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PEST OR GUEST, FRIEND OR FOE? REFRAMING THE “HARD LOOK” DOCTRINE’S ROLE IN ENVIRONMENTAL PESTICIDE POLICY

I. THE UNITED STATES ADMINISTRATION: A BRIEF INTRODUCTION TO THE MODERN ADMINISTRATIVE STATE

Pesticide use has remained a hallmark of human civilization for over four thousand years.¹ Often misunderstood, pesticides encompass a range of products intended to repel, mitigate, prevent, or destroy pests.² Though typically seen as manufactured products, pesticides historically encompassed natural and living organisms, as well as other horticultural management practices seeking to preserve ecosystem balance.³ In the United States, the nineteenth and twentieth centuries witnessed the explosion of agrochemicals and other chemical compounds that facilitated the country’s rise toward economic and agricultural dominance.⁴ As decades passed, federal agencies such as the United States Department of Agriculture (USDA), the Occupational Safety and Health Administration (OSHA), and the Environmental Protection Agency (EPA) promulgated regulatory policies dually aimed at fostering economic production and mitigating the toxic consequences of these potent products.⁵ This inherent balancing act prompted a dilemma between private commercial interests and the public sector.⁶

³. See generally Nathan Donley, Robert D. Bullard, Jeannie Economos, Iris Figuerola, Jovita Lee, Amy K. Liebman, Dominica Navarro Martinez, & Fatemeh Shafiei, Pesticides and Environmental Injustice in the USA: Roots Causes, Current Regulatory Reinforcement and a Path Forward, BMC Public Health 1, 2 (Apr. 22, 2022), https://bmcpublichealth.biomedcentral.com/articles/10.1186/s12889-022-13057-4 (introducing definitional scope of pesticides). A “pest” includes any unwanted living thing, such as insects, rodents, other animals, fungi, bacteria, weeds, and microbes, that have a negative effect on humans by harming crops, interfering with agricultural structures and resources, and spreading or causing disease. See id. at 2 (explaining “pests”).
⁵. See id. at 1-2 (rectifying common misconceptions about pesticides).
In contrast to the long history of pesticide use, the development of a body of administrative law is relatively recent. Until the twentieth century, the United States resisted codifying a uniform system of laws regulating pesticide use. Many citizens and administrative scholars argued that such a system would further intensify the government’s already over-expansive role in commerce, social life, and politics, diminishing individual rights and autonomy.

In 1946, however, the enactment of the Administrative Procedure Act (APA) signaled the advent of a federal regulatory scheme. This legal watershed moment represented a compromise between opposing political forces — Republicans and conservative Democrats, and New Deal Democrats — where a vision for a modern administrative state required a gentle balance between competing interests. Conservatives lauded the procedural safeguards required in administrative adjudications, and liberals celebrated the quasi-legislative functions of substantive rulemaking. In effect, the APA preserved individual rights from unfettered agency abuse while inviting public participation and expert input to rulemaking processes. Nonetheless, the firm grasp of the APA on federal agencies continues to precipitate unanswered questions regarding the exact contours of administrative law. To that end, with the rise of policy-driven initiatives concerning climate change and other complex, scientific issues requiring factfinding, the reliance on administrative agencies for their expertise has increased.

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7. See generally Ernest Gellhorn & Glen O. Robinson, Perspectives on Administrative Law, 75 Colum. L. Rev. 771, 772-73 (1975) (underscoring foundations of administrative law).


10. Id. at 207 (identifying watershed moment for administrative law); see generally Administrative Procedure Act, 5 U.S.C. §§ 551–559 (2023) (outlining scope, boundaries, and constraints of judicial review).


12. See id. at 452-54 (qualifying compromises embedded within APA).

13. See Elias, supra note 9, at 207-08 (emphasizing tradeoffs of APA).


15. See Elias, supra note 9, at 214, 223-24 (emphasizing role of federal agencies in modern administrative state).
Section 706(2)(A) of the APA governs judicial review of administrative agency actions under the “arbitrary and capricious” test. In the subsequent decades since Congress passed the APA, the arbitrary and capricious standard regularly deferred to agencies’ findings. Within thirty years, however, U.S. Supreme Court decisions like *Citizens to Protect Overton Park, Inc. v. Volpe* and *Motor Vehicles Manufacturers Ass’n v. State Farm Mutual Automobile Insurance Co.* reinvigorated debates about the level of adherence to the statutory text of the APA. In *Overton Park*, the Court required agencies involved in informal rulemaking to create a record subject to judicial review. The Court introduced the language “thorough, probing, [and] in-depth,” under Section 706(2)(A) arbitrary and capricious review for the first time. A decade later, the Court solidified this language in its probing review in *State Farm*. Thus, the heightened standard introduced in *Overton Park* and reinforced in *State Farm* gave rise to the “hard look” doctrine, which is a legal


20. See Garry, supra note 17, at 151, 154-56 (assessing appropriate standard of judicial review).

21. See *Overton Park*, 401 U.S. at 420 (requiring creation of adequate agency record). In instances where agencies offer bare records without including the processes behind conclusions, the Court found it may require participating administrative officials to give testimony explaining their action. See id. (highlighting bare record without disclosed facts as insufficient). Moreover, this declaration — according to some administrative scholars — contravened settled principles of administrative law. See Garry, supra note 17, at 154 (examining debates among APA originalists). This departure signaled the imposition of additional judicial procedure, which courts generally avoided. See id. at 153-54 (avoiding court-mandated procedure); see also Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 542 (1978) (holding administrative agencies generally free to create own procedure).


23. See, e.g., *State Farm*, 463 U.S. at 43 (applying heightened scrutiny into agency record). The Court held a “rational connection” between the facts on the proffered record and the rendered decision survived remand. Id. (underpinning hard look doctrine by “rational connection” inquiry).
standard of review utilized by judges to assess administrative agency actions. In the realm of administrative law, the significance of State Farm draws analogies to that of Marbury v. Madison in establishing judicial review. The evolution of the hard look doctrine has profound implications for environmental policy — both retroactively and prospectively — because the EPA and other related agencies promulgate policy-driven rules and regulations. With issues involving environmental policy, including climate change, the principles of judicial review are implicated because the APA requires both factfinding and procedural standards. Fundamentally, the imposition of procedural standards dissuades the endorsement of certain policy-driven choices by generalist judges.

To date, administrative scholars and judges have continued to breathe life into the debates surrounding the hard look doctrine. In 2021 alone, regulatory agencies promulgated 3,257 final rules with the force and effect of federal law. In comparison, Congress enacted 143 federal laws. This statistic translates to roughly twenty-three federal regulations for every federal law passed by Congress. Consequently, courts frequently face claims regarding procedural or substantive defects in administrative rules because of the wide breadth of federal regulations. As a result, the costly threat of rescission or vacatur incentivizes agencies to assemble thorough, robust records with strong reasoning that withstand probing judicial review post-State Farm. As the frontiers of scientific and empirical knowledge

25. 5 U.S. 137, 178-79 (1803) (reifying judicial review).
27. See Elias, supra note 9, at 223-34 (underscoring concerns with APA’s judicial review provisions).
28. See id. (qualifying role of procedural safeguards of APA).
29. See id. (offering broader advantages of agency flexibility and discretion).
32. Id. at 7 (distinguishing congressional role in formulating policy).
33. Id. at 7-8 (acknowledging broad legal effects of federal regulation).
34. See Gersen & Vermeule, supra note 26, at 1367 (noting counter-intuitive relationship between litigation and final agency rules).
become increasingly complex, the hard look doctrine amplifies the challenge of determining whether agencies have adequately explained their reasoning in their rulemaking. 36 To that end, the ancillary question of whether reviewing courts may vacate technical or scientific questions outside their expertise arises. 37

This Comment observes how appellate courts and the U.S. Supreme Court employ the hard look doctrine to signal a return to the procedural commitments of the APA, rather than signaling judicial support of substantive questions of policy. 38 Under the hard look doctrine, courts underscore the inherent functional limitations of their expertise and knowledge, which reinforces the authority delegated by Congress and the U.S. Constitution. 39 Part II supplies a brief overview of the preeminent debates among administrative scholars regarding the level of adherence to the APA, the hard look doctrine, and the development of the modern administrative state. 40 Part III surveys the current state of the issue, develops the function of comparative epistemic knowledge, and explores how recent U.S. Supreme Court precedent oscillated toward a commitment for reasoned procedural process. 41 Part IV explores calls to reform the hard look doctrine, illustrations of tradeoffs within the hard look doctrine, and the critiques of agency ossification. 42 Finally, Part V posits that the revitalized scrutiny of the hard look doctrine will afford agencies more flexibility in fashioning innovative solutions to modern challenges, and notes that policy and environmental justice intersect in this context. 43


37. See id. at 750-51 (providing implicit commentary on issues of expertise in relation to the court’s judicial review function).

