
ARTICLE

SUBSTANCE AND PROCEDURE IN LOCAL
ADMINISTRATIVE LAW

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Although administrative law scholars have devoted thousands of law review pages to debating the optimal mix of substantive, procedural, and political constraints on federal agency decisionmaking, when it comes to local administrative agencies, these questions have largely gone unexplored. The lack of attention to local administrative agencies is striking given the sheer breadth of local administration, and the important role that local agencies play in individuals' day-to-day lives. This Article begins to fill this gap. In doing so, it takes as its jumping-off point the familiar set of arguments in federal administrative law about the role of procedures and substantive judicial review in the administrative process, and it considers to what extent these same arguments might apply to local agencies as well. It argues that substantive judicial review may be especially important at the local level, and that many of the concerns that scholars have expressed about the distorting effects of judicial review are less applicable to the local context. At the same time, it argues that procedural requirements—such as notice-and-comment rulemaking—may be much less effective at ensuring the quality of local agency decisionmaking, particularly when procedures are not backed by the threat of substantive judicial review.

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INTRODUCTION

The central questions of administrative law are well worn and familiar. What role, if any, should courts play in overseeing agency decisionmaking? Should courts focus primarily on ensuring that agencies followed certain procedures in making their decisions? Or should courts also be permitted to scrutinize the substance of the decisions reached? And to what extent can political safeguards—or internal agency controls—substitute for robust judicial review?

Federal administrative law scholars have devoted tens of thousands of law review pages to answering these questions.¹ And although scholars are no

¹ See e.g., Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345, 389 (2019); Christopher J. Walker, *Modernizing the Administrative Procedure Act*, 69 ADMIN. L. REV. 629, 629 (2017); Cass R. Sunstein, *In Defense of the Hard Look: Judicial Activism and Administrative Law*, 7 HARV. J.L. & PUB. POL’Y 51, 51-52 (1984); Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review*, 101 YALE L.J. 31, 44 (1991); Adrian Vermeule, *What Legitimacy Crisis?*, CATO UNBOUND

closer to agreement on the optimal mix of substantive, procedural, and political constraints on agency decisionmaking, they have, over the years, articulated a fairly coherent set of arguments about the relative benefits and tradeoffs of each. Most acknowledge, for example, that requiring agencies to comply with certain procedures—such as notice-and-comment rulemaking—has the potential to provide agencies with additional information, encourage more thorough deliberation, provide access to a greater diversity of viewpoints, and potentially increase agency legitimacy.² Most also recognize that procedures can introduce delay, consume agency resources, elevate lawyers at the expense of agency experts, and give powerful interest groups yet another tool with which to thwart agency regulation.³ To the extent that scholars differ on whether there currently are too many procedural requirements—or too few—these differences stem largely from a disagreement over the relative importance or magnitude of the potential benefits and costs that procedures impose. There may not be clear answers, but at the very least, there is a relatively defined set of terms for the debate.

When it comes to *local* administrative law, however, these relatively basic questions have gotten surprisingly short shrift. Indeed, with only a very few exceptions, it is fair to say that they simply have not been asked.⁴ The literature on “administrative law” is focused almost exclusively on federal administrative agencies, and occasionally the states.⁵ And although there is a

(May 9, 2016), <https://www.cato-unbound.org/2016/05/09/adrian-vermeule/what-legitimacy-crisis> [<https://perma.cc/GY97-9CX4>]; Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 68 (1995); William F. Funk, *To Preserve Meaningful Judicial Review*, 49 ADMIN. L. REV. 171, 171 (1997); J. Skelly Wright, *Courts and the Rulemaking Process: The Limits of Judicial Review*, 59 CORNELL L. REV. 375, 375 (1974).

² See, e.g., Cass R. Sunstein, “Practically Binding”: *General Policy Statements and Notice-and-Comment Rulemaking*, 68 ADMIN. L. REV. 491, 504 (2016); Jim Rossi, *Redeeming Judicial Review: The Hard Look Doctrine and Federal Regulatory Efforts to Restructure the Electric Utility Industry*, 1994 WIS. L. REV. 763, 771; Nicholas R. Parrillo, *Should the Public Get to Participate Before Federal Agencies Issue Guidance? An Empirical Study*, 71 ADMIN. L. REV. 57, 70 (2019).

³ See generally Nicholas Bagley, *The Puzzling Presumption of Reviewability*, 127 HARV. L. REV. 1285, 1287 (2014) (discussing how judicial review can introduce delays, divert resources, and upset agency priorities); Elhauge, *supra* note 1, at 44.

⁴ Nestor Davidson’s *Localist Administrative Law* takes a broad view of local administration and considers at least some of the questions raised here. Nestor M. Davidson, *Localist Administrative Law*, 126 YALE L.J. 564 (2017). Aaron Saiger’s *Local Government as a Choice of Agency Form* is not specifically on local administration but likewise grapples with some of these same questions. Aaron Saiger, *Local Government as a Choice of Agency Form*, 77 OHIO ST. L.J. 423 (2016). There also is a great student Note on local administrative procedures in Chicago and New York. Casey Adams, Note, *Home Rules: The Case for Local Administrative Procedure*, 87 FORDHAM L. REV. 629 (2018).

⁵ See, e.g., Miriam Seifter, *Gubernatorial Administration*, 131 HARV. L. REV. 483 (2017); Miriam Seifter, *Further from the People: The Puzzle of State Administration*, 93 N.Y.U. L. REV. 107 (2018) [hereinafter Seifer, *Further from the People*]; William Funk, *Rationality Review of State Administrative Rulemaking*, 43 ADMIN. L. REV. 147 (1991); Michael Pappas, *No Two-Stepping in the Laboratories: State*

rich literature on “local government law,” that literature, too, has largely ignored the question of local administration.⁶ To the extent that local agencies have been discussed at all, it typically has been in piecemeal fashion, by scholars who write about zoning, environmental regulation, or public health.⁷

The lack of attention to local administrative agencies is striking given the sheer breadth of local administration. In large cities like Seattle, Chicago, and New York, administrative agencies have adopted thousands of regulations on issues ranging from third party delivery services,⁸ to gender-based discrimination,⁹ to dockless bike-sharing,¹⁰ to public health.¹¹ In smaller municipalities, analogous “regulations” often are adopted by local legislatures (i.e., “ordinances”). But even still, there are many examples of more traditional administrative action as well. The Needham, Massachusetts Board of Health, for example, has adopted rules to regulate indoor tanning salons, tattoo parlors, and the sale of tobacco products, among many others.¹² In

Deference Standards and Their Implications for Improving the Chevron Doctrine, 39 MCGEORGE L. REV. 977 (2008).

⁶ As Davidson points out, the core questions of “local government law” involve the relationships between cities and states, cities with neighboring municipalities, and cities with their residents. The internal workings of municipal government, and the allocation of authority between local legislatures and administrators have largely been ignored. Davidson, *supra* note 4, at 569.

⁷ Paul Diller’s work on local public health agencies offers a number of important insights. See generally Paul A. Diller, *Local Health Agencies, the Bloomberg Soda Rule, and the Ghost of Woodrow Wilson*, 40 FORDHAM URB. L.J. 1859 (2013) (pointing to local health boards as an example of local “expert-driven” rulemaking bodies) [hereafter Diller, *Local Health Agencies*]; Paul A. Diller, *Why Do Cities Innovate in Public Health? Implications of Scale and Structure*, 91 WASH. U. L. REV. 1219 (2014) [hereafter Diller, *Why Do Cities Innovate*] (noting that local health boards have often been at the forefront of local public health regulations). There also is a rich literature on zoning boards, including their composition and decisionmaking processes. See, e.g., Sara C. Bronin, *Rezoning the Post-Industrial City: Hartford*, 31 PROBATE & PROP., January-February 2017, at 44 (describing the Hartford rezoning process); Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CALIF. L. REV. 837 (1983) (highlighting the politicized nature of local land use control); Clayton P. Gillette, *Kelo and the Local Political Process*, 34 HOFSTRA L. REV. 13 (2005) (pointing to the ways in the Court’s decision in *Kelo v. New London* was designed to reinforce political process protections against abusive land use practices).

⁸ CITY OF CHI., DEP’T OF BUS. AFFS. & CONSUMER PROT., RULES FOR THIRD-PARTY FOOD DELIVERY SERVICES (May 12, 2020), <https://www.chicago.gov/content/dam/city/depts/dol/rulesandregs/Third%20Party%20Delivery%20Services%20Rules.pdf> [https://perma.cc/G3GS-8KQW].

⁹ See, e.g., N.Y. COMP. CODES R. & REGS. tit. 47, §2-06(b) (2019) (requiring New York businesses and organizations to provide access to single-gender programs or facilities on the basis of gender identity, regardless of physical anatomy or sex assigned at birth).

¹⁰ PHILA. DEP’T OF STS., REGULATIONS GOVERNING A PILOT PROGRAM FOR DOCKLESS BICYCLE SHARING (August 20, 2019), <http://regulations.phila-records.com/pdfs/Department%20of%20Streets%20Dockless%20Bicycles%20Sharing.pdf> [https://perma.cc/3NMD-2HMR].

¹¹ *Health Code and Rules*, N.Y.C. DEP’T OF HEALTH, <https://www1.nyc.gov/site/doh/about/about-doh/health-code-and-rules.page> [https://perma.cc/QDK8-W7CN].

¹² See *Board of Health*, NEEDHAM, MASS., <https://www.needhamma.gov/1103/Board-of-Health> [https://perma.cc/KG9W-X8G5] (listing these health regulations). Needham, Massachusetts is used as

Connecticut, local planning commissions exercise final authority over all zoning decisions, including comprehensive rezonings.¹³ And of course in cities large and small, agencies engage in a great deal of adjudication as well. They grant permits and licenses, make benefits determinations, adjudicate zoning adjustments, and much more.¹⁴

The constraints on these various forms of local administrative action vary dramatically from city to city—and sometimes from agency to agency. This is particularly true when it comes to agency rulemaking, which is exempt from the constitutional requirements of procedural due process, and also typically is exempt from the procedural constraints imposed by state administrative procedure acts (APAs).¹⁵ In the absence of state or federal regulation, some municipalities, like Philadelphia and New York City, have adopted municipal APAs that have borrowed in various ways from the federal model.¹⁶ Chicago, on the other hand, lacks a uniform APA, which means that agency procedures either are incorporated into specific grants of authority, or are left entirely to an agency's discretion.¹⁷

The availability of substantive judicial review varies dramatically as well. In New York state, agency rules are subject to a fairly robust form of arbitrariness review that is analogous to the federal “hard look” standard.¹⁸ In Massachusetts, agency decisions are reviewed under a highly permissive standard that functions much like the constitutional “rational basis” test.¹⁹ And in Illinois, so long as a local agency acts within the scope of its authority, its decisions do not appear to be subject to any substantive review at all.²⁰

an example of local administrative practices throughout this paper due to their unusually robust online records of Board meetings.

¹³ Bronin, *supra* note 7, at 45.

¹⁴ Davidson, *supra* note 4 at 594-95.

¹⁵ Under the Supreme Court's *Londoner–Bi-Metallic* framework, “adjudicative” decisions must comply with the requirements of procedural due process, whereas “legislative” decisions, such as agency rules, need not. *Londoner v. Denver*, 210 U.S. 373 (1908); *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441 (1915). As for state APAs, a small number of states require municipal agencies to comply with state administrative procedures when adopting regulations. See WYO. STAT. ANN. § 16-3-101 (2020); HAW. REV. STAT. § 91-1 (2020). State procedural requirements sometimes extend only to agency adjudication; see also Davidson, *supra* note 4; Saiger, *supra* note 4.

¹⁶ Philadelphia, for example, requires all agencies to submit all rules for public comment, and to prepare a written response to the comments received. PHILA., PA. HOME RULE CHARTER § 8-407. New York City agencies must also solicit public comments—but they do not need to prepare any sort of response. N.Y.C., N.Y. CHARTER ch.45, § 1043. See *infra* Section I.D.

¹⁷ Adams, *supra* note 4, at 632.

¹⁸ See, e.g., *N.Y. Statewide Coal. of Hisp. Chambers of Com. v. The N.Y.C. Dept. of Health & Mental Hygiene*, No. 653584-12, 2013 WL 1343607, at *19-20 (N.Y. Sup. Ct. Mar. 11, 2013), *aff'd*, 970 N.Y.S.2d 200 (N.Y. App. Div. 2013). On the federal “hard look” standard, see *infra* note 121 and accompanying text.

¹⁹ Maria Ponomarenko, *Administrative Rationality Review*, 104 VA. L. REV. 1399, 1415 (2018).

²⁰ *Landmarks Pres. Council of Ill. v. City of Chicago*, 531 N.E.2d 9, 15 (Ill. 1988).

Much of this variation is attributable to the ad hoc manner in which states and municipalities have approached the question of local administrative law. Unlike state APAs, which have undergone several waves of revision and standardization, there has never been much of an effort to develop a coherent body of “local” administrative law, or even to articulate a basic set of principles that ought to guide that effort.²¹ It may very well be the case that Needham’s administrative procedures should look nothing like the federal government’s, or even New York’s—but it should at the very least be possible to articulate the factors that ought to drive these differences. And yet that is precisely what is missing from the literature.

This Article begins to fill this gap by proposing the beginnings of a framework for governing the local administrative state. In doing so, it takes as its jumping off point the familiar set of arguments in federal administrative law about the relative advantages and drawbacks of substantive and procedural constraints on administrative action. And it considers the degree to which these various arguments would apply—or perhaps apply differently—to local agencies. Importantly, the goal here is not to resolve the debates that have divided federal administrative scholars and practitioners, but rather to point out why we might want to be more (or less) skeptical of various kinds of regulatory constraints in the local context.

It argues that at the local level, the basic requirements of reason-giving backed by substantive judicial review may actually do more to improve the quality of agency decisionmaking, without necessarily skewing agency decisions in the ways that federal critics claim. Given the relative informality of local decisionmaking processes, requiring local agencies to justify their decisions on the record may have a more tangible impact on agency decisionmaking than it does in the much more bureaucratized world of federal administration. At the same time, many of the familiar arguments against substantive judicial review are likely to be much weaker locally. For example, the conventional wisdom in federal administrative law is that generalist courts often are unable to grasp the technical complexity of agency regulations. At the local level, however, the issues that agencies deal with tend to be less complex—and therefore more legible to reviewing courts.

On the other hand, this Article suggests that although procedural requirements may play an important role in fostering agency legitimacy, they may be less likely at the local level to improve the quality of the decisions made. Because local officials tend to be more proximate to the entities they regulate, and generally more familiar with local concerns, procedures may be

²¹ There was a brief moment in the 1960s when a small number of scholars pushed to develop a coherent local administrative procedure framework, but it went nowhere. Davidson, *supra* note 4, at 570 n.11 (citing scholarship).

less likely to generate new and valuable information that agency officials would not have obtained in some other way. In addition, because local processes tend to be less salient, and overall participation levels quite low, procedural requirements also are less likely to bring in outside perspectives or counteract the views that agencies already are likely to hear through more direct contact with regulated groups.

Together, these arguments suggest that the dominant mode of local agency governance, which tends to be heavy on procedure, but light on substantive review, may have it exactly backwards. In particular, this Article casts doubt on the value of purely procedural constraints on agency decisionmaking that are completely untethered from any substantive scrutiny—for example, ordinances that require agencies to hold public hearings, but do not require agencies to respond on the record to the comments made. And it raises serious questions about the desirability of some proposals to incorporate into local administrative law the basic intuition behind the Supreme Court’s decision in *United States v. Mead*, which held that courts should generally afford more deference when agencies act with a greater degree of procedural formality.²² At the local level, robust procedures may not in fact be a plausible substitute for substantive judicial review.

Before turning to the structure of the paper, a brief note on scope: Although this paper touches at times on agency adjudication, its primary focus is on agency *policymaking*, either through interpretive guidance or binding rules. The reason for this is two-fold. First, as discussed above, administrative rulemaking is exempt from the requirements of procedural due process, and as a result, this is an area where states and localities enjoy a great deal of discretion in structuring local procedures and establishing the standards of review. Second, agency rulemaking and statutory interpretation also have been at the focal point of the debates in federal administrative law over the desirability and scope of judicial review, which makes this a natural place to start.²³

Part I provides an overview of the wide world of local administration, describing the range of approaches that states and localities have adopted when it comes to the procedural and substantive constraints on agency decisionmaking. Part II draws on the familiar arguments from federal administrative law about the role of courts in the administrative process, considering the degree to which the lessons from federal administrative law

²² Davidson, *supra* note 4, at 615 (arguing in favor of a local *Mead*).

²³ Relatedly, although the focus of this paper is on *agency* policymaking, it is important to note that in many jurisdictions, legislative bodies—such as municipal city councils, or county boards of supervisors—perform a variety of “administrative” functions. I discuss the ways in which the traditional requirements of administrative law apply to local legislative bodies in Maria Ponomarenko, *Legislative Administration*, 2021 WIS. L. REV. 1231.

might apply locally. In particular, it points to a number of salient differences between local and federal agencies that make it somewhat more likely that substantive judicial review could play a useful role in local decisionmaking. Part III discusses specific doctrinal implications for local administrative law.

I. LOCAL ADMINISTRATION

Although much of the focus of administrative scholarship has been on federal administrative agencies, a great deal of administration occurs at the local level. This Part describes the vast expanse of local administration, including both the issue areas that traditionally have been the subject of local regulation, as well as the range of approaches that jurisdictions have used to structure and oversee the local administrative state.

The challenge in writing about local administrative government is that there are more than 89,000 local government bodies, which are constrained in various ways by the fifty states.²⁴ In order to develop a relatively comprehensive picture of local administration, I began with a list of the fifteen largest metropolitan areas and examined the degree to which administrative bodies at either the municipal or county level engage in regulatory policymaking. Five metropolitan areas stood out as having particularly active administrative regimes: New York, Chicago, Philadelphia, Boston, and Seattle. For each of these, I conducted a deep dive into the range of procedural, substantive, and political on local agency decisionmaking under both state and local law. I also identified a number of smaller jurisdictions in these states and others with extensive agency regulation and examined their practices and procedures as well. Finally, I reviewed the Administrative Procedure Acts (APAs) in all fifty states to determine the degree of discretion that states afford to local governments to structure local administrative practice and procedure. The picture that emerges is hardly exhaustive, but it generally captures the breadth and variety of local administrative practice across the United States.

A. *The Subject Matter of Local Administration*

Local governments—including counties, municipalities, and special purpose districts—engage in a great deal of regulatory activity.²⁵ Although

²⁴ *Census Bureau Reports There Are 89,004 Local Governments in the United States*, U.S. CENSUS BUREAU (Aug. 30, 2012), <https://www.census.gov/newsroom/releases/archives/governments/cb12-161.html> [https://perma.cc/FW68-8E2W].

²⁵ For a broad overview of local regulatory activity, see generally Davidson, *supra* note 4.

some of this activity could just as easily occur at either the national or state levels, much of it is responsive to uniquely local concerns.

One of the oldest—and most quintessential—areas of local regulation is in the realm of public health. Indeed, even in smaller hamlets that otherwise do very little “regulating,” health boards often are the exception. For example, the Board of Health in Needham, Massachusetts—a town of just over 30,000 that still is governed by town meeting—has issued regulations on everything from the sale of flavored tobacco products, to the operation of tattoo parlors and tanning salons, to the prevention of concussions in youth athletics.²⁶ Public health regulations often can be quite detailed, easily rivaling federal agency regulations in both breadth and specificity. Chicago’s “Food Code” alone spans 281 pages, and touches on everything from the proper use and maintenance of wiping cloths to the labeling of shucked shellfish.²⁷

Another traditional sphere of local regulatory activity concerns land use and zoning. In each of the fifty states, municipalities are delegated broad authority to decide how land within the boundaries of their jurisdiction may be used. The Standard State Zoning Enabling Act—used in some form in all but a handful of states—authorizes municipalities to promote “health, safety, morals, or the general welfare of the community” by regulating everything from the size of buildings, yards, and open spaces, to the permissible density of individual neighborhoods, to the “location and use of buildings, structures, and land for trade, industry, residence, or other purposes.”²⁸ Municipalities have used their zoning authority to enact comprehensive building codes, promote economic development, set aside land for conservation purposes, and to promote (or discourage) the construction of affordable housing.²⁹

26 NEEDHAM, MASS., BD. OF PUB. HEALTH REGS., art. 1(G); *id.* at §§ 7.3, 21.2; *id.* at art. 24(A)(5).

27 CHI., ILL. FOOD CODE RULES §§ 3-302.17,3-304.14 (2018).

28 A STANDARD STATE ZONING ENABLING ACT § 1 (Dep’t of Com. 1926).

29 See Davidson, *supra* note 4, at 571, 608; see also Katrina M. Wyman & Danielle Spiegel-Feld, *The Urban Environmental Renaissance*, 108 CALIF. L. REV. 305, 337-339 (2020) (describing the proliferation of local environmental regulations). Chicago retains a “Planned Development Designations” zoning category which is aimed at “promot[ing] economically beneficial development patterns that are compatible with the character of existing neighborhoods . . . and encourage[ing] the protection and conservation of the city’s natural resources.” *Planned Development Designations*, CITY OF CHICAGO, https://www.chicago.gov/city/en/depts/dcd/provdrs/admin/svcs/planned_developmentdesignations.html [<https://perma.cc/97M8-SYVF>].

