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The Era of “Risk-Risk” and the Problem of Keeping the APA Up to Date

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This Special Issue combines commentary on very specific problems of the modern administrative state with an analysis of the Supreme Court’s interpretation of the Administrative Procedure Act (“APA”) over its fifty-year life. The discussions by Professors Sunstein and Viscusi of “risk-risk” or “health-health” issues—the possibility that a regulation aimed at improving health may actually increase net health risks—may seem far removed from Professor Strauss’s treatment of the broader issue of preserving the APA’s relevance for the next half-century. But the relatively specific discussions help to inform the broader one. If risk-risk issues are in any way typical of problems unforeseen by the APA’s drafters but now important, their nature may shed light on the kinds of interpretation of the APA that will best accommodate innovation. After a brief look at Professor McGarity’s outline of possible positions on the future of the regulatory state, I shall address the risk-risk discussions. I shall then turn to Professor Strauss’s analysis and consider what one can reasonably demand of interpretation of a statute such as the APA.

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I. A TAXONOMY OF ATTITUDES TOWARD THE REGULATORY STATE

Professor McGarity sorts various attitudes toward the modern administrative state into five categories—"radical anti-interventionists," "free marketeers," "modern mugwumps," "good government reinventionists," and "unrepentant protectionists." As I understand the piece, McGarity does not claim that each category has some fundamental inherent logic, such that a person is guilty of self-contradiction if he finds himself a free marketeer on one issue but, say, a good government reinventionist on another. Such a strong reading of the taxonomy would not, I think, be convincing. For example, McGarity places in the unrepentant protectionist box both observers who would object to market-mimicking pollution control devices such as effluent charges, and ones who would object to the "symbolic message" conveyed by an antidiscrimination regime with marketable "rights to discriminate."¹ It seems to me, however, that a reasonable person might view the symbolic messages differently in the two cases. There appears to be a fairly broad social consensus that some pollution is not merely inevitable but justifiable, in the sense that at some point the incremental costs of pollution control exceed any incremental gain. If so, then market-mimicking devices may well represent a practical means of getting the biggest bang (in pollution reduction) for the buck (in pollution control costs). But the social consensus on, say, racial discrimination is quite different—a view that it is an evil, to be extinguished altogether. In this context, marketable discrimination rights seem to create a cognitive dissonance that would tend to thwart the stated goals of government intervention. Thus, if McGarity were claiming that every observer must fit herself tidily into only one of his five boxes, I would have to say that the claim is unproven.

Although McGarity does not expressly advocate any of the named schools of thought, he becomes increasingly generous as he moves along from radical anti-interventionists to unrepentant protectionists. According to McGarity, the former are said to believe that the "best gauge of the health of a country's political economy is how well it treats the rich."² From this, a reader might infer that these people were inverted Rawlsians, favoring corporate welfare policies and anything else that grinds the faces

¹ Thomas O. McGarity, *The Expanded Debate Over the Future of the Regulatory State*, 63 U Chi L Rev 1463, 1514-15 (1996).

² *Id* at 1491.

of the poor in the interests of redistribution to the rich. The supporting citation, though not entirely clear, seems to address a different question—whether society in general, and the rich themselves, view the rich as “merely rich or also [as] bearers of wealth.”³ I take it that the source here, George Gilder,⁴ is suggesting only that a society is likely to be better off if its members broadly recognize that earning large sums of money, or even enjoying large investment returns, is not ipso facto reprehensible, but in fact may well be part of a positive-sum game, from which those who interact with the rich may benefit.

By contrast, when McGarity turns to good government reinventionists and unrepentant protectionists, we find more benign portrayals. Good government reinventionists, for example, “recognize that governmental solutions require large and complex bureaucracies,”⁵ and “recognize that government sets the rules of the marketplace and that government intervention may be justified on fairness, equity, or other grounds apart from broken markets.”⁶ Unrepentant protectionists are still more perspicacious. They have “[r]eal world stories” that “belie the benign reassurances of the free marketeers.”⁷ They have “a healthy respect for uncertainty.”⁸ To the supposed “obvious” (!) assertion of unnamed persons that “equal opportunity, environmental, and consumer protection laws have been on the books for at least two decades without achieving significant success” at reducing the degree of invidious discrimination, environmental degradation and consumer fraud, they have “at least three responses,”⁹ none of which is evidently subject to any flaw worth mentioning. As McGarity does not explicitly advocate any particular position, it seems best to take him at his word; to do otherwise would be to argue with what is presented as a system of cataloging.