38. For further discussion of the challenges of agency factfinding, see infra notes 132-83 and accompanying text.

39. For discussion of courts’ institutional limitations regarding specialized knowledge and expertise, see infra notes 138-54 and accompanying text. Administrative scholar Professor Adrian Vermeule has coined the term “comparative epistemic competence” as a device for courts to determine whether agency reasoning that is heavily dependent on scientific or technical data survives Section 706(2)(A) review. See generally Adrian Vermeule, The Parliament of the Experts, 58 Duke L.J. 2231, 2241, 2263-66 (2009) (defining comparative epistemic competence).

40. For discussion of debates among administrative scholars, see infra notes 44-137 and accompanying text.

41. For a critical discussion, see infra notes 138-89 and accompanying text.

42. For discussion of reframed look and reform of the hard look doctrine, see infra notes 190-237 and accompanying text.

43. For discussion of impact of hard look doctrine and broader environmental policy and pesticide use, see infra notes 238-58 and accompanying text.
II. Back to the Vaca tur: A Background on the Hard Look
Doctrine & Judicial Review

Some administrative scholars equate State Farm’s importance in
administrative law with the legal and constitutional significance of
Marbury because of State Farm’s potent influence on judicial review
in relation to agency action.44 This premise reveals the underlying
function of federal agencies as congressionally-created entities with
subject-matter expertise.45 Though agency rulemaking and adjudi-
cative powers derive from organic congressional statutes, existing
administrative principles do not exempt reviewing courts from issues
of non-delegation and external pressure.46

A. The Administrative Procedure Act (APA)

Adopted in 1946, the APA generally governs the procedure and
scope of review for administrative decisions.47 Prior to its codifica-
tion, courts grappled with defining the exact parameters of judicial
review on policy issues.48 In 1943, the U.S. Supreme Court held,
in SEC v. Chenery Corp. (Chenery I),49 that an agency order relying
upon external factors and not upon “its special administrative
competence” or existing prescribed agency criteria fails to survive
remand.50 The 1946 codification of the APA, however, illustrated
the first uniform federal body of administrative law.51 The APA innov-
atively implemented the quasi-legislative function of rulemaking

44. See Gersen & Vermeule, supra note 26, at 361 (drawing comparison to
Marbury).
45. Perspectives on Administrative Law, supra note 7, at 778-79 (examining rela-
tionship between legislative and administrative branches).
46. See id. at 780-81 (providing discussion of judicial review on administrative
action).
48. See SEC v. Chenery Corp. (Chenery I), 318 U.S. 80, 81-85, 88-90, 92-93 (1943)
(outlining case facts, emphasizing dispositive issues, and rejecting post-hoc rational-
izations to remand). In Chenery I, a public utility company sought to reorganize
and issue preferred stock to directors. Id. at 81-85 (providing facts). The operative
statute required reorganizations be “fair and equitable” without direct reference to
purchase of preferred stock. Id. at 85 (discussing question presented). The Securi-
ties and Exchange Committee (SEC) determined the permissibility of the issuance
of the preferred stock and mandated a new buy-back scheme, which the company
appealed. See id. at 83-85 (emphasizing dispositive issue). The U.S. Supreme Court
invalidated the SEC order because the agency relied upon an erroneous application
of common law instead of existing agency experience or expertise. Id. at 88-90
(remanding to agency for correction).
49. 318 U.S. 80, 88-90, 92-93 (1943) (discrediting import of common law).
50. See id. at 90 (focusing inquiry on internal agency rationale).
51. A Golden Anniversary, supra note 8 (underscoring absence of federal admin-
istrative law statute before APA).
with broad application.\(^{52}\) Shortly after the APA’s enactment, the board directors from *Chenery I* returned before the Court to appeal a similar SEC order.\(^{53}\) In *Chenery II*,\(^{54}\) the majority’s reasoning demonstrated the Court’s post-APA preference to defer to agency expertise, experience, and knowledge instead of imposing additional judicially-crafted procedural requirements.\(^{55}\) The APA’s impact illustrates the culmination of compromises between conservative and liberal forces.\(^{56}\)

Today, the APA serves as the statutory “constitution” of the administrative state because it provides the default rules that bind agencies.\(^{57}\) Unlike the U.S. Constitution, however, Congress can pass legislation that supersedes the APA’s default rules.\(^{58}\) Ordinarily, courts interpret the APA by its originalist, static meaning at the time of adoption, with few exceptions.\(^{59}\)

Nevertheless, “informal” or “notice-and-comment” rulemaking, such as the registration of pesticides and other agricultural products, dominates the modern era of agency regulation.\(^{60}\) Under the APA, the agency must notify interested parties of its proposed rule.\(^{61}\) After a period of public comment, the agency’s promulgation of its final rule must supply a “concise general statement” of its “basis

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53. See SEC v. Chenery Corp. (*Chenery II*), 332 U.S. 194, 196-97, 203-04, 208-09 (1947) (discussing procedural posture, describing appellees’ arguments, and upholding SEC order). On remand, the SEC denied the board directors’ reorganization plan, and thus, the directors appealed again. *Id.* at 196-97 (discussing procedural posture). On appeal, the board directors argued that the SEC must approve their proposed restructuring plan and go through formal procedures to prohibit their plan. *Id.* at 203-04 (rebuking appellants’ arguments). The Court rejected this argument, noting the SEC relied upon its expertise and experience. *Id.* at 209 (rationalizing how order survives remand).

54. 332 U.S. 194, 208-09 (1947) (illustrating development of administrative procedural questions).

55. *Id.* at 208-09 (emphasizing expertise).

56. See APA: Past, Present, Future, supra note 11, at 453-54 (describing opposing views on strong administrative state). For a further discussion of this compromise between conservative and liberal forces, see supra notes 9-17.


58. See 5 U.S.C § 559 (requiring express language by Congress to supersede or amend rules of APA).

59. See Dir., Off. of Workers’ Comp. Programs, Dept’t of Labor v. Greenwich Collieries, 512 U.S. 267, 276 (1994) (reaffirming static meaning of APA by interpreting term through lens of APA drafters). At the time of the APA’s adoption, adjudication came through formal rulemaking; today, interested parties often receive notice through informal processes, such as notice-and-comment rulemaking. See generally Metzger, supra note 16, at 3 (discussing APA’s modern application and procedural requirements).

60. See Metzger, supra note 16, at 3-4 (acknowledging dominance of informal rulemaking).

The notion of what constitutes a “concise general statement” remains a leading source of debate because agencies frequently deal with complex and comprehensive technical issues.63

The operative law that authorizes pesticide and herbicide use in the United States is the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).64 FIFRA requires the EPA to regulate pesticide and herbicide use and production.65 The EPA’s “registration” scheme acts as the modern primary regulatory mechanism and exemplifies a form of informal rulemaking.66 Until the EPA issues a registration, a product may not be distributed or sold in the United States.67 In 2007, Congress added a new procedural process to the FIFRA scheme: registration review.68

62. See id. § 553(c) (creating minimum requirements under informal rulemaking).


64. See generally Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136-136(y) (issuing operative conditions and standards for FIFRA); see also H.R. Rep. No. RL31921, at 2-4 (2012) (summarizing FIFRA’s history). As an original matter, Congress authorized the U.S. Department of Agriculture (USDA) to set standards for pesticide use in 1910; later in 1947, Congress broadened FIFRA’s scope of regulations into FIFRA. See id. at 2 (summarizing history of FIFRA). FIFRA’s 1972 amendment brought major changes, including labeling requirements and shifting the regulation of pesticide use and production to the EPA’s purview, an agency created in 1970. See id. (highlighting shift towards EPA regulation).

