arbitrariness review has shifted towards scrutiny of the *quality of an agency's reasoning*. A court will typically ask whether an exercise of discretion rests [103]

on an analysis that is at least plausible in light of the record, the parties' contentions, and the constraints of the underlying statute. Theoretically, this sort of review is supposed to be quite deferential, and it frequently is. At times, indeed, abuse of discretion review can seem rather perfunctory. When a court feels that an agency has reached a credible result and that the parties have raised no troubling issues, it might uphold the action with only minimal discussion.

Sometimes, however, modern abuse of discretion review becomes quite probing. A classic articulation of this approach was written by Judge Leventhal in Greater Boston Television Corp. v. FCC, 444 F.2d 841, 850–52 (D.C. Cir. 1970): the court will intervene if it "becomes aware, especially through a combination of danger signals, that the agency has not really taken a 'hard look' at the salient problems, and has not genuinely engaged in reasoned decisionmaking." Although the phrase "hard look" originally meant the careful scrutiny that an *agency* was expected to give to the issues, today it is more commonly used to refer to the detailed and intensive inquiry that the *courts* often conduct as they review exercises of administrative discretion. Such an inquiry is

clearly susceptible of abuse by the courts, which might easily use a critique of an agency's reasoning process as an excuse to overturn a policy judgment with which they simply happen to disagree. Notwithstanding its dangers, however, the hard look doctrine is widely employed. It has been especially prominent in review of rulemaking, as will be seen in a later section. See pp. 111–115 infra.

The case law has established a number of specific situations in which a reviewing court can properly hold that an agency has abused its discretion, including the following:

First, even when an administrator's discretionary decision is in accord with governing statutes, it may be unlawful if it is inconsistent with the agency's own rules. Since a rule issued under delegated authority to implement a statute (often referred to as a legislative rule) has the "force of law," it is normally binding on an agency in the same way that a statute is. This point was at issue in litigation resulting from the famous "Saturday Night Massacre" incident. The Justice Department had issued formal regulations providing that the Watergate Special Prosecutor would not be removed from his duties "except for extraordinary improprieties on his part." Nevertheless, Acting Attorney General Bork followed President Nixon's directive to

justification adopted to defend a past agency action. On the other hand, in Decker v. Nw. Envtl. Def. Ctr., 133 S. Ct. 1326 (2013), the Court found that none of the exceptions applied and relied on *Auer* to defer to an EPA interpretation of its regulation on industrial stormwater runoff pollution.

Not content with the whittling away of *Auer* deference, several members of the Supreme Court have indicated their willingness to consider abandoning it altogether. In his dissent in *Decker*, Justice Scalia declared: "[H]owever great may be the efficiency gains derived from *Auer* deference, beneficial effect cannot justify a rule that not only has no principled basis but contravenes one of the great rules of separation of powers: He who writes a law must not adjudge its violation." In their concurring opinions in *Decker*, Chief Justice Roberts [98]

and Justice Alito said they would be willing to reconsider the doctrine in an appropriate case. Later, Justice Thomas wrote at length to express doubts about *Auer* in Perez v. Mortgage Bankers Ass'n, 135 S. Ct. 1199 (2015) (concurring opinion). With the passing of Justice Scalia, however, *Auer* now seems less imperiled. In any event, it seems doubtful that the Court would hold that judges who are reviewing a highly technical rule (such as the industrial stormwater runoff rule mentioned above) should have no discretion to give weight to the

views of the agency that wrote the rule and administers it.

1. C. SUBSTANTIAL EVIDENCE REVIEW

When an agency's legal premises survive judicial scrutiny, the reviewing court must go on to consider whether to sustain the agency's factual findings. The APA contains three standards of review that potentially can govern this inquiry, and the court must apply one of these standards unless a statute or historical practice clearly dictates otherwise. Dickinson v. Zurko, 527 U.S. 150 (1999) (evidence of early use of a stricter test in patent cases was not "clear" enough to permit any departure from the APA framework in such cases). The "substantial evidence" test, 5 U.S.C. § 706(2)(E), comes into play in "a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute." In other words, it is triggered if the agency decision was made after a trial-type, on-the-record hearing (a "formal adjudication" or "rulemaking on a record"). In most other proceedings, the facts are reviewed under the

"arbitrary and capricious" test of § 706(2)(A), although in a handful of cases the court finds the facts for itself in a de novo trial, as provided in § 706(2)(F). This section explains the substantial evidence test, the most traditionally recognized and easily comprehended of the three. This discussion will provide the groundwork for an analysis of the

other two standards, which are considered at pp. 111–115 infra.

