DECONSTRUCTING ARBITRARY AND CAPRICIOUS REVIEW*

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Arbitrary and capricious—or "hard look"—review is a legitimizing force in a political and legal environment that is increasingly hostile to administrative government. It is thus no surprise that arbitrary and capricious review is a recurring topic of debate for both courts and commentators. Despite this active focus on hard look review, however, a crucial point has been overlooked. Existing scholarship overwhelmingly portrays arbitrary and capricious review as one-dimensional—as applying the same standard in the same way across all manner of agency conduct. This Article reconceptualizes hard look review as a multidimensional expression of judicial deference and argues that arbitrariness review is both more effective and more easily justified when it is "deconstructed"—when it first divides administrative policymaking into its constituent parts, such as record building, reason giving, input scope and quality, and rationality. This deconstruction exposes arbitrary and capricious review for what I contend it is and should be: a collection of more particularized inquiries into specific components of agency decision making. Deconstruction also provides a new theoretical framework in which arbitrary and capricious review tailors judicial deference to discrete aspects of agency decision making. Finally, deconstruction offers institutional and systemic benefits that help clarify how hard look review should be utilized in

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different contexts and how courts should defer to the political branches more generally.

INTRODUCTION

In an environment where questions about the cost and scope of administrative government dominate our political discourse,[1]

1. A recent and powerful example of the level of disagreement over the proper role of administrative government was the heated debate in 2013 over the automatic spending cuts widely known as the "sequester." *See, e.g.*, Chris Cilliza, *After the Sequestration Stalemate, Things Will Only Get Worse*, WASH. POST (Mar. 3, 2013), http://www.washingtonpost.com/politics/in-the-sequestration-battle-things-will-only-get-worse/2013/03/03/f4ba0990-8412-11e2-9d71-f0feafdd1394_story.html?hpid=z1 ("The parties are deeply divided over the right path forward when it comes to healing the economy and lowering

arbitrary and capricious—or "hard look"—review of agency decisions[2] is an important source of legitimacy for the administrative state.[3] It embodies the difficult and persistent question in American public law of "who decides" issues of law or policy.[4] By incorporating principles of judicial deference to agency conduct, hard look review provides a critical check against unconstrained agency power while still protecting agency expertise and independence from overreaching by the courts.[5] It also serves an important political purpose by

the debt. Obama continues to advocate for . . . tax increases and spending cuts. Republicans believe . . . that the only thing that needs to be done now is to cut."); Richard W. Stevenson, *G.O.P. Clings to One Thing It Agrees On: Spending Cuts*, N.Y. TIMES (Mar. 3, 2013), http://www.nytimes.com/2013/03/04/us/politics/gop-lacking-unity-clings-to-budget-goals.html?hp&_r=0 (suggesting that the sequester is evidence that the "the only issue that truly unites Republicans is a commitment to shrinking the federal government through spending cuts, low taxes and less regulation").

2. "Arbitrary and capricious review," "arbitrariness review," and "hard look review" will be used interchangeably throughout the Article to refer to judicial review of agency policymaking under the standard articulated by the Administrative Procedure Act. *See* 5 U.S.C. § 706(2)(A) (2012).

3. *See, e.g.*, Sidney A. Shapiro & Richard E. Levy, *Heightened Scrutiny of the Fourth Branch: Separation of Powers and the Requirement of Adequate Reasons For Agency Decisions*, 1987 DUKE L.J. 387, 395 ("In this country, judicial review and the legitimacy of administrative government are inextricably intertwined.").

4. *See* Thomas W. Merrill, *The Constitutional Principle of Separation of Powers*, 1991 SUP. CT. REV. 225, 228 (formulating an inductive, "minimal" conception to separation of powers issues that connects rulings of unconstitutionality to attempts by Congress to create a "Fourth Branch"); Thomas O. Sargentich, *The Contemporary Debate About Legislative-Executive Separation of Powers*, 72 CORNELL L. REV. 430, 433 (1987) (encouraging deeper analysis of separation of powers doctrine beyond the traditional formalist-functionalist dichotomy and arguing that the debate encompasses issues about the "legitimacy of the modern administrative process"); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 578 (1984) ("[T]he rigid separation-of-powers compartmentalization of governmental functions should be abandoned in favor of analysis in terms of separation of functions and checks and balances."). *See generally* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH (1962) (discussing judicial review of legislative conduct); JOHN HART ELY, DEMOCRACY AND DISTRUST (1980) (discussing judicial review of legislative conduct); Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1515–16 (1991) (arguing that "the Madisonian goal of avoiding tyranny through the preservation of separated powers should inform the Supreme Court's analysis in cases raising constitutional issues involving the structure of government").

5. *See, e.g.*, Evan J. Criddle, *When Delegation Begets Domination: Due Process of Administrative Lawmaking*, 46 GA. L. REV. 117, 183 (2011) (explaining that "hard look review . . . advances republican values by enmeshing administrative lawmaking within constraints that are roughly equivalent to the checks and balances of Articles I and II"); Emily Hammond Meazell, *Presidential Control, Expertise, and the Deference Dilemma*, 61 DUKE L.J. 1763, 1772 (2012) ("Naturally, expertise also figures into judicial review as a reason for deference to agencies."); Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U. CHI. L. REV. 761, 768 (2008) (advocating "arbitrariness review" as a "safeguard[] for the decline of constitutional checks on agency authority"); Glen Staszewski, *Rejecting the Myth of Popular Sovereignty and Applying an Agency*

protecting against agency choices that run afoul of our democratic expectations.[6] It is no surprise then, in light of both its legal and political significance, that arbitrary and capricious review is a frequent topic of discussion for both courts and commentators.[7]

The current discussion, however, overlooks a critical point. It treats arbitrary and capricious review as one-dimensional by applying the same standard in the same way across all manner of agency conduct.[8] This Article rejects this one-dimensional approach and offers a new perspective on arbitrary and capricious review. Rather than treat arbitrariness review as a singular concept or standard, this Article reconceptualizes hard look review as a multifaceted and diverse manifestation of judicial deference. It argues that arbitrariness review is both more effective and more easily justified when it is "deconstructed"—when it divides administrative policymaking into its constituent parts, such as record building, reason giving, input scope and quality, and rationality.[9] This shift in

Model to Direct Democracy, 56 VAND. L. REV. 395, 440–47 (2003) (considering judicial review as a check on potentially excessive administrative authority and identifying hard look review as "necessary to enforce [republican] ideals").

6. *See* Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 391 (1986) ("The stricter the review and the more clearly and convincingly the agency must explain the need for change, the more reluctant the agency will be to change the status quo."); Jim Rossi, *Redeeming Judicial Review: The Hard Look Doctrine and Federal Regulatory Efforts to Restructure the Electric Utility Industry*, 1994 WIS. L. REV. 763, 821 ("When courts invoke the hard look doctrine, they force agencies to adopt a decisional process designed to ensure that the relevant reasons for change—namely, those public values enshrined in the Rule of Law through a democratic process—are identified and implemented, or force agencies to articulate alternative reasons.").

7. *See* Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 1, 29 (2009) ("[S]cholars have spent inordinate amounts of time debating hard look review and criticizing it on a variety of grounds."); *see, e.g.*, Jack M. Beermann & Gary Lawson, *Reprocessing* Vermont Yankee, 75 GEO. WASH. L. REV. 856, 880–82 (2007) (disputing hard look review's apparent inconsistency with *Vermont Yankee*); William S. Jordan, III, *Ossification Revisited: Does Arbitrary and Capricious Review Significantly Interfere with Agency Ability To Achieve Regulatory Goals Through Informal Rulemaking?*, 94 NW. U. L. REV. 393, 395 (2000) (summarizing the ossification arguments of opponents to hard look review); Richard J. Pierce, Jr., *Waiting for* Vermont Yankee *III, IV, and V? A Response to Beermann and Lawson*, 75 GEO. WASH. L. REV. 902, 904–10 (2007) (arguing that intrusive arbitrary and capricious review is inconsistent with the minimal procedural requirements imposed by the Supreme Court's interpretation of the APA in *Vermont Yankee*); Mark Seidenfeld, *The Irrelevance of Politics for Arbitrary and Capricious Review*, 90 WASH. U. L. REV. 141, 145–48 (2012) (responding to Professor Watts and discussing the relevance of political influences in hard look review).

8. For a more detailed discussion of the existing scholarly treatment of arbitrary and capricious review, see *infra* Part I.B.

9. The suggested process of dividing administrative decision making into its constituent parts will be hereafter referred to as "deconstruction" of arbitrary and capricious review. For present purposes, the term deconstruction is used in its broadest

perspective exposes arbitrary and capricious review for what it should be: a collection of more particularized inquiries into specific components of agency decision making.

Deconstructing arbitrary and capricious review in this manner offers several tangible benefits. First, it more accurately describes how courts, especially the Supreme Court, apply arbitrary and capricious review to individual agency determinations. This is potentially useful in and of itself as a means of bringing greater coherence to a doctrine aptly described by Professors Sidney Shapiro and Richard Levy as "open-ended" and lacking in "precise content."[10] Deconstruction is not, however, simply or even primarily descriptive. It is in fact fundamentally prescriptive. Despite employing features of deconstructed arbitrary and capricious review in their analyses, neither commentators nor courts have articulated a theoretical construct to explain or defend that approach. This project is the first to not only offer a robust view of deconstruction, but also to treat it as a theoretically coherent concept. Doing so allows us to use the deconstruction model to evaluate each of the components of agency conduct against the underlying principles of judicial deference and goals of hard look review. This provides a new, dynamic perspective on arbitrariness review that tailors judicial deference to discrete aspects of agency decision making. It permits arbitrariness review to consider an agency's failure to provide any explanation whatsoever for a policy decision, for instance, differently from a decision to consider specific social or economic factors in reaching that same conclusion. Although either of these choices may be arbitrary, deconstruction is the first systematic approach to consider the appropriate level of judicial deference for each separate choice. The overarching result is a new and more thorough picture of how courts should engage with individual agency policy decisions. Finally, deconstruction allows us to appreciate the corresponding institutional

sense. It does not, for example, refer to the school of literary theory and philosophy of language derived principally from Jacques Derrida's work. *See generally* JACQUES DERRIDA, OF GRAMMATOLOGY (Gayatri Chakravorty Spivak trans., corrected ed. 1997) (arguing that the methods of recording thoughts have a profound effect on the nature of knowledge, and arguing for deconstruction of the relationship between oral language and written language). Deconstruction in the present context instead refers to the more general meaning from the Oxford English Dictionary: "To undo the construction of, to take to pieces." III OXFORD ENGLISH DICTIONARY 106 (1st ed. 1961).

10. Sidney A. Shapiro & Richard E. Levy, *Judicial Incentives and Indeterminacy in Substantive Review of Administrative Decisions*, 44 DUKE L.J. 1051, 1065–66 (1995) ("[T]he arbitrary and capricious standard is relatively open-ended, and the Supreme Court has not given it more precise content.").

and systemic reasons to treat arbitrary and capricious review as a multidimensional exercise. These in turn increase our understanding of how and when hard look review should be employed in different contexts and of when courts should defer to the political branches more generally.

Part I of this Article highlights current perspectives on hard look review. It describes the Supreme Court's use of hard look review since its seminal decision in *Citizens to Preserve Overton Park, Inc. v. Volpe*[11] and reviews the relevant legal scholarship on hard look review during that period. It concludes that although commentators and the Court have identified several issues within hard look review, they have neither developed all of those issues nor formulated a coherent theory for incorporating them into their broader understanding of arbitrariness review. Part II fills this gap by deconstructing arbitrary and capricious review into two broad categories—first- and second-order review—each of which consists of multiple subparts. It then articulates the theoretical distinctions among these deconstructed parts to provide an entirely new perspective on arbitrary and capricious review.

Part III examines the benefits of deconstruction. It measures deconstructed arbitrariness review against the primary rationales put forth for judicial deference to administrative agencies—institutional competency or expertise and political legitimacy—as well as the underlying purposes of hard look review, and it offers a normative argument for why deconstruction promotes better judicial review in individual cases. It goes on to outline the institutional and systemic benefits that arise from deconstructing hard look review, such as improving its accuracy, efficacy, and predictability and promoting increased comity between the political branches and the courts. Part III finishes by addressing the potential costs of deconstruction, and explains why they are outweighed by deconstruction's normative, institutional, and systemic benefits. This Article concludes by reiterating how treating hard look review as a multidimensional concept promotes not only better administrative governance, but also a more responsive and cooperative constitutional democracy.

I. UNDER-THEORIZED ARBITRARY AND CAPRICIOUS REVIEW

The federal courts are no strangers to arbitrary and capricious review. Yet despite its relative ubiquity in administrative law, hard look review remains under-theorized by courts and commentators.

11. 401 U.S. 402 (1971).

Deconstruction offers a coherent framework for judicial review that embraces the complexity and multidimensional nature of administrative policymaking and thereby newly empowers courts to incorporate the full breadth and depth of agency conduct into hard look review.

Arbitrary and capricious review is rooted in the Administrative Procedure Act ("APA").[12] Around the time of the APA's adoption, arbitrariness review mirrored the highly deferential rational basis review employed by pre-APA courts.[13] As Professor Richard Pierce explained, "an agency needed no evidence, no record, and no statement of reasons to support a rule; rules were rarely challenged; and challenges were rarely successful."[14] In the 1960s and 1970s, the interest group model and concerns about agency capture emerged as dominant features of administrative law.[15] The result was a movement in the lower courts to develop a more rigorous approach to arbitrary and capricious review in hopes of protecting the public against imbalanced political influences on agency conduct.[16] The D.C. Circuit

12. 5 U.S.C. § 706(2)(A) (2012) (requiring a reviewing court to set aside "agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law").

13. *See* Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1252 (1986) ("As in its initial phase, the New Deal continued its propensity to address particularized areas of unrest through regulation by experts . . . ."); *id.* at 1266 ("With the final legitimation of the New Deal came the acceptance of a central precept of public administration: faith in the ability of experts to develop effective solutions . . . ."); Matthew Warren, Note, *Active Judging: Judicial Philosophy and the Development of the Hard Look Doctrine in the D.C. Circuit*, 90 GEO. L.J. 2599, 2601 (2002) ("Even after the Administrative Procedure Act of 1946 created a presumption of reviewability of agency action, judicial review of administrative agencies remained generally deferential." (footnotes omitted)).

14. RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW 81 (2008); *see also* Watts, *supra* note 7, at 15 (explaining that "[a]fter the APA was enacted in 1946, things did not change much" regarding the standard for arbitrariness review of agency action).

15. *See* Watts, *supra* note 7, at 15–16, 34 n.145 (citing Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1761 (2007)) (describing the move to an interest group model—which promotes participation in the decision-making process to reflect all affected interests—due, at least in part, to concerns about agency capture); *see also* Thomas W. Merrill, *Capture Theory and the Courts: 1967-1983*, 72 CHI.-KENT L. REV. 1039, 1043 (1997) (describing capture theory as a "pathology" in which "agencies were regarded as being uniquely susceptible to domination by the industry they were charged with regulating").

16. *See* Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 105 COLUM. L. REV. 1749, 1761 (2007) ("Administrative law reflected the interest group representation model by building up the reasoned decisionmaking requirement, also known as the 'hard look doctrine.' "). The predominant view has since shifted from the interest group model to the presidential control model. *See id.* at 1763 ("By the 1980s, administrative law theory and doctrine had transitioned to presidential control of agency decisionmaking as a principal mechanism for legitimating such decisionmaking.").

ultimately coined the term "hard look" review to describe this new approach to arbitrary and capricious review,[17] and the two phrases have since become interchangeable in describing the application of the APA's arbitrary and capricious standard.

The Supreme Court echoed the lower courts' movement toward more rigorous review in *Overton Park*,[18] and cemented the applicability of hard look review in *Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Automobile Insurance Company*.[19] Since its adoption of hard look review, the Court has used relatively consistent language to describe its approach to reviewing agency policy decisions,[20] but has in fact applied the concept of arbitrariness differently in a wide range of cases. These varied applications demonstrate the need for deconstruction's unifying perspective .

Hard look review is a "searching and careful" process by which a court reviews an agency's policymaking process to ensure that it does not exceed the proper bounds of administrative discretion.[21] The ultimate judicial inquiry, however, is described as a "narrow one," one in which a "court is not empowered to substitute its judgment for that of the agency" on a particular policy matter.[22] Reviewing courts generally ask whether an agency determination represents a "clear error of judgment" or is "so implausible that it could not be ascribed to a difference in view or the product of agency expertise."[23] In performing their reviews, however, courts—and especially the

17. Greater Bos. Television Corp. v. FCC, 444 F.2d 841, 851 (D.C. Cir. 1970) (stating that an agency decision should be overturned "if the court becomes aware, especially from a combination of danger signals, that the agency has not really taken a 'hard look' at the salient problems, and has not genuinely engaged in reasoned decision-making." (footnote omitted)).

18. Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 415–17 (1971).

19. 463 U.S. 29, 42–43 (1983).

20. *See, e.g.*, FCC v. Fox Television Stations, Inc., 556 U.S. 502, 513 (2009) ("[A]n agency [must] examine the relevant data and articulate a satisfactory explanation for its action." (internal quotation marks omitted)); *State Farm*, 463 U.S. at 48 ("We have frequently reiterated that an agency must cogently explain why it has exercised its discretion in a given manner . . . ."); Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 549 (1978) ("[W]hen there is a contemporaneous explanation of the agency decision, the validity of that action must 'stand or fall on the propriety of that finding . . . .' "); *Overton Park*, 401 U.S. at 420 ("[Review of the agency decision] is to be based on the full administrative record that was before the Secretary at the time he made his decision.").

21. *Overton Park*, 401 U.S. at 416.

22. *Id.*

23. *State Farm*, 463 U.S. at 43 (citing Bowman Transp. Inc. v. Arkansas-Best Freight Sys., 419 U.S. 281, 285 (1974)).