Local governments also regulate the use of public ways. They set speed limits³⁰ and establish rules for parking on public streets.³¹ In larger municipalities, they also provide various public transit options, and regulate private alternatives such as taxis and vehicles-for-hire.³²

In larger cities—though occasionally in smaller municipalities as well—local governments also regulate various other aspects of commercial life. Cities have adopted minimum wage laws, employment regulations, and anti-discrimination provisions.³³ The City of Seattle requires more than twenty categories of businesses to obtain a municipal license and comply with various requirements, including burglar alarm retailers, mobile home parks, rental housing agencies, and businesses that operate “amusement devices” such as pool tables or arcade games.³⁴ New York City’s Department of Consumer Affairs also regulates car washes (and mobile car washes), electronic stores, process servers, home improvement businesses, and home appliance dealers, among many others.³⁵

Finally, local governments also “administer” a variety of essential public services. They educate students. They deliver fire and policing services. They organize trash and recycling pickup. They ensure residents have access to gas and electricity.³⁶ And they operate recreation centers, libraries, and parks. Many of these activities are not strictly “regulatory,” meaning they neither

³⁰ See, e.g., 75 PA. CONS. STAT. ANN. § 3363 (2013) (granting discretion to local governments to alter maximum speed limits); N.Y. VEH. & TRAF. LAW § 1683(a)(15) (McKinney 1960); MISS. CODE ANN. § 63-3-511 (1972) (“[L]ocal authorities shall determine and declare, by ordinance, a reasonable and safe speed limit, which shall be effective when appropriate signs giving notice thereof are erected on such street. . .”).

³¹ See CAL. VEH. CODE § 22508 (West 2013) (outlining limits on local regulation of parking rules); VA. CODE ANN. § 46.2-1220 (2019) (“The governing body of any county, city, or town may by ordinance provide for the regulation of parking, stopping, and standing of vehicles within its limits.”).

³² For example, New York City has the authority to regulate and license taxicabs under a state statutory grant. N.Y. GEN. MUN. LAW § 181 (McKinney 2016). In some states, local governments can consolidate resources to expand public transportation through the establishment of regional transit authorities which have tax-levying power. See, e.g., OHIO REV. CODE ANN. § 306.322 (West 2021).

³³ Minneapolis is one of the several major cities that has used its municipal power to enact a minimum wage greater than the state or federal floor. MINNEAPOLIS, MINN., CODE OF ORDINANCES § 40.390 (2019); see also *Graco, Inc. v. City of Minneapolis*, 937 N.W. 2d 756, 766 (Minn. 2020) (ruling in favor of the City of Minneapolis in a challenge to the minimum wage ordinance). Chicago has gone beyond federal and state law by enacting anti-discrimination ordinances related to fair housing and employment, which the municipal Commission on Human Rights investigates and adjudicates. *Discrimination Cases*, CITY OF CHICAGO, <https://www.chicago.gov/city/en/depts/cchr/provdrs/discrim.html> [<https://perma.cc/XLH2-SFG2>].

³⁴ *About Business Regulations*, CITY OF SEATTLE <http://www.seattle.gov/business-regulations#amusementdevice> [<https://perma.cc/V5SE-A2AX>].

³⁵ N.Y.C., N.Y., RULES tit. 6, ch. 2 (2019).

³⁶ See Alexandra B. Klass & Rebecca Wilton, *Local Power*, 75 VAND. L. REV. 93, 95 (2022) (discussing the secondary power of local governments to provide electricity to their constituents, moving beyond an understanding of local governments as purely regulatory bodies).

impose binding obligations on the public, nor adjudicate public entitlements. And for this reason, even at the federal level these activities would fall outside the traditional bounds of “administrative law.” Still, even these local government functions at times involve more traditional forms of regulation and are therefore germane to the discussion that follows.

B. *The Forms of Local Administration*

Not all local regulatory activity is carried out by local *agencies*. Often, generally applicable regulations—such as licensing requirements or comprehensive zoning plans—are adopted by local legislative bodies, such as city councils or county boards of supervisors.³⁷ Indeed, in many jurisdictions, administrative agencies lack the authority to adopt binding rules. In Los Angeles, Houston, and Minneapolis, for example, agencies may propose rules, or even hold hearings and seek public input.³⁸ But ultimately, all regulations must be adopted by the city council before they go into effect. In still other jurisdictions, rulemaking authority varies from one agency to another. In San Francisco, the Municipal Transportation Authority (MTA) has broad rulemaking authority over the city’s transportation sector—but other agencies must typically submit their rules to the Board of Supervisors for approval.³⁹

Yet in plenty of other jurisdictions, both large and small, a great deal of regulation is carried out by administrative bodies. In cities like New York, Chicago, Philadelphia, and Seattle, agencies issue hundreds of rules each year.⁴⁰ The same is true in much smaller jurisdictions as well. In Connecticut, for example, “legislative” zoning decisions typically are made by appointed

³⁷ See, e.g., PHILA., PA. HOME RULE CHARTER § 2-307 (2007) (announcing procedure for approving zoning ordinances or amendments to zoning ordinances); MINNEAPOLIS, MINN., CODE OF ORDINANCES § 4.1 (“The Council may grant a license only if the license expires within one year.”).

³⁸ See generally L.A., CAL., ADMIN. CODE div. 8 (regulating the creation and operation of agencies to solicit public input); HOUS., TEX. CHARTER §§ 2-501-527 outlining the process by which the Houston Department of Administration and Regulatory Affairs operates); MINNEAPOLIS, MINN. CODE OF ORDINANCES § 204.50 (permitting the environmental health division to promulgate rules and regulations as necessary to carry out its purpose).

³⁹ San Francisco’s boards and commissions have the power to “[recommend] to the Mayor for submission to the Board of Supervisors rates, fees and similar charges with respect to appropriate items coming within their respective jurisdictions.” S.F., CAL. CHARTER § 4.102. Some of these bodies appear to have limited rulemaking authority. For example, the San Francisco Charter creates the Human Rights Commission and gives it the power to “implement” the city’s non-discrimination ordinances. *Id.* at § 4.107. However, it may only issue rules and regulations “for the conduct of its business”; new ordinances must go through the Board of Supervisors. *Id.*; See also § 8A.102.

⁴⁰ Philadelphia maintains an online database of independent agency regulations similar to, but less comprehensive than, the *Federal Register*. See generally *Regulations – List of Regulations Promulgated by the City*, CITY OF PHILA., <https://regulations.phila-records.com/> [<https://perma.cc/DYU8-8Z2A>].

commissions without any possibility of city council review.⁴¹ And in Kentucky, Planning and Zoning Commission regulations automatically go into effect unless a local legislative body affirmatively votes to overturn it.⁴²

Size and geography certainly account for some of the differences in agency rulemaking authority, but only up to a point. Generally speaking, agencies in cities to the east of the Mississippi are more likely to engage in administrative rulemaking.⁴³ And larger cities are more likely than smaller municipalities to have a robust administrative practice. But these are only general trends. Agencies in Portland, Seattle, and Denver, for example, regularly adopt rules, whereas agencies in Miami and Charleston do not. Meanwhile, small towns up and down the eastern seaboard typically have active boards of health that regulate various aspects of municipal life.⁴⁴ And as discussed above, zoning in most Connecticut towns is done entirely by administrative boards.

Importantly, even in jurisdictions where agencies do not adopt binding rules, they nevertheless exercise a great deal of interpretive discretion in carrying out their legislative mandates. Many agencies that lack rulemaking authority still have the authority to adjudicate individual disputes—to grant licenses, approve zoning variances, or issue fines and fees. In making these decisions, agencies must give meaning to relatively broad statutory terms, such as “substantially alter,” or “major modification.”⁴⁵ Sometimes they do this on an ad hoc basis in individual cases. Sometimes they issue guidelines

⁴¹ See Bronin, *supra* note 7, at 46-48 (describing Hartford, Connecticut’s comprehensive rezoning process).

⁴² Jerry L. Anderson, Aaron E. Brees & Emily C. Reninger, *A Study of American Zoning Board Composition and Public Attitudes toward Zoning Issues*, 40 URB. LAW. 689, 693 (2008); see also KY. REV. STAT. ANN. § 100.211 (West 2022).

⁴³ The city charters of New York, Philadelphia, and Chicago grant independent agencies the authority to issue binding rules. See PHILA., PA. HOME RULE CHARTER § 8-407; N.Y.C., N.Y. CHARTER §§ 1041-47; CHI., ILL. MUN. CODE tit. IV. By contrast, agencies in many major cities generally do not promulgate binding rules without approval from the City Council or the Mayor. See L.A., CAL. CHARTER § 506 (b) (“[R]ules, when adopted by order of a general manager who is the head of a department, shall be subject to the approval of the Mayor.”).

⁴⁴ In Massachusetts, for example, local boards of selectmen have the authority to appoint members of local boards of public health which have issued regulations on important issues such as indoor smoking. See Diller, *Local Health Agencies*, *supra* note 7, at 1878-79. This is also the case in West Virginia, where “local boards of health have been more aggressive in regulating indoor smoking . . . than elected local entities.” *Id.* at 1872. Princeton, New Jersey’s board also has acted extensively on smoking bans as well as water fluoridation rules. *Id.* at 1869, 1873 (citing LDM, Inc. v. Princeton Reg’l Health Comm’n, 764 A.2d 507, 523-24, 530 (N.J. Super. Ct. Law Div. 2000)).

⁴⁵ *Jennings v. N.Y. State Bd. of Mental Health*, 682 N.E. 2d 953, 958 (N.Y. 1997) (reviewing the Acting Commissioner of the New York State Office of Mental Health’s determination that a proposed facility would not “substantially alter the nature . . . of the neighborhood . . .”); *Theophilopoulos v. Bd. of Health*, 5 N.E.3d 1245, 1250 (Mass. App. Ct. 2014) (reviewing an agency’s determination that a modification was not “major” under the statute).

that apply across the board.⁴⁶ These “interpretive rules”—whether formally reduced to writing or informally applied from one case to another—are an important form of local agency policymaking that predominates at the federal level as well and gives rise to a variety of federal administrative doctrines and disputes.

C. *The Structure of Local Administration*

At the federal level, most administrative agencies share certain basic features. With few exceptions, agencies are situated within the executive branch.⁴⁷ Agency heads are appointed by the President, and are subject to presidential removal, at least for cause.⁴⁸ And all federal agencies exercise powers delegated to them by Congress, a separate and co-equal branch. When scholars write about the federal administrative state, there is little doubt as to precisely the sorts of entities they have in mind.

At the local level, however, it turns out to be quite a bit more difficult to define precisely what makes a government entity “local”—or for that matter an “agency.” Some local agencies do indeed look quite a bit like their federal counterparts. In New York City, for example, most agencies are created by the City Council to perform a specific municipal function, be it operating schools or enforcing consumer protection laws.⁴⁹ And agencies generally are thought to be part of the City’s executive branch.⁵⁰ All agency heads are appointed by the Mayor and are subject to at least some form of mayoral removal.⁵¹ They are, in short, readily recognizable as “local” “executive” “agencies.”

Other entities are clearly both “local” and “agencies”—but may not be “executive” agencies in the traditional sense. For example, under a council-manager form of municipal government, agency heads are appointed either

⁴⁶ See, e.g., *Bailey v. Zoning Bd. of Adjustment*, 801 A.2d 492, 501 (Pa. 2002) (recognizing that even agencies that lack statutory rulemaking authority may promulgate interpretive rules).

⁴⁷ There are a small number of agencies that answer directly to Congress, such as the Government Accountability Office and the U.S. Capitol Police. *Branches of the U.S. Government*, USA.GOV, <https://www.usa.gov/branches-of-government>. [<https://perma.cc/GBU9-AE8Z>].

⁴⁸ Independent agencies typically have for-cause removal, whereas executive agency heads may be removed at will. See Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 827-28 (2013) (describing the traditional distinction between independent and executive agencies based in part on their removal provisions).

⁴⁹ For example, the City Council established the Department of Consumer Affairs in 1969 through its Consumer Protection Law, which the agency is charged with enforcing. *History of the Department, NYC CONSUMER AFFAIRS* <https://www1.nyc.gov/site/dca/about/overview.page> [<https://perma.cc/B9DT-A8FP>]. For a comprehensive list of city agencies, see generally N.Y.C., N.Y. CHARTER chs. 30-58.

⁵⁰ See Davidson, *supra* note 4 at 594; see also N.Y.C., N.Y. RULES (establishing city agencies including Department of Consumer Affairs).

⁵¹ *Id.*; see also N.Y.C., N.Y. CHARTER ch. 1, § 6 (“The mayor shall appoint the heads of administrations, departments, all commissioners and all other officers not elected by the people, except as otherwise provided by law.”).

directly by the city council, or by a city manager, who in turn is appointed by the city council and is subject to council removal.⁵² The same is true at the county level, where boards of supervisors typically are responsible both for adopting county-level legislation and for overseeing the administrative officials who are tasked with implementation.⁵³ Although these jurisdictions may have robust administrative bureaucracies, they lack the traditional separation of legislative and executive powers that has defined many of the debates surrounding the federal administrative state.

Beyond that, there is a dizzying array of administrative entities that push at the definitions of “local” or “agency” in various ways. Public health boards are typically “local” in the sense that they have jurisdiction over a particular county or municipality, but they are in fact creatures of both state and local law. In Georgia, for example, state law requires that each county have a board of public health.⁵⁴ It also describes the health boards’ powers, and establishes the process and criteria for appointment.⁵⁵ The individuals who serve on county health boards, however, are appointed by the governing authority in each county.⁵⁶ And counties are permitted to assign health boards to perform additional functions—such as inspecting public swimming pools—so long as they touch in some way on matters of public health.⁵⁷

This same hybrid structure—part local, part state—predominates in a variety of other contexts as well.⁵⁸ As discussed above, all fifty states have specific statutes in place authorizing municipalities to engage in zoning and planning activities.⁵⁹ These statutes authorize—and sometimes require—municipalities to create zoning commissions, boards of adjustment, and the

⁵² See Davidson, *supra* note 4, at 601-02.

⁵³ *Id.* at 613.

⁵⁴ GA. CODE ANN. § 31-3-1 (2020).

⁵⁵ *Id.* §§ 31-3-2, 31-3-4, 31-3-5.

⁵⁶ *Id.* § 31-3-2(a).

⁵⁷ See *id.* § 31-45-8 (“Each public swimming pool shall be inspected by the county board of health to determine compliance with this chapter and with the rules and regulations adopted by the Department of Public Health.”); see also *id.* § 31-3-4 (outlining the power of each board to regulate public health.).

⁵⁸ For example, the Philadelphia Parking Authority (PPA), which manages parking in addition to taxicab regulation and other traffic matters, is an example of a hybrid state/local agency despite its traditional local government function. Philadelphia’s City Council established the agency in the 1950s after a statutory grant of authority from the Commonwealth’s legislature, and the Governor of Pennsylvania currently appoints all members of the PPA’s board. See *About the Parking Authority*, PHILA. PARKING AUTH., <http://philapark.org/about-ppa> [<https://perma.cc/4MAL-Q4ST>] (providing general information about the Philadelphia Parking Authority). Both the governor of Michigan and members of the Wayne County Board have to the power to appoint members to the board of the Wayne County Airport Authority, which was established by state statute and governs the operations of Detroit’s international airport. *Board*, WAYNE COUNTY AIRPORT AUTH., <https://www.metroairport.com/business/about-wcaa/board> [<https://perma.cc/B4D7-N5DF>].

⁵⁹ See *supra* Section I.A.

like.⁶⁰ Zoning statutes determine which powers municipal legislatures may delegate to these administrative bodies.⁶¹ And they describe the appointments process, set out the procedures that boards must follow, and establish the grounds and standards of judicial review.⁶² Regional metropolitan planning councils blur the lines still further—they exercise authority over a specific substate region, include a mix of state and local officials, and are regulated in part by federal law.⁶³

It also is more difficult at the local level to define precisely what constitutes an “agency.” Consider, for example, special purpose districts, like water districts, public improvement districts, regional transportation councils, and school boards. They are “agencies” in the sense that they have limited jurisdiction over a specific government function and their procedures are tightly circumscribed by law.⁶⁴ But they also are typically independent from the municipalities or counties within which they operate.⁶⁵ Sometimes their members are elected by district residents. Sometimes they are appointed by the governor or some other entity.⁶⁶ Their boundaries may be co-extensive

⁶⁰ See, e.g., MICH. COMP. LAWS § 125.3211 (2022) (allowing local legislative bodies to appoint zoning commissions); OHIO REV. CODE ANN. § 519.05 (LexisNexis 2021) (outlining the requirements of a township rural zoning commission).

⁶¹ Sara C. Bronin, *Comprehensive Rezonings*, 2019 BYU L. REV. 725, 739 (2020) (“With the exception of the state of Connecticut, state legislatures have vested the ability to draft and amend zoning codes—which encompass both the text of the zoning code and the associated map—exclusively in the local legislative body.”); see also CONN. GEN. STAT. §§ 8-1, 8-4a (2021) (detailing that a municipality may adopt charter provisions through a zoning commission); TEX. LOC. GOV'T CODE ANN. 211.001-007 (West 2022) (outlining the powers of a zoning commission).

⁶² See Bronin, *supra* note 61, at 739 (“Comprehensive rezonings must follow applicable procedures to withstand judicial scrutiny.”).

⁶³ See, e.g., 23 U.S.C. § 134 (stating designation requirements of metropolitan planning organizations); *About DVRPC*, DEL. VALLEY REG'L PLAN. COMM'N, <https://www.dvrpc.org/about> [<https://perma.cc/P35V-BCNP>] (discussing the general work of a metropolitan planning organization).

⁶⁴ For example, the Chicago Transit Authority is a “special district” under Illinois law and is not an agency of Chicago’s municipal government nor of the Illinois state government. *Chi. Transit Auth. v. Danaher*, 353 N.E.2d 97, 100 (Ill. App. Ct. 1976); see also Saiger, *supra* note 4, at 437 (“The jurisdiction of special districts, like that of local governments, is thus limited to their local borders. But they are special purpose, with jurisdiction limited to a particular subject matter, such as drainage, sewage, water quality, or electricity.”).

⁶⁵ See Saiger, *supra* note 4 (“Special district [sic] are ‘autonomous local governments that provide a single or limited services.’”).

⁶⁶ In the Minneapolis-St. Paul region, a regional planning body known as the Metropolitan Council has extensive authority to govern infrastructure and housing initiatives across a seven-county area. The governor appoints members of the council based on the recommendations of a nominating committee composed of local elected officials. See *Council Member Appointments Process*, METRO. COUNCIL, <https://metro council.org/About-Us/Who-We-Are/CouncilMembers/Appointments-Process.aspx> [<https://perma.cc/35QS-UNWF>] (outlining how a governor appoints a council member). In the Chicago area, the Regional Transportation Authority which governs the local commuter rail system is governed by a Board of Directors whose members are appointed—by the mayor of Chicago, suburban members of the Cook County Board, or the chairman the County Board in the five collar

with a specific county or municipality—as is true, for example, of school districts in Florida, which follow county lines.⁶⁷ Or they may cross municipal boundaries in unpredictable ways. The City of Phoenix, for example, has four unified school districts, four high school districts, and twenty-one elementary school districts.⁶⁸ Some of these districts are located entirely within city limits, whereas others cover small portions of Phoenix, along with several other neighboring municipalities.⁶⁹

This paper adopts a relatively broad definition of “local agency” to include any substate unit of government with limited jurisdiction over a specific government function. This definition would include the vast array of special purpose governments, along with more traditional executive agencies and appointed and elected health and zoning boards. But it would exclude municipal city councils and county boards of supervisors that exercise general jurisdiction over a particular geographic area—even when these entities act in an “administrative” capacity by adjudicating individual disputes.⁷⁰

D. Existing Constraints on Local Administration

Legislatures and courts have a variety of tools at their disposal with which to oversee and structure the administrative state. When it comes to discrete agency decisions—such as agency orders or rules—the choice typically is between agency procedures and substantive review (or more often, some mix of the two).⁷¹ A procedural approach to agency regulation requires agencies to go through certain steps in making their decisions: to make proposed regulations publicly available, to solicit public comments, or to hold hearings and enable members of the public or a subset of affected parties to take part.⁷² Procedural requirements may be backed by judicial review, but they need not be. Requirements also may be enforced through legislative oversight, or

counties surrounding Cook County, among other officials. *Board of Directors*, REG’L TRANSP. AUTH., <https://www.rtachicago.org/about-us/leadership/board-directors> [<https://perma.cc/6CPP-KBGR>].

⁶⁷ FLA. STAT. § 1001.30 (2022).

⁶⁸ *School Districts*, CITY OF PHX., <https://www.phoenix.gov/education/schools> [<https://perma.cc/Z27Z-XEF6>].