65. See generally 7 U.S.C. § 136a(a) (issuing conditions and standards for registration).

66. See, e.g., Nat. Res. Def. Council, Inc. v. EPA (Ninth Cir. Glyphosate Litig.), 38 F.4th 34, 44 (9th Cir. 2022) (exemplifying regulatory mechanism for pesticides). Glyphosate is the most commonly used pesticide in the world and is the main ingredient in the weedkiller Roundup. See generally SPRINGER NATURE, REVIEWS OF ENVIRONMENTAL CONTAMINATION AND TOXICOLOGY 3-4 (James B. Knaak, ed., 2021) (providing background on glyphosate and its composition and utility).


68. Ninth Cir. Glyphosate Litig., 38 F.4th at 43-45 (noting implementation of registration review in FIFRA scheme).
Likewise, the APA equips reviewing courts with vacatur and remand — the power to hold agency actions, findings, conclusions, and FIFRA registrations as unlawful. More precisely, reviewing courts may vacate or hold unlawful agency actions that are “arbitrary, capricious . . . not in accordance with law [or] without observance of procedure . . . .” The limited number of unlawful actions described in Section 706 illustrates the embedded deference afforded to agencies with niche fields of expertise. Additionally, the inherent deference and broad discretion courts afford to agencies also fuel the functional flexibility that empowers the administrative state. The alternative would lead to an APA replete with procedural hurdles and a rigid, overburdened administrative state suffering from ossification and lacking innovation. Though this claim finds agreement among some scholars, other scholars posit that ossification remains an overstated phenomenon that lacks empirical backing.

B. The Genesis & Evolution of the Hard Look Doctrine

Throughout the mid-twentieth century, the United States Court of Appeals for the District of Columbia (D.C. Circuit) primarily developed the hard look doctrine under arbitrary and capricious review. D.C. Circuit judges aptly supplied arguments for hard look review for differing reasons. With an increasingly complex web


73. See id. at 827-28 (reproaching APA without adjudicative powers); see also Thomas O. McGarity, Some Thoughts on “Deossifying” the Rulemaking Process, 41 Duke L.J. 1385, 1405-10 [hereinafter Deossifying Rulemaking] (contemplating effect of ossification, or excessive procedural requirements).


76. See generally Ronald J. Krotoszynski Jr., History to the Winners: The Bazelon-Leventhal Debate and the Continuing Relevance of the Process/Substance Dichotomy in
of countervailing interests in the public sphere, a rigid, originalist reading of the APA revealed insufficiencies that fail to grapple with modern questions of policy and science. Such vulnerabilities, as some administrative scholars argue, led to the concept of “capture.” The concept of “capture” posited that regulators and government bureaucrats routinely and predictably serve as vassals to the interest-holders meant to be regulated. The effect, therefore, led to a transformational period in administrative law that reframed original understandings about the relationship between agencies and reviewing courts.

1. Battle of the Judges: The Bazelon-Leventhal Debates

A mistrust of agencies rose in the decades after the adoption of the APA. The notion of a heightened standard of judicial review — absent from the APA text — gained traction because courts saw it as a deterrent against agencies shirking their statutory duties. Additionally, agencies faced growing skepticism that their decisions were products of reasoned expertise, and instead, this expertise served as a pretense for rule promulgation. As a fierce proponent of judicial scrutiny, Judge Bazelon of the D.C. Circuit posited that judges remained ill-equipped to answer scientific questions, draw conclusions from empirical technicalities, and handle the technical


79. See PREVENTING REGULATORY CAPTURE 49, 56 (Daniel Carpenter & David A. Moss eds., 2013) (opining regulatory agencies act as vassals). The EPA is not unique in this regard; regulated actors stand firm, savvy, and persistently assertive in reaching their preferred policy goals. See, e.g., Greve, supra note 5, at 44-46, 64-67 (expanding upon effects of capture). Moreover, these regulated actors amass massive capital, tools, and resources that are dispersed. Id. at 44 (observing plausible reasons for capture). In contrast, agency resources and power remain concentrated, and thus, subverted by the resources of regulated actors. Id. at 44-45 (interpreting incentives of regulators and agencies).

80. See Merrill, supra note 77 (clarifying innovations in administrative law).

81. Garry, supra note 17, at 162 (investigating rise of agency capture).


merits of science with precision and efficiency. Judge Bazelon’s solution called for strengthening administrative procedures that countervailed agency gamesmanship. He found that reviewing courts should avoid deferring to the “mysteries of administrative expertise.” A heightened judicial review approach thus created an ex-ante incentive for agencies to refrain from abusing their subject-matter expertise and discretion.

In contrast, Judge Leventhal of the D.C. Circuit insisted that judges harness the expertise of various fields through their exposure to law and adjacent topics. He introduced the phrase “hard look” in his preeminent D.C. Circuit opinion, _Greater Boston Television Corp. v. FCC_, in 1970. Specifically, Judge Leventhal opined that the function of a reviewing court was to assure agencies offered “reasoned consideration” to “all the material facts and issues.” For example, Judge Leventhal found a probing judicial search to be appropriate in instances where the textual requirements of the APA lacked the tools to fully address issues at the limitations of understanding. Judge Leventhal, therefore, championed a hard look into the substance underlying agency decisions and opined that

84. Krotoszynski, _supra_ note 76, at 1000-01 (providing Judge Bazelon’s approach and opinion on lacking characteristics of generalist judges).

85. _Id._ (describing tactics employed by agencies).

86. _Env’t Def. Fund, Inc. v. Ruckelshaus_, 439 F.2d 584, 597 (D.C. Cir. 1971) (strengthening judicial scrutiny); _see also_ _Ethyl Corp. v. EPA_, 541 F.2d 1, 69 (D.C. Cir. 1976) (en banc) (demonstrating opposing approaches).


88. Krotoszynski, _supra_ note 76, at 1002-03 (contrasting Judge Leventhal approach).


90. _Id._ at 851 (introducing hard look language). Judge Leventhal emphasized the “supervisory function” of courts, in which its function calls for whether the agency has given a “reasoned consideration . . . [of] all the material facts and issues.” _Id._ (footnotes omitted) (alteration in original) (emphasizing supervisory role). Additionally, Judge Leventhal provided some factors to consider including: the agency decision clarity, the identification and significance of crucial facts, and a consideration of general applicability to involved parties. _See id._ (providing dispositive factors).

91. _See id._ (footnotes omitted) (illustrating probing scrutiny); _see also_ _Sierra Club v. EPA_, 719 F.2d 436, 458-59 (D.C. Cir. 1983) (observing failure to comport with reasoned consideration). The _Sierra Club_ court found the “hallmark of arbitrary action” was inconsistent reasoning without explanation. _Id._ at 459 (remanding EPA action because of internal inconsistences).

