

RULE BY REASONABLENESS

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INTRODUCTION

To a reasonable creature, that alone is insupportable which is unreasonable, but everything reasonable may be supported.

—Epictetus¹

The rule of reason is sometimes said not to be much of a rule at all,² but in this Article I argue that reasonableness is tractable, cognizable, and

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1. EPICETUS, DISCOURSES, *in* 1 THE WORKS OF EPICETUS 9 (Thomas Wentworth Higginson trans., Cambridge Univ. Press 1890).

2. As James Gibson suggested, “reasonable care can be a frustratingly imprecise

ultimately the right way to design judicial review, especially when courts review the work of agencies.³ I do so because although administrative law doctrine has eschewed the rule of reason in theory, courts and scholars increasingly accept that review for reasonableness is really the only way to describe what courts do when they supervise the conduct of agencies.⁴ There are those who are accustomed to the old standards of review and those who want to reform those standards. This Article takes the latter view—it argues that reasonableness is both an acceptable and desirable way to review agency action, largely by analogizing it to other vibrant areas of law that succeed with a reasonableness standard. It builds on my earlier work, which established that the standards of review validate agencies roughly two-thirds of the time despite offering putatively different levels of scrutiny for various forms of administrative action.⁵ While that work focused on what agencies actually do, this Article focuses on what they *should* do, adds a comparative approach, and addresses possible critiques of the rule of reason.

If judges turned to the rule of reason and rejected the complicated standards of review that currently exist in administrative law, they would not be abandoning constraint. Instead, they would be embracing a broad standard with philosophical overtones (which admittedly does not sound very intuitive or constraining), a standard that has been specified in many different legal contexts and factual settings.

Administrative law has eschewed reasonableness in favor of elaborate standards of review encompassing no less than six different ways that courts

concept.” James Gibson, *Doctrinal Feedback and (Un)reasonable Care*, 94 VA. L. REV. 1641, 1643 (2008).

3. It is a controversy to which I have contributed, and this Article builds on my earlier, more descriptive work. See David Zaring, *Reasonable Agencies*, 96 VA. L. REV. 135, 186–87 (2010) (observing that regardless of the standard of review employed by courts, agencies win their appeals roughly two-thirds of the time, suggesting that courts apply a broad reasonableness metric to review agency action).

4. See *infra* Part II for a further discussion, but for example, in antitrust law alone there are those who have argued, with some alarm, that reason is sometimes applied “in the twinkling of an eye.” PHILLIP AREEDA, *FED. JUDICIAL CTR., THE “RULE OF REASON” IN ANTITRUST ANALYSIS: GENERAL ISSUES* 37–38 (1981). Or that “[t]he rule of reason’s application is arbitrary because there is no way of telling which way the scales of justice will tilt.” Thomas Kennedy, Comment, *Will America’s Pastime Be a Part of America’s Future?: An Antitrust Analysis that Enables Sports Leagues to Compete Effectively in the Entertainment Market*, 46 UCLA L. REV. 577, 588 n.49 (1998). Or that the “rule of reason has no substantive content” and “is curiously lacking in definition.” Thomas A. Piraino, Jr., *Making Sense of the Rule of Reason: A New Standard for Section 1 of the Sherman Act*, 47 VAND. L. REV. 1753, 1754 (1994). Antitrust, of course, is only one of the areas of the law that turns on reasonableness. For more, see *infra* Part II.

5. Zaring, *supra* note 3, at 186–87.

are to scrutinize agency action (seven if you also consider the doctrines surrounding review of agency interpretation of agency rules, which Richard Pierce and Joshua Weiss analyze in this volume of the *Administrative Law Review*.⁶ For all this doctrinal complexity, however, the validation rate of agencies varies little on the basis of the standard of review.⁷

The two-thirds average validation rate suggests that lawyers and judges are converging upon a single standard of review.⁸ If that standard is characterized as a reasonableness standard, it need not be thought of as lawless, unconstrained, or no rule at all. Reasonableness works all over the legal system. It undergirds the law of negligence, which depends upon the “reasonable person” standard; the Fourth Amendment, which prohibits “unreasonable searches and seizures”; antitrust law, which turns ever more increasingly on a “rule of reason” used to evaluate restraints upon trade; securities law; contract law; and the list could go on.⁹

In each of these well-established areas of law, reasonableness has become the core doctrine. It affords lawyers and judges, not to mention juries, the opportunity to make and specify law in particular contexts and permits the application of community standards to controversial conduct. Yet reasonableness is not so unpredictable as to make planning impossible. To be sure, reasonableness has always had its critics—it has been branded as too unspecific, and there is a vigorous jurisprudential debate about what, precisely, it means.¹⁰ But as the resilient legal system has shown time and again, reasonableness may enable the constitution of a standardized, coherent, and rich corpus of law premised on broad flexibility for decisionmakers, real jurisdictional and procedural constraints, and the power to use precedent to give content to and specify the broad meaning of the rule of reason.

6. See Richard J. Pierce, Jr. & Joshua Weiss, *An Empirical Study of Judicial Review of Agency Interpretations of Agency Rules*, 63 ADMIN. L. REV. 515 (2011).

7. Zaring, *supra* note 3, at 186–87.

8. See *id.*

9. See *infra* Part II for a discussion of each of these rules of reason.

10. Understanding what reasonableness requires has been a preoccupation of legal thinkers for decades. Rather than attempt to recount all the relevant sources, perhaps the interested reader could consider some humanistic approaches. See generally JOSEPH RAZ, PRACTICAL REASON AND NORMS (Oxford Univ. Press 1999) (1975). For a discussion, see generally Adam Gearey, *The Poetics of Practical Reason: Joseph Raz and Philip Larkin*, 19 LAW & LITERATURE 377 (2007). See also Jane Flax, *Postmodernism and Gender Relations in Feminist Theory*, in FEMINISM/POSTMODERNISM 39 (Linda J. Nicholson ed., 1990). For a discussion of the Flax and the feminist critique of reasonableness more generally, see Naomi R. Cahn, *The Looseness of Legal Language: The Reasonable Woman Standard in Theory and in Practice*, 77 CORNELL L. REV. 1398 (1992).

I explore three other implications of the case for reasonableness. First, a claim about what standards of review are supposed to do. Some envision those standards as checklists, or cues, for the courts.¹¹ These checklists and cueing functions are plausible but are frequently abandoned in practice and add complexity to a judicial inquiry pairing such standards with substantive law tests.¹² Rather than thinking of the standards of review as requiring the itemization of a list—check the text first, the legal work done by the agency second, and whether the action would be a good idea third—reasonableness review is much less cabined. And the reasonableness approach to administrative law is a challenge to the merits of the plausible reasons to do such cabining.

Second, reason's capaciousness broadens the permissible scope of legal inquiry. Reasonableness admits constraints, legal and otherwise, that we all think matter in realistic visions of the application of law, such as politics and community standards.

Third, rule by reasonableness takes judges and courts out of an exalted context where they do something different—parse complicated standards of review—than do juries, police officers, and financial bureaucrats, all of whom apply a broad rule of reason to their work.¹³ This is a useful demystification of law, and a reminder that courts are government officials too and that government officials often find rules of reason to be useful guides as to how to do their jobs.

In what follows, this Article compares administrative law's emerging embrace of reasonableness to other, more settled forms of government action, namely government searches and seizures and government supervision of the financial system. I also compare administrative law to negligence law. The Article concludes with some implications for lawyers and academics persuaded by the prominence of the reasonableness inquiry across various forms of law.

11. In administrative law, for example, the so-called *Chevron* two-step test requires courts to consult the plain text of the statute and then evaluate whether there is any ambiguity in that text. If ambiguous, a court will uphold an agency's interpretation if it is a reasonable one. See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

12. To be sure, the standards of review in administrative law are both substantive in that they tell the court what to look for in agency action—say, arbitrariness—and how carefully to look for that arbitrariness—a hard look.

13. Financial regulation has its own set of elaborate rules for how the government is supposed to treat the banks, thrifts, and credit unions that it charters. But, as the financial crisis suggests, some of the elaboration of the rules of decisionmaking are a bit of a reach. While some believe that the financial crisis exemplifies how law gets abandoned when crisis hits, my own view is that the law did matter during the crisis. For a discussion, see generally David Zaring, *Administration by Treasury*, 95 MINN. L. REV. 187 (2010).

I. TESTING REASONABLENESS

Administrative lawyers have evinced increasing dissatisfaction and uncertainty about the standards of review that guide the discipline, and rightly so. Scholars and courts increasingly agree that the standards of review in administrative law are overly complex. And the courts are also doing something about it, turning away from current doctrine and toward a general reasonableness review that would replace the complicated standards reviewed here. This section of the Article reviews some of the problems with the current standards of review; those acquainted with the critiques will find it familiar, though the trends in citations to those standards identified are new and perhaps indicative that further research in the area is needed.

We now know that, regardless of the standard of review employed, courts validate agency policymaking between 60% and 70% of the time.¹⁴ The fact is a challenging one for current doctrine.

In theory, administrative law encompasses a complex review scheme that employs no fewer than six different standards of review depending on what precisely the agency did. In many cases, courts review agency factfinding under a substantial evidence standard, but in others they review under an arbitrary and capricious standard.¹⁵ Review of agency legal determinations triggers *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* deference,¹⁶ *Skidmore v. Swift & Co.* deference,¹⁷ *Auer v. Robbins* deference,¹⁸ or sometimes no deference at all, as is the case when interpreting the Administrative Procedure Act or the Constitution.¹⁹ Finally, after pairing the correct standard of review with the sort of action the agency took, courts must

14. This assumes, of course, and somewhat controversially, that the distribution is normal.

15. Zaring, *supra* note 3, at 177–86.

16. 467 U.S. 837 (1984).

17. 323 U.S. 134 (1944).

18. 519 U.S. 452 (1997).

19. 463 U.S. 29 (1983). De novo review can also occur in other limited circumstances. See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971) (holding that de novo review of agency determinations is limited to when “the action is adjudicatory in nature and the agency factfinding procedures are inadequate,” and “when issues that were not before the agency are raised in a proceeding to enforce nonadjudicatory agency action”). The agency’s organic statute, or its legislative history, may also authorize de novo review. See, e.g., Food Stamp Act, 7 U.S.C. § 2023(a)(15) (2006) (“The suit in the United States district court or State court shall be a trial de novo by the court in which the court shall determine the validity of the questioned administrative action in issue”); *Chandler v. Roudeshush*, 425 U.S. 840, 861 (1976) (finding that the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, permits de novo review of administrative action).

perform a general arbitrariness review under the *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.* standard.²⁰ Sometimes *State Farm* review is called hard look review, and at other times it is called rationality review.²¹

Because it has never been easy for courts to distinguish between questions of law, questions of fact, and mixed questions of law and fact, subsequently apply the right standard of review, and then finally perform a catchall review for arbitrariness, it is worth asking if it makes sense to make all of these doctrinal distinctions.

The courts may not think so. They are increasingly sneaking reasonableness standards into their reviews in lieu of making the difficult distinctions required by contemporary standard of review doctrine. The United States Court of Appeals for the District of Columbia Circuit once concluded that, as among the three standards of review for legal questions, “the result is the same whether the court applies *de novo* review, deference under *Skidmore v. Swift & Co.*, or *Chevron* deference.”²² The Ninth Circuit, for its part, has stated that the “‘rule of reason’ . . . does not materially differ from an ‘arbitrary and capricious’ review.”²³ Judge Patricia Wald bemoaned the fact that “[a]fter fifty years . . . we have yet to agree on how this review should operate in practice. We are still struggling with where to draw the line between obsequious deference and intrusive scrutiny.”²⁴

In prior work, I pooled studies of agency validation that focused on this or that standard of review.²⁵ Pooling eleven studies consisting of 5,081 observations from across all judicial review standards results in an overall agency validation rate of 69%.²⁶ There is little variance among the rates of validation, regardless of the standard. The standard deviation among the studies was 7.54, meaning, roughly, that slightly less than two-thirds of the time the studies placed agency validation rates between 62.5% and 76.5%.²⁷

20. 463 U.S. 29, 52 (1983).