Supreme Court—have outlined a wide array of agency conduct that could be brought to bear on that question. For instance, the Supreme Court routinely cites the requirement that an agency consider the "relevant factors" before making its policy decision.[24] It has likewise considered the existence and quality of the administrative record supporting the agency's decision,[25] the presence and persuasiveness of the agency's explanation for that decision,[26] and the "rational connection" between the agency's explanation and its ultimate policy position in determining arbitrariness.[27]

While each of these considerations may be valid ways to establish whether an agency acted arbitrarily, they are not simply interchangeable. It is very different, for example, to say that an agency failed in its duty to provide a reasoned explanation of its decision by failing to provide any reasons whatsoever than to claim that an agency failed because it offered reasons that the court deemed inadequate to rationally justify that decision. The former constitutes judicial oversight of a simple disclosure requirement, while the latter represents a rejection of the agency's policy judgment. As a matter of judicial deference, these decisions implicate very different principles and concerns regarding judicial influence over the political branches. It is thus important to treat them accordingly. The Court, however, has failed to do so, often evaluating several distinct types of agency conduct in a single arbitrariness decision. The result is a weakening of the theoretical foundations of arbitrary and capricious review that does a disservice to administrative law and the relationships among our public institutions. The Supreme Court's jurisprudence and the relevant academic commentary in the area highlight the potential value of deconstruction to arbitrary and capricious review.

A. Arbitrariness Review in the Supreme Court

The Court's most notable treatments of hard look review can be found in three cases—*Overton Park*, *State Farm*, and *FCC v. Fox*

24. *See id.* at 42–43.

25. *See Overton Park*, 401 U.S. at 420 (explaining that judicial review of an agency's decision must be "based on the full administrative record that was before the [agency]" at the time of the decision and that if the record is not sufficiently developed to permit such a review, "it may be necessary for the District Court to require some explanation").

26. *See State Farm*, 463 U.S. at 52 (holding that "the agency's explanation for rescission of the passive restraint requirement is *not* sufficient to enable us to conclude that the rescission was the product of reasoned decisionmaking").

27. *Id.* at 43 (citing Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962)).

Television Stations, Inc.[28]—spanning more than three decades. In *Overton Park*, the Supreme Court held that the district court erred when it affirmed the Secretary of Transportation's ("Secretary") provision of funds for the construction of a federal highway through a public park in Memphis, Tennessee.[29] The Court ruled that the lower courts erred by relying on litigation affidavits rather than on the administrative record before the Secretary at the time of his decision in evaluating whether the Secretary's funding decision was arbitrary and capricious.[30] The Court went on, however, to point out that "since [on remand] the bare record may not disclose the factors that were considered [by the Secretary] . . . it may be necessary for the District Court to require some explanation in order to determine if the . . . Secretary's action was justifiable."[31] The possible courses of action for the district court famously included "requir[ing] the administrative officials who participated in the decision to give testimony explaining their action."[32] *Overton Park* represents an acknowledgment by the Court that hard look review is not limited to the quality of an agency's final policy position but that it in fact can be based upon a purely procedural concept. The lack of a complete administrative record could be, regardless of the quality and rationality of the agency's ultimate policy decision, sufficient on its own to invalidate agency action as arbitrary and capricious.

The Court's landmark decision in *State Farm* built on *Overton Park*'s recognition of alternative grounds for finding arbitrariness. It offers a powerful example of the Court taking a monolithic approach to the multifaceted problem of hard look review. In *State Farm*, the Court addressed whether the National Highway Traffic Safety Administration's ("NHTSA") decision to rescind a rule requiring passive restraints in new automobiles was arbitrary and capricious.[33] The Court concluded that it was arbitrary and capricious on three separate, and very different, grounds. The first was the NHTSA's total failure to consider whether airbag technology alone, as opposed to a manufacturer's choice between passive seatbelts and airbags, could be an effective way to meet the Agency's desired safety standards.[34] The Court did not focus on whether airbags were indeed

28. 556 U.S. 502 (2009).
29. *Overton Park*, 401 U.S. at 406.
30. *See id.* at 409, 420.
31. *Id.* at 420.
32. *Id.*
33. Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 40–57 (1983).
34. *See id.* at 46–51.

a desirable safety improvement or whether it would have been rational for the Agency to reach that conclusion, but it instead focused solely on the fact that the Agency "apparently gave no consideration whatever" to the viability of an airbags-only requirement.[35] Because the "agency submitted no reasons at all" for its decision, the Court found its decision impermissibly arbitrary.[36]

In a much closer decision, the Court also held that the NHTSA acted arbitrarily because it "was too quick to dismiss the safety benefits of automatic seatbelts."[37] Rather than rely on a total lack of agency explanation, the Court in the automatic seatbelt context found that the Agency's conclusion was flawed because it did not reflect the Agency "bring[ing] its expertise to bear on the question."[38] More specifically, the Court criticized the NHTSA's decision to exclude detachable passive belts on the grounds that people failed to use "active" manual belts.[39] It concluded that the NHTSA fatally missed the point that detachable belts require an affirmative act to disconnect them, and therefore that inertia—which was the Agency's stated concern for why any kind of belt is unlikely to be effective—"works in *favor* of, not *against*, use of the [detachable belt]."[40] In this instance, the Court found arbitrariness in what it perceived as a logically flawed policy position; it held that the Agency acted arbitrarily because there was no rational basis for its conclusion to exclude detachable seatbelts from its safety standard.

In yet another portion of its opinion, the Court in *State Farm* reviewed a procedural omission by the NHTSA but criticized the Agency's decision in terms of its substantive irrationality. The Court stated that the Agency acted arbitrarily not only by failing to consider airbags separately from seatbelts and by irrationally concluding that

35. *Id.* at 46. The Court in *State Farm* may have believed that an airbags-only standard, if considered by the Agency, would have at minimum qualified as a rational safety measure based on the administrative record. For purposes of deconstruction, however, the fact that the Court may have had one eye on the rationality of the NHTSA's conclusion is not nearly as significant as the fact that the Court explicitly relied on a completely different agency choice—the decision not to analyze the airbags-only option at all—to find the Agency's conduct arbitrary. This conflation of different categories of agency conduct is precisely the difficulty that deconstruction seeks to remedy in the interest of bringing greater precision, clarity, and accountability to hard look review. The Court's own explanation of its reasoning in *State Farm* is thus further evidence of the promise of deconstructing arbitrary and capricious review.

36. *Id.* at 50.

37. *Id.* at 51.

38. *Id.* at 54.

39. *Id.*

40. *Id.*

detachable belts were no better than manual belts, but also by failing to "separately consider the [nondetachable] belt option" as part of its safety standard.[41] In this case, although seemingly dealing with a simple failure of the Agency to articulate any reasons for its decision, the Court explained that "[b]y failing to analyze the [nondetachable belt] option in its own right, the agency has failed to offer the rational connection between facts and judgment required to pass muster under the arbitrary-and-capricious standard."[42] This third part of the analysis thus appears to conflate the Agency conduct of publishing reasons with its creation of a logical nexus between those reasons and the Agency's ultimate policy position. The different aspects of the Court's arbitrariness analysis in *State Farm* demonstrate the analysis's versatility and highlight the Court's failure to provide any coherent explanation as to whether or how arbitrariness review can accommodate widely divergent administrative contexts.

Another example of how the Court has employed arbitrary and capricious review in different ways is its recent decision in *Fox Television*. In that case, the Court asked whether the Federal Communications Commission ("FCC") acted arbitrarily when it announced a new, more restrictive policy on the broadcasting of "fleeting expletives."[43] Citing the familiar doctrinal standard for establishing arbitrariness, the Court concluded that the FCC had not acted arbitrarily in changing its policy because the "agency's reasons . . . were entirely rational."[44] It went on to review the various justifications in the administrative record and to confirm the rationality of each of them. For instance, the Court noted that the FCC's "predictive judgment" that creating a blanket exception for fleeting expletives would "lead to increased use of expletives . . . makes entire sense" and was "an exercise in logic rather than clairvoyance."[45] Unlike its decisions in *Overton Park* and *State Farm*, the Court in *Fox Television* focused entirely on the quality of the Agency's reasoning and evaluated the Agency's final policy determination solely on (highly deferential) rationality grounds.[46] This is very different from deciding that a failure to build a record or to offer any explanation whatsoever for a particular position

41. *Id.* at 55.
42. *Id.* at 56.
43. FCC v. Fox Television Stations, Inc., 556 U.S. 502, 512–13 (2009), *vacated*, 132 S. Ct. 2307 (2012).
44. *Id.* at 517.
45. *Id.* at 521.
46. *See id.* at 517–18.

constitutes arbitrary agency conduct. The Court's approach in *Fox Television* is further evidence that arbitrariness review is a multidimensional process that is often not properly understood or treated as such by the Court.

This overview of the Supreme Court's hard look jurisprudence is important for present purposes not as a focus of doctrinal criticism, but as evidence of the need for—and current lack of—a more nuanced way of dealing with the concept of arbitrariness in administrative law. The above examples of arbitrary and capricious review by the Court invoke very different types of agency conduct and, albeit implicitly, very different perspectives regarding the proper degree of judicial deference toward that conduct. Despite these important differences, neither the courts nor commentators have so far attempted to articulate whether, how, or why these inherent variations in agency policymaking affect arbitrariness review.

B. Scholarly Treatment of Arbitrary and Capricious Review

Judicial review of agency action, including arbitrary and capricious review, is an exceedingly popular topic among administrative law scholars.[47] Like the Supreme Court, however, scholars have largely overlooked the multidimensional nature of agency policymaking in their treatment of hard look review. Even the most active scholarly conversations about arbitrary and capricious review simply do not include the concept of deconstruction. For example, there is a long-running debate around the claim that hard look review leads to the ossification of agency rulemaking.[48] A second

47. *See, e.g.*, Watts, *supra* note 7, at 29 (observing the vast amounts of time scholars have dedicated to the topic).

48. Ossification is the "the extreme cost and delay attendant to the use of notice and comment procedures to issue a rule." Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 59 n.1 (1995) (citing Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 1992 DUKE L.J. 1385). For examples from the scholarly debate surrounding ossification, see, e.g., Mark Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking*, 75 TEX. L. REV. 483, 483 (1997) ("Articles lamenting the recent 'ossification' of notice and comment rulemaking seem to be the fashion in administrative law scholarship today."). *See generally* Jordan, *supra* note 7, at 395 (questioning "whether the hard look version of arbitrary and capricious review has in fact led to the ossification of informal rulemaking"); Thomas O. McGarity, *The Courts and the Ossification of Rulemaking: A Response to Professor Seidenfeld*, 75 TEX. L. REV. 525, 529 (1997) ("Although I agree with Professor Seidenfeld that hard look judicial review is not the only factor contributing [to] the present ossification of the rulemaking process, I am more concerned than he is about its potential to disrupt ongoing agency programs, and I am less concerned about the potential for irrational decisionmaking that might result from reduced judicial scrutiny."); Richard J. Pierce, Jr., *The Role of the Judiciary in*

discussion addresses the question of whether arbitrariness review could interfere with the minimal procedural requirements of the APA and thus run afoul of the Court's prohibition on judicially-created procedures in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*,[49] and a third has emerged regarding the proper role (if any) of political considerations in hard look review.[50]

In the few instances where authors do show some interest in categorizing hard look review, they do so in a way that is notably distinct from deconstruction. Professor Richard Pierce singles out one aspect of hard look review in his 2009 article about the relevant factors an agency may consider in its decision making.[51] Besides the fact that it addresses only one of the many categories of agency conduct included in deconstruction, Professor Pierce's purpose is almost exclusively doctrinal; he explores the recent judicial opinions dealing with relevant factors and offers his thoughts and predictions for the future direction of the case law.[52] He does not address how the relevant factors analysis relates to other categories of agency conduct, or whether those other categories might be amenable to individual treatment.

Implementing an Agency Theory of Government, 64 N.Y.U. L. REV. 1239, 1264 (1989) ("There is mounting evidence that fear of judicial rejection of a policy based on the requirement of reasoned decisionmaking has introduced into the policymaking process delay and resource commitments so great that some agencies have abandoned their efforts and policymaking completely.").

49. 435 U.S. 519 (1978). *See generally* Beermann & Lawson, *supra* note 7, at 880–82 (discussing the tension between hard look review and the principles of *Vermont Yankee*); Pierce, *supra* note 7, at 904–10 (responding to Beermann and Lawson's arguments in favor of hard look review and arguing that hard look review is inherently unpredictable); Paul R. Verkuil, *Judicial Review of Informal Rulemaking: Waiting for Vermont Yankee II*, 55 TUL. L. REV. 418 (1981) ("Ultimately . . . the Supreme Court will have to reconcile the apparently conflicting [precedents] in order to achieve a final resolution of the scope of review standard.").

50. *See generally* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001) (discussing how the Clinton administration helped establish a system of "presidential administration" of agencies in which a president's policies and political agenda shape the administrative state); Nina A. Mendelson, *Disclosing "Political" Oversight of Agency Decision Making*, 108 MICH. L. REV. 1127, 1131 (2010) (stating "any discussion of political reasons [behind administrative actions] cannot be finally resolved without improving the transparency of the decision-making process"); Watts, *supra* note 7 (arguing for an expanded conception of arbitrary and capricious review that acknowledges political influences).

51. *See* Richard J. Pierce, Jr., *What Factors Can an Agency Consider in Making a Decision?*, 2009 MICH. ST. L. REV. 67, 67–69.

52. *See id.*

In a 2005 book chapter, Professor Lisa Schultz Bressman describes the various bases upon which courts employ the rational connection approach to hard look review—the requirement that an agency's ultimate policy conclusion be rationally related to the administrative record.[53] Professor Bressman's analysis is certainly relevant to the idea of deconstruction, as it also seeks to identify the sub-issues informing judicial review of agency policymaking.[54] It does not, however, go as far either descriptively or normatively as the present project.[55] First, Professor Bressman's account focuses primarily on lower court opinions and does so with regard to only one of the subgroups uncovered by deconstruction: the rational connection doctrine.[56] Second, Professor Bressman's account is descriptive; it stops short of any normative claims about the factors informing hard look review.[57] Deconstruction, by contrast, closely examines the Supreme Court's hard look jurisprudence and unpacks all aspects of arbitrary and capricious review in pursuit of normative guidance for both agencies and courts. This normative focus is critical to deconstruction's contribution, as it provides a new and powerful insight into the interaction between agencies and courts over important matters of public policy.

In a 1996 article, Professor Gary Lawson recognizes that "observers of the federal administrative scene have not adequately distinguished among judicial review of the outcome of the agency proceeding, the procedures employed by the agency in reaching that outcome, and the process of decision making, or chain of reasoning, by which the agency reached its conclusions."[58] Although he does explore the theoretical distinctions among these three aspects of agency policymaking, he applies them across multiple standards of review (arbitrariness, substantial evidence, and *Chevron* deference) and refrains from making any of the finer distinctions present in

53. *See* Lisa Schultz Bressman, *Judicial Review of Agency Discretion*, *in* A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES 177, 180 (John F. Duffy & Michael Herz eds., 2005) (introducing the "components of arbitrary and capricious review" and noting the lack of any "rules of thumb" for applying the standard).

54. *See id.* at 181–95 (reviewing a number of reasons courts reverse agency actions).

55. *See* Michael Herz & John F. Duffy, *Preface to* A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES, *supra* note 53, at xii–xiii (explaining the project that gave rise to the book as "describ[ing] federal administrative law in a manner that would be both manageable and comprehensive").

56. *See* Bressman, *supra* note 53, at 181–95.

57. *See id.*

58. Gary Lawson, *Outcome, Procedure and Process: Agency Duties of Explanation for Legal Conclusions*, 48 RUTGERS L. REV. 313, 316 (1996) (emphasis omitted).

deconstruction.[59] Perhaps most importantly, Professor Lawson does not engage in any comparative normative analysis among the various categories of agency conduct.

Professors Sid Shapiro and Richard Levy seek to remedy the indeterminacy of arbitrariness review in a 1995 article by fashioning more determinate "craft norms" through which to better restrain reviewing judges.[60] In furtherance of these new craft norms, Professors Shapiro and Levy suggest an amendment to section 706 of the APA that would shift arbitrary and capricious review toward a collection of more "specific inquiries."[61] The specific inquiries are borrowed from the Court's statement of the arbitrariness standard in *State Farm*, and thus include only a relatively small portion of the conduct considered by deconstruction.[62] Moreover, Professors Shapiro and Levy do not explore the theoretical distinctions among those inquiries or their normative ramifications, both of which are primary concerns of deconstruction.

Finally, Professor Cass Sunstein's 1983 article in the wake of *State Farm* describes hard look review as having "both procedural and substantive components."[63] He breaks down the procedural aspects of hard look review into four "central requirements"—requirements to offer detailed explanations, justify departures from past practices, allow effective participation by affected interests, and consider possible alternatives—and defines the substantive aspect as the "willingness to overturn decisions that appear unjustified."[64] Although these components share some overlap with those considered here, they are not coextensive; Professor Sunstein focuses on the requirements courts put on agencies through hard look review, while deconstruction focuses on the individual steps involved in agency policymaking. Moreover, while Professor Sunstein explains how the *State Farm* Court "ratifie[d] the major elements" of hard look review in its decision, he does not evaluate those elements (or hard look review more broadly) either theoretically or normatively.[65] The crux of his analysis is to highlight a shift in the nature of administrative law from principles of private to public law, and as

59. *See id.*
60. *See* Shapiro & Levy, *supra* note 10, at 1052.
61. *Id.* at 1073–74.
62. *See id.* at 1075.
63. Cass R. Sunstein, *Deregulation and the Hard-Look Doctrine*, 1983 SUP. CT. REV. 177, 181.
64. *Id.* at 181–83.
65. *Id.* at 213.

such, the analysis is notably distinct from the present discussion of deconstruction.[66]

In sum, neither the scholarly literature nor the Supreme Court's jurisprudence has employed the perspective on hard look review offered by deconstruction. This new approach distinguishes among the different facets of agency policymaking in pursuit of a more consistent, effective, and comprehensible form of arbitrary and capricious review. It better describes the multivariable nature of hard look review, while at the same time creating a new typology designed to promote judicial integrity and administrative confidence in the viability of agency policy decisions.

