THE LIMITS OF LEGISLATIVE CONTROL OVER THE "HARD-LOOK"

RICHARD W. MURPHY*

TABLE OF CONTENTS

INTRODUCTION

My delight at being invited to the Third Administrative Law Discussion Forum diminished for a moment when I learned the cost of admission was a brief essay addressing how the Administrative Procedure Act (APA) should be amended. I checked whether I know how to fix the APA and realized that I do not. I resolved not to lament my ignorance because, given the APA's general applicability across the massive administrative state and quasi-constitutional status, determining how best to rewrite the statute with any confidence would be difficult. To reinforce this point, suppose that you opened an old file drawer that had sat closed for the last several thousand years—filled with cost-benefit analyses for building the pyramids, perhaps. A great cloud of dust billows out and swirls into the shape of the administrative-law genie, who offers you *one* wish entitling

* Associate Professor of Law, William Mitchell College of Law. Many thanks to Professors Sidney Shapiro, Ronald Krotoszynski, and Russell Pannier for their comments on earlier incarnations of this Article.

you to rewrite the APA *one* time.[1] Would it be wise to seize what might be your one and only chance to deossify rulemaking forever? Or, given that genies' wishes seem, by and large, to be devices for illustrating the law of unintended consequences, would it be better to let sleeping statutes lie?

This said, one of the APA's more obvious candidates for legislative tinkering must be the arbitrary-and-capricious standard of review of § 706(2)(A).[2] The courts' "hard look gloss" on this standard subjects agency reasoning processes that underlie significant policy decisions, to a heightened form of rationality review.[3] For over two decades, judges and scholars have vigorously debated whether this sort of review improves or ossifies regulatory policy.[4] It has no doubt lasted such a long time because both sides have persuasive points to make. We want agency action to be "rational" and public-spirited and therefore judicial review should seek to encourage these ends to the degree it can without imposing excessive costs. On the other hand, we do not want generalist judges without legitimate

---

1. No cheating by wishing for a million APA wishes or the like.

2. 5 U.S.C. § 706(2)(A) (providing that "[t]he reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law").

3. *See* Sidney A. Shapiro & Richard E. Levy, *Heightened Scrutiny of the Fourth Branch: Separation of Powers and the Requirement of Adequate Reasons for Agency Decisions*, 1987 DUKE L.J. 387, 419-22 (discussing the evolution of the "hard look gloss" in judicial interpretations of § 706).

4. For representative criticisms of the ossifying effects of the hard-look gloss on agency rulemaking, see, e.g., Thomas O. McGarity, *The Courts and the Ossification of Rulemaking: A Response to Professor Seidenfeld*, 75 TEX. L. REV. 525, 530 (1997) (contending that the benefits of hard-look review are dubious due to its ideological character and that it has played a "prominent role" in causing the demise of informal rulemaking); Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59 (1995) (placing much of the blame for the ossification of rulemaking on the courts' approach to judicial review); and Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1411-25 (1992) (discussing inefficient, distorting effects of aggressive substantive judicial review on agency rulemaking). For relatively favorable discussions of the hard-look gloss, see, e.g., William S. Jordan, III, *Ossification Revisited: Does Arbitrary and Capricious Review Significantly Interfere with Agency Ability to Achieve Regulatory Goals Through Informal Rulemaking?*, 94 NW. U. L. REV. 393 (2000) (surveying D.C. Circuit applications of the hard-look and concluding that they did not significantly impede agency action); Mark Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking*, 75 TEX. L. REV. 483, 490 (1997) (surveying "deossfication" proposals; concluding that "calls for relaxing judicial review may be premature"); Thomas O. Sargentich, *The Critique of Active Judicial Review of Administrative Agencies: A Reevaluation*, 49 ADMIN. L. REV. 599 (1997) (stressing the role of judicial review in providing legitimacy for administrative action); Patricia M. Wald, *Judicial Review in the Time of Cholera*, 49 ADMIN. L. REV. 659, 670 (1997) (asserting that "[c]ourts . . . wander down a treacherous path if they begin to erode a core requirement of administrative law—reasoned decision making—to help agencies through a bad period"); and Jim Rossi, *Redeeming Judicial Review: The Hard Look Doctrine and Federal Regulatory Efforts to Restructure the Electric Utility Industry*, 1994 WIS. L. REV. 763, 768 (contending that "deliberative democratic theory provides a compelling normative argument in favor of [hard look] judicial review as a protector of increased citizen participation and deliberative government").

