Depoliticizing Judicial Review of Agency Rulemaking

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Abstract

Administrative law doctrines for reviewing agency rulemaking currently give judges a significant amount of discretion to invalidate agency rules. Many commentators have recognized that this has politicized judicial review of agency rulemaking, as judges appointed by a president of one political party are more likely to invalidate agency rules promulgated under the presidential administration of a different political party. Unelected judges, though, should not be able to use indeterminate administrative law doctrines to invalidate agency rules on the basis that they disagree with the policy decisions of a presidential administration.

This Article therefore argues for the elimination of the Supreme Court’s dicta on the Administrative Procedure Act’s (APA) arbitrary and capricious standard of review in Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co., 463 U.S. 29 (1983), and the D.C. Circuit’s hard look doctrine. In their place, courts should establish a doctrine for reviewing agency rulemaking that examines only the agency’s purpose in regulating and the means used by the agency to achieve that purpose—instead of giving courts leeway to impose additional procedures on agencies and to nitpick rulemaking records. Constitutional doctrines for reviewing legislation already focus on a government actor’s purpose and means, so these doctrines should also be used for reviewing agency rules, which are legislative-like pronouncements that are binding with the force of law.

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

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The Obama Administration’s largest impact on federal policy may very well come from institutions that are not usually on the public’s radar screen: administrative agencies. Federal agencies create a substantial majority of the country’s new laws, and “[t]here is going to be a huge amount of action in the regulatory arena after years of deregulation under President Bush.”

Weeks into office, President Obama directed the EPA to reconsider two Bush Administration decisions: (1) preventing states from setting auto emission and fuel efficiency standards that are more stringent than federal standards, and (2) adopting less stringent controls on mercury pollution from power plants. Similarly, as soon as President Obama took office, the FDA approved “the world’s first test in people of a therapy derived from human embryonic stem cells”—a clinical trial that had been rejected by the Bush Administration. Moreover, the Obama Administration’s Interior Department reversed the Bush Administration’s plan to allow offshore oil drilling. Some also believe that the Obama Administration’s FCC could reinstitute the controversial “fairness doctrine.”

In fact, the Bush Administration anticipated that the Obama Administration would overhaul the country’s administrative regulations, so in the final months of President Bush’s tenure, his Administration took a series of administrative actions to deregulate various consumer and environmental industries. Most would assume that the administrative actions of an outgoing president could be overturned by an incoming presidential administration that wants to reverse course on federal regulatory policy.

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

2 Brian C. Mooney, Harvard’s Sunstein to Oversee Regulation, BOST. GLOBE (Jan. 9, 2009) (quoting Jeffrey Rosen).


8 See R. Jeffrey Smith, A Last Push to Deregulate, WASH. POST, at A1 (Oct. 31, 2008) (“The White House is working to enact a wide array of federal regulations, many of which would weaken government rules aimed at protecting consumers and the environment, before President Bush leaves office in January.”).
After all, the electorate holds presidents accountable for their actions, and presidential administrations react to the public’s perception of the administration’s regulatory policies.9

But current administrative law doctrines for judicial review of agency rulemaking are a “judicially created obstacle course”10 that give judges far too much leeway to reach results based on their partisan policy preferences.11 This, in turn, allows unelected judges to prevent many shifts in regulatory policy that are favored by an incoming president. President Bush could therefore have expected that his final deregulatory acts would “be difficult for his successor to undo.”12

Of course, this is nothing new for modern presidential administrations. President Reagan campaigned on a major shift in federal regulatory policy, but the deregulatory changes his Republican administration enacted were met with staunch resistance by the courts—which were freshly packed with judges appointed by Democratic President Carter. Indeed, the administrative law doctrines adopted in the late 1970s and early 1980s allow judges to use their policy preferences to invalidate agency action. These doctrines are still in place today and could prevent the Obama Administration from shifting regulatory policy as President Obama has promised. And just like President Reagan’s predicament, President Obama will have to get his regulatory changes through

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


12 Smith, supra note 8, at A1.
courts that are full of judges who were appointed by President Bush over the past eight years.\textsuperscript{13}

It would be a mistake, however, for judges to continue using indeterminate administrative law doctrines to invalidate agency rules on the basis that they disagree with the policy decisions of a presidential administration. This argument does not turn on the prudence of the Obama Administration’s policies; it is a matter of the separation of powers and institutional competence. The courts can just as easily invalidate the agency rulemaking of a Democratic President as a Republican President. For example, even in President Bush’s final year of office, courts struck down his administration’s regulations related to global warming and the broadcast of indecent material.\textsuperscript{14} Quite simply, administrative law doctrines need to be modified to prevent unelected judges from using their policy preferences to invalidate agency rulemaking.

This Article therefore offers a proposal to end the battles over agency rulemaking that are currently fought between presidential administrations of one political party and judges of the other.\textsuperscript{15} This proposal would scrap the administrative law doctrines created in the 1970s and 1980s that allow courts to invalidate significant amounts of agency rulemaking. Specifically, the Supreme Court’s dicta on the Administrative Procedure Act’s (APA) arbitrary and capricious standard of review in \textit{Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.}\textsuperscript{16} and the D.C. Circuit’s hard look doctrine should be eliminated.

Courts could then establish a doctrine for reviewing agency rulemaking that focuses not on requiring the agency to use additional procedures and nitpicking the rulemaking record but on examining the agency’s purpose in regulating and the means used by the agency to achieve that purpose. In fact, constitutional doctrines for reviewing legislation already focus on the purpose and means. By tying review of agency rulemaking to the doctrines for reviewing legislation, courts could provide a limiting principle to justify their review of agency rulemaking while learning from precedents from the past century that used trial and error to find the most effective doctrines for

\begin{itemize}
\item \textsuperscript{13} See Eric A. Posner, \textit{Does Political Bias in the Judiciary Matter?: Implications of Judicial Bias Studies for Legal and Constitutional Reform}, 75 U. CHI. L. REV. 853, 866 (2008) (“However, for judges with lifetime tenure, at any given time their policy preferences may well lag those of the public and of existing parties.”).
\item \textsuperscript{14} See Ctr. for Bio. Div. v. NHTSA, 538 F.3d 1172 (9th Cir. 2008) (striking down Bush Administration fuel emissions standards on the basis of global warming); CBS Corp. v. FCC, 535 F.3d 167 (3d Cir. 2008) (invalidating the Bush Administration’s rule that penalized the broadcast of indecent material).
\item \textsuperscript{15} See generally Cass R. Sunstein, \textit{Does Red Lion Still Roar? Keynote Address}, 60 ADMIN. L. REV. 767, 769–70 (2008) (“There is a statistically significant difference between the overall liberal voting rate of Democratic and Republican appointees.” (citing CASS SUNSTEIN ET AL., \textit{ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY} (2006))).
\item \textsuperscript{16} 463 U.S. 29 (1983).
\end{itemize}
reviewing legislative-like pronouncements such as agency rules. Moreover, this shift would coincide with the modern Court’s insistence that the APA be interpreted as it was understood when Congress enacted it in 1946.

Ultimately, this Article proposes that courts should review agency rulemaking under the standard for reviewing legislation that has become known as “rational basis with bite.” Rational basis with bite would require the agency, at the time it promulgates a rule, to articulate its actual statutory purpose in promulgating the rule and explain how the rule is rationally related to that purpose—instead of allowing courts to come up with hypothetical purposes or explanations to justify the agency’s rule, as courts are allowed to do under traditional rational basis review known also as minimum rationality review. Not only would rational basis with bite significantly reduce the ability of judges to veto agency rules based on policy disagreements, but the Supreme Court’s precedents on APA arbitrary and capricious review fit quite well with the rational basis with bite doctrine.

Rational basis with bite is also preferable to the other standards used in reviewing legislation. To eliminate the chances of judges using their policy preferences in reviewing agency rulemaking, some might be tempted to adopt minimum rationality review—the traditional rational basis test for reviewing most legislation, which is extremely deferential. However, there are strong reasons for using some heightened standard for reviewing agency rulemaking compared to legislation: Agencies are comprised of unelected officials and are not required to use the rigorous procedures that the Constitution requires of Congress, and the Supreme Court underenforces the nondelegation doctrine. At the same time, intermediate or strict scrutiny would only make it easier for judges to use their policy preferences to invalidate agency rules. Rational basis with bite therefore drastically reduces the ability of judges to infuse their policy preferences into review of agency rulemaking, but still subjects agency rules to a heightened standard of review compared to most legislation.

This Article proceeds in three parts. Part I traces the Supreme Court’s evolving doctrine for reviewing agency rulemaking in a unique way: by comparing how the Court’s changing doctrine for reviewing agency rulemaking contrasted with the Court’s doctrines for reviewing legislation. In hindsight, this may seem like an obvious way to evaluate the doctrine for reviewing agency rulemaking, but no court or commentator has recognized the link between these doctrines. Part I thus also shows how judges got into the business of invalidating agency rules on the basis of policy disagreements in the first place, and it explains how the Supreme Court has left lower courts with little guidance on

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17 This Article focuses on agency informal (notice-and-comment) rulemaking. See 5 U.S.C. § 553. The APA’s arbitrary and capricious review standard applies when courts review agency informal rulemaking. See 5 U.S.C. § 706(2)(A). The arbitrary and capricious standard, though, also applies when courts review other forms of agency action, such as informal adjudication. See, e.g., Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 415 (1971). It could be prudent for courts to use the same rational basis with bite standard in reviewing those other forms of agency action under APA arbitrary and capricious review. This Article, however, does not address this issue because part of the rationale for proposing the rational basis with bite standard is the connection between agency rulemaking and legislation. See infra Part I.A.
how to review agency rulemaking. This has allowed the D.C. Circuit—the federal court that reviews most agency rulemaking—to invalidate a significant number of agency rules under its hard look doctrine. Part II argues that doctrines for judicial review of legislation should be used in creating doctrines for judicial review of agency rulemaking, because this will shift the focus back to reviewing an agency’s purpose in regulating and the means used to further that purpose. Under current doctrines for reviewing agency rulemaking, unelected judges can overrule the substantive policy decisions made by expert agencies because courts in the 1970s and 1980s began divorcing doctrines for reviewing agency rulemaking from doctrines for reviewing legislation. Without any theoretical limitations on judicial review of agency rulemaking, arbitrary and capricious review under the APA has essentially become a mechanism for courts to veto agency rulemaking. Part III then proposes that the rational basis with bite doctrine be used for APA arbitrary and capricious review of agency rulemaking. This Part concludes by applying rational basis with bite review to two recent courts of appeals cases to show how the doctrine fits with existing Supreme Court precedent and can prevent judges from using their policy preferences to uphold or invalidate agency rulemaking.

The arguments in Part II and III are conceptually distinct: One could accept that doctrines for reviewing legislation should be used in creating doctrines for reviewing agency rulemaking (agreeing with Part II), while arguing that a level of scrutiny other than rational basis with bite should be used in reviewing agency rulemaking (disagreeing with Part III). This distinction is important because virtually no one has suggested that the doctrines for reviewing agency rulemaking should be based on the doctrines for reviewing legislation. Thus, even if there is disagreement over this Article’s ultimate proposal that the rational basis with bite doctrine should be used in reviewing agency rulemaking, the debate regarding the problems that currently exist for judicial review of agency rulemaking would be greatly enhanced by tethering the doctrines for reviewing agency rulemaking to the doctrines for reviewing legislation.

I. The Supreme Court’s Evolving Doctrine for Judicial Review of Agency Rulemaking

The courts have gone through various phases in reviewing agency rulemaking. Most accounts of these phases focus on the different degrees of faith that judges had in administrative agencies, without examining the underlying doctrinal shifts.\(^{18}\) This Part, however, analyzes the Supreme Court’s evolving doctrine for judicial review of agency rulemaking by contrasting those doctrines with the Court’s doctrines for judicial review of legislation. This novel analysis provides a more complete picture of why courts began according agency rulemaking less deference and how judicial review of agency rulemaking has become so politicized.

\(^{18}\) The typical account of the changes in deference to agencies typically goes something like this: Courts gave broad deference to agencies immediately after President Roosevelt’s New Deal in 1930s, courts retracted the deference accorded to agencies by the 1970s when courts became skeptical that agencies had been captured by the regulated industries, and while that 1970s view largely holds true today, some modern courts have re-expanded the deference to agencies based on a textualist view that the APA that it should be interpreted as it was understood when it was enacted in 1946.
At first, the Supreme Court treated agency rulemaking exactly the same as legislation. Soon, though, the Court recognized the differences between agency rules and legislation, and started subjecting agency rulemaking to a slightly higher standard of review. By the 1970s, however, the D.C. Circuit became extremely weary that administrative agencies had been captured by the industries they regulated, so it created the hard look doctrine, which gave courts the power to invalidate agency rulemaking for a whole host of reasons—for example, because the agency did not afford interested parties enough procedure or the agency did not sufficiently analyze alternatives. The Supreme Court’s reaction to the D.C. Circuit’s hard look doctrine was anything but a model of clarity, and it has left the doctrine for reviewing agency rulemaking in a big mess. Indeed, administrative law textbooks today still ponder how the Court’s three major arbitrary and capricious review cases fit together, and those cases were all decided at least 25 years ago. 19

A. Equating Agency Rulemaking with Legislation

Because the Supreme Court has essentially abandoned the nondelegation doctrine, agencies are permitted to make rules that generally function as if they were statutes enacted by Congress itself. According to the nondelegation doctrine, “Congress may not constitutionally delegate its legislative power to another branch of Government.”20 The Court, however, has interpreted the nondelegation doctrine such that it virtually never prevents Congress from delegating legislative power to agencies.21 Consequently, Congress can delegate “authority to the agency generally to make rules carrying the force of law,”22 and agency rules that are binding with the force of law basically function as congressional legislation. So when an agency promulgates a rule that is binding with the force of law (for example, through informal rulemaking—which is also known as notice-and-comment rulemaking), it is acting as a proxy for Congress in the lawmaking process.23

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19 See, e.g., Peter L. Strauss et al., Gellhorn and Byse’s Administrative Law 989 (10th ed. 2003) (leaving open the question of “what analytical pattern” Overton Park, State Farm, and Chevron “exhibit”).

