that the preceding sketch is unfair to petitioners because they might decide to petition for review of a rule based on an agency's failure to respond to a comment and then find out to their dismay during judicial review that the agency has a very good and unexpected post hoc response. Agencies would, in a word, "sandbag" challengers of their rules. This objection seems overblown after reflection on the nature of rulemaking litigation and the limited nature of the proposal. First off, agencies would have little incentive to sandbag as such. Much of the point of the instant proposal is, of course, to relieve agencies of some of the burden of explanation that courts have imposed on rulemaking. Still, where a comment presents a notable substantive issue, it will be in an agency's interest to demonstrate during rulemaking that it has a sufficient response to discourage litigation.

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231 *See supra* subsections I.B.2, I.C.1 (discussing parameters of expanded notice requirements).

232 *Chenery*, 318 U.S. at 94 ("[T]he orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained.").

Moreover, especially in complex, technical environments, the real players in litigation are well-funded, corporate interests and, to a lesser extent, sophisticated public interest groups.[233] In general, these interests should be very tough to sandbag given that they know a great deal about the genuine issues at stake. The proposal's requirement that post hoc rationales be based on information shared with the public during the rulemaking process provides further assurance that agencies will not be able to "hide the ball" when dealing with such sophisticated players. In any event, where an agency nonetheless manages to sandbag a challenger, a court could cure the problem rather easily and thoroughly by allowing another round of briefing.

3. Ensuring Agency Sincerity

One might object that post hoc rationales, in the hurly-burly of litigation, are likely to be nothing more than post hoc *rationalizations*. Such a "rationalization" would be merely an argument of convenience for litigation purposes rather than something the agency "really" believed. The bar on post hoc rationales is thus necessary to protect agency sincerity.

This criticism rests on a naïve portrait of decisionmaking by agencies (or even by individuals, for that matter). As noted above, no single person on the planet likely reads, digests, and approves of truly massive "concise general statements" that agencies must produce for complex rules.[234] In such a situation, the difference between legitimate "rationale" and illegitimate "rationalization" is hardly clear.

Furthermore, this argument fails to give due consideration to the fact that most of the real policymaking that occurs through informal rulemaking *precedes* formal commencement of notice and comment. By requiring that agencies' final rules closely resemble their proposed rules, courts have, in effect, required agencies to make something close to final policymaking decisions before issuing their proposals.[235] Shoving policymaking into the shadows of the pre-notice period is problematic for a number of reasons—including that it magnifies the influence of special interests.[236] Most to the present point, requiring agencies to make large investments in their proposed rules makes them difficult for agencies to abandon. This means, ironically enough, that the concise general statements that agencies publish as *contemporaneous* rationales of their *final* rules might be better regarded as *post*

233 *See* Wagner et al., *supra* note 228, at 123–32 (documenting dominance by regulated industries of participation in technical rulemaking by the EPA).

234 *See supra* notes 113–14 and accompanying text (emphasizing that many "concise general statements" are far too large for any given person to absorb, which is not their point in any event).

235 *See supra* subsection I.C.1 (explaining that the expanded notice requirements courts have imposed on agencies have, rather perversely, shoved agency policymaking back into the pre-notice period of rulemaking).

236 *See* Wagner et al., *supra* note 228, at 124–28 (documenting that regulated interests dominate pre-notice contacts with agencies in technical rulemaking).

hoc rationalizations of their *proposed* rules. They are, in large part, exercises in justification.

In short, given the complex, bureaucratic nature of rulemaking, rationalizations should be accepted as inevitable rather than condemned. Agency rules should be tested by their reasonability, not by agency sincerity.

4. Ensuring That Commenters Can Meaningfully Affect Rulemaking

A closely related argument is that allowing an agency to wait until judicial review to offer responses to comments robs commenters of genuine power to influence the shaping of rules in a meaningful way. The theory here might be that, if an agency has to respond to a comment during the rulemaking process itself, then there is still time for that comment to actually inform the agency's policymaking decision. Once the policy decision has been set in concrete as a final rule, the agency, not wishing to upset its own applecart, will not be willing to give genuine consideration to other options and will instead defend its chosen rule to the last. Allowing post hoc rationales would thus tend to turn notice and comment into a sham.

Our first and main response to this argument is that, as just discussed, policymaking give-and-take is largely done by the time the notice-and-comment process commences.[237] The proposal to allow post hoc rationales can do little to undermine a purported benefit of notice and comment that does not actually exist—at least not to any great degree. Second, if an agency ignores a truly significant comment to which it cannot offer a reasonable answer, then it still runs the risk of vacation. Lastly, assuming for the sake of argument that a complete bar on post hoc rationales somehow, to some degree, enables the notice-and-comment process to have more policymaking impact, this benefit must be weighed against the considerable mischief that this bar creates.