policymaking authority blocking beneficial regulatory action with picky, ignorant, or ideologically-driven objections.[5]

In keeping with this Articles's spirit of evasion, it will not argue that congressional elimination of the hard-look gloss would be good or bad for the world. Rather, in a more modest vein, it will speculate concerning certain unintended side effects for constitutional law such an effort might generate. The idea that the hard-look might have a constitutional dimension is not new. Not long after *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*[6] was handed down, Professors Shapiro and Levy contended that the hard-look is best understood as a manifestation of a separation-of-powers principle that requires courts to review executive action to preserve the rule-of-law values enshrined in the Constitution.[7] The gist of this type of argument is that the rule of law requires that judicial review provide some minimum amount of protection against arbitrary agency action and, given the vast discretionary powers enjoyed by modern agencies, the hard-look is a necessary means for providing this minimal control. This Article will point out two other potential connections between the hard-look and constitutional doctrines. First, even if the hard-look itself is not, strictly speaking, a constitutional doctrine, its elimination would affect how courts interpret other means of judicial control which *are* rooted in the Constitution. Second, it may be the case that separation of powers requires that courts decide *for themselves* how to assess the minimal rationality of agency action and that congressional elimination of the hard-look would violate this principle.

Assume for the sake of argument that the Constitution does not compel the hard-look doctrine. Inevitably, accepted principles of "ordinary" administrative law have formed part of the conceptual backdrop against which courts have made the evaluative judgments necessary to resolve the constitutional issues spawned by the modern administrative state.[8] Change this ordinary-law backdrop, and pressure to change related constitutional

---

5. Often, judges disagree over whether their review efforts help or hurt the regulatory process. For a recent and notable example of such disagreement, compare Prometheus Radio Project v. FCC, 373 F.3d 372, 404-11, 418-21, 431-35 (3d Cir. 2004) (majority opinion) (rejecting as arbitrary various regulations governing broadcast media ownership that the FCC had promulgated after considerable effort), with *id.* at 435, 445 (Scirica, C.J., dissenting) (affirming as reasonable all the regulations the majority had rejected as arbitrary).

6. 463 U.S. 29 (1983).

7. *See generally* Shapiro & Levy, *supra* note 3, at 425-40 (arguing that the "rationalist model" of judicial review that demands that agencies adequately explain their actions fills the separation-of-powers void left by the courts' abandonment of the "structuralist" and the "proceduralist" approaches to controlling executive action).

8. *Cf.* Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 467-68 (2003) (distinguishing between "ordinary" and "constitutional" administrative law; suggesting that, best understood, both are concerned to control the danger of arbitrary agency action).

doctrines might build. More specifically, both the hard-look gloss and the (moribund) nondelegation doctrine theoretically provide a means for controlling agency discretionary action. Deprive the courts of the former and, over time, they may tighten the latter. On this view, one might expect courts in a post-hard-look world to be quicker to invoke the nondelegation doctrine to invalidate or at least narrow the broadest statutory grants of discretionary authority.[9]

But perhaps Congress lacks authority to legislate away the hard-look in the first place. Almost everyone would agree that Congress possesses considerable authority to adjust the strictness of judicial standards of review within a substantial range.[10] For example, as *Universal Camera Corp. v. NLRB*[11] explains, the APA includes an opaque effort to stiffen judicial review of agency findings.[12] Legislating away the hard-look gloss, however, would tell the courts to "dumb down" rather than stiffen a form of rationality review that they have developed over the years to respond to the problem of reviewing significant agency policy decisions. Arguably, it is implicit in the courts' core function of blocking arbitrary executive action that *they*, not Congress, must decide for themselves what minimum amount of effort their rationality review should require. Any other conclusion would allow Congress to insist that courts lend their imprimatur to actions they have not genuinely concluded are minimally "reasonable"—a result which threatens to make a sham of judicial review.