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

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


23 See id. at 230 (“It is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force. . . . Thus, the overwhelming number
It would therefore make sense to develop doctrines for judicial review of agency rulemaking with regard to the doctrines developed for judicial review of legislation, as both deal with review of legislative-like pronouncements that carry the force of law. In fact, when Congress codified the arbitrary and capricious standard for reviewing agency action in the Administrative Procedure Act (APA) in 1946, it was actually adopting the “rational basis” standard used by the Supreme Court to review most pieces of congressional legislation. Under rational basis review, the Court asks (1) whether the law at issue furthers a legitimate governmental purpose, and (2) whether the law is rationally related to that purpose. As applied to agencies, this rational basis test would ask whether the agency acted in accordance with a legitimate statutory purpose—not just any governmental purpose—as agencies’ powers are limited by the statutory delegations made by Congress.

The most frequently cited pre-APA example of equating arbitrary and capricious review to rational basis review came in *Pacific States Box & Basket Co. v. White*, which stated:

> With the wisdom of such a regulation we have, of course, no concern. We may inquire only whether it is arbitrary or capricious. That the requirement is not arbitrary or capricious seems clear. That the type of

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

25 See, e.g., *Wickard v. Filburn*, 317 U.S. 111, 129–30 (1942) (“An Act of Congress is not to be refused application by the courts as arbitrary and capricious and forbidden by the Due Process Clause merely because it is deemed in a particular case to work an inequitable result.”); *Nebbia v. New York*, 291 U.S. 502, 525 (1934) (“[T]he guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious . . . .”); *Dent v. West Virginia*, 129 U.S. 114 (1889) (“due process of law . . . exclude[s] everything that is arbitrary and capricious in legislation affecting the rights of the citizen”). See also Jack M. Beermann & Gary Lawson, *Reprocessing Vermont Yankee*, 75 GEO. WASH. L. REV. 856, 870 (2006) (“Similarly, the passage in § 706(2)(A) instructing courts to hold unlawful any agency action that is ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law’ was probably intended in 1946 to reflect something like the ‘rational basis’ test in post-1937 substantive due process law.” (citations omitted)); Cross, supra note 11, at 1246 n.7 (“The original understanding of [arbitrary or capricious] was that courts would reverse rules only when an agency ‘acted like a lunatic.’” (quoting Martin Shapiro, *APA: Past, Present, Future*, 72 VA. L. REV. 447, 454 (1986))).

26 See infra notes 166–174 and accompanying text.

container prescribed by Oregon is an appropriate means for attaining a permissible ends cannot be doubted.  

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

B. Recognizing the Differences Between Agency Rulemaking and Legislation

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

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28 Id. at 182 (emphases added).

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

30 As then-Professor Scalia pointed out, however, Congress probably expected the arbitrary or capricious standard of review for informal rulemaking to apply to a much smaller set of cases than it currently applies to. Antonin Scalia, Vermont Yankee: The APA, The D.C. Circuit, and The Supreme Court, 1978 SUP. CT. REV. 345, 375–78. That is because after the APA was enacted, the Court greatly expanded the circumstances when agencies could use informal rulemaking instead of adjudication, id. at 375–77, and the Court established “the principle that rules could be challenged in court directly rather than merely in the context of an adjudicatory enforcement proceeding against a particular individual,” id. at 377.


32 198 U.S. 45 (1905) (invalidating a New York law that limited the working hours for bakers).

33 See NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (upholding, under the Commerce Clause, Congress’s power to regulate labor relations); West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (upholding Washington’s minimum wage law and rejecting a Lochner-based, substantive due process freedom of contract rationale).
the citizens of the United States. Moreover, when Congress legislates, it must follow a “single, finely wrought and exhaustively considered, procedure”: Presentment of congressional acts to the President could result in a presidential veto, and the bicameral structure of Congress requires “full study and debate in separate settings.” In contrast, agencies can promulgate rules using the minimal set of informal procedures listed in APA Section 553: The agency must simply provide a “[g]eneral notice of proposed rulemaking,” an opportunity for “interested persons” to comment on the proposed rule through written submissions to the agency, a “concise general statement” of the final rule’s “basis and purpose,” and “publication” of the final rule. Undoubtedly, one of the greatest advantages of agencies is their ability to engage in informal rulemaking, but this also significantly undermines the basis for treating agency rulemaking as the equivalent of legislation.

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

On a more fundamental level, though, seeing the nondelegation doctrine as an underenforced constitutional norm could provide a constitutional basis for requiring

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


37 See KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE 283 (1970) (describing APA informal rulemaking as being among the "greatest inventions of modern government").


39 See Mistretta v. United States, 488 U.S. 361, 415 (1989) (Scalia, J., dissenting) ("[W]hile the doctrine of unconstitutional delegation is unquestionably a fundamental element of our constitutional system, it is not an element readily enforceable by the courts."); Cass R. Sunstein, Nondelegation Canons, 67 U. CHI. L. REV. 315, 338 (2000) ("The difficulty of drawing lines between prohibited and permitted delegations makes it reasonable to conclude that for the most part, the ban on unacceptable delegations is a judicially underenforced norm, and properly so."). See generally Keller, supra note 38, at 57–59 (discussing how the nondelegation doctrine is an underenforced constitutional norm).
heightened judicial review of agency rulemaking compared to legislation. The Court’s rejection of the nondelegation doctrine largely stems from wanting to give Congress adequate power to deal with an ever-increasing workload and from the Court’s inability to create a manageable nondelegation doctrine test—not because the Court believes there are no problems with allowing Congress to delegate legislative power to agencies. In light of these “questions of propriety or capacity” relating to the Court’s abilities, the Court has created a “judicial concept of a constitutional concept” that is different from the “concept itself.”

But this does not mean that the “understanding of [the nondelegation doctrine] itself” cannot be enforced through other means, such as applying heightened standards of judicial review of agency rulemaking compared to legislation. In other words, if the Court had enforced the constitutional concept of the nondelegation doctrine—Congress cannot delegate legislative power—agencies would never have been permitted to exercise legislative power by promulgating rules carrying the force of law. Due to the


41 See J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 407–08 (1928) (permitting Congress to delegate legislative power on the grounds that “common sense” allows Congress to delegate what it cannot practicably do itself).

42 See Bradford R. Clark, Separation of Powers as a Safeguard of Federalism, 79 TEX. L. REV. 1321, 1374 (2001) (explaining that the Court’s rejection of the nondelegation doctrine “appears to stem from the judiciary’s limited institutional competence rather than any fundamental disagreement with the doctrine’s goal.”); Murphy, supra note 40, at 1134 (stating that the courts could not “devise a stable, workable, desirable form of the nondelegation doctrine”).


44 Id.

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

46 See INS v. Chadha, 462 U.S. 919, 985 (1983) (White, J., dissenting) (“This Court’s decisions sanctioning such [administrative] delegations make clear that Article I does not require all action with the effect of legislation to be passed as law.”).
institutional competence of courts, though, the Court has not enforced that constitutional concept and has instead created the judicial concept of the nondelegation doctrine: the intelligible principle test, which simply requires Congress to provide some intelligible principle in the statutory delegation to cabin the agency’s authority. Nevertheless, the Court has not enforced that constitutional concept and has instead created the judicial concept of the nondelegation doctrine: the intelligible principle test, which simply requires Congress to provide some intelligible principle in the statutory delegation to cabin the agency’s authority. 47 Nevertheless, the Court could impose heightened standards of judicial review of agency rulemaking “as a second-best surrogate” for the substantive enforcement of the nondelegation doctrine.

Given the inherent difference between agencies and legislatures plus the underenforcement of the nondelegation doctrine, it is no surprise that the Supreme Court quickly began treating agency rulemaking differently from congressional legislation. Just one year after the APA was enacted, SEC v. Chenery 49 reaffirmed a pre-APA ruling that a court should only examine the actual purposes “invoked by the agency” instead of “substituting what it considers to be a more adequate or proper basis.” 50 This marked a split from how the court reviewed congressional action. In 1946, it was unclear whether rational basis review allowed courts to consider any hypothetical, conceivable purpose that Congress may have had in enacting a law or only Congress’s actual purpose. 51 The former approach is usually called “minimum rationality”; the latter approach has become known as “rational basis with bite.” Recently, the Supreme Court has clarified that rational basis review of congressional acts entails the former approach, such that courts can examine hypothetical, conceivable purposes when reviewing congressional action.

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


49 332 U.S. 194, 196 (1947) (Chenery II).

50 Id. at 196. Four years earlier, when SEC v. Chenery was before the Supreme Court for the first time, the Court required the agency “to give clear indication that it has exercised the discretion with which Congress has empowered it.” SEC v. Chenery, 318 U.S. 80, 94–95 (1943) (Chenery I). Chenery I therefore held “that an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained.” Id. at 95.

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

52 See, e.g., FCC v. Beach Commc’ns, Inc., 508 U.S. 307, 313–15 (1993) (stating that courts could consider any “conceivable” purpose under rational basis review, and “because we never require a
But since Chenery, the Court has used the rational basis with bite approach in reviewing agency action.

Of course, this observation about Chenery is made much easier in hindsight: There is no indication that the Court thought about how Chenery affected the rational basis test previously adopted in Pacific States Box, and, to compound the ambiguity, Chenery never even cited the APA or the arbitrary and capricious standard. To be sure, Chenery was not seen as a groundbreaking precedent: The Chenery Court thought it was reciting “[a] simple but fundamental rule of administrative law,” and it merely adopted one variant of the rational basis test over another. But Chenery is the first sign that the Supreme Court would treat judicial review of agency action differently than judicial review of congressional action.

It is therefore not surprising that Citizens to Preserve Overton Park v. Volpe, the first Supreme Court case to invoke the APA’s arbitrary and capricious standard explicitly in striking down an agency action, introduced a standard for judicial review of agency action that looked nothing like the minimum rationality review typically used for reviewing legislation. While Overton Park dealt with an informal adjudication as opposed to rulemaking, Overton Park still should have been an easy case under Chenery. The administrative record in Overton Park contained no explanation of why the Secretary of Transportation had authorized the use of federal funds for building Interstate-40 through Overton Park (a 342-acre city park near the center of Memphis, Tennessee). According to the statutory delegation, though, the Secretary could only have authorized these funds if no “feasible and prudent” alternative route existed and there had been “all possible planning to minimize harm to the park.” Because the Secretary “did not indicate why he believed there were no feasible and prudent alternative routes or why design changes could not be made to reduce the harm to the park,” the Court could have just cited Chenery and remanded for the agency to provide an explanation.

Instead, Overton Park contains six pages infusing all sorts of ambiguity into the APA’s arbitrary and capricious standard. On one hand, Overton Park cited Pacific States Box for the proposition that an agency’s “decision is entitled to a presumption of regularity,” and it described arbitrary and capricious review as a “narrow” standard legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature”).

53 Chenery II, 332 U.S. at 196.
55 Id. at 408.
57 Id. at 408.
58 Id. at 415 (citing Pac. States Box & Basket Co. v. White, 296 U.S. 176, 185 (1935)).
through which “[t]he court is not empowered to substitute its judgment for that of the agency.” But then the Court erratically described arbitrary and capricious review as “thorough, probing, in-depth review,” which was supposed to be “searching and careful.” So while Overton Park paid lip service to Pacific States Box’s rational basis approach, Overton Park ultimately explained that arbitrary and capricious review required courts to “consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.” It also directed courts to examine the agency’s “construction of the evidence” if the agency did “not disclose the factors that were considered.” Given that the statutory delegation at issue required the Secretary to address alternatives and plan to minimize the harm to parks, Overton Park’s requirement that the agency consider all “the relevant factors” probably only meant that the agency had to explain how these statutory predicates for exercising its delegated authority were met—which is precisely what Chenery had already held. However, lower courts—in particular the D.C. Circuit—would read Overton Park much more broadly.

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

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

It therefore would have made perfect sense for courts to place the APA’s arbitrary and capricious standard somewhere on the tiers-of-scrutiny sliding scale used for judicial review of legislation. Unfortunately, instead of linking judicial review of agency rulemaking to judicial review of legislation, the courts are in the process of concocting an ever-growing list of ways to invalidate agency action under APA arbitrary and capricious review. It began with the D.C. Circuit creating the “hard look” doctrine in the 1970s under the guise of arbitrary and capricious review, and continues because the Supreme Court’s reaction to the D.C. Circuit’s hard look doctrine provided little guidance to lower courts. This has resulted in an unclear, arbitrary doctrine for judicial review of agency action that has no link to the doctrines for judicial review of legislation.

59 Id. at 416.
60 Id. at 415.
61 Id. at 416.
62 Id.
63 Id. at 420.
1. The D.C. Circuit Replaced “Arbitrary and Capricious” with “Hard Look”

By 1971 when *Overton Park* was decided, many believed that agencies were no longer “acting in the public interest” because they “had been captured by the industries and private interests that they regulated.” Against this backdrop, the D.C. Circuit—the court that reviews most federal agency actions—became skeptical of agency action, and it used *Overton Park* as an opening to implement the “hard look” doctrine under arbitrary and capricious review. Originally, the hard look doctrine required courts to ensure that the agency had taken a hard look at the regulatory issues. Over time, however, the D.C. Circuit morphed the hard look doctrine “into one that required a hard look not just by the agency, but by the court as well.” Regardless of who was required to do the hard looking, all three iterations of the D.C. Circuit’s hard look doctrine gave courts much more authority to invalidate agency action than the rational basis review originally contemplated by the APA—and no variant of the hard look doctrine was linked to the doctrines for judicial review of congressional action.