21. See, e.g., William Funk, *Rationality Review of State Administrative Rulemaking*, 43 ADMIN. L. REV. 147 (1991).

22. *Bullcreek v. Nuclear Regulatory Comm'n*, 359 F.3d 536, 541 (D.C. Cir. 2004) (citations omitted).

23. *Neighbors of Cuddy Mountain v. Alexander*, 303 F.3d 1059, 1071 (9th Cir. 2002) (citing *Idaho Sporting Cong. v. Thomas*, 137 F.3d 1146, 1149 (9th Cir. 1998)).

24. Patricia M. Wald, *Judicial Review in Midpassage: The Uneasy Partnership Between Courts and Agencies Plays On*, 32 TULSA L.J. 221, 258 (1996).

25. The assumption was that, even if one study is unreliable, averaging a number of studies is more likely to approach something like the “market price” of appellate validation of agency action, regardless of the standard of review.

26. Zaring, *supra* note 3, at 171 tbl.1.

27. *Id.*

The implications are notable. While doctrinal enthusiasts might expect wide variance between strong deference and de novo review (given that in the one case—*Chevron*—courts are supposed to defer to any reasonable legal interpretation by the agency, and in the other case—certain questions of the Administrative Procedures Act (APA) and constitutional interpretation—courts are supposed to ignore the legal interpretation of the agency), this sort of variation simply does not exist in the reported cases.

Moreover, there appears to be an increasing level of dissatisfaction with the standards of review where they sit, especially among the federal appellate courts located outside of the District of Columbia.

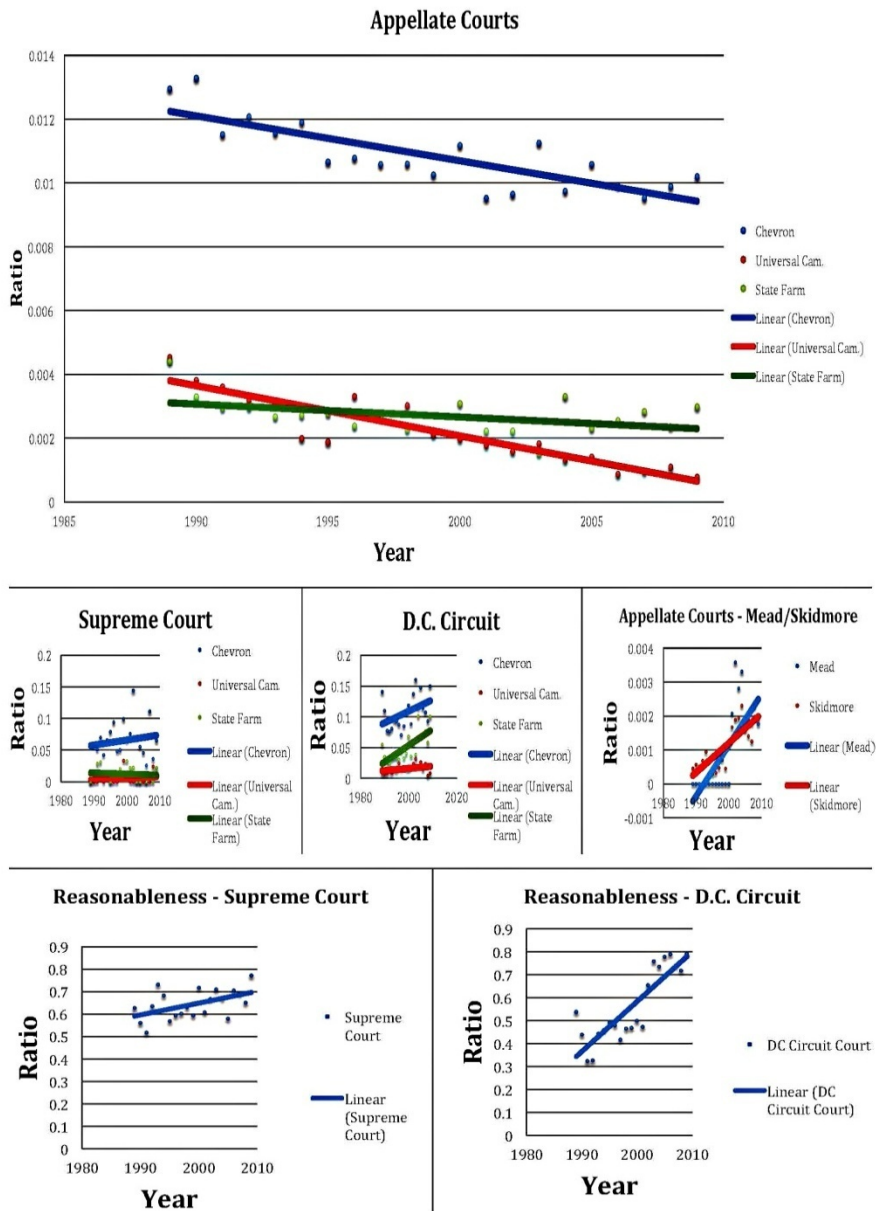


Figure 1: Standards of Review Citation Trends (Source: Westlaw)

When all the federal appellate courts are pooled, they have been citing *Chevron*, *Universal Camera Corp. v. NLRB*,²⁸ and *State Farm* in a lower and lower percentage (or “ratio”) of their total cases over the past twenty years. That trend has been arrested to some degree by the willingness of the D.C. Circuit and the Supreme Court, when taken alone, to continue to cite the fundamental cases in their review of decisions (again, the graphs in Figure 1 recount the percentage of cases in which the seminal standard of review cases are cited).

It has also naturally been arrested by an increase in citation to *United States v. Mead Corp.*²⁹ and *Skidmore* because the Court rendered the *Mead* decision less than twenty years ago, and in so doing revitalized, perhaps briefly, *Skidmore* deference. But at the same time, the terms *reasonable* or *reasonableness* appear in an increasing and very large proportion of all of the decisions of the Supreme Court and D.C. Circuit, one that dwarfs either court’s use of the other standards of judicial review. In fact, as the graphs in Figure 1 show, both courts cite the term *reasonable* or *reasonableness* in a growing majority of their opinions. In this sense, the Supreme Court is citing canonical administrative law cases less often. In the 2009 October term it cited the *Chevron* decision once and the *Skidmore*³⁰ decision once, as Kathryn Watts observed.³¹

One must not read too much into these trend lines, which stem from a growing docket in areas of nonadministrative law as much as anything within the subject matter, and are presented here more as food for thought than as comprehensive, controlled empiricism. However, the pattern suggests that the standard administrative law doctrines may become somewhat less helpful across a broad range of appellate concerns.

These trends—increasingly similar validation rates between the standards of review and a mixed picture of resort to those cases that set forth the baseline of those standards, even as resort to reasonableness grows and grows—have not gone unnoticed in the academy, which has evinced its own dissatisfaction with current doctrine. Jack Beermann leveled a number of well-judged criticisms of the *Chevron* two-step standard of review, which at its worst is in his view both incoherent and indecipherable.³² He

28. 340 U.S. 474 (1951).

29. 533 U.S. 218 (2001).

30. 323 U.S. 134 (1944).

31. Kathryn A. Watts, *Judicial Review*, in DEVELOPMENTS IN ADMINISTRATIVE LAW AND REGULATORY PRACTICE 2009–2010 43, 43–44 (Jeffrey S. Lubbers ed., 2011).

32. See Jack M. Beermann, *End the Failed Chevron Experiment Now: How Chevron Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779, 788–839 (2010) (describing how “*Chevron* has failed” by looking to its intrinsic failings, failings in its application, and its costs and benefits).

exemplifies a growing dissatisfaction with the two-step approach to much of administrative law, and his dissatisfaction is widely shared.³³ Even one of the scholars most supportive of *Chevron*, Richard Pierce, has viewed the growing complexity of a regime he hoped held the promise of simplicity, clarity, and useful judicial deference with some dismay.³⁴

The result has been a growing call for reform. Beermann simply called for *Chevron's* abrogation.³⁵ Others supported a return to the pre-*Chevron* regime of so-called *Skidmore* deference, where courts afford agencies policymaking space essentially based on the quality of that policymaking.³⁶ Adrian Vermeule and Matthew Stephenson have complemented the dissatisfied turn in administrative law scholarship by arguing that the *Chevron* standard is actually incoherent on its own terms.³⁷ They plausibly posit that *Chevron* is not a two-step process at all; the two steps are interchangeable, and really what is going on in administrative law might best be thought of as a single step. In their words, "*Chevron* calls for a single inquiry into the reasonableness of the agency's statutory interpretation."³⁸

This sort of doctrinal revisionism can be developed still further.³⁹ If that one step that Vermeule and Stephenson think better describes *Chevron* review is the reasonableness step, it is not a step that only applies to *Chevron*. Rather, reasonableness is the standard that the courts should, and increasingly do, apply to every reviewable case in administrative law.⁴⁰ Reasonableness applies not only when agencies interpret the extent of their legal authority. It also applies to the other standards of review applicable to agencies, such as whether the agency chose informal or formal

33. See, e.g., William R. Andersen, *Against Chevron—A Modest Proposal*, 56 ADMIN. L. REV. 957, 960 (2004); Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 998–1003 (1992) (criticizing the sequence and the dividing line of the *Chevron* two-step analysis); J.B. Ruhl, *Complexity Theory as a Paradigm for the Dynamical Law-and-Society System: A Wake-Up Call for Legal Reductionism and the Modern Administrative State*, 45 DUKE L.J. 849, 925 (1996).

34. Richard J. Pierce, Jr., *What Do the Studies of Judicial Review of Agency Actions Mean?*, 63 ADMIN. L. REV. 77, 94–95 (2011).

35. See Beermann, *supra* note 32.

36. See, e.g., Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 456 (1989). Nor would Beermann be necessarily opposed to such a formulation. See Beermann, *supra* note 32, at 849–50.

37. Matthew C. Stephenson & Adrian Vermeule, *Chevron Has Only One Step*, 95 VA. L. REV. 597, 598 (2009); see also Ronald M. Levin, *The Anatomy of Chevron: Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253, 1254 (1997) (arguing that the two *Chevron* steps are identical).

38. Stephenson & Vermeule, *supra* note 37, at 598.

39. Zaring, *supra* note 3, at 186–87.

40. See *id.* at 178 (positing that similar affirmance rates across cases suggests that courts “may use similar degrees of scrutiny regardless of the doctrinal basis of the review”).

adjudication, whether the agency engaged in notice-and-comment rulemaking or formal rulemaking, or whether the court takes a hard look at whatever the agency has done to see whether there is a degree of arbitrariness entwined within the agency's decisionmaking process.⁴¹

There has long been handwringing in academia regarding the possibility that “the rules governing judicial review have no more substance at the core than a seedless grape,”⁴² and that there are “serious questions” about whether they “make[] any sense.”⁴³ Academics have had an increasingly difficult time distinguishing between the various standards of review, and articles like Stephenson's and Vermuele's have questioned the stability of these doctrinal distinctions. Similarly, Judge Brett Kavanaugh of the D.C. Circuit argued that hard look review is better thought of as a review for rationality, and in that sense does not differ much from the second step of the *State Farm* inquiry.⁴⁴ Lisa Bressman identified a common practice used in the appellate courts to engage in *Chevron* avoidance; that is, to either not address *Chevron* or assume that it does not matter.⁴⁵ Current doctrine in administrative law has, as we have seen, been characterized by increasing real-world convergence and stern theoretical critique.