To provide a framework for this Article's exploration of these questions, Part I will briefly turn to some of the "usual suspects" on separation-of-powers issues (e.g., a few Framers, Blackstone, etc.) for insight into the rationale for using the courts to police against arbitrary executive action. Part II considers the complementary roles that law and reason must play in this judicial supervisory role. Part III explores some potential constitutional implications of a congressional effort to eliminate the hard-look gloss. One broad point that arguably emerges from (or perhaps underlies) this analysis: The urge of courts, given the chance, to find a means to protect against the perceived danger of arbitrary executive action is deeply rooted in their institutional natures. Squeeze a balloon and another part of it will expand. Similarly, if Congress put the "squeeze" on

---

9. *Cf.*, Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607, 646 (1980) (Stevens, J., plurality) (construing OSHA's statutory authority narrowly to avoid "such a 'sweeping delegation of legislative power' that it might be unconstitutional . . .").

10. For a forcefully stated and enjoyably iconoclastic contrary view, see Gary Lawson, *Controlling Precedent: Congressional Regulation of Judicial Decision-Making*, 18 CONST. COMMENT. 191, 219-23 (2001) (contending that "the bottom line must be that federal statutes that prescribe a standard of proof for federal courts are per se unconstitutional").

11. 340 U.S. 474 (1951).

12. *Id.* at 487-90 (detecting in the APA's "substantial evidence" standard a "mood" to stiffen judicial review of agency findings).

the courts' hard-look method of policing arbitrary action, it might build pressure on the courts to expand their use of other means to this end.

I. WHY BOTHER WITH AN INDEPENDENT JUDICIAL BRANCH, ANYWAY?

For the Framers, the dominant rationale for separation of powers was to protect citizens from overreaching, arbitrary government action by creating an institutional environment in which the rule of law could be meaningful. As Madison famously explained in *The Federalist No. 47*, absent separation of powers, tyranny follows by definition:

> No political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty, than that . . . [t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.[13]

Why must tyranny ensue from such concentration? Because tyranny is, by its nature, unbridled discretion, and a government official who combines all three powers can create his or her own legal "authority" at any moment to justify doing anything to anyone. In this vein, James Wilson, a drafter of the Constitution second in influence perhaps only to Madison, observed:

> Let us suppose the legislative and judicial powers united: what would be the consequence? The lives, liberties, and properties of the citizens would be committed to arbitrary judges, whose decisions would, in effect, be dictated by their own private opinions, and would not be governed by any fixed or known principles of law. For though, as judges, they might be bound to observe those principles; yet, Proteus-like, they might immediately assume the form of legislators; and, in that shape, they might escape from every fetter and obligation of law.[14]

Any entity free to make up *and* enforce the law is not *bound* by law in any significant sense. If such a state of affairs is undesirable, then it follows that the power to make law and enforce it should be divided, which suggests the need for separate legislative and executive actors.

The logic of Wilson's observation does not in itself, however, explain why law enforcement power, broadly understood as the "executive power," should be subdivided between executive and judicial actors.[15] The prime justification for this second subdivision calls to mind the old common-law dictum that no person should be judge of his or her own cause. Before an

---

13. THE FEDERALIST NO. 47, at 307-08 (James Madison) (Robert Scigliano ed., 2000).

14. 1 THE WORKS OF JAMES WILSON 365 (James DeWitt Andrews ed., Callaghan & Co. 1896).

15. *Cf.* 1 CHARLES-LOUIS DE MONTESQUIEU, THE SPIRIT OF LAWS 162-63 (Thomas Nugent trans., J.V. Prichard rev. ed., 1991) (1748) (describing the "judiciary" and the "executive" powers as subdivisions of a broader "executive" power).

executive actor can do anything, he or she must decide what to do and muster the political will to do it. As a self-starting, "activist" branch, the executive will naturally tend to bend its understanding of the law to accommodate its political ends. Unless its power to do so is checked, laws which read fine on paper will become meaningless in practice. Blackstone adverts to this tendency in his explanation for the elimination of the Court of Star Chamber:

> Were [the judicial power] joined with the executive, this union might soon be an overbalance for the legislative. For which reason, by the statute . . . which abolished the court of star chamber, effectual care is taken to remove all judicial power out of the hands of the king's privy council; *who, as then was evident from recent instances, might soon be inclined to pronounce that for law, which was most agreeable to the prince or his officers*. Nothing therefore is more to be avoided, in a free constitution, than uniting the provinces of a judge and a minister of state.[16]

One can see an echo of this same problem in Hamilton's discussion of the importance of the independence of judicial power in *The Federalist No. 78*. In it, he argues that the judiciary "may truly be said to have neither FORCE [like the executive] nor WILL [like the legislature], but merely judgment."[17] Why is it good that courts lack force and will? As relatively passive institutions to which other people bring their problems, the courts are less likely to be politically invested in any given dispute they are called upon to resolve; therefore, we can expect them as a group to show less self-interested bias than legislative and executive actors.[18]

Summarizing, unbridled discretion (a/k/a "tyranny") is bad; to restrict official discretion requires law; and self-interested, "activist" legislative and executive actors will, given the chance, warp the laws to suit their political fancies. A prime function of the relatively passive judiciary is to guard against arbitrary official action by enforcing the constraints of law—a job for which the courts are, thanks to their institutional structure, uniquely suited.