II. DECONSTRUCTING ARBITRARY AND CAPRICIOUS REVIEW

The Supreme Court's difficulty (or disinterest) in developing a unified theory of arbitrary and capricious review—especially after its adoption of the hard look doctrine—calls for a more detailed examination of judicial deference to agency policymaking. Deconstruction answers this call by applying hard look review to each individual aspect of the policymaking process. Deconstruction unveils a subset of more pointed and fundamental inquiries within arbitrary and capricious review that courts may use to better effectuate their role as a check on agency activity while simultaneously promoting notions of administrative effectiveness and legitimacy.[67] These

66. *See id.* at 177 (stating that recent court decisions "reflect a shift in the underlying premises of administrative law, a shift that appears to be leading, for the first time, to a public law divorced from traditional principles of private law").

67. It is worth mentioning that deconstruction does not conflict with the formidable scholarship questioning whether the different standards of review in administrative law are in fact very different, either in theory or practice. This is a more common feature of scholarship examining the relationship between the *Chevron* doctrine and hard look review, and Professor Ronald Levin has made perhaps the most convincing case that hard look review is in fact indistinguishable from review under step two of *Chevron*—the judicial determination of whether an agency's interpretation of its own ambiguous statutory language was reasonable. *See* Ronald M. Levin, *The Anatomy of* Chevron*: Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253, 1254–55 (1997) (arguing that the standard applied in step two of the *Chevron* test is indistinguishable from arbitrariness review under the APA); *see also* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984) (stating what is now referred to as the *Chevron* two-step process for reviewing an agency's action). On a broader scale, Professor David Zaring reviewed the empirical literature regarding whether different standards of review affect judicial outcomes and concluded that a single reasonableness standard would offer the same outcomes at a far lower transaction cost. *See* David Zaring, *Reasonable Agencies*, 96 VA. L. REV. 135, 135 (2010). On first glance, it may appear that a project like deconstruction would fly in the face of Professors Levin's and Zaring's conclusions about the utility in consolidating judicial review doctrines. In fact, however, deconstruction is entirely consistent with (or at least unaffected by) the prospect of consolidation. Deconstruction

inquiries can be divided most broadly into what this Article refers to as "first-order" and "second-order" grounds for review. Exploring the first-order grounds of record building, reason giving, input quality, and research scope, and the second-order grounds of relevant factors and rational connection, is the initial step toward adequately understanding the multidimensional nature of hard look review.

The first-order bases for arbitrariness focus on agencies' modes of self-education and information gathering. First-order agency conduct operates as a threshold or prerequisite to administrative policymaking, and as such it is farther removed from affecting the content of a final policy determination than second-order conduct. For instance, in the environmental risk assessment context, an agency must initially build an adequate record for review, acquire reliable scientific inputs, and determine the scope of technical information needed to perform its analysis.[68] It must then publicly explain its conclusion.[69] While each of these steps is of course relevant to the final decision as to whether and how closely to regulate discharge of a pollutant, for example, they are each attenuated (albeit to different degrees) from the value judgments animating that determination. In the absence of any of the above first-order activities, an agency could still reach a conclusion about the appropriate degree of regulation that would rationally serve the public interest.[70]

does not change or complicate the applicable standard of review of agency policymaking. It only delineates among the various categories of agency activity in order to allow for better application of whatever standard is to be applied. So if *Chevron* step two collapses into hard look review or hard look review collapses into a broader reasonableness standard, deconstruction will serve the same purpose within that new standard: to empower courts to better perform and understand their review of administrative agencies by dividing agency conduct into its theoretically distinct parts. *See* Ronald M. Levin, *Hard Look Review, Policy Change, and* Fox Television, 65 U. MIAMI L. REV. 555, 574–75 (2011) ("I would argue in favor of the utility of doctrines that define the breadth of review. Clarity about what bases the agency needs to have touched should facilitate the courts' decisional process . . . .").

68. *Risk Assessment: Basic Information*, EPA.GOV, http://epa.gov/riskassessment/basicinformation.htm#arisk (last visited Nov. 16, 2013).

69. *See id.*

70. The most troubling of these first-order categories is likely to be input quality. At first glance, it may appear that a reasonable or defensible conclusion cannot be reached without reliable scientific support. There are two reasons why this is not necessarily so, and thus why data quality is included in the category of first-order agency considerations. The first is that unreliable data are not necessarily incorrect; even data that were collected outside the bounds of accepted scientific norms could provide information that in fact guides the agency toward a defensible conclusion. Second is that scientific inputs may be only one of many relevant factors to inform a policy analysis, and as such even reliance on misleading, unreliable data may not affect the ultimate policy outcome in a given case. That said, an argument could certainly be made for thinking of input quality as a second-

The second-order components of hard look review include the agency's choice of relevant factors to influence its final policy conclusion and the relationship between that conclusion and the agency's supporting rationale. These second-order considerations are distinct from their first-order counterparts because they are more closely connected with the *value judgment* exercised by the agency, and thus they are subject to a different set of normative and institutional concerns under hard look review.[71] This initial division of arbitrariness review into first- and second-order components serves a purpose on its own, as it invites a conversation about the relative justifications for reviewing courts to treat some of the threshold or prerequisite issues associated with agency policymaking differently from the agency's ultimate policy conclusions. It also acts as a useful entrée into a more detailed review of the narrower forms of hard look review available to the courts.

It is worth noting at this point that the division of arbitrary and capricious review into these various subparts is necessarily inexact. There is certainly room for debate about whether certain agency decisions are in fact a first- or second-order question. It is entirely possible that in some circumstances what may appear theoretically to be a first-order, threshold question of administrative record building may have such a direct and significant effect on the content of the final policy decision that it is better described as a second-order consideration. For instance, many agencies gather data and perform analyses to predict the likely consequences of a policy before enacting it. On the one hand, collecting predictive data fits nicely as first-order conduct due to its focus on agency self-education. Conversely, the predictive data could be the driving factor (or reason) behind the agency's ultimate policy conclusion, making it appear far more like a second-order issue. While this difficulty is important to keep in mind throughout the deconstruction process and is dealt with in more detail later, it is not inconsistent with the ultimate goal of the project, namely to identify and theoretically distinguish various approaches to hard look review.

Put another way, deconstruction is not meant to operate as a rigid set of rules to prescribe the outcome of judicial review in every case. There are good reasons to grant judges latitude in their review

order issue. Even in those circumstances, deconstruction is a useful exercise, as it does not ultimately depend upon rigid classification of different modes of agency conduct, as much as the theoretical distinctions among them. *See* discussion *infra* Part II.A.3 (describing in greater detail the first-order category of input quality).

71. *See* discussion *infra* Part II.A–B.

of agency conduct, even within a categorical framework like deconstruction. The ultimate goal of deconstruction is thus to highlight the theoretical distinctions among the various steps taken by agencies in formulating policy in order to open additional space for normative considerations about the appropriate measure of deference in specific cases. This is accomplished even where courts disagree as to which categories are implicated in a given case. As Professor Ronald Levin argued nearly twenty years ago:

> Whether to maintain a particular set of categories [of judicial review] should depend heavily on whether the distinction underlying them is valid: Does the agency *deserve* deference more in one case than in the other? An affirmative answer constitutes a strong argument for preserving the distinction, even though judges may have room to maneuver if the application of the distinction is not self-evident. Sometimes our main concern is that the law be "settled"; at other times we prefer that it be "settled right." Therefore, at least until we have had enough experience with a given standard of review to say that it has proved its worth in the precise form in which it is couched, courts should at least be open to considering whether refinements and exceptions to it are warranted.[72]

Deconstruction offers precisely the types of "valid" (albeit novel) distinctions that Professor Levin suggests should be preserved without denying courts the latitude necessary to ensure that, with experience, the law will be "settled right."[73]

Regardless of whether each of the proposed categories is best described as first-order, second-order, or some combination of the two, the fact that they are theoretically distinct offers a valuable opportunity for normative consideration of each. This normative perspective in turn permits a more sophisticated valuation of the optimal use of arbitrariness review in a variety of administrative contexts.

A. First-Order Review

Reviewing an agency's first-order determinations dates back at least to the Supreme Court's decision in *Overton Park*.[74] Since that

72. Ronald M. Levin, *Judicial Review and the Uncertain Appeal of Certainty on Appeal*, 44 DUKE L.J. 1081, 1091 (1995) (responding to Shapiro & Levy, *supra* note 10).

73. *See id.*

74. *See* Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 419–20 (1971) (holding that the lower courts erred by relying on litigation affidavits rather than on the administrative record).

time, the Court has advanced several different conceptions of first-order arbitrariness, from the complete lack of stated reasons in support of a decision to the failure to develop an adequate record upon which to base judicial review.[75] The Court has not, however, offered a theoretical framework for its treatment of such perceived shortcomings. The Court also has failed to define the entire range of potential shortcomings that could (or should) lead to a finding of arbitrary agency action.

1. Record Building

The process of developing an administrative record sufficient to facilitate judicial review is a well-known feature of arbitrary and capricious review,[76] and for good reason. Courts cannot perform their constitutionally required duty of ensuring that agencies act within permissible political and legal bounds without an account of how the agency in fact conducted itself. As a result, the existence of a complete administrative record is a necessary component of any defensible agency action and, conversely, the absence of such a record counsels in favor of a finding that the agency acted arbitrarily.[77] Perhaps the most obvious example of this mode of review is *Overton Park*, where the Court ordered reconsideration of the Secretary of Transportation's decision on the "full administrative record" and

75. *See, e.g.*, Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 46 (1983) (finding arbitrariness because the Agency "apparently gave no consideration whatever" to the viability of an airbags-only requirement); *Overton Park*, 401 U.S. at 420 (explaining that judicial review of an agency's decision must be "based on the full administrative record that was before the [agency]" at the time of the decision, and that if the record is not sufficiently developed to permit such a review, "it may be necessary for the District Court to require some explanation").

76. *See, e.g.*, *Overton Park*, 401 U.S. at 420; Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 654 (1990) ("At most, *Overton Park* suggests that [the APA's arbitrary and capricious standard] imposes a general 'procedural' requirement of sorts by mandating that an agency take whatever steps it needs to provide an explanation that will enable the court to evaluate the agency's rationale . . . ."); *see also* Janet C. Hoeffel, *Risking the Eighth Amendment: Arbitrariness, Juries, and Discretion in Capital Cases*, 46 B.C. L. REV. 771, 793 (2005) ("In order to expose arbitrary decision making, we need a record. In administrative law, there is a built-in procedure for reviewing an agency's decision for 'arbitrary and capricious' decisions: the decisionmaker must make a complete and thorough record of the reasons for the decision."). The circuit courts have confirmed the importance of developing a record for arbitrary and capricious review. *See, e.g.*, Kathryn J. Kennedy, *The Perilous and Ever-Changing Procedural Rules of Pursuing an ERISA Claims Case*, 70 UMKC L. REV. 329, 380 & n.266 (2001) ("In cases where the arbitrary and capricious standard is applicable, virtually all the circuits limit the evidence presented at court to that contained in the administrative record." (citations omitted)).

77. *See Overton Park*, 401 U.S. at 420.

suggested that if such a record did not exist, the district court could exercise its authority to ensure that one was created.[78]

In cases where an administrative record exists but is allegedly incomplete or unsatisfactory, a more detailed inquiry may be required. The Court employed such an analysis in *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*[79] *Arkansas-Best* involved a challenge to the Interstate Commerce Commission's ("ICC") issuance of new certificates of public convenience for transportation companies seeking to operate on routes already utilized by existing certificate holders.[80] One of the issues raised before the district court was whether the administrative record should be reopened due to the five-year time lapse between the close of the ICC's evidentiary hearings and the Agency's final decision.[81] Even though it was "unclear" whether the district court independently relied on the state of the administrative record in setting aside the Commission's order,[82] the Supreme Court nonetheless considered the completeness and adequacy of the record sufficiently important to warrant attention.[83]

The following first-order criteria in this Section address some—if not all—of the remaining examples of how perceived weaknesses in the administrative record manifest themselves upon hard look review. For present purposes, therefore, it is sufficient to note that the complete lack of an administrative record (or some material portion thereof)[84] may be grounds for a ruling that the accompanying agency action is arbitrary and that other more nuanced infirmities in the record may serve as independent bases for finding that agency action fails hard look review.

78. *Id.*; *see also State Farm*, 463 U.S. at 43–44 ("[I]t is also relevant that Congress required a record of the rulemaking proceedings to be compiled and submitted to a reviewing court . . . .").

79. 419 U.S. 281 (1974).

80. *See id.* at 281.

81. *Id.* at 294.

82. *Id.*

83. *See id.* at 294–300 (concluding "that there is sound basis for adhering to our practice of declining to require reopening of the record, except in the most extraordinary circumstances").

84. *See, e.g.*, United States v. Nova Scotia Food Prods. Corp., 568 F.2d 240, 252 (2d Cir. 1977) ("When the basis for a proposed rule is a scientific decision, the scientific material which is believed to support the rule should be exposed to the view of interested parties for their comment.").

2. Reason Giving

Reason giving is a well-known and widely discussed feature of legitimate administrative action. Numerous commentators have cited the importance of agencies offering public explanations for their decisions as a way of promoting substantive rationality as well as public accountability and transparency.[85] Because agencies occupy a somewhat insulated place in our constitutional democracy, it is crucial for their democratic legitimacy that they appear constrained by rationality and, at least indirectly, our elected officials.[86] One way to protect against irrational, unchecked agency action is to require that the agency explain itself. While the simple existence of reasons cannot ensure that an agency reached a rational conclusion, it can ensure that irrational or unsupported conclusions will be more readily identified and addressed by all three branches of government and the public. Courts and commentators generally agree and have spent significant time and energy exploring the theoretical bases for requiring agencies to provide reasoned explanations for their decisions.[87] On this basis, reason giving is among the least interesting of the categories in deconstructed arbitrary and capricious review.

85. *See, e.g.*, Lisa Schultz Bressman, *Disciplining Delegation After* Whitman v. American Trucking Ass'ns, 87 CORNELL L. REV. 452, 485 (2002) ("[Administrative law principles] require agencies in general to articulate a basis for their policy determinations and, in particular, to articulate the standards for those determinations."); Cary Coglianese & Gary E. Marchant, *Shifting Sands: The Limits of Science in Setting Risk Standards*, 152 U. PA. L. REV. 1255, 1256 (2004) (arguing that "[a]dministrative law aspires to bring reason to agency policymaking" by "requir[ing] agencies to specify the basis for the rules they promulgate"); Lawson, *supra* note 58, at 315 ("Well-settled principles of administrative review plainly require agencies to provide reasoned explanations for their legal interpretations . . . ."); Jerry L. Mashaw, *Small Things Like Reasons Are Put in a Jar: Reasons and Legitimacy in the Administrative State*, 70 FORDHAM L. REV. 17, 24 (2001) (addressing the legitimacy of the administrative state through the role of reason giving); Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 634 (1995) (discussing reason giving as a part of administrative and judicial decision making).

86. *See* Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 462 (2003) ("From the birth of the administrative state, we have struggled to describe our regulatory government as the legitimate child of a constitutional democracy. That is, we have sought to reconcile the administrative state with a constitutional structure that reserves important policy decisions for elected officials and not for appointed bureaucrats."); Cynthia R. Farina, *The Consent of the Governed: Against Simple Rules for a Complex World*, 72 CHI.-KENT L. REV. 987, 987 (1997) ("The nature of our attempts to solve the problem—that is, to reconcile the reality of regulatory government in the United States with the ideals of American constitutional democracy—has varied with the times.").

87. *See, e.g.*, Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 50 (1983) (finding the Agency's decision impermissibly arbitrary because the "agency submitted no reasons at all" for its decision); *supra* note 85 and accompanying text.

What does make it interesting, however, is that reason giving can be further subdivided into first- and second-order components. This subdivision of administrative reason giving opens up the possibility of comparing and contrasting the normative bases for requiring agencies to supply any reasons at all—first-order reason giving—with those for offering reasons that provide persuasive support for the ultimate policy decision—second-order reason giving. Both modes of reason giving are discussed as part of the Supreme Court's conclusion in *State Farm*.[88] In deciding that the Agency arbitrarily failed to consider an airbags-only standard after determining that an airbags-or-passive seatbelt standard would not be effective, the Court explained that the Agency failed because it "submitted no reasons at all."[89] This was a first-order failure by the Agency; it did not necessarily represent a flaw in the Agency's ultimate policy judgment to abandon the new safety standard, but rather it represented a flaw in its ability to meet the necessary prerequisites for exercising that judgment.

By contrast, the *State Farm* Court's rejection of the NHTSA's decision to abandon automatic seatbelts was based on second-order reason giving. The Agency had articulated some reasons for its decision, so there was no first-order problem of failing to provide any explanation for its conduct. The Court instead took issue with the *quality* of the NHTSA's explanation, holding that the reasons that were proffered by the Agency did not create the necessary "rational connection between the facts found and the choice made."[90] This second-order analysis directly implicates the final policy choice by the Agency and is synonymous with the rational connection category discussed below.[91] At this stage in the analysis, it is enough to show that although first- and second-order reason giving are clearly related, they are potentially distinct when considered in light of broader principles of judicial deference to agency decision making.[92] Disaggregating them opens up a more dynamic treatment of arbitrariness review that could lead to additional insights into how such review best fits within our administrative system.

88. *See State Farm*, 463 U.S. at 50, 56.

89. *Id.* at 50.

90. *Id.* at 52, 56 (citation omitted).

91. For a thorough discussion of rational connection review (or second-order reason giving), see *infra* Part II.B.2.

92. For a detailed discussion of two core principles of judicial deference to administrative agencies—agency expertise and political accountability—see *infra* Part III.A.1.

