MODALITIES OF AGENCY RULEMAKING

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Agency rulemakings are a critical component of contemporary governance. This Article argues that there are a distinct set of modalities that characterize how agencies formulate and justify their rules. Just as the well-known modalities of constitutional interpretation capture the norms of constitutional discourse, the modalities of agency rulemaking offer a framework for understanding how agencies reason through and justify regulatory decisions. I show a common set of moves that agencies make across substantive contexts and across administrations. The rulemaking modalities are: (1) the public interest, (2) statutory purpose, (3) instrumental rationality, (4) technical expertise, (5) implementation considerations, and (6) cost-benefit analysis.

Exploring the modalities of agency rulemaking holds important lessons about the place of agencies in our system of government. First, attention to how the rulemaking modalities interact with each other—and in particular how agencies resolve tensions between modalities—provides an important study of how agencies balance competing pressures in justifying their policy choices. Second, attention to the modalities shows that agency rulemakings are methodologically distinctive—and distinctly appealing—relative to how Congress and the courts often make decisions. The rulemaking modalities are consistent with several desirable qualities that are often missing in other governmental decisionmaking: consideration of the full range of policy choices, attention to the likely consequences of various courses of action, and evidence-based reasoning for why government opts for one policy over other possibilities. Third, understanding the rulemaking modalities can shed light on how the "hard look" standard for judicial review of agency action operates, and how it should operate.

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INTRODUCTION

Agency rulemakings are a critical component of contemporary governance. Agencies make rules regulating nearly every aspect of our economy and society. Binding rules seek to regulate risk, manage externalities, and implement federal programs. They touch on topics ranging from health and safety to civil rights, financial stability to climate change, labor-management relations to healthcare provision. The proliferation of agency rules makes understanding the nature and operation of the rulemaking process essential to understanding modern American governance.[1]

Despite their importance, rulemakings as a genre receive little attention. Relatively few lawyers—and virtually no other Americans—are in the habit of reading rulemakings from start to finish. Judicial opinions and judicial reasoning have long been the cornerstone of American legal education. Increasingly, law schools also teach students how to read statutes and explore debates over methods of statutory interpretation.[2] But law students receive no comparable training in how to read a rule. Tellingly, administrative law courses rarely require that students read rules in their entirety and often discuss rulemaking primarily in the context of judicial review.

Rulemaking is a distinctive genre worthy of study in its own right. Rulemakings are much more than mere regulatory mandates. Instead, they contain lengthy argumentation and justification, in which agencies explain why they opted for a particular policy approach and justify that choice, often in considerable detail. An agency engaged in a rulemaking has to show its work, much more so than Congress passing a statute, an agency engaging in enforcement, or even a court issuing an

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[1] *See* Reuel E. Schiller, *Rulemaking's Promise: Administrative Law and Legal Culture in the 1960s and 1970s*, 53 ADMIN. L. REV. 1139, 1140 (2001) (noting that beginning at the end of the 1960s, "agencies turned to [rulemaking] as the primary staple of administrative action"); *see also* MAEVE P. CAREY, CONG. RSCH. SERV., R43056, COUNTING REGULATIONS: AN OVERVIEW OF RULEMAKING, TYPES OF FEDERAL REGULATIONS, AND PAGES IN THE FEDERAL REGISTER 1, 23–24 (2019) (reporting that between 3,000 and 4,500 final rules are issued each year).

[2] *See* Margaret Y. K. Woo & Jeremy R. Paul, *From the Editors*, 65 J. LEGAL EDUC. 1 (2015) (introducing a collection of articles on the rise of courses in legislation and statutory interpretation).

opinion. As a result, the most detailed agency rulemakings can contain hundreds of pages of narrative and justification.[3]

What types of arguments do agencies make in justifying their rules? How do agencies explain and defend their policy choices? What do these justifications reveal about the position of administrative governance, relative to governance by the other branches?

This Article answers these questions, which are necessary to understanding administrative power in the United States. It presents a novel account of the modalities of agency rulemaking, arguing that that there are a distinct set of modalities that agencies use to justify their rules. It presents six different types of reasoning that agencies frequently use to justify the policy choices that they make in rules: (1) the public interest, (2) statutory purpose, (3) instrumental rationality, (4) technical expertise, (5) implementation considerations, and (6) cost-benefit analysis. While the precise modalities invoked will vary by rule, these modalities represent six different approaches that agencies typically draw from in justifying their rules.

Scholars of constitutional law have asked parallel questions in assessing how courts go about interpreting and implementing the Constitution. In constitutional law, the concept of modalities refers to the different types of accepted modes of constitutional argument—arguments from text, precedent, history, and so forth.[4] These modalities shape how constitutional meaning is debated and constructed, both

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[3] *See, e.g.*, Standards of Performance for New, Reconstructed, and Modified Sources and Emissions Guidelines for Existing Sources: Oil and Natural Gas Sector Climate Review, 89 Fed. Reg. 16820 (Mar. 8, 2024) (EPA rule addressing several emissions-related issues); PFAS National Primary Drinking Water Regulation, 89 Fed. Reg. 32532 (Apr. 26, 2024) (EPA rule addressing toxic chemicals); The Enhancement and Standardization of Climate-Related Disclosures for Investors, 89 Fed. Reg. 21668 (Mar. 28, 2024) (SEC rule addressing climate disclosure).

[4] In Philip Bobbitt's famous formulation, the modalities of constitutional argument are historical argument, textual argument, structural argument, prudential argument, and doctrinal argument. *See* Philip Bobbitt, Constitutional Fate: Theory of the Constitution 7–8 (1982). *See also* Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 Harv. L. Rev. 1189, 1194–1209 (1987) (examining different approaches to constitutional interpretation, including arguments from text, the Framers' intent, constitutional purposes, precedent, and values); Michael W. McConnell, *Time, Institutions, and Interpretation*, 95 B.U. L. Rev. 1745, 1746 (2015) (examining different approaches to constitutional interpretation, including arguments from originalism, precedent, longstanding practice, judicial restraint, and living constitutionalism (which he refers to as "the normative approach")); Jack M. Balkin, *Arguing About the Constitution: The Topics in Constitutional Interpretation*, 33 Const. Comment. 145, 182 (2018) (presenting a list of eleven different modalities). *But see id.* at 152 (arguing that "the modalities are a group of widely used rhetorical topics that help constitute American legal culture" but which "rest on (largely undertheorized) commonplaces about what makes a constitutional argument plausible or persuasive").

inside and outside the courts. Something similar holds, this Article argues, for agency rulemakings.

I proceed in three parts. Part I presents the taxonomy of modalities of agency rulemaking. Drawing on examples from major rules on a variety of topics, it explores how each modality operates in practice and discusses reasons why each modality might be attractive to agencies, and what benefits each modality might have for good governance. I then explore lessons for administrative law from this Article's focus on modalities. Part II discusses how agencies mediate when the modalities come into tension. Part III suggests that the modalities can help defend agency power in the face of critique and considers the implications that the modalities may have for judicial review of agency rules.

I
Rulemaking Modalities

Agencies make a range of arguments to explain and justify their rulemakings.[5] Yet a survey of a broad variety of rules, across administrations and across subject matter, reveals that rulemakings tend to rely on six primary types of argument.[6] This Part develops a typology of these rulemaking modalities. It emphasizes the role of each mode of argument in justifying major rules. While there are areas of overlap and interaction among the different modalities, each one is distinctive. Together, they capture the modes of argument that agencies typically make in justifying their rules.[7]

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[5] My focus here is on informal ("notice-and-comment") rulemaking, given that it is the dominant mode of rulemakings in the contemporary United States, though this Article's analysis of the modalities largely also extends beyond informal rulemaking to other sorts of rulemaking (such as formal rulemaking or negotiated rulemaking).

[6] My approach parallels the approach taken by constitutional law scholars, who developed lists of modalities of constitutional argument mainly by reading Supreme Court decisions and other materials from constitutional litigation. *See, e.g.*, Bobbitt, *supra* note 4, at 6 (framing constitutional modalities as "a typology of the kinds of arguments one finds in judicial opinions, in hearings, and in briefs"). My approach, like theirs, is admittedly somewhat impressionistic; it does not aspire to exhaustively catalogue every possible mode of argumentation or draw quantitative conclusions about the relative prevalence of different modalities. An important direction for future empirical research would be an effort, perhaps using text-analysis methods, to more comprehseively catalogue the different types of arguments that agencies make to justify their rules, examine the relative prevalence of each modality, and trace the different modalities that are deployed in different circumstances (with a focus, for example, on identifying variation across issuing agencies, subject matter, time, party in power, and other variables).

[7] One challenge of focusing on how agencies justify their rules is that an agency's (public) justifications for a given rule might differ from the agency's (private) motive for adopting the rule. I revisit this issue in Part II. *See infra* text accompanying notes 154–56.

Agencies engaged in rulemaking work in the shadow of multiple mandates and pressures. The Administrative Procedure Act[8] (APA) sets out bare-bones requirements for informal rulemaking: It requires only that agencies provide "a concise general statement of their basis and purpose"[9] and allow "interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments."[10] Judge-made law has significantly "supplemented the [APA's] requirements for notice-and-comment rulemaking to create an alternative, robust 'paper hearing' process."[11] Presidential directives detail how agencies are to go about the rulemaking process, including by providing guidelines on the substantive analyses that agencies must undertake to justify their rules.[12] Agencies themselves promulgate internal guidelines on nearly every topic, including how to go about making rules and conducting regulatory analysis.[13]

These diverse forces, some of which I return to below, structure how agencies go about formulating and justifying their rules. Sometimes a statute points an agency toward a given modality, as in the case of environmental statutes that require agencies to use the best available science.[14] Sometimes the White House directs an agency toward particular modalities, as for rulemakings that implement presidential priorities or those required by executive order to conduct a cost-benefit analysis.[15] The shadow of judicial review certainly shapes the use of modalities, most notably through agencies acting in anticipation of arbitrary and capricious review.[16] And agencies develop internal procedures and cultures that can entrench certain approaches to the modalities.[17]

In setting out the modalities of agency rulemaking, I focus on agency policy analysis, not legal analysis. The APA requires that agencies

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[8] Administrative Procedure Act of 1946, Pub. L. 79–404, 60 Stat. 237.

[9] 5 U.S.C. § 553(c).

[10] *Id.*

[11] Daniel A. Farber & Anne Joseph O'Connell, *The Lost World of Administrative Law*, 92 Tex. L. Rev. 1137, 1160 (2014).

[12] Relevant executive orders include Exec. Order No. 12,291, 46 Fed. Reg. 13193 (Feb. 17, 1981); Exec. Order No. 12,866, 58 Fed. Reg. 51735 (Sept. 30, 1993); Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 18, 2011); Exec. Order No. 14,094, 88 Fed. Reg. 21879 (Apr. 6, 2023).

[13] *See* Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 Mich. L. Rev. 1239, 1253–54 (2017) ("Agencies generate a vast amount of rules, procedures, and specifications geared at agency personnel to govern how they undertake their jobs and to supervise their actions.").

[14] *See infra* notes 63–64 and accompanying text.

[15] *See infra* notes 87–88 and accompanying text.

[16] *See infra* notes 46–49 and accompanying text.

[17] *See supra* note 13.

identify the legal authority for each rule[18] and provides for judicial review to ensure that rules are not in excess of the agency's statutory authority.[19] In defending the legality of their rules, agencies engage in statutory interpretation.[20] But authorizing statutes often give agencies wide discretion as to what sorts of regulatory requirements to impose. In the face of that discretion, agencies seek to justify their choices. And it is those justifications that are characterized by a distinctive set of modalities, which I turn to next.

A. Public Interest

Agencies justify their rules as serving the public interest. The specific conception of the public interest varies across contexts, but agencies routinely frame their actions as advancing goals of economic prosperity, basic fairness, public health and safety, environmental protection, or national security.[21] It is hard to think of a major rulemaking that the agency doesn't justify by reference to these or other considerations of the public interest. Indeed, agencies often cite multiple public interests in the same statute. The EPA, for example, has justified clean air rules as both broadly "protect[ing] human health and the environment"[22] and also providing particular "benefits for vulnerable communities."[23] The Department of Labor has likewise justified increasing the minimum wage for federal contractors by citing the goals of "efficiency and economy gained in government procurement," including through "increased morale and productivity" among workers, as well as broader social benefits of "reduced poverty and income inequality."[24]

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18 5 U.S.C. § 553(b)(2).

19 *Id.* § 706(2)(c).

20 *See generally* Anya Bernstein & Cristina Rodríguez, *Working with Statutes*, 103 Tex. L. Rev. 921 (2025) (discussing agency statutory interpretation).

21 Sometimes the type of public interest at issue is obvious from and closely related to the type of rule at issue. It is natural, for example, for agencies to cite the public interest in public health when issuing a clean air rule. In other instances, agencies cite public interests that less obviously arise from the rule's subject matter. Notable, in this regard, is the frequency with which agencies have invoked foreign policy and national security interests, even in rulemakings that concern topics that are typically considered part of domestic policy. *See* Elena Chachko, *Toward Regulatory Isolationism? The International Elements of Agency Power*, 57 U.C. Davis L. Rev. 57, 72 (2023) (noting that "[g]lobal climate change is an increasingly prominent foreign policy factor in domestic regulation" and citing agency reliance on rules invoking the interests in "preserving the Executive's foreign policy leeway," "potential harm to diplomatic relations with foreign governments," and "the foreign policy implications of petroleum dependence").

