Limiting Judges: Placing Limits on Judges' Power in Hard Look Review

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LIMITING JUDGES: PLACING LIMITS ON JUDGES’ POWER IN HARD LOOK REVIEW  
BY TOBY COLEMAN∗

The “hard look” standard of review in administrative law has long provided judges broad discretion to strike down agency actions. The virtually unlimited nature of hard look review creates the danger that judges will craft decisions to achieve their desired policy outcomes. Though judges have acknowledged that this potential for outcome-oriented decisionmaking exists, they have consistently downplayed the danger of outcome-oriented decisionmaking—despite empirical evidence showing otherwise. One practical way to reduce the danger of outcome-oriented decisionmaking in hard look review is to place limit on judges’ powers. In FCC v. Fox Television Stations, Inc., the Supreme Court began to explore the possibility of limiting judges’ hard look review powers. The result was a vague standard that could limit some powers, but might ultimately be too vague to serve as a concrete standard of review. Though the idea of limiting judges’ hard-look review powers has some promise, the effort might be undermined by the judiciary’s inability to accurately assess the risk of outcome-oriented decisionmaking.

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I. Introduction

In March 2004, just weeks after Janet Jackson had her infamous “wardrobe malfunction” at Super Bowl XXXVIII, the Federal Communications Commission ("FCC") handed down a decision that cracked down on cursing on television. The FCC ruling focused on a type of expletive known in the trade as the “fleeting expletive”—a single expletive, uttered in isolation. For twenty-five years—the entirety of the FCC’s broadcast obscenity regime—the FCC had treated fleeting expletives as an aspect of television that was beyond its reach to punish as indecent. All of that changed in a blink of an eye soon after Jackson bared her breast on national television and obscenity complaints at the FCC skyrocketed from 166,683 in 2003 to 1.4 million in 2004. Beginning in March 2004, the FCC regarded it as its job to punish broadcasters for airing stray “F-words” and “S-words” just like they punished the broadcaster who aired George Carlin’s infamous “Filthy Words” monologue.

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3 Id.
4 Fox Television Stations, Inc. v. FCC, 489 F.3d 444, 461 (2d Cir. 2007) (noting broadcasters had relied on the FCC’s previous “restrained approach” to indecency enforcement); CBS v. FCC, 535 F.3d at 174 (summarizing the FCC’s long history of explaining “that isolated or fleeting material did not fall within the scope of actionable indecency”).
When the FCC changes its policies like that, what sort of explanation does it need to provide to pass judicial review under the section 706 Administrative Procedure Act (“APA”)? The requirements for explaining policy changes have never been crystal clear under the APA or the Supreme Court’s *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, decision. As a result, a decision striking down an agency policy change as “arbitrary” and “capricious” under § 706(2)(A) does not just engender questions about the agency’s motivations—it can also foster questions about the motivations of judges. Could it be that the judge’s (or judges’) decision is the not the result of some failure of explanation by the agency, but instead the result of one court’s policy disagreement with the agency?

In the twenty-five years since the Supreme Court’s *State Farm* decision, the federal judiciary has reviewed agency decisions to change policy according to a standard of review that seeks to minimize the risk that agencies will make policy changes based on politics, personal biases, or whims. It has paid little attention to the risk that the judges themselves will inject their own politics, biases and whims into reviews of agency change—despite evidence that such outcome-oriented decisionmaking occasionally occurs.

In *FCC v. Fox Television Stations, Inc.*, the case challenging the FCC’s decision to change its fleeting expletives policy, the Supreme Court examined the standard of review for agency changes and attempted to come up with an approach that protected against the danger of

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10 *See, e.g., Allentown Mack Sales and Serv., Inc. v. NLRB*, 522 U.S. 359, 374 (1998) (“Not only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational.”).
11 Instead of imposing concrete limits on judges’ abilities to engage in unprincipled decisionmaking, the standard of review under *State Farm* simply warns judges not to substitute their judgments for those of the agencies. *State Farm*, 463 U.S. at 43.
outcome-oriented decisionmaking by judges as well as the danger of irrational policymaking by agencies. Two distinct standards emerged from the case. The first, articulated by Justice Scalia in the majority opinion, provides that

the agency must show that there are good reasons for the new policy. But it need not demonstrate to a court’s satisfaction that the reasons for the new policy are better than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better, which conscious change of course adequately indicates. This means that the agency need not always provide a more detailed justification that what would suffice for a new policy created on a blank slate.\(^{13}\)

The second, set out by Justice Kennedy in his concurring opinion, underscores that

an agency’s decision to change course may be arbitrary and capricious if the agency sets a new course that reverses an earlier determination but does not provide a reasoned explanation for doing so. . . . The question whether a change in policy requires an agency to provide a more-reasoned explanation than when the original policy was first announced is not susceptible, in my view, to an answer that applies in all cases.\(^{14}\)

While these formulations have some similarities, they each stake out differing standards of review for agency change. The majority’s standard of review starts with the presumption that change does not need to be explained, and then requires the reviewing to judge to show that an explanation of change is logically necessary. Kennedy’s standard of review rejects the majority’s presumption that change does not need to be explained, preferring instead to leave it to the reviewing judge to decide, on the basis of the circumstances surrounding the policy change, whether an explanation is necessary.

These different approaches reflect a split in how the Supreme Court justices regard the lower court judges that do most of the review under § 706 of the APA. On one side, Chief Justice Roberts, Justice Alito, Justice Scalia, and Justice Thomas regard their peers as potentially fallible

\(^{13}\) Id. at ___, No. 07-582, slip op. at 11.
\(^{14}\) Id. at ___, No. 07-582, slip op. at 1 (Kennedy, J., concurring).
judges whose occasional tendency to let politics, bias, or personal whim influence their decisions should be guarded against. On the other side, Justice Breyer, Justice Ginsberg, Justice Souter, and Justice Stevens contend that the risks of unprincipled decisionmaking by federal judges are not significant enough to necessitate limits on judicial review that could make it easier for agencies to change policies based on politics or bias instead of reason.

Straddling the Court’s divide is Justice Kennedy. He does not take a side in this general debate comparing the relative dangers of unprincipled judicial decisionmaking against the risks of irrational agency action because he does not believe there is “an answer that applies in all cases.” His desire to maintain a standard that allows for a case-by-case weighing of the relative dangers ultimately limits the changes FCC v. Fox makes to the standard of review for agency action and may highlight the judiciary’s inability to systemically account for its institutional fallibilities.

II. The Standard for Explaining Change

Under § 706 of the APA, the judiciary reviews agency actions to make sure that they are not “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.” Following this standard, a reviewing judge examines an agency’s explanation for its action to make sure there is a “rational connection between the facts found and the choice made.”

15 The four justices joined in a portion of Justice Scalia’s opinion in FCC v. Fox which indicates that, if allowed, Article III judges would expropriate policy-making power “like jackals stealing the lion’s kill.” Id. at ____, No. 07-582, slip op. at 22 (Scalia, J., opinion).
16 See id. at ____, No. 07-582, slip op. at 6 (Breyer, J., dissenting) (contending that limiting judges’ ability to strike down agency policy changes would “grant agencies the freedom to change major policies on the basis of nothing more than political considerations or even personal whim”).
17 Id. at ____, No. 07-582, slip op. at 1 (Kennedy, J. concurring).
Farm, the controlling decision on arbitrary-and-capricious review, provides that an agency’s explanation can be struck down as arbitrary and capricious if the agency

relied on factors which Congress had 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 of a product of agency expertise.20

This list of explanatory flaws is incomplete: there are a myriad of other reasons agency action could be arbitrary and capricious.21

In fact, State Farm makes clear that an inadequate explanation of policy change can also render agency action arbitrary and capricious. State Farm held that the rescission of a rule mandating the installation of airbags in new cars was arbitrary and capricious because the National Highway Traffic Safety Administration (“NHTSA”) had not adequately explained why the safety considerations that led it to require airbags no longer applied.22 Because the NHTSA had previously concluded that airbags were “an effective and cost-beneficial lifesaving technology,” State Farm held that the NHTSA could not abandon its airbag mandate without explaining why it no longer considered airbags to be a practical way to prevent highway deaths.23

A. State Farm and the Standard of Review for Change

Though State Farm held that failure to explain change can render an agency action arbitrary and capricious, the power a reviewing judge has to scrutinize an agency’s explanation for change has been unclear for decades. The level of scrutiny an agency’s explanation for

20 Id.
21 For instance, Puerto Rico Sun Oil Co. v. EPA held that “[t]he ‘arbitrary and capricious’ concept, needless to say, is not easy to encapsulate in a single list of rubrics because it embraces a myriad of possible faults and depends heavily upon the circumstances of the case.” 8 F.3d 73, 77 (1st Cir. 1993)
22 State Farm, 463 U.S. at 46–51.
23 Id. at 51.
change is subject to is difficult to determine because § 706 of the APA provides the judiciary with a “narrow” scope of review that is supposed to guard against irrational agency actions without limiting agencies’ abilities to change their policies.\textsuperscript{24}

\textit{State Farm}’s articulation of that nuanced standard has done little to clarify things. By providing that an agency “changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance,” \textit{State Farm} left the standard uncertain.\textsuperscript{25} Do agencies making changes have to meet a heightened standard of review to pass muster? Or is \textit{State Farm} simply saying that an agency’s decision to rescind a rule will be reviewed for rationality just like any other action under § 706?

The First Circuit Court of Appeals, the Second Circuit Court of Appeals and the Third Circuit Court of Appeals have interpreted \textit{State Farm} as outlining a special standard of review for agency decisions to change policy.\textsuperscript{26} Under this interpretation, agencies must justify their policy changes to reviewing courts. In general, this approach to the standard of review requires agencies to show that they “sensibly rejected” the status quo.\textsuperscript{27} The Second Circuit’s interpretation of the standard appears to go a bit further by providing that an agency making a “flip-flop” in policy must show that its “new rule effectuates the statute as well as or better than the old one” to survive judicial review.\textsuperscript{28} Though the Second Circuit has expressly denied that its

\textsuperscript{24} \textit{Id.} at 43.  
\textsuperscript{25} \textit{Id.} at 42.  
\textsuperscript{26} Pa. Fed’n of Sportsmen’s Clubs, Inc. v. Kempthorne, 497 F. 3d 337, 351 (3d Cir. 2007); Citizens Awareness Network, Inc. v. United States, 391 F.3d 338, 352 (1st Cir. 2004); N.Y. Council, Ass’n of Civilian Technicians v. FLRB, 757 F.2d 502, 508 (2d Cir. 1985).  
\textsuperscript{27} \textit{Citizens Awareness Network}, 391 F.3d at 352.  
\textsuperscript{28} \textit{N.Y. Council}, 757 F.2d at 508.
standard is a “heightened” one, questions remain about the approach—in part because the D.C. Circuit once described a similar standard of review as “heightened somewhat.”

