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Outcome, Procedure, and Process: Agency Duties of Explanation for Legal Conclusions

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OUTCOME, PROCEDURE AND PROCESS: AGENCY DUTIES OF EXPLANATION FOR LEGAL CONCLUSIONS

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The so-called *Chevron* doctrine,[1] which requires reviewing courts to accept all reasonable agency interpretations of statutes that the agency administers,[2] is one of the most important doctrines in modern federal administrative law. Under the now-familiar two-step formulation enunciated by the *Chevron* court, if Congress "has directly spoken to the precise question at issue . . . , that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[3] If the statute is ambiguous,

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1. The doctrine derives its name from Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). The name is misleading, as the *Chevron* doctrine actually has very little to do with the *Chevron* decision—but that is a story for another time.

2. *Id.* at 842-43. Agencies do not *administer* every statute that they must *interpret* and *apply*. The word "administer" in this context is a term of art that the courts have not yet defined with precision. *See* Gary Lawson, *Proving the Law*, 86 NW. U. L. REV. 859, 884 n.78 (1992).

3. *Chevron*, 467 U.S. at 842-43.

however, the court must accept any permissible, or reasonable,[4] interpretation put forth by the agency.[5] Observers of modern administrative law know that most of the action in *Chevron* cases is focused on step one. If the reviewing court finds the relevant statute ambiguous, the agency's interpretation is almost always upheld at step two, with little discussion by the court.[6]

Professor Mark Seidenfeld has recently argued that, in *Chevron* cases, reviewing courts should significantly expand their presently perfunctory step-two analyses.[7] Under Professor Seidenfeld's proposal, courts at *Chevron* step two would not merely ask whether the agency's interpretation of a statute objectively bears some plausible relationship to the statute's meaning, but would also require agencies to proffer reasoned

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4. The *Chevron* decision unhelpfully spoke only of "permissible" agency interpretations, but subsequent decisions have clarified that "permissible" in this context means "reasonable." *See, e.g.*, Pauley v. Bethenergy Mines, Inc., 501 U.S. 680, 699 (1991).

5. *Chevron*, 467 U.S. at 843-44. The *Chevron* test can be formulated more simply as a one-step inquiry that asks whether the agency interpretation is reasonable. This one-step test would reach exactly the same results as the current two-step formulation, but with less room for misunderstanding, because an interpretation that is inconsistent with the clear meaning of the relevant statute is ipso facto unreasonable. *See* Lawson, *supra* note 2, at 884 n.78; Panel Discussion, *Developments in Judicial Review with Emphasis on the Concepts of Standing and Deference to the Agency*, 4 ADMIN. L.J. 113, 123-26 (1990) (comments of the Honorable Stephen F. Williams).

6. *See* Mark Seidenfeld, *A Syncopated* Chevron: *Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV. 83, 96 (1994) ("Regardless of whether a reviewing court is deferential or active, once it reaches step two it rarely reverses an agency interpretation as unreasonable."). Agencies do occasionally lose at step two, *see, e.g.*, Whitecliff, Inc. v. Shalala, 20 F.3d 488, 493-94 (D.C. Cir. 1994); Abbott Lab. v. Young, 920 F.2d 984, 988 (D.C. Cir. 1990); Associated Gas Distribs. v. Federal Energy Regulatory Comm'n, 899 F.2d 1250, 1261 (D.C. Cir. 1990), but such decisions are relatively rare. Not all judges are happy with this state of affairs. *See, e.g.*, Natural Resources Defense Council, Inc. v. Reilly, 976 F.2d 36, 41-42 (D.C. Cir. 1992) (Silberman, J., concurring) ("It is sometimes thought . . . that if the statutory language is ambiguous, affirmance of the agency's interpretation is a foregone conclusion. I believe that notion misreads the 'plain language' of the *Chevron* opinion (if I may be pardoned the pun).").

7. *See* Seidenfeld, *supra* note 6.

justifications for their chosen interpretations.[8] In other words, according to Professor Seidenfeld, courts should subject agency interpretations of statutes to a review that is analogous to "hard look" review, which has been a staple of judicial review of federal agency policymaking for the past quarter-century.[9]

Professor Seidenfeld defends his proposal primarily on grounds of political theory.[10] Regardless of whether one finds that defense persuasive (and I do not), there is a much more mundane reason to take Professor Seidenfeld's proposal seriously: his proposal is already the law and has been the law, at least in theory, for several decades. Well-settled principles of administrative review plainly require agencies to provide reasoned explanations for their legal interpretations, in almost precisely the fashion that Professor Seidenfeld desires.[11]

Nonetheless, Professor Seidenfeld is correct that courts generally have not enforced, or even acknowledged, the requirement that agencies explain the bases for their legal conclusions. This gap between theory and practice results from the failure of courts and scholars to consider carefully some very

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8. As Professor Seidenfeld put it:

> Thus, in reviewing an agency's interpretation, courts should require the agency to identify the concerns that the statute addresses and explain how the agency's interpretation took those concerns into account. In addition, the agency should explain why it emphasized certain interests instead of others. In other words, the agency must reveal what led it to balance the statutory aims as it did. The agency should also respond to any likely contentions that its interpretation will have deleterious implications. In short, to satisfy the second step of the syncopated *Chevron*, the agency should explain why its interpretation is good policy in light of the purposes and concerns underlying the statutory scheme.

Id. at 129.

9. *Id.* at 128-29. For a short discussion of "hard look" review, see *infra* text accompanying notes 40-43.

10. Professor Seidenfeld argues that *Chevron* deference is grounded in a pluralistic political theory, Seidenfeld, *supra* note 6, at 94-103, that is descriptively and normatively inferior to a political theory that emphasizes republican notions of deliberative democracy. *Id.* at 125-27. As Professor Seidenfeld straightforwardly put it, "[d]eliberative democratic theory suggests a revamping of *Chevron*." *Id.* at 138.

11. *See infra* Part II.

elementary aspects of scope-of-review doctrine. Participants in and observers of the federal administrative scene have not adequately distinguished among judicial review of the *outcome* of the agency proceeding, the *procedures* employed by the agency in reaching that outcome, and the *process of decisionmaking*, or *chain of reasoning*, by which the agency reached its conclusions. Accordingly, Part I of this article discusses this basic but widely misunderstood distinction among outcome, procedure and process in the context of contemporary law governing scope of review of agency action. Part II draws on this discussion to demonstrate that current doctrine obliges courts to require agencies to provide reasoned explanations for their legal conclusions. Part III then discusses in detail a recent opinion from the D.C. Circuit[12] that reflects the court's recognition of this obligation. This decision may herald a long-overdue merger of theory and practice regarding judicial review of agency legal conclusions.

I. OUTCOME, PROCEDURE AND PROCESS

A court reviewing an agency decision can evaluate at least three aspects of the decision: the agency's decisionmaking *outcome*, the agency's decisionmaking *procedure*, and the agency's decisionmaking *process*. A defect in the outcome, the procedure or the process can be an independently sufficient ground to prevent affirmance of the agency decision.[13]

A classic example of an outcome test is the "substantial evidence" test used to review factual conclusions in formal agency proceedings.[14] Whatever may be the appropriate quan-

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12. National Ass'n of Regulatory Util. Comm'rs v. ICC, 41 F.3d 721 (D.C. Cir. 1994).