22 Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64662, 64663, 64664 (Oct. 23, 2015).

23 *Id.* at 64670.

24 Increasing the Minimum Wage for Federal Contractors, 86 Fed. Reg. 67126, 67212 (Nov. 24, 2021).

Agencies sometimes invoke the public interest by linking a particular rulemaking to an administration's broader policy agenda. The final decades of the twentieth century witnessed an increasing role for the White House in coordinating and directing agency rulemaking activities.[25] One consequence of this trend is that individual rulemakings are often part of government-wide efforts—which include multiple rulemakings, spending, enforcement, and other policy tools—to advance a given policy priority. Some rulemakings expressly situate their interventions as part of broader efforts by the executive branch to advance policies that it believes are in the public interest, often citing the need for a "whole-of-government" approach to a given issue. Agencies have deployed this mode of argument in rules on topics as diverse as climate change,[26] public health,[27] economic competition,[28] and immigration.[29]

Agencies have several reasons for framing their interventions in terms of the public interest. Most fundamentally, justifying rules by reference to the public interest instantiates the longstanding aspiration of governance that is motivated by the public good.[30] Further, agencies are engaged in the process of implementing statutes. Because the

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[25] *See generally* Harold H. Bruff, *Presidential Management of Agency Rulemaking*, 57 Geo. Wash. L. Rev. 533 (1989); Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245 (2001); Jerry L. Mashaw & David Berke, *Presidential Administration in a Regime of Separated Powers: An Analysis of Recent American Experience*, 35 Yale J. on Reg. 549 (2018).

[26] *See, e.g.*, Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64661, 64665 (Oct. 23, 2015) (EPA Clean Power Plan rule describing itself as "a significant step forward in implementing the President's Climate Action Plan" and noting that the rule "implement[s] one of the strategies of the Climate Action Plan"); Pipeline Safety: Gas Pipeline Leak Detection and Repair, 88 Fed. Reg. 31890, 31923 (May 18, 2023) (DOT pipeline safety rule noting "a spectrum of regulatory actions being undertaken across the U.S. Federal Government to reduce methane emissions" as part of "a whole-of-government approach to combatting the climate crisis" and noting "[p]arallel proposals by EPA and PHMSA to reduce methane emissions from natural gas infrastructure").

[27] *See, e.g.*, Food Labeling: Front-of-Package Nutrition Information, 90 Fed. Reg. 5426, 5429 (Jan. 16, 2025) (FDA nutrition-labeling rule describing how the agency, "as part of a whole-of-government approach, broadly seeks to help reduce the burden of diet-related chronic diseases").

[28] *See, e.g.*, Enhancing Transparency of Airline Ancillary Service Fees, 87 Fed. Reg. 63718, 63719 (Oct. 20, 2022) (DOT situating an airline fees rule in the context of a "whole-of-government approach to strengthen competition" and an executive order on that topic).

[29] *See, e.g.*, Circumvention of Lawful Pathways, 88 Fed. Reg. 31314, 31369 (May 16, 2023) (DOJ rule arguing that "CBP, USCIS, and DOJ are all part of the whole-of-government approach necessary to address irregular migration and ensure that the U.S. asylum system is fair, orderly, and humane").

[30] *See* The Federalist No. 10, at 75 (James Madison) (Clinton Rossiter ed., 1961) ("To secure the public good and private rights against the danger of such a faction . . . is then the great object to which our inquiries are directed.").

statutes that provide the underlying authority for agency rulemakings themselves nearly always purport to serve the public interest in one or more ways, agencies can signal fidelity to the underlying statute by invoking the same public interest or interests.[31]

The expectation that agencies will defend their rules as furthering the public interest requires that agencies articulate the social benefits they believe rules will achieve. The search for a more robust conception of the public interest—a set of shared values or objective good—has long bedeviled administrative law.[32] But even the more modest expectation that agencies articulate some sort of public-regarding reason for their rules can serve several valuable functions.

First, an expectation that agencies justify their rules in terms of the public interest allows for public scrutiny of the particular interests that agencies invoke. Sometimes those interests are uncontroversial: If a rule's stated goal is to increase economic well-being or guard against national security threats, few will disagree with that goal. In other instances, however, the goals are more contestable. This might be the case because of competing social values: One administration's rule might seek to expand abortion access; another administration's might seek to restrict it.[33] When agencies state their goals, they enable others—the voters at the ballot box, Congress in its oversight capacity,

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[31] In a series of case studies, Jody Short provides evidence that agencies typically "ground definitions of the public interest in their statutory authority," "respond to legislative amendments of that authority," and "rarely consider substantive values outside the four corners of their statutory authority in making public interest determinations." Jodi L. Short, *In Search of the Public Interest*, 40 YALE J. REG. 759, 825 (2023); *see also id.* at 826 ("The agencies defined what constitutes the public interest in their respective contexts, grounding their definitions in statutory law.").

[32] A half-century ago, Richard Stewart noted both skepticism of "agencies' ability to protect the 'public interest,'" and also "doubt [in] the very existence of an ascertainable 'national welfare,'" as part of a broader decline in "faith in the existence of an objective basis for social choice." Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1683 (1975). *See also* Nikhil Menezes & David E. Pozen, *Looking for the Public in Public Law*, 92 U. CHI. L. REV. 971, 1001 (2025) (noting the difficulty of discerning the public interest given a lack of "consensus on the social or normative fact of the public interest," but emphasizing that "[i]t remains possible to define the public interest in less ambitious, more stipulative terms—for example, as the absence of private self-dealing or as coterminous with the outcome of a cost-benefit analysis or fair procedure" and concluding that "[i]mplicitly, most agencies appear to do just this").

[33] *Compare, e.g.*, Compliance With Statutory Program Integrity Requirements 84 Fed. Reg. 7714, 7777–78 (Mar. 4, 2019) (modifying Title X family planning regulations to provide "clear demarcation between Title X services and abortion-related services," place "an adequate emphasis on holistic family planning," and "ensure transparency"), *with, e.g.*, Ensuring Access to Equitable, Affordable, Client-Centered, Quality Family Planning Services, 86 Fed. Reg. 56144, 56145 (Oct. 7, 2021) (revoking the 2019 rule and citing its "burdensome additional requirements" and "significant negative public health consequences").

and courts conducting judicial review—to hold the agency to account for its (sometimes contestable) understanding of the public interest.

Second, agency statements of the rationales for their rules allow for scrutiny of whether and to what extent rules in fact further their stated purposes. A rule that purports to advance the public interest by saving money will be vulnerable to criticism if it actually saves little money or, worse, if it in fact costs more than it saves.[34] A rule that purports to boost employment is on weaker ground if critics can show that its effects on employment are minimal or even harmful. Similar points hold for rules that are justified by reference to some other social value. When agencies specify what value or values their rules purport to serve, both the public and other institutions can evaluate agency regulatory outputs by reference to those values.

Third, a public interest modality takes certain values off the table. Namely, it seeks to exclude from the rulemaking process what have sometimes been called "naked preferences," defined as "the distribution of resources or opportunities to one group rather than another solely on the ground that those favored have exercised the raw political power to obtain what they want."[35] A public interest modality can be a counterweight to rules that only benefit some narrow subgroup in a way that runs contrary to the public interest. To be sure, rules that are the product of interest group capture can very often be justified through references to the public interest (even if in an attenuated or unpersuasive manner). But a public interest modality at least attempts to take naked preferences off the table as a possible justification for agency rulemaking.

B. Statutory Purposes

Agencies frequently justify their rules as furthering the purposes of the statute that authorized the rulemaking or related legislative provisions. These arguments situate a rule's specific regulatory choices within broader statutory frameworks and congressional policy objectives. The statutory purposes modality does not focus on the legality of an agency action. As noted above, in making legal arguments, agencies largely use the same methods of statutory interpretation as the courts.[36]

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[34] Proposed "public charge" requirements provide an example. *See* Alex Nowrasteh, *Op-Ed: Denying Green Cards to Legal Immigrants Won't Fix the Welfare System—It Will Cost Taxpayers More*, L.A. Times (Aug. 17, 2018), https://www.latimes.com/opinion/op-ed/la-oe-nowrasteh-immigrant-use-of-welfare-20180817-story.html [https://perma.cc/RB6F-PTFL].

[35] Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 Colum. L. Rev. 1689, 1689 (1984).

[36] *See supra* notes 18–20 and accompanying text.

But once the threshold issue of legality is met, the statutory purposes modality involves the agency justifying its exercise of discretion in light of the purpose of the statutory scheme.

The use of statutory purpose arguments to justify agency policy choices reflects the origins of agency power. Agencies themselves are creatures of statute, and each individual rulemaking is an exercise of delegated authority from Congress pursuant to a particular statute.[37] By invoking congressional purposes to justify rules, agencies maintain connection to the authorizing source of law and seek to show how their regulatory choices further Congress's aims.

Agency invocations of statutory purpose come in many forms. Often, agencies invoke statutory purpose to buttress their chosen course of action, explaining why their rules further statutory purpose.[38] In other instances, agencies invoke statutory purpose as a reason for rejecting alternative possible courses of action, explaining why a different approach from the one the agency chose (perhaps one proposed in public comments) would be inconsistent with statutory purpose.[39] While agencies usually focus on a single statutory purpose, at times a rule explains how it furthers multiple statutory purposes[40]

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[37] *See, e.g.*, FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 161 (2000) ("[A]n administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress.").

[38] *See, e.g.*, Securities Whistleblower Incentives and Protections, 76 Fed. Reg. 34300, 34311 (June 13, 2011) (SEC whistleblower rule defining "independent knowledge" in light of how "Congress primarily intended our whistleblower program" to be used and in a manner "consistent with [Congress's] purpose"); Telemarketing Sales Rule, 89 Fed. Reg. 26760, 26776 (Apr. 16, 2024) (FTC telemarketing rule noting that "Congress's purpose in enacting the Telemarketing Act was to prevent deceptive or abusive telemarketing acts or practices" and emphasizing that "recordkeeping provisions prevent deceptive or abusive telemarketing acts or practices because they are necessary to effectively enforce the [rule]").

[39] *See, e.g.*, Transfer of Clean Vehicle Credits Under Section 25E and Section 30D, 88 Fed. Reg. 70310, 70315 (Oct. 10, 2023) (IRS clean vehicle tax credit rule declining to treat transfers to dealers as a transfer for purposes of tax credits, because doing so "would thus frustrate Congress's purpose in enacting" the relevant provision of the Inflation Reduction Act); Community Reinvestment Act, 89 Fed. Reg. 6574, 6597 (Feb. 1, 2024) (FDIC rule implementing the Community Reinvestment Act (CRA) justifying the choice of size threshold for small banks on the grounds that an alternative threshold might "result in less community development activity relative to the current CRA regulations or proposal," which "would be counter to the CRA statute's purposes"); Eligibility To Receive Emergency Financial Aid Grants to Students Under the Higher Education Emergency Relief Programs, 86 Fed. Reg. 26608, 26621 (May 14, 2021) (Department of Education rule implementing CARES Act emergency financial assistance concluding that certain required verification before funds could be distributed "could impose unnecessary delays in distributing funds to students, which would run directly counter to the overriding legislative purpose of this funding," namely "to provide rapid relief to students").

[40] *See, e.g.*, Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. at 64773–76 (Oct. 23, 2015) (EPA rule containing extended discussion of the Clean Power Plan's consistency with the purposes of

or mediates between competing statutory purposes.[41] Agencies often invoke statutory purposes briefly or in passing, but at times a rule will engage in a more detailed and systematic way with the underlying statutory purpose.[42] And at times agencies cite statutory purpose in justifying why they decline to act on a particular issue.[43]

When agencies invoke statutory purpose, they generally do so at a high level of generality. Agencies cite the general purpose of a statute—to create an effective federal program, to encourage or discourage particular private sector activity, and so forth. Agencies rarely refer to statutory purpose in ways that are especially complex. They seldom conduct extensive legislative history analysis. Nor do they usually attempt to discern particular legislative intent with regard to a policy choice at issue. Instead, agencies invoke legislative purpose to show how their policy choices further the statutory scheme that Congress enacted.[44]

Agencies have continued to cite statutory purpose as part of justifying their regulatory actions, even during a purportedly textualist age.[45] The contexts of judicial interpretation and agency rulemaking are not perfectly analogous, since agencies invoke statutory purpose in part to justify how they choose to exercise authority granted to them by statute, whereas courts that invoke legislative purpose typically do so to determine the meaning and scope of statutes in the first instance. Despite this important difference, the criticisms of purpose-focused

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the Clean Air Act, with sections on three distinctive purposes: "protecting human health and welfare," "encouraging pollution prevention," and "advancing technology to control air pollution").