A court applying the substantial evidence test is supposed to assess the reasonableness of the agency's factfinding, and not find the "right" or "true" facts itself. The test is sometimes analogized to appellate review of jury verdicts: in this view, a reviewing court "must decide whether on this record it would have been possible for a reasonable jury to reach the [agency's] conclusion. Allentown Mack Sales & Serv., Inc. v. NLRB, 522 U.S. 359, 366–37 (1998). Another frequently quoted formulation states that substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938). These verbal glosses on the text of the APA are admittedly not very helpful in applying the substantial evidence test to particular cases. Perhaps the most that can be said is that a court reviewing agency action under the substantial evidence test should make sure that the agency has done a careful, workmanlike job of collecting and evaluating the available data—or, as Judge Leventhal put it, that the agency has taken a "hard look" at the important factual issues. When the action being reviewed is a rule rather than an order, [100]

[100] however, other complications enter the picture, as discussed at pp. 123–125 infra.

In reviewing agency findings under the substantial evidence test, the court is obliged to consider the "whole record." Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951). That is, the court is not supposed to look only for evidence that supports the agency's decision; it is required to consider all of the relevant evidence for and against the agency's findings, and determine whether they are within the zone of reasonableness. In the federal system, and in many states as well, uncorroborated hearsay can constitute substantial evidence. See, e.g., Richardson v. Perales, 402 U.S. 389 (1971) (hearsay reports of examining physicians were substantial evidence for denial of disability claim, even though opposed by live testimony on behalf of the claimant).

Another question that can arise when courts review agency findings under the substantial evidence test is how the court should view an agency's reversal of an administrative law judge's initial decision. Section 557(b) of the APA gives the agency heads broad power to find the facts de novo when they are reviewing an initial decision. See pp. 271–274 infra. At the same time, however, § 557(c) declares that the initial decision is part of the official record of the proceeding, and the substantial evidence test requires the reviewing court to consider the "whole record." The *Universal Camera* decision relied on these provisions in explaining the proper role of the ALJ's decision during judicial review: The substantial evidence test applies

decision, not the ALJ's. However, since the ALJ's decision is part of the record, the reviewing court must consider it in evaluating the evidentiary support for the final agency decision. Thus, a contrary initial decision may undermine the support for the agency's ultimate determination. In this context, the weight to be accorded the ALJ's findings may depend upon the kind of issues that are involved in the proceeding. When the case turns on eyewitness testimony, as the *Universal Camera* case did, the initial decision should be given considerable weight: the ALJ was able to observe the demeanor of the witnesses and assess their credibility and veracity first hand. See, e.g., Panasquitos Village, Inc. v. NLRB, 565 F.2d 1074 (9th Cir.1977). On the other hand, if the decision depends primarily upon expert testimony or policy considerations, the ALJ's decision may deserve little deference; the agency heads may be the best equipped to deal with this kind of testimony, and the reviewing court should be less concerned about their reversal of the ALJ.

Of course, the substantial evidence test becomes meaningful only in conjunction with a substantive standard against which the agency's fact findings will be evaluated. An agency can sometimes lighten its evidentiary burdens, in effect, by interpreting the governing statute in a way that makes the requirements for a prima

facie case very lenient. This device will be effective if (but only if) the court finds that the agency's interpretation of the statute is reasonable and consistent with the statutory purpose, as required by *Chevron*. See, e.g., NLRB v. Transportation Mgmt. Corp., 462 U.S. 393 (1983) (in 102 "mixed motive" discharge cases, Board could permissibly interpret Labor Act as putting burden on employer to disprove causation in fact). Agencies often use rulemaking for this purpose. See pp. 293–297 infra.

1. D. ABUSE OF DISCRETION REVIEW

Once the reviewing court has found that the agency correctly understood the law and adopted a rational view of the facts, it must still consider whether the action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). This inquiry is sometimes nicknamed review for "arbitrariness," sometimes review for "abuse of discretion," and sometimes simply called "arbitrary and capricious review." (Although § 706(2)(A) also supplies the standard for judicial review of agency fact findings in cases that are not governed by the substantial evidence test, see pp. 111–115 infra, the following discussion deals only with arbitrariness review in its nonfactual dimensions.)

dismiss the prosecutor without cause. The court held that this violation of a valid administrative regulation made the firing illegal. Nader v. Bork, 366 F. Supp. 104 (D.D.C. 1973). The court did not actually reinstate the prosecutor (in part because a successor had already been appointed), but its legal reasoning was later adopted by the Supreme Court in a closely related context. United States v. Nixon, 418 U.S. 683 (1974).