13. Such defects "prevent affirmance" rather than "require reversal," because errors in agency proceedings often call for a remand to the agency rather than an outright reversal.

14. *See* 5 U.S.C. § 706(2)(E) (1994) ("The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . unsupported by substantial evidence 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 . . . ."). Organic statutes can also prescribe a "substantial evidence" test for factual conclusions in informal proceedings. *See, e.g.*, Association of Data Processing Serv. Orgs., Inc. v.

tum of evidence needed to satisfy the substantial evidence test,[15] application of the test does not require one to know anything about the conclusion under review *other than the conclusion itself*. A judge applying the substantial evidence test need not know *how* or *why* the agency generated the conclusion; rather, the judge need only consider whether that conclusion satisfies a certain threshold of consistency with the record.[16] The conclusion either has the requisite "fit" with the record evidence or it does not. The substantial evidence test judges the *outcome* of the agency proceeding, not the methods by which that outcome was generated.

Although the "how" and "why" of the agency's factual conclusions are irrelevant to the substantial evidence test, they are not necessarily irrelevant to the judicial review process. Suppose that a judge determines, upon examination of an agency factual conclusion and a specified record, that the conclusion has the requisite "fit" with that record to satisfy the substantial evidence test (or any other applicable outcome test). Further suppose that the judge concludes that the agency, in the course of reaching its conclusion, failed to provide a legally required public hearing. The agency decision will be reversed or

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Board of Governors of the Fed. Reserve Sys., 745 F.2d 677, 682-83 (D.C. Cir. 1984) (containing dictum that construes 12 U.S.C. § 1848 (1994) to require substantial evidence review of the Board's factual conclusions in informal rulemakings).

15. No single verbal formula expresses the quantum of evidence needed to satisfy the substantial evidence test. Based on the Supreme Court's articulations of the standard, *see* Consolo v. Federal Maritime Comm'n, 383 U.S. 607 (1966); Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951), and the lower courts' day-to-day application of the standard, one can fairly say that the standard is less deferential than the standard for review of jury factfinding but more deferential than the "clearly erroneous" test for review of factfinding by federal judges in bench trials.

16. Under the Administrative Procedure Act an agency factual conclusion in a formal proceeding must be supported entirely by material in the closed, historical record of the proceeding. 5 U.S.C. § 556(e) (1994) ("The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision . . . ."). A substantial evidence review under an organic statute may allow a factual conclusion to be supported by evidence outside a closed record, but the body of material to which the agency conclusion must conform must somehow be defined.

remanded, not because the outcome is unsupported by substantial evidence, but because the decision is *procedurally* defective. Procedural error—the failure to jump through all of the hoops prescribed by law—is a distinct form of error that is independent of the substantive merits of the agency's outcome. Outcome tests focus on *what* the agency concluded, while procedural tests focus on *how* the agency reached and issued its conclusion. A substantively flawless outcome can fail a procedural test, and a procedurally flawless decision can fail an outcome test.

Suppose now that an agency factual conclusion satisfies the relevant outcome and procedural tests, but the agency reached its conclusion by consulting astrological charts. While the agency's outcome may correspond to the record evidence closely enough to satisfy the substantial evidence or other applicable outcome test, and the agency may have complied with every legally required procedure, the reviewing court will still reject the decision. The law independently requires that the agency's decisionmaking *process*—the chain of reasoning employed by the agency to reach its conclusion once all applicable procedures have been followed—satisfy a minimum standard of rationality. Process tests, which perhaps should be called *reasoning process* or *decisionmaking process* tests to distinguish them clearly from *procedural* tests, concern *why* the agency reached the conclusion that it did.

The Administrative Procedure Act requires reviewing courts to reject agency decisions that are, inter alia, "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[17] In some contexts, this provision serves as an outcome test; it requires, for example, that an adequate quantum of evidence support factual conclusions in informal proceedings,[18] to which the substantial evidence test generally does not apply. It can also serve as a source of *procedural requirements* if an agency's failure to afford to a party procedures that are permitted, but not otherwise required, by law would be "arbitrary," "capricious" or "an abuse of discretion."[19] Finally,

17. 5 U.S.C. § 706(2)(A) (1994).

18. *See Association of Data Processing Serv. Orgs., Inc.*, 745 F.2d at 683 (stating that "the substantial evidence test and the arbitrary and capricious test are one and the same").

19. Theoretically, a procedure that is not otherwise legally required

the "arbitrary or capricious" test regulates an agency's *decisionmaking process* by ensuring that the agency reaches its conclusions through a rational decisionmaking mechanism.[20] Astrological divination is not a rational decisionmaking process, and inferences from planetary or stellar positions generally are not rational reasons for adopting a conclusion.[21] Even if the agency's astrological speculations coincidentally yield an outcome that passes the relevant outcome test, the agency decision cannot stand because the agency is obliged to reach its conclusions through a rational reasoning process.

At a minimum, the "arbitrary or capricious" test prohibits decisionmaking processes that are starkly irrational, such as reliance on astrology. At a maximum, it imposes a far more rigorous requirement of explanation. Whenever an agency has legal discretion, the "arbitrary or capricious" test requires the agency to exercise that discretion rationally. Where such discretion involves an issue of policy significance, well-settled principles of administrative review typically impose a substantial duty of explanation on the agency. In the words of the court that coined the phrase "hard look," an agency must "articulate with reasonable clarity its reasons for decision, and identify the significance of the crucial facts."[22]

An example will illustrate how this modern, process-oriented

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might be so essential to a proceeding that an agency's failure to provide that procedure voluntarily would be "arbitrary," "capricious" or "an abuse of discretion." Such occasions would be extremely rare. *See* Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 543 (1978) (asserting that agencies are free to fashion their own procedures "[a]bsent . . . extremely compelling circumstances").

20. *See* Motor Vehicle Mfrs. Ass'n v. Farm Mutual Auto. Ins. Co., 463 U.S. 29, 42-43 (1983) (describing the role of rationality in reviewing an agency's decisionmaking process).

21. For a list of sources critically examining the evidentiary and theoretical basis of astrological claims, see Gary Lawson, *AIDS, Astrology, and* Arline: *Towards a Causal Interpretation of Section 504*, 17 HOFSTRA L. REV. 237, 266 n.130 (1989).

22. Greater Boston Television Corp. v. FCC, 444 F.2d 841, 851 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971). *See also Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43 ("[T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" (quoting Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1963))).

review operates. Consider the issue in *Industrial Union Department, AFL-CIO v. American Petroleum Institute*,[23] shorn of its obvious constitutional overtones.[24] The relevant statute requires the Secretary of Labor to promulgate standards for workplace exposure to toxic substances

> which most adequately assure[], to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standards for the period of his working life.[25]

Assume that nothing in the statute requires that a toxic substance pose a *significant* risk to the health of employees before the agency can lawfully set standards for that substance[26] and that no issue of the feasibility of any agency standard is presented.[27] Assume further that the agency has overwhelming factual evidence that very high doses of a fictional toxic substance—call it *zenbene*—are associated with blood disorders. The agency also has weaker, but nonetheless substantial, evidence that high doses of *zenbene* are associated with leukemia. The agency, however, has no reliable evidence concerning the health effects of *zenbene* at the low levels of exposure that are typical in workplaces. Thus, many different conclusions about the health effects of low-level *zenbene* exposure are equally consistent with the available factual data. The agency must nonetheless choose a standard to impose on low-level *zenbene*

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23. 448 U.S. 607 (1980).