First, *procedural* hard look was the original version of the hard look doctrine: Procedural hard look ensured that the “agency itself had taken a hard look at the relevant issues before reaching its decision,” by requiring the agency to use various procedures—not otherwise required by statute—that expanded the ability of interested parties to present their arguments to the agency. For instance, using procedural hard look, the

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65 See Scalia, supra note 30, at 348 (explaining that the D.C. Circuit “handles the vast majority of significant rulemaking appeals”).

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

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

68 Garland, supra note 29, at 526 (citing Nat’l Lime Ass’n v. EPA, 627 F.2d 416, 451–52 n.126 (D.C. Cir. 1980)).

69 Credit has been given to the D.C. Circuit as a whole for adopting the hard look doctrine under the guise of arbitrary and capricious review. See Scalia, supra note 30, at 348 n.13 (suggesting that the hard look doctrine had, “on one occasion or another, received the explicit support of the [D.C. Circuit’s] members”). However, specific judges, such as Judges Harold Leventhal and David Bazelon, are widely recognized as having the greatest influence on the development of the hard look doctrine. See Warren, supra note 31, at 2607–26 (discussing the different approaches to the hard look doctrine espoused by Judges Leventhal and Bazelon).

70 See Garland, supra note 29, at 525.
D.C. Circuit required “adjudicatory-type hearing procedures” such as cross-examination and oral hearings for informal rulemaking, even though APA Section 553 enumerates which procedures are required for informal rulemaking and it says nothing about cross-examination and oral hearings. D.C. Circuit Judge David Bazelon championed procedural hard look as “the best way for courts to guard against unreasonable or erroneous administrative decisions,” instead of “scrutiniz[ing] the technical merits of each decision.”

Second, quasi-procedural hard look, as now-D.C. Circuit Judge Garland recognized, required the agency to adopt various procedures that the agency itself had to jump through in reaching its substantive decision—these requirements therefore had a “procedural tinge” and yet a “substantive aspect.” In other words, quasi-procedural hard look “require[d] specification of the agency’s policy premises, its reasoning, and its factual support.” These requirement went to the “internal thought process by which an agency decisionmaker reaches a rational decision”—as opposed to procedural hard look, whose requirements went to the “the external process by which litigants present their arguments to the agency.” Yet, quasi-procedural hard look did not directly address the agency’s substantive policy choice. For example, quasi-procedural hard look required agencies to “respond[ ] to significant points made during the public comment period,” consider “significant alternatives,” and examine “all relevant factors.”

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

73 Garland, supra note 29, at 529 & n.123.

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

75 Garland, supra note 29, at 530.

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

77 Id. at 530; see id. (quasi-procedural hard look set forth “the kind of decisionmaking record the agency must produce to survive judicial review”—not the “kind of procedures that an agency must use to generate a record”).

78 Id. at 527 (citing Home Box Office, Inc. v. FCC, 567 F.2d 9, 35 (D.C. Cir. 1977)); William H. Rodgers, Jr., A Hard Look at Vermont Yankee: Environmental Law Under Close Scrutiny, 67 GEO. L.J. 699, 704–08 (1979)); see also Am. Radio Relay League, Inc. v. FCC, 524 F.3d 227, 244 (D.C. Cir. 2008) (Tatel, J., concurring) (“In previous informal rulemaking cases, we ordered additional agency disclosures to facilitate meaningful arbitrary and capricious review.”).
Third, under *substantive* hard look, the D.C. Circuit reviewed the agency’s ultimate policy conclusions by “infusing greater rigor into the traditional ‘rational basis’ test,” and it began “intensive[ly]” scrutinizing the “the record support for agencies’ findings of fact.” The seeds for substantive hard look were sown as early as 1970, when Judge Harold Leventhal’s dicta in *Greater Boston Television Corp. v. FCC* referred to a “hard look” doctrine that “call[ed] on the courts to intervene not merely in case of procedural inadequacies” but anytime the agency had “not genuinely engaged in *reasoned decision-making*.” Note the shifting standard: “arbitrary and capricious” became “hard look,” which became “reasoned decision-making.” Of course, “reasoned decision-making” is a much more open-ended, intense standard of review than the rational basis test contemplated by *Pacific States Box*. This equivocation on the term “reasonable” even caused Judge Bazelon to criticize Judge Leventhal’s substantive hard look as an inquiry that “inevitably invites judges of opposing views to make plausible-sounding, but simplistic, judgments of the relative weight to be afforded various pieces of technical data.” Eventually, the Supreme Court joined this debate that had been brewing in the D.C. Circuit for nearly a decade, although the Court’s reaction did not bring the debate to an end.

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

To this day, the Supreme Court has provided very little guidance on the standard for judicial review of agency rulemaking, and it has not definitively addressed all three iterations of the D.C. Circuit’s hard look doctrine. The Supreme Court clearly rejected

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79 Garland, *supra* note 29, at 534 (citing Recording Indus. Ass’n v. Copyright Royalty Tribunal, 662 F.2d 1, 8 (D.C. Cir. 1981); Nat’l Lime Ass’n v. EPA, 627 F.2d 416, 451 n.126 (D.C. Cir. 1980); Weyerhaeuser Co. v. Costle, 590 F.2d 1011, 1027 (D.C. Cir. 1978)).


81 444 F.2d 841 (D.C. Cir. 1970) (Leventhal, J.).

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

83 Ethyl Corp. v. EPA, 541 F.2d 1, 66 (D.C. Cir. 1976) (en banc) (Bazelon, J., concurring). Judge Leventhal responded by arguing that “Congress has been willing to delegate its legislative powers broadly and courts have upheld such delegation because there is court review to assure that the agency exercises the delegated power within statutory limits, and that it fleshes out objectives within those limits by an administration that is not irrational or discriminatory.” *Id.* at 68-69 (Leventhal, J., concurring) (citing Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971)) (citation omitted).

84 The Supreme Court has described the extra procedures imposed by the National Environmental Policy Act (NEPA) as requiring the agency to take a “‘hard look’ at environmental consequences.” Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976) (quoting NRDC, Inc. v. Morton, 458 F.2d 827, 838 (D.C. Cir. 1972)), *quoted in* Winter v. NRDC, Inc., 129 S. Ct. 365, 376 (2008); Robertson v. Methow Valley Citizens
procedural hard look in *Vermont Yankee Nuclear Power Corp. v. NRDC, Inc.* While some commentators have posited that the Court accepted quasi-procedural and substantive hard look in *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, that is an over-reading of *State Farm*. Rather than adopting the rest of the hard look doctrine, *State Farm* merely gave an amorphous list of criteria for invalidating agency action—in dicta. And then *Chevron U.S.A., Inc. v. NRDC, Inc.* created a large escape hatch from *State Farm*.

a. **Vermont Yankee Rejected Procedural Hard Look**

A unanimous Supreme Court came down hard on the D.C. Circuit in *Vermont Yankee* by rejecting procedural hard look. *Vermont Yankee* held that APA Section 553 “established the maximum procedural requirements which Congress was willing to have the courts impose upon agencies in conducting rulemaking procedures.” The agency had not allowed the interested parties to use discovery or cross-examination during the

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85 435 U.S. 519 (1978). *See* Garland, *supra* note 29, at 529 (explaining that *Vermont Yankee* was limited to rejecting procedural hard look); Scalia, *supra* note 30, at 356 (noting that *Vermont Yankee* was decided on the basis of “inadequacy of procedures” and not “inadequacy of record support”); Warren, *supra* note 31, at 2631 (stating that *Vermont Yankee* rejected Judge Bazelon’s procedural hard look).

86 463 U.S. 29 (1983). *See*, e.g., Garland, *supra* note 29, at 543 (“On one level, the *State Farm* decision is a ringing endorsement of the quasi-procedural hard look.”); *id.* at 545 (recognizing that both elements of the substantive hard look—scrutiny of the agency’s record and a heightened standard of review going beyond minimum rationality—appeared in *State Farm*); Kagan, *supra* note 9, at 2372 (explaining that courts regularly review ‘agencies’ decision-making processes under the ‘hard look’ standard exemplified in *Motor Vehicle Manufacturers Ass’n of the United States v. State Farm Mutual Automobile Insurance Co.*’); Warren, *supra* note 31, 2631 (“[T]he Supreme Court finally used the substantive hard look standard to overturn an agency action in [*State Farm*].”)


rulemaking proceedings, neither of which is required by APA Section 553. The D.C. Circuit “refrained from actually ordering the agency to follow any specific procedures,” and it claimed that it did not want to “intrude on the agency’s province by dictating to it which, if any, [procedures not required by APA Section 553] it must adopt to flesh out the record.” Nevertheless, the Supreme Court construed the D.C. Circuit’s opinion as holding that the procedures used during the rulemaking “were inadequate,” and the Court reversed on the basis that the D.C. Circuit had required the agency to use extra-statutory procedures.

Rebuking the D.C. Circuit, the Supreme Court explained that “[t]he fundamental policy questions appropriately resolved in Congress and in the state legislatures are not subject to reexamination in the federal courts under the guise of judicial review of agency action.”

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

*Vermont Yankee* therefore rejected the D.C. Circuit’s procedural hard look, without addressing the validity of the quasi-procedural or substantive hard looks. This is why calls for the Court to reinvigorate *Vermont Yankee* do not address the real controversies surrounding APA arbitrary and capricious review.

*Vermont Yankee* did not explicitly answer whether courts could review “the inadequacy of the record to support the agency.” And the inadequacy of support in the record may implicate the amount of procedure used “if one chooses to regard certain evidence as inherently

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90 Scalia, *supra* note 30, at 353; see *Vermont Yankee*, 435 U.S. at 541 (noting that the intervenors argued that they should have been afforded the opportunity for “discovery or cross-examination”); *id.* at 535 (“[D]espite the fact that it appeared that the agency employed all the procedures required by 5 U.S.C. § 553 (1976 ed.) and more, the court determined the proceedings to be inadequate and overturned the rule.”).

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


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

94 *Id.* at 558.

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

96 *Cf.* Beermann & Lawson, *supra* note 25, at 858 (“For the past three decades, various scholars have been anticipating, and urging, a ‘Vermont Yankee II’ . . . .”).

unreliable unless it has been subjected to particular tests.” Stated another way, a court could find that an agency acted arbitrarily or capriciously by not establishing a record for appellate review that adequately responded to public comments, considered alternatives, or examined relevant factors—even though APA Section 553 does not require the agency to create a contemporaneous record or respond to public comments. So while Vermont Yankee came down hard on the D.C. Circuit, it was still unclear whether the D.C. Circuit’s quasi-procedural and substantive hard look doctrines survived Vermont Yankee.

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

Finally, in 1983, the Supreme Court provided some gloss on the APA’s arbitrary and capricious standard in State Farm, which remains the Court’s definitive case on arbitrary and capricious review. Most of this gloss, however, was dicta. Moreover, the parties were focused on whether the arbitrary and capricious standard was either minimum rationality review or an unreviewability standard in the context of agency deregulation; they were not focused on the precise contours of a heightened standard for judicial review of agency rulemaking that went beyond the standard applied to legislation. State Farm undoubtedly held that the Court would not treat agency rulemaking as the equivalent of legislation, thereby rejecting the minimum rationality approach to arbitrary and capricious review. And State Farm nixed the argument that

98 Id.

100 See Garland, supra note 29, at 529 & n.128 (“The critical question for the hard look doctrine was whether Vermont Yankee’s proscription of ‘extra procedural devices’ applied to the requirements that an agency explain itself, examine objections and relevant factors, and consider alternatives. Opponents of the doctrine argued it did.”) (citing Public Sys. v. FERC, 606 F.2d 973, 983, 984, 986 (Robb, J., dissenting)); id. at 530 (“The Supreme Court’s own view regarding the validity of the quasi-procedural requirements was unclear.”).


102 See Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 n.9 (1983) (“The Department of Transportation suggests that the arbitrary and capricious standard requires no more than the minimum rationality a statute must bear under the Due Process Clause. We do not view as equivalent the presumption of constitutionality afforded legislation drafted by Congress and the presumption of regularity afforded an agency in fulfilling its statutory mandate.”).
deregulation should be treated like agency inaction and therefore basically unreviewable. But the contours of the heightened standard that was adopted in *State Farm* largely remain a mystery.

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

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.

Because items on this list look quite similar to some of the reasons given by the D.C. Circuit for invalidating agency action, many have posited that *State Farm*endorsed both the quasi-procedural and substantive hard look doctrines. Plus, the Court distinguished *Vermont Yankee* on the basis that *State Farm*’s arbitrary and capricious test did not “require . . . any specific procedures” for the agency to use, which was a rationale frequently invoked under the D.C. Circuit’s quasi-procedural hard look. *State Farm*’s explanation that it was not requiring any specific procedures is especially peculiar because *Vermont Yankee* had rejected that precise rationale for invalidating agency action. Moreover, in the portion of *State Farm* that only five Justices joined, the Court stated that agency action must be “supported by the record and reasonably explained,” such that the Court could conclude that the agency engaged in “reasoned

103 Id. at 41–42.

104 Id. at 43.

105 See Garland, supra note 29, at 545 (describing *State Farm* as “[r]eciting a veritable litany of [quasi-procedural] requirements”).

106 State Farm, 463 U.S. at 43.

107 See, e.g., Garland, supra note 29, at 543 (“On one level, the *State Farm* decision is a ringing endorsement of the quasi-procedural hard look.”); id. at 545 (recognizing that both elements of the substantive hard look—scrutiny of the agency’s record and a heightened standard of review going beyond minimum rationality—appeared in *State Farm*); Warren, supra note 31, 2631 (“[T]he Supreme Court finally used the substantive hard look standard to overturn an agency action in *State Farm*.”).

108 *State Farm*, 463 U.S. at 50–51.
decisionmaking.”