41 *See, e.g.*, Representation—Case Procedures: Election Bars; Proof of Majority Support in Construction Industry Collective-Bargaining Relationships, 89 Fed. Reg. 62952, 62954 (Aug. 1, 2024) (recognizing the National Labor Relations Act's competing goals of "industrial stability and employee freedom of choice").

42 *See, e.g.*, Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. at 64704 (Clean Power Plan discussion of statutory purpose).

43 *See, e.g.*, Kathryn A. Watts, *Proposing A Place for Politics in Arbitrary and Capricious Review*, 119 Yale L.J. 2, 67 (2009) (noting that agencies "tend to explain their denials of rulemaking petitions . . . by referencing the agency's statutory authority [and] the underlying statutory purposes").

44 During the early days of hard look review, some characterized the doctrine as requiring that agencies "show connections between statutory purposes and regulatory policies." Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 Harv. L. Rev. 421, 470 (1987).

45 The rise of statutory textualism displaced purposive arguments for some judges under some circumstances (namely, when text read in context yields a clear result). *See* Jonathan R. Siegel, *The Legacy of Justice Scalia and His Textualist Ideal*, 85 Geo. Wash. L. Rev. 857, 867 (2017). Surveys of lower court judges show that a large majority (thirty-seven of forty-one surveyed) continue to believe purpose is an appropriate tool of statutory interpretation. *See* Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 Harv. L. Rev. 1298, 1327 (2018).

analysis in the statutory interpretation context do seem as though they would also apply (even if perhaps with less force) when agencies invoke purpose in justifying how they exercise their delegated statutory authority. Nonetheless, agencies continue to invoke statutory purpose in justifying their policy choices in rulemakings.

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These first two modalities—the public interest and statutory purpose—mainly concern the *ends* that agencies choose to pursue. But agencies also need to decide the best *means* of advancing particular ends and justify those means relative to alternative means that they could have chosen for accomplishing similar ends. I turn next, therefore, to modalities that concern how agencies justify their chosen means of pursuing their regulatory goals.

C. Instrumental Rationality

Agencies provide logically coherent reasoning to justify their choices of regulatory approach. This modality emphasizes the role of reasons in agency decisionmaking. It is characterized by instrumental rationality, sometimes called means-ends reasoning. It involves an agency explaining why its chosen approach will advance its objectives, why the agency rejected alternative approaches, and why major objections to the agency's preferred course of action are not persuasive. The core feature of this modality is its focus on the internal logic of the agency's reasoning. An agency's explanation need not conclusively demonstrate the objective correctness of its policy choices. Rather, agency decisions must reflect logical analysis of relevant considerations rather than unreasoned preferences.

This modality is closely associated with judicial review under the Administrative Procedure Act's "arbitrary and capricious" standard.[46] The Supreme Court's oft-quoted account of that standard in *Motor Vehicle Manufacturers Association v. State Farm*[47] nicely summarizes the core of what it means for an agency to give a reasoned explanation. In *State Farm*, the Court emphasized that agencies may not "rel[y] on factors which Congress has not intended it to consider, entirely fail[] to consider an important aspect of the problem, [or] offer[] an explanation for its decision that runs counter to the evidence before the agency."[48]

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46 *See* 5 U.S.C. § 706(2)(A).
47 463 U.S. 29 (1983).
48 *Id.* at 43.

Note what this standard does and does not require. Agencies need not show that their decisions are immune from counterarguments, do not involve downsides, or do not pose tradeoffs. But they do have to explain why counterarguments are not persuasive, why the downsides do not warrant declining to issue the rule, and why it views the tradeoffs as worthwhile. In the Court's words, agencies must "articulate a satisfactory explanation for [their] action including a 'rational connection between the facts found and the choice made.'"[49] This is, in essence, a requirement of instrumental rationality.

One frequent component of instrumental rationality in agency decisionmaking is comparison of different possible courses of action to justify the course that the agency chooses. Courts have been somewhat divided on what sorts of comparative analysis is required by the APA.[50] But as a matter of agency practice, agencies often do consider and dismiss alternatives.[51] OMB Circular A-4 instructs agencies, in formulating a regulation, to "consider reasonable regulatory alternatives."[52] In doing so, it specifically directs agencies to consider how their proposed course of action compares to at least one alternative regulatory approach that is more stringent than the agency's preferred course of action, and at least one alternative that is less stringent.[53] An instrumental rationality modality does not entail canvassing the full universe of possible policy interventions, but

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[49] *Id.* (citing Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962)). *See also* Jacob Gersen & Adrian Vermeule, *Thin Rationality Review*, 114 Mich. L. Rev. 1355, 1358 (2016) (arguing that arbitrary and capricious review only applies to "genuinely ungrounded agency decisionmaking, in the sense that the agency cannot justify its action even as a response to the limits of reason"); Louis J. Virelli III, *Deconstructing Arbitrary and Capricious Review*, 92 N.C. L. Rev. 721, 738 (2014) (dividing arbitrary and capricious review into "the first-order grounds of record building, reason giving, input quality, and research scope, and the second-order grounds of relevant factors and rational connection").

[50] *See* Gersen & Vermeule, *supra* note 49, at 1389 ("[A]lthough both *State Farm* and successor cases explicitly repudiate the idea that agencies must consider all feasible policy alternatives, many judges act as though there is such an obligation, often without quite saying so."); *see also* Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 646 (1990) ("If agency action may be disturbed whenever a reviewing court is able to point to an arguably relevant statutory policy that was not explicitly considered, then a very large number of agency decisions might be open to judicial invalidation.").

[51] *See* Christopher Carrigan & Stuart Shapiro, Admin. Conf. of the U.S., Developing Regulatory Alternatives Through Early Input 3 (2021) ("[I]n practice, agencies almost universally engage in developing and considering alternatives, particularly for complex and novel rulemakings.").

[52] Off. of Mgmt. & Budget, Exec. Off. of the President, Circular A-4 at 21 (2023), https://www.whitehouse.gov/wp-content/uploads/2023/11/CircularA-4.pdf [https://perma.cc/HE9C-UH7V] [hereinafter Circular A-4].

[53] *See id.*

agencies often decide that one way to justify a given policy choice is by arguing that it is superior to reasonable alternative approaches.

An instrumental rationality modality serves several purposes. Each is keyed to a different actor: The modality has advantages from the standpoint of promoting a rigorous agency decisionmaking process, developing a record for judicial review of agency action, and enabling public accountability for agency choices.

For agencies themselves, an expectation that they will justify their rules in means-ends terms prompts them to undertake analysis of various policy alternatives and their likely effects. This looks different depending on the substantive domain, but an expectation of instrumental rationality typically prompts agencies to consider a range of possible policy interventions to solve a given problem, and to weigh the advantages and disadvantages of different approaches. In this sense, the instrumental rationality modality can be a counterweight to rushed or sloppy decisionmaking. (It also helps elevate the role of technical expertise, a point I return to below.[54])

For courts, the expectation of reasoned explanation facilitates judicial review of agency action.[55] Meaningful judicial review requires a record; a court cannot evaluate whether a rule is arbitrary and capricious without information about the agency's process and reasoning.[56] A rule that opts for one regulatory policy over another may or may not be arbitrary and capricious; making that determination requires more than knowing the bottom-line regulatory mandate that the agency intends to impose. Courts, in short, need explanation in order to engage in hard look review.

For the public, reasoned explanation can facilitate accountability. To be sure, many rulemakings fall beneath the public radar, and the rationales for most agency rulemakings do not facilitate meaningful public accountability. But in select cases, seeing an agency's reasoning can play a role in promoting accountability, whether to the voters or to Congress.[57]

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54 *See infra* Section I.D.

55 Kathryn E. Kovacs, *Rules About Rulemaking and the Rise of the Unitary Executive*, 70 Admin. L. Rev. 515, 545 (2018) ("When the Supreme Court opened the door to pre-enforcement review under the hard-look standard in the 1960s and 1970s, the purpose of the [APA's] 'concise general statement' shifted from informing the public to enabling judicial review.").

56 *See* 5 U.S.C. § 706 (providing that "[i]n making the foregoing determinations [including under the arbitrary and capricious standard], the court shall review the whole record or those parts of it cited by a party").

57 *See, e.g.*, Benjamin Eidelson, *Reasoned Explanation and Political Accountability in the Roberts Court*, 130 Yale L.J. 1748, 1752 (2021) (arguing that under an "emerging model" of arbitrary and capricious review, "ensuring robust political accountability is *itself* a central

D. Technical Expertise

A related modality involves an agency appealing to specialized knowledge and empirical evidence drawn from technical, scientific, economic, social scientific, or other data that bears on the problem before it. Engaging in the sort of instrumental rationality just described typically requires empirical data of one sort or another. The technical facts that agencies invoke come in many forms, ranging from climate change studies to consumer product safety tests, from labor market economics to healthcare data. Invoking technical expertise helps ground agency decisions in empirical facts about the world.[58]

Technical expertise plays a central role in nearly every sort of major rulemaking. EPA rules concerning greenhouse gas emissions draw heavily from environmental science about the effects of global warming.[59] Department of Transportation rules on automobile safety draw on data from its own testing of different safety features.[60] Rules governing the labor market draw on scholarly literature in economics.[61] And so forth. Across agencies and subject-matter areas, technical expertise of one sort or another informs agency rulemakings.

Some regulatory statutes mandate that agencies make use of technical expertise. The general grant of rulemaking authority to the Securities and Exchange Commission requires that it consider "whether [its] action will promote efficiency, competition, and capital formation"[62]—determinations that are impossible without economic analysis. The Endangered Species Act mandates that the endangered species listing determinations must be made "solely on the basis of the best scientific and commercial data available."[63] The Toxic Substances Control Act likewise provides that "to the extent that the [EPA] Administrator makes a decision based on science, the Administrator

concern of arbitrariness review, alongside (or perhaps ahead of) ensuring the substantive soundness or political neutrality of agency decisions").

58 Many have argued that even seemingly technocratic sources of knowledge contain within them normative assumptions that render the search for a strictly technocratic mode of policy analysis a futile one. I here take no position on these debates, which largely echo fundamental questions in the philosophy of science. *See generally* Guy Axtell, Objectivity (2015); Theodore M. Porter, Trust in Numbers: The Pursuit of Objectivity in Science and Public Life (2020).

59 *See, e.g.*, Nat'l Ctr. for Env't Econ., Env't Prot. Agency, Report on the Social Cost of Greenhouse Gases (2023) (EPA estimates of the social cost of greenhouse gasses, relying heavily on climate models).

60 *See* sources cited *infra* note 70.

61 *See, e.g.*, Non-Compete Clause Rule, 89 Fed. Reg. 38342, 38372–74 (May 7, 2024) (FTC rule describing the analytical framework it applied in assessing empirical evidence).

62 15 U.S.C. § 77b(b).

63 16 U.S.C. § 1533(b)(1)(A).

shall use scientific information, technical procedures, measures, methods, protocols, methodologies, or models, employed in a manner consistent with the best available science[.]"[64] In these and other instances, agencies develop and deploy technical expertise because they are required to do so by statute.

The executive branch has also promulgated more general guidance that makes technical expertise central to agency decisionmaking, beyond particular statutory mandates. Executive Order 12866, which has governed the regulatory process for decades under presidents of both parties, requires agencies to base regulatory "decisions on the best reasonably obtainable scientific, technical, economic, and other information concerning the need for, and consequences of, the intended regulation."[65] Circular A-4 directs agencies that "analysis should be credible, objective, realistic, and scientifically balanced."[66] It further counsels that agencies should "provide documentation that the analysis reflects the highest quality evidence . . . and analytical methods[.]"[67] Consistent with these directives, reliance on technical information is often at the core of regulatory analysis.

The technical expertise modality has several components, all focused on agencies obtaining and evaluating the necessary data to make informed decisions. Agencies canvass existing scholarly literature in search of data relevant to a policy problem at hand.[68] Agencies often receive empirical data in the course of the notice-and-comment process, which purport (sometimes persuasively, sometimes not) to show the likely effects of proposed policy interventions.[69] Agencies at times conduct original analysis or studies of their own, when existing data is insufficient to make well-informed policy decisions.[70]

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64 15 U.S.C. § 2625(h).

65 Exec. Order No. 12,866, 58 Fed. Reg. 51735, 51736 (Sept. 30, 1993).

66 Circular A-4, *supra* note 52, at 68.

67 *Id.* at 84.

68 *See, e.g.*, Nat'l Ctr. for Env't Econ., *supra* note 59, at 1 (indicating that the EPA's report reflected "recent advances in the scientific literature on climate change and its economic impacts").

69 For a critical view, see Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 Duke L.J. 1321, 1327 (2010) (documenting how "administrative law's utter inability to recognize and address information excess—its filter failure—significantly undermines its ability to ensure administrative accountability in certain areas of regulation").