⁶⁹ Several districts that serve Phoenix students, such as Paradise Valley Unified and Glendale Union, extend beyond the city limits to major suburbs. See *High School Districts in the City of Phoenix*, https://www.phoenix.gov/education/site/Documents/nsd_schl_disthigh.pdf [<https://perma.cc/X9GM-PSCB>] (portraying a map of high school districts in Phoenix).

⁷⁰ On the administrative constraints that bind local legislative bodies, see Ponomarenko, *supra* note 23.

⁷¹ Legislatures can, of course, forego both of these options and rely instead on wholesale political oversight and agency design. In short, instead of policing individual decisions, legislatures and executive officials can structure agencies in ways that are designed to ensure that on the whole, agency decisions are consistent with legislative mandates and generally sound.

⁷² See, e.g., 5 U.S.C. § 553.

through internal bureaucratic controls.⁷³ A substantive approach typically gives some other actor the authority to review whether an agency's decision is consistent with the underlying statute, supported by the record, or generally sound. Although substantive review need not involve the courts, it very often does.⁷⁴

Given that so many local agencies are in fact creatures of state law, it is perhaps not surprising that many of the procedural and substantive constraints on local agency decisionmaking are imposed at the state level as well. Indeed, a distinguishing feature of "local" administrative law is that much of it is not in fact "local" at all.

For agency adjudication, the basic procedural requirements of notice and an opportunity to be heard are grounded in the federal constitutional requirement of procedural due process. Beginning in the early twentieth century with *Londoner v. Denver*, the Supreme Court has made clear that when local governments adjudicate private rights—by granting zoning variances, for example, or imposing specific taxes or assessments on individual plots of land—they must afford those who are affected at least a rudimentary opportunity to be heard before a final decision is made.⁷⁵ In *Goldberg v. Kelly*, which broadened the constitutional definition of "property" to include various public entitlements, the Supreme Court dramatically expanded the category of local government actions to which the requirements of procedural due process apply.⁷⁶ Since *Goldberg*, courts have extended due process protections to a range of agency decisions, ranging from school suspensions to liquor license renewals.⁷⁷

Although states and localities have since codified many of these requirements, the existence of a constitutional baseline means that there is a fair amount of uniformity when it comes to local agency adjudication across agencies and states. At least for more significant deprivations, state and local law typically require that an agency give notice, provide an opportunity for a

⁷³ See, e.g., Exec. Order No. 13,892, 84 Fed. Reg. 55,239, 55,240 (Oct. 15, 2019) (imposing restrictions on the issuance of agency guidance documents).

⁷⁴ There are, however, important exceptions. For example, Executive Order 12866 requires agencies to submit all "significant" rules to the White House Office of Management and Budget (OMB) for review. Exec. Order No. 12,866, 58 Fed. Reg. 51,738, 51,740 (Oct. 4, 1993). The Paperwork Reduction Act also requires OMB review of any provisions that impose new reporting requirements on businesses or the public at large. See Paperwork Reduction Act, 44 U.S.C. §§ 3501–3521 (2020).

⁷⁵ See *Londoner v. Denver*, 210 U.S. 373, 386 (1908).

⁷⁶ See *Goldberg v. Kelly*, 397 U.S. 254, 262 n.8 (1969).

⁷⁷ See, e.g., *Goss v. Lopez*, 419 U.S. 565, 574–75 (1975) (school suspensions); *MacArthur v. Presto*, 221 P.2d 934, 935 (Colo. 1950) (en banc) (liquor licenses); *Great Atl. & Pac. Tea Co. v. Bd. of License Comm'rs*, 444 N.E.2d 364, 367 (Mass. 1983) (liquor licenses); see also Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1268 (1975) (discussing the fact that "some kind of hearing" is necessary before an individual is deprived of her property interests).

pre or postdecision hearing, and issue a decision on the record.⁷⁸ And state law almost uniformly permits individuals who are aggrieved by a local agency's determinations to challenge the agency's decision in state court.⁷⁹

When it comes to local agency rulemaking, however, the differences among states—as well as between municipalities in the same state—can be substantial. Although all jurisdictions employ some mix of procedural and substantive requirements, the precise mix between substance and procedure, as well as the rigor of the constraints, varies greatly from one jurisdiction to another. In some jurisdictions, local administrative law closely mirrors the federal model. In others, local agencies operate subject to few, if any, constraints.

1. Procedural Constraints

In most jurisdictions, the one aspect of local administrative law that is in fact “local” concerns the procedures that local agencies must follow when they adopt binding rules. There are just two states—Wyoming and Hawaii—in which the state's Administrative Procedure Act rulemaking requirements bind local agencies as well.⁸⁰ In several other states, subject-specific

⁷⁸ See, e.g., *Williams v. Seattle*, 643 P.2d 426, 430 (Wash. 1982) (en banc) (outlining requirements in Washington State).

⁷⁹ William A. McGrath, Caryl M. Lazzaro, John C. Bilzor & Anne E. Bomar, *State Judicial Review of Administrative Action*, 43 ADMIN. L. REV. 571, 707-08 (1991) (detailing five states' review procedures for administrative adjudication).

⁸⁰ WYO. STAT. ANN. § 16-3-101 (2021) (defining agency to include “county, city or town or other political subdivision”); HAW. REV. STAT. § 91-1(1) (2020) (defining agency to include “county board[s].” In the remaining states, local agencies are exempt entirely from the requirements of state APAs, though as discussed below, courts in a number of states have applied APA-derived substantive standards of review to local agencies as a matter of administrative common law. See *Davidson*, *supra* note 4, at 605 n.191 (noting that Alabama, Arizona, California, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Iowa, Louisiana, Massachusetts, Minnesota, Mississippi, Missouri, Montana, New Jersey, New Mexico, New York, North Carolina, South Dakota, Utah, Vermont, and West Virginia all exempt local governments from the state APA); Saiger, *supra* note 4, at 429-30 n.21 (adding Indiana, Maine, and possibly Alaska as states that exempt local agencies from APA requirements). As to the remaining states, see *Corbin v. Special Sch. Dist.*, 465 S.W.2d 342 (Ark. 1971) (holding that Arkansas's APA only applies to state agencies); COLO. REV. STAT. § 24-4-102 (2022) (Colorado APA defining “agency” to include only agencies “of the state”); KAN. STAT. ANN. § 77-502 (2021) (Kansas APA expressly excluding political subdivisions); KY. REV. STAT. ANN. § 13B.010 (LexisNexis 2022) (Kentucky APA limiting the definition of “agency” to an entity that is part of the executive branch of the state government); MICH. COMP. LAWS § 24.203 (2022) (Michigan APA limiting “agency” to “state” boards and departments); N.H. REV. STAT. ANN. § 541-A:1 (2021) (New Hampshire APA, same); OHIO REV. CODE ANN. § 119.01 (2018) (Ohio APA, same); OKLA. STAT. ANN. tit. 75 § 250.3 (West 2021) (Oklahoma APA, same); *City of Providence v. Local 799, Int'l Ass'n of Firefighters*, 305 A.2d 93, 95 (R.I. 1973) (interpreting the Rhode Island APA to exclude local agencies); 10 TEX. GOV'T. CODE ANN. § 2001.003 (West 2021) (Texas APA defining “agency” to mean an entity with “statewide jurisdiction”); *Riggins v. Hous. Auth.*, 549 P.2d 480, 482 (Wash. 1976) (en banc) (reading the state APA to mostly exempt local agencies). Some states, like Ohio and Pennsylvania, have separate state laws that govern local agency adjudication. OHIO REV. CODE ANN. § 2506 (West 2022) (setting out the procedures for appealing local agency

authorizing statutes impose procedural requirements on certain kinds of local agencies, such as zoning boards or boards of public health.⁸¹ Rulemaking procedures for other municipal agencies, however, are generally determined by local law.

Left largely to their own devices, municipalities have adopted a variety of approaches. At one end of the spectrum are a handful of cities, including New York, Philadelphia, Boston, and Seattle, that have adopted uniform Administrative Procedure Acts to govern local rulemaking.⁸² At the other end of the spectrum are the vast majority of municipalities that either specify procedures on an agency-by-agency basis or are entirely silent on the procedures that agencies must follow in adopting administrative rules.⁸³

Where procedures exist, they vary widely. In some jurisdictions, agency procedures incorporate the three key features of federal rulemaking: notice, an opportunity to provide comments, and the requirement of an agency response. In Philadelphia, for example, agencies must provide advanced notice of proposed rules, hold hearings upon request, and then prepare a report summarizing the comments received and the changes made.⁸⁴

A number of other jurisdictions preserve the basic procedural requirements of notice and an opportunity to be heard, while dispensing with the requirement of an agency response.⁸⁵ New York City, for example, maintains a rulemaking website called “NYC Rules,” which is modeled after the federal government’s own “Regulations.gov.”⁸⁶ Agencies post proposed rules at least 30 days in advance, accept both written and electronic

adjudications); 2 PA. CONS. STAT. § 105 (2022) (outlining the provisions governing local agency adjudications that together are referred to as the “Local Agency Law”).

⁸¹ In Massachusetts, for example, the state public health law requires local health boards to provide advanced notice of proposed rules, and to hold public hearings on rules that have to do with sanitation. MASS. GEN. LAWS. ch. 111, § 31 (2021). Likewise, California applies specific hearing rules and procedures for hearings conducted in schools. *See* CAL. EDUC. CODE §§ 44944, 44948.5, 87679 (2021).

⁸² For a comprehensive overview of New York, Philadelphia, and Seattle’s local APAs, see Adams, *supra* note 4, at 646–55.

⁸³ Adams, *supra* note 4, at 646–55. Chicago and Portland are both examples of cities with robust administrative practice but without APAs. In Chicago, procedures that agencies must follow vary widely. *Compare* CHI., ILL., MUNI. CODE § 2-112-070 (2021) (requiring a public hearing for health rules if a citizen objects), *with id.* at § 2-45-047 (requiring only review by the Commissioner of Planning and Development for zoning changes). The same is true in Portland. *See infra* note 85. *See also* NEEDHAM, MASS., GEN. BY-LAWS § 2.5 (2021) (imposing no procedural requirements on a health board actively engaged in rulemaking).

⁸⁴ PHILA., PA., HOME RULE CHARTER § 8-407.

⁸⁵ For example, Portland’s Development Bureau gives thirty days’ notice and accepts written and oral testimony but has no obligation to respond. PORTLAND, OR., CITY CODE & CHARTER ch. 3.30.040 (2019). Once again showing the unstandardized approach to local rulemaking, however, the same city’s Office of Equity and Human Rights requires just fifteen days’ notice. *Id.* ch. 3.128.040.

⁸⁶ NYC RULES, <https://rules.cityofnewyork.us> [<https://perma.cc/5EVY-KQT3>]; REGULATIONS.GOV, <https://www.regulations.gov> [<https://perma.cc/8WTX-2TWE>].

comments, and may hold hearings.⁸⁷ Agencies need not, however, respond in any way to the comments received.⁸⁸ In Seattle, agencies are required to give notice and accept written comments—but in the absence of a rulemaking portal, the process is considerably less transparent.⁸⁹ In New Jersey, all regulations adopted by local boards of public health must be presented at two consecutive board meetings and then noticed in at least one local newspaper, before they go into effect.⁹⁰

The required degree of formality goes down further from there. In Chicago, each agency is subject to a different set of procedural requirements, and some agencies are not required to engage the public at all. For example, the Department of Business Affairs and Consumer Protection must provide advanced notice and solicit comments when regulating “public chauffeurs or public passenger vehicles.”⁹¹ But for all other regulations—on topics ranging from filling stations to sidewalk cafes—the Department must simply ensure they are “printed and made available” at the Department’s office after they have gone into effect.⁹² Massachusetts likewise requires all local boards of public health to “describe the substance” of any proposed regulation in a general circulation newspaper ten days before it goes into effect—but does not require that agencies solicit the public’s input on proposed rules.⁹³

2. Substantive Constraints

Unlike the procedural requirements that local agencies must follow, the substantive constraints on local agency decisionmaking are fixed entirely by state law. In a number of states, either the state APA or another generally applicable statute both authorizes judicial review of local agency regulations

⁸⁷ N.Y.C. N.Y., CHARTER ch.45, § 1043.

⁸⁸ *Id.*

⁸⁹ Agencies typically post rulemaking announcements on their individual websites (some more prominently than others), publish a rulemaking notice in at least one local newspaper, and send out an announcement to those who have subscribed to the agency’s mailing list. *See* SEATTLE, WASH. MUN. CODE ch. 3.02. Seattle agencies vary significantly in terms of how easy it is to locate draft rules. The Department of Finance and Administrative Services, for example has a “FAS Director’s Rules” link featured prominently featured on its homepage (though one might quibble with the notion that website visitors would know that this is where proposed regulations necessarily will be found). *See Finance and Administrative Services*, SEATTLE, <https://www.seattle.gov/finance-and-administrative-services> [<https://perma.cc/6Q9J-8RCF>]. The Seattle Department of Transportation, meanwhile, nests its proposed rules deep in a tree menu, under “About Us”, then, “Document Library”, then “Director’s Rules and Ordinances.” *Director’s Rules & Ordinances: Seattle Department of Transportation*, SEATTLE, <https://www.seattle.gov/transportation/document-library/directors-rules-and-ordinances> [<https://perma.cc/3FRW-XUQH>].

⁹⁰ 26 N.J. REV. STAT. § 26:3-66 (2021).

⁹¹ CHI., ILL., MUN. CODE § 2-25-120 (2021).

⁹² *Id.*

⁹³ MASS. GEN. LAWS ch. 111, § 31 (2020).

and articulates the applicable standard of review.⁹⁴ Other states, like Washington, spell out the applicable standards of review for certain categories of agencies—such as school boards and zoning boards—but are silent on others.⁹⁵ In still other states, courts have held that although the state APA does not apply to local agencies, the same general principles of judicial review extend to local agencies “by analogy.”⁹⁶ Finally, some state courts, in the face of legislative inaction, have reviewed local agency decisions under the permissive standards of the state’s substantive due process clause.⁹⁷

Although many of these statutes and courts use familiar terms like “arbitrary [and] capricious,” the meaning that state courts ascribe to these terms in practice varies considerably across states.⁹⁸ Often, as William Funk notes, “only the most impressionistic judgments can be made concerning the level of rationality review available in the various jurisdictions.”⁹⁹ Still, even a brief survey of judicial decisions in a handful of states makes clear that the applicable standards of review differ from one another in important ways.

In New York state, for example, local agency decisions are reviewed under an arbitrary and capricious standard that in practice operates much like federal “hard look review.”¹⁰⁰ All challenges to agency regulations are brought under Article 78 of the state’s rules of civil procedure, which authorize courts to set aside agency regulations that are “arbitrary and capricious” or an “abuse of discretion.”¹⁰¹ Courts have interpreted this standard to require that agency rules be “based on a rational, documented, empirical determination.”¹⁰² Although agency officials need not conduct exhaustive studies, they typically must be able to point to some factual basis to justify a challenged rule.¹⁰³ This

⁹⁴ See, e.g., N.Y. C.P.L.R. § 7801-06 (Consol. 2022).

⁹⁵ See WASH. REV. CODE § 36.70c.010 (land use code); *id.* § 28a.645.030 (appeals from school boards).

⁹⁶ 2 ANTIEAU ON LOCAL GOVERNMENT LAW § 26.08 (2d ed. 2021).

⁹⁷ See, e.g., *Snohomish Cnty. Builders Ass’n v. Snohomish Health Dist.*, 508 P.2d 617, 622-23 (Wash. Ct. App. 1973) (evaluating local health regulations under the due process standards of the Washington State Constitution); *Williams v. Seattle Sch. Dist. No. 1*, 643 P.2d 426, 430 Wash. 1982)(en banc) (discussing the court’s inherent power to review non-judicial agency decisions).

⁹⁸ See Funk, *supra* note 5, at 153-55 (discussing state adoption of the Model State Administrative Procedure Act and noting “substantial variation” in practice before state courts).

⁹⁹ *Id.* at 156.

¹⁰⁰ On the federal “hard look” standard, see *infra* note 121 and accompanying text.

¹⁰¹ N.Y. C.P.L.R. § 7803.3 (Consol. 2014).

¹⁰² *Lynch v. N.Y.C. Civilian Complaint Rev. Bd.*, 98 N.Y.S.3d 695, 703 (N.Y. Sup. Ct. 2019).

¹⁰³ *Metro. Taxicab Bd. of Trade v. N.Y.C. Taxi & Limousine Comm’n*, 960 N.E.2d 944, 946-47 (N.Y. Sup. Ct. 2011) (invalidating a New York City Taxi & Limousine Commission rule because the Commission had not “presented any justification with support in the record for its decision”); *Cath. Med. Ctr. of Brooklyn & Queens, Inc. v. Dep’t of Health*, 401 N.E.2d 388, 389 (N.Y. 1979) (“In making a quasi-legislative determination, the commissioner, of course, is not confined to factual data alone but also may apply broader judgmental considerations . . .”).

statewide standard binds *all* local agencies, from New York City's sprawling Department of Transportation, to Schuylers County's Board of Health.¹⁰⁴

By contrast, agency decisions in a number of states are reviewed under the same deferential standards that apply to legislative enactments. In Massachusetts, for example, courts have made clear that the applicable standard of review functions much like the constitutional "rational basis" test that federal courts apply to ordinary economic legislation.¹⁰⁵ Agencies in Massachusetts are not required to point to any facts or evidence to support their regulations, and it falls to plaintiffs to demonstrate "the absence of any *conceivable* ground upon which [the rule] may be upheld."¹⁰⁶ Likewise, courts in Illinois distinguish between agency rules, which must only satisfy the requirements of minimal rationality, and adjudicative decisions which are subject to a somewhat more demanding standard of review.¹⁰⁷

Still other states fall somewhere in between. In Pennsylvania, for example, the commonwealth's supreme court has said that agency rules may only be set aside if they "appear to be so entirely at odds with fundamental principles as to be the expression of a whim rather than an exercise of judgment."¹⁰⁸ Yet in 2018 the state supreme court applied this seemingly permissive standard to strike down a set of regulations issued by the Philadelphia Parking Authority on the grounds that the regulations did not meaningfully account for differences between medallion and non-medallion taxicabs, placing an "unreasonable and arbitrary burden" on non-medallion drivers.¹⁰⁹ Whether the Court's decision is simply an outlier—or a portend of more rigorous review—remains to be seen.

3. The Procedure–Substance Mix

Finally, when it comes to the mix of procedural and substantive constraints on any particular agency's regulatory activities, jurisdictions are

¹⁰⁴ Schuylers County has a population of just 17,752. U.S. CENSUS BUREAU, QUICKFACTS: SCHUYLERS COUNTY, NEW YORK, <https://www.census.gov/quickfacts/fact/table/schuylerscountynewyork/PST045221> [<https://perma.cc/HC33-E85E>].

¹⁰⁵ Ponomarenko, *supra* note 19, at 1415.

¹⁰⁶ *Purity Supreme, Inc. v. Att'y Gen.*, 407 N.E.2d 297, 306 (Mass. 1980) (alteration in original) (emphasis added) (quoting *Colella v. State Racing Comm'n*, 274 N.E.2d 331, 334 (Mass. 1971)).

¹⁰⁷ *See Figiel v. Chi. Plan Comm'n*, 945 N.E.2d 71, 78 (Ill. App. Ct. 2011) (explaining that quasi-judicial decisions face a higher level of scrutiny than municipal legislative decisions); *But see Midwest Petroleum Ass'n v. City of Chicago*, 402 N.E.2d 709, 715 (Ill. App. Ct. 1980) (citing interchangeably to decisions concerning both municipal ordinances and administrative regulations in upholding a challenged local agency rule); *Ill. Coal Operators Ass'n v. Pollution Control Bd.*, 319 N.E.2d 782, 785 (Ill. 1974) (pointing to the fact that agency regulations had been subject to multiple hearings as evidence that they clearly were not arbitrary).

¹⁰⁸ *Rohrbaugh v. Pa. Pub. Util. Comm'n*, 727 A.2d 1080, 1085 (Pa. 1999).

¹⁰⁹ *Bucks Cnty. Servs., Inc. v. Phila. Parking Auth.*, 195 A.3d 218, 238 (Pa. 2018).

all over the map. In New York City, for example, agencies must comply with a fairly robust set of procedural requirements—and then satisfy a demanding standard of substantive judicial review.¹¹⁰ In Philadelphia, agency procedures are, if anything, more comprehensive than New York's, but agencies typically face less scrutiny when their decisions are later challenged in court.¹¹¹ Meanwhile, in Chicago, agencies face few procedural *or* substantive constraints.¹¹²

Administrative law constraints in smaller jurisdictions vary greatly as well. In Massachusetts, for example, health boards can adopt sweeping regulations with a mere ten days' notice to the public, and without any formal opportunity for public comment.¹¹³ And plaintiffs face a heavy burden in seeking to overturn these rules in court.¹¹⁴ In New York State, local procedural requirements in smaller jurisdictions are likewise lax—but the substantive standard of review is essentially the same as the standard that applies to federal agencies under the APA.¹¹⁵

* * *

One would expect, of course, given the sheer diversity of local administration, that local “administrative law” would vary greatly as well. Yet as the discussion above makes clear, much of the variation in local agency practice and procedure seems largely unconnected to any observable differences in agency function, municipal structure, or city size. Chicago, Philadelphia, and New York are all large cities with a strong mayor form of government and a robust administrative state—and yet the mix of administrative law constraints that agencies face differs greatly among all three. The same is true in much smaller jurisdictions as well. The Needham Board of Health, for example, operates with few procedural or substantive constraints on its decisions.¹¹⁶ Four hundred miles to the west (and across the border with New York), regulations adopted by the Schuylers County Board of Health are subject to a fairly demanding standard of substantive judicial review.¹¹⁷ Existing scholarship offers little guidance as to which of these jurisdictions has generally gotten the balance right—though as the next Part suggests, the literature on federal administrative law may be a promising place to start.

