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Hard Look Review in a World of Techno-Bureaucratic Decisionmaking: A Reply to Professor McGarity

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Reply

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I. Introduction

Having staked out a scholarly position that touts the administrative state as holding the greatest promise for regulation in the "public interest,"[1] I initially thought it ironic that I am engaged in a debate about judicial review with Professor McGarity, a scholar who, like me, sees value in reliance on expert administrative agencies to implement regulatory statutes.[2] For this reason, I felt a need to clarify why my views on judicial review differ from those of Professor McGarity.

II. The Need to Temper Agency Techno-Bureaucratic Decisionmaking

Professor McGarity analogizes agency decisionmaking to that of a large corporation. Both administrative agencies and corporations rely on institutional structures to make decisions that depend on a complex set of factors. Thus, Professor McGarity suggests that "techno-bureaucratic rationality," rather than "comprehensive analytical rationality," is the appropriate mode of decisionmaking for agencies as well as corporations.[3]

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1. *See* Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1541-42 (1992) (arguing that administrative agencies are well-suited to making deliberative policy decisions because they act without direct pressure from popular opinion).

2. *See* Thomas O. McGarity, *Beyond the Hard Look: A New Standard for Judicial Review?*, NAT. RESOURCES & ENV'T, Fall 1986, at 32, 33 (concluding that, because of inherent complexities, scientific policy decisions are best made by agencies with relevant expertise); Thomas O. McGarity, *The Expanded Debate over the Future of the Regulatory State*, 63 U. CHI. L. REV. 1463, 1513 & n.253 [hereinafter McGarity, *The Expanded Debate*] (characterizing himself as an "unrepentant protectionist" who believes in regulatory intervention to solve existing social problems).

3. Thomas O. McGarity, *The Courts and the Ossification of Rulemaking: A Response to Professor Seidenfeld*, 75 TEXAS L. REV. 525, 537-38 (1997) [hereinafter McGarity, *Response*]. Professor McGarity has more fully explained the terms "comprehensive analytical rationality" and "techno-

He then goes on to argue that hard look review is not consistent with this mode of decisionmaking.[4]

I agree with Professor McGarity that techno-bureaucratic rationality is a valid, and probably the most appropriate, mode of agency decisionmaking. As Professor McGarity acknowledges, however, administrative agencies are not exactly like private corporations.[5] Corporations are disciplined by the competitive market. When market imperfections render competition incapable of ensuring that corporate activity furthers the public good, corporations are subject to the scrutiny of the very administrative agencies whose decisionmaking process Professor McGarity analogizes to that of corporations. Government agencies, however, are usually subject neither to discipline by the competitive marketplace nor comprehensive oversight by other agencies. Agencies also make decisions that, backed by the coercive power of the state, mandate the behavior of other entities; if a regulated entity violates an administrative rule or order, it is subject to penalties and its officers are sometimes subject to imprisonment.[6] For these reasons, I believe that some form of hard look review, such as the modified version I propose in my initial article, should play an important role in ensuring against abuse of agency discretion. Without such review, I question the legitimacy of leaving this coercive power in the hands of officials who are not directly electorally accountable.

Professor McGarity appears to believe that agency decisions are justified so long as those decisions remain within the bounds set by Congress when it authorizes agency action. He reasons that it is difficult to get Congress to overcome the influence of powerful "self-interest groups" such as manufacturing associations.[7] For Professor McGarity, once Congress overcomes the hurdles put in place by a political system biased towards moneyed self-interest, the agency should have carte blanche to implement the progressive agenda that underlies that agency's authorizing statute.[8]

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bureaucratic rationality" in THOMAS O. MCGARITY, REINVENTING RATIONALITY: THE ROLE OF REGULATORY ANALYSIS IN THE FEDERAL BUREAUCRACY 5-6 (1991) [hereinafter MCGARITY, REINVENTING RATIONALITY].

4. *See* McGarity, *Response*, *supra* note 3, at 538-49 (stating that the evidentiary demands imposed on agencies by the hard look doctrine prohibit agencies from maintaining a techno-bureaucratic approach).

5. *See id.* at 526-27 (noting that private corporations are subject to market controls while agencies are subject to controlling factors such as the press and interagency review).