3. Input Quality

Another first-order issue that arises in agency decision making, especially in decisions involving scientific or technical information, is whether an agency had processes in place to ensure the reliability or veracity of the informational inputs to its policy decisions.[93] Reliable inputs serve at least two important functions in the administrative process. They provide substantive information that is relevant and helpful to policymakers, and they create a rational basis from which administrators may justify their policy determinations.[94] The exclusion of unreliable information, however, may be even more important. Whereas a lack of reliable inputs does not necessarily destroy an agency's ability to make a principled decision,[95] the introduction of unreliable information might. Unreliable information could cause agencies to make poorly informed policy decisions or, more cynically, to "manufacture uncertainty"[96] or otherwise mischaracterize those inputs in support of a policy decision that is not in fact supported by the data.[97] This in turn creates significant

93. *See* Final Information Quality Bulletin for Peer Review, 70 Fed. Reg. 2664 (Jan. 14, 2005) (mandating independent peer review for all important scientific information disseminated by administrative agencies). Like its predecessor policies at individual agencies, the mandate was somewhat open-ended, leaving the form and scope of peer review to the agencies' discretion, noting that "[p]eer review may take a variety of forms." *Id.* at 2665 ("We recognize that different types of peer review are appropriate for different types of information. Under this Bulletin, agencies are granted broad discretion to weigh the benefits and costs of using a particular peer review mechanism for a specific information product.").

94. *See* Administrative Procedure Act, 5 U.S.C. § 553(c) (2012) (requiring new rules to include a "concise general statement of their basis and purpose"); Mashaw, *supra* note 85, at 24–25 (recounting the development of the "concise statement" requirement of section 553(c) of the APA "into the requirement of a comprehensive articulation of the factual bases, methodological presuppositions, and statutory authority that justifies any exercise of rulemaking").

95. *See* FCC v. Fox Television Stations, Inc., 556 U.S. 502, 519 (2009) ("There are some propositions for which scant empirical evidence can be marshaled . . . . It is one thing to set aside agency action . . . because of failure to adduce empirical data that can readily be obtained. It is something else to insist upon obtaining the unobtainable." (internal citation omitted)).

96. Professor David Michaels, the Energy Department's former Assistant Secretary for Environment, Safety, and Health under President Clinton, defined "manufacturing uncertainty" as "reanalyz[ing] the data to make [previously firm] conclusions disappear—poof. Then they say one study says yes and the other says no, so we're nowhere." Rick Weiss, *'Data Quality' Law is Nemesis of Regulation*, WASH. POST, Aug. 16, 2004, at A1; *see also* Gardiner Harris, *White House is Accused of Putting Politics Over Science*, N.Y. TIMES (July 10, 2007), http://www.nytimes.com/2007//07/10/washington/11cnd-surgeon.html?pagewanted=print&_r=2& (identifying areas in which scientific information became politicized).

97. This is analogous to Professor J.B. Ruhl's "The Science Made Us Do It" violation. *See* J.B. Ruhl, *Reconstructing the Wall of Virtue: Maxims for the Co-Evolution of*

systemic problems, including possibly rendering the agency's conduct arbitrary.

Courts' role in ensuring input quality, however, is another matter. Examples involving judicial review of the effect of unreliable information in the administrative process are difficult to come by, as courts are loath to second-guess agencies' scientific conclusions.[98] Moreover, as Professor Wendy Wagner has demonstrated, agency use of flawed scientific information is extremely rare.[99] Finally, the approach most often associated with judicial judgments about agency science—and generally described in the academic literature as "regulatory *Daubert*"[100]—has been widely criticized.[101] Regulatory

Environmental Law and Environmental Science, 37 ENVTL. L. 1063, 1067–68 (2007). The opposite problem, that of using unreliable scientific information to "manufacture certainty," is less of a concern as it depends on the total absence of reliable scientific information rather than merely the presence of a single source of unreliable information as in the case of manufacturing uncertainty.

98. *See* Emily Hammond Meazell, *Super Deference, the Science Obsession, and Judicial Review as Translation of Agency Science*, 109 MICH. L. REV. 733, 734 (2011) (describing the judiciary's tendency to defer more strongly to agency scientific determinations as "super deference"). There are, however, examples outside of the judicial review process that indicate that an agency relying on bad science is not an impossibility. The application of established agency use of "bad science" is evident in the EPA's 2003 decision not to promulgate additional regulations regarding the weed killer atrazine. *See* Weiss, *supra* note 96 (explaining that in the same month that the European Union banned atrazine, "the EPA decided to permit ongoing use in the United States with no new restrictions"). Just prior to the EPA's decision, the European Union had decided to ban atrazine on the basis of scientific evidence demonstrating that atrazine caused dangerous hormonal changes in wildlife. *See id.* (noting that the harmful effects of atrazine "have been echoed by at least four other independent research teams in three countries"). The EPA, however, pointed to scientific uncertainty about the potential dangers of atrazine as the basis for its regulatory inaction. *Id.* (listing the scientific grounds on which further regulation of atrazine was challenged). The cause of this uncertainty was scientific data supporting atrazine's safety that came from studies funded by atrazine's manufacturer, Syngenta, and later deemed fundamentally flawed by the EPA's Scientific Advisory Panel. *Id.* ("A special EPA science panel would eventually level stinging criticisms at [Syngenta's] studies for their poor design and sloppy implementation."). The result was an administrative process that may not only have been informed by unreliable science, but was also accused of "manufacturing [scientific] uncertainty" in order to justify a predetermined policy position. *Id.* (quoting Professor David Michaels).

99. *See* Wendy E. Wagner, *The "Bad Science" Fiction: Reclaiming the Debate over the Role of Science in Public Health and Environmental Regulation*, 66 LAW & CONTEMP. PROBS., Autumn 2003, at 63, 72 ("[D]espite the thousands of public health and safety regulations promulgated annually, there are surprisingly few examples of EPA using unreliable science or using science inappropriately to support a final regulation." (footnotes omitted)); *see also* SHEILA JASANOFF, THE FIFTH BRANCH: SCIENCE ADVISERS AS POLICYMAKERS 3–4, 20–38 (1990) (noting that most criticisms of agency science "had relatively little to do with the competence or incompetence of agency officials").

100. *See* Alan Charles Raul & Julie Zampa Dwyer, *"Regulatory* Daubert*": A Proposal to Enhance Judicial Review of Agency Science by Incorporating* Daubert *Principles Into*

Daubert seeks to apply the gatekeeping principles of the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[102] to judicial review of agency scientific determinations.[103] In *Daubert*, the Court held that Federal Rule of Evidence 702 required courts to judge the reliability and relevance of scientific information proposed to be admitted as evidence at trial.[104] Notwithstanding the differences between evidentiary determinations and hard look review, regulatory *Daubert* proposes a similar form of judicial review in the administrative context.[105] This is problematic, as Professor Thomas McGarity and others point out, due to the wide gap in institutional competency between agencies and courts: generalist courts are simply not qualified to judge the technical determinations of expert agencies.[106]

These valid criticisms of the judiciary's ability to review the quality of agency science, however, do not eliminate the potential value of input quality to deconstruction. As an initial matter, the introduction of the input quality category is not meant as an affirmative claim that courts *should* attempt to judge the "correctness" or reliability of agency science as part of their hard look review. Rather, it suggests that if they did, it would be a decidedly different inquiry than, for instance, a review of whether the agency provided reasons for its ultimate policy position. The theoretical distinctions between modes of review are important independent of the inherent value or utility of those individual modes, even when courts are reluctant to review one of the categories altogether.

Administrative Law, 66 LAW & CONTEMP. PROBS., Autumn 2003, at 7, 8, 39 (defining "regulatory *Daubert*" as a "conceptual framework" that allows judges to inquire into "agency science and related administrative justifications for regulatory action").

101. *See, e.g.*, Thomas O. McGarity, *On the Prospect of "Daubertizing" Judicial Review of Risk Assessment*, 66 LAW & CONTEMP. PROBS., Autumn 2003, at 155, 156, 171 (stating that "judicial adoption of regulatory *Daubert* will likely result in unconstrained regulatory policymaking by unaccountable and scientifically illiterate judges and in a much higher incidence of judicial remand of important regulations").

102. 509 U.S. 579 (1993).

103. *See* Raul & Dwyer, *supra* note 100, at 39 (explaining how "regulatory *Daubert*" would apply to judicial review of an agency's scientific determinations).

104. *See Daubert*, 509 U.S. at 597. Rule 702 was amended after *Daubert* to reflect the Court's decision. *See* FED. R. EVID. 702 (advisory committee's note).

105. *See, e.g.*, Raul & Dwyer, *supra* note 100, at 20–27 (discussing the application of *Daubert* principles to judicial review of administrative agencies).

106. *See* McGarity, *supra* note 101, at 156 ("Judges' limited competence in areas involving scientific data and analysis, complex modeling exercises, and large uncertainties is well recognized in administrative law and has been effectively demonstrated by the courts themselves in post-*Daubert* toxic torts opinions."); *see also* Wagner, *supra* note 99, at 97 ("[I]f the courts' scientific competency is less than that of the party they are reviewing, it is unclear what the courts are contributing to the exercise.").

Professor Emily Hammond's work on judicial review of agency science describes the phenomenon of "super-deference," by which courts defer more strongly to agency scientific determinations than to other policy-related conclusions.[107] At first glance, it may appear that the concept of super-deference renders input quality review, at least of scientific information, effectively moot. This point is debatable for the reasons articulated below,[108] but at minimum, input quality review has value as a comparative tool to provide greater clarity and integrity to hard look review in general. As Professor Hammond notes, many claims of bad agency science are better described as examples of inadequate agency reasoning.[109] By singling out input quality as an individual category of hard look review, courts are encouraged to delineate between input quality and reasoning and to pay closer attention to the normative bases for review in each distinct context. This provides a benefit to hard look review regardless of whether input quality is itself frequently employed by the courts.[110]

Moreover, there are several ways in which courts may refine their consideration of input quality that could either eliminate or greatly reduce the impact of their lack of technical expertise. Rather than focusing on the accuracy or reliability of specific data points, judges could focus on broader questions such as the qualifications and independence of the information's source (particularly where agencies rely on outside studies for their data), whether an agency considered and responded to significant public comments, or whether it employed methodological protections such as peer review in its data acquisition.[111] Although these inquiries are not wholly non-

107. *See* Meazell, *supra* note 98, at 734.

108. *See infra* notes 111–12 and accompanying text.

109. *See* Meazell, *supra* note 98, at 749 & n.83.

110. *See* discussion *infra* Part III.A.2.

111. *See* Louis J. Virelli III, *Scientific Peer Review and Administrative Legitimacy*, 61 ADMIN. L. REV. 723, 732–40 (2009) (defining administrative peer review and outlining its benefits for agency science). A possible concern regarding judicial reliance on peer review is that agencies are often forced to make technically related policy decisions before relevant scientific opinion is settled, such that relying on peer review as indicia of reliability conflates the standards of scientific publication with those of valuable scientific inputs to the administrative process. While it is certainly true that agencies operate under many more restraints in their use of scientific information than academic scientists, *see id.* at 737–38, it does not alter the positive value of peer review to courts seeking to understand the reliability of a given agency input. Peer-reviewed support carries with it the imprimatur of reliability, regardless of whether the converse is true; the lack of peer-reviewed support is not the opposite of reliability, but it is an indication that the information at issue has not been vetted by the scientific community, and as such requires some other indicia of its reliability. In either case, keeping peer review in mind as a useful

technical, they are sufficiently general and sufficiently procedural such that they transcend technical subject matter and thus are more likely to be within judicial competence than review of the "correctness" of agency science.

Lastly, input quality is not limited to scientific or technical information. The reliability of nontechnical relevant inputs is equally important to the administrative process and is far more likely to be within the normal competence of the courts. For nontechnical inputs, courts could inquire into whether an agency gathered information from known and reputable sources or through methods recognized as reliable by professional organizations or in other areas of the law.[112] Neither of these inquiries requires any specific technical expertise, yet each could be a valuable means of protecting the veracity or reliability of the administrative record.

Judicial review of an agency's procedures for ensuring input reliability could be a useful way to evaluate whether that agency had acted arbitrarily in making a policy decision based on those inputs. The possibility of an agency employing unreliable or false information in its policymaking arguably renders the entire decision-making process arbitrary, and as such, courts should include within their arbitrariness review an agency's procedures for admitting reliable inputs and excluding unreliable ones.

Despite a seemingly direct connection between reliability and rational decision making, the Supreme Court has never explicitly looked into input quality as part of its arbitrary and capricious review. Rather than use this fact as a reason to disregard arbitrariness review of data quality, it should instead be thought of as a strong justification for deconstructing arbitrary and capricious review to reveal additional bases upon which courts can and should focus their attention.

signal of information quality can prove helpful, even if not dispositive, for reviewing courts.

112. Acquiring information about a specific place or event, for instance, may be better done through first-hand observations by agency personnel, other eyewitness accounts, or some form of adversarial fact-finding rather than via third-party statements and hearsay. This concept for judicial treatment of nontechnical inputs is mirrored in the Court's decision in *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 149–50 (1999). *Kumho Tire* was a successor to *Daubert* and thus carries with it the same precautionary notes discussed above with regard to strict application of *Daubert* in the regulatory context. *See supra* notes 100–06 and accompanying text. It nevertheless reflects the idea expressed here that courts can evaluate (at least in meaningful part) the reliability of nonscientific agency inputs without claiming to share the agency's expertise.

4. Research Scope

A related inquiry into first-order agency activity addresses the *breadth* of information that agencies consider in their policymaking. In addition to focusing on the quality of information brought into the process, the number and range of information sources could also have a significant impact on arbitrariness. Imagine a scenario where an agency gathers a single, reliable study or data source to inform a policy decision. The quality of the relevant information is not implicated in this instance, but that does not mean that the agency's procedures are not arbitrary in another dimension. It is not only possible but likely, given the complexity and controversial nature of many of the problems facing agencies, that several reliable and potentially conflicting inputs may be germane to a single issue before an agency.

Perhaps more importantly, inclusion of the proper range of information is reflective of the agency's due diligence in policymaking, which is important for ensuring both that the agency is properly informed and that the public sees its administrative institutions engaging in thorough, rigorous analyses. An agency's failure to incorporate an adequate range of information on a particular subject thus forms an independent ground for a finding of arbitrariness and should be treated accordingly by courts during hard look review.

The Supreme Court acknowledged the relevance of research scope to hard look review in *Fox Television*. The Court held that a change in the FCC's policy restricting the use of "fleeting expletives" on television was not arbitrary or capricious, at least in part based on the Court's determination that the Agency acted rationally in concluding that such expletives could be harmful to children.[113] The court of appeals had stated that the FCC's policy change could not be upheld without evidence suggesting that fleeting expletives do in fact cause serious enough harm to children to warrant government intervention.[114] The Court rejected that line of reasoning, explaining that the effect of broadcast profanity on children is not something that lends itself to direct empirical study, and thus the other information available to the Agency—such as children's propensity to

113. *See* FCC v. Fox Television Stations, Inc., 556 U.S. 502, 517–18 (2009).

114. *See id.* at 519 ("In the [appellate court] majority's view, without 'evidence that suggests a fleeting expletive is harmful' . . . the agency could not regulate more broadly.").

mimic observed behavior—constituted a sufficient knowledge base to support the new policy.[115]

There are several ways to view the Court's decision in *Fox Television*, and this vantage point is admittedly a narrow one.[116] It is nevertheless useful to deconstruction because it provides evidence that the Court does consider research scope as a meaningful part of administrative policymaking. The range of information discussed by the *Fox Television* Court all pertained to the effect of profanity on children. The Court concluded that the Agency did not need to expand its research scope to include empirical data because it had sufficient information to conduct a rational analysis.[117] This may well be a controversial position, but regardless of whether the Court was right in its determination about the scope of the Agency's investigation, the very fact that it undertook the inquiry is enough to demonstrate deconstruction's potential usefulness.

The research scope consideration introduced here is distinct from the "relevant factors" analysis frequently referred to by courts and described below.[118] The question of whether an agency has considered all of the factors relevant to a given policy question can be thought of in at least two ways, neither of which are necessarily coextensive with the scope of data collected by the agency. As an initial matter, the relevant factors to a policy question can be thought of as a statutory question whereby Congress has outlined the factors to be accounted for by an agency, and the agency's failure to account for these factors would render its decision "arbitrary . . . or not in accordance with law" under the APA.[119] Another manifestation of the relevant factors standard is an agency's failure—in the absence of congressional guidelines—to properly identify the list of factors that are substantively relevant to its final determination. This second version of the relevant factors analysis could involve both under- and over-inclusive approaches by the agency, for example by including

115. *See id.* ("[I]t suffices to know that children mimic the behavior they observe . . . .").

116. *See, e.g.*, *id.* at 505 (referring to the statutory language proscribing "any . . . indecent . . . language" as support for the FCC's new policy position). This does not take away from the relevance of the agency's research scope to hard look review generally, but it does demonstrate the complexity of such review and the apparent difficulty experienced by the Court in articulating a consistent, coherent framework for explaining its reasoning in such cases. Deconstruction will help to alleviate this difficulty.

117. *See id.* at 519 (finding that empirical data demonstrating how one-word indecent expletives would constitute harm to children were not required because knowing children mimic others' behavior is sufficient).

118. *See infra* Part II.B.1.

119. 5 U.S.C. § 706(2)(A) (2012).

economic considerations where they are either germane or inapposite to the ultimate policy question.[120]

By contrast, the research scope variable asks about the range of data collected by an agency in connection with its policy determination. The scope of an agency's research could be measured within a single relevant factor, for instance where an agency has considered only one source of statistical evidence pertaining to an issue when multiple credible sources are available. It could also be measured across several factors, where the full range of data sources are collected for one of the relevant factors, but not for others. In either case, an agency's failure to incorporate a more inclusive universe of relevant data is a separate and distinct basis for a finding of arbitrariness that merits individual attention.

For similar reasons, research scope is also best thought of as a first-order consideration. To focus on the breadth of information gathered by the agency is to focus on the agency's diligence in preparing itself to make its policy judgment. Whether all or most of the relevant information is brought before the agency does not dictate answers to second-order questions of whether it contemplated all of the relevant factors or made a rational connection between the available information and its ultimate policy position. Research scope is thus—at least conceptually—a threshold consideration in an agency's policy judgments. That is not to say that research scope is entirely divorced from the final outcome, is not related to questions of agency rationality or integrity, or is otherwise unimportant to agency practice. It is simply to recognize a further theoretical distinction that could be useful to courts and commentators seeking to ask more probing questions about the efficacy of hard look review.

These examples of first-order criteria for courts to consider during hard look review—record building, reason giving, input quality, and research scope—are not meant to be exhaustive or necessarily novel; while input quality would be a novel consideration in arbitrary and capricious review, reason giving, for instance, would not. The purpose of this exercise is instead to identify some distinctions that could make hard look review more principled, effective, and democratically legitimate.