II. RISK-RISK, HEALTH-HEALTH ANALYSES

Sunstein and Viscusi both offer sophisticated accounts of the risk-risk problem, Sunstein stressing institutional concerns and Viscusi the more purely analytical substantive issues. Sunstein

³ Id at 1491 n 130.

⁴ See George Gilder, *Wealth and Poverty* 50 (Basic Books 1981).

⁵ McGarity, 63 U Chi L Rev at 1507-10 (cited in note 1) (emphasis added).

⁶ Id at 1509 (emphasis added).

⁷ Id at 1518.

⁸ Id at 1520.

⁹ Id at 1514.

asks why risk-risk (or health-health) tradeoffs seem to be more palatable than "attend[ing] to the overall gains from regulation and to the overall losses from regulation"¹⁰—that is, some kind of cost-benefit analysis.¹¹ But at least at a high enough level of generality, it seems hardly controversial that government should avoid acts that do more harm than good.¹² Sunstein's suggestion that people may find tradeoffs between health and other goods peculiarly incommensurable does not strike me as convincing.¹³ People make these tradeoffs every day in their individual lives, when they trade the risks of a little extra speed for added convenience, or nutritional risks for flavor delights, or cancer and cardiovascular hazards for the psychic and other rewards of smoking. And while he is undoubtedly right to observe that "reduction of mortality and morbidity effects to dollars *can* erase qualitative distinctions among diverse risks,"¹⁴ it need not do so. Nothing in the basic idea of cost-benefit analysis compels disregard of pain and suffering, or of the number of years of life likely to be saved, or even, for that matter, of the fault or innocence of the persons whose life expectancies may be prolonged. Whatever the explanation for the hostility to cost-benefit analysis, however, it seems irrefutable that general utilitarian tradeoffs encounter greater resistance than does the balancing of pure health-health risks.

Health-health analysis has a critical implication that Sunstein overlooks. Agencies engaged in risk assessment have commonly adopted "conservative" assumptions, ones that take the chance of overestimating rather than underestimating the target risk, on the theory that the prime importance of human health and life justifies such a tilt—better to be safe than sorry. Of course a technical response to this is to say that the tilt is better done openly, after the most likely risk has been calculated, when the agency makes the policy decision on how far to go toward its reduction.¹⁵ But before health-health issues came to the

¹⁰ Cass R. Sunstein, *Health-Health Tradeoffs*, 63 U Chi L Rev 1533, 1549-50 (1996).

¹¹ The qualifier "some kind" is important. Sunstein is surely right that people would reasonably object to any analysis that "erase[d] important qualitative distinctions among [] risks." *Id.* at 1551. A death accompanied by prolonged suffering, inflicted on a wholly involuntary youthful victim, is hardly the same as a painless death suffered by a nonagenarian as a result of conduct chosen quite unnecessarily and with ample warning of its hazards.

¹² *Id.* at 1562.

¹³ See *id.* at 1551-52.

¹⁴ *Id.* at 1551 (emphasis added).

¹⁵ Compare *International Union, United Auto., Aerospace and Agric. Implement*

fore, the basic substantive critique of this sort of conservatism—that it risked undue sacrifice of other values—necessarily implicated the controversy over, and hostility toward, cost-benefit analysis.

