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DEFERENCE TO ADMINISTRATIVE AGENCIES IN FEDERAL ENVIRONMENTAL, HEALTH AND SAFETY LITIGATION—THOUGHTS ON VARYING JUDICIAL APPLICATION OF THE RULE

DONALD W. STEVER, JR.*

Early on in the argument of virtually every brief filed on behalf of a government agency whose administrative action is being challenged, one will find an assertion that reviewing courts owe deference to the agency.¹ This notion actually embodies four concepts: a) deference to an agency’s interpretation of its statutes;² b) deference to an agency’s construction of its own regulations ("even more deference");³ c) deference to judgments about matters of a complex technical or scientific nature within the agency’s area of expertise;⁴ and d) deference to an agency’s basic fact-finding.⁵

The deference rule has been the subject of significant debate in recent years, and is among one of the major issues in "regulatory

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1. During the time the author was chief of the Pollution Control and Environmental Defense sections of the Justice Department's Land and Natural Resources Division, he reviewed hundreds of appellate briefs written by agency attorneys and members of his staff. The "deference" assertion was literally considered mandatory boilerplate.


3. Montana Power Co. v. EPA, 608 F.2d 334, 345 (9th Cir. 1979) (relying on Udall v. Tallman, 380 U.S. 1 (1965)). The Supreme Court, in *Udall*, used words of arguably different import. The Court, in discussing deference as to statutory and regulatory interpretation, stated that deference as to the latter "is even more clearly in order." 380 U.S. at 16.


5. *See, e.g.*, Avoyelles Sportsmen’s League, Inc. v. Marsh, 715 F.2d 897 (5th Cir. 1983).
reform” platforms. Critics argue that the rule gives agencies too much power, and makes meaningful judicial review impossible. In its most extreme form, this criticism is grounded upon a notion that Congress should delegate powers to administrative agencies with greater specificity, and that organic statutes that allow extreme agency latitude should be held unconstitutional. Other critics quarrel with the notion that those in positions of power are presumed to be correct and argue that the presumption should cut the other way.

The recent debate over the judicial acquiescence to agency rulemaking or the judicial policy of deference has illustrated that there is a substantial degree of confusion over its origins, scope and application. Indeed, the federal courts of appeals, whose decisions apply and presumably delimit the scope of the deference rule, have applied the rule erratically. One function of this article is to examine varying judicial use of the deference rule. Another is to determine whether deference to agency expertise has a significant impact on the outcome of regulatory litigation.

I. ORIGIN OF THE DEFERENCE DOCTRINE

Judicial deference to an agency’s interpretation of the language of statutes it administers appears to have evolved without any statutory basis during the 1940’s, out of cases involving disputes arising under section 2 of the National Labor Relations (Wagner) Act. To

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6. E.g., S. REP. No. 284, 97th Cong., 1st Sess. 165 (1981) [hereinafter Senate Judiciary Committee Report]. “We wish to make clear our disapproval of this doctrine and our intent that the courts not presume that the agencies are correct in their interpretations of the law, whether derived from the Constitution, the organic statutes and implementing regulations, procedural statutes . . . or federal common law where it exists.” Id.
7. Id. at 165.
10. Pub. L. No. 74-198, § 2, 49 Stat. 449, 450 (1970) (current version at 29 U.S.C. § 152 (1976 & Supp. V 1981)) [hereinafter Wagner Act]; see, e.g., Office and Professional Employees Int’l Union Local 425 v. NLRB, 419 F.2d 314 (D.C. Cir. 1969). There is no evidence, for example, that the development of the doctrine was related to the concept “arbitrary and capricious” scope of review as opposed to the “substantial evidence” scope of review, set forth in the Administrative Procedure Act, 5 U.S.C. 706 (2)(A),(E) (1982) [hereinafter APA]. As will be shown, the deference rule rests on language contained in decisions of the Supreme Court that predate the APA. See infra text accompanying notes 11-41. While one might find it interesting to explore what difference really exists between the “arbitrary and capricious” and “substantial evidence” standards as each has been applied, see, e.g., Superior Oil Co. v. Federal Energy Regulatory Comm’n,
the extent one decision can be identified as seminal, it is probably Justice Rutledge's opinion in *NLRB v. Hearst Publications, Inc.* The Court was faced with the question of whether newsboys were "employees" and thus their employer bound to bargain with their chosen representative. The Wagner Act did not specifically define the term.12 Hearst argued that, in the absence of a statutory definition, the Court should define the term independently by reference to the common law distinction between employees and independent contractors.13 In rejecting this argument, the Court pointed out that the National Labor Relations Board, the agency responsible for administering the NLRA, develops a familiarity with the factual realities of employer-employee relationships in the ordinary course of its administrative routine, and concluded that since Congress entrusted fact-finding to the Board, the Court should not "substitute its own inferences of fact for the Board's, when the latter have support in the record."14

With respect to the interpretation of a statute, the Court acknowledged that such questions are ultimately for the courts to decide, "giving appropriate weight" to the agency's judgment.15 The Court went on to state, however, that "where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited," the agency's determination will be accepted if it has "'warrant in the record' and a reasonable basis in law."16

It is not clear, though, that the Supreme Court in *Hearst* actually decided the issue before it by means of according deference to the Board. The Court's deference analysis takes place after it has already concluded that Congress had not intended to restrict the scope of the term "employee" to the vagaries of state common law, and in addition, that Hearst's newsboys were the object of the evils

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563 F.2d 191 (5th Cir. 1977), I have chosen not to embark upon such an adventure. I am, here, concerned with the concept of deference generally. Most of the cases in which deference is relied upon involve informal rulemaking, and are thus reviewed under the "arbitrary and capricious" standard. *See generally* Avoyelles Sportsmen's League, Inc. v. Marsh, 715 F.2d 897 (5th Cir. 1983).

13. 322 U.S. at 120.
14. *Id.* at 130.
15. *Id.* at 130-31.
16. *Id.* at 131.
Congress sought to address in the Wagner Act. Viewed in light of the syntax of the opinion, the Court's reliance on deference to the agency appears to be only a supporting argument—as if to say, "we disagree with the plaintiff's urgings, as we read the statute and, by the way, the Board's position is not inconsistent with our view."18

The Court seemed quite willing to accord administrative agencies the same degree of deference normally accorded jury findings when it stated that courts must not "substitute their own inferences of fact."19 That the Court in Hearst accorded the same degree of deference to the Board's interpretation of the statute under which it had acted is much less clear.

In stating that courts should give "appropriate weight" to the judgment of administrative agencies, the Court relied on Norwegian Nitrogen Products Co. v. United States.20 Norwegian Nitrogen involved a dispute over whether, under the Tariff Act of 1922,21 the United States Tariff Commission was required to hold a public hearing prior to taking certain actions that affected the plaintiff. The Court's opinion, authored by Justice Cardozo, upheld the Commission's procedures partly on the basis of Congress's apparent acquiescence to the Commission's longstanding administrative practice of not providing hearings.22 Rather than elevate administrative practice to a position of special or peculiar reliance, the Court considered it as an aid to the Court's own construction of the statute, to be con-

17. Id. at 120-32.
18. This view is supported by the sentence leading in to its deference discussion. After concluding that Hearst's newsboys ought to be entitled to wage and hour protection, the Court said: "It is not necessary in this case to make a completely definitive limitation around the term 'employee.' That task has been assigned primarily to the agency...." 322 U.S. at 130.
19. Id. The Court muddied the water somewhat 27 years later when in Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971), it stated that a reviewing court must consider "whether there has been a clear error of judgment." Id. at 416. For an amusing commentary on this point see Ethyl Corp. v. EPA, 541 F.2d 1,34 n.74 (D.C. Cir. 1976).
22. 288 U.S. at 313-16. The court said:
True indeed it is that administrative practice does not avail to overcome a statute so plain in its commands as to leave nothing for construction. True it also is that administrative practice, consistent and generally unchallenged, will not be overturned except for very cogent reasons if the scope of the command is indefinite and doubtful. The practice has peculiar weight when it involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.
Id. at 315 (citations omitted).
sidered concurrently with other "external aids that are drawn from history and analogy" and the "internal [aid] to be derived from the wording of related sections." "

The *Hearst* Court concluded its deference analysis with the statement that "where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited." This is arguably little more than another way of saying that in applying the law to the facts, review of the fact-finder's determination is not de novo.  

Shortly after *Hearst*, the Court placed what has come to be a significant gloss on the *Hearst* opinion's deference language. In *Unemployment Compensation Commission of Alaska v. Aragon*, the Court cited the *Hearst* Court's statement that a reviewing court's function is limited, and that all that is needed to support an agency is that its interpretations have "'warrant in the record'" and a "'reasonable basis in law.'" Nonetheless, the Court opined that "to sustain the Commission's application of . . . [a broad statutory term to a set of facts], we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings."  

Although the language is couched in terms of statutory interpretation, the Court in *Aragon* was actually reviewing the Commission's finding that a given set of facts constituted a labor dispute "in active process," for the purpose of determining whether a discharged employee was entitled to unemployment compensation under the Alaska Act. The term "labor dispute" was not defined in the statute. As it did in *Hearst*, the Court first concluded, on its own, that the plaintiff's proffered narrow definition of "labor dispute" was not tenable in light of the purposes to be served by the statute. Only

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23. *Id.*
24. *Id.; see also* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944). (The court should evaluate "the thoroughness evident in [the agency's] consideration, the validity of its reasoning, its consistency. . . .")
25. 322 U.S. at 131.
26. Justice Roberts, who authored the dissenting opinion, apparently read more into the statement, however: "It is urged that the Act uses the term ['employee'] in some loose and unusual sense such as justifies the Board's decision. . . ." *Id.* at 136 (Roberts, J., dissenting).
27. 329 U.S. 143 (1946).
28. *Id.* at 154 (citing NLRB v. Hearst Publications, Inc., 322 U.S. 111 (1944)).
29. *Id.* at 153.
30. *Id.* at 149-50.
31. *Id.* at 150-51.
then did it discuss the Commission's finding that a labor dispute (as broadly construed without reference to deference) was "in active progress" at the time the employee was discharged. This, despite the breadth of the Court's language, was fact-finding (or at most a mixed question of law and fact, tending toward fact), and according deference to an administrative fact-finder is based on a different legal footing than acceding to an agency's construction of the law.  