¹¹⁰ See *supra* notes 86–88, 100–104 and accompanying text.

¹¹¹ See *supra* notes 84, 108–109 and accompanying text.

¹¹² See *supra* note 91–92, 107 and accompanying text.

¹¹³ See *supra* note 93 and accompanying text.

¹¹⁴ See *supra* note 105–106 and accompanying text.

¹¹⁵ See *supra* note 100–104 and accompanying text.

¹¹⁶ See *supra* note 83.

¹¹⁷ See *supra* note 100–104 and accompanying text (describing the New York standard as akin to “hard look” review).

II. TOWARD A THEORY OF LOCAL ADMINISTRATIVE LAW

The vast literature on federal administrative agencies may seem like an odd place to look for insights for how best to oversee the local administrative state. The Environmental Protection Agency and the Chautauqua County Board of Health may both be “agencies” that regulate aspects of health and safety—but the similarities largely end there. Perhaps more importantly, although federal administrative law scholars have spent decades debating the optimal mix of substantive and procedural constraints on federal administrative agencies, they are no closer to agreement on whether the existing regime under the federal APA is too onerous or too sparse.¹¹⁸

Yet when it comes to laying the groundwork for local administrative scholarship, the existing literature on federal administration turns out to have a great deal to contribute. In particular, it provides a roadmap of sorts: an agreed-upon set of factors and assumptions that, if true, would make the various kinds of constraints on agency decisionmaking either more or less likely to be effective. The *conclusions* from federal administration may have little purchase locally. But the *reasons* behind those conclusions provide a jumping-off point for assessing the potential benefits and drawbacks of both procedural and substantive review.

This Part draws on the familiar—and largely agreed-upon—set of arguments about the potential costs and benefits of both substantive and procedural constraints on agency decisionmaking, evaluating the degree to which these various arguments might apply to local agencies as well.

It argues that the basic federal administrative law requirements of reasoning, backed by a modest form of substantive judicial review, may in fact prove more effective locally—without raising some of the same concerns that have led many federal administrative law scholars to doubt whether substantive review is worth the cost.

On the other hand, this Part suggests that when it comes to local agencies, there may be less of a reason to think that more robust procedures will necessarily lead to better outcomes. Agency procedures may lend greater legitimacy to agency decisions and may contribute to higher levels of civic engagement more broadly. But they may not do much to improve the quality of the decisions reached. Contrary to the conventional approach to local administration, which is heavy on procedure but light on substance,

¹¹⁸ See, e.g., Parrillo, *supra* note 2, at 64-66 (detailing disagreement in the literature over whether public should get to participate in formulating agency guidance); Bagley, *supra* note 1, at 346-47 (describing debate over the proposed Regulatory Accountability Act, which would introduce trial-like formal rulemaking procedures for certain agency rules).

procedural requirements may, in fact, be an inadequate substitute for substantive judicial review.

Although the sheer diversity of local administrative structures presents a challenge for any attempts to generalize, this Part makes clear that generalization is both possible and useful. First, when it comes to many of the relevant factors, differences *across* local agencies turn out to be far less pronounced than differences between the federal and local. Second, given how much of local administrative law is determined at the state level, generalization is inherent in local administration. The one-size-fits-all requirements of state administrative law often apply to local agencies that have little in common beyond geography—and so it is worth asking whether *as a general matter*, the various requirements are likely to be too onerous or too sparse.

A. Substantive Judicial Review

Unlike their local counterparts, federal agencies regulate against the backdrop of robust substantive review. Federal courts are empowered to scrutinize the substance of agency rules to ensure that they are consistent with the underlying statutes and are substantively nonarbitrary. Although the first inquiry tends to be quite deferential, the second often is not. Under *Chevron*, courts are required to defer to reasonable agency interpretations of ambiguous provisions in statutes administered by the agency.¹¹⁹ In practice, this means that unless a statute directly addresses the issue in question, the agency's interpretation will likely prevail.¹²⁰ In contrast, under *State Farm*, courts are instructed to take a "hard look" at the agency's reasoning to ensure that the agency has adequately considered all of the important aspects of the problem, and that the agency rule is supported by the evidence and arguments before it.¹²¹

¹¹⁹ *Chevron, U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

¹²⁰ See Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 833-34 (2001) (describing the "dramatic[] expan[sion]" of deference to agency interpretations post-*Chevron*); Kent Barnett & Christopher J. Walker, *Chevron in the Circuit Courts*, 116 MICH. L. REV. 1, 6 (2017) (finding that, when *Chevron* deference was applied in the circuit courts, agency rules were upheld 77% of the time); Catherine M. Sharkey, *Cutting in on the Chevron Two-Step*, 86 FORDHAM L. REV. 2359, 2380-81 (2018) (describing how courts apply a "perfunctory" *Chevron* analysis, leading to increased deference to agencies).

¹²¹ *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("[A]n agency rule would be arbitrary and capricious if the agency has . . . entirely failed to consider an important aspect of the problem [or] offered an explanation for its decision that runs counter to the evidence . . ."); see also Richard J. Pierce, Jr., *Judicial Review of Agency Actions in a Period of Diminishing Agency Resources*, 49 ADMIN. L. REV. 61, 71 (1997) (detailing the requirements of "hard look" review). This standard is also known as "arbitrariness review;" for a discussion of the term and its nuances, see Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U. CHI. L. REV. 761, 761-63 (2008).

Proponents of substantive “arbitrariness review” argue that it improves the quality of agency decisions by forcing agencies to articulate the reasons for their actions and to anticipate competing arguments that challengers might raise in court.¹²² Where the threat of review alone does not do enough to combat the possibility of agency error, courts can always step in to ensure that erroneous decisions are eventually overturned.¹²³ Substantive review also can potentially reduce the problem of capture by making it harder for agencies to take actions that disproportionately favor the powerful few.¹²⁴

The growing consensus in federal administrative scholarship, however, is that although substantive review can at times be beneficial, the entire enterprise is fraught with peril. It empowers generalist courts to second-guess the judgment of agency experts. It encourages agencies to invest far too many resources into insulating their decisions from judicial scrutiny. And it provides powerful interest groups with yet another cudgel with which to beat back efforts to strengthen regulatory constraints.

These intuitions, however, are based on a set of assumptions about agencies, regulated parties, and courts that have much less traction locally. When it comes to local administration, there is both more cause for optimism, and less of a reason to worry about the potential drawbacks “hard look” review.

1. Complexity and Expertise

Many of the arguments about the consequences of substantive judicial review turn on assumptions about complexity and expertise.¹²⁵ The prototypical federal agency routinely decides on arcane matters that require a great deal of technical expertise: they establish safety standards for nuclear power reactors and commercial airliners, they determine acceptable levels of thousands of chemicals and additives, and they issue intricate rules to implement obscure provisions of the Internal Revenue Code. In order to do this, they employ large staffs of experts in the various domains. The Environmental Protection Agency (EPA), for example, has nearly 15,000

¹²² Rossi, *supra* note 2, at 768.

¹²³ *Id.* at 821-22 (“[B]y invoking the hard look doctrine to review the sufficiency of an agency’s reasoned analysis, courts play a role in ensuring that the dialogue of bureaucratic expertise is compatible with the democratic process.”). *But see* Frank B. Cross, *Shattering the Fragile Case for Judicial Review of Rulemaking*, 85 VA. L. REV. 1243, 1334 (1999) (arguing that judges introduce errors of their own and should not be relied on to fix agency errors).

¹²⁴ Pierce, *supra* note 1, at 68; *see also infra* subsection II.A.3 (discussing the capture problem).

¹²⁵ *See, e.g.*, Patricia M. Wald, *Judicial Review in Midpassage: The Uneasy Partnership Between Courts and Agencies Plays On*, 32 TULSA L.J. 221, 238-40 (1996) (describing the increase in the number of complex cases and its effect on the judiciary).

employees, many of whom are engineers, scientists, and other environmental specialists.¹²⁶

Courts and scholars alike routinely cite agency expertise as a reason for courts to defer.¹²⁷ Agency expertise is one of the core justifications for the *Chevron* doctrine, which requires judicial deference to reasonable agency interpretations of the statutes they administer.¹²⁸ For critics of substantive review, agencies' superior expertise counsels strongly in favor of courts embracing a lighter touch.¹²⁹

Meanwhile, the complexity of federal regulation casts doubt on the notion that courts can in fact play a useful role.¹³⁰ As judges themselves have acknowledged, reviewing agency decisions for substantive arbitrariness is no easy task.¹³¹ Agency regulations often span dozens if not hundreds of pages, and may be supported by thousands of pages of studies, commentary, and reports. Because judges lack the expertise necessary to parse these materials, they are forced to rely on the representations made by the parties to the dispute—but without any basis for assessing the relative strength of competing claims. As Richard Pierce points out, judges “are easily led to believe that a minor dispute is a major dispute or that an inherent uncertainty with respect to a factual or scientific predicate for a rule could be eliminated if the agency just thought about it a little more.”¹³² Because agencies cannot

¹²⁶ *What Kind of People Work at EPA?*, EPA, <https://www.epa.gov/careers/what-kind-people-work-epa> [<https://perma.cc/SD47-UQG4>].

¹²⁷ See generally, Ronald J. Krotoszynski, Jr., *Why Deference?: Implied Delegations, Agency Expertise, and the Misplaced Legacy of Skidmore*, 54 ADMIN. L. REV. 735, 739-41 (2002) (discussing the Court's use of agency “expertise” as a main justification for judicial deference).

¹²⁸ *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844, 865 (1984) (noting deference to agency interpretations when it involves “more than ordinary knowledge” of the matter being regulated, and contrasting the lack of judicial subject-matter expertise with the “technical and complex” nature of the regulatory scheme and the “detailed and reasoned” consideration given by the agency).

¹²⁹ See, e.g., Jacob Gersen & Adrian Vermeule, *Thin Rationality Review*, 114 MICH. L. REV. 1355, 1396 (2016); see also Eric Berger, *Individual Rights, Judicial Deference and Administrative Law Norms in Constitutional Decision Making*, 91 B.U. L. REV. 2029, 2067-68 (2011) (noting that judicial deference is routinely premised on notions of agency expertise).

¹³⁰ See Irving R. Kaufman, *Judicial Review of Agency Action: A Judge's Unburdening*, 45 N.Y.U. L. REV. 201, 201 (1970) (“[J]udges cannot possibly be as familiar as the administrative agency with the factual controversies or the specialized knowledge involved in many agency decisions.”); Ronald J. Krotoszynski Jr., *History Belongs to the Winners: The Bazelon-Leventhal Debate and the Continuing Relevance of the Process/Substance Dichotomy in Judicial Review of Agency Action*, 58 ADMIN. L. REV. 995, 1008-09 (2006) (“Simply put, an appellate judge with a staff of three or four law clerks and one or two administrative assistants has neither the time nor the ability to engage in a meaningful review of [the agency's record].”).

¹³¹ See, e.g., Judge David L. Bazelon, *The Impact of the Courts on Public Administration*, 52 IND. L.J. 101, 107 (1976) (“The problem is not so much that judges will impose their own views on the merits. The question is whether they will even know what is happening.”); Wald, *supra* note 125, at 235 (“[W]e do occasionally get wrong the mechanics of what is actually going on in the real world transactions being regulated, and that kind of misunderstanding can lead to a badly skewed decision.”).

¹³² Pierce, *supra* note 1, 69-70.

anticipate which far-fetched argument will catch a judge's eye, they tend to overcompensate by building voluminous records to try to anticipate every possible criticism that a rule might face, which adds significantly to the costs that review can impose.¹³³

At the local level, however, these concerns are less salient because the policy domains within which local agencies operate—such as zoning, transportation, and public health—tend to be quite a bit less complex. In the fall of 2020, New York City agencies clarified rules for sidewalk produce stands,¹³⁴ prohibited discrimination on the basis of hair,¹³⁵ and established new reporting requirements for short-term rental services.¹³⁶ Over the course of 2019, the Needham Board of Public Health considered whether to ban flavored tobacco products,¹³⁷ whether the sale of cannabidiol (CBD)-infused items violated existing board of health regulations,¹³⁸ and whether to distinguish between recreational and medical marijuana dispensaries for zoning purposes.¹³⁹ All of these choices required some degree of domain knowledge and expertise. None required the sort of technical sophistication that is necessary to set national policy on securities regulation, greenhouse gas emissions, or nuclear waste.

Perhaps unsurprisingly, local agency officials also have quite a bit less expertise on which to draw. To be sure, some agencies—particularly in larger cities—have hundreds if not thousands of employees, including dedicated

¹³³ See *id.* at 65 (“To have any realistic chance of upholding a major rule on judicial review, an agency’s statement of basis and purpose now must discuss in detail each of scores of policy disputes, data disputes, and alternatives to the rule adopted by the agency.”).

¹³⁴ See *Notice of Adoption*, N.Y.C. DEPT OF CONSUMER AFFS. (May 13, 2020), <https://rules.cityofnewyork.us/wp-content/uploads/2020/10/DCA-Final-Stoop-Line-Stands.pdf> [<https://perma.cc/MVG7-E6B3>].

¹³⁵ See *Notice of Adoption*, N.Y.C. COMM’N ON HUMAN RTS. (Mar. 13, 2020), <https://rules.cityofnewyork.us/wp-content/uploads/2020/09/CCHR-Final-Rule-Hair-Discrimination.pdf> [<https://perma.cc/6V5X-DQD9>] (“Discrimination based on hair can function as a proxy for discrimination based on race or religion and constitute a form of unlawful stereotyping.”).

¹³⁶ See *Notice of Adoption*, N.Y.C. MAYOR’S OFFICE OF SPECIAL ENFT (Nov. 2, 2020), <https://rules.cityofnewyork.us/wp-content/uploads/2020/11/Final-Rule-Required-Disclosures-Of-Short-Term-Rental-Transactions-By-Booking-Services-with-certification-003.pdf> [<https://perma.cc/T7S3-MEAG>].

¹³⁷ See *Needham Board of Health Minutes: January 11, 2019, 7:00 AM to 9:00 AM*, TOWN OF NEEDHAM, <https://www.needhamma.gov/ArchiveCenter/ViewFile/Item/7133> [<https://perma.cc/WDN4-HAJC>].

¹³⁸ See *Needham Board of Health Minutes: February 15, 7:00 AM to 9:00 AM*, TOWN OF NEEDHAM, <https://www.needhamma.gov/ArchiveCenter/ViewFile/Item/7167> [<https://perma.cc/5CDN-BF8N>].

¹³⁹ See *Board of Health Meeting Minutes: December 10, 2019*, NEEDHAM PUB. HEALTH DIV., <https://www.needhamma.gov/ArchiveCenter/ViewFile/Item/7693> [<https://perma.cc/RW7Q-29H4>] (“The Board of Health has discussed set back distances for medical versus recreational marijuana facility and will now develop a formal policy.”).

policy staffs.¹⁴⁰ The vast majority of local agencies, however, do not. Particularly in smaller jurisdictions, policymaking authority is vested in boards or commissions made up entirely of unpaid volunteers, who take on board duties on top of their other professional commitments.¹⁴¹ These boards may in turn oversee a small department with perhaps a handful of employees, who are expected to juggle a variety of administrative tasks.¹⁴² They are, in short, a far cry from the sprawling bureaucracies that comprise the federal administrative state.

In addition, although board members and staff may have a variety of relevant qualifications, they generally lack the sort of targeted expertise that is more common at the federal level. Local health boards, for example, are often made up of doctors, nurses, and other public health professionals.¹⁴³ But the matters on which they regulate, ranging from food safety to youth athletics, might extend well beyond their professional training.¹⁴⁴ A zoning board might include a mix of developers, lawyers, and community advocates,¹⁴⁵ none of whom are uniquely qualified to determine whether emissions from a proposed autobody shop would pose a health hazard to neighboring residents,¹⁴⁶ or whether a proposed subdivision would threaten local wetlands.¹⁴⁷

These differences have several implications for substantive judicial review. First, the notion that generalist courts are hopelessly incapable of scrutinizing the substance of agency decisions is largely inapplicable to the local context. Generalist judges may not be experts in local planning or public health. Indeed, there is every reason to think that they would be perfectly capable of parsing the evidence and arguments on which local agencies rely, much like

¹⁴⁰ See, e.g., *About the NYC Department of Health and Mental Hygiene*, N.Y.C HEALTH, <https://www1.nyc.gov/site/doh/about/about-doh.page> [<https://perma.cc/5WAD-45E6>] (“With an annual budget of \$1.6 billion and more than 6,000 employees throughout the five boroughs, we’re one of the largest public health agencies in the world.”).

¹⁴¹ See Diller, *Local Health Agencies*, *supra* note 7, at 1878-79 (describing the composition requirements for local health boards).

¹⁴² See, e.g., *Health Department Staff Directory*, NEEDHAM, MASS., <https://www.needhamma.gov/Directory.aspx?did=46> [<https://perma.cc/CN8G-9ZQM>].

¹⁴³ *Id.*

¹⁴⁴ See, e.g., *Board of Health*, *supra* note 12 (outlining local health department rules on everything from “indoor tanning” to “concussion prevention”).

¹⁴⁵ See, e.g., Anderson, *supra* note 42, at 700-05 (“The national data show that American zoning boards are overwhelmingly populated with members from white-collar occupations.”).

¹⁴⁶ See *Fish v. Accidental Auto Body, Inc.*, 125 N.E.3d, 774, 783 (Mass. App. Ct. 2019) (“[T]he health agent of the town’s board of health admitted at trial that the decision to relocate the venting was based only on his surmise that it would help dissipate exhaust from the paint booth and was not based on expert opinion or guidance from a ‘standard.’”).

¹⁴⁷ See *Zoning Bd. of Appeals v. Herring Brook Meadow, LLC*, 2 N.E.3d 202 (Mass. App. Ct. 2014) (discussing a zoning board’s decision to deny a permit for a development due to the development’s potential impact on wetlands).

they do when deciding on any number of matters with which they may only have passing familiarity, such as commercial contracts or real estate disputes.

Second, to the extent that local officials are expected to make decisions with fewer resources—and in fields that extend beyond their professional training—there is reason to think that local agency officials are, on balance, more likely to err. And either way, to the extent that deference is justified on the ground that agencies are uniquely qualified to resolve the issues that come before them, there may be less of a reason for courts to defer.

Of course, the less local agency decisions look to be the product of expertise, the more they start to look like the sorts of *political* judgments to which courts also tend to defer.¹⁴⁸ Indeed, few principles are more deeply ingrained in either federal or state administrative law than the principle that political judgements are the exclusive province of the political branches.¹⁴⁹ Although arguments grounded in political legitimacy are perhaps somewhat more plausible at the local level, as the discussion at the end of this Section makes clear, they also provide at best a limited justification for a more hands-off approach.¹⁵⁰

2. Informality and Reason-Giving

At the local level, the basic requirements of reason-giving, backed by substantive judicial review, also may prove more effective at actually improving the quality of decisions reached. A chief critique of reason-giving at the federal level is that it tends to be largely performative, with agency lawyers stepping in to craft justifications that will survive judicial scrutiny.¹⁵¹ It also can often be resource-intensive, particularly if, as discussed above, agencies respond to the prospect of “hard look” scrutiny by producing voluminous records that anticipate every possible objection that a party or

¹⁴⁸ See Davidson, *supra* note 4, at 617-19 (describing how local administrative bodies serve an important role as an aggregator of local public opinion).

¹⁴⁹ See, e.g., *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865 (“Judges are . . . not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges’ personal policy preferences. In contrast, an agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration’s views of wise policy to inform its judgments.”)

¹⁵⁰ See *infra* subsection II.A.4.

¹⁵¹ See, e.g., MARTIN SHAPIRO, WHO GUARDS THE GUARDIANS? JUDICIAL CONTROL OF ADMINISTRATION 154 (1988) (“The agencies . . . hire more lawyers and give them more of a role in producing decisions that will withstand court scrutiny.”); Elizabeth Magill & Adrian Vermeule, *Allocating Power Within Agencies*, 120 YALE L.J. 1032, 1054 (2011) (“Under either prong of hard look review, lawyers are crucial, either to identify what the relevant factors are or to ensure that the agency’s conclusions will not strike other lawyers—namely the judges—as wildly implausible.”).

court might make.¹⁵² Finally, to the extent that the goal of reason-giving is to encourage greater deliberation, the requirement may be superfluous given that major agency regulations already are subject to multiple layers of review.¹⁵³ Much of the back-and-forth that reason-giving is thought to foster already occurs at various junctures in the policymaking process.