70 In some instances, agencies conduct research about the content and likelihood of particular regulatory effects. *See, e.g.*, Office of Regulatory Analysis and Evaluation, Nat'l Highway Traffic Safety Admin., FMVSS No. 226: Ejection Mitigation 11 (2011) (describing the results of NHTSA testing of how various automobile design choices bear on outcomes in rollover and certain side crashes); Nat'l Highway Traffic Safety Admin., U.S. Dep't of Transp., DOT HS 811 512, Vehicle Rearview Image Field of View and Quality Measurement (2011) (describing methodology for and results of NHTSA tests of rear visibility technology as part of the process of formulating a rule on the topic). In other

In all of these instances, agencies must use their expertise to assess the data before them. How reliable is the data that the agency possesses? Are there disagreements about the facts? Are the facts likely to be stable, or to change over time? What uncertainties remain, and how should those be dealt with in policymaking? The technical expertise modality entails agency engagement with these and other questions about the empirical facts relevant to a given rulemaking.[71]

A technical expertise modality helps guard against policymaking based on instincts or ideology. Agencies should justify rulemakings by explaining the anticipated effects of their actions. Doing so requires that agencies deploy technical evidence to determine the likely impacts of a given rule. To be sure, rulemaking (like policymaking of any sort) is an inherently value-laden enterprise, and technical expertise cannot substitute for political or moral judgment. For this reason, technical expertise alone cannot dictate the proper course of action for an agency to follow. Nonetheless, technical expertise is a central part of agency rulemakings.

E. Implementation Considerations

This modality focuses on practical implementation concerns and real-world consequences of regulatory choices. It emphasizes workability, including the feasibility and costs of compliance, agency enforcement resources, and intersections of new rules with existing regulatory frameworks. Implementation considerations represent a distinct mode of regulatory reasoning, focused on how the demands of regulations intersect with facts on the ground, including the institutional capacity of regulated parties. A pragmatic understanding of how a rule would operate in practice is a central part of agency reasoning.

The virtues of agencies accounting for implementation stem from the reality of a complex society and economy. Regulations might be less effective in producing desirable outcomes or might have negative effects if regulatory design is not attentive to real-world issues of how the regulation would in fact operate on the ground. If agencies are to make sound policy, they must account for these sorts of pragmatic considerations.

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instances, agencies generate data as part of the process of monetizing regulatory effects. *See* CIRCULAR A-4, *supra* note 52, at 37 ("It is often helpful to collect timely, case-specific data on revealed preference or stated preference values to support regulatory analysis.").

[71] This technical expertise modality relates to the instrumental rationality modality, in that the agency's use of technical data need not be unassailable but rather must engage with the relevant evidence in a reasonable and defensible way.

Many of Circular A-4's provisions can be understood as directing agencies toward considering implementation. Circular A-4 directs agencies, in analyzing the likely effects of their regulations, to consider a range of policy design choices geared toward ensuring the rule meets its objectives without causing unnecessary negative effects in practice. For example, it instructs agencies to consider the impact of different possible effective dates for regulatory provisions,[72] different possible methods to promote compliance by regulated entities,[73] the differential impacts of regulatory requirements on larger versus smaller regulated entities,[74] the differential impacts of regulation by geography,[75] and the possibility of either under- or over-compliance with a regulation in practice.[76] More generally, Circular A-4 emphasizes "the important task of matching underlying problems to the regulatory action that is best designed to address those problems."[77] Each of these provisions counsels agencies to be attentive to implementation-related concerns when making rules.

Nearly every agency rulemaking discusses practical considerations. The Department of Labor's overtime rules considered the costs to employers of updating their payroll systems.[78] The Department of Housing and Urban Development, in establishing a fair housing planning process, was attentive to the potential burdens of that process on municipalities.[79] The Department of Transportation, in mandating auto safety improvements, at times establishes phased-in compliance

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72 CIRCULAR A-4, *supra* note 52, at 23 (providing examples of instances in which "[t]he compliance dates of a regulation may have an important effect on its net benefits").

73 *Id.* (noting the differential effects of different sorts of reporting, monitoring, and enforcement choices).

74 *Id.* at 24 (directing agencies to "consider assessing different requirements for large and small firms (or other entities), basing the requirements on estimated differences in the anticipated costs of compliance and in the anticipated benefits").

75 *Id.* (directing agencies to "consider assessing the consequences of setting different requirements for the different regions" when "there are significant regional variations in [a regulation's] benefits or costs").

76 *Id.* at 53 (directing agencies to "endeavor to clearly present any key assumptions about compliance with a regulation" and noting that "[a]ssuming full compliance may be inappropriate when available evidence suggests imperfect compliance is likely").

77 *Id.* at 26.

78 *See* Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees, 89 Fed. Reg. 32842, 32909 (Apr. 26, 2024) (considering "costs on establishments by requiring them to evaluate the exemption status of employees, update and adapt overtime policies, notify employees of policy changes, and adjust their payroll systems").

79 *See* Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42272, 42351 (July 16, 2015) (noting that "HUD has taken additional steps to reduce burden on entities that are small in size or may, notwithstanding size, have less capacity to perform the assessment of fair housing as provided in the rule").

schedules to provide time for automobile companies to adjust their manufacturing processes.[80] Like these examples, nearly every rulemaking contains, in some form or another, express attention to pragmatic issues regarding implementation.

It is always prudent for agencies to consider implementation in rulemaking, because the virtues or vices of a regulation depend on how the regulation in fact operates on the ground. But accounting for implementation-related considerations can sometimes be difficult. Agencies may lack reliable sources of information about the costs of implementation.[81] Or, even if present information is reliable, agencies may struggle to project how implementation will proceed in the future.[82] These points do not undermine the importance of implementation-related analysis as a modality, but they do highlight the difficulty of applying this modality in practice.

F. Cost-Benefit Analysis

Regulatory cost-benefit analysis is a final type of justification that agencies offer for their rulemakings. Cost-benefit analysis typically incorporates several of the modalities already discussed: A high-quality cost-benefit analysis takes into account the public interests that the rule will advance, technical information, and implementation-related considerations.[83] But cost-benefit analysis is a distinctive methodology that, in the context of the U.S. regulatory process, comes with its own set of standards and norms concerning what constitutes persuasive reasoning.

Cost-benefit analysis, as its name suggests, involves examining the benefits and costs of a proposed policy.[84] As practiced by federal agencies, cost-benefit analysis involves identifying all of the benefits and costs of a regulation, expressing those benefits and costs in monetized terms, and subtracting total costs from total benefits to calculate the

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[80] *See, e.g.*, Federal Motor Vehicle Safety Standards; Rear Visibility, 79 Fed. Reg. 19178, 19181 (Apr. 7, 2014) (noting that the "final rule establishes a flexible phase-in schedule that affords the manufacturers the maximum amount of time permitted by the [statute] to achieve full compliance").

[81] *See* Art Fraas, Elizabeth Kopits & Ann Wolverton, *A Review of Retrospective Cost Analyses*, 17 Rev. Env't Econ. & Pol. 22, 29 (2023) ("[C]ompliance strategies differed from ex ante expectations for 10 of the 13 [EPA] rules in our sample.").

[82] *See id.* at 34 ("EPA frequently bases its ex ante cost estimates on commercially available control technologies even when more cost-effective alternatives are under development or the regulation is expected to spur innovation.").

[83] Circular A-4, *supra* note 52, at 51.

[84] This and the following several paragraphs summarize discussion in an earlier article on how and why agencies use cost-benefit analysis. *See* Jonathan S. Gould, *Cost-Benefit Analysis in Polarized Times*, 75 Admin. L. Rev. 695, 702–10 (2023).

regulation's "net benefits." Agencies then use that net benefits figure to argue that their proposed regulatory interventions are net beneficial relative to a baseline, typically the status quo without the regulatory change. Agencies also at times use the net benefits figure to argue that their proposed interventions are superior to other possible regulatory choices.

Cost-benefit analysis is a central part of the justification for many important agency rulemakings. Many rules include a lengthy section in which agencies describe, monetize, and compare all of the rule's anticipated benefits and costs. In doing so, agencies draw on their own technical expertise, insights from academic research, and any relevant public comments. A high-quality cost-benefit analysis includes the full range of benefits and costs (both direct and indirect), accounts for any uncertainty that may exist with regard to the likelihood or magnitude of those benefits and costs, and conducts sensitivity analysis to assess the impact of changes in assumptions on the results of the analysis.

Agencies conducting cost-benefit analysis often encounter difficult conceptual and practical questions. Extensive scholarly literature—and executive branch guidance—covers topics as diverse as how agencies should go about monetizing the diverse range of regulatory effects, how to account for any effects that cannot or should not be monetized, whether and how to account for the distributional effects of a regulation, whether and how to account for regulatory impacts on future generations, and whether and how to account for regulatory impacts outside the country.[85] The agencies that conduct the most major rulemakings have developed considerable internal capacity for tackling these and other difficult questions that arise in the course of regulatory analysis.[86]

There are two primary forces pushing agencies to perform cost-benefit analysis. The first and most straightforward is internal to the executive branch: Agencies perform cost-benefit analysis because the White House requires them to do so for some rules. Executive orders by presidents of both parties have directed agencies to conduct cost-benefit analysis,[87] and internal executive branch documents have provided

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[85] *See id.* at 765–81 (discussing each of these issues).

[86] *See, e.g.*, *Overview of Economic Analysis at the EPA*, Env't Prot. Agency (Jan. 3, 2025), https://www.epa.gov/environmental-economics/overview-economic-analysis-epa [https://perma.cc/V5TP-Q963] (describing the role of economic analysis at EPA and the work of the agency's Science Advisory Board and Clean Air Act Advisory Committee).

[87] The most important of those executive orders, which as of this writing has been in effect for over three decades, is the Clinton Administration's Executive Order 12,866. *See* Exec. Order No. 12,866, 58 Fed. Reg. 51735, 51736 (Sept. 30, 1993) ("Each agency shall assess both the costs and the benefits of the intended regulation and . . . propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs."). *See also* Gould, *supra* note 84, at 701 n.25 (citing sources).

guidance on the details of what cost-benefit analysis should entail.[88] One of the roles of the Office of Information and Regulatory Affairs (OIRA), which is housed within the White House, is to oversee and enforce these cost-benefit mandates.[89] The second reason for agencies to perform cost-benefit analysis is a fear that failing to do so may make their rules vulnerable in litigation. Courts have at times scrutinized an agency's treatment of benefits and costs as part of arbitrary and capricious review, and in other instances courts have read cost-benefit requirements into statutes authorizing agency action.[90] The desire to safeguard rules from litigation therefore pushes agencies toward cost-benefit analysis.

It would be easy to assume from legal academic discourse that cost-benefit analysis is the hegemonic modality of agency decisionmaking.[91] This would be a mistake. While most of the highest-profile rulemakings feature a cost-benefit analysis, a large majority of overall federal rulemakings do not.[92] The reasons for this vary. Sometimes agencies

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[88] *See* Circular A-4, *supra* note 52, at 27–85 (cost-benefit analysis guidance applying to the entire executive branch). Some agencies have also issued their own internal guidance documents on cost-benefit analysis. *See, e.g.*, Nat'l Ctr. for Env't. Econ., Env't Prot. Agency, Guidelines for Preparing Economic Analyses (2014), https://www.epa.gov/sites/default/files/2017-08/documents/ee-0568-50.pdf [https://perma.cc/CU87-HWJR].

[89] *See* Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 Harv. L. Rev. 1838, 1865 (2013) (noting that cost-benefit mandates "certainly are an important part of interagency review and an enduring feature of OIRA's own role").

[90] *See* Gould, *supra* note 84, at 757–61 (discussing case law on cost-benefit analysis). The merits of the courts' approach to cost-benefit analysis are beyond my scope here.

[91] For decades, legal scholarship has featured exhaustive discussion of the virtues and vices of the method. Major contributions include (but are not limited to) Frank Ackerman & Lisa Heinzerling, Priceless: On Knowing the Price of Everything and the Value of Nothing (2004); Richard L. Revesz & Michael A. Livermore, Retaking Rationality: How Cost-Benefit Analysis Can Better Protect the Environment and Our Health (2008); Cass R. Sunstein, The Cost-Benefit Revolution (2018); Matthew D. Adler & Eric A. Posner, *Rethinking Cost-Benefit Analysis*, 109 Yale L.J. 165 (1999); John D. Graham, *Saving Lives Through Administrative Law and Economics*, 157 U. Pa. L. Rev. 395 (2008); Steven Kelman, *Cost-Benefit Analysis: An Ethical Critique*, 5 Regulation 33 (1981); Lewis A. Kornhauser, *On Justifying Cost-Benefit Analysis*, 29 J. Legal Stud. 1037 (2000).