And these same five Justices even quoted the D.C. Circuit’s seminal hard look decision, Greater Boston, approvingly.

But many facets of State Farm suggest that the Supreme Court was not completely signing on to the D.C. Circuit’s quasi-procedural and substantive hard look doctrines. For one thing, the Supreme Court has not used the label “hard look” to describe APA arbitrary and capricious review after State Farm, whereas the Court does use “hard look” to explain the additional procedures required by the National Environmental Policy Act. State Farm also clarified that it was not requiring an agency “to consider all policy alternatives in reaching a decision.” Rather, the Court made it abundantly clear that the deregulatory posture of the case required the agency to consider the rescinded alternatives. That holding has been justified largely on the grounds that most deregulation cases “involved conscious and purposeful changes in agency policy,” so the Court wants to determine whether “an improper motive has intruded into the decisionmaking process.”

Once you accept this unique rule that an agency must consider as an alternative a regulation it is attempting to rescind, most of State Farm becomes a simple case under Chenery. In State Farm, the National Highway Traffic Safety Administration rescinded its regulation that had required new cars to include passive restraints—airbags, detachable automatic seatbelts, or nondetachable automatic seatbelts. The agency explained that it could no longer conclude that the safety benefits from the passive restraint regulation would outweigh the approximately $1 billion it would cost the automobile industry to comply with this regulation. According to the agency, when it initially promulgated the passive restraint regulation, it estimated that 60% of new cars would be equipped with airbags and 40% would be equipped with automatic seatbelts; however, by 1981 when it rescinded the regulation, the industry planned to comply with the passive restraint regulation by installing detachable automatic seatbelts in 99% of new cars.

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109 Id. at 52.

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

111 See supra note 84.

112 Id. at 51.

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

114 Garland, supra note 29, at 553.

115 State Farm, 463 U.S. at 37–38.

116 Id. at 38–39.
Because this type of automatic seatbelt could be detached, the agency reasoned that they would not result in significant safety benefits.\textsuperscript{118}

However, the agency’s explanation did not address whatsoever airbags or nondetachable automatic seatbelts. The obvious flaw in the agency’s reasoning for rescinding the \textit{entire} regulation is that airbags or nondetachable seatbelts may have improved car safety, even if detachable seatbelts would not have. And when you combine \textit{State Farm}’s deregulation rule that an agency must consider the rescinded alternatives with \textit{Chenery}’s requirement that the agency must provide the explanation for its actions, the agency in \textit{State Farm} was required to explain why a regulation requiring new cars to have airbags or nondetachable seatbelts would not have resulted in significant safety benefits. But the agency did not. The rescission of the airbag and nondetachable seatbelt alternatives was therefore wholly illogical, and would have failed even under \textit{Chenery}’s rational basis with bite approach.\textsuperscript{119} Indeed, all nine Justices—including Justice Rehnquist who wrote \textit{Vermont Yankee}—held that the rescission of the airbag and nondetachable seatbelt alternatives was arbitrary and capricious.\textsuperscript{120}

\textit{State Farm}’s 5–4 split over the detachable seatbelt alternative,\textsuperscript{121} though, was the significant dispute in the case, because the agency did explain why it rescinded this alternative.\textsuperscript{122} As the agency indicated, “\[o\]nce a detachable automatic belt is detached, it becomes identical to a manual belt.”\textsuperscript{123} Thus, if a person detaches the automatic belt, “its use thereafter requires the same affirmative action that is the stumbling block to obtaining high usage levels of manual belts.”\textsuperscript{124} Justice White’s majority opinion held the agency

\begin{itemize}
  \item \textsuperscript{117} \textit{Id.} at 38.
  \item \textsuperscript{118} \textit{Id.} at 39 (quoting 46 Fed. Reg. 53419, 53421 (Oct. 29, 1981)).
  \item \textsuperscript{119} By way of analogy, assume a cook put pepperoni, sausage, and mushrooms on your frozen pizza. Before putting it into the oven, the cook asked you whether you want all three of those toppings. You respond, “I don’t like mushrooms, so please take off the mushrooms, pepperoni, and sausage.” That is the same form of reasoning used by the agency in \textit{State Farm}.
  \item \textsuperscript{120} \textit{See State Farm}, 463 U.S. at 58 (Rehnquist, J., concurring in part and dissenting in part) (“In particular, I agree that, since the airbag and [nondetachable] automatic seatbelt were explicitly approved in the standard the agency was rescinding, the agency should explain why it declined to leave those requirements intact. In this case, the agency gave no explanation at all. Of course, if the agency can provide a rational explanation, it may adhere to its decision to rescind the entire standard.”).
  \item \textsuperscript{121} \textit{See id.} at 58 (“I do not believe, however, that NHTSA’s view of detachable automatic seatbelts was arbitrary and capricious.”).
  \item \textsuperscript{123} 46 Fed. Reg. 53419, 53421 (Oct. 29, 1981).
  \item \textsuperscript{124} \textit{Id., quoted in State Farm}, 463 U.S. at 39.
\end{itemize}

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acted arbitrarily or capriciously because it did not account for “inertia” favoring seatbelt use based on the fact that “the passive belt, once reattached, will continue to function automatically unless again disconnected.” Justice Rehnquist’s dissent, which was joined by three other Justices, acknowledged that the agency’s explanation was “by no means a model.” Yet it found the explanation “adequate” because it articulated a “rational connection between the facts found and the choice made.”

Regardless of who you believe has the better of that debate, the important point is that Justice White’s majority opinion did not actually use or endorse most of the hard look doctrine in deciding this issue. The majority’s dispositive holding basically turned on the agency’s “fail[ure] to consider an important aspect of the problem”—inertia, a real-world aspect about the nature of detachable automatic seatbelts. While Justice White referenced the record material, he explicitly noted that the agency had the discretion to ignore the empirical evidence at issue. The majority’s holding did not turn on requiring the agency to produce additional data, respond to more comments, or consider other statutory purposes. Moreover, it did not foreclose the agency from coming up with an explanation of why the inertia from detachable seatbelts actually would not result in increased seatbelt usage.

To be sure, the *State Farm* majority used a stricter standard for reviewing agency rulemaking than the dissent, but the precise contours of that stricter standard remain unclear. What emerges from *State Farm* is not that the Supreme Court adopted the D.C. Circuit’s hard look doctrine wholesale. Rather, *State Farm* (1) established that agency deregulation is reviewed under the APA’s arbitrary and capricious standard, (2) rejected the minimum rationality approach to arbitrary and capricious review, (3) required an

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125 *State Farm*, 463 U.S. at 54; see also Brief of Respondents State Farm Mutual Automobile Insurance Company, et al., Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983) (No. 08-354), 1982 U.S. Briefs 354, at *70 (“Since detachable automatic belts overcome these causes and put inertia on the side of wearing belts, the assumption that detachables would do no better than manual belts is contrary to the record.”).

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

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

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

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

130 See *id.* at 54 (majority opinion) (whether inertia from detachable seatbelts would increase seatbelt usage “is a matter for the agency to decide, but it must bring its expertise to bear on the question”).
agency to consider as an alternative a regulation it is attempting to rescind, and (4) mandated that agencies at least consider and explain all relevant, real-world aspects of a regulatory problem. But it remains unclear just how heightened *State Farm*’s standard for judicial review of agency rulemaking really is. Just one year after *State Farm*, the Supreme Court did provide a clue in *Chevron*.

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

Most see *Chevron* as solely a case about deference to agency statutory interpretations. But *Chevron* actually involved a specific type of arbitrary and capricious review—review of an agency’s interpretation of a statute it administers.\(^{131}\) Indeed, *Chevron* referred to the arbitrary and capricious standard,\(^ {132}\) even though it never mentioned *State Farm*.\(^ {133}\) After seeing *Chevron* as an arbitrary and capricious review case, it is apparent that *Chevron* created a large escape hatch from *Chenery*’s requirement that an agency must explain its actions and *State Farm*’s list of criteria for invalidating agency rulemaking.\(^ {134}\)

*Chevron* announced a two-step inquiry for reviewing an “agency’s construction of the statute which it administers.”\(^ {135}\) First (“Chevron Step One”), courts “must give effect to the unambiguously expressed intent of Congress.”\(^ {136}\) Second (“Chevron Step Two”), “if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the

\(^{131}\) See, e.g., North Carolina v. EPA, 531 F.3d 896, 906 (D.C. Cir. 2008) (stating that Chevron Step Two was *State Farm*’s arbitrary and capricious standard); Arent v. Shalala, 70 F.3d 610, 615 (D.C. Cir. 1995) (“*Chevron* review and arbitrary and capricious review overlap at the margins. But it would be a mistake to view this case as one involving typical *Chevron* review.”). See also Garland, supra note 29, at 550 (“But the line between reviewing the validity of an agency’s statutory interpretations and reviewing the reasonableness of its policies is often a fine one . . . . The teachings of *Chevron*, therefore cannot be dismissed as inapplicable to the arbitrary and capricious test.”); Ronald M. Levin, *The Anatomy of Chevron: Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253, 1254 (1997) (proposing that Chevron Step Two and the APA’s arbitrary and capricious test “be deemed not just overlapping, but identical”).


\(^{133}\) See Garland, supra note 29, at 550 (“The Court treated *Chevron* as a case of statutory construction—neither *State Farm* nor the APA was even mentioned—and arguable the two cases can be distinguished on that ground.”).

\(^{134}\) Compare Nat’l R.R. Passenger Corp. v. Bost. & Me. Corp., 503 U.S. 407, 418–20 (1992) (deferring to the agency under *Chevron*), with id. at 425–27 (White, J., dissenting) (arguing that the agency action was invalid under *State Farm*).


\(^{136}\) *Id.* at 843.
statute.” 137 So, for purposes of *Chevron*, an agency need not articulate the connection between its interpretation and the statutory language, as “a court may not substitute its own construction of a statutory provision for a *reasonable* interpretation made by the administrator of an agency.” 138

*Chevron* therefore revitalized the minimum rationality approach to arbitrary and capricious review in the context of agency statutory interpretation. 139 After all, by not requiring the agency to explain why it interpreted a statute in a certain manner, *Chevron* implicitly created an exception to *Chenery’s* holding that the agency must provide the explanation to justify its act. On the other hand, how one interprets the term “reasonable” determines whether the *Chevron* test looks more like rational basis review of legislation or the D.C. Circuit’s hard look doctrine. If *Chevron* Step Two is interpreted as a return to minimum rationality review in the narrow context of agency statutory interpretation, *Chevron* creates an escape hatch from the more stringent *State Farm* inquiry. And *Chevron* seemed to suggest that was how to interpret *Chevron* Step Two, as the Court went to great lengths to emphasize the deference that should be accorded to agencies. 140 Then again, the Supreme Court recently added another prong to the *Chevron* inquiry—*Chevron* Step Zero—that reduces deference to agency statutory interpretation through factors that look a lot like the D.C. Circuit’s hard look doctrine. 141 The Court, however, has not extended *Chevron* Step Zero to agency informal rulemaking, so that development has basically not affected judicial review of agency rulemaking. 142

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137 *Id.*

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

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

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

141 *See* Keller, *supra* note 38, at 68–69 (discussing *Chevron* Step Zero and explaining that *Chevron* deference could be rejected if the agency lacked expertise, changed positions, did not carefully consider the relevant issues, or was addressing an important issue) (citing Gonzales v. Oregon, 546 U.S. 243, 267–68 (2006); Barnhart v. Walton, 535 U.S. 212, 222 (2002); United States v. Mead Corp., 533 U.S. 218, 228 (2001); Christensen v. Harris County, 529 U.S. 576, 587 (2000)).

142 *See* id. at 67–68 & nn.117–18 (explaining that *Chevron* Step Zero will not reduce the deference accorded to agencies when the agencies engage in informal rulemaking).
State Farm—and its Chevron exception—to this day remain as the definitive precedents on APA arbitrary and capricious review. But State Farm and Chevron left lower courts without much guidance on how to review agency action. On one hand, State Farm opened the door for courts to scrutinize the substantive policy decisions made by agencies, but then Chevron instructed lower courts to apply minimum rationality review to agency statutory interpretation. As many, including then-Judge Breyer, noted, that combination set up a doctrine for review of agency action that seemed completely backwards: Courts were to defer to agencies on questions of law relating to statutory interpretation, but were to nitpick substantive agency policy conclusions on matters in which judges lacked institutional competence.\(^{143}\) Nevertheless, this is the current state of the law.

II. Doctrines for Judicial Review of Agency Rulemaking Should Use the Doctrines for Judicial Review of Legislation

The law on arbitrary and capricious review is in shambles and has given judges too much leeway to impose their policy preferences on agencies because courts have stopped using the doctrines for judicial review of legislation when reviewing agency rulemaking. Essentially, when courts recognized that agency rulemaking differed in significant respects from legislation,\(^ {144}\) they went too far in severing the connection between the doctrines for review of agency rulemaking and legislation.\(^ {145}\) Without a theoretical grounding, arbitrary and capricious review of agency rulemaking became highly politicized, and the most direct remedy for this problem is doctrinal innovations that will limit the ability of judges to use their policy preferences to invalidate agency rules.\(^ {146}\) The significant differences between agency rulemaking and legislation do warrant a more nuanced doctrine than merely treating agency rulemaking as the equivalent of legislation.\(^ {147}\) This observation, though, does not entail an either-or proposition: Courts can—and should—develop doctrines for judicial review of agency rulemaking by using doctrines for review of legislation, even if courts should not treat

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\(^{144}\) See supra Part I.B.

\(^{145}\) See supra Part I.C.

\(^{146}\) See Thomas J. Miles & Cass R. Sunstein, Depoliticizing Administrative Law, University of Chicago John M. Olin Law & Economics Working Paper No. 143, at 24, available at http://ssrn.com/abstract=1150404 (“And if arbitrariness review is being conducted in a way that shows a significant effect from judicial policy preferences, then the most obvious response would be to reduce the intensity of such review. What is now a ‘hard look’ on the part of reviewing courts might be transformed into a ‘soft look.’”).