At the local level, however, these sorts of critiques have less bite. First, because local agency processes tend to be much faster and more informal, reason-giving requirements may have more of a tangible impact on the quality of decisions made.¹⁵⁴ The basic intuition behind reason-giving requirements is that people make better decisions when they anticipate having to explain their decisions to others.¹⁵⁵ Studies suggest that the prospect of accountability tends to reduce bias and encourages more careful consideration of opposing views.¹⁵⁶ Most of the benefits of accountability stem from the fact that reason-giving requirements force decisionmakers to slow down, to anticipate possible objections, and to ensure that their initial judgments are indeed sound.¹⁵⁷ Perhaps unsurprisingly, much of the experimental literature on reason-giving has focused on decisionmaking in relatively informal settings,¹⁵⁸ which raises the question of how well their insights would translate to the formalized, multilayered decisionmaking processes of the federal

¹⁵² Pierce, *supra* note 1, at 65 (“To have any realistic chance of upholding a major rule on judicial review, an agency’s statement of basis and purpose now must discuss in detail each of scores of policy disputes, data disputes, and alternatives to the rule adopted by the agency.”).

¹⁵³ These include Office of Management and Budget review of major agency regulations, interagency review and consultation processes, as well as various processes internal to the agency itself. See IFC CONSULTING, *THE REG MAP: INFORMAL RULEMAKING 3* (2020), https://www.reginfo.gov/public/reginfo/Regmap/REG_MAP_2020.pdf [<https://perma.cc/LSR3-9N52>] [hereinafter REGMAP]. Agencies also face various forms of Congressional oversight, from direct congressional review of major rules to more informal oversight through committee hearings and budgetary control. See Christopher R. Berry & Jacob E. Gerson, *Agency Design and Political Control*, 126 *YALE L.J.* 1002, 1038 (2017) (describing ex post mechanisms of control applied to all federal agencies); Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 *TEXAS L. REV.* 15, 44 (2010) (noting the use of congressional budget power to exert pressure on agencies).

¹⁵⁴ See Davidson, *supra* note 4, at 606 (noting informality at the local level).

¹⁵⁵ See Martin Shapiro, *The Giving Reasons Requirement*, 1992 *U. CHI. LEGAL F.* 179, 180 (1992) (“A decisionmaker required to give reasons will be more likely to weigh pros and cons carefully before reaching a decision than will a decisionmaker able to proceed by simple fiat.”); Frederick Schauer, *Giving Reasons*, 47 *STAN. L. REV.* 633, 633-34 (1995) (“In law . . . giving reasons is seen as a necessary condition of rationality.”).

¹⁵⁶ Oren Bar-Gill & Barry Friedman, *Taking Warrants Seriously*, 106 *NW. U. L. REV.* 1609, 1642-43 (2012) (summarizing literature on bias and accountability).

¹⁵⁷ Phillip E. Tetlock, *Accountability and the Perseverance of First Impressions*, 46 *SOC. PSYCH. Q.* 285, 290 (1983) (theorizing that accountability may limit an individual’s tendency to form conclusions from incomplete evidence and increase an individual’s level of receptiveness to contradictory evidence).

¹⁵⁸ See, e.g., Linda Babcock, George Loewenstein & Samuel Issacharoff, *Creating Convergence: Debiasing Biased Litigants*, 22 *L. & SOC. INQUIRY* 913, 918 (1997) (focusing on reason-giving in the context of settlement negotiations and its impact on parties’ ability to reach a voluntary settlement); Tetlock, *supra* note 157, at 290-91 (demonstrating the benefits of reason-giving in the context of juries).

administrative state. In the rough-and-tumble world of local administration, however, it is more plausible to think that reason-giving requirements could in fact prompt decisionmakers to think through their decisions in ways that they otherwise might not.

Second, the “lawyerization” of the administrative process that critics point to at the federal level may not be quite so inevitable locally, particularly in smaller agencies that do not have attorneys on staff.¹⁵⁹ In these agencies, it is likely that the officials responsible for drafting regulations would also be the ones to explain on the record the basis for their policy choices. Once again, this suggests that at the local level, reason-giving could come closer to achieving the stated goal of fostering greater deliberation on the part of decisionmakers themselves.

Finally, the relative informality of local agency decisionmaking may also reduce some of the perceived costs of substantive judicial review. Much of the “bite” of substantive review at the federal level comes not from the “hard look” standard itself, but from the other requirements with which it overlaps, such as the requirement that agencies produce cost-benefit assessments, or environmental impact reports, which then become part of the administrative record for courts and parties to critique.¹⁶⁰ In the absence of these requirements, there is less of a concern that substantive judicial review would lead to greater and greater demands on agency time. In New York, for example, where local agencies are bound by a comparable “hard look” standard, courts generally require agencies to produce at least some evidence to justify a challenged regulation—but do not insist on the sort of exhaustive justification that at the federal level has become the norm.¹⁶¹

¹⁵⁹ Indeed, most do not even have the benefit of a city attorney’s office on which to draw. Smaller municipalities typically outsource legal services to local firms. *See, e.g., The Leader in Public Sector Law*, KP LAW, <http://www.k-plaw.com> [<https://perma.cc/KJ6M-695X>] (providing town counsel or city solicitor services for one-third of Massachusetts cities and towns); *Cities & Towns*, ANDERSON KREIGER, <https://andersonkreiger.com/practice/cities-towns> [<https://perma.cc/ESW7-P2D6>] (providing town counsel services for several municipalities in Massachusetts). Although local agencies at times turn to outside counsel to advise on more complicated or controversial regulations, they are unlikely to do this for every issue that comes before them.

¹⁶⁰ *See* Ponomarenko, *supra* note 19, at 1458-59 (“The problem with relying on ‘hard look review’ as a model for constitutional review of state and local decisions is that its fairly basic requirements operate against a backdrop of additional procedural and substantive constraints that, taken together, substantially ratchet up the standard of review.”).

¹⁶¹ *See, e.g., Lynch v. N.Y.C. Civilian Complaint Rev. Bd.*, 98 N.Y.S.3d 695, 714-15 (N.Y. Sup. Ct. 2019) (upholding New York Civilian Complaint Review Board resolution to independently investigate allegations of sexual misconduct based in part on “studies [that] have shown underreporting of police sexual misconduct allegations” and the logical conclusion that “an alleged victim of sexual abuse by an NYPD officer might be intimidated to go back to the very precinct where she or he was abused”); *Jewish Mem’l Hosp. v. Whalen*, 391 N.E.2d 1296, 1300 (N.Y. 1979) (upholding a state health agency rule on the grounds that it “cannot be said to be irrational” in light of the evidence and arguments before the agency).

For that same reason, local agencies also may have less of an incentive to “over-invest” in shielding their decisions from any possibility of getting struck down in court. Part of why federal agencies invest as much as they do in building a comprehensive record that can withstand judicial scrutiny is because even in the absence of litigation, the “costs” of promulgating a new rule are substantial.¹⁶² Major rules must be reviewed by the Office of Management and Budget (OMB), and often are then circulated to other agencies as part of an inter-agency review process.¹⁶³ Depending on the subject matter at issue, an agency may need to prepare comprehensive assessments of the costs and benefits of the proposed regulation, as well as its privacy or environmental impacts.¹⁶⁴ Regulations that require the collection of information must comply with the additional requirements of the Paperwork Reduction Act.¹⁶⁵ Agencies must then release their rules for public comment, and wade through the hundreds—if not hundreds of thousands—of comments that they receive.¹⁶⁶ Having done all this work, agencies are understandably wary of having to go back to the drawing board because they failed to anticipate some minor objection. This is particularly true when, as Thomas O. MacGarity points out, a complex “rulemaking can precipitate dozens of major appealable issues and hundreds of subsidiary issues.”¹⁶⁷

Because local rulemaking tends to be quite a bit more informal—and by extension, less “costly”—the costs of judicial invalidation are likely to be more modest, as well. To be sure, the prospect of litigation would inevitably push agencies to expend *somewhat* more effort in justifying their decisions. But there is likely to be an upper bound in terms of the energy that local officials are willing to invest to forestall the possibility of having a decision struck down in court.

3. Courts and “Capture”

A closer question is whether, at the local level, substantive judicial review would simply provide additional leverage to those individuals and groups who

¹⁶² Bagley, *supra* note 1, at 361 (describing the various costs associated with rulemaking). *See also* REGMAP, *supra* note 153 at 3 (describing the various steps that federal agencies must take in promulgating rules).

¹⁶³ REGMAP, *supra* note 153, at 3.

¹⁶⁴ *See, e.g.*, National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-47 (requiring agencies to review regulations for conformity with federal environmental policy); Exec. Order No. 12,866, 3 C.F.R. § 638 (1993) (requiring initial review by the OMB and then regular review by the agency to ensure conformity with the agency’s objectives).

¹⁶⁵ REGMAP, *supra* note 153; 44 U.S.C. §§ 3501-20.

¹⁶⁶ Mariano-Florentino Cuéllar, *Rethinking Regulatory Democracy*, 57 ADMIN. L. REV. 411, 420, 469 fig.4 (2005) (describing the public comment requirement and noting instances where rulemakings garnered hundreds of thousands of comments).

¹⁶⁷ Thomas O. McGarity, *Judicial Review of Scientific Rulemaking*, 9 SCI. TECH. & HUMAN VALUES 97, 100 (1984).

already hold disproportionate sway. At the federal level, one of the primary justifications for substantive judicial review is that it can help mitigate against the risk of agency capture. The problem, as critics point out, is that in practice it may in fact make the problem of capture worse. Although some of these same arguments apply locally, as well, there is perhaps less of a reason to worry that at the local level, judicial review would simply become another cudgel with which powerful interest groups could beat back the administrative state.

The anti-capture justification for substantive judicial review goes something like this: Left to their own devices, agencies may be more likely to succumb to external pressure and adopt policies that disproportionately favor the powerful few. By requiring agencies to articulate public-regarding justifications for their decisions, and then empowering courts to ensure those justifications are consistent with the evidence before the agency, hard look review makes it harder for agencies to ignore the interests of the public at large. Substantive review can also help promote broader participation in agency proceedings by ensuring that agencies carefully consider all of the comments they receive, including from groups who might otherwise hold less sway.¹⁶⁸ Indeed, some have suggested that it is the threat of judicial review that forces agencies to meaningfully engage with outside groups.¹⁶⁹

But as a number of scholars have argued, this optimistic take ignores the fact that the same entities that already wield disproportionate influence in the administrative process may also be the ones who are most likely to seek recourse in the courts if things do not go their way.¹⁷⁰ After all, litigation takes up money and time—resources in short supply at smaller entities and public interest groups. Regulated entities may also be better positioned to take advantage of a quirk in the federal system: agency regulations can often be challenged in any one of twelve circuits.¹⁷¹ This encourages forum shopping, and effectively gives regulated entities (as a group) twelve bites at the apple.¹⁷² Whereas regulated entities need only to persuade a single court that a particular regulation is invalid, the agency must persuade each and every court that hears a challenge that the agency's reasoning is sound. This substantially increases the threat of litigation, and, in turn, the likelihood that

¹⁶⁸ See Bagley, *supra* note 1, at 389-91 (summarizing the anti-capture justification for judicial review).

¹⁶⁹ Pierce, *supra* note 1, at 68 (stating that judicial review may have value in ensuring a rational, publicly accessible decision process prior to litigation and encouraging agencies to consider perspectives it may otherwise ignore).

¹⁷⁰ See Bagley, *supra* note 1, at 397-400 (arguing that hard-look review as an antidote to regulatory capture is based on misplaced assumptions); Pierce, *supra* note 1, at 69; Elhauge, *supra* note 1, at 77 (arguing that judicial review still favors well-resourced interest groups, thereby reinforcing the problem of capture).

¹⁷¹ Cross, *supra* note 123, at 1249.

¹⁷² *Id.* at 1251 (“[A] rule acceptable to eleven of the twelve circuits could easily be struck down by the twelfth, strategically chosen as the forum by a regulated entity.”).

an agency acquiesces to industry demands before a rule ever goes into effect. As scholars point out, this system disproportionately favors “multistate actors and wealthy, well-organized parties” who are best able to engage in the sort of strategic behavior that the multi-circuit structure allows.¹⁷³

When it comes to local administrative law, a threshold question is whether “capture” is in fact much of a problem to begin with. Recent scholarship has suggested that local agencies—and local governments generally—may be more resistant to traditional forms of agency capture than their federal counterparts.¹⁷⁴ Paul Diller points out that local jurisdictions tend to be more politically homogenous, which may make it easier for local officials to resist pressure from corporate interests on policies that their constituents generally support.¹⁷⁵ Local elections also are cheaper and less competitive, which further diminishes the power of well-funded interests to influence the results.¹⁷⁶ In addition, because the barriers to political entry and influence are lower, it is easier for well-organized but underfunded groups—such as block organizations, churches, and ethnic groups—to gain a seat at the local-government table.¹⁷⁷ Finally, local agency officials also tend to be further removed from the “revolving door” culture that tends to skew federal agency decisionmaking.¹⁷⁸

On the other hand, there still are plenty of reasons to think that local agencies, like all government bodies, may be more likely to favor some interests at the expense of others. Homeowners, for example, tend to exercise disproportionate power in local government, and have historically used their

¹⁷³ *Id.* at 1256-57 (quoting Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 *YALE L.J.* 679, 767 (1989)).

¹⁷⁴ Clayton P. Gillette, Comment, *Interest Groups in the 21st Century City*, 32 *URB. LAW.* 423, 426-27 (2000) (challenging the notion that interest-group domination would exist more prominently at the subfederal level); Clayton P. Gillette, *Local Redistribution, Living Wage Ordinances, and Judicial Intervention*, 101 *NW. U. L. REV.* 1057, 1064-65 (2007) (arguing that broad participation at the local level “allows accurate measurement of residents’ preferences” and limits the risk of interest-group capture) [hereinafter Gillette, *Local Redistribution*].

¹⁷⁵ Diller, *Why Do Cities Innovate*, *supra* note 7, at 1275-76 (noting that New York’s political homogeneity may in part explain its innovative approach to public health).

¹⁷⁶ Diller, *Local Health Agencies*, *supra* note 7, at 1886-87 (“The low profile and utter lack of competition in some city legislative elections may . . . thereby diminish the relative influence of well-funded industry interest groups[.]”); *see also* Gillette, *Local Redistribution*, *supra* note 174, at 1115-16 (arguing that the higher cost of state election campaigns makes state government more vulnerable than local government to capture, but that uncompetitive local elections raise the risk of local government capture).

¹⁷⁷ Gillette, *Local Redistribution*, *supra* note 174, at 1116-17 (noting that various political actors may have different levels of success locally depending on their organization level and the interests of their constituents); Heather K. Gerken, *The Supreme Court, 2009 Term—Foreword: Federalism All the Way Down*, 124 *HARV. L. REV.* 4, 7-8 (2010) (noting that hyper-local institutions offer opportunities for participation for traditionally underrepresented groups).

¹⁷⁸ Diller, *Local Health Agencies*, *supra* note 7, at 1896, 1889.

power to oppose the construction of multi-family dwellings.¹⁷⁹ Homeowner influence is evident in local exclusionary zoning ordinances, but it also is readily apparent in the decisions of various local boards, such as zoning and health boards, that play a role in approving new construction projects.¹⁸⁰ Similarly, although “business interests” are generally well represented locally, not all businesses are created equal. Local health boards routinely regulate bars, smoke shops, tattoo parlors, and convenience stores, all of which are likely to draw the ire of local residents, thereby making them particularly vulnerable to agency overreach. In sum, agency decisionmaking may be systematically biased in precisely the sorts of ways that courts could potentially step in to correct.

The operative question, of course, is not whether there is some possibility of bias or “capture” but whether judicial review is likely to make the problem better or worse.¹⁸¹ Here, it is particularly difficult to draw any hard and fast conclusions. But there is perhaps some reason to think that at the local level, the concern that judicial review will exacerbate agency capture may not be quite so compelling.

A basic feature of administrative law is that “regulated” entities are disproportionately likely to sue because they are the ones who have the most at stake.¹⁸² And at first blush, this is even more likely to be true locally, where there typically will not be a Natural Resources Defense Council or Community Nutrition Institute ready to step in on the general public’s behalf.

The difference at the local level is that “regulated” entities tend to be much smaller and more diffuse. Although local agency decisions occasionally implicate the interests of large corporations—particularly in the context of tobacco regulation and menu labeling—the vast majority do not.¹⁸³ Zoning boards may face pressure from developers, but they also routinely decide on matters that affect the rights of small businesses and individual property

¹⁷⁹ See generally PAIGE GLOTZER, *HOW THE SUBURBS WERE SEGREGATED: DEVELOPERS AND THE BUSINESS OF EXCLUSIONARY HOUSING, 1890–1960* (2020) (discussing the history of housing segregation in suburban neighborhoods, tracing how local governance led to its persistence).

¹⁸⁰ A particularly egregious example is *Stevens vs. Sherborn Bd. of Health*, which involved a health board denial of a septic tank permit to a developer of low-income housing. No. 16-000214, 2017 WL 3251495, at *1 (Mass. Super. Ct. July 27, 2017). Although the developer produced plans showing that each of the planned apartment units would have two bedrooms and agreed to build a unit cap into the master deed, the health board classified each apartment as a “single family dwelling,” which, under local law, could be “presumed” to have three bedrooms. *Id.* at *3. The larger bedroom count then enabled the board to subject the developer to additional permitting and approval requirements that it was not able to meet. *Id.* at *3-4. The Superior Court dismissed the board’s conclusion as “legally untenable.” *Id.*

¹⁸¹ See Bagley, *supra* note 1, at 398 (discussing the effects of judicial review on agency capture); Cross, *supra* note 123, at 1313 (identifying justifications for judicial review of agencies).

¹⁸² Cross, *supra* note 123, at 1315.

¹⁸³ On local regulations of tobacco and menu labeling, as well as the various legal challenges they ran into, see Diller, *Why Do Cities Innovate*, *supra* note 7, at 1224-42.

owners.¹⁸⁴ Health board regulations fall primarily on local businesses, including family-owned restaurants, convenience stores, childcare centers, and the like.¹⁸⁵ Outside of the major cities, the various disputes that come before local boards will often be too localized to invite participation from national (or even regional) trade associations or advocacy groups.

Indeed, because local regulations often affect the interests of individual property owners, tenants, and licensees, traditional businesses likely make up only a fraction of those who seek recourse in the courts to challenge municipal agency orders and rules. State court dockets are notoriously opaque, which usually makes it difficult to say much of anything about the composition of cases brought.¹⁸⁶ One exception, however, is the New York County Supreme Court (the state trial-level court in Manhattan), which maintains a searchable electronic database that includes every case that is filed, along with copies of all complaints, orders, and briefs.¹⁸⁷ In 2018, New York residents and business owners filed a total of 885 challenges to agency orders and rules, of which roughly eighty percent concerned the actions of city agencies and boards.¹⁸⁸

¹⁸⁴ See, e.g., *Kenner v. Zoning Bd. of Appeals*, 944 N.E.2d 163 (Mass. 2011) (involving dispute between two neighboring homeowners); *Gale v. Zoning Bd of Appeals*, 952 N.E.2d 977 (Mass. App. Ct. 2011) (involving a dispute over a cottage on an individual landowner's property).

¹⁸⁵ See, e.g., *Health Code and Rules*, NYC HEALTH, <https://www1.nyc.gov/site/doh/about/about-doh/health-code-and-rules.page> [<https://perma.cc/QDK8-W7CN>] (listing New York City health code provisions and board of health regulations); see also *Restaurant Industry Statistics*, AMTRUST FIN., <https://amtrustfinancial.com/blog/loss-control/the-restaurant-industry-a-closer-look> [<https://perma.cc/R35R-BXDH>] (noting that 70% of restaurants are single-unit operations, and more than 90% have fewer than fifty employees).

¹⁸⁶ Ethan J. Leib, *Local Judges and Local Government*, 18 N.Y.U. J. LEGIS. & PUB. POL'Y 707, 710 (2015) [hereafter Leib, *Local Judges*] (noting the lack of available information about local court operations). On local courts generally, see *id.*; Justin Weinstein-Tull, *The Structures of Local Courts*, 106 VA. L. REV. 1031 (2020); Ethan J. Leib, *Localist Statutory Interpretation*, 161 U. PA. L. REV. 897 (2013).