92. _See, e.g._, _Kennecott Copper Corp. v. EPA_, 462 F.2d 846, 850-51 (D.C. Cir. 1972) (requiring more reasoning than express APA text). Here, Judge Leventhal conceded the text of the APA required a “concise general statement,” but found there are instances where the minimum requirements are insufficient. _Id._ at 850 (commenting on APA insufficiencies).
courts have a duty to look beyond procedural defects by identifying any salient problems.93

Both Judge Leventhal and Judge Bazelon underscored that agency review often requires more than the express procedure supplied by the APA.94 This approach, however, draws strong opponents due to the potential impediments to the administrative process.95 Despite originalist textual arguments, the pragmatic consequences of agencies grappling with additional constraints and excessive reasoning requirements arguably lead to lower-quality rules.96 Furthermore, in areas at the frontiers of technical and scientific expertise, a reasoned consideration presupposes an objective answer exists for all scientific or environmental policy issues.97 Considerable uncertainty falls incumbent upon agencies tasked with promulgating rules on health, safety, climate change, and empirical knowledge.98 Thus, difficulties arise when agencies must offer exhaustive rationales for rulemaking, especially when such rules are informed by cautioned predictions and reasoned observations.99

2. Overton Park & Vermont Yankee Framework

Generally, courts may not add additional procedures without an appropriate organic statute.100 Administrative agencies, therefore, remain free to fashion their own procedures as long as they align with constitutional constraints.101 Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.102 illustrates the long-standing principle that reviewing courts cannot impose additional procedural requirements and methods of inquiry onto areas that

93. Krotoszynski, supra note 76, at 1002-04 (appealing to judicial expertise).
94. See id. at 1003-04 (illustrating demand for procedure and agency review beyond APA’s minimum requirements).
96. Id. at 1281 (critiquing judicial review requirements).
98. See id. (noting policy determinations exacerbated disadvantages with policy).
99. Id. (describing dilemma of rigorous agency explanations).
102. Id. at 542-43 (underscoring principles and text of APA).
fall within agency expertise. The Vermont Yankee decision came seven years after the Court handed down Overton Park. In Overton Park, Justice Marshall introduced the language “thorough, probing, in-depth [judicial] review” for the first time when applying the arbitrary and capricious standard to the Department of Transportation’s action. Notably, the text of the APA does not expressly require a “record” for informal proceedings like the highway approval at issue in Overton Park.

Nonetheless, the Court followed a pragmatic approach and imposed a “record” requirement as the primary basis for assessing the permissibility of agency action. The Court emphasized that the inquiry into agency records encompassed a “searching and careful . . . [but narrow] review.” The exact level of scrutiny under Section 706(2)(A), however, continues to illuminate the elusive meaning of “arbitrary and capricious.”

3. A State Farm Is Born

Similar to the debates between Judge Bazelon and Judge Leventhal, the Court’s precedents established in Vermont Yankee and Overton Park illustrated conflicting rationales — or even antithetical approaches — to some scholars. Unsurprisingly, the lasting effect of these rulings fueled confusion among appellate courts,

103. Id. at 543 (limiting scope of judicial intervention).
104. See generally id. at 519 (identifying date of decision).
106. See generally 5 U.S.C §§ 553, 555 (noting silence of “record” requirement for informal rulemaking).
107. See Overton Park, 401 U.S. at 419-20 (finding remand as appropriate remedy to complete record). The operative statutes prohibited the Secretary of the Department of Transportation (Secretary) from approving federal funds for highway construction if a “feasible and prudent” alternative existed; plaintiffs buttressed their claim under this requirement. Id. at 405-06 (discussing facts). The Secretary approved the highway funding, and plaintiffs further argued he failed to comply with formal rulemaking procedures. Id. at 407-08 (underlining plaintiffs’ legal basis); see also 5 U.S.C. § 556 (delineating formal APA procedures). The Court disagreed but also found the Secretary’s basis for approval incomplete and thus required remand to assemble a complete record. Overton Park, 401 U.S. at 414, 419-20 (emphasizing necessity for complete record) (footnote omitted).
108. See id. at 416 (alteration in original) (qualifying requirement of record with narrow factfinding). Moreover, the Court stressed that courts may not substitute its own policy preferences with the judgment of the subject-matter agency. Id. (insisting on agency deference).
110. See Garry, supra note 17, at 161 (reflecting on opposition to increased scrutiny).
To that end, the enflamed debate regarding the level of judicial scrutiny courts may use is a byproduct of the ambiguity from leading precedents. In theory, however, the heightened hard look review standard intended to assure agencies acted within their respective Congressional mandates and faithfully adhered to statutory discretion.

The U.S. Supreme Court ratified the notion that Section 706(2)(A) arbitrary and capricious review requires a “hard look” in its 1983 State Farm decision. By way of background, Congress directed the U.S. Department of Transportation to issue vehicle safety standards — including seatbelts — after considering “relevant available motor vehicle safety data,” whether the proposed standard is “reasonable, practicable, and appropriate” for [a particular car model], and “the extent to which such standards will contribute to carrying out the purposes” of the Act. Further, the operative statute designated the Secretary of Transportation (Secretary) to issue safety standards after contemplating whether that standard showed practicality, met the needs for motor vehicle safety, and was stated in objective terms. The rule at issue mandated installing seatbelts to mitigate automobile deaths and injuries. After several proposed revisions and significant public opposition, the Secretary issued a modified rule allowing motor vehicle companies to choose airbags or passive seatbelts as a safety mechanism.

The 1980s saw a shift towards deregulation, however, and the successive Secretary ordered a one-year delay for implementing the rule while also proposing to rescind the rule. This proposal came after public comment and hearings reflected changing political sentiments and backlash from the motor vehicle industry cited

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111. See id. at 161-62 (examining confusion of lower courts).
112. See id. at 161 (finding ambiguity in application of probing review).
116. State Farm, 463 U.S. at 29 (delineating factors given by Congress).
117. Id. at 34-35 (identifying rule). More specifically, the rule required the installation of passive seatbelts and airbags in motor vehicles. Id. at 35-36 (specifying requirements for motor vehicle industry).
118. Id. at 37 (departing from initial rule).
119. Id. at 38 (highlighting changed circumstances).
economic difficulties. Subsequently, the agency rescinded the passive seatbelt requirement, arguing it could no longer sustain that the requirement produced "significant safety benefits." Consequently, plaintiffs — insurance companies — argued that the agency’s decision to rescind the requirement was arbitrary and capricious.

The D.C. Circuit distinguished initial rules from their rescissions, holding that arbitrary and capricious review applied to the rescission and remanded. Yet, the court based its reasoning on an intensified misunderstanding of legislative history. The Supreme Court, however, upheld the application of arbitrary and capricious review for distinct, important reasons. The Court eschewed a muddled understanding of legislative history and instead focused on whether the agency articulated its decision through a "rational connection between the facts found and the choice made." Further, the Court underscored the narrow scope of arbitrary and capricious review — where courts may not substitute agency action with its own policy goals — and thus aligned itself with precedent like Vermont Yankee. Likewise, the Court reinvigorated the principles of Chenery II by emphasizing how reviewing courts cannot rely upon post hoc rationalizations to vacate and remand agency action. Nonetheless, the endorsement of a heightened standard of review prompted criticism from appellate courts and administrative commentators for lacking clear guidance.

120. State Farm, 463 U.S. at 38 (inferring motivating factors behind recission proposal).
121. Id. (considering arguments of agency for rescission).
122. Id. at 39 (pinpointing plaintiffs’ legal argument).
124. Id. at 222, 229 (discussing departure from arbitrary and capricious review).
125. State Farm, 463 U.S. at 46-48 (distinguishing rationale for Section 706(2)(A) review).
126. Id. at 43 (citing Burlington Truck Lines v. United States, 371 U.S. 156, 168 (1962)) (underscoring hard look as rational connection between facts and choice made). Moreover, the Court provided permissible examples of when arbitrary and capricious applied, such as reliance on factors outside of Congress’s intent, failure to consider intended factors, reasoning counter to the proffered record and evidence, and implausibility that falls outside agency expertise. Id. (expressing examples of arbitrary and capricious reasoning).
127. Id. (stressing narrow nature of permissible judicial scrutiny).
128. Id. (elaborating on settled administrative law); see also Virelli, supra note 71 (preserving delegated authority of agency expertise).
129. Oydanich, supra note 30 (discussing critiques).
4. *Baltimore Gas*

In the same term as *State Farm*, the Court rendered the *Baltimore Gas and Electric Co. v. Natural Resources Defense Council, Inc.* decision, which stressed that reviewing courts must give deference to agencies on matters at the frontiers of science. In *Baltimore Gas*, the Court emphatically relied upon the principles of *Vermont Yankee* to reverse the lower court’s remand. More precisely, it declared that reviewing courts shall only vacate administrative actions for departures from substantial procedural reasons mandated by controlling statute and not “simply because the court is unhappy with the result reached.” The Court stressed that reviewing courts’ sole purpose under arbitrary and capricious review is to ensure a “rational connection” between the relevant facts and the decision made.