6. *See, e.g.*, Securities Act of 1933, 15 U.S.C. § 77x (1994); Occupational Safety and Health Act of 1970, 29 U.S.C. § 666(e)-(g) (1994); Clean Air Act, 42 U.S.C. § 7413(c) (1994).

7. *See* McGarity, *Response*, *supra* note 3, at 530-31.

8. *See* McGarity, *The Expanded Debate*, *supra* note 2, at 1517 (justifying regulatory intervention on the grounds that "Congress enacted most regulatory statutes to protect some citizens from the adverse consequences of the profit-maximizing activities of corporations and other citizens").

I have several problems with this justification.[9] First, it does not support the legitimacy of agency action when Congress intends a statute to further the interests of entities other than public interest groups. Professor McGarity thus implicitly requires courts to distinguish those statutes passed to further a public-interest-oriented regulatory agenda from others. As a practical matter, distinguishing public interests from private ones could embroil the courts in inquiries that will make judicial discretion in applying hard look review pale by comparison.[10] For example, if Congress were to adopt a statute intended to grant labor unions increased power to resist employer efforts to break strikes, I cannot envision how a court would go about determining whether the interests of organized labor are public or private in nature.

Second, and perhaps more significant for statutes like those protecting the workplace or environment on which Professor McGarity focuses, Congress rarely enacts legislation with one purpose in mind. Congress passes statutes to address problems it identifies, and usually the provisions of a statute reflect some balance of the affected interests.[11] For example,

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9. Although Professor McGarity's basis for regulatory intervention adds an explanation for Congress's actions, it is essentially grounded in the "legal process" justification for agency authority to regulate. According to the legal process school, agencies' expertise and ability to develop experience with particular regulating domains give the administrative state a comparative advantage for developing policies best suited to achieve the purposes underlying the agencies' authorizing statutes. *See* Keith Werhan, *The Neoclassical Revival in Administrative Law*, 44 ADMIN. L. REV. 567, 576-83 (1992) (describing the historical influence of the legal process school on administrative law); *see also* William N. Eskridge, Jr. & Gary Peller, *The New Public Law Movement: Moderation as a Postmodern Cultural Form*, 89 MICH. L. REV. 707, 710 (1991) (arguing that the post-New Deal era legal process view validated the role of regulatory agencies without undermining their flexibility); Thomas O. Sargentich, *Teaching Administrative Law in the Twenty-First Century*, 1 WIDENER J. PUB. L. 147, 155-56 (1992) (explaining that the Administrative Procedure Act of 1946 provided a procedural check on agency decisionmaking without disturbing the agency's policymaking discretion). The legal process justification, however, fails to confront seriously the fact that Congress does not resolve the value-laden choices between conflicting regulatory purposes and leaves many of these choices for the agencies to decide when implementing their authorizing statutes. *See* Mark Seidenfeld, *A Syncopated* Chevron*: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEXAS L. REV. 83, 93 (1994) (noting that legal process proponents view the agency, not the courts, as the proper entity to make determinations regarding the technical aspects of statutory interpretation).

10. For Professor McGarity, "a clear distinction exists . . . between a group composed of entities seeking primarily to enrich themselves and an association of individuals attempting to achieve broader ends that may or may not directly benefit those individuals." McGarity, *Response*, *supra* note 3, at 532 n.29. For me the distinction is not so clear. For example, consider an environmental organization that lobbies the legislature and advocates pro-environmental positions in agency proceedings. This is probably McGarity's quintessential public interest group. Nonetheless, the workers and leaders of such a group often receive recognition and salaries for their efforts and thus have a financial and reputational stake in the continued existence and success of the group's activity. Also, many individuals contribute to the group in hopes of preventing degradation of the environment and preserving the aesthetic quality around their houses and other land that they own. For these individuals, environmental concerns coincide with economic interests.