---

16. 1 WILLIAM BLACKSTONE, COMMENTARIES *259-60 (emphasis added).

17. THE FEDERALIST NO. 78, at 496 (Alexander Hamilton) (Robert Scigliano ed., 2000).

18. Mining a similar vein, Montesquieu contrasted the relative activity and passivity of the executive and judicial branches by drawing a distinction between the personality types he thought should staff them: Members of the prince's council (the executive) should conduct themselves with "a kind of warmth and passion"; by contrast, "in courts of judicature a certain coolness is requisite, and an indifference, in some measure, to all manner of affairs." 1 MONTESQUIEU, *supra* note 15, at 86.

II. JUDICIAL CONTROL OF THE MODERN ADMINISTRATIVE STATE: WEAKER LAW AND STRONGER REASON

As the ill-health of the nondelegation doctrine demonstrates, the separation-of-powers requirement that law place substantial constraints on the scope of executive discretion is for the most part honored in name but not in practice.[19] This state of affairs came to pass for good reasons. Vast delegations often make policy sense—many people think it an excellent thing for the Environmental Protection Agency (EPA) to have broad authority to clean up the environment, for example. Also, for the government to function, enforcement officials must possess some discretion. Wielding the nondelegation doctrine with any force would therefore require courts to resolve the especially nasty line-drawing problem of determining the degree of discretion which is impermissible.[20] Be all this as it may, as a matter of abstract, arid, hornbook law, the Supreme Court has stated time and again that a legislative delegation of power to the executive branch will pass muster so long as it sets forth an "intelligible principle" to guide agency action.[21] The Court last rejected a delegation outright pursuant to this test in 1935, invalidating portions of the National Industrial Recovery Act (NIRA) that delegated to President Roosevelt the power to run the economy more or less as he saw fit.[22] Since that time, the Supreme Court has been willing to find an "intelligible principle" in every statute it has examined for one.[23]

The near-death of the nondelegation principle in its "pure" constitutional guise, however, does not signify that courts have been completely willing to surrender their task of setting outer limits on the permissible scope of agency discretion. Courts have on occasion combined the nondelegation doctrine with the canon of constitutional avoidance to justify adopting narrow statutory interpretations of agency authority where broader ones might be unconstitutionally broad.[24]

---

19. *Cf.* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 474-75 (2001) (noting that the Court has "almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law") (citation omitted).

20. *See* Mistretta v. United States, 488 U.S. 361, 415-16 (1989) (Scalia, J., dissenting) (noting that the scope of permissible delegation is necessarily one of degree rather than kind, which has discouraged the Court from invalidating statutes on this ground).

21. *See, Whitman*, 531 U.S. at 474 (discussing precedents that apply the "intelligible principle" standard).

22. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (invalidating delegation to the President of authority to prescribe codes of fair competition); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935) (invalidating delegation to the President of unguided discretion to prohibit interstate transport of petroleum products).

23. *See Whitman*, 531 U.S. at 474 (describing post-*Schechter* precedents that have upheld especially broad delegations).

24. *See* Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607, 646 (1980) (Stevens, J., plurality) (construing OSHA's statutory authority narrowly to avoid

This said, far more judicial energy goes into policing the *manner* in which agencies exercise their discretion than its permissible scope. The short of the matter is that courts attempt to require agencies to behave rationally. On reflection, it is plain that separation of powers (and the rule of law) presuppose some such sort of rationality constraint. To illustrate the force of this principle, suppose that the Clean Air Act read as follows:

> § 1 EPA shall do whatever it takes to clean up the air.
>
> § 2 EPA's interpretation and implementation of this statute need not be rational.

This absurd statute would authorize the EPA to do anything at all; e.g., it could determine that human beings pollute the air and therefore take steps to remove them from the surface of the planet. Of course, broad background understandings concerning the nature of the rule of law and the limits of rational interpretation block such silliness.