To the extent the Court, in these early decisions, gave respect or weight to administrative construction, it was in connection with the agency's "practical administrative construction of a disputed provision." It was a narrow sort of respect, the type normally expected to be accorded a person who works daily in an area and is accustomed to applying generalized statutory directives to various factual situations.

Evolution of the deference concept to its current formulation began with dictum contained in Udall v. Tallman. The case involved a dispute over the proper construction of an interim Interior Department regulation, and whether a certain administrative order constituted a violation of another regulation of the same agency. As to that issue, the Court quite understandably stated that it would accord great weight to the Agency's past practice in identical situations. If it finds a consistent pattern of action, the Court stated it will uphold the challenged construction.

In prefacing its discussion of the issue before it, however, the Court uttered the now oft-cited dictum: "When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration." The Court based this assertion on the Aragon case and on an apparent misreading of Justice Cardozo's language from Norwegian Nitrogen. Justice Cardozo was giving a
slight degree of deference to longstanding administrative practices unchanged by successive sessions of Congress.

The reason for such deference is straightforward. The Court presumes Congress to be aware of longstanding administrative interpretation and would act to change the wording of the statute if it disagreed. The argument for such deference increases in strength each time the statute is amended without change in the provision at issue.

The *Udall* dictum is unbridled by these limitations. It would accord the same degree of deference to a new agency's interpretation of a new statute as would be accorded to longstanding interpretation. Subsequent reliance on the *Udall* dictum, is further suspect because its broad pronouncement was not necessary to the result reached by the Court on the merits of the case which, as discussed above, could have been decided (and no doubt was decided) on the more limited deference principles articulated in *Norwegian Nitrogen*.

II. DEVELOPMENT OF THE DEFERENCE RULE SUBSEQUENT TO *UDALL V. TALLMAN*

From *Udall*, the deference rule has grown in the manner of branches on a tree as the courts of appeals had applied it using sometimes vastly different criteria. Each of the forms of deference—to agency fact-finding, statutory interpretation, and regulatory interpretation—have been applied at times with identical standards, and at times quite differently. One new form of deference, to scientific and technical judgment, is a recent innovation and has prompted lively debate over its application.

Before examining the development and parameters of each type of deference, something must be said about the significance of the provisions of section 10 of the Administrative Procedure Act (APA) on the development of the deference concept generally. Section 10 makes all agency action subject to scrutiny as to whether it is "contrary to constitutional right, power, privilege or immunity," "in excess of statutory jurisdiction, authority, or limitations,"
or short of statutory right,”47 or “without observance of procedure required by law.”48 Only the second of these provides guidance for court review of an agency’s statutory interpretation.49

The factual determinations made in agency adjudications are subject to review under the “substantial evidence” standard.50 A comparatively small number of actions fall into this category and even fewer are subject to de novo review.51 The vast majority of agency informal rulemaking actions are, as to the agency’s fact-finding, reviewable under a standard that requires affirmance unless the actions are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”52

The “arbitrary and capricious” standard is frequently stated to include a presumption that agency action is valid.53 Nothing in the APA or its legislative history, however, points to such a presumption.54 The source usually relied upon for the presumption is a pronouncement in Citizens to Preserve Overton Park v. Volpe55 that administrative decisions are entitled to “a presumption of regularity.”56 It is not at all certain, however, that the Supreme Court had in mind a presumption of substantive correctness, or of general validity, when it used the term “regularity,” or whether it intended to link the presumption to any statutory command of the APA.

The Court’s entire paragraph, from which the usual quotation is extracted, is as follows:

Even though there is no de novo review [under 5 U.S.C. § 706(2)(F)(1982)] in this case and the Secretary's approval . . . does not have ultimately to meet the substantial-evidence test, the generally applicable standards of § 706 require the reviewing court to engage in a substantial inquiry. Certainly, the Secretary's

47. Id. § 706(2)(C).
48. Id. § 706(2)(D).
49. Ethyl Corp. v. EPA, 541 F.2d 1, 34 n.71 (D.C. Cir. 1976).
56. Id. at 415.
decision is entitled to a presumption of regularity. But that presumption is not to shield his action from a thorough, probing, in-depth review.\textsuperscript{57}

*Pacific States Box & Basket Co. v. White*,\textsuperscript{58} on which the *Overton Park* Court rested its "presumption of regularity" language,\textsuperscript{59} predates the APA by eleven years. *Pacific States* involved a suit to enjoin enforcement of an order by a state agriculture department requiring fruits to be sold in certain sized containers. The plaintiff challenged the order in federal district court on a number of grounds, among which were the federal pre-emption, the imposition of an unreasonable burden on interstate commerce, and that the order was not properly within the scope of the police power.\textsuperscript{60} Procedurally, the case was before the Supreme Court on appeal of the grant of a motion to dismiss before trial.\textsuperscript{61} The plaintiff argued that it was an error for the Iowa court to dismiss its complaint on the police power ground, since it had pled facts that, when construed in the light most favorable to the complaint, made out a prima facie case.\textsuperscript{62} The Court first stated that, when legislative action, generally within the police power, is challenged, the courts will presume the existence of facts sufficient to support the legislative action, thereby requiring a plaintiff to do more than plead in a conclusory manner.\textsuperscript{63} The Court was responding to the plaintiff's argument that an administrative order should be entitled to less deference than a legislative act.\textsuperscript{64} Thus, the statement later relied on in *Overton Park* was a

\textsuperscript{57} Id. (citations omitted).
\textsuperscript{58} 296 U.S. 176 (1935).
\textsuperscript{59} 401 U.S. at 415.
\textsuperscript{60} 296 U.S. at 180-85.
\textsuperscript{61} Id. at 185.
\textsuperscript{62} Id. at 184.
\textsuperscript{63} Id. at 185. The Court stated that the plaintiff must "carry the burden of showing by a resort to common knowledge or other matters which may be judicially noticed, or to other legitimate proof that the action is arbitrary." Id. (quoting Borden's Farm Products v. Baldwin, 293 U.S. 194, 209 (1934)).
\textsuperscript{64} Id. at 185-86. The Court's language is worth quoting in its entirety: Every exertion of the police power, either by the legislature or by an administrative body, is an exercise of delegated power. Where it is by a statute, the Legislature has acted under power delegated to it through the Constitution. Where the regulation is by an order of an administrative body, that body acts under a delegation from the Legislature. . . . [W]here the regulation is within the scope of authority legally delegated, the presumption of the existence of facts justifying its specific exercise attaches alike to statutes, to municipal ordinances, and to orders of administrative bodies. Compare Aetna Insurance Co. v. Hyde, 275 U.S. 440 (1928).

296 U.S. at 185-86. The Court's reference to the *Aetna* case reinforces a narrow reading
limited one. The "presumption" relates not to the legal or factual
support for the challenged action *per se*, but only to the extent that,
in the context of civil litigation brought against a governmental en-
tity, the plaintiff's unsupported allegations of error are not enough.

The Court in *Pacific States* was not concerned with substantive
review of an administrative rule under a statute providing for judicial
review. It was simply articulating the threshold presumption of
validity of state action when subjected to constitutional challenge.
In restating the *Pacific States* doctrine in *Overton Park*, the Court
was arguably saying only that it will presume the agency acted
within the scope of its delegated power, and require the plaintiff to
carry the vital burden of persuasion. *Overton Park* did, after all,
arise in the district court, and it would seem a great change in the
law for the Court to apply the usual burden to it. Indeed, when
viewed in its entirety, the "presumption" language quoted from
*Overton Park* seems more consistent with an absence of deference to
any significant degree, as a matter of statutory law, than with the
proposition for which the language is usually cited, namely that
§ 706(2)(F) requires the judiciary to presume substantive correctness
in reviewing administrative decisions.

That the degree of deference accorded an agency is a product of
judgment rather than statutory law is underscored by the fact that
the courts of appeals have generally tended to treat "substantial evi-
dence" and "arbitrary and capricious" cases in a similar manner,
from the standpoint of according deference to an agency's fact-
gathering.65

65. Ethyl Corp. v. EPA, 541 F.2d 1, 36 (D.C. Cir. 1976). *See also* Senate Judiciary
Committee Report, supra note 6, at 165-66.

The best attempt at drawing a distinction between these two standards is found in
*Ethyl* where the court stated:

[Despite the fact] that in reviewing the evidence relied upon in agency proceed-
ings, the two standards often seem to merge. The primary difference between
the two in such cases would seem to be that "substantial evidence" review is
limited to evidence developed in formal hearings, while "arbitrary and capri-
cious" review of an agency engaged in informal rule-making is not so limited,
but rather may consider the agency's developed expertise and any evidence ref-
erenced by the agency or otherwise placed in the record.

541 F.2d at 37 n.79 (citations omitted).

This analysis is not, however, totally persuasive. Is it not, for example, the case that
an agency applies its "developed expertise" to the facts following an adjudication to the
same degree it applies its expertise in formulating a rule? In addition, one should expect
the Environmental Protection Agency to apply its "developed expertise" to the facts in

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III. DEFERENCE TO AGENCY FACT-FINDING

Concluding that there is no firm statutory basis in the APA for according agency actions presumptive validity does not, however, end the inquiry. The lower federal courts and, indeed, the Supreme Court on occasion, actually defer to agency fact-finding, or at least regularly pay lip service to the notion of presumptive validity. That the courts do not apply the concept uniformly is an understatement. Although the variations are almost infinite, one can divide the decisional universe into three broad categories of approach: the "hard look" cases; what I call the "quick look" cases; and the "no look" cases. The absence of uniform adherence to one standard of deference magnifies the significance of forum shopping to some extent.

The characteristics of the "hard look" line of cases are perhaps


68. See, e.g., Lead Indus. Ass'n v. EPA, 647 F.2d 1130 (D.C. Cir. 1980). This, like many "quick look" decisions, purports to follow the "hard look" doctrine, but does not really take a hard look at agency fact-finding. This illustrates that anyone seeking to analyze a court's approach must look at how the court actually handled the fact-finding issues, rather than simply rely on what the court says it is doing. See id.