[92] Gould, *supra* note 84, at 716 (citing OMB data showing that a large majority of rules are issued without a formal cost-benefit analysis). Moreover, the method is to some degree manipulable, in that agencies may be able to change parameters and modeling assumptions to support conclusions that they prefer. *See* Amy Sinden, *In Defense of Absolutes: Combating the Politics of Power in Environmental Law*, 90 Iowa L. Rev. 1405, 1409–10 (2005) (arguing that "CBA is indeterminate, both because of intractable theoretical difficulties (like wealth effects and discount rates) and because of practical problems (like inadequate data and scientific uncertainty)"). *But see* Jonathan S. Masur, *Regulatory Oscillation*, 39 Yale J. on Reg. 744, 760 (2022) (noting that the first Trump Administration "could not make the costs of . . . [various] Obama-era regulations exceed their benefits," and arguing that "[t]o some degree, then, cost-benefit analysis is robust to even the most aggressive attempts to manipulate it").

simply do not comply with executive branch directives, whether for principled reasons or because of lack of capacity.[93] Some statutes authorize rulemakings but bar agencies from conducting cost-benefit analysis or require an alternative standard for choosing between regulatory alternatives.[94] In other instances, agencies might claim to be compelled by law to choose one regulatory policy over another, even if the policy it favors would fare poorly on a cost-benefit analysis.[95] For other rules still, an agency might conclude that a key regulatory effect cannot or should not be monetized and that traditional cost-benefit analysis is therefore not possible or prudent.[96] And for a subset of rules, often called "transfer rules" because they involve the direct transfer of resources from one party to another, agencies have historically not conducted cost-benefit analysis.[97]

These examples show that despite the dominance of cost-benefit analysis in some scholarly discourse about rulemakings, the method is far from the only means through which agencies seek to justify their regulatory decisions. Cost-benefit analysis is a central modality of

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93 *Cf.* Alex Acs, *Presidential Directives in a Resistant Bureaucracy*, 41 J. PUB. POL. 776, 789–93 (2021) (empirical analysis of agency compliance rates with Executive Order 12,866).

94 *See, e.g.*, Endangered Species Act of 1973, Pub. L. No. 93-205, § 7, 87 Stat. 884, 892 (1973) (directing that agencies take "action necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered species"); *see also* Tenn. Valley Auth. v. Hill, 437 U.S. 153, 184 (1978) ("The plain intent of Congress in enacting [the ESA] was to halt and reverse the trend toward species extinction, whatever the cost. This is reflected not only in the stated policies of the Act, but in literally every section of the statute.").

95 The first Trump Administration reported that its repeal of the Clean Power Plan (CPP) "would produce costs well in excess of benefits" and "also offered a variety of different options involving partial repeals of the CPP—all of those options failed a cost-benefit test as well." Jonathan S. Masur & Eric A. Posner, *Chevronizing Around Cost-Benefit Analysis*, 70 DUKE L.J. 1109, 1123 (2021). Ultimately, the Trump Administration made a statutory argument (rather than a cost-benefit argument) to justify its repeal of the CPP. *See* Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions From Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations, 84 Fed. Reg. 32520, 32523 (July 8, 2019) ("Because the CPP significantly exceeded the Agency's authority, it must be repealed.").

96 *See, e.g.*, Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42272, 42349 (July 16, 2015) ("[M]ost of the [rule's] positive impacts entail changes in equity, human dignity, and fairness . . . . Since the rule primarily results in such unquantifiable impacts, it is appropriate to consider many of its effects in qualitative terms.").

97 *See* Sunstein, *supra* note 89, at 1869 (noting that "agencies do provide Regulatory Impact Analyses for budgetary transfer rules, but they typically outline only the budgetary costs and do not discuss social costs and benefits"); Clinton G. Wallace, *Centralized Review of Tax Regulations*, 70 ALA. L. REV. 455, 458–59 (2018) (noting that OMB "has generally been content to view tax regulations as addressing 'transfer payments,' a category of government action that OMB's oversight framework exempts from cost-benefit analysis").

agency decisionmaking, but it exists alongside the other modalities and is at times in tension with them.

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Agency rulemaking is a distinctive genre, and this Part has sought to explain the types of arguments that agencies offer to justify their rules. Understanding the modalities sheds light on the types of arguments that agencies deploy, and that citizens, other public officials, and courts can critically evaluate. Yet there are also broader lessons to be drawn from the modalities, and I turn to those lessons next.

II
How the Modalities Interact

How do the rulemaking modalities interact with each other in practice? The answer varies by rule, but broadly speaking there are two possibilities: Multiple modalities might be complementary, or they might be in tension with one another.

A. Complementarity

The rulemaking modalities often complement one another. Agencies will typically deploy multiple modalities, sometimes even all of them, to justify a particular rule. Agencies have obvious incentives to argue that multiple modalities each justify the same policy choice. The ideal of complementarity does not mean that different modalities do not play distinctive roles; to the contrary, different modalities might play different but mutually reinforcing roles. When this occurs, the modalities are complementary.[98]

One way in which the modalities can complement each other is with regard to the goal of a rulemaking. Agencies will often define the particular public interest that they seek to advance and also argue that underlying statutory purposes support their pursuit of that interest. This move links the first two modalities: Agencies pursue the public interest not only as they or the White House understand it, but also in a way that is consonant with solving the problems that the statute seeks to address.

The instrumental rationality modality often requires reference to several of the other modalities. If an agency ignores relevant technical considerations or relies on bad science, that failure can render the

[98] This use of multiple modalities to justify the same result parallels how courts use the modalities of constitutional interpretation. *See* Fallon, *supra* note 4, at 1193 ("Typically, legal arguments—including those of judicial and even Supreme Court opinions—find the best arguments in all of the categories to support, or at least not to be inconsistent with, a single result.").

rule arbitrary and capricious.[99] Similarly, if an agency issues a rule without what courts deem to be sufficient regard to the logistics of implementation, that too can cause courts to vacate the rule as arbitrary and capricious.[100] Reasonable explanation has its own independent content—in terms of considering implications of one policy choice as compared to others—but issuing a reasonable explanation often requires reference to one or more other modalities.

Instrumental rationality and cost-benefit analysis can also complement each other. The two are different, in that instrumental rationality focuses on argument, whereas cost-benefit analysis focuses on quantification. But they can be mutually supportive in important instances. The instrumental rationality modality frequently involves agencies explaining why their preferred approach is superior to alternative possible regulatory interventions. Cost-benefit analysis can at times provide an answer: If alternative regulatory approaches can be shown to have lower net benefits than the approach favored by the agency, that fact can be a basis for explaining why the agency chose the course of action that it did.[101]

Another point of complementarity involves the relationship between technical expertise, implementation-related considerations, and cost-benefit analysis. Agencies can and sometimes do rely on technical expertise outside of a cost-benefit framework, as in the case of rules that concern scientific topics but do not employ cost-benefit analysis.[102]

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99 *See* Emily Hammond Meazell, *Super Deference, the Science Obsession, and Judicial Review as Translation of Agency Science*, 109 MICH. L. REV. 733, 749 (2011) ("[I]f an agency actually does ignore important studies, rely on seriously flawed methodology, or reach a conclusion that seems at odds with the relevant science, and it fails to explain itself in a reasoned manner, it may well face a remand." (emphasis omitted)); *cf.* Wendy E. Wagner, *The "Bad Science" Fiction: Reclaiming the Debate Over the Role of Science in Public Health and Environmental Regulation*, 66 LAW & CONTEMP. PROBS. 63, 72 (2003) ("[D]espite the thousands of public health and safety regulations promulgated annually, there are surprisingly few examples of EPA using unreliable science or using science inappropriately to support a final regulation.").

100 *See, e.g.*, Nat'l Parks Conservation Ass'n v. EPA, 788 F.3d 1134 (9th Cir. 2015) (vacating an EPA regional haze regulation in light of several alleged failures of the agency to consider the logistics of implementation).

101 *See* Regulatory Planning and Review, Exec. Order No. 12,866, 3 C.F.R. 638, 639 (1994) ("[I]n choosing among alternative regulatory approaches, agencies should select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity), unless a statute requires another regulatory approach.").

102 *See, e.g.*, Endangered and Threatened Wildlife and Plants; Endangered Species Status for the Dunes Sagebrush Lizard, 89 Fed. Reg. 43748, 43758 (May 20, 2024) (Endangered Species Act rule reviewing scientific literature but declining to conduct cost-benefit analysis because "the Act does not allow us to consider the economic impacts of a listing"); Irradiation in the Production, Processing and Handling of Food, 79 Fed. Reg. 20771 (Apr. 14, 2014) (FDA rule evaluating scientific literature but never discussing cost-benefit analysis).

Similarly, agencies can and sometimes do invoke implementation-related considerations outside of a cost-benefit framework. Congress at times mandates that agencies issue rules complying with particular standards, like "lowest achievable emissions rate."[103] This language requires that the agency consider implementation-related considerations but does not call for cost-benefit analysis.[104]

Many major rulemakings invoke multiple modalities, often in complementary ways. To see these complementarities in action, consider the EPA's first ever rule regulating per- and polyfluoroalkyl substances (PFAS) in drinking water.[105] The rule invoked all six of the modalities discussed in Part I. It emphasized that regulating PFAS was in the *public interest*, given the known adverse health effects that can result from PFAS exposure.[106] While *statutory purpose* did not play a large role in the rulemaking, the EPA did reference the statute's objective of protecting public health in justifying its rule.[107] The agency engaged in *instrumental rationalization* to justify its choice, including by conducting extensive factfinding on each of the various chemicals with respect to each of the three relevant statutory factors, responding to public comments on each of those factors, and proposing tailored approaches to each chemical.[108] The rulemaking is suffused with *technical information*, with the EPA relying heavily on insights from toxicology, chemistry, environmental science, and public health to assess the risks posed by PFAS and to develop appropriate regulatory limits.[109] The details of the rule accounted for *implementation-related considerations*, as evident from the EPA's general characterization of its approach in

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103 42 U.S.C. §§ 7501(3), 7503(a)(2).

104 *See* United States v. EME Homer City Generation, L.P., 727 F.3d 274, 280 n.6 (3d Cir. 2013) (noting that under the Clean Air Act, "[i]n nonattainment areas, sources are required to attain the lowest achievable emission rate," which "requires sources to use whatever technology achieves the lowest emission rate contained in a [state implementation plan] or possible in practice, regardless of costs").

105 PFAS National Primary Drinking Water Regulation, 89 Fed. Reg. 32532 (Apr. 26, 2024).

106 *See id.* at 32532 ("The EPA is establishing drinking water standards for six PFAS in this [National Primary Drinking Water Regulation] to provide health protection against these individual and co-occurring PFAS in public water systems."); *see also id.* at 32539–605 (providing extensive detail on health benefits of the rule).

107 *See id.* at 32532 ("[T]he state of the science and information has sufficiently advanced to the point to satisfy the statutory requirements and fulfill [the Safe Drinking Water Act's] purpose to protect public health . . . .").

108 *See id.* at 32544–62.

109 *See id.* (providing relevant data with respect to each PFAS chemical); *see also id.* at 32532 (noting that the EPA's rule "represents data-driven drinking water standards that are based on the best available science"); *id.* at 32534–35, 32543, 32564 (emphasizing that the EPA based its analysis on peer-reviewed studies).

pragmatic terms[110] and its specific accounting for pragmatic concerns with respect to implementation timelines.[111] And the agency justified its rule with an extremely detailed *cost-benefit analysis*, which took into account regulatory impacts that could and could not be monetized.[112] These modalities operated in parallel, but they also complemented one another: The agency's view of the public interest was reinforced by the statutory purpose, the cost-benefit analysis relied on the presented technical information, the technical information was used to support the EPA's view of the public interest, and so forth.

This brief example shows that the modalities often reinforce one another. In many instances, the various modalities will work in parallel. Together, they can help motivate rulemakings, justify the agency's approach, and rebut possible concerns. This harmonious story will often accurately describe how agencies go about conducting rulemakings, and certainly agencies will rarely overtly acknowledge that different modalities point toward different outcomes. But at times the story is not so neat, and the modalities will be in tension with one another. I turn to that scenario next.

B. Tensions

The rulemaking modalities are not always complementary. Sometimes, one modality will point toward one regulatory approach, and a different modality will point toward another. How should agencies navigate these sorts of tensions? When the modalities point in opposing directions, which should take priority?

To motivate these questions, consider the following examples of tensions between modalities that sometimes exist:

- *Statutory purpose and cost-benefit analysis*. There will sometimes be a tradeoff between most fully advancing statutory purposes and pursuing the course of action that maximizes net benefits under a cost-benefit analysis.[113]

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110 *See id.* at 32568, 32570 (describing the EPA's "Hazard Index approach" as "the most practical approach for establishing an MCLG for PFAS mixtures that meets the statutory requirements").

111 *See id.* at 32618 (finding that "it is practicable for all systems to complete their initial monitoring within three years" and that "[r]equiring water systems to conduct initial monitoring within the three years following rule promulgation will ensure public health protection as soon as practicable"); *see also id.* at 32632–33 (including a detailed discussion of implementation timelines).

112 *See id.* at 32652–719 (presenting the results of the agency's cost-benefit analysis).

113 Scholars have often emphasized this potential tension. *See, e.g.*, Martin Shapiro, *APA: Past, Present, Future*, 72 VA. L. REV. 447, 469 (1986) ("Narrow conceptions of cost-benefit analysis ought not excuse failures to implement statutory purposes fully.").