II. SURVEYING REASONABLENESS

It makes sense to think about administrative law doctrine, at least as it actually exists, as something more like a “reasonable agency” standard. A reasonableness standard captures what courts actually do, simplifies a complicated and sometimes bewildering area of doctrine, and makes room for the heuristics that we all suspect are actually applied to agency law.

41. *See id.*

42. Ernest Gellhorn & Glen O. Robinson, *Perspectives on Administrative Law*, 75 COLUM. L. REV. 771, 780 (1975); *see also* STEPHEN G. BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY: PROBLEMS, TEXT, AND CASES 415 (5th ed. 2002) (noting the “many puzzles” involved with sorting through the standards); Ernest Gellhorn, *Justice Breyer on Statutory Review and Interpretation*, 8 ADMIN. L.J. AM. U. 755, 755 n.4 (1995) (questioning “whether the legal rules were worth serious study—or at least the amount of time usually invested in them in the classroom or casebooks”); Paul R. Verkuil, *An Outcomes Analysis of Scope of Review Standards*, 44 WM. & MARY L. REV. 679, 681–82 (2002) (“[R]eviewing judges are still struggling to make sense of these standards, especially as they apply to scope of review of facts or of law and policy.”).

43. GARY LAWSON, FEDERAL ADMINISTRATIVE LAW 364 (4th ed. 2007).

44. *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 247–48 (D.C. Cir. 2008) (Kavanaugh, J., dissenting) (arguing that step two of the *Chevron* inquiry and the *State Farm* hard look inquiry are exceedingly similar, if not identical).

45. Lisa Schultz Bressman, *How Mead Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443, 1464–68 (2005).

It also suggests a return to traditional common law roots. As the APA has been characterized as a common law statute in the past, the return would not be so wrenching.⁴⁶

But perhaps most importantly, as this section of the Article discusses, reasonableness works across a broad range of doctrines (and appears in an ever-increasing percentage of Supreme Court and D.C. Circuit opinions), which suggests that it could work for administrative law too. A review of some examples suggests how.

There are many areas of law that both depend upon a reasonableness standard and that no one thinks are lawless outposts of the legal system. Negligence, the foundation of tort law, turns on a reasonableness standard.⁴⁷ So does a great deal of Fourth Amendment law, to such a degree that Akhil Amar wrote that the animating theory of the Fourth Amendment does nothing more than “require that all searches and seizures be reasonable.”⁴⁸ The standards of financial regulation appear to be guided as much by reason as by any other formulation of the standard of agency of supervision—partly because so much of that supervision occurs outside and away from the doctrinal complexity that judges have imposed on other agencies. If reasonableness works in these areas, it is difficult to see why it would not do so in conventional administrative law. Moreover, appellate judges are good at assessing reasonableness, given that they apply it all the time in other contexts, such as when deciding whether the decision of the trier of fact was reasonable.

No one argues that there is no law to apply in negligence cases or Fourth Amendment cases (financial regulation is admittedly a bit more controversial). Instead, these areas of the law exemplify how doctrine—

46. Gillian Metzger has recently made this connection. See Gillian E. Metzger, *Ordinary Administrative Law as Constitutional Common Law*, 110 COLUM. L. REV. 479, 483, 487 (2010); see also Jack M. Beerbaum, *Common Law and Statute Law in US Federal Administrative Law*, in ADMINISTRATIVE LAW IN A CHANGING STATE: ESSAYS IN HONOUR OF MARK ARONSON 45, 45–47 (Linda Pearson et al. eds., 2008) (positing that federal courts approach administrative law in a common law way); Kenneth Culp Davis, *Administrative Common Law and the Vermont Yankee Opinion*, 1980 UTAH L. REV. 3, 3–10 (describing the evolution of administrative common law). But cf. John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 115 (1998) (admitting the common law character of administrative law, but suggesting that this character may be changing as more statutes governing agency conduct are enacted).

47. See, e.g., *Martin v. Evans*, 711 A.2d 458, 461 (Pa. 1998) (“Negligence is the absence of ordinary care that a reasonably prudent person would exercise in the same or similar circumstances.”).

48. Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 759 (1994). For just one famous example, see *Terry v. Ohio*, where the Court held that officers must have reasonable suspicion that whomever they have stopped pose a risk to their safety or that of others before they can perform frisks. 392 U.S. 1, 30–31 (1968).

applied through a reasonableness standard—can evolve to provide a great deal of guidance to the particular kinds of facts and circumstances that might count as negligence or a reasonable search. What follows are not definitive accounts of how tort law, Fourth Amendment law, and financial regulation work—multiple treatises and armies of articles have been compiled on each subject—but attempts to show how these areas of the law can depend upon a reasonableness analysis, and how reasonableness works in practice.

A caveat before proceeding: While the reasonableness I propose here would be a standard of review that courts would apply to agency action, that is not precisely what reasonableness means in tort or Fourth Amendment law. The tort and Fourth Amendment doctrines call for an inquiry into the substance of the act—the thing that the tortfeasor or government official did. Standards of review are quasi-procedural in that they tell courts how to think about the record of the proceedings in the agency. Moreover, while in some negligence cases reasonableness is a question for the jury, in administrative law it is one for the judge. In my view, these distinctions are not too important. In tort law, Fourth Amendment law, and my version of administrative law, courts apply reason to evaluate the conduct of tortfeasors, police officers (or other government officials), or agencies. Indeed, because both the Fourth Amendment and administrative law concern the conduct of public officials, rather than private actors, the analogy there is especially close.

A. *Torts*

The premise of negligence law is that we owe everyone a duty to exercise reasonable care in the conduct of our affairs.⁴⁹ As one English court put it, “Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.”⁵⁰ To avoid negligence liability, one must act as a “reasonable man under like circumstances,” according to the Restatement (Second) of Torts.⁵¹ How would a reasonable man act, though? In Prosser and Keeton’s view, the reasonable person is a person

49. JOSEPH W. GLANNON, *THE LAW OF TORTS: EXAMPLES AND EXPLANATIONS* 70 (3d ed. 2005).

50. *Blyth v. Birmingham Waterworks Co.*, (1856) 156 Eng. Rep. 1047 (Ex.) 1049; 11 Ex. 781 (Alderson, B.).

51. RESTATEMENT (SECOND) OF TORTS § 283 (1965).

who acts at all times with “ordinary prudence, . . . reasonable prudence, or some other blend of reason and caution.”⁵²

Courts have further refined this broad instruction over the course of centuries. Sometimes they have been presented with almost philosophical questions about reasonableness. It has been suggested that reasonable people must consider the foreseeable risks of injury that their conduct will impose on others in light of its utility,⁵³ and that actors must consider the extent of the risks posed by their actions.⁵⁴ Sometimes the guidance is expressed as a form of cost–benefit calculation, which itself has been the subject of many efforts to jurisprudentially specify what the requirement is. In cost–benefit terms, reasonable people should evaluate the likelihood of actually causing harm,⁵⁵ whether alternatives to their conduct would reduce the risk,⁵⁶ the cost of potential harm, and whether the potential costs outweigh the benefits.⁵⁷ This sort of abstract instruction might seem inscrutable, at least to enthusiasts for clear rules. But these theoretical inquiries do set the basic standards in place for interpretation. They are meant to make some sense of a broad standard, to impart some rules of decision to make sense of what reasonableness means. In turn, this sort of instruction is meant to make a reasonableness standard more generally tractable. The next step is to make it understandable in a variety of contexts—and that is what a host of reported decisions have done.

Above all, the reasonableness inquiry requires courts to make concrete decisions and provide clarity about the standards of conduct expected by reasonableness. We know what constitutes, for example, reasonable care for invitees⁵⁸ and for hosting events where alcohol is served,⁵⁹ either as a

52. PROSSER & KEETON ON THE LAW OF TORTS § 32 at 174 (W. Page Keeton ed., 5th ed. 1984).

53. RESTATEMENT (SECOND) OF TORTS § 291 (1965).

54. *Id.* § 293.

55. *Id.* § 293(b).

56. *Id.* § 292(c).

57. This cost–benefit calculation was embodied by Judge Learned Hand’s $B < PL$ formula. As Hand put it, negligence turns on “a function of three variables: (1) The probability that [an accident will occur]; (2) the gravity of the resulting injury, if [it] does; (3) the burden of adequate precautions. Possibly it serves to bring this notion into relief to state it in algebraic terms: if the probability be called P; the injury, L; and the burden, B; liability depends on whether B is less than L multiplied by P, i.e., whether B [is less than] PL.” *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947). For a discussion of the formula, see Lewis F. Powell, Jr., *Foreward* to GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE*, at x (1994); Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 32–33 (1972) (endorsing the Hand formula).

58. *See, e.g.*, *Massey v. Tingle*, 867 So. 2d 235, 239 (Miss. 2004) (explaining that the owner of the premises “is not an insurer of the invitee’s safety, but does owe to an invitee the duty to keep the premises reasonably safe, and when not reasonably safe, to warn only

business or as a party thrower. There is a reasonable care standard for medical malpractice, and appellate decisions have described what medical malpractice in various specialties and subspecialties might look like.⁶⁰ Negligence law is even more specific, even as it reaches broadly; although it does not permit people to avoid judicial assessment on the reasonableness of their actions because of their limited abilities or even insanity,⁶¹ it does take the particular circumstances of a wide array of situations into account.⁶²

All of this is the sort of work that all law students, as first-year students of tort law or takers of the bar exam, are expected to master, a fact that is itself a testament to the tractability of reasonableness. Whatever its definitional ambiguities, reasonableness has proven to be a useful concept in torts—so useful that it has become the jurisprudential underpinning of that entire field of law.

B. Fourth Amendment

Criminal procedure, especially as it concerns the Fourth Amendment, is also premised on a reasonableness inquiry, or perhaps more accurately, a number of them. The Fourth Amendment itself provides that there is a right “against unreasonable searches and seizures.”⁶³ Interpreting what exactly *unreasonable* means turns, in different contexts, on the reasonable expectations of privacy on the part of the citizens and the reasonableness of the imposition by the government authority.⁶⁴ Conversely, where there is a

where there is hidden danger or peril that is not in plain and open view” (emphasis omitted) (internal quotation marks omitted) (citing *Corley v. Evans*, 835 So. 2d 30, 37 (Miss. 2003))).

59. See, e.g., *Hansen v. Friend*, 824 P.2d 483, 486 (Wash. 1992) (holding that social hosts have a duty of care not to serve liquor to minors and are liable for injuries that are proximately caused by breach of this duty).

60. See, e.g., *Johnson v. Riverdale Anesthesia Assocs., P.C.*, 547 S.E.2d 347, 348 (Ga. Ct. App. 2001) (holding that the applicable standard of care in a medical malpractice case is that employed by the medical profession generally and not what an individual doctor would have done under the circumstances (citing *McNabb v. Landis*, 479 S.E.2d 194 (Ga. Ct. App. 1996))).

61. *Vaughan v. Menlove*, (1837) 132 Eng. Rep. 490 (C.P.) 492–93; 3 Bing. (N.C.) 468, 471–72 (rejecting the argument that an individual with poor judgment ought to be able to avoid being held negligent because subjective reasonableness to them was less than the subjective reasonableness to the average person).