Alongside the *State Farm* decision, these leading precedents illustrated the difficulties of reviewing courts when faced with questions of scientific uncertainty. Moreover, in light of the spirit of *State Farm*, the Court found legitimacy in how agencies often adopt reasoning informed by uncertainty and reasoned assumptions to cope with empirical limitations of knowledge. Today, reviewing courts may not ask agencies to answer the impossible with overly-cumbersome, judicially-created procedures.

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131. *See id.* at 103-04 (expressing deference to agency expertise). Previously, Judge Bazelon of the D.C. Circuit remanded the method chosen by the Nuclear Regulatory Commission (NRC) to consider and disclose the environmental impact of uranium, as required by the National Environmental Policy Act (NEPA). *See, e.g.*, Nat. Res. Def. Council, Inc. v. U.S. Nuclear Regul. Comm’n, 685 F.2d 459, 463-64 (D.C. Cir. 1982) (contextualizing procedural posture of administrative issue). The court found the choice to utilize a numerical table failed to consider the underlying uncertainties associated with radiological particulates. *Id.* at 477-78 (providing rationale for remand). Thus, the court deemed the rule arbitrary and capricious because it failed to account for health, socioeconomic, and cumulative effects. *Id.* (supplying legal basis).
133. *Id.* (citing *Vermont Yankee*, 435 U.S. at 558) (internal quotation marks omitted) (emphasizing reviewing courts should not impose additional requirements).
134. *Id.* at 105 (reaffirming “rational connection” test in hard look review).
135. *Id.* at 98-100 (noting uncertainty not inherent to some instances of fact-finding).
136. *Id.* at 100-02 (crediting use of uncertainty in agency’s analysis).
137. *Baltimore Gas*, 462 U.S. at 99-105 (reiterating courts cannot add additional procedures outside of APA and operative statutes).
III. THE STATE OF THE UNION: THE AMERICAN ADMINISTRATIVE STATE TODAY

Administrative scholars at the time of the APA’s adoption could not have imagined the breadth of scientific progress that followed in the late twentieth and twenty-first centuries. Akin to the debates facing Judges Bazelon and Leventhal, courts today are often reluctant to approach complex, scientific agency rules with absolute certainty. For example, the U.S. Supreme Court reached the merits of sixty-four arbitrary and capricious challenges between 1983 and 2016 but only found administrative rules arbitrary and capricious thirteen percent of the time. Contemporaneously, the use and profits of pesticides and other agricultural products exploded, thus increasing the number of industry actors under the EPA’s broad oversight and expertise. As such, six cases fell under the EPA’s subject-matter expertise, and the Court found one — Massachusetts v. EPA — arbitrary and capricious under Section 706(2)(A).

A. Comparative Epistemic Competence

The concept of agency expertise remains a recurring theme among judicial opinions and observations of the administrative state. In the modern administrative state, rulemaking predicated on agency expertise attempts to eliminate political influence and

139. Id. (underscoring issues facing EPA and OSHA).
140. Oydanich, supra note 30, at 1653 (highlighting survival of agency rules).
141. Glenna & Bruce, supra note 6, at 3 (presenting data on profitability of pesticides like glyphosate).
143. Gersen & Vermeule, supra note 26, at 1408-12 (demonstrating table of Section 706(2)(A) challenges). More precisely, Vermeule and Gersen narrowed the thirteen percent statistic to eight percent when accounting for “pure arbitrariness cases.” Id. at 1362 (acknowledging remarkable success rate of agencies). In other words, agencies have fended off ninety-two percent, at best, and eighty-seven percent, at worst, of Section 706(2)(A) challenges in light of precedents like State Farm. See id. (bolstering reviewing courts’ adhesion to delegated function).
144. Seidenfeld, supra note 83, at 151 (discussing expertise model of agencies).
external forces facilitating capture.  

To that end, the administrative state and APA both assume that “facts” are products of agency expertise; agency expertise thus acts as a vehicle to find facts and inform final rules.  

Furthermore, Professor Vermeule — leading administrative law scholar — suggests that “facts” include discrete adjudicative facts, background information, theories of causation, and predictions about the consequences of alternate policies.  

Indeed, Vermeule’s assertion becomes increasingly relevant when reading the text of the APA — where the text expressly contemplates the idea of “facts” for judicial review.  

The difficulty of factfinding, however, reveals the underlying dilemma of creating certainty in arenas of complex scientific, medicinal, environmental, and climate policy.  

Despite a sea of available scientific knowledge, in many instances, agencies cannot find definitive certainty, “truth,” or “fact” in either scientific or legal policies.

As mentioned briefly in Part I, a common strategy agencies employ to determine facts is to convene a panel of experts.  

Professor Vermeule underscores how the promulgation of agency rules often undertakes significant risks and judgments of uncertainty, such as the level of permissible pesticide exposure.  

To complicate matters further, Vermeule observes that a hallmark of administrative agencies is nonideal decision-making.  

Likewise, agencies render decisions with narrow time constraints and limited access to available information.  

It is also common for agencies to disregard experts’ opinions or the majority consensus on certain technical data issues.  

Nevertheless, Professor Vermeule posits that reviewing courts should only probe whether the agency provided

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145. Id. (characterizing advantages of agency expertise); see also Sidney A. Shapiro, The Failure to Understand Expertise in Administrative Law: The Problem and the Consequences, 50 WAKE FOREST L. REV. 1097, 1097-99 (2015) [hereinafter Failure Understand Expertise Admin. L.] (discussing foundational role of expertise).

146. See Vermeule, supra note 39, at 2235-36 (suggesting role of expertise in factfinding).

147. Id. at 2236 (defining facts).


149. Vermeule, supra note 39, at 2236-38 (exploring uncertainties of agency expertise).


151. See Vermeule, supra note 39, at 2242 (substantiating use of expert panels).

152. See id. at 2238 (mentioning position of agency rulemaking).

153. Gersen & Vermeule, supra note 26, at 1357 (characterizing agency decision-making).

154. See id. (elaborating nonideal decision-making).

155. See Vermeule, supra note 39, at 2242 (discussing relationship between expert opinion and agency decision-making).
valid arguments for departing from relevant panel expertise. His argument, therefore, emphasizes the idea of comparative epistemic competence — that is, the consideration of which institutional body is in the best position to answer questions of fact.

The concept of comparative epistemic competence further underscores how courts face serious and inherent limitations of knowledge. In this Bazelon-esque approach, courts balance experts’ technical data with the adequacy of agency reasoning for departing from that expertise. Further, in dealing with issues of scientific policy and uncertainty, comparative epistemic competence preserves the longstanding principle of Baltimore Gas, which suggests that agency expertise and deference decide policy.

B. Concise General Statements: A Return to the Essence of Vermont Yankee

In the spirit of hard look review, several scholars offer ways to reframe this judicial review approach forty years after its ratification. For example, Professors Sidney Shapiro and Richard Murphy posit that the current administrative state demands reform of arbitrary and capricious review to align with modern problems. Namely, these commentators believe an administrative state replete with policy questions at the frontiers of knowledge and science requires a deconstructed look at the doctrine. As notice-and-comment rulemaking constitutes the majority of agency action today, the issue of “concise general statements” arises once again. For example, when an agency promulgates concise general statements in its approval of registration for a pesticide linked to cancer,

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156. Id. (offering perspective on agency reasoning).
157. See id. at 2266 (defining comparative epistemic competence).
158. See id. (exemplifying courts’ limitations).
159. See id. at 2266-69 (finding reasons agencies depart from panels of expertise); see also Krotoszynski, supra note 76, at 1000-01 (explaining Judge Bazelon’s approach).
160. See Vermeule, supra note 39, at 2266-69 (reinforcing notion of agency deference).
162. Id. at 362-65 (defending reform in light of leading precedent).
163. Id. (proposing reframing of hard look review); see also Virelli, supra note 71, at 769-72 (arguing theoretical and pragmatic utility of reframing arbitrary and capricious review).
164. Arb. Review Made Reasonable, supra note 97, at 340-41 (augmenting focus on challenges of concise general statements); see also 5 U.S.C § 553(c) (providing APA requirement).
it naturally wants to pack technical data and reasoning into its explanation to avoid the costly consequences of vacatur and remand.\textsuperscript{165}