Notably, the same general period that marked judicial abandonment of real efforts to constrain the scope of administrative discretion with law also saw an increase in judicial efforts to constrain agencies with rationality review. The hard-look is, as noted earlier, a judicial gloss on § 706's arbitrary-and-capricious standard of review. At the time of the APA's enactment in 1946, this standard was understood to impose an extremely deferential form of the rationality test.[25] The canonical case for this proposition is 1935's *Pacific States Box & Basket Co. v. White*,[26] which, perhaps more than coincidentally, was decided the same year that the Court invalidated NIRA on nondelegation grounds.[27] The plaintiff, a California manufacturer, sued to enjoin the operation of a rule promulgated by an Oregon agency that banned the use of certain types of containers for packing berries. In rejecting this challenge, the Court held that the agency's action was entitled to the same presumption of regularity as that of a legislature. It observed:

> When such legislative action is called in question, if any state of facts reasonably can be conceived that would sustain it, there is a presumption of the existence of that state of facts, and one who assails the

---

"such a 'sweeping delegation of legislative power' that it might be unconstitutional . . ."). For an argument that the nondelegation doctrine is "alive and well" and living in various "canons" of statutory construction, see generally Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315 (2000).

25. *See* William Funk, *Rationality Review of State Administrative Rulemaking*, 43 ADMIN. L. REV. 147, 149 (1991) (discussing judicial interpretation of the "arbitrary and capricious" standard as of 1946; discussing its evolution since that time).

26. 296 U.S. 176 (1935).

27. *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935); *supra* text accompanying note 22.

> classification must carry the burden of showing . . . that the action is arbitrary.[28]

As Professor Pierce has observed: "[T]his version of the arbitrary-and-capricious test demands virtually nothing of an agency except a lawyer with enough creativity to identify a plausible justification for a rule based on a plausible pattern of facts."[29]

The modern, hard-look gloss on the arbitrary-and-capricious standard departs from *Pacific States Box* in two notable respects. First, in *SEC v. Chenery Corp.*,[30] the Court made plain that courts should not affirm agency actions based on hypothetical facts and reasons dreamt up by judges themselves; an agency's action must stand or fall on the basis of the rationale on which the agency itself purports to base its decision.[31] Second, courts fashioned a relatively demanding set of inquiries for determining whether an agency's reasoning process qualifies as rational, and therefore not arbitrary.[32] The Supreme Court endorsed some flavor of this stiffened approach to rationality review in 1983's *Motor Vehicle Manufacturers Ass'n*[33] in which the Court offered this now familiar description of the arbitrary-and-capricious test of § 706(2)(A):

> [T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made. In reviewing that explanation, we must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.[34]

---

28. *Pac. States Box*, 296 U.S. at 185 (citation and quotation marks omitted).

29. 1 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 7.4, at 443 (4th ed. 2002). *See also* Funk, *supra* note 25, at 159 (observing that "[b]y presuming facts and rationale sufficient to justify the rule, a court is merely concluding that it is not impossible that the agency acted rationally. This is not review of the rationality of agency rulemaking in any real sense").

30. 318 U.S. 80 (1943).

31. *Id.* at 88 (1943).

32. *See* McGarity, *Some Thoughts*, *supra* note 4, at 1410 (describing the rise of the "hard look" doctrine in the 1970s).

33. 463 U.S. 29 (1983).

34. *Id.* at 43 (citations and quotation marks omitted). Also of note, the Court rejected the Department of Transportation's suggestion that it revive the minimal-rationality approach of *Pac. States Box*. *Id.* at 43 n.9.

It is tempting to characterize the demise of the nondelegation doctrine and the rise of the hard-look gloss as together forming part of a *modus vivendi* between the courts and the modern administrative state. As the latter developed, courts confronted vaster grants of legislative authority to agencies; e.g., OSHA and the EPA both possess what amounts to legislative power to affect many millions of lives. With greater power comes greater potential damage from its arbitrary misuse. The courts' inability to devise a stable, workable, desirable form of the nondelegation doctrine meant that they could not respond to this increased danger by "tightening" constitutional constraints on delegations—i.e., they could not or would not demand that Congress write more constraining laws. Courts could, however, respond by increasing their efforts to police arbitrariness by demanding more evidence of agency rationality.[35] On this telling, in keeping with their longstanding institutional mission of guarding against the arbitrary exercise of official discretion, the courts responded to greater agency discretionary power by imposing a greater duty on agencies to explain its exercise.