- *Statutory purpose and implementation-related considerations*. The rule that would most fully advance a statute's purpose might be in tension with implementation-related considerations, such as the likelihood of imperfect compliance by regulated entities or limited agency resources for monitoring and enforcement.
- *The public interest and cost-benefit analysis*. Cost-benefit analysis measures preferences, not well-being;[114] it struggles to fully capture the regulatory effects of some types of regulations;[115] and it has historically declined to take into account distributional considerations.[116] For these reasons, cost-benefit analysis could at times be unhelpful or an impediment to advancing an agency's view of the public interest.
- *Technical expertise and implementation-related considerations*. While technical analysis might suggest an optimal regulatory approach, a focus on practical implementation constraints may point toward a different course of action.

There are two basic approaches to navigating these and other tensions between modalities: Agencies could establish a hierarchy of modalities, or they could attempt to harmonize between the modalities. I consider each approach in turn.

First, agencies could mediate tensions between the modalities by establishing a hierarchy governing which modalities should take priority when they are in conflict. In the constitutional law context, for example, Richard Fallon has argued that in instances of serious tensions between different interpretive approaches, "categories of argument are assigned a hierarchical order in which the highest ranked factor clearly requiring an outcome prevails over lower ranked factors."[117] In the constitutional law context, Fallon suggests that "the implicit norms of our constitutional practice accord the foremost authority to arguments from text, followed, in descending order, by arguments concerning the

114 *See* John Bronsteen, Christopher Buccafusco & Jonathan S. Masur, *Well-Being Analysis vs. Cost-Benefit Analysis*, 62 Duke L.J. 1603 (2013) (arguing for agency reliance on well-being analysis and contending that it improves upon the shortcomings of cost-benefit analysis).

115 *See* Thomas O. McGarity, *A Cost-Benefit State*, 50 Admin. L. Rev. 7, 72 (1998) ("Virtues like altruism, dignity, equity, fairness . . . , decency, mutuality, tolerance, and empathy . . . are belittled or ignored entirely in a cost-benefit regulatory regime in which allocative efficiency is the only goal.").

116 *See* Richard L. Revesz & Samantha P. Yi, *Distributional Consequences and Regulatory Analysis*, 52 Env't L. 53, 55 (2022) (noting that efforts to incorporate distributional analysis into regulatory analysis "cannot be regarded as anything other than a failure").

117 Fallon, *supra* note 4, at 1193. Fallon emphasizes that courts will usually be able to achieve "coherence" between methods and it is only "the rare case in which coherence proves unattainable and the hierarchy governs." *Id.* at 1246.

framers' intent, constitutional theory, precedent, and moral and policy values."[118] This line of reasoning suggests the question of whether a similar hierarchy could be justified in the rulemaking context—or, perhaps, whether one already implicitly exists as a matter of agency practice.

As a descriptive matter, there is no consistent hierarchy that agencies use to resolve tensions between different rulemaking modalities. Nor, as a normative matter, would such a hierarchy necessarily be desirable. Each of the rulemaking modalities contributes something important to agency decisionmaking. To create a rigid hierarchy among the modalities would necessarily require ranking them in ways that implicate deep questions about the nature of administrative power. Should the administrative state primarily be a vehicle for agencies to pursue the understandings of the public interest embodied in executive branch priorities and congressional purposes? Or should it be understood mainly as a more technocratic branch, devoted to rational decisionmaking in light of evidence? The former approach would privilege the public interest and statutory purposes modalities; the latter approach would privilege the cost-benefit and implementation modalities. Because generating a firm hierarchy of modalities would require settling on a theory about the basic character of the administrative state, no hierarchy could be created without considerable theorizing on fundamental questions of public law. Moreover, any hierarchy of modalities that reflected one conception of the administrative state over others would necessarily be contestable.

Second, and alternatively, agencies could seek to harmonize between the modalities to the extent possible. This will at times result in rules that imperfectly hew to each modality, but attempting to be at least partially faithful to each modality—even when several seem to be in tension with one another—holds considerable appeal as a way for agencies to make decisions on difficult questions of regulatory policy. To put the point simply: The agency is better off attempting to employ each modality, even if imperfectly, rather than neglecting any one modality entirely.

For an example of how this might work in practice, consider the tension in NHTSA's backover rule between the statutory purpose, on the one hand, and cost-benefit analysis, on the other. The agency promulgated the rule pursuant to a statute describing itself as "[a]n [a]ct [t]o direct the Secretary of Transportation to issue regulations to reduce the incidence of child injury and death occurring inside or

118 *Id.* at 1193–94.

outside of light motor vehicles."[119] In particular, the statute mandated that the Secretary issue a rule "to expand the required field of view to enable the driver of a motor vehicle to detect areas behind the motor vehicle to reduce death and injury resulting from backing incidents."[120] The statute left the agency with discretion, however, to decide whether to mandate cameras, sensors, or some other technology.[121] The statutory purpose was clear, and it favored the agency taking decisive action to prevent backover accidents.

The tension between modalities arose from the fact that, on certain modeling assumptions, it was difficult for the agency to present a cost-benefit analysis in which monetized benefits of the regulation (fewer injuries and deaths) exceeded monetized costs (the economic cost of backup cameras or other technologies).[122] The final rule acknowledged this fact but justified the rule on two grounds: first, that it was the most cost-effective means of satisfying the statutory mandate,[123] and second, that the unquantifiable benefits of the rule—most notably the fact that many victims of backover accidents are children, elderly, or persons with disabilities—justified the rule despite the analysis of monetized net benefits.[124]

The backover rulemaking represents a middle ground between the statutory purpose and cost-benefit modalities. Fulfilling the statutory mandate and purpose of reducing backover accidents was clearly a guiding motivator for the agency, and rightly so, but the agency was more attentive to costs than it would have been had the statutory purpose been

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119 Cameron Gulbransen Kids Transportation Safety Act of 2007, Pub. L. No. 110-189, 122 Stat. 639, 639.

120 *Id.* § 2(b), 122 Stat. at 640.

121 *See id.*

122 *See* Federal Motor Vehicle Safety Standards; Rear Visibility, 79 Fed. Reg. 19178, 19184 (Apr. 7, 2014) (noting that "the costs of the rule exceed its quantifiable benefits"); *id.* at 19179 tbl.1 (estimating monetized benefits and costs).

123 *Id.* at 19184 ("[T]he agency has carefully considered all impacts of this rule and has chosen the most cost-effective option in meeting the statutory mandate."); *id.* ("[R]ear visibility systems meeting the requirements of today's rule are the most effective, least burdensome, and most cost-effective systems that can address the backover safety risk and fulfill the requirements of the [statute].").

124 *Id.* (noting that "there are significant unquantifiable considerations associated with this rule, in particular the young age of many victims and the fact that many drivers involved in backover crashes are relatives or caretakers of the victims, that support this action"); *id.* at 19236 (noting that "[t]he victims of the relevant crashes here include not only children but also people with disabilities and the elderly"); *id.* (noting that "it is important to reduce the risk that drivers will be the direct cause of the death or injury of a person, particularly a small child at one's own place of residence or that of a relative or close friend" and describing this as "not fully or adequately captured in the traditional measure of the value of a statistical life").

the sole concern.[125] Cost-benefit analysis was core to the rulemaking as well, but the rule was unusual in that it was promulgated despite a finding by the agency that monetized net benefits were negative—likely not what would have occurred had the agency only been following traditional cost-benefit principles. In sum, both the statutory purpose and cost-benefit modalities played a role in the rulemaking, but neither was the sole or dominant modality. In this sense, the content of the final backover rulemaking represents a justifiable outcome because it found a way for two modalities to co-exist, however imperfectly.[126]

The fact that the modalities can be in tension might seem like an unfortunate fact, but it also presents an important test for agencies. In the ideal case, agencies reckon with the tension, do their best to mediate between modalities, and provide reasons to justify why they prioritize one modality over another in a particular circumstance. In other instances, agencies might ignore an inconvenient modality or obfuscate its implications. But honestly reckoning with potential tensions between the modalities can be part of agencies' broader process of providing justifications for policy choices.

III
Agencies, Congress, and Courts

A. The (Comparative) Virtues of Rulemaking

Agency rulemakings are methodologically distinctive. Decisions made by other parts of government—most notably, Congress and the courts—deploy different types of arguments than agencies making rules. Comparing the modalities of agency rulemakings to the decisional approach of government in these other contexts paints rulemakings in a comparatively positive light. A reasonable desideratum for the policymaking process is for government to consider the full range of policy choices, evaluate the likely consequences of various courses of action, and publicly provide reasons for why it opts for one choice over

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125 Indeed, some critics of the rulemaking charged the agency with excessive focus on costs at the expense of the statutory mandate.

126 This is not to characterize the final rule or rulemaking as perfect. To the contrary, perhaps the most significant flaw in the process was that the backover rule was delayed for years beyond the statutory deadline, at the cost of lives that could have been saved had the rule issued sooner. The statute was enacted in 2008 and set a three-year deadline for the rulemaking, but the final rule was not issued until 2014. *See* Scot J. Paltrow, *Special Report: Small White House Office Puts the Brakes on Life-Saving Regulations*, Reuters (Oct. 29, 2015, 12:26 PM), https://www.reuters.com/article/us-usa-regulations-oira-special-report/special-report-small-white-house-office-puts-the-brakes-on-life-saving-regulations-idUSKCN0SN24A20151029 [https://perma.cc/N734-3CN5].

other possibilities.[127] For those goals, rulemaking is often superior to decisionmaking by either legislatures or courts.

Begin with the comparison to statutes. In enacting statutes, Congress need not explain every choice that it makes, engage with alternative possible policy designs, justify its choice of one policy option relative to alternatives, or respond to public input. If Congress sets a regulatory standard at level *X* rather than *Y*, it might not give a persuasive justification for that choice. For a small number of most prominent and controversial legislative provisions, the legislative process will include considerable debate, informed by evidence, and proponents will explain and defend the approach that the legislation takes.[128] The many lesser-known legislative provisions, by contrast, can fly under the radar, without much by way of explanation or justification. Nor does the prospect of judicial review create an incentive for Congress to explain or justify most of its policy choices, since nearly all legislative provisions are reviewed by the courts only under the highly deferential rational basis standard.[129] Because most legislative provisions will not be closely scrutinized by either the public or the courts, Congress often has little incentive to mount a detailed defense of its policy choices.

Even when Congress does explain and justify its policy choices, it faces difficulties in doing so with the level of rigor of agencies conducting a high-quality regulatory impact analysis. Congress's expertise deficit, relative to the agencies, is one of the canonical reasons for legislative delegations of rulemaking authority to agencies in the first instance.[130] Further, observers of Congress have lamented the decline in the first branch's institutional capacity in recent decades. Congress has "allowed its own capacity to atrophy," in the words of one account describing the weakening of "the organizational resources, knowledge, expertise, time, space, and technology that are necessary for Congress to perform its constitutional role."[131] The congressional process is often more rigorous

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127 This is of course not the only thing that one might want out of the policymaking process; democracy and other process values provide other important considerations.

128 *See generally* Jesse M. Cross, *Legislative History in the Modern Congress*, 57 Harv. J. on Legis. 91 (2020) (discussing the various actors and processes contributing to the production of legislative history).

129 *See* Williamson v. Lee Optical Inc., 348 U.S. 483, 487–88 (1955) (providing the classic statement of the rational basis standard, under which a statute "need not be in every respect logically consistent with its aims to be constitutional").

130 *See, e.g.*, David Epstein & Sharyn O'Halloran, *The Nondelegation Doctrine and the Separation of Powers: A Political Science Approach*, 20 Cardozo L. Rev. 947, 962 (1999) (noting that "one of the reasons bureaucracies are created is for agencies to implement policies in areas where Congress has neither the time nor expertise to micro-manage policy decisions").

131 Timothy M. LaPira, Lee Drutman & Kevin R. Kosar, *Overwhelmed: An Introduction to Congress's Capacity Problem*, *in* Congress Overwhelmed: The Decline in Congressional

than critics generally concede; legislative debates can engage in high-quality deliberation over policy and critics' most negative caricatures of Congress often considerably undersell its capacity. Congress at times (though by no means always) shows itself capable of engaging in serious policymaking that considers a range of alternatives.[132] Congressional committees contain staffers with meaningful subject-matter expertise, and Congress draws on expertise from the executive branch and the broader public in formulating legislation.[133] Perhaps the most important repository of internal expertise in Congress is the Congressional Budget Office, which produces a score for nearly every bill that is approved by a House or Senate committee.[134] Even when Congress is performing at its best, however, it is difficult to imagine it having as much access to expertise as federal agencies. Agencies have far more personnel, including much larger numbers of career civil servants who can develop expertise, often highly technical, over a decades-long career.[135] As a result, Congress will typically be unable to engage in the sort of reasoning that agencies can, especially when the agency at issue is one with substantial in-house technical expertise. The result is legislative outputs typically lack the systematic sorts of justifications that are present in many agency rulemakings.

Judicial decisions likewise often compare unfavorably to agency rulemakings in their ability to take principles of sound policy design into account, though for somewhat different reasons. Begin with constitutional interpretation. Judicial decisionmaking is guided by a set of norms around what types of arguments are permissible means of interpreting the Constitution.[136] Just as important, though, are the modalities of argument that are widely deemed impermissible in

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Capacity and Prospects for Reform 1, 1 (Timothy M. LaPira, Lee Drutman & Kevin R. Kosar eds., 2020); *see also* Molly E. Reynolds, *The Decline in Congressional Capacity*, *in* Congress Overwhelmed 35 (documenting declines in personnel, financial resources, and internal expertise that have collectively reduced Congress's capacity).

