1984

Legislative Formality, Administrative Rationality

Harold H. Bruff
University of Colorado Law School

Texas Law Review

Volume 63, Number 2, October 1984

Legislative Formality, Administrative Rationality

Harold H. Bruff*

I. Introduction

American administrative law seems condemned to suffer eternal disquiet about the role of bureaucracy in a democracy.[1] Observers have groped for theories to explain and control the administrative process. Whatever their accuracy or wisdom, dominant theories can produce powerful effects on administrative law.

I perceive in recent developments the partial emergence of a new theory of rulemaking, an aspect of the administrative process whose functional similarity to legislation poses difficult theoretical problems. The new approach rests upon a dichotomy between legislative formality and administrative rationality. Recent Supreme Court cases have confined important aspects of congressional supervision of the agencies to the Constitution's formal procedure for enacting statutes.[2] In contrast, agency policymaking is held to a standard that emphasizes substantive rationality, focusing on the persuasiveness of the agency's articulated justification for a regulation and the sufficiency of the factual support that underlies it.[3]

The purpose of this Article is to explore the source, nature, and implications of the new approach. It is particularly important to identify the underlying normative premises. No one has done so; I posit several. First, legislative formality relies on the congressional decisionmaking

* Professor of Law, University of Texas. I wish to thank Ernest Gellhorn, Robert Hamilton, Douglas Leslie, Glen Robinson, and Mark Yudof for helpful comments.

1. *See generally* J. FREEDMAN, CRISIS AND LEGITIMACY: THE ADMINISTRATIVE PROCESS AND AMERICAN GOVERNMENT (1978); Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch,* 84 COLUM. L. REV. 573 (1984).

2. *See infra* Part III.

3. *See infra* Part IV.

process to maximize the fairness of legislation. Second, reviewing the rationality of regulation at the agency level allows more meaningful and flexible control than does reviewing the rationality of legislation. Third, by protecting the integrity of administrative value choices within statutory limits, these two approaches attempt to maximize regulation's pursuit of the public interest.

I endorse these goals and offer some prescriptions to aid their realization. Part II begins with a brief outline of previous theories of the administrative process; their perceived successes and failures help explain the development of the new theory. Part III explores the Court's formalist constraints on Congress and supplies a rationale for them. Turning to administrative rationality, Part IV canvasses the forces that affect the agencies. Part V then presents an integrated view of agency decisionmaking that addresses the question: what kinds of rationality should we expect of administrators?

II. Theories of Regulation

A. The Framers' View

There have been a number of influential conceptions of the administrative process, all of which have present effects.[4] The earliest, held by the Framers of the Constitution and prevalent until the threshold of this century, was that a system of separate institutions checking one another was the best guarantee against arbitrary government. The Constitution's broad allocations of authority, however, said little about how to structure a bureaucracy to implement the dispersed powers. Early Congresses created a simple and hierarchical departmental structure within the executive branch that remained largely intact for a century.[5] The federal government performed only rudimentary functions such as national defense; it did not intervene pervasively in private decisionmaking. The courts controlled administration largely by employing private law doctrines to require government to justify intrusions on individuals, rather than by developing distinctive public law doctrines that might have enhanced governmental power.[6]

4. For a concise discussion of these theories, see Shapiro, *Administrative Discretion: The Next Stage*, 92 YALE L.J. 1487, 1495-99 (1983).

5. *See* Van Riper, *The American Administrative State: Wilson and the Founders—An Unorthodox View*, PUB. AD. REV., Nov.-Dec. 1983, at 477, 479. At the opposite extreme would be a highly fragmented executive branch, such as often characterizes state governments.

6. *See* Stewart & Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1202-04 (1982).

B. The Progressive View

The Progressive era saw the first large-scale attempts to regulate the economy; the government began to assume tasks of ever-increasing complexity. The Progressives were optimistic about government's capacity to improve the social order. They saw administration as nonpartisan and expert, removed from the legislature's factional strife.[7] Agencies were expected to implement statutory commands in a mechanical fashion, principally through adjudication, the most formal of administrative processes. Rulemaking was not yet an important method of policymaking.

During the first third of this century, the courts did not entirely share the Progressive credo. They invalidated a number of regulatory statutes ostensibly on doctrinal grounds, although the real objection seemed to be one of political philosophy.[8] In particular, the doctrine of substantive due process, which purported to assess the rationality of statutes, became notorious for its subjectivity. To ensure that statutes would sufficiently control administrative discretion, the courts also articulated the doctrine that legislative powers must not be delegated.[9] Yet the necessity of delegating important policy decisions to the agencies soon became apparent; the delegation doctrine was honored mainly in the breach.[10]

By the end of the New Deal, broad congressional power was confirmed both to regulate and to delegate to the agencies. The Administrative Procedure Act[11] (APA) codified the rich experience of the New Deal and provided a nonconstitutional source of authority for the courts to control administration. It blended previous theories, recognizing agencies as distinct and expert policymaking institutions while regularizing agency procedures to control discretion and preserving the traditional nature of judicial review.[12] For rulemaking, the APA specified a simple notice and comment procedure, but did not require administrators to create a formal record for judicial review.[13] The absence of a record re-

7. *See* Aranson, Gellhorn & Robinson, *A Theory of Legislative Delegation,* 68 CORNELL L. REV. 1, 25 (1982).

8. *See* Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) (noting that the Constitution "does not enact Mr. Herbert Spencer's Social Statics").

9. *See* Aranson, Gellhorn & Robinson, *supra* note 7, at 7-10.

10. The delegation doctrine was enforced, however, in the New Deal delegation cases. *See* Carter v. Carter Coal Co., 298 U.S. 238 (1936); Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935).

11. Ch. 324, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

12. *See* G. ROBINSON, E. GELLHORN & H. BRUFF, THE ADMINISTRATIVE PROCESS 33-38 (2d ed. 1980).

13. Ch. 324, § 4, 60 Stat. 237, 238 (1946) (codified as amended at 5 U.S.C. § 553 (1982)).

quirement reflected the view adopted by the Supreme Court a decade earlier. The Court had found that the Constitution did not compel administrators to gather facts in advance to support their regulations.[14] It thought that regulations were entitled to the same presumption of facial validity as statutes, so that any plausible factual basis would suffice to uphold a regulation against a due process attack. Enforcement actions would provide a sufficient opportunity to explore the factual basis of a regulation.[15]

C. The Interest Representation Theory

In the following decades, the Progressive view eroded before increasing evidence that politics is an inescapable part of administration and that no neutral "public interest" is likely to appear as a guide to the bureaucrat. Not surprisingly, an interest representation theory partially displaced the Progressives' faith in agency expertise.[16] The new theory acknowledged political influence and concentrated on assuring that it was openly and fairly exercised. Both Congress and the courts went to considerable lengths to improve opportunities for public participation in agency policymaking.[17] The courts also required the agencies to explain their resolution of policy issues sufficiently to demonstrate that the views of interested groups had been accorded full and fair consideration.[18]

These requirements showed concern for both the agency's responsiveness to the views of interested parties and the intrinsic correctness of the agency decision. They were responses to the increasing importance of rulemaking as a means of policymaking.[19] Pressure grew for pre-enforcement review of regulations; the Supreme Court responded by reducing doctrinal barriers to that form of review and by requiring that it be

14. Pacific States Box & Basket Co. v. White, 296 U.S. 176, 185-86 (1935).

15. *See* Nathanson, *Probing the Mind of the Administrator: Hearing Variations and Standards of Judicial Review Under the Administrative Procedure Act and Other Federal Statutes,* 75 COLUM. L. REV. 721, 755, 763-64 (1975).

16. *See generally* Stewart, *The Reformation of American Administrative Law,* 88 HARV. L. REV. 1669 (1975) (discussing the expansion of the traditional model of American administrative law by enlargement of the class of interests entitled to participate in formal processes of agency decisionmaking).

17. *See, e.g.,* 3 SENATE COMM. ON GOVERNMENTAL AFFAIRS, STUDY ON FEDERAL REGULATION: PUBLIC PARTICIPATION IN REGULATORY AGENCY PROCEEDINGS, S. DOC. NO. 71, 95th Cong., lst Sess. (1977); *see also* Gellhorn, *Public Participation in Administrative Proceedings,* 81 YALE L.J. 359 (1972) (discussing the development of standing to intervene in administrative adjudications and to seek review of administrative action).

18. *See* Stewart, *supra* note 16, at 1782; Verkuil, *Judicial Review of Informal Rulemaking,* 60 VA. L. REV. 185, 236 (1974).

19. *See* Wright, *The Courts and the Rulemaking Process: The Limits of Judicial Review,* 59 CORNELL L. REV. 375, 378 (1974).

performed on an "administrative record" gathered by the agency.[20] The lower courts enthusiastically joined in, developing a style of "hard look" review that closely compared the agency's stated rationale for its regulation with data and policy views found in the administrative record.[21]

D. The Emerging View

The interest representation theory has been weakened by the perception that not all participants in the politics of administration are equal; nor can they readily be made so.[22] Yet we are most unlikely to return to the earlier vision of detached expertise in the agencies. The interest representation era at least succeeded in dismissing the Progressives as hopelessly naive. Recent commentary has attempted, with limited success, to reconcile all of the earlier views.[23] Persistent calls have arisen for the identification of new theories and implementary doctrines.[24] Perhaps the Supreme Court is beginning to respond.

There has been a renewed emphasis on fundamental separation of powers analysis in examining the relationship of the agencies to the constitutional branches. This analysis is employed in part to address nagging questions not yet answered and in part to respond to perceived systemic inadequacies.[25] The emerging emphasis on legislative formality and administrative rationality has inverted the view of administration held by the Progressives, whose emphasis on legislative rationality and administrative formality has been embarrassed by the decline of both substantive due process and the delegation doctrine. To see the reasons for so dramatic a transformation of doctrine, we must examine the newly formalist approach to judicial control of legislative action.

III. Legislative Formality

A. The Demise of the Legislative Veto

The most prominent recent controversy over the limits of congressional power to oversee the executive concerned the legislative veto.[26]

20. *See* Pedersen, *Formal Records and Informal Rulemaking,* 85 YALE L.J. 38, 62 (1975).

21. *See* Sunstein, *Deregulation and the Hard-Look Doctrine,* 1983 SUP. CT. REV. 177, 181.

22. Public choice theory, which is discussed below, has contributed importantly to this perception. *See infra* subpart III(B)(1).

23. For a summary and an example of these attempts, see Sargentich, *The Reform of the American Administrative Process: The Contemporary Debate,* 1984 WIS. L. REV. 385.

24. *See, e.g.,* Rabin, *Administrative Law in Transition: A Discipline in Search of an Organizing Principle,* 72 NW. U.L. REV. 120 (1977).

25. *See, e.g.,* Strauss, *supra* note 1 (abandoning the "rigid" separation of powers analysis of administrative law as internally inconsistent and favoring a checks-and-balances/separation of functions model).

26. *See generally* Bruff & Gellhorn, *Congressional Control of Administrative Regulation: A*

Statutes delegating power to the executive often retained authority to invalidate executive implementation by vote of one or both houses of Congress. This technique markedly increased the power of Congress to control execution; the alternative, statutory override of executive action, requires both bicameral concurrence in Congress and presentation to the President for his possible veto.

The Supreme Court's landmark legislative veto case, *INS v. Chadha,*[27] was rigidly formalist in effect. The Court's sweeping opinion appeared to invalidate every version of the legislative veto.[28] It began by identifying two pertinent purposes of the bicameral structure of Congress and the presentation requirement.[29] The first, instrumental to maintaining a balance of power within government, is to restrict the power of Congress compared to that of the President. The second, instrumental to limiting the power of government as a whole, is to avoid unwise legislation, in part by dampening the effects of faction in the legislative process.

After alluding to the central importance of these structural controls on legislation, the Court turned to the question whether the legislative veto should be considered legislation. In a conclusory passage, the Court defined the legislative action that must be passed by both houses of Congress and presented to the President to include any action altering the legal rights and duties of persons outside the legislative branch.[30] Any attempt by Congress to compel the executive branch to exercise its delegated statutory authority in a particular way falls within this definition of legislative action.[31] In consequence, Congress may now compel executive compliance "in only one way; bicameral passage followed by presentment to the President. Congress must abide by its delegation of authority until that delegation is legislatively altered or revoked."[32]

. It is not clear why the Court decided to restrict Congress to the

Study of Legislative Vetoes, 90 HARV. L. REV. 1369, 1370-71 (1977); Martin, *The Legislative Veto and the Responsible Exercise of Congressional Power,* 68 VA. L. REV. 253, 256-57 (1982).

27. 103 S. Ct. 2764 (1983).

28. *See* Tribe, *The Legislative Veto Decision: A Law by Any Other Name?,* 21 HARV. J. ON LEGIS. 1, 19-21 (1984) (discussing the implications of the *Chadha* decision). The Court has since summarily affirmed court of appeals decisions invalidating other applications of the veto device. *See* Process Gas Consumers Group v. Consumer Energy Council of Am., 103 S. Ct. 3556 (1983), *aff'g* Consumers Union of United States v. FTC, 691 F.2d 575 (D.C. Cir. 1982) (Nos. 82-935 & 82-1044), also *aff'g* Consumer Energy Council of Am. v. FERC, 673 F.2d 425 (D.C. Cir. 1982) (Nos. 81-2008, 81-2020, 81-2151 & 81-2171), and *denying cert. to* Consumer Energy Council of Am. v. FERC, 673 F.2d 425 (D.C. Cir. 1982) (Nos. 82-177 & 82-209).