Health-health analysis tends to undermine the assumption that it is better to chance exaggerating than underestimating a risk. If one cannot know *a priori* that more stringent regulations (the presumptive consequence of overestimating a risk) mean more health on a net basis, a preference for health and safety over other values, however sound, seems simply irrelevant to risk estimation. If the agency ratchets up the remedy in reliance on exaggerated estimates of the target risk, but the remedy itself inflicts health costs, there is no assurance that the added severity is advancing health on a net basis. In many cases, of course, a quick eyeballing of the situation may reveal that the health hazards of stringent regulation are trivial. The need to inquire into health-health issues should, as Sunstein suggests, itself be subject to some sort of cost-benefit analysis, in which the costs of further inquiry are balanced against the potential advantages.¹⁶ And the statute may have barred the agency from considering any but the target risk.¹⁷ But, once the possibility of health-health issues is admitted, ritual bows to the primacy of health are exposed as unresponsive to the criticism of "conservative" assumptions.

Viscusi addresses some of the economic analysis of health-health issues, including a regulation's possible tendency to create health risks through its economic impact. Here the issue is neither cost-benefit relationships nor direct health-health effects, such as the way in which restrictions on the use of a substance may drive people to use still more hazardous substitutes or may lull them into riskier behavior. Instead, Viscusi identifies two types of indirect health-health impacts—the health costs of the economic activity engendered by the restriction itself¹⁸ (the "economic activity" effect) and the health costs caused by diversion of

Workers v Pendergrass, 878 F2d 389, 394-95 (DC Cir 1989) (because of agency authority to exercise a policy preference to err on the side of greater risk reduction, its choice of maximum likelihood estimate over upper confidence limit for calculations would be permissible in principle).

¹⁶ See Sunstein, 63 U Chi L Rev at 1552-53 (cited in note 10). See also *Gas Appliance Mfrs. Ass'n, Inc. v Department of Energy*, 998 F2d 1041, 1047 (DC Cir 1993) (applying such a balancing test to agency's lack of research).

¹⁷ See Sunstein, 63 U Chi L Rev at 1555 (cited in note 10).

¹⁸ See W. Kip Viscusi, *Regulating the Regulators*, 63 U Chi L Rev 1423, 1451 (1996).

resources to compliance with the regulation and thus away from other health-improving expenditures, such as ones on health care and on more healthy food, cars, and housing (the "mortality-income" effect).¹⁹

The economic activity effect may well exist, but Viscusi's statement of it seems misleading. If the health costs of \$1 billion of average economic activity are \$35 million (seven fatalities using Viscusi's numbers, or some combination of fatalities and lesser injuries), it does not follow that one could impute such health costs to any particular regulation costing \$1 billion to implement. Indeed, I would expect regulation-induced anti-risk measures to leave overall economic activity (the economy's pure macro numbers) largely unchanged; the regulation would draw land, labor, and capital toward the regulatory compliance activity and away from other uses. Of course the composition of economic activity would change, with possible health implications. Thus, if the regulation shifted activity from manufacturing to construction, an activity that produces more fatalities per worker,²⁰ that shift would increase the fatality rate. But a shift in the opposite direction would have beneficial health effects. In any event, however feasible it may be to identify the distribution of the new, induced activities, it will surely be hard to predict the activities from which resources will be diverted. After all, the diversion will arise from a combination of the regulation's (1) dampening economic activity (other than, obviously, compliance costs) in the regulated field, because its goods or services will be more costly, and (2) luring resources from other activities as the new demand for safety causes outward movement along the supply curve for inputs to the extra safety. It would take quite an econometrician to produce convincing estimates of how much each of the "other activities" would decline. Thus the net economic activity effect seems likely to prove elusive.

Viscusi's calculations of mortality-income effects, spelled out elsewhere in some detail,²¹ rest on two aspects of consumer behavior: (1) their willingness to spend money on extra health, in terms of dollars per statistical death or injury averted (the "price" of health), and (2) the proportion of added income that they are

¹⁹ *Id.* at 1452-53.

²⁰ See W. Kip Viscusi and Richard J. Zeckhauser, *The Fatality and Injury Costs of Expenditures*, 8 *J Risk & Uncertainty* 19, 32 (1994).