24. As we shall see, the constitutional problems cannot be entirely avoided. *See infra* notes 32-33 and accompanying text.

25. 29 U.S.C. § 655(b)(5) (1994).

26. This stipulation solves the problem that worried the plurality in *Industrial Union*. *See* 448 U.S. at 639-41 (concluding in a plurality opinion that the OSH Act authorizes regulation only of "significant risks of harm").

27. This stipulation removes the problem that prompted then-Justice Rehnquist to write separately in *Industrial Union* and in the subsequent *American Textile* case. *See id.* at 671 (Rehnquist, J., concurring) (concluding that § 655(b)(5)'s feasibility requirement renders the statute unconstitutionally vague); American Textile Mfrs. Inst., Inc. v. Donovan, 452 U.S. 490, 543 (1981) (Rehnquist, J., dissenting) (same).

exposure.

It is possible that health risks at high levels of *zenbene* exposure signal health risks at low levels of exposure, so that the dose-response curve for *zenbene* will always show negative health effects at positive exposure levels. It is also possible, however, that below a certain threshold *zenbene* exposure is harmless, so that no inference about low-level exposure can be drawn from evidence concerning high-level exposure. It is even possible that low-level exposure to *zenbene* is affirmatively *beneficial*. Numerous substances are harmful at high levels of exposure but beneficial at lower levels: Vitamin A is certainly one such substance, and radiation is probably another.[28] If, as we have assumed, the agency does not have any theoretical or factual grounds on which to base a conclusion about the shape of *zenbene*'s dose-response curve at low exposure levels, then no scientific method can determine which standard will "most adequately assure[] . . . , on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standards for the period of his working life."[29] Nor can a standard be chosen on the basis of some theory of risk aversion. The question is not whether employees should receive the maximal possible protection, as the statute already mandates such a goal, but rather which standard will provide such maximal protection. A rigorous standard that reduces *zenbene* exposure to zero or near-zero fails to protect employee health best if *zenbene* behaves like Vitamin A or radiation. In that instance, the best standard may well be one that *requires* workplaces to ensure some low-level exposure to *zenbene*.

The agency, in short, has no scientific way to demonstrate that any single outcome is the only, or even the best, outcome under the terms of the statute. The agency must therefore choose its standard based on considerations external to the evidence and the statute, such as administrative concerns or (assuming that the statute permits such considerations) cost-

28. The phenomenon by which low-level doses of radiation promote health is known as *hormesis*.

29. As required by 29 U.S.C. § 655(b)(5) (1994).

benefit analysis.

A court reviewing the agency's *zenbene* standard faces the same problems as did the agency. The court by hypothesis has no better ground for selecting an appropriate dose-response curve than does the agency. An outcome test in this context is therefore of little value.[30] If we assume that the agency provides all procedures required by law, the agency has also satisfied all applicable procedural tests. Nonetheless, the agency must somehow choose from among the range of available standards, on the basis of something like the prudential concerns suggested above, and its choice must not be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[31]

A reviewing court in this situation has essentially four options. First, it could say that, because one cannot evaluate the agency's choice of a standard by reference either to objective facts or the organic statute, the choice of a standard is essentially a *legislative* act, and the statute is therefore an unconstitutional delegation of legislative power. This is the correct answer as a matter of first principles,[32] but it is not available

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30. Conceivably, one could say that "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof," 5 U.S.C. § 556(d) (1994), and that the agency cannot lawfully promulgate a standard because it cannot affirmatively justify any standard in light of the available evidence. This makes no sense, however, in a context in which the organic statute requires the agency to choose *some* standard.

31. *See supra* text accompanying notes 17-20.

32. No precise formula can determine whether a statute grants an agency so much policymaking discretion that the statute amounts to an unconstitutional delegation of legislative power. *See* Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1239 (1994) [hereinafter Lawson, *The Rise and Rise*] (suggesting, in all seriousness, that the Constitution's nondelegation principle provides that "Congress must make whatever policy decisions are sufficiently important to the statutory scheme at issue so that Congress must make them"); *cf.* MARTIN H. REDISH, THE CONSTITUTION AS POLITICAL STRUCTURE 136 (1995) (valid statutes must evince "some meaningful level of normative political commitment by the enacting legislators, thus enabling the electorate to judge its representatives."). *See generally* Gary Lawson, *Who Legislates?*, 1995 PUB. INT. L. REV. 147 (discussing in more detail the nature, source and application of the Federal Constitution's nondelegation principle). Determining the assumptions to be made about the shape of

to a court, especially a lower court, as a matter of current doctrine.[33] In the modern administrative state, agencies routinely make important policy decisions that cannot be reduced to traditional questions of fact or law.[34]

Second, the reviewing court could provide only cursory review to an agency's legislative-like policy judgments, such as the choice of a *zenbene* standard in the face of genuine factual uncertainty and statutory silence. It could choose, in other words, to uphold any agency decision that is not completely ridiculous on its face. In terms of process review, the court would forbid the agency to base its decision on astrology or literally to pull a standard out of a hat, but beyond this requirement of minimum rationality, the courts would not intervene. When enacted in 1946, the Administrative Procedure Act ("APA") probably contemplated this highly deferential form of review for many agency decisions. The APA specifies a number of outcome tests[35] and (in conjunction with organic statutes) procedural tests,[36] but the only real constraint imposed by the APA on the agency's decisionmaking process is that the process not be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[37] This very strong statutory language, when untainted by modern understandings, suggests an extraordinary level of deference to agencies. This highly deferential approach, however, does not fit well with the modern conception of the judicial role in administrative review. However correct as an original matter, such an approach is no more thinkable today than is a revival of the nondelegation

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dose-response curves in the face of scientific uncertainty, when the decision can have enormous consequences in terms of lives and dollars, is not close to the line: it is a decision that Congress must make.

33. *See* Lawson, *The Rise and Rise*, *supra* note 32, at 1240 (noting that the Supreme Court has not invalidated a statute on non-delegation grounds since 1935).

34. For an illuminating exploration of the relationship between the delegation phenomenon and statutory interpretation problems in the modern administrative state, see Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452 (1989).

35. *See* 5 U.S.C. § 706(2) (1994).

36. *See* 5 U.S.C. §§ 553-57 (1994).

37. 5 U.S.C. § 706(2)(A) (1994).

doctrine.[38]

Third, courts could simply determine the appropriate policy choices themselves. This option, while possible, is also inconsistent with commonly held understandings about the judicial role in administrative review and is unlikely to be embraced openly.[39] Modern understandings require a method of review that allows for an extensive judicial check on agency behavior but that does not permit the court simply to replace the agency's policy judgment with its own.

The fourth option, which modern courts have embraced with vigor, is "hard look" review, under which the court ensures that the agency has taken a "hard look" at—has thought carefully about—the relevant problem.[40] The best statement of what such review requires when the agency has decided a question on which the facts and the law are silent is still found in the D.C. Circuit's 1974 opinion in *Industrial Union Department, AFL-CIO v. Hodgson*:[41]

> What we are entitled to at all events is a careful identification by the Secretary, when his proposed standards are challenged, of the reasons why he chooses to follow one course rather than another. Where that choice purports to be based on the existence of certain determinable facts, the Secretary must, in form as well as substance, find those facts from evidence in the record. By the same token, when the Secretary is obliged to make policy judgments where no factual certainties exist or where facts alone do not provide the answer, he should so state and go on to identify the considerations he found persuasive.[42]

The agency must demonstrate *awareness* and *candor*. It must indicate that it knows that it is dealing with factual and statutory uncertainty and that an answer is therefore not dictated by any evidentiary or interpretative considerations. It must then identify the nonfactual and nonstatutory considerations

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38. *See supra* notes 32-34 and accompanying text.