29. 103 S. Ct. at 2782-84.

30. 103 S. Ct. at 2784-85 & n.16.

31. *Id.* at 2785-86.

32. *Id.* at 2786. The Court also concluded that U.S. CONST. art. I, § 7 "represents the Framers' decision that the legislative power of the Federal government be exercised in accord with a single, finely wrought and exhaustively considered, procedure." *Id.* at 2784.

traditional form for legislation. The purposes of that form, accurately described in *Chadha,* are surely pertinent, yet the Court failed to say how the legislative veto contravened them. The majority opinion's opacity suggests that the Court may not understand why it is requiring adherence to forms. In relying exclusively on the presentation clauses and defining their applicability very broadly, the Court eschewed narrower grounds for decision that were readily available.[33] Nor did the Court differentiate its analysis of the two purposes of the constitutional structure. As a result, it failed to see that in some of the sensitive separation of powers disputes in which the legislative veto had been employed, only the first of the two purposes—maintaining the balance of power between Congress and the President—would have been directly in question. Whatever the merits of the *Chadha* result in those cases,[34] regulation is a context in which confining Congress to the formal legislative process can be defended on a rationale that the Court hinted at in *Chadha.* It stems from the second purpose of the Constitution's form for legislation, that of controlling the influence of faction in the national political process.

B. A Rationale for Formalism

Because regulation has direct effects on the people, it is the political purposes underlying the Constitution's structure that engender the strongest arguments for formal controls on legislative action in the regulatory context. Control of the agencies has not so shifted from Congress to the President that the advantages of formal controls on Congress should be foregone in order to redress a serious imbalance of power between the branches.

In *Chadha,* the Court mentioned the hopes of the Framers that the Constitution's institutional safeguards would foster legislation advancing the general public interest.[35] The Framers saw human nature as both rational and self-interested; they relied on competition among officeholders to neutralize these characteristics.[36] In addition, they thought that the political process would reinforce the Constitution's structural controls. In his famous argument in the *Federalist No. 10,* Madison relied on

33. For example, Justice Powell's concurrence invoked general separation of powers principles to argue that the particular veto in question, which overrode the Attorney General's decision to suspend deportation of an individual alien, impermissibly invaded the judiciary's function of reviewing the application of statutory criteria to individual cases. *See id.* at 2789 (Powell, J., concurring).

34. *See generally* Strauss, *Was There a Baby in the Bathwater? A Comment on the Supreme Court's Legislative Veto Decision,* 1983 DUKE L.J. 789 (arguing that legislative veto should be prohibited in regulatory context only).

35. 103 S. Ct. at 2782.

36. *See Editor's Introduction* to THE FEDERALIST 26-27 (B. Wright ed. 1961).

the size and diversity of the new nation to offset the effects of faction.[37] At the nation's inception, however, it was not possible to predict how this would occur.[38] The Framers also believed that representative democracy would elevate leaders devoted to the public interest rather than narrow faction.[39] Indeed, the rhetoric (if not the practice) of the first half century of American politics thoroughly condemned the evils of party politics.[40]

To assess how well the Framers' hopes for a political process that would embody the public interest have been realized, I turn to modern theories that explore the nature of our political process and its relationship with the Constitution's structure. This analysis aids an appraisal of how the constitutional requisites should be interpreted today.

1. Public Choice Theory.—Modern economic analysis, which employs essentially the same assumptions about human behavior as did the Framers, has been applied to politics through public choice theory.[41] Unhappily, public choice theory demonstrates what experience suggests—that the legislature has a limited capacity to serve the public interest. Indeed, no method of collective decision can define and realize a true "public" interest,[42] because of intractable problems posed by redistribution.[43] This does not mean that the structure of collective decision is irrelevant; to the contrary, differences in forms of decision have important normative implications.

Ideally, legislation should create widely beneficial public goods, which the private market will not produce because of "free rider" effects.[44] Much legislation, however, is devoted to the provision of private

37. THE FEDERALIST No. 10, at 134-36 (J. Madison) (B. Wright ed. 1961). Madison used the term "faction" to mean "interest group." I employ the same usage here.

38. Madison could say only that resolution of factional clashes between such classes as the landed and mercantile interests was "the principal task of modern legislation." *Id.* at 131; *see also Editor's Introduction, supra* note 36, at 84-86.

39. *See* G. WILLS, EXPLAINING AMERICA: THE FEDERALIST 185-92 (1981).

40. *See* J. BURNS, THE VINEYARD OF LIBERTY 91, 99, 134-35, 239, 368-69 (1981).

41. *See* D. MUELLER, PUBLIC CHOICE 1-2 (1979). The intellectual link between the Framers' views and public choice theory is the economic and political theory of Adam Smith. Public choice theory assumes that political actors pursue their self-interest in a rational fashion and analyzes how legal rules can be expected to affect human behavior under those conditions. But much behavior is not explained by these assumptions. Thus, the theory is perforce limited; it identifies tendencies that occur a significant proportion of the time and that architects of legal rules should consider.

42. The now-classic demonstration of this proposition is Arrow's Theorem, explained in Easterbrook, *Ways of Criticizing the Court,* 95 HARV. L. REV. 802, 823-24 (1982). *See also* D. MUELLER, *supra* note 41, at 185-201.

43. *See* D. MUELLER, *supra* note 41, at 48.

44. Public goods are characterized by jointness of supply (so that one person's consumption of the good does not lessen that of another) and the impracticability of excluding anyone from enjoying the good once it is supplied generally (so that "free riders" can obtain the good for free unless

goods, benefits flowing to particular interest groups.[45] The redistributional effects of this legislation are justifiable only if they are intentionally produced and if they are consistent with some accepted notion of public welfare, such as relief for the poor.

The classic public interest justification for regulation is market failure.[46] Whatever its public interest justification, regulation vigorously distributes private benefits and costs. Except in extreme instances, therefore, it is not practicable to categorize it as public or private goods legislation. Indeed, the distributional effects of regulation may be substantially more difficult to isolate than those of a money subsidy.

Government intervention to redress market failure is warranted only if political failure will not produce even higher costs, such as hidden subsidies.[47] This conclusion suggests a need for substantive limits on regulation.[48] With the modern demise of any effective substantive limits on congressional power to regulate the national economy, then, there is special need to preserve the structural safeguards against political failure.

In relying on the diversity of the polity to negate the effects of faction, Madison did not sufficiently reckon with the advantages that factions receive from the incentives in our system. Public choice theory has systematically explored these advantages. I summarize them here not to argue that all legislation serves narrow interests, but only to show that there is a sufficient tendency for it to do so to justify giving full effect to the formal controls on the legislative process that do dampen faction.

Our representative system of government lacks a precise means for determining demand for publicly supplied goods, such as kinds and levels of spending or regulation.[49] The problem is partly due to the fact that voters choose among candidates who take positions (often ambiguous ones) on many issues. The actual process for revealing demand for particular goods and translating it into legislation therefore requires communication between congressmen and their constituents after the campaign is over.

payment is coerced). Common examples are national defense and law enforcement. *See* Samuelson, *The Pure Theory of Public Expenditure,* 36 REV. ECON. & STATISTICS 387 (1954).

45. *See* Levine, *Revisionism Revised? Airline Deregulation and the Public Interest,* LAW & CONTEMP. PROBS., Winter 1981, at 179, 179-80. Any sharp distinction between public and private goods is theoretically flawed; every public good has private good aspects because of differences in impact and preferences. Nevertheless, the distinction is analytically useful as a broad generalization.

46. *See id.*

47. *See* Michelman, *Politics and Valucs or What's Really Wrong with Rationality Review?,* 13 CREIGHTON L. REV. 487, 495 (1979).

48. *See id.* at 497.

49. There is a rich but inconclusive literature on the problem of revealing demand for public goods. *See generally* D. MUELLER, *supra* note 41, at 68-89 (discussing three proposed mechanisms for inducing individuals to reveal their preferences for public goods).

Interest groups tend to demand private goods benefiting their members. If they spent their time and money seeking public goods, much of the benefit would escape to others. It is rational for any group to seek goods whose benefits to them exceed the costs they bear, even if the program is inefficient from a broader point of view. Thus, if the benefits of a program are significantly more concentrated than the costs, the beneficiaries will find it rational to support the program even if the total costs exceed the benefits.[50] When groups compete for legislation, each has an incentive to demand its private benefits, even though the net result of the process is a welfare loss to all.[51] Similarly, these groups do not have sufficient incentives to oppose the activity of other groups, because that opposition would create a public good.

Congressmen also have significant incentives to support private goods legislation. Because relatively small interest groups possess distinct advantages in organizing their constituencies,[52] congressmen can ordinarily build constituent support more effectively through response to interest groups than by appeal to the general public. In doing so, legislators have ample opportunity to overstate the benefits of a program to its beneficiaries while discounting the costs to those disadvantaged.[53] The resulting tendency of our factional politics to redistribute wealth from large groups to small ones has produced the opposite of the oppressive majorities that the Framers feared.[54]

Territorial representation creates pressure on congressmen to support legislation that has divisible local benefits not enjoyed by other districts.[55] It is easier for a legislator to claim credit for introduction and passage of legislation with localized benefits than for other public or private goods legislation, because of the more diffused responsibility in Con-

50. *See* J. BUCHANAN & G. TULLOCK, THE CALCULUS OF CONSENT 135-40, 164-67 (1962).

51. Aranson, Gellhorn & Robinson, *supra* note 7, at 30-31. In games theory, this situation is known as a "prisoner's dilemma," in which cooperation among participants would produce optimal results, but in which the incentives operating on each participant cause uncooperative behavior to occur. *See, e.g.*, R. AXELROD, THE EVOLUTION OF COOPERATION 7-10 (1984).

52. *See* M. OLSON, THE LOGIC OF COLLECTIVE ACTION 22-36 (1965). Although all groups make suboptimal efforts because of free rider effects occurring within the groups, small groups still have a comparative advantage. *See id.* at 35.

53. In public finance, this is known as the "fiscal illusion." *See* Goetz, *Fiscal Illusion in State and Local Finance*, in BUDGETS AND BUREAUCRATS: THE SOURCES OF GOVERNMENT GROWTH 176, 177 (T. Borcherding ed. 1977). The difficulty of identifying costs accentuates the mechanism of private goods formation. *See* J. BUCHANAN & G. TULLOCK, *supra* note 50, at 144.

54. *See* Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263, 266 (1982).

55. The best example is pork barrel spending. *See generally* J. FEREJOHN, PORK BARREL POLITICS: RIVERS AND HARBORS LEGISLATION, 1947-1968 (1974) (discussing how federal public works projects are funded).

gress for the latter.[56]

Interest groups using political action committees can direct their contributions where they will have the most effect—usually to influential members of the pertinent committees. The effect is partially to transform territorial representation into interest representation.[57] The outcome can be regulation that distributes benefits and burdens on both territorial and interest group bases.[58]

Thus, the incentives affecting both citizens and legislators have defeated Madison's hope that faction would be self-neutralizing. Instead, faction is powerfully self-reinforcing within both houses of Congress.[59] The resulting picture of the political process is dismal, but it is also incomplete, because there are inherent limits to the power of interest groups in Congress. These limits appear most clearly if the legislator is viewed as an agent for his constituents.

As principals, interest groups and individuals demand legislation they favor, monitor the legislator's compliance with these demands, and issue rewards and penalties with their votes and campaign contributions. Yet no principal obtains an agent's perfect compliance with his wishes, for all of the principal's supervisory activity is costly, and at some point the costs of supervision exceed the gains.[60] Thus, some discretion, some "slack" for the agent, is inherent in any agency relationship.

Congressmen ordinarily have considerable slack, because the costs of supervision are particularly high in this relationship.[61] Formulating instructions in the form of desired legislation is difficult and complex. Monitoring the legislator's compliance may require unraveling the subtleties of statutory language or assessing positions taken on procedural disputes. To enforce their preferences, constituents may have to outbid others who have competing demands.

In addition to the costs of monitoring, interest groups face the prob-

56. *See* D. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 52-53, 59-60 (1974).

57. This effect is probably offset by the tendency of committees to be self-selected, with members choosing committees that decide policy of direct interest to their districts. *See* Weingast, *Regulation, Reregulation, and Deregulation: The Political Foundations of Agency Clientele Relationships,* LAW & CONTEMP. PROBS., Winter 1981, at 147, 150.

58. A famous example is the Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685 (amending various sections of 42 U.S.C.), which embodied stark tradeoffs of the benefits and burdens of regulation on both bases. *See generally* B. ACKERMAN & W. HASSLER, CLEAN COAL/DIRTY AIR (1981).