70. Forum shopping among the federal circuits can be risky, however, because different panels within the larger circuit court benches may accord markedly different degrees of deference. For example, the D.C. Circuit is generally regarded as a "hard look" court, and yet some of its decisions are better described as "quick look," particularly when issues of scientific judgment are raised. Later, the Fourth Circuit, conventional wisdom holds, is a "hard look" jurisdiction where environmental regulations are challenged by industry groups, and a "no look" jurisdiction when the petitioners are environmental organizations. There are, however, decisions of the court that defy this generalization. The decisional patterns of panels of certain judges within each circuit are more easily categorized, although it is not my intention to do so here, except in a general way.
best exemplified by the District of Columbia Circuit's opinion in *National Lime Association v. EPA.*\(^71\) In a lengthy opinion by Judge Wald, the court struck down the Environmental Protection Agency's standards for lime kilns.\(^72\) The court devoted substantial ink to a detailed analysis of the technical documents relied on by EPA, competing technical documents inserted into the record by commentators, and other technical material contained in the rulemaking record.\(^73\) The opinion is nothing less than a microscopic view of every significant aspect of the agency's rulemaking, a task that required the mastery of the industry's terminology and, indeed, the nature of the lime manufacturing process to an incredible degree. The remand of the regulation (which established numerical emission limits for particular matter and opacity limits from lime kilns) was based primarily on the court's conclusions that EPA did not study a broad enough range of plant types, and thus its data was not sufficiently representative of the emission reduction capability of the subcategory as a whole.\(^74\)

The detail of the court's scrutiny of the record is illustrated by

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\(^71\) 627 F.2d 416 (D.C. Cir. 1980).

\(^72\) New Source Performance Standards (NSPS) are required to be promulgated under section 111 of the Clean Air Act, 42 U.S.C. § 7411(f) (Supp. V 1981). The statute requires the EPA to set numerical emission limits for pollutants emitted by new facilities which reflect the "degree of emission reduction achievable through the application of the best system of continuous emission reduction which . . . has been adequately demonstrated for that category of sources." *Id.* § 7411(a)(1)(C). The statute requires the EPA to assess the operating technology and determine which is the "best" system in terms of removal efficiency, cost effectiveness, etc., that has been "adequately demonstrated." *Id.* The EPA goes about this task by hiring a technical contractor who surveys a representative sample group of candidate facilities, and evaluates them as well as the level of research and development work, and technology transferable from other types of facilities. The contractor writes a "development document," upon which the EPA bases its regulation.

\(^73\) Judge Wald, in a conversation with the author after the decision was rendered, told an amusing anecdote about the record. The agency had, following its usual APA practice, certified an index to the administrative record. After the briefs came in, and oral argument was held, the court determined that it needed to look at relevant documents in the record not contained in the joint appendix filed with the briefs. The agency was asked to produce a list of documents, which in due course arrived in a large number of boxes. For the next few months the hapless law clerk assigned to the opinion was wedded to a shopping cart full of agency paper.

This anecdote raises a troublesome issue, related to the deference issue. Complex agency rulemakings generate awesome amounts of paper. It is not unusual for a rulemaking record at the EPA or the FDA to consume ten or more four-drawer filing cabinets. The parties' appendix is usually highly selective and reproduces documents that reference other documents not included in the appendix. This presents the obvious difficulty for the conscientious "hard look" court of how much judicial and law clerk time should be devoted to wading through documents in the spirit of thoroughness.

\(^74\) 627 F.2d at 434 & n.54.
references in the opinion to the minutes of meetings held by EPA\textsuperscript{75} and by detailed discussions of a number of technical reports culled from the record.\textsuperscript{76} The court held the agency to an exceedingly high standard of explication. Although it disdained an intention to require “ninety-five percent certainty in all the facts which enter into the Agency’s decision,”\textsuperscript{77} the court’s rejection of EPA’s data base arguably put the agency to a measure more stringent than “the standard of ordinary civil litigation,” which the court says “demands only 51% certainly.”\textsuperscript{78}

The “hard look” approach, at least as manifested in \textit{National Lime}, has the advantage of keeping the agency’s “nose to the grindstone.” Assuming the court and the law clerks are able to master the technical nuances to a reasonable degree, it is less likely that shoddy data gathering by an agency, or regulatory sleight of hand will go undetected. On the other hand, it is far from certain that in the great majority of cases a remand for more data gathering will alter the substance of the final rule. One typical agency strategy on remand is simply to “fix up” the record by filling in gaps identified by the court, and explaining away the new data as cumulative or not as representative of the old data, and then emerge essentially with the same rule.\textsuperscript{79}

The “hard look” cases consume excessive amounts of judicial time. The \textit{National Lime} case is instructive on this point. The lime manufacturing industry, as air polluters go, represents a comparatively small cluster of sources. Its pollutants are not exotic, and the technology employed to control them is not exceedingly complex or unique. Yet the court personnel must have spent thousands of hours in background research, record reviews and analysis to produce an opinion of more than 30 pages, containing 146 footnotes.\textsuperscript{80}

There is, finally, the concern that the “hard look” will cross the unclear line that divides appellate review from \textit{de novo} review. In \textit{National Lime}, for example, EPA’s position was not without support

\begin{itemize}
\item \textsuperscript{75} Id. at 442.
\item \textsuperscript{76} E.g., id. at 436 n.59, 60, 438-42.
\item \textsuperscript{77} Id. at 453-54. The court’s reference to 95% certainty relates to the 5% standard deviation accepted for scientific peer review. \textit{See} Ethyl Corp. v. EPA, 541 F.2d 1, 28 n.58 (D.C. Cir. 1976).
\item \textsuperscript{78} 627 F.2d at 453 n.139.
\item \textsuperscript{79} \textit{See}, e.g., 44 Fed. Reg. 6439-40 (1980).
\item \textsuperscript{80} \textit{See} 627 F.2d at 416. A similarly lengthy “hard look” opinion, also authored by Judge Wald, is \textit{Small Refiner Lead Phase-Down Task Force v. EPA}, 705 F.2d 506 (D.C. Cir. 1983). A characteristic of the truly “hard look” opinion is their length, in spite of the relatively narrow issues involved.
\end{itemize}
in the record. Agency engineers had made a judgment that they had enough data on which to base the standards the agency had adopted for air pollution emissions from new lime kilns, and it is on this point of judgment that the court and the agency disagreed. This point becomes all the more troubling when one reviews the briefs of the parties and finds that the point on which the court dwells at greatest length, namely representatives, was hardly addressed at all in the briefs. There is a point at which a court's insistence on record support and on the agency's explication of its reasons for acting based on one quantum of data rather than some greater quantum amounts to a disguised substitution of the court's judgment for that of the agency's. To avoid such substitution requires a measure of restraint that is arguably not inherent in the "hard look" approach.

The "no look" cases portend a tyranny of another sort. In two cases, both styled Citizens Against the Refinery's Effects v. EPA (CARE I and CARE II) separate challenges were made by the same petitioner to air pollution permits issued by EPA to the developer of a proposed oil port/oil refinery complex in Hampton Roads, Virginia. The petitioner, in two lengthy briefs, attacked the mathematical modeling used by EPA to predict sulfur dioxide dispersion from the refinery. It argued that EPA's data was incorrect, and that certain analytical assumptions made by the agency were designed to underpredict pollutant concentrations. In the second case, CARE II, the petitioner argued strenuously that the State of Virginia and EPA violated the Clean Air Act in the way they calculated hydrocarbon reductions resulting from a change in the type of paving asphalt used on rural roads, which were used to offset hydrocarbon emissions expected to be generated by the refinery complex.

The Fourth Circuit made quick work of the petitioner's plea. Relying on Overton Park and Udall (which also form the foundation of the "hard look" cases), the court expressly refused to do much more than blink at the record. The Fourth Circuit's philosophy is typified by the following quotation from its opinion in CARE I:

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81. See Brief for Petitioner, National Lime Ass'n v. EPA, 627 F.2d 416 (D.C. Cir. 1980).
82. 643 F.2d 178 (4th Cir. 1981); 643 F.2d 183 (4th Cir. 1981).
83. I have deliberately chosen an air pollution case for consistency and in order to avoid potential ambiguity arising out of a different statutory scheme. See, e.g., National Lime, 627 F.2d at 452 n.127, where the court alludes to a gloss allegedly placed on "arbitrary and capricious" review by the legislative history of the 1977 amendments to the Clean Air Act.
84. 643 F.2d at 181.
85. Id. at 186.
“CARE argues that this Court must examine in great detail the technical modeling data submitted to the agency and, in considering this data as well as materials outside the record, determine that EPA approval of the HRECS permit was unlawful. This we cannot do.”

That, of course, is precisely what the District of Columbia Circuit in National Lime did do. The Fourth Circuit’s two CARE opinions address each issue raised by the petitioner very briefly. The court typically stated the bare outline of the petitioner’s argument and then dismissed it, stating that on the record EPA’s action was not arbitrary and capricious. The opinions include little substantive discussion of the factual issues raised in the case. Thus, deference to EPA as a fact-finder is effectively total.

Courts following the “no look” philosophy have not had to expend substantial judicial time on rulemaking appeals. Moreover, to the extent forum shopping is possible, litigants will tend to avoid bringing rulemaking challenges before such courts. The major difficulty presented by this approach to judicial review is a risk that erroneous or illegal agency action will effectively escape review, where the agency acted in procedurally regular manner.

The “no look” approach accords far less scrutiny to agency fact-finding than is normally given to fact-finding by a trial judge. Since administrative agencies are subject to many political and other

86. *Id.* at 181. The court’s reference to “materials outside the record” is curious. CARE’s brief does not reveal any reliance on facts outside EPA’s record. The court may have been referring to EPA documents, such as its “Guidelines for Air Quality Models,” which CARE argued EPA ignored. While not formally inserted in the rulemaking record of each permit proceeding, such generic documents form part of the body of “law” that arguably binds the agency.

87. *Cf.*, Commonwealth of Pennsylvania v. EPA, Nos. 79-1025, 80-2772 (3rd Cir. 1981), cert. denied, 456 U.S. 972 (1982). In this case several petitioners brought serious challenges to EPA’s relaxation of the sulfur dioxide emission limits for two power plants in West Virginia. A number of record inadequacies were argued, and EPA initially sought a limited remand during which it sought to cure one of the more obvious problems. Over three hundred pages of briefs were filed, along with a thousand pages of appendix. The court dismissed the petitions with a one-sentence order, without opinion, the day after oral argument. *Id.* Although such disposition is common for dismissal of obviously frivolous cases on motion, this case was not in any sense frivolous. The Third Circuit’s action appears to represent the court’s refusal to wade into the thick of a factually complex rulemaking case.