62. Similarly, legal malpractice depends not on a reasonable lay person’s knowledge of the law but rather a reasonable lawyer’s skills and training in assessing whether their standard was up to snuff.

63. U.S. CONST. amend. IV.

64. *Illinois v. Rodriguez*, 497 U.S. 177, 183–86 (1990) (recognizing that the ultimate Fourth Amendment foundation is reasonableness, not warrants).

“reasonable expectation of privacy,” the Fourth Amendment has been interpreted to require the issuance of a warrant before privacy expectations can be impinged upon.⁶⁵ Here, too, reasonableness has its ambiguities, but it has proven to be a workable concept that allows judges and other government officials to apply the protections of the Fourth Amendment to a vast array of contexts. The courts (in the Fourth Amendment context, it is often the Supreme Court that sets the rules) have also wrestled with philosophical and practical questions about what reasonableness, broadly defined, means. In what follows, I sample various ways that courts have used the reasonableness inquiry to specify what government officials may and may not search or take.

The courts have ruled that warrantless searches may be reasonable if done pursuant to an arrest.⁶⁶ Where justified by special needs beyond the normal need for law enforcement, the courts have also upheld warrantless searches in public schools, government offices, and prisons—in each case dispensing with a warrant and probable cause requirements in favor of a reasonableness standard that balances the government’s interest against the individual’s interest and privacy.⁶⁷ In the same way, privacy expectations have also been deemed less reasonable given a history of pervasive regulation of an industry; such a history has made administrative searches (such as spot inspections by United States Department of Agriculture or

65. *Katz v. United States*, 389 U.S. 347, 360–61 (1967) (Harlan, J., concurring). Although “reasonable expectation of privacy” was first formulated in a concurring opinion, the Court has cited it as a concise formulation of what the majority was after. *See, e.g., Terry v. Ohio*, 392 U.S. 1, 9 (1968); *cf. Mapp v. Ohio*, 367 U.S. 643, 655–56 (1961) (providing for the exclusion of evidence that is obtained through an unreasonable search). As Akhil Amar put it, “in the landmark *Katz* case, the Court, perhaps unconsciously, smuggled reasonableness into the very definition of the Amendment’s trigger: the Amendment comes into play whenever government action implicates a ‘reasonable expectation of privacy.’” Amar, *supra* note 48, at 769.

66. *See Harris v. United States*, 331 U.S. 145, 155 (1947) (finding the search of a four-room apartment without a warrant pursuant to an arrest of a man in the apartment to be a reasonable search and consistent with the Fourth Amendment); *see also Fahy v. Connecticut*, 375 U.S. 85, 86–87 (1963) (holding that where evidence has been unlawfully obtained in violation of the accused’s constitutional rights and has been erroneously admitted in evidence, there must be a reversal if there was a reasonable possibility that the evidence complained of might have contributed to the conviction).

67. One of the many treatises that could be cited here, in addition to the *Katz* and *Terry* cases, is the useful Congressional Research Service’s online treatise on the Constitution. *See CONG. RESEARCH SERV., NO. 103-6, THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION 1204* (Johnny H. Killian & George A. Costello eds., 1996), <http://www.gpoaccess.gov/constitution/pdf/con015.pdf>.

Occupational Safety and Health Administration officials) without warrants more presumptively legitimate.⁶⁸

Determining what that individual's interest is—again, she is entitled to a reasonable expectation of privacy—has also produced a great deal of jurisprudence.⁶⁹ After the Supreme Court announced that reasonableness would encompass the content of the rights of the citizenry against searches in a series of cases in the 1960s,⁷⁰ judges have found that reasonable expectation of privacy is particularly strong in the home,⁷¹ while privacy expectations outside of the home, such as in automobiles, are less reasonable.⁷²

Applicants for warrants must establish probable cause to obtain one, and that too requires an inquiry into the reasonableness of the request. As the Supreme Court has said:

In determining what is probable cause . . . [w]e are concerned only with the question whether the affiant had *reasonable* grounds at the time of his affidavit . . . for the belief that the law was being violated on the premises to be searched; and if the apparent facts set out in the affidavit are such that a *reasonably* discreet and prudent man would be led to believe that there was a commission of the offense charged, there is probable cause justifying the issuance of a warrant.⁷³

Probable cause, for its part, is to be ascertained by “the factual and practical considerations of everyday life on which *reasonable and prudent* men, not legal technicians, act.”⁷⁴

68. *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 627 & n.8 (1989).

69. 4 WAYNE R. LAFAVE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* § 9.5 (4th ed. 2004) (“Reasonable suspicion of crime or any comparable test will, of course, seem rather vague when unadorned by judicial interpretation based upon specific fact situations, as would the ‘reasonable grounds to believe’ test for arrest, or, for that matter, the ‘probable cause’ requirement of the Fourth Amendment. It is certainly asking too much to expect that the basic standard which is to serve as the starting point for analysis should from its inception provide a ready answer for every conceivable fact situation.”).

70. Although there, reasonableness was defined narrowly, and unreasonableness, in many cases, presumed. The Court before then, and on occasion afterwards, suggested that “searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.” *Coolidge v. New Hampshire*, 403 U.S. 443, 454–55 (1971) (internal quotation marks omitted) (citing *Katz*, 389 U.S. at 357).

71. *See, e.g.*, *Payton v. New York*, 445 U.S. 573, 602 (1980); *Alderman v. United States*, 394 U.S. 165, 176–77 (1969).

72. *See, e.g.*, *Katz*, 389 U.S. at 352.

73. *Dumbra v. United States*, 268 U.S. 435, 441 (1925) (emphases added).

74. *Brinegar v. United States*, 338 U.S. 160, 175 (1949) (emphasis added).

The ability to conduct a search without obtaining a warrant, if it is not covered by one of the reasonableness exceptions, depends on the reasonableness of the suspicion of the police officer.⁷⁵ In *Terry v. Ohio*, the case that made clear that police officers could search some people without warrants, the Court indicated that the inquiry would turn on whether the police officer's actions were reasonable, as tested by whether the police officer could point to "specific and articulable facts which, taken together with rational inferences from those facts," would lead to magistrate on review to conclude that the search was reasonable.⁷⁶ A reasonable suspicion of criminal activity, in other words, is the standard for these sorts of warrantless stops.

Here, too, a substantial body of reported decisions has arisen. Indeed, the very policing of whether a stop has occurred or not turned on whether "a reasonable person would have believed that he was not free to leave."⁷⁷ If a reasonable person would "feel free to decline the officers' requests or otherwise terminate the encounter," the stop is not a stop.⁷⁸

This reasonableness standard has been further specified and contextualized in Fourth Amendment law, just as it has in negligence law. It has gotten the courts, including the Supreme Court, into specific opinions on fingerprints, blood, urine samples, skin scrapings, voice and handwriting exemplars, conversations, and other evidence.⁷⁹ Reasonableness also governs the inquiry as to the appropriateness of various sorts of tracking devices.⁸⁰

All told, because of its centrality in Fourth Amendment doctrine, reasonableness is the standard underpinning many of our privacy protections in constitutional law. That inquiry has permitted the development of a very specific jurisprudence to deal with individual cases and questions of reasonableness in particular factual circumstances.

75. *Terry v. Ohio*, 392 U.S. 1, 20–21 (1968) (applying the reasonableness inquiry to stops and frisks); *United States v. Castellanos*, 731 F.2d 979, 983 (D.C. Cir. 1984) (holding that the test as to whether a "seizure" has occurred "is whether police engaged in a show of authority which would lead a reasonable person, innocent of any crime, to conclude he was not free to go under all the circumstances").

76. 392 U.S. at 20–22.

77. See WAYNE R. LAFAYE & JEROLD H. ISRAEL, *CRIMINAL PROCEDURE* § 3.8(c), at 206 (2d ed. 1992) (footnote omitted) (citing *United States v. Mendenhall*, 446 U.S. 544, 554–55 (1980) (plurality opinion)).

78. *Florida v. Bostick*, 501 U.S. 429, 436 (1991).

79. See *CONG. RESEARCH SERV.*, *supra* note 67, at 1224.

80. *United States v. Pineda-Moreno*, 591 F.3d 1212, 1216–17 (9th Cir. 2010) (concluding that law enforcement agents' use of a tracking device attached to defendant's vehicle to continuously monitor the location of a vehicle is not a search).

It is accordingly unsurprising that Akhil Amar's theoretical conception of what the Fourth Amendment is supposed to do is premised primarily on the idea that the reasonableness inquiry explains what the Fourth Amendment is meant to do.⁸¹ Amar's insight—perhaps the leading theoretical exposition of the point of the Fourth Amendment and one inclined favorably toward the reasonableness analysis—again explains how reason does not mean that the government can do whatever it wants. Or, for that matter, that courts will be enabled to interpret the directive any which way.

C. *Financial Regulation*

Administrative law, at least as it is currently studied and taught, has been uncomfortably paired with financial regulation, which works differently than the litigation-intensive, rule-oriented world of health, safety, and environmental regulation.⁸² But financial regulation turns on a variety of reasonableness inquiries as well, although the rules defining the business of banking or ensuring that those institutions are safe and sound often appear to be convoluted and hypertechnical. Because reasonableness appears in many specific areas of financial regulation as the test to apply, particularly in those areas amended after the financial crisis, and is probably the unstated standard to which the overall performance of the regulators is measured, I offer it here as a third case study for the relevance of

81. Amar, *supra* note 48, at 759; *see also* Akhil Reed Amar, *The Future of Constitutional Criminal Procedure*, 33 AM. CRIM. L. REV. 1123, 1133 (1996) (“Shouldn’t ‘reasonableness’ under the Fourth Amendment be read in light of other constitutional values—of property, privacy, equality, due process, free speech, democratic participation, and the like—affirmed in other amendments? Shouldn’t Seventh Amendment juries play some role in determining Fourth Amendment reasonableness, just as they play a role in determining reasonableness generally in tort law?”). *But see* Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 825 (1994) (“[T]he modern Court’s (at least occasional) focus on warrants and probable cause as the touchstones of constitutional ‘reasonableness’ and on the exclusionary rule as a distinctive Fourth Amendment remedy can and should be defended against the more freewheeling ‘reasonableness’ inquiry . . .”). And for a new take on Fourth Amendment fundamentals, *see* Orin S. Kerr, *An Equilibrium-Adjustment Theory of the Fourth Amendment*, 125 HARV. L. REV. (forthcoming 2011) (manuscript at 10–12), available at <http://ssrn.com/abstract=1748222>, where Kerr posits that the Supreme Court adjusts the scope of protection in response to new facts and technological innovations in order to restore the status quo level of protection.

82. *See* Zaring, *supra* note 13, at 201 (“Between 1998 and 2008 . . . the EPA was a party to 199 cases in the D.C. Circuit; and the Department of Transportation was a party to thirty-five such cases. In contrast, Treasury was a party to only fourteen cases during that decade, . . . seven percent the EPA number.” (citations omitted)); *id.* at 193 (“[F]inancial regulation—which standalone parts of Treasury do for both banks and thrifts—is simply less litigious than is the sort of regulated industry oversight that other important agencies, such as the Environmental Protection Agency (EPA), perform.”).

reasonableness. Although the observation is made cautiously, a broad recognition that the rule of reason is the rule applied by financial regulators in much of what they do, even when they are doing something unlikely to be subject to judicial review, might enable scholars to take a more holistic approach to administrative law, one more inclusive of the agencies that do important work, but that makes an uneasy fit with the current doctrines. Although judicial review of agency action and the standards of financial regulation are unlikely to grow together soon, evaluating them on the same metric might reconnect administrative law scholarship with an important administrative enterprise that it has ignored for too long. And so financial regulation is included as an example of reasonableness regulation somewhat tendentiously because of its importance and seeming distance from the conventional tropes of administrative law (which, of course, turn more on reasonableness than I think has been recognized).