120. *See, e.g.*, Entergy Corp. v. Riverkeeper, Inc., 556 U.S. 208, 222 (2009) (holding that the EPA was permitted to consider costs as a relevant factor in its regulation of cooling-water intake structures at existing power plants).

B. Second-Order Review

Arbitrary and capricious review also takes account of the second-order features of agency action. Second-order arbitrariness review is a more amorphous category than first-order review, primarily because the range of policy issues that arise before agencies and reviewing courts is so widely varied. In order to meaningfully theorize these second-order features of hard look review, it is therefore necessary to describe the relevant questions asked by courts in rather broad strokes.

1. Relevant Factors

One key manifestation of second-order arbitrariness review is an examination of the number and nature of "relevant factors" considered by an agency in reaching its policy decision.[121] As Professor Richard Pierce recently explained, "[i]t is hard to imagine any administrative law issue more basic than identifying the factors that an agency must, can, and cannot consider in making a decision."[122] Relevant factors analysis is a prominent feature of hard look review.[123] It helps agencies make thoughtful choices based on a thorough understanding of all aspects of their decisions.[124]

Perhaps more importantly, the relevant factors analysis occupies a particularly powerful position in the overall arc of agency decision making; it acts as a potential bridge between what are described here as first-order activities of information gathering and the agency's ultimate policy determinations. The former are precursors to the relevant factors analysis. They go to the quality of the available policy inputs, regardless of whether those inputs are directly relevant to a policy question or whether the agency has identified all of the issues associated with that question. The latter, by contrast, is a potential product of the relevant factors determination. Before an agency offers its explanation for why the administrative record rationally supports its ultimate determination it must, either explicitly or

121. *See* Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins., 463 U.S. 29, 43 (1983) ("In reviewing [an agency's] explanation, we must 'consider whether the decision was based on a consideration of the relevant factors . . . .' " (quoting Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc., 419 U.S. 281, 285 (1974)).

122. Pierce, *supra* note 51, at 67.

123. *See id.* (explaining that the question of which factors are relevant to an agency's decision is something "[e]very agency must confront . . . every day, and circuit courts address it on a regular basis").

124. *See State Farm*, 463 U.S. at 42–43 (explaining that courts must examine the relevant factors within an "arbitrary and capricious" analysis).

implicitly, make choices as to which factors are significant enough to be treated as influential components in that determination. Those choices qualify as second-order considerations under the present definition because they involve policy judgments by the agency that have a direct impact on the content of the agency's final position.[125] By virtue of its key role in the policymaking process, relevant factors analysis merits the separate consideration within arbitrary and capricious review offered by deconstruction.

The Supreme Court apparently agrees. There are two contexts in which a relevant factors analysis can take place. The first occurs when factors are provided by statute,[126] requiring the reviewing court to ask whether the factors actually relied on by the agency comport with those in the statute.[127] The second involves congressional silence

125. *See supra* notes 67–71 and accompanying text (defining first- and second-order considerations). There is the possibility that a "statutory" relevant factors analysis could appear to be more of a first-order than a second-order question. If the statutory analysis is thought of first and foremost as a "box-checking" exercise, where an agency is merely required to say that it considered certain statutorily defined factors to successfully justify its policy conclusion, then it would appear more like a first-order consideration. There are at least two possible problems with this perspective. First, it is unclear whether the Court would consider such a cursory statement as satisfying a relevant factors analysis under its current arbitrary and capricious jurisprudence. *See* Pierce, *supra* note 51, at 67–69 (describing the recent fluctuations in the Court's current approach to its relevant factors analysis). Second, the purpose of the relevant factors inquiry is to promote a better value judgment by the agency. It seeks to ensure that the agency's final determination is informed by, and consistent with, all of the relevant issues affecting the subject. In addition to Congress's relevance determination, which is obviously a substantive decision, the reviewing court's determination that the agency's ultimate conclusion sufficiently incorporates the statutory factors fits here as a second-order consideration because it requires an understanding of both the policy decision itself and the quality of its underlying rationales.

126. This "statutory" relevant factors analysis can be further divided into two subparts. The first asks if an agency took all of the statutorily enumerated factors into account in reaching its decision, and the second asks if an agency included a factor in its analysis that was statutorily prohibited. *See, e.g.*, Pierce, *supra* note 51 at 67–69. The Court undertook this first brand of statutory relevant factors review in *American Paper Institute, Inc. v. American Electric Power Service Corp.*, 461 U.S. 402, 417–18 (1983) (concluding that the Federal Energy Regulatory Commission's decision incorporated all of the relevant statutory factors), and the second brand of statutory factors review in *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 468, (2001) (prohibiting the EPA from considering costs in its air quality standard setting because doing so was deemed precluded from consideration by section 109(b) of the Clean Air Act).

127. Despite initial appearances, the "statutory" relevant factors analysis is at least conceptually different from review of the agency's statutory interpretation under *Chevron*. *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984). Under the relevant factors analysis, courts ask whether the agency's explanation encompasses the relevant statutorily defined issues, not whether the statute in fact requires the agency to consider those issues in the first instance (presumably that would be a matter of law). In cases where the statutory requirements are ambiguous, a statutory

regarding the relevant factors and asks whether the agency's own choices regarding which factors to consider satisfy hard look review.[128] Although there is no single method of identifying relevant factors under this analysis, courts could rely on information like the agency's policy mission, its own description of its deliberations, and the cultural and historical role of the agency in drawing out which factors should be treated as relevant to its final decision.

The Court has considered the relevant factors question often and in both contexts,[129] although never self-consciously enough or with sufficient regard for the other categories of agency conduct to achieve

relevant factors analysis could certainly incorporate *Chevron* principles in answering the initial question of what exactly the agency is required to consider, and for present purposes it is assumed that an agency decision in that regard would receive *Chevron* deference. It is sufficient here to note that the *Chevron* analysis needed to establish which factors are indeed statutorily relevant is independent from the question that is ultimately subject to arbitrary and capricious review—did the agency's explanation of its policy decision include information sufficient to satisfy that statutory requirement?

128. There are obvious parallels between this example of hard look review and step two of *Chevron*. *See id.* at 843. In both cases, agencies are left with statutory space in which to exercise their discretion and are reviewed for their reasonableness or rationality in that exercise. To the extent these similarities exist, relevant factors considerations in hard look review may have something to learn from the courts' experience with—and commentators' far greater focus on—*Chevron*. *See, e.g.*, Levin, *supra* note 67, at 1254 (arguing that the standard applied in step two of the *Chevron* test is indistinguishable from arbitrariness review under the APA). *But see* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 1001 n.4 (2005) (distinguishing between step two of *Chevron* and hard look review by noting that an agency's "inconsistency bears on whether the Commission has given a reasoned explanation for its current position, not on whether its interpretation is consistent with the statute" under *Chevron*). In terms of the larger aim of deconstruction, however, it is unlikely that much can be gained or lost by analogy to *Chevron*. Many of the categories of hard look review identified here (especially first-order considerations like record building) are unlikely to be issues of statutory interpretation in the first instance, and thus *Chevron* cannot offer much in terms of the entire range of hard look review represented by deconstruction or in terms of the comparative lessons to be learned by thinking of arbitrariness review across those categories. In this way, the process of deconstructing arbitrary and capricious review offers an additional perspective on how hard look review may be distinct from *Chevron* deference. Alternatively, to the extent that *Chevron* step two is effectively redundant with arbitrariness review under 5 U.S.C. § 706(A)(2), there is no clear reason why deconstruction would not be equally useful in that context.

129. *See, e.g.*, Arkansas v. Oklahoma, 503 U.S. 91, 113 (1992) (holding that the EPA was not arbitrary and capricious, noting that the court of appeals erred in identifying the EPA's omission of consideration of the river's degraded nature as a relevant factor); Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 48, 55 (1983) (concluding, inter alia, that the Department of Transportation's decision to rescind a passive restraint regulation for automobiles was arbitrary and capricious because it failed to consider two "alternative way[s] of achieving the [safety] objectives of the Act"); *American Paper*, 461 U.S. at 417–18 (holding that the Federal Energy Regulatory Commission's decision incorporated all of the relevant statutory factors).

the benefits or insights associated with deconstruction.[130] In *American Paper Institute, Inc. v. American Electric Power Service Corp.*,[131] the Court reviewed the Federal Energy Regulatory Commission's ("FERC") decision to apply the "full-avoided-cost" rule to electric utilities' purchases of electric energy from cogenerators and small power producers.[132] The Court concluded that the Agency's decision was not arbitrary and capricious because the Agency incorporated the enumerated statutory factors,[133] including the requirement that it be "just and reasonable to the electric consumers of the electric utility and in the public interest."[134]

In *FCC v. National Citizens Committee for Broadcasting*,[135] in the face of congressional silence regarding relevant factors, the Court upheld an FCC decision regarding local common ownership of newspapers and broadcast radio or television stations.[136] The FCC's decision was challenged, *inter alia*, as arbitrary and capricious because it treated existing newspaper-broadcast combinations more favorably than new ones.[137] The court of appeals concluded that the FCC acted arbitrarily by not favoring diversification of ownership as the primary factor in its decision.[138] The Supreme Court rejected the appellate court's reasoning, explaining that the FCC's interest in the continuation of quality service and the past performance of incumbent ownership were both relevant factors in the Agency's policy determination, and as such, the Agency's decision to include them in its analysis was neither arbitrary nor capricious.[139]

Finally, in *Judulang v. Holder*,[140] the Court held that the Board of Immigration Appeals ("BIA") acted arbitrarily in applying the "comparable grounds" rule to determine if an alien is eligible for discretionary relief from deportation.[141] The Court acknowledged that

130. For a discussion of the normative, institutional, and systemic benefits of deconstructing arbitrary and capricious review, see *infra* Part III.

131. 461 U.S. 402 (1983).

132. *Id.* at 404.

133. *See id.* at 412–18.

134. *Id.* at 413 (quoting Public Utility Regulatory Policies Act of 1978 § 210, 16 U.S.C. § 824a-3(b) (Supp. V 1976) (internal quotation marks omitted)).

135. 436 U.S. 775 (1978).

136. *See id.* at 779.

137. *See id.*

138. *See id.* at 790–91

139. *See id.* at 805–09. The Court then explained how the Agency's ultimate balance of those factors was also rational, thereby distinguishing the relevant factors analysis from the rational connection category discussed *infra* Part II.B.2. *See id.* at 814.

140. 132 S. Ct. 476 (2011).

141. *Id.* at 490. The "comparable grounds" rule "evaluates whether the ground for deportation charged in a case has a close analogue in the statute's list of exclusion

the statute was silent with regard to the relevant factors[142] and rejected the Government's contention that historical practice and cost considerations were adequate bases to prohibit an alien from seeking discretionary relief.[143] The Court instead based its arbitrariness ruling on its own determination of the relevant factors, holding that the BIA's "action must be based on non-arbitrary, 'relevant factors,' which here means that the BIA's approach must be tied, even if loosely, to the purposes of the immigration laws or the appropriate operation of the immigration system."[144]

These widely varying examples of the Court applying the relevant factors analysis demonstrate its importance to hard look review. Its pivotal place in the policymaking process between first-order considerations and the agency's final policy position reinforce the idea that it is a distinct, highly influential part of that process. As such, the identification of relevant factors is a category of agency conduct that courts should consider—within the framework of deconstruction—as an independent source of potentially arbitrary agency action.

grounds"; in turn, "[i]f the deportation ground consists of a set of crimes 'substantially equivalent' to the set of offenses making up an exclusion ground, then the alien can seek [discretionary] relief." *Id.* at 481–82 (citations omitted).

142. *See id.* at 488 (describing the legal sources for determining the relevant factors as existing in a "text-free zone").

143. *See id.* ("Arbitrary agency action becomes no less so by simple dint of repetition."); *id.* at 490 ("Cost is an important factor for agencies to consider in many contexts. But cheapness alone cannot save an arbitrary agency policy.").

144. *Id.* at 485 (citation omitted). The Court performed a similar relevant factors analysis in *Massachusetts v. EPA*, 549 U.S. 497 (2007), when it held that the EPA acted arbitrarily in refusing to initiate a rulemaking to limit greenhouse gas emissions. *Id.* at 534. The EPA did cite several relevant factors in deciding not to initiate a rulemaking, including the piecemeal approach to global warming of regulating new car emissions, the international difficulties that could be created by a domestic regulation, the possibility of a jurisdictional conflict with the Department of Transportation over any regulation requiring increased fuel efficiency, and uncertainties regarding the relationship between greenhouse gases and global warming. *See* Pierce, *supra* 51, at 78 (citing 68 Fed. Reg. 52,922, 52,928–32 (Sept. 8, 2003)). The Court found that the EPA's refusal was impermissible because it did not consider the question of whether greenhouse gases contribute to climate change. *See Massachusetts*, 549 U.S. at 533–34. Despite Congress's silence regarding the relevant factors and the fact that all of the factors that EPA did consider were logically relevant to its determination, the Court decided which issues were sufficiently informative to demand inclusion under hard look review. *See id.*

2. Rational Connection

Rational connection review[145] describes the judicial determination of whether an agency's policy choice "runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."[146] This approach to arbitrariness review is both intuitive and familiar. It is an important check on potentially unprincipled or irrational administrative conduct that goes to the very heart of the justifications of the administrative state; its deferential approach fosters agency expertise and efficiency, while at the same time guarding against the promulgation of administrative law that is so irrational as to betray its democratic pedigree.[147] It is also paradigmatically substantive, as it focuses only on the quality of the agency's value judgment—the specifics of its policy position and whether its stated justifications offer persuasive logical support for that position. It is only secondarily concerned with the first-order steps taken by the agency to develop the supporting inputs for its conclusion. Although these features of administrative action are useful to a court's rational connection analysis, they impact the court's rationality determination only to the extent they facilitate the agency's justifications for its position. A court's final rational connection decision is ultimately a review of second-order logical reasoning and judgment by the agency that merits (and receives) significant attention.

A recent example of rational connection review is the Supreme Court's decision in *Fox Television*.[148] Justice Scalia, writing for the

145. This concept is synonymous with the second-order components of reason giving discussed *supra* in Part II.A.2.

146. Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

147. *See, e.g.*, Jost Delbrück, *Exercising Public Authority Beyond the State: Transnational Democracy and/or Alternative Legitimation Strategies?*, 10 IND. J. GLOBAL LEGAL STUD. 29, 34 (2003) ("[W]e find several elements and criteria that are held to contribute to the legitimacy of the exercise of public authority. . . . [S]uch criteria are transparency and efficiency of government (or more broadly, public authority), and actions and accountability . . . . Finally, we may add expertise as a factor that can contribute to the acceptability of acts of public authorities.").

148. *See* 556 U.S. 502, 517–18 (2009). For a more detailed discussion of the Court's *Fox Television* opinion, see *supra* Part I.A (discussing the Court's arbitrary and capricious decision analysis generally), Part II.A.4. (discussing *Fox Television* as an example of the research scope category of deconstructed arbitrariness review). *See also, e.g.*, Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 1000–01 (2005) ("We conclude . . . that the Commission [did not act arbitrarily because it] provided a reasoned explanation for treating cable modem service differently from DSL service."); Immigration & Naturalization Serv. v. Yueh-Shaio Yang, 519 U.S. 26, 32 (1996) (finding

majority, explained that the FCC was reasonable in assuming that fleeting expletives were likely to cause harm to younger viewers because even a fleeting statement can constitute a damaging and lasting "first blow."[149] By contrast, the dissent concluded that the FCC's stated justifications for its harsher treatment of fleeting expletives could not be reasonable because all of its proffered justifications were available when the Agency adopted its earlier, more permissive approach; without additional support justifying the policy change, the dissent determined that the change was not rational.[150] This split among the Justices is an example of the existence and dynamic nature of rational connection review. Not only did the Justices in *Fox Television* feel comfortable evaluating the logic and consistency of the Agency's substantive policy decision, but they reached directly opposite conclusions as to what reasonable agency conduct should look like in that instance.

The high degree of attention paid to the rational connection portion of hard look review could be seen to counsel against deconstruction. After all, courts are already quite willing to tackle the question of whether an agency's final policy decision was supported by the administrative record and often do so with a singular focus. In fact, if there is one category of arbitrariness review that seems well suited to be all-inclusive, it is the rational connection category.[151] Maybe this preference reflects an optimal version of arbitrary and capricious review, such that courts should move away from singling out other forms of agency conduct such as record building and relevant factors analysis and treat everything as part of a rational connection review. Such a focus would thereby obviate the need for serious consideration of any modes of agency conduct prior to a final policy decision.

that the Attorney General did not act arbitrarily in denying discretionary waiver of deportation because "[i]t is assuredly rational, and therefore lawful, for her to distinguish aliens . . . who engage in a pattern of immigration fraud from aliens who commit a single, isolated act of misrepresentation"); Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc., 462 U.S. 87, 105–06 (1983) (holding that the Nuclear Regulatory Commission did not act arbitrarily because it showed a "rational connection between the facts found and the choice made" in adopting a zero-release assumption for the storage of nuclear waste).

149. *Fox Television*, 556 U.S. at 517–18 (citations omitted).

150. *See id.* at 541 (Stevens, J., dissenting) ("It . . . makes eminent sense to require the Commission to justify why its prior policy is no longer sound before allowing it to change course.").

151. In a slightly different context, Professor Mark Seidenfeld has expressed the view that the "reasoned decision-making standard . . . is essentially process based" and thus can be understood as encapsulating a wide range of agency conduct. *See* Seidenfeld, *supra* note 7, at 155.

This Article contends—and seeks to show—that the opposite is true, but at a minimum it would seem that if these opposing views exist, they demand further exploration. As the above examples demonstrate, the Supreme Court has applied hard look review in some capacity to nearly every category within the proposed framework for deconstruction.[152] This recognition of the multifaceted nature of agency decision making within hard look review supports the theoretical foundation of deconstruction and highlights its potential value, but it simultaneously begs the question: Is there really something to gain from thinking of hard look review as a collection of more targeted inquiries into specific aspects of agency activity?