88. Forum shopping is the practice wherein litigants seek to have their case adjudicated in what they perceive to be the most favorable forum. Such a practice is permissible where the Judicial Review provision does not specify a court of exclusive venue. Compare 33 U.S.C. § 1369 (1976) with 42 U.S.C. § 7607 (Supp. V 1981).

89. *See, e.g.*, Rogers v. Loage, 50 U.S.L.W. 5041 (1982) (Court refused to disturb district court findings of fact as to intentional discrimination unless they appeared to be clearly erroneous).
extraneous pressures not affecting trial judges to as great an extent, a reasonably strong argument can be made that the bias should tilt the other way. One gets a sense that the “no look” courts are simply unwilling to grapple with the technical issues often presented in health and environmental rulemaking appeals. After one reads a good sample of the briefs presented in these cases, the courts’ view garners a measure of sympathy. The briefs often contain detailed technical arguments that are full of acronyms and regulatory jargon foreign to the vocabulary of most judges. Given the choice between deference and spending untold numbers of hours simply to understand the terminology employed, before getting to the legal arguments advanced, many overworked judges naturally opt for deference.

A significant number of the cases fall into the “quick look” category. While “quick look” decisions sometimes purport to be in the “hard look” category, they characteristically do not peer behind the excerpts of the record reproduced by the litigants in the appendix filed with the briefs. This approach accordingly places a justifiably heavier burden on a petitioner to demonstrate the presence of significant gaps or anomalies in the record. It arguably also fosters the writing of less technical briefs, since “quick look” judges cannot be assumed to have the desire to educate themselves about the subject matter of the agency’s rulemaking. Finally, the agency’s own explanation of the reasons for making this or that choice become the focal point of a “quick look” court’s analysis.

In spite of the abundance of “hard look” rhetoric that has found its way into regulatory agency cases in recent years, the number of true “hard look” cases is relatively small. Heavy court dockets and practical limitations on the judges’ ability to become thoroughly familiar with the agencies’ business no doubt will keep the number of true “hard look” cases small. The relative percentage of decisions of the “no look” variety may well increase, particularly as the govern-


91. See, e.g., Brief for Appellee, Duquesne Light Co. v. EPA, 481 F.2d 1 (D.C. Cir. 1973).

92. A related issue is the philosophical question regarding the extent to which judges should actively review decisions of a highly technical or scientific nature at all. See infra notes 97-132 and accompanying text.

93. There are “quick look” examples in virtually all of the circuits, including the D.C. Circuit. See, e.g., Weyerhaeuser Co. v. Costle, 590 F.2d 1011 (D.C. Cir. 1978).


95. See infra note 123.
ment continues to press arguments that the courts should accord deference to complex technical issues (that are, in fact, complex), and particularly if the "regulatory reform" enthusiasts convince Congress to reduce drastically the exclusive jurisdiction of the District of Columbia Circuit to review certain agencies' rules.96

IV. DEFERENCE TO SCIENTIFIC AND TECHNICAL JUDGMENTS MADE BY AGENCIES

The tendency of judges to refuse to look closely at agency factual determinations, policy choices, or to an agency's interpretation of statutory terms, has in recent years become even more pronounced where the agency's decision has involved scientific or technical issues. It has become almost a mandatory part of the boilerplate in briefs and opinions involving EPA, for example, that more deference than usual is due when the issues are scientific or technical.97

A lively debate flourished in the mid-1970s among the judges of the District of Columbia Circuit over the role of the courts in reviewing technically complex agency decisions. This debate is set out in microcosm in the en banc opinions of the District of Columbia Circuit in Ethyl Corp. v. EPA.98 Judge Leventhal was the primary advocate for active judicial scrutiny of even the most complex scientific

96. See, e.g., S. 1472, 96th Cong., 1st Sess. (1979); H.R. 746, 97th Cong., 2d Sess. (1982); H.R. REP. No. 435, 97th Cong., 2d Sess. (1982). It is obviously easier to take a "hard look" at a regulatory decision the second time around. The mere fact that one judge on the panel has become familiar with the regulatory jargon the agency uses gives that panel a significant headstart toward grasping the issues with the sophistication needed for the "hard look." Having wrestled with the Clean Air Act in National Lime, Judge Wald doubtless was required to spend less time in taking a hard look at the issues in Small Refiners Lead Phase-Down Task Force v. EPA, 643 F.2d 178 (4th Cir. 1981), decided two years later. Thus, to the extent Congress confines rulemaking appeals to the D.C. Circuit, that court's institutional knowledge of the programs necessarily increases to a sufficient degree of sophistication that the "hard look" can be done more expeditiously.


98. 541 F.2d 1, 33-37, 66-69, 97-100 (D.C. Cir. 1976).
issues on appeal.\textsuperscript{99} Leventhal's view was that since Congress granted administrative agencies broad discretion to make scientific judgments, judges must “acquire whatever technical knowledge is necessary as background for decision of the legal questions,”\textsuperscript{100} in order to properly fulfill their constitutional mandate. The opposing view, articulated by Chief Judge Bazelon, is that judges are simply ill-equipped to peer into the substance of technical agency decisions.\textsuperscript{101} Judge Bazelon's approach to keeping the agencies honest, at least at the time the \textit{Ethyl} case was decided,\textsuperscript{102} was to impose upon them a stringent standard of procedural correctness, “to establish a decision-making process which assures [that] a reasoned decision . . . can be held up to the scrutiny of the scientific community and the public.”\textsuperscript{103}

At bottom, Judge Bazelon's \textit{Ethyl} position enables courts to look more closely at the substance of agency decisions in familiar subject areas than they do in unfamiliar areas.\textsuperscript{104} While that position no doubt accurately accommodates the realities occasioned by


\textsuperscript{100} 541 F.2d at 68. Judge Leventhal came very close to suggesting that if the courts of appeals are not able to muster the knowledge necessary to undertake close scrutiny, Congress should consider “science courts,” or similar technically trained courts. See \textit{id}. (“If technical difficulties loom large, Congress may push to establish specialized courts.”)

\textsuperscript{101} \textit{id}. at 67 (Bazelon, C.J., concurring) (“[S]ubstantive review of mathematical and scientific evidence by technically illiterate judges is dangerously unreliable. . . . ”).

\textsuperscript{102} The Supreme Court’s decision in \textit{Vermont Yankee Nuclear Power Co. v. Natural Resources Defense Council, Inc.}, 435 U.S. 519 (1978), may have caused him to move a bit closer to Judge Leventhal’s position.

\textsuperscript{103} \textit{International Harvester Co. v. Ruckelshaus}, 478 F.2d 615, 652 (D.C. Cir. 1973) (Bazelon, C.J., concurring).

\textsuperscript{104} See 541 F.2d at 66.

It is one thing for judges to scrutinize FCC judgments concerning diversification of media ownership to determine if they are rational [a reference to \textit{Greater Boston TV v. FCC}, 444 F.2d 841 (D.C. Cir. 1971), \textit{cert. denied}, 403 U.S. 923 (1971)]. But I doubt judges contribute much to improving the quality of the difficult decisions which must be made in highly technical areas when
time and human intellectual limitations, it permits a double standard of judicial review: one for agencies dealing in subject-matter within the realm of common experience of most judges and lawyers, and yet another for agencies operating outside that realm. While one might argue that in some ways such a result makes sense, it suffers from two important drawbacks: (1) there is no evidence that Congress has intended such a distinction to be drawn; and (2) in the absence of the creation of specialized courts, this approach virtually assures that many actions of technically-oriented agencies will go effectively unreviewed.105

A serious difficulty with the procedural grindstone approach (which basically presumes deference to substantive decisions) advocated by Judge Bazelon in Ethyl is that the Supreme Court, in Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council (Vermont Yankee II)106 seriously limited the court of appeals' ability to structure administrative agency procedures.

In Vermont Yankee I, Natural Resources Defense Council, Inc. v. Nuclear Regulatory Commission,107 Judge Bazelon's opinion carried out the philosophy articulated in his concurring opinion in Ethyl. The court set aside portions of a Nuclear Regulatory Commission (NRC) rule that prohibited individual licensing boards from considering, as environmental costs, the environmental risks associated with the production of nuclear fuel and the disposal of nuclear waste. The NRC had decided to treat that issue "generically," and held hearings on the nuclear fuel cycle impacts.108 The District of Columbia Circuit found that the procedures employed by the NRC were inadequate to thoroughly examine the waste disposal issues,109

they take it upon themselves to decide . . . that 'in assessing the scientific and medical data the Administrator made clear errors of judgment.'

Id. (citing Ethyl Corp. v. EPA, 541 F.2d 1 (D.C. Cir. 1976)).

105. Judge Leventhal replied to Chief Judge Bazelon's position, see supra note 104, in this way:

Our obligation is not to be jettisoned because our initial technical understanding may be meagre when compared to our initial grasp of FCC or freedom of speech questions. When called upon to make de novo decisions, individual judges have had to acquire the learning pertinent to complex technical questions in such fields as economics, science, technology and psychology. Our role is not as demanding when we are engaged in review of agency decisions. . . .

541 F.2d at 69.


107. 547 F.2d 633 (D.C. Cir. 1976).

108. Id. at 655. (The NRC had limited consideration of such costs to "generic" rulemaking proceedings). See Note, Judicial Review of Generic Rulemaking: The Experience of the Nuclear Regulatory Commission, 65 Geo. L.J. 1295 (1977).

