rulemaking proceeding can be highly technical, notably in the fields of health and safety regulation. Finally, an informal rulemaking record is fundamentally different from the adjudicative records that judges have traditionally reviewed. As Judge McGowan noted, an informal rulemaking record "is indistinguishable in its content from [materials collected in] the proceedings before a legislative committee hearing on a proposed bill—letters, telegrams, and written statements from proponents and opponents, including occasional oral testimony not subjected to adversary cross-examination." In reviewing this kind of record, there is a risk that the judges will "vote their policy preferences in the same manner as does the legislator" and "thereby risk nullification of the principle that democracies are to be run in accordance with the majority will." Carl McGowan, Congress and the Courts, 62 A.B.A.J. 1588, 1589–90 (1976). Thus, courts have had to develop a method of review that would enable them to prevent abuses of power in the rulemaking process, but that would not permit them to make essentially legislative or political judgments.

## 1.HARD LOOK REVIEW

In Automotive Parts & Accessories Ass'n v. Boyd 407 F.2d 330 (D.C. Cir. 1968), the court faced up to some of these complications. Judge McGowan stated that judicial review of rulemaking "need be no less searching and strict [than in a case of formal adjudication], but because it is

addressed to different materials, it inevitably varies from the adjudicatory model. The paramount objective is to see whether the agency, given an essentially legislative task to perform, has carried it out in a manner calculated to negate the dangers of arbitrariness and irrationality. . . ." To that end, the agency's statement of basis and purpose (the written explanation accompanying the rule) must "enable us to see what major issues of policy were ventilated by the informal proceedings and why the agency reacted to them as it did." In other words, the court would examine whether the agency had engaged in what Judge Leventhal was soon to call "reasoned decisionmaking," including whether the agency explained its position cogently and thoroughly, and whether it responded to significant criticisms by participants in the rulemaking proceeding. The term "hard look," which is also used to describe this type of inquiry, is not a distinctive standard of review, but rather an informal description of the scrutiny that (at least theoretically) is regularly used in arbitrary and capricious review generally.

The Supreme Court gave its most explicit approval to the developing case law insisting on reasoned decisionmaking in Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983). In 1981, the Department of Transportation rescinded a 1977 rule requiring the installation of "passive restraints" in automobiles—either airbags or automatic seatbelts. The agency explained this



action by saying that "detachable" automatic seatbelts, the industry's

The judicial assertiveness inherent in this formula remains characteristic of modern hard look review. In the years since *State Farm*, courts of appeals have often remanded rules after discerning such problems as a conclusory or illogically reasoned statement of basis and purpose, Tripoli Rocketry Ass'n v. BATFE, 437 F.3d 75 (D.C. Cir. 2006); failure to address a statutorily required factor, Public Citizen v. FMCSA, 374 F.3d 1209 (D.C. Cir. 2004); failure to respond to significant arguments submitted during the public comment period, Appalachian Power Co. v. EPA, 249 F.3d 1032 (D.C. Cir. 2001); reliance on factually insupportable assertions, United States Telecom Ass'n v. FBI, 276 F.3d 620 (D.C. Cir. 2002); or failure to explain the rejection of a salient alternative regulatory strategy, Public Citizen, Inc. v. Mineta, 340 F.3d 39 (2d Cir. 2003). To be sure, the great majority of administrative rules do survive judicial review for abuse of discretion. Nevertheless, the threat of reversal on this basis imposes significant discipline on agencies, particularly since the relevant criteria involve judgment calls, and the agency may not be able to predict how stringently a given panel of judges will apply them. Indeed, some scholars regard the intrusiveness of today's judicial review as an impediment to the rulemaking process itself. See pp. 351–353 infra.

## 2. SCIENTIFIC UNCERTAINTY

Despite the ambitions of hard look review, reviewing courts realize that their capacity to evaluate regulations in highly technical areas is

favored method of meeting the requirement, would not necessarily promote safety, because consumers would detach them. The *State Farm* Court found two flaws in this explanation. First, the agency's doubts about the effectiveness of automatic seatbelts ignored the factor of inertia: consumers who would not bother to fasten manual belts might well allow self-fastening belts to remain in place. The agency had to address this crucial point. Second, even if those belts were ineffective, the agency did not explain why it had not fallen back on a requirement of airbags or "nondetachable" seatbelts instead.