B. FCC v. Fox and the Standard of Review for Change

FCC v. Fox explicitly rejected the notion that there is a “heightened” or otherwise special standard of review for change, holding instead that the standard for reviewing change is the same as the standard for other agency actions. This one-standard-fits-all approach is a result of the spare language of § 706 of the APA. Because the statute does not distinguish between making policies and changing policies, FCC v. Fox holds that judges cannot, either.

In making this holding, FCC v. Fox minimized the importance of the language in State Farm that led the appellate courts to create a separate standard for reviewing agency policy changes. According to FCC v. Fox, State Farm never stood for the proposition that agency policy changes had to be subject to a particular type of scrutiny. Instead, FCC v. Fox held that State Farm stands for quite the opposite: that every type of policy change, no matter how it is described, is subject to the same standard of review under § 706 of the APA.

This decision to minimize State Farm’s importance in setting out the standard for reviewing change turned largely on how the Court interpreted State Farm’s use of the word “rescission” when describing the standard of review for explaining change. The meaning of the word rescission was important in State Farm because the decision was not clear about whether it

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29 Id.
30 NAACP v. FCC, 682 F.2d 993, 998 (1982). Though the D.C. Circuit issued this decision prior to the State Farm decision, its description of the standard as “heightened” continues to resonate. See FCC v. Fox Television Stations, Inc., 556 U.S. ___, No. 07-582, slip op. at 10 (2009) (quoting the “heightened somewhat” language from NAACP v. FCC).
31 FCC v. Fox, 556 U.S. at ___, No. 07-582, slip op. at 10.
32 Id. at ___, No. 07-582, slip op. at 11.
33 Id. at ___, No. 07-582, slip op. at 10.
34 The Court held that “State Farm neither held nor implied that every agency action representing a policy change must be justified by reasons more substantial than those required to adopt a policy in the first instance.” Id.
is using the term to talk about policy changes in general or just decisions to rescind specific policies. *FCC v. Fox*’s holding that *State Farm* affirmed a one-standard-for-all system of administrative review was based largely on its interpretation of the term “rescission” to just mean the cancellation of old policies.\(^{35}\) By interpreting rescission in that narrow fashion, the context of *State Farm* becomes important. In this narrow view of *State Farm*, the fact that the Court detailed a particular standard of review for rescissions does not mean that *State Farm* was establishing a general standard of review for change. Instead, it was simply rejecting the NHTSA’s claim that judicial review of rescissions should be particularly deferential and affirming that decisions to rescind agency policies are subject to the same standard of review as other agency actions.\(^{36}\)

The Court could have gone the other way, and interpreted the term “rescission” broadly.\(^{37}\) If it had, *State Farm*’s declaration that an agency “changing its course by rescinding a rule” had to put forward explanation “beyond that which may be required when an agency does not act into the first place” would have seemed to set out a special standard of review for change. A number of courts have adopted that interpretation,\(^{38}\) and there is some language in *State Farm* that could support a broader reading of the term “rescission.”\(^{39}\)

\(^{35}\) The Court focused on the fact that it “involved a rescission of a prior regulation.” *Id.*

\(^{36}\) In essence, *FCC v. Fox* held that *State Farm* was deciding which statutory standard of review an agency decision to rescind a policy would be subject to. As *FCC v. Fox* noted, the Court had two options in *State Farm*. It could subject rescissions to the standard of review for agency actions under the arbitrary-and-capricious standard of § 706(2)(A) of the APA, or it could subject rescissions to the more deferential standard of review for agency decisions not to act under § 706(1) of the APA. *Id.* at ____, No. 07-582, slip op. at 11. Because the APA did not set out a third standard of review for policy changes, *FCC v. Fox* held that *State Farm* never “held or implied” that a separate standard of review existed. *Id.* at ____, No. 07-582, slip op. at 10–11.

\(^{37}\) Justice Breyer’s dissent did that. *Id.* at ____, No. 07-582, slip op. at 4 (Breyer, J., dissenting).

\(^{38}\) *Supra* note 26.

\(^{39}\) *State Farm* held that “[r]evocation constitutes a reversal of the agency’s former views as to the proper course.” Motor Veh. Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 27, 41 (1983). As Justice Breyer noted in his dissent, if that is the definition *State Farm* was using for the term “revocation,” then *State Farm*’s holding regarding the standard for rescinding policies would appear to have broader application than *FCC v. Fox* admits. *FCC v. Fox*, 556 U.S. at ____, No. 07-582, slip op. at 4.
Though a broader reading of *State Farm* was possible, *FCC v. Fox*’s narrow reading of the case is the most defensible. A rescission is not just any change; it is an “annulment, cancellation, or reversal . . . of an act or power.”\(^{40}\) Reading the word to mean something more not only requires a creative interpretation of the word itself, it also requires some disregard for the factual context of *State Farm*, which specifically considered the standard of review for agency efforts to rescind existing policies.

**C. A Single Standard of Review: Now What?**

Rejecting a special standard of review for change and holding that agency policy changes will be subject to the same standard of review as other agency actions influences how judges review agency policy changes, but it does not ultimately determine whether judges can strike down agency actions because of insufficient explanations for change. Under the general “hard look” standard of review employed by federal courts, judges retain broad authority to strike down agency actions they consider insufficiently explained.\(^{41}\) As a result there is still a danger that judges will continue to use a special standard for reviewing agency policy change. Such *ad hoc* judging could be particularly problematic if judges use their “hard look” discretion to strike down agency policy changes with which they disagree.\(^{42}\)

There is, then, a systemic need to prevent judges from engaging in outcome-oriented decisionmaking when reviewing agency policy changes. The problem is that identifying when a particular judge or panel of judges is engaging in unprincipled or outcome-oriented decisionmaking is difficult to do. Judges do not generally come out and announce that they are manipulating the standard of review to achieve a particular outcome because such honesty would

\(^{40}\) *BLACK’S LAW DICTIONARY*, 1321 (7th ed. 1999).

\(^{41}\) See *infra* notes 82–85 and accompanying text.

\(^{42}\) See *infra* notes 75–80 and accompanying text.
invite higher courts to overrule them and imperil their reputations as jurists. Because outcome-oriented judicial decisionmaking is generally done *sub rosa*, it can really only be rooted out by limiting the power that judges’ have to influence the outcome in a case.

Determining how to limit judges’ power to strike down agency actions is difficult because judicial reviews of agency actions defy simple categorization. Judges review a vast array of agency actions under § 706 and take into account a myriad of factors whose relative importance shift from case to case. In these variable circumstances, it is difficult to categorically identify situations where judicial power is more likely to be abused and limits are necessary. As a result, judges have tended to rely on each other to respect the limits of their power. When judges cross the line, they rely on dissenting opinions and appellate review to blow the whistle on unprincipled decisionmaking.

III. Determining the Limits of Judicial Review

One of the biggest challenges in setting limits on judges’ power to strike down agency decisions is the difficulty determining the standards of judicial review under § 706 of the APA. The modern “hard look” approach requires a judge to perform a searching and careful review of the substance of the agency decision to make sure that the agency took a “hard look” at all of its

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options. While doing this, the reviewing court must take care to not go too far and “substitute its judgment for that of the agency.” This is a careful balance: the judge must examine the logic underlying the agency decision to make sure the agency’s decision makes sense, and do it all without injecting her own opinion about what makes sense into the mix.

A. The Power of Procedural Review

When the APA was first adopted in 1946, judges’ powers to review agency decisions were constrained to procedural review. The Supreme Court established this “proceduralist” standard of review in the years prior to the APA. In its 1941 Phelps Dodge Corp. v. NLRB decision, the Supreme Court reversed a NLRB order reinstating a group of strikers because of a procedural flaw: the NLRB had failed to explain the basis of its decision. This gave the judiciary the power to strike down agency actions lacking explanation, something the judiciary had not had before. Though important, this power was limited. Phelps Dodge only allowed

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judges to look for explanations to make sure they were there. Judges could not to review the substance of the explanations.\textsuperscript{51}

In 1943, the Court expanded judges’ powers of procedural review in \textit{SEC v. Chenery Corp. (Chenery I)}.\textsuperscript{52} \textit{Chenery I} remanded an SEC decision for a new explanation because the reasons the SEC offered for its actions were not reasons it could use to justify its decision.\textsuperscript{53} The remand gave judges the power to strike down administrative orders that were procedurally defective—even in cases where the procedural defects could be cured \textit{post hoc}.\textsuperscript{54}

The decision to just empower judges to perform procedural review of agency actions had obvious shortcomings. For one, procedural review made the judiciary a relatively ineffective check on agency discretion. As long as an agency explained its actions and offered up an explanation that could procedurally justify its action, the reviewing court had to uphold the agency’s action.\textsuperscript{55} Such limited review meant that the nation would have to “look to the agencies themselves for fair administration of the laws and compliance with [the APA].”\textsuperscript{56} For those who

\begin{itemize}
\item \textsuperscript{51} The Court held:
\begin{quote}
We do not intend to enter the province of the board, nor do we do so. All we ask of the Board is to give clear indication that it has exercised the discretion with which Congress has empowered it. This is to affirm most emphatically the power of the Board.
\end{quote}
\textit{Phelps Dodge}, 313 U.S. at 197.
\item \textsuperscript{52} \textit{SEC v. Chenery Corp. (Chenery I)}, 318 U.S. 80 (1943).
\item \textsuperscript{53} \textit{id.} at 94–95. The SEC based its decision on federal decisions that it interpreted as creating a fiduciary duty of controlling shareholders that barred them from participating in the reorganization of companies they controlled. \textit{id.} at 87–88.
\item \textsuperscript{54} \textit{id.} at 93–94.
\item \textsuperscript{55} The circumscribed nature of the reviewing judge’s power in proceduralist review was apparent when the Court considered \textit{SEC v. Chenery Corp.} again in 1947. \textit{SEC v. Chenery Corp. (Chenery II)}, 332 U.S. 194 (1947). In \textit{Chenery II}, the Court upheld the SEC’s initial order because it had provided a plausible explanation. \textit{See id.} at 207 (finding that the Court could not disturb the decision because the SEC had made “an informed, expert judgment”); Shapiro & Levy, \textit{Heightened Scrutiny}, \textit{supra} note 48 at 455 n. 143 (“[I]n its proceduralist form the reasons requirement is relatively unconcerned with the result reached by an agency as long as that result is supported by reasons.”).
\item \textsuperscript{56} Wald, \textit{supra} note 44 at 223 (quoting \textbf{ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY} 230 (1946) (remarks of Sen. McCarran)).
\end{itemize}
thought judges needed more power to check agency discretion, limiting judges to proceduralist review reduced judicial review to a formality, “a mere feint.”

