

Effective Judicial Control of the Basis of Agency Choice

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Abstract

One can look to any of a wide variety of normative perspectives on government, and in particular administrative government, to justify a focus by the courts on the *reasons* for which an agency takes an action, as opposed to the *actual merit* of that action. But a stipulation that “judges should care about reasons” is not by itself sufficient to justify the current regime of rationality review. If one thinks that the bases for agency action ought to be policed by the courts, one has to ask whether the rules courts (are supposed to) follow in reviewing the basis for agency decisions in fact cause administrators to choose among policies on the desired grounds, when they would otherwise resort to some unsavory considerations. The most troubling worry about the effectiveness of rationality review stems from the nature of reasons themselves. Judges cannot directly observe administrators’ *actual reasons* for their decisions. This paper attempts first to render these concerns precise, and second to explore the implications of these concerns for the design of judicial rules.

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1 Introduction

In enforcing the APA's ban on "arbitrary and capricious" agency action, judges give a great deal of attention the explanations administrators offer for their policy choices. An administrator must base her choices on all the considerations required by statute and otherwise relevant to the problem at hand. She must ignore factors specifically disallowed by organic statute or by constitutional concerns for due process and equal protection. Finally, her reasons for selecting the policy under review must be internally consistent, and must account for the entire body of facts and arguments before the agency at the time of the decision. (Blackletter Statement...scope section)

One can look to any of a wide variety of normative perspectives on government, and in particular administrative government, to justify a focus by the courts on the *reasons* for which an agency takes an action, as opposed to the *actual merit* of that action. In fact, even if one doubts that the reasons for action are per se important (see Scalia and Shaprio cites in Sunstein Stanford LR note 158), one might still think administrators' reasons for action or decisionmaking processes are good *measures* of their actions' merits. Stephenson, for instance, argues that agencies can communicate otherwise unverifiable information about a decision's merits to the courts either by varying the thoroughness of their explanation for the decision (hard look signaling paper) or by varying the formality of the process leading up to the decision (textual plausibility vs. process paper).

But a stipulation that "judges should care about reasons" is not by itself sufficient to justify the current regime of rationality review. If one thinks that the bases for agency action ought to be policed by the courts, one has to ask whether the rules courts (are supposed to) follow in reviewing the basis for agency decisions in fact cause administrators to choose among policies on the desired grounds, when they would otherwise resort to some unsavory considerations. Unlike the notion that the reasons for agency choice are normatively significant, the assertion that courts can *cause* administrators to choose on a worthy basis is not at all obvious.

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The most troubling worry about the effectiveness of rationality review stems from the nature of reasons themselves. Judges cannot directly observe administrators' *actual reasons* for their decisions. At best, they can look to circumstances in which those decision were made to effectively check the support for various *hypotheses* about those reasons. A judge worried about undue political influence on a decision, for instance, might look to see whether administrators appear to have deliberately ignored information that if accounted for would legally require an action harmful to the interest of a powerful lobby. What a judge cannot do, however, is fully and definitively determine (with apologies to Senator Howard Baker) "what administrators knew and when they knew it."

This of course does not eliminate the possibility of effective rationality review outright. But it does suggest that the task of designing judicial rules that control the basis of agency decision is not at all straightforward. In particular, the asymmetric distribution of information between judges, agencies, and interested parties, and the opportunities for exploitation of this asymmetry are first order concerns in evaluating the potential for a given judicial practice to combat the dominance of unsavory considerations in agency policymaking.

This paper attempts first to render these concerns precise, and second to explore the implications of these concerns for the design of judicial rules. It pursues these aims by first constructing a model of policy choice by a single administrator. This model is deliberately spare, and abstracts from all sorts of complexities of actual policymaking. It focuses on just one aspect of the legal concern with the basis for agency action—the requirement that an administrator "adequately consider" her policy options in light of the problem she is charged to resolve.

Analysis of the model uncovers a disturbing possibility. If indeed judges can only partially observe the circumstances of agency choices, it may be that effective judicial control of the *basis* for agency decision can only be achieved by relaxing judicial standards on the *merits* of those decisions. The reason for this tradeoff is inherent in the institutional powers of Article III courts. The most significant carrots and sticks judges have at hand to induce good behavior of any sort by administrators is the threat of setting their choices aside. This

is a blunt instrument, and in particular its use has consequences not just for administrators themselves but for public policy as a whole. But if indeed judges are at an informational disadvantage relative to administrators, they must provide incentives in order to get administrators to comply with judicial goals. In general, this will mean that gains on one dimension of compliance must come at the cost of greater leeway on other dimensions.

2 A Model of Consideration and Choice under Uncertainty

To clarify this model’s relevance to concerns about the basis of agency choice I introduce and interpret the model in terms of a very basic account of the agency choices at issue in *Citizens to Preserve Overton Park v. Volpe*—a precedent setting case that nicely illustrates the concern with “adequate consideration”. The decision at issue in that case was one by the Department of Transportation (DOT) to authorize the use of federal funds for construction of a highway routed through a municipal park (Overton Park) in Memphis, Tennessee. At the time of the decision, a statute was in effect that prohibited use of federal funds for highway construction through parkland if a “feasible and prudent” alternative existed. In the majority opinion Justice Marshall read this to allow the DOT to weigh the value of protecting parkland against other considerations such as cost, but to give the protection of parkland “paramount importance”. “The Secretary,” Marshall wrote “cannot approve the destruction of parkland unless he finds that alternative routes present unique problems.”