109. 547 F.2d at 641.
and the court ordered the NRC to permit consideration of the issues in individual license adjudications.\textsuperscript{110}

The Supreme Court’s now famous \textit{Vermont Yankee II} opinion knocked the underpinnings from Judge Bazelon’s procedural theory of judicial review in technically complex cases. In sweeping language, the Court held that the courts of appeals are without authority to review and overturn rulemaking proceedings “on the basis of the procedural devices employed (or not employed) . . . .”\textsuperscript{111} Review of an agency’s decision, the Court said, must stand or fall on the propriety of the agency’s fact-finding. “If that finding is not sustainable on the administrative record made, then [it] . . . must be vacated.”\textsuperscript{112}

\textit{Vermont Yankee II}, by removing from the courts the procedural option championed by Judge Bazelon, leaves them with only two choices: undertaking the excruciatingly in-depth review argued for by the late Harold Leventhal,\textsuperscript{113} or essentially abdicating the review function where technical matters are at issue.\textsuperscript{114} The choice is inherently in the first instance a much more difficult one for the courts themselves to make than for the Congress. Moreover, as the gradual merger of “substantial evidence” and “arbitrary and capricious” into a more or less single standard of review demonstrates,\textsuperscript{115} what Con-

\textsuperscript{110} There is some language in the opinion supporting a secondary holding—that the NRC’s record was inadequate to support the rule. \textit{See id.} at 654; \textit{see also id.} at 659 (Tamm, J., concurring). The Supreme Court later concluded, however, that the court had struck down the rule on the procedural ground. \textit{Vermont Nuclear Power Corp. v. Natural Resources Defense Council, Inc.}, 435 U.S. 519, 541-42 (1978).

\textsuperscript{111} 435 U.S. at 548.

\textsuperscript{112} \textit{Id.} at 549 (citing \textit{Camp v. Pitts}, 411 U.S. 138, 143 (1973)).

\textsuperscript{113} Judge Leventhal died in 1979, and with his death the courts lost their most articulate advocate for close judicial scrutiny of agency decisions. His last opinion, published posthumously, was \textit{Alabama Power Co. v. Costle}, 636 F.2d 323 (D.C. Cir. 1979), in which he rejected an agency argument that the court should defer to the agency’s construction of a provision of the Clean Air Act, and not undertaken its own evaluation of Congressional intent. Although she has thus far not articulated her own philosophical view of the issue, Judge Wald’s opinions in \textit{National Lime} and \textit{Small Refiner Lead Phase-Down Task Force v. EPA}, 705 F.2d 506 (D.C. Cir. 1983), seem to be cut from the Leventhal mold. But see \textit{National Wildlife Fed’n v. Gorsuch}, 693 F.2d 156 (D.C. Cir. 1982), in which she accords quite broad deference to the administrative agency, to a degree arguably inconsistent with the preceding decisions. \textit{National Wildlife} involved deference to EPA’s statutory interpretation, while the other cases involved review of the factual record for support for a standard.

\textsuperscript{114} For his part, Judge Bazelon seems to have reacted to \textit{Vermont Yankee II} by moving a bit closer to the Leventhal view. See \textit{Natural Resources Defense Council, Inc. v. Nuclear Regulatory Comm’n}, 685 F.2d 459 (D.C.Cir. 1982) [hereinafter cited as \textit{Vermont Yankee III}], wherein he waded through the technical complexities of the NRC’s S-3 table, concluding that the agency’s reliance on it was arbitrary and capricious.

\textsuperscript{115} Schwartz, \textit{supra} note 9, at 450.
In this context, it is important to explore the underpinnings of the "scientific and technical" deference doctrine. The assumption underlying the "scientific and technical" deference doctrine is that agency personnel possess technical expertise making them better able to make policy and legal judgments in technical and scientific subject areas than Congress or the courts. Cast in another light, it could be said that the notion is a manifestation of the mystique with which contemporary society clothes science. It is thus perfectly understandable for the judiciary, having grown up and having been schooled in this perception, to say "Who am I to question the choices made by those invested with superior knowledge?"

The answer to this, of course, is that this perception ignores the realities of agency decisionmaking. Historically, the upper management of technical agencies have been political appointees who are not necessarily experts (indeed, they are often lawyers), and who serve at most for a few years. While there is often a degree of ingrained experience among the middle managers, the turnover of technical and legal personnel at an agency like EPA or the Occupational Safety and Health Administration is relatively high. These agencies have, in recent years, been staffed by a significant percentage of young professionals, whose exposure to the subject-matter of a particular regulation may in fact be not much greater than that of a judge who has previously heard one of the agency's cases.

The agencies do indeed employ scientists and engineers, and these people compile and analyze data that ultimately forms the basis of a challenged rule. Nevertheless, it is possible for these people to articulate their data and analyses in narrative form that is understandable by intelligent judges. They are required to do so in order to explain their recommendations to their non-technical superiors.

What makes the "hard look" in technical cases difficult and cumbersome is very often not the inherent complexity of the underlying subject-matter so much as the degree to which the agency's

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117. For example, from 1980 to 1982 the agency lost 2,312 civilian employees. U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES (103d ed. 1982-1983). Moreover, reports in 1982 had indicated that the agency's attrition rate was running at a rate of 32 percent a year. However, in a press briefing on February 5, 1982, EPA Chief of Staff John F. Daniel disputed the 32% attrition rate figure and stated that attrition was lower than usual in fiscal 1981 and 1982. CONGRESSIONAL QUARTERLY INC., FEDERAL REGULATORY DIRECTORY 1983-1984 111-42 (1983).
record-gathering and often labyrinthine decisionmaking procedures tend to obfuscate the issues.\(^{118}\)

A carefully-crafted preamble to a technical rule, published in the Federal Register, should be able to identify, in understandable language, the key issues of contention in the rulemaking, and explain which issues relate to interpretation or extrapolation of scientific data, and which involve policy choices, such as choosing one set of assumptions over another for reasons of philosophy, practical administration or statutory interpretation. The extent to which an agency's preamble will achieve clarity will be dependent on the substantive knowledge and expressive ability of the people who write the document. An inexperienced staff attorney who does not understand the rulemaking issues well will be no better able to produce a readable preamble than a staff technical expert unskilled in the art of writing. Employment of the skills of professional technically-trained writer-editors could not only foster the production of understandable preambles, but could also produce useful, functional indices to cumbersome rulemaking records.\(^{119}\)

A contributing, related factor is the refusal of lawyers to frame the issues for the court in a concise, understandable form. My review of scores of briefs filed in EPA rulemaking appeals between

\(^{118}\) What are very often litigated, moreover, are policy decisions that have been made by non-expert agency managers, who have presumably understood the record subsequently placed before the court. In EPA and other agencies, the text of the regulations is, in its formal form, often written by the agency's lawyers. In addition, technical matters that initially appear to the layman opaque will often turn out to be relatively simple when looked at closely. The technology employed to control particulate emissions from air pollution sources, seeming complex at first blush, is actually quite simple. A "baghouse," for example, is one type of device used to remove particulates. This technology, discussed in Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 390-91 (D.C. Cir. 1973) \textit{cert. denied}, 417 U.S. 921 (1974), is basically little more than a large version of the common domestic vacuum cleaner.

\(^{119}\) The EPA has utilized writer-editors to assist it in some of its complex rulemakings. Indices to the record are filed routinely by federal agencies with the courts of appeals. \textit{Fed. R. App. P.} 16, 17, 28 U.S.C. § 2112(a) (1976). Ordinarily the litigants provide the court with copies of the portions of the record they consider relevant to the issues raised in the appeal in a joint, deferred appendix. \textit{Fed. R. App. P.} 30(c).

Neither the federal rules nor any federal statute require agencies to annotate the preamble to a regulation with specific cross-references to documents or testimony in the record, or to key the index to points made in the preamble. Often the litigants' appendix excludes record material that the court could find helpful, particularly if it is reviewing a broad-based challenge to a rule premised on alleged inadequate support in the record. The indices to the record are most often simply either an alphabetical or chronological list of documents contained in the agency's file. By requiring the agencies to annotate the preamble, and to produce useful indices, which the courts could accomplish by amending Rule 17, review of cumbersome records could be facilitated greatly.
1977 and 1982 has led me to conclude that this fault seems to affect government lawyers more frequently than private practitioners, and agency lawyers more frequently than Justice Department lawyers. The briefs are loaded with acronyms and other examples of regulatoryese that require at least a glossary of terms to be understandable. The arguments on technical substantive issues are often crabbed and convoluted, owing sometimes to the author's own inadequate grasp of the issue and perhaps more often, to an effort to economize on space in the face of a court's rigidly-imposed page limit.

The argument most frequently made in favor of great deference is that judicial "evaluation of the scientific evidence inevitably invites judges of opposing views to make plausible-sounding, but simplistic, judgments of the relative weight to be afforded various pieces of technical data." This argument, however, can be rebutted in several ways. First, there are numerous examples among the "hard look" cases of successful judicial handling of scientific issues in an intelligent, not overly simplistic way.

120 The relationship between the Justice Department and its agency clients is an uncertain one. Some agencies, such as OSHA and the NRC, possess their own litigating authority, and thus their court of appeals briefs receive only cursory review by the Justice Department, or none at all. Both the EPA and the Justice Department operate under a formalized arrangement by which agency attorneys write all or a portion of early and final drafts of most briefs. Agency and Justice attorneys and their supervisors work in committee fashion in producing briefs. Disputes over brief content are negotiated, with the Justice Department possessing final authority in such matters.

121 Page limitations have become common in the various circuits' local rules. Fifty pages is the most common limit. The government can suffer heavily if it must respond to arguments raised by several separate litigants in a consolidated case, (each of whom, absent intelligent case management by the circuit administrator, has fifty pages available), and yet may not exceed the page limitation. This problem can also be alleviated somewhat by aggressive case administration by the circuit's staff counsel. Litigants with essentially the same point of view can be required to combine their efforts into a single brief, for example, with a negotiated page limitation. Furthermore, well-orchestrated settlement discussions conducted under the court's own timetable can weed out many issues before briefing, thereby lessening the complexity of the case in the end.

There is a theoretical downside to such a practice, however. Persons who are not parties to rulemaking litigation "settlement" discussions may object to them on the ground that the discussions constitute closed-door rulemaking from which the public is foreclosed. Although any such "settlement" which results in repeal or amendment of a portion of the challenged regulation must be formally adopted by the agency pursuant to APA rulemaking procedures, non-party opponents can argue, with some force, that in the case of "settlement" rules, the procedures are little more than a sham. The proposed rule is a de facto fait accompli, since the agency has arguably staked its credibility with the court on successful completion of the deal.