59. Both the interest groups and the legislators find themselves in "prisoner's dilemmas," *see supra* note 51, in which dominant incentives produce uncooperative behavior that results in a net loss to all.

60. *See* Alchian & Demsetz, *Production, Information Costs, and Economic Organization,* 62 AM. ECON. REV. 777 (1972).

61. *See* A. MAASS, CONGRESS AND THE COMMON GOOD 64-65 (1983); Kalt & Zupan, *Capture and Ideology in the Economic Theory of Politics,* 74 AM. ECON. REV. 279, 282-85 (1984).

lem of limited choice. An imperfectly responsive legislator must be compared to available alternative candidates, whose behavior in office is likely to be difficult to predict. Consequently, although legislators have incentives to respond to factional demands, they retain substantial discretion to pursue the public interest as it appears to them. Statutory delegations of regulatory power usually state public values, as in a directive to "meet the need for motor vehicle safety."[62] Often, however, these public values are commingled with private benefits, as in a command to ensure "to the extent feasible . . . that no employee will suffer material impairment of health."[63] Some legislation represents a fairly stark payoff to a favored group, for example price supports that benefit dairy farmers.[64] It is this factional component of legislation that justifies enforcing the Constitution's procedural safeguards.

2. Structural Checks on Faction.—In designing structural controls on legislation, the Framers confronted dilemmas that are inherent in any collective decisionmaking process. There are two important stages of collective choice.[65] The first, or constitutional, stage authorizes the future government to decide certain issues and specifies the pertinent decision rule, such as a majority, to be used for each issue.[66] The second, or operational, stage consists of public choice under the governing decision rules, as in ordinary legislation. Selecting a decision rule requires a prospective—and necessarily rough—judgment about which rule will produce the lowest sum of two kinds of costs: the decision costs of obtaining assent from the requisite number of participants and the external costs of decisions that disfavor a given participant.[67] A rule requiring unanimous decision eliminates external costs but imposes high and perhaps insuperable decision costs. Redistribution inheres in any collective choice process that does not require unanimity.[68]

(a) The structure of congressional decisionmaking.—Majority rule, the primary decision rule within Congress, has the lowest decision

62. 15 U.S.C. § 1392(a) (1982).

63. 29 U.S.C. § 655(b)(5) (1982).

64. *E.g.*, 7 U.S.C. § 608(c) (1982); *see* Block v. Community Nutrition Inst., 104 S. Ct. 2450 (1984).

65. *See* D. MUELLER, *supra* note 41, at 257-59.

66. For example, U.S. CONST. art. I, § 8 specifies the subjects on which Congress may legislate; section 7 prescribes majority rule for the initial passage of statutes and requires two-thirds majorities to override a presidential veto.

67. J. BUCHANAN & G. TULLOCK, *supra* note 50, at 45, 69-72.

68. *Id.* at 190. The practice of trading votes on separate issues, or logrolling, does not eliminate redistribution, although it does reduce allocational inefficiencies. *Id.* at 198-99.

cost of any rule that can produce a stable outcome.[69] Thus, it greatly facilitates policymaking, but it necessarily imposes substantial external costs. The incentives that foster private goods legislation ensure relatively high externalities under majority rule. Indeed, with territorial representation and simple majority rule, the smallest coalition needed for victory can approach one quarter of the voters (just over half in half the districts).[70] If interest groups are more randomly scattered, decision costs rise and external costs diminish. This means that under pure majority rule, interest groups that are present in substantial numbers in many districts have an advantage over equally numerous groups that are concentrated in a few districts. Farmers may be a group possessing such an advantage.[71]

The response of the Framers to the problem of faction was to condition legislation on the concurrence of three institutions with differing bases of representation, or supermajorities of two of them.[72] Their choice was apt; the price, however, was sharply increased decision costs. Thus, the addition of a second house in our bicameral system shifts the decision rule toward unanimity and reduces the power of factions.[73] The amount of the reduction depends on the degree of interest group overlap in the two chambers. The partial district overlap between the House and Senate reduces, but does not eliminate, the efficacy of bicameralism in controlling faction.[74]

In addition to the Constitution's structural checks, Congress itself has developed a set of formal and informal controls that promote the stability of legislation and dilute the influence of faction.[75] For private goods to be collectively produced, coalitions must form around a package of benefits in both houses of Congress. Theoretically, a bill with benefits barely over half its costs can succeed.[76] Such a coalition, however, would be unstable—votes in its favor would be subject to reversal by a compet-

69. *See* D. MUELLER, *supra* note 41, at 28-31.

70. J. BUCHANAN & G. TULLOCK, *supra* note 50, at 221. This proposition assumes perfect representation of constituent preferences by the legislator. Although that does not occur in fact, *see supra* notes 60-61 and accompanying text, the tendency described in text exists.

71. The political power that a group can exert also depends on its internal organization. *See* M. OLSON, *supra* note 52, at 153-59.

72. INS v. Chadha, 103 S. Ct. 2764, 2782-84 (1983); THE FEDERALIST No. 62, at 409-10 (J. Madison) (B. Wright ed. 1961); *id.* No. 63, at 415; *id.* No. 73, at 469-70 (A. Hamilton).

73. *See* J. BUCHANAN & G. TULLOCK, *supra* note 50, at 235, 244.

74. Modern political funding techniques, by blurring the territorial basis of representation, also reduce the efficacy of bicameralism as a control on faction, at least to the extent that money buys faithful representation. *See supra* text accompanying note 57.

75. *See* Landes & Posner, *The Independent Judiciary in an Interest-Group Perspective,* 18 J.L. & ECON. 875, 878 (1975).

76. *See* J. BUCHANAN & G. TULLOCK, *supra* note 50, at 162.

ing coalition at the next opportunity.[77] The primary formal response to this problem is an array of agenda control devices, such as the functions of the House Rules Committee.[78] More informally, the need for stable coalitions often leads to bills that distribute benefits much more widely, if inefficiently, than would measures supported by only bare majority coalitions.[79] Congressmen can cooperate in this way without threatening one another's capacity to serve constituents.[80] These arrangements within Congress, together with the aspects of our constitutional structure that raise decision costs, promote the stability of legislation. Regulatory legislation is relatively stable because, unlike continuing subsidies, it does not require substantial later appropriations.[81] Because such legislation may not be evaluated carefully each session, the coalition need not maintain a firm hold on a majority of supporters.

(b) The President's veto power.—The President's participation in the legislative process, both in proposing and supporting legislation and in exercising the veto power, dampens faction and increases the stability of legislation.[82] The President's veto power is a more potent check on faction than is the bicameral structure of Congress, because the President's national constituency makes his calculus of the merits of a bill different from that of any congressman. He lacks the territorial representative's incentive to favor divisible local benefits. Also, because his constituency is an amalgam of all interest groups, he must weigh the benefits and costs of a bill directly against each other; Congress avoids doing so by combining provisions that benefit particular members but that are not justifiable in the aggregate. The coalitions that support the President may differ enough from the one promoting a particular bill to make a veto attractive; the smaller the coalition supporting a bill, the more likely is this disparity. Moreover, the mere threat of a veto can raise the size of the coalition necessary to push a bill through Congress[83] and can affect the bill's substance.[84]

77. This is because a collectivity often lacks a single policy equilibrium. Although individuals' preferences are ordered in a rational priority sequence, a collectivity can display inconsistent preference ordering, so that the outcome of collective choice can depend on the order in which questions are presented. *See* D. MUELLER, *supra* note 41, at 38-49.

78. *See* A. MAASS, *supra* note 61, at 77-86 (1983).

79. *See* J. FEREJOHN, *supra* note 55.

80. *See* R. AXELROD, *supra* note 51, at 112-13.

81. *See* Landes & Posner, *supra* note 75, at 889.

82. With regard to stability, the hierarchically organized presidency is better suited to following a consistent set of preferences than is a collective body like Congress. *See supra* note 77.

83. *See* J. BUCHANAN & G. TULLOCK, *supra* note 50, at 248.

84. The Framers were aware of this. *See, e.g.*, THE FEDERALIST NO. 73, at 472 (A. Hamilton) (B. Wright ed. 1961).

3. The Legislative Veto.—When Congress passed statutes reserving legislative veto authority in one or both of its houses, the effect was to lower congressional decision costs on particular issues, while necessarily increasing externalities both for members of Congress and ultimately for society as a whole. Decision costs were lowered in two ways. First, the statutes excluded the President (and often one of the two houses of Congress) from the consensus needed to override a regulation.[85] Second, because veto resolutions were limited to invalidating regulations, it was easier to form a coalition of those opposed to a rule for various reasons than it would have been to enact a substitute policy.[86] The external costs burdened those congressmen and citizens who stood to benefit from regulations that were either invalidated by a veto resolution or altered in response to more informal congressional pressures.[87]

It is easy to see why Congress was tempted to replace the ordinary process of legislation with the legislative veto—Congress suffers all of the decision costs of legislation but only a portion of the external costs produced by more informal processes.[88] The less formal process subverted primary controls on the fairness of legislation in two ways. The first was to vitiate the effectiveness of the bicameralism and presentation requirements in raising the size of coalitions needed for collective choice. Retention of veto authority systematically favored interest groups having advantages in one or both houses of Congress because of their distribution throughout the nation.[89] Second, the veto device allowed Congress to select its decision rule at the operational stage of policymaking rather than at the constitutional stage. A check on the fairness of selecting decision rules is the difficulty of determining who will profit from their later use in specific cases. Yet at the operational stage it is much easier to predict the winners and losers from a change in the decision rules.[90] In some cases, it might be possible to predict which particular faction would be aided by legislative veto authority.

The Framers expected that our constitutional structure, which makes it easier to block than to effect legislative change, would restrict

85. For any regulation having sufficient presidential support to ensure his veto of legislation invalidating it, the effect of retained legislative veto authority would be to avoid the need for two-thirds majorities in both houses to override the President's veto.

86. *See* Bruff & Gellhorn, *supra* note 26, at 1422-23.

87. For a description of the informal congressional processes that surrounded legislative veto authority, see *id.* at 1409-12.

88. External costs within Congress from legislative vetoes would have been due to both frustrated expectations of the members who favored a vetoed regulation and complaints from constituents.

89. For an example of such an advantage, see Bruff & Gellhorn, *supra* note 26, at 1382-85.

90. *See* J. BUCHANAN & G. TULLOCK, *supra* note 50, at 120.

the amount of legislation to which the people would be subject.[91] The legislative veto, by circumventing the usual structure and creating an incentive for Congress to lower its decision costs by delegating power, tended to increase the size of government as a whole.[92]

Agencies taking actions subject to legislative veto could avoid a veto by building at least the minimum necessary coalition in Congress. Drafting a regulation in a way that would neutralize opposition in Congress increased the chance that relatively narrow factions would benefit from regulation if they were especially powerful in one or both houses. Congress, placed in a more reactive stance than in drafting legislation, lost agenda control and the opportunity to amend the agency regulation in ways that would broaden support for it. A collateral effect was to destabilize policy, because of the possibility of conflict between the agency and one or both houses of Congress. All might differ on appropriate policy; no part of the veto mechanism led out of the impasse.[93]

The legislative veto thus stripped away some central advantages of our legislative structure, but left some central disadvantages. In *Chadha,* the Court restored the role of legislative formality in ensuring the fairness of legislation, but with only the most oblique references to its reasons for doing so. To assess the potential scope of the formalist approach, I turn to other regulatory cases that have employed it.

C. The Scope of Formalism

In three recent cases, the Court has required Congress to act through the formal legislative process in order to make binding policy. In the passive restraints case, *Motor Vehicle Manufacturers Association v. State Farm Mutual Insurance Co.,*[94] the Court addressed the scope of judicial review of administrative deregulation. It held that the decision of the National Highway Traffic Safety Administration (NHTSA) to rescind the Carter administration's passive restraint rule had to meet the same standard of review as the original formulation of the rule. The formalist aspect of the case was the Court's unanimous rejection of a court of appeals holding that congressional actions less formal than legislation, including the failure of legislative veto resolutions, could sufficiently ratify a rule to intensify judicial review of its later rescission.

The Court appeared to have three reasons for denying inchoate legislative action even the limited legal effect of increasing judicial scrutiny

91. *See, e.g.,* THE FEDERALIST NO. 73, at 470 (A. Hamilton) (B. Wright ed. 1961).
92. *See* Bruff & Gellhorn, *supra* note 26, at 1426-28.
93. *See id.* at 1385, 1397-1400.
94. 103 S. Ct. 2856 (1983).

of a seemingly inconsistent agency action: the inherent ambiguity of informal legislative action, the lack of an opportunity for Congress to review the policy alternative eventually selected by the agency, and the possibility of changed circumstances between congressional review and agency action. Moreover, because the Court applied a general standard of review for rulemaking that required the agency to justify fully its change of course, little need remained to intensify judicial review in response to inchoate congressional action.

