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# Bending the Rules: Flexible Regulation and Constraints on Agency

Mark Seidenfeld

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# BENDING THE RULES: FLEXIBLE REGULATION AND CONSTRAINTS ON AGENCY DISCRETION

MARK SEIDENFELD\*

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\* Professor, Florida State University College of Law. I am indebted to my colleagues Rob Atkinson, Larry Garvin and Jim Rossi for discussions about this article and comments on earlier drafts. I also owe thanks to Martha Mann and Avner Ben Gera for their dedicated research assistance.

## INTRODUCTION

Judging from the recent spate of books and articles criticizing federal, state, and even local regulation,<sup>1</sup> the regulatory apparatus in the United States is broken. The literature chides regulators for applying their rules woodenly, without considering whether application in a particular circumstance will further the goals the rules were meant to achieve.<sup>2</sup> In addition, commentary criticizes courts for holding agencies to exacting standards of care in making regulatory decisions, forcing agencies to devote inordinate time and resources to every decision.<sup>3</sup> As a result, the critics inform us,

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1. See generally, e.g., WILLIAM A. FISCHER, *THE ECONOMICS OF ZONING LAWS: A PROPERTY RIGHTS APPROACH TO AMERICAN LAND USE CONTROLS* (1985) (proposing communal property rights approach to zoning as means of improving local land use regulation); JERRY L. MASHAW & DAVID L. HARFST, *THE STRUGGLE FOR AUTO SAFETY* (1990) (criticizing NHTSA's abandonment of its safety mission in favor of recall strategy); Richard B. Stewart, *United States Environmental Regulation: A Failing Paradigm*, 15 J.L. & COM. 585 (1996) (criticizing current centralized command and control environmental regulations). The current movement for regulatory reform has roots in economic analyses critiquing various aspects of regulation. See, e.g., Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681 (1973) (examining effect of economic market analyses on land use control systems); James E. Krier, *The Pollution Problem and Legal Institutions: A Conceptual Overview*, 18 UCLA L. REV. 429 (1971) (analyzing effect of pollution on market and legal institutions). The movement, however, has expanded beyond the ranks of legal academics, spawning a variety of federal and state programs to reform traditional regulatory approaches. See Marianne Lavelle, *The 'Property Rights' Revolt: Environmentalists Fret as States Pass Reagan-Style Takings Laws*, NAT'L L.J., May 10, 1993, at 1 (describing recent state efforts to curb regulation by requiring compensation for economic injury such regulation imposes on property owners); Eric W. Orts, *Reflexive Environmental Law*, 89 NW. U. L. REV. 1227, 1268-87 (1995) (describing "emergence of reflexive elements in current environmental law"); Jim Rossi, *The 1996 Revised Florida Administrative Procedure Act: Revolution or Counter-Revolution?*, 49 ADMIN. L. REV. 345, 358 (1997) (describing Florida's reform of its administrative law as driven by coalition of "advocates of flexibility and rationality" and those opposed to government attempts to regulate markets altogether).

2. A popularized account of this critique, PHILIP HOWARD, *THE DEATH OF COMMON SENSE: HOW LAW IS SUFFOCATING AMERICA* (1994), resonated sufficiently with the American populace that it reached the New York Times bestseller list for 29 weeks. See *Best Sellers*, N.Y. TIMES, Sept. 3, 1995, §7, at 18. See DAVID OSBORNE & TED GAEBLER, *REINVENTING GOVERNMENT: HOW THE ENTREPRENEURIAL SPIRIT IS TRANSFORMING THE PUBLIC SECTOR* (1992), for an earlier popularized call for reform of government regulation.

3. See R. Shep Melnick, *Administrative Law and Bureaucratic Reality*, 44 ADMIN. L. REV. 245, 247 (1992) (stating that courts' unclear and inconsistent requirements when reviewing agency rules have led to enormous increases in size of rulemaking records and in length of rulemaking process); Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1419 (1992) [hereinafter McGarity, *Deossifying*] (stating that stringent judicial review induces agencies to prepare for worst case scenarios, an "extremely resource-intensive and time-consuming" effort); Richard J. Pierce, Jr., *Seven*

agencies have no choice but to compromise implementation of their fundamental statutory mandates.<sup>4</sup> Some blame industry pursuit of private benefits for undermining the public interest even as others lambast regulators for imposing burdens on these same self-interested entities — burdens that drive jobs and investments overseas. The death of regulatory common sense has even led some contemporary Cassandras to predict catastrophes for the United States economy.<sup>5</sup>

The recent criticism of regulation has prompted several proposals to return the regulatory state to working order. Although these proposals take a variety of forms, for many critics the solution is increasing administrators' discretion and relieving them from onerous constraints on their use of coercive regulatory powers.<sup>6</sup> These critics see administrators as generally good decisionmakers, or at least good enough that giving them *carte blanche* to regulate is preferable to miring the economy down in a regulatory process that cannot react quickly enough to the ever-changing technical, economic and political environments in which regulated entities find themselves. Those who propose increasing regulators' discretion to respond to regulatory problems focus on the rigidity of agency regulations and the judicialization of the process the agency uses to reach them.<sup>7</sup> Statutory prescrip-

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*Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 65 (1995) (holding courts responsible for "ossification" of agency rulemaking because "courts have transformed the simple, efficient notice and comment process into an extraordinary lengthy, complicated process").

4. See THOMAS O. MCGARITY & SIDNEY A. SHAPIRO, *WORKERS AT RISK: THE FAILED PROMISE OF THE OCCUPATIONAL AND SAFETY HEALTH ADMINISTRATION* 257-58 (1993) (contending that chronic delay in Occupational Safety and Health Administration (OSHA) promulgation of health and safety standards results from overzealous judicial review); Richard J. Pierce, Jr., *Two Problems in Administrative Law: Political Polarity on the District of Columbia Circuit and Judicial Deterrence of Agency Rulemaking*, 1988 DUKE L.J. 300, 311 [hereinafter Pierce, *Two Problems*] (reporting replacement of systematic policymaking through rulemaking with policy paralysis or ad hoc policymaking through adjudication); cf. JOHN M. MENDELOFF, *THE DILEMMA OF TOXIC SUBSTANCE REGULATION: HOW OVERREGULATION CAUSES UNDERREGULATION AT OSHA* 1-17 (1988) (arguing that overly strict regulation has caused slow pace of standard setting and unwillingness to regulate some hazards).

5. See, e.g., Richard J. Pierce, Jr., *The Unintended Effects of Judicial Review of Agency Rules: How Federal Courts Have Contributed to the Electricity Crisis of the 1990s*, 43 ADMIN. L. REV. 7, 7-9 (1991) [hereinafter Pierce, *Unintended Effects*] (predicting severe electricity shortages due to judicial review discouraging and delaying rulemaking at FERC).

6. See HOWARD, *supra* note 2, at 180-82; OSBORNE & GAEBLER, *supra* note 2, at 108-37; JAMES Q. WILSON, *BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT* 369-70 (1989) (noting that need to constrain government abuse limits extent to which one can "deregulate government").

7. HOWARD, *supra* note 2, at 104-05; McGarity, *Deossifying*, *supra* note 3, at 1440-41; cf. JERRY L. MASHAW, *BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS* 192 (1983) (concluding that "traditional legal techniques for moderating

tions and an agency's own substantive regulations bind the agency and can interfere with the agency's ability to react reasonably to the circumstance in which the statute or regulation must be implemented. Moreover, to the extent an agency has discretion to alter the substantive rules that bind its regulatory actions, cumbersome procedures can interfere with the agency's ability and willingness to amend rules in a timely manner to fit particular situations it faces.<sup>8</sup>

This Article evaluates the extent to which increasing administrative discretion is likely to result in more flexible regulation that serves the public interest. Agency discretion is a nebulous concept. Discussions of increasing discretion subsume more particular issues such as the extent to which agencies can set policy, the freedom of agencies to deviate from established policy in particular circumstances, and whether discretion is plenary rather than subject to supervision by other institutions.<sup>9</sup> One cannot, however, discuss these issues independently because increasing agency leeway with respect to one issue necessarily alters the agency's freedom with respect to another. For example, freedom to deviate from established policy, taken to an extreme, allows an agency to change the policy by consistent detours during implementation. Also, eliminating all review of agency decisions formally would allow the agency complete freedom to set policy and deviate from it. Of course internal decisionmaking norms at the agency may mean that formal freedoms do not translate into a pragmatic ability to deviate from past practices.<sup>10</sup> Nonetheless, lack of supervision usually does al-

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bureaucratization of [the SSD claims] decision processes are essentially bankrupt"). *But see* KENNETH F. WARREN, *ADMINISTRATIVE LAW IN THE POLITICAL SYSTEM* 195-96 (abr. 3d ed. 1997) (contending that more structured rulemaking processes are necessary to ensure democratic accountability of this quasi-legislative function).

8. *See* Pierce, *Unintended Effects*, *supra* note 5, at 25 (noting that rulemaking procedures and judicial review delayed FERC from putting into effect rules intended to allocate natural gas during gas shortage until after shortage passed).

9. *See* Edward L. Rubin, *Discretion and Its Discontents*, 72 *CHI.-KENT L. REV.* 1299, 1303 (1997) (comparing German view of administrative discretion with American view of supervision process).

10. *See* JAMES G. MARCH, *A PRIMER ON DECISION MAKING: HOW DECISIONS HAPPEN* 60-61 (1994) (describing how an organization's behavioral rules are tied to self-identity of members of organization); JAMES G. MARCH & JOHAN P. OLSEN, *REDISCOVERING INSTITUTIONS: THE ORGANIZATIONAL BASIS OF POLITICS* 21-23 (1989) (proposing that organizational behavior is governed by routines that may be formally dictated or "learned and internalized through socialization or education"); *cf.* JAMES G. MARCH & HERBERT A. SIMON, *ORGANIZATIONS* 160-61 (1958) (stating that many organization decisions are made by routine response to outside stimuli, but also noting that influence of routine, rather than explicit problem solving, is greatest "[w]hen a stimulus is of a kind that has been experienced repeatedly in the past"). Recently, much legal commentary has focused on the influence of legal norms on individual behavior. *See* Robert D. Cooter, *Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant*, 144

ter somewhat the latitude an agency has to side-step existing policy. The interrelationship between these aspects of discretion leads me to structure my discussion according to the operational apparatus that one might use to constrain discretion, while maintaining flexibility standards that cabin the agency authority to set policy in the first place and ex-post review to modify agency decisions after they are made. I take care at all turns, however, to consider the implications such means would have on the various aspects of discretion identified above.

The Article begins by discussing the need for *ex ante* constraints on agency decisionmaking in order to ensure that regulation is predictable and democratically accountable. It first looks at the role of legally binding rules to guide agency discretion, and the ability of regulators to deviate from such rules to avoid perverse outcomes. It proceeds to describe the role of institutional norms in agency decisionmaking, and to identify some unique problems use of such norms imposes for permitting constrained flexibility. The Article next addresses the need for ex-post review to ensure against several pathologies of agency decisionmaking. It evaluates the potential for bottom-line outcome review of agency decisions to provide workable constraints on agency discretion without forfeiting agency flexibility. Finally, the Article evaluates the potential for review of the agency decisionmaking process to provide such constraints, and suggests that judicial review of agency reasoning is an important aspect of ensuring against the identified pathologies.