III. COULD CONGRESS GET RID OF THE HARD-LOOK?

On its face, the requirement that agencies explain the reasonableness of their policy choices to reviewing courts may sound eminently sensible. Numerous scholars, however, have contended that this requirement imposes a crushing burden on rulemaking efforts by agencies which, in their vain efforts to document the rationality of their decisionmaking processes, must try to predict and answer every objection that some random, perhaps politically hostile, reviewing court might deem plausible.[36] Any substantial rule might require an agency to make a host of difficult evaluative judgments, often on the basis of less than perfect information. Therefore, agencies frequently find it impossible to make the records supporting their rules anything like bulletproof for review purposes. Their attempts at such justification sometimes cause their

35. *See* Shapiro & Levy, *supra* note 3, at 413-27 (depicting the stiffening of rationality review as a judicial response to the failure of structuralist (e.g., the Nondelegation Doctrine) and procedural controls to check agency discretion); *cf.* Wald, *supra* note 4, at 662 (arguing that "[i]t may be true that these formulas [for judicial rationality review] should be changed from time to time because they are too strict or not strict enough to maintain the proper constitutional and statutory relationship between legislator, enforcer, and judicial reviewer. This delicate balance already appears to change from decade to decade").

36. *See* McGarity, *supra* note 4, at 1412 (noting that "[b]ecause they can never know what issues dissatisfied litigants will raise on appeal, [agencies] must attempt to prepare responses to all contentions that may prove credible to an appellate court, no matter how ridiculous they may appear to agency staff").

"concise statements of basis and purpose" to run hundreds of dense pages in the *Federal Register*.[37]

The controversial status of intrusive, hard-look-style judicial review of agency action naturally raises the question of whether Congress should amend the APA to eliminate it. Suppose that Congress reinstated something like the old *Pacific States Box* minimal-rationality approach to the arbitrary-and-capricious test by enacting a "clarifying" amendment to § 706(2)(A).[38] Whether such legislation would improve regulatory policy raises difficult empirical and evaluative questions about the functioning of government beyond the scope of this piece. More to the present point, such congressional action could bring to the fore fundamental questions concerning the limits of judicial control over agency discretion and of legislative control over the exercise of judicial power.

A. Change the "Ordinary" Law and the Constitutional Law Might Change, Too

Start with the plausible premises that: (a) it is part of the institutional makeup of the courts to police against arbitrary executive action by ensuring that it is lawful; and (b) determining whether discretionary action falls within lawful limits requires determining whether it amounts to a reasonable means to attain some lawful end. Judgment of whether a given act makes sense depends, in part, on the stakes involved. Most people think harder about which house to buy than about whether to buy a frappuccino or coffee. Similarly, one might expect courts to respond to the increased risk of arbitrariness inherent in greater agency power by reviewing its exercise more closely, and one might think of the hard-look gloss on the arbitrary-and-capricious test as manifesting this impulse. Were Congress to take legislative steps to get rid of the hard look, it would not eliminate the judicial concerns over arbitrariness that led the courts to stiffen rationality scrutiny in the first place. Rather, if successful, this step would only cut off one means for policing arbitrariness.

Perhaps this judicial energy would find another outlet in some kind of reinvigorated nondelegation doctrine. If stiffened rationality review reduces judicial concerns over arbitrary action, then such review should increase judicial toleration for broader, otherwise more threatening, delegations of discretionary power. The flipside of this coin is that, were

---

37. *See* Richard J. Pierce, Jr., *The APA and Regulatory Reform*, 10 ADMIN. L.J. AM. U. 81, 83 (1996) (observing that "[r]eviewing courts now routinely reject agency rules on the basis of a judicially-detected 'gap' in a detailed statement of basis and purpose several-hundred pages long").

38. For a different approach to amending § 706 that seeks to make hard-look review more determinate and less amenable to judicial, outcome-driven manipulation, see Shapiro & Levy, *supra* note 3, at 1074-79.

judges successfully forced to give up heightened rationality review, they might become less tolerant of broad delegations and more inclined to strike them as unconstitutional or at least narrow them as a matter of constitutional avoidance.