11. *See* CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE 124 (1990) ("There will be not one but many purposes in any statute; those purposes will

in passing the Occupational Safety and Health Act (OSHA), Congress intended to reduce risks to worker health and safety, but not at all costs. Thus, although one might characterize OSHA as meant to further workplace safety, and perhaps even claim that workplace safety is a public rather than a private interest, in fact Congress intended OSHA to change the point of balance between workers' and employers' interests. Yet Congress rarely specifies the balance of interests in detail in the statutory provisions it enacts. Rather, it leaves discretion to the agency to engage in the inherently political act of balancing those interests.[12] Congress may grant this political discretion with respect to matters on which it cannot decide or even matters that it never envisioned when it passed the authorizing statute in the first place. Hence, one cannot justify agency authority by claiming that Congress dictated the outcome of every fundamental regulatory controversy that the agency confronts. Nor can one justify such grants of political power by Congress's authority to overrule agency rules if it finds them objectionable; Congress's lack of time to address detailed regulatory concerns and the inertia built into the legislative process render the potential for an explicit statutory rejection of a rule an insufficient check on such broad grants of power to agencies.[13]

For me, the promise of the administrative state stems from the possibility of institutional checks placed on the decisionmaking process that can help ensure both that agencies seek to implement some commonly accepted view of the public good and that their ultimate decisions do not deviate too greatly from that mark. These checks include the internal structure of the decisionmaking process as well as external checks by the President, Congress, and the courts. Judicial review plays a key role in reinforcing internal agency structures that encourage regulations to reflect a diversity of professional perspectives and not the idiosyncratic values of a particular office within an agency. Thus, although I agree that techno-bureaucratic rationality rather than comprehensive analytical rationality is a valid mode of agency decisionmaking, I also believe that, when used by an agency,

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sometimes conflict with one another, and they will have been compromised and traded off in complex ways."); Frank H. Easterbrook, *What Does Legislative History Tell Us?*, 66 CHI.-KENT L. REV. 441, 446-47 (1990) ("Statutes are drafted by multiple persons, often with conflicting objectives."); Abner J. Mikva, *A Reply to Judge Starr's Observations*, 1987 DUKE L.J. 380, 380-81 (illustrating the compromise involved in the passage of a particular strip mining law).

12. *See* Industrial Union Dep't, AFL-CIO v. American Petroleum Inst., 448 U.S. 607, 676-85 (1980) (Rehnquist, J., concurring) (reviewing the legislative history of the Occupational Safety and Health Act (OSHA) and concluding that Congress intentionally left the agency with discretion to decide the extent to which OSHA's standards for toxic substances were meant to impose financial burdens on industry).

13. *See* Seidenfeld, *supra* note 1, at 1551 (describing factors that contribute to congressional inability to oversee agency policymaking meaningfully); Seidenfeld, *supra* note 9, at 98-99 (noting that the general inefficiency of the legislative process is exacerbated by factors such as the size of Congress, the need for a majority in both houses and presidential approval, and the committee system).

techno-bureaucratic decisionmaking must be tempered to ensure that agencies do not abuse the discretion inherent in such a system to such an extent that the resulting rules they promulgate fail to comport with the balance of values that undergird their authorizing statutes.

Having clarified my theoretical points of agreement with and difference from Professor McGarity, I proceed to address some of his particular arguments for why hard look review, even as I would operationally modify it, is not a good idea.

III. Judicial Review as a Check on Abuses of Techno-Bureaucratic Rationality

Professor McGarity believes that hard look review aims for an ideal of "comprehensive analytical rationality" that is impossible for an agency to achieve.[14] He argues that the constraints of "inadequate data, unquantifiable values, mixed societal goals, and political realities" force an agency to rely on its "hands-on experience," rather than some idealized analytic process, to make the tough decisions needed to adopt regulations.[15] Although I agree that hard look review has been used by some courts to demand more generation and analysis of data than agencies can reasonably be expected to provide, I also believe that many of the demands of hard look review have value as applied to techno-bureaucratic decisionmaking.

A. The Benefits of Hard Look Review Applied to Techno-Bureaucratic Decisionmaking

Because agencies must make decisions with less than perfect information, in the face of competing claims for agency resources, and with a need to balance very real political pressures, agency decisionmaking ultimately involves choices of heuristics that enable the agency to reach a determination in light of such pragmatic constraints.[16] Certainly agency experience will be relevant in making such choices; experience may give

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14. McGarity, *Response*, *supra* note 3, at 538 (arguing that the judicial preference for comprehensive analytical rationality prevents agencies from adopting the more effective techno-bureaucratic approach).