¹⁸⁷ THE SUPREME COURT RECORDS ON-LINE LIBRARY, <https://iapps.courts.state.ny.us/iscroll/AdvCSearch.jsp> [<https://perma.cc/7BJM-QT5Y?type=image>]. The New York County Supreme Court is, to my knowledge, the only trial-level court in the country that maintains a searchable, publicly accessible database of *all* cases filed, and includes not only basic case information but also every complaint, brief, and order issued in the case. This provides a rare glimpse at the overall composition of cases filed, free of the various selection effects that creep in when focusing exclusively on reported cases. The other advantage of reviewing New York cases is that local agencies in New York are subject to a more rigorous standard of review than is typical in many other states, and so it provides a helpful window into the cases that get brought when courts are willing to entertain substantive claims. To be sure, New York City also is distinct in ways that make it difficult to extrapolate to other jurisdictions—but, as discussed below, a review of reported cases in Massachusetts points to similar trends.

¹⁸⁸ There were a total of 885 Article 78 cases (i.e., cases brought under the New York State Law governing review of administrative proceedings) filed in 2018, of which I have reviewed a random sample of 100. Because only one of the first 100 sampled cases included challenges to agency rules, I reviewed another 350 in a more cursory fashion to pull out rulemaking claims. All told, 15 cases included rulemaking challenges: 9 brought as pre-enforcement challenges to recently adopted rules, and the remaining 6 brought as challenges to an underlying rule raised in defense to an enforcement proceeding.

Only a small fraction of the challenges to agency *orders*—less than fifteen percent—were brought by commercial entities. The rest were brought by tenants, city employees, individual license holders, and various community groups. Business interests accounted for a slightly higher percentage of challenges to agency *rules*; even so, two-thirds of rulemaking challenges were filed by employees, tenants, advocacy organizations, and community groups.

What this suggests is that at the local level, empowering “regulated” entities to challenge the substance of agency regulations—either directly or as a defense to enforcement proceedings—may not have quite the same effect that it does federally. When a local zoning board denies a construction permit to a proposed low-income development at the behest of neighboring property owners, it is not clear that empowering the developer to sue simply reinforces the political status quo.

The fact that challenges to local agency decisions are generally limited to just one state-court forum also helps mitigate the ability of well-organized interests to game the system in their favor.¹⁸⁹ States vary on the precise allocation of judicial responsibility, but the primary forum for challenging local agency decisions is generally in state court, usually either the trial or appellate-level court in the county within which the agency sits.¹⁹⁰ And in some jurisdictions, violations of municipal ordinances and their implementing regulations may first be adjudicated in municipal court, which means that truly “local” courts may also play a role in delineating the scope of local agency authority.¹⁹¹ But even in these jurisdictions, affirmative state-law challenges to local agency orders or rules may only be heard in a single state-court forum.¹⁹² Outside of New York City, this means that individuals and entities who are unhappy with an agency decision typically have just one forum in which to sue.¹⁹³ As a result, another key driver of inequality and delay at the federal level—the ability to challenge in multiple circuit courts—is largely absent locally.

189 Parties may of course be able to bring claims in federal court as well—but when it comes to state administrative law challenges to agency regulations (which are the subject of this paper), these are necessarily limited to state courts.

190 See, e.g., N.Y. C.P.L.R. § 7804 (Consol. 2012) (requiring challenges to agency action to be brought in the county where the agency decision was made).

191 See Leib, *Local Judges*, *supra* note 186, at 710–11 (explaining that New York’s municipal courts hear ordinance violations); WASH. ST. ADMIN. OFF. OF THE CTS., A GUIDE TO WASHINGTON STATE COURTS 10 (2011) (“Violations of municipal or city ordinances are heard in municipal courts.”).

192 See, e.g., WASHINGTON STATE ADMINISTRATIVE OFFICE OF THE COURTS, A GUIDE TO WASHINGTON STATE COURTS 10 (2011) (noting that municipal courts do not have jurisdiction over civil cases).

193 New York City straddles five counties, and as a result, city-wide agency rules could potentially be challenged in any one of five county courts. In this, as in many things, however, New York is largely *sui generis*.

There is, however, one wrinkle at the local level that complicates this picture at least to some degree—namely, the fact local judges themselves may be susceptible to political pressure in ways that federal judges are not. Whereas federal judges are appointed, approximately 90% of state judges must “face the voters” at some point in their tenure, either as part of the initial selection process or in regular retention elections.¹⁹⁴ More importantly, whereas federal judges enjoy the benefit of lifetime tenure, trial judges in all but four states must periodically stand for reelection, or to seek reappointment from either the governor or the state legislature.¹⁹⁵

The conventional wisdom—borne out in countless studies—is that the prospect of facing either the voters or their representatives affects the manner in which judges decide cases on matters that may be of interest to their constituencies.¹⁹⁶ The evidence suggests that as judges get closer to reelection,

¹⁹⁴ Joanna M. Shepherd, *Are Appointed Judges Strategic Too?*, 58 DUKE L.J. 1589, 1595, 1600 tbl.1 (2009) (listing the various procedures for state judge appointment and retention).

¹⁹⁵ Trial level judges in thirty-nine states must periodically stand for reelection. Seemant Kulleen, *Judicial Selection: An Interactive Map*, BRENNAN CTR. FOR JUST., <http://judicialselectionmap.brennancenter.org/?court=Trials&phase=Additional&state=MA> [<https://perma.cc/UMF9-LYRE>]; see also Gregory A. Huber & Sanford C. Gordon, *Accountability and Coercion: Is Justice Blind when It Runs for Office?*, 48 AM. J. POL. SCI. 247, 247 (2004). In eight additional states, judges must be reappointed either by the governor or by the state legislature. Kulleen, *supra*. Exceptions include Hawaii, where judges are reappointed by a non-partisan merit committee, and Rhode Island, Massachusetts, and New Hampshire, where judges are appointed for life. *Id.*

¹⁹⁶ See generally HERBERT M. KRITZER, JUSTICES ON THE BALLOT 59-76 (2015) (surveying the literature demonstrating the effect of judicial elections on decisions on matters ranging from abortion to criminal law). Much of the literature has focused on state supreme court justices who, since the 1990s, have increasingly faced expensive, hard-fought reelection campaigns. Perhaps unsurprisingly, studies suggest that on politically salient issues, such as abortion or the death penalty, justices tend to vote more in line with the preferences of median voters in their states as they approach reelection. See Herbert M. Kritzer, *Impact of Judicial Elections on Judicial Decisions*, 12 ANNU. REV. LAW SOC. SCI. 353, 360 (2016) [hereinafter Kritzer, *Judicial Elections*] (citing a study finding that judges who faced reelection were more likely to vote in line with voters' preferences on the death penalty than judges in states which did not have judicial retention elections) (2016); Brandice Canes-Wrone, Tom S. Clark & Jason P. Kelly, *Judicial Selection and Death Penalty Decisions*, 108 AM. POLIT. SCI. REV. 23, 24 (2014) (“The analysis suggests that judicial selection mechanisms significantly influence death penalty decisions . . .”); Joanna M. Shepherd, *The Influence of Retention Politics on Judges' Voting*, 38 J. LEGAL STUD. 169, 171 (2009) (“I find that the voting of state supreme court judges is strongly associated with the stereotypical preferences of the retention agents The results are strongest for judges who are reelected through partisan elections.”). Others have found similar effects in business and medical malpractice cases, particularly in states with partisan elections. See *id.* at 188. The few studies that have focused on trial level judges have also found various election-cycle effects. A number of studies, for example, have shown that elected judges tend to impose harsher sentences in criminal cases, particularly during an election year. See Huber & Gordon, *supra* note 195, at 255 (“All else equal, the sentence imposed by a judge whose election is imminent is likely to be about three to four-and-one-fourth months longer (depending on specification) than if the judge were recently elected or retained.”); Kritzer, *Judicial Elections*, *supra*, at 358 (discussing studies exploring the impact of elections on harshness in criminal sentencings). Others have found that elected judges in particular tend to favor in-state plaintiffs at

their rulings tend to skew closer to the preferences of the median voters in their state.¹⁹⁷ Judges also tend to avoid controversial issues that are likely to garner unfavorable attention.¹⁹⁸

On a more basic level, the state trial judges who hear the vast majority of administrative law claims also are much closer than are federal judges to the issues and parties that come before them.¹⁹⁹ Although trial judges are part of the “state” judiciary, they also are inherently local. Judges typically are elected or appointed from within the communities in which they serve.²⁰⁰ Most reach the bench by building up strong ties with the political establishment, as well as the state or local bar.²⁰¹ And in many communities, the judges work in the same building as the agency officials whose decisions they review.²⁰²

What this suggests is that state judges may be somewhat more likely to reinforce prevailing power dynamics—whether in favor of the agency or against. Absent more research, however, it is difficult to know just how much of an effect this is likely to have. Part of the problem is that much of the existing literature on elections and judicial behavior has focused on issues like abortion and criminal sentencing, which are quite a bit more salient than the arcane world of local administration.²⁰³ It is not altogether clear that their findings can be extrapolated to this context. In addition, countless studies have shown that, although federal judges do not need to worry about reelection, their administrative law decisions are nevertheless shaped in large part by politics and ideology.²⁰⁴ As a comparative matter, then, it is hard to say that state courts would necessarily be any better or worse.

4. Politics and Accountability

The last main argument against substantive judicial review at the federal level is that it empowers courts to substitute their own vision of sound policy for that of agency officials who tend to be more accountable for the decisions

the expense of out-of-state defendants, presumably because out-of-state defendants don't vote in local elections. KRITZER, *supra*, at 73.

¹⁹⁷ Shepherd, *supra* note 196, at 188.

¹⁹⁸ See, e.g., Kritzer, *Judicial Elections*, *supra* note 196, at 359-60 (summarizing earlier studies on the subject).

¹⁹⁹ See Leib, *Local Judges*, *supra* note 186, at 717 (explaining that local judges often serve where they grew up and must interact with the political establishments in their localities); *id.* at 734 (noting that local judges are “closest to the day-to-day life of the law that citizens experience . . .”).

²⁰⁰ Leib, *Local Judges*, *supra* note 186, at 717.

²⁰¹ *Id.*

²⁰² *Id.* at 721.

²⁰³ See, e.g., Huber & Gordon, *supra* note 195, at 261. (discussing criminal sentencing); see also Kritzer, *Judicial Elections*, *supra* note 196, at 359-60 (summarizing literature).

²⁰⁴ See, e.g., Miles & Sunstein, *supra* note 121, at 767-68 (discussing findings that political commitments influence decisions judges make when reviewing agency decisions for arbitrariness).

they make. The formalist version of this argument is that judicial second-guessing threatens the separation of powers by encroaching on the authority that the legislature specifically delegated to the executive branch.²⁰⁵ The functionalist version of the argument is that agencies are already held accountable in ways that may diminish the need for a judicial second look.²⁰⁶ Although both versions of the argument have some traction at the local level, they do not come close to justifying the degree of deference that courts afford to local agency regulations in states like Massachusetts and Illinois.²⁰⁷

The unavoidable reality of substantive judicial review is that it involves at least some degree of judicial second-guessing, and, by extension, the “substitution of judicial discretion for administrative discretion.”²⁰⁸ Consciously or not, a judge who thinks a particular rule is a bad idea as a matter of policy is more likely to find that the agency’s reasoning is unpersuasive or that the evidence before it is insufficient.²⁰⁹ Inevitably, this shifts policymaking authority away from the agency to which it was lawfully delegated, thereby imposing at least some separation of powers costs. This is as much the case at the local level as it is at the federal.

However, when it comes to the functional case against judicial review, the arguments at the local level are less compelling. First, in many jurisdictions, agency board members are not accountable to local governments at all, but instead are elected.²¹⁰ Although this may be a direct form of accountability, it is not an especially effective one when it comes to ensuring that agency decisions are in fact sound. Turnout in local elections is notoriously low, “usually below 25 percent of eligible voters . . . and often under 10 percent.”²¹¹ Those who vote tend overwhelmingly to be long-term, home-owning residents whose views may not be representative of the parties who come before agencies.²¹² Although “homevoters” are generally better informed than their nonvoting counterparts, the opaque nature of local administration likely

²⁰⁵ Cross, *supra* note 123, at 1333 (arguing that substantive and procedural review of rulemaking allows judges to rewrite legislation in accordance with their own views).

²⁰⁶ *Id.* at 1290.

²⁰⁷ See *supra* notes 105–107 and accompanying text.

²⁰⁸ Shapiro, *supra* note 155, at 188.

²⁰⁹ *Id.* at 187–88.

²¹⁰ See, e.g., Diller, *Local Health Agencies*, *supra* note 7 at 1878 (describing selection procedures in Massachusetts). In some jurisdictions, the channels of accountability are even murkier: The Tacoma-Pierce Health Board, for example, is comprised of both city council members and appointed members from various other participating jurisdictions, which means there is no single channel through which voters can change the composition of the board. *Board of Health Members*, TACOMA-PIERCE CNTY. HEALTH DEPT, <https://www.tpchd.org/i-want-to-/about-us/board-of-health/members> [<https://perma.cc/KLK7-5D4W>].

²¹¹ J. ERIC OLIVER, SHANG E. HA & ZACHARY CALLEN, LOCAL ELECTIONS AND THE POLITICS OF SMALL-SCALE DEMOCRACY 55 (2012).

²¹² *Id.*

limits even their understanding of local officials' behavior.²¹³ In smaller jurisdictions they also may not have much of a choice of who to vote for because elections are so often uncontested. As Eric Oliver writes, the challenge in many jurisdictions is "simply finding enough qualified people to serve much less run for local office."²¹⁴

Elections also are an incredibly blunt tool with which to oversee the administrative state. Elections may guard against particularly egregious forms of bureaucratic excess, and they may make agency officials think twice before adopting regulatory positions that may engender pushback from the voters who are most likely to pay attention. But elections are unlikely to protect the interests of less popular groups, or to ensure that agency decisions are in fact supported by the evidence or are generally sound.

Even in jurisdictions where agency heads answer directly to mayors or councils, political oversight at the local level tends to be less robust. A number of larger cities require all proposed rules to be reviewed by the law department,²¹⁵ and New York City adds an additional layer of review by the Mayor's Office of Operations, which is intended to ensure that the agency has adequately considered the basis and impact of the proposed rule.²¹⁶ Most local governments, however, lack the capacity to engage in these sorts of multilayered review processes.²¹⁷

To be sure, the relative weakness of formal accountability structures may be balanced out, at least to some degree, by what Nestor Davidson calls "on-the-street accountability"—namely, the informal checks on agency behavior that come from the very proximity between agency officials and those who come before them.²¹⁸ Agency officials routinely interact with regulated entities. And they often reside in the same communities in which their decisions will be felt. As a result, it may be harder for local agency officials to escape the consequences of unpopular or controversial choices, especially in the smaller jurisdictions where more formal accountability mechanisms may be particularly sparse. At best, however, these informal mechanisms can ensure that agencies do not fall too out of step with the will of local residents.

²¹³ *Id.* at 55-56 (describing "homevoters" as "more likely to be politically engaged and informed about local affairs").

²¹⁴ *Id.* at 122.

²¹⁵ PHILA., PA., HOME RULE CHARTER § 4-400 (1929); N.Y.C., N.Y. CHARTER ch. 45, § 1043(d) (2022).

²¹⁶ N.Y.C., N.Y. CHARTER ch.45, § 1043(d).

²¹⁷ To borrow a familiar distinction coined by Matthew McCubbins and Thomas Schwartz, although local officials may have some capacity to engage in "fire alarm oversight," they generally lack the capacity to maintain more formalized "police patrol oversight" over the local administrative state. Matthew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 166 (1984).

²¹⁸ Davidson, *supra* note 4 at 618.

It is much less clear that they alone can ensure that agency decisions are in fact reasoned and sound.

* * *

In sum, the case for substantive judicial review is generally stronger at the local level. Given the relative informality of local decisionmaking processes, substantive review may be more likely to promote greater deliberation and to encourage agencies to anticipate and consider opposing views. At the same time, there is less of a reason to worry that judicial review would unduly distort agency processes or give too great an advantage to organized interests at the expense of the public good.

Importantly, although some of the arguments discussed above may depend in part on agency function or size, others apply to all local agencies with equal force. Big city agencies, for example, tend to have greater capacity and expertise and they often are subject to more robust bureaucratic controls. On the other hand, the issues that come before them are still going to be much more accessible to courts. And there may still be less of a reason to worry that judicial review would unduly distort agency decisionmaking or further expand the power of organized groups.

B. *Procedural Constraints*

When it comes to procedural constraints on agency decisionmaking, however, the arguments in favor of more robust procedures are weaker locally—especially where procedures are not backed by the threat of substantive judicial review.

The main argument in favor of rulemaking procedures is that they can improve the quality of agency decisions by providing access to arguments and evidence that agencies would not otherwise consider, and by encouraging participation from stakeholders who might not otherwise be consulted.²¹⁹ Transparent decisionmaking procedures also promote agency legitimacy by enabling members of the public to participate in decisions that affect them, and generally avoiding the perception that important decisions are being made behind closed doors.²²⁰

Procedure skeptics, on the other hand, point out that procedures take up a fair bit of agency time, and that they may not always succeed at broadening

²¹⁹ See, e.g. Nina A. Mendelson, *Rulemaking, Democracy, and Torrents of E-Mail*, 79 GEO. WASH. L. REV. 1343, 1356-59 (2011) (summarizing the arguments in favor of rulemaking procedures).

²²⁰ See, e.g., Jessica Mantel, *Procedural Safeguards for Agency Guidance: A Source of Legitimacy for the Administrative State*, 61 ADMIN. L. REV. 343 (2009) (exploring the role that procedural checks concerning the creation and issuance of agency guidance have in promoting agency legitimacy).

participation or nudging agency policies in the ways that proponents would hope.²²¹ Critics note, for example, that notice-and-comment rulemaking occurs late in an agency's decisionmaking process—after an agency has considered and rejected other alternatives, conducted an exhaustive internal review process, and secured approval from the Office of Management and Budget.²²² By this point, agencies are rarely amenable to starting over, and typically are focused much more on simply defending the positions that they already have decided to adopt.²²³ As E. Donald Elliot writes, “no administrator in Washington turns to full-scale notice-and-comment rulemaking when she is genuinely interested in obtaining input from interested parties.”²²⁴ In this regard, notice and comment rulemaking is more akin to “Kabuki theater . . . a highly stylized process for displaying in a formal way the essence of something which in real life takes place in other venues.”²²⁵

Many of these same critiques apply to local agencies as well. Although hearings and public comment processes encourage broader participation and contribute to agency decisionmaking, it is less clear at the local level that they can predictably improve the quality of the decisions themselves.

1. Legitimacy

It is hard to know the degree to which robust hearing and consultation requirements increase local agency legitimacy, but it seems likely that their total absence would have some legitimacy costs. Beginning around the turn of the twentieth century, and accelerating in the 1960s, states and localities across the country adopted a variety of measures to make state and local government more transparent and accessible to the public.²²⁶ They required that certain kinds of decisions be made at “open” meetings that the public would be welcome to attend.²²⁷ They adopted state Freedom of Information Acts that mirror and at times exceed the requirements imposed on federal

²²¹ See, e.g., Parrillo, *supra* note 2 at 89 (“We should not be overly sanguine in our hope that agency policymaking will be seriously influenced by stakeholders who are not already somehow known to the agency.”).

²²² William F. West, *Formal Procedures, Informal Processes, Accountability, and Responsiveness in Bureaucratic Policy Making: An Institutional Policy Analysis*, 64 PUB. ADMIN. REV. 66, 72-73 (2004).

²²³ *Id.* at 72; Parrillo, *supra* note 2, at 71; see also Jason Webb Yackee & Susan Webb Yackee, *A Bias Towards Business? Assessing Interest Group Influence on the U.S. Bureaucracy*, 68 J. POL. 128, 135 (2006) (revealing that agencies are more likely to adapt their final rules in response to comments made by business interests than other commenters).

²²⁴ E. Donald Elliott, *Re-Inventing Rulemaking*, 41 DUKE L.J. 1490, 1492 (1992).

²²⁵ *Id.*

²²⁶ R. James Assaf, Note, *Mr. Smith Comes Home: The Constitutional Presumption of Openness in Local Legislative Meetings*, 40 CASE W. RES. L. REV. 227, 229 (1989).

²²⁷ *Id.* (noting open-meeting laws in all fifty states).

agencies as a matter of federal law.²²⁸ And they adopted state administrative procedures that incorporate to one extent or another the basic requirements of notice and an opportunity to be heard for regulations and orders alike.²²⁹ The sheer breadth and uniformity of these various requirements suggests that even if people do not take advantage of agency procedures, they take some comfort in knowing that the opportunity is there.

In addition, a rich body of literature in sociology and public administration suggests that local participation can increase overall levels of civic engagement and strengthen community cohesion.²³⁰ Individuals who attend local meetings develop a better understanding of government processes, which may make them more likely to participate again in the future.²³¹ Local engagement also can foster a greater sense of community cohesion, and reinforce the notion that individual residents are part of a broader whole.²³² In short, allowing individuals to have a say in local government can generate value beyond the issue at hand.²³³

2. Improved Decisionmaking

The harder question, however, is whether robust procedures necessarily improve the quality of agency decisions, and relatedly, whether procedural formality can ever be an adequate substitute for substantive judicial review.