122 Ethyl Corp., 541 F.2d at 66 (Bazelon, C.J., concurring).

123 See, e.g., Lead Indust. Ass'n v. EPA, 647 F.2d 1130 (D.C. Cir. 1980). In Lead Industries the court was able to grasp, in a sophisticated manner, issues relating to blood chemistry, sensitive population groups and exposure pathways.
A second response lies in the nature of the issues raised in rulemaking appeals. The courts are rarely asked to examine technically complex data. More often the challengers are arguing that the agency ignored relevant data, that it acted without any data or enough data under a statute which did not give it such latitude, or that it based its decision on irrelevant factors. The hardest cases, and those most clearly calling for deference, are those in which the agency is confronted with starkly conflicting expert evidence and a statute that requires it to act within a short time frame. In those cases the court must determine whether the evidence is roughly of equal credibility and that the agency's choice of a course of action was based on a reasonable and adequately articulated set of policy judgments. In all of these cases there is no reason why the courts should not examine the record carefully, and no reason to conclude that they would not be competent to do so.

The Supreme Court's recent decision in *Baltimore Gas and Electric Co. v. NRDC* (Vermont Yankee IV), however, may well serve to remove the last arrow from the quiver of those who seek to challenge the actions of technical agencies. Reversing a decision of the District of Columbia Circuit, the Court, in a gesture of sweeping deference to the Nuclear Regulatory Commission, ruled that the Commission's generic rule that discounts the environmental consequences of the uncertainties surrounding nuclear waste disposal, and those associated with potentially long-term storage of high level radioactive waste from nuclear power plants is not arbitrary and capricious, even though the Commission's record demonstrated substantial uncertainty as to whether and how much waste could be safely disposed.

The Court's previous decision on the subject, *Vermont Yankee*
II, prohibited the Court from following Judge Bazelon's formula for utilizing procedural constraints to keep technical agencies from abusing their authority.131 In Baltimore Gas and Electric, the Court stated, seemingly without critical evaluation, that the courts must "remember that the Commission is making predictions, within its area of special expertise, at the frontiers of science. When examining this kind of scientific determination, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential."132 Adopting a "no look" approach to the NRC, the Court effectively cut off judicial review of all but the most mundane of the agency's rules.

V. DEFERENCE TO AN AGENCY'S STATUTORY INTERPRETATION

Most of the reasons advanced for judicial deference to administrative agency fact-finding do not apply, at least directly, where deference is claimed for statutory interpretation. In interpreting a piece of organic legislation, the agency is not weighing evidence presented to it in the first instance. Interpreting a statute does not require any special technical expertise.133 Even a statute whose subject matter is technical is produced by a non-technical group of legislators, and has behind it a body of legislative history that is as available to judges and litigants as it is to the agency.

The two most common arguments made in favor of deference to

131. See supra text accompanying notes 106-12; see also D. Stever, Jr., Seabrook and the Nuclear Regulatory Commission, The Licensing of a Nuclear Power Plant 14-22 (1980).

132. 103 S. Ct. at 2256 (citing Industrial Union Dep't v. American Petroleum Inst., 448 U.S. 607, 656 (1980».

Arguably, the Court misconstrues what the court of appeals did. Judge Bazelon's opinion simply said that the law does not permit the NRC, in undertaking a benefit-cost analysis, to ascribe a cost of zero to an activity whose costs, by the agency's own admission, are unknown. 685 F.2d at 484-85. There are well-known techniques for accounting for uncertainty, and the upshot of the court of appeals' decision was to require the NRC to employ them to achieve complete public disclosure of the costs of licensing nuclear power plants.

Other language in the Court's opinion invites speculation that the Court felt that the court of appeals had substituted its own policy judgments for those of the NRC. See 103 S. Ct. at 2252 ("fundamental policy questions" are not for the courts to resolve). This perception was no doubt ruled by the concurring opinion of circuit Judge Edwards, who made no bones about his dissatisfaction with the government's current nuclear energy policy. 685 F.2d at 496-97 (Edwards, J., concurring).

133. But see National Wildlife Fed'n v. Gorsuch, 693 F.2d 156, 167 (D.C. Cir. 1982) ("construction of act likely to require scientific and technical expertise") (relying on Dupont v. Train, 430 U.S. 112, 135 n.25 (1977); and Natural Resources Defense Council, Inc. v. EPA, 656 F.2d 768, 774 (D.C. Cir. 1981)).
an agency's statutory interpretation are: (1) that the agency works with the statute every day and presumably thereby acquires a unique understanding of it; and (2) that the agency acquires a unique understanding of what Congress intended by participating in the legislative process.

The first of these arguments fits best a situation in which an agency is confronted with facially conflicting statutory commands and no helpful legislative history. In such a case it would seem that any rational scheme developed by the agency to reconcile the conflict should be upheld. Agencies do not, however, always interpret their statutes for such benign reasons; for example, as a reasonable attempt at reconciliation. An agency may interpret a provision narrowly because that construction requires less work by agency personnel, or interpret the statute in a way that better serves the current political viewpoint of the appointed agency officials.

The range of interpretive situations in which an agency must construe a statute based on its workaday knowledge, in the absence of legislative guidance available to the courts, should be quite narrow. There is a danger that if the courts mechanically defer to an agency's reading of an organic statute on the agency's claim of super-


135. See, e.g., Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 556 (1980); Frank Diehl Farms, Inc. v. Secretary of Labor, 696 F.2d 1325 (11th Cir. 1983); Natural Resources Defense Council, Inc. v. EPA, 656 F.2d 768, 774 (D.C. Cir. 1981).

136. See, e.g., Citizens to Save Spencer County v. EPA, 600 F.2d 844, 890-91 (D.C. Cir. 1979) (agency choice of one of two conflicting deadline provisions given deference).

137. Alabama Power Co. v. Costle, 636 F.2d 323, 354 (D.C. Cir. 1979) ("EPA recognized that its definition [of the term "major emitting facility"] placed an intolerable burden on both the agency and minor sources of pollution and sought to cope with it by creating a broad exemption for smaller sources. As we explain . . . the Act does not give the agency a free hand authority to grant broad exemptions.").


Under EPA's current, bubble concept regulation, effective October 14, 1981, source means an entire plant. Under the regulation previously in force, an individual piece of process equipment within the plant ranked as a source. EPA changed its definition of source expressly to cut back substantially the coverage of non-attainment area new source review.

*Id.* at 720 (footnotes omitted). The court does not state what becomes obvious upon reading the Federal Register and related EPA internal documents. 46 Fed. Reg. 50,766 (1981). The revisionist statutory interpretation was part of the "regulatory reform" philosophy of the Reagan administration, which disliked much of what it had inherited from the EPA under the Carter administration.
rior working knowledge, self-serving and incorrect agency decisions will be upheld unless contrary legislative intent is particularly strong. The sole inquiry when an agency's interpretation of a statute is challenged is: "What was Congress's intention?" The courts have available to them sufficient information concerning an agency's history under the statute at issue, and sufficient access to legislative history, to enable them to make independent judgments as to the lawfulness of the agency's interpretation without according deference to the agency. 139

The second argument in favor of interpretive deference rests on a false premise: by involvement in the legislative process concerning its statutes, an agency has the inside track on legislative intent. 140 It should first be understood that the affected agency is not always a significant actor in the battles to create or amend organic legislation. 141

There is, of course, a great deal of agency-initiated legislation, and agencies often take an advocacy position in connection with pending legislation that affects their programs. 142 There are, however, many other actors in the legislative drama whose roles often

139. An agency's prior practices may influence Congress when it amends a statute. Section 404 of the Clean Water Act, 33 U.S.C. § 1344 (Supp. V 1981), provides an example. The statute requires a permit from the Secretary of the Army prior to the discharge of dredged or fill material into a wetland or water body. Id. Prior to the enactment of this provision in 1972, the Army (acting through the Corps of Engineers) had regulated similar activity under the River and Harbor Act of 1899, 33 U.S.C. § 403 (1976 & Supp. V 1981). Congress chose to confer permit issuing authority on the Army rather than the EPA, the legislative history demonstrates, because the Corps had an existing permit program. Subsequently, an issue was raised as to the legality of the legislative-style hearing held by the Corps. It had been held that, under virtually identical statutory language, the EPA was required to hold adjudicatory hearings in connection with its permit-issuing activities pursuant to section 402 of the Act. 33 U.S.C. § 1342 (1976). Despite the similarity in statutory language, the courts that have confronted the issue have uniformly concluded that Congress intended to engraft the Corps' pre-existing program of legislative hearings onto section 404. See, e.g., Buttrey v. United States, 690 F.2d 1170, 1175-76 (5th Cir. 1982).

140. See, e.g., Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 556 (1980); Frank Diehl Farms, Inc. v. Secretary of Labor, 696 F.2d 1325 (11th Cir. 1983).


equal or exceed that of the agency.\textsuperscript{143} There is little logic in elevat­
ing one actor over the others when it comes to according deference to an opinion regarding what legislators have said. Moreover, since the viewpoints of all participants are recorded faithfully in the Congres­sional Record, and are sometimes reprinted in bound "Legislative History" compilations,\textsuperscript{144} the courts, guided by litigants, can readily discern the policy arguments considered by Congress, and compare them with its ultimate output.

The courts of appeals are as divided in their approach to inter­pretive deference as they are with respect to the deference owed to agency fact-finding and scientific and technical judgment.

What is most troubling about this schismatic pattern is that there appears to be no doctrinal basis for deciding when to defer and when not to defer. It is impossible to distinguish the "deference" and the "no deference" cases, and examples of both approaches can be found within the same circuit.\textsuperscript{145} For analytical purposes, two recent District of Columbia Circuit decisions are useful, \textit{National Wildlife Federation v. Gorsuch}\textsuperscript{146} (the "dams case") and \textit{Natural Re­sources Defense Council v. Gorsuch}\textsuperscript{147} (the "bubble case").

At issue in the dams case was EPA's refusal to subject hydro­electric and other dams to the National Pollutant Discharge Elimination System (NPDES) permit requirements of the Clean Water

\textsuperscript{143} This is particularly true in environmental legislation. Industry lobbying groups and environmental organizations possess substantial technical expertise, and have functioned as integral players at virtually every stage of the legislative process that has produced environmental legislation in recent years. See, e.g., J. KRIER & E. URSIN, POL­LUTION AND POLICY: A CASE ESSAY ON CALIFORNIA & FEDERAL EXPERIENCE WITH MOTOR VEHICLE AIR POLLUTION, 1940-1975 (1977).

\textsuperscript{144} See generally A LEGISLATIVE HISTORY OF THE CLEAN AIR AMENDMENTS, supra note 141.