15. *Id.* (quoting MCGARITY, REINVENTING RATIONALITY, *supra* note 3, at 5-6). Professor McGarity's "techno-bureaucratic rationality" is essentially an example of an exercise in "bounded rationality." *See generally* Herbert A. Simon, *A Behavioral Model of Rational Choice*, 69 Q.J. ECON. 99 (1955) (formulating a pragmatic theory of rationality subject to decisionmaking constraints, such as the inability of an individual to consider all alternatives or to distinguish between the desirability of all outcomes).

16. For a comprehensive sample of papers addressing how individuals use heuristics as cognitive shortcuts for decisionmaking and the potential biases to which their use leads, see generally JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (Daniel Kahneman et al. eds., 1982). For a brief discussion in the legal literature of how heuristics relate to "bounded rationality," see Adam J. Hirsch, *Inheritance and Inconsistency*, 57 OHIO ST. L.J. 1057, 1149-51 (1996).

the agency a special appreciation for the risks inherent in one choice or another.[17] But as I pointed out in my initial article, an agency's structure can lead its staff members to choose decisionmaking heuristics without recognizing that their choices are essentially dictated by professional values rather than science and without consideration of alternatives that reflect different values.[18]

My experience as an agency lawyer leads me to believe that, without some external constraint on agency decisionmaking processes, staff members are apt to take shortcuts to avoid extra work, to yield to short-run political pressures that take time and energy to counter, or to alter a decision to make it easier to defend to their superiors. For example, a staff member who has spent several years studying how to regulate a purported problem will have a harder time explaining to a superior what she has been doing with her time if she concludes that regulation is unnecessary than if she comes up with a proposed regulation. Generally, shortcuts based on a staff member's experience are necessary in light of the pragmatic information and resource constraints on agency rulemaking.[19] But shortcuts that staff members take are often inappropriate. Staff members frequently will not even be aware that they are taking inappropriate shortcuts; if the culture in an agency office is to resolve an issue in a particular manner, the staff member usually will not contemplate competing alternatives to the standard resolution.[20]

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17. As then-Judge Breyer pointed out, agency staff members are more likely to understand the relative significance of risks posed by agency decisions and less likely to react in a short-sighted panic. *See* STEPHEN BREYER, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION 48-49 (1993).

18. *See* Mark Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking*, 75 TEXAS L. REV. 483, 505-07 (1997); *see also* HERBERT A. SIMON, ADMINISTRATIVE BEHAVIOR: A STUDY OF DECISION-MAKING PROCESSES IN ADMINISTRATIVE ORGANIZATION 47-51 (3d ed. 1976) (noting that choices of intermediate ends by agencies involve both factual judgments and value choices); Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 48-49 (1995) (arguing that the difference between lay and expert evaluations of risk reflect value choices when citizens' judgments do not rest on demonstrable cognitive errors).

19. This phenomenon is not limited to decisionmaking by agency staff members. People in general need to limit their choices and the information at which they look in order to make everyday decisions in our complex world. *See generally* Simon, *supra* note 15.

20. Psychological studies have shown that scientists engaged in public-policy decisionmaking base factual decisions on covert, untested scientific theories, and that such bases lead to disagreement and destructive strategies that block the formation of rational policy. *See* Kenneth R. Hammond et al., *Improving Scientists' Judgements of Risk*, 4 RISK ANALYSIS 69, 70 (1984); *see also* Wendy E. Wagner, *The Science Charade in Toxic Risk Regulation*, 95 COLUM. L. REV. 1613, 1628-31 (1995) (describing how agencies engage in a "science charade" by treating many policy choices as if they were scientifically determined). These studies also show that forcing scientists to confront the cognitive shortcomings of their decisionmaking processes "makes it possible to discover and compare the source of differences in scientists' judgments, and thus to aid in their revision [of their values] when appropriate." Hammond, *supra*, at 70; *cf.* Simon, *supra* note 15, at 115 (noting that his model of

Hard look review is useful as a means of getting an agency to recognize that its choices often involve values and of avoiding the pitfalls of unthinkingly making such choices by inappropriately taking shortcuts. Active judicial review of the agency decisionmaking process can give staff an incentive (and perhaps power) to resist political pressure from agency higher-ups to reach preordained results. It can empower staff members outside the lead office responsible for promulgating a rule and compel serious consideration of their concerns. It can force staff members from the lead office responsible for a rule not to follow their gut blindly without first considering whether alternative decisionmaking criteria might be appropriate, then asking whether additional information and analyses would be useful, and finally consulting with those who might not share their potentially provincial professional perspective. The value of the hard look doctrine, when applied to a techno-bureaucratic rational process, depends on retaining those aspects of the doctrine that encourage the agency to think through its decisions without imposing on the agency requirements to collect and analyze information merely to satisfy a court that it has done a careful job.