State Farm reinforces and extends the *Chadha* result. Nevertheless, the Court has not always denied effect to inchoate congressional action. It has sometimes inferred congressional acquiescence in executive policies from its failure to enact statutes overturning them.[95] In many of these cases Congress legislated on subjects closely related to the executive practice, but did not take the opportunity to overrule it.[96] Some of the cases have also presented subtle constitutional issues about the interrelation of presidential and congressional powers, issues that do not complicate litigation concerning ordinary regulation.[97] Moreover, it is one thing to infer acquiescence in an existing executive practice. It would be quite another to accept the court of appeals' position in *State Farm,* which found a congressional commitment to existing policy sufficient to forestall a later alteration. Thus, even though informal congressional action is not always entirely disregarded, *State Farm* suggests that the Court will require Congress to legislate if it wishes to compel executive compliance.

In *TVA v. Hill,*[98] the Court refused to alter its interpretation of the requirements of the Endangered Species Act[99] to reflect apparently contrary interpretations by congressional committees appropriating funds for the Tellico Dam. Completion of the dam might have violated the Act by eliminating the habitat of the snail darter. In declining to find that Congress had amended the Act *pro tanto* by continuing to fund the dam despite the environmental controversy, the Court pointed out that the actual appropriations were lump sums of which funds for the dam constituted a minor item, so that it was unclear whether Congress had adopted the committee positions.[100]

95. *See, e.g.,* Haig v. Agee, 453 U.S. 280, 300 (1981) (citing Zemel v. Rusk, 381 U.S. 1 (1965)).

96. *See, e.g.,* Bob Jones Univ. v. United States, 103 S. Ct. 2017, 2033-34 (1983); Haig v. Agee, 453 U.S. 280, 300-01 (1981).

97. *See* Bruff, *Judicial Review and the President's Statutory Powers,* 68 VA. L. REV. 1, 32-36 (1982).

98. 437 U.S. 153 (1978).

99. Pub. L. No. 93-205, 87 Stat. 884 (1973) (codified as amended in scattered sections of 16 U.S.C.).

100. 437 U.S. at 189, 192; *see also* SEC v. Sloan, 436 U.S. 103, 119-21 (1978) (refusing to view

Although ambiguity in congressional actions may have been the decisive factor in *Hill,* the Court also expressed its reluctance to find that Congress had amended a substantive statute by an appropriations measure, in violation of its internal rules.[101] The Court purported only to require Congress to make clear its intent to contravene its own rules. Yet the Court's near disregard of the ordinary sources of legislative history suggests that it was silently enforcing the congressional rules.

Thus, a broad reading of *Hill* would suggest that the Court is prepared to control the forms of congressional action by enforcing the congressional rules that govern the legislative process.[102] Such an approach, however, would risk confrontation between the Court and Congress and would draw the Court into issues that it is poorly equipped to decide.[103] The concern that is common to *Chadha, State Farm,* and *Hill* can be met by confining the formalist approach to a focus on whether Congress has acted as a whole in forming policy. If it has, how responsibly Congress has acted cannot be investigated by the Court without entering very deep water indeed.

In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council,*[104] the Court upheld the Environmental Protection Agency's "bubble" approach to air pollution control, which allows the aggregation of emissions from separate facilities within the same factory, so that increases from one facility can be offset by decreases from another. The Court concluded that this policy, the validity of which depended on the interpretation of the statutory term "source," was a reasonable construction of the statute and therefore was within the EPA's discretion. This much was traditional doctrine. The Court may have extended its reach, however, by disapproving the willingness of the court of appeals to engage in a broad analysis of statutory purpose. Instead, the Supreme Court looked for specific congressional intent on the issue at hand, and, failing

re-enactment of statute as congressional approval of SEC's interpretation of that statute). Nor was the stance of the committees entirely free from ambiguity. The committees noted TVA's efforts to transfer the darters to a new habitat, which would have made the Act inapplicable to the project, and also argued that the Act was not retroactive, which conflicted with the Court's interpretation. 437 U.S. at 192-93.

101. The Court also noted that the appropriations committees lack jurisdiction over substantive matters. 437 U.S. at 191.

102. For an analysis of such a judicial role, see Linde, *Due Process of Lawmaking,* 55 NEB. L. REV. 197, 238 (1976).

103. *Cf.* Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 130 (1810). For example, in the Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, 88 Stat. 302 (codified as amended in scattered sections of 2 & 31 U.S.C.), Congress set deadlines and procedures for its consideration and adoption of the federal budget. Congress has repeatedly failed to follow these apparently mandatory procedures. *See generally* A. SCHICK, CONGRESS AND MONEY, BUDGETING, SPENDING AND TAXING (1980). It is unlikely that a court order would improve the situation.

104. 104 S. Ct. 2778 (1984).

to find it, left interstitial policy entirely to the agency. This approach, if adhered to by the Court, will maximize agency discretion.

Chevron is in the Court's new formalist vein because it requires Congress to declare its policies in text or unambiguous legislative history if it is to confine administrative discretion. Having searched in vain for a specific congressional intent on the permissibility of a "bubble" approach, the Court speculated that Congress might have been unaware of the issue, might have delegated it to obtain expert administrative resolution, or might have chosen the lottery of unconfined delegation because of a failure to reach agreement on specifics. The Court concluded that "[f]or judicial purposes, it matters not which of these things occurred."[105] What does matter, apparently, is what the statute and the legislative history *say.* The Court emphasized the political accountability of the agencies, which the courts do not share. This emphasis correctly recognizes that when courts deny agencies the power to supply interstitial values, the courts are likely to fill the vacuum themselves, even though they lack the warrant to do so.[106]

Chevron and *Hill* exemplify the Court's recent emphasis on the textual interpretation of statutes.[107] Public choice theory demonstrates the difficulty of assigning uniform intent to those voting for a statute, except insofar as it can be gleaned from the text.[108] Moreover, there is reason to distrust legislative history; interest groups have shaped its content in an effort to win in court what was lost in Congress.[109] When this tactic succeeds, the power of the committees increases at the expense of Congress as a whole.[110] Even so, legislative history is part of the public record of a statute and should be considered; legislators are as likely to base their votes on salient portions of committee reports and floor statements by sponsors as they are on the often arcane text.[111]

Taken together, the text and public record of a statute provide the political record on which it must be justified to constituents. The need to present a credible case that legislation serves the public interest imposes

105. *Id.* at 2793.

106. *But see* Stewart, *The Resource Allocation Role of Reviewing Courts,* in COLLECTIVE DECISION MAKING: APPLICATIONS FROM PUBLIC CHOICE THEORY 205 (C. Russell ed. 1979) (proposing that the courts assume such a role). There is an alternative to judicial displacement of agency discretion: enforcement of the delegation doctrine, which I consider below. *See infra* subpart III(D)(2).

107. *See, e.g.,* 437 U.S. at 184 n.29; *see also* Note, *Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court,* 95 HARV. L. REV. 892 (1982) (attempting a broad explanation of the Court's methods of statutory interpretation).

108. *See* Easterbrook, *supra* note 42, at 828 n.57; Note, *supra* note 107, at 900-01.

109. For an example, see B. ACKERMAN & W. HASSLER, *supra* note 58, at 52-58.

110. *See* R. MELNICK, REGULATION AND THE COURTS: THE CASE OF THE CLEAN AIR ACT 375 (1983).

111. *See* Posner, *supra* note 54, at 274-75, 286.

some constraint on private goods legislation.[112] The effectiveness of this political constraint may be weak for regulatory legislation, however, because it is so easily cloaked in plausible public purposes.

D. Substantive Requirements for Legislation

Today, the delegation doctrine and substantive due process do not meaningfully constrain legislation. Perhaps one or both of them should be strengthened to provide a substantive supplement to the Court's formal controls. In my opinion, however, the decline of these doctrines was no accident and their revival in any strong form for federal legislation would be a mistake. The reasons lie in the nature of legislation and in the inherent disadvantages of the doctrines themselves.

1. Substantive Due Process.—Legislation is almost always rational in the strict sense that it selects and advances a particular value or values. Typically, legislation is a complex compromise among values sought by competing interest groups. Yet substantive due process would require legislation to be instrumentally rational,[113] in the sense that it serve some legitimate "public" end beyond the specific policies that it enacts.[114] So stated, this approach fails to recognize that when the legislature advances the welfare of an interest group, whether it be veterans, the poor, or dairy farmers, there are virtually always at least arguable public benefits as well.[115]

Moreover, the substantive due process doctrine misapprehends the source of legislation's legitimacy. The legislative process is likely to seem fair only by viewing its overall operation and totaling the gains and losses to any given participant.[116] A court reviewing a particular statute is denied this broader perspective. Thus, it is tempting for a court, perceiving accurately that a statute is pursuing narrower interests than those of the general public, to erect a requirement that it also instrumentally serve a broader end. Such an end, when supplied by the court, is artificial and subject to manipulation in service of one of the litigating interests.[117]

More important, this kind of rationality requirement can foster unfairness if it is vigorously enforced, because it deprives winners in the

112. *See id.* at 286.

113. *See* Kennedy, *Legal Formality,* 2 J. LEGAL STUD. 351, 358 n.13 (1973) (summarizing Weber's distinction between instrumental rationality in the sense of serving an extrinsic end and what he called "substantive" rationality, or direct choice among values).

114. *See* Linde, *supra* note 102, at 204, 208.

115. *See id.* at 229; Posner, *supra* note 54, at 285-86.

116. *See* J. BUCHANAN & G. TULLOCK, *supra* note 50, at 284-85.

117. *See* Linde, *supra* note 102, at 212-15; Mashaw, *Constitutional Deregulation: Notes Toward a Public, Public Law,* 54 TUL. L. REV. 849, 865, 866-67 (1980).

legislature of gains for which they may have made heavy sacrifices in the logrolling process that the court cannot see.[118] Some innovative efforts have been made to define a limited role for substantive due process by requiring legislation to advance some plausible public purpose.[119] But these efforts encounter serious difficulties in defining appropriate limits to plainly redistributional legislation. In any event, most federal regulation would survive any such test.

2. The Delegation Doctrine.—If judicially imposed rationality requirements are inappropriate, perhaps the delegation doctrine should be enforced as a neutral way to force the legislature to enact statutes with visible tradeoffs that courts and administrators can honor. This could be viewed as a formalist effort that is necessary to honor the premises of *Chadha,* in which the Court drew a bright line between legislation and execution and required Congress to abide its delegations until it changed them by statute.[120] Yet courts requiring Congress to enact specific policy standards confront difficult separation of powers problems.

Statutory ambiguity is often the intentional product of compromise or uncertainty, as the Court recognized in *Chevron.*[121] If Congress is prepared to tolerate executive discretion on some aspect of policy as the price of enacting a program, how is a court to judge whether Congress *could* have been more specific, and, more important, whether Congress *should* have been more specific? Moreover, the delegation doctrine is not easily limited, because every statutory standard contains a host of open questions for implementation. The Court has yet to show serious signs of reviving the delegation doctrine, despite some indirect use of it as a justification for narrow interpretation and some invocation of it in separate opinions.[122] This is as it should be. Existing formal controls on the legislature will suffice for regulation.

IV. Oversight: External Pressures on Execution

The Supreme Court's recent decisions requiring Congress to legislate in order to compel executive compliance have shifted power from Congress to the agencies. Yet the power of the agencies is still limited. Aside from statutory constraints, there are three major limiting influ-

118. *But see* Michelman, *supra* note 47, at 500 (arguing that we should require the "gains won" to serve the public interest).

119. *See, e.g.,* Mashaw, *supra* note 117, at 866-75; Michelman, *supra* note 47, at 506-10.

120. *See supra* subpart III(A).

121. *See supra* notes 104-06 and accompanying text.

122. *See* American Textile Mfg. Inst., Inc. v. Donovan, 452 U.S. 490 (1981); Industrial Union Dep't v. American Petroleum Inst., 448 U.S. 607 (1980).

ences: oversight by the three constitutional branches, pressure from interest groups, and internal characteristics of the agency. Appraisal of these influences will aid in predicting administrative behavior and in identifying needed modifications of the legal rules that govern agency action. This Part discusses the external constraints imposed by Congress, the Executive, the courts, and interest groups. Part V completes the appraisal by examining the factors that affect agency policy from within.

From an administrator's standpoint, the three constitutional branches and numerous interest groups confer rewards and exact penalties for particular decisions. The extent to which these diverse overseers conflict and agree will influence the administrator's choice of policies. In addition, each overseeing institution's organization and nature may foster or impede an internally consistent approach to the agencies. Finally, the effectiveness of the differing oversight techniques varies. I cannot attempt to describe these factors definitively here, in part because they vary with the particular regulatory context. Instead, my effort is to sketch the system sufficiently to support some conclusions about its general nature and effects.

In the remainder of this Article, I outline what constitutes administrative rationality and explore its relationship to legislative formality. The presence of formally stated public values in statutes, combined with administrative discretion in implementation, creates the possibility that agencies will mold regulation to serve the general interest. Yet the legitimacy of agency policymaking flows in large part from faithful execution of statutory commands,[123] which are often designed to serve particular interests. The tension between these two roles for administration is a theme of much that follows here.

Past theories of administration have been seriously incomplete: agencies are neither neutral and expert policymakers nor miniature models of the legislature, although they have some characteristics of both.[124] Not surprisingly, a host of new theories has arisen to explain agency behavior. I review them summarily because each has explanatory power, although none provides a single lens through which the administrative process should be viewed.