### I. *EX ANTE* CONSTRAINTS ON AGENCY DISCRETION

Binding rules provide substantive limits on agency action prior to the agency making a decision in a particular context — what I call *ex ante* constraints. Statutes impose such constraints when they mandate the explicit action an agency must take under particular circumstances. The more particular and detailed the statutory provision, the less freedom an agency has in applying its regulatory prescriptions in specific situations.<sup>11</sup> Broad statutory delegations of power to an agency to regulate a general area of the

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U. PA. L. REV. 1643 (1996) (focusing on effects of norms on various aspects of law and economics). Social norms, enforced by community expressions of disapproval and attendant opprobrium such community reaction engenders, provide one mechanism constraining conduct that is not limited by formal legal rules. See ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 141-43 (1991) (giving examples in which norms dictated behaviors different from those imposed by legal rules); JON ELSTER, THE CEMENT OF SOCIETY: A STUDY OF SOCIAL ORDER 99-100 (1989).

11. Cf. Edward L. Rubin, *Law and Legislation in the Administrative State*, 89 COLUM. L. REV. 369, 393-408, 411-23 (1989) [hereinafter Rubin, *Law and Legislation*] (defending jurisprudence of broad and vague statutory delegations and describing potential means for Congress to ensure effectiveness of statutes creating such delegations).

economy, characteristic of much legislation adopted under the New Deal belief in agency expertise, impose few *ex ante* constraints on the agency.<sup>12</sup> In contrast, statutes that provide rigorous formulae may preclude reasonable regulation that balances social costs against benefits.<sup>13</sup>

In addition to statutes, agency rules can also provide *ex ante* constraints on agency regulatory discretion. If an agency is bound to follow its own rules, and the process of amending rules is so protracted that the agency cannot amend the rule in time to apply it to the prevailing problem, then the agency will not be free to take into consideration unique attributes of the factual circumstances facing the agency. The same result follows if agencies are unable to amend rules because they simply do not have sufficient resources to devote to the process or because the politics of the situation makes the cost of amendment not worth the benefit.

*Ex ante* legal constraints dissolve as agencies gain discretion to waive rules, make exceptions to them, or simply decline to enforce them in appropriate circumstances. Reformers who bemoan the inflexibility of rule-bound regulatory systems propose that agencies be allowed liberally to deviate from rules when common sense and good policy dictate.<sup>14</sup>

#### A. *The Tension Between the Need for Binding Rules and Agency Discretion*

Administrative law has long recognized a tension between the rule of law and agency discretion to implement statutes. Rules as *ex ante* constraints on agency behavior serve several important functions. Foremost, binding rules allow private entities to predict regulatory decisions and to plan accordingly.<sup>15</sup> Rules foster investment in productive enterprises by

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12. See MARTIN SHAPIRO, WHO GUARDS THE GUARDIANS?: JUDICIAL CONTROL OF ADMINISTRATION 43 (1988) (noting that often New Deal statutes "placed almost no limits" on agency rulemaking authority); Peter L. Strauss, *Legislative Theory and the Rule of Law: Some Comments on Rubin*, 89 COLUM. L. REV. 427, 427-30 (1989) (noting that "transformation in statutory practice accompanying the rise of the administrative state . . . from direct ('transitive') legislative resolution of policy problems to indirect ('intransitive') resolution through the empowerment of agents").

13. See MENDELOFF, *supra* note 4, at 7 (asserting that "[t]he statutory requirement to set standards stringently makes it more difficult to justify them as sensible public policy").

14. See Alfred C. Aman, Jr., *Administrative Equity: An Analysis of Exceptions to Administrative Rules*, 1982 DUKE L.J. 277, 278 (examining agency exceptions to legislative rules); Jim Rossi, *Making Policy Through the Waiver of Regulations at the Federal Energy Regulatory Commission*, 47 ADMIN. L. REV. 255, 258-60, 281-90 (1995) [hereinafter Rossi, *Making Policy*] (supporting FERC's development of policy through grant of waivers statutory requirements for independent power producers).

15. See FRIEDRICH A. HAYEK, THE ROAD TO SERFDOM 72-73 (1944); JEFFREY L. JOWELL, LAW AND BUREAUCRACY: ADMINISTRATIVE DISCRETION AND THE LIMITS OF LEGAL



reducing the risk that regulators will deem an activity prohibited.<sup>16</sup> In addition, rules can increase the efficiency of regulation. If different cases involve the same relevant factual circumstances, then an agency can resolve an issue raised by the cases once and for all by rule.<sup>17</sup> Otherwise, the agency would have to redecide the issue in every adjudicatory proceeding. Binding rules can also increase the democratic accountability of government. Legislators are directly elected, giving statutory prescriptions a superior democratic pedigree than that of agency decisions. Agency rule-making requires some degree of public notoriety, which fosters executive and legislative oversight of the policy the rule implements, and thereby makes rules more democratically accountable than ad hoc agency decisions.<sup>18</sup> Rulemaking also creates the potential for more meaningful public participation in the policy making process, which again bolsters the democratic foundation of agency rules.<sup>19</sup>

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ACTION 13, 19-20 (1975); see also HENRY J. FRIENDLY, *THE FEDERAL ADMINISTRATIVE AGENCIES: THE NEED FOR BETTER DEFINITION OF STANDARDS* 20 (1962) (advocating that initial grants of authority to agencies contain specific standards to provide predictability); Thomas O. Sargentich, *The Reform of the American Administrative Process: The Contemporary Debate*, 1984 WIS. L. REV. 385, 398 (focusing on how public laws facilitate private ordering "in that they restrain official arbitrariness that otherwise might interfere with individual decisionmaking").

16. The greater uncertainty about whether an activity will be prohibited, inherent in a system of ad hoc policy decisions, imposes risk costs for which investors demand a higher rate of return. See RICHARD BREALEY & STEWART MYERS, *PRINCIPLES OF CORPORATE FINANCE* 112-14 (1981). These costs, in turn, discourage investment by decreasing the net present value of payoffs from such investment. See *id.* at 61-63, 175-78. In addition, use of stable rules, rather than ad hoc decisions that reflect the best action in light of current beliefs about social welfare, results in more optimal investment by discouraging entities from making decisions based on predictions of future regulatory policy. See Finn E. Kydland & Edward C. Prescott, *Rules Rather than Discretion: The Inconsistency of Optimal Plans*, 85 J. POL. ECON. 473, 486 (1977).

17. See JOWELL, *supra* note 15, at 12 (noting justness of uniformity of rule application); WILLIAM F. WEST, *ADMINISTRATIVE RULEMAKING: POLITICS AND PROCESS* 50 (1985) (arguing that rulemaking enables agencies to "formulate and enforce policy" quicker and cheaper than in adjudication); Glen O. Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform*, 118 U. PA. L. REV. 485, 516 (1970) (examining claims that administrative process over-judicialized).

18. See KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., 1 *ADMINISTRATIVE LAW TREATISE* 262 (3d ed. 1994); THEODORE J. LOWI, *THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES* 304 (2d ed. 1979); see also WEST, *supra* note 17, at 187 (noting that use of rulemaking has on occasion "spurred especially strong opposition from regulated interests and rebuke from Congress").

19. See DAVIS & PIERCE, *supra* note 18, at 266; CORNELIUS M. KERWIN, *RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY* 161-63 (1994). But see WARREN, *supra* note 7, at 195-96, 202 (disputing that rulemaking is democratic because it serves ends of powerful special interest groups).

Rules, however, are by their nature over and under inclusive: They prohibit some conduct that their promulgator would condone and allow other conduct that the promulgator would condemn.<sup>20</sup> Viewing such rules as legally binding on the agency decisionmaker and therefore applying them to the letter leads to decisions that, in the particular context in which the agency applies them, may fail to promote the purposes of the regulations.<sup>21</sup>

By conforming to the American self-image as a country governed by "laws and not men," and thereby treating rules as binding on regulatory decisions, government bureaucrats disable themselves from responding to the unique character of circumstances in the cases before them.<sup>22</sup> Rules, after all, are necessarily imperfect; they cannot take into account every factor relevant to the appropriate disposition of a matter facing the agency.<sup>23</sup> Proponents of decreased judicialization of regulatory apparatus would encourage government officials to ignore the letter of a rule to the extent necessary to further its underlying purposes.

The tension between the "rule of law" and regulatory flexibility is not new.<sup>24</sup> Belief in the rule of law underlies attempts throughout this century to limit legislative delegation of law-making discretion to agencies, and the unworkability of the non-delegation doctrine in the modern state, to a great extent, reflects the necessity of regulatory flexibility.<sup>25</sup> It is hard to argue

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20. See Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 346-53 (1949) (examining development of equal protection and due process in judicial and legislative actions).

21. See EUGENE BARDACH & ROBERT A. KAGAN, *GOING BY THE BOOK: THE PROBLEM OF REGULATORY UNREASONABLENESS* 71-72 (1982) (examining assumptions and concerns about precision in regulatory decisionmaking). The potential for rules to deviate from optimal congruence with the desires of their promulgator will increase with increases in their "transparency" — that is, the objectivity of their application in particular factual contexts. See Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65, 73 (1983).

22. See PHILIPPE NONET & PHILIP SELZNICK, *LAW AND SOCIETY IN TRANSITION: TOWARD RESPONSIVE LAW* 64 (1978) (describing shortcomings of 'rule of law' approach).

23. See BARDACH & KAGAN, *supra* note 21, at 58.

24. The tension dates back at least as far as Aristotle's distinction between legal justice, which derives from application of general rules, and equity, which corrects the imperfections of general rules. ARISTOTLE, *NICOMACHEAN ETHICS* 141-42 (Martin Ostwald ed. & trans., Bobbs-Merrill 1962) (n.d.). Many works addressing the fundamental nature of law discuss this tension. See, e.g., RONALD DWORIN, *LAW'S EMPIRE* 144-47 (1986); F.A. HAYEK, *1 LAW, LEGISLATION AND LIBERTY* 102 (1973); ROBERTO MANGABEIRA UNGAR, *LAW IN A MODERN SOCIETY: TOWARD A CRITICISM OF SOCIAL THEORY* 192-200 (1976).

25. See Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 96-98 (1985); Richard J. Pierce, Jr., *Political Accountability and Delegated Power: A Response to Professor Lowi*, 36 AM. U. L. REV. 391, 404-05 (1987) [hereinafter Pierce, *Political Accountability*] (examining Professor Lowi's article concerning adverse political consequences of broad delegations of power to agencies);

against empowering regulators with greater flexibility to better serve the purposes underlying regulation. Problems arise, however, when different individuals characterize the purposes of a regulatory scheme.<sup>26</sup>

For example, Philip Howard's criticism of the rejection of Mother Theresa's application to renovate a condemned apartment building and turn it into a shelter for the homeless in New York City evokes much popular sympathy.<sup>27</sup> The city ordinance dictating that multistory buildings must have elevators seems ludicrous when applied to Mother Theresa's proposal instead of that of some slum lord providing substandard housing. But why? Presumably, the absurdity occurs because one recognizes the waste of an opportunity to put an unused building to good use by one whose motives in doing so seem selfless. If our administrative system, however, directed regulators to evaluate whether the rule serves a good purpose when applied in this context, one could easily argue that regulators should approve renovations of all unoccupied buildings regardless of whether they contain an elevator.