B. Evidence That Hard Look Review Provides These Benefits

Professor McGarity appears to doubt that judicial review will increase the propensity of agencies to scrutinize their rules carefully. For example, he states that he is "absolutely confident that sensible agency heads would seek diverse professional perspectives from agency staff . . . even in the complete absence of judicial review."[21] History suggests, however, that prior to judicial demands under hard look review, agencies often ignored such perspectives and that agency decisions reflected capture by the

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bounded rationality involves not only rational pursuit of outcomes within a given set of limits to render decisionmaking tractable but also rational setting of these limits given the capabilities of the decisionmaker).

The current Federal Bureau of Investigation (FBI) and National Transportation Safety Board (NTSB) investigation of the explosion of Trans World Airlines Flight 800 illustrates how heuristic biases can drive agency decisionmaking. Safety board engineers, who frequently investigate crashes caused by mechanical failure, believe that the explosion was probably caused by such failure. *See* Matthew Purdy, *Many Answers in Crash Except the One That Counts*, N.Y. TIMES, Dec. 15, 1996, § 1 at 1. FBI investigators, who routinely investigate bombings, surmise that the crash was likely the result of a bomb. *See id.* When asked why, an NTSB engineer replied: "Because there is no evidence of a bomb." *Id.* (paraphrase). Responding to the same question, an FBI investigator explained: "Because there is no evidence of mechanical failure." *Id.* (paraphrase). Thus, what cognitive psychologists label the "availability heuristic"—the tendency of decisionmakers to over-estimate the probability of events that come easily to their minds—seems to drive the difference in attribution of the cause of the explosion by the FBI and the NTSB. *See* Amos Tversky & Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, 5 COGNITIVE PSYCHOL. 207, 208 (1973).

21. McGarity, *Response*, *supra* note 3, at 533 n.34.

regulated.[22] Moreover, at least one insider (who worked as a lawyer for the Environmental Protection Agency's (EPA) Office of General Counsel) agrees with me that hard look review is imperative if the staff members from lead offices are to take the concerns of those from other offices seriously.[23]

Professor McGarity counters that "fears of renegade agencies may have had some force in the early 1970s, when executive and congressional oversight mechanisms had yet to evolve, . . . [but] in the mid-1990s [they] have [an] artificial ring . . . ."[24] As I pointed out in my primary article, political review helps cabin the bottom-line outcome of agency rulemaking, but does little to ensure that the agency carefully deliberates as part of its rulemaking process.[25] In fact, I am somewhat surprised by Professor McGarity's response, given his persuasive demonstration that oversight by President Reagan's Office of Management and Budget, purportedly to ensure rationality of agency decisionmaking, in fact merely operated to filter out agency rules adverse to the President's pro-industry constituency.[26]

In addition, particular rulemaking proceedings demonstrate to me that, coupled with a deferential pass-fail standard of review, political pressure can actually discourage careful agency analysis. For example, prompted by pressures from the religious right, in 1988 the Department of Health and Human Services (HHS) adopted regulations prohibiting federally subsidized family planning facilities from counseling clients about abortion.[27] The major issue of administrative law facing the agency was the interpretation of section 1008 of the Public Health Act. HHS perceived itself as facing review under the *Chevron* doctrine, which at the time required courts to defer to any agency interpretation of a statute that was reasonable and did not contravene clear congressional understandings of how the stat-

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22. For example, it was judicial demands for focus on environmental factors that lead to the statutory demands of the National Environmental Policy Act that agencies consider environmental impacts of their decisions. Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1298-99 (1986).

23. *See* William F. Pederson, Jr., *Formal Records and Informal Rulemaking*, 85 YALE L.J. 38, 53-60 (1975).

