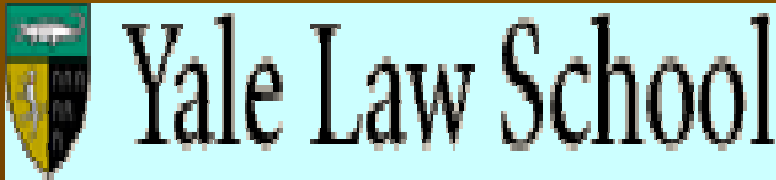


The Fourth Transatlantic Duke Dialogue on Precaution

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“Substance is excreted in the interstices of procedure” – Maitland

- Bergkamp and Smith (2004)
 - Appreciate possible US-EU differences in enforcement
 - U.S. 3rd party citizens suits to enforce
 - Under-estimate importance of enhanced judicial review of factual basis of administrative decisions in discouraging precautionary regulation in U.S.

Gail Charnley and E. Donald Elliott, Risk Versus Precaution: Environmental Law and Public Health Protection, 32 Environ. Law Reprtr 10363 (Mar. 2002).

- U.S. Administrative Law requirements to assemble a comprehensive factual record and for adversarial and “searching” judicial review of factual basis of expert decisions discourage U.S. agencies from promulgating risk-based regulations on a “precautionary” (weak or preliminary scientific) basis
 - Can regulate preventively (i.e. before harm)
 - Can regulate stringently (i.e. costs exceed benefits)
 - Can regulate if scientific record on risk is not required by the statute (e.g. technology-based standards)

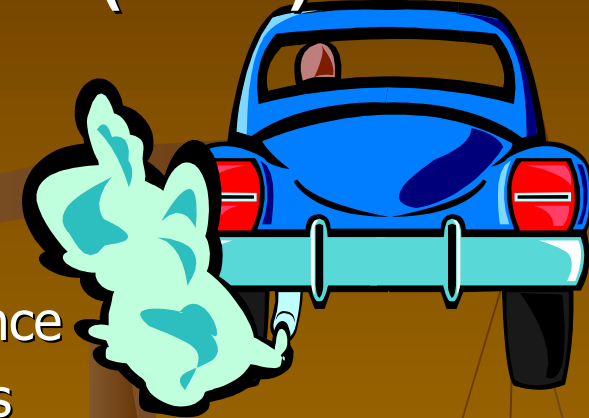
U.S. Courts Enforce the Administrative Procedure Acts (APA) 5 USC §706

- Procedures
- Statutory Limits (“ultra vires”)
- Factual Support
- Reasoned Explanation
- Abuse of Discretion

Post-1980 “hard Look” judicial review in environmental cases

Ethyl Corp. v. EPA, 541 F.2d 1 (D.C. Cir.)(en banc), *cert. denied*, 426 U.S. 941 (1976).

- Upheld a precautionary decision by EPA (ban lead in gasoline)
 - weak scientific evidence at time; stronger since
 - one of EPA's greatest public health successes
- Judge J. Skelly Wright: “delegated decision of legislative policy – not reviewed with the rigor proper for questions of fact”



**1946-1980 - U.S. judicial review was more deferential
→ allowed more precautionary/arbitrary/religious
decision-making by agencies**

Industrial Union Dept., AFL-CIO v. Amer. Petroleum Inst., 448 U.S. 607 (1980)(OSHA Benzene standard)

- Supreme Court reversed precautionary policy decision (cancer policy: use feasible technology to reduce exposure to hazards)
- Agency must prove “significant risk”/incremental benefit
- Reviewed as fact, not policy *contra Ethyl* (substantial evidence)
- Agencies adopt quantitative risk assessment to satisfy
 - John Martonik et al., The History of OSHA’s Asbestos Rulemakings and Some Distinctive Approaches That They Introduced for Regulating Occupational Exposure to Toxic Substances, 62 Am. Indus. Health Ass’n J. 208, 213 (2001).
 - Mike Shapiro (EPA) – 90% of process to build record for judicial review
- In Selecting Candidates for Regulatory Investments, EPA Prefers a “Mature” Scientific Record

***post-1980* - U.S. judicial review more demanding of demonstrated factual basis for risk-based decisions → less precautionary/arbitrary/religious decision-making**

Corrosion Proof Fittings v. EPA, 947 F.2d 1201 (5th Cir., 1991)(EPA asbestos ban)

- EPA precautionary TSCA §6 rule banning 5 uses of asbestos because many other uses had proved hazardous, 54 Fed. Reg. 29,460 (1989).
- Court applied Benzene substantial evidence test; set aside
 - Despite ten years of rulemaking, 100,000 page record and 10,000 scientific studies of health effects of asbestos, EPA had not compiled substantial evidence to support its action
 - No evidence of significant risk/exposure from some uses (asbestos cement sewer pipe)

***post-1980* - U.S. judicial review more demanding of demonstrated factual basis for risk-based decisions → less precautionary/arbitrary/religious decision-making**

Charnley and Elliott (2002)

“The precautionary principle ... reflects the need to take action in the face of potentially serious risks without awaiting the results of scientific research that establishes cause-and-effect relationships with full scientific certainty. In contrast, U.S. law reflects a traditional suspicion of government regulation, requiring extensive factual records proving “significant risks” to justify regulation aimed at protecting public health from environmental contaminants. This fundamental norm of the U.S. legal culture, sometimes called the “principal of legality,” makes precautionary environmental health regulation difficult because government must assemble a factual record to support its actions. ... The rise of the precautionary principle can be viewed as an objection to the U.S. legal tradition of extensive administrative law requirements and court review of the factual basis of government decisions about environmental risks.”