If the cost of the elevator will increase the rents needed to justify the renovation to the extent that no homeless would be able to afford to live in the building, or more likely to the extent that the owner could not recoup his investment from the social service agencies, then one can cogently argue that it is best to approve the building without an elevator. In that context, as in the Mother Theresa example, requiring an elevator will mean the building will not be renovated and will remain unused. It seems preferable that those currently on the streets have some shelter even if it does not have an elevator.<sup>28</sup> And, if potential residents of a renovated building desire and

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Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1695-96 (1975) [hereinafter Stewart, *Reformation*] (focusing on expansion of, and changes to, traditional model of agency discretion). Despite this recognized necessity, some continue to urge renewal of the non-delegation doctrine as a means of reinstating accountability of the government to the public interest. See, e.g., Peter H. Aranson et al., *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 63-64 (1982) (discussing public choice perspectives and delegation authority); Theodore J. Lowi, *Two Roads to Serfdom: Liberalism, Conservatism and Administrative Power*, 36 AM. U. L. REV. 295, 297 (1987) [hereinafter Lowi, *Two Roads*] (reviewing politics of administrative agencies in relation to delegated powers).

26. See NONET & SELZNICK, *supra* note 22, at 77-78.

27. See HOWARD, *supra* note 2, at 3-5.

28. This argument parallels the literature criticizing enforcement of housing codes and the doctrine of warranty of habitability because such enforcement will reduce the supply of low income housing. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 471-73 (4th ed. 1992); see also WERNER Z. HIRSCH, *LAW AND ECONOMICS: AN INTRODUCTORY ANALYSIS* (2d ed. 1988) (performing regression analysis of empirical data and concluding that habitability laws intended to benefit low income tenants cost these tenants more than value of improvements laws prompted).

can afford an elevator, presumably the market would induce the building owners to install one.

Lest one surmise that this is an easy example because elevators are not essential to decent housing, note that the same argument could apply to the requirement that apartment buildings have heat and water and not be overcrowded.<sup>29</sup> The point is that giving regulators more discretion about whether and how to apply a rule also allows the regulator discretion about the weighing of the various purposes that may be said to underlie the rule. Giving the regulator this discretion can compromise the relevant political community's ability to mandate a standard that reflects its shared values, such as the value that every individual should have housing of a certain minimal quality. Giving unchecked discretion to regulators ultimately increases flexibility, but it also allows ad hoc decisionmaking to undermine the mission of the regulatory program that reformers seek to further.<sup>30</sup> Thus, society must strike some balance between granting administrators discretion to ignore substantive limits on their actions and constraining their exercises of discretion.

### *B. Administrative Law's Current Balance Between Flexibility and Constraint*

The current administrative state already incorporates a balance between the value of regulatory flexibility and the need for constraint of decision-makers. The fundamental structure of administrative law today reflects a consensus that, given the complexity of the modern world, the state cannot operate if every major policy issue would have to be resolved by the legislature and every legal standard announced by binding rule. The Supreme Court's retreat from the non-delegation doctrine implicitly has accepted the Weberian notion that bureaucratic decisionmaking permits purposive governmental action in the complex modern state.<sup>31</sup> Throughout the modern

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29. The tension between finding housing for the homeless and ignoring housing code violations plays out, for example, in the actions of New York City homeless-diversion workers who often "urge the poor to double and triple up with other families" in substandard apartments because that is the only alternative to homelessness. See Deborah Sontag, *For Poor, Life 'Trapped in a Cage'*, N.Y. TIMES, Oct. 6, 1996, at A1; see also William Fulton, *Behind L.A.'s Homeless Crisis: Housing Codes for the '60s*, L.A. TIMES, Dec. 4, 1994, at M6 (blaming homeless crisis in L.A. on lack of low income housing supply due in part to outdated housing codes meant to combat substandard housing rather than lack of housing).

30. See Nonet & Selznick, *supra* note 22, at 76; Marshall J. Breger, *Regulatory Flexibility and the Administrative State*, 32 TULSA L.J. 325, 335 (1996) (examining recent trend in flexibility in relations with administrative agencies).

31. According to Weber:

era of the regulatory state, administrators have had broad discretion to adopt policies as they see fit to implement vaguely worded statutes. With some notable exceptions, statutes today provide wide expanses for flexible agency decisionmaking.<sup>32</sup>

During the early years under the Administrative Procedure Act (APA), the traditional model of administrative law sought to balance the tension between discretion and constraint by requiring agencies to limit their own discretion.<sup>33</sup> The traditional model counseled that agencies should adopt rules that bind their subsequent decisions.<sup>34</sup> According to this model, if the agency wants to establish a policy, then it should do so using the APA's notice and comment procedures.<sup>35</sup> If it needs to alter that policy, or provide an exception within a factual context different from that it envisioned when it adopted the rule, it should first amend its rule following the same proce-

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Experience tends universally to show that the purely bureaucratic type of administrative organization . . . is, from a purely technical point of view, capable of attaining the highest degree of efficiency and is in this sense formally the most rational known means of carrying out imperative control over human beings.

MAX WEBER, *THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION* 337 (A.M. Henderson & Talcott Parsons eds. & trans., 1947).

32. See Lowi, *Two Roads*, *supra* note 25, at 295-96; Pierce, *Political Accountability*, *supra* note 25, at 391-92; cf. Rubin, *Law and Legislation*, *supra* note 11, at 374 (asserting that, in modern administrative state, norm that legislature should exert political control over administrative agencies does not invalidate broad delegation of rulemaking authority to agencies under vague standards).

33. The traditional model is the product of application of the legal process school of jurisprudence to administrative law. The legal process school advocated a middle ground between formalism and realism that provided the underpinnings for the Federal Administrative Procedures Act. See Mark Seidenfeld, *A Syncopated Chevron: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV. 83, 92 (1994) [hereinafter Seidenfeld, *Syncopated Chevron*] (requiring agencies to explain why their interpretations of statutory scheme makes good policy); Keith Werhan, *The Neoclassical Revival in Administrative Law*, 44 ADMIN. L. REV. 567, 576-77 (1992) (exploring trends of returning to neoclassical model of administrative law). "The rule of law is central to the traditional model . . ." Keith Werhan, *Delegalizing Administrative Law*, 1996 U. ILL. L. REV. 423, 460 (discussing modern efforts to reform federal administrative policymaking); see also Sargentich, *supra* note 15, at 397 n.26.

34. See KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* 55-57 (1969); see also FRIENDLY, *supra* note 15, at 145-46 (advocating that agencies adopt more rules and policy statements to guide their discretion in adjudications); WARREN, *supra* note 7, at 286-97 (discussing significance of Davis's position).

35. See Merton C. Bernstein, *The NLRB's Adjudication-Rule Making Dilemma Under the Administrative Procedures Act*, 79 YALE L.J. 571, 619-21 (1970) (analyzing relationship between agency and rulemaking process); David L. Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921, 932 (1965) (evaluating modes utilized by agencies to formulate policy).

ture. The agency, however, remains free to adopt and alter substantive policy as it sees fit.

This traditional legal process—approach fails to respond to the proponents of increased agency discretion because it would still force the agency, in any particular situation, to conform with rules that may prove unwise in that context. Even though the agency could adopt new policy to reflect changed circumstances or knowledge that the original policy was not working, adopting a new rule following the APA notice and comment procedures is cumbersome.<sup>36</sup> Perhaps because agencies are not directly electorally accountable, the process by which they develop legally binding rules has become protracted. Without the ballot box to provide even the semblance of public accountability, agencies rely instead on procedures that allow participation by all affected by the rule.<sup>37</sup> Furthermore, courts have mandated that agencies must explain how their decisions comport with the purposes and the constraints imposed by their authorizing statutes.<sup>38</sup> As a result, agencies often cannot alter rules on short notice to take into account the latest understanding about a problem, or unforeseen circumstances in a particular instance of rule application. Moreover, adopting rules by notice and comment procedures is expensive, and the agency faces uncertainty about whether a court will ultimately uphold a rule.<sup>39</sup> Hence, agencies may

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36. See Thomas O. McGarity, *The Courts and the Ossification of Rulemaking: A Response to Professor Seidenfeld*, 75 TEX. L. REV. 525, 528 (1997) [hereinafter McGarity, *Ossification of Rulemaking*]. Currently, to promulgate a substantive rule an agency must comport with the procedural requirements of 20 statutes and executive orders, imposing over 100 independent "steps" in the rulemaking process. See REQUIREMENTS FOR ADMINISTRATIVE RULEMAKING (unpublished document prepared by Mark Seidenfeld for ABA Section on Administrative Law, Committee on Rulemaking) (on file with author) (summarizing on one page grid, followed by seven pages of elaboration, procedural requirements imposed on agencies by statutes and executive orders).

37. See Donald R. Brand, *Reformers of the 1960s and 1970s: Modern Anti-Federalists?*, in REMAKING AMERICAN POLITICS 27, 37 (Richard A. Harris & Sidney M. Milkis eds., 1989); Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 NW. U. L. REV. 173, 182-83 (1997) [hereinafter Rossi, *Mass Participation*] (showing effect of mass participation in agency policymaking); Stewart, *Reformation*, *supra* note 25, at 1761.

38. See *American Paper Inst., Inc. v. American Elec. Power Serv. Corp.*, 461 U.S. 402, 413 (1983) (asserting adequacy of agency's examination of rules); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971) (examining legality of judicial review of agency actions); *C.K. v. New Jersey Dep't of HHS*, 92 F.3d 171, 182 (1996) (discussing Secretary's grant of waiver of compliance with federal laws); *cf.* *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 645-46 (1990) (rejecting requirement that agency consider factors that reflect policies within statutes other than one authorizing its action, where authorizing statute gives agency power to take action "appropriate and consistent with its duties under this title," i.e., the authorizing act).

shy away from amending rules in response to changes in circumstances that render the existing rules unsuitable.

The courts, however, rarely have heeded the legal process admonition that agencies should be required to limit their own discretion by rule. The Supreme Court has consistently held that agencies can make policy by adjudication as well as by rulemaking.<sup>40</sup> Agencies can even announce new policies through non-binding statements of policy without resorting to any procedures other than publication of the statement in the *Federal Register*.<sup>41</sup> Moreover, an agency enjoys latitude to write waiver provisions into a rule, which allows the agency to deviate from the rule when its application would undermine the policies the rule means to promote.<sup>42</sup> In addition,

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39. See Jerry L. Mashaw, *Improving the Environment of Agency Rulemaking: An Essay on Management, Games, and Accountability*, 57 LAW & CONTEMP. PROBS., Winter & Spring 1994, at 185-86 [hereinafter Mashaw, *Agency Rulemaking*] (streamlining agency rulemaking process); Thomas O. McGarity, *Regulatory Analysis and Regulatory Reform*, 65 TEX. L. REV. 1243, 1290 (1987) (critiquing procedures agencies use to implement regulatory actions); Mark Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking*, 75 TEX. L. REV. 483, 492 (1997) [hereinafter Seidenfeld, *Demystifying*].

40. See *SEC v. Chenery Corp.*, 332 U.S. 194, 202-03 (1947); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 295 (1974). Twice the Supreme Court has intimated that agencies might have to adopt rules prior to applying a policy to a person's detriment. In *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969), the NLRB used an order resolving an adjudication to announce a change in a long standing policy, but decided not to apply the new policy to the parties in that particular adjudication. The Supreme Court reversed, intimating that rules are the appropriate vehicle for announcing prospective regulatory changes. *Id.* at 763-65. In light of *Bell Aerospace*, which the Court decided only five years after *Wyman-Gordon* and which upheld the NLRB's adoption of a new policy in an adjudication, *Wyman-Gordon* is better viewed as holding only that an agency cannot use an adjudication to make policy that it then does not apply in that adjudication. In *Morton v. Ruiz*, 415 U.S. 199, 235 (1974), the Bureau of Indian Affairs attempted to limit statutorily provided assistance to Indians living on a reservation, relying on a guideline published in its internal Manual. The Supreme Court reversed and suggested that the Bureau could not rely on the Manual because it had not adopted it as a legislative rule. Although *Morton* can be read to suggest that agencies cannot make new policy except by rulemaking, it is usually viewed today as holding only that an agency cannot rely on a non-legislative rule as legally binding.