The DOT here faced a situation endemic to agency policymaking—forced to choose between options, none of which could please everyone, but acting under statutory authority that appears to rank the importance or weight the agency should apply to the various interests concerned. The model I use here contemplates the simplest possible version of this dilemma, in which an agency must choose between two policy alternatives, labeled A and B . There are two interest groups, and it is known that each policy benefits one of the groups at the expense of the other. I refer to the group benefited by policy A as group A , and the group benefited by policy B as group B . Letting $x \in \{A, B\}$ denote the policy chosen, the

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groups have utility functions $U_A(x)$ and $U_B(x)$, respectively, where

$$U_A(A) - U_A(B) = L_A \geq 0$$

and

$$U_B(B) - U_B(A) = L_B \geq 0.$$

Throughout I use L_A and L_B to refer to the stakes each group holds in the agency's decision. For either group $i \in \{A, B\}$, L_i can be thought of as the loss that group incurs when the decision that favors her is passed over for the decision that favors the other group.

As for the statutory scheme assume that it orders the agency to act to maximize the expected value of the utility function

$$U_S(x) = WU_A(x) + (1 - W)U_B(x)$$

where $W \in (0, 1)$ is the weight the law requires the agency to apply to the interest of group A relative to that of group B . For instance, if in the *Overton Park* case we think of group A as persons who are regular users of the park, and group B as taxpayers who are not users of the park, Justice Marshall's reading that the statute requires the agency to assign "paramount importance" to protection of the park could be represented as a case of this model in which W is close to 1.

To see how this statute binds on the agency's policy choice, observe that the effect on the value of the statutory objective of a switch from policy B to policy A is

$$U_S(A) - U_S(B) = WL_A - (1 - W)L_B.$$

If, then, the losses imposed by each decision are exactly known, the statute requires the agency to choose policy A when $WL_A > (1 - W)L_B$ and policy B when $WL_A < (1 - W)L_B$. Obviously, this model assumes a statute that is extraordinarily specific. I leave it to future papers to extend these findings to the case of statutory vagueness.

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How can the legal concern with the basis of decision be represented in this spare model? To see this, it helps to examine what features of agency choice judges (are supposed to) examine when reviewing for arbitrariness. Under current law, judges reviewing a decision for arbitrariness are supposed limit the scope of their examination severely. The opinion in *Overton Park*, for example, sets aside the question of whether the DOT's choice in fact reflected the high value assigned by the statute to protection of parkland. Justice Marshall emphasized early on that whether a given alternative route *was* feasible and prudent was not a decision delegated to the courts. Instead, Marshall's opinion focused on a litigant's claim that the Secretary of Transportation "did not make an independent judgement" regarding the feasibility or prudence of alternative highway routes. Ultimately, the court ordered a lower court to re-examine the DOT decision. Marshall's wrote:

That review is to be based on the full administrative record that was before the Secretary at the time he made his decision. But since the bare record may not disclose the factors that were considered or the Secretary's construction of the evidence... [t]he court may require the administrative officials who participated in the decision to give testimony explaining their action.

The lower courts, then, were specifically to inquire into the *reasons for or bases of* the DOT decision, as opposed to the merits of the decision itself. This is the identifying characteristic of rationality review. Courts reviewing decisions for arbitrariness are to insure that each policy decision under review is the result of a rational inquiry into the merits of the policy options. This inquiry is to be directed in a way that makes sense given the goals of the statute. Thus Justice Marshall's concern—not whether there *were* feasible and prudent alternative routes, but whether DOT officials *engaged in an investigation sufficient to determine* whether there were.

This doctrine appears to rest on an implicit assumption that the consistency with statutory goals or values of any given policy alternative relative to others is almost never *prima facie* certain. Some investigation of alternatives (either by administrators or judges) must be undertaken in order make such a judgement. In *Overton Park* the need for such in-

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investigation is obvious. If nothing else, judging the feasibility of alternative routes requires someone to look at a map to identify a list of alternatives to be considered. One would then need to know, for each route, whatever it is that engineers need to know to predict the likely costs of a highway through that route. One would also need to estimate the amount of compensation governments would have to pay to gain right of way through each route.

Two elements, then, must be added to the model to account for the adequate consideration requirement. First, one needs a representation of uncertainty about the merits of each policy option relative to the statutory goals. Second one needs a representation of the possibility of reducing that uncertainty through some sort of costly investigation. To continue to maintain simplicity, assume that it is known that each of the losses L_i , for $i \in \{A, B\}$, is equal either to 0 or to 1. Suppose that it is known ex-ante that the likelihood that $L_A = 1$ is $\alpha \in (0, 1)$ and the likelihood that $L_B = 1$ is $\beta \in [0, 1]$. Suppose further that these losses are independently distributed.

Now suppose that any given person (e.g. an administrator, a judge, a potential litigant) may exert “investigative effort” directed towards the reduction of uncertainty about either loss. One can think of this effort as actual physical investigation, or as “hard thinking” that requires one to turn cognitive attention away from other valuable activities for some period of time. If an actor exerts effort towards reducing uncertainty about loss L_i and in fact $L_i = 1$, then with probability $q \in (0, 1)$ she observes evidence that establishes definitively that $L_i = 1$. With probability $1 - q$, she observes nothing. If, on the other hand, $L_i = 0$, then she obtains no evidence of any kind.

This model of costly investigation (introduced by Aghion and Tirole) has a basic features that make it well-suited to a concern with adequate consideration. It allows for the possibility that consideration will not resolve all uncertainty. If an actor investigates and obtains no evidence, then she knows that it is possible either than $L_i = 1$ but evidence of this failed to be uncovered, or that $L_i = 0$. In particular, using Bayes’s rule, an actor that

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investigates loss L_A and uncovers no information has posterior belief

$$\Pr(L_A = 1 \mid \text{no evidence}) = \frac{\alpha - \alpha q}{1 - \alpha q}$$

Similarly, an actor that expends effort e_B investigating loss L_B and uncovers no information has posterior belief

$$\Pr(L_B = 1 \mid \text{no evidence}) = \frac{\beta - \beta q}{1 - \beta q}$$

3 What Would a Perfect Administrator Do?

The plaintiffs' claim in *Overton Park* was that the Secretary of Transportation had not collected enough information to come to a reasonable judgement about whether there were feasible alternatives to the route through the park. Moreover, they were quite specific about the kind of information the Secretary should have collected. As they read the statute, the Secretary had to in fact collect the engineering data needed to establish that each specific route for the highway *around* Overton Park was prohibitively costly.