B. Hard Look Review

In the late 1960s and early 1970s, judges began subjecting agency explanations to more searching review. The D.C. Circuit declared that

We stand on the threshold of a new era in the history of the long and fruitful collaboration of administrative agencies and reviewing courts. For many years, courts have treated administrative policy decisions with great deference, confining judicial attention primarily to matters of procedure. On matters of substance, the courts regularly upheld agency action, with a nod in the direction of the ‘substantial evidence’ test, and a bow to the mysteries of administrative expertise. Courts occasionally asserted, but less often exercised, the power to set aside agency action on the ground that an impermissible factor had entered into the decision, or a crucial factor had not been considered. Gradually, however, that power has come into more frequent use, and with it, the requirement that administrators articulate the factors on which they base their decisions.

This push to subject agency action to more substantial judicial review came as the theory of agency capture created concern that agency administrators were working to further their personal and political interests instead of the public’s interest. As the politicians and the judiciary lost their blind faith in agency experts to act in the public good, the judiciary began to believe that it

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57 Chenery II, 332 U.S. at 210 (Jackson, J., dissenting).
59 Shapiro & Levy, Heightened Scrutiny, supra note 48 at 412–13; see generally Peter H. Schuck, The Politics of Regulation, 90 YALE L.J. 702, 705 (1981) (book review) (tracing the theory of agency capture that arose in the mid-1960s to the crusading done by Ralph Nader, various Congressional committees, and investigative reporters); see also Rabin, supra note 47 at 1297 n. 376 (noting that, beginning in 1969, Nader issued a widely-publicized series of reports detailing allegations of agency capture).
needed to serve as a more robust check on agency discretion. More substantive judicial review was necessary, one decision declared, to ensure that “important legislative purposes, heralded in the halls of Congress, are not lost or misdirected in the vast hallways of federal bureaucracy.”

In 1971, the Supreme Court agreed to give judges the power to perform more substantive reviews in *Citizens to Preserve Overton Park v. Volpe.* Overton *Park* held that “the generally applicable standards of § 706 require the reviewing court to engage in a substantial inquiry.”

This substantial inquiry looked beyond procedure to make sure that the agency had based its decision on “consideration of the relevant factors.”

Hard look review is the product of *Overton Park*’s decision to empower judges to make substantive review of agency actions. It holds that instead of confining himself to a procedural review, a judge should examine the information underlying the agency decision to make sure that it there is a “rational connection between the facts found and the choice made.” This additional power of substantive review is supposed to be exercised with care: judges are not supposed to use the additional power to make the “ultimate decision,” instead they are just supposed to use

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60 It took decades for the judiciary to increase scrutiny of agency decisions because the administrative state initially flourished under the notion that experts would use their knowledge neutrally to further the public good. MARTIN SHAPIRO, WHO GUARDS THE GUARDIANS? JUDICIAL CONTROL OF ADMINISTRATION 134 (1988).


63 *Id.* at 415.

64 *Id.* at 416.

65 Professors Levy and Shapiro astutely point out that the foundation of the rationalist standard of review set out in the Supreme Court’s *State Farm* decision is language from *Burlington Truck Lines, Inc v. United States*, a decision that restated the proceduralist standard of review. Levy & Shapiro, *Heightened Scrutiny, supra* note 48 at 422 (citing Motor Veh. Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 27, 43 (1983) and Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962)). *Burlington Truck Lines* held that agencies needed to show a “rational connection between the facts found and the choice made.” *Burlington Truck Lines*, 371 U.S. at 168. *State Farm* took the “rational connection” language and refashioned it as the basis for a different form of review that looked at the substance of the decision itself. *State Farm*, 463 U.S. at 43.
more substantive review to make sure that agencies have truly “taken a ‘hard look’ at all the relevant factors.”

This careful line between substantive review and judicial overreaching set out by hard look review has been impossible to concretely delineate. As a result, the approach has long created concerns that judges would misuse or misapply the hard-look standard to influence agency actions. As one judge pointed out in 1973,

Socrates said that wisdom is the recognition of how much one does not know. I may be wise if that is wisdom, because I do not know about dynamometer extrapolations, deterioration factor adjustments, and the like to decide whether or not the government’s approach to these matters was statistically valid.

In part because of questions about generalist judges’ ability to perform rational review of technical decisions, there was significant doubt in the years after Overton Park about whether § 706 allowed judges to do anything more than procedural review. Some judges contended that the substantive review called for by Overton Park was actually just a more searching form of procedural review.

Though academics continue to worry that hard look review leads to situations where judges misunderstand technical issues and get things wrong, the Supreme Court has been far more concerned about the judges’ ability to use their power of review to influence the outcome

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66 Levanthal, supra note 44 at 514.
68 See, e.g. id. at 651 (Bazelon, J., concurring) (interpreting the APA as permitting judges to only perform procedural review).
69 This more substantive form of procedural review came to be known as “hybrid rulemaking.” E.g., Stephen F. Williams, ‘Hybrid Rulemaking’ Under the Administrative Procedure Act: A Legal and Empirical Analysis, 42 U. Chi. L. Rev. 401 (1975). Hybrid rulemaking allowed a judge to strike down an agency decision because the agency failed to use procedures that, though not required by statute, were deemed necessary by the court to ensure that all relevant factors were considered. See Public Serv. Comm’n v. Fed. Power Comm’n, 487 F.2d 1043, 1071 (D.C. Cir. 1973) (remanding for failure to give petitioners adequate opportunity to respond to record), vacated and remanded, 417 U.S. 964; Portland Cement, 486 F.2d at 402 (remanding for failure to give an “adequate opportunity” for comment); Int’l Harvester Co. v. Ruckelshaus, 478 F.2d 615, 629–31 (D.C. Cir. 1973) (providing for a limited right of cross-examination).
70 See infra note 80.
of agency decisions. In Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, the Court struck down the more substantive form of procedural review known as “hybrid rulemaking” because it permitted judges to engraft “their own notions of proper procedures upon agencies entrusted with substantive functions by Congress.” Baltimore Gas and Electric Co v. Natural Resources Defense Council, Inc., reiterated this concern by holding that “Congress has assigned the courts only the limited, albeit important, task of reviewing agency action to determine whether the agency conformed with controlling statutes.”

C. Legitimacy and Outcome-Oriented Decisionmaking

Hard look review serves to legitimize agency actions by subjecting agency decisions to searching judicial scrutiny. By reviewing agency decisions to make sure that the ends bear a rational connection to the means, the judiciary helps assure the public that agency administrators are acting in the public interest and not to further their own interests or the interests of a powerful interest group.

Hard look’s power to legitimize agency actions that might otherwise be regarded as illegitimate products of special interests remains as long as the judges do not use their special powers of review to influence agency policies to achieve their own desired outcomes. When judges use hard-look review as a tool to gain specific policy outcomes, its utility as a legitimizing check on administrative agencies fades. Outcome-oriented decisionmaking saps the legitimacy of hard look review in two ways:

74 Sunstein, supra note 73 at 525; Shapiro & Levy, Heightened Scrutiny, supra note 48 at 412–13.
1. In cases where outcome-oriented decisionmaking occurs, it injects personal and political preferences into a standard of review that is supposed to be based on impersonal reason. The demand that agencies take a “hard look” at a problem is, in essence, an effort to make sure that agencies fully and dispassionately reason problems out before taking action. If a judge demanding dispassionate reason from an agency ultimately makes her decision based on an irrational personal or political preference, the reason for hard-look review in that case is lost amid the judge’s personal and political calculations.

2. In all other cases, outcome-oriented decisionmaking creates a suspicion that judges are manipulating the standard even when they are not. The simple knowledge that judges can manipulate hard-look review to achieve desired outcomes casts a pall of illegitimacy on the entire hard look enterprise because there is no practical way to sort out the legitimate hard look decisions from the outcome-oriented ones.

The judiciary could take steps to reduce the generalized suspicion about hard-look review by creating a more definite standard of review. As it stands now, hard look review permits the reviewing judge to fashion a new test for rationality each and every time she hears a case. This

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76 D.C. Circuit Judge Patricia Wald has written that the hard look doctrine exists “to make sure that agency ‘expertise’ does not disguise agency refusal to deal with agonizing questions or with cogent opposition to its intended direction.” Patricia M. Wald, Judicial Review of Complex Administrative Agency Decisions, 462 ANNALS AM. ACAD. POL. & SOC. SCI. 72, 77 (1982).

77 See, e.g., Wald, Midpassage, supra note 44 at 234–35 (responding to this suspicion).

78 Judges do not generally acknowledge when extralegal factors, such as a desire to achieve a certain outcome, have influenced their decisions. See Joel B. Grossman, Social Backgrounds and Judicial Decision-Making, 79 HARV. L. REV. 1551, 1552 (1966) (assessing the influence of extralegal factors “is particularly difficult because of norms which prevent judges from openly casting their decisions in such terms”). Though their influence is not noted in the written decisions, extralegal factors can influence a judge’s decision. See Posner, Skepticism, supra note 43 at 865 (noting that most legal decisions conceal the discretion judges have to craft an outcome). Even when extralegal factors determine the outcome in a case, it can be difficult for observers to see because there is “precedent nowadays for virtually every proposition.” Patricia M. Wald, The Rhetoric of Results and the Results of Rhetoric: Judicial Writings, 62 U. CHI. L. REV. 1371, 1400 (1995).

an ad hoc system of review makes it likely that personal bias, error, or both will creep into the judicial decisionmaking process.\(^\text{80}\)

In this indefinite system of review, outcome-oriented decisionmaking is particularly pernicious because it is so difficult to identify. Unlike mistakes and instances of judicial misunderstanding that can be objectively identified to some degree, outcome-oriented decisionmaking can only be objectively identified when the judge engaging in it owns up to it.\(^\text{81}\) Because judges rarely admit to outcome-oriented decisionmaking, it is tougher to root out.