132 *See, e.g.*, Robert G. Kaiser, Act of Congress: How America's Essential Institution Works, and How It Doesn't (2013) (detailed case study of the development of Dodd-Frank financial reform legislation).

133 *See* Ganesh Sitaraman, *The Origins of Legislation*, 91 Notre Dame L. Rev. 79, 96–106 (2015) (discussing the role of congressional committee staff and executive branch personnel in the legislative drafting process).

134 *See Products*, Cong. Budget Off., https://www.cbo.gov/about/products [https://perma.cc/8CV2-VZ9T].

135 *Cf.* Cass R. Sunstein, *The Most Knowledgeable Branch*, 164 U. Penn. L. Rev. 1607, 1616–19 (2016) (discussing the pressures and constraints facing Congress that make the development of policy expertise difficult in most circumstances).

136 On constitutional decisionmaking, *see* sources cited *supra* note 4 (discussing various approaches to the modalities of constitutional interpretation).

constitutional argument.[137] Most arresting, from the standpoint of the rulemaking modalities discussed in Part I, is the way in which norms of constitutional argument seem to prevent "policy arguments," at least when made in a rigorous and systematic manner.[138] As David Pozen and Adam Samaha note, "explicitly predicting, valuing, or quantifying the range of consequences associated with various interpretive options remains essentially unheard of in constitutional law."[139] This description of the types of reasoning that are off the table in the constitutional law context is striking for how well it describes the characteristics of a sound regulatory analysis.

Similar norms exist in the domain of statutory interpretation. The Supreme Court has repeatedly emphasized that "raw consequentialist calculation plays no role in our decision[s]"[140] and "it is not our task to assess the consequences of each approach and adopt the one that produces the least mischief."[141] Debates over statutory interpretation focus on a range of considerations—how to read legislative text, what role (if any) legislative purpose or legislative history should play in interpretation, when and how to use canons of construction—none of which are expressly focused on how to achieve the best policy outcomes.[142] As in the constitutional context, the methods that the

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137 *See* David E. Pozen & Adam M. Samaha, *Anti-Modalities*, 119 MICH. L. REV. 729, 739 (2021) (defining anti-modalities as "forms of [constitutional] argument that are considered out of bounds by most well-trained lawyers").

138 *Id.* at 746.

139 *Id.* at 750; *see also id.* ("Any sustained effort to work through the practical advantages or disadvantages of a constitutional proposition—identifying key assumptions, estimating probabilities, assigning distributional weights, specifying a social-welfare function, rank-ordering alternatives, running regressions, considering counterfactuals, or the like—would immediately elicit suspicion that the anti-modality boundary had been breached.").

140 Niz-Chavez v. Garland, 593 U.S. 155, 171 (2021).

141 Lewis v. City of Chicago, 560 U.S. 205, 217 (2010); *see also* Pozen & Samaha, *supra* note 137, at 766 n.181 (noting that "the field of statutory interpretation in recent decades has arguably turned away from policy argument in the form of openly consequentialist claims about what the enacting legislature would or should have wanted" but arguing that "considerations of 'policy' do not seem to have become anti-modal in that field to the degree that they have in constitutional law").

142 When courts do invoke the consequences of their statutory interpretations, they often hide behind Congress, by assuming that a consequence the court views as negative is one that Congress could not have intended. *See, e.g.*, FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000) (justifying a major questions canon based on the view that "Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion"); Pub. Citizen v. U.S. Dep't of Just., 491 U.S. 440, 470 (1989) (Kennedy, J., concurring) (justifying the absurdity canon on the view that it "demonstrates a respect for the coequal Legislative Branch, which we assume would not act in an absurd way"); Choate v. Trapp, 224 U.S. 665, 675 (1912) (justifying an Indian law canon on the grounds that "Congress is conclusively presumed to have intended that the legislation under which these allotments were made to the Indians should be liberally construed in their favor in determining the rights granted to the [tribes]").

Court disavows in the statutory interpretation context are precisely the ones that agencies rely on in promulgating rules.

To be sure, policy or consequentialist arguments can make their way into judicial reasoning, in either constitutional or statutory cases. Numerous scholars have showed how even purportedly legalist decisions often employ consequentialist reasoning.[143] But courts virtually never engage in policy analysis with anything remotely approaching the systematic and rigorous approach that characterizes standard agency rulemakings.[144] Nor could they. Judges and clerks typically lack training in policy analysis. They are unable to acquire information on their own and instead depend on submissions from the parties or others. They lack the infrastructure or resources necessary to make rigorous economic, scientific, or social scientific assessments of the likely effects of different decisions.[145] And they make decisions through case-by-case adjudication, which may be a poor vehicle for formulating general rules to apply across a range of circumstances.[146]

Rulemakings, by contrast, tackle policy and consequentialist considerations directly, overtly, and systematically. Taken together, the rulemaking modalities account for most of the things that one would want out of a policymaking process. They direct agencies' attention toward the goals that serve the public interest,[147] as understood by other government actors—the President and Congress[148]—who are subject to more direct forms of democratic accountability as compared to agency personnel. The rulemaking modalities demand that agencies justify

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143 *See, e.g.*, Jane S. Schacter, *Text or Consequences?*, 76 Brook. L. Rev. 1007, 1009 (2011) (arguing that "while textualism on the books conspicuously eschews the legitimacy of consequentialism in statutory interpretation, textualism in action often uses strikingly consequentialist methods"); Aaron Tang, *Consequences and the Supreme Court*, 117 Nw. U. L. Rev. 971, 976 (2023) (arguing that "the Court uses harm-focused, consequentialist reasoning with surprising frequency across a range of case types"); Nicholas S. Zeppos, *The Use of Authority in Statutory Interpretation: An Empirical Analysis*, 70 Tex. L. Rev. 1073, 1095 (1992) (presenting empirical analysis showing the frequency with which "the Court relies upon practical or consequentialist considerations relevant to the application or enforcement of the statute in question").

144 *See* Pozen & Samaha, *supra* note 137, at 749 (noting that though an anti-modality "rules out anything resembling professional-level consequentialist analysis," courts nonetheless engage in more informal references to empirical facts or crude balancing of benefits and costs (emphasis omitted)).

145 *See* Sunstein, *supra* note 135, at 1613–16 (exploring the limitations of judicial competence to conduct policy analysis).

146 *See* Frederick Schauer, *Do Cases Make Bad Law?*, 73 U. Chi. L. Rev. 883, 884 (2006) (arguing that "cases may produce inferior law whenever the concrete case is nonrepresentative of the full array of events that the ensuing rule or principle will encompass").

147 *See supra* Section I.A.

148 *See supra* Section I.B.

their decisions.[149] In doing so, agencies draw on relevant specialized knowledge[150] and account for implementation-related considerations.[151] For the most important rules, agencies often conduct a formal cost-benefit analysis that seeks to capture the full range of impacts of their rules, both positive and negative.[152]

These modalities represent a wide range of substantive considerations that ought to be part of the making of public policy. If a policymaking system were being designed from first principles, most would agree that agencies ought to account for the public interest, explain and justify their decisions, draw on relevant specialized information, and account for implementation-related considerations. The use of statutory purpose is somewhat more controversial, but even those skeptical of purpose-based arguments in the statutory interpretation context might be more sympathetic to their use as a way to guide how agencies use the discretion that Congress has unambiguously delegated. Cost-benefit analysis is controversial in its many details, but one of its basic aims—requiring agencies to systematically consider the full range of effects of its policy interventions—commands broad acceptance if described in those more general terms.[153]

A possible rejoinder to this line of argument is that even if the modalities of agency rulemaking are modes of argument that we have good reason to prioritize, agencies might invoke the modalities without in fact being motivated by them. In many circumstances, the modalities that an agency offers to justify a rule will overlap heavily with the motivation that in fact caused the agencies to engage in the rulemaking in the first instance. But not always. In particular, political considerations are largely absent from agency justifications for their rulemakings. I know of no agency that has ever justified a rule by writing that the rule is necessary to confer electoral advantage on the president or his copartisans.[154] The closest that agencies usually come to embracing political considerations is when, in the course of justifying a rule, they mention a particular demographic group, geographic area, or

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149 *See supra* Section I.C.

150 *See supra* Section I.D.

151 *See supra* Section I.E.

152 *See supra* Section I.F.

153 Two prominent critics of regulatory cost-benefit analysis as conventionally practiced, for example, emphasize that "analysis of costs and benefits, in lowercase letters, is an essential part of any systematic thought about public policy" while distinguishing "[o]ur criticism concern[ing] the much narrower doctrine of Cost-Benefit Analysis, which calls for a specific, controversial way of expressing and thinking about costs and benefits." ACKERMAN & HEINZERLING, *supra* note 91, at 211.

154 *Cf.* Pozen & Samaha, *supra* note 137, at 753–56 (describing partisan arguments as "anti-modal" in constitutional argument).

industry that is politically important to the president,[155] but even then the politics of the rulemaking are left unsaid and the policy is justified in terms of the broader public interest, statutory purpose, cost-benefit analysis, and so forth. The modalities, in short, might in some instances be a fig leaf for the agency's actual (more political) motives.

Even if we accept this conclusion, the modalities still have considerable virtues. In many instances, the modalities used to justify a rule will be the same ones that are in fact motivating the agency. Even when the modalities do not reflect an agency's actual motivations, an expectation that agencies justify their actions in terms of the modalities can nonetheless serve as a check (even if an imperfect one) against "the role of dogmas, intuitions, and interest groups" in regulatory policymaking.[156] The modalities cannot, of course, prevent agencies from pursuing rules based on political motives. But it is likely salutary for agencies to be expected to articulate the rationales for their rules in terms of the modalities, even if the modalities are not the only (or even primary) motivation for the rule.

It might seem like a simple conclusion to say that agencies, in making rules, tend to account for the types of considerations that one would want to be central to the policymaking context. But the contrast with legislative and judicial decisionmaking is striking, given that neither of those branches have the incentives or opportunities to conduct detailed policy analysis of the sort that, as the modalities capture, is the norm in many agency rulemakings. At the very least, comparing agencies to Congress and the courts paints agencies in a relatively favorable light, in that agencies often take into account important public policy considerations that the other branches will often be ill-equipped to consider.

More ambitiously, I somewhat tentatively suggest that the modalities might help lessen anxieties about the legitimacy of agency rulemaking. Concerns about legitimacy have long plagued

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[155] At times, presidents of both parties have directed agencies to account for the interests of particular populations, in rulemakings and otherwise, that are of political import to the president's party. Democratic presidents, for example, have issued executive orders on environmental justice, which focus on racial and ethnic minorities and low-income communities. *See, e.g.*, Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 16, 1994); Exec. Order No. 14,096, 88 Fed. Reg. 25251 (Apr. 26, 2023). Republican presidents, by contrast, have issued executive orders focused on faith communities in general and Christians in particular. *See, e.g.*, Exec. Order 13,279, 67 Fed. Reg. 77141 (Dec. 16, 2002); Exec. Order 14,202, 90 Fed. Reg. 9365 (Feb. 12, 2025).

[156] *Cf.* Cass R. Sunstein, *Some Costs & Benefits of Cost-Benefit Analysis*, 150 DAEDALUS 208, 209 (2021) (making a parallel argument about cost-benefit analysis).

the administrative state.[157] No decisional mechanism or set of modalities can fully assuage concerns among those who believe that agencies suffer a democracy deficit.[158] But for some, the modalities might help. Several of the modalities direct agencies toward elected officials: Public interests are often defined based on presidential priorities, and statutory purpose looks back to the law that Congress enacted. For those worried about excessive agency discretion, modalities that direct agencies toward instrumental rationality, scientific or other technical data, implementation-related considerations, and cost-benefit analysis may prove helpful. These modalities do not, of course, reduce agency discretion to zero, which would be undesirable and likely impossible. They do, however, provide a means of disciplining agency action. Taken together, the modalities prompt agencies to engage in a mode of reasoning that can not only explain but also help justify congressional delegations of rulemaking authority to administrative agencies.

B. Rulemaking Modalities and Judicial Review

What can the modalities teach us about one of the core questions of administrative law—the question of judicial review? In a descriptive register, the modalities are in some respects a product of judicial doctrine, which can prompt agencies to emphasize or deemphasize particular modalities. In a normative register, understanding the modalities as a set of norms of agency decisionmaking can help give content to hard look review. This final Section examines each of these sets of ideas about the relationship between the modalities and judicial review in turn.

As a descriptive matter, the anticipation of judicial review can shape how agencies approach the modalities. Agency regulations are subject to judicial review, and agencies draft their rules in anticipation of eventual review by the courts.[159] For this reason, we should expect that judicial doctrine has the ability to elevate some modalities over others.