The Court in *State Farm* was careful to point out that the alternatives ignored in the rescission decision had previously been endorsed by the agency itself, and that the administrator was reversing a settled course of action. It also emphasized that a rule is not arbitrary simply because there is no direct evidence in support of the agency's conclusion. But the agency must analyze the evidence that is available and "provide a rational connection between the facts found and the choice made." Generalizing, the Court declared: "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."

limited. The problems in this area surfaced in Ethyl 120 Corp. v. EPA, 541 F.2d 1 (D.C. Cir. 1976) (en banc), which upheld an EPA rule reducing the use of lead additives in gasoline on the ground that the additives created a health hazard. Judge Bazelon, in a concurring opinion, argued that judicial review of the facts should be extremely restrained, because "substantive review of mathematical and scientific evidence by technically illiterate judges is dangerously unreliable." At most, reviewing courts could assure rationality indirectly, by making sure that the agency had strictly complied with applicable procedural requirements and had exposed its factual premises to public scrutiny. Judge Leventhal, however, cautioned against judicial abdication: court review of the substance of agency rules, even in technical areas, was crucial to the legitimacy of agency rulemaking. Yet even Leventhal joined the majority opinion, written by Judge Wright, which demonstrated keen awareness of the importance of judicial restraint in such cases. First, the court interpreted the Clean Air Act permissively: the EPA's mandate to regulate emissions that "will endanger" public health was satisfied if the agency showed a significant risk of harm, not necessarily proof of actual harm. Second, the court showed a willingness to defer to the agency's factfinding, so long as it was not based on "hunches" or "wild guesses." Judge Wright concluded: "Where a statute [delegating rulemaking authority] is precautionary in nature, the evidence difficult to come by, uncertain, or conflicting because it is

on the frontiers of scientific knowledge, . . . and the decision that of



an expert administrator, we will not demand rigorous step-by-step proof of cause and effect."

The Supreme Court has also called for judicial restraint in this area. In the *Benzene* case, although the plurality read the statute to require a showing of significant risk before toxic substances could be regulated, it also concluded that the Secretary was not required to support his finding "with anything approaching scientific certainty"; the finding of risk need only be supported by "a body of reputable scientific thought." Industrial Union Dep't, AFL-CIO v. American Petroleum Inst., 448 U.S. 607 (1980). (The dissenters would have allowed even more leeway to the Secretary.) Similarly, in Baltimore Gas & Elec. Co. v. NRDC, 462 U.S. 87 (1983), the Court remarked that "a reviewing court must generally be at its most deferential" when an agency is "making predictions, within its area of special expertise, at the frontiers of science." Accordingly, the Court sustained an NRC rule that permitted licensing boards to ignore the possibility of environmental harm from long-term storage of spent nuclear fuel, despite considerable uncertainty about whether a safe method of storing nuclear waste would ever be found.

## 3. REMEDIES

If the court finds a rule invalid, it will almost always remand it for further consideration. Under *Chenery* principles, the court cannot

specify what alternative rule, if any, the agency should adopt. See p. 109 supra. Usually, when remanding a rule, a 122

court also sets it aside. Recent decisions, however, have sometimes left a rule in effect during remand proceedings. Fox TV Stations, Inc. v. FCC, 280 F.3d 1027 (D.C. Cir. 2002); Central Maine Power Co. v. FERC, 252 F.3d 34 (1st Cir. 2001). This practice of "remand without vacation" enables a court to protect reliance interests and prevent disruption in a regulatory program while the agency is considering how best to respond to the court's concerns. The legality of this practice has been questioned because of its seeming conflict with § 706 of the APA, which provides that a court "shall . . . set aside" agency action that is found to violate any of the Act's review standards. See Checkosky v. SEC, 23 F.3d 452 (D.C. Cir. 1994). Nevertheless, courts have continued to employ the technique, which can be defended as an exercise of equitable remedial discretion, which the APA could be presumed not to have repealed. In deciding whether to use remand without vacation in a particular case, courts usually consider a variety of factors. See Allied-Signal, Inc. v. U.S. NRC, 988 F.2d 146 (D.C. Cir. 1993). One is the seriousness of the rule's deficiencies: is it likely that the agency can rehabilitate the rule through further explanation or procedures, or is the problem with the rule so fundamental that the agency could never cure it? Another factor is the degree of disruption that would result from short-run invalidation. In addition, remand without vacation has been used where the challenger approved of the extant rule but obtained a

remand in order to force the agency to consider strengthening it. North Carolina v. EPA, 550 F.3d 1176 (D.C. Cir. 2008).