In evaluating the potential benefits of agency procedures, it is important to keep in mind that even in the absence of formal procedural requirements, agencies typically have a strong incentive to consult with at least some individuals or entities outside the agency before adopting a new policy or rule.²³⁴ Agencies may need information that only outside entities can

228 Keith W. Rizzardi, *Sunburned: How Misuse of The Public Records Laws Creates An Overburdened, More Expensive, And Less Transparent Government*, 44 STETSON L. REV. 425, 430, 439-42 (2015) (noting that “[a]ll fifty states have public records laws allowing public access to the records of state and local government,” and highlighting ways the federal Freedom of Information Act is narrower than state counterparts such as Florida’s constitutional right to public-record access).

229 Arthur Earl Bonfield, *The Federal APA and State Administrative Law*, 72 VA. L. REV. 297, 316 (1986).

230 Nadav Shoked, *The New Local*, 100 VA. L. REV. 1323, 1382 (2014) (summarizing literature).

231 Ank Michels & Laurens De Graaf, *Examining Citizen Participation: Local Participatory Policy Making and Democracy*, 36 LOC. GOV’T STUD. 477, 480, 487 (2010) (arguing that citizen involvement has positive effects on democracy in that citizens feel responsible for matters of public import); Tina Nabatchi & Lisa Blomgren Amsler, *Direct Public Engagement in Local Government*, 44 AM. REV. PUB. ADMIN. 63S, 76S (2014) (same).

232 See David Mathews, *Community Change Through True Public Action*, 83 NAT’L CIVIC REV. 400, 401 (1994) (emphasizing the importance of “banding together” for dealing with local matters).

233 Of course, as Bagley reminds us, government agencies also gain legitimacy by doing a good job, and to the extent that procedures detract from agencies’ ability to do so, they may themselves impose legitimacy costs. Bagley, *supra* note 1, at 385-86.

234 See, e.g., Parrillo, *supra* note 2, at 86-91; Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 CORNELL L. REV. 397, 425-27 (2007) (stating that some agencies

provide.²³⁵ And they may view consultation as a way to secure greater compliance and cooperation from regulated groups.²³⁶ In fact, evidence at both the federal and local levels suggests that even in the absence of procedural mandates, agencies routinely consult with external stakeholders in developing policies or rules.²³⁷

In order for procedural requirements to have a positive impact on agency decisions, they must invite participation from those with whom the agency would *not* otherwise consult. Just as importantly, procedures must be able to generate *new information* that the agency would not have considered, or to more carefully engage with arguments that the agency would otherwise have ignored. Although there is some evidence to suggest that consultation requirements can indeed broaden participation in local agency proceedings, it is less clear that this broadened participation in fact leads to meaningful changes in agency rules.

a. *Broadening Participation*

At the federal level, a number of studies have found that rulemaking procedures invite participation from groups that agencies might otherwise ignore. Studies suggest that in the absence of procedural mandates, agencies still consult with regulated entities and their representatives. But they are less likely to hear from public interest organizations and more peripheral actors such as regional trade associations or local government groups.²³⁸ A similar pattern likely prevails at the local level as well.

What matters, of course, is whether the individuals who would otherwise have been excluded from informal agency consultation actually participate when given the opportunity to do so. Most local rulemaking requirements mirror the federal model in that they require agencies to provide the public with notice and an opportunity to comment—but do not require agencies affirmatively to reach out to any particular individuals or groups.²³⁹ As a

do not solicit many comments but instead selectively seek input on certain policy and guidance documents); Peter L. Strauss, *Publication Rules in the Rulemaking Spectrum: Assuring Proper Respect for an Essential Element*, 53 ADMIN. L. REV. 803 (2001) (discussing the benefits of robust procedures, which can include transparency and consistency in rulemaking).

²³⁵ Parrillo, *supra* note 2, at 95 (quoting an agency official explaining that “‘guidance needs science,’ and ‘the companies have the science’”); Mendelson, *supra* note 234, at 425.

²³⁶ Mendelson, *supra* note 234, at 425 (“By responding to [regulated entities’] concerns in advance, the agency might avoid oversight altogether.”).

²³⁷ See, e.g., Davidson, *supra* note 4, at 604-07 (describing the large amount of discretion local agencies generally have in conducting outreach); Mendelson, *supra* note 234, at 427-29 (describing informal stakeholder consultation by federal agencies); Parrillo, *supra* note 2, at 87-88 (recounting anecdotal evidence of stakeholder consultation at the federal level).

²³⁸ Parrillo, *supra* note 2, at 87-88, 93-94; Mendelson, *supra* note 234, at 425-29.

²³⁹ See *supra* notes 85-93, and accompanying text.

result, they put the onus on individuals and organizations to show up if they want to be heard.

Here, evidence on local participation is decidedly mixed. On the one hand, the conventional wisdom is that local government is more accessible, which makes participation easier.²⁴⁰ Residents may also perceive local participation as more valuable given the outsized influence that a small group of individuals can have on local policy.²⁴¹ The empirical evidence generally bears this out. For example, studies suggest that citizen participation in local government is inversely proportionate to city size: the smaller a jurisdiction, the more likely its residents are to attend local meetings, or to reach out to local officials to express their views.²⁴²

On the other hand, overall levels of participation in agency procedures are typically quite low.²⁴³ In 2018, for example, Philadelphia agencies received comments on just eight percent of proposed rules.²⁴⁴ Similarly, New York residents and organizations commented on just two of the twenty agency rules that went into effect in the fall of 2020.²⁴⁵ In 2018, a majority of the monthly meetings held by the Needham Board of Health did not have any guests in attendance.²⁴⁶ By way of comparison, federal agencies typically receive comments on more than sixty percent of proposed rules.²⁴⁷

When it comes to more controversial regulations, however, local participation can be quite a bit more robust. The New York City Board of Health received approximately 40,000 public comments on its proposed “Portion Cap Rule,” which prohibited the sale of large, sugary drinks.²⁴⁸ Similarly, when the Needham Board of Health considered banning the sale of flavored tobacco products, dozens of parents, business owners, public-

²⁴⁰ Shoked, *supra* note 230, at 1380 (summarizing conventional wisdom).

²⁴¹ Gillette, *Local Redistribution*, *supra* note 174, at 1116.

²⁴² J. Eric Oliver, *City Size and Civic Involvement in Metropolitan America*, 94 AM. POL. SCI. REV. 361, 362.

²⁴³ William H. Baker, H. Lon Addams & Brian Davis, *Critical Factors for Enhancing Municipal Public Hearings*, 65 PUB. ADMIN. REV. 490, 491 (2005) (noting that many hearings “attract very small crowds”).

²⁴⁴ Adams, *supra* note 4, at 652.

²⁴⁵ *Recently Adopted Rules*, N.Y.C., <https://rules.cityofnewyork.us/> [<https://perma.cc/C4AK-C374>]. Here are the two rules: N.Y.C., N.Y. RULES § 5-280 (2020) (creating a “presumption of a cashless establishment” if a food or retail store displays a sign that it refuses to accept cash); *id.* § 104-04 (2020) (creating a system for certifying corrected defects of fire alarms).

²⁴⁶ *Board of Health Minutes*, NEEDHAM, MASS., <https://www.needhamma.gov/Archive.aspx?AMID=51&Type=&ADI> [<https://perma.cc/6FW3-6F37>] (recording guests in attendance at only the February, March, and December meetings).

²⁴⁷ Stuart Shapiro, *Presidents and Process*, 23 J.L. & POL. 393, 404 (2007) (reviewing two months of federal register records during both the Obama and Bush administrations and finding that approximately 36-37 percent of rules did not receive comments).

²⁴⁸ *Notice of Adoption*, N.Y.C. DEP’T OF HEALTH (Sept. 23, 2012), <https://web.archive.org/web/20150507220413/http://www.nyc.gov/html/doh/downloads/pdf/notice/2012/notice-adoption-amend-article81.pdf>.

interest organizations, and trade association representatives turned out.²⁴⁹ In short, it appears that local rulemaking may indeed invite greater participation, at least on issues that generate widespread public concern.

b. *Changing Outcomes*

However, the fact that rulemaking procedures have the potential to broaden participation does not necessarily mean that this participation will improve the quality of the decisions made. And in fact, there are several reasons to doubt that local agency decisionmaking will predictably (or often) benefit from broader participation.

Broader participation leads to better outcomes if it provides agencies with information that they would not otherwise have considered, at a point when they are willing to consider it. Here, it is useful to distinguish between the two types of information that may be generated through public comment: technical information and political information.²⁵⁰ Technical information includes data, evidence, and arguments that may be relevant to the agency's decision.²⁵¹ It also includes what Cynthia Farina describes as "situated knowledge"—namely, "information about impacts, problems, [and] enforceability" of proposed regulations "that is known by the commenter because of lived experience in the complex reality into which the proposed regulation would be introduced."²⁵² A long-haul truck driver, for example, may be able to provide valuable information about the unintended consequences of introducing on-board recorder systems that agency officials would otherwise not have considered.²⁵³

Political information, meanwhile, alerts agencies to potential sources of opposition (or support) that they might not have anticipated.²⁵⁴ Consultation enables agencies to "test the political waters" . . . and identify which stakeholders would 'push back.'²⁵⁵ Political information can help agencies avoid unforeseen legal challenges, as well as legislative intervention or electoral blowback.

249 *Needham Board of Health Minutes: December 12, 2018, 7:00 to 9:00 PM*, TOWN OF NEEDHAM, <https://www.needhamma.gov/ArchiveCenter/ViewFile/Item/7090> [<https://perma.cc/9HBE-FVP7>]; *Needham Board of Health Minutes: December 14, 2018, 7:00 to 9:00 AM*, TOWN OF NEEDHAM, <https://www.needhamma.gov/ArchiveCenter/ViewFile/Item/7091> [<https://perma.cc/75TT-S5FG>] (listing, among others in attendance, representatives from the New England Franchise Owners Association and Tobacco Free Massachusetts and owners of a local convenience store and gas station).

250 Parrillo, *supra* note 2, at 86-89.

251 *Id.*

252 Cynthia R. Farina, Mary Newhart, Josiah Hedit & CeRI, *Rulemaking vs. Democracy: Judging and Nudging Public Participation that Counts*, 2 MICH. J. OF ENV'T. & ADMIN. AFFS. 124, 148 (2012).

253 *Id.* at 149.

254 Parrillo, *supra* note 2, at 89.

255 *Id.* at 89-90 (quoting a former USDOT general counsel).

At the federal level, anecdotes suggest that broadening participation to include more marginal regulated entities, public interest organizations, academics, and local government officials may at times generate useful political and technical information to aid agency decisionmaking.²⁵⁶ When participation is broadened still further to include members of the general public, however, the value of the additional comments goes down substantially. As Nina Mendelson and others have found, comments from the mass public often state value choices rather than make evidence-based arguments and as a result, agencies tend to give them short shrift.²⁵⁷ When agencies change policy in response to public comments, it is almost invariably in response to comments from more sophisticated groups.²⁵⁸ Finally, because mass comment campaigns typically are organized by various interest groups, they provide at best a weak signal of how an agency regulation is likely to fare with legislators or with the public at large.²⁵⁹

At the local level, the strongest argument for broadening participation through formal rulemaking procedures is that doing so can sometimes provide agencies with valuable political information about the policy in question. When residents turn out in large numbers, agencies inevitably take note.²⁶⁰ An unexpected burst of interest may alert agency officials to the fact that a particular policy is more controversial than they had anticipated—and occasionally lead agency officials to pursue another course. Interview-based studies with local officials suggest that, from their perspective, this is the primary value that hearings can bring.²⁶¹ For residents too, turning out in droves may be the most effective way to have their perspective heard.²⁶²

On the other hand, public consultation requirements are less likely to generate technical information that an agency would not have obtained in

²⁵⁶ Parrillo, *supra* note 2, at 86–90 (citing the views of various federal agency officials).

²⁵⁷ Mendelson, *supra* note 219, at 1346; Cuellar, *supra* note 166, at 426.

²⁵⁸ Cuellar, *supra* note 166, at 479, 485.

²⁵⁹ See Cuellar, *supra* note 166, at 484–85 (noting that, while interest groups provide necessary sophistication for effective comments, it can result in a “deluge of form letters” that “are quite likely to . . . diverge from the more nuanced positions that many of [the groups’] members might prefer to take”).

²⁶⁰ See Brian Adams, *Public Meetings and the Democratic Process*, 64 PUB. ADMIN. REV. 43, 46 (2004) [hereinafter Adams, *Public Meetings*] (“Gathering a group of citizens to go to a meeting . . . clearly communicates to officials that there is interest in an issue.”).

²⁶¹ See *id.* at 46 (“One respondent stated that attending public meetings was important because ‘it seems like if you don’t show up at the Council meetings, the council says “well, maybe this is a non-issue.”’”); Maureen M. Berner, Justin M. Amos & Ricardo S. Morse, *What Constitutes Effective Citizen Participation in Local Government? Views from City Stakeholders*, 35 PUB. ADMIN. Q. 128, 144 (2011) (“Officials view public hearings . . . as the main participatory avenue because . . . citizens are expected to ‘prioritize and give input on programs and projects by attending and raising their concerns in front of Council and staff. This would be the most appropriate time for that direct input.’”).

²⁶² See, e.g., Adams, *Public Meetings*, *supra* note 260, at 46 (quoting a meeting attendee explaining that “getting a lot of people to a council meeting is critical to showing that people care about an issue”).

other ways. The sorts of “sophisticated” entities that participate in federal agency proceedings tend to be much less active locally. Although there is a robust interest group presence in cities like Chicago and New York, the same cannot be said of the smaller municipalities.²⁶³ When members of the public participate in local agency proceedings, they tend to voice their support or opposition to a particular regulation without providing additional arguments or evidence with which the agency must contend.²⁶⁴

As is true at the federal level, formal opportunities to participate may also come too late in the local agency process to have a meaningful impact.²⁶⁵ Most rulemaking statutes require agencies to obtain public input between 10 and 30 days before a proposed policy goes into effect—which is to say long after most of the salient details have been hammered out in consultation with whatever parties the agency itself decides to consult.²⁶⁶ Indeed, agency officials themselves sometimes acknowledge that, for them, the main purpose of public hearings is to legitimate decisions after the fact.²⁶⁷

Even still, public rulemaking could potentially improve the quality of agency decisions if it forced agencies to more fully explain the basis for their decisions to the public. In this regard, a procedural rulemaking requirement can function much like a reason-giving requirement, just with a different audience in mind.

The problem is that a great deal of local rulemaking foregoes entirely the requirement of an agency response. In both Seattle and New York, for example, agencies are required to solicit public comments but are not required to respond—in writing or otherwise—to the comments received.²⁶⁸ Even in-person hearing requirements do not necessarily generate a robust exchange of

²⁶³ See Seifter, *Further from the People*, *supra* note 5, at 138–39 (noting that, even at the state level, public-interest groups are more resource constrained and significantly outnumbered relative to their federal counterparts and to their state-level business or industry opponents).

²⁶⁴ See, e.g., Adams, *Public Meetings*, *supra* note 260, at 47 (“Rather than acting as a deliberative forum where ideas are exchanged and people’s opinions change based on rational persuasion, the view of meetings that emerges here is of a forum in which constituents provide their elected officials with new information about their *views* on an issue”) (emphasis added).

²⁶⁵ See, e.g., Berner et al., *supra* note 261, at 155 (“Citizens are even concerned that these hearings commonly take place late in the process, a sign that they feel citizens through hearings, are not having an adequate level of influence on the process.”); Cheryl Simrell King, Kathryn M. Feltey & Bridget O’Neil Susel, *The Question of Participation: Toward Authentic Public Participation in Public Administration*, 58 PUB. ADMIN. REV. 317, 322 (1998) (quoting focus group participants as expressing similar sentiments).

²⁶⁶ See Adams, *Public Meetings*, *supra* note 260, at 49 (“By the time a decision reaches the city council or school board, it has already been in the works for quite some time . . . Compromises may already be built into the policy, with the key players working out agreements among themselves.”); see also *supra* notes 85 to 93 and accompanying text.

²⁶⁷ Barry Checkoway, *The Politics of Public Hearings*, 17 J. APPLIED BEHAV. SCI. 566, 571 (1981) (“Another use of public hearings is to legitimate a decision that has already been made.”).

²⁶⁸ See *supra* notes 86 to 89 and accompanying text.

views. In most jurisdictions, agency officials are not required to respond publicly to comments made during agency hearings, and in fact may be actively discouraged from doing so.²⁶⁹ A common refrain is that “agencies typically hold public meetings to announce and defend their policies, and the public comes only to vent. . . . [V]ery little hearing occurs at most public hearings.”²⁷⁰

* * *

As this Section makes clear, there undoubtedly is value to local agency procedures. They bring some measure of transparency to government decisionmaking. They give individuals and organizations some degree of “voice” in the decisions that affect them. On controversial issues, packed meeting rooms can provide agency officials with an important political signal that they otherwise might have missed.

What procedural constraints largely cannot do, however, is ensure that agency decisions are in fact well-reasoned or sound. The formal consultation requirements come too late in the process to have a meaningful impact on agency decisions. And they are less likely to generate new and valuable information that agencies would not otherwise have had. This does not necessarily mean that states and localities should do away with these requirements entirely—but it does suggest that there is a limit to what they may be expected to achieve.

III. DOCTRINAL IMPLICATIONS

In many jurisdictions across the United States, the primary constraints on local agency decisionmaking are procedural. Boards and commissions are required to make all decisions at “open meetings,” which often include an opportunity for public comment. Agencies typically are required to provide advanced notice of proposed regulations—and, in larger cities, to more formally solicit comments from affected groups. Substantive judicial review, however, plays a far more modest role. Although courts ensure—with varying degrees of interpretive deference—that agency decisions are authorized by statute, they often have only very limited authority to scrutinize the substance

²⁶⁹ Adams, *Public Meetings*, *supra* note 260, at 44; Nabatchi & Blomgren Amsler, *supra* note 231, at 76.

²⁷⁰ Katherine A. McComas, *Theory and Practice of Public Meetings*, 11 COMM’N THEORY 36, 38 (2001); *see also* Jeffrey M. Berry, Kent E. Portney, Mary Beth Bablitch & Richard Mahoney, *Public Involvement in Administration: The Structural Determinants of Effective Citizen Participation*, 13 J. VOLUNTARY ACTION RSCH., Apr. 1984, at 7, 17 (1984) (“If an agency wanted to insulate itself from the influence of citizen groups and wanted to insure [sic] that its policies would undergo as little change as possible, it would be much better off relying on public hearings to meet its citizen participation mandate.”).

of the decision reached.²⁷¹ Nonetheless, the discussion in Part II suggests that, in the local context, there may in fact be more of a substantive role for courts to play.

This Part turns to some specific doctrinal implications for local administrative law. It suggests, first and foremost, that local agency regulations should be subject to at least some modest version of “hard look review.” It also casts doubt on the wisdom of incorporating into local administrative law the *Mead* principle that procedural rigor can substitute for substantive judicial review. Finally, it suggests that the *Chevron–State Farm* divide—which affords greater deference to interpretive judgments than to substantive ones—has no place in local administrative law. This Part concludes by considering whether, given the variation among local agencies, it even makes sense to adopt a uniform and trans-substantive standard of local administrative law (and tentatively suggests that it does).

A. *Embracing Reason-Giving and “Hard Look” Review*

Like their federal counterparts, local agencies should be required to engage in “reasoned decisionmaking”—that is, they should be required to articulate the reasons for their decisions, which would then be the basis for substantive judicial review. The strength of these requirements should, of course, be tailored to the local context. Indeed, if there is one lesson from federal administrative law, it is that there is little to be gained from requiring agencies to go through years and sometimes decades of litigation and revision in order to see their policies come to life.²⁷² Nevertheless, in most states, adopting a more robust substantive standard of review improve local administrative outcomes.

New York provides some sense of how these requirements might function in practice. As discussed in Part I, New York is one of the few states that expressly sets out the standard of review for local agency decisions; it also imposes on local agencies the same basic requirements of reasoned decisionmaking that bind state agencies. For these reasons, New York case law provides a useful glimpse at what a local “hard look” standard might entail.

Consider for example *Dorfman v. City of Salamanca Board of Public Utilities*, which concerned a decision by a local utilities board to double the rates charged for water to certain users.²⁷³ In Salamanca, as elsewhere, some buildings have larger pipes—and larger meters—which enable a larger volume of water to flow through; a single-family home might therefore have

²⁷¹ On state-court deference to agency interpretations of their authorizing legislation, see Pappas, *supra* note 5, and Luke Phillips, *Chevron in the States? Not So Much*, 89 MISS. L.J. 313 (2020).

²⁷² Pierce, *supra* note 1, at 61 (pointing to the ways in which onerous rulemaking requirements can undermine an agency’s ability to perform its statutory mission).