\textsuperscript{146} 693 F.2d 156 (D.C. Cir. 1982).

\textsuperscript{147} 685 F.2d 718 (D.C. Cir. 1982), cert. granted, 103 S. Ct. 2427 (1983).
Act.\textsuperscript{148} The National Wildlife Federation had argued, and the district court had found,\textsuperscript{149} that dams changed the physical and chemical properties of the water in a stream and produced adverse effects on wildlife in a manner not significantly different from what occurs as a result of traditional discharges of pollutant from a factory or a municipal sewer.\textsuperscript{150} The district court therefore ordered EPA to commence regulatory releases from dams under the NPDES permit program.\textsuperscript{151}

EPA had been equivocal in its position on the issue.\textsuperscript{152} Internal agency documents revealed sharp disagreements among agency officials, which persisted over a number of years, on the question of what to do about the pollutant-like effect dams.\textsuperscript{153} The government had also reversed its position with respect to whether or not section

\begin{thebibliography}{99}
\bibitem{150} The district court concluded that the stratification created in the pool behind a dam induces certain chemical changes in the water. Water near the top is warmer and richer in oxygen, for example, than water near the bottom. In water pollution parlance, the lower water is low in dissolved oxygen. When this water is released from the dam, it is considered to be discharged from a point source. \textit{Id.} at 1313. The statute requires a permit for the discharge of a pollutant from a point source. 33 U.S.C. § 1342 (1976). The district court reasoned that since the statute defined "pollution" as the "man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water," 33 U.S.C. § 1362(19) (1976), the statutory definition of "pollutant" should be construed broadly, and language in that definition apparently limiting its scope to pollutants discharged \textit{into} water essentially disregarded as being exemplary rather than preclusive. 530 F. Supp. at 1310.
\bibitem{151} 530 F. Supp. at 1313-14. "Point source" is defined in 33 U.S.C. § 1362 (Supp. V 1981), as any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete, fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include return flows from irrigated agriculture. \textit{Id.}
\bibitem{153} This conclusion stems partly from information gained by the author while serving with the United States Department of Justice between 1978 and 1982, and partly from court records. \textit{E.g.}, Letter from Alan Kirk, Acting Assistant Administrator for Enforcement and General Counsel, EPA, to S. Leary Jones, Director, Division of Water Quality Control, Tennessee Department of Public Health (June 23, 1973); \textsc{Environmental Protection Agency, The Control of Pollution from Hydrographic Modifications} (1973); EPA, Office of General Counsel, Action Memorandum on Issuing NPDES Permits to Dams (1978). The principal argument against regulating dams was that the administrative burden of permitting nearly two million existing dams would be too great.
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304(f)(2)(F) of the Clean Water Act\textsuperscript{154} exhibits an intention by Congress that dams be treated as "nonpoint sources" of pollution, and left essentially unregulated.\textsuperscript{155}

The district court reasoned that "the statutory interpretation involved here does not require scientific expertise,"\textsuperscript{156} and thus, in light of the agency's equivocation, the court was equally suited to the task of dissecting the statute and ascertaining Congress's intent.\textsuperscript{157}

The court of appeals rejected the district court's reasoning and accorded EPA's currently-proffered position a great deal of deference.\textsuperscript{158} In its lengthy discussion on the deference notion, the court of appeals asserted that "the standard for deference . . . 'defies generalized application and demands, instead, close attention to the nature of the particular problem faced by the agency'."\textsuperscript{159} If the nature of the problem involves "policy implications," "full deference" will be accorded.\textsuperscript{160} The court considered that EPA's statutory interpretation involved "policy implications of the point source—nonpoint source choice,"\textsuperscript{161} and went on to analyze the statute on the narrow question of whether EPA's interpretation was reasonable.\textsuperscript{162}

The court of appeals' distinction between policy implicated statutory interpretation and "narrow dissection of the language of the

\textsuperscript{155} See 693 F.2d at 169. Nonpoint sources of pollution (typically agricultural or urban run-off) are studied, but not regulated, under the Clean Water Act. The court of appeals ascribed this change of position to the EPA, and in a long footnote unconvincingly argued that the EPA's position had been consistent all along. 693 F.2d at 168 n.36. Compare id. at 168 n.40. What in fact happened is that the appellate attorneys in the Justice Department were persuaded that the government had to make the section 304(f)(2)(F) argument in order to prevail. EPA water quality personnel opposed making the argument, which they feared would result in the court's placing too broad a gloss on the section, thereby interfering with EPA's regulation of mines and other pollution generating activities whose wastewater emanates from an impoundment. However, EPA was not the "real party in interest" in the dams case. The Corps of Engineers, which owns many of the nation's dams, and which was a defendant in several similar cases, had a substantial interest in prevailing over the National Wildlife Federation. It strongly advocated that the Justice Department make all available arguments, and the Department did so.
\textsuperscript{156} 530 F. Supp. at 1311.
\textsuperscript{157} See id.
\textsuperscript{158} 693 F.2d at 169-70. This is somewhat ironic in light of the background of the formulation of the government's position. See supra note 153 and accompanying text.
\textsuperscript{159} 693 F.2d at 170 (quoting Natural Resources Defense Council, Inc. v. SEC, 606 F.2d 1031, 1050 (D.C. Cir. 1979)).
\textsuperscript{160} Id. at 170.
\textsuperscript{161} Id.
\textsuperscript{162} Id.
Act"163 is not altogether satisfactory when viewed in light of the “policy” issues apparently confronting EPA. Whether and how to regulate discharges from dams under the Clean Water Act are not questions of scientific complexity. The statutory construction issue is straightforward—it involves construing definitions in light of reason, common sense, and Congress’s goals. The “policy” issue identified by the court of appeals was whether to treat dams as point sources or nonpoint sources164—that is to say, whether to regulate or not to regulate—another way of expressing the ultimate question. The “policy choices” facing EPA in determining what position to take on the legal question are not terribly complex, namely, how much work would be involved in the activity and how much would regulation cost.165 These can easily be viewed by the court as objective facts in its ascertaining Congressional intent. They do not compel deference to an interpretation of the statute urged by the government that serves the government’s self-interest.

In sharp contrast to the deference accorded EPA in construing the Clean Water Act is the absence of deference accorded EPA’s construction of the Clean Air Act in the bubble case. The bubble case involved a challenge to an EPA regulation that created what has been euphemistically termed the “double bubble.” EPA, in its initial regulations issued to implement the 1977 amendments to the Clean Air Act, had defined the term “stationary source” differently for the purposes of administering Part D of the Act166 from the way it defined the term “major emitting facility” in connection with Part C of the Act.167 Congress did not define the term “stationary source” in

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163. *Id.* at 169.
164. *Id.* at 170.
165. Both the bureaucratic cost (in terms of work-years necessary to carry out the regulatory program) and the social cost (including the cost to develop and install treatment technology) are more dependent upon how the EPA implements such a program than whether the law requires it to embark on the program in the first instance. Although the government argued and the district court found, 530 F. Supp. at 1313, that the exercise would be extremely costly on both counts, it is clear that EPA had a great degree of latitude to structure the program. Even if the regulatory scheme proved very expensive, it would not have been the first time Congress imposed a cost without expressly considering it in the legislative process.
166. 42 U.S.C. §§ 7501-08 (Supp. V 1981). Part D requires, *inter alia*, issuance of permits, and the imposition of stringent emission controls on new sources of air pollution proposed to be located in areas where air quality is poorer than the federal national ambient air quality standards (NAAQS). These are termed “nonattainment areas.” *Id.*
167. 42 U.S.C. §§ 7470-79 (Supp. V 1981). Part C requires the imposition of permits, and stringent controls as part of a complex scheme to prevent the deterioration of existing air quality in areas where air is comparatively free of pollution. Part C is called the Prevention of Significant Deterioration (PSD) program. *Id.*
Part D, but it did define the term in section 111 of the Act,\textsuperscript{168} the basic provision for regulating new sources of pollution.\textsuperscript{169} It did not define the term “major emitting facility” in Part C.

EPA defined “stationary source,” for Part D purposes, to include both an entire industrial plant, and each piece of equipment that emits an air pollutant.\textsuperscript{170} Therefore, a large industrial facility was likely to have a number of individual “sources” of pollution, each one of which was subject to Part D. For Part C purposes, however, EPA defined “major emitting facility” only as a plant.\textsuperscript{171} By treating a large plant as a single source, EPA’s regulation treats the facility as if it were covered by a large “bubble.” Individual points of emission may increase or decrease, but what is important from the regulatory standpoint is the “net emission increase from the plant as a whole above the statutory or regulatory trip wire. . . .”\textsuperscript{172} The “bubble” was required for protection of significant deterioration (PSD) purposes as a result of a ruling in an earlier lawsuit construing the Part C provisions.\textsuperscript{173} The District of Columbia Circuit had previously held that a “bubble” was impermissible under the pre-1977 “new source performance standards,” section 111 of the Act.\textsuperscript{174} Congress had not said anything expressly about a “bubble” for Part D purposes, so EPA’s choice not to employ the concept, but instead adopt a “dual definition” of source for Part D purposes, constituted an exercise of statutory interpretation on its part.