²¹ W. Kip Viscusi, *Mortality effects of regulatory costs and policy evaluation criteria*, 25 *RAND J Econ* 94 (1994).

willing to allocate to health (the marginal propensity to consume health). As to the first, rational and well informed persons would presumably allocate their expenditures on health so as to equalize the health return in all areas, for example, health care expenditures as such, income sacrificed in return for reductions in hazards in the workplace, and health characteristics of products (more crashworthy cars, for example). Thus, as I understand Viscusi's reasoning, we may infer from workers' insistence on premiums for risky work that imply, for example, a value-of-life of \$5 million, that additional expenditures on health are likely to be made at the same rate of exchange. Then, if the marginal propensity to spend on health is 0.1, \$50 million in income foregone would imply \$5 million in reduced health spending and, thus, the loss of one statistical life.

I am certainly not qualified to evaluate Viscusi's analysis here. On one side, it may underestimate the serendipitous contributions that wealth makes to health; even a person buying a heavier car purely for comfort, for example, will benefit from the greater safety that (everything else being equal) the car will provide. But other methods for quantifying wealth's contribution to health are clearly tricky, despite the strong statistical association noted by both Sunstein and Viscusi. Causation works both ways (health generates wealth as well as the reverse, as good health enables people to earn more), and both health and wealth may in part be attributable to common causes, such as education or intelligence. Given these difficulties, Viscusi's method of quantification may be the best that we are likely to see for a long time.

III. KEEPING THE APA UP TO DATE

Professor Strauss invites us to look at changing modes of interpreting the APA over time and also to think of ways to keep it responsive to changing times. He sketches out three eras of interpretation. In the first he sees the Supreme Court applying a method associated with Hart and Sacks's *The Legal Process*,²² seeking to give effect to the APA's purposes where "the evils it was aimed at appear."²³ Legislative history serves to identify the problems that the framers sought to resolve, so as to assure in-

²² Henry M. Hart, Jr. and Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (Foundation 1994).

²³ Peter L. Strauss, *Changing Times: The APA at Fifty*, 63 U Chi L Rev 1389, 1399-1400 (1996), quoting *Wong Yang Sung v McGrath*, 339 US 33, 40-41 (1950).

terpretations that actually solve those problems. For the second (or "middle") period, Strauss depicts a freewheeling approach, characterized by a readiness "to reinterpret the text to fit contemporary developments."²⁴ Using as his prime example the briefing and opinion in *Association of Data Processing Service Organizations, Inc. v Camp*,²⁵ Strauss says that the "contemporary trend [] teased out of recent statutes and developments and perhaps the courts' own preferences, shaped choice within the range that . . . the 'terms of the Act warrant.'"²⁶ In Strauss's third era, the present, we find an interpretive technique likely to "transform[] the APA into a much more time-bound statute than it has thus far been."²⁷ He points to *Director, Office of Workers' Compensation Programs v Greenwich Collieries, Inc.*,²⁸ where the Court interpreted the term "burden of proof," as used in § 7(c),²⁹ on the basis of its "ordinary meaning" on the date of enactment in 1946.³⁰

The reader is left in little doubt that Strauss views the first two phases of interpretation as sound, and the third as unsound. The first two differ mainly in that the Court's expectations of enlightenment from the legislative history were understandably greater in the first phase. The problems arising under the statute were more likely to be ones that concerned the framers, so their explanations were more presumptively apt to resolve those problems. By contrast with the healthy problem-solving mode of the first two eras, Strauss depicts the current phase as one in which the Court has turned "from a stance of cooperation with the work of Congress to one of distant detachment," a change "profoundly destabilizing to the legal order."³¹ *Greenwich Collieries* at least superficially supports Professor Strauss's belief that the current method of interpretation may be destabilizing, as the decision—finding "burden of proof" to mean burden of persuasion rather than merely burden of coming forward—evidently had the effect of overturning about sixty-five years of settled practice

²⁴ Strauss, 63 U Chi L Rev at 1393 (cited in note 23).

²⁵ 397 US 150 (1970).

²⁶ Strauss, 63 U Chi L Rev at 1405 (cited in note 23) (emphasis and internal citation omitted).

²⁷ See *id.* at 1413.

²⁸ 114 S Ct 2251 (1994).

²⁹ 5 USC § 556(d) (1994).