To the extent that modern financial institutions have increasingly ventured into the capital markets, they are subject to a reasonableness inquiry. Reasonableness defines what would be “material” information that must be disclosed to investors. The Supreme Court defined *materiality* in *TSC Industries, Inc. v. Northway, Inc.* by reference to what a “reasonable shareholder” would consider important.⁸³ The due diligence that must be done for public offerings uses a “reasonable” investigation standard.⁸⁴ And the stock exchange standards for suitability (when broker-dealers must ensure that investments are suitable for customers) also use a reasonable standard.⁸⁵

Reasonableness has become a centerpiece of the newest model of financial regulation. The Dodd-Frank Act is replete with requirements that regulators analyze their industry through a reasonableness lens. Under § 112(b) of the Act, core financial regulators must sign an annual statement to the effect that they are convinced that the government and the private sector are “taking all reasonable steps to ensure financial stability and to mitigate systemic risk.”⁸⁶ A number of anti-evasion devices in the statute

83. 426 U.S. 438, 449 (1976). Although that case involved a potentially misleading proxy statement, the *TSC* standard has been applied to most other securities contexts where materiality is the touchstone.

84. Securities Act of 1933 § 11, 15 U.S.C. § 77(k) (2006).

85. *FINRA Manual, NASD Rules: Rule 2310, Recommendations to Customers (Suitability)*, FIN. INDUS. REGULATORY AUTH., INC., available at http://finra.complinet.com/en/display/display_viewall.html?rbid=2403&element_id=3638&record_id=4315 (last visited Aug. 14, 2011).

86. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 112(b), 124 Stat. 1376, 1396 (2010) (to be codified at 12 U.S.C. § 5322).

also use reasonableness standards.⁸⁷ The Act grants “reasonable discretion” to various private sector derivative bodies charged with centralizing clearing of derivatives, information gathering, or providing swap execution facilities—these would be the derivatives-clearing organizations that are meant to provide a liquid market and more open price discovery of these relatively newfangled financial instruments that many institutions misvalued during the financial crisis (particularly housing-related derivatives).⁸⁸ It also allows the Federal Reserve to take enforcement actions against financial utilities and financial institutions if the it has “reasonable cause.”⁸⁹ A similar reasonable cause standard marks the Consumer Financial Protection Bureau’s enforcement powers; in defining what constitutes “abusive” practices that the Bureau can regulate, the Act uses a reasonable standard.⁹⁰ In one of the Act’s more controversial features, the Federal Reserve Board may limit the “interchange transaction fees” for debit cards, or what payment networks can charge merchants for using debit card networks, to those fees that are “reasonable.”⁹¹ And residential mortgage lenders must now ensure that borrowers have a “reasonable” ability to repay.⁹² It might be said that the consumer protection provisions of the Act almost entirely turn on reasonableness.

In addition, financial regulators, and the lawyers who appear before them, deal with bet-the-bank transactions, such as mergers and acquisitions and the attendant antitrust review—a review complicated by the size limitations imposed on banks—and as we know, those objectives depend on reasonableness as well.⁹³ Since such mergers have to win the approval of the Federal Reserve Board as well as the antitrust regulators, banking lawyers have participated in the review and approval process for these

87. See, e.g., *id.* sec. 619, §13(e), 124 Stat. at 1627 (to be codified at 12 U.S.C. § 1851).

88. *Id.* sec. 725, § 5b(c), 124 Stat. at 1687–85 (to be codified at 7 U.S.C. 7a–1(c)); *id.* sec. 728, § 21, 124 Stat. at 1697 (to be codified at 7 U.S.C. 24a); *id.* sec. 733, § 5h, 124 Stat. at 1713–14 (to be codified at 7 U.S.C. § 7b–3).

89. *Id.* § 807(e), 124 Stat. at 1814–15 (to be codified at 12 U.S.C. § 5466); *id.* § 808(e), 124 Stat. at 1817 (to be codified at 12 U.S.C. § 5467).

90. *Id.* § 1031(d), 124 Stat. at 2006 (to be codified at 12 U.S.C. § 5531).

91. *Id.* sec. 1075, § 920(a)(2), 124 Stat. at 2068 (to be codified at 15 U.S.C. § 1693o–2).

92. *Id.* sec. 1401, § 103, 124 Stat. at 2137–38 (to be codified at 15 U.S.C. § 1602). Creditors have to make a “reasonable and good faith determination” into the borrower’s ability to repay. *Id.* sec. 1411, § 129C, 124 Stat. at 2142 (to be codified at 15 U.S.C. § 1639c).

93. The Reigle–Neal Act prevents bank holding companies from obtaining more than 10% of the total deposits in institutions insured by the Federal Deposit Insurance Corporation (FDIC) via acquisition of out-of-state banks, though it can expand by other means, such as through internal deposit growth. See 12 U.S.C. §§ 1831u(b)(2)(A), 1842(d)(2)(A) (2006). For an extended discussion, see RICHARD SCOTT CARNELL ET AL., *THE LAW OF BANKING AND FINANCIAL INSTITUTIONS* 186–87 (4th ed. 2009).

transactions, which turn upon their own rule of reason—the rule that antitrust law applies to all restraints on trade.⁹⁴ Related to these issues is the sort of wise counsel that banking lawyers who understand the affiliation limitations on banks (that is, the limitations on the businesses that the bank holding companies can acquire in addition to holding chartered banks or thrifts) provide.⁹⁵

Finally, although the mechanism is difficult to specify, the reasonableness inquiry captures the constraints on financial regulators as well as anything else. During the crisis, those regulators all but threw out the rule book in pursuit of means to stabilize the financial system.⁹⁶ It is that stabilization

94. *Standard Oil Co. v. United States*, 221 U.S. 1, 66–67 (1911) (“[T]he construction which we have deduced from the history of the act and the analysis of its text is . . . that in every case where it is claimed that an act or acts are in violation of the [antitrust] statute the rule of reason, in the light of the principles of law and the public policy which the act embodies, must be applied.”). Courts have consistently moved away from per se rules in antitrust law and *California Dental Ass’n v. FTC*’s assertion that there is no “categorical line to be drawn between restraints that rise to an intuitively obvious inference of anticompetitive effect and those that call for more detailed treatment” but that “what is required, rather, is an enquiry meet for the case.” 526 U.S. 756, 780–81 (1999). This implies an analysis based in reasonableness for all restraints on trade, but one would not want to overstate the case. Horizontal price fixing is still per se illegal, and horizontal market division is all but per se illegal, if it is not in fact per se illegal.

95. Again, for an extended discussion, see CARNELL, *supra* note 93, at 425–94. And these are not the only things banking lawyers do, of course. These lawyers and their charges at the banks remain in close contact with the government, as the Treasury Secretary’s and Federal Reserve Chairman of New York’s contacts with the banks during the financial crisis revealed. One lawyer in particular, Rodgin Cohen, played an especially important role in maintaining this sort of contact with the government and mediating the government’s interests with those of the banks he represented during the financial crisis. This sort of close contact work is another responsibility of banking lawyers, and it is not one that creates actions suitable for review under traditional administrative law doctrines.

96. Steven M. Davidoff & David Zaring, *Regulation by Deal: The Government’s Response to the Financial Crisis*, 61 ADMIN. L. REV. 463, 468 (2009) (explaining that the response to the financial crisis was a real departure from the normal notice-and-comment form of rulemaking); Gary Lawson, *Burying the Constitution Under a TARP*, 33 HARV. J.L. & PUB. POL’Y 55, 57 (2010) (using the Troubled Asset Relief Program (TARP) as an example of the unconstitutionality of modern administrative law); Alexander Mehra, *Legal Authority in Unusual and Exigent Circumstances: The Federal Reserve and the Financial Crisis*, 13 U. PA. J. BUS. L. 221, 222 (2010) (evaluating the scope of the Federal Reserve’s § 13(3) lending powers and arguing that by purchasing assets and extending credit against corporate shares, the Federal Reserve exceeded the bounds of its statutory authority during the financial crisis); Richard J. Pierce, Jr., *Presidential Control Is Better Than the Alternatives*, 88 TEX. L. REV. *SEE ALSO* 113, 123–24 (2009), <http://www.texaslrev.com/sites/default/files/seealso/vol88/pdf/88TexasLRevSeeAlso113.pdf> (describing this process); Eric A. Posner & Adrian Vermeule, *Crisis Governance in the Administrative State: 9/11 and the Financial Meltdown of 2008*, 76 U. CHI. L. REV. 1613, 1624–30 (2009) (stating that some of Treasury’s actions during the financial crisis were probably not legal); Simon Johnson, *The Quiet Coup*, 303 ATLANTIC, May 2009, at 46, 49,

function, more than any other, which organizes the efforts of the varied collection of agencies that oversee the financial system.⁹⁷ Indeed, although there are many different regulators in the financial regulatory universe, and they have somewhat different roles, each of them is charged with ensuring that banks are safe and sound. Although that inquiry is both exceedingly technical and one that has its own terminology, one suspects that the gestalt of the inquiry does turn, in fact, on reasonableness.⁹⁸

available at <http://www.theatlantic.com/magazine/archive/2009/05/the-quiet-coup/7364/> (arguing that banks captured the policymaking process during the financial crisis). For a comprehensive look at what has been spawned by the crisis, see generally DAVIS POLK & WARDWELL LLP, FINANCIAL CRISIS MANUAL: A GUIDE TO THE LAWS, REGULATIONS AND CONTRACTS OF THE FINANCIAL CRISIS (2009), <http://www.davispolk.com/files/Publication/d1ab7627-e45d-4d35-b6f1-ef356ba686f2/Presentation/PublicationAttachment/2a31cab4-3682-420e-926f-054c72e3149d/fcm.pdf>.

97. For a discussion of these regulators, see Adam J. Levitin, *Hydraulic Regulation: Regulating Credit Markets Upstream*, 26 YALE J. ON REG. 143, 149 (2009) (“For federally chartered banks, the regulator depends on the type of charter. The Office of the Comptroller of the Currency (OCC), a bureau of the Treasury Department, has primary authority over entities with national bank charters (‘national banks’). Another Treasury office, the Office of Thrift Supervision (OTS) has authority over entities with a federal thrift charter, such as savings associations, savings banks, and savings and loans (‘national thrifts’). Although the OCC and the OTS are part of the Treasury Department, they are autonomous, and the Treasury Secretary lacks authority to compel the Comptroller of the Currency or the Director of the OTS to promulgate any rule. Additionally, an independent agency, the National Credit Union Administration (NCUA), has authority over federal credit unions.” (footnote omitted)); Lawrence A. Cunningham & David Zaring, *The Three or Four Approaches to Financial Regulation: A Cautionary Analysis Against Exuberance in Crisis Response*, 78 GEO. WASH. L. REV. 39 (2009) (describing the differences between the regulators); Howell E. Jackson, *A Pragmatic Approach to the Phased Consolidation of Financial Regulation in the United States* 3–4 (Harvard L. School Pub. Law & Legal Theory Working Paper Series, Paper No. 09-19, 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1300431 (critiquing the divergent approaches within the United States); Roberta Romano, *The Political Dynamics of Derivative Securities Regulation*, 14 YALE J. ON REG. 279, 282 (1997) (“The regulation of financial markets in the United States is dispersed. Securities are regulated by the Securities and Exchange Commission (SEC) while derivatives on securities—financial instruments whose value is derived from an underlying security or index of securities—are regulated by a variety of agencies. Options on securities are regulated by the SEC; futures, and options on futures by the Commodity Futures Trading Commission (CFTC); and off-exchange-traded forward contracts, options, and swaps are typically not subject to any federal regulation (unless undertaken by an institution which is itself federally regulated, such as banks). This multiplicity of regulatory authority has been the principal bone of regulatory contention for decades, as regulators, interest groups and legislators have sought to shift jurisdiction to their preferred agency. Even when a regulator does not object to another’s jurisdictional grab, market participants have contested the agencies’ authority to do so in court.”); John C. Coffee, Jr., *Competition Versus Consolidation: The Significance of Organizational Structure in Financial and Securities Regulation*, 50 BUS. LAW. 447, 448–50 (1995).