To that end, some commentators draw attention to the issue of ossification — where transaction costs and burdensome procedural requirements created by agency conditions and court review adversely affect rulemaking.\textsuperscript{166} For other critics, however, ossification is a toothless phenomenon.\textsuperscript{167} Critics rebuked how reviewing courts began to require more procedure outside the text of the APA.\textsuperscript{168} More specifically, the D.C. Circuit required more elaborate records substantiated by methods found in formal court procedures, prohibited ex parte communications, scrutinized deviations of final rules from proposed rules, and necessitated agencies respond in technical detail to outside parties.\textsuperscript{169} After the U.S. Supreme Court ruling in \textit{Vermont Yankee}, however, the pendulum of administrative law oscillated back to the original procedures of the APA and its text.\textsuperscript{170} Despite the continued evolution of administrative law and its longstanding, nebulous debates of substance and procedure, several scholars await another \textit{Vermont Yankee} precedent that reaffirms the consistency, predictability, and adherence to the original understanding of the APA.\textsuperscript{171}

Administrative scholars often coin this movement “\textit{Vermont Yankee II},” for it essentially considers federal appellate court doctrine and reinvigorates debates about the contours of APA procedure.\textsuperscript{172} One such scholar, distinguished Professor Paul Verkuil, argues that the heightened, probing review of the hard look doctrine creates immense uncertainty — in both its application and its standing — that overshadows agency discretion.\textsuperscript{173} Nonetheless, appellate courts like the D.C. Circuit continue to require agencies to respond thoroughly to technical questions raised by interested

\textsuperscript{165} Arb. Review Made Reasonable, supra note 97, at 342 (indicating agency motivations).
\textsuperscript{166} Brooks, supra note 24, at 275 (stating conclusions about impact of ossification).
\textsuperscript{167} O’Connell, supra note 74, at 978-81 (drawing skepticism of conventional understandings of ossification).
\textsuperscript{168} See Beermann & Lawson, supra note 63, at 3-6 (analyzing evolution of American administrative law).
\textsuperscript{169} Id. (noting creation of procedural machinery).
\textsuperscript{170} Id. (cataloging ongoing debates among scholars).
\textsuperscript{171} Id. (suggesting strong return to \textit{Vermont Yankee} principles).
\textsuperscript{172} See Beermann & Lawson, supra note 63 (amplifying critiques of additional judge-made procedures); see also Richard J. Pierce, Jr., \textit{Waiting for Vermont Yankee II}, 57 ADMIN. L. REV. 669, 683-84 (2005) (calling for “\textit{Vermont Yankee II}” decision).
parties during the final rule-making process.\textsuperscript{174} Again, the level of technicality and explanation prompts questions concerning the level of deference to agency expertise and how agencies like the EPA should respond to increasing caseloads and the transaction costs of avoiding vacatur and remand.\textsuperscript{175}

C. Recent Supreme Court Jurisprudence

In 2015, the U.S. Supreme Court reaffirmed the principles of \textit{Vermont Yankee} in \textit{Perez v. Mortgage Bankers Ass' n},\textsuperscript{176} which imported the emphasis on procedure into the twenty-first century and further underscored the central relationship between subject-matter agencies and reviewing courts.\textsuperscript{177} The Court expressly implemented the language from \textit{Vermont Yankee} into its opinion.\textsuperscript{178} Emphatically, the Court reiterated that “the APA sets forth the full extent of judicial . . . review . . . for \textit{procedural correctness}.”\textsuperscript{179} The majority also appealed to the history of administrative law by reasoning that imposing additional procedural requirements violated “the \textit{very basic tenet} of administrative law . . . .”\textsuperscript{180} Currently, the Court continues to navigate the interaction between \textit{Vermont Yankee} and \textit{State Farm} to clarify the muddied application of the hard look doctrine to challenges of public significance.\textsuperscript{181}

In recent terms, the Roberts Court tacitly implemented the rationales of \textit{Vermont Yankee} and \textit{State Farm} to reiterate a reasoned decision-making approach.\textsuperscript{182} The Roberts Court underscored

\textsuperscript{174} See \textit{Arb. Review Made Reasonable, supra note 97}, at 341-42 (responding to level of technicality imposed on contemporary concise general statements); \textit{see also Lilliputian Sys., Inc. v. Pipeline & Hazardous Materials Safety Admin., 741 F.3d 1309, 1311-12 (D.C. Cir. 2014)} (finding agency’s failure to respond to material issues arbitrary).

\textsuperscript{175} See \textit{Garry, supra note 17}, at 168 (discussing costs of judicial review on agencies); \textit{see also Failure Understand Expertise Admin. L., supra note 145, at 1115} (considering challenges of agency rulemaking).

\textsuperscript{176} 575 U.S. 92, 101-02 (2015) (exemplifying hard look review in recent times).

\textsuperscript{177} \textit{Arb. Review Made Reasonable, supra note 97}, at 332 (relating hard look review to modern context).

\textsuperscript{178} See \textit{id.} (discussing impact of precedent); see, e.g., \textit{Perez, 575 U.S. at 102} (underlining importance of foundational tenets of administrative law).


\textsuperscript{181} See \textit{Oydanich, supra note 30}, at 1644-46 (offering examples of hard look doctrine at U.S. Supreme Court).

\textsuperscript{182} \textit{See id.} (analyzing agency rescission through lens of \textit{State Farm}); \textit{see also Arb. Review Made Reasonable, supra note 97}, at 332 (supporting foundational claims of administrative law).
the procedural requirement to provide a reasoned explanation for agency action in *Department of Homeland Security v. Regents of the University of California*,183 the seminal case involving the rescission of the Deferred Action for Childhood Arrivals (DACA) program.184 Ultimately, the Court found the rescission arbitrary and capricious because Acting Secretary of Homeland Security Elaine C. Duke’s failure to explain her decision flouted the procedural requirements of the APA.185 In brief, Acting Secretary Duke offered a succinct yet deficient explanation that stemmed from conclusions from the Fifth Circuit and the Attorney General that opined on the illegality of DACA.186 The Roberts Court, however, qualified that the policy preferences of a reviewing court shall defer to the policy choices of agencies — with the caveat that such choices comport with procedural requirements.187 Expressly, the Roberts Court conceded that it could not speak to whether “DACA or its rescission are sound policies. ‘The wisdom’ of those decisions ‘is none of [the Court’s] concern.’”188 To that end, the Roberts Court attempted to speak to the limitations of judicial review, appeal to agency expertise and deference, and underscore the foundational procedural pillars of the administrative state.189

IV. Administering Reform: Reframing Hard Look Review

Litigation against agencies like the EPA frequent appellate court dockets; thus, the EPA’s final rules about pollutants, registration of pesticides, and policy choices to mitigate environmental risks undergo judicial review.190 Presently, courts and contractors tasked to dissect agency rulings for technical flaws scrutinize the four corners of the APA’s required concise general statement.191 Once a modest statutory obligation, the concise general statement

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184. Oydanich, supra note 30, at 1658-59 (opining close relationship between hard look doctrine and Court decision)
185. See Regents, 140 S. Ct. at 1910-11 (contextualizing Secretary Duke’s rationale).
186. See id. (noting deficiencies in reasoning).
187. See id. at 1912-13, 1916 (positing rescission suffered analogous deficient reasons to State Farm).
188. Id. at 1916 (citing SEC v. Chenery Corp. (*Chenery II*), 332 U.S. 194, 207 (1947)) (preserving language from *Chenery II*).
189. See Gersen & Vermeule, supra note 26, at 1356 (proposing clarity and reform of hard look review review).
190. Deossifying Rulemaking, supra note 73, at 1414 (acknowledging EPA as frequent player for Section 706 review).
requirement has morphed into a defensive bulwark from sources attacking agency findings and deference.\footnote{\textit{Dessouying Rulemaking}, supra note 73, at 1400 (displaying concern for imposing additional requirements). The author further notes that additional procedural requirements for agency action may lead to “judicial overreaching” and strenuous scrutiny. \textit{Id.} at 1400-41 (highlighting agencies will avoid rulemaking when requirements are overly cumbersome and time-consuming).} The dominant debates about agency expertise and the fear of capture and ossification, however, require a reframing of the hard look doctrine.\footnote{Gersen & Vermeule, \textit{supra} note 26, at 1356 (proposing less demanding interpretation of Section 706(2)(A)).} As the EPA promulgates rules at the frontiers of science through its expertise, reviewing courts — guided by recent precedents — should scrutinize agency rules through a less demanding lens than previously contemplated.\footnote{See \textit{id.} at 1356-58 (investigating ways to navigate arbitrary and capricious review).} This approach concedes the comparative epistemic knowledge of reviewing courts, preserves deference to agencies and their subject-matter expertise to assess facts, and finally, attempts to clarify the scope of hard look review.\footnote{See Virelli, \textit{supra} note 71, at 725-29 (calling for reconceptualizing hard look doctrine).}