Outcome-oriented decisionmaking has become a particularly difficult to identify in recent years as the meaning of “arbitrary and capricious” has expanded under hard look review.\(^\text{82}\) The term that used to refer to unexplained agency actions and agency actions that had been

\(^\text{80}\) See Frank B. Cross, Pragmatic Pathologies of Judicial Review of Administrative Rulemaking, 78 N.C. L. Rev. 1013, 1019–56 (2000) (detailing all of the ways judges can make misguided decisions in hard-look review); Thomas O. McGarity, The Courts and the Ossification of Rulemaking: A Response to Professor Seidenfeld, 75 Tex. L. Rev. 525, 547–552 (1997) [hereinafter McGarity, Ossification Response] (arguing that various administrative decisions were the result of the judges’ lack of technical expertise and inability to know what was important and what was not); Shapiro & Levy, Judicial Incentives, supra note 79 at 1064–68 (predicting the indeterminate standards of administrative law free judges up to make more outcome-oriented decisions); Richard J. Pierce, Two Problems in Administrative Law: Political Polarity on the District of Columbia Circuit and Judicial Deterrence of Agency Rulemaking, 1988 Duke L.J. 300, 303–07 (contending that D.C. Circuit judges decide administrative cases based on their political affiliations); Martin Shapiro, Administrative Discretion: The Next Stage, 92 Yale L.J. 1487, 1507 (1983) (“Courts cannot take a hard look at materials they cannot understand nor be partners to technocrats in a realm in which only technocrats speak the language.”).

\(^\text{81}\) The difficulty of objectively identifying outcome-oriented decisionmaking is reflected by the fact that few hard-look decisions have been reversed because they were deemed outcome-oriented decisions. This low reversal rate does not necessarily indicate that judges do not engage in much outcome-oriented decisionmaking. In fact, a number of scholars have argued that it happens frequently. See, e.g. Pierce, supra note 80 at 303–07. Professor Thomas O. McGarity has pointed out that “it is not hard to find examples of judicial overreaching.” Thomas O. McGarity, Some Thoughts on ‘DeOssifying’ the Rulemaking Process, 41 Duke L.J. 1385, 1412 (1992). One example cited repeatedly by McGarity is Corrosion Proof Fittings v. EPA, 947 F.2d 1201 (5th Cir. 1991), a decision remanding an EPA asbestos rule because of flaws in the analysis. McGarity contends that the Fifth Circuit “almost certainly got it wrong,” and points out that the court adopted a “highly questionable analysis of the agency’s statute” and “ill-informed critique” of the EPA’s cost-benefit analysis. McGarity, Ossification Response, supra note 80 at 547–48; but see Cass R. Sunstein, In Defense of the Hard Look: Judicial Activism and Administrative Law, 7 Harv. J.L. & Pub. Pol’y 51, 53 (1984) (contending the decision was correct).

\(^\text{82}\) Compare SEC v. Chenery Corp. (Chenery I), 332 U.S. 194, 207 (U.S. 1947) (“The wisdom of the principle adopted is none of our concern. Our duty is at an end when it becomes evident that the Commission’s action is based upon substantial evidence and is consistent with the authority granted by Congress.”) with Puerto Rico Sun Oil Co. v. EPA, 8 F.3d 73, 77 (1st Cir. 1993) (“The ‘arbitrary and capricious’ concept, needless to say, is not easy to encapsulate in a single list of rubrics because it embraces a myriad of possible faults and depends heavily upon the circumstances of the case.”).
undertaken without the proper procedure now refers to any action that the reviewing court
determines has been insufficiently explained. A judge can deem an agency’s explanation
insufficient for almost any reason. D.C. Circuit Judge Patricia M. Wald commented that

For all our frenetic activity in the area, the so-called “inadequate explanation” is still difficult to quantify or even explicate. If a judge on reflection finds that some material aspect of the agency’s rationale doesn’t seem to make sense or seems inconsistent with another part of the decision, or if she simply finds an omission of some important consideration and convince a second judge, that is enough.

The “acknowledged impossibility” of defining what makes an agency explanation inadequate leaves judges open to the charge that they are making hard-look decisions based on their personal preferences for outcomes rather than objective criteria.

IV. The Evidence that Outcome-Oriented Decisionmaking Occurs

Judges have long denied that a cognizable amount of their decisions are outcome oriented. For the most part, they contend that they make decisions based on the law, reason, and educated judgment, not politics or ideology. Against those contentions stands a mounting body of empirical and anecdotal evidence suggesting that outcome-oriented occurs in a significant number of cases. To reconcile the judges’ denials with the evidence of outcome-oriented

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83 Wald, supra note 44 at 233–34.
84 Id. at 234.
85 Id.
decisionmaking, one must recognize that, in all likelihood, outcome-oriented decisionmaking occurs unconsciously.\(^{88}\)

\(\text{a. The General Evidence}\)

The evidence that politics and ideology influence judicial decisions is now so significant that even some of the judiciary’s most steadfast defenders have had to acknowledge that outcome-oriented decisionmaking occurs to some extent.\(^{89}\) The strongest evidence for outcome-oriented decisionmaking is at the Supreme Court, where “it is widely considered a settled social scientific fact that law has almost no influence on the justices.”\(^{90}\) Though judges on the circuit courts of appeals tend to hew far closer to the law than the Supreme Court, studies have shown that circuit court judges’ personal ideologies tend to influence outcomes in a number of cases.

It is hardly novel to say that federal judges are political figures. Observers have presumed for years that judges share the political ideologies of the presidents who appointed them, and have found some anecdotal correlations between character of a judge’s opinions and the president who appointed him.\(^{91}\) According to this line of reasoning, a judge appointed by President Reagan would tend to write more conservative decisions than a judge appointed by President Carter because President Reagan was more conservative than President Carter, and so

\(^{88}\) See C. K. ROWLAND & RONALD A. CARP, POLITICS AND JUDGMENT IN FEDERAL DISTRICT COURTS 171 (1996) (concluding that cognitive shortcuts used by district judges while processing “imperfect information” led to ideological outcomes); Cross, supra note 86 at 1477–78 (theorizing that “motivated reasoning” may lead to outcome-oriented decisionmaking); Patricia M. Wald, A Response to Tiller and Cross, 99 COLUM. L. REV. 235, 235 (1999) (acknowledging that judges may “react instinctively against” an agency decision).

\(^{89}\) D.C. Circuit Judge Harry T. Edwards, who long contended that claims that politics and ideology influenced judicial decisions were wrong, finally had to admit in 1991 that it was no longer clear to him “that partisan politics and ideological maneuvering have no meaningful influence on judicial decisionmaking.” Edwards, Judicial Function, supra note 43 at 838; see also Cross, supra note 86 at 1478 (quoting judges acknowledging that personal politics can influence judicial decisionmaking).


\(^{91}\) E.g., Pierce, supra note 80 at 303–07.
on. This theory cannot, of course, explain every judicial decision, nor does it attempt to. It simply posits that judges’ personal and political ideology end up influencing the judicial decisionmaking process more than judges would like to admit.

This theory has some empirical support. A study by Tracy George examining 274 en banc decisions issued by the Fourth Circuit Court of Appeals between 1972 and 1996 found that most judges had engaged in “ideological voting.” These patterns of ideological voting, George concluded, were “consistent with the hypothesized effect of the party of the President who appointed the judge.” Dan Pinello’s meta-analysis of studies covering more than 79,000 circuit court decisions concluded that there was a correlation between ideology and outcome, with Democratic judges tending to be “more liberal on the bench than their Republican counterparts.” Frank Cross’s review more than 17,000 circuit court decisions concluded that the amount of influence politics had on a judge’s decisionmaking process depended on who the judge was appointed by. Reagan-Bush appointees, for instance, were more likely to be influenced by ideology than Carter judges.

B. Evidence of Outcome-Oriented Decisionmaking in Hard Look Review

Empirical evidence that ideology influences judicial decisions creates particular questions about the integrity of hard look review. Can judges who are otherwise influenced by their ideology file away their personal beliefs when performing hard look review? For years, judges

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92 Though imperfect, this proxy-by-politics works because it is unlikely to produce false positives: judges’ deviations from their appointing presidents’ ideologies results in an understatement of the correlation between outcomes and ideologies, instead of an overstatement. Cross, supra note 86 at 1479.


94 Id.

95 Pinello, supra note 87 at 243.

96 Cross, supra note 86 at 1502–09.

97 Id. At 1506.
have contended that they can, and that their decisions are “more consistent and less personal than our critics admit.” In many ways, this claim defies expectations. As Professors Levy and Shapiro point out, judges would actually be expected to render more outcome-oriented decisions when performing hard-look review because the standards are indefinite and pose less of a barrier to outcome-oriented decisionmaking.99

Despite the judges’ claims to the contrary, ideology appears to influence judicial reviews of agency decisions to some extent. Richard Revesz, for instance, has found empirical evidence that ideology influenced the D.C. Circuit’s decisions in environmental regulation cases during the mid-1980s.100 The study found that, during the mid 1980s, there was a statistically significant correlation between the party of the president who appointed a judge and how the judge voted when reviewing environmental regulations.101 During that period, Republican appointees were more likely to reverse environmental regulations challenged by the industry while Democratic appointees were more likely to reverse environmental regulations challenged by an environmental group.102

98 Wald, supra note 44 at 235.
99 Shapiro and Levy contend that even “craft-oriented” judges who normally would be immune to the temptation to engage in result-oriented decisionmaking are more likely to do so when applying an indefinite standard. Shapiro & Levy, supra note 79 at 1061. Shapiro and Levy estimate that the likelihood that a judge will render an outcome-oriented decision, when charted, looks like this:

![Diagram](image)

101 Id. at 1740–43.
102 Id.
Frank Cross and Emerson Tiller further bolstered the hypothesis that ideology influences the outcomes in administrative review cases in their study of early 1990s D.C. Circuit reviews of agency actions using the *Chevron* standard. They found that majority-Republican panels were more likely to observe *Chevron* deference to an agency’s interpretation of a statute when the agency’s interpretation was conservative, while majority-Democrat panels were more likely to observed *Chevron* deference when the agency’s interpretation was liberal.

C. Identifying Instances of Outcome-Oriented Decisionmaking

Despite the growing number of studies indicating that outcome-oriented decisionmaking occurs during judicial review of agency actions, identifying particular instances of outcome-oriented decisionmaking remains difficult. As it stands, self-reporting is about the only way outcome-oriented decisionmaking can be identified on a case-by-case basis. Perhaps not surprisingly, judges rarely announce that they are making an outcome-oriented decision. Self-reporting is rare because judges are not necessarily cognizant that they are making an outcome-oriented decisions. And once a decision is made, it is often difficult to tell whether the judge has made an outcome-oriented decisions — the standards of review are too indefinite to determine objectively whether a case was decided on the basis of the law or the judge’s preference for an outcome.