III. WHY DECONSTRUCTION?

Deconstruction offers several potentially significant benefits for courts, agencies, and the administrative state in general. First, it creates a unique opportunity to consider the normative consequences of each of the different facets of arbitrary and capricious review. More specifically, deconstruction enables different categories of agency activity to be evaluated against the core principles of judicial deference and hard look review in order to shed some initial light on how each category should be treated by the courts. Judicial deference and hard look review are both fundamentally concerned with questions of institutional competence, agency expertise, political accountability, and transparency. In addition to advancing agency epistemic authority and accountability, hard look review provides courts with a check against administrative authority. Deconstruction can help advance these purposes while also working to combat some of the noted shortcomings of searching judicial review such as ossification and agency capture.[153]

Institutionally, deconstructing arbitrary and capricious review benefits both courts and administrative agencies. Even without providing clear prescriptions for deciding individual cases,[154] deconstruction enhances the depth and sophistication of the courts' review in those cases, and also offers greater information to agencies

152. Input quality is the notable exception. *See supra* Part II.A.3.

153. Ossification and agency capture are two frequently discussed phenomena in administrative law. *See supra* notes 15, 48 and accompanying text (defining agency capture theory and ossification).

154. *See supra* p. 739 (recognizing the potential difficulties in applying deconstruction in specific cases).

about how their choices will be received by the judiciary.[155] Moreover, it permits courts to make distinctions among different categories of administrative action that could promote both the integrity of individual agency decisions and administrative legitimacy more broadly. Deconstructing arbitrary and capricious review also offers system-wide advantages—advantages that accrue across multiple branches of the federal government or of the government as a whole. It advances a unifying theoretical foundation for judicial review of agency policymaking and better describes actual practice in administrative law, both of which promote systemic accountability and transparency.[156] Finally, it advances the constitutional principle of separation of powers by more accurately realigning Congress and the courts in their interactions with each other through administrative agencies.[157]

A. Normative Benefits

Deconstruction opens up a new set of categories for judicial review and, in turn, an opportunity to more closely evaluate the normative bases for that review. Because arbitrary and capricious review is arguably best understood as a doctrine of deference, the animating principles behind judicial deference to administrative agencies serve as a useful background against which to ask whether and how courts should treat each proposed category of arbitrariness review going forward and what this reveals about hard look review more broadly.

155. *See supra* notes 72–73 and accompanying text (describing some of the potential difficulties for courts in applying deconstruction but arguing that the conceptual framework provided by deconstruction has substantial benefits even when it does not necessarily make isolated instances of hard look review simpler or easier).

156. *See, e.g.*, CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION 187 (1990) ("The principle of political accountability has an unmistakable foundation in Article I of the Constitution, and it is an overriding structural commitment of the document. The principle has foundations as well in assessments of institutional performance. At the same time, it operates to counteract characteristic failures in the regulatory process."); Molly Beutz, *Functional Democracy: Responding to Failures of Accountability*, 44 HARV. INT'L L.J. 387, 428 (2003) (noting that transparency is a "precondition" to accountability as "[t]ransparency . . . facilitate[s] accountability because citizens need information to know when to hold which leaders accountable for what decisions"); Mark Fenster, *The Opacity Of Transparency*, 91 IOWA L. REV. 885, 899 (2006) ("The most significant consequences [of government transparency] flow from the public's increased ability to monitor government activity and hold officials . . . accountable for their actions.").

157. *See* CHARLES H. KOCH, JR., WILLIAM S. JORDAN III & RICHARD W. MURPHY, ADMINISTRATIVE LAW: CASES AND MATERIALS 37 (6th ed. 2010) (acknowledging the importance of "reconcil[ing] the modern administrative state and the apparent structural requirements of our two-hundred-some-year-old Constitution").

1. Principles of Judicial Deference

The concept of judicial deference to administrative action is in some ways merely the photographic negative of judicial review of that action.[158] It seeks to answer the same general question as judicial review—whether an agency has acted within the legal and political space afforded it by Congress and the Constitution—and entrusts courts to be the ultimate arbiter of that issue. Despite these similarities, deference is nonetheless conceptually different from judicial review, at least from an institutional perspective. Whereas judicial review generally originates from the point of view of the judiciary acting as a bulwark against agency overreaching, judicial deference seeks out reasons to limit judicial intervention out of respect for the epistemic and political benefits of agency discretion.[159]

This analysis focuses on the deferential aspect of arbitrary and capricious review for several reasons. First, courts often describe arbitrariness review in terms of its limited nature and its respect for agency judgment, both of which sound directly in concepts of deference.[160] Second, the principles animating judicial deference are fundamental to the structure and legitimacy of administrative law. The concept of judicial deference impacts nearly every mode of agency decision making and is directly reflective of the considerations supporting the creation and empowerment of agencies within our tripartite government.[161] Finally, deference is a worthy focus because

158. By judicial deference in this instance, this Article refers to the sliding scale of judicial respect for administrative independence and competence that occurs across the entire landscape of administrative law and varies based on the type of agency decision under review and the procedures employed to reach that decision. By contrast, this Article does not limit its discussion of deference to an effectively binary conception, where courts simply permit agency decisions to stand without judicial interference.

159. *See, e.g.*, Eric Berger, *Deference Determinations and Stealth Constitutional Decision Making*, 98 IOWA L. REV. 465, 479–85 (2013) (discussing separately the epistemic and political bases for judicial deference to agency decisions).

160. *See, e.g.*, Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971) (explaining that a "court is not empowered to substitute its judgment for that of the agency" under arbitrary and capricious review).

161. Professors Shapiro and Levy explained the significance of judicial review, which under the working definition employed here is synonymous with judicial deference, to the legitimacy of the administrative state:

> In this country, judicial review and the legitimacy of administrative government are inextricably intertwined. . . . The ultimate success of judicial review, however, rests on the ability of the Supreme Court to articulate and implement principles that place administrative government within a constitutional framework. This responsibility includes both the doctrinal necessity of explaining how progressive government is consistent with liberal values and the practical necessity of articulating a version of judicial review that is an effective check and balance on

it is a judicially-created concept that often operates with the force of dispositive law despite not being expressly defined or consistently applied with respect to administrative agencies.[162] This status as a background—sometimes referred to as "stealth"[163]—feature of administrative law renders deference, and especially the principles behind it, a powerful and potentially underappreciated component of administrative law.

There are at least two core principles motivating judicial deference to administrative action: agency expertise and political accountability.[164] Deference to administrative expertise was originally based on the technocratic model of administrative governance in which agencies were created and administrators chosen for their specialized, substantive knowledge.[165] The technocratic model presumed that expert bureaucrats would provide a well-informed, objective perspective that would protect policymaking from undue political influence.[166] More recently, respect for institutional competence and congressional design have emerged as the preferred justifications for judicial deference to administrative decisions.[167] Epistemic deference sets wide boundaries within which administrators may exercise their particularized knowledge. Courts affirmatively avoid "substituting [their] judgment for that of the

> administrative government. Unless both the doctrinal and practical necessities are met when individual judicial decisions are made, judicial review will be reduced to its symbolic element and the legitimation of administrative government will be more myth than reality.

Shapiro & Levy, *supra* note 3, at 395.

162. *See* Daniel J. Solove, *The Darkest Domain: Deference, Judicial Review, and the Bill of Rights*, 84 IOWA L. REV. 941, 953 (1999) ("The practice of deference has drastic effects on the outcomes of cases.").

163. *See* Berger, *supra* note 159, at 469.

164. *See id.* at 479 ("Courts often defer to administrative agencies because of their epistemic or political authority.").

165. *See* Cass Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 441 (1987) (describing the "New Deal enthusiasm for insulated and technically expert agencies" and noting that "the New Deal conception of administration sought to insulate public officials in order to protect governmental processes against the distortions produced by factionalism").

166. *See* Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1252 (1986) ("As in its initial phase, the New Deal continued its propensity to address particularized areas of unrest through regulation by experts . . . ."); *id.* at 1266 ("With the final legitimation of the New Deal came the acceptance of a central precept of public administration: faith in the ability of experts to develop effective solutions . . . .").

167. *See* Meazell, *supra* note 5, at 1764 ("Judicial deference to administrative agencies is often grounded in . . . comparative institutional expertise.").

[expert] agency"[168] and intervene in agency conclusions only when they exceed the basic parameters of rationality or plausibility.[169]

The principle of political accountability—the idea that government institutions like administrative agencies should be subject to public scrutiny[170]—recognizes the representative gap between agencies and the courts. The Constitution protects judicial independence by insulating judges from the political branches or the polity at large.[171] Agencies, by contrast, occupy a unique place within our constitutional structure. Although they exercise the powers of all three of the coordinate branches of government, they are not explicitly provided for in the Constitution,[172] nor are administrators subject to direct popular control via democratic election.[173] This lack of electoral restraint on agency action makes accountability and transparency key features of administrative legitimacy;[174] without a mechanism for holding agencies politically accountable for their actions, agency conduct threatens to run afoul of our democratic arrangement. On the other hand, although agencies are not directly accountable to the electorate, they are far more politically restrained

168. FCC v. Fox Television Stations, Inc., 556 U.S. 502, 513 (2009) (quotation omitted).

169. *See id.* at 536 (Kennedy, J., concurring).

170. *See* Glen Staszewski, *Reason Giving and Accountability*, 93 MINN. L. REV. 1253, 1257–58 (2009) ("The existing political accountability paradigm . . . focuses . . . on a perceived need to ensure that public officials are politically accountable to a majority of the electorate for their specific policy decisions.").

171. *See* U.S. CONST. art. III, § 1 (providing for life tenure and salary protection for federal judges).

172. Agencies are not entirely excluded from the constitutional text. Article II anticipates the existence of executive departments in its language regarding presidential requests for the opinion of the department heads. *See* U.S. CONST art. II, § 2, cl. 1 ("The President . . . may require the Opinion, in writing, of the principal Officer in each of the executive Departments . . . .")

173. *See* Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1512 (1992) ("Over the past century, the powers and responsibilities of administrative agencies have grown to an extent that calls into question the constitutional legitimacy of the modern federal bureaucracy."); Strauss, *supra* note 4, at 575 (noting the difficulty in constitutional law of "understanding the relationships between the agencies that actually do the work of law-administration, whose existence is barely hinted at in the Constitution, and the three constitutionally named repositories of all governmental power—Congress, President, and Supreme Court"). That is not to say that agencies are wholly insulated from electoral politics or public influence. Beyond their generally understood obligation to govern responsibly, there are also direct influences on agencies from entities like the President and Congress, for instance, who are directly responsive to the electorate.

174. *See* SUNSTEIN, *supra* note 156, at 187; Beutz, *supra* note 156, at 428; Fenster, *supra* note 156, at 899.

and responsive than the courts.[175] Agencies are accountable to Congress and the Executive for their authority, finances, and policy priorities.[176] The President appoints agency heads with the advice and consent of the Senate, and in many cases those appointees are removable at will by the President alone.[177] This greater accountability to the political branches is an animating theme of judicial deference to agencies—because agencies are more responsive to political will, courts should be reluctant to intervene too severely in administrative decision making beyond protecting agencies' accountability and transparency.

2. Agency Expertise and Institutional Competence

Deconstruction offers several insights into arbitrary and capricious review, many of which become readily apparent when viewed in the light of agency expertise and institutional competence. Courts employing hard look review regularly defer to agency policy judgments based on the agency's epistemic authority.[178] Although agency expertise certainly supports some measure of judicial deference, epistemic justifications become far less compelling when we begin to unpack arbitrary and capricious review through deconstruction.

Viewed broadly, the first- and second-order distinction in arbitrariness review carries with it divergent epistemic justifications for judicial deference. The agency's second-order conduct—its ultimate policy determination and its choices regarding which underlying factors are relevant to that decision—merits a high measure of judicial respect based on agency expertise. However, its first-order components—the quality and scope of data collected and

175. *See* Berger, *supra* note 159, at 482 ("Unlike elected legislatures and chief executives, many administrative agents are unelected and are not directly answerable to the people. Elected legislators may be less representative than many of us would like to think, but, by virtue of their election, they are nonetheless more politically responsive than unelected federal judges. By contrast, agencies' political accountability is, at best, indirect.").

176. *See* Strauss, *supra* note 4, at 583 (outlining the relationships between agencies and the coordinate branches).

177. *See* U.S. CONST. art. II, § 2, cl. 2 ("[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Officers of the United States . . . ."); Myers v. United States, 272 U.S. 52, 176 (1926) (holding that the President may remove an executive officer without the consent of the Senate).

178. *See, e.g.*, Marsh v. Or. Natural Res. Council, 490 U.S. 360, 376, 385 (1989) (noting that the question presented for hard look review "implicates substantial agency expertise" and determining that the agency's conclusion was not arbitrary or capricious at least in part because it was based on "careful scientific analysis").

the provision of reasons for its decision—are far less the product of particularized agency experience or knowledge and are thus far more likely to be within the institutional competence of the judiciary.

To further illustrate this distinction, consider an example wherein the Food and Drug Administration ("FDA") seeks to regulate children's access to products containing high fructose corn syrup for health reasons. The decision that high fructose corn syrup presents a health risk to children and the FDA's explanation of its reasons for that decision are substantive policy choices based on administrative expertise in risk assessment. Similarly, the FDA's choice as to which factors it should consider in making its decision is a product of its substantive experience and expertise. Perhaps the Agency looked at child obesity rates and the related healthcare costs, but explained that it chose not to consider rates of athletic participation among children in certain age groups or data regarding which foods would likely serve as substitutes in children's diets in the absence of products containing corn syrup. Those choices are based on expertise that is not only present at the FDA, but that is lacking (at least as an institutional matter) in the courts, and as such offers a valid basis for greater judicial deference on epistemic grounds.

On the other hand, what about the Agency's first-order choices? Are they matters of particularized agency knowledge that merit special deference or respect, or are they sufficiently within the institutional competency of the courts such that deference is less justified? The creation of an administrative record and the provision of reasons are not choices that depend on any experience or knowledge unique to, or even present in greater amounts in, the Agency. Because courts are just as capable as administrators in determining whether a record exists to support a policy conclusion,[179]

179. This statement implicates the tension between the rule against judicial enhancement of agency procedures announced by the Court in *Vermont Yankee* and the standard for hard look review articulated in *Overton Park* and its progeny. For a detailed discussion of this tension, see *infra* notes 210–19 and accompanying text. The statement also raises the question of when concerns about the adequacy of the administrative record go beyond first-order concerns to second-order considerations (like the relevant factors test) about which information to include in the record. The answer is up to the court in an individual case and depends on which feature of the record the court deems to be inadequate. *See supra* Parts II.A.1, II.B.1 (discussing the record building and relevant factors categories within deconstruction). This potential difficulty with categorizing agency activity does not, however, detract from the value of deconstruction, as the very act of asking the question about whether a problem in the administrative record is a first- or second-order issue adds a layer of detail and sophistication to the analysis that has benefits for courts, litigants and the administrative state in general. *See infra* Part III.D (explaining

singling out these categories of arbitrariness review supports treating them differently from conduct more directly connected to the final policy decision.

The same may also be true, although perhaps not as clearly so, in the areas of input quality and research scope. Input quality without question implicates agency expertise in that it goes to the research methods of individuals qualified in the relevant field. There are at least two reasons, however, why input quality is not tied closely enough to an agency's final policy judgments to merit as high a measure of deference as a second-order determination. The first is that input quality is not limited to technical information. The quality of relevant inputs is an important issue for all manner of supporting data, including non-technical information.[180] This means that generalist judges may simply find themselves reviewing the reputation or qualifications of the information's source to determine input quality, a task that is not so far beyond judicial expertise that it entitles the agency to a large degree of epistemic deference. Secondly, where technical or scientific inputs are at issue, judges are still able to competently review the agency's procedures for safeguarding the reliability of those inputs. Even if judges are not equipped to understand the details of a particular study or scientific inquiry, factors like agency reliance on blind peer review or agency responses to significant comments in rulemaking are within judicial competence. Thus, there is less basis for deference to agency claims of reliable data than to the second-order application of that information to a specific policy position.[181]

Research scope is another example of a first-order decision by an agency that is less dependent on agency expertise than a monolithic view of arbitrariness would suggest. The quantity of information gathered and consulted by an agency in policymaking may initially seem like a second-order issue, and for good reason. The specific information relied upon by an agency is the product of a substantive choice that is influenced by administrators' particularized knowledge of the subject matter. The range of relevant information *from which that specific information is drawn*, however, is less of a second-order consideration because it is too far attenuated from the agency's ultimate value judgment to be thought of as directly affecting the

how the potential difficulty of implementing deconstruction does not outweigh its benefits).

180. *See supra* note 70 and accompanying text.

181. *See supra* Part II.A.3 for a more detailed discussion of how input quality can be measured without exceeding judicial competence.

policy outcome.[182] Moreover, to the extent that concerns about the range of information brought before the agency can be identified with specificity by the parties, the court may be better equipped to determine whether potentially useful information was omitted from the administrative process than, for example, whether the agency's value judgment about how to apply that information to a policy issue was sound. Since it is not dependent on any technical or otherwise particularized knowledge other than what potentially relevant information was available and whether it was part of the agency's research, research scope can be largely viewed as a first-order question in agency policymaking.[183] When isolated as its own subject of arbitrariness review, an agency's choice as to the scope of its research is both sufficiently important to the integrity and reasonableness of the administrative decision and well enough within the institutional competence of the judiciary that it does not necessarily merit a high level of deference on epistemic grounds.