123. *See* Sargentich, *supra* note 23, at 397.
124. *See supra* Part II.

A. Congressional Oversight

1. Control by Legislation.—Only when Congress legislates are the heterogeneous views of its members channeled into potentially consistent commands. And even then, the statutes that govern a particular agency may not provide a coherent set of instructions. A modern agency's statutory authority is likely to be quite complex. The statutes usually form a patchwork that reflects the varying views of a number of Congresses. Moreover, the statutes that address particular agencies are supplemented by requirements that all agencies consider the effects of their actions on subjects as diverse as the environment and small business.[125] To the extent that these general statutes have directive content, they add to the complexity of an agency's instrumental duties; to the extent that they authorize considering broad public values but do not confine actual choice, they expand agency discretion.[126]

Nor has the yearly appropriations process led to the overall coordination of regulatory policy within substantive statutory limits. The congressional budget process, which has not succeeded in controlling spending generally, focuses primarily on programs involving large direct outlays of federal funds, not on regulation.[127] Moreover, appropriations are not as sensitive a control for regulation as for spending programs, because their influence on regulatory policy is ordinarily indirect.[128] Still, appropriations for enforcement levels can send clear signals to an agency and may determine whether an agency can meaningfully enforce its statutes.[129]

2. Informal Oversight.—I have already described the *State Farm* Court's refusal to allow inchoate legislative action to affect the legal status of agency policymaking.[130] Although the traditional forms of nonstatutory oversight left to Congress after *State Farm* and *Chadha* lack direct legal force, an agency disregards them at its peril.[131] Congress has

125. *See, e.g.,* Regulatory Flexibility Act, 5 U.S.C. §§ 601-612 (1982); National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4361 (1982).

126. *See* B. ACKERMAN & W. HASSLER, *supra* note 58, at 110 (urging the courts to encourage agencies to take a broad view of their statutory authority in order to coordinate the myriad delegations).

127. *See* 2 SENATE COMM. ON GOVERNMENT OPERATIONS, STUDY ON FEDERAL REGULATION: CONGRESSIONAL OVERSIGHT OF REGULATORY AGENCIES, S. DOC. NO. 26, 95th Cong., 1st Sess. 18-37 (1977) [hereinafter cited as CONGRESSIONAL OVERSIGHT].

128. *See* Landes & Posner, *supra* note 75, at 889.

129. Also, Congress sometimes instructs an agency on the use of funds in committee reports accompanying appropriations. CONGRESSIONAL OVERSIGHT, *supra* note 127, at 31-33.

130. *See supra* notes 94-97 and accompanying text.

131. *See* Gellhorn, *The Wages of Zealotry: The FTC Under Siege,* REGULATION, Jan.-Feb. 1980, at 33, 40.

an arsenal of informal devices, such as oversight hearings and constituent casework, with which to prod administrators.

Many characteristics of congressional oversight stem from the nature of the committee system. Overall, oversight is uncoordinated; it is exercised by substantive and appropriations committees in both houses and by individuals.[132] Committee structure is sufficiently disorganized to have become a subject of serious reform efforts.[133]

The committees and subcommittees are formed through a process that approximates self-selection, as members seek to influence policy that is of interest to them.[134] This process aids the coherence of oversight, not to mention its vigor. In consequence, committee-based oversight often exerts pressure for the creation of private benefits flowing to the constituencies represented on the committee.[135] On the other hand, oversight provides a highly visible opportunity for congressmen to press for regulatory initiatives that will advance the public interest.[136]

A committee that is intensely interested in an agency's policy may exert greater influence than any other. Some agency behavior has been portrayed as directly subservient to the desires of congressional committees.[137] But this view does not take adequate account of the other influences on agency behavior that I review below. Moreover, with the demise of the legislative veto and the rise of other formal controls on the legislative process, an agency can more easily avoid control by a committee. Indeed, the inadequacy of this theory is highlighted by a competing view that portrays the agencies as essentially divorced from congressional control.[138] A more moderate outlook sees the relationship between the committees and the agencies as one of bargaining, with each side having something to offer the other.[139]

It is important to distinguish the role of the committee system in processing legislation from its role in oversight. The agenda control that the committees exert is a primary safeguard against instability in statu-

132. *See generally* D. MAYHEW, *supra* note 56, at 125.

133. *See, e.g.*, 42 CONG. Q. WEEKLY REP. 3035 (1984); H.R. REP. No. 866, 96th Cong., 2d Sess. (1980). The limited success of past efforts justifies skepticism about the prospects for such reform.

134. *See supra* note 57.

135. *See* D. MAYHEW, *supra* note 56, at 89-90.

136. The history of airline deregulation is one prominent example of this. *See generally* Levine, *supra* note 45.

137. *See* H. KAUFMAN, THE ADMINISTRATIVE BEHAVIOR OF FEDERAL BUREAU CHIEFS 164-66 (1981); Weingast & Moran, *The Myth of Runaway Bureaucracy—The Case of the FTC*, REGULATION, May-June 1982, at 33.

138. *See* Weingast & Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 J. POL. ECON. 765 (1983).

139. *See* M. FIORINA, CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT (1977).

tory policy caused by ephemeral shifts in congressional coalitions.[140] Agenda control is effective because statutory change can be prevented by any committee in either house through which it must pass. For oversight, however, nothing prevents a given subcommittee from pressing an agency with views that are ephemeral and not widely shared in Congress. Thus, by sending the agencies inconsistent signals, committee oversight can reduce the stability of administrative policymaking.

3. Implications.—Disorganized oversight presents both problems and opportunities for the agencies. On the one hand, any policy initiative may produce a negative response from somewhere in Congress. On the other, agencies can use disagreement among and within the committees to obtain some room to maneuver. Because an agency can defend a policy if it can scrape together enough support to prevent statutory override or other effective response, such as diminution of appropriations, it is often sufficient merely to counter congressional opposition, not to overcome it. The agencies have the important advantage of controlling the agenda by determining both the substance and timing of their actions, within statutory limits. Also, because congressional oversight is often reactive, prompted by constituent complaints rather than independent investigation,[141] an agency action that does not stir resistance from powerful interest groups may pass unquestioned.

Congressional oversight usually focuses on conforming agency action to the views of the current Congress, not those of the Congress that passed the statute the agency is implementing. Although congressional rhetoric often portrays oversight as a means to enforce the original intent of statutes, Congress has no immediate incentive to pursue that goal, as opposed to a goal of forcing agency fidelity to current congressional desires, except insofar as keeping agencies faithful to statutes is a general lesson worth delivering. Constituent pressure reflects current desires of groups that supported or opposed a statute; their needs and comparative power may have changed significantly since enactment. For the interest groups, using Congress to enforce yesterday's bargains may involve some new tradeoff that is more costly than a trip to court. This will not always be true; sometimes congressional pressure is the cheapest enforcement means. For a congressman, the decision whether to expend one's limited political capital with an agency in an effort to enforce statutes depends on the rewards constituents will provide for doing so.[142] Without such

140. *See* Weingast, *supra* note 57, at 155-56.
141. *See id.* at 153.
142. *See* D. MAYHEW, *supra* note 56, at 124-25.

rewards, there is little reason for the effort, because the courts can be expected to discharge this function.[143]

Insofar as oversight is effective, it allows Congress to update statutory policies, within the limits of the discretion originally conferred on the agency. The decision cost of this technique is lower than that of statutory amendment, but it produces less policy stability.[144] The political stability of oversight is a function of the continuing interplay of power within and among the oversight committees; therefore, some instability is likely.

Despite its limitations, congressional oversight is important, because agency implementation provides a more meaningful opportunity to test the political acceptability of regulation than does initial statutory enactment of a program. Statutory standards usually do not provide precise notice of the policy that eventually emerges from the agency. An example is the program involved in *State Farm.* The statutory directive to "meet the need for motor vehicle safety"[145] bore little resemblance to the detailed passive restraints regulation that the agency adopted and then abandoned. Also, at the time of implementation the consequences are first felt concretely by those affected, not all of whom would have known about or responded to the formulation of the same policy as a statutory directive to the agency.

Congressional oversight does not provide complete assurance of the political acceptability of regulation, however. Oversight does not always lead to the statutory resolution of important policy issues that have arisen before the agencies, because legislation tends to await political necessity. Only the adoption and threatened implementation of an agency rule is likely to elevate an issue high enough on the congressional priority list to force legislation.[146] Given legislative inertia and the strategic advantages held by the agencies, statutory override is likely only when a regulation is highly unpopular or treads on interests powerful in Congress. Because agencies avoid making decisions that are known to be unpopular enough to engender a serious risk of statutory override, it is comparatively rare. In light of the limits of congressional supervision, the other two branches of government have developed oversight activities

143. *See* Landes & Posner, *supra* note 75, at 880-83.

144. *Cf. id.* at 885 (discussing the similar tradeoff between constitutional and statutory enactments).

145. 15 U.S.C. § 1392(a) (1982).

146. An example is the automobile ignition interlock regulation, overridden by Congress in 1974. The story is told in Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co., 103 S. Ct. 2856, 2863 (1983).

both to ensure that regulation is responsive to political needs and to achieve goals of their own.

B. The Executive Branch

Whatever a President's own policy preferences concerning regulation, he must oversee agency action in order to control the executive branch that he heads. Agencies compete for funds and power; supervision by the President's Office of Management and Budget (OMB) is necessary to constrain the competition.[147] In addition, centralized review of regulation can help the President check policy that may result from agency alliances with congressional committees or interest groups, enhancing his power against those forces.[148]

Given the size of the government and the staggering complexity of the issues it considers, however, the oversight capacity of the relatively small bureaucracy that directly serves the President is quite limited. There are more pressing demands on the President's time and that of his immediate staff than overseeing the details of regulation. Moreover, the President lacks strong incentives to intervene in regulation, because he bears only attenuated political responsibility for decisions made in the agencies and because intervention is likely to be a zero-sum game from his standpoint—he trades the pleasure of one constituency for the hostility of another. Also, any desire to dictate the outcome of particular regulatory controversies is chilled by doubts about the President's legal authority to override decisions placed by statute in other officers[149] and by advantages the agencies hold because of their superior knowledge of the details.[150]

Because the executive branch is hierarchically organized under a single individual, Presidential oversight of the agencies has a potential to be unitary and consistent that the other branches cannot match. Yet there are limits. No administration sails the political winds without tacking occasionally. Within the White House, competition for power and changes in personnel cause variations in the tenor of oversight. A supplementary source of oversight in the executive branch is interagency review. Sometimes mandated by statute or executive order, interagency review of regulation is frequent and diverse in content.[151] Thus, even if

147. Agencies seeking funds and power find themselves in "prisoner's dilemmas," *see supra* note 51, in which destructive competition will occur unless OMB can force cooperation.

148. *See* Weingast, *supra* note 57, at 159.

149. *See* Bruff, *Presidential Power and Administrative Rulemaking,* 88 YALE L.J. 451, 495-98 (1979).

150. *See* Strauss, *supra* note 1, at 595.

151. *See generally* ABA COMMISSION ON LAW AND THE ECONOMY, FEDERAL REGULATION:

the net effect of oversight within the executive establishment is to promote consistency, the executive is far from monolithic.

Realistically, a President can hope to constrain the parochialism of the agencies by instilling in them the broad principles of his policy outlook and by ensuring some coordination of policymaking. He does so partly by appointing the administrators and a few principal subordinates. Not all appointees closely conform to the President's views, however. Appointments often appease interest groups or reflect congressional sponsorship of candidates.[152] Moreover, once appointments are made, administrators who have a constituency of their own enjoy some political protection from removal, even when the President has plenary removal power.[153]

Control is also exercised through OMB's budgetary functions and its administration of procedural directives. At its inception, the Reagan administration issued Executive Order 12,291, which requires executive agencies to perform cost-benefit analyses for regulations and, within statutory limits, to select the policy that maximizes benefits compared to costs.[154] Agency analyses and regulations are then subject to review and comment, but not reformulation, by OMB.[155] Although cost-benefit analysis is political in nature, some of its proponents claim that it is neutral and technocratic, perhaps in an effort to avoid attracting the attention of other overseers in the courts and Congress.[156]

Centralized political control of this kind departs sharply from the Progressive view of administration as a field for detached expertise.[157] Vigorously administered, presidential oversight could shift discretion in administering statutes from the agencies to the White House. The President's national constituency and his constitutional responsibility to oversee the execution of many statutes give him a substantial claim to exercise administrative discretion in at least some circumstances.[158] Yet it must be recognized that the limitations on knowledge that hamper reg-

ROADS TO REFORM 84-88 (1979) (discussing various forms of interagency and White House review of regulations).

152. Thus, congressional participation is not limited to the constitutional check of advice and consent. *See* Weingast, *supra* note 57, at 152.

153. *See* Strauss, *supra* note 1, at 590.

154. Exec. Order No. 12,291, 3 C.F.R. 127 (1982), *reprinted in* 5 U.S.C. § 601 app. at 431-34 (1982).

155. *See generally Cost-Benefit Analysis and Agency Decision-Making: An Analysis of Executive Order No. 12,291,* 23 ARIZ. L. REV. 1195 (1981). Previous administrations had imposed milder versions of these requirements. *See* Bruff, *supra* note 149, at 464.