When judges do self report outcome-oriented decisionmaking, the appellate courts will generally strike down the decision because of judicial overreaching. In *Sierra Club v. Van Antwerp*, for instance, the 11th Circuit Court of Appeals struck down a district court judge’s

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104 *Id.* at 2169.
105 *See supra* note 88.
decision in *Sierra Club v. Flowers* because the judge acknowledged that his decision was based on his own judgments of what an agency should do.\footnote{Sierra Club v. Van Antwerp, 526 F.3d 1353, 1363 (11th Cir 2008); Sierra Club v. Flowers, 423 F. Supp. 2d 1273 (S.D. Fla. 2006).} In striking down *Flowers*, the 11th Circuit pointed to the district judge’s astonishing conclusion, which made the following observations:

> The Corps was, and I am, faced with a most difficult decision: to balance the rights and interests of these particular mining companies with the rights and welfare of the public. In the last analysis, the Court finds that the record in this case compels the conclusion that the permits should not have been issued. Not only have I, and the Corps should have, considered the condition of the wetlands environment at the time that the permits were issued, but I also have looked directly into the future of fifty years of mining in this area—a point clearly implied by the Corps’ “bridging permits” and vague “special conditions” thereon—and I find that, based upon application of the factors identified by Congress to the record before me, the Corps should not have issued these permits authorizing this mining.\footnote{Id. at 1380.}

As *Van Antwerp* shows, the current system of appellate review can catch outcome-oriented decisionmaking when it is reported and acknowledged by judges. But if such self-reporting is rare, what can the judiciary do to catch the outcome-oriented decisions that judges do not report or acknowledge?

V. Preventing Outcome-Oriented Decisionmaking

Instead of attempting to identify outcome-oriented decisionmaking after it occurs, the judiciary could try to prevent outcome-oriented decisionmaking before it happens. *FCC v. Fox* attempts to do just that by limiting when judges can review an agency’s reasons for changing policies.\footnote{See FCC v. Fox Television Stations, Inc., 556 U.S. __, No. 07-582, slip op. at 11–12 (2009) (limiting when judges can demand an explanation for change); *id* at __, slip op. at 1 (Kennedy, J., concurring) (same).} Restricting judge’s ability to review certain aspects of agency decisions is a practical
way to limit judges’ powers without eviscerating hard-look review. But for it to work, the limits on judges’ powers must be concrete. Setting out concrete limits on what judges can do in hard-look review is difficult because there is no consensus about when judges are likely to overstep their bounds and engage in outcome-oriented decisionmaking.

\[ \text{a. Limits on Judicial Review Are Easier to Enforce} \]

As \textit{FCC v. Fox} shows, it is easier to enforce limits on judges’ power to review certain agency actions than it is to determine if a court’s decision was improperly outcome-oriented. \textit{FCC v. Fox} reviewed the Second Circuit’s decision in \textit{Fox Television Stations, Inc. v. FCC}\textsuperscript{109}, which struck down the FCC’s new fleeting expletives policy as arbitrary and capricious. \textit{Fox v. FCC} held that the FCC’s policy was arbitrary and capricious because the FCC had not adequately explained why it had changed from a policy of tolerating fleeting expletives to one punishing them.\textsuperscript{110} In making this ruling, the Second Circuit did not identify any procedural flaws—the FCC had met its procedural obligations by announcing the change in policy and explaining its reasons for the change. All of the flaws in the FCC’s explanation, according to the Second Circuit, were logical: The FCC had not justified the policy change because it had not shown that fleeting expletives were more harmful than they were thirty years ago when the FCC’s policy of toleration began.\textsuperscript{111} The FCC had not justified the policy change because there was evidence that broadcasters could still air fleeting expletives in certain circumstances.\textsuperscript{112} The

\begin{footnotesize}
\begin{enumerate}
\item[109] Fox Television Stations, Inc. v. FCC, 489 F.3d 444 (2d Cir. 2007).
\item[110] Id. at 457–62.
\item[111] Id. at 461.
\item[112] The Second Circuit held that the FCC’s decision to allow CBS to air an unedited version of “Saving Private Ryan” during prime time showed that the FCC’s claim that it was banning fleeting expletives to protect children from the first blow of indecency was not credible. \textit{Id.} at 458–59.
\end{enumerate}
\end{footnotesize}
FCC had not justified its policy change because its prediction that broadcasters would fill the air with fleeting expletives was implausible.\textsuperscript{113}

While all of the logical flaws in the FCC’s explanation identified by \textit{Fox v. FCC} were real,\textsuperscript{114} it was possible that the decision was really the result of the court’s disagreement with the agency. Judge Leval claimed as much in his dissent.\textsuperscript{115} And the dissent had a point. With nobody claiming that it was unreasonable to consider fleeting expletives indecent,\textsuperscript{116} and nobody claiming that there were procedural problems with the policy, one of the only remaining reasons to strike down the policy was disagreement with the policy. In such a situation, holding that the FCC had inadequately explained the change from one policy to another could provide convenient cover for an outcome-oriented decision.

When reviewing such a decision, the \textit{possibility} that the outcome was the result of outcome-oriented decisionmaking does not matter much. Judicial decisions, much like agency decisions, are reviewed according to the reasons given—not the reasons that could have been animating the decision. Unless there is an indication in the decision itself that the judge made his decision to achieve a certain outcome—something like what the judge did in \textit{Sierra Club v. Flowers},\textsuperscript{117}—then the \textit{possibility} that outcome-oriented decisionmaking influenced a court’s hard-look review will not sway appellate review. Instead, the decision will stand or fall on its legal merits.

\textsuperscript{113} \textit{Id.} at 460.
\textsuperscript{114} For instance, the FCC’s prediction that a rule tolerating fleeting expletives “would as a matter of logic permit broadcasters to air fleeting expletives as long as they did so one at a time” was a bit overheated, especially since the broadcasters had never exploited the previous policy of toleration to barrage the airwaves with fleeting expletives. \textit{In re Complaints Regarding Various Television Broads. Between Feb. 2, 2002 and Mar. 8, 2005 (Remand Order)}, 21 F.C.C.R. 13,299, 13,309 (2006).
\textsuperscript{115} \textit{Fox v. FCC}, 489 F.3d at 472–73 (Leval, J., dissenting).
\textsuperscript{116} The Second Circuit was careful not to hold that it was unreasonable to consider the “F-word” indecent. Instead, it held that the FCC’s decision to consider the “F-word” indecent had not been adequately supported by evidence, and thus could not be upheld. \textit{Id.} at 460 n.10 (citing Bowen v. Am. Hosp. Ass’n, 476 U.S. 610, 626 (1986)).
\textsuperscript{117} See supra Section III.C (quoting Sierra Club v. Flowers, 423 F. Supp. 2d 1273, 1380 (S.D. Fla. 2006)).
Because judges rarely even hint that they are engaging in outcome-oriented decisionmaking,\textsuperscript{118} it is far easier to enforce limits on judicial review than it is to create a standard that will actually root out outcome-oriented decisions. Unlike the after-the-fact effort to root out improper decisionmaking, a system that enforces limits on judicial review does not rely on judges to self-report all instances of outcome-oriented decisionmaking. Instead of relying on judges to indicate when they overstepped their bounds, a system that enforces limits on judicial review determines in advance when judges are most likely to engage in outcome-oriented decisionmaking—and then seeks to prevent judges from getting into those situations. Such preventative limits, when stated in concrete terms, are far easier to enforce because there is no need to determine what unspoken factors influenced the judge. With preventative limits, all that needs to be determined is whether a judge had the authority in a given situation to review the aspects of the agency decision that he reviewed.

\textit{b. Setting Concrete Limits on Judicial Review}

During the three decades of hard look review, courts have conspicuously avoided setting out concrete limits on their power to review agency decisions. Judges claim it is impossible to set hard-and-fast limits on judicial review because every agency decision raises different concerns and different questions that the court must examine.\textsuperscript{119} For decades, judges have contended that it is far preferable to set out general limits—such as “a court is not to substitute its judgment for that of the agency”\textsuperscript{120}—and then let each judge decide for himself what he can review and what he cannot.\textsuperscript{121}

\textsuperscript{118} See supra note 78.
\textsuperscript{119} See, e.g., supra note 21 (quoting Puerto Rico Sun Oil Co. v. EPA, 8 F.3d 73, 77 (1st Cir. 1993)).
\textsuperscript{121} Justice Breyer’s dissent contended that the judiciary should continue this approach and recognize that “change is sometimes (not always) a relevant background feature that sometime (not always) requires focus (upon
As a result of this approach, there is general agreement that the power of hard-look review is limited. In instances where policy changes are presumptively rational, for example, judges do not have the power to demand explanations for change because those explanations will not influence the judges’ decisions on rationality.122 This consensus on general limits dissolves, however, as soon as people start delving into the specifics. In *FCC v. Fox*, for instance, the disagreements over the limits on hard-look review began as soon as the Court began trying to identify the instances where policy changes would be presumptively rational—and thus off-limits to hard-look review.

The difficulties experienced by the Court in *FCC v. Fox* while trying to specify one of the limits on judges’ hard-look powers demonstrates how devilish the details of hard-look review can be. Rather than settling on a single formula for limiting judges’ power to strike down agency policy changes, *FCC v. Fox* offered up two competing sets of limits. One set of limits proposed by the majority provided that a judge could not strike down an agency action because of an insufficient explanation for change unless (1) the previous policy had “engendered serious reliance interests that must be taken into account,” (2) the new policy contradicted factual findings underlying the old policy, or (3) it would be otherwise be “arbitrary and capricious to prior justifications) and explanation lest the policy (in that circumstance) be ‘arbitrary, capricious, an abuse of discretion.’” *FCC v. Fox* Television Stations, Inc., 556 U.S. ___, No. 07-582, slip op. at 6 (2009) (Breyer, J., dissenting).

122 This general agreement is reflected in *FCC v. Fox*, where both the majority and the dissent hold that there are situations where an agency’s decision to change its policy can be explained with, “We now weigh the relevant considerations differently.” *Id.* at ___, No. 07-582, slip op. at 5 (Breyer, J., dissenting); *see also id.* at ___, No. 07-582, slip op. at 11. This general agreement on the limits on judges’ powers is based on long-held principles of agency deference, including the recognition that judges have to give agencies enough leeway to “adapt their rules and policies to the demands of changing circumstances.” *In re* Permian Basin Area Rate Cases, 390 U.S. 747, 784 (1968). In cases where judges do not have the authority to scrutinize explanations for change, it is generally understood that a court can only make sure that the agency has acknowledged the change and explained its reasons for the new policy. These limits ensure that judicial review of change is limited to ensuring that agencies are being forthcoming about how the are exercising their discretion. *See, e.g.*, HENRY J. FRIENDLY, THE FEDERAL ADMINISTRATIVE AGENCIES 63 (1962) (noting that the concern about change is that agencies will slip a change through without telling anyone so it can remain free to use the old policy whenever it suits its purposes).
ignore such matters.” The other set of limits, set out by Justice Kennedy in his concurring opinion, provided that judges could also strike down an agency actions for an insufficient explanation of change when an agency rejected “the considerations that led it to adopt that initial policy.”