98. Lawrence G. Baxter, *Capture in Financial Regulation: Can We Channel It Toward the Common Good?*, 21 CORNELL J.L. & PUB. POL’Y [hereinafter Baxter, *Capture in Financial*

Regulators manage all these charges without reference to the standards of review promulgated so complicatedly by the Supreme Court, or with reference to the cost–benefit analysis that has animated so much regulation and evaluation of regulations in other industries.⁹⁹ As Julie Hill has explained, “regulators likely use rules of thumb that are not memorialized in publicly available material” when they make their decisions about bank

Regulation] (forthcoming 2011) (manuscript at 6), available at <http://ssrn.com/abstract=1769203>. Compliance with basic safety and soundness rules involves interaction and negotiation with bank examiners who, every three to five quarters (they are charged with conducting annual examinations of the banks they supervise), enter the premises of banks, review their books and spreadsheets, internal controls, and other matters, and draw a conclusion as to whether the institutions have sufficient capital on hand. See generally Beverly J. Hirtle & Jose A. Lopez, *Supervisory Information and the Frequency of Bank Examinations*, 5 FRBNY ECON. POL’Y REV., Apr. 1999, at 1, 2–3 (1999), available at <http://www.frbsf.org/economics/economists/jlopez/hirtle.pdf> (describing the timing and process of bank examinations). In my view, compliance and supervision is done on a reasonableness basis—reasonable compliance with the basic rules—though the question is not entirely without doubt. The so-called CAMELS system exemplifies efforts to get some precision into otherwise rather broad question about safety and soundness, and marks how this sort of supervision has rules in place. CAMELS is a five-point scale on which the regulators evaluate the regulated entities on six different issue areas: (C)apital adequacy, (A)ssset quality, (M)anagement ability, (E)arnings, (L)iquidity, and (S)ensitivity to risk. *Risk Categories & Risk-Based Assessment Rates*, FDIC, <http://www.fdic.gov/deposit/insurance/assessments/risk.html> (last visited Aug. 14, 2011). For a discussion, see Peter S. Kim, *The FDIC’s Special Assessment: Basing Deposit Insurance on Assets Instead of Deposits*, 14 N.C. BANKING INST. 381, 401–02 (2010); Jonathan R. Macey & Geoffrey P. Miller, *Bank Failures, Risk Monitoring, and the Market for Bank Control*, 88 COLUM. L. REV. 1153, 1226 (1988). For each of these issue areas, the regulators devise a five-point scale, and an overall five-point rating, with low scores being awarded to safe and sound banks. High-scoring banks may be subject to “prompt corrective action” notices, written agreements, cease and desist orders, or other enforcement mechanisms, all designed to get banks to replenish their capital and possibly to root out the practices or people at the bank that led to undercapitalization (the process by which each regulator chooses to make use of these various enforcement mechanisms is rather opaque). For a careful discussion and critique, see Lawrence G. Baxter, *Administrative and Judicial Review of Prompt Corrective Action Decisions by the Federal Banking Regulators*, 7 ADMIN. L.J. AM. U. 505, 567 (1994) (“Four features seem to be particularly important: absence of clear protection against improper classification decisions; uncertainty regarding the availability of judicial review; the anomalous coexistence of PCA [the prompt corrective action system] and formal enforcement powers; and anomalous inconsistencies between PCA and conservatorship/receivership powers.”). See also Gail Otsuka Ayabe, Comment, *The “Brokered Deposit” Regulation: A Response to the FDIC’s and FHLBB’s Efforts to Limit Deposit Insurance*, 33 UCLA L. REV. 594, 624 n.194 (1985) (“A ‘problem’ bank is a CAMEL 4- and 5-rated bank. A ‘near-problem’ bank is a CAMEL 3-rated bank.” (citations omitted)).

99. See generally Baxter, *Capture in Financial Regulation*, *supra* note 98 (manuscript at 20); Edward Sherwin, *The Cost–Benefit Analysis of Financial Regulation: Lessons from the SEC’s Stalled Mutual Fund Reform Effort*, 12 STAN. J.L. BUS. & FIN. 1, 12–17 (2006) (arguing that regulation has become separated from that basic administrative law principle, the cost–benefit analysis).

safety and soundness.¹⁰⁰ In doing this, bank regulators are not just charged with insuring the safety and soundness of the system but rather have a pro-bank mandate as well to ensure that the banking system as a whole operates efficiently.¹⁰¹ Here too, the reasonableness inquiry is exceedingly difficult to detach from a governance enterprise; if it applies to banking regulation, perhaps reasonableness can work for the standards of review as well.

The foregoing does not mean that the only way to evaluate the performance of financial regulators is to consider whether they did a reasonable job; but rather that it is likely that it probably does characterize that evaluation in practice. That evaluation is rarely done by courts under the doctrines of judicial review of agency action but nonetheless characterizes the standards to which other government actors hold these agencies.

D. Conclusion

In tort law, the standard of reasonable care is the premise of the negligence law that is the most common basis for tort liability. In criminal procedure, the Supreme Court has concluded that the Fourth Amendment prohibits unreasonable searches and seizures and has defined the assessment of that term through a reasonableness standard. Under both of these standards, thousands of cases are adjudicated every year. Whole treatises have been written that focus on the evaluation of reasonable conduct in both contexts. And in financial regulation—especially in the post-Dodd–Frank version of it—reasonableness is the coin of the realm. We have, in short, collectively made our peace with the legal tractability of the reasonableness standard through many cases and bureaucratic disputes.

Reasonableness in the context of administrative law is not very different from the doctrinally familiar mandate that government officials may not act arbitrarily and capriciously—itsself a capacious concept.¹⁰² In reasonableness contexts, reported cases serve as guides for a more precise, fact-dependent and fine-grained inquiry into the sort of law that should be applied in any particular context.¹⁰³

100. Julie Andersen Hill, *Bank Capital Regulation by Enforcement: An Empirical Study*, IND. L.J. (forthcoming) (manuscript at 50), available at <http://ssrn.com/abstract=1773072>. Hill further stated, “The individual bank minimum capital requirements contained in the formal capital enforcement actions seem to hint that regulators employ non-public rules of thumb.” *Id.*

101. *See id.* (manuscript at 4–6).

102. *See supra* note 46 and accompanying text.

103. One way to think about this matter might be adduced from the way Akhil Amar approaches the reasonableness inquiry in the Fourth Amendment context, in which the “other parts of the Bill of Rights . . . identify constitutional values that are elements of

Moreover, the examples of reasonableness considered in this Article are not the only examples. Courts premise the materiality element of the antifraud laws on what “reasonable investors” would find material.¹⁰⁴ Sexual harassment is proven by showing harassment sufficiently “severe or pervasive” that it is both subjectively and objectively hostile or abusive, as judged by a “reasonable person” standard.¹⁰⁵ The “rule of reason” has been the law of the Sherman Act for well over a century—and the move from per se rules in antitrust to a general reasonableness test has been one of the features of modern antitrust regulation.¹⁰⁶ Reasonableness is also a standard interpretive tool used in contract law.¹⁰⁷

constitutional reasonableness. These other Clauses at all times stand as independent hurdles, above and beyond composite reasonableness, that every search or seizure must clear, but the Clauses can also serve other functions. They can furnish benchmarks against which to measure reasonableness and components of reasonableness itself.” Amar, *supra* note 48, at 805 (emphasis omitted) (footnote omitted).

104. SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 862 (2d Cir. 1968) (en banc) (defining a misrepresentation or omission as an act that conveys a false impression of the facts or is misleading, which in turn requires an inquiry “into the meaning of the statement to the reasonable investor and its relationship to the truth”). In *TSC Industries, Inc. v. Northway, Inc.*, the Supreme Court essentially adopted the reasonableness rule, holding that information should be deemed material if there exists “a substantial likelihood” that it “would have been viewed by the reasonable investor as having significantly altered the ‘total mix’ of information” available to the public. 426 U.S. 438, 449 (1976). For other illustrations of the use of reasonableness in securities regulation, see *Basic Inc. v. Levinson*, 485 U.S. 224 (1988); *Texas Gulf Sulphur Co.*, 446 F.2d at 1305; Jeffrey L. Davis, *Materiality and SEC Disclosure Filings*, 24 SEC. REG. L.J. 180 (1996). For a discussion, see Richard C. Sauer, *The Erosion of the Materiality Standard in the Enforcement of the Federal Securities Laws*, 62 BUS. LAW. 317, 320 (2007).

105. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21–22 (1993). In 1991, the Ninth Circuit propounded a “reasonable woman” standard for these sorts of cases. See *Ellison v. Brady*, 924 F.2d 872, 878–79 (9th Cir. 1991) (“We . . . prefer to analyze harassment from the victim’s perspective,” prohibiting “conduct which a reasonable woman would consider sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment.” (footnote omitted)). But after *Harris*, the Ninth Circuit redefined its test to cover a “reasonable person with the same fundamental characteristics.” *Fuller v. City of Oakland*, 47 F.3d 1522, 1527 (9th Cir. 1995). For a discussion, see Ann Juliano & Stewart J. Schwab, *The Sweep of Sexual Harassment Cases*, 86 CORNELL L. REV. 548, 582–83 (2001).

106. The Sherman Antitrust Act may be found at 15 U.S.C. §§ 1–7 (2006). The rule of reason used to interpret its hostility to restraints on trade was announced in *Standard Oil Co. v. United States*, 221 U.S. 1, 66 (1911) (“[T]he construction which we have deduced from the history of the act and the analysis of its text is . . . that in every case where it is claimed that an act or acts are in violation of the [antitrust] statute the rule of reason, in the light of the principles of law and the public policy which the act embodies, must be applied.”). See also Thomas C. Arthur, *A Workable Rule of Reason: A Less Ambitious Antitrust Role for the Federal Courts*, 68 ANTITRUST L.J. 337, 337 (2000) (“The traditional rule of reason was uniformly viewed as ‘a euphemism for an endless economic inquiry resulting in a defense verdict.’” (quoting

Appellate judges, finally, are accustomed to making reasonableness determinations in standards of review for nonagency action, making the importance of reasonableness a jurisprudential fact that they would not find surprising. In the federal system, triers of fact are also reviewed for reasonableness and have been so reviewed for decades.¹⁰⁸ Reasonableness review is thus a feature of federal civil procedure in addition to being the sort of standard that has permitted the creation of a useful and fact-sensitive jurisprudence in other areas of the law that benefit from fact-oriented elaboration.¹⁰⁹

It is, in sum, not an overstatement to suggest that reasonableness pervades legal analysis, and there is no doctrinal reason not to reclaim it for administrative law.