In addition to the significant differences between first- and second-order categories of agency action, each of these broader categories is susceptible to still finer distinctions. These finer distinctions further support the value of deconstructing arbitrary and capricious review, especially as it pertains to agency expertise and institutional competence. For example, within second-order arbitrariness review, an agency's statutory relevant factors analysis is arguably less deserving of judicial deference than its rational connection analysis. This is because statutory relevant factors analysis is the product of a legislative mandate regarding which factors an agency must consider in reaching a policy decision. Although the process of implementing those mandates may require some substantive judgments by the agency, courts are generally more competent to evaluate whether an agency has met legislative

182. For further discussion of why research scope is best thought of as a first-order category, see *supra* Part II.A.4.

183. That is not to say that *all* research scope questions are necessarily first-order issues. Questions could certainly arise about an agency's research scope that look more like second-order relevant factors issues, especially where the relevance of the allegedly overlooked or excluded research was under debate. In those cases, courts are free within the deconstruction framework to treat the question before them in whatever way they see fit; the fact that the specific category an issue fits into is not always clear does not change the potential benefits of thinking of arbitrary and capricious review as a multidimensional process.

expectations then they are to judge the wisdom of an agency's final policy position.[184]

In the first-order context, the quality of administrative inputs and the scope of agency research are more difficult for courts to evaluate than the far more straightforward questions of whether the agency assembled an adequate record or articulated any reasons whatsoever in support of its decision. Data quality and research scope implicate at least some particularized knowledge of the relevant subject matter, while record building and first-order reason giving are purely procedural steps. This does not mean that there is no difference between input quality and research scope on the one hand and second-order issues like relevant factors analysis and rational connection on the other hand. Courts are still more competent to decide the first two issues than the more substantive second-order questions, but they are even better poised to address purely procedural issues like the existence of a record or reasons supporting the agency's conclusion than any of the other four deconstructed rationales of hard look review.[185] Epistemic deference is thus a sliding scale that can be truly appreciated only by first deconstructing arbitrary and capricious review into its constituent parts. Without deconstruction, even high-level distinctions between first- and second-order administrative decisions would be at best underappreciated and at worst lost.

A possible retort to this case for deconstruction is that courts already effectively make the kinds of distinctions suggested above, and for that reason deconstruction is either redundant or superfluous. More specifically, skeptics may offer examples of hard look review where the court did not defer to the agency's epistemic authority when it overturned or remanded a decision for first-order reasons such as failure to create a sufficient record. By contrast, when reviewing an agency's rational connection analysis, courts regularly

184. This, of course, assumes that any statutory factors are expressed unambiguously, thereby avoiding the complications of *Chevron* step two. *See supra* notes 126–34 and accompanying text (describing the two contexts in which relevant factors analysis exists—statutory relevant factors and congressional silence). Where the statute is ambiguous, that could be considered representative of congressional silence and thus arguably the relative institutional competencies presented here may no longer attach. Regardless of whether step two of *Chevron* changes relevant factors analyses in the face of congressional silence, the fact that such a change may be necessary is the reason why deconstruction is a worthy endeavor.

185. The other four rationales are input quality, research scope, relevant factors, and rational connection. For a detailed discussion of these rationales, see *supra* Part II.A.3–B.2.

defer to a far greater degree. In short, the argument goes, deconstruction is merely descriptive of a phenomenon that is already well-established in administrative law. There are several responses to this objection.

The first is that no matter how much one is convinced that some of the present distinctions are already part of arbitrariness review, the Supreme Court has never articulated so much as the high-level distinction between first- and second-order considerations in its arbitrary and capricious jurisprudence, making it at best tenuous to contend that deconstruction as defined here is currently an active part of administrative law. Second, even if courts do sometimes make the distinctions highlighted by deconstruction, they rarely do so explicitly or self-consciously, and for that reason alone it is important to try to bring some theoretical integrity to such a consequential area of the law. Third, some of the more granular categories presented here (like input quality) do not appear anywhere in the Court's arbitrary and capricious cases, despite having an arguably profound effect on the integrity of agency policymaking. Fourth, even if deconstruction is ultimately no more than a descriptive exercise it may nonetheless offer an insightful new way to understand and reconcile the courts' seemingly inchoate hard look jurisprudence.[186]

Finally, and perhaps most importantly, the relative deference analyses made possible by deconstruction may also help courts determine the absolute value of deference in a given case. By breaking arbitrariness review into its constituent parts, courts can more easily understand how each component of agency action reflects the expertise and institutional competence of the agency and can adjust their deference allocations for each category relative to the others. This more nuanced view of epistemic deference may also assist courts in calibrating the *total* amount of deference given to a specific category of agency action. For example, just as deconstruction encourages courts to offer greater deference to agency rational connection analyses than input quality determinations, it can also help a court set the degree of deference it will apply to a rational connection analysis regardless of whether another category of agency action is relevant in that case. When based on deconstructed arbitrariness review, this degree of deference will be more principled, as it will more accurately reflect the importance of institutional

186. This positive claim for the potential descriptive value of deconstruction is beyond the scope of this Article, but it is the subject of future intended work by the Author.

competence and agency expertise to the interaction of agencies and courts.

3. Political Accountability and Transparency

Deconstruction is also useful in helping courts use deference to promote political accountability and transparency. When treated as a singular phenomenon, arbitrariness review seeks to provide agencies with sufficient political space to exercise their own value judgments. The idea is that nearly all of the limits on agency value judgments can be better provided by political forces, either from the political branches or the public at large, and judicial review is designed to facilitate the processes that lead to those judgments.[187] While this approach is certainly a useful way to think about hard look review in general, it stops short of asking the next question, namely whether and to what degree agency accountability justifies deference toward *each individual category* of agency activity. The answer to that question is better understood through deconstruction.

The first- and second-order distinction within arbitrary and capricious review offers one example of how different categories can offer very different measures of administrative accountability and transparency. In general, the first-order categories have far less of an impact on accountability than their second-order counterparts. Agency decisions to build a record, offer reasons for their conclusions, or rely on certain data sources provide very little substantive information upon which interested members of the public may evaluate an agency's performance, especially when compared to the amount and quality of information provided by second-order relevant factors and rational connection analyses. Moreover, where an agency fails in its first-order tasks of record building or reason giving, the overwhelming lack of publicly available information renders the entire policymaking process far less transparent or accessible, such that outside observers are left with little or no basis on which to judge the quality of the agency's decision making. Input quality and research scope offer similar difficulties. Public attention to an agency's choices to exclude or ignore certain information in its deliberative process may offer some means of holding the agency accountable for its decision. However, the potentially technical nature

187. *See, e.g.*, Seidenfeld, *supra* note 7, at 159–60 ("In essence, the arbitrary and capricious standard recognizes that the political arena is the appropriate forum for constraining any value choices made by the agency in rulemaking . . . . [but] there is a role for judicial review to facilitate proper operation of the political arena.").

of the information at issue and the fact that outsiders would be forced to compare the agency's choices against the entire universe of potentially relevant, excluded information make it very difficult for these categories to offer any meaningful measure of agency accountability or transparency. As a result, political deference is less easily justified in the first-order context.

Second-order categories, by comparison, are much more accessible to public review and critique. An agency's final policy conclusions provide the best example of this. The decision itself is transparent by virtue of its promulgation, and, provided the agency did not employ arbitrary first-order procedures in reaching that decision,[188] the quality of the agency's judgment is the type of political determination that we treat all manner of political actors, including the general public, as equipped to evaluate in an open society. An agency's determination about the relevant factors to be considered in its analysis is slightly more difficult from an accountability and transparency viewpoint. As with the first-order categories, relevant factors analyses could involve decisions about the exclusion of information that could be difficult for the political branches or the general public to properly identify and understand. A relevant factors analysis nevertheless offers greater opportunities for transparency and accountability than its first-order counterparts because it involves political considerations that bear immediately on the final policy outcome rather than on narrower questions of information quality and quantity, which are even more likely to be outside the bounds of political actors' core competencies. Because relevant factors decisions are more closely tied to issues that political actors are familiar with and capable of evaluating for themselves, relevant factors questions offer a greater measure of transparency and accountability than the first-order categories of arbitrariness review even if they offer less accountability and transparency than the final agency decision itself.

Accountability and transparency are important principles in administrative law and are key factors in judges' decisions to defer to agency positions. All political deference decisions, however, are not created equal. Deconstructing arbitrary and capricious review into its constituent parts allows us to better identify where deference on political grounds is best suited to achieve its goal of providing agencies the flexibility needed to achieve their missions without running afoul of their democratic obligations. First-order categories

188. This effect is further reason for courts to independently scrutinize first-order decisions within the framework of deconstruction.

of review appear to offer less accountability in general than second-order ones, yet within each category there is further room for variation. More important than the specific character of each category of review, however, is the point that deconstruction offers fertile ground for distinctions that can offer normative as well as positive benefits to administrative law.

Moreover, as with epistemic deference, the relative conclusions reached with regard to political accountability can benefit courts' deference decisions in absolute terms. By understanding that certain first-order categories, for instance, are less deserving of deference than other first- or second-order ones, courts have a better framework in which to determine exactly how much leeway agencies should receive within each category. This information not only improves individual deference determinations, but also offers a theoretical basis for courts to render more consistent and principled deference determinations going forward.

4. Agency Discretion, the Interest Group Model, and Capture

In addition to promoting agency expertise and accountability, deconstruction also serves several of the remaining purposes of hard look review. It helps courts find the proper balance between broad administrative authority and an agency's democratic responsibility to govern rationally and in the public interest. It also dilutes the negative effects of the interest group model of administrative government and agency capture. The interest group model seeks to prevent regulated entities with fewer information costs and greater resources from gaining undue influence in the administrative process.[189] It is informed by agency capture theory, which warns that regulators who interact with a particular industry over time tend to become overly sympathetic to the interests and concerns of that industry at the expense of their duty to act in the public interest.[190]

A monolithic approach to arbitrariness review makes it more difficult for courts to draw clear boundaries among different

189. *See* Seidenfeld, *supra* note 7, at 154 ("In the regulatory arena, regulated entities control relevant information and thus do not bear the same costs in order to participate in the regulatory process. Those with focused interests, which often also correspond to the regulated entities, have the advantage of lower costs of organizing and coordinating action." (footnotes omitted)).

190. *See* MARTIN SHAPIRO, WHO GUARDS THE GUARDIANS?: JUDICIAL CONTROL OF ADMINISTRATION 62–66 (Richard B. Russell Lecture Ser. No. 6, 1988) (describing capture theory as the phenomenon of how, over time, agencies "tend[] to see the world more and more the way the [regulated] industry sees it" and tend "to regulate in the interest of the regulated").

categories of agency activity. This leads to a number of potential problems. For one, reviewing courts may be more likely to simply reach the wrong conclusion in specific cases,[191] thereby frustrating or eliminating an agency's achievement of potentially important and widely beneficial policy goals. Conversely, courts may allow policy choices that are not based on reasoned, responsive government, such as those anticipated by the interest group model or agency capture theory. Moreover, agencies could react to the inconsistency of hard look review[192] in at least two different but similarly unfortunate ways. They could refrain from activities that could trigger such review (ossification),[193] or they could seek to exert pressure on the judiciary by pressing their policy agenda despite the possibility of judicial resistance.[194] This latter approach could enhance the influence of agency capture as a fractured relationship between agencies and the courts could embolden agencies to provide rents to preferred entities or industries. In any event, both cases create costs to the administrative process that are worth avoiding. Lastly, the institutional integrity of both branches suffers in the face of perceived inconsistent—or worse, unprincipled—judicial judgment that could result from monolithic hard look review.

Deconstruction offers some solutions to these potential problems. For first-order issues like the building of an administrative record or the supplying of reasons for an agency's decision, the bounds of agency discretion are far clearer than for second-order questions such as the agency's choice of relevant factors or proffer of a rational connection between its stated explanation and policy conclusion. Although deconstruction cannot eliminate all of the specific difficulties associated with judicial review of second-order

191. *See infra* Part III.B (discussing the greater potential for accuracy in hard look review due to deconstruction).

192. *See* Shapiro & Levy, *supra* note 10, at 1065–66 ("[T]he arbitrary and capricious standard is relatively open-ended, and the Supreme Court has not given it more precise content.").

193. *See infra* Part III.A.5.

194. A recent example of an agency pressing its agenda in tension with a judicial order is the National Labor Relations Board's ("NLRB") decision to continue with prosecution and enforcement proceedings against CLC Holdings, LLC and Cablevision Systems despite the D.C. Circuit's recent decision that President Obama's recess appointments to the Board are unconstitutional. *See* Noel Canning v. Nat'l Labor Relations Bd., 705 F.3d 490, 506 (D.C. Cir.), *cert. granted*, 133 S. Ct. 2861 (2013); Letter from Lafe E. Solomon, Acting Gen. Counsel, Nat'l Labor Relations Bd., to Eugene Scalia, Esq., Gibson, Dunn & Crutcher LLP (May 28, 2013) (on file with the North Carolina Law Review) (explaining that the NLRB will not suspend its proceedings against CLC Holdings based on the court's decision in *Noel Canning*).

arbitrariness questions, it can ease some of the tensions over hard look review by separating out the more accessible first-order questions and offering a new perspective on second-order issues such that the availability and scope of judicial deference to administrative judgment is more clearly delineated.

Furthermore, first-order issues may be especially important to the problems of the interest group model and capture theory. Questions of data quality and research scope are easy ways for agencies to realize the fears of the interest group model by protecting certain entities without having to publicly explain why those preferences were exercised. Consider an agency's reliance on two conflicting scientific studies to conclude that scientific uncertainty counseled in favor of a rent-creating outcome for the regulated industry.[195] Now imagine that one of those studies was done by an independent researcher and was peer reviewed, and the other was performed by the regulated industry and was not. Without having to engage in the second-order question of whether scientific uncertainty in fact exists or justifies the chosen policy outcome—questions that the presence of a single flawed study does not necessarily answer—courts could focus their review on the agency's failure to employ reliable information in its administrative process, a threshold question that is easier and more clearly within the realm of judicial competence than broader questions of the veracity of the scientific claim.[196] Similarly, if only one study was proffered, courts could focus

195. The term "rent" in this context is better described as economic rent, which Professors Lucian Bebchuk and Jesse Fried define as the "extra returns that firms or individuals obtain due to their positional advantages." LUCIAN BEBCHUK & JESSE FRIED, PAY WITHOUT PERFORMANCE 62 (2004); *see also* Lynne L. Dallas, *Short-Termism, the Financial Crisis, and Corporate Governance*, 37 J. CORP. L. 265, 300 n.253 (2012) (defining economic rent as "[w]hen a company, organization or individual uses their resources to obtain an economic gain from others without reciprocating any benefits back to society through wealth creation" (quoting *Rent-Seeking*, INVESTOPEDIA, www.investopedia.com/terms/r/rentseeking.asp (last visited Jan. 12, 2014))).

196. That is not to say that inquiries into the reliability of scientific information are without their own challenges. For example, if an agency failed to discover a potentially useful study, there could be significant costs in ordering the agency to revisit its decision. An agency could also potentially convert a first-order issue like input reliability into a second-order question of reason giving or rationality by publicly explaining its decision about which information to rely upon. Although both of these examples represent real possibilities for added complexity in the application of deconstruction to a specific case, they do not undermine the value of the enterprise itself. The perspective provided by deconstruction still offers courts a useful tool for thinking about—and ultimately performing—hard look review by encouraging them to consider each aspect of agency policymaking separately when deciding how much their review should defer to agency authority. Deconstruction is not a bright-line rule for arbitrary and capricious review, but rather a way to approach the review process that allows courts to more accurately

their attention on the research scope question without venturing into the murkier balancing of considerations and policy preferences required by second-order determinations. Finally, concerns about judicial overreaching are diluted by the fact that deconstruction renders courts more transparent in their review process, thereby signaling with specificity to agencies the range of issues upon which the court will focus its review.[197] With advance knowledge of this full range of judicial considerations, an agency can better tailor its decision-making process to meet judicial expectations, which in turn gives courts less of a basis to interfere in agency policymaking.

5. Ossification

The potential for ossification of agency rulemaking—what Professor Pierce described as "the extreme cost and delay attendant to the use of notice and comment procedures to issue a rule"[198]—is an oft-cited, albeit not uncontroversial, shortcoming of hard look review.[199] To the extent that hard look review does ossify agency rulemaking, deconstruction could offer some encouragement for agencies to continue in their regulatory missions without sacrificing the benefits to rationality and accountability presented by judicial review. Unlike one-dimensional arbitrariness review, deconstructed hard look review serves an information-giving function for agencies that allows them to more carefully conduct themselves in certain areas while creating additional regulatory space in others. Even at its most generalized, deconstruction signals to agencies that first-order issues will be more closely scrutinized, ensuring that agencies meet the base requirements of building a record, offering reasons and ensuring the proper scope and quality of data in their policymaking. Once these hurdles are overcome, however, deconstruction signals to agencies that second-order issues like the relevant factors and

understand and apply principles of judicial deference to agency action. *See supra* page 739 (explaining the need for flexible application of deconstruction in individual cases).

197. This phenomenon also offers the benefit of creating more specific lines of precedent within hard look review. The availability of more focused precedents could add even more clarity to judicial review of agency policymaking. *See infra* Part III.B (discussing the institutional benefits of more informative hard look precedents due to deconstruction).

198. Pierce, *supra* note 48, at 59 n.1 (citation omitted).

199. *See, e.g.*, Jordan, *supra* note 7, at 393–94; Richard J. Pierce, Jr., *Rulemaking Ossification Is Real: A Response to Testing the Ossification Thesis*, 80 GEO. WASH. L. REV. 1493, 1499 (2012); Mark Seidenfeld, *Why Agencies Act: A Reassessment of the Ossification Critique of Judicial Review*, 70 OHIO ST. L.J. 251, 252 (2009); Jason Webb Yackee & Susan Webb Yackee, *Testing the Ossification Thesis: An Empirical Examination of Federal Regulatory Volume and Speed, 1950–1990*, 80 GEO. WASH. L. REV. 1414, 1427 (2012).

rational connection analyses should receive greater latitude. This more particularized guidance should reduce existing deterrents to agency action and could help alleviate ossification by offering sufficient comfort to administrators to overcome some of their concerns about the severity of judicial oversight.

In sum, there are many potential normative benefits to deconstruction, both in terms of its positive effects on courts' broader deference determinations and its advancement of the underlying goals of hard look review. These normative incentives, however, are not the only reasons to consider deconstruction. There are also significant institutional and systemic benefits to reconceptualizing hard look review.