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157 *See, e.g.*, James O. Freedman, Crisis and Legitimacy: The Administrative Process and American Government 7–10 (1978) (noting that "criticism of the administrative agencies has been animated by a strong and persisting challenge to the basic legitimacy of the administrative process" and that "[e]ach generation has tended to define the crisis in its own terms"); Cynthia R. Farina, *The Consent of the Governed: Against Simple Rules for a Complex World*, 72 Chi.-Kent L. Rev. 987, 987 (1997) (noting that "the legitimacy problem is handed down from generation to generation of administrative law scholars").

158 *Cf.* Richard B. Stewart, *Administrative Law in the Twenty-First Century*, 78 N.Y.U. L. Rev. 437, 445 (2003) (noting "the potential democracy deficit created by broad statutory delegations to regulatory bureaucracies").

159 *See, e.g.*, Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. Pa. L. Rev. 1, 68 (2014) (noting that "[a]gency political appointees do not operate in a vacuum but are guided by their general counsel and by career attorneys," and that "[e]specially for

For example, some courts have at times suggested that a rule without a monetized cost-benefit analysis might be arbitrary and capricious for that reason alone, but the Supreme Court has never endorsed that view.[160] Even so, the fear that a rule without a monetized cost-benefit analysis might be vulnerable to legal risk could push agency rule-writers to include a cost-benefit analysis even when they might otherwise choose not to do so.[161] The shadow of judicial review is certainly not the only reason agencies use cost-benefit analysis—presidential directives and internal agency cultures matter as well—but the courts have played a role in elevating the cost-benefit modality.[162]

Judicial doctrine can also push agencies away from certain modalities. Consider the public interest modality, and in particular the practice of agencies justifying some rules on the grounds that they further presidential priorities or aid in a "whole-of-government approach" to a particular policy problem.[163] If an agency makes these sorts of arguments central to their justification for a rule, they likely risk increasing the chance that the rule will be found unlawful under the Supreme Court's major questions doctrine, which requires that agencies "point to clear congressional authorization for the power it claims" when it makes certain major policy interventions.[164] The typical major questions case involves a presidential priority: "presidents campaigning on the policy, directing agencies to adopt the policy, and then publicly taking credit and responsibility for the policy."[165] An agency worried about scrutiny under the major questions doctrine might seek to downplay, in its justification for a rule, the extent that the rule furthers the president's agenda or the extent of the rule's policy impact.[166] The result would be that agencies rely less on the public interest

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controversial rules, agencies take pains to develop their legal strategies to ensure they are as robust as possible and likely to withstand attack" via litigation).

160 *See* Gould, *supra* note 84, at 758–61 (discussing relevant doctrine).

161 *See id.* at 760 ("A cautious agency general counsel . . . could reasonably think that the best way to safeguard a rulemaking from judicial invalidation is to hew as closely to traditional cost-benefit analysis as possible.").

162 Conversely, and counterfactually, if the courts were to develop a hostility to cost-benefit analysis in a particular domain, that would almost certainly lead agencies to rely less heavily on the method in the course of justifying their rules in that domain.

163 *See supra* notes 26–29 and accompanying text.

164 *See* West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022) (internal quotation marks omitted).

165 Jodi L. Short & Jed H. Shugerman, *Major Questions About Presidentialism: Untangling the "Chain of Dependence" Across Administrative Law*, 65 B.C. L. Rev. 511, 512 (2024); *see also id.* (noting that this is true for "each of the major questions policies over the past three decades").

166 *See* Daniel J. Hemel, *Major Questions Avoidance and Anti-Avoidance*, 98 S. Cal. L. Rev. 1497 (noting that the major questions doctrine incentivizes agencies to downplay a rule's economic or political significance to avoid heightened judicial scrutiny).

modality and more on other modalities, such as technical expertise or statutory purpose.

These examples suggest a potential social science research agenda on the extent to which doctrine shapes the modalities. Text analysis could determine which modalities are employed in each regulation, which could open the door to testing on a range of questions. How have the prevalence of different modalities changed over time? Have prominent judicial decisions—such as those elevating cost-benefit analysis or those applying the major questions doctrine—changed how agencies approach the modalities? How, if at all, do agencies deploy the modalities differently when making rules that are unlikely to be subject to judicial review?[167] Each of these questions, and others, points toward possible empirical work that could allow for a deeper understanding of how courts shape the types of arguments that agencies use to justify their rules.

As a prescriptive matter, the modalities can help inform how courts exercise judicial review of agency action under the "hard look" standard.[168] This is *not* to say that the courts should use the modalities as a checklist or in any other sort of mechanical way. My claim is instead a more modest one: Under *some* circumstances, it will be arbitrary and capricious for the agency to ignore a modality without articulating a good reason for doing so. Because the modalities can be understood as norms of rational agency decisionmaking, courts can look to them to inform how they go about conducting hard look review.

Courts already do just that, even if not in name. One way of understanding how hard look review operates in practice is by reference to the modalities. To be sure, courts do not speak in terms of modalities when engaging in hard look review. But cases in which courts find agency action to have been arbitrary and capricious often involve agencies departing from one or several of the modalities.

What would it mean for courts to more expressly engage with the modalities in the course of hard look review? Doing so might not lead to much by way of doctrinal change, but it could help structure what is generally an open-ended inquiry.[169]

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[167] *See* 5 U.S.C. § 701(a) (APA provision exempting certain types of rules from judicial review).

[168] *See generally* Stephen G. Breyer, Richard B. Stewart, Cass R. Sunstein, Adrian Vermeule, Michael E. Herz, Administrative Law and Regulatory Policy: Problems, Text, and Cases 326–86 (9th ed. 2022) (providing an overview of the doctrine and academic commentary).

[169] *See* Sidney A. Shapiro & Richard E. Levy, *Judicial Incentives and Indeterminacy in Substantive Review of Administrative Decisions*, 44 Duke L.J. 1051, 1065 (1995) (describing hard look review as "relatively open-ended").

First, courts could observe which modalities agencies have and have not used to justify their rules. Some modalities should be present in nearly every rulemaking: It will almost always be appropriate for agencies to explain how their policy choice serves the public interest, justify their policy choice in light of statutory purpose, engage in means-ends reasoning, and account for any pragmatic considerations related to implementation. The absence of one or several of these modalities from an agency's analysis will often suggest that the agency might have acted in an arbitrary and capricious manner.[170] Other modalities are not necessarily applicable to every rule. Not every rule will involve technical expertise, but many will call for agencies to account for empirical evidence of one sort or another, whether economic, scientific, or otherwise. Similarly, a monetized cost-benefit analysis will not be appropriate for every rule, though it will be for many of the most significant rules.

Second, courts can evaluate the quality of how agencies use the modalities. If an agency purports to invoke a modality but does so in an obviously sloppy or inappropriate way, that could be a reason to find a rule arbitrary and capricious. With respect to the technical expertise modality, for example, an agency's failure to honestly engage with relevant technical data can make a rule arbitrary and capricious.[171] Similarly, a rulemaking may be arbitrary and capricious if it is based on a cost-benefit analysis that contains significant flaws, such as incompleteness or bias.[172]

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170 *See, e.g.*, Pub. Citizen, Inc. v. Mineta, 340 F.3d 39, 56 (2d Cir. 2003) (concluding that "[a]bsent any 'satisfactory explanation' in the rulemaking record, the adoption of a standard that permits installation of plainly inferior systems seems to us to be arbitrary and capricious." (quoting Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins., 463 U.S. 29, 43 (1983))); United Mine Workers v. Mine Safety & Health Admin., 626 F.3d 84, 94 (D.C. Cir. 2010) (finding that "the proposition that a rule may be supported solely by the agency's expertise, does not absolve [the agency] from providing a reasoned explanation for its decision" when the agency failed to explain what its expertise was and how it informed its determination); D.C. v. United States Dep't of Agric., 496 F. Supp. 3d 213, 227 (D.D.C. 2020) (finding a USDA rule arbitrary and capricious "for failure to consider significant critical comments relevant to the over-arching statutory purpose").

171 *See, e.g.*, Ctr. for Biological Diversity v. Zinke, 900 F.3d 1053, 1074–75 (9th Cir. 2018) (finding a rule arbitrary and capricious based on multiple flaws in technical analysis). *But see* Cytori Therapeutics, Inc. v. FDA, 715 F.3d 922, 923 (D.C. Cir. 2013) (warning that "courts must be careful not to unduly second-guess an agency's scientific judgments" when applying the arbitrary and capricious standard).

172 *See, e.g.*, Bus. Roundtable v. SEC, 647 F.3d 1144, 1148–49 (D.C. Cir. 2011) (finding SEC rule arbitrary and capricious upon concluding that the agency "inconsistently and opportunistically framed the costs and benefits of [a] rule; failed to adequately quantify the certain costs or to explain why those costs could not be quantified; neglected to support its predictive judgments; [and] contradicted itself" in the course of its analysis); Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin., 538 F.3d 1172, 1181 (9th Cir. 2008) (finding

Third, for those modalities that agencies do not invoke in a given rulemaking, courts could evaluate their reasons for eschewing the modality. This will often be relevant in the context of cost-benefit analysis. Failure to conduct cost-benefit analysis is not (and should not be) a per se reason to find a rule arbitrary and capricious, given that an agency might well have a good reason not to conduct a cost-benefit analysis.[173] But an agency's reasons for declining to conduct cost-benefit analysis might be relevant to hard look review. There are several good reasons for an agency to decline to conduct cost-benefit analysis: the underlying statute might bar or limit the use of the method, the rule might primarily involve the types of regulatory impacts that do not lend themselves to traditional cost-benefit analysis, or an emergency situation might justify the agency dispensing with analysis. In any of these scenarios, an agency explaining its reasoning should be able to survive arbitrary and capricious review by explaining why it chose to engage (or not engage) in particular forms of analysis.[174] In other instances, by contrast, failure to engage in cost-benefit analysis might rise to the level of arbitrary and capricious action. For example, if an agency conducted cost-benefit analysis to justify a regulatory requirement, and then the agency later does not conduct cost-benefit analysis in rescinding or modifying that same requirement, the choice not to present a cost-benefit analysis for the latter rule might rise to the level of arbitrary and capricious action (absent a good justification, such as an emergency).

Fourth, when two or more modalities are in tension, courts can evaluate (deferentially) how the agency mediated the tension. One illustration of this is NHTSA's means of dealing with the tension between its statutory mandate and cost-benefit analysis in its rear visibility rulemaking.[175] While the rule did not face litigation under the APA, if it had, it would have been appropriate for courts to uphold the rule. The rule made arguments from instrumental rationality, based on its understanding of the public interest and statutory purposes, and explained why it opted to require rear-view cameras despite the results of its cost-benefit analysis. Courts should credit such explanations.[176]

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fuel economy standards rule arbitrary and capricious for its "failure to monetize the value of carbon emissions").

173 *See* Gersen & Vermeule, *supra* note 49, at 1374 ("[R]ationality certainly does not require quantified cost-benefit analysis in the technical sense."); *id.* at 1378 ("The Supreme Court has consistently held that quantified CBA is discretionary for agencies.").

174 *See supra* notes 91–97 and accompanying text.

175 *See supra* notes 119–26 and accompanying text.

176 Had the agency *declined* to mandate rear-view cameras, by contrast, it would have been appropriate for a court to take a less deferential posture, unless the agency could provide a compelling justification for why the cost-benefit analysis should trump statutory purpose. Moreover, the agency's cost-benefit analysis understated regulatory benefits by declining to

None of this is a proposal to change the content of hard look review. The modalities, as a descriptive account of how agencies justify their decisions—though one that I endorse as a rational way to go about decisionmaking—do not themselves counsel toward either more or less scrutinous review of agency rulemaking. However, to the extent that the modalities have become part of the understanding of what it means for agencies to make rational decisions, they could help structure the arbitrariness inquiry that courts conduct under hard look review.

Conclusion

In nearly every domain of the economy and society, agency rules govern our lives. Despite this centrality, citizens and lawyers alike rarely think about the diversity of arguments that agencies make to justify their rules. This Article has sought to catalogue the different types of arguments that agencies make to justify their rules. In doing so, it showed the range of different types of justifications that agencies give in the course of making policy. Agencies look to the public interest and statutory purpose, engage in instrumental rationality, account for technical expertise and implementation-related considerations, and often deploy cost-benefit analysis. These modalities, which agencies do deploy as a descriptive matter, also represent key factors that agencies ought to rely on as a normative matter. The modalities, to put it simply, are themselves rational and defensible. More so than perhaps any other type of government action, an agency rulemaking (when the system is working as it should) can account for the diverse range of considerations that ought to animate government decisionmaking. Despite frequent criticisms of the administrative state, a study of the modalities of agency rulemaking point to some important virtues of agency power in the modern state.

account for "co-benefits" of the regulation (benefits from the increased prevalence of display screens in automobiles other than backover accident reduction). In addition to reducing the likelihood of backover accidents, the display screens provide convenience benefits to drivers (by allowing them to more easily use navigation aids, play music and podcasts in the car, etc.) and may also reduce the likelihood of non-backover accidents (if they reduce cell phone use while driving). *See* Daniel J. Hemel, *Regulation and Redistribution with Lives in the Balance*, 89 U. Chi. L. Rev. 649, 688 (2022) (noting that the agency neglected co-benefits).