41. See Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311, 1313-14 (1992) [hereinafter Anthony, *Interpretive Rules*] (arguing that agencies abuse such rules to coerce private conduct); Peter L. Strauss, *The Rulemaking Continuum*, 41 DUKE L.J. 1463, 1467 (1992) (coining term "publication rulemaking" for such documents and noting need for such rules).

42. See Rossi, *Making Policy*, *supra* note 14, at 266 n.48 (noting that FERC's authority under Federal Power Act to grant waivers in public interest has even allowed FERC to exempt some entities from what appear to be regulatory requirements under Public Utility Regulatory Policies Act); see also Breger, *supra* note 30, at 340-44 (discussing waivers as means of achieving regulatory flexibility). In general, an agency need not provide a safety

unless Congress explicitly provides otherwise, agencies enjoy plenary legal discretion to refuse to enforce rule or statutory violations.<sup>43</sup> Finally, agency managers usually are adept at utilizing informal ties that they have developed over many years, with those outside the agency, to achieve the agency's regulatory mission in the face of formal constraints that would inhibit that achievement.<sup>44</sup> Thus, those who suggest that regulators today are substantively rule-bound may have overstated the extent to which the terrain of regulatory law is too confining.

### C. Congress's Increasing Propensity to Micromanage Agency Policy

I do not mean to deny that sometimes statutes limit the ability of agencies to devise standards for a particular context or tailor decisions to fit the needs of a particular regulated entity.<sup>45</sup> But, to the extent that regulatory

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valve allowing it to waive a rule in a particular context. *See* *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 601 n.44 (1981) (holding that Federal Communications Act requirement that FCC provide formal hearing in licensing proceeding, does not necessitate that FCC provide opportunity for applicant to show that it should be excepted from binding standard governing such licensing). Nonetheless, in several cases courts have rejected challenges to agency rules as arbitrary and capricious only because the agency promised to consider waiving the rules in appropriate circumstances. *See, e.g.*, *Nuclear Info. Resource Serv. v. NRC*, 969 F.2d 1169 (D.C. Cir. 1992); *P & R Temmer v. FCC*, 743 F.2d 918, 929 (D.C. Cir. 1984). These cases indicate the significance the courts, and society generally, place on an agency's ability to grant a waiver to rules when the agency deems such a waiver appropriate.

43. *See* *Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985) (holding that agency decision not to enforce rule is unreviewable because decision was traditionally committed to agency discretion); *see also* Ronald M. Levin, *Understanding Unreviewability in Administrative Law*, 74 MINN. L. REV. 689, 719 (1990) (contending that distinction in *Heckler v. Chaney* does not hinge on simple dichotomy between agency action and inaction); Jim Rossi, *Waivers, Flexibility and Reviewability*, 72 CHI.-KENT L. REV. 1359, 1366, 1371 (1997) (noting that courts review agency grants of waivers from rules, but often do not review denials of such waivers). *But cf.* Harold J. Krent, *Reviewing Agency Action for Inconsistency with Prior Rules and Regulations*, 72 CHI.-KENT L. REV. 1187, 1196 (1997) (noting that some courts have reviewed agency decisions not to enforce statute or rule based on allegations that decision not to enforce was inconsistent with existing rules).

44. *See* Ralph S. Brower & Mitchel Y. Abolafia, *Procedural Entrepreneurship: Enacting Alternative Channels to Administrative Effectiveness*, 26 AM. REV. PUB. ADMIN. 287, 292-300 (1996) (describing several strategies public managers use to overcome external constraints on decisionmaking).

45. *See* Richard B. Stewart, *Environmental Contracts and Covenants: A United States Perspective*, in ENVIRONMENTAL CONTRACTS AND COVENANTS: NEW INSTRUMENTS FOR A REALISTIC ENVIRONMENTAL POLICY? 143, 144-45 (Jan M. van Durné ed., 1993) (describing how detailed nature of environmental statutes and ability of private individuals to enforce statutory obligations create significant barriers to governmental agencies and regulated entities negotiation of facility specific agreements that would relieve entity from having to comply with more general environmental regulations).



imperfections arise from an attempt to balance flexibility and accountability by *ex ante* mandating criteria for decisions, the culprit seems to be an increased mood in Congress that detailed policy should be made by statute.<sup>46</sup> The problem is not the structure of administrative law imposed by courts, but the reaction of the politically accountable branches to complaints about burdensome agency regulation. Nonetheless, the propensity of Congress to micromanage agency decisionmaking does interfere with regulators' flexibility to structure their responses to the particular circumstances they face.

Political dissatisfaction with agency performance has, of late, led Congress to provide very detailed statutory prescriptions for regulatory problems.<sup>47</sup> Despite the details, however, Congress tends to write statutory prescriptions to cover broad rather than particular regulatory contexts. Hence, such standards exacerbate the problems of over and under inclusiveness of rules. In addition, statutory standards derive from a political process that downplays the importance of technical knowledge and deliberation, and instead emphasizes ideological interests and the preferences of special interest groups.<sup>48</sup> This process promotes adoption of unrealistically strict standards, which symbolically satisfies the ideologues, but limits enforcement authority or funding, which placates entities subject to the standards.<sup>49</sup> As

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46. Ironically, the congressional mood for prescribing agency discretion stems from the same concern that has prompted some commentators to call for increasing agency discretion — the ineffectiveness of regulatory government in the face of powerful interest group pressures. See, e.g., HOWARD, *supra* note 2, at 166-68 (noting problems that stem from characterizing regulation as securing rights of various interest groups). The difference between the congressional and academic response may be that Congress views agencies but not itself as being illegitimately subject to such pressure, while academics view all governmental institutions as tainted by special interest politics. See Thomas W. Merrill, *Capture Theory and the Courts: 1967 - 1983*, 72 CHI.-KENT. L. REV. 1039, 1053 (1997).

47. See Sidney A. Shapiro & Robert L. Glicksman, *Congress, the Supreme Court, and the Quiet Revolution in Administrative Law*, 1988 DUKE L.J. 819, 828 (noting trend toward more detailed statutory prescriptions of regulatory matters); Richard J. Lazarus, *The Neglected Question of Congressional Oversight of EPA: Quis Custodiet Ipsos Custodes (Who Shall Watch the Watchers Themselves)?*, 54 LAW & CONTEMP. PROBS., Autumn 1991, at 205, 228 [hereinafter Lazarus, *Neglected Question*]; Steven Shimbarg, *Checks and Balances: Limitations on the Powers of Congressional Oversight*, 54 LAW & CONTEMP. PROBS., Autumn 1991, at 241, 247.

48. See Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1544-45 (1992) [hereinafter Seidenfeld, *Civic Republican*].

49. See Richard J. Lazarus, *The Tragedy of Distrust in the Implementation of Federal Environmental Law*, 54 LAW & CONTEMP. PROBS., Autumn 1991, at 311, 328-29 [hereinafter Lazarus, *Tragedy of Distrust*] (describing how those who supported cleaning up environment got Congress to pass strict laws reflecting their aspirations, while those skeptical of environmental regulation managed to keep Congress from funding EPA sufficiently to substantially implement these laws); Lazarus, *Neglected Question*, *supra* note 47, at 222-24

a result, detailed statutory standards frequently pose a dilemma for implementing agencies; they can enforce standards that may be inappropriately structured for the situation at hand, often at great sacrifice to other parts of the agency's regulatory program, or ignore violations of the statutory mandates altogether.<sup>50</sup> If this dilemma is not enough to counsel against primary reliance on statutory standards, the rigidity of such standards is reinforced by the difficulty of getting Congress to amend a statute which is not working well. Even the cumbersome rulemaking process provides greater opportunity for prompt action than does the legislative process.<sup>51</sup>

In addition to promulgating detailed statutory standards, Congress has also driven agencies to rely on rulemaking in contexts and over timeframes that often prove counterproductive.<sup>52</sup> In several recent regulatory programs, Congress has codified the legal process approach to constraining

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(contending that political benefits of environmental regulation led Congress to pass "series of dramatic and uncompromising environmental statutes," but costs of implementing environmental regulation encouraged some in Congress to criticize EPA for regulatory excesses in enforcing these laws).

50. For the classic explanation of how overly strict standards can lead to underregulation, see generally MENDELOFF, *supra* note 4. Perhaps the best known example of an underenforced strict standard involves the Delaney Clause of the Food and Drug Act, 21 U.S.C. § 348(c)(3) (1994), which prohibits the Food and Drug Administration from approving any food additive that causes cancer in humans or animals. Because the Delaney Clause has the potential to require the FDA to ban many useful products that pose at most a small risk of cancer, the FDA has interpreted the clause so that it makes "no meaningful contribution to cancer protection." FRANK B. CROSS, *ENVIRONMENTALLY INDUCED CANCER AND THE LAW: RISKS, REGULATION, AND VICTIM COMPENSATION* 144 (1989). See generally Richard A. Merrill, *FDA's Implementation of the Delaney Clause: Repudiation of Congressional Choice or Reasoned Adaptation to Scientific Progress*, 5 *YALE J. ON REG.* 1 (1988) (describing how FDA minimized affect of Delaney Clause on its approval of food additives).

51. Despite these formidable drawbacks, Marshall Breger lauds "[c]learer and more precise statutory directives" as a means of ensuring accountability in flexible regulatory schemes. Breger, *supra* note 30, at 345. I fail to see, and Breger does not explain, how such *ex ante* constraints permit a meaningful degree of regulatory flexibility.

52. Requiring that agencies adopt rules by statutorily specified deadlines is an example of a procedural *ex ante* constraint. Some scholars contend that such procedural constraints allow Congress to ensure fidelity to the interests of the coalition responsible for enacting the legislation without dictating substantive outcomes that might later prove unwise. See, e.g., Matthew D. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 *VA. L. REV.* 431, 435-38 (1989); Matthew D. McCubbins et al., *Administrative Procedures as Instruments of Political Control*, 3 *J.L. ECON. & ORG.* 243, 253-64 (1987). There is little reason to believe, however, that Congress can impose *ex-ante* procedural and structural controls that effectively constrain agency discretion. See David B. Spence, *Administrative Law and Agency Policy-making: Rethinking the Positive Theory of Political Control*, 14 *YALE J. ON REG.* 407, 421-30 (1997). See generally Glen O. Robinson, *Commentary on "Administrative Arrangements and the Political Control of Agencies": Political Uses of Structure and Process*, 75 *VA. L. REV.* 483 (1989).

agency discretion by requiring the agency administering the program to adopt rules by statutorily prescribed deadlines.<sup>53</sup> Such deadlines induce agencies to misappropriate their resources because agencies must focus their regulatory efforts on rules prompted by litigation to enforce statutory deadlines, rather than on rules aimed at ameliorating the most serious problems within the agencies' statutory mandate.<sup>54</sup> Statutory deadlines can also prompt agencies to hurry their rulemakings and thereby adopt ill-conceived regulations.<sup>55</sup> Congress has also authorized citizen suits allowing private entities to seek penalties for rule and statutory violations — suits that can significantly interfere with regulators' enforcement policies.<sup>56</sup>

Like Congress, the President has also attempted to impose *ex ante* constraints on regulators. To the extent allowed by particular statutes, executive orders have required agencies to adopt regulations that maximize net social benefits as identified by cost-benefit analyses.<sup>57</sup> Competition between Congress and the President for control over administrative programs

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53. See Alden F. Abbott, *The Case Against Federal Statutory and Judicial Deadlines: A Cost-Benefit Appraisal*, 39 ADMIN. L. REV. 171, 172 n.1 (1987) (listing areas of regulation in which Congress has mandated agencies to adopt rules by statutory deadlines).