\(^{147}\) See supra notes 34–48 and accompanying text.
agency rulemaking as the equivalent of a typical piece of legislation. Specifically, courts should place APA arbitrary and capricious review on the tiers-of-scrutiny sliding scale used for review of legislation, even if courts should not equate arbitrary and capricious review with the minimum rationality test used for reviewing most legislation.

This Part begins with background information on the tiers of scrutiny, which is the current doctrine for judicial review of legislation. It then proceeds to give both practical and theoretical reasons why arbitrary and capricious review should be tied to the tiers of scrutiny. Practically, arbitrary and capricious review under State Farm has left lower courts in disarray and has politicized judicial review of agency rulemaking. Theoretically, courts have given no justification for State Farm or the hard look doctrine, and the Supreme Court is signaling that the APA’s arbitrary and capricious standard should be interpreted as it was understood by Congress when it passed the APA. This would entail a return to Pacific States Box’s focus on an agency’s purpose in regulating and the means used to achieve that purpose. And the doctrines for review of legislation already provide a nuanced framework—based on over a century of trial-and-error—for evaluating the purpose and means used in creating legislative-like pronouncements.

A. The Tiers of Scrutiny for Reviewing Legislation

It is settled constitutional law that judicial review of legislation is based on the tiers of scrutiny, but it took over a century for these precedents to become entrenched. These tiers of scrutiny require courts to analyze the means and the ends of legislation, by asking whether the governmental purpose rises to the requisite level (the ends) and whether the legislation has the requisite connection to furthering that purpose (the means). Currently, the Court has recognized three different levels of scrutiny, which establish a sliding scale for reviewing legislation. In determining which level of scrutiny a piece of legislation should be reviewed under, courts consider various factors: the original understanding of the Constitution, the institutional competence of courts to second-guess legislatures, whether courts in future cases would be required to apply heightened scrutiny in an unprincipled manner that would open a “Pandora’s box,”

148 See Shapiro & Levy, supra note 40, at 425 (under the tiers of scrutiny, courts analyze “the rationality of legislative purposes and means chosen to achieve them”).


151 See id. (citing City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 443 (1975)).

152 Id. (citing City of Cleburne, 473 U.S. at 445–46).
whether a deficiency in the political process exists, and whether the legislation affects an immutable characteristic or “burdens an individual for something not based on that individual’s choice.”

A small proportion of legislation will be reviewed under “strict scrutiny,” which requires that the legislation serve a compelling governmental purpose and be narrowly tailored to serve that purpose. Strict scrutiny applies to “classifications based on race or national origin and classifications affecting fundamental rights.”

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

“Rational basis” review is the most deferential doctrine for reviewing legislation, as it merely requires that the legislation has a legitimate governmental purpose and is rationally related to that purpose. Unlike strict and intermediate scrutiny, the Supreme Court has held that courts reviewing legislation for a rational basis can consider any conceivable, hypothetical governmental purpose that a legislature could have had in

153 See id. at 229 n.20 (citing United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938)).

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

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

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


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


161 See, e.g., Craig, 429 U.S. at 197.

mind; most legislation will be reviewed for a rational basis, as anything not triggering strict or intermediate scrutiny will get rational basis review.

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

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

164 See Kelso, supra note 149, at 230 (describing “minimum rationality” review as examining any “conceivable legitimate interest to support the statute”).

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

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

167 See, e.g., Kelso, supra note 149, at 226 (arguing that the Supreme Court should recognize seven levels of scrutiny, but that the Court has applied ten different levels of scrutiny).


169 See supra note 162 and accompanying text.

170 See supra note 163 and accompanying text.

The Court has not yet recognized the existence of rational basis with bite, much less defined when rational basis with bite applies instead of minimum rationality.\footnote{172} Generally speaking, rational basis with bite has applied in cases with two features: (1) they involve a classification that the Court does not want lower courts applying intermediate or strict scrutiny to, given institutional competence concerns and the fear of opening a Pandora’s box;\footnote{173} (2) but the law at issue nevertheless blatantly “burdens an individual for something not based on that individual’s choice.”\footnote{174} In other words, rational basis with bite has been applied when there was both a plausible argument for applying heightened scrutiny and also reasons for the Court to be worried about subjecting the law at issue to heightened scrutiny—because lower courts could over-use their power of judicial review to strike down other pieces of legislation that the Court would consider valid.

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

It took the Court over a century to solidify the tiers of scrutiny,\footnote{175} because developing doctrines for review of legislative-like pronouncements needs to account for many factors including the institutional competence of courts to review policy decisions made by governmental bodies entrusted with such decisions. One large limitation inherent in the tiers of scrutiny is that court can only evaluate a piece of legislation’s purpose and means—courts, for example, cannot require Congress to hold more hearings

Parents Involved in Cmty. Schools v. Seattle Sch. Dist. No. 1, 426 F.3d 1162, 1194 (9th Cir. 2005) (en banc), rev’d 127 S. Ct. 2738 (2007) (Kozinski, J., concurring) (“By rational basis, I don’t mean the standard applied to economic regulations, where courts close their eyes to reality or even invent justifications for upholding government programs, but robust and realistic rational basis review, where courts consider the actual reasons for the plan in light of the real-world circumstances that gave rise to it.” (citations omitted)). See generally Neelum J. Wadhwani, Note Rational Reviews, Irrational Results, 84 Tex. L. Rev. 801, 814–15 (2006) (explaining “the Court’s schizophrenic oscillation” between minimum rationality and rational basis with bite).

\footnote{172} In the analogous context of criminal sentencing, courts may very well be applying a rational basis with bite standard to appellate review of a district court’s sentence that is outside the Sentencing Guidelines range. Congress has required district courts to give a written explanation for all sentences given outside the Guidelines range. 18 U.S.C. § 3553(c)(2). The courts of appeal then review this explanation and the sentence under a reasonableness standard. United States v. Booker, 543 U.S. 220, 261–62 (2005).

\footnote{173} See Kelso, supra note 149, at 229 n.19 (citing City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 443, 445–46 (1975)).

\footnote{174} Id. at 229 n.20 (citing Plyler v. Doe, 457 U.S. 202, 220 (1982)); see also Lawrence v. Texas, 539 U.S. 558 (2003) (O’Connor, J., concurring in the judgment) (stating that rational basis with bite applies “[w]hen a law exhibits . . . a desire to harm a politically unpopular group” (citing Romer, 517 U.S. at 632; Cleburne, 473 U.S. at 446–47; Plyler, 457 U.S. at 216; Moreno, 413 U.S. at 534)).

\footnote{175} See supra note 25.
or examine different aspects of the underlying problem. Similar institutional competence concerns surround judicial review of agency rulemaking, as unelected judges are reviewing the policy decisions made by the government body entrusted with making such decisions.

However, instead of acknowledging the “[y]ears of refinement” that went into creating the tiers of scrutiny, the Court has not examined the tiers of scrutiny in reviewing agency rulemaking. Consequently, courts are not limiting themselves to reviewing the agency’s purpose in regulating and the means used to achieve that purpose; rather, State Farm’s dicta established a vague, open-ended list of criteria that essentially gives courts carte blanche to validate or invalidate agency rules. For both practical and theoretical reasons, State Farm’s list of criteria should be eliminated, and the APA’s arbitrary and capricious standard should be placed on the tiers-of-scrutiny sliding scale.

Practically, the lower courts’ application of State Farm has proven that its doctrine for review of agency rulemaking is unprincipled and unmanageable. Within a decade after State Farm and Chevron, “the Chevron framework [had] broken down, and State Farm [had] been all but ignored by agencies and the courts, including the Supreme Court.” At times, the Supreme Court and the circuit courts cited the State Farm criteria in applying the arbitrary and capricious standard, but they were more often ignored. At the other extreme, the D.C. Circuit continues to use its hard look doctrine to invalidate agency rulemaking, and other courts frequently cite the D.C. Circuit’s hard look cases. Confirming this disarray, lower courts often selectively quote from Overton Park or State Farm for the proposition that arbitrary and capricious review is either “narrow” or more probing—but courts frequently will not explain that this review


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


179 Id. at 1067.

180 See, e.g., Long Island Head Start Child Development Servs. v. NLRB, 460 F.3d 254 (2d Cir. 2006) (“applying State Farm ‘hard look’ standard to NLRB adjudication”); El Conejo Americano of Texas, Inc. v. DOT, 278 F.3d 17, 19–20 (D.C. Cir. 2002) (invoking the “hard look” standard under arbitrary and capricious review). But see Nw. Envtl. Defense Ctr. v. Bonneville Power Admin., 477 F.3d 668, 687 n.15 (9th Cir. 2007) (“Because the Supreme Court has never explicitly embraced the ‘hard look’ approach to judicial review under the arbitrary and capricious standard of the APA, we adhere to the Supreme Court’s explicit guidance in State Farm that an agency must cogently explain its actions and demonstrate a rational connection between the facts it found and the choice it made.” (citation omitted)).
is supposed to be both narrow and probing, according to *Overton Park* and *State Farm*. D.C. Circuit Judge Kavanaugh may have summed it up best:

Courts have incrementally expanded those APA [§ 553] procedural requirements well beyond what the text provides. And courts simultaneously have grown *State Farm*’s “narrow” § 706 arbitrary-and-capricious review into a far more demanding test. Application of the beefed-up arbitrary-and-capricious test is inevitably if not inherently unpredictable—so much so that, on occasion, the courts’ arbitrary-and-capricious review itself appears arbitrary and capricious.\(^{182}\)

*Chevron* has not fared much better. Most lower courts interpreted *Chevron* as a return to minimum rationality review of agency statutory interpretation,\(^{183}\) although a significant number of D.C. Circuit cases infused the hard look doctrine into *Chevron*\(^{184}\) by continuing to equivocate on the term “reasonable.”\(^{185}\) However, to compound the ambiguity, the Supreme Court’s recent *Chevron* Step Zero doctrine ratcheted back *Chevron* deference through factors that look a lot like the D.C. Circuit’s hard look doctrine.\(^{186}\)

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181 A quick search on Westlaw in December 2008 revealed that *Overton Park* was cited 1,642 times in the federal courts of appeals. 817 times, the court quoted *Overton Park* for the proposition that arbitrary and capricious review is narrow or that the court could not substitute its judgment for the agency’s judgment—but did not state that this review was thorough, probing, or in-depth. The opposite happened 107 times. The search was limited to federal courts of appeals cases citing *Overton Park*, and the locate terms of the search were <narrow substitute % (thorough probing in-depth)>. Likewise, *State Farm* was cited 1,149 times in the federal courts of appeals. 383 times, the court quoted *State Farm* for the proposition that arbitrary and capricious review is narrow or that the court could not substitute its judgment for the agency’s judgment—but did not list the *State Farm* criteria for invalidating agency action. The opposite happened 134 times. The search was limited to federal courts of appeals cases citing *State Farm*, and the locate terms of the search were <narrow substitute % (“rel! on factors” “fail! to consider” “counter to the evidence” “implausible”)>.


183 See Levin, supra note 131, at 1266 n.59 (“[U]nder current law step two is so deferential as to be almost inconsequential . . . .” (citing Mark Seidenfeld, *A Syncopated Chevron: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV. 83 (1994))).

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

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

186 See Keller, supra note 38, at 68–69 (discussing *Chevron* Step Zero and explaining that *Chevron* deference could be rejected if the agency lacked expertise, changed positions, did not carefully consider the relevant issues, or was addressing an important issue) (citing Gonzales v. Oregon, 546 U.S. 243, 267–68
Empirical studies confirm that under *State Farm* and *Chevron*, the political policy preferences of judges significantly affect whether judges invalidate agency action.\(^{187}\) With such a muddled doctrine, this comes as no surprise, as there is leeway to apply one’s own policy preferences under indeterminate doctrines. Nevertheless, much of the commentary supporting the hard look doctrine—a more robust form of *State Farm*’s criteria for invalidating agency action—has taken it on faith that judges would not let their political policy preferences cloud their judgments.\(^{188}\) Evidence to the contrary suggests that *State Farm* and the D.C. Circuit’s hard look doctrine, at the very least, should be reconsidered. Indeed, the major reason why Congress creates agencies is so that an expert set of decisionmakers—not judges—can set national policy. When judges overrule expert agencies on the basis of judicial policy preferences, they eliminate the major advantage of having an administrative state in the first place.

In addition to these practical concerns, there are theoretical reasons for rejecting *State Farm*’s approach and placing APA arbitrary and capricious review of agency rulemaking on the tiers-of-scrutiny sliding scale. Most importantly, courts need to return to focusing solely on the agency’s *purpose* in regulating and the *means* used by the agency to achieve that purpose. In fact, the APA itself explicitly contemplates that the agency’s record only needs to include a “concise general statement of [the rule’s] *basis* and *purpose*.”\(^{189}\) When courts are given the leeway to require agencies to use additional procedures to formulate a more lengthy record for appellate review, judges are given an easy way use their policy preferences to invalidate an agency rulemaking under the guise of merely asking for a more thorough record. However, the ability of judges to use their policy preferences in reviewing agency rulemakings would be significantly constrained if judges could only examine the agency’s explanation about its purpose and means. Such an inquiry would focus simply on whether the agency invoked a regulatory purpose contained with its statutory delegation and whether it adequately explains how the rule it promulgated was sufficiently connected to that purpose.

The hard look doctrine itself is basically “a surrogate for motivation analysis”—an analysis of the agency’s purpose to see whether an “improper motive

\(^{187}\) See supra note 11 and accompanying text.