39. *See, e.g., Motor Vehicles Mfrs. Ass'n of the United States*, 463 U.S. at 43 (noting that "a court is not to substitute its judgment for that of the agency").

40. *See supra* note 22 and accompanying text.

41. 499 F.2d 467 (D.C. Cir. 1974).

42. *Id.* at 475-76.

upon which it chooses to rely and the reasons why it selected those considerations rather than others. The agency should prevail, on this model, so long as those considerations and the reasons that led to them bear some plausible relation to the agency's mission.[43]

Accordingly, to satisfy the "hard look" requirement, the agency charged with setting *zenbene* standards in the above example would have to explain its decisionmaking process in something like the following terms:

> The governing statute tells us to set the *zenbene* standard that best promotes worker safety. We cannot identify such a standard without knowing the shape of the dose-response curve for *zenbene* at low levels of exposure. We have no data concerning such exposure and no theoretical reason for choosing any one of the infinite shapes that a dose-response curve might take. Accordingly, a wide range of standards, corresponding to the many possible dose-response curves that fit the available data, are supportable under the statute and facts before us. Nonetheless, we are compelled by statute to choose a standard. We cannot base that choice directly on evidence or statutory command and must therefore rely on some combination of prudential or administrative concerns. These are not the considerations upon which we would rely in an ideal world, but this is not an ideal world. We considered the problem exhaustively using whatever tools were at hand and now offer the prudential and administrative concerns that we ultimately find decisive.

II. *CHEVRON* REVIEW VERSUS PROCESS REVIEW

The *Chevron* test is an outcome test. *Chevron* review judges the relationship between an agency's interpretation of a statute and the court's understanding of the statute's meaning. The agency interpretation must stand if it is a reasonable fit

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43. Of course, nothing guarantees that courts applying this model of review will stay within its confines. Courts can defer too little, by substituting their policy judgment for the agency's, or too much, by rubber-stamping agency decisions without serious analysis. Any standard can be misapplied intentionally or unintentionally, however, and nothing suggests that the "hard look" doctrine is much worse than other standards in this regard.

with the statute, even if it is not, in the court's judgment, an ideal fit.[44] *Chevron* review is thus analogous to the substantial evidence test. The agency's legal conclusion under *Chevron* is analogous to the agency's factual conclusion under the substantial evidence test, and the court's understanding of the statute's meaning in a *Chevron* case is analogous to the record evidence in a substantial evidence case. With both *Chevron* and the substantial evidence test, the question is whether the agency's decision satisfies some requisite degree of fit with a specified body of material.[45] Under *Chevron*, as is true under the substantial evidence test, the reviewing court need not know *how* or *why* the agency chose the particular interpretation under review. *Chevron* is concerned solely with whether that interpretation, however reached, is a reasonable interpretation of the statute.

Of course, an agency can satisfy the *Chevron* test and still lose the case. If, for example, the agency has failed to provide a legally required hearing, its decision will fail a procedural test even though it has satisfied the relevant outcome test. Further, if the agency reaches its interpretation through a decisionmaking process that is "arbitrary" or "capricious," the agency decision cannot stand even if the interpretation itself is substantively reasonable under *Chevron*.

This latter point is simple, indeed obvious, but often overlooked: even when the agency has chosen an interpretation of a statute that is reasonable under *Chevron*, firmly settled principles of administrative review independently require a careful examination of the *process* or *method* by which the agency formulated its reasonable interpretation.[46] If an agency construes a statute by putting the possible interpretations into a hat and pulling one out at random, the agency decision cannot stand, *even if the agency's conclusion happens to be substantively reasonable*. The parties are entitled to have the agency reach

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44. *Chevron*, 467 U.S. at 844.

45. The degree of fit required by *Chevron* may not mirror the degree of fit required by the substantial evidence test. The precise degree to which agency interpretations must fit the statute under *Chevron* is not important at this point, though it will become important later in the analysis. *See infra* text accompanying notes 51-54.

46. *See supra* note 20 and accompanying text.

a substantively reasonable conclusion through a rational, nonarbitrary method of reasoning. This is exactly the reasoned decisionmaking requirement that Professor Seidenfeld hopes to graft onto *Chevron* review. Such grafting is unnecessary, however, because the requirement is already part of the law—not through *Chevron* as such, but through the requirement that agency decisions not be arbitrary or capricious.

A moment's reflection will indicate how arbitrary or capricious review supplements *Chevron* review. *Chevron* review does not require the agency to select the best possible interpretation of a statute, but only an interpretation that is within a zone of reasonableness. Consequently, many interpretations of a single statute often will pass the *Chevron* test. The agency can choose any of those permissible interpretations and survive *Chevron* review. The agency's selection of one of the permissible interpretations, however, does not end the judicial review process. The parties are still entitled to ask the agency why it chose that interpretation rather than one of the other permissible interpretations. The agency is not entitled to choose a substantively permissible interpretation for an impermissible—that is, arbitrary or capricious—reason. Under the general requirement that agencies justify their exercises of discretion, the agency must explain how it made its choice from among permissible alternatives. The agency's interpretation must actually be reasonable to survive *Chevron*'s outcome test and must have been chosen by reasonable means to satisfy the arbitrary or capricious standard's process test.

The crucial question is what kind of explanation the agency must provide when it chooses from among permissible interpretations of a statute. The precise scope of the explanation requirement under the arbitrary or capricious test varies with the context. The "hard look" requirement of extensive explanation is generally associated with decisions involving significant questions of policy. Many other areas involving agency discretion do not require "hard look" review. For example, the decision whether to reopen a matter in the face of new evidence or changed circumstances[47] or the decision whether to grant a

47. *See* ICC v. Brotherhood of Locomotive Eng'rs, 482 U.S. 270, 278 (1987) (stating that courts should overturn an agency's refusal to reopen

petition to initiate a rulemaking[48] call for only minimal judicial scrutiny under current law. Where along this spectrum does the choice of an interpretation from among a range of permissible interpretations fall, and what is the character of the explanation that the agency must provide?

The answers depend upon the nature of the statute that the agency is interpreting. If all statutes lent themselves to traditional statutory analysis, meaning that a sufficiently careful study of the statute's text, structure, purposes and (if one believes in such things) legislative history would always yield a determinate outcome, then the only acceptable reason for an agency to choose an interpretation would be that the agency sincerely believed that interpretation to be the best among the available alternatives.[49] It would be starkly irrational for an agency to say, "We believe that Congress has instructed us to do X, but we think Y is better policy. We can assert that Y is at least a plausible interpretation of the statute, and therefore adopt Y even though we do not believe it is the correct one." If the agency genuinely concludes that one statutory interpretation is correct, it must choose that interpretation. Under *Chevron*, a court can affirm the agency decision even if the court believes that the interpretation is not the best available alternative. The reasons advanced by the agency for that interpretation, however, must pertain to the correctness of the interpretation.