54. See Abbott, *supra* note 53, at 171; see also STEPHEN BREYER, *BREAKING THE VICIOUS CYCLE: TOWARD EFFECTIVE RISK REGULATION* 19-20 (1993) (highlighting problem of "random agenda selection" and attributing it in part to agencies responding to public pressures).

55. See Abbott, *supra* note 53, at 171-72; see also Jim Rossi, *Redeeming Judicial Review: The Hard Look Doctrine and Federal Regulatory Efforts to Restructure the Electric Utility Industry*, 1994 WIS. L. REV. 763, 793-800 (describing how FERC used adjudicatory proceedings and conditions on licenses to work-out some cost allocation problems created by deregulating generation of electric power).

56. See Barry Boyer & Errol Meidinger, *Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suits Under Federal Environmental Laws*, 34 BUFF. L. REV. 833, 891 (1985) (stating that "private enforcement actions might well disrupt or challenge the network of [enforcement] norms, assumptions and understandings that have grown up within the EPA and its counterpart state agencies"); cf. Michael I. Krauthamer, Note, *Public Interest Research Group v. Magnesium Elektron, Inc.: Undetectable Injury, a Loophole in Citizen Suit Standing*, 50 ADMIN. L. REV. 837, 851-54 (arguing that citizen suit provision of Clean Water Act empowers citizens unable to prove measurable injury in fact to bring actions against violators of Act when government chooses not to exercise discretionary enforcement power).

57. See, e.g., Exec. Order No. 12,866, 3 C.F.R. 638 (1994), reprinted at 5 U.S.C. § 601 (1994). Clinton's mandate that regulations be justified by a cost-benefit calculus is the latest in a series of executive orders, dating back to the Nixon presidency, mandating that agencies perform some sort of cost-benefit analysis. For a description of the history of these executive orders, see Robert V. Percival, *Checks Without Balance: Executive Office Oversight of the Environmental Protection Agency*, 54 LAW & CONTEMP. PROBS., Autumn 1991, at 127, 129-55.

has exacerbated the propensity of the political branches to micromanage agency decisionmaking.<sup>58</sup>

The political branches, however, need the ability to constrain agencies by specific statutory or executive directive to ensure that agency decisions do not reflect values inconsistent with consensus values of the polity. For example, in the face of the Reagan EPA's strong stand against implementing environmental laws,<sup>59</sup> Congress could justify forcing the agency to regulate by detailing regulatory prescriptions, requiring rulemaking by specific deadlines, and authorizing citizen suits to enforce statutory mandates. Such legislation was needed to prevent the agency from utilizing its discretion to undermine the preference of the polity for stronger environmental regulation.<sup>60</sup> In the context of an administration willing to implement the laws in good faith, however, these provisions are counter-productive.

Several proposed reforms would help alleviate problems caused by overly restrictive statutory prescriptions. First, Congress should avoid the temptation to write specific regulatory standards into statutes when such provisions are not needed to constrain a runaway agency. Authorizing and appropriation committee oversight usually permits Congress to communicate its concerns effectively to an agency without hamstringing the agency with inflexible statutory provisions.<sup>61</sup> Second, Congress should not impose enforceable rulemaking deadlines on agencies without having determined

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58. See Sidney A. Shapiro, *Political Oversight and the Deterioration of Regulatory Policy*, 46 ADMIN. L. REV. 1, 20 (1994) [hereinafter Shapiro, *Political Oversight*].

59. See generally JONATHAN LASH ET AL., *THE STORY OF THE REAGAN ADMINISTRATION'S ATTACK ON THE ENVIRONMENT: A SEASON OF SPOILS* (1984); see also RICHARD A. HARRIS & SIDNEY M. MILKIS, *THE POLITICS OF REGULATORY CHANGE: A TALE OF TWO AGENCIES* 258 (2d ed. 1996).

60. See Michael E. Kraft, *A New Environmental Policy Agenda: The 1980 Presidential Campaign and its Aftermath*, in ENVIRONMENTAL POLICY IN THE 1980S: REAGAN'S NEW AGENDA 29, 45-47 (Norman J. Vig & Michael E. Kraft eds., 1984) [hereinafter ENVIRONMENTAL POLICY] (reporting that opinion polls during congressional campaign of 1982 and into 1983 consistently indicated that large majority of Americans opposed Reagan's environmental policies).

61. For a description of Congress's means of overseeing agency policy, see JAMES W. FESLER & DONALD F. KETTL, *THE POLITICS OF THE ADMINISTRATIVE PROCESS* 273-76 (1991). The efficacy of such oversight assumes that the preferences of committee members parallel those of Congress as a whole. When members of committees with authority to oversee agency activities are "preference outliers," *ex ante* statutory constraints may provide a means of limiting iron triangles between the oversight committee, the agency and the regulated industry that leads to agency capture. See Kathleen Bawn, *Choosing Strategies to Control Bureaucracy: Statutory Constraints, Oversight, and the Committee System*, 13 J.L. ECON. & ORG. 101, 120 (1997). Assuming that the whole Congress is more representative of the entire polity than is any particular committee, such a situation is a special instance of the need for legislation to keep agency action within bounds consistent with the views of the general polity.

that the matters addressed by the required rules are imperative. Third, even when Congress finds it necessary, or perhaps politically expedient, to provide detailed regulatory provisions, it should consider allowing agencies to exempt particular entities or classes of entities from these provisions if the agency can persuasively demonstrate that applying those provisions would not serve the announced public purposes of the statute.<sup>62</sup>

Courts too can help eliminate the worst impact from statutory micromanagement. They should recognize that agencies need freedom to avoid perverse consequences from detailed statutory prescriptions and, therefore, should allow agencies significant leeway to interpret statutes in light of their underlying purposes. In *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,<sup>63</sup> the Supreme Court appeared to have recognized a broad domain for agency discretion in statutory interpretation.<sup>64</sup> Unfortunately, in the fourteen years since *Chevron*, many courts have restricted that domain using controversial and, by the thesis above, ill founded resort to strained textual readings of statutes.<sup>65</sup> A reinforcement of

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62. See DANIEL A. FARBER, *ECO-PRAGMATISM 193-95* (1999) (proposing that EPA be allowed to "reform" statutory provisions if it determines that such provisions applied to a particular class of entities, is unnecessary or prohibitively costly"). The Mine Safety and Health Act of 1977 provides an example of this flexible approach to regulation. That Act allows exemptions of mines from safety standards if the Secretary determines that an alternative to meeting a standard "guarantee[s] no less than the same measure of protection afforded by such a standard, or that application of such standard . . . will result in the diminution of safety to the miners . . ." 30 U.S.C. § 811(c) (1994).

63. 467 U.S. 837 (1984).

64. See Linda R. Cohen & Matthew L. Spitzer, *Solving the Chevron Puzzle*, 57 *LAW & CONTEMP. PROBS.*, Spring 1994, at 65, 105 (noting that *Chevron* signaled to lower courts Supreme Court's desire to allow greater agency discretion in interpreting statutes). Overall, lower courts initially read *Chevron* as such a signal. See Peter H. Schuck & E. Donald Elliott, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 *DUKE L.J.* 984, 1029-36 (presenting evidence that *Chevron* increased appellate court affirmances, and reduced reversals and remands, of agency statutory interpretation).

65. See Seidenfeld, *Syncopated Chevron*, *supra* note 33, at 119-24. Some have argued that textualism is justified because legislative history is fiction. See Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 *HARV. J.L. & PUB. POL'Y* 61, 68 (1994); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 *DUKE L.J.* 511, 517. Others have questioned whether legislative history is a reliable indicator of congressional understanding of statutes it passes. See *Blanchard v. Bergeron*, 489 U.S. 87, 98-100 (1989) (Scalia, J., concurring); Kenneth W. Starr, *Observations About the Use of Legislative History*, 1990 *DUKE L.J.* 371, 376-77. John Manning recently has argued that textualism is justified as a means of preventing Congress from self-delegating the ability to influence legal interpretation to congressional committees. See John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 *COLUM. L. REV.* 673, 718-19 (1997). But courts have gone beyond refusing to look at legislative history and have even refused to admit a meaning well within the general understanding allowed by text in order to overturn an agency interpretation. See Richard J. Pierce, *The Supreme Court's New Hypertextualism:*

the original judicial understanding of *Chevron* as a signal that in all but the clearest cases agencies should have discretion to interpret statutes as the current regulatory environment requires would go far towards unburdening regulations from anachronistic and otherwise overly restrictive prescriptions.<sup>66</sup>

The recent move by Congress to micromanage agency decisionmaking by providing detailed *ex ante* prescriptions is not the only culprit causing inflexible decisionmaking. Although agencies are not free to ignore statutes, they do have significant leeway to interpret them to allow necessary regulation.<sup>67</sup> Agencies also frequently can offer special treatment to cooperative entities willing to go beyond conduct the agency can require under its authorizing statute,<sup>68</sup> or the agency can use its authorized powers to twist the arms of entities unwilling to cooperate.<sup>69</sup> Agency flexibility to use waivers, enforcement discretion, and arm-twisting, however, will not help if the internal norms of the agency itself are not conducive to flexibility.

## II. NORMS AS INFLEXIBLE RULES FOR AGENCY DECISIONS

In addition to constraining agency discretion, rules can facilitate agency exercise of that discretion. A facilitative rule need not be a formal statement limiting an agency's actions; it may be a norm, convention, or stan-

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*An Invitation to Cacophony and Incoherence in the Administrative State*, 95 COLUM. L. REV. 749, 766-74 (1995). Using such a hyper-textual technique to restrict the discretion of the executive branch is not justified by any of the traditional defenses of textualism. See Seidenfeld, *Syncopated Chevron*, *supra* note 33, at 120; cf. Peter L. Strauss, *When the Judge is Not the Primary Official with Responsibility to Read: Agency Interpretation and the Problem of Legislative History*, 66 CHI.-KENT L. REV. 321, 350 (1990) (suggesting that concerns about abuses from court's use of legislative history do not apply with equal force to agency use of such history because agency is disciplined by continuing relationships with White House and Congress and its committees).

66. One might still retain meaningful judicial review over agency statutory interpretation by having courts review the reasoning of the agency interpretative process, and remand interpretations that the agency could not adequately justify in light of the decisionmaking record. See Seidenfeld, *Syncopated Chevron*, *supra* note 33, at 127-28.

67. Even with courts reading *Chevron* narrowly, it remains a durable symbol that courts should consider deferring to agency interpretations of statutes. See Ronald M. Levin, *The Anatomy of Chevron: Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253, 1258-59 (1997).

68. See Douglas C. Michael, *Cooperative Implementation of Federal Regulations*, 13 YALE J. ON REG. 535, 558-95 (1996) (surveying current uses of cooperative regulation).