A. How to Get Away With Reform

When Congress tasks agencies to consider the “public interest” in rulemaking, the hard look doctrine comes into sharper focus.\footnote{See, e.g., 7 U.S.C. § 136a(c)(7)(C) (narrowing statutory requirements for conditional registrations).} For operative statutes like FIFRA, which authorizes the EPA to render policy judgments on hazardous chemicals for the public interest, the line between procedure and substance is nebulous.\footnote{For a discussion of FIFRA and further background, see \textit{supra} notes 57-65 and accompanying text.} Further, the EPA may not issue a registration that causes “[u]nreasonable adverse effects on the environment.”\footnote{7 U.S.C. § 136a(c)(5)(C) (alteration in original) (limiting registration to certain statutory conditions).} The construction of “unreasonable adverse effects” includes unreasonable risks to “man or the environment” and a consideration of the economic, social, and environmental cost-benefits of the pesticide’s use.\footnote{\textit{Id.} § 136(bb) (defining unreasonable adverse effects).} Despite some statutory guidance, the EPA inevitably relies upon its institutional competence and expertise to assess unreasonable risks and balancing tests.\footnote{For a discussion of the debates on agency expertise, their role in rulemaking, interaction with judicial review, and inherent limitations, see \textit{supra} notes 74-92 and accompanying text.} Courts often misunderstand the application of the hard.
look doctrine when litigants challenge the agency registration of a product associated with severe health risks like cancer or links to environmental degradation.201

The Roberts Court’s use of the hard look doctrine as a procedural tool rather than a means to signal support for policy preferences reaffirms the spirit of Vermont Yankee.202 Moreover, this approach guides a much less demanding and intrusive interpretation of Section 706(2)(A) hard look review.203 The return to the procedural essence of Vermont Yankee in Perez and Regents underscores how a hard look review and the procedural limits of the APA can coexist.204 To that end, this approach preserves agency competence and permits flexibility for agencies to depart from past experience to acknowledge uncertainty in policy.205

Likewise, a less demanding reading of hard look precedents discourages courts from articulating additional procedural requirements.206 It also curtails courts from the temptation to usher certain policy preferences, signal support of partisanship, or impart judicial wisdom.207 Further, a Vermont Yankee reading that comports with a less demanding amount of scrutiny affords reviewing courts a narrower lens that speaks to procedural compliance with the APA and organic statutes like FIFRA.208 This narrower lens prompts reviewing courts to assess the record for reasoned explanations when choosing to rationally depart from certain requirements.209 Ultimately, subject-matter agencies acting through their expertise and experience would survive the low bar of simply offering sound reasoning, especially at the frontiers of science and knowledge.210

201. See Gersen & Vermeule, supra note 26, at 1356 (qualifying misunderstood application of hard look review by reviewing courts).
202. See Beermann & Lawson, supra note 63, at 33 (synthesizing hard look critiques with Vermont Yankee principles).
203. Gersen & Vermeule, supra note 26, at 1356 (supporting reframing of Section 706(2)(A) understanding).
204. See Beermann & Lawson, supra note 63, at 32-34 (providing argument of hard look doctrine and Vermont Yankee coexistence).
205. Id. at 33 (arguing hard look review does not prevent Congress’s intention of agency flexibility); see also Virelli, supra note 71, at 782-84 (rationalizing adequacy of hard look review and APA procedural requirements).
206. Id. at 784 (discussing role of judicial review); see also Chenery II, 332 U.S. at 209 (underscoring agency expertise). For a discussion of agency expertise and foundational administrative law precedent, see supra notes 44-50 and accompanying text.
207. Virelli, supra note 71, at 782 (offering advantages of deconstructed, less-demanding review).
208. See id. (assessing consistency).
209. See Gersen & Vermeule, supra note 26, at 1363 (finding unreasoned explanation arbitrary and capricious).
to a Vermont Yankee procedural lens clarifies the hard look review dilemma.  
That is, it is crucially different to say an agency failed to provide a reasoned explanation for departing from a procedural requirement than to say an agency’s reasoning fails in the reviewing court’s eyes.  
The latter fundamentally denigrates the body of decided administrative law.

B. Modern Pesticide Illustration: Ninth Circuit Glyphosate Litigation

The U.S. Supreme Court has yet to rule on the interaction between the hard look doctrine and pesticide registration under FIFRA. Circuit courts, however, already have remanded agency action for procedural defects in this body of environmental policy. Recently, in Natural Resources Defense Council, Inc. v. EPA (Ninth Cir. Glyphosate Litig.), the Ninth Circuit relied upon the EPA’s underlying analyses, which the EPA used to support its contention that glyphosate — the main ingredient in Roundup weedkiller — posed an unlikely risk to humans. There, advocacy groups claimed the EPA’s reasoning for issuing its temporary decision to register glyphosate constituted arbitrary and capricious action. The plaintiffs contested that the EPA’s inconsistent reasoning and lack of reasoned explanation evidenced an arbitrary and capricious decision.

The Court of Appeals for the Ninth Circuit agreed with the plaintiffs. The court emphasized the departure of the EPA’s own guidelines — particularly the EPA’s Cancer Guidelines and Cancer Paper studies — without providing reasoned explanations.

The EPA leaned on its record to support its decision, but the agency’s

(1983) (reifying principles of Vermont Yankee). For a discussion of agency deference and the intersection between scientific knowledge and policy, see supra notes 124-31 and accompanying text.

211. Virelli, supra note 71, at 729 (distinguishing reviewing court approaches).
212. Id. (clarifying distinction between approaches).
213. Id. (bolstering theoretical foundations and legal precedent).
214. See, e.g., Hardeman v. Monsanto Co., 997 F.3d 941, 950 (9th Cir. 2021), cert. denied, 142 S. Ct. 2834 (2022) (denying appeal considering interaction).
216. 38 F.4th 34, 44-45, 51-52 (9th Cir. 2022) (providing representative case).
217. Id. at 50-52 (assessing agency record).
218. Id. (agreeing inconsistencies inundated agency record). For a discussion of registration under FIFRA, see supra notes 58-65 and accompanying text.
220. Id. at 45 (finding agency contravened its own guidelines).
221. Id. (admonishing departure from settled agency practices).
decision collapsed under its own framework.\textsuperscript{222} The EPA failed to offer reasons for why it chose to selectively use studies to solely bolster its final decision, rather than to qualify or caution its findings.\textsuperscript{223} Furthermore, the EPA failed to reasonably address the uncertainty of cancer risks in its studies and instead offered wholesale, conflated explanations for differing methods of statistical inquiry.\textsuperscript{224}