The subtle difference between the limit set out in Kennedy’s concurring opinion and the limit set out by the majority is important because they establish two different limits on hard-look review. Under the majority’s limit, a judge has far less leeway to consider an agency’s reasons for changing its policy. If the agency’s explanation for its new policy is reasonable, and there is no particular reason to presume change is unreasonable, then the reviewing court does not have the authority to strike down policy change under hard-look review. In contrast, Kennedy’s limit gives a judge wide latitude to consider an agency’s explanation for change. As long as the change is significant enough to reverse course, the reviewing court can strike down the agency’s policy change as insufficiently explained.

The differences between the majority’s limit and Kennedy’s limit become clear in application. In *FCC v. Fox*, Kennedy and the rest of the majority undertook vastly different reviews of the FCC’s fleeting expletive decision, even though they all agreed that the FCC’s new fleeting expletives ban was fundamentally reasonable.

Under the majority’s approach, the only issue up for review was whether the FCC’s new fleeting expletives policy was reasonable. The fact that the FCC had a policy of tolerating fleeting expletives for decades before it changed course did not play into the review because “that fact that an agency had a prior stance does not alone prevent it from changing its view or

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123 Id. at ___, No. 07-582, slip op. at 12.
124 Id. at ___, No. 07-582, slip op. at 1 (Kennedy, J., concurring).
125 Kennedy joined the portion of the majority decision that held that the FCC could have reasonably concluded that it needed to sanction the broadcast of fleeting expletives. Id. at No. 07-582, slip op. at 26.
create a higher hurdle for doing so.”126 As a result, the case was over once the majority held that the FCC could “reasonably conclude” that banning fleeting expletives from broadcast television was an appropriate way “to give conscientious parents a relatively safe haven for their children.”127 No analysis of the FCC’s explanation of change was necessary.

Under Kennedy’s approach, the fate of the FCC’s new fleeting expletives policy hinged entirely on his review of the FCC’s explanation for change. The FCC’s explanation of its new policy was not sufficient under Kennedy’s approach because the new policy was based on a changed understanding of FCC v. Pacifica Foundation,128 the 1978 case that set some of the parameters for indecency regulation of broadcast television and radio.129 When the FCC established its policy of tolerating fleeting expletives in 1978, it read Pacifica as barring it from regulating fleeting expletives as indecent.130 Though it was an incorrect reading of Pacifica—the Court actually reserved the question for a later day131—that misguided interpretation of Pacifica influenced the FCC’s fleeting expletives policy for more than two decades.132 When the FCC began sanctioning broadcasters for airing fleeting expletives in 2004, the change was a final rejection of that restrictive reading of Pacifica. Because the FCC rejected the consideration that led it to adopt the initial policy, Kennedy’s approach required the FCC to explain its reasons for change.133 In the end, Kennedy only ended up upholding the FCC’s new fleeting expletives

126 Id. at ____, No. 07-582, slip op. at 15.
127 Id. at ____, No. 07-582, slip op. at 26.
129 FCC v. Fox, 556 U.S. at ____, No. 07-582, slip op. at 4–5 (Kennedy, J., concurring); see also Pacifica, 438 U.S. at 748–52 (allowing the FCC to sanction broadcast indecency).
130 See In re Application of WGBH Educ. Found., 69 F.C.C.2d 1250, 1254 (1978) (interpreting Pacifica as barring the FCC from punishing fleeting expletives and announcing that “[w]e intend strictly to observe the narrowness of the Pacifica holding”).
131 See Pacifica, 438 U.S. at 750 (emphasizing that the Court was not deciding whether the FCC could punish a broadcaster for “an occasional expletive”).
132 FCC v. Fox, 556 U.S. at ____, No. 07-582, slip op. at 3–4 (detailing how the FCC moved away from its policy of tolerating fleeting expletives and came to adopt a rule punishing them).
133 Id. at ____, No. 07-582, slip op. at 4 (Kennedy, J., concurring).
policy because he concluded that the FCC’s explanation for changing its reading of *Pacifica*, though not “a model for agency explanation,” was sufficient enough to justify the change.\(^{134}\)

Though Kennedy and the rest of the majority ended up agreeing on the outcome in *FCC v. Fox*, the limits they placed on hard-look review were very different. The majority’s limit constrains judicial review in a hard-and-fast way in an effort to ensure that judges defer to agency decisions to change from one reasonable policy to another. Kennedy’s limit is more flexible: though it restricts judges’ power to review agency policy changes, the limit still leaves it to judges to decide when they can review and agency’s reasons for change.

**C. Applying the Limits Set Out in FCC v. Fox**

*FCC v. Fox* set out a simple requirement. To strike down an agency decision because of an insufficient explanation of change, a judge must find that (1) the previous policy had engendered “serious reliance interests,” (2) the new policy contradicts factual findings underlying the old policy, or (3) it would be otherwise be “arbitrary and capricious to ignore such matters.” While all of these categories are a bit unclear, questions about what fits in to the final, catch-all category will be particularly vexing for lower courts in light of Kennedy’s concurring opinion, which seems to expand this category so that it includes almost any significant change of policy. If the limits are interpreted to be as permissive as Kennedy envisions, the question must be asked: do these limits really limit judges at all?

1. **Changes to policies that have engendered serious reliance interests** The first and most narrow category of cases where judges can strike down agency policy changes for an insufficient explanation of change are “serious reliance” cases. These are cases where entrenched and justified reliance on an old agency policy creates questions about whether a change to a new

\(^{134}\) *Id.*
policy is reasonable. For a judge to find that serious reliance interests are at play, he must have more than just some evidence of reliance on the old policy—he must have evidence of extensive societal or industrial reliance on the old policy that would make change unusually expensive, disruptive, or otherwise unreasonable.

By all indications, situations where reliance can be deemed “serious” enough to permit judicial scrutiny of an agency’s reasons for change will be rare. In *FCC v. Fox*, for instance, the Court held that the expense and disruption of moving from a system that tolerated the occasional broadcast of a fleeting expletive to a system of zero tolerance was not serious enough to merit an examination of the FCC’s reasons for changing its policy.\(^\text{135}\) If altering long-established FCC policy in a way that threatens broadcasters’ ability to air live events is not significant enough to be a serious reliance case, then there are few changes to agency policy that will be considered serious enough to fit into this category.

For the most part, the policy changes that will fit into the “serious reliance” category will be changes that fail to “take account of legitimate reliance on prior interpretation.”\(^\text{136}\) They will be cases like *United States v. Pennsylvania Industrial Chemical Corp.*, where the industry contended that it was being punished for failing to comply with a new policy even though the agency had told it that it could comply with the law by relying on the old policy.\(^\text{137}\) In cases where agencies affirmatively mislead the regulated into reliance on an old policy, the court’s

\(^{135}\) *FCC v. Fox* concluded that reliance on the FCC’s prior policy was irrelevant because the broadcasters all received “notice of the potential consequences of their action” before facing sanctions. *Id.* at ____, No. 07-582, slip op. at 14–15. The dissenters would have gone the opposite way and required an explanation of the change because of the reliance interests involved. *Id.* at ____, No. 07-582, slip op. at 13–15 (Breyer, J., dissenting). Justice Breyer’s dissent, in particular, was concerned about the FCC’s failure to respond to small broadcasters’ claims that the new fleeting expletives rules would make it impossible for them to broadcast local live events such as city council meetings and sporting events. *Id.* at ____, No. 07-582, slip op. at 14 (Breyer, J., dissenting).


ability to examine an agency’s reasons for change provides protection against unreasonable agency decisionmaking.

There might also be some policy changes that fit into the “serious reliance” category because they are socially disruptive. Few policy changes would be socially disruptive enough to fit into this category. Even Justice Breyer, an administrative law scholar, could not think of a real-world example. So he created a hypothetical:

An (imaginary) administrator explaining why he chose a policy that requires driving on the right-side, rather than the left-side, of the road might say, “Well, one side seemed as good as the other, so I flipped a coin.” But even assuming the rationality of that explanation for an initial choice, that explanation is not at all rational if offered to explain why the administrator changed driving practice, from right-side to left-side, 25 years later.138

Though Justice Breyer’s point is worth noting—some agency policies are ingrained so deeply into the fabric of the country that changing them would be per se unreasonable—it does not make much of a practical difference for the simple reason that most agency policies are not as socially significant as the rules of the road.

2. Changes that contradict the factual findings underlying the old policy This is the category of cases that includes the State Farm decision, which famously struck down the NHTSA’s attempt to rescind an airbag rule because it went against the agency’s own safety findings. State Farm is a prototypical example of the case that fits into the category because it involved an effort to change a policy that was primarily based on a single factual foundation. In that case, the NHTSA issued a policy requiring auto manufacturers to install airbags in all new cars after concluding that airbags were an effective and relatively cheap way to reduce traffic fatalities.139 When the NHTSA later decided to rescind the airbag requirement, it did not disavow

138 Id. at ____, No. 07-582, slip op. at 4 (Breyer, J., dissenting).
its prior findings on airbags or explain why those findings no longer supported an airbag requirement. In striking down this change as arbitrary and capricious, *State Farm* established changes that contradict prior factual findings must be explained.\textsuperscript{140}

Though this category is well-established, its contours are unclear. How incompatible must the new policy be with the prior factual findings to qualify as a contradiction? And how central to the prior policy do the factual findings have to be? *FCC v. Fox* does not provide much guidance because it did not have to: the FCC’s old fleeting expletives policy was not based on factual findings, so there were no factual findings for the new fleeting expletives policy to contradict.\textsuperscript{141}

3. Other cases where it would be otherwise arbitrary and capricious to ignore change

*FCC v. Fox* indicates that there might be other situations where judges could scrutinize an agency’s reasons for change.\textsuperscript{142} Though the majority does not indicate what sort of cases might fall into this catch-all category, Kennedy’s concurring opinion provides that it would include all cases where a policy change involves a rejection of the considerations that underlie the old policy.\textsuperscript{143} If Kennedy’s concurrence outlines the catch-all category, then it is a category that encompasses almost every major agency policy change. After all, about the only time a policy change does not constitute a rejection of the old policy’s foundations is when the new policy amounts to a modification of the old policy.

Ultimately, the extent of this catch-all category depends on the precedential value lower courts assign to Justice Kennedy’s concurring opinion. Those that conclude that it had

\textsuperscript{140} Id.