24. McGarity, *Response*, *supra* note 3, at 536.

25. *See* Seidenfeld, *supra* note 18, at 501-02.

26. *See* MCGARITY, REINVENTING RATIONALITY, *supra* note 3, at 69-70.

27. The adopted regulations, Prohibition on Counseling and Referral for Abortion Services, 42 C.F.R. § 59.8 (1995) [hereinafter Abortion Counseling Regulations], collectively and popularly known as the "gag rule," were the subject of a memorandum from President Clinton, *see* Presidential Memorandum, The Title X "Gag Rule," 58 Fed. Reg. 7455 (1993), which resulted in the Secretary of HHS suspending and rescinding the regulations, *see* Standards of Compliance for Abortion-Related Services in Family Planning Service Projects, 58 Fed. Reg. 7462 (1993) (to be codified at 42 C.F.R. § 59) (suspending the regulations); Standards of Compliance for Abortion-Related Services in Family Planning Service Projects, 58 Fed. Reg. 7464 (1993) (to be codified at 42 C.F.R. § 59) (providing notice of proposed rulemaking for rescinding the regulations).

ute would apply to a particular issue.[28] The agency used the leniency of the *Chevron* doctrine as an excuse not to analyze the likely impact of its rule; the agency explicitly stated that it had met its burden of analysis because the rule "is reasonable in light of all the circumstances."[29] The experience of HHS's gag rule leads me to believe that if the courts were to adopt a pass-fail test for the Administrative Procedure Act's arbitrary and capricious review of rules, agencies frequently would aim to structure rules that merely satisfy political concerns and minimize the agency's workload rather than attempt to develop the best rule given existing pragmatic constraints.[30]

IV. The Problems Caused by Applying Hard Look Review to Techno-Bureaucratic Rationality

In addition to expressing skepticism about the consistency of hard look review and techno-bureaucratic rationality, Professor McGarity also asserts that I "missed the more serious and debilitating impact of judicially required changes in the way agencies go about analyzing and resolving regulatory problems."[31] I agree with Professor McGarity that the hard look doctrine as applied by many courts has required agencies to engage in analysis for its own sake. I am more sanguine than he, however, about the prospects of modifying hard look review to minimize this debilitating impact without abandoning the standard altogether.

Professor McGarity views judicial review as an opportunity for judges "who were placed upon the bench precisely because of their commitment to private markets and their skepticism about the governmental programs that the agencies are advancing"[32] to undermine regulatory protections that Congress intended. I do not see the federal judiciary as a monolithic antiregulatory institution. For most judges, political considerations enter decisions only indirectly. Politics are not an explicit concern; instead, they color the manner in which judges view the circumstances surrounding the rules they review. The case reporters contain numerous decisions in which even the most zealous free-market jurists have upheld government

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28. *See* Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844-45 (1984).

29. Abortion Counseling Regulations, 53 Fed. Reg. at 2925.

30. Review of agency statutory interpretation under the *Chevron* doctrine poses the same dilemma as review of agency discretion for adopting rules under the hard look test. *See* Seidenfeld, *supra* note 9, at 128-29. In fact, current activist review under the first step of *Chevron* probably represents a greater threat to agencies' abilities to implement their regulatory agenda than does hard look review. *See* Martin Shapiro, *A Golden Anniversary?: The Administrative Procedures Act of 1946*, REGULATION, 1996, No. 3, at 40, 47.

31. McGarity, *Response*, *supra* note 3, at 529.

32. *Id.* at 530.

regulations under hard look review.[33] Moreover, many judges exhibit proregulatory values; there are numerous examples of judges reversing agencies for failing to regulate sufficiently under a "progressive" statutory scheme.[34] Thus, I do not accept Professor McGarity's conclusion that the goal of judges reviewing agency rules is to thwart regulatory programs.