156. *See* Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique,* 33 STAN. L. REV. 387, 389 (1981).

157. *See* B. ACKERMAN & W. HASSLER, *supra* note 58, at 5.

158. *See* Bruff, *supra* note 149.

ulation generally[159] are especially great at the apex of the executive branch.

In *State Farm,* the Court dealt an indirect blow to the President's power to control regulatory policymaking in the agencies. The Court addressed the scope of judicial review of an act of administrative deregulation that reflected the Reagan administration's efforts to require that regulation be cost-justified. The agency's rationale for its decision to rescind mandatory passive restraint requirements was that they would not produce enough safety enhancement to justify their costs, because many drivers would detach the automatic seatbelts that manufacturers planned to install.[160] The Court rejected an argument that deregulation should be held to a very low standard of justification and held that NHTSA's rescission had to meet the same standard of judicial review as the original formulation of the rule.[161] Specifically, the Court found that the agency had insufficiently explained its decision to rescind the regulation entirely instead of choosing some other alternative, such as mandating the use of airbags in place of detachable seatbelts.

State Farm signals that a change of administration and the resulting change of policy orientation in the White House and at the agencies does not alone justify a change of regulatory policy. Instead, agencies must run the obstacle course that Congress and the courts have erected for policymaking. If they do so properly, however, administrative policy may reflect the incumbent administration's views, within statutory limits.[162]

Recent statutes delegating regulatory authority have usually included special procedures for rulemaking that go well beyond the simple notice and comment provisions of the Administrative Procedure Act.[163] Typically, these requirements increase both opportunities for public participation in rulemaking and obligations of the agencies to analyze their policy choices. And the judicial practice of "hard look" review, affirmed in *State Farm,* employs the same dual emphasis as the new statutes.[164] The requirements for public participation reflect the interest representation theory of administrative law.[165] The heightened analytic emphasis parallels cost-benefit requirements imposed by the Executive itself.

159. *See infra* Part V.
160. *See* 46 Fed. Reg. 53,420 (1981).
161. *State Farm,* 103 S. Ct. at 2866.
162. *See* Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 104 S. Ct. 2778, 2793 (1984).
163. *See generally* ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, A GUIDE TO FEDERAL AGENCY RULEMAKING 114-38 (1983).
164. *See infra* subpart IV(C)(2).
165. *See supra* subpart II(C).

Thus, *State Farm* attempts to control executive oversight by preventing it from short-circuiting minimum procedural norms for policymaking that are imposed by the other branches and by holding it to its own promise not to displace the substantive discretion of the agencies.

C. *The Courts*

1. Compliance with Statutory Commands.—With the rise of the modern administrative state, the role of the federal courts as primary lawmakers has been supplanted somewhat by their role of reviewing congressional and agency lawmaking.[166] Courts police the distribution of power between Congress and the agencies and allocate policymaking authority between them when statutes do not clearly do so. Because this role calls for deference to decisions not given to the courts,[167] it requires considerable judicial restraint. Judges have an incentive toward restraint in their desire to maintain independence from the other branches: if the courts faithfully enforce the bargains embodied in statutes, the other branches are not likely to threaten judicial independence.[168] Nevertheless, the capacity of the other branches to monitor and penalize judicial misbehavior is limited, and judges often succumb to the temptation to enter the policymaking arena.[169]

Judicial review attempts to ensure that agencies adhere to the limits of statutory authority. Although statutes governing modern health and safety regulation are far more specific than classic New Deal delegations, the particular statutory terms pertinent to a regulatory controversy may be highly ambiguous. When it is relatively clear that a statute does contain an actual policy choice, the Supreme Court ordinarily defers to it, even if the result appears harsh or wasteful.[170] In situations of greater ambiguity, the courts could follow the formalist implications of *Chadha* to the extent of renewing the delegation doctrine. I doubt that they will do so, however, because of difficulties with the doctrine that I explained

166. *See* Elliott, *INS v. Chadha: The Administrative Constitution, the Constitution, and the Legislative Veto*, 1983 SUP. CT. REV. 125, 164, 166.

167. *See, e.g.*, Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 104 S. Ct. 2778, 2782-83 (1984); Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, 103 S. Ct. 2246, 2256 (1983); Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 546 (1978).

168. *See* Landes & Posner, *supra* note 75, at 885.

169. Judicial independence and the difficulty of identifying the appropriate limits of judicial review make it impractical to attempt retribution against individual federal judges who overstep the bounds of their role. Instead, Congress and the President usually attack the judiciary generally, for example by restrictions on jurisdiction.

170. *See, e.g.*, American Textile Mfrs. Inst., Inc. v. Donovan, 452 U.S. 490 (1981); TVA v. Hill, 437 U.S. 153 (1978); Union Elec. Co. v. EPA, 427 U.S. 246 (1976).

above.[171] Instead, the courts may simply infer a standard, reclaiming some of the lawmaking function otherwise lost to the agencies. In doing so, the courts can invoke the established practice of reading statutes to avoid constitutional questions, while ignoring the fact that when the infirmity is the absence of a meaningful standard, judicial interpretation is unguided.[172]

Thus, insofar as the text and legislative history of a statutory delegation are ambiguous, there is an element of discretion to be exercised by either the courts or the agencies themselves.[173] The Supreme Court has recently reaffirmed the traditional doctrine that vests such discretion in the agencies by calling for courts to defer to "reasonable" administrative interpretations of statutes.[174] Nevertheless, the Court itself does not consistently follow the doctrine; it sometimes displaces an agency's interpretation without clear support for doing so in the statute's text or legislative history.[175] The premises of the Court's recent decisions imposing formalist constraints on Congress, however, would require adherence to the doctrine of deference to administrative interpretations of statutes.[176]

2. Hard Look Review.—In addition to assuring facial consistency with statutory commands, courts bolster the legitimacy of regulation by reviewing administrative resolution of fact and policy issues. As with statutory interpretation, however, the courts state a doctrine of deference to reasonable administrative judgments.[177] Recall that the *State Farm* Court explicitly rejected arguments for either very relaxed or very stringent review of administrative deregulation.[178] The Court's refusal to recognize a substantive presumption against regulation completes the erosion of the early view that government intervention into private eco-

171. *See supra* subpart III(D)(2).

172. *E.g.*, Industrial Union Dep't v. American Petroleum Inst., 448 U.S. 607, 640-41 (1980); *see* Stewart & Sunstein, *supra* note 6, at 1249.

In addition to the alternatives mentioned in text, a court can call for Congress to resolve the ambiguity, under a "clear statement" approach. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 5-17, at 288-89 n.14 (1978).

173. *See generally* Woodward & Levin, *In Defense of Deference: Judicial Review of Agency Action*, 31 AD. L. REV. 329 (1979) (discussing desirability of judicial deference to agency construction of governing statutes).

174. Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 104 S. Ct. 2778 (1984); *see supra* notes 104-06 and accompanying text.

175. *See, e.g.*, Public Serv. Comm'n v. Mid-Louisiana Gas Co., 103 S. Ct. 3024 (1983).

176. *See supra* subpart III(C).

177. *See, e.g.*, Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, 103 S. Ct. 2246, 2256 (1983). Courts bolster the legitimacy of regulation in other ways as well. *See, e.g.*, Sargentich, *supra* note 23, at 404-07 (arguing that procedural limitations also enhance the legitimacy of agency actions).

178. Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Ins. Co., 103 S. Ct. 2856, 2866-67 (1983).

nomic ordering needs special justification. At the same time, however, the Court has not erected a contrary presumption in favor of regulation which would treat it as creating entitlements for its beneficiaries that could not be eliminated without special justification.[179] Instead, *State Farm* charts a middle course that fosters the stability of agency policymaking by disfavoring unexplained changes in the regulatory status quo.

The generally applicable scope of substantive review is defined by the APA's command to set aside agency actions that are "arbitrary, capricious, [or] an abuse of discretion."[180] The *State Farm* Court said that a rule

> would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.[181]

State Farm thus adopted "hard look" review of the substance of regulation, an approach that had developed in preceding years, principally in the lower courts.[182] Hard look review compares the agency's stated rationale for a decision with supporting or opposing data and policy views gathered by the agency as the "administrative record" for judicial review. The court identifies the agency's value choices and checks their consistency with the factual basis asserted for them, the agency's other present or past policies, and the governing statute.

The direct effect of conditioning policy change on elaborate and persuasive explanation is to dampen the vigor of regulatory redistributions, but not to prevent them entirely.[183] By protecting expectations generated by statute or existing regulation from disappointment without articulated reasons, hard look review could play the same legitimizing role in administrative law that the jurisprudential school of "reasoned elaboration" once held out for the courts themselves through norms of neutral, consistent, and candid decisional processes.[184] Its success in that endeavor de-

179. *See* FCC v. WNCN Listeners Guild, 450 U.S. 582, 603-04 (1981).

180. 5 U.S.C. § 706(2)(A) (1982).

181. 103 S. Ct. at 2867.

182. *See* Sunstein, *supra* note 21, at 183. The Court initiated this approach in Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971).

183. *Cf.* B. OWEN & R. BRAEUTIGAM, THE REGULATION GAME: STRATEGIC USE OF THE ADMINISTRATIVE PROCESS 26 (1978) (portraying procedural protections generally as playing such a role).

184. *Compare* Yudof, *School Desegregation: Legal Realism, Reasoned Elaboration, and Social Science Research in the Supreme Court*, LAW & CONTEMP. PROBS., Autumn 1978, at 57, 68, *with* B. ACKERMAN & W. HASSLER, *supra* note 58, at 104-07.

pends, however, on the extent to which agencies can be forced to engage in reasoned decisionmaking.[185]

Unhappily, hard look review suffers from the defects that inhere in focusing on the sufficiency of official explanations for policymaking.[186] An agency desiring a particular policy outcome can perform the charade of hearing from everyone interested, responding to their views and data in rational discourse, and elaborating a rationale for the decision that is coherent, supported by the administrative record, and consistent with prior agency policy and known statutory intent. Two can play this game, however. Because reviewing courts are aware of the artificial aspects of their review, they may be drawn to a subterfuge of their own—reviewing the distributional fairness of regulation without saying so. Thus, it appears that courts often remand for more explanation when they simply disagree with the agency's policy.[187] In *State Farm,* for example, the Court's insistence on an explanation for NHTSA's failure to require airbags can be understood as a signal to the agency to craft a rule that satisfies those calling for strict safety measures.

To the extent that the courts go beyond the stated goals of hard look review and directly review the distributional fairness of regulation, their ultimate goal may be to force the agencies to pursue the creation of public rather than private goods in the exercise of their discretion, at least to the extent permitted by statute.[188] The courts cannot assume such a role, however, without invading the heart of administrative discretion and abandoning traditional values of judicial self-restraint. Instead, courts should content themselves with the limited gains in promoting the public interest aspect of regulation that are obtained by hard look review as it should operate.

These gains are made possible by the fact that modern administrative law places primary judicial review of the value choices in regulation at the stage of administrative implementation rather than statutory formulation. Accordingly, review is substantially stricter than it would be if it focused on the validity of the statutes themselves. The delegation doc-

185. For an optimistic view, see Environmental Defense Fund, Inc. v. Ruckelshaus, 439 F.2d 584, 598 (D.C. Cir. 1971) (Bazelon, J.).

186. *See generally* Sax, *The (Unhappy) Truth About NEPA,* 26 OKLA. L. REV. 239 (1973).

187. *See, e.g.,* Secretary of Agriculture v. United States, 347 U.S. 645 (1954); WAIT Radio v. FCC, 418 F.2d 1153, 1156 (D.C. Cir. 1969); Melody Music, Inc. v. FCC, 345 F.2d 730, 733 (D.C. Cir.), *cert. denied,* 382 U.S. 962 (1965).

188. *See* Stewart & Sunstein, *supra* note 6, at 1238-39; Sunstein, *supra* note 21, at 183. This is not necessarily an exclusive goal; for example, the courts may also pursue such goals as ensuring the efficiency of regulation. *See* Stewart & Sunstein, *supra* note 6, at 1253. Even if all judges share the goal of guiding agency value choices toward the public interest, however, no single conception of that interest will be supplied the agencies, because of the decentralized nature of judicial review. *See infra* notes 210-12 and accompanying text.

trine and substantive due process do not—and I argued above cannot[189]—provide meaningful review of legislative value choices. In contrast, courts can examine administrative action in ways that would be most inappropriate if applied to Congress. Even if the courts do not directly review the distributional fairness of regulation, their focus on the agency's formal rationale and on compliance with statutory procedure provides the agency an opportunity—and a need—to demonstrate that it has actually responded, at least in part, to the claims of interested persons.