The Ninth Circuit curiously abstained from incorporating \textit{State Farm} into its analysis.\textsuperscript{225} Perhaps the Ninth Circuit understood the consequences of ruling on substantive scientific policy questions because the cancellation of a major global pesticide was at stake.\textsuperscript{226} The critique of the EPA guidelines was not a seal of approval on substantive policy but rather an emphasis on abandoning internal procedure.\textsuperscript{227} The Ninth Circuit’s decision possibly reflects an attempt to avoid further muddying the impact of hard look review on a substance-driven policy area.\textsuperscript{228} Rather, the court acknowledges the \textit{procedural} requirements necessitated by \textit{Vermont Yankee}, where courts cannot impose additional procedure, such as requiring the EPA to resubmit another attempt before a ninety-day deadline.\textsuperscript{229} Thus, this recent example of hard look review on pesticide regulation illustrates a clear understanding of what it means to adhere to the APA and leading precedent.\textsuperscript{230} To that point, the role of the probing court is not to impose onerous explanations for conclusions of fact but rather to reveal where the agency has failed procedurally.\textsuperscript{231}

C. Softening Ossification

The critique of ossification in agency rulemaking seems to be overstated.\textsuperscript{232} A statistical study that accounted for ten federal agencies — including the EPA — found that the average duration

\textsuperscript{222} Id. at 45-47 (recognizing lack of reasoned explanations).
\textsuperscript{223} Id. at 47-50 (cataloguing litany of inconsistent explanations).
\textsuperscript{224} Ninth Circ. Glyphosate Litig., 38 F.4th at 47 (finding agency explanations illogical).
\textsuperscript{225} Id. at 61-62 (noting silence on \textit{State Farm} principles).
\textsuperscript{226} See id. at 50-51 (demonstrating careful focus on balancing competing interests).
\textsuperscript{227} See id. (demanding remand of agency findings).
\textsuperscript{228} See id. at 61-62 (pondering Ninth Circuit’s emphasis on procedure).
\textsuperscript{229} Ninth Circ. Glyphosate Litig., 38 F.4th at 61, n.20 (accepting delegated authority afforded by FIFRA and APA).
\textsuperscript{230} Admin. Resol. of Sci. Pol’y, supra note 36, at 750 (positing judicial review does not reveal unequivocal support of agency decisions).
\textsuperscript{231} Id. (attributing excessive policy explanations as impossible burden on agencies).
\textsuperscript{232} O’Connell, supra note 74, at 964-65 (translating statistical data to reach conclusion).
of completed rulemaking is under two years.\textsuperscript{233} Though not determinative of the entire debate, the study seeks to refocus the conversation on the many other factors agencies calculate when creating rules.\textsuperscript{234} The return to the procedural spirit of \textit{Vermont Yankee} and increased deference to agencies allows for more opportunities to innovate solutions and adopt the policy preferences of a duly elected presidential administration.\textsuperscript{235} The movement to facilitate increased judicial oversight will only harden the creation of modern policies — regardless of policy preferences or presidential administration.\textsuperscript{236} Indeed, the constant explanation of agency action produces enormous transaction costs and defeats the entire purpose of agency expertise.\textsuperscript{237}

V. \textbf{PESTS A\textit{SI}DE: THE IMPACT OF A MORE DEFERENTIAL ADMINISTRATIVE \textit{STATE} ON ENVIRONMENTAL PESTICIDE POLICY}

A return to \textit{Vermont Yankee} procedure and increased deference preserves agency competence and results in developing high-quality rules for public benefit and protection.\textsuperscript{238} Additionally, a more deferential and less demanding view of hard look review generates more room for agencies to reform and experiment.\textsuperscript{239} As noted previously, the role of agency expertise continues to contribute to regulations affecting public policy, especially at the frontiers of environmental policy.\textsuperscript{240} The key to generating high-quality, robust regulations, therefore, is allowing agencies to draw upon complex scientific areas of inquiry, including toxicology and epidemiology, to evaluate compliance with statutes like \textit{FIFRA}.\textsuperscript{241} In its advent, proponents of the APA saw administrative agencies as instruments equipped with subject-matter expertise to respond to specific problems — a

\textsuperscript{233} \textit{Id.} at 964 (supporting proposition that administrative state lacks ossification).

\textsuperscript{234} \textit{See id.} at 963-65 (elaborating on costs and benefits of agency rulemaking).


\textsuperscript{236} \textit{Id.} at 10 (acknowledging potentials for increased regulatory procedures).

\textsuperscript{237} \textit{See O’Connell, supra} note 74, at 908 (offering disadvantages of excessive agency transaction costs).

\textsuperscript{238} \textit{See Brooks, supra} note 24, at 274-75 (calling for deferential approach to informal rulemaking).

\textsuperscript{239} Gersen & Vermeule, \textit{supra} note 26, at 1394-95 (underscoring best position of agencies in rulemaking).

\textsuperscript{240} \textit{See Failure Understand Expertise Admin. L., supra} note 145, at 1098-99 (highlighting relationship between agency expertise and public policymaking).

\textsuperscript{241} \textit{See id.} at 1105-08 (understanding role of agency expertise in rule promulgation).
unique advantage over the prolonged legislative process. Today, fact-finding and uncertainty have developed a more complicated relationship, but this relationship can only be tempered by “comparative epistemic competence.” Moreover, the APA emphasizes the fact-finding role of agencies, in which their institutional expertise and competence place them in the best position to promulgate regulation. Similarly, other bodies, like the judiciary and Congress, possess general rather than technical expertise. Thus, despite the limitations and imperfect conditions of rulemaking, only agencies furnish the wherewithal to evaluate questions at the frontiers of science, questions about the adverse impact on the environment, and questions about the carcinogenic potential of pesticides.

Yet, agencies are not immune from critiques of pandering to private commercial interests or contributing to environmental injustice. The Ninth Circuit even stressed how the nationwide acreage of glyphosate use spans three times the size of California. In fact, advocates and environmentalists alike frequently criticize the EPA. Nevertheless, because the EPA may be its own problem, it is simultaneously its own solution. Reform is a slow and laborious process, but the EPA’s expertise and competence are vital to monitoring its final decisions.

The EPA is the same body with the capability — and statutory power — to innovate and implement policies that expressly acknowledge disparities informed by class, race, and other socioeconomic factors. Moreover, just as legal precedent supplies agencies with tools in deferred statutory interpretation, the EPA can use existing tools to make sure that the EPA’s expertise is put to good use in achieving environmental justice.

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242. See Elias, supra note 9, at 208 (expressing effectiveness of agency rulemaking).
244. See id. (reiterating expertise of agencies).
245. See Virelli, supra note 71, at 748 (suggesting methods courts may utilize to reduce their lack of technical expertise).
246. Vermeule, supra note 39, at 2265-66 (noting tradeoffs); Gersen & Vermeule, supra note 26, at 1357 (qualifying non-ideal decision-making circumstances that place limitations on agency rationality).
247. Donley et al., supra note 2, at 3-5, 9-11 (denoting examples of environmental injustice).
249. See, e.g., Glenna & Bruce, supra note 6, at 3, 7-8 (chastising role of EPA in perpetuating environmental injustice).
251. Failure Understand Expertise Admin. L., supra note 145, at 1115-18 (entrusting agency expertise).
252. Id. at 1118 (advocating for agency expertise).
statutes to promulgate new policies that acknowledge disparities. For example, the EPA possesses the institutional expertise under its registration authority to mandate that pesticide manufacturers provide warning labels in other languages and to assess the associated costs and benefits. In addition, FIFRA’s existing language comports with the EPA’s expertise to facilitate ways to monitor and test the disproportionate impact of pesticides on low-income groups and agricultural workers. Further, reformers call for the EPA to cooperate with third-party auditors to assess the impact of capture in agency rulemaking. Congress tasked the EPA with the daunting task of reconciling conflicting scientific explanations, empirical methodologies, and dueling subject-matter experts. As such, more deference produces a pragmatic solution that allows agencies to resolve complex issues through a robust and discursive process.

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254. See Donley et al., supra note 2, at 16-18 (proffering alternatives). According to one statistic, California’s eight most impoverished counties — with majority Hispanic populations — accounted for over half of the state’s glyphosate use. Id. at 9-10 (including statistical analyses of overexposure to marginalized communities).

255. Id. at 16-18 (emphasizing EPA’s role in reform).

256. Id. (calling for shifts in pesticide industry culture).

257. Failure Understand Expertise Admin. L., supra note 145, at 1115-18 (endorsing role of agencies in public policy).

258. See id. (championing vital role of agency expertise in problem solving and public policy).

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