5. Protecting Against Agency Laziness

Yet another argument for the bar on post hoc rationales is that it forces agencies to take greater care when crafting their rules.[238] Certainly, it stands to reason that agencies will canvass and answer comments more carefully if failure to do so might eliminate years of work. It is not clear, however, that this extra work improves rules to a degree that its benefits justify the costs.

At the outset, it bears noting that barring post hoc rationales to force agencies to take more care in assembling contemporaneous explanations for their rules runs counter to a whole body of judicial precedents declaring that

237 *See supra* subsection I.C.1 (discussing how expanded notice requirements encourage agencies to make policy decisions before issuing notices of proposed rules).

238 *See* Note, *supra* note 16, at 1926–29 (noting and criticizing this argument).

agencies, not courts, are best situated to allocate scarce agency resources and that agencies should be left to do so free of judicial intervention.[239]

In any event, adoption of the instant proposal would still leave strong incentives in place for agencies to avoid significant errors as they craft rules. Once again, the judicial transformation of rulemaking has forced agencies to do most of their real work of policymaking before notice and comment formally begins.[240] Allowing limited use of post hoc rationales during judicial review would not alter the incentives of agencies to make major investments in developing their proposed rules in the first place. Moreover, courts have discretionary power to enjoin the enforcement of rules during judicial review.[241] In deciding whether to wield this power, a court should be able to give weight to an agency's egregious failure to explain a rule, e.g., where an agency ignores an obviously powerful objection. Finally, at the end of the day, an agency's rationales for a rule, regardless of whether they first appear in the concise general statement or are post hoc, remain subject to review for arbitrariness. If an agency cannot offer a reasonable justification for its rule, a court can vacate it.

CONCLUSION

Over the last seventy years since adoption of the APA, the procedures governing legislative rulemaking have become relentlessly more complex and burdensome. Courts took the lead in this process, radically expanding agencies' duties of notice and explanation. The primary mechanism for this change has been aggressive construction of the APA's command in section 706(2) that courts set aside "arbitrary" agency actions. Courts have required agencies to publish all supporting scientific and technical information in their possession supporting proposed rules and effectively imposed a requirement that final rules be very similar to proposed rules.[242] At the same time, courts have held that an agency's "concise general statement . . . of basis and purpose" supporting a rule must include a persuasive response to all significant comments submitted during the notice-and-comment process.[243] Incorporating a variant of the *Chenery* contemporaneous rationale principle, courts have generally barred agencies from supplementing these concise gen-

239 Heckler v. Chaney, 470 U.S. 821, 831–32 (1985) ("The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities.").

240 *See supra* subsection I.C.1 (explaining that agencies are incentivized to make policy decisions prior to issuing notices of proposed rules, due to the expanded notice requirements).

241 5 U.S.C. § 705 (2012).

242 *Supra* subsections I.B.2, I.C.1 (discussing judicial expansion of notice requirements).

243 *See supra* note 65 and accompanying text (discussing agency obligation to respond to comments).

eral statements with post hoc rationales.[244] An agency rule that fails to satisfy these explanatory requirements is subject to condemnation as "arbitrary."

Together, these reforms have created a structure that makes it easier for outsiders to challenge rules effectively and more difficult for agencies to defend them. They also represent a particular balance that courts have struck among various legitimate values served by rulemaking and its judicial review, e.g., accountability, transparency, fairness, rationality, thoroughness, effectiveness, and efficiency. As the evolution of modern arbitrariness review emphatically confirms, striking this balance implicates a type of judicial discretion.

Building on a suggestion that Judge Wald made two decades ago,[245] this Article proposes that courts exercise this discretion to strike a new, improved balance that enhances agency effectiveness and efficiency without significantly undermining values such as accountability, accuracy, and fairness. Specifically, contrary to current doctrine, courts should allow agencies to defend the rationality of their rules based on post hoc rationales so long as they are based on information exposed to outside scrutiny during the notice-and-comment process. This reform leaves in place the expanded notice requirements of modern arbitrariness review, ensuring that outsiders would continue to obtain the information that they need to challenge agency rules effectively during rulemaking or judicial review. It would, at the same time, lessen distortions caused by strained application of the contemporaneous rationale principle to rulemaking, reducing agency incentives to "over-explain" their rules, reducing the incentives of outsiders to bloat the notice-and-comment process, and reducing the risk of vacation of rules that rationally advance agency statutory missions.

244 *See supra* subsection I.B.5 (discussing the judicial imposition of *Chenery*'s contemporaneous rationale principle on notice-and-comment rulemaking).

245 Wald, *supra* note 16, at 666.