3. Judicial Review of Technical Decisions.—Congress is under no obligation to analyze the factual predicate for its legislation; legislative norms are not necessarily based on careful investigation of the pertinent facts. Because the agencies must provide factual support for their regulations, perhaps they can give social policy a kind of legitimacy that the legislative process cannot. Yet in the end, politics, not factual analysis, drives regulation.[190] The reasons for this lie partly in the forces influencing an administrator and partly in the nature and limits of analytic knowledge. Although analysis can shape the political debate by revealing the parameters of knowledge and ignorance,[191] it rarely answers the central questions in regulation. Because most regulation is preventive in nature, the issues often involve scientific uncertainty and normative judgments such as the degree of risk society should bear.[192] Consequently, technical analysis is often inconclusive.[193] Moreover, technical data are manipulable, by experts within the agency hoping to persuade the policymakers,[194] or by the agency itself in an effort to appease its overseers. Thus, analysis alone will not produce a single best regulatory policy; value choices are inevitable.

Hard look review encourages agencies to attempt comprehensive analytic resolution of the problems they face. Potentially, this can lead to overestimation of the capacity of analytic approaches. For detailed articulation such as the courts require is a central check on the analytic process itself, but does not necessarily relate to the facts as they exist in the

189. *See supra* subpart III(D).

190. *See generally* Crandall & Lave, *Foreword* to THE SCIENTIFIC BASIS OF HEALTH AND SAFETY REGULATION 1-17 (R. Crandall & L. Lave eds. 1981); McGarity, *Judicial Review of Scientific Rulemaking*, SCI., TECH. & HUM. VALUES, Winter 1984, at 97, 99.

191. *See* C. LINDBLOM & D. COHEN, USABLE KNOWLEDGE 77 (1979).

192. *See, e.g.*, Sierra Club v. Costle, 657 F.2d 298 (D.C. Cir. 1981) (reviewing EPA ruling that promulgated new source performance standards governing emission control by coal burning power plants); Ethyl Corp. v. EPA, 541 F.2d 1 (D.C. Cir.) (en banc) (reviewing EPA order requiring annual reductions in the lead content of leaded gasoline), *cert. denied*, 426 U.S. 941 (1976).

193. *See* C. LINDBLOM & D. COHEN, *supra* note 191, at 47, 81.

194. *See* B. ACKERMAN & W. HASSLER, *supra* note 58, at 80-84.

world.[195] In order to insulate their regulations from judicial review, the agencies often provide explanations that disguise the uncertainties that underlie their judgments.[196] For example, regulations often rely on computer projections of the performance of the national economy years or even decades into the future.[197] Perhaps aware of this problem and of the inherent limitations of technical analysis, the Court has recently expressed a willingness to give special deference to administrative judgments that are unavoidably clouded by scientific uncertainty.[198] This encourages the agency to admit its uncertainty. If it does so, the need to state a basis for decision other than technical knowledge may help to expose the value choices that actually account for policy.[199]

4. Judicial Review of Agency Procedure.—The Court has made it clear that hard look review of the substance of agency action will be accompanied by comparatively lenient review of agency procedure. In its celebrated *Vermont Yankee* decision,[200] the Court rebuked lower courts for requiring agencies to adopt rulemaking procedures not prescribed by statute, but left the door open for substantive remands. The Court emphasized its view that the APA's rulemaking procedures embody a political compromise. Yet substantive review itself reflects a considerable gloss on the original APA. Although the Court has never explained why it reviews the substance of regulation more vigorously than its procedure,[201] the difference may result from a perception that judicial tinkering with procedural devices in an attempt to assure fair and equal representation of all interested persons is ultimately futile.[202]

Vermont Yankee left lower courts with the difficult task of deciding how they should define the administrative record for substantive review without running afoul of the Court's ban on judicially imposed procedures. Some important decisions by the District of Columbia Court of Appeals have increased administrative discretion by rejecting arguments that the presence of influences on decision that did not appear in the administrative record should invalidate the administrator's decision.

195. *See* T. SOWELL, KNOWLEDGE AND DECISIONS 334-35 (1980).

196. *See* McGarity, *supra* note 190, at 103.

197. *See, e.g.*, Sierra Club v. Costle, 657 F.2d 298, 332-36 (D.C. Cir. 1981).

198. Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, 103 S. Ct. 2246, 2256 (1983).

199. *See* American Petroleum Inst. v. Costle, 665 F.2d 1176 (D.C. Cir. 1981); Shapiro, *supra* note 4, at 1509.

200. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519 (1978).

201. *See* Stewart, *Vermont Yankee and the Evolution of Administrative Procedure,* 91 HARV. L. REV. 1805, 1816-17 (1978).

202. *See* Shapiro, *supra* note 4, at 1497-99.

These decisions depart from the interest representation view of administration in their willingness to assume that administrators have acted responsibly without closely scrutinizing every influence on them.

In *Sierra Club v. Costle,*[203] the court upheld the EPA's emissions standards for new coalburning power plants. Despite the presence of *ex parte* contacts from executive, congressional, and private sources, the court ultimately relied on the administrator's duty to decide consistently with the statute and the administrative record before him. *Sierra Club* continued a retreat by the D.C. Circuit from an earlier panel decision in *Home Box Office, Inc. v. FCC,*[204] which attempted to ban all *ex parte* contacts in informal rulemaking.[205] Even in *Home Box Office,* the panel emphasized that its goal was to ensure that the agency exercised its statutory duty to decide and did not simply act as a broker among the interest groups. In *United Steelworkers of America v. Marshall,*[206] the court refused to condemn an agency's extensive use of consultants when the administrator had reviewed their work product before adopting it as her own. Also, the court found no authority to require separation of rulemaking functions within the agency to prevent staff from lobbying the administrator. In *Association of National Advertisers, Inc. v. FTC,*[207] the court adopted a standard for disqualification for bias in rulemaking that focused on the willingness of the administrator to make the fact and policy judgments required by statute.

Aside from *Vermont Yankee*'s mandate, two concerns seem to underlie the courts' emphasis on the agency's formal product. One is the impracticability of identifying the "real" influences that account for agency policymaking, despite the temptations to do so that result from the usual practice of assembling the administrative record on an ad hoc basis as litigation impends.[208] The courts have traditionally reviewed the agency's formal decision, rather than probe the mental processes of the decisionmaker.[209] The second reason is that the courts review only to assure that the agency's decision is rational and consistent with statutory criteria, not that it is the "best" decision.

203. 657 F.2d 298 (D.C. Cir. 1981).

204. 567 F.2d 9 (D.C. Cir.) (per curiam), *cert. denied,* 434 U.S. 111 (1977).

205. The court began its retreat in Action for Children's Television v. FCC, 564 F.2d 458 (D.C. Cir. 1977), when it refused to invalidate an FCC decision because of *ex parte* communications that neither supplanted the administrative record as the basis for the agency's action nor resulted in unfairness to interested persons.

206. 647 F.2d 1189 (D.C. Cir. 1980), *cert. denied,* 453 U.S. 913 (1981).

207. 627 F.2d 1151 (D.C. Cir. 1979), *cert. denied,* 447 U.S. 921 (1980).

208. *See generally* Pederson, *Formal Records and Informal Rulemaking,* 85 YALE L.J. 38 (1975) (discussing the need to prescribe the requirements of the administrative record before rulemaking begins).

209. *See* G. ROBINSON, E. GELLHORN & H. BRUFF, *supra* note 12, at 129-30.

5. The Courts as an Oversight System.—Judicial review of regulation is decentralized enough to make it difficult for the courts to issue a consistent set of commands to an agency and to ensure that they are obeyed. Although review of rulemaking is heavily concentrated in the District of Columbia Circuit, not every panel speaks with the same voice.[210] Moreover, review of enforcement decisions, on which the actual effectiveness of regulation largely depends, usually occurs in the district courts around the nation. Even if an issue reaches the Supreme Court, the Court's proclivity for highly fragmented decisions diminishes the prospect for clear guidance to the agencies.[211] As a result, agencies are sometimes able to resist judicial efforts to force them to take unwanted action, at least until the Supreme Court does speak clearly.[212]

It is quite possible for judicial review to produce unrealistic demands on an agency. No single lawsuit presents the range of problems with priorities and resources that confront an administrator.[213] For example, if the cost of regulation is to be considered only at the enforcement stage,[214] a court reviewing the adoption of a governing standard may force the agency to adopt a more stringent policy than can feasibly be implemented. Indeed, the administrator may adopt a stringent standard to survive judicial review, intending to loosen its effect quietly at the enforcement stage.[215] The overall effect is to foster regulatory standards whose promises far outstrip their performance.[216]

Judicial review can also have significant effects on the internal structure and dynamics of an agency. The most dramatic example is the creation of a new program through statutory interpretation.[217] When a court ties the validity of regulation to technical support of a particular kind, such as scientific or economic analysis, the effect can be to increase the

210. The circuit's decisions on *ex parte* contacts in rulemaking are a vivid example. *See supra* notes 203-05 and accompanying text.

211. For an example of this fragmentation, see Industrial Union Dep't, AFL-CIO v. American Petroleum Inst., 448 U.S. 607 (1980). *See also* Easterbrook, *supra* note 42, at 806-07 (noting that the nature of collective decision and the Court's caseload and case selection techniques make fragmented decisions inevitable).

212. An example is FCC format regulation, culminating in FCC v. WNCN Listeners Guild, 450 U.S. 582 (1981).

213. *See* R. MELNICK, *supra* note 110, at 373.

214. *See, e.g.*, Union Elec. Co. v. EPA, 427 U.S. 246 (1976).

215. *See* R. MELNICK, *supra* note 110, at 356.

216. *See id.* at 361.

217. For example, the EPA's "PSD" program for the maintenance of air quality in unpolluted regions originated in a court order to EPA, Sierra Club v. Ruckelshaus, 344 F. Supp. 253 (D.D.C.), *aff'd per curiam*, 4 Env't Rep. Cas. (BNA) 1815 (D.C. Cir. 1972), *aff'd by an equally divided Court sub nom.* Fri v. Sierra Club, 412 U.S. 541 (1973), and was later embodied in statute, Clean Air Act Amendments of 1977, Pub. L. No. 95-95, §§ 127-128, 91 Stat. 685, 731-45 (codified at 42 U.S.C. §§ 7470-7491 (1982)). *See* R. MELNICK, *supra* note 110, at 345-48.

power of professional groups in the agency at the expense of other groups, including the political appointees heading the agency.[218]

D. The Interest Groups

Pressure on regulators from interest groups is unlikely to equate with the general public interest. The advantages in organizing and lobbying that some groups hold over the general public certainly extend to the administrative process.[219] Indeed, not every interested person is assured of being heard at all. Currently regulated industries have an effective voice; interests that might arise to compete with them do not.[220]

Nevertheless, agencies are usually pressured by a wide variety of conflicting interest groups, not just one regulated industry. Long-held theories that agencies become the captives of their regulated industries no longer seem true, if they ever were, in light of such developments as expanded agency jurisdictions that cover many industries, the rise of "public interest" groups, and opportunities for widespread participation in administrative processes.[221] Thus, although administrative law has not perfected political representation before the agencies, at least it has ensured that administrators will be exposed to the viewpoints of most affected persons.

V. Agency Decisionmaking: The Supply and Demand of Rationality

My review of external influences on agency decisionmaking reveals a diversity that belies any theory of administrative behavior that isolates one decisive factor. I have emphasized the need to identify the practically effective kinds of feedback the agencies receive, not merely the theoretically important ones.[222] Applying the same approach to influences within the agency yields a similar conclusion: these influences are likely to complicate and constrain, but not compel, final decision. Thus, the organization and nature of our government lodges a real but constrained

218. *See* R. MELNICK, *supra* note 110, at 380. Not surprisingly, the beneficiaries often are the lawyers. *See id.* at 355-57.

219. B. OWEN & R. BRAEUTIGAM, *supra* note 183, at 13; *see also* M. OLSON, *supra* note 52 (noting that rational, self-interested individuals will not act to achieve common interests without coercion or separate incentives).

220. *See* B. OWEN & R. BRAEUTIGAM, *supra* note 183, at 30. At times, however, surrogates such as "public interest" groups argue on behalf of unorganized economic interests.

221. *See generally id.* at 11-12 (summarizing capture theories); Weingast, *supra* note 57, at 149 (criticizing Peltzman's capture theory).

222. *See* T. SOWELL, *supra* note 195, at 110-11.

discretion in the administrator.[223]

A. Internal Influences on Agency Decisionmaking

To analyze agency behavior, I will focus on the forces influencing the administrator, the individual charged by statute with making the agency's final decision. A premise of this discussion is that individual motivation and behavior are determinative, even in an institutional setting; groups or institutions do not have characteristics apart from those of their constituents.[224]

A preliminary question is whether administrators share a dominant motive that accounts for their decisions insofar as nothing compels the outcome. The economist's model of rational pursuit of self-interest has led to a theory of the budget-maximizing bureaucrat, interested in expanding the power of the agency and with it his personal power.[225] Yet personal ambition or ideology, the very forces that may account for a budget-maximizing purpose, can lead the administrator to pursue other goals.[226] In addition, OMB provides incentives to substitute cooperation for interagency competition. Thus, agency behavior cannot be explained in terms of "empire building" alone.