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a proceeding only upon a showing of the "clearest abuse of discretion").

48. *See* WWHT, Inc. v. FCC, 656 F.2d 807, 809 (D.C. Cir. 1981) ("[T]he decision to institute rulemaking is one that is largely committed to the discretion of the agency, and . . . the scope of review of such a determination must, of necessity, be very narrow.").

49. Conceivably, one could require an agency's interpretation to meet some higher threshold of proof. For example, one could require an agency to believe that its interpretation is not merely the best alternative, but that it is more likely than not to be correct, or even correct beyond a reasonable doubt. A best-available-alternative test and a preponderance-of-the-evidence test can lead to different outcomes whenever a statute affords more than two possible interpretations. The standard of proof required for claims about legal meaning, however, leads very quickly to a large set of problems discussed at length elsewhere. *See* Lawson, *supra* note 2; Gary Lawson, *Proving Ownership*, 11 SOC. PHIL. & POL'Y 139 (1994).

The substantial evidence test for agency factual conclusions illustrates this point.[50] Under that test, courts must affirm agency decisions based upon factual conclusions so long as those conclusions are plausible, even if the court believes that the agency has it wrong. This test, however, does not entitle the agency to choose a wrong answer *knowingly*, simply because that answer is plausible. The substantial evidence test instructs reviewing courts to review agency outcomes generously; it does not license agencies to choose wrong answers knowingly if right ones are attainable using traditional tools of factfinding. In, for example, an unfair labor practice case in which the employer's anti-union animus is a critical issue, an agency could not reason as follows:

> Given the facts, we think that the employer probably did not act with anti-union animus. A contrary conclusion, though not the best answer, would not be ridiculous and could probably pass the substantial evidence test. We choose to find that the employer acted with anti-union animus. We so conclude not because of anything in the evidence before us, which in fact persuades us of the contrary conclusion, but because we believe that imposing liability on the employer will promote some other policy which we regard as desirable.

This explanation would fail the arbitrary or capricious test even though, by hypothesis, the agency's factual conclusion would pass the substantial evidence test. The agency must give a reasoned explanation for its factual conclusion, and the reasons must pertain to the record evidence.

Similarly, agencies must give reasoned explanations for their legal conclusions, and, where possible, those reasons must pertain to the meaning of the statute. The agency must believe that its interpretation is correct, even if the court will not require that the interpretation in fact be correct. *Chevron* instructs reviewing courts to review agency legal conclusions generously; it does not license agencies to choose wrong conclusions knowingly if right ones are attainable.

The analysis thus far assumes that agencies and courts construe statutes using traditional methods of statutory inter-

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50. *See supra* notes 14-16 and accompanying text (discussing the substantial evidence test).

pretation. It is well acknowledged, however, that much of what passes under the name of "statutory interpretation" in the modern administrative state is really naked policymaking.[51] Statutes are often too vague to be "interpreted" in any meaningful sense, and the traditional tools of interpretation will not always yield an answer. No amount of statutory interpretation, however skillful or intensive, will instruct the Occupational Safety and Health Administration ("OSHA") how to set standards for toxic substances in the workplace in the face of scientific uncertainty. In the old days, statutes that did not lend themselves to interpretation in the traditional sense would be prime candidates for invalidation as unconstitutional delegations of legislative authority.[52] In the modern world, however, invalidating such statutes is generally not a doctrinally-available option for courts.[53] Accordingly, the agency must resolve problems arising under the statute, even if the agency's best good-faith effort at traditional statutory interpretation leaves it without guidance. In these contexts, the agency actually makes policy choices when it "interprets" the statute. An agency faced with such statutory silence is in much the same position as a hypothetical OSHA faced with factual silence regarding the low-level dose-response curve for *zenbene*.[54] If the agency has a statutory mandate to establish *zenbene* standards that best promote worker safety but no factual data on which to base dose-response curves, it must set workplace exposure standards for toxic substances on the basis of nonfactual, nonscientific policy concerns. When statutes are silent and agencies are nonetheless enjoined to act, agencies must base decisions on policy concerns that are not directly dictated by the statute.

At this point, the "hard look" doctrine makes its appearance.

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51. *See, e.g.*, Richard J. Pierce, Jr., Chevron *and Its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VAND. L. REV. 301, 304 (1988) (asserting that statutory interpretation often requires an agency to resolve policy rather than legal issues).

52. *See supra* notes 32-34 and accompanying text.

53. *See* Lawson, *The Rise and the Rise*, *supra* note 32, at 1240 (noting that the Supreme Court has not invalidated a statute on nondelegation grounds since 1935).

54. *See supra* text accompanying notes 23-31 (dealing with *zenbene* hypothetical).

Modern doctrine requires agencies to explain their significant policy choices. The selection of one statutory interpretation over other possible alternative interpretations can easily qualify as a significant policy choice. In that instance, the agency must demonstrate to the parties and the reviewing court that the agency has at least carefully considered the interpretative problem, even if such consideration did not lead unambiguously to a single outcome. When the agency chooses a particular reading of the statute from among a range of possibilities, the agency is obliged to explain the decisionmaking process that underlies its choice.

Accordingly, settled modern doctrine requires the following from a court reviewing an agency interpretation of a statute that it administers:

> Ensure that the agency provided all *procedures* required by law. Then ask, pursuant to *Chevron*, if the agency's *outcome* is a reasonable "fit" with the statute. Do not require the agency's interpretation of the statute to be *correct* (as determined by whatever theory of statutory interpretation the court employs), but rather require that the conclusion be one that a reasonable person could reach. If the agency's interpretation satisfies this deferential outcome test, then ask whether the *process* by which the agency reached that conclusion was "arbitrary" or "capricious." A nonarbitrary, noncapricious agency process must at least attempt to determine the correct interpretation of the statute. Require the agency to explain how it tried to reach a conclusion using traditional tools of statutory interpretation. Generously defer to the agency's identification and application of the relevant interpretative tools, but ensure that the agency sincerely attempted to use actual interpretative tools. If, but *only* if, the agency genuinely and reasonably concludes that traditional tools of statutory interpretation are ineffective in this case, allow the agency to employ considerations of policy in resolving the matter. Review of those considerations should follow the traditional "hard look" approach: ensure that the agency identifies and articulates the factors that it considers and the assumptions that it makes; determine (with an appropriately deferential attitude) if those factors and assumptions are substantively rational; and ensure that the agency applied its articulated considerations reasonably, logically and consistently.

III. THE EMERGING UNDERSTANDING OF *CHEVRON*

Professor Seidenfeld's article is only one sign of an emerging recognition within the administrative law community of the need to consider carefully the relationship between the *Chevron* test and the arbitrary or capricious standard of review. Judge Laurence Silberman of the D.C. Circuit, for example, has expressed important thoughts on this question in a law review article as well as several opinions, at least one of which provides powerful precedential support for Professor Seidenfeld's proposal. Judge Silberman's discussion reflects his characteristic insight, but also illustrates the need for judges, lawyers and scholars carefully to distinguish outcome review from process review.