\(^{188}\) See, e.g., Garland, *supra* note 29, at 558 (“[H]ard look review may be too hard because it may permit a court to substitute its judgment for the agency’s on the pretext of determining whether a policy outcome is ‘reasonable.’ . . . It is hard to rebut this charge directly, beyond asserting the good faith of the judiciary.”); Shapiro & Levy, *supra* note 40, at 438 (“It would, of course, be naïve to suppose that [substantive hard look] can completely avoid the problem of judges finding flaws in agency reasoning because they dislike the result.”).

\(^{189}\) 5 U.S.C. § 553(c) (emphasis added).

\(^{190}\) Garland, *supra* note 29, at 555.
has intruded into the decisionmaking process.\textsuperscript{191} If courts’ main concern in reviewing agency rulemaking is the agency’s purpose, then the doctrines for judicial review of agency rulemaking should be simplified to focus directly on the agency’s purpose instead of proxies that do not necessarily implicate that purpose. Using the tiers of scrutiny in reviewing agency rulemaking would restore this direct focus on the agency’s purpose in rulemaking.

Another theoretical concern is that courts applying \textit{State Farm} and the D.C. Circuit’s hard look doctrine have neglected to justify their doctrines of judicial review of agency rulemaking.\textsuperscript{192} There is no limiting principle to the D.C. Circuit’s requirement that courts give agency action a hard look—a hard look can result in any outcome that a judge wants. And \textit{State Farm}’s adoption in dicta of a non-exhaustive list of criteria for invalidating agency action practically invited lower courts to create their own lists. The tiers of scrutiny, on the other hand, provide judicial standards employed by courts in many other contexts, such as an objective reasonableness standard under rational basis review. One of the greatest advantages of adopting a tiers-of-scrutiny approach to reviewing agency rulemaking is that courts could then take advantage of cross-doctrinal precedents, which give content to the various standards contained within the tiers of scrutiny.

Indeed, that is precisely what Congress was trying to do when it codified the arbitrary and capricious standard in the APA: Courts had been using the arbitrary and capricious standard in reviewing legislation, so Congress wanted courts to use the doctrines for reviewing legislation when reviewing agency action.\textsuperscript{193} This is extremely relevant to the modern Supreme Court, which has explained that the APA should be interpreted in accordance with the understanding of the APA when Congress passed it in 1946.\textsuperscript{194} The modern Court’s shift to interpreting the APA in accordance with its original understanding provides substantial support for applying the tiers of scrutiny used for reviewing legislation when reviewing agency rulemaking.

\textsuperscript{191} \textit{Id.} at 553.

\textsuperscript{192} \textit{See} Cross, \textit{supra} note 11, at 1244 (“[T]he justification for \textit{some} measure of [judicial review of rulemaking] is widely taken for granted.”).

\textsuperscript{193} \textit{See supra} note 25 and accompanying text.

\textsuperscript{194} \textit{See} Dickinson v. Zurko, 527 U.S. 150, 155 (1999) (“A statutory intent that legislative departure from the norm must be clear suggests a need for similar clarity in respect to grandfathered common-law variations. The APA was meant to bring uniformity to a field full of variation and diversity.”); \textit{id.} at 165 (“Congress has set forth the appropriate standard in the APA.”); Director, Office of Workers’ Compensation Programs v. Greenwich Collieries, 512 U.S. 267, 275 (1994) (interpreting the APA’s use of the term “burden of proof” in accordance with 1930s and 1940s sources, and “presum[ing] Congress intended the phrase to have the meaning generally accepted in the legal community at the time of enactment”).
For both practical and theoretical reasons, courts should place the APA’s arbitrary and capricious standard on the tiers-of-scrutiny sliding scale. *State Farm* has left courts with an inconsistent, unmanageable doctrine for judicial review of agency rulemaking, and it has unnecessarily fostered the politicization of administrative law. To fix this problem, courts reviewing agency rules should return to focusing solely on the agency’s purpose in regulating and the means used to achieve that purpose. By focusing on the means and ends of agency rulemaking, courts will no longer be in the business of adding to *State Farm*’s laundry list of ways that agency action can be invalidated. And the tiers of scrutiny used for reviewing legislation already provide a framework for focusing on the means and ends of regulation. Thus, the most salient and effective remedy for depoliticizing judicial review of agency rulemaking is for courts to use doctrines for reviewing legislation when they review agency rulemaking. This would entail placing APA arbitrary and capricious review on the tiers-of-scrutiny sliding scale.

Granted, there could still be some room for examining the agency’s rulemaking record or second-guessing the agency’s ultimate policy decision. But the degree to which courts will be able to do that depends on where arbitrary and capricious review is placed on the tiers-of-scrutiny sliding scale. The next Part will address that question. But regardless of where arbitrary and capricious review is placed on the tiers of scrutiny, an appreciation that the doctrines for reviewing legislation should be used in reviewing agency rulemaking would significantly clarify and improve the doctrines for reviewing agency rulemaking.

III. Arbitrary and Capricious Review of Agency Rulemaking Should Be the Rational Basis With Bite Standard Used for Reviewing Legislation

Ultimately, this Article argues that courts should equate APA arbitrary and capricious review of agency rulemaking to the rational basis with bite standard used in reviewing legislation. 195 Under this rational basis with bite approach, courts would ask (1) whether the agency’s rule conforms to a legitimate statutory purpose and (2) whether the rule is rationally related to that purpose. 196 Importantly, courts would not be permitted to examine any conceivable, hypothetical statutory purposes, but only the actual purpose invoked by the agency. 197 This Part first provides an argument for adopting rational basis with bite instead of the other standards on the tiers of scrutiny. 198

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

196 *See supra* note 162 and accompanying text.

197 *See supra* note 171 and accompanying text.

198 This Article does not take a position on whether adoption of this rational basis with bite approach would overrule *Chevron*. As previously mentioned, *Chevron* created an exception from the typical arbitrary and capricious standard of review applied under *State Farm*, which applies when courts review agencies’ interpretation of statutes that they are delegated to administer. *See supra* notes 139–142 and
It then applies the rational basis with bite approach to two recent court of appeals cases to show how the standard can bring clarity to this area of the law, which is currently “more Rorschach than rule of law.”

A. Rational Basis With Bite Should Be Used in Reviewing Agency Rulemaking, Instead of Minimum Rationality, Intermediate Scrutiny, or Strict Scrutiny

Equating APA arbitrary and capricious review of agency rulemaking to the rational basis with bite approach has two primary advantages compared to other levels of scrutiny: (1) it balances the justification for heightened review of agency rulemaking with the need to limit judges’ abilities to use their policy preferences to invalidate agency rulemaking, and (2) rational basis with bite fits comfortably within the Supreme Court’s precedents on APA arbitrary and capricious review.

This first concern of adopting a standard that is not too stringent yet not too lenient is what motivated the Court to use rational basis with bite in reviewing legislation—it did not want judges to have the latitude to strike down much legislation, but it believed minimum rationality review was too lenient. Minimum rationality review and strict scrutiny—the two extreme standards for reviewing legislation—can therefore be eliminated quite easily. The significant differences between agencies and Congress, as well as the underenforced nondelegation doctrine, provide a strong basis for subjecting agency rulemaking to a more heightened standard than the minimum rationality review used for reviewing most legislation. At the same time, under strict scrutiny, judges would be even more likely to use their policy preferences when

accompanying text. *Chevron* could easily remain as an entrenched exception to this rational basis with bite approach that applies when courts review agency statutory interpretation.


200 See supra notes 173–174 and accompanying text.

201 See supra Part I.B.

202 This, of course, would contradict *Pacific States Box*, which expressly equated agency rulemaking with congressional legislation. See supra notes 27–33 and accompanying text. But the courts are long past treating agency rulemaking the same as congressional legislation. See supra Parts I.B & I.C. Moreover, in the same year that *Pacific States Box* was decided (1935), the Court used the nondelegation doctrine twice to invalidate congressional delegations to agencies. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 529 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388, 433 (1935). Those are the only two times the Court has invoked the nondelegation doctrine to invalidate congressional delegations of power. It is therefore unclear whether *Pacific States Box*’s holding was premised on the view that the Court would be actively enforcing the nondelegation doctrine, as the nondelegation doctrine could prevent Congress from delegating large amounts of legislative power. Had the *Pacific States Box* Court known that the modern Court would basically not enforce the nondelegation doctrine, *Pacific States Box* may very well have treated agency rulemaking differently from legislation.
reviewing agency rulemaking than they are under the current *State Farm* framework. Even staunch advocates of reducing deference to agencies would probably not evaluate agency rulemaking under strict scrutiny, as that would imply that almost all agency action is suspect and illegitimate.\textsuperscript{203}

That, of course, leaves intermediate scrutiny as the only real alternative to rational basis with bite. Under intermediate scrutiny, the Court would also look at the agency’s actual statutory purposes; but instead of merely requiring the agency’s rule to be *rationally related* to a *legitimate* purpose, intermediate scrutiny would require the rule to be *substantially related* to an *important* purpose. This more indeterminate phrasing of the intermediate scrutiny standard would probably allow courts to retain the D.C. Circuit’s hard look doctrine, which has resulted in the unmanageable, politicized doctrines we currently have for reviewing agency rulemaking. Tellingly, the Supreme Court recently stated that intermediate scrutiny required a “hard look.”\textsuperscript{204}

Intermediate scrutiny would therefore not be an improvement over *State Farm*, as it would essentially adopt the D.C. Circuit’s hard look doctrine—and then some. This would give judges significant leeway to impose their policy preferences on agencies, which is the major defect of the current *State Farm* approach to arbitrary and capricious review.\textsuperscript{205} For example, if a statutory delegation contained more than one policy directive, a court reviewing under intermediate scrutiny could favor one policy over another—by stating that one statutory purpose was *important*, while another was not—and invalidate agency action that relied on the less-favored policy. In fact, most delegations direct agencies to do some form of cost-benefit analysis, so a reviewing court could invalidate agency action on the grounds that the agency should have weighed other, more important statutory purposes greater than cost-benefit analysis.\textsuperscript{206} As another example, an agency could promulgate a rule that sets a standard at a certain level; but under intermediate scrutiny, a court could find that the standard is not stringent enough such that it is not *substantially* related to that important statutory purpose.

\begin{itemize}
\item \textsuperscript{203} Cf. Indus. Union Dep’t, AFL-CIO v. Am. Petrol. Inst., 448 U.S. 607, 695 n.9 (Marshall, J., dissenting) (“There is also room for especially rigorous judicial scrutiny of agency decisions under a rationale akin to that offered in *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 . . . (1938).” (citing Env’t’l Def. Fund v. Ruckelshaus, 439 F.2d 584 (D.C. Cir. 1971))); Env’t’l Def. Fund v. Ruckelshaus, 439 F.2d 584, 598 (D.C. Cir. 1971) (Bazelon, C.J.) (“[C]ourts are increasingly asked to review administrative action that touches on fundamental personal interests in life, health, and liberty. These interests have always had a special claim to judicial protection, in comparison with the economic interests at stake in a ratemaking or licensing proceeding.”).  
\item \textsuperscript{204} United States v. Virginia, 518 U.S. 515, 541 (1996).  
\item \textsuperscript{205} See supra notes 11 and accompanying text.  
\item \textsuperscript{206} But see John D. Graham, *Saving Lives Through Administrative Law and Economics*, 157 U. PA. L. REV. 395, 403 (2008) (“My central argument is that [cost-benefit analysis], while easy to criticize because of its transparency, has compelling philosophical and practical advantages over other suggested approaches to lifesaving regulation.” (citation omitted)).
\end{itemize}
Rational basis with bite does leave some room for judges to invalidate agency action: The agency’s rule must be rationally related to a legitimate statutory purpose, actually invoked by the agency. Judges could therefore find the agency’s rule was not rationally related or the purpose was not legitimate. These labels are not rock-solid limitations that completely cabin the discretion of judges. But it would be much harder to invalidate agency action under this formulation than under intermediate scrutiny. Almost any purpose contained in a statutory delegation will be a legitimate governmental purpose, so, as long as the agency invokes a purpose enumerated by the statute, courts will not be able to invalidate agency action under the purpose prong. And the rationally related prong implies a standard of objective reasonableness, where a judge asks whether no objectively reasonable person could conclude that the agency rule was related to the statutory purpose. Judges can manipulate review under an objective reasonableness standard, but it is much more difficult to get away with that when everyone agrees that the more determinate objective reasonable standard applies instead of a “substantially related,” “hard look” or “reasoned decisionmaking” standard.

The rational basis with bite standard is therefore important if for no other reason than it can highlight when courts are egregiously overstepping their mandate of conducting arbitrary and capricious review without being swayed by judicial policy preferences. One of the reasons why the Supreme Court rarely addresses arbitrary and capricious review is that such cases are largely insulated from review because there is no metric for determining when a judge decides a case based on policy preferences. But the rational basis with bite doctrine will illuminate when courts of appeals let policy preferences dictate their results, as it will require judges to employ an objective reasonableness standard—and the Supreme Court is quite comfortable reviewing objective reasonableness standards.

Moreover, the perceived stringency of the standard for reviewing agency rulemaking affects whether agencies, *ex ante*, will choose to engage in rulemaking in the first place. The ossification of rulemaking would continue under intermediate scrutiny review of agency rulemaking because that standard implies that courts could quite plausibly strike down a significant amount of agency rulemaking, whereas rational basis with bite would uphold most rules. Before studies documented that judges were infusing...
their policy preferences into arbitrary and capricious review, the most often-cited argument against State Farm was that it ossified rulemaking. Agencies would not engage in new rulemaking and existing rules would never be changed because agencies feared that the resources they would devote to the rulemaking would be wasted if a court used heightened review to invalidate the rule. If all agency rulemaking were to be viewed like a suspect classification that triggers intermediate scrutiny, agency rulemaking would probably become even more ossified as agencies would not even be able to argue that arbitrary and capricious review is “narrow.”