³⁰ Strauss, 63 U Chi L Rev at 1416-17 (cited in note 23).

³¹ *Id.* at 1421.

under the Longshoreman and Harborworkers Compensation Act.³²

Before trying to address the issue of modernization generally, let's first have a look at *Data Processing*, Professor Strauss's example of interpretation in the middle era, when assumptions and findings of the framers were less likely to be deemed informative than in the early days, but still before the onset of the current alleged sclerosis. Strauss singles out as characteristic of the Court's opinion its reliance on "trend": "Where statutes are concerned, the trend is toward enlargement of the class of people who may protest administrative action."³³ The Court's argument—and I think Strauss has fairly captured it—is somewhat astonishing. The implicit premise appears to be that, once a trend has been identified, it is the courts' duty to keep it rolling. But almost any trend involves not just a steady accretion of some costless good, but also some sacrifice of other goods, a sacrifice either deemed appropriate by some decision maker or rendered inevitable by some social evolution. If the trend arises from the conscious decision of a select group of persons (*Data Processing* points almost exclusively to decisions of the Court itself), then one supposes that the decision makers (unless driven by some controlling statute) have thought that the goods secured by each step in the trend outweighed the goods sacrificed, perhaps because over time the value of the goods sacrificed had depreciated, or that of the goods secured had risen. In the case of standing, the tradeoff is not especially obscure. The good of some citizens' increased ability to hold agencies accountable to Congress is obtained at the cost of increased litigation (with its attendant expense and delay) and, more importantly, a shift of interpretive power and agenda-setting discretion from a politically responsible executive branch to a life-tenured judiciary. Although cabined by the many doctrines of deference and nonreviewability, the shift, and the costs incurred by *Data Processing's* trend, are quite real.

To see a trend thus tells us little. The question is how far it should go. Where Congress has addressed itself to the issue, the congressional answer would seem dispositive in the absence of some constitutional override, which no one suggests was present in *Data Processing*. It seems from Professor Strauss's account that the language, context, and legislative history of the provision interpreted in *Data Processing*, § 10(a) of the APA,³⁴ point-

³² Id at 1418-20.

³³ Id at 1405, quoting *Data Processing*, 397 US at 154.

³⁴ 5 USC § 702 (1994).

ed generally (though not conclusively) toward the narrower of the two readings proposed—that is, to an understanding that in the absence of a specific statute allowing suit by a “person aggrieved,” mere competitive injury was not enough.³⁵ Yet, as he notes, the Court skipped all that. Instead, it relied on a trend largely of its own creation and refrained from any discussion of the advantages and disadvantages of pushing the trend forward another notch.

Data Processing underscores that a consciously modernizing interpretation tends to leave the instrument being interpreted back in the dust. Even if the *Data Processing* Court had condescended to share with the public some clue about its view of the goods that the decision necessarily traded off, there would be a question about why such tradeoffs should enter the Court’s analysis. One answer might be that the congressional language was driven by such a tradeoff, with the Court’s mission being to read the statutory terms in light of the likely congressional concern and evaluation of the competing goods. Assuming that answer, the next question would be whether the courts are to make their own evaluation or to take the balance implicit in Congress’s initial decision. Even if the courts are to make their own evaluation, is this to evolve steadily over time? Given Congress’s frequent involvement in the matter through specific statutes providing for review, as well as the questionable ability of the courts to make the necessary tradeoffs, I don’t see any clear basis for inferring a congressional intent to launch the courts on such a mission.

But Professor Strauss is of course right that statutory obsolescence is a problem. His recent article *On Resegregating the Worlds of Statute and Common Law*³⁶ makes the point particularly effectively in the context of administrative agencies’ organic statutes, where loose judicial interpretations (ones allowing the agency considerable latitude) tend to facilitate accommodation of new realities.³⁷ By reading linguistic ambiguities for all they are reasonably worth and deferring to any administrative interpretation that falls within the resulting range, the courts can allow politically responsive actors, not bound by *stare decisis*, to fit the statute to the times. This seems to me a basic message, perhaps the basic message, of *Chevron*.³⁸

³⁵ Strauss, 63 U Chi L Rev at 1404 (cited in note 23).