69. See Lars Noah, *Administrative Arm-Twisting in the Shadow of Congressional Delegations of Authority*, 1997 WIS. L. REV. 873, 876-95 (surveying forms of arm-twisting used by federal agencies). Arm-twisting is controversial, however, precisely because it allows an agency to evade "substantive limitations on [its] delegated authority." *Id.* at 875.

dard that the agency uses to guide its decisionmaking. Any agency response to a situation that follows from placing the facts of the situation into predetermined categories such that the placement leads to a unique decision involves application of a "rule."<sup>70</sup> But, even defined as mere guides that make the agency decisionmaking task tractable, rules still can interfere with the flexibility of regulation by leading the agency to ignore particularities of the circumstances facing it that might warrant the agency deviating from its established norms.

#### A. Norms as Means of Guiding Agency Discretion

Agencies, like other organizations, rely on rules to simplify the decisionmaking process.<sup>71</sup> Rather than have to reanalyze the implications of a decision for each situation, the agency can instead focus on which rule to apply and how to apply it. But simplification alone is not inherently valuable; the simplification must serve the agency's ultimate goals. Rules can serve such goals in a number of ways.

First, rules often develop to reflect an agency's feedback from regulatory outcomes in previous situations. They are developed and handed down as routines that govern the organization's behavior in a manner that avoids unpleasant outcomes.<sup>72</sup> Rules so developed allow an agency to utilize its learned experience in an efficient and coherent manner.

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70. Rule application can occur at any point in the decisionmaking process. Agencies rely on "rules," used in the broad sense I have described, when they decide what issues to address, who will make the decision, what information is relevant to the decision and what outcome follows from the information. See Xueguang Zhou, *Organizational Decision Making as Rule Following*, in ORGANIZATIONAL DECISION MAKING 257, 259 (Zur Shapira ed., 1997).

71. See ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* 31-32 (1984) (finding that simple rules of decisionmaking outperform complex models in some game experiments); Ronald A. Heiner, *The Origin of Predictable Behavior*, 73 AM. ECON. REV. 560, 565-67 (1983) (noting that organizations develop simple predictable behavior, i.e., norms, in response to the complexity of decisional situation); see also HERBERT A. SIMON, *ADMINISTRATIVE BEHAVIOR* 118-19 (4th ed. 1997) (describing how administrators "satisfice" to simplify decisions and focus their attention on factors they consider crucial).

72. See RICHARD R. NELSON & SIDNEY G. WINTER, *AN EVOLUTIONARY THEORY OF ECONOMIC CHANGE* 99 (1982) (asserting that routinization of activity provides most important form of storage of organization's operational knowledge); Barbara Levitt & James G. March, *Organizational Learning*, 14 ANN. REV. SOC. 319, 323, 327-29 (1988) (describing how experiential knowledge becomes part of organization's memory); cf. Robert Axelrod, *An Evolutionary Approach to Norms*, 80 AM. POL. SCI. REV. 1095, 1109 (1986) (stating that using computer simulations to show how learning from experience can lead to norms, but demonstrating also that without "metanorm" or some other external mechanism for supporting norm, how norms created by such learning can collapse).

Second, rules can relieve tensions that derive from agency managers' monitoring subordinates' decisions.<sup>73</sup> A director of an office within an agency can more easily check to ensure that a subordinate correctly applied a rule than she can reassess an ad hoc decision. More importantly, the employee is not likely to feel specially singled out or punished when the director monitors for compliance with rules.

Third, rules can decrease the need for monitoring behavior. In fact, if rules are sufficiently pervasive that all behavior becomes routinized, so little discretion is left to agency staff members that the need for hierarchical structure over particular applications vanishes.<sup>74</sup> Rules also allow an agency to resolve uncertainty in a predictable and efficient manner.<sup>75</sup> Decisionmakers often face uncertainty about how information relates to the desirability of their choices. Does a study that shows a slight increase in laboratory rats' cancer rates at exposure levels a hundred times greater than would be experienced by any human support approving a food additive? One could argue that point either way. A rule mandating a ban on any food additive that increases cancer rates in laboratory animals would resolve the uncertainty about the import of this information. By restricting the universe of relevant categories, and thereby sometimes the universe of relevant information, rules allow agencies to reach a predictable outcome.<sup>76</sup>

### *B. The Potential for Norms to Lead to Non-optimal Decisions*

Although regulatory agencies impose most facilitative rules on themselves in the form of decisionmaking norms, and can change them without invoking any formal procedure, such norms can cause agencies to make non-optimal decisions.<sup>77</sup> Organizations tend to follow such norms un-

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73. See ALVIN W. GOULDNER, *PATTERNS OF INDUSTRIAL BUREAUCRACY* 177 (1954) (noting ability of norms to decrease tension created by managerial oversight).

74. See MICHEL CROZIER, *THE BUREAUCRATIC PHENOMENON* 53 (1964) (describing how, in French civil service, routinization obviates need for supervisors to exercise direct authority over those in their charge).

75. See Zhou, *supra* note 70, at 261.

76. See MARCH, *supra* note 10, at 89 (noting that rules are rigid precisely because they are meant to make rule-based actions predictable to others); Heiner, *supra* note 71, at 570-71 (ascribing development of predictable behavior, i.e., norms, to limitations on organization's ability to select maximally desirable alternatives and uncertainty of how information affects such outcomes).

77. See MARCH, *supra* note 10, at 82-91 (explaining how biases in recalling and evaluating experiences, as well as in interpreting feedback regarding outcomes to which rule application leads, can result in development of maladaptive rules); Hillel J. Einhorn, *Learning from Experience and Suboptimal Rules in Decision Making*, in *JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES* 268, 273-76 (Daniel Kahneman et al. eds., 1982) (explaining how feedback from outcomes can reinforce sub-optimal decisionmaking rules);



thinkingly.<sup>78</sup> That is precisely the point: The agency uses the norm to avoid having to devote resources to thinking through the particular decision in light of every factor that potentially might bear on its wisdom. Moreover, norms tend to outlive their usefulness.<sup>79</sup> An agency usually will not alter decisionmaking norms unless it faces a crisis which vividly calls into question the benefit of these norms,<sup>80</sup> or the structure of the agency changes to include individuals whose backgrounds lead them to use different norms and hence question the ones the agency has traditionally used,<sup>81</sup> or an external monitor, such as the President, Congress, or the courts, imposes a constraint that requires the agency to alter these norms.<sup>82</sup>

There is a need for a balance in an agency's strict reliance on internal norms. To the extent a norm represents a simplification of the decision-making process based on an agency's analytic evaluation of its past experience, use of the norm may provide an efficient means for the agency to bring its expertise to bear on the problem. The ability of the agency to translate experience into such simplifying norms forms much of the foundation of the expertise rationale for delegating power to the agency in the first place.<sup>83</sup> But, efficiency gains are offset by the costs attributable to the

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Heiner, *supra* note 71, at 568-70 (describing how evolutionary process for developing rules that govern human behavior may not result in optimal behavior and may even allow dysfunctional behavior to persist); *cf.* Eric A. Posner, *Law, Economics, and Inefficient Norms*, 144 U. PA. L. REV. 1697, 1711-25 (1996) (arguing that social norms, in general, can be inefficient).

78. See Dennis Chong, *Values Versus Interests in the Explanation of Social Conflict*, 144 U. PA. L. REV. 2079, 2084 (1996) (suggesting that habits that dictate choice, i.e., decisionmaking norms, can reflect mindless repetition).

79. See B. GUY PETERS, *AMERICAN PUBLIC POLICY: PROMISE AND PERFORMANCE* 98-99 (3d ed. 1993) [hereinafter PETERS, *AMERICAN PUBLIC POLICY*]; FRANCIS E. ROURKE, *BUREAUCRACY, POLITICS, AND PUBLIC POLICY* 30 (2d ed. 1976).

80. See Zhou, *supra* note 70, at 278.

81. *Cf.* DOUGLAS YATES, *BUREAUCRATIC DEMOCRACY: THE SEARCH FOR DEMOCRACY AND EFFICIENCY IN AMERICAN GOVERNMENT* 132 (1982) (asserting that "the force of [guild-like] professionalism is diminished by conflict among various professional groups over the shape and substance of policy").

82. See Zhou, *supra* note 70, at 268 (noting influence of external legal requirements on internal decisionmaking norms); *cf.* Errol E. Meidinger, *Regulatory Culture: A Theoretical Outline*, 9 LAW & POL'Y 355, 370-72 (1987) (noting that statutes and court decisions can help structure agency's regulatory culture, but cannot dictate that culture uniquely).

83. According to one of the most influential proponents of the expertise rationale for administrative agencies, and the legal-academic father of the New Deal, James Landis, "expertness cannot derive [other than from a long continuance in office]. It springs only from that continuity of interest, that ability and desire to devote fifty-two weeks a year, year after year, to a particular problem." JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 23 (1938); see also ROURKE, *supra* note 79, at 15 (stating that "[d]ealing day in and day out with the same tasks gives public agencies an invaluable kind of practical knowledge that comes from experience"); *cf.* *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144,

norm precluding the agency from adjusting its decision to particular circumstances.<sup>84</sup> Hence, whether use of the norm is beneficial will depend on the agency's past experiences and the particular circumstances it faces. To the extent the norm merely allows an agency to avoid having to resolve uncertainty, the desirability of its use will also depend on particular circumstances.

In addition to knowledge borne of experience, agencies are given broad regulatory power because they have professional expertise and the capability to implement technical regulatory requirements.<sup>85</sup> In particular, the delegation of decisionmaking to agencies is premised at least in part on their ability to collect and analyze information and to understand the technical issues relevant to the decision agencies face.<sup>86</sup> Again, a norm that relieves the agency of collecting and analyzing data in a particular context may lead the agency to reach a non-optimal outcome. This in itself does not mean that use of the norm is not desirable, because collection and analysis of data takes time and resources. If, however, the benefit that would flow from a decision that reflected such collection and analysis of information exceeds the costs of collection and analysis, then use of the norm is counterproductive. Similarly, use of decisionmaking norms to decrease monitoring costs is detrimental if the resulting decisions under the norm deviate from the optimal decision more than is justified by the decreased costs.

Generally, it is difficult for an agency or an external monitor to know when use of a norm is justified. On the one hand, professionals trained to solve a class of regulatory problems may force a particular problem into an inappropriate decisionmaking structure with which they are familiar merely because solutions within that structure exist.<sup>87</sup> On the other hand, those

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151-53 (1991) (deferring to Secretary of Labor's interpretation of his regulation, rather than interpretation of OSHRC, because Secretary's involvement with every day enforcement allows him to develop expertise that explains, in part, Congress's delegation of law making functions to Secretary).

84. Cf. William H. Rodgers, Jr., *Where Environmental Law and Biology Meet: Of Pandas' Thumbs, Statutory Sleepers, and Effective Law*, 65 U. COLO. L. REV. 25, 36-37 (1993) (analogizing some maladaptations in law to those in evolution that occur when adaptation that serves species will in one environment proves to be liability in changed environment).

85. See ROURKE, *supra* note 79, at 16-17.

86. See B. GUY PETERS, *THE POLITICS OF BUREAUCRACY* 225-26 (4th ed. 1995) [hereinafter PETERS, BUREAUCRACY].

87. See Einhorn, *supra* note 77, at 273-76. Similar concerns — that bureaucrats immersed in the task of solving a single social problem may lack the balanced perspective needed for sound policy decisionmaking — have prompted arguments for retaining judicial review by generalist courts despite the inefficiency of such review by generalists. See Har-

outside the profession may not understand the basis for the norm at all. Thus, a reviewer almost has to perform the analysis that the norm obviates in order to know for sure whether use of the norm was unwise. Sometimes, however, one can identify a systematic bias introduced by use of a decisionmaking heuristic.<sup>88</sup> When a heuristic leads to such a bias, regulatory decisions may consistently err on one side of optimal outcomes. This consistency may compound the degree to which decisions deviate from optimality. For example, suppose the EPA, in setting an allowable level of a particular pollutant, must determine the effects of given levels of a toxin in the blood, the extent to which exposure to the pollutant leads to absorption of the toxin, and the extent to which individuals are exposed to the pollutant.<sup>89</sup> If the EPA uses a norm that dictates caution in setting allowable pollution levels and therefore resolves the uncertainties in each of the three determinations in favor of greater protection of health, then the EPA will establish a standard that may be greatly more restrictive than health concerns warrant, even given the EPA's preference for resolving uncertainty to favor greater protection.