The second major advantage of adopting the rational basis with bite approach for reviewing agency rulemaking is that it accommodates the Supreme Court’s APA arbitrary and capricious review precedents amazingly well. Only in the past few

209 See supra notes 11 and accompanying text.

210 See, e.g., JERRY L. MASHAW & DAVID L. HARFST, THE STRUGGLE FOR AUTO SAFETY (1990) (“The result of judicial requirements for comprehensive rationality has been a general suppression of the use of rules.”); Thomas O. McGarity, Some Thoughts on “Deossifying” the Rulemaking Process, 41 DUKE L.J. 1385, 1453 (1992) (explaining that “many observers from across the political spectrum” saw the “ossification” of the rulemaking process as “one of the most serious problems . . . facing regulatory agencies”); Richard J. Pierce, Seven Ways to Deossify Agency Rulemaking, 47 ADMIN. L. REV. 59, 93–95 (1995) (“Judicial ossification of rulemaking is a function of two variables: (1) judicial imposition of decisionmaking procedures that are costly and time-consuming; and, (2) the high risk of judicial invalidation of a rule on either procedural or substantive grounds.”); Paul R. Verkuil, Rulemaking Ossification—A Modest Proposal, 47 ADMIN. L. REV. 453, 457–58 (1995) (“Pierce correctly identifies the social costs of rulemaking ossification . . . .”). But see William S. Jordan, III, Ossification Revisited: Does Arbitrary and Capricious Review Significantly Interfere with Agency Ability to Achieve Regulatory Goals Through Informal Rulemaking?, 94 Nw. U. L. REV. 393, 444–45 (2000) (“Judicial review under the hard look doctrine is the price we pay for delegating highly complex important public policy decisions to unelected administrative agencies. The ossification critique has long suggested that the price is too high . . . . This research suggests otherwise.”); Mark Seidenfeld, Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking, 75 TEX. L. REV. 483, 499–502 (1997) (“Critics of hard look review are on solid ground in concluding that aggressive judicial review of agency reasoning has contributed to ossification of the rulemaking process. Their assertion, however, that merely easing the standard of review will deossify this process is more tenuous.”).

211 See, e.g., Am. Radio Relay League, Inc. v. FCC, 524 F.3d 227, 248 (D.C. Cir. 2008) (Kavanaugh, J., concurring in part, concurring in the judgment in part, and dissenting in part) (remarking that State Farm has “gradually transformed rulemaking—whether regulatory or deregulatory rulemaking—from the simple and speedy practice contemplated by the APA into a laborious, seemingly never-ending process”).

212 See supra notes 159–161 and accompanying text.


214 Conversely, Justice O’Connor explained that rational basis with bite was a “searching” form of judicial review, Lawrence v. Texas, 539 U.S. 558 (2003) (O’Connor, J., concurring in the judgment), and Overton Park stated that arbitrary and capricious review was “searching,” Overton Park, 401 U.S. at 416.
decades have courts and commentators recognized that rational basis with bite was a different form of rational basis review than minimum rationality review. But before anyone had a label for rational basis with bite, *Chenery* implicitly implemented this doctrine in reviewing agency action—just one year after the APA was enacted. *Chenery* held that a court had to review the actual purposes “invoked by the agency” instead of “substituting what it considers to be a more adequate or proper basis.” And the requirement that courts examine the actual purposes instead of hypothetical purposes is precisely what makes rational basis with bite a heightened standard compared to minimum rationality review.

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

Beyond these watershed precedents, recent Supreme Court cases also support applying the rational basis with bite approach when reviewing agency rulemaking. A number of cases signal that the Court wants to retreat from *State Farm*’s conception of a stringent standard for arbitrary and capricious review. *United States Postal Service v. Gregory* described arbitrary and capricious review as “extremely narrow.” And then seven Justices in *Verizon Communications, Inc. v. FCC* limited *State Farm*’s “more searching judicial review” to cases that “involved review of an agency’s ‘changing its

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215 See supra note 168 and accompanying text.

216 See supra notes 49–53 and accompanying text.

217 SEC v. Chenery, 332 U.S. 194, 196 (1947) (*Chenery II*); see also Camp v. Pitts, 411 U.S. 138 (1973) (“The explanation may have been curt, but it surely indicated the determinative reason for the final action taken.” (citing SEC v. Chenery, 318 U.S. 80 (1943) (*Chenery I*)).

218 See supra note 171 and accompanying text.


course’ as to the interpretation of a statute.” Even Justice Breyer, the one Justice who did not sign on to the majority opinion, described arbitrary and capricious review as a form of “‘rational basis’ review.” The State Farm Court certainly believed the criteria it listed in dicta would apply to any case involving arbitrary and capricious review, so the Court appears quite ready to scale back State Farm.

In fact, the Court recently heard argument in FCC v. Fox Television Stations, Inc., which involved an agency changing its position under the Bush Administration to start penalizing the broadcast of fleeting expletives. Fox Television could determine that a change in agency position based on a different presidential administration’s policy decision should not be reviewed any differently from when an agency makes a policy decision for the first time. If the Court were to make such a holding, it would essentially be agreeing with Justice Rehnquist’s dissent in State Farm, which posited that “[a] change in administration brought by the people casting their votes is a perfectly reasonable basis for an executive agency’s reappraisal of the costs and benefits of its programs and regulations.” Thus, if Fox Television were to hold that different presidential administrations can validly order a change in agency position based on a difference in policy decisions, the Court would further undermine the State Farm framework.

In any event, these signals in arbitrary and capricious review cases align with the Court’s more general trend of interpreting the APA as it was understood when Congress enacted it in 1946. In 1946, the arbitrary and capricious standard was the equivalent of the rational basis standard used for reviewing legislation. However, at that time, it was unclear whether the rational basis standard was the minimum rationality approach—that

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223 Justice O’Connor was recused. Id. at 474.

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

225 See State Farm, 463 U.S. at 41 (holding that whether a rule was being promulgated or rescinded, the same arbitrary and capricious standard under the APA applied).

226 No. 07-582 (argued Nov. 4, 2008).

227 Fox Television Stations, Inc. v. FCC, 489 F.3d 444, 451 (2d Cir. 2007).

228 See generally Joshua McKarcher, Essay, Restoring Reason: Reformulating the Swerve Doctrine of Motor Vehicles Manufacturers v. State Farm, 76 GEO. WASH. L. REV. 1342, 1344 (2008) (“Such ‘swerves’ in policy are not inherently suspect and should not be regarded as such by courts.”).


230 See supra note 194 and accompanying text.

231 See supra note 24–33 and accompanying text.
allowed courts to examine any conceivable purpose that Congress may have— or the rational basis with bite approach—that limited courts to look at only the actual purpose stated by Congress.\footnote{See supra note 51 and accompanying text.} The rational basis with bite approach to reviewing agency rulemaking may therefore be perfectly in line with what Congress understood arbitrary and capricious review to mean in 1946. But at the very least, Congress in 1946 did not think of the arbitrary and capricious standard as a heightened level of review, such as intermediate scrutiny.\footnote{Cf. United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).}

While all of these precedents support the rational basis with bite approach for reviewing agency rulemaking, there is only one Supreme Court precedent—rather one-third of a precedent—that could support the case for intermediate scrutiny: \textit{State Farm’s} 5–4 holding that the agency acted arbitrarily or capriciously by rejecting the detachable automatic seatbelt regulation. The debate over detachable automatic seatbelts boiled down to how much these seatbelts would increase seatbelt usage, which affected the cost-benefit analysis permitted by the agency’s statutory delegation.\footnote{See Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 33 (1983) (stating that the statutory delegation directed the agency to “issue motor vehicle safety standards that ‘shall be practicable, shall meet the need for motor vehicle safety, and shall be stated in objective terms’” (quoting 15 U.S.C. § 1392(a)) (emphasis added)); see also id. (directing the agency to consider “whether the proposed standard ‘is reasonable, practicable and appropriate’” (quoting 15 U.S.C. § 1392(f)(1))).} Recall that Justice White’s majority opinion determined that the agency invalidly rescinded the detachable automatic seatbelt regulation, because the agency did not consider the “inertia” favoring seatbelt use based on the fact that “the passive belt, once reattached, [would] continue to function automatically unless again disconnected.”\footnote{Id. at 54.} Justice Rehnquist’s dissent disagreed, stating that the “agency acknowledged that there would probably be some increase in belt usage, but concluded that the increase would be small and not worth the cost of mandatory detachable automatic belts.”\footnote{Id. at 58–59 (Rehnquist, J., concurring in part and dissenting in part).}

The rational basis with bite approach to reviewing agency rulemaking supports Justice Rehnquist’s position. Cost-benefit analysis was a legitimate statutory purpose,\footnote{See supra note 234 and accompanying text.} which the agency invoked to justify its rescission of the detachable seatbelt regulation\footnote{See State Farm, 463 U.S. at 38–39 (positing that the agency concluded that it could no longer find that detachable seatbelts “would produce significant safety benefits,” so the detachable seatbelt regulation was “no longer . . . reasonable or practicable in the agency’s view” given the “$1 billion” it would cost to implement the regulation).}—thereby satisfying its obligation under rational basis with bite and \textit{Chenery}
to explain its actual purpose. The remaining question was therefore whether the agency explained how its rescission of the detachable seatbelt regulation was rationally related to the cost-benefit analysis performed by the agency. As Justice Rehnquist’s dissent noted, the agency provided a “rational connection” between the two, by explaining that detachable seatbelts required an affirmative act to use once detached and it was likely that many people would detach their seatbelt at some point as many people were not using manual seatbelts. That observation certainly seems at least reasonable; even if a court would think otherwise, one could see how a reasonable agency could look at the human behavior associated with seatbelts and conclude that a person not inclined to use manual seatbelts would be inclined to detach an automatic seatbelt at least once and then never reattach it.

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

239 See supra note 50, 171 and accompanying text.
240 See supra note 162 and accompanying text.
241 State Farm, 463 U.S. at 59 (Rehnquist, J., concurring in part and dissenting in part) (quoting Burlington Truck Lines v. United States, 371 U.S. 146, 168 (1962)).
242 See id. at 54 (majority opinion) (“A detachable belt does require an affirmative act to reconnect it . . . .”).
243 See supra note 158 and accompanying text.
244 See supra note 125 and accompanying text.
245 See State Farm, 463 U.S. at 55 (“In reaching its judgment, NHTSA should bear in mind that Congress intended safety to be the preeminent factor under the Motor Vehicle Safety Act . . . .”)
246 See supra notes 205–206 and accompanying text.
There are plenty of good reasons, though, that the courts should not let this narrow debate in *State Farm* stand in the way of adopting the rational basis with bite approach for reviewing agency rulemaking. The contours of a heightened standard of review for agency rulemaking were not the focus of the briefing or argument in *State Farm*, so it would be odd to interpret *State Farm* as foreclosing development of a broadly applicable doctrine.\(^{247}\) Plus, *State Farm* itself split 5–4 on the detachable automatic seatbelt issue, so the precedential value of this holding is significantly limited.\(^{248}\) Moreover, the stare decisis factors used by the Court even suggest that *State Farm* should not prevent courts from adopting the rational basis with bite approach to reviewing agency rulemaking. The Court has already undermined\(^ {249}\) *State Farm* by creating a large exception to it in *Chevron*\(^ {250}\) and then limiting *State Farm* to changes in an agency’s position in *Verizon Communications*.\(^ {251}\) And the *State Farm* list of criteria for invalidating agency action has “proven to be intolerable simply in defying practical workability,”\(^ {252}\) because it has allowed judges to use their policy preferences to invalidate agency rulemaking.\(^ {253}\)

In fact, a strong argument against the rational basis with bite approach to reviewing agency rulemaking is that this standard is still too indeterminate and manipulable, so it will not prevent judges from politicizing administrative law.\(^ {254}\) Admittedly, rational basis with bite includes standards that could allow judges to base their judgments on their policy preferences, by equivocating on the term “rational” as the

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\(^ {247}\) See supra note 101 and accompanying text.

\(^ {248}\) See, e.g., Payne v. Tennessee, 501 U.S. 808 (1991) (overruling precedents that “were decided by the narrowest of margins”).

\(^ {249}\) See Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 855 (1992) (explaining that precedents can be overruled when “related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine”).

\(^ {250}\) See supra Part I.C.2.c.

\(^ {251}\) See supra notes 222–224 and accompanying text.

\(^ {252}\) *Casey*, 505 U.S. at 855.

\(^ {253}\) See supra note 11 and accompanying text.

\(^ {254}\) See Cross, supra note 11, at 1327 (“Numerous judges and scholars have sought over the years to constrain the scope of judicial review or to improve its functioning through a variety of legal standards. Such proposals, however, merely shuffle the buzz words required of an interventionist court.”).
D.C. Circuit has done. And various scholars have noted how the tiers of scrutiny are not applied consistently even in reviewing legislation.

Rational basis with bite may not be a perfect standard, but it is still the best doctrine available for reviewing agency rulemaking. The only way to eliminate any chance of judges using their policy preferences to uphold or invalidate agency rulemaking is to get rid of all judicial review of agency rulemaking. Making agency rulemaking unreviewable, though, would conflict with Congress’s codification of the arbitrary and capricious standard in the APA and all of the Supreme Court’s precedents on reviewing agency action. In fact, it would subject congressional legislation to more heightened standards of review than agency rulemaking, which seems completely backwards. So unless Congress were to repeal the APA’s arbitrary and capricious standard of review, judicial review of agency rulemaking is not going anywhere. Similarly, all nine Justices in State Farm held that a more heightened standard of review than minimum rationality applied to agency rulemaking, even though the 5–4 detachable seatbelt holding in State Farm is quite suspect. Rational basis with bite is therefore the best approach for limiting the use of policy preferences by judges when they review agency rulemaking, while still subjecting agency rulemaking to a heightened standard of review compared to legislation.