The Supreme Court, of course, did not rule on whether this claim was correct. But they did rule that the claim must be adjudicated—and in fact ordered the lower courts to re-hear the case specifically in an effort to judge this claim. This reflects a bedrock assumption of rationality review: There is such a thing as “adequate” consideration, and such a thing as “inadequate” consideration. This distinction hinges not only on the *amount* of consideration that occurs, but also on the allocation of attention *across* alternative questions.

Before elaborating the model to consider the problem of controlling actual administration, then, it is worth being clear about what it would mean to say that an allocation of investigative effort is “adequate” given the statutory framework. In this section, I propose a benchmark for adequacy by characterizing the allocation of investigative effort that a “perfect” administrator would choose. A perfect administrator is one whose preferences over policy are identical to the statutory objective. Specifically, she chooses levels of investigative effort, observes the results and then makes a policy decision. When making each of these

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choices, she strives *exclusively* to maximize the expected value of the statutory objective

$$WU_A(x) + (1 - W)U_B(x)$$

Such an administrator, as one would expect, would always collect the maximum amount of information possible. Thus the case in which there are unlimited resources available for investigation is uninteresting. I therefore focus on characterizing the allocation of effort that a perfect administrator would choose when she has enough resources only to investigate *one* of the two losses.

The following proposition (which I prove in the appendix) characterizes the way in which such an administrator would allocate her effort. The results apply to a restricted range of parameters of the model. First of all, it restrict attention to the case in which $W > 1 - W$, so that the statute places more weight on the welfare of group A than on the welfare of group B . This is without loss of generality, since the labels placed on the two groups are arbitrary. More substantively, the proposition also restricts attention to the case in which $(1 - W)\beta < W\alpha < 1 - W$ and

$$W \frac{\alpha - \alpha q}{1 - \alpha q} < (1 - W)\beta.$$

Under this restriction, an investigation of either loss is informative enough that its outcome should determine the policy choice. In the absence of this assumption, the characterization of the administrator's behavior would be trivial—she would only devote resources to the investigation (if there is one) that could affect her policy choice.

Proposition 1. *Suppose that $(1 - W)\beta < W\alpha < 1 - W < W$ and*

$$W \frac{\alpha - \alpha q}{1 - \alpha q} < (1 - W)\beta$$

The effort allocation and policy choice that maximizes the perfect administrator's expected utility—and thus the expected value of the statutory objective—is as follows:

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(i) If

$$(1 - W)\beta < W \frac{\alpha - \alpha q}{1 - \alpha q + q \left(\alpha \frac{W}{1-W} - 1 \right)}$$

the perfect administrator investigates L_B . If the investigation shows that $L_B = 1$, she chooses policy B. If the investigation uncovers no evidence then she chooses policy A.

(ii) If

$$(1 - W)\beta > W \frac{\alpha - \alpha q}{1 - \alpha q + q \left(\alpha \frac{W}{1-W} - 1 \right)}$$

the perfect administrator investigates L_A . If the investigation shows that $L_A = 1$, she chooses policy A. If the investigation uncovers no evidence then she chooses policy B.

The proposition has a number of implications regarding the effect of the administrator's circumstance on which investigation would amount to "adequate" consideration under the statute.

Implication 1 As the prior expectation of the magnitude of the effect of the decision on a given interest increases (α for interest A, β for interest B), and all else is held constant, the resources devoted to investigation of that group's loss decreases.

This implication is illustrated in Figure 1 which displays the line $(1-W)\beta = W \frac{\alpha - \alpha q}{1 - \alpha q + q \left(\alpha \frac{W}{1-W} - 1 \right)}$ in a plane in which the horizontal axis is the value of α and the vertical axis is the value of β . In the case displayed, the quality of investigations q is set to 0.9, and the weight on interest A is set to 0.51. The shaded region displays the zone in which $(1 - W)\beta \leq W \frac{\alpha - \alpha q}{1 - \alpha q}$ and thus where the results of the proposition do not apply. By the proposition, if the prior beliefs about the losses (α, β) lie above and to the left of the solid line, the administrator investigates L_A . If on the other hand, her prior beliefs lie below and to the right of the line she investigates L_B . Thus holding (say) α constant, there is threshold level of β below which the administrator investigates L_B and above which she investigates L_A .

This result may seem a bit surprising. One might think that if one is relatively *certain* about the effect of policy on one interest (whether one is certain the effect is large *or* certain