### C. *The Difficulty with Ex Ante Prescriptions of Agency Norms*

Reliance on internal norms as rules poses a difficult problem for the structure of administrative government. Norms that affect decisionmaking are pervasive.<sup>90</sup> They enter the agency at every level at which formal and informal decisions are made, from the agency's formation of an understanding of its regulatory role to the decision about whether and how to enforce particular regulatory provisions against a single entity in a particular context. Agency decisionmakers often are not conscious that they are relying on such norms.<sup>91</sup> In addition, the factors that affect whether reliance

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old H. Bruff, *Specialized Courts in Administrative Law*, 43 ADMIN. L. REV. 329, 331-32 (1991) [hereinafter Bruff, *Specialized Courts*].

88. The cognitive psychology of decisionmaking has identified a host of systematic biases caused by individuals' reliance on heuristics. See Amos Tversky & Daniel Kahneman, *Judgement Under Uncertainty: Heuristics and Biases*, 185 SCIENCE 1124-31 (1974); Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 SCIENCE 453-58 (1981).

89. In setting the primary national ambient air quality standard for lead, the EPA in fact did have to resolve all three of these decisions to determine the level at which borne lead will have an adverse impact on health. See *Lead Indus. Ass'n v. EPA*, 647 F.2d 1130, 1138-45 (D.C. Cir. 1980) (affirming EPA's lead NAAQS).

90. See Zhou, *supra* note 70, at 259; see also RICHARD M. CYERT & JAMES G. MARCH, *A BEHAVIORAL THEORY OF THE FIRM* 112 (1963) (noting that "[t]he way in which the organization searches for alternatives is substantially a function of the operating rule it has").

91. See ELSTER, *supra* note 10, at 100 (asserting that "[t]he operation of [social] norms is to a large extent blind, compulsive, mechanical or even unconscious").

on a norm is desirable vary with the details of the circumstances surrounding an agency decision. It is the very complexity and relevancy of such details that determines whether reliance on a decisionmaking norm is desirable. Hence dictating, *ex ante*, the norms on which an agency may rely and when the agency should rely on these norms is impracticable. *Ex ante* constraints on use of such norms will not work.

A more promising approach would attempt to structure the agency to avoid having a dominant set of norms that result in systematically biased outcomes. For decisions involving political judgments, as most regulatory decisions do at some level, the structure should guard against norms that implement values inconsistent with those shared by the polity generally. For example, one might incorporate into the Army Corps of Engineers a group of environmental scientists to counterbalance the bias engineers have towards development and the belief they tend to have in technical solutions to environmental problems. This alone, however, might not be sufficient. Experience with corporate mergers have shown that merely combining groups with different backgrounds and decisionmaking norms does not ensure against misplaced reliance on such norms: One group might dominate the process and simply ignore the input from the other group;<sup>92</sup> alternatively, the group cultures might clash irreconcilably causing stagnation of the decisionmaking process altogether.<sup>93</sup> Thus, along with a call for inclusion of staff members with disparate backgrounds in the decisionmaking process, one needs to specify meta-rules that will determine how those members will interact.<sup>94</sup>

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92. See Gordon A. Walter, *Culture Collision in Mergers and Acquisitions*, in ORGANIZATIONAL CULTURE 301, 311-13 (Peter J. Frost et al. eds., 1985) (describing how one company's culture tends to override that of other for various types of mergers and acquisitions).

93. A unified, "strong" corporate culture helps a corporation to overcome organizational complexity allowing coordination and control of its employees' behavior, which in turn allows the corporation to respond quickly and efficiently to its external environment. See JOHN P. KOTTER & JAMES L. HESKETT, CORPORATE CULTURE AND PERFORMANCE 141-42 (1992); DANIEL R. DENISON, CORPORATE CULTURE AND ORGANIZATIONAL EFFECTIVENESS 180 (1990). Although a strong culture does not guaranty that the response to the external environment will improve performance, see KOTTER & HESKETT, *supra*, the absence of any organizational culture makes coordinated action extremely difficult. Cf. Meidinger, *supra* note 82, at 359 (asserting that "[o]nly by working from some base of shared understandings can any group of people act in concert with each other").

94. How the various group members interact will depend on what tasks they are assigned and what authority they, or the office to which they belong, are given over the decisions of the group. If offices that do not share decisionmaking norms retain overlapping authority over a decision, any conflict about that decision will have to be resolved at a higher level of authority within the agency. Resolution at a higher level of authority decreases the efficiency of decisionmaking but increases the accountability of the agency by

This too is difficult to do *ex ante*. The degree to which the structure of administrative law should empower non-traditional offices in an agency depends on the propriety of reliance on the agency's traditional decision-making norms. Again, this will vary with the particularities of the decision facing the agency. In many cases, the use of norms that have dominated agency decisionmaking will reflect valuable lessons from the agency's past experience and should be encouraged, while in other cases unthinking reliance on such norms will result in bad decisions. Thus, the intractability of determining when reliance on norms is appropriate renders *ex ante* controls over agency decisionmaking insufficient.

The inability of *ex ante* constraints to foresee the myriad of contexts in which regulators will have to apply rules, along with the abstract nature of decisionmaking norms, make *ex ante* constraints on agency discretion, constraints that prevent the agency from making policy or deviating from it once made, unlikely means of balancing the need for constraints against the need for regulatory flexibility. Review of particular agency decisions after they are made, what I call *ex-post* review, thus presents itself as the likely means for providing such a balance. But, recent recognition of the costs of *ex-post* review suggests that first one must determine whether meaningful review is appropriate at all or alternatively whether agencies should be free to adopt individual rules or reach particular adjudicatory decisions independent of oversight on any level other than political oversight of the agency's overall performance.

### III. THE NEED FOR EX-POST CONSTRAINTS ON AGENCY DISCRETION

#### A. Arguments for Relaxing Ex-Post Review of Agency Decisions

Although *ex-post* constraints may be needed to promote wise administrative decisionmaking, unfortunately, such constraints have contributed to the judicialization of the rulemaking process.<sup>95</sup> Since the late 1960s, courts have relied on active review of agency decisions to balance the tension between the needs for regulatory flexibility and legal constraint. Courts have allowed agencies significant substantive and procedural leeway in making policy to implement their enabling statutes, but have demanded that agencies demonstrate that they have seriously deliberated about the policy options facing them. For example, the Supreme Court has held that, in rulemaking proceedings, courts cannot mandate that an agency use proce-

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allowing greater control of policy development by agency heads and ultimately the polity. See HERBERT A. SIMON ET AL., PUBLIC ADMINISTRATION 164-68 (Transaction ed. 1991).

95. See McGarity, *Ossification of Rulemaking*, *supra* note 36, at 528; Pierce, *Unintended Effects*, *supra* note 5, at 26.

dures in addition to the minimal procedures required by the APA or those specified by the agency's own rules.<sup>96</sup> The courts continue to allow agencies to set policy in case-by-case adjudication as well as in policy statements and guidelines not even subject to these minimal notice and comment requirements.<sup>97</sup> At the same time, however, courts have required agencies to open their administrative proceedings to regulatory beneficiaries not directly subject to the rule or order at issue.<sup>98</sup> Judges have also scrutinized the reasons agencies give for their decisions to ensure that the agencies consider every factor that the court deems relevant to those decisions.<sup>99</sup>

In the past decade, both Capitol Hill and the White House have also increased their ex-post scrutiny of agency rulemaking. Agencies must now prepare economic assessments that identify the costs and benefits of major

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96. *Vermont Yankee Nuclear Power Corp. v. National Resources Defense Council, Inc.*, 435 U.S. 519 (1978). More recently, the Supreme Court held that courts could not rely on general notions of fairness to require that an agency follow procedures in informal adjudication that are not mandated by the authorizing statute or the agency rules, even though this may relieve the agency from providing any procedure at all in such adjudications. See *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 655 (1990).

97. See *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 295 (1974) (affirming agency policy set in adjudicatory proceeding); *SEC v. Chenery Corp.*, 332 U.S. 194, 202-03 (1947) (same); *Pacific Gas & Elec. Co. v. Federal Power Comm'n*, 506 F.2d 33, 39 (D.C. Cir. 1974) (rejecting challenge to agency policy statement because agency indicated it would consider deviations from policy in individual cases). Several administrative law scholars believe that these holdings leave agencies too much leeway to adopt standards that effectively bind private entities without affording these entities sufficient notice and opportunity to participate in developing these standards. See Anthony, *Interpretive Rules*, *supra* note 41, at 1317-18; Michael Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 DUKE L.J. 381, 383-84, 402.

98. See *National Welfare Rights Org. v. Finch*, 429 F.2d 725, 735-38 (D.C. Cir. 1970); *Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994, 1005 (1966); see also Albert K. Butzel, *Intervention and Class Actions before the Agencies and the Courts*, 25 ADMIN. L. REV. 135, 135-37 (1973) (stating that agencies now allow liberal intervention in formal adjudicatory proceedings); Stewart, *Reformation*, *supra* note 25, at 1749 (describing how increased access to agency proceedings was part of general movement of administrative law towards accommodating interest groups).

99. Even before the inception of the APA, courts evaluated agency decisions based on the reasons the agency gave for them. See, e.g., *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943). Nonetheless, review of agency policy choices was extremely deferential until the Supreme Court intimated that courts were to ensure that agencies carefully considered all factors relevant to the decision, *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971), and Judge Leventhal announced the hard look test, see *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970), under which courts involve themselves intimately with the issues raised by a decision in order to assess whether the agency gave a sufficiently careful look at all such issues. See Seidenfeld, *Demystifying*, *supra* note 39, at 491-92 (describing operational demands of hard look test).

rules.<sup>100</sup> The Office of Management and Budget (OMB) reviews these assessments and can force agencies to negotiate about rules that it finds are not economically justified.<sup>101</sup> Congress now reviews all agency rules on a fast-track basis; Congress has sixty days to disapprove a major legislative rule by an up-or-down vote before the rule goes into effect.<sup>102</sup>

According to critics of the current regulatory process, ex-post review has discouraged flexible regulation. It induces agencies to engage in collection and analysis of data merely to satisfy its overseers — Congress, the President, and the courts — even when the information generated will not influence the agency decision.<sup>103</sup> Such review encourages agencies to open their policymaking deliberations to a myriad of interest groups who view others in the proceeding as adversaries. This adversarial atmosphere in turn fosters strategic use of the agency proceeding for delay, obfuscation, or creating a record for a subsequent court challenge.<sup>104</sup> The demands of ex-post review force the agency to devote a vast quantity of resources to formalities of explanation in order for the agency policy to survive judicial and OMB review,<sup>105</sup> and increases uncertainty about whether the agency will satisfy such review even after performing the required analyses.<sup>106</sup> At best, critics claim, agencies will attempt to meet the demands of such review, which will greatly slow the adoption of rules; at worst, agencies will shy away from their regulatory mandates altogether. The result has been

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100. See Exec. Order No. 12,866, 3 C.F.R. 638 (1994), reprinted in 5 U.S.C. § 601 (1994). President Reagan was the first to impose a cost-benefit requirement on agency rules, although a OMB review of some rules as a purported means of monitoring regulatory costs dates back to President Nixon. See Percival, *supra* note 57, at 133-34.