Even if judges were solidly opposed to progressive regulation, other reasons support the belief that the operational modifications to judicial review that I propose are more likely to relieve the antiregulatory impact of review than is a call for the fuzzy, albeit more deferential, pass-fail standard of review. Of course, all else being equal, a more deferential standard of review will lead to fewer reversals of agency rules than a more aggressive standard. But Professor McGarity's pass-fail metaphor holds judges to a less objectively verifiable standard than does my operationally modified hard look review. And the greater ability to monitor judicial deviation from my modified hard look test may more than compensate for its lower level of deference.[35] On the one hand, a judge who is hell-bent on stopping regulation may find it easy to do so by simply finding that the agency has failed Professor McGarity's pass-fail test, and the only way to criticize such a determination is to assert that the judge simply made the wrong call. On the other hand, operational standards such as my proposal facilitate identification of when a judge has demanded too much of an agency. Thus, judges are more likely to pay a reputational price for violating an operational standard than for applying a fuzzy standard in an overly activist manner.[36]

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33. *See, e.g.*, American Dental Ass'n v. Martin, 984 F.2d 823, 827, 830 (7th Cir. 1993) (Posner, J.) (finding an OSHA rule governing bloodborne pathogens reasonable except as applied to sites not controlled by entities subject to the rule); Southwestern Bell Corp. v. FCC, 896 F.2d 1378, 1380-82 (D.C. Cir. 1990) (Silberman, J.) (affirming a rule governing transfer of assets between regulated telephone companies and their unregulated affiliates as reasonable to prevent abuse of ratepayers); Natural Resources Defense Council, Inc. v. EPA, 822 F.2d 104, 117-21 (D.C. Cir. 1987) (Starr, J.) (upholding as reasonable a rule requiring that point sources of water pollution provide the Environmental Protection Agency (EPA) with a list of toxic substances that each source uses or manufactures); *see also* City of Las Vegas v. Lujan, 891 F.2d 927, 932-35 (D.C. Cir. 1989) (Silberman, J.) (applying a deferential standard to an emergency rule listing the Mojave Desert population of the desert tortoise as an endangered species).

34. Contrary to Professor McGarity's beliefs about judicial review, Shep Melnick found that federal appellate courts' judicial review of the EPA's Clean Air Act regulations "strengthened the EPA's 'lean' toward stringent standards." R. SHEP MELNICK, REGULATION AND THE COURTS: THE CASE OF THE CLEAN AIR ACT 355 (1983).

35. *See* Sidney A. Shapiro & Richard E. Levy, *Judicial Incentives and Indeterminacy in Substantive Review of Administrative Decisions*, 44 DUKE L.J. 1051, 1058-60 (1995) (predicting that judges will more likely decide cases based on their desires about substantive outcomes when standards of review are indeterminate); *see also* Nicholas S. Zeppos, *Judicial Review of Agency Action: The Problems of Commitment, Non-Contractibility, and the Proper Incentives*, 44 DUKE L.J. 1133, 1150 (1995) (criticizing Shapiro and Levy's proposed standards for judicial review as too indeterminate to constrain judges).

36. *See* Shapiro & Levy, *supra* note 35, at 1067 (contending that "judges are freer to pursue an outcome orientation" when the determinate standard is unclear).

V. Conclusion

In his response to my primary article, Professor McGarity has raised concerns that hard look review, even as I suggested modifying it, would continue to paralyze agency rulemaking proceedings. Although I share some of Professor McGarity's concerns, given the time and space constraints on my response, I had to content myself with answering his most fundamental points. My thoughts on other interesting questions raised by Professor McGarity's response, such as whether the opinions in *Corrosion Proof Fittings v. EPA*[37] and *AFL-CIO v. OSHA*[38] represent judicial overreaching rather than proper responses to inappropriate deliberative shortcuts taken by agencies, will have to await another day.

Ultimately, I believe that much of the disagreement between Professor McGarity and me hinges on different estimates of the benefits and costs that hard look review bestows on the rulemaking process. We both agree that hard look review, as traditionally applied, has unnecessarily chilled agency rulemaking. Questions such as the impact that either Professor McGarity's pass-fail test or my modified hard look review would have on the quality and quantity of agency rulemaking are empirical questions that cannot be answered without courts first trying out some of our ideas for relieving the burdens imposed by hard look review as applied over the past two decades. My modest hope is only that our exchange will stimulate a carefully considered judicial response to the problem of hard look review, rather than simply a judicial abandonment of meaningful review of the rulemaking process altogether.

37. 947 F.2d 1201 (5th Cir. 1991).
38. 965 F.2d 962 (11th Cir. 1992).