Reasons as Experiments: Judgment and Justification in the “Hard Look”

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Arbitrariness review of agency rulemakings has long set “political” influences aside as a special case worthy of special scrutiny. This essay argues that the orthodox account of arbitrariness review in this vein makes some untenable assumptions about both reviewing courts and agencies as agents. If we seek more agency responsiveness to reason rightly defined, then reviewing courts must begin devoting more (scarce) cognitive resources to the monitoring of agencies’ behaviors over time. Reviewing courts should encourage agencies to organize themselves in order to learn-by-doing. This will probably entail paying less attention to the separation of law from fact, science from politics, and judgment from justification.

Arbitrariness review of agency rulemakings has long set “political” influences aside as a special case worthy of special scrutiny. Reviews of agency “judgment” as apart from the review of legal conclusions or findings of fact normally target just such influences. This essay argues that the orthodox account of arbitrariness review in this vein makes some untenable assumptions about both reviewing courts and agencies as agents.

I first argue that agencies are essentially expert systems, composites together from the spectrum of epistemic domains and professional traditions, leaving them uniquely dependent on the very “political” actors who cycle in and out and bring their “political” biases with them as they come and go. Second, I argue that reviewing courts have come to define their own tasks in arbitrariness review in such fantastically ambitious terms that no mortal could possibly discharge those tasks competently. Because of the adversarial processes by which our courts operate, the predicament is made worse as judges must construct law out of the complex statutory materials of today at the same time they must scrutinize the work of ostensibly expert organizations, all while being forbidden from trusting fully the submissions of their litigants. If a rational agency adapts its own behavior to the known biases of reviewing courts, agency learning will simply exacerbate this predicament still further.

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resources to the monitoring of agencies’ behaviors over time. In particular, reviewing courts should encourage agencies to organize themselves in order to learn-by-doing. This will probably entail paying less attention to the separation of law from fact, science from politics, and judgment from justification. Finally, I argue that those separations are at best matters of degree (and probably pure fiction) and have not served us well, all things considered.

We routinely talk of “policy” and “political” influences in the making of administrative regulations. Agency judgments that include such considerations have long been a special case in administrative law. But what role do these influences really play in agency judgment? Administrative rulemakings today are subjected to external forces of many kinds, some laying emphasis on the supposedly “rational” process of summing the relevant reasons and some laying emphasis on the action’s wider public salience. And an agency’s decision-making process, whatever its actual character, is usually held in contrast to the more “political” moments in government where winners reward the loyal for their loyalty, say, or act out of their own venality. In this paper, I shall argue that separating these two ideal types of decision-making for purposes of judicial review of agency rulemakings is much harder than the conventional thinking assumes. Most of the empirical work on these questions is predicated on this basic misjudgment and most courts’ professed attitudes about judicial review rest upon it as well. Courts and their modes of review, I shall argue, cannot achieve a good perspective on agency decisions in rulemakings. Thus, they are poor judges of agency reasonableness, at least if by that notion we mean agencies’ responsiveness to reason rightly defined. Indeed, if what they mean to be doing is identifying and rooting out “political” decisions, court cases of review may themselves be inadequately responsive to reason, all things considered. Although the strongest form of this objection would undermine judicial review wholesale, I shall defend a qualified version motivated by a pragmatic theory of judicial competence.

At their best, agencies take an iterative approach to the public problems they must address, and they organize themselves to learn-by-doing. Contemporary pragmatists have sought to improve and to make more rigorous agencies’ step-wise use of such methods. But if it is more of their “experimentalism” in the judicial review of agency rulemakings that we seek, judicial review should be conducted more mindfully of the court’s own influence and limitations. Doing so, I argue, would lead individual judges to bracket the particulars of a case and shift more of their attention to the ways in which agency behavior and public problem-solving can be integrated and thereby justified over time.

John Dewey observed that democracy is “organized intelligence” and that the single criterion for judging among different models of democracy is “the degree of organization of the public which is attained.” Opinion is still divided over how or what Dewey conceived of as the “public,” certainly, but one thing is obviously not what Dewey thought of as public: the singular, partial, partisan, or personal motivations – undimmed by the needs or claims of others. Dewey’s