III. DEFENDING REASONABLENESS

This section responds to some criticisms of reasonableness review and explores several implications that the adoption of a reasonableness standard in administrative law might entail. One critique is theoretical: it posits that the extant standards of review prevent the politicization of administration and that reasonableness would not do so. Another is empirical: it takes the fact that agencies are affirmed roughly two-thirds of the time as an unstable, rather than permanent fact, and so argues that just because the standards of review have similar validation rates now does not mean that they are in fact similar. This section also weighs the function of standards of review more generally by arguing that implementing a reasonableness standard is practically possible and normatively desirable, in that it would simplify administrative law, which should be understandable and accessible.

Maxwell M. Blecher, Schwinn—*An Example of a Genuine Commitment to Antitrust Law*, 44 ANTITRUST L.J. 550, 553 (1975)). See generally Case Comment, *Sherman Act*, 124 HARV. L. REV. 179, 400–10 (2010) (discussing *American Needle, Inc. v. National Football League*, 130 S. Ct. 2201 (2010), a decision by the Supreme Court in light of the rule of reason).

107. See, e.g., Brent C. Shaffer, *Counseling the Client on the Reasonable Consent Standard to Assignments*, PRAC. REAL ESTATE LAW., July 2003, at 7, 7–8 (“Reasonableness is a relative term. Luckily, the courts have provided ample guidelines” for the “standards of reasonableness articulated by the courts in construing commercial lease assignments.”).

108. George C. Christie, *Judicial Review of Findings of Fact*, 87 NW. U. L. REV. 14, 23 (1992) (observing, albeit in a somewhat narrow context, that “the courts merely look for reasonable evidentiary support”).

109. For an accessible critique of the reasonableness standard (while acknowledging its appellate ubiquity), see Chad M. Oldfather, *Appellate Courts, Historical Facts, and the Civil–Criminal Distinction*, 57 VAND. L. REV. 437, 443 (2004) (“[T]he governing standards in both criminal and civil cases pose roughly the same question for the reviewing court. The court must first view the evidence in the light most favorable to the verdict, and then ask whether the verdict could have been reached by a reasonable jury.”).

It also considers some other implications of broad legal rules such as reasonableness in the context of administrative regulation.

A. Critiques of Reasonableness

One strong critique of reasonableness review in administrative law is that it would allow judges to enact their political preferences because nothing about reasonableness inquiries forecloses the utilization of such preferences, and because the general nature of the inquiry would ease the constraints on judges inclined to do so.¹¹⁰

But, as the record of reasonableness in other areas of the law suggests, a reasonable agency standard would not mean that administrative law is just a matter of politics. It is true that many scholars argue that politics play an important role in understanding how administrative law decisions are made.¹¹¹ Political scientists are particularly prone to such suggestions even though they now are struggling to import some constraints from law into their rational-actor paradigm.¹¹²

110. Sasha Volokh argues that doctrine can limit the whims of judges who would like to enact their political preferences but do not. Alexander Volokh, *Choosing Interpretive Methods: A Positive Theory of Judges and Everyone Else*, 83 N.Y.U. L. REV. 769 (2008). Although I am unconvinced by the style of the argument, it surely is true that cases with clear legal answers prevent judges from disregarding those answers in favor of their policy preferences.

111. See generally WILLIAM M. LANDES & RICHARD A. POSNER, *THE POLITICAL ECONOMY OF INTELLECTUAL PROPERTY LAW* (2004) (describing the incentives of judges as including reputation and leisure); JEFFERY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2002) (arguing that judges essentially enact their policy preferences into law when adjudicating); Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823 (2006).

112. See David S. Law & David Zaring, *Law Versus Ideology: The Supreme Court and the Use of Legislative History*, 51 WM. & MARY L. REV. 1653, 1740 (2010) (concluding that Supreme Court justices are more likely to consult legislative history in their statutory interpretation when the legislative history favors their “ideologically preferred outcomes”); Mark J. Richards et al., *Does Chevron Matter?*, 28 LAW & POL’Y 444 (2006) (concluding that it may, in fact, matter);. But see LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* (1998) (arguing more generally that political decisions count for most of the inputs into Supreme Court decisionmaking). For discussions about the relevance of law by scholars who are not known for otherwise celebrating the importance of doctrine, see Barry Friedman, *Taking Law Seriously*, 4 PERSPECTIVES ON POL. 261, 266 (2006); and Matthew C. Stephenson, *Legal Realism for Economists*, J. ECON. PERSPECTIVES, Spring 2009, at 191. There are numerous other examples of law professors expressing their concern about the law-disregarding nature of social scientific scholarship. See, e.g., Carolyn Shapiro, *Coding Complexity: Bringing Law to the Empirical Analysis of the Supreme Court*, 60 HASTINGS L.J. 477 (2009). It would be incorrect to pin much of the vanguard of the criticism on Stephenson and Friedman, both of whom have expressed some skepticism about the binding nature of legal constraints in their scholarship. Perhaps it is sufficient to take the placements of both articles in respected peer-reviewed

Others are clear-eyed about whether judges are able to do whatever they want when they adjudicate.¹¹³ But this is the case now, and reasonableness would not change anything, even as the problems of the politicization of judicial review can be overstated.

At any rate, we expect politics to play a role in some decisionmaking. Richard Pierce has observed that it would be impossible to eliminate politics from law.¹¹⁴ Indeed, it has been mooted that perhaps politics may even have played a role in decisions as foundational as *Marbury v. Madison*.¹¹⁵ It may be that the ideological element of adjudication is distinct but not dramatic, as the area for disagreement reaches relatively few cases decided within a relatively narrow band of decisions. But even defined narrowly, the importance of the political perspectives of judges can be overstated. Few cases produce dissents, meaning that the judges usually agree on the outcomes of decisions.¹¹⁶ Indeed, sometimes the evidence for the politicization of adjudication is sparse, as it was for substantial-evidence cases before the D.C. Circuit between 2000 and 2004, which I reviewed and failed to find an ideological basis of the voting of the judges, if ideology is measured by the party of the appointing president.¹¹⁷

But if we think that politicization can be an overstated threat and legal rules can do something about it (some are unsure of even that, of course), reasonableness might be the right sort of constraint, allowing a little

journals as some evidence of the social scientific disciplines to take a more nuanced view of the constraining power of law. And of course, other, well-cited scholars in the social sciences make much of the importance of capable legal institutions for economic development. See Rafael La Porta et al., *Legal Determinants of External Finance*, 52 J. FIN. 1131 (1997); Rafael La Porta et al., *Law and Finance*, 106 J. POL. ECON. 1113 (1998); Rafael La Porta et al., *Corporate Ownership Around the World*, 54 J. FIN. 471 (1999).

113. My own view is that no one takes the law-is-irrelevant critique seriously. Political scientists, like all of us, reject the “law doesn’t matter” hypothesis every day in real life. We all register real estate sales and enter into employment contracts without checking on the political affiliations of the judges on the courts that might hear our claims. Indeed, it might be more accurate to say that we usually, with almost all of our conduct, presume that the law matters almost all of the time.

114. Richard J. Pierce, Jr., *The Role of Constitutional and Political Theory in Administrative Law*, 64 TEX. L. REV. 469, 471 (1985) (“[I]ncreased Presidential control of agency policy making is the only response to the problem of broad agency discretion that is consistent with constitutional and political theory.”). See generally Jerry L. Mashaw, *The Economics of Politics and the Understanding of Public Law*, 65 CHI.-KENT L. REV. 123 (1989).

115. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); see Pierce, *supra* note 114.

116. Subject, however, to Miles’s and Sunstein’s observations that divided panels tend to adopt less ideological outcomes—on a whistleblower theory, one suspects, though the mechanism of this amelioration of ideology is not very clear. Miles & Sunstein, *supra* note 111, at 852.

117. Zaring, *supra* note 3, at 197.

political policymaking discretion but not too much. The duty of agencies to be reasonable, when compared with constitutional limitations on congressional action that are less rigorous (Congress must only have a “rational basis” to act, a term that the courts have interpreted extremely broadly), if anything, clarifies where the most political decisions are meant to be made. Congress has substantially more authority to act arbitrarily, even capriciously, through legislation, subject to the check of the ballot box. It may reverse policies without laying any groundwork for doing so or cater to interest groups, and it need not give reasons for its decisions or justify them with scrutinized findings.

Administrative law precludes agencies from doing any of these things under either current doctrine or a reasonableness inquiry. And the importance of a reasonableness, or reasonable-like, inquiry is why administrative lawyers know that they must be able to tell a good story about why the policy choice they made makes sense and does not work a forfeiture on the individuals affected by the regulatory action.

Nor would the adoption of a reasonableness standard mean that agencies would forever win 60%–70% of their cases. That is currently what the studies across various standards of review suggest, especially for the current era; courts upheld agencies at both slightly higher and slightly lower rates in some older studies.¹¹⁸ It could be—though I think it unlikely—that the validation rates will diverge soon. But the goal of this Article has been to suggest that there is no reason to eschew reasonableness regardless of the

118. *Id.* at 169. This will not surprise those who suspect that the D.C. Circuit took a different perspective to agency action in the 1960s and 1970s than it does today. It is quite a standard view among not just political scientists, but historians. *See, e.g.*, JEFFREY BRANDON MORRIS WITH CHRIS ROHMANN, *CALMLY TO POISE THE SCALES OF JUSTICE: A HISTORY OF THE COURTS OF THE DISTRICT OF COLUMBIA CIRCUIT* (2001). A number of judges have also suggested that the D.C. Circuit is different from other courts and has evolved over time. *See* E. BARRETT PRETTYMAN, JR. ET AL., *D.C. CIRCUIT, HISTORY OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT IN THE COUNTRY'S BICENTENNIAL YEAR* (1977) (Prettyman was a lawyer and a judge on the court); Susan Low Bloch & Ruth Bader Ginsburg, *Celebrating the 200th Anniversary of the Federal Courts of the District of Columbia*, 90 *GEO. L.J.* 549, 605 (2002); John G. Roberts, Jr., *What Makes the D.C. Circuit Different? A Historical View*, 92 *VA. L. REV.* 375, 388–89 (2006) (describing the era of conflict between the 1960s and 1980s on the court). It could change in the future. Indeed, the lack of variability across affirmance rates is striking and interesting, but subject to selection bias—we simply do not know if litigants bring only really strong *Chevron* cases and really weak *State Farm* cases, despite the fact that they are affirmed at the same rate, and it may be that we will never know. This is a limitation of these sorts of observational, opinion-based data, and one worth keeping in mind—I mention it here because it suggests that even now we may be, in a strength-adjusted basis, in a world where the various standards of judicial review do, in fact, have different effects.

uncanny convergence of agency validation rates. It has other useful characteristics and works well in other circumstances.

B. *Implications of Reasonableness*

Adoption of a reasonable agency standard has other advantages. Researchers could spend more time looking at the other questions that we all think affect litigation, such as the importance of the perspective of the judges on the panel, the reputation of the agency (which I have always thought might matter in cases before the D.C. Circuit), or the importance of the administrative action. Courts may, after all, take different approaches when confronted with rulemakings about global warming as opposed to adjudications about whether somebody should get a camping permit.

If reasonableness review is the right way to think about administrative review, it might make for a “flatter, simpler base” of administrative law (flatter and simpler is what tax professors and tax lawyers think might be the right way to write a tax code; they provide the trope here).¹¹⁹ More sorts of administrative action could be interpreted through the reasonableness lens, which is an intuitive one used by jurors and police officers, as well as by appellate judges. Perhaps such a perspective might be useful for administrative law.