³⁶ 1994 S Ct Rev 429.

³⁷ Id at 486-527.

³⁸ *Chevron v NRDC*, 467 US 837 (1984). Richard Pierce lays out in grim detail the

But the *Chevron* solution is unavailable for the APA; there is no agency to which its interpretation has been delegated. (Deference to individual agencies in APA interpretations would thwart its apparent purpose to serve as a charter governing procedures across agencies.) Can it then be kept up to date only by the (literally) "trendy" approach of *Data Processing*? Before trying to answer that question I will step back a minute and ask more generally what the consuming public might reasonably expect from courts in their interpretation of a statute such as the APA—intended to guide the procedures of countless arms of the administrative state.

Congress's decision to adopt the APA expressed, presumably, its belief that the courts—and perhaps the citizenry—needed some help. If Congress had fully embraced the judicial answers to the questions posed by administrative proliferation, a statute would not have been necessary. I apologize for mentioning the obvious, but anxiety over obsolescence tends to obscure the point. Absent constitutional imperatives, the congressional voice is decisive. Thus, to state the obvious, one criterion for sound interpretation of the APA must be fidelity to what Congress meant.

A second criterion is that interpretations should lend themselves to reasonable application across the range of agencies and agency activities governed by the statute. For example, a very demanding view of § 3(a)(2)'s requirement that an agency make its decisions "available for public inspection,"³⁹ well suited to the Social Security Administration with offices scattered over the country and tens of millions of clients, might be quite unsuitable for the Federal Energy Regulatory Commission. If one size must fit all, as in some sense it must under the APA, then those who define the permissible size must either build flexibility into the definition (for example, "reasonable" availability) or find some other solution to the problem of variability. As applied to *Greenwich Collieries*, this principle might support reading "burden of proof" as burden of production only. Because that reading leaves the more significant issue, burden of persuasion, untouched, it enables individual agencies to resolve it separately with a focus on context.

consequences of judicial insistence on rigid narrow meanings in his account of the *Maislin* decision and its sequel. Richard J. Pierce, Jr., *The Supreme Court's New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 Colum L Rev 749, 766-76 (1995).

³⁹ 5 USC § 552(a)(2) (1994).

Notice that each of these approaches to agency diversity has its costs. A pliable standard provides relatively little advance guidance. But a clear universal standard, deliberately set in lax terms (ones that leave agencies relatively unconstrained), may jeopardize private interests that Congress meant to protect.

Third, there is surely an interest—the one that Strauss singles out for emphasis—in interpretations that fit current circumstances. Congress's provision that in a formal hearing any "oral or documentary evidence may be received," subject to the agency's power to exclude "irrelevant, immaterial or unduly repetitious evidence,"⁴⁰ should doubtless be construed in a way that recognizes the advantages (and hazards) of information on a disk, or at least in a way that allows agencies to adjust to changing technology. Further, in some contexts, later congressional enactments or other exogenous developments might change background assumptions strongly enough to shift the meaning of an APA term. As Justice Scalia noted over a decade ago, the extraordinary and largely unexpected shift of agency policy-making from the adjudicative to the rule-making format, coupled with relaxed ripeness standards and new congressional requirements of timely challenges to administrative rules, goes some way toward explaining the courts' perhaps surprisingly demanding reading of § 4's requirement that the agency accompany final rules with "a concise general statement of their basis and purpose."⁴¹ The framers would perhaps be startled by the modern "concise" statement—commonly dozens of folio pages of minute print. But "concise" is a relative term. If an agency is imposing a vast set of complex requirements in a single rule making, it may take quite a few words to explain their "basis and purpose," even concisely. And the courts have never insisted on prolixity.⁴² As the mandate of § 4 is quite elastic, and the Court had already found that, in some cases, disclosure of agency reasoning was essential to substantive judicial review,⁴³ the stretch here is modest.

While Strauss focuses on keeping the APA current, I wonder if the central fault of *Greenwich Collieries*, by his lights, is really the Court's asserted failure to allow the meaning of the APA to

⁴⁰ 5 USC § 556(d) (1994).