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## 4.SUBSTANTIAL EVIDENCE REVIEW

In several regulatory statutes enacted in the early 1970s, such as the Occupational Safety and Health Act, Congress provided that agency rules should be reviewed under a substantial evidence test. This trend evidently resulted from a desire for particularly probing judicial review; historically, the substantial evidence test had been regarded as significantly more rigorous than the arbitrariness test, which ordinarily governs rulemaking. But this approach created an "anomaly," Judge McGowan later wrote, because these new rulemaking statutes generally contemplated "informal" (notice-and-comment) rulemaking, while the substantial evidence test has traditionally been understood as a test for judging the evidence in a record compiled during a trial-type hearing. Industrial Union Dep't, AFL-CIO v. Hodgson, 499 F.2d 467 (D.C. Cir. 1974). He went on to say that, no matter how the standard of review was phrased, a court could not be expected to demand solid factual support for predictive or scientific fact findings, let alone for policy judgments. Congress now seems to have ceased creating this type of statutory provision—partly because it has become more aware of the inherent limits of the judicial function, as explained by Judge McGowan, and partly because the "hard look"

declines to give stare decisis effect to lower court decisions with which it disagrees. Too much nonacquiescence, however, would interfere with the courts' ability to prevent an agency from violating its statutory mandate. The practice is generally upheld, but is considered questionable when an agency adheres to its legal position in a case that could only be reviewed in a circuit that has already rejected the agency's stance. When the Social Security Administration made frequent use of the latter kind of nonacquiescence in the administration of its disability benefits program in the 1980s, it was widely criticized.

[5]However, the agency need not supply complete record support for scientific conclusions and other propositions that are inherently unprovable. See pp. 119–121 infra. Also, under some circumstances an agency can dispense with proof by invoking the doctrine of official notice. See pp. 299–304 infra.

[6]In the rare case of a rule issued after a trial-type hearing, the substantial evidence test (§ 706(2)(E)) would apply to review of the agency's fact findings.

that courts provide under the arbitrariness test has become just as intrusive as the rigorous review that Congress had hoped to achieve through a substantial evidence test. See National Lime Ass'n v. EPA, 627 F.2d 416, 452 (D.C. Cir. 1980) (in 1977 revision of Clean Air Act, 124

substantial evidence test for rulemaking was rejected as unnecessary).

Some cases continue to assert that a statute that applies the substantial evidence test to rules requires unusually rigorous review. E.g. , AFL-CIO v. OSHA, 965 F.2d 962 (11th Cir. 1992). Increasingly, however, courts see a "convergence" between the arbitrariness test and the substantial evidence test. As Judge (later Justice) Scalia explained in Association of Data Processing Serv. Orgs. v. Board of Gov's., 745 F.2d 677 (D.C. Cir. 1984), the real difference between the two tests is that in substantial evidence review the court seeks support for factual findings in the record of a formal hearing, while in arbitrariness review it does not. But, he continued, this does not mean that an agency needs more factual support to pass one test than to pass the other. Virtually all circuits have endorsed the *Data Processing* analysis. Traditionally, the substantial evidence test was regarded as a more stringent standard because it occurred on a record. But now that informal actions are reviewed on the "administrative record," that functional distinction has lost its force. Moreover, agencies are now using informal rulemaking to implement policies that formerly would have been handled through trial-type proceedings, and courts perceive no

reason why this shift in procedure should result in a diminished scope of review on substantive issues. In any event, the debate over which test is stricter is somewhat fruitless. Both tests really contemplate a standard of "reasonableness," which no one can define with precision. Under either test, ultimately, the court is likely to be influenced by a variety of subtle factors, [125]

such as the nature and complexity of the issues involved, the consequences of an erroneous determination, the agency's reputation for competence and fairness, and the judge's philosophy of judicial review.

## 1. H. AGENCY INACTION AND DELAY

The APA's definition of "agency action" includes "failure to act." 5 U.S.C. § 551(13). Nevertheless, when courts are asked to review administrative inaction, they are usually much more deferential than when affirmative acts are challenged, and sometimes they refuse review altogether. This attitude reflects an understanding of the practical point that an agency has limited resources and must set priorities in a manner that courts cannot easily supervise. One example of this self-restraint is Heckler v. Chaney, 470 U.S. 821 (1985), in which the Court held that an agency's refusal to initiate an enforcement proceeding is "presumptively unreviewable." See pp. 371–373 infra. Similarly, an agency may bring an enforcement action against one suspected violator without immediately pursuing similarly situated