Second, departure from agency precedents embodied in prior adjudicative decisions can constitute an abuse of discretion, if the reasons for the failure to follow precedent are not adequately explained. "[A]n administrative agency is not allowed

to change direction without some explanation of what it is doing and why." United Automobile Workers v. NLRB, 802 F.2d 969, 975 (7th Cir. 1986). The Supreme Court arguably relaxed this principle to a certain extent in FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009). In the context of reviewing FCC orders that revised the Commission's approach to enforcing prohibitions on broadcast indecency, the Court said that when an agency changes its policy it "of course . . . 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 the conscious change of

course adequately indicates." The *Fox* holding facilitates the evolution of agency policy over time and is especially important when an incoming administration wishes to depart from policies of its predecessor. See, e.g., Air Transport Ass'n of Am., Inc. v. National Mediation Bd., 663 F.3d 476 (D.C. Cir. 2011). The flexibility afforded by the *Fox* principle does have limits, however. The Court cautioned that an agency does have a special burden of explanation if its new policy "rests upon factual findings that contradict those which underlay its prior policy" or if "its prior policy has engendered serious reliance interests that must be taken into account." See, e.g., Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117 (2016) (cursory explanation was inadequate in light of industry reliance on prior interpretation).

When a reviewing court finds that a particular administrative decision is inconsistent with the agency's own precedents, it will generally remand the matter to the agency for a fuller statement of reasons instead of reversing outright. If the agency supplies a reasonable explanation for its new direction, its action should survive review.

Third, an agency can abuse its discretion by breaching certain principles of judge-made law. Equitable estoppel is one such area,

although the Supreme Court has confined this doctrine within very narrow limits. See pp. 195–197 infra. Res judicata and collateral estoppel constitute another species of judge-made law. B&B Hardware v. Hargis Industries, 135 S. Ct. 1293 (2015) (ruling protecting a trademark by the Trademark Trial and Appeal Board precluded district court review by same challenger when factors to be decided by the court were largely the same in both cases). Thus, a breach of preclusion principles can also constitute an abuse of discretion. For example, in United States v. Stauffer Chem. Co., 464 U.S. 165 (1984), Stauffer secured a court decision rejecting an EPA interpretation of the Clean Air Act. When the agency tried to relitigate the identical issue against Stauffer in another court, the Supreme Court held that the agency was precluded by collateral estoppel. On the other hand, in United States v. Mendoza, 464 U.S. 154 (1984), the Court held that collateral estoppel may not be asserted against the United States by persons who were not parties to the earlier case. The Court explained that to allow such "nonmutual" collateral estoppel "would substantially thwart the

development of important questions of law by freezing the first final decision rendered on a particular legal issue."[4]

Fourth, a court will sometimes hold that a particular remedy is too severe, if the agency has not explained satisfactorily why it did not choose a less drastic sanction. See, e.g., Jacob Siegel Co. v. FTC, 327 U.S. 608 (1946)

(remanding case in which FTC ordered company to abandon allegedly deceptive brand name but did not seriously consider whether an informational label would have been adequate). More specifically, courts may intervene when an agency applies a new holding retroactively, if they think that the public interest in enforcement is outweighed by the unfairness of imposing a sanction for conduct that the respondent had reasonably believed to be lawful. See, e.g.; Velasquez-Garcia v. Holder, 760 F.3d 571 (7th Cir. 2014); Retail, Wholesale & Dep't Store Union v. NLRB, 466 F.2d 380 (D.C. Cir. 1972). Still, review of an agency's remedial decisions tends to be fairly deferential: usually courts are reluctant to second-guess the

agency's choice of sanctions, which falls close to the core of the executive branch's enforcement discretion. See Butz v. Glover Livestock Comm'n Co., 411 U.S. 182 (1973) (upholding agency choice of penalty amount within statutory parameters.

1. E. FINDINGS AND REASONS

The review standards for legal, factual, and discretionary determinations, as set forth in the preceding three sections, all presuppose that the court will examine the agency's reasoning with a good deal of care. In practice, however, agencies often take action without explaining, or explaining adequately, the grounds on which