In 1981, EPA amended its regulations and made the Part D definition of “stationary source” in all material respects identical with its definition of “major emitting facility” under Part C of the Clean Air Act,\textsuperscript{175} thereby allowing the “bubble” to attach to a pollution emitting facility for nonattainment purposes,\textsuperscript{176} as well as prevention

\begin{itemize}
  \item \textsuperscript{169} See Alabama Power Co. v. Costle, 636 F.2d 323, 396 (D.C. Cir. 1979).
  \item \textsuperscript{170} Requirements for Implementation Plans, 45 Fed. Reg. 52,676, 52,696-97 (1980).
  \item \textsuperscript{171} \textit{Id.} at 52,693. While we are dealing with two different terms (“stationary source” and “major emitting facility”), their concepts are identical. Each relates to the thing or entity that must be regulated.
  \item \textsuperscript{172} Gorsuch, 685 F.2d at 724 n.26.
  \item \textsuperscript{173} Alabama Power Co. v. Costle, 636 F.2d 323 (D.C. Cir. 1979).
  \item \textsuperscript{174} ASARCO, Inc. v. EPA, 578 F.2d 319, 327-30 (D.C. Cir. 1978).
  \item \textsuperscript{175} 45 Fed. Reg. 50,766 (1980).
  \item \textsuperscript{176} The practical effect of this action was to allow process changes within a large industrial plant complex to avoid “new source review,” and thus not be required to achieve the “lowest achievable emission rate” (LAER) standards applicable to new sources constructed in nonattainment areas. Critics argued that this would result in “status quo” air quality rather than constantly improving air quality, as Congress intended
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for PSD purposes.\textsuperscript{177}

The statute does not define “stationary source.” The legislative history, the court found, was “at best contradictory.”\textsuperscript{178} EPA articulated a rational, albeit not terribly convincing, set of policy reasons for its new definition,\textsuperscript{179} and its definitions did not violate any previous ruling of the court.\textsuperscript{180} All of these factors would, under the rationale enunciated by the District of Columbia Circuit in the dams case, call for deference to EPA’s implementation of the Act. Yet the court accorded not a word of deference to the agency. It struck down the “double bubble” on the premise that EPA’s definition of “source” was inconsistent with the basic philosophy of Part D, which addresses the improvement of air quality.\textsuperscript{181}

The dams case and the bubble case are inconsistent in their treatment of deference to an agency’s statutory interpretation. They are inconsistent because there are no criteria for according deference. While the panel in the dams case made an effort at articulating its reasons for according deference to EPA,\textsuperscript{182} those reasons are not wholly satisfactory, and arguably do not adequately account for the deference shown in the case.\textsuperscript{183}

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  \item[177.] See Gorsuch, 685 F.2d at 725-26.
  \item[178.] Id. at 726.
  \item[179.] The EPA argued (1) since the change simplified its clean air program somewhat, it promoted efficiency and reduced regulatory complexity, 46 Fed. Reg. at 50,767; (2) that the change better implemented Congress’s desire to give the states more flexibility as the primary administrators of the Act, \textit{id}; and (3) the definition was not inconsistent with the basic thrust of Part D of the Act, which basically requires a moratorium on new construction only until the state submits to EPA a set of more stringent regulatory controls than it had prior to 1977. Compare \textit{id} with 42 U.S.C. §§ 7501-08 (Supp. V 1981); see Brief for Appellee at 33-36; Natural Resources Defense Council, Inc. v. Gorsuch, 685 F.2d 718 (D.C. Cir. 1982).
  \item[180.] The court of appeals felt that it was bound to follow its previous decision in ASARCO, Inc. v. EPA, 616 F.2d 1153 (9th Cir. 1980). ASARCO, however, dealt with section 111 of the Clean Air Act. The EPA argued, somewhat inartfully, that there are differences between section 111 and the Act, and the Part D provisions that were sufficient to permit the court to ignore \textit{ASARCO}. Brief for Appellee at 26-27; Natural Resources Defense Council, Inc. v. Gorsuch, 685 F.2d 718 (D.C. Cir. 1982).
  \item[181.] 685 F.2d at 726.
  \item[182.] The court said it would defer to an agency’s interpretation where the interpretation was based on considerations of policy. 693 F.2d at 169.
  \item[183.] There are, of course, many other examples of deference and nondeference
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VI. WHAT ROLE SHOULD DEFERENCE PLAY?

The degree of deference accorded agencies should necessarily depend upon what the court is reviewing. In its basic fact-finding, a regulatory agency functions in much the same way a trial judge functions. It receives sometimes conflicting factual evidence and expert opinions, and chooses among them in light of extant legal constraints, its biases and its experience. As a fact-finder an agency is not a totally objective *tabula rosa*, dispensing justice in a vacuum. But then neither is the trial judge. A judge who has ruled on a hundred medical malpractice summary judgment motions, or perhaps the better analogy, a dozen antitrust bench trials, develops substantial expertise. Such a judge is, under the law, entitled to no greater fact-finding deference than the judge who has just done his or her first such case. Appellate courts generally defer to the judge’s decision as to whom to believe, and so too should be the case with agencies. Trial judges, however, preside over adversary proceedings whose fairness, in terms of requiring that a complete record be developed, is ensured by rigid procedural safeguards not applicable to agency “rulemaking.” While a certain level of fact-finding deference is due to agencies, the appellate courts should scrutinize the substance of an informal agency record to the same degree as that of a trial record. The nature of administrative records is such that it is easier for contrary facts and opinions to be obscured.

In matters of scientific and technical complexity, justice would seem better served by the courts according less deference than they do to more mundane fact-finding. Whatever merit Judge Bazelon’s concern has that judges find it easier to scrutinize less exotic records closely,¹⁸⁴ there are compelling reasons for minimizing deference in such matters. A principal concern is that there is a potential for the development of a tyranny by bureaucrat-technicians in the absence of strong minded judicial review. This concern would be ameliorated if true peer review does not exist in government agencies at the policymaking levels.¹⁸⁵ Moreover, relatively nontechnical policy de-

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¹⁸⁴. See supra notes 107-15 and accompanying text.
¹⁸⁵. It might be argued that scientific “advisory committees” established under some of the environmental and health regulatory statutes fill a peer review role. Such a committee has a limited role under the Clean Air Act, for example, critiquing EPA’s “criteria documents” that assess the health effects of various postulated concentrations of air pollutants, and are supposed to form the basis for EPA’s establishment of national ambient air quality standards. Advisory committees also function under the Toxic Sub-
Decisions are often obscured by agency lawyers who cloak the regulation in scientific or technical buzz words.\textsuperscript{186} Decisions "at the frontiers of science"\textsuperscript{187} by regulatory agencies are not science. They are legal and policy judgments made within the framework of a statute. In reviewing agency regulations, the courts are passing judgment not on the work product of scientists, but on regulations usually written by lawyers,\textsuperscript{188} effectuating decisions made by political appointees and career government managers, who have relied upon scientific employees and consultants to aid them in understanding the data relevant to the subject matter. Finally, health and environmental decisions can have tremendous long-term societal consequences, and agency policy choices are often made in a highly antagonistic political atmosphere.\textsuperscript{189} These factors strongly argue for less rather than greater judicial deference.

There is no compelling argument for much deference to an agency's statutory interpretation under most circumstances. The tools for ascertaining legislative intent are readily accessible to judges. While it is easy to say that an agency acquires a day-to-day familiarity with a statute, the significance of that fact is not readily

\textsuperscript{186} Indeed, such regulatory razzle-dazzle appears to have played no small part in the EPA's regulatory turnaround in the "bubble" case.

\textsuperscript{187} See Baltimore Gas and Electric Co. v. Natural Resources Defense Council, Inc., 103 S. Ct. 2246, 2256 (1983), where the court said: "... [A] reviewing court must remember that the Commission is making predictions, within its area of special expertise, at the frontiers of science. When examining this kind of scientific determination, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential." \textit{Id.} (citations omitted).

\textsuperscript{188} At the EPA, the agency with which the author is most familiar, lawyers, whose average age is in the late twenties, write the final drafts of all major substantive regulations. The general counsel passes final judgment on the sufficiency of the regulation and the statutory authority for the rule. In a very real sense, extreme judicial deference to an agency like the EPA amounts to a large degree to deference to the agency's lawyers, whose collective experience is not overwhelming, either as a matter of science or law.

\textsuperscript{189} See generally B. ACKERMAN & W. HASLIER, CLEAN COAL DIRTY AIR (1981).
apparent when what is at issue is the agency's choice of rival interpretations of the statute. To put the matter bluntly, EPA does not construct "bubbles" on a routine basis. That which is routine in administering a statute seldom ends up in the courthouse.\textsuperscript{190}

The danger inherent in the current trend toward greater deference to EPA and other scientific and technical agencies is ultimate loss of the judicial check and balance over a major segment of governmental activity that has enormous social and economic significance to the citizenry. On the practical side, the absence of a uniform rule for according deference to agency decisions is creating a hodgepodge of irreconcilable decisions on the validity of agency rules. At present, it is possible for identical actions to be either upheld or overturned depending upon which philosophy of deference is followed by the court of appeals panel assigned to the case.

There is need for reform, which is most likely to be successful if the Supreme Court were to take a long, hard look at the deference doctrine, and lay down stern rules for the courts of appeals to follow. That would, of course, require the Court to stem the tide of its own deferential proclivities, and abandon its tendency of recent years to more or less mechanically recite the deference doctrine, particularly when confronted with technologically complex rules.

Legislative reform, I think, at least in the form proposed during recent sessions of Congress,\textsuperscript{191} would be less successful. These efforts focus on tinkering with the language of the APA.\textsuperscript{192} While a stern command by the Congress may ultimately result in relative uniformity of decision, achieving such uniformity could take years of litigation over the meaning and scope of the command. The courts' amalgamation of the substantial evidence—arbitrary and capricious dichotomy into one standard of review\textsuperscript{193} sharply illustrates that legislative reform must be clear and precise.

\textsuperscript{190} See also supra text accompanying notes 133-41 for a discussion of regulatory agency participation in the legislative process.


\textsuperscript{192} See, for example, H.R. 746, 97th Cong., 2d Sess. (1982), and H.R. Rep. No. 435, 97th Cong. 2d Sess. (1982), which proposed to amend the Administrative Procedure Act to make regulations more cost-effective, to ensure periodic review of old rules, to improve regulatory planning and management, to eliminate needless formality and delay, and to enhance public participation in the regulatory process.

\textsuperscript{193} See supra note 10.
VII. Conclusion

Judicial deference to a federal agency’s regulatory fact-finding, decisionmaking and statutory construction is a custom of uncertain judicial origin which has been embraced by the present Supreme Court seemingly without critical analysis of its roots, its jurisprudential legitimacy or its significance in terms of our constitutional system of checks and balances. There is no uniformity in the way courts have approached deference to administrative agencies, and the result has been a hodgepodge of rulemaking decisions that provide little in the way of guidance as to what decisionmaking standards will really be applied to the agencies. The Supreme Court seems to have slipped into a pattern of deferring to agency judgments without considering the long-term consequences of such a practice.

The whole notion of deference needs to be reconsidered, and the law clarified. My own inclination would be to narrow the practice considerably, to accord deference only with respect to an agency’s interpretation of its own regulations, and as to policy choice clearly given by Congress to the agency to make. In record review and statutory construction cases, no special deference to an agency’s view should be given.