101. See Mark Seidenfeld, *A Big Picture Approach to Presidential Influence of Agency Policy-Making*, 80 IOWA L. REV. 1, 44-45 (1994) [hereinafter Seidenfeld, *Big Picture Approach*].

102. The Small Business Regulatory Fairness Act of 1996, 5 U.S.C. §§ 801, 804 (Supp. III 1997). For a thorough description of the fast track review process, see generally Daniel Cohen & Peter L. Strauss, *Congressional Review of Agency Regulations*, 49 ADMIN. L. REV. 95 (1997).

103. See Philip J. Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1, 21 (1982); Melnick, *supra* note 3, at 247; Pierce, *Two Problems*, *supra* note 4, at 310.

104. See Harter, *supra* note 103, at 20-21; Robert B. Reich, *Regulation by Confrontation or Negotiation?*, HARV. BUS. REV., May-June 1981, at 82, 86-91; Robert A. Kagan, *Adversarial Legalism and American Government*, 10 J. POL'Y ANALYSIS & MGMT. 369, 375-79 (1991).

105. See Richard J. Pierce, *Judicial Review of Agency Actions in a Period of Diminishing Agency Resources*, 49 ADMIN. L. REV. 61, 71 (1997).

106. See *id.* at 65; Mashaw, *Agency Rulemaking*, *supra* note 39, at 203. *But cf.* Patricia M. Wald, *Regulation at Risk: Are Courts Part of the Solution of Most of the Problem?*, 67 S. CAL. L. REV. 621, 636-39 (1994) (concluding that during 1992-93 term, D.C. Circuit remanded only six of thirty-six rules because the agency failed to supply adequate reasons, and noting that, even in these cases, the court frequently reversed only part of rule).

described as the ossification of the rulemaking process,<sup>107</sup> or alternatively as paralysis by analysis.<sup>108</sup> The solution, say critics of the process, is to relieve the agency of the need to persuade reviewers of the wisdom of the agency policy.<sup>109</sup> By their accounts, review should depend only on the outcome the agency reaches, not on the process it used to get to that decision, and judicial review should not be at all searching.

### B. Problems with Relaxing Ex-Post Review

Ex-post review appears to have contributed to slowing agency rulemaking processes and making them costlier than the proponents of the APA envisioned in 1947.<sup>110</sup> But, these affects may be justified in light of a genuine concern about the power many agencies now wield. It seems appropriate that an agency involve the general public and take care to consider feasible alternatives to a regulatory scheme that will cost hundreds of millions of dollars and affect the health and welfare of a large segment of the populace. Even for less significant rules, such review may serve a legitimating function in our democratic system.<sup>111</sup> Moreover, there are indi-

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107. See McGarity, *Deossifying*, supra note 3, at 1385-86 (attributing term "ossification" to Don Elliot).

108. See Thomas O. McGarity, *The Expanded Debate over the Future of the Regulatory State*, 63 U. CHI. L. REV. 1463, 1523 (1996); Zygmunt J.B. Plater, *Environmental Law as a Mirror of the Future: Civic Values Confronting Market Force Dynamics in a Time of Counter-Revolution*, 23 B.C. ENVTL. AFF. L. REV. 733, 757 (1996); Sydney M. Wolf, *Fear and Loathing About the Public Right to Know: The Surprising Success of the Emergency Planning and Public Right-to-Know Act*, 11 J. LAND USE & ENVTL. L. 217, 317 (1996).

109. See McGarity, *Deossifying*, supra note 3, at 1453; Pierce, *Unintended Effects*, supra note 5, at 29; cf. Patricia M. Wald, *Making "Informed" Decisions on the District of Columbia Circuit*, 50 GEO. WASH. L. REV. 135, 138 (1982) (suggesting that courts should act as judicial "nursemaids" to agency decisionmaking).

110. "The consensus in 1946 was that administrative procedure, rather than judicial review, was the best mechanism for controlling agency discretion." Patricia M. Wald, *Judicial Review in Midpassage: The Uneasy Partnership Between Courts and Agencies Plays On*, 32 TULSA L.J. 221, 223 (1996) [hereinafter Wald, *Judicial Review*]; see also ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES 77-79 (1941) (suggesting that extensive judicial review would destroy benefits of expertise and specialization provided by administrative agencies); Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1266-68 (1986) (stating that "a strong measure of judicial deference to agency decisions accurately reflected the tenor of the leading administrative decisions handed down in the post-New Deal era").

111. See Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 470-74 (1987) (arguing that "hard look" judicial review constrains agencies from engaging in improperly motivated decisions); *id.* at 456 (suggesting that OMB review of rulemaking "unites . . . [the] seemingly antagonistic aspirations of . . . technical expertise and political accountability"); Sidney A. Shapiro & Richard E. Levy, *Heightened Scrutiny of the Fourth Branch: Separation of Powers and the Requirement of Adequate Reasons for Agency*



cations that ex-post review helps curb documented abuses of the regulatory system.<sup>112</sup> Hence, before calling for a return to an era of unfettered agency discretion, one should evaluate the extent to which various aspects of ex-post review help check abuses and the extent to which these aspects impose superfluous costs on the regulatory system. I have identified three major categories into which most of problems caused by relatively unchecked discretion fall: Domination of agency decisionmaking by special interest groups, unwarranted political influence on agency decisionmaking, and agency imposition of idiosyncratic values via its regulatory decisions.

### 1. *The Threat of Interest Group Domination of Agency Policy*

Unfettered agency discretion to implement the purposes of a rule may lead to domination of agency decisionmaking by special interest groups. As regulators' discretion increases, so does the potential for special interest groups to influence agency policy. The concern of interest group domination is a generalization of the notion of capture that became a major focus of those who studied economic regulation from the 1950s to the 1970s.<sup>113</sup> But domination is a broader concept than capture; it occurs whenever an interest group consistently influences an agency to regulate for the benefit of the group rather than to promote stated statutory aims.<sup>114</sup> Although, like

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*Decisions*, 1987 Duke L.J. 387, 428-30, 432 (contending that heightened scrutiny of agency reasoning preserves both liberal values reflected in Constitution and progressive values which undergird administrative state).

112. See Sanford E. Gaines, *Decisionmaking Procedures at the Environmental Protection Agency*, 62 IOWA L. REV. 839, 849-50 (1977) (describing how Eighth Circuit twice reversed EPA's wet corn milling effluent standard which was not supported by data in rule-making record); see also William F. Pedersen, *Formal Records and Informal Rulemaking*, 85 YALE L.J. 38, 56-59 (1975) (describing how hard look doctrine forced EPA lead agencies to take into account legitimate concerns from those in other EPA offices). But see McGarity, *Deossifying*, *supra* note 3, at 1416-17 (citing corn wet milling rulemaking as example of judicial over-reaching in reviewing agency decision).

113. See Merrill, *supra* note 46, at 1050-52 (discussing history and theory of capture and its influence on administrative law). For a comprehensive discussion of both the general problem of capture and the mechanisms by which it may come about, see generally PAUL QUIRK, *INDUSTRY INFLUENCE IN FEDERAL REGULATORY AGENCIES* (1981).

114. The classical understanding of capture defines it as the unique susceptibility of agencies to domination by the industry which they were intended to regulate. See Merrill, *supra* note 46, at 1050-51. My definition of domination requires neither that the influence come from the regulated industry nor that the agency be the only governmental institution subject to the dominant interest group's influence. Domination, like the capture, does not include regulation on behalf of an interest group if the publicly stated purpose of the statute is to benefit that group. Cf. WILSON, *supra* note 6, at 75-76 (asserting that regulation to benefit interest groups is not capture if "Congress intended it that way"). I include in my definition, however, regulation to benefit groups when such benefit may have been a hidden objective of Congress, although such regulation may reflect capture of the legislature along

capture, the threat of domination is greatest when an agency regulates a particular industry, it can occur whenever, within a particular policy area, the agency perceives itself as serving the interests of a discrete group with intense interest in the outcome of agency decisions.<sup>115</sup>

Those who propose easing judicial review of agency decisions to deossify the rulemaking process would have courts defer to agency decisions of policy unless the decision was beyond the agency's legal authority or was essentially irrational.<sup>116</sup> Such a standard would reinstate the traditional view of the APA, which dominated administrative law from 1947 until the late 1960s.<sup>117</sup> Under such a view, political oversight provided the primary constraint on agency policymaking. Domination scenarios, however, frequently involve situations in which political oversight will exacerbate rather than eradicate the influence of focused special interests. Special interest groups carry on their political battles on a multitude of fronts.<sup>118</sup> Interest groups commonly befriend legislators who are on committees that oversee an agency's jurisdiction or budget, or who otherwise can influence agency policy, to pressure the agency to regulate on the groups' behalf.<sup>119</sup>

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with that of the agency. In fact, much unjustifiable special interest regulation is the product of cozy relationships among those who populate a particular policy subsystem, e.g., legislative staff assigned to the committee or subcommittee overseeing the regulation, administrators responsible for implementing the regulatory program, and interest group representatives. See James A. Thurber, *Dynamics of Policy Subsystems in American Politics*, in INTEREST GROUP POLITICS 319, 327-30 (Allan J. Cigler & Burdett A. Loomis eds., 3d ed. 1991) (describing "dominant policy subsystems").

115. See Michael E. Levine & Jennifer L. Forrence, *Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis*, 6 J.L. ECON. & ORG. 167, 169-70 (Special Issue 1990).

116. See, e.g., McGarity, *Deossifying*, *supra* note 3, at 1453 (calling for pass/fail standard of review); see also Seidenfeld, *Demystifying*, *supra* note 39, at 499-500 (discussing proposal for more deferential standards of judicial review).

117. Cf. Wald, *Judicial Review*, *supra* note 110, at 224-25 (noting shift from deferential to hard look review courts made in 1960s and 1970s).

118. See Lakshman Guruswamy, *Integrating Thoughtways: Re-Opening of the Environmental Mind?*, 1989 WIS. L. REV. 463, 505 n.196 (conjecturing that congressional subcommittee is as, or more, likely to be captured by special interest group than is an agency). But cf. Jonathan Bendor & Terry M. Moe, *Agenda Control, Committee Capture and the Dynamics of Institutional Politics*, 80 AM. POL. SCI. REV. 1187, 1202 (1986) (predicting that industry capture of congressional committee may be short-lived or may "promote policy outcomes that are less desirable than those that could have been obtained by ignoring the committee entirely").

119. See BRUCE A. ACKERMAN & WILLIAM T. HASSLER, CLEAN COAL, DIRTY AIR 100, 114 (1981) (describing how Senator Byrd's interest in encouraging use of high-sulphur eastern coal influenced EPA regulation of sulphur dioxide emissions from coal burning power plants); Richard J. Lazarus, *The Tragedy of Distrust in the Implementation of Federal Environmental Law*, 54 LAW & CONTEMP. PROBS., Autumn 1994, at 311, 357 (asserting that

Hence, reformers who propose reading arbitrary and capricious review as a minimal rationality standard do little to quell fears of dysfunctional interest group domination of regulatory policy.<sup>120</sup>

Regulatory reformers downplay the significance of interest group domination. They believe that judicial interference with agencies' efforts to regulate is a more predominate malady plaguing