²⁷³ *Dorfman v. City of Salamanca Bd. of Pub. Utilities*, 30 N.Y.S. 3d 774 (N.Y. App. Div. 2016).

a half-inch meter, whereas a commercial building might have a meter that is one inch or greater.²⁷⁴ Prior to the rule change at issue, the Board charged larger meter users a slightly higher rate (\$20.00 for larger meters versus \$19.20 for smaller ones) to reflect the fact that larger meters conferred a greater benefit on the users and were somewhat more expensive for the city to maintain.²⁷⁵ Faced with a budget shortfall, however, the Board decided in 2013 to double the rate charged to the 3% of customers with large meters, while leaving the rate for smaller meters unchanged. Overnight, an 80¢ difference became a \$20 gap.²⁷⁶ In striking down the rule, the court explained that, although the Board was well within its rights to charge some users more, it needed to provide at least *some* basis for setting the rates that it did.²⁷⁷ Even in its appellate briefs, however, the Board failed to provide any justification for its calculations beyond the conclusory statement that large meter users benefited “more.”²⁷⁸

On the other hand, courts have routinely upheld regulations, even controversial regulations, where there is some evidence in the record to support it. *Independent Master Plumbers*, a case involving a regulation adopted by the Westchester County Board of Plumbing Examiners, provides a contrast to *Dorfman* in this respect.²⁷⁹ At issue in that case was a new regulation imposing a stricter 1:1 supervision ratio for apprentice plumbers and defining “supervision” more stringently to require a supervising master plumber to be within earshot at all times.²⁸⁰ Upholding the regulation, the New York Appellate Division court noted that the Board had received numerous complaints of inadequate supervision, and had discussed the issue at multiple public meetings prior to adoption.²⁸¹ The Board also considered industry ratios in other jurisdictions and determined that its prior regulations had been too lax.²⁸² Nothing more was required, the court found, under the prevailing standard of arbitrariness review.²⁸³

The New York version of “hard look” review does differ from the federal standard in one important respect, which in some cases undermines the goals

²⁷⁴ Reply Brief of Respondents-Appellants at *4-5, *Dorfman v. City of Salamanca Bd. of Pub. Utils.*, No. 16-00304, 2016 WL 11546483 (N.Y. App. Div. Feb. 2, 2016).

²⁷⁵ *Id.* at *5.

²⁷⁶ *Id.*

²⁷⁷ *Dorfman*, 30 N.Y.S.3d at 775 (finding the record “silent with respect to facts supporting the [Utility] Commission’s determination”).

²⁷⁸ Reply Brief of Respondents-Appellants, *supra* note 274, at *7.

²⁷⁹ *Indep. Master Plumbers v. Westchester Cnty. Bd. of Plumbing Exam’rs*, 786 N.Y.S. 2d 92 (N.Y. App. Div. 2004).

²⁸⁰ *Id.* at 93.

²⁸¹ *Id.* at 94.

²⁸² *Id.*

²⁸³ *Id.*

of more rigorous review. At the federal level, the APA requires agencies to issue a “statement of basis and purpose” to support any new regulation, and, under the Court’s decision in *S.E.C. v. Chenery Corp.*, the agency decision must stand or fall based on the reasons provided at the time.²⁸⁴ In New York, however, courts have said that for *rulemaking*, as opposed to adjudication, “there is no requirement that [the agency] articulate its rationale . . . at the time of promulgation, provided that the record reveals that the rule had a rational basis.”²⁸⁵ And even if a local APA does require a statement of basis and purpose, agencies are not necessarily bound by their initial statements when they later justify their decisions in court.

What this means in practice seems to vary considerably from case to case: although at times it appears to be a sensible accommodation to the reality of local decisionmaking, in other cases it risks dispensing entirely with the requirement that the agency engage in reasoned decisionmaking. For example, in *Tri City v. N.Y.C. Taxi & Limousine Commission*, the question was whether the Commission had adopted a reasonable formula to calculate the minimum per-trip rate that companies like Uber and Lyft must pay to their drivers.²⁸⁶ The specific issue on appeal concerned the use of company-specific “utilization rates” (that is, the percentage of time that drivers spend actively ferrying passengers as opposed to waiting in between calls) to determine how much drivers receive per trip.²⁸⁷ In issuing the rule, the agency explained that the reason for including company-specific utilization rates was to ensure that drivers on different platforms earned a comparable hourly wage—and it cited to an economic study that it had commissioned in support.²⁸⁸ Petitioners had urged the agency to use a single, industry-wide utilization rate on the theory that a company-specific standard could potentially have some anti-competitive effects.²⁸⁹ The Taxi Commission did not address these specific arguments at the time it issued its regulation, though—as the court pointed out—there was plenty of evidence in the record to support its decision to reject the competing view.²⁹⁰ And importantly, the Commission’s more thorough discussion of the challengers’ arguments in court filings was entirely

²⁸⁴ 5 U.S.C. § 553(c); *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (citing *S.E.C. v. Chenery Corp.*, 332 U.S. 194, 196 (1947)) (“[W]e may not supply a reasoned basis for the agency’s action that the agency itself has not given.”).

²⁸⁵ *Tri-City, L.L.C. v. N.Y.C. Taxi & Limousine Comm’n*, 138 N.Y.S.3d 30, 31 (N.Y. App. Div. 2020).

²⁸⁶ *Id.* at 30-31.

²⁸⁷ Brief for Respondents at *2-3, *Tri City, L.L.C. v. N.Y.C. Taxi and Limousine Comm’n*, No. 2019-5104, 2020 WL 7379778 (N.Y. App. Div. March 9, 2020).

²⁸⁸ *Id.* at *9-10.

²⁸⁹ *Id.* at *20.

²⁹⁰ *Tri City L.L.C.*, 138 N.Y.S.3d at 31.

consistent with the initial justification that it had provided at the time.²⁹¹ On these facts, the New York Appellate Division court's conclusion that the requirements of reasoned decisionmaking had been met seems reasonable.

In *In re Big Apple Food Vendors v. Street Vendor Review Panel*, however, it is much harder to see how the agency engaged in anything that approximated "reasoned" decisionmaking.²⁹² The New York City Council had authorized the Street Vendor Review Panel to prohibit vendors from operating on certain streets entirely if it determines that the streets have become "too congested . . . to permit the operation of such business."²⁹³ At issue was the Panel's decision to add twenty-six streets to a list of prohibited sites—thereby ejecting those vendors who had previously operated in those locations.²⁹⁴ Both the trial and appellate courts overturned the Panel's regulation on the ground that it had failed to articulate any criteria for determining whether a street had become "too congested."²⁹⁵ As the appellate court explained, the agency had "failed to provide the court with any idea as to how the Panel members decided which streets were 'regularly too congested', and therefore left the court 'clueless as to how and upon what evidence it applied the statutory criteria.'"²⁹⁶ The New York Court of Appeals, however, sided with the agency, explaining that the agency was not required to engage in any fact finding or justification and that it fell to petitioners to demonstrate that there was insufficient evidence to support the rule.²⁹⁷

The Court of Appeals' approach in the food vendor's case is problematic in two respects. First, as Part II suggests, a basic reason-giving requirement may be especially valuable in the local context given the relative informality with which important decisions often are made. Second, in the absence of an affirmative reason-giving requirement, the hard look standard threatens to become too much of a rubber stamp, as evidenced by the Court of Appeals' decision in *Big Apple* itself. Rather than scrutinize whether the agency had adequately justified its regulation (as the Court had done in many other local agency cases²⁹⁸), the Court simply announced in conclusory fashion that the plaintiffs' "heavy burden" had not been met.²⁹⁹

²⁹¹ Brief for Respondents, *Tri City v. N.Y.C. Taxi and Limousine Comm'n*, No. 2019-5104, 2020 WL 7379778 at *15-17 (N.Y. App. Div. March 9, 2020).

²⁹² *In re Big Apple Food Vendors Ass'n v. The St. Vendor Rev. Panel*, 637 N.Y.S.2d 397 (N.Y. App. Div. 1996).

²⁹³ *Id.* at 398.

²⁹⁴ *Id.* at 397.

²⁹⁵ *Id.* at 398.

²⁹⁶ *Id.* at 399.

²⁹⁷ *In re Big Apple Food Vendors Ass'n v. Street Vendor Review Panel*, 683 N.E.2d 752, 755 (N.Y. 1997).

²⁹⁸ See, e.g., *Metrop. Taxicab Bd. v. Taxi & Limo Comm'n*, 960 N.E.2d 944, 945 (N.Y. 2011) (striking down a Taxi Commission regulation on the ground that it lacked support).

²⁹⁹ *Big Apple Food Vendors Ass'n*, 683 N.E.2d at 755.

One concern of course, is that a reason-giving requirement, if strictly enforced, could lead to greater and greater demands on agency time. Critics point out that at the federal level, the basic requirement at the federal level that agencies articulate a basis and purpose for proposed regulations has grown over the years into a requirement that the agency include as part of its justification *all* of the studies, data, and evidence on which it relied.³⁰⁰ Failure to adequately respond to a particular line of criticism may result in an agency regulation getting struck down—even if the agency’s decision is otherwise sound.

At the local level, however, there is good reason to think that, even if applied more rigorously, a reason-giving requirement would be easier for agencies to meet. As discussed in Part II, much of the “bite” of federal hard look review comes from the ways in which it interacts with the various other requirements imposed on federal agencies, such as cost–benefit analysis of proposed rules. It also reflects the inherent complexity of federal regulation itself. A “complex scientific rulemaking” that generates dozens of appealable issues inevitably creates lots of opportunities for challengers and courts to quibble with what the agency has done.³⁰¹ At the local level, substantive judicial review is much less likely to metastasize in quite the same way.

B. *Rejecting a Local Mead*

Another implication from Part II is that at the local level, procedural rigor may be a poor substitute for substantive judicial review. Over the years, a number of federal administrative law scholars have argued in favor of what Cass Sunstein has dubbed a “pay me now or pay me later” approach to administrative law.³⁰² The principle, first articulated by the Supreme Court in *United States v. Mead*, is that courts should afford greater deference to agency decisions that are the product of more robust procedures.³⁰³ As Sunstein explains, *Mead* puts agencies to a choice: they “may proceed expeditiously and informally” with the knowledge that courts will review their decisions more closely, or “they may act more formally, in which case” a

300 Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1295–1314 (1986) (detailing how the modest requirements of notice-and-comment rulemaking ballooned over time).

301 McGarity, *supra* note 167, at 97, 100 (describing the resulting “blunderbuss attack” on the rulemaking).

302 Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 225 (2006) (explaining that *Mead* gives agencies the choice to proceed formally and enjoy the benefit of *Chevron* deference, or informally and risk more skeptical judicial review).

303 *United States v. Mead Corp.*, 533 U.S. 218, 230 (2001) (“It is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force.”).

more permissive deference standard applies.³⁰⁴ “In either case,” he argues, “the legal system, considered as a whole, will provide an ample check on agency discretion.”³⁰⁵ Although *Mead* is limited to questions of statutory interpretation, a number of scholars have embraced its basic intuition and urged its extension into the broader realm of substantive judicial review.³⁰⁶

Nestor Davidson has urged a similar approach to local administrative law as well. Pointing to *Mead*, Davidson has urged state courts to “calibrate . . . deference” based on the procedural rigor with which an agency approaches its decision.³⁰⁷ And indeed, this basic intuition appears to drive much of local administrative law—particularly in places like Philadelphia and Seattle where agencies are required to engage in a fairly robust set of procedures but are then subject to a highly permissive standard of judicial review.³⁰⁸

At the local level, however, there is reason to doubt that more robust procedures can act as a stand-in for substantive judicial review. Certainly, the mere fact that an agency complied with procedural mandates by making its decision available for public comment should not be deemed sufficient to withhold judicial scrutiny. Given low rates of participation and the impressionistic character of most local comments, the mere fact of procedural compliance says little about the soundness of the decision reached.

Even robust participation may not be a perfect proxy for sound decisionmaking. As discussed above, the New York City Board of Health received more than 40,000 comments on its proposed Portion Cap Rule—an exceptionally high degree of engagement that presumably would warrant a more deferential judicial response.³⁰⁹ Yet the agency’s own records show little evidence that the Board of Health actually engaged with any of the comments received: the agency’s final rule simply says that “no changes were made to the amendment in response to the comments received.”³¹⁰

³⁰⁴ Sunstein, *supra* note 302, at 225–26.

³⁰⁵ *Id.* at 226.

³⁰⁶ See, e.g., Lisa Bressman, *Beyond Accountability*, 78 N.Y.U. L. REV. 461, 551–53 (2003) (urging courts to peg the level of deference afforded to the adoption of notice-and-comment rulemaking); see also Matthew C. Stephenson, *The Strategic Substitution Effect: Textual Plausibility, Procedural Formality, and Judicial Review of Agency Statutory Interpretations*, 120 HARV. L. REV. 528, 533–34, 564–65 (2006) (generally praising the substance–procedure tradeoff).

³⁰⁷ Davidson, *supra* note 4, at 614–15.

³⁰⁸ See *supra* Section I.D (describing the mix of substantive and procedural constraints on agency decisionmaking in both cities).

³⁰⁹ See *supra* note 248.

³¹⁰ *Notice of Adoption*, N.Y.C. DEP’T OF HEALTH (Sept. 23, 2012), <http://www.nyc.gov/html/nycrules/downloads/rules/F-DOHMH-09-13-12-a.pdf> [<https://perma.cc/CD7W-KJ94>].

C. Rethinking the Chevron–State Farm Divide

The discussion in Part II also suggests that the more robust standard of review should apply not only to the substantive rationality of agency decision, but also to agencies' interpretations of the statutes they enforce. One of the puzzling features of federal administrative law is that courts are instructed to afford greater deference to agency interpretations of their authorizing legislation than to the substantive judgments that agencies make.³¹¹ As many scholars have argued over the years, this *Chevron–State Farm* divide seems to have it exactly backwards.³¹² Even if one accepts that statutory interpretation is shot through with policy judgment, why should courts defer more readily to *interpretive* judgments than to substantive ones?

Perhaps the strongest justification for the Supreme Court's bifurcated approach is that when it comes to matters of statutory interpretation, consistency is paramount. When a court decides whether a particular order or regulation is supported by the evidence, the decision typically is limited to that specific order or rule. Statutory interpretation questions, however, are likely to reach much further beyond the confines of any particular case. The problem is that at the federal level, agency decisions can often be challenged in any one of twelve circuits. If courts are given too much interpretive leeway, the possibility of conflicting interpretations of both statutes and regulations is substantial.³¹³

At the local level, this justification for the *Chevron–State Farm* divide is largely inapplicable because in the vast majority of jurisdictions, agency decisions may be challenged in only one state-court forum.³¹⁴ The risk of inconsistent interpretations of statutes and regulations is therefore minimal. Importantly, the same holds true even where local agencies are tasked with implementing state law. Although it is possible that different trial or appellate courts would arrive at differing interpretations of the underlying statutes, these differences are less problematic because individual agencies would still be subject to the jurisdiction of just one court and would not themselves have to comply with inconsistent judicial commands.

The Supreme Court also has justified its deferential *Chevron* standard on grounds of agency expertise—but as the discussion in Part II makes clear, this

³¹¹ See Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 384 (1986).

³¹² On this see Breyer, *supra* note 311, at 397 for a description of this as “the exact opposite of a rational system” and Sharkey, *supra* note 120.

³¹³ See, e.g., Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1121–22 (1987) (noting that circuit courts may vary in their statutory interpretation); Matthew C. Stephenson, *Legislative Allocation of Delegated Power: Uncertainty, Risk, and the Choice Between Agencies and Courts*, 119 HARV. L. REV. 1035 (2006).

³¹⁴ See *supra* notes 221–226 and accompanying text.

too is a weaker argument where local agencies are concerned. Because the issues themselves are often much less complex, agencies have less of a comparative advantage over courts in making sense of what the legislature might have meant. Often times, agency officials themselves have less expertise on which to draw, or have expertise that is less tailored to the many issues with which they deal.

As two separate studies by Michael Pappas and Luke Phillips have found, state courts already tend to be less deferential to agency interpretations than their federal counterparts.³¹⁵ Phillips, for example, found that just fourteen states apply the highly deferential *Chevron* model.³¹⁶ Twenty-five call for *de novo* review, and the rest apply something in between.³¹⁷ Although it falls beyond the scope of this paper to weigh in on precisely what the interpretive standard should be, there are, as this Section suggests, a number of reasons to prefer at least a somewhat less deferential approach.

D. *Trans-Substantivity and Uniformity in Local Administrative Law*

A final question raised by the discussion in Part II is whether it even makes sense to apply a uniform and trans-substantive standard of local administrative law. Should health board regulations be judged by the same substantive standards of rationality as taxi commissions and zoning boards? And given that New York City has a population that is larger than most states—and has a robust bureaucracy that looks much more like the federal model than its local counterparts—does it really make sense to subject it to the same administrative law norms that apply to much smaller agencies and boards?

At the federal level, trans-substantivity is the norm, but there are important departures as well. In adopting the APA, Congress intentionally opted for a trans-substantive standard to replace the ad hoc, agency-specific requirements that had previously been the norm.³¹⁸ But in the years since, Congress also has imposed on agencies a variety of additional requirements as part of more specific statutory schemes. The National Environmental Policy Act (NEPA) for example, is *uniform* in the sense that it applies to all agencies whose proposed actions have some environmental impact.³¹⁹ But it

³¹⁵ Pappas, *supra* note 5; Phillips, *supra* note 271.

³¹⁶ Phillips, *supra* note 271, at 315.

³¹⁷ *Id.*

³¹⁸ See David Marcus, *Trans-Substantivity and the Processes of American Law*, 2013 B.Y.U. L. REV. 1191, 1213 (“Congress, by a unanimous vote, passed the trans-substantive APA in 1946”); see also Jerry L. Mashaw, *Federal Administration and Administrative Law in the Gilded Age*, 119 YALE L.J. 1362, 1365 (2010) (discussing the “explicitly trans-substantive . . . federal Administrative Procedure Act (APA)”); Michael Asimow, *Best Practices for Evidentiary Hearings Outside the Administrative Procedure Act*, 26 GEO. MASON L. REV. 923, 938 (2019) (referring to “trans-substantive statute[s] like the APA”).

³¹⁹ 42 U.S.C. §§ 4321–4347 (1969).

is not formally *trans-substantive* in that it imposes a more rigorous set of procedures when agencies regulate in ways that generate environmental concerns. Other statutes dispense with the principle of uniformity as well. The D.C. Circuit, for example, has interpreted the National Securities Markets Improvement Act to require the Securities and Exchange Commission to engage in cost–benefit analysis when adopting certain kinds of regulations, which substantially increases the burden on the SEC to justify its rules.³²⁰

As discussed in Part I, uniformity is inherent in local administration because so much of “local” administrative law is in fact imposed by the states. In every state, either state legislatures or state courts have articulated the appropriate standards of review, which then apply to large and small agencies alike. States have, however, at times departed from the principle of trans-substantivity—for example by articulating specific standards of review for land use and schooling, while implicitly leaving it to courts to cobble together the rest.³²¹

The premise behind this paper is that it is indeed possible to say something useful about “local” administrative law writ large—that despite the differences between New York City and Putman County, it is possible to make at least some very general claims about the role of courts in overseeing the local administrative state. And indeed, many of the arguments in Part II, about the complexity of local regulation, or the structure of state courts, apply with equal force to large and small agencies alike.

The harder question is whether local administrative law should in some ways accommodate the differences in political accountability and expertise that differentiate agencies in places like Chicago and New York City from their much smaller counterparts. In his *Localist Administrative Law*, for example, Nestor Davidson argues that in calibrating deference, courts should consider the manner in which agency officials are held politically accountable, as well as whether agency officials in fact possess the requisite expertise.³²² Given the many differences among local agencies, this sort of highly textured approach undoubtedly holds some appeal.

Yet as debates over trans-substantivity in federal administration make clear, there are reasons to be wary of too textured an approach. For one, as

320 Donna M. Nagy, *The Costs of Mandated Cost–Benefit Analysis in SEC Rulemaking*, 57 ARIZ. L. REV. 129, 130 (2015) (describing rigorous cost–benefit analysis as a “de facto requirement” for SEC rulemaking).

321 See, e.g., Washington State, where specific statutes govern land use decisions, WASH. REV. CODE §§ 36.70c.005–900, and school board decisions, WASH. REV. CODE § 28A.645.010. All other local agency decisions are subject to a more permissive rationality standard that the Washington Supreme Court has inferred from the state’s due process clause.

322 Davidson, *supra* note 4, at 611–13, 621.

David Marcus suggests, it is not clear that judges are particularly well-suited to engaging in the sort of institutional analysis that Davidson's approach would call for.³²³ Another concern may be that empowering judges to tailor standards of review to different agencies would open the door for judges to more forcefully police the actions of those agency officials with whom they politically disagree. In short, the modest claim of this paper is that when it comes to local administrative law, there are good reasons to favor a somewhat more robust—and uniform—standard of substantive judicial review.

CONCLUSION

The arguments in this paper are necessarily preliminary. Indeed, there is a great deal of work to be done to better understand both the day-to-day realities of local administration, and the effects of judicial review on local administrative decisionmaking. But as this paper makes clear, that work need not proceed on an entirely blank slate. The decades of federal administrative scholarship provide a roadmap for understanding the likely effects of both substantive and procedural constraints on the local administrative state.

³²³ Marcus, *supra* note 318, at 1230.

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