B. Institutional Advantages

In addition to its normative benefits, deconstruction offers institutional advantages for both courts and agencies. Deconstruction offers courts a more focused approach to arbitrary and capricious review that could improve the quality of their review in individual cases. Rather than simply citing the highly deferential standard that has become commonplace in arbitrariness cases and then treating the entire administrative process as a single, monolithic enterprise, courts relying on a deconstructed view of arbitrariness can single out the specific area or areas of agency action that raise concerns and tailor their reviews accordingly. The result is a more transparent, consistent approach to arbitrariness review. This new approach could enhance the integrity and reputation of reviewing courts, which are often accused of politically motivated decision making in the arbitrary and capricious context, as well as enhancing the provision of deference and potential remedies. First-order errors may call for less deference but also less intrusive remedies such as remand, whereas second-order issues could lead to greater judicial deference but more severe consequences like invalidation. Regardless of how courts choose to use the additional information and insight offered by deconstruction, the fact that it allows for more robust consideration of the entirety of an agency's policymaking process makes it a worthwhile, and institutionally beneficial, exercise.

Deconstruction also enables courts to better distinguish across different types of policy questions that come before them on arbitrary and capricious review. For example, complex scientific or technical questions may demand even greater second-order deference than

non-scientific issues due to the highly specialized nature of the subject matter.[200] Moreover, deconstruction enables courts to tailor their arbitrariness review to considerations of agency rulemaking versus adjudication. The more structured and deliberate framework attending formal and informal rulemaking may render second-order arbitrariness review less appealing. This is because the opportunities for interested parties to participate in the rulemaking process promote transparency and accountability and act as a potential political constraint on agency discretion. In less procedurally structured contexts such as informal adjudication, more searching second-order review may be necessary to protect against agency overreaching in the absence of robust procedural safeguards.[201]

Courts, however, are not the only beneficiaries of deconstructed arbitrary and capricious review. Shifting the framework for hard look review will lead to a new generation of "deconstructed" hard look decisions. These decisions can be helpful precedents both horizontally, to promote consistency within a particular court, or vertically, to give guidance to lower courts about how judicial deference should be apportioned along the spectrum of first- and second-order agency activities. In addition to making judges' lives easier, the development of hard look precedent within a deconstructed framework may benefit litigants, as they will be able to make better arguments and predictions about how a court will view their case. Finally, deconstruction offers agencies clearer instructions as to how they should prioritize their policymaking. It makes the review process more transparent and consistent, which in turn allows agencies to make policy with greater knowledge of what the judiciary expects of them. Over time, as courts continue to perform

200. *See* Balt. Gas and Elec. Co. v. Natural Res. Def. Council, Inc., 462 U.S. 87, 103 (1983) ("When examining . . . [a] scientific determination [that is at the frontiers of science], as opposed to simple findings of fact, a reviewing court must generally be at its most deferential."); Ethyl Corp. v. EPA, 541 F.2d 1, 66 (D.C. Cir. 1976) (Bazelon, J., concurring) ("[I]n cases of great technological complexity, the best way for courts to guard against unreasonable or erroneous administrative decisions is not for the judges themselves to scrutinize the technical merits of each decision. Rather, it is to establish a decision-making process that assures a reasoned decision that can be held up to the scrutiny of the scientific community and the public." (quoting Int'l Harvester Co. v. Ruckelshaus, 478 F.2d 615, 652 (D.C. Cir. 1973) (Bazelon, J., concurring))). *See generally* Meazell, *supra* note 98 (describing the phenomenon of judicial "super-deference" to agency science). For a more detailed discussion of the relationship between deconstruction and judicial review of agency science, see *supra* Part III.A.3.

201. The converse may also be true, for instance where interest group influences crowd out other participants in the rulemaking process. Either way, the differences between rulemaking and adjudicative processes offer another potential basis for employing the kind of targeted review that deconstruction is meant to facilitate.

deconstructed arbitrary and capricious review, agencies may internalize the distinctions among various categories of agency action. The result could be an integrated system of policymaking and judicial review based on deconstruction that better reflects the interbranch comity and cooperation envisioned by the separation of powers.

C. Systemic Improvements

Systemically, deconstruction offers several benefits to the administrative state writ large as well as to our tripartite constitutional democracy. First, it promotes the theoretical integrity of judicial review. This is a valuable contribution because it offers principled limitations to both sides of the delicate balance between agencies and the courts over matters of public policy. By encouraging courts to think more pointedly about the feature of agency action under review and whether that feature is rationally justified, deconstruction limits judicial review of agency policymaking. This limitation not only prevents courts from overreaching into political determinations by administrators but it also projects an appearance of judicial restraint that is legitimizing for the administrative state. Conversely, deconstruction provides clear notice and puts additional—and appropriate—pressure on agencies to focus on each aspect of their policymaking and to ensure that they are meeting their epistemic and political responsibilities. Deconstruction counsels agencies to take extra care to employ, and defend their use of, rational procedures as well as rational outcomes. Due to agencies' unique place in the interstices of our constitutional democracy,[202] the additional accountability and transparency associated with deconstruction enhances the credentials and perception of the administrative state.

A second systemic advantage of deconstruction is that it more accurately describes current practice in administrative law. This advantage has ramifications for the quality of judicial review and agency policymaking, but perhaps even more importantly for the public perception of both. The impact on the quality of judicial review from accurately describing current practice is felt both horizontally within a given court over time, and vertically through the entire judicial system. Taking the Supreme Court as an example, deconstruction's more accurate accounting of the Court's hard look jurisprudence offers a clearer framework for future decisions. This framework could thus help to bring greater clarity and consistency to

202. *See* Strauss, *supra* note 4, at 575.

a doctrine that has been historically uneven.[203] A similar benefit can accrue vertically by offering lower courts more structure within which to perform their reviews and a more targeted collection of precedents to guide them. All of these improvements project beyond the judiciary as an institution because they help bring greater integrity and reliability to the courts' exercise of their authority as unelected reviewers of the political branches.[204] Perhaps more importantly, they project a degree of interbranch cooperation and governmental competence that advances the public's faith in its institutions.

The final systemic benefit of deconstruction lies in its effect on the constitutional relationship among Congress, the executive, and the courts. Interbranch comity is an essential feature of the separation of powers.[205] The branches are coequal and necessarily interactive,[206] and while each possesses powerful checks designed to maintain a sense of equilibrium and balance within the federal structure, the confrontational or unwelcome use of those checks may trade short-term gains for long-term losses in governmental efficiency and

203. *See* Shapiro & Levy, *supra* note 10, at 1065–66.

204. This anti-democratic feature of the federal courts has long been the subject of a heated debate among constitutional law scholars. *See, e.g.*, BICKEL, *supra* note 4, at 16–23; ELY, *supra* note 4, at 86–104.

205. Professor Paulsen uses the term "coordinacy" to describe the same concept:

> The "coordinacy" of the three branches of the federal government is one of the fundamental political axioms of our federal Constitution. . . . This does not mean that the branches are equal in the quantum of powers assigned to them. . . . Coordinacy is a term of power-*relationship*, not of power-*scope*. . . . It is the idea of *coordinacy*, even more than the cognate concept of separation on which it depends and builds, that fuels the system of "checks and balances" that guards against "a tyrannical concentration of all the powers of government in the same hands."

Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What The Law Is*, 83 GEO. L.J. 217, 228–29 (1994); *see also, e.g.*, Jonathan L. Entin, *Separation of Powers, the Political Branches, and the Limits of Judicial Review*, 51 OHIO ST. L.J. 175, 226 (1990) ("[T]he separation of powers assumes a minimum level of interbranch comity.").

206. *See, e.g.*, Clinton v. Jones, 520 U.S. 681, 702 (1997) ("[O]ur . . . system imposes upon the Branches a degree of overlapping responsibility, a duty of interdependence as well as independence the absence of which 'would preclude the establishment of a Nation capable of governing itself effectively.' " (alterations in original) (citation omitted)); *id.* at 703 ("As Madison explained, separation of powers does not mean that the branches 'ought to have no *partial agency* in, or no *control* over the acts of each other.' " (quoting THE FEDERALIST NO. 47, at 325–26 (James Madison) (J. Cooke ed., 1961))); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) ("While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.").

productivity.[207] Deconstruction works to enhance interbranch comity in a way that helps realize the fullest expression of our tripartite government. To the extent deconstruction makes judicial review of agency policymaking more focused and effective, it properly orients the courts in their role as a constitutional check on Congress and the executive. Arbitrariness review based on more detailed, nuanced, and principled considerations of agency action cabins the judiciary within its proper role of protecting against constitutional boundary-crossing by Congress or administrative agencies. Singling out second-order issues such as relevant factors and rational connection analysis for more deferential treatment affirms congressional authority to shape the scope and purpose of agency authority while honoring the full spectrum of political discretion bestowed upon the Executive by the legislature. The ultimate result is more robust and dynamic interaction among the three coordinate branches that best represents the principle of separation of powers.

The goal of deconstructing arbitrary and capricious review is to offer a more theoretically sound and descriptively accurate account of judicial review of agency policymaking. The normative, institutional, and systemic benefits that accrue from deconstruction confirm its value. But just as deconstruction offers significant benefits to administrative law and our constitutional democracy more broadly, it also presents some potential costs.

D. Deconstruction's Costs

Deconstruction introduces several levels of complexity into arbitrariness review that could prove difficult for courts and commentators. First and likely most obvious is the problem of actually doing the deconstruction. Classification of certain forms of agency conduct as first- or second-order could be difficult for reviewing courts. Distinctions within each of these broader classifications, for example between the first-order categories of input quality and research scope, may prove even more difficult. Although these categories are theoretically distinguishable from one another and do in fact represent different parts of the overall policymaking process, it is easy to imagine how different courts could draw boundaries among these categories differently, potentially leading to

207. An extreme version of this phenomenon has been described as a "constitutional showdown" by Professors Posner and Vermeule: "a disagreement between branches of government over their constitutional powers." Eric A. Posner & Adrian Vermeule, *Constitutional Showdowns*, 156 U. PA. L. REV. 991, 997 (2008).

incongruous results in similar cases. This potential inconsistency could then detract from several of the benefits of deconstruction mentioned above, including the clarification of arbitrary and capricious review.[208]

While these concerns are certainly valid, they ultimately do not dilute the overall value of deconstruction. As an initial matter, a similar level of confusion is already apparent in the courts' treatment of hard look review,[209] so it is unlikely a more explicit organizing framework would exacerbate the problem. Moreover, deconstruction does not rely heavily on the courts' choices of specific subcategories of review, or even on the clarity of the boundaries between broader categories like first- and second-order arbitrariness. The foregoing analysis is designed to show that valid theoretical distinctions exist among different features of agency policymaking and that at least at the highest levels, some practical distinctions can be made that will reflect actual agency practice. The theoretical differences between gauging the reliability of specific informational inputs and weighing relevant policy considerations, for example, should not be terribly controversial. Additionally, whereas some categorizations between first- and second-order agency practices may be challenging, others will not. It is relatively easy to identify a decision to provide reasons as a first-order issue and a final policy conclusion as a second-order determination.

Once these core points are established, the challenge of categorization is best understood as a matter of judicial reasoning and experience that is within the competency of the courts. It is also not likely to dilute the ultimate value of deconstruction. As courts employ deconstruction over time, categories may well evolve and coalesce into a more consistent, deconstructed framework that is increasingly easier to apply. If not, and courts continue to struggle with creating and using the subcategories that result from deconstruction, then the benefits of deconstruction may be less robust, but they are nonetheless still significant. Deconstruction would still empower courts to more accurately evaluate the normative justifications for their deference decisions, to think of potential arbitrariness in more targeted and sophisticated terms, and to better balance the judicial role of protecting against administrative overreaching with the political branches' mandate to set public policy. Regardless of exactly

208. *See supra* Part III.A–C (outlining the benefits of deconstruction, including that it offers a more accurate and transparent form of hard look review).

209. *See* Shapiro & Levy, *supra* note 10, at 1065–66 (describing the uncertainty of the Supreme Court's arbitrary and capricious standard).

what the resulting deconstructed framework looks like, its very existence moves arbitrary and capricious review forward in ways that promote better judicial decision making, administrative legitimacy, and interbranch comity.

Another potential objection to deconstruction is that it runs afoul of the prohibition on judicially mandated rulemaking procedures first set forth in *Vermont Yankee* and rearticulated in *Pension Guaranty Benefit Corp. v. LTV Corp.*[210] *Vermont Yankee* introduced the now-seminal rule that courts may not require agencies to employ procedures beyond those required by statute, including the APA.[211] An argument could be made that asking courts to separately consider an agency's first-order procedural choices within hard look review constitutes an invalid judicial intrusion into agency procedures. Although *Vermont Yankee* famously set the standard, *LTV Corp.* is the more instructive case on this point. *LTV Corp.* involved an informal adjudication in which the Pension Benefit Guarantee Corporation ("PBGC") restored LTV's terminated pension plan on the grounds that the company was in fact able to pay the benefits itself.[212] The lower court had held that the PBGC had not followed adequate procedures in issuing its order, but the Supreme Court reversed, explaining that since the section of the APA governing informal adjudications[213] did not require any procedures beyond those employed by the Agency in that case, the courts were powerless to require additional steps for the same reasons articulated in *Vermont Yankee*.[214]

There are several reasons why singling out first-order agency conduct through deconstruction does not violate *LTV Corp.* and *Vermont Yankee* and, perhaps more importantly, does not represent undue judicial interference with agency policymaking. First, in *LTV Corp.*, the Court explained that it was not displacing its position in *Overton Park* that the APA's arbitrary and capricious standard imposed a "general 'procedural' requirement" by forcing agencies to create a judicially reviewable record.[215] It went on to state that the problem with the lower court's ruling was that it prescribed specific extra-statutory procedures relating to LTV's role in the PBGC's

210. 496 U.S. 633 (1990).

211. *See* Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 548–49 (1978).

212. *See LTV Corp.*, 496 U.S. at 643.

213. *See* 5 U.S.C. § 555 (2012).

214. *See LTV Corp.*, 496 U.S. at 655–56.

215. *Id.* at 654.

decision-making process, thus interfering with the legislative prerogative to set those procedural standards and subjecting agencies to an intolerably uncertain procedural regime.[216] Professors Jack Beermann and Gary Lawson endorsed this interpretation of *LTV Corp.* as the "natural reading" of the case and were "not convinced that hard-look review violates *Vermont Yankee* [because] [h]ard-look review does not necessarily force agencies to adopt any specific procedures. . . . *Vermont Yankee* and hard-look review can peacefully coexist."[217]

Deconstruction comports with Professors Beermann's and Lawson's reading of *LTV Corp.* It does not require or even encourage courts to articulate specific procedural requirements for specific parties, nor does it force courts to pass judgment on the adequacy of the specific agency procedures in a given case. At its core, deconstruction merely creates the opportunity for courts to view agency action through a more detailed lens, not to reach specific conclusions about the validity of specific agency conduct. Second, to the extent deconstruction involves judicial review of administrative procedure, it looks to specific categories of first-order, procedural conduct to determine if that conduct either adversely affected the court's ability to engage in its own statutorily required judicial review or was influential enough to render the second-order policy decision by the agency arbitrary and capricious. Both of these analyses are independently justified by the judicial review provisions of the APA,[218] and as such they should be read as consistent with the statute's procedural provisions.

Finally, and perhaps most importantly, *Vermont Yankee* and *LTV Corp.* are largely inapposite to deconstruction. If any of the procedural categories singled out by deconstruction are ultimately found to violate the *Vermont Yankee* rule, courts can still choose not to consider those categories for precisely that reason without sacrificing the overall usefulness of deconstruction.[219] The ultimate value of deconstruction lies in its shifting the courts' perspective on arbitrariness review from a monolithic view of agency policymaking

216. *See id.* at 655 (explaining that the "procedural inadequacies cited by the court all relate to LTV's role in the PBGC's decisionmaking process").

217. Beermann & Lawson, *supra* note 7, at 871, 882. *But see* Pierce, *supra* note 7, 904–10 (2007) (arguing that the judiciary's implementation of hard look review could be understood to violate *Vermont Yankee*).

218. *See* § 706(2)(A).

219. *See* Beermann & Lawson, *supra* note 7, at 882 ("[I]f courts apply hard-look review in a manner that is sensitive to the Vermont Yankee problem, it will not push agencies into procedures not mandated by law.").

to a more detailed analysis of the discrete steps within that process. If procedural considerations were to threaten the bounds of *Vermont Yankee* or any other established doctrine of administrative law, that could just as easily be seen as a benefit, rather than a cost, of deconstruction. The increased judicial insight into the agency's conduct that revealed the *Vermont Yankee* problem may not have been available under the current approach to hard look review. Rather than force courts into untenable positions, deconstruction opens up the full panoply of normative and practical considerations for the courts and allows for more thorough, effective, and transparent review.

CONCLUSION

Judicial review of administrative agencies raises some of the most persistent and fundamental issues in American law. Among them is the question of how courts should evaluate agency policy decisions. On the one hand, the separation of powers and institutional competencies support wide agency discretion in setting and pursuing policy goals. On the other, some measure of restraint is necessary to ensure that agencies do not act arbitrarily or capriciously by either overreaching their authority or succumbing to corrupting political influences. The current solution to this tension between courts and agencies over administrative policymaking is hard look review. Since its inception, it has been the subject of significant attention and controversy among courts and commentators. Opinion has appeared to coalesce, however, around the idea that hard look review is a unilateral concept—a single legal standard applied across the entirety of an agency's decision-making process.

That is where hard look review has fallen short. Even a cursory review of the Supreme Court's hard look jurisprudence demonstrates that the Court is aware that different modes of agency conduct may merit different applications of the arbitrariness standard, yet it is seemingly unable or unwilling to develop a coherent theory to address that reality. That is where deconstruction comes in. Rather than being treated as a one-dimensional instrument, arbitrary and capricious review can and should be broken into its component parts. More specifically, theoretical lines should be drawn among the different modes of reviewable agency conduct in order to better reflect the multifaceted nature of policymaking. This deconstruction of agency policymaking creates an opportunity to develop a comprehensive framework for hard look review that is not only currently lacking, but is also both normatively and practically sound.

That is the goal and desired contribution of this Article. It deconstructs hard look review in order to offer greater insight into the individual aspects of agency policymaking and their relationship with judicial review. This new perspective on hard look review reveals potential normative, institutional, and systemic benefits for the entire administrative state.