⁴¹ 5 USC § 553(c) (1994). See Antonin Scalia, *Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court*, 1978 S Ct Rev 345, 375-81.

⁴² Compare *Greater Boston Television Corp v FCC*, 444 F2d 841, 852 (DC Cir 1970) (drawing the line between the "intolerably mute" and the "tolerably terse" in the context of inadequately explained shifts of policy).

⁴³ *SEC v Chenery Corp*, 318 US 80, 93-95 (1943).

flow with the times. To be sure, its interpretive technique showed no interest in keeping current. Yet Strauss's most powerful argument against the Court's reading is its conflict with the historic (sixty-five-year-old) understanding of the Longshoreman and Harborworkers Compensation Act.⁴⁴ That conflict became inevitable in 1972, when legislative changes brought hearings under the Longshoreman Act within the APA's requirements for an on-the-record hearing, and the difficulty would have arisen just as sharply if those changes had occurred in 1952, or even a month after adoption of the APA. Strauss's real complaint—still a serious one—lies in regard to the second criterion that I hypothesized for APA interpretation, namely, the need to embrace disparate agencies and disparate activities. On that criterion, none of the options open to the Court was particularly appetizing, except for one altogether independent of the APA, which I discuss below. The Court could not adopt an elastic interpretation such as might be embodied in a concept of "reasonableness." It had to decide between two discrete possibilities, burden of production or burden of persuasion; Congress surely could not have meant the term to shift its meaning back and forth, from agency to agency, at the will of the courts. So long as the Court was forced to choose a one-size-fits-all meaning, the option with the advantage of being less intrusive upon agency choice (mere burden of production) came at the price of allowing agencies to deny some private parties the benefit of forcing their adversaries to carry the burden of persuasion—a benefit Congress intended them to have if the Court's reading of Congress's 1946 meaning was correct.

As it turns out, the issue of across-agency applicability was not all that acute in *Greenwich Collieries*. As Strauss notes, the Longshoreman Act authorized the Secretary of Labor to establish exceptions by regulation,⁴⁵ but the Court found that he had not exercised that power.⁴⁶ The Secretary's clear power to deviate from the APA seems to reflect Congress's recognition that the Longshoreman Act involved special values. Because the Secretary could protect those values regardless of the Court's construction of the APA, the case was hardly the strongest for seeking out a meaning in the APA that would allow agencies to accommodate their specific concerns.

⁴⁴ Strauss, 63 U Chi L Rev at 1414-15 (cited in note 23).

⁴⁵ 30 USC § 932(a) (1994).

⁴⁶ *Greenwich Collieries*, 114 S Ct at 2254-55.

What of the health-health issues discussed by Professors Sunstein and Viscusi? So far as appears, these were wholly unanticipated by the APA's framers. More broadly, they seem to exhibit characteristics quite distinct from the concerns of 1946. The issues appear at the intersection of different disciplines (natural sciences and economics) and raise problems for coordinating across different agencies. For example, the issue of whether to require that children under two have their own airplane seats involves first the technical question of what contribution the seat requirement may make to safety, second the impact of that requirement on travellers' choice between air and its alternatives (mainly automobile), and finally the safety of the other means of travel. A sensible resolution (to the extent permitted by statute) requires the agency to blend the lessons of science and economics and (perhaps) to seek coordination with other agencies; at a minimum, one would hope that the agency would not regulate air travel on the basis of false assumptions about conditions in other transportation modes. So far as I know, the APA has thrown no roadblocks in the way of interdisciplinary and interagency cooperation. Indeed, in *Sierra Club v Costle*,⁴⁷ the D.C. Circuit construed the more stringent procedural demands of the Clean Air Act to allow relatively free communications within the executive branch in the course of a rule making. Even in the context of that specialized statute, the court was alert to avoid Procrustean solutions to the extent congressional language left the matter open. That approach, driven by the doctors' maxim that one should above all avoid doing harm, may be more effective than a self-conscious quest for up-to-date readings of the APA.

⁴⁷ 657 F2d 298, 404-08 (DC Cir 1981).