The structure of an agency affects decisionmaking. Health and safety regulation often involves a single administrator within an executive agency, rather than the collegial form typical of economic regulation in the independent agencies.[227] The principal consequences of the choice between these two forms of organization are: substantially more active presidential oversight for the executive agencies[228] and a better prospect for consistent decisionmaking for the noncollegial agencies.[229] For all the agencies, however, the prospect for consistency is limited by frequent turnover among the political appointees, which alters the values prevail-

223. *See* W. NISKANEN, BUREAUCRACY AND REPRESENTATIVE GOVERNMENT (1971); Strauss, *supra* note 34, at 595.

Some current theories of administration would deny or at least minimize this rather modest, not to say obvious, proposition. *See* Robinson, *Stalking the Washington Bureaucrat* (Book Review), 68 CORNELL L. REV. 269, 270 (1983) (summarizing one observer's view).

224. Not everyone shares this premise. *See, e.g.,* Robinson, *supra* note 223, at 275 (reviewing a work taking such a contrary view).

225. *See* W. NISKANEN, *supra* note 223.

226. Administrative deregulation in the Civil Aeronautics Board is an example. *See generally* Levine, *supra* note 45, at 182-83.

227. The main exceptions are the Consumer Product Safety Commission, *see* 15 U.S.C. § 2053 (1982), and the Nuclear Regulatory Commission, *see* 42 U.S.C. § 5841 (1982).

228. *See generally* Strauss, *supra* note 1, at 668.

229. The latter consequence flows from the nature of collective choice. *Cf.* Easterbrook, *supra* note 42, at 811-31 (applying public choice theory to show that the Supreme Court cannot be expected to make consistent decisions). The tendency toward inconsistency in collegial decisionmaking can be dampened by granting the chairperson special powers.

ing in the agency and limits the familiarity of the final administrative decisionmakers with the issues and forces they confront.

Subordinate bureaus within the agency often represent entrenched policy orientations, which the administrator cannot entirely negate. Statutes or executive orders may establish bureaus to create distinct policy biases,[230] or may alter the agency significantly through reorganization.[231] Whether or not a particular agency's internal organization is embedded in statute, the administrator may lack the legal or political power to effect substantial reorganization, or even to alter the staff significantly.

Because the civil servants remain while political appointees come and go, the staff possess important advantages of knowledge and patience over their nominal leader.[232] If the views of the staff are homogeneous, the administrator may fall captive to them, unless outside influences prevent it.[233] Yet the bureaus are likely to be diverse and competitive; the administrator can play them off against one another. Policy differences among bureaus stem from such variables as assigned function (prosecution vs. legislative liaison), professional training (scientists vs. economists vs. attorneys), and location (headquarters vs. field offices). Outside intervention, for example by a court decree, can powerfully affect the internal dynamics of an agency.[234] For the administrator, the effect of outside intervention can be either to impair or to increase control over the agency.[235]

B. Administrative Discretion and the Public Interest

1. Administrative Discretion.—The nature of administrative discretion depends on the sum of the pressures influencing an agency's decisions. An administrator is monitored by a variety of individuals and

230. For example, the Advisory Committee on Reactor Safeguards was created within the Nuclear Regulatory Commission to provide safety review independent of the NRC staff. Pub. L. No. 85-256, 71 Stat. 579 (1977) (codified at 42 U.S.C. § 2039 (1982)).

231. For example, the Environmental Protection Agency was first created by a presidential reorganization plan. *See generally* Karl, *Executive Reorganization and Presidential Power,* 1977 SUP. CT. REV. 1 (tracing the development of the use of executive reorganization to expand presidential power).

232. *See* Strauss, *supra* note 34, at 586.

233. *See* Robinson, *The Federal Communications Commission: An Essay on Regulatory Watchdogs,* 64 VA. L. REV. 169, 216-17 (1978); *cf.* Sierra Club v. Costle, 657 F.2d 298, 406 (D.C. Cir. 1981) (recognizing the effect on an administrator of exposure "on a 24-hour basis to a dedicated but zealous staff").

234. For an example of executive intervention, see B. ACKERMAN & W. HASSLER, *supra* note 58, at 91-93, which discusses President Carter's creation of the Regulatory Analysis Review Group, comprised of executive office economists, to review analyses required from cabinet-level agencies for every significant regulation. For an example of judicial intervention, see R. MELNICK, *supra* note 110, at 345-48.

235. For an example of increased control, see R. MELNICK, *supra* note 110, at 350.

groups inside and outside the agency, all hoping to sway the agency's decisions. But all of this activity is constrained by the costs of performing it, so that some "slack" for the agent, some substantive discretion, is inherent in the monitoring relationship.[236] Compared to other decisionmakers who are subject to monitoring, such as corporate managers, administrators are subject to an especially complex and disorganized set of monitors. The very multiplicity of competing actors suggests that no one of them will attain effective control. Indeed, in government the monitors spend considerable time and effort watching one another.

Consequently, an administrator usually has discretion in shaping policy.[237] The amount of this discretion depends in part on the administrator's own activities. Advocacy of a preferred position and credit-claiming for past successes can help the administrator to gather and mobilize support.[238] The final decision provides an opportunity for the administrator to pursue personal values, which may or may not equate with the general public interest.[239] Indeed, perhaps the administrator *must* exercise personal choice; at least one court has rebuked an agency for acting as a broker among contending interest groups, rather than employing its statutory discretion.[240]

2. The Public Interest.—Forces influencing agency decisions combine to produce policies that, although not necessarily conforming to a "true" public interest, nonetheless have broad public support. Initially, oversight pressures administrators to reach decisions that are consistent with their governing statutes. Although regulatory statutes do distribute private benefits as well as recognize public values, they ordinarily at least authorize, and often command, pursuit of widely beneficial values. To the extent that statutory text or legislative history is clear, an agency has a relatively good chance to implement its directives without being derailed by informal pressure from Congress or the Executive, or by judicial interpretation. If the agency is disinclined to implement it, judicial review is especially likely to force the issue. Moreover, an agency has an incentive to shield itself behind its statutes, because there is likely to be more oversight pressure on an agency going against the grain of its statutes than on one going with the grain. An agency stepping out of its

236. *See supra* notes 60-61 and accompanying text.

237. I concede that at times pressure from one quarter may be so strong that it effectively dictates the outcome.

238. Compare the analogous advertising and credit-claiming activities of congressmen. *See* D. MAYHEW, *supra* note 56, at 52-61.

239. *See generally* Kalt & Zupan, *supra* note 61.

240. Home Box Office, Inc. v. FCC, 567 F.2d 9, 53 (D.C. Cir.), *cert. denied,* 434 U.S. 111 (1977).

statutory bounds receives direct blame for doing so; an agency implementing a distasteful statutory command can deflect at least some of the blame to Congress.

In addition, administrators face strong incentives to craft a compromise among the major forces pressing their decision.[241] The widespread access to policymaking processes that the agencies are required to provide fosters compromise. And substantive judicial review encourages compromise as well.[242] If the administrator renders a decision that gives each contending group at least part of what it wants, daily relations with them are eased and they are less likely to seek redress by appealing to the agency's overseers. Nevertheless, the administrator's slack allows choice within a range of available alternatives: a final decision is likely to have elements of both compromise and discretion.

Thus, modern legal requirements defining administrative rationality share with legislative formality the effect of ensuring that public policy will be supported by coalitions representing a set of values that is relatively widely accepted. Moreover, legislative formality and administrative rationality interrelate. For example, formalist constraints on Congress allow compromise to occur in the agencies by protecting administrators from especially powerful techniques of intervention, such as the legislative veto. Because the "public interest" is difficult or impossible to define neutrally and concretely in most regulatory contexts, we must settle for legal rules that attempt to produce broad support for regulation.

3. The Alternatives to Administrative Discretion.—Final agency decision depends on the personal choice of an individual or a small group of bureaucrats, who are only indirectly responsible to the public. One reason to place the choice there is that the alternatives are worse. Inevitably, someone other than Congress will exercise discretion delegated by statute, unless and until a statute alters the delegation. If not the agency, it will be someone not subject to the diverse controls that do influence the administrator. It might be a congressional committee or an individual member. If so, there would be no guarantee of broad political accountability.[243] It might be the White House staff, or even the President himself.[244] If the former, political accountability would be indirect, based on

241. *See* Gellhorn & Robinson, *Rulemaking Due Process: An Inconclusive Dialogue,* 48 U. CHI. L. REV. 201, 243-47 (1981). For an example of such a compromise, see B. ACKERMAN & W. HASSLER, *supra* note 58, at 100-03.

242. *See supra* note 189 and accompanying text.

243. *See* Bruff & Gellhorn, *supra* note 26, at 1417-20.

244. *See generally* Bruff, *supra* note 149.

suppositions of what the President wants. If the latter, the advantage of direct political accountability would be offset by the difficulty of informing a busy Executive on a matter of regulatory policy. Finally, it might be the judiciary. The judges, subject to none of the oversight safeguards that administrators confront, are particularly ill-suited to displace administrators in supplying value decisions in regulation.[245]

Yet there may be a more important reason to place regulatory value choices with administrators than the lack of a satisfactory alternative. Congress delegates discretion to agencies when it is unsure what policy it wants, or when it is unable to reach agreement on specifics. If the agency promulgates a regulation that could not have passed as legislation, statutory override is difficult because of the inertia built into the legislative process. The important question is whether agencies are more likely to use their discretion to produce public or private goods. Clearly, either is possible. Yet I have identified forces that prod administrators to increase the public benefits of regulation. Therefore, it may be beneficial for Congress to delegate power whenever there is agreement on the need for regulation but a specific provision that ensures the production of public benefits by the administrator cannot be enacted as legislation.

C. The Limits of Administrative Knowledge and Power

Agencies and the institutions that oversee them should prefer regulations that respect the limits of administrative knowledge and power. Attention to two principles can aid this endeavor.[246] First, regulations should be judged *ex ante,* that is, by asking what rules will produce the best aggregate results. Second, rules should be analyzed by judging their marginal effect on private conduct.

Viewing regulation *ex ante* draws attention to the tradeoffs that an administrator faces in formulating a rule. If these tradeoffs are not considered, analysis of the rule will unduly weight some of the rule's effects. For example, an agency can adopt a more stringent substantive standard if it accords some flexibility in its implementation, because a more efficient rule encounters less resistance at a given level of stringency. Moreover, it is far easier for an agency to state a regulatory goal that private conduct must meet than to specify the means of compliance.[247] The EPA's "bubble" policy upheld in *Chevron* is an example of a regulation

245. *But see* Stewart, *supra* note 106.

246. *See* Easterbrook, *Foreword: The Court and the Economic System,* 98 HARV. L. REV. 4 (1984) (applying similar criteria to statutes).

247. *See* Breyer, *Analyzing Regulatory Failure: Mismatches, Less Restrictive Alternatives, and Reform,* 92 HARV. L. REV. 549 (1979).

designed to obtain the benefits of decentralized knowledge regarding the cheapest means of compliance. Yet a challenger may complain that such a rule is not sufficiently strict because it contains flexibility, neglecting to note that the flexibility may have allowed the adoption of a stricter standard than would be possible without it. If *ex ante* analysis increases general understanding of the choices inherent in regulating, it should eventually increase the acceptability, and thus the legitimacy, of regulation.[248]

Addressing the marginal effects of rules provides assurances that regulation is effective in fact as well as in theory. For example, an administrator may believe that increasing the generality of a rule has costs to the agency in diminished control of private behavior. The reason that administrators may fail to consider all the costs of relative specificity is that the agency does not bear those costs.[249] Administrators should understand, however, that the efficacy of regulation depends on acquiescence in it by those regulated as well as on formal governmental commands. The stringency of a standard should be set with a view to obtaining widespread compliance—the idea is to set the standard and the penalties for violating it so that it does not pay to cheat.[250]

Agencies should be willing to honor these principles because they allow the agencies to pursue the values they choose most effectively. Institutions that exercise oversight, such as the courts, should also be willing to hold the agencies to these principles because the style of oversight it calls for is relatively simple and effective. For example, when courts examine regulatory decisions *ex ante,* they can focus on whether the agency allowed the cheapest means of compliance, or gave a satisfactory explanation for not doing so. Similarly, courts can require agencies to address the effects of their rules on the behavior of those regulated and can review the persuasiveness of the analysis.[251]

Insofar as this view of administrative rationality designs legal rules in order to take advantage of the behavior of self-interested participants, it shares a central premise with legislative formality. The political philosophy involved was also shared by the Framers of our Constitution.[252]

248. *See* J. FREEDMAN, *supra* note 1, at 10-11, 265 (citing M. WEBER, THE THEORY OF ECONOMIC AND SOCIAL ORGANIZATION 130-32 (1947)); F. HAYEK, RULES AND ORDER 95 (1973).

249. Because these costs are spread throughout the regulated sectors of society, the costs of gathering information about them, of political organization, and of oversight will prevent them from being completely transformed into effective complaints to the agency.

250. *See* R. AXELROD, *supra* note 51, at 155-57.

251. In *State Farm,* the agency did address this question, but its analysis was found wanting. *See supra* note 160 and accompanying text.

252. F. HAYEK, *supra* note 248, at 28-29 (referring to Hume).