In the 1990 law review article, Judge Silberman suggested that step two of *Chevron*

> is not all that different analytically from the APA's arbitrary and capricious review. In either the second step of *Chevron* or in arbitrary and capricious review, the court often asks itself whether the agency considered and weighed the factors Congress wished the agency to bring to bear on its decision. If the agency did so, that the court would have struck the balance somewhat differently cannot be grounds to overturn the agency's action.[55]

A recent opinion authored by Judge Silberman translates this approach into practice. The opinion merits close examination for at least two reasons. First, it serves as an excellent, and rare,[56] case study of the interface between *Chevron* and arbitrary or capricious review; and second, it demonstrates that at least in some circumstances a requirement that agencies explain the basis for their legal judgments is the law in fact as

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55. Laurence H. Silberman, Chevron—*The Intersection of Law and Policy*, 58 GEO. WASH. L. REV. 821, 827-28 (1990).

56. Very few cases provide any serious discussion of step two of *Chevron*, much less a careful discussion of the relationship between step two and the arbitrary or capricious test. Indeed, the only other recent case that has come to my attention that pays substantial attention to the step two analysis was also written by Judge Silberman. *See* Whitecliff, Inc. v. Shalala, 20 F.3d 488 (D.C. Cir. 1994).

well as in theory.

In *National Ass'n of Regulatory Utility Commissioners v. ICC* ("*NARUC*"),[57] the D.C. Circuit ordered the Interstate Commerce Commission to reconsider its proposed registration scheme for interstate motor carriers.[58] Prior to 1993, states that charged registration fees to interstate motor carriers had to participate in a so-called "bingo card" program.[59] For each vehicle that engaged in interstate traffic, the carrier had to obtain a specific card that listed all of the states participating in the registration program.[60] After the carrier paid the registering state the appropriate registration fee for a specific vehicle, that state would issue a stamp to the carrier.[61] The stamp was placed on the vehicle's card in the spot corresponding to that state.[62] To check registration of a vehicle operating within the state, a participating state simply examined the vehicle's "bingo card" for a proper stamp.[63]

In 1991, Congress ordered the Commission to replace the vehicle-specific "bingo-card" system with a scheme that allowed motor carriers to pay a single fleet-wide fee to one registering state, which would then share the fee with other participating states.[64] States that receive registration fees must "issue a receipt . . . reflecting that the carrier . . . has paid fee amounts in accordance with the fee system established,"[65] and each registering carrier must keep copies of the receipt "in each of the carrier's commercial motor vehicles."[66]

One important question arising under the new statutory scheme concerned whether the states or the carriers would

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57. 41 F.3d 721 (D.C. Cir. 1994). Judge Silberman's opinion was joined by Judges Buckley and Rogers.

58. *Id.* at 723.

59. *Id.* at 724.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *See* Intermodal Surface Transportation Efficiency Act, Pub. L. No. 102-240, § 4005, 105 Stat. 1914, 2146-48 (1991) (codified at 49 U.S.C. § 11506 (1994)).

65. 49 U.S.C. § 11506(c)(2)(B)(i) (1994).

66. *Id.* at § 11506(c)(2)(B)(ii).

make copies of the registration receipts.[67] The carriers advocated a system in which they, rather than the registering states ("base states"), would make enough copies of the one official receipt to cover the fleets for which they paid fees.[68] The carriers maintained that such a system would reduce their administrative burdens and minimize delays and paperwork resulting from lost or destroyed receipt copies.[69] The states and insurance companies urged the Commission to require the base states, rather than the carriers, to issue to each carrier official copies of the registration receipt, equal to the number of vehicles for which that carrier paid a registration fee.[70] The states argued that allowing the carriers to copy receipts invited fraud, as only costly audits would ensure that carriers copied only enough receipts to cover vehicles for which fees were paid.[71] If a vehicle was checked at a roadside point, possession of a carrier-made copy of the registration receipt would prove only that the carrier had registered at least one vehicle; no immediately available method would determine whether the carrier had actually paid a registration fee for each vehicle it was currently operating.[72]

A sharply divided Commission accepted the carriers' position.[73] The Commission first noted that "[w]hile the statute does not specify who is responsible for making copies of the receipt to be kept in each commercial motor vehicle,"[74] the statute's use of the singular term "a receipt . . . suggests that the only paper document a State is permitted to issue is a single receipt."[75] The Commission also found support for its decision in the statute's legislative history. The Commission noted that

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67. *National Ass'n of Regulatory Util. Comm'rs*, 41 F.3d at 725.

68. *Id.* at 728.

69. *See id.* at 727 (discussing ICC's belief that its task was to ease the carriers' administrative burdens in obtaining copies).

70. *Id.* at 724.

71. *Id.* at 728.

72. *Id.* at 726.

73. *See* Single-State Insurance Registration, No. MC-100 (SUB-NO. 6), 1993 WL 164867, at *1 (I.C.C. May 10, 1993). The Commission vote on this question was 3-2, with the Chairman and Vice-Chairman dissenting.

74. *Id.* at *5.

75. *Id.*

> the legislative history explains that the new system is to be instituted by the Commission "in such a manner as to eliminate as much of the paperwork and other compliance burdens as possible." A system in which the base State-issued receipt can be copied and distributed by a carrier to its trucks is the least burdensome way of disseminating the copy of the receipt that must be carried in each vehicle.[76]

Although having state-issued receipts for each registered vehicle might enhance the states' ability to enforce their registration systems through roadside vehicle inspections, the Commission maintained that "such an approach would seem to go beyond Congress' intention and venture into the realm of assisting State enforcement efforts that Congress did not specifically address."[77] States could protect their registration fee revenues from carrier fraud by using information required under other regulatory schemes[78] or by using their power "individually or collectively . . . [to] audit carrier records . . . to enforce compliance with the law."[79] Finally, the Commission noted that permitting carriers to copy the receipt "would decrease burdens for carriers by eliminating delays when they add or replace vehicles and it would permit carriers more easily to replace lost or destroyed documents."[80]

The states petitioned for review of the Commission's decision on the ground that permitting carriers to copy receipts is "arbitrary and capricious because it is inconsistent with one of the evident purposes of the . . . [statute]—to preserve state revenues."[81] The states argued that the statute's requirement that each vehicle carry a copy of the carrier's registration receipt demonstrated that Congress contemplated some level of roadside enforcement of the fee requirement.[82] Further, they argued, the legislative history evinced a concern not just "to benefit the interstate carriers by eliminating unnecessary

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76. *Id.* (quoting H.R. CONF. REP. NO. 102-404, 102d Cong., 1st Sess. 440 (1991)).

77. *Id.*

78. *Id.*

79. *Id.* at *23 n.5.

80. *Id.* at *6.

81. *National Ass'n of Regulatory Util. Comm'rs*, 41 F.3d at 726.

82. *Id.* (interpreting 49 U.S.C. § 11506(c)(2)(B)(ii) (1994)).

compliance burdens,"[83] but also "to preserve revenues for the states which [sic] had participated in the bingo program."[84] If the carriers can simply make an unlimited number of copies of a single receipt, "states lose their capacity to police the number of vehicles registered by a carrier for use within their territory."[85]

The Commission responded that the statute was silent on whether the carriers or the states would make copies of the registration receipt and that the Commission's rule was a permissible interpretation of the statute under *Chevron*.[86] Thus, the petitioning states insisted that the issue was whether the Commission's decision satisfied the "arbitrary or capricious" test, while the Commission sought to frame the issue in terms of *Chevron*.