To make the preceding speculation a little more concrete, consider the Supreme Court's last treatment of the nondelegation doctrine in *Whitman v. American Trucking Ass'ns*,[39] which arose out of a challenge to the EPA's revision of its national ambient air quality standards (NAAQS) for ozone and particulate matter (PM).[40] Section 109(b)(1) of the Clean Air Act instructs the agency to set primary ambient air quality standards "the attainment and maintenance of which in the judgment of the Administrator, . . . allowing an adequate margin of safety, are requisite to protect the public health."[41] To put the matter mildly, this vague language leaves the EPA with a tremendous amount of discretion to take actions with vast consequences for public health and industry. Indeed, the D.C. Circuit, in the adventuresome panel opinion that held that this NAAQ authority violated the nondelegation doctrine, noted that it seemed to grant the EPA authority to require the deindustrialization of the country.[42]

The Supreme Court curtly reversed the D.C. Circuit's nondelegation ruling, explaining that "[t]he scope of discretion § 109(b)(1) allows is in fact well within the outer limits of our nondelegation precedents."[43] Writing for the majority, Justice Scalia noted that these precedents had upheld, *inter alia*: the Federal Communications Commission's power to regulate the airwaves in the "public interest" and the wartime Office of Price Administration's power to set "fair and equitable prices."[44] Given this low bar, the EPA's NAAQ authority posed no serious concern.

In point of fact, the EPA had not, of course, proposed de-industrialization. Rather, it merely had revised downward permissible levels of ozone and PM. With regard to ozone, for instance, the agency "adopted new . . . standards under which eight-hour-average ozone concentrations may not exceed 0.08 parts per million (ppm), in place of the old, one-hour-average standards of 0.12 ppm."[45] Among many other arguments, the petitioners had argued that these adjustments were arbitrary-and-capricious. On remand from the Supreme Court, the D.C. Circuit

---

39. 531 U.S. 457 (2001).
40. *Id.*
41. 42 U.S.C. § 7409(b)(1) (2000).
42. Am. Trucking Ass'ns v. EPA, 175 F.3d 1027, 1038 n.4 (D.C. Cir. 1999).
43. *Whitman*, 531 U.S. at 474 (2001).
44. *Id.* (citing Nat'l Broad. Co. v. United States, 319 U.S. 190, 225-26 (1943); Yakus v. United States, 321 U.S. 414, 420, 423-26 (1944)).
45. Am. Trucking Ass'ns v. EPA, 283 F.3d 355, 360 (D.C. Cir. 2002) (citing Ozone NAAQS, 62 Fed. Reg. at 38,856).

upheld the EPA's NAAQ revision against these challenges.[46] Its exploration of the sufficiency of the agency's decisionmaking process filled fifteen pages of a West reporter.[47]

Suppose that instead of reviewing an extensive rulemaking record for rationality under a *State Farm*-type approach, the court had been forced instead to conduct a *Pacific States Box*-type of review. The court would have had to presume the existence of "any state of facts [that] reasonably [could] be conceived that would sustain" the agency's decision.[48] As a practical matter, such a standard would seem to require the reviewing court to rubber-stamp rather than scrutinize the basis for the agency's 0.08 ppm standard. Of course, innumerable other potential standards could have benefited from the same lax scrutiny—e.g., 0.07 ppm, 0.09 ppm, etc.

Would application of this lax *Pacific States Box* standard provide a court the same level of assurance as more searching hard-look review concerning the rationality of the EPA's exercise of its gargantuan discretionary authority? One would think not.

Judicial comfort levels are important for this kind of inquiry because the problem of determining how much agency discretion is too much to pass constitutional muster ultimately turns on fuzzy, evaluative judgments rather than application of some clear-cut calculus. It is more than plausible to think that courts can, as a general matter, accept broader delegations of power to agencies that must explain themselves. As a consequence, removing this duty to explain might create a kind of judicial discomfort that would cause courts to move over time toward a "tighter" nondelegation doctrine. Of course, courts could prove unwilling to drag out this "big gun" to invalidate congressional delegations outright under virtually any circumstances. But the shadow of a stronger nondelegation doctrine might still manifest itself via the canon of constitutional avoidance—i.e., courts would assuage their concerns about the scope of agency discretion *sans* hard-look review by aggressively exercising their power to impose narrow statutory constructions.