\textsuperscript{141} *FCC v. Fox*, 556 U.S. at ___, No. 07-582, slip op. at 15–16; id. at ___, No. 07-582, slip op. at 4 (Kennedy, J., concurring).

\textsuperscript{142} See id. at ___, No. 07-582, slip op. at 11–12 (listing cases involving serious reliance interests and cases contradicting prior factual findings as examples of cases where an explanation for change would be necessary).

\textsuperscript{143} Id. at ___, No. 07-582, slip op. at 1 (Kennedy, J., concurring).
precedential value will likely interpret *FCC v. Fox* as imposing far fewer limits on judicial review than those that treat Justice Kennedy’s concurring opinion as a simple concurrence.

Determining how the lower courts will treat Justice Kennedy’s concurrence is difficult because it is not clear that Justice Kennedy intended to set a precedent distinct from the majority. Justice Kennedy has created this quandary by joining in the majority’s rationale as well as its judgment. If Justice Kennedy had simply joined the majority in judgment, then it would have been clear that he intended to set out a distinct limit on judicial review. By joining the majority’s rationale, Justice Kennedy has indicated that he supports the limits outlined by the majority. Justice Kennedy’s decision to join the majority opinion could lead the lower courts to presume that Justice Kennedy’s concurrence has no precedential value. The opposite is also possible: lower courts could conclude that Justice Kennedy’s concurring opinion does have precedential value. The fact that Justice Kennedy was the fifth vote in a bare five-justice majority could create the presumption that his concurrence has precedential value, especially in cases where Justice Kennedy’s approach it would lead to a different outcome.

If Justice Kennedy’s concurrence is treated as having precedential value, then the limits *FCC v. Fox* imposes on judicial review might not limit judges much at all. Judges would be allowed to strike down policy changes for insufficient explanation of change whenever the new policy constitutes a significant departure from the old policy. Such a broad allowance for judicial

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145 See id. at 2090 (noting that when a justice who wrote a concurrence is listed as joining in the majority opinion, it is presumed that he agrees the majority’s legal rationale).
146 There are some concurring opinions written by justices who also joined the majority opinion that have been adopted by lower courts as binding. Id. at 2088–96 (citing Justice Blackmun’s concurring opinion in Nat’l League of Cities v. Usery, 426 U.S. 833 (1976); Justice Powell’s concurring opinion in Branzberg v. Hayes, 408 U.S. 665 (1972); and Justice Fortas’ concurring opinion in United States v. Container Corp. of Am., 393 U.S. 333 (1969)).
147 See id. at 2104–2110 (noting that concurring opinions are more likely to be deemed to have precedential value when they are issued by the justice holding the fifth vote and they outline a legal standard that would produce a different outcome than the majority’s standard would).
review does not really limit when judges can scrutinize agencies’ reasons for change. Whenever a judge wants to flex her power to examine an agency’s reasons for change, she could justify it by claiming that the change is a significant departure from the prior policy in some way.

VI. The Court’s Differences on Hard-Look Limits Reflect a Deeper Divide About the Likelihood of Outcome-Oriented Decisionmaking

The Court splintered when setting out the limits of a judge’s power in hard-look review because the justices have drastically different views about whether hard-look review’s indefinite standards create a significant risk that judges will improperly use hard-look review to strike down agency policies they disagree with. Chief Justice Roberts, Justice Alito, Justice Scalia, and Justice Thomas pushed for strict limits on judges’ hard-look powers because they regarded outcome-oriented decisionmaking as a real danger. Justice Breyer, Justice Ginsberg, Justice Stevens, and Justice Souter rejected concrete limits on judges’ hard-look powers because they feared that such limits would reduce the judiciary’s ability to prevent another problem: irrational agency action. In this split court, Justice Kennedy played the familiar role of the swing voter.

A. The Likelihood of Outcome-Oriented Decisionmaking

Hard-look review creates the risk of outcome-oriented decisionmaking because it provides the reviewing judge with nearly unfettered discretion to decide whether an agency decision is reasonable or not. By giving the reviewing judges the power to determine the bounds of reason in every case, hard-look review provides judges with opportunities to draw bounds of

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148 See infra notes 153–155.
149 See infra notes 156–158.
reason in ways that make policies they oppose arbitrary and capricious. Judges, in other words, can use their powers in hard-look review to set out boundaries of reason that further their own policy preferences and frustrate the policies they oppose.

The challenge is determining what adjustments to the bounds of reason are appropriate under hard-look review and which are not. Undoubtedly, many adjustments are appropriate: what is reasonable in one circumstance is not necessarily reasonable in another. At some point, though, these changes to the bounds of reason stop being proper circumstantial adjustments and start becoming improper attempts to manipulate the standard. This point where an adjustment to the bound of reason becomes improper is the threshold point.

In many ways, the placement of the threshold point determines whether hard-look review creates a significant danger of outcome-oriented decisionmaking. Chief Justice Roberts, Justice Alito, Justice Scalia, and Justice Thomas see a great threat of outcome-oriented decisionmaking in the current hard-look standard because they set a low threshold point for judicial adjustments to the bounds of reason. They consider a standard that demands more explanation from an agency trying to change its policies to be a suspect attempt by the judiciary to grab oversight power properly left to Congress. In the memorable words of Justice Scalia, a standard of review permitting judges to narrow the bounds of reason just because they consider Congressional oversight inadequate is a standard of review that lets judges expropriate an

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150 When performing hard-look review, judges often downplay their discretion and proclaim that they are “generalist judges” empowered “merely to patrol the boundary of reasonableness.” Am. Dental Ass’n v. Martin, 984 F.2d 823, 831 (7th Cir. 1993). While this is true, it is also true that the judges are empowered to determine where this “boundary of reasonableness” lies.

151 Though most legal scholars ignore the possibility that lower courts manipulate legal standards to achieve desired outcomes, critical legal scholars, legal realists, and political scientists have amassed some evidence that judges “decide cases according to their political proclivities and use precedent, if at all, as an ex post facto justification for their decisions.” See Cross & Tiller, supra note 103 at 2156–57 (citing studies).

152 Justice Breyer’s example of the road administrator who decides to change the rules of the road by the flip of a coin provides a paradigmatic example of how a change in circumstances can make a decision that once appeared reasonable seem unreasonable. FCC v. Fox, 556 U.S. at ___, No. 07-582, slip op. at 4 (Breyer, J., dissenting).

153 Id. at ___, No. 07-582, slip op. at 21–23 (Scalia, J., opinion).
agency’s policy-making power “like jackals stealing the lion’s kill.”154 To prevent that theft from happening, Scalia and his three co-authors in FCC v. Fox contended that a judge’s power to strike down an agency decision because of an insufficient explanation must be severely limited. If it is not, they contended that judges would cook up “special burden[s]” and “gloomyscenario[s]” to justify striking down disfavored policy changes as arbitrary and capricious.155

In contrast, Justice Breyer, Justice Ginsberg, Justice Stevens, and Justice Souter see far less risk of outcome-oriented decisionmaking because they set a much higher threshold point for judicial adjustments to the bounds of reason. While they acknowledge that judges must give agencies “broad policymaking leeway,” their dissent in FCC v. Fox did not perceive a need to limit reviewing judges’ powers to demand explanations for change.156 In fact, their dissent, written by Justice Breyer, contended that adding such limits to the hard-look standard would “significantly change judicial review in practice, and not in a healthy direction.”157 The problem with limiting what a judge can scrutinize during hard-look review, they contended, is that it restricts the judge’s ability to make sure that the agency considered all relevant factors during its decision-making processes. Change is a relevant factor that must be considered just like any other relevant factor, they contended, and the power to strike down an agency decision for failing to explain change entails no more risk of unprincipled decisionmaking than the power to strike down an agency decision for failing to consider any other relevant factor.158

154 Id. at ____, No. 07-582, slip op. at 22 (Scalia, J., opinion).
155 Id. at ____, No. 07-582, slip op. at 23–24 (Scalia, J., opinion).
156 Id. at ____, No. 07-582, slip op. at 2–5 (Breyer, J., dissenting).
157 Id. at ____, No. 07-582, slip op. at 6 (Breyer, J., dissenting).
158 See id. (“[I]f it is always legally sufficient for the agency to reply to the question ‘why change?’ with the answer ‘we prefer the new policy’ (even when the agency has not considered the major factors that led it to adopt its old policy), then why bother asking the agency to focus on the fact of change? . . . Where does, and why would, the APA grant agencies the freedom to change major policies on the basis of nothing more than political considerations or even political whim?”).
B. The Lower the Likelihood of Outcome-Oriented Decisionmaking, the Worse Limits on Judicial Review Look

The dissenters considered limits on judges’ abilities to strike down agency policy changes to be a change for the worse because they did not believe that the existing hard-look standard created much of a risk of outcome-oriented decisionmaking. Because they estimated that the risk of outcome-oriented decisionmaking was low, they did not believe that the benefits of limiting judicial power were worth the risk of more irrational and politically motivated agency actions slipping through judicial review.

When determining whether to limit judges’ power to strike down agency action in hard-look review, the risks created by broad judicial discretion must be weighed against the dangers that arise when judicial oversight is restricted. The entire hard-look approach to judicial review under § 706 of the APA is premised upon the belief that agencies, if left to their own accord, will be able to slip actions based on political bias, personal whims, or uneducated guesswork past their Congressional overseers. Because hard-look review presumes that the risk of irrational agency decisionmaking is high when judicial review is restricted, it provides judges with broad authority to scrutinize almost any aspect of agency action to make sure it is rational. While this approach to judicial review creates some risk of outcome-oriented decisionmaking, the significance of the risk is unclear, especially in comparison to the danger of irrational agency decisions.

In FCC v. Fox, the dissenters made it clear that they do not think that the risks created by limiting judicial power are worth the reward. Once judges are limited in what they can do when

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reviewing agency policy changes, the dissenters contended that agencies would be free “to change major policies on the basis of nothing more than political consideration or even personal whim.” That risk was too much for the dissenters to stomach because they believed it far outstripped the small benefit that they estimated would accrue from limiting judges’ powers to take hard looks at agency policy changes.

C. The Judiciary Might Underestimate the Prevalence of Outcome-Oriented Decisionmaking

The dissenters’ approach does not account for the possibility that the justices, as members of the federal judiciary, underestimate the risk that their colleagues on the federal bench will use hard-look review to substitute their judgments for those of the agencies.