Judge Silberman's opinion saw no fundamental difference between the two characterizations of the relevant issue. His discussion is the most sophisticated (even if not entirely correct) treatment yet seen of the relationship between *Chevron* and the arbitrary or capricious test:

> Perhaps because neither the wording of the statute nor the legislative history explicitly addresses the question of the assignment of copying responsibility, petitioners frame their arguments in terms of an arbitrary and capricious challenge rather than a claim of agency misinterpretation of the statute. Yet petitioners emphasize that the "Commission's analysis of congressional intent makes no sense" — because it assumes that "Congress did not intend, or was indifferent, that the [single-state system] be enforced." Implicitly then, if not directly, petitioners are arguing as well that the Commission has impermissibly interpreted the statute (*Chevron* Step II). This is not surprising; the inquiry at the second step of *Chevron* overlaps analytically with a court's task under the Administrative Procedure Act (APA) in determining whether agency action is arbitrary and capricious (unreasonable). *See, e.g., General Am. Transp. Corp. v. ICC*, 872 F.2d 1048, 1053 (D.C. Cir. 1989) ("[T]he questions posed—has the Commission

83. H.R. REP. NO. 102-404, 102d Cong., 1st Sess. 437 (1991).
84. *Id.*
85. *National Ass'n of Regulatory Util. Comm'rs*, 41 F.3d at 726.
86. *Id.*

> adopted an impermissible construction of the Act and is its . . . policy arbitrary and capricious—are quite similar. Both questions require us to determine whether the Commission, in effecting a reconciliation of competing statutory aims, has rationally considered the factors deemed relevant by the Act."). Whether an agency action is to be judged as reasonable, in accordance with the APA's general arbitrary and capricious standard, or whether it is to be examined as a permissible interpretation of the statute *vel non* depends, at least theoretically, on the scope of the specific congressional delegation implicated . . . . [T]he more an agency purports to rely on Congress' policy choice—as set forth in specific legislation—than on the agency's generally conferred discretion, the more the question before the court is logically treated as an issue of statutory interpretation, to be judged by *Chevron* standards.[87]

On the merits, the court found it "hard to take the Commission's position seriously."[88] According to the court, the statute presented the agency with the familiar task of balancing conflicting policy objectives.[89] In this case, the agency faced the task of "reducing carrier burdens while preserving state registration revenues (the latter maintained through roadside enforcement)."[90] The court found two critical errors in the Commission's handling of that balancing problem. First, "the agency purported to find *in the statute* a legal constraint on that balancing process that is simply not there."[91] Second, although the court acknowledged that the agency may "give somewhat greater weight to the goal of easing the carriers' administrative burdens than to the competing statutory objective,"[92] relegating the states to enforcement by audit "strikes

87. *Id.* at 726-27 (citations omitted).

88. *Id.* at 728.

89. *Id.*

90. *Id.*

91. *Id.* According to the court, the statute's requirement that all vehicles carry registration receipt copies could only be designed to promote roadside enforcement by state agencies. *Id.* Therefore, the court concluded, it was "wholly artificial for the Commission to assert that for it to 'assist' state roadside enforcement would contravene congressional intent." *Id.*

92. *Id.*

us as not so much a balance of conflicting policy goals as the acceptance of one without any real consideration of the other."[93] The agency, said the court, "must explain how such an alternative could possibly substitute, under any plausible cost/benefit analysis, for the traditional—and congressionally approved—method of roadside enforcement."[94] Further, "the Commission failed . . . to explain the extent to which a carrier actually would be 'burdened' in the event a copy was lost or stolen and replacement could only be had from the registration state."[95] In sum, "[t]he Commission has . . . acted unreasonably, whether one considers the case as one involving a question of *Chevron* Step II statutory interpretation or a garden variety arbitrary and capricious review or, as we do, a case that overlaps both administrative law concepts."[96]

The court's analysis does not adequately distinguish between outcome review and process review. This primarily stems from the failure of the courts that have formulated the *Chevron* doctrine, the Supreme Court in particular, to clarify the meaning of "reasonable" or "permissible" at step two of the *Chevron* test. If *Chevron* is viewed, as it should be, as a pure outcome test, then an interpretation is "reasonable" if it conforms, with some non-minimal degree of fit, to an external standard of correct statutory interpretation. Reasonableness in that context has nothing at all to do with the agency's *explanation for* or *defense of* its interpretation; rather, review of the agency's reasoning process is left to the arbitrary or capricious test. On the other hand, if one takes the *Chevron* step two requirement of reasonableness to be a *general* requirement that subsumes both outcomes and processes, then it does indeed become very difficult to distinguish *Chevron* step two review from arbitrary or capricious review. A general requirement of reasonableness is precisely what the modern interpretation of the arbitrary or capricious test requires of every agency decision to which that test applies.[97]

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93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.*
97. A number of decisions slide, without discussion or apparent awareness, from outcome-based to process-based notions of what is "reasonable"

The distinction between an outcome test of reasonableness and a process test of reasonableness can be clarified by examining more closely the two errors in the agency decision found by the *NARUC* court. The first error concerned the agency's statement that formulating its policy with any regard at all for facilitating state enforcement efforts would contravene the statute.[98] This error can be considered in two ways. One is in terms of outcomes. One could say that even though the statute says nothing specifically about who is to copy receipts, the statute's context, history, legislative history and purposes all demonstrate that it requires some balancing of carrier and state enforcement interests. A wide range of balances, including balances that seem strongly to favor carrier interests over state interests, fall within *Chevron*'s notion of reasonable statutory interpretations; however, an interpretation that views the statute as precluding any consideration of state enforcement efforts falls outside the zone of reasonableness. Thus, applying conventional principles of statutory interpretation, one could argue that the agency has straightforwardly read into the statute a command that plainly is not present.

This error, however, is better seen as one of process that implicates the arbitrary or capricious test rather than one of outcome that implicates *Chevron*. The ultimate decision under review is the agency's decision to permit carriers to copy receipts. The primary outcome question is whether that specific decision can plausibly be justified under the statute. The agency's subsidiary construction of the statute to preclude consideration of state enforcement interests in the decisionmaking process is a *reason* for reaching the ultimate interpretation under review. If the agency had never intimated that the statute forbade consideration of state enforcement interests, a court would still have to decide whether the agency's ultimate decision to permit carriers to copy registration receipts reflects a reasonable interpretation of the relevant statute. Either the statute objectively permits such an interpretation or it does not. If it does permit such an interpreta-

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or "permissible" under step two of *Chevron*. *See, e.g.*, Continental Air Lines v. DOT, 843 F.2d 1444, 1452 (D.C. Cir. 1988); AFL-CIO v. Brock, 835 F.2d 912, 917 (D.C. Cir. 1987).

98. *National Ass'n of Regulatory Util. Comm'rs*, 41 F.3d at 728.

tion, a court could then ask whether the agency reached that permissible outcome through an impermissible reasoning process.[99] If the agency reached its conclusion because it thought that the statute forbade consideration of state enforcement interests,[100] the court would have been correct to remand to the agency for further consideration, as the statute clearly contained no such prohibition.

The second error found by the court concerned the balancing of carrier and state enforcement interests reflected in the carriers-may-copy rule.[101] Once again, one can view this issue in two ways. First, one can consider whether the particular balance struck by the agency is substantively reasonable. For this purpose, whether one views the question from the perspective of *Chevron* step two or the arbitrary or capricious test is important in a number of respects.