B. Maybe Courts Themselves Have to Decide How Courts Should Assess Minimal Rationality

The preceding analysis assumed that Congress has constitutional authority to eliminate the hard-look gloss. There are plausible grounds to

---

46. *Id.* at 358. Strictly speaking, these challenges invoked the arbitrary-and-capricious standard of review set forth in § 307(d)(9) of the Clean Air Act, 42 U.S.C. § 7407(d)(9). For the present purpose, however, this is a distinction without a difference because courts treat this standard as functionally identical to the arbitrary-and-capricious standard of § 706(2)(A) of the APA. *Id.* at 362.

47. *Id.* at 364-80.

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

question this premise. If history is any guide, Congress does have considerable power to enact laws that tell courts how they must operate. For instance, Congress has filled the United States Code with standards of review instructing courts how closely they are to review agency decisions—the APA's § 706 is the leading example of this practice. Nonetheless, there must be some limit on this congressional power to govern operation of judicial power. Suppose, for example, Congress were to enact legislation providing that congressional passage of a law is irrebuttable evidence of constitutionality or that all agency findings of fact and interpretations of law are correct. Such laws would render judicial review a meaningless sham and must be unconstitutional.[49] The problem, therefore, becomes one of determining how to limit congressional authority to legislate judicial standards of review.[50]

To start, suppose that part of your job involves giving passing or failing grades to student papers depending on whether they are, in your view, "minimally rational."[51] As a good-faith grader, you work on each paper until you reach a point where you can comfortably assert that the paper falls within the space where reasonable minds might disagree. Different papers would presumably take different amounts of time. Now suppose that you have been instructed to spend no more than 30 seconds on reviewing each paper. Compliance with this rule would naturally prevent you from determining the minimal rationality of any paper that, in your judgment, seems to demand more than 30 seconds of thought. Put another way, granting a passing grade to a paper pursuant to the 30-second rule would not signify that you had judged it, in your view, to be minimally rational. Rather, it would only signify that you were unable to exclude the possibility that it was minimally rational in the course of 30 seconds.

The preceding example illustrates the point that only the reviewer of a decision can properly determine how long or how hard the reviewer needs to think before reaching a conclusion about the decision's minimal rationality. Suppose now that Congress amended § 706(2)(A) to provide that, in the course of reviewing for arbitrariness, a court must not think about the agency's decision for longer than five seconds. No one would

---

49. Note that, even if Congress has the "greater" power to preclude review of a given agency action, it does not follow that it has the "lesser" power to force courts to give their stamp of approval to agency action after engaging in sham review. *Cf.* Lawson, *supra* note 10, at 221 (observing that "the power to control the decision-making process is not a lesser power than the power to control jurisdiction. It is a qualitatively different power that is either on the same level or, more likely, on a different scale than the power over jurisdiction").

50. *Cf. id.* at 219-23 (contending that Congress lacks *any* authority to legislate judicial standards of review).

51. *Cf.* McGarity, *Some Thoughts*, *supra* note 4, at 1454 (discussing Professor McGarity's suggestion that courts adopt a "pass-fail prof" approach to reviewing agency rulemaking).

say that surviving such a truncated review establishes that the reviewing judge believes that the agency's decision was minimally rational and not arbitrary. Rather, just as in the grading example, surviving such review would merely indicate that the judge could not determine the decision was arbitrary in the time allotted.

The very fact that over time courts have developed the hard-look gloss suggests that they regard it as a necessary means for determining the minimal rationality of the manner in which agencies exercise their often vast discretionary powers. On this view, the effect of congressional reinstatement of old-style *Pacific States Box* review would be to force courts to give their stamp of approval to agency actions that the courts have not actually determined are minimally rational according to their own, judicial standards. Arbitrariness review would sink into a sort of sub-rationality review.

Separation of powers surely presumes that, at least where judicial review exists, it must be meaningful. As the name suggests, a sub-rational standard of review would threaten to trivialize judicial review. It therefore should be beyond the power of Congress to legislate such a standard.

CONCLUSION

The hard-look gloss's requirement that agencies offer rational explanations for their significant policy decisions has no doubt helped courts to stomach the vast delegations of discretionary power that are the hallmark of the modern administrative state. If the courts were to accept the constitutionality of congressional elimination of the hard-look gloss, then the same forces that led courts to create that doctrine in the first place might cause them to toughen other forms of judicial control of executive action, such as the nondelegation doctrine. Alternatively, a plausible separation-of-powers argument exists for striking congressional efforts to "dumb down" the courts' minimal rationality standards.

* * *