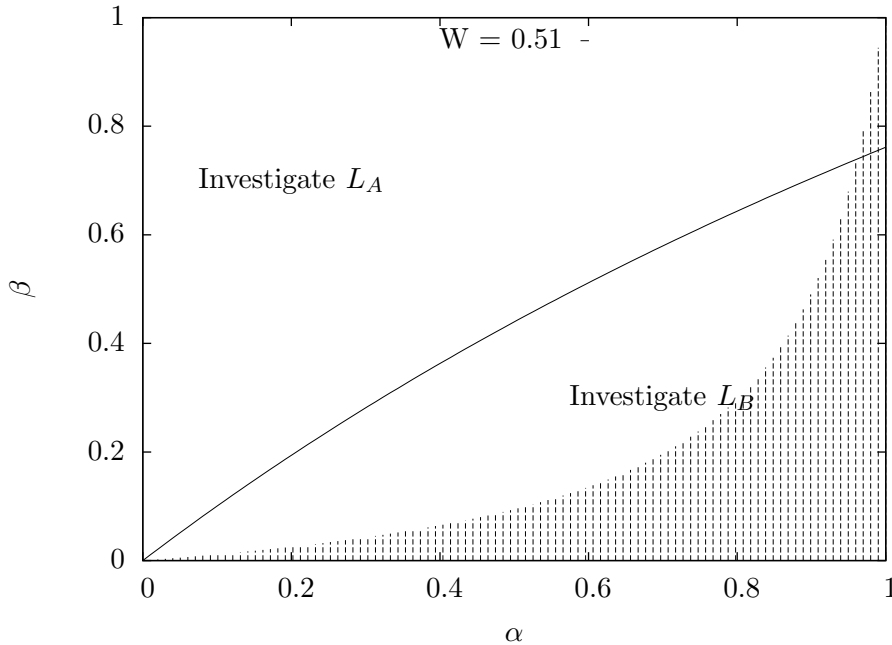


Figure 1: Adequate Consideration as a Function of Prior Information

the effect is small) and very *uncertain* about the effect of policy on the other, then one should devote resources to investigating the effects of policy on the latter group. But this intuition is only partially consistent with the model here. For instance, if α is very close to 0 and thus one has almost no uncertainty ex-ante about the loss to group A , then for most values of β —including the value $\beta = \frac{1}{2}$ at which prior uncertainty about loss L_B is maximized—one should investigate loss L_A —and not the (less-certain) loss L_B . On the other hand, the intuition that increases in certainty should to decrease the value of investigation holds when one is close to certain that $L_A = 1$. Here, one is relatively apt to prefer investigating loss L_B .

The reason for this asymmetry is subtle, but important. The investigations in this simple model can produce mis-leading results about a loss L_i *only* when $L_i = 1$. When this is the case, one can still end up uncovering no evidence, which leads to a lower posterior that $L_i = 1$. But when $L_i = 0$, one will uncover no evidence for sure. These investigations, therefore are subject to *false negatives*, but immune to *false positives*. As a result, these

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investigations are in fact *more accurate* when the underlying state is $L_i = 0$. Thus as one's prior probability that $L_i = 0$ gets larger, the returns to investigation of that loss get larger.

This effect is of course especially pronounced here in which we employ the extreme assumption that false negatives are possible but false positives are not. But the basic implication—that the relative likelihoods of false positives and false negatives partially drive what patterns of consideration are “adequate”—would be true whether this extreme assumption were made or not. As a non-obvious result, then, it is worth emphasizing.

Implication 2 If investigation of one question is relatively more likely to produce mis-leading results, and all else is held constant, the returns to the statutory objective of that investigation are smaller.

Combining these two implications, one sees that the administrator's choice to investigate one loss instead of the other hinges on a tradeoff between the informativeness of investigation of that loss on the one hand, and the importance of information about that loss given the weights applied by statute. Since in this case $W > 1 - W$, this loss L_A is always more important than the loss L_B . However, because of pronounced problem of false negatives of these investigations, this importance is overridden when β is small enough relative to α .

This basic principle in turn drives the effect on the perfect administrator of changes in the weight W applied by statute to group A , and the quality q of the investigation when $L_i = 1$.

Implication 3: If statutory goals put more weight on the interest of one group as opposed to the other and all else is held constant, then the perfect administrator will be more apt to devote resources to investigation of the losses imposed on that group.

Implication 4: As the quality of investigation becomes worse (all else held constant) the perfect administrator becomes more apt to investigate the impact of policy on the interests of those most favored under the statutory scheme.

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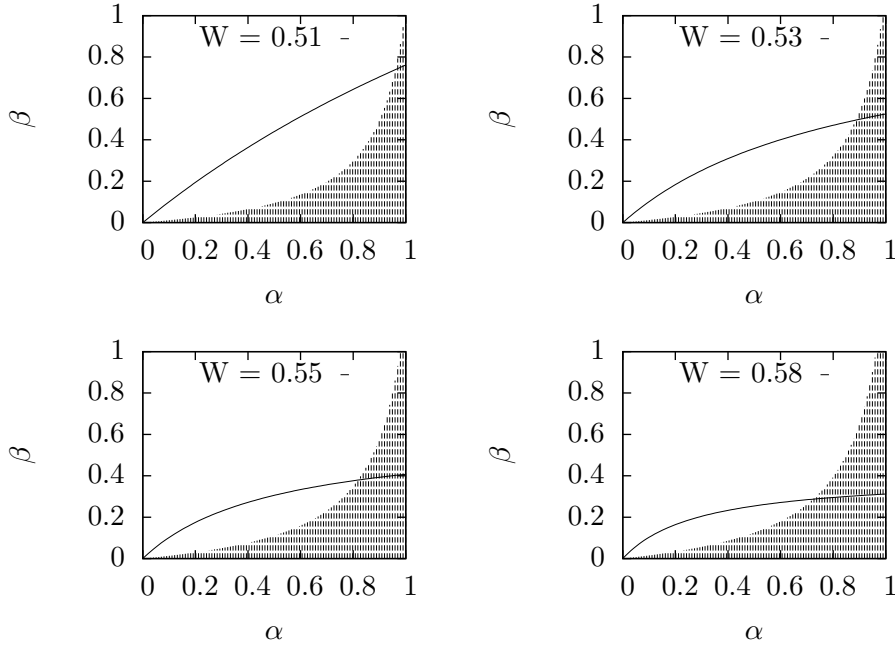


Figure 2: Effect of statutory weights on adequate consideration

Figures 2 and 3 illustrate these two implications. Figure 2 replicates Figure 1 at four different values of the weight W on the interest of group A . To interpret the figure, consider what happens when one fixes a value of α , and then increases W . One can see that this causes the maximum value of β at which resources should be devoted to investigation of loss L_B to get *smaller*. In other words, as the importance of interest group A in the statutory scheme gets greater, the perfect administrator becomes more apt to investigate the losses that group A stands to incur.