For one thing, substantive reasonableness under *Chevron* step two should be judged solely by reference to the organic statute under consideration, while substantive reasonableness under the arbitrary or capricious test can be judged by anything that is generally relevant to reasoned decisionmaking. Of course, with a broad enough theory of statutory interpretation, such as one that holds that statutes should always be construed to promote good public policy, any part of a system of reasoned decisionmaking becomes, by definition, part of the statutory interpretation process. If one has a more limited view of what counts as relevant for statutory interpretation, however, such as text, structure, purpose and legislative history, reasonableness under *Chevron* step two should involve a much

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99. *See supra* text accompanying notes 20-22.

100. It is not certain that the agency made such a claim. The court focused on one line in the agency opinion that said that adopting a system of state-issued receipts "would seem to go beyond Congress' intention and venture into the realm of assisting State enforcement efforts that Congress did not specifically address." *National Ass'n of Regulatory Util. Comm'rs*, 41 F.3d at 727 (citing Single-State Insurance Registration, No. MC-100 (SUB-NO. 6), 1993 WL 164867, at *5 (I.C.C. May 10, 1993)). In the context of the Commission's whole opinion, which includes explicit discussion of the impact of its proposals on state enforcement efforts, hanging dispositive weight on this one inelegant and arguably ambiguous statement is at least uncharitable.

101. *Id.* at 728.

more focused and constrained inquiry than reasonableness under the arbitrary or capricious test.

On the other hand, the standard of review for agency outcomes under the arbitrary or capricious test may be more deferential than the standard of review under *Chevron* step two. The arbitrary or capricious test authorizes courts to hold agencies to general standards of reasonableness in all aspects of their decisionmaking, including the outcomes they reach.[102] It runs counter to modern administrative law principles, however, for courts to second-guess agency outcomes directly when agencies are exercising discretion in policy-laden areas.[103] This is a major reason for the development in modern times of "hard look" review: instead of directly overturning agency outcomes, courts require agencies to give detailed explanations for their decisions and then scrutinize those explanations for completeness, coherence and consistency.[104] It would raise serious eyebrows in the administrative law world for a court openly to say, in any but the most egregious cases, "We think the agency incorrectly balanced the various factors involved and thus reached a wrong outcome." This is not to say that courts do not in fact second-guess agency outcomes in this fashion; of course, they do it all the time. Modern doctrine, however, discourages judges and lawyers from openly talking in terms of judicial reversal of agency policy outcomes. Instead, they translate complaints about the substance of agency decisionmaking into complaints about the agency's procedures or decisionmaking process. Rather than saying, "the agency reached the wrong result," lawyers and judges typically say, "the agency failed to provide an adequate explanation for its results and thereby failed to demonstrate that it engaged in reasoned decisionmaking." Accordingly, formal doctrine, if not actual practice, confines outcome review of policy-oriented decisions under the arbitrary or capricious test to overturning only truly outrageous outcomes.

The reasonableness test under step two of *Chevron* is not quite so generous. Although no decision or set of decisions has

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102. *See supra* notes 17-20 and accompanying text.
103. *See supra* notes 32-34 and accompanying text.
104. *See supra* notes 40-43 and accompanying text.

ever clearly defined a "reasonable" interpretation of a statute, observers of and participants in the administrative process have generally assumed that reasonableness review under step two is roughly comparable, in intensity, to review of factual conclusions under the substantial evidence test.[105] That standard is highly deferential, but it authorizes courts to reject far more agency outcomes than does a standard that only permits rejection of truly outrageous outcomes.

In sum, outcome review under *Chevron* step two, properly conceived, is simultaneously less deferential and more limited than outcome review under the arbitrary or capricious test. *Chevron* step two considers fewer factors than does the arbitrary or capricious test, but *Chevron* holds the agency to a higher standard of care with respect to those factors.

The court in *NARUC* may have applied an outcome test when it stated that adopting a system that makes roadside enforcement of the registration system virtually impossible "strikes us as not so much a balance of conflicting policy goals as the acceptance of one without any real consideration of the other."[106] In other words, if the statute contemplated no roadside enforcement, why would it require trucks to carry copies of the receipts at all? Therefore, a scheme that hampers such enforcement as much as does the carriers-may-copy rule is simply an unreasonable outcome.

The agency's success on this issue under an outcome test may well have depended on which outcome test the court applied. The agency's carriers-may-copy outcome may or may not have survived review under *Chevron* step two, but it is an easy winner under the arbitrary or capricious standard's "truly outrageous outcome" test. Congress ordered abandonment of the vehicle-specific bingo-card system, the one evident method

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105. The issue is far more complicated than this, but a thorough treatment would involve a separate article. One would have to explore, inter alia, the general nature of standards of proof and the extent to which *Chevron* step two calls for a single standard of proof or a range of standards depending on various features of the agency decision under review. The only point here is that outcome review under *Chevron* step two, whatever its true character, is generally more intensive and less deferential than is outcome review under the arbitrary or capricious test.

106. *National Ass'n of Regulatory Util. Comm'rs*, 41 F.3d at 728.

for assuring effective roadside enforcement of state registration requirements. Any other system would be highly imperfect and would probably require state audits as the principal enforcement tool. It may be wrong, but it is not outrageous, to conclude that it makes little sense to pay much attention to roadside enforcement under any single-state registration system. The agency's conclusion clearly survives an arbitrary or capricious outcome test, even if it would fail a more vigorous *Chevron* step two test.

The *NARUC* court's criticism of the agency's balancing of carrier and state enforcement interests, however, likely resulted from process review rather than outcome review. The court emphasized that the agency seemed not to have given "any real consideration" to the states' enforcement interests, which is the language of process review. The court continued in this vein:

> At minimum, the Commission must explain how such an alternative could possibly substitute, under any plausible cost/benefit analysis, for the traditional—and congressionally approved—method of roadside enforcement. As for the carriers' interests, the Commission failed . . . to explain the extent to which a carrier actually would be "burdened" in the event a copy was lost or stolen and replacement could only be had from the registration state.[107]

This insistence on adequate explanations constitutes process review: the problem is not the agency's outcome as such, but the agency's failure to demonstrate that the outcome resulted from a careful consideration of all relevant factors.

Does it matter whether this process review occurs under the rubric of the arbitrary or capricious test's "hard look" doctrine or the reasonableness standard of *Chevron* step two as previously described? Probably not, so long as the process component of *Chevron* reasonableness is applied in the same way as the "hard look" doctrine. Nonetheless, it is probably the better part of valor to keep the distinction clear by limiting *Chevron*'s reasonableness test to review of outcomes and leaving process review to the familiar "hard look" standard. Courts and lawyers are then less likely to misunderstand or misapply the

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107. *Id.*

relevant process test. The "hard look" doctrine, after all, is familiar to judges and administrative lawyers; the trick is simply to get them to apply that familiar doctrine to agency legal conclusions. *Chevron* is confusing enough without making the step two reasonableness requirement perform double-duty as both an outcome test and a process test.

IV. CONCLUSION

Whether one considers the agency's obligation to explain and justify its legal interpretations as stemming from step two of *Chevron* or (as argued here) from the "hard look" component of the generally-applicable arbitrary or capricious test, current doctrine clearly imposes such an obligation in theory. The D.C. Circuit's decision in *NARUC* may generate such an obligation in fact as well.