D.C. Circuit Court of Appeals Judge Harry T. Edwards demonstrated the judicial tendency to underestimate the dangers of outcome-oriented decisionmaking in 1985, when he wrote that claims that the personal politics of D.C. Circuit Court judges influenced his court’s decisions were wrong and that “on the whole, the function of the courts of appeals is characterized by the effort to intelligently and faithfully apply legal principles, a task that demands the exercise of judgment but that does not involve ‘political’ considerations to any significant extent.” Just six years later, Edwards had to back off that claim and admit that it was no longer clear to him “that partisan politics and ideological maneuvering have no meaningful influence on judicial decisionmaking.” Amazingly, Edwards continued to downplay the risk of outcome-oriented judicial decisionmaking even after he admitted that it was a problem. Claiming that politically-tainted judicial decisionmaking was the result of “external pressures” that has been “created and exacerbated” by the public’s belief that judicial

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160 FCC v. Fox, 556 U.S. at ___; No. 07-582, slip op. at 6 (Breyer, J., dissenting).
162 Edwards, Judicial Function, supra note 43 at 838.
decisionmaking is political in nature, Edwards contended that the best way to contain the problem was to ignore it:

[C]ontinued assessments of judicial performance in political terms will promote a “new reality,” for most people will come to believe that the judicial function is nothing more than a political enterprise. . . [T]he judiciary will sharply devalued and incompetent to fulfill its role as a mediator in a society with lofty but sometimes conflicting ambitions. This would be a horror to behold.163

Systemically, living with the risk of outcome-oriented decisionmaking only makes sense if the risk is relatively low. For years, judges have claimed that the risk of outcome-oriented decisionmaking is low. Edwards, for instance, contended that judges can only inject the personal views into the “very hard” cases, which he estimated made up less than 15 percent of any judge’s caseload.164 In hard-look review in particular, Judge Wald claimed that hard-look review decisions were “more consistent and less personal than our critics admit.”165

Empirical studies performed over the past two decades indicate that these judges have underestimated the role that reviewing judges’ personal politics can play in the decisionmaking process.166 Judges are underestimating the amount of outcome-oriented decisionmaking that occurs because, for better or worse, they take their colleagues at their word. Because few judges are openly acknowledging their outcome-oriented decisionmaking, most judges presume that it is not a problem. As a doctrinal matter, ignoring outcome-oriented decisionmaking until judges decide to do it more openly is a bit ludicrous. Why wait until judges are openly flouting the law to rein them in? It would make far more sense for the judiciary to acknowledge that outcome-oriented decisionmaking is a concern, and look for some more effective ways to cut it out of hard-look review. Given the complaints about outcome-oriented decisionmaking that have been

163 Id. at 838–39.
164 Id. at 856–63.
165 Wald, supra note 44 at 235.
166 See supra notes 91–104 and accompanying text.
issued in recent years from within the judiciary, an effort to limit outcome-oriented
decisionmaking in hard-look review would go a long way towards re-legitimizing the process.

D. The Problem of Accurately Assessing the Risk of Unprincipled Decisionmaking

Even if the judiciary assigned greater importance to the prevention of unprincipled
decisionmaking, it is not necessarily clear that the benefits provided by a hard-and-fast limit on
judges’ power to strike down agency policy changes would exceed its systemic costs. The
problem is that the risk that a judge will use hard-look review to substitute his judgment for that
of the agency is impossible to assess in any general sense. Because the risk of unprincipled
decisionmaking is so difficult to assess, determining the desirability of broad limits on judges’
hard-look powers is hard.

This determination is made all the more difficult by the relatively small size of the risks
at issue. In general, the risk that a judge will improperly substitute his judgment for that of an
agency is probably not that big because in most cases the judges will have strong incentives to
base their decisions on the law, and not their personal policy preferences. Restrictions on when
judges could strike down agency policy changes might make it easier for agencies to slip through
a handful of irrational policies, but for the most part agencies would still be subject to the same
exacting hard looks they have always been subject to.

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167 Massachusetts v. EPA, 549 U.S. 497, 559 (2007) (Scalia, J., dissenting) (contending that the majority
was substituting its “own desired outcome for the reasoned judgment of the responsible agency”); Fox Television
Stations, Inc. v. FCC, 489 F.3d 444, 473 (2d Cir. 2007) (Leval, J., dissenting) (claiming the majority was striking
down an agency decision because of “a difference of opinion between the court and the agency”).

168 See Shapiro & Levy, Judicial Incentives, supra note 79 at 1055-58 (listing the various incentives for
judicial behavior and noting that judges do have incentives to influence policy); Richard A. Posner, What Do Judges
and Justices Maximize? (The Same Thing Everyone Else Does), 3 SUP. CT. ECON. REV. 1, 4–5 (1993) (noting that
while judges are “ordinary people” subject to “the tug of self-interest,” most are not ideological crusaders).

169 See FCC v. Fox Television Stations, Inc., 556 U.S. ___, No. 07-582, slip op. at 22 (2009) (Scalia, J.,
opinion) (noting that limiting judges ability to scrutinize explanations for change does not change the fact that
judges have the ability to impose very close scrutiny on agency decisions).
Because it was so difficult to accurately assess the risks of unprincipled decisionmaking created by hard-look review, the justices deciding *FCC v. Fox* ended up making up their own estimations of risk using their own preconceptions of how judges operate. The high risk seen by Scalia and the three justices who joined his decision was colored by their belief that hard-look’s standards let judges grab policy-making power like “jackals stalking the lion’s kill”\(^\text{170}\), the low risk seen by the dissenters was influenced by their conviction that judges performing hard-look review are acting as restrained monitors who only strike down agency decisions that exceed the bounds of reason.\(^\text{171}\)

Only Justice Kennedy refused to rely on preconceptions to determine what sort of limits on judges’ hard-look review powers would be appropriate. For Kennedy, the difficulty of determining the risk of unprincipled decisionmaking in the abstract convinced him that the issue would have to be resolved on a case-by-case basis. Because there is no “answer that applies in all cases,” he wrote in his concurrence, there should be no bright-line limit on judges’ power to strike down agency policy changes.\(^\text{172}\) Reviewing the actions of agencies is a “delicate, subtle, and complex” undertaking, Kennedy held, and doing it right required judges to eschew simplistic rules and set out a nuanced limit on judicial power that restrains judicial discretion without taking away judges’ broad powers to strike down significant changes.\(^\text{173}\)

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\(^{170}\) *Id.*  
\(^{171}\) *See id.* at ____, No. 07-582, slip op. at 5–6 (Breyer, J., dissenting) (contending that judges are just trying to make sure that agencies considered all the relevant factors).  
\(^{172}\) *See id.* at ____ , No. 07-582, slip op. at 1 (Kennedy, J., concurring) (agreeing with the dissenters that agencies have to explain change whenever they reject a consideration that was the foundation of the prior policy).  
\(^{173}\) *Id.* at ____, No. 07-582, slip op. at 2–5 (Kennedy, J., concurring).
VII. Coming to Grips with Systemic Shortcomings in Hard-Look Review

By voting with the majority in *FCC v. Fox*, Justice Kennedy acknowledged that the hard-look standard’s indefinite standard of review creates a real risk that judges will misuse their powers to substitute their judgments for those of the agencies. With Kennedy’s backing, *FCC v. Fox* could have begun the process of restating the hard-look standard of review so that it would address concerns that judges were overstepping their authority.

In the end, though, Kennedy was unwilling to support a hard-and-fast limit on the power of judicial review because he was unwilling to presume that the risk of unprincipled decisionmaking was significant enough to necessitate a bright-line limit. Though Kennedy was probably right in fact (the risk of unprincipled decisionmaking is almost certainly a variable risk that goes up and down depending on the various circumstances of a case), his decision to leave it to reviewing judges to determine if their hard-look powers are limited shows how difficult it is for the judiciary to address systemic problems. In this case, the entire problem is that judges occasionally overstep the bounds of their authority. A restriction that leaves it up to judges to determine whether they are, in fact, overstepping the bounds of their authority does not solve the problem. It just puts the onus on judges to show that they are not really misusing their hard-look powers.

Lurking behind this unwillingness to grapple with unprincipled decisionmaking is the fear that admitting to the problem will undermine the legitimacy of the judicial branch. In an era when a significant portion of the public already presumes that the judiciary is engaging in
political decisionmaking, this fear seems a bit overblown. After all, the federal judiciary continues to have great power despite its perceived shortcomings.

The majority’s *FCC v. Fox* decision provided one way for the judiciary to begin acknowledging that it needs to limits judges’ power to prevent them from engaging in outcome-oriented decisionmaking. Rather than treating the problem as something that cannot be acknowledged for fear that it will undermine the judiciary’s role as the overseer of the administrative state, Scalia’s *FCC v. Fox* opinion forthrightly addresses the problem as something that needs to be fixed so that the judiciary’s oversight role will not be tainted by lingering suspicions of outcome-oriented decisionmaking.

The Court deserves kudos for starting to grapple with the questions about judicial decisionmaking that have dogged the hard-look standard for the past two decades. By giving judges broad leeway to strike down agency action, the hard-look standard has left observers with the persistent suspicion that some judges are misusing their powers to strike down policies they disagree with. Judges’ assurances that they are making above-board decisions have not kept the suspicions at bay, especially as the empiricists have begun piling up studies that they argue show that judges let ideologies influence their decisions.

After more than two decades of letting judges set the limits of their power under hard look review, *FCC v. Fox* indicates that the judiciary is searching for a new way to apply this narrow-but-searching standard of review. The alternatives it offers for limiting judges’ power to strike down agency policy changes offer insight into the options for, and the perils of, reform. One option is to set out a bright-line limit that places a concrete restriction on judges’ powers, much like the ones in *Vermont Yankee* and the *FCC v. Fox* majority opinion. While such limits

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174 See, e.g., Edwards, *Myths, supra* note 86 at 620 (complaining that it is “all too easy to find a newspaper article or hear a news report, or even listen to a purportedly scholarly lecture by a law professor, and get the impression that judges decide cases mostly on the basis of whim of personal predilection”).
can provide clear guidance, they might be too fixed and unbending for a judiciary trying to make sure that any limits it imposes on judges do not provide agencies with the opportunity to make political or otherwise-unreasonable decisions. Another is to craft limits that are more nuanced and flexible, as Kennedy did in *FCC v. Fox*. While these limits provide judges with more leeway to respect agency discretion while providing meaningful judicial oversight, they may be so flexible that, much like *State Farm*’s warning not to substitute the court’s judgment for that of the agency, they do not serve as a real limit on judges’ power at all.

Ultimately, the judiciary’s best option for limiting judges’ power under hard-look review might be to rewrite the standard of review itself. For decades, the Court has addressed concerns about agency power by reinterpreting the arbitrary and capricious standard. Concerns about the judiciary’s powers over the agencies could be addressed the same way—with a 21st century reinterpretation of the arbitrary and capricious standard that properly takes into account the risk that judges will craft decisions to achieve certain outcomes.