Figure 3 shows the effect of reducing the quality (or, alternatively informativeness) of the investigations. Evidently, for a given prior expectation of the loss L_A , a perfect administrator with less reliable investigative options is willing to investigate loss L_A at a lower expectation of L_B .

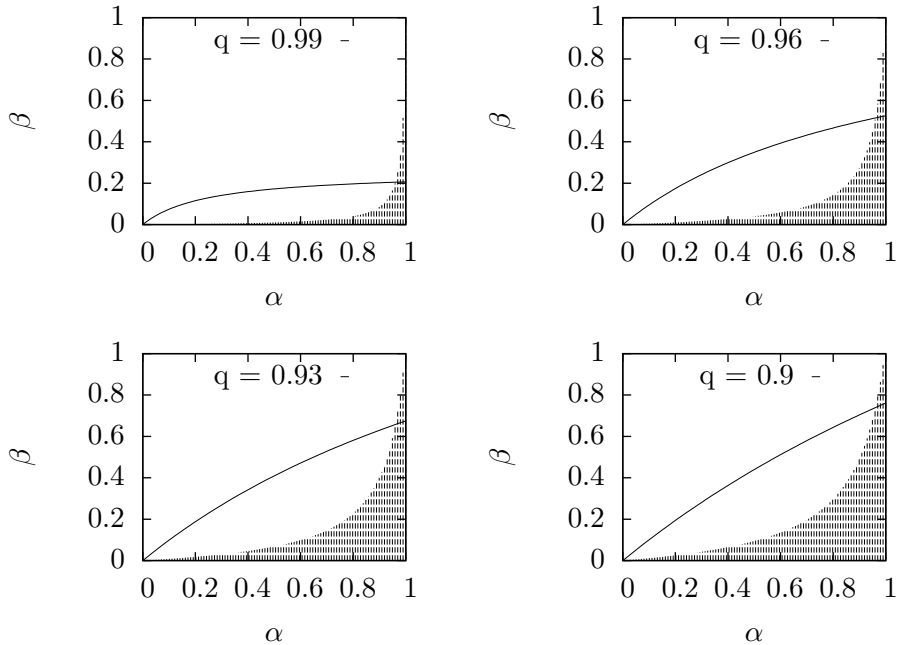


Figure 3: Effect of quality of investigations on adequate consideration

4 A Less-Than-Perfect Administrator

Now consider an administrator who is not inclined to act to maximize the statutory objective in the absence of judicial review. She cares about the effect of her policy choice on the two interests, but weighs the welfare of one interest against the other at a rate different than the statutory scheme requires. Specifically, if the final policy choice is $x \in \{A, B\}$, her payoff is

$$U(x) = \hat{W}U_A(x) + (1 - \hat{W})U_B(x)$$

where $\hat{W} \neq W$. The court's problem here is to design a regime of judicial review that induces the administrator to act *as if* $\hat{W} = W$ —both in her investments in information and in the way she uses that information in her policy decisions.

A commonsense judicial rule might be as follows:

Given the administrator's circumstances—i.e. her prior information α and β , and the quality of her investigative options q , set aside her decision *unless* she

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investigates and chooses policy exactly as described in Proposition 1.

One could certainly give reason for thinking this rule would work. The problem is that it is difficult to see how it could in fact be implemented. Judges will often find themselves much less informed than administrators about the merits of each option prior to the investigation. Moreover, even if judges can observe an administrator's allocation of effort across investigative tasks, they are often hard pressed to interpret the highly technical results of such investigations.

I therefore focus in this section on the problem of designing a judicial rule to control a less-than-perfect administrator when judges can observe an agency's investigative effort and policy choice, *but not the circumstances under which the administrator allocates investigative effort, or the outcomes of her investigation*. Specifically, a judicial rule in this context pre-commits the court to either set aside or sustain an agency decision based entirely on the pair (ℓ, x) , where $\ell \in \{L_A, L_B\}$ is the loss the agency investigates (i.e. the basis for her decision), and $x \in \{A, B\}$ is her policy choice. For example, one possible judicial rule pre-commits the judiciary to the following standard:

(Basis, Policy Choice)	Judicial Decision
(L_A, A)	Set Aside
(L_A, B)	Uphold
(L_B, A)	Uphold
(L_B, B)	Set Aside

Critically, such rules cannot depend on the administrator's prior information (α, β) about the two losses nor the outcome of any investigation. To simplify exposition, I limit the analysis to the case in which the quality of investigation q , the statutory weight W , and the administrator's preferences \hat{W} are common knowledge (or alternatively non-varying). Allowing information about these parameters to be asymmetrically distributed would lead to the same substantive insights. Finally, in order to focus for the time being on the problem of controlling the agency—as opposed to private parties—I assume that the probability

of litigation is unaffected by the judicial rule or the policy choice. This is of course unrealistic, and may be substantively significant. But analysis of the case in which litigation is endogenous is so complex that it must be relegated to a second paper.

Given a judicial rule, then, policy making proceeds as follows.

1. The administrator observes (α, β) . She then chooses which loss to investigate—i.e. she chooses $\ell \in \{L_A, L_B\}$. She then observes the results of her investigations, and chooses policy $x \in \{A, B\}$.
2. With probability $1 - \lambda \in (0, 1)$ no litigation occurs, the administrator's choice stands as final policy and payoffs are awarded. With probability λ litigation occurs. The judicial rule is then implemented—that is if (ℓ, x) complies with the standard then x stands as final policy. Otherwise, the court remands the decision, and a pre-determined status quo policy $s \in \{A, B\}$ stands as final policy.