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

As discussed previously, the rational basis with bite standard would have produced a different result in State Farm. Besides that example of how the rational basis with bite standard would function in reviewing agency rulemaking, this section briefly applies rational basis with bite to two recent court of appeals cases, as additional examples of how courts could apply this standard in a manageable way. Currently, “[b]etween one-third and sixty percent of agency rules that are appealed to courts are

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255 See supra notes 82–83 and accompanying text.


257 See Cross, supra note 11, at 1328–29 (“An effort to cobble together a deferential system of judicial review of rulemaking is a fool’s errand. Only clear firebreaks that preclude such review and that render disobedience obvious can be effective.”).

258 See supra Part I.B.

259 See supra notes 237–242 and accompanying text.
overturned through application of the hard-look doctrine.” The rational basis with bite doctrine would drastically reduce that figure, thereby cabining the discretion of judges to use their policy preferences to invalidate agency rulemaking. For example, in both American Radio Relay League, Inc. v. FCC and Northwest Coalition for Alternatives to Pesticides (NCAP) v. EPA, the majorities invalidated agency rules, but the rational basis with bite standard would have supported the dissenters’ arguments for upholding the rules.

The D.C. Circuit in American Radio Relay League, Inc. v. FCC invalidated an FCC rule that reestablished a preexisting extrapolation factor for estimating interference caused by regulated technologies including “Broadband over Power Line” (BPL), which allows internet access simply by plugging a computer into an electrical outlet. That extrapolation factor determined whether an operator could get a license to use a regulated technology like BPL, because the FCC would not issue a license if the technology would cause too much interference with radio operators. A federal agency within the Department of Commerce provided data supporting the preexisting extrapolation factor, and one commenter determined that the characteristics of BPL interference also favored keeping the preexisting extrapolation factor. Two other commenters, though, recommended a lower extrapolation factor. The agency explicitly recognized these different views, and decided to retain the preexisting extrapolation factor given a “lack of conclusive experimental data.” The agency then reconsidered this decision after one commenter submitted new studies conducted in the United Kingdom, which supported

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261 524 F.3d 227 (D.C. Cir. 2008).

262 544 F.3d 1043 (9th Cir. 2008).

263 Am. Radio, 524 F.3d at 240–41.

264 Id. at 232.


266 Id.

267 Id.
the use of a lower extrapolation factor.268 The agency, though, noted these various conflicting views, which were explained in its initial decision, and concluded that “[n]o new information has been submitted that would provide a convincing argument for modifying [the preexisting extrapolation factor] at this time.”269

Citing State Farm, the majority in American Radio held that this was not a “reasoned explanation” for rejecting the United Kingdom studies, which supported the use of a lower extrapolation factor.270 The majority also noted that the agency’s modeling data was “not based on empirical evidence derived from testing or scientific observation.”271

Judge Kavanaugh dissented, explaining that the agency “reasonably stated that the evidence submitted by commenters was conflicting [and] that the new evidence submitted on reconsideration was not sufficiently conclusive to require a change.”272 He also posited that a short explanation can still be reasoned, as “State Farm does not require a word count.”273

The rational basis with bite standard supports Judge Kavanaugh’s dissent in American Radio. No one disputed that the agency was acting in furtherance of its statutory purpose of setting standards for preventing interference with radio operators that are “consistent with the public interest, convenience, and necessity.”274 The question therefore would be whether the agency explained how its decision to keep the preexisting extrapolation factor was rationally related to that purpose. Admittedly, the agency’s explanation in its reconsideration order hardly addressed the new United Kingdom studies, but rational basis with bite would not require the agency to explain every study presented to the agency. Even under State Farm, the agency is required simply to articulate a “rational connection between the facts found and the choice made,”275 and the Court will “uphold a decision of less than ideal clarity if the agency’s path may be


269 Id. at 9318.


271 Id. at 240.

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

273 Id.

274 Id. at 231 (quoting 47 U.S.C. § 302a(a)).

reasonably discerned.”\textsuperscript{276} Here, the agency’s reasoning was clear: The agency had already been presented with conflicting studies, the United Kingdom study was simply one more study adding to this scientific split, and the agency cautiously decided to retain its long-standing approach given the disputed scientific evidence.

The \textit{American Radio} majority employed the quasi-procedural hard look doctrine and erred by using a divide-and-conquer approach that required the agency to offer a detailed explanation for rejecting each adverse study.\textsuperscript{277} But the Supreme Court in \textit{Baltimore Gas & Electric Co. v. NRDC, Inc.} clarified that reviewing courts should be “most deferential” when an agency is “making predictions, within its area of special expertise, at the frontiers of science.”\textsuperscript{278} And had the agency changed its position by adopting the lower extrapolation factor, courts could have criticized the agency under \textit{State Farm} because the agency changed its long-standing extrapolation factor on the basis of disputed evidence. If it is unreasonable for the agency to explain that it was presented with conflicting studies and chose to retain its preexisting standard, the agency simply cannot win and courts will always be able to invalidate agency rulemaking involving disputed scientific issues. The rational basis with bite approach would prevent this by requiring only that the agency explain how its rule is rationally related to a statutory purpose under the agency’s statutory delegation.

Like \textit{American Radio}, the Ninth Circuit in \textit{Northwest Coalition for Alternatives to Pesticides (NCAP) v. EPA}\textsuperscript{279} invalidated agency rules under \textit{State Farm} because the agency had not “demonstrate[d] a rational connection between the factors that the EPA examined and the conclusions it reached.”\textsuperscript{280} Under the Food Quality Protection Act (FQPA), the agency was required to apply a 10x child safety factor (i.e., assume that pesticides were ten times more likely to be toxic to infants and children), unless the agency had “reliable data” to use a different child safety factor.\textsuperscript{281} The agency promulgated regulations that set a 3x child safety factor for acetamiprid and pymetrozine and a 1x child safety factor for mepiquat.\textsuperscript{282}

\textsuperscript{276} \textit{Id.} at 43.

\textsuperscript{277} Cf., \textit{e.g.}, \textit{Gulla v. Gonzales, 498 F.3d 911, 920 (9th Cir. 2007) (Fernandez, J., dissenting)} (noting that by isolating each piece of evidence through a “divide-and-conquer strategy,” a reviewing court “can make it seem like [it is] deferring when [it is] not actually doing so”).


\textsuperscript{279} \textit{544 F.3d 1043 (9th Cir. 2008)}.


\textsuperscript{281} \textit{21 U.S.C. § 346a(b)(2)(C)(ii)(II)}.

\textsuperscript{282} \textit{NCAP}, 544 F.3d at 1047.
The rulemaking record contained multiple documents pertaining to the original promulgation of these safety factors in 2001 and 2002. The agency explained that the “toxicology database” for acetamiprid was complete and a study of the pesticide in animals showed no evidence of “increased susceptibility,” but the results of a developmental neurotoxicity study were still pending.\textsuperscript{283} Likewise, there was a “complete toxicity database for pymetrozine” and a study in animals showed “no evidence of increased susceptibility,” but the “FQPA safety factor was not reduced to one due to the need for a developmental neurotoxicity study.”\textsuperscript{284} As for mepiquat, other studies had already determined that the “risk estimates” for a compound nearly identical to mepiquat “were below the Agency’s level of concern.”\textsuperscript{285} The rulemaking record also included the agency’s published guidance document for determining FQPA safety factors; this document provided that the agency could reduce the safety factor to 3x if it had evidence that the pesticide was not more dangerous to children but the results of a key study were missing, thus creating “database deficiencies.”\textsuperscript{286} The record indicated that this 3x uncertainty factor was generally accepted by the scientific community.\textsuperscript{287}

Additionally, the record included the agency’s 2005 final order, which rejected the objections made by interested parties to the agency’s decision to reduce the child safety factors for these three pesticides.\textsuperscript{288} This final order cited the agency’s explanation in originally promulgating these safety factors, and it again noted that the results of the developmental neurotoxicity studies were pending.\textsuperscript{289}

The NCAP majority invalidated these three pesticide regulations on the grounds that the 2005 final order was “vague, making it impossible . . . to determine whether the EPA’s deviations from the 10x child safety factor . . . were in fact supported by reliable

\textsuperscript{283} Id. at 1054 n.3 (Ikuta, J., concurring in part and dissenting in part) (quoting Acetamiprid: Pesticide Tolerance, 67 Fed. Reg. 14,649, at 14,655 (Mar. 27, 2002)).

\textsuperscript{284} Id. (quoting Pymetrozine: Pesticide Tolerance, 66 Fed. Reg. 66,786, at 66,791 (Dec. 27, 2001)).

\textsuperscript{285} Id. (quoting Mepiquat: Pesticide Tolerance, 67 Fed. Reg. 3,113, at 3,115 (Jan. 23, 2002)).

\textsuperscript{286} Id. at 1058 (quoting Office of Pesticide Programs, EPA, Determinations of the Appropriate FQPA Safety Factor(s) in Tolerance Assessment 10 (Feb. 28, 2002)).

\textsuperscript{287} Id. at 1059 (citing Michael L. Dourson et al., Evolution of Science-Based Uncertainty Factors in Noncancer Risk Assessment, 24 Regulatory Toxicology & Pharmacology 108 (1996)).

\textsuperscript{288} Id. at 1047 (majority opinion) (citing Order Denying Objections to Issuances of Tolerances, 70 Fed. Reg. 46, 706 (Aug. 10, 2005)).

\textsuperscript{289} Id. at 1051–52.
Judge Ikuta dissented, finding that the agency’s regulations were not arbitrary because the rulemaking record included much more of an explanation than simply the agency’s 2005 final order responding to objections. She quoted the agency’s explanations from 2001 and 2002 when it originally promulgated these regulations, and she referred to the documents supporting the use of a 3x safety factor when the results of a key study were pending. Given “the EPA’s reliance on [the] long-established and widely accepted protocol” of using a 3x safety factor if the results of one key study were pending, Judge Ikuta reasoned that the court should have “defer[red] to the scientific analysis and judgments made by an agency operating within its area of special expertise.”

The rational basis with bite standard supports Judge Ikuta’s dissent. Like American Radio, no one questioned that the agency was acting in furtherance of its statutory purpose of setting child safety factors at 10x unless it had “reliable data” that supported a lower factor. The dispositive question under rational basis with bite would thus be whether the agency explained how its decision to set lower child safety standards was rationally related to that purpose. Taken in isolation, the 2005 final order itself may not have provided such an explanation, but the 2005 final order cited the explanations given by the agency in 2001 and 2002 when it originally promulgated these regulations. And the rest of the rulemaking record easily explains how the lower child safety factors are rationally related to the agency’s statutory mandate of needing “reliable data” before lower the child safety factor below 10x. The record stated that the databases of studies for acetamiprid and pymetrozine were complete except for the developmental neurotoxicity studies, and that studies in animals did not show an increased risk. The record also stated that the agency chose a 3x factor for these two pesticides given the accepted practice of the scientific community when the results of just one key study are pending. Finally, the record provided that studies already showed no increased risk in

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290 Id. at 1051.


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

293 Id. at 1054 n.3.

294 Id. at 1059.

295 Id. at 1059–60 (citing Balt. Gas & Elec. Co. v. NRDC, Inc., 462 U.S. 87, 103 (1983)).


297 See supra notes 283–284 and accompanying text.

298 See supra notes 286–287 and accompanying text.
children from exposure to a substance nearly identical to mepiquat, so the agency had reliable data to reduce that pesticide’s child safety factor to 1x because there was no database deficiency for mepiquat.\(^{299}\) In sum, by examining only the 2005 final order instead of the entire rulemaking record, the majority invoked State Farm and ignored the agency’s explanation in other portions of the record, which showed a rational relation between the child safety factor rules and the statutory purpose of setting child safety factors at 10x unless the agency had reliable data to support lower factors.

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

IV. Conclusion

Current administrative law doctrines for reviewing agency rulemaking have allowed unelected judges to become some of our nation’s most powerful policy wonks. This past year, judges invalidated Bush Administration regulations on high-profile issues like global warming and the broadcast of indecent material.\(^{300}\) In the coming years, judges could just as easily invalidate Obama Administration regulations on issues like stem cell research, oil drilling, air and water quality standards, or fuel emission regulations.\(^{301}\)

To ensure that judges’ policy preferences are not ossifying agency rules, courts need to craft a new doctrine for reviewing agency rulemaking, which give appropriate deference to expert agencies that are charged with setting our nation’s policies. Such a doctrine should have a theoretical limitation grounded in the precedents for reviewing legislation, which have been developed over the past century. This Article proposes the rational basis with bite doctrine, because it is a heightened standard of review that accounts for the differences between agencies and legislatures, it would effectively prevent judges from using their policy preferences to invalidate agency rules, and it fits most closely with Supreme Court precedent on APA arbitrary and capricious review.

Our modern administrative state, which does not fall neatly within any one of our three branches of government, is still largely a work in progress.\(^{302}\) Indeed, the Supreme

\(^{299}\) See supra note 285 and accompanying text.

\(^{300}\) See supra note 14 and accompanying text.

\(^{301}\) See supra notes 2–7 and accompanying text.

\(^{302}\) See FTC v. Ruberoid Co., 343 U.S. 470, 487 (1952) (Jackson, J., dissenting) (“The rise of administrative bodies probably has been the most significant legal trend of the last century . . . . They have
Court’s reluctance to address APA arbitrary and capricious review is an implicit recognition that agencies and lower courts have needed latitude to experiment with the proper ways to review agency rulemaking. But as the D.C. Circuit’s hard look doctrine shows, this experiment has failed. Judges have been pulled into policy decisions in ways that the framers of our Constitution could never have contemplated. Courts should therefore scrap these paternalistic doctrines that allow judges to invalidate agency rulemaking by disagreeing with the substantive policy decisions made by administrative agencies. This will allow presidential administrations to respond to the electorate, result in a structure of government more in line with constitutional separation of powers principles, and end the regulatory battles currently waged between presidential administrations of one political party and judges of the other.