Moreover, reasonableness may be upon us sooner than many doctrinalists would suspect. It is possible that *Chevron*, *State Farm*, and finally the fact-based standards of appellate review have already essentially evolved into the standard of reasonableness, similar to the way common law evolves.¹²⁰ As Kathryn Watts observed, the Supreme Court cited *Chevron* once and *Skidmore* once over the Fall 2009 term, and we have already seen that direct citations to the administrative law standards are occupying a shrinking proportion of the appellate docket, even as the D.C. Circuit and Supreme Court refer to reasonableness in a higher and higher percentage of those cases.¹²¹

119. See, e.g., Boris I. Bittker, *A “Comprehensive Tax Base” as a Goal of Income Tax Reform*, 80 HARV. L. REV. 925, 926–27 (1967) (supporting creating a comprehensive tax base with few exceptions in tax policy design); Daniel S. Goldberg, *To Praise the AMT or to Bury It*, 24 VA. TAX REV. 835, 847 (2005) (identifying why tax reformers might prefer “a more comprehensive tax base and one free of incentive provisions”).

120. See Jack Beermann, *Common Law and Statute Law in Administrative Law*, 63 ADMIN. L. REV. 1 (2011).

121. Watts, *supra* note 31, at 1–2.

Would that be a good thing? There is a worthy story to tell about the valuable features of the current standards of review. They have been designed to teach the appellate courts humility.

They also represent a tick-the-box approach to adjudication that is a plausible approach to the design of judicial review, even if it appears to fail in practice. The first step of the *Chevron* case, for example, forces courts to engage in a statutory interpretation exercise that Justice Scalia has championed as a way to tether them to the rule of law.¹²² There is little doubt that courts engage in more careful statutory interpretation now than they may have in the years before Scalia made his way onto the Supreme Court.¹²³ Moreover, as Richard Pierce observes, what we want courts to do when reviewing agency action is to be sure that they have paid attention to the statute, that their policy decision is not unreasonable, and that they have explained what they did and how they got from the statute to the policy.¹²⁴ Each of these factors would seem to be encouraged by the current standard of review regime, and although nothing about a reasonableness inquiry would preclude these factors, stating them gives courts more guidance about what they should exactly do.

In this sense, standards of review might serve as a cueing function for judges.¹²⁵ At their best, they offer a checklist of things the judges are supposed to ask agencies to do. A checklist, or decision-tree approach—indeed even one much more elaborate than the approach required by *Chevron*, *State Farm*, and their ilk today—might help judges make sense of the complicated real world of administrative action, which turns science and social science into policy and which in turn is executed by regulation. Checklist review or decision-tree review could ease the job of courts as they go down the path of trying to discern what exactly a judge did and why.

Though checklists and decision trees are appealing in theory, it is an open question as to whether the standards of review in practice really guarantee this kind of inquiry. The number of steps they push the agency

122. See, e.g., Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws*, in ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3 (Amy Gutmann ed., 1997).

123. For one empirical study reviewing how much Justice Scalia's ascension to the court changed jurisprudence with regard to the use of legislative history in statutory interpretation, see Law & Zaring, *supra* note 112.

124. See Richard J. Pierce, Jr., *Making Sense of Procedural Injury*, 62 ADMIN. L. REV. 1 (2010).

125. Cf. Robert B. Ahdieh, *Law's Signal: A Cueing Theory of Law in Market Transition*, 77 S. CAL. L. REV. 215, 255 (2004) (“[R]egulatory cues do not rely on the application or threat of public sanction.”); Richard H. McAdams, *A Focal Point Theory of Expressive Law*, 86 VA. L. REV. 1649, 1651 (2000) (arguing that law's expressive function can serve as a “focal point” around which private actors can coordinate their behavior).

to do are three or so, even under *Pierce*'s paradigm, and two of those steps are usually conflated into one—the hard look requirements that the courts simply read into the arbitrariness provisions of *State Farm*.¹²⁶ Indeed, a body of precedent more attuned to the facts and circumstances of particular cases might help courts through the specifics of administrative law more than would the current complex web of doctrine.

All of this permits an inquiry into what the standards of review are supposed to do. And so there are some final implications to reasonableness worth considering.

Presumably, standards of review offer guidance to agencies as to what is appropriate administrative procedure and offer guidance to courts as to how to assess agency action in delineating the vision and decisionmaking between courts and agencies. *Chevron* also sets the terms of the separation of powers framework. It has been dubbed the anti-*Marbury v. Madison*, which is the case that instructed the Executive Branch that “[i]t is emphatically the province and duty of the judicial department to say what the law is.”¹²⁷ Deferential standards of review like *Chevron*, however, permit the agencies within the Executive Branch to draw definitive conclusions about what the law is on their own and with the acquiescence of the judiciary, or so some have argued.¹²⁸ *Chevron*, in theory, reworks the separation of power angle between courts and agencies into one between courts and Congress itself.¹²⁹

126. Because courts have given context to whatever it is that *arbitrary and capricious* means by devising their own common-law style standards, I think it is unimportant to limit what they do even though the reasonableness inquiry does not appear in the statutory text while other terms do.

127. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

128. Cass R. Sunstein, *Beyond Marbury: The Executive's Power to Say What the Law Is*, 115 YALE L.J. 2580, 2589 (2006) (“We can now see that *Chevron* is properly understood as a kind of counter-*Marbury* for the administrative state.”); Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 188–89 (2006) (“*Chevron* was quickly taken to establish a new approach to judicial review of agency interpretations of law, going so far as to create a kind of counter-*Marbury* for the administrative state. *Chevron* seemed to declare that in the face of ambiguity, it is emphatically the province and duty of the *administrative* department to say what the law is.” (footnote omitted)); Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 2 (1983) (arguing that deference would not be an unconstitutional transfer of the Judiciary’s duty “to say what the law is,” but a recognition that Congress often implicitly delegates lawmaking authority to administrative agencies); Jonathan T. Molot, *Reexamining Marbury in the Administrative State: A Structural and Institutional Defense of Judicial Power over Statutory Interpretation*, 96 NW. U. L. REV. 1239 (2002) (discussing the views of Monaghan and Sunstein).

129. Kenneth Bamberger and Peter Strauss have made some arguments along these lines. They argue that the *Chevron* test “separates questions of statutory implementation assigned to independent judicial judgment (Step One) from questions regarding which the courts’ role is limited to oversight of agency decisionmaking (Step Two).” Kenneth A. Bamberger & Peter L. Strauss, *Chevron’s Two Steps*, 95 VA. L. REV. 611, 611 (2009).

However, if the separation of powers worked by *Chevron* is important, it is not clear as an empirical matter that a reasonableness standard would do anything differently. Moreover, reasonableness review is a sort of deference that gets courts out of the business of flyspecking agency action or substituting their own judgment for that of the agency.

A reasonableness standard, however, does not preclude deference to Congress's wishes. It might, in fact, make courts more sensitive to those wishes by making room for larger considerations than the purely legal ones of the statutory interpretation encompassed by *Chevron* step one and the zone of reasonable statutory interpretations included in step two.¹³⁰ Moreover, agencies remain subject to congressional control though a number of other means—through regular oversight, control of funding, and all of the other indicia on which positive political theorists focus when they address the questions of how congressional control of agency action is expressed.

Others have hoped that *Chevron* will resolve agency ossification, the prospect that overly aggressive judicial review prevents agencies from meeting their regulatory obligations.¹³¹ But no one thinks that after the promulgation of *Chevron* the length and complexity of rulemakings has declined.¹³² They have increased instead. Lengthier *Federal Registers*, of course, do not prove that the administrative state has become ossified by process—the jury is out on just how ossified the administrative state has become.¹³³ But it is fair to say that many of the standards of measuring ossification have not suggested that our current standards of review serve any purpose in reducing the procedural hoop jumping that marks those agencies subject to appellate review for their policymaking efforts.

130. Of course, this all assumes that courts do, in fact, treat *Chevron* as a heuristic that encourages fidelity to Congress's language. Based on the relatively stable validation rates of agency action, *Chevron* or no, its reference to the statute may not be so important after all.

131. The canonical article in this area is Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1453 (1992) (concluding that in complex scientific cases, courts apply a pass/fail standard to grade the agency).

132. As Elizabeth Foote has said, "by turning nearly every challenge on judicial review into a question of law as a matter of 'statutory interpretation,' the Supreme Court's *Chevron* doctrines likely generate more, not less, judge-made ossification of statutes than the [Administrative Procedures Act] regime that they displaced." Elizabeth V. Foote, *Statutory Interpretation or Public Administration: How Chevron Misconceives the Function of Agencies and Why It Matters*, 59 ADMIN. L. REV. 673, 677 (2007).

133. See generally Jason Webb Yackee & Susan Webb Yackee, *Administrative Procedures and Bureaucratic Performance: Is Federal Rule-making "Ossified"?*, 20 J. PUB. ADMIN. RES. & THEORY 261 (2010) (utilizing data that covers all active federal rule-writing agencies from 1983 to 2006 and concluding that the results "largely disconfirm the ossification thesis").

Finally, the standards of review should be performing some duty to the public. They should be clarifying what agencies can do and what courts can do. It is not clear that this duty to the public is being met, as *Chevron* turns into an increasingly confusing part of an increasingly elaborate and confusing series of standards of review. It seems clear that the laity is less likely to be able to interpret and parse current doctrine than it would if the courts relied on the reasonableness standard.

In this sense, the normative case for reasonableness lies in an intuition that administrative law should not be the province of obscure doctrinal geniuses. It is too important to calcify into obscurity with an impossible set of standards of review, and it is no place for smart judges to draw obscure curtains across the important watchdog role they play for Congress and the public. Administrative law is too important to be incapable of interpretation. Understanding that it really amounts to a fact-specific and context-sensitive reasonableness inquiry avoids this sort of obfuscation of a critical function in a bureaucratic state that still is committed to maintaining the separation of powers announced in the Constitution.

C. *Getting There*

Administrative law, with its broad and rarely amended procedural statutes and its commitment to limited judicial review, is the sort of doctrine particularly amenable to a rule of reason. And, as I have suggested both here and elsewhere, it appears that the courts may be moving toward a rule of reason.

How, though, might they get there, given the complex web of rules that have grown to require a variety of other steps? My own view is that amendment of the APA will not be required, and that the facts on the ground—the increasing embrace of reasonableness among practitioners and adjudicators of administrative action—will do what Congress need not, and what, I suspect, the Supreme Court will ultimately endorse. The rule of reason will become the rule of administrative law not by a Supreme Court decision overruling *Chevron*, *Skidmore*, and their ilk. The sea change of reasonableness—if it even is, in fact, a sea change—is the kind of amendment to the standards of review that will echo the common law standard that it represents. Change will happen slowly, and it will percolate up from appellate courts to the Supreme Court. If administrative law looks a lot like common law—and many scholars have argued that it does—then we can expect that the reforms urged in this Article will be embraced slowly, perhaps even imperceptibly, but inevitably and intelligently. While this Article is prescriptive and normative—I think that reasonableness is the right way to evaluate agency action, as well as the approach that the courts,

sub silentio, are increasingly adopting—it takes a somewhat fatalistic view about the character of reform. The courts will, I suspect, ultimately embrace a reasonableness standard of review and reject the complexity of the current set of standards under which they labor. That doctrinal move lies within their power and discretion in interpreting the APA, which itself is certainly capable of supporting a reasonable agencies approach.

CONCLUSION

It is time to embrace reasonableness and, in administrative law, open ourselves to its possibilities. Courts are increasingly moving away from the complex standard of review superstructure. There is another way, and it is a way that works elsewhere in the legal firmament, including in Fourth Amendment and negligence law. There is nothing lawless about reasonableness, it works in a number of different contexts, and it has both practical and theoretical advantages. Ignoring its promise does no favors to those areas of the law snarled in increasingly confusing and elaborate doctrinal curlicues.