4.1 Optimal Judicial Rules

To get a sense of how a judicial rule might work, examine Figure 4 below. In that figure, the solid line is the set of points (α, β) at which

$$(1 - W)\beta = W \frac{\alpha - \alpha q}{1 - \alpha q + q \left(\alpha \frac{W}{1-W} - 1 \right)}$$

The dotted line are the points at which

$$(1 - \hat{W})\beta = \hat{W} \frac{\alpha - \alpha q}{1 - \alpha q + q \left(\alpha \frac{\hat{W}}{1-\hat{W}} - 1 \right)}$$

where the administrator's weight on group A is $\hat{W} = 0.61$ and the weight required by statute is $W = 0.51$. This figure, then, displays the case in which the administrator is inclined to put more value on the welfare of group A than the statute does. As in proposition 1, I

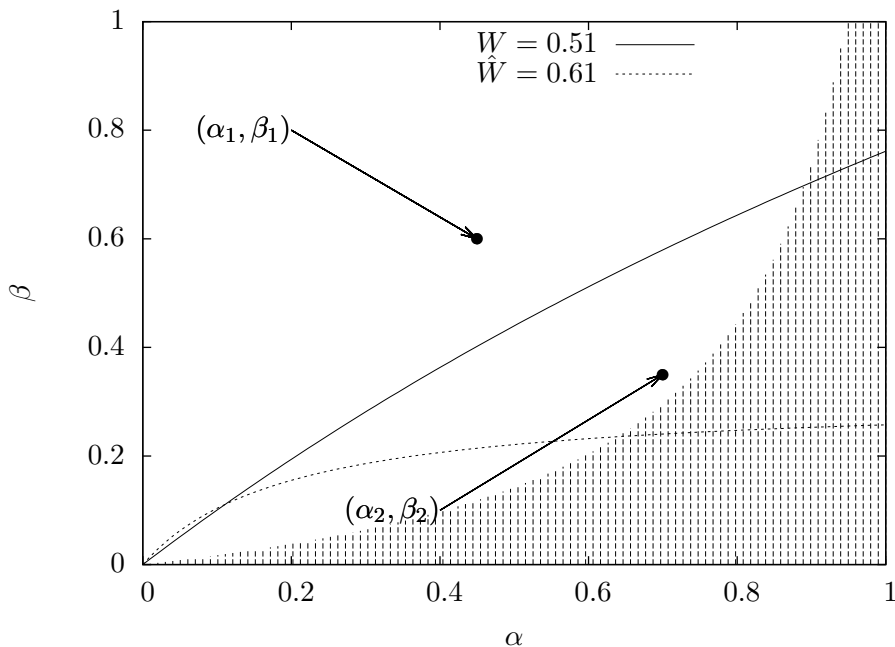


Figure 4: Controlling a less-than-perfect administrator

assume that

$$W' > 1 - W' > W'\alpha > (1 - W')\beta > W'\frac{\alpha - \alpha q}{1 - \alpha q}$$

for both $W' = W$ and $W' = \hat{W}$.

Right away, one should note that when (α, β) are realized in the region above and to the left of *both* lines, or below and to the right of *both* lines, the less-than-perfect administrator is intrinsically motivated to act just like the perfect administrator. Thus if the court could be sure that all cases would fall in this region, the best rule would be one that never remanded a decision. When, however, (α, β) lies in the region *between* the two lines the behavior the administrator would like to engage in is something other than what would maximize the expected value of the statutory objective. Specifically, maximizing the statutory objective would require the administrator to investigate loss L_B , and then choose policy B if she learns that $L_B = 1$ and policy A otherwise. The imperfect administrator instead prefers to investigate loss L_A and choose policy A if she learns that $L_A = 1$ and policy B otherwise.

To see the difficulty this creates, suppose for a moment that there are only two possible

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values of (α, β) labeled (α_1, β_1) and (α_2, β_2) , and located as indicated in Figure 4. Suppose a judge reviews a decision in which the administrator has investigated L_A . This focus of investigation on the stakes of group A is consistent with law *only* if $(\alpha, \beta) = (\alpha_1, \beta_1)$. The problem, however, is that the judge cannot be sure that this is the case. It may instead be that $(\alpha, \beta) = (\alpha_2, \beta_2)$, in which case the only legitimate basis for decision is an investigation of the effect on group B . Even worse, the judge knows that when $(\alpha, \beta) = (\alpha_2, \beta_2)$, this administrator is inclined by her bias towards group A to mis-allocate her investigation of policy in exactly this way.

So what should this judge do? Should he ratify the decision hoping (in the absence of evidence) either that $(\alpha, \beta) = (\alpha_1, \beta_1)$ or that the administrator has defied her own biases? Should he instead set the decision aside as suspiciously consistent with the administrator's known biases? There is no free lunch here. Upholding the administrator's decision runs the risk of ratifying a decision with an improper basis, reversing it risks setting aside a decision consistent with the law in both its basis and merits.

One way to evaluate the judge's options is to determine which pattern of judicial choice, if *anticipated* by the less-than-perfect administrator, gives the administrator an incentive to set aside her biases in favor of statutory goals. To see how this might work, note that a judicial rule here amounts to a designation of a set of policy decisions that will be upheld by the court for each of the administrator's possible allocations of investigative effort. More concisely, these rules list the policy decisions that are allowable for each possible basis of choice. Since a remand always leads to an exogenously-given status quo policy, we can focus on rules that always include that status quo as an allowable decision. For example, if the status quo policy is A , one possible judicial rule is:

Basis	Allowable Policy Choices
investigation of L_A	A and B
investigation of L_B	A only

Such judicial rules can affect administrative incentives by creating tradeoffs for the administrator between the basis on which she makes her choice, and the set of policies that

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can survive judicial review. If the administrator faces the judicial rule above for instance, and she anticipates that the court adheres to that rule, she knows that she can make an investigation of L_A the basis for her decision *only by giving up the option of enacting policy B*. Since this administrator cares about policy outcomes (albeit in a way different than a perfect administrator would), this amounts to a significant tradeoff for her. In other words judges' ability to link the basis of decision to the set of permissible policies can be a powerful tool for controlling the basis of policy choice.

In this particular case where $\hat{W} > W$, one would like to employ this tool specifically to correct the administrator's intrinsic tendency to investigate loss L_A when investigation of loss L_B is legally preferred. Thus an effective rule must in particular make investigation of loss L_A less attractive, and thus must make the set of allowable policy choices when investigation of L_A is used as a basis for decision *smaller* than the set of allowable choices when investigation of L_B is used as the basis of decision. Therefore, the only judicial rule that can possibly induce her to investigate L_B when she would not otherwise do so is:

	Basis	Allowable Policy Choices
If status quo is A ,	investigation of L_A	A only
	investigation of L_B	A and B

	Basis	Allowable Policy Choices
If status quo is B ,	investigation of L_A	B only
	investigation of L_B	A and B

Note that even if these rules effectively shape the administrator's choice of basis—causing her to investigate L_A when $(\alpha, \beta) = (\alpha_1, \beta_1)$ and L_B when $(\alpha, \beta) = (\alpha_2, \beta_2)$, the dismal maxim continues to apply. There is no free lunch. It is always possible that an investigation of L_A will uncover information that suggests that the status quo policy is *less consistent* with statutory goals than the alternative policy. But the rules that induces the less than perfect administrator to ignore her biases *removes* the option of choosing the alternative policy when she investigates L_A . To providing incentives to decide on the correct basis,

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then, judges must require administrators in some cases to *ignore* information generated by their “adequate considerations”.

More generally, the choice to impose this rule requires one to trade off the value of *generating* information useful to pursuing statutory goals against the value of *using* any such information generated. If one imposes this rule and it indeed causes the administrator to choose investigate L_B when (α, β) is at a point such as (α_2, β_2) and investigate L_A otherwise,¹ one improves the information generated by the administrative process, but limits the use that information. In particular, the rule induces the administrator to investigate the losses imposed on group B when it is desirable that she do so. However, inducing her to do this requires the court to essentially dis-allow the *use* of any information generated from an investigation of L_A .

So how should this tradeoff be resolved? Suppose that this rule indeed causes the administrator to ignore her biases, and to simplify exposition restrict attention to the case in which the status quo policy is alternative A . Compare the performance of policy against the statutory objective under the restrictive rule to the performance of policy under a rule that is totally unrestrictive—i.e. that never remands any decision. A critical preliminary to recognize is that the effect of the restrictive rule on the statutory objective depends on the administrator’s prior information about the losses imposed on each group. When (α, β) is realized at a point such as (α_2, β_2) , the administrator acting under the *non-restrictive* rule investigates L_A when investigation of L_B is more consistent with the statutory objective. Under the *restrictive rule*, the administrator acts on the correct basis—investigating L_A . Thus in this circumstance, the restrictive rule is clearly preferred. Figure 5 displays the expected gain in the statutory objective one obtains from imposing the restrictive rule when $(\alpha, \beta) = (\alpha_2, \beta_2)$. In the figure, we allow (α_2, β_2) to vary over the range in which the less-than-perfect administrator is inclined to mis-behave. One can show that when (α, β) is realized in this region, the expected gain to the statutory objective from having

¹One can indeed show that for given parameters $(W, \hat{W}, \alpha_1, \beta_1, \alpha_2, \beta_2)$, this will be the case so long as the probability of litigation λ lies between an upper and lower bound $\underline{\lambda} < \bar{\lambda}$.

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the restrictive rule is place

$$W\alpha(1 - q - \beta q) - (1 - W)\beta(1 - q - \alpha q)$$

Given these costs, one might question whether this judicial rule is in fact desirable. This concern is well-placed, and in fact implies that any preference for such rules cannot be unequivocal. But unequivocal rejection of these rules is also unjustified. Whether or not the imposition of such a rule in fact advances statutory goals depends on the magnitude of these costs relative to the benefits—where the costs and benefits are of course measured in terms of statutory goals.

To make these qualifications on the utility of such a rule precise suppose that this rule indeed causes the administrator to act as desired—in particular when she anticipates this rule she bases her decision on investigation of L_A when $(\alpha, \beta) = (\alpha_1, \beta_1)$ and L_B when $(\alpha, \beta) = (\alpha_2, \beta_2)$.² Further, to speed the exposition, suppose that the status quo policy is A .³ Under these circumstances, consider the effect on the value of the statutory objective of imposing this rule *instead of* a rule that is total non-restrictive, and thus under which the perfect administrator always investigates L_A and chooses according to the outcome of that investigation.

The relative performance of these two rules depends on the realization of the administrator's prior information. In the event that $(\alpha, \beta) = (\alpha_2, \beta_2)$ the restrictive rule induces the administrator investigate L_B , but places no restrictions on her choice. She therefore acts exactly as the perfect administrator would. Under the non-restrictive rule, on the other hand, she investigates L_A , and then chooses according to the outcome of that investigation. The key difference in the rules here is therefore the information that underlies the administrator's choice. Under the restrictive rule, the administrator bases her choice on the outcome of the investigation that the perfect administrator would use. Under the

²One can indeed show that for given parameters $(W, \hat{W}, \alpha_1, \beta_1, \alpha_2, \beta_2)$, this will be the case so long as the probability of litigation is neither too high nor too low.

³The qualitative results do not depend on the status quo.

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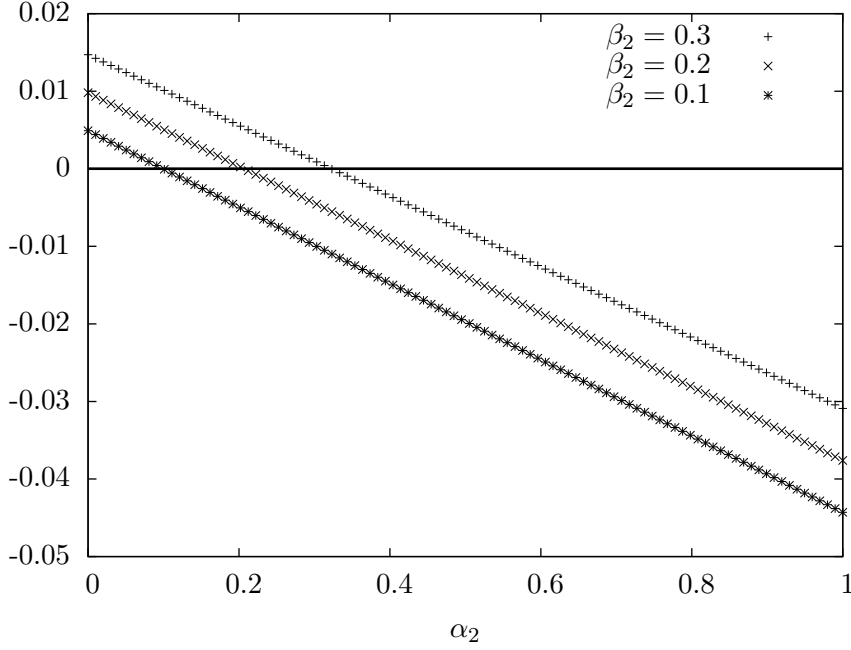


Figure 5: Value of imposing the restrictive rule when $(\alpha, \beta) = (\alpha_2, \beta_2)$ as a function of α_2 for various levels of β_2 .

non-restrictive rule, the administrator collects information that is not the most relevant for the pursuit of statutory goals, but nonetheless uses the information collected in a way that serves those goals. One in particular can show that

$$\begin{aligned}
 & (\text{Expected value of statutory objective under RESTRICTIVE rule when } (\alpha, \beta) = (\alpha_2, \beta_2)) - \\
 & (\text{Expected value of statutory objective under NON-RESTRICTIVE rule when } (\alpha, \beta) = (\alpha_2, \beta_2)) = \\
 & \quad -W\alpha_2 [1 - q - \beta_2 q] + (1 - W)\beta_2 [1 - q - \alpha_2 q]
 \end{aligned}$$

Figures 5 through 7 show how this value depends on the α_2 and β_2 .

The cost of imposing the rule in this circumstance is the rigidity it introduces to policy in the event that $(\alpha, \beta) = (\alpha_1, \beta_1)$. Specifically, if $(\alpha, \beta) = (\alpha_1, \beta_1)$ the cost of having the rule in place is

$$\lambda [(1 - W)\beta_1(1 - \alpha_1 q) - W\alpha_1(1 - q)]$$

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On the other hand, the benefit of the rule is realized when $(\alpha, \beta) = (\alpha_2, \beta_2)$. In this circumstance, the rule causes the administrator to collect and use information more relevant to statutory goals that she would otherwise. Specifically, if $(\alpha, \beta) = (\alpha_2, \beta_2)$ the value of having the rule in place is

$$W\alpha_2 [1 - q - \beta_2 q] - (1 - W)\beta_2 [1 - q - \alpha_2 q]$$

Assuming the two circumstances (α_1, β_1) and (α_2, β_2) occur with equal frequency, the rule that controls the basis of decision improves policy with respect to the statutory objective if and only if

$$\lambda \leq \frac{W\alpha_2 [1 - q - \beta_2 q] - (1 - W)\beta_2 [1 - q - \alpha_2 q]}{(1 - W)\beta_1 (1 - \alpha_1 q) - W\alpha_1 (1 - q)}$$

5 Discussion

Although the opinion in *Overton Park* did not declare a blanket requirement for on-the-record decision making in informal agency proceedings, it clearly implies that a close relationship between an agency's choice and the record of its proceedings is a necessity for judicial review. Judge Marshall made very clear the distinction between the merits of an agency's decision, and the evidence that the agency had done enough work to determine that merit. In order to adjudicate the latter question, there must be some verifiable facts that plausibly indicate the reasons for administrators' choices.

But even the most thorough record leaves much unseen. The above analysis constructs a picture of what the limits of the record might imply for the effectiveness of rationality review. Above all else, it shows that even with limited information, judges with some idea of the biases of an agency can use judicial rules to shape the basis on which administrators choose among policies. The bad news is that administrators' informational advantages require judges to pay for these gains. In the model here, this payment is made in the form of a distortion in the standards judges apply to the merits of a decision. To induce an administrator to alter her basis for decision, judges must use rules under which decisions

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that serve statutory goals are sometimes set aside.

Is this tradeoff worth making? One might be inclined to see this as a question that requires one to reconcile different values—say “legitimacy” versus “efficiency”. But one of the more subtle messages of this paper is that when statutes command agencies to pursue particular ends and the means to those ends are uncertain, “adequate consideration” can be defined entirely in terms of those statutory goals. The tradeoff between basis and merit here, then, is in fact a tradeoff between two alternative means to a single end. If an administrator is to be made to ignore her own biases when choosing which information to collect, her right to *use* information from non-legitimate sources must be constrained by the court. This leads to problems when circumstance in which those sources of information *are* legitimate. If judges indeed cannot fully discern the circumstances in which administrators choose what and how much to “consider”, then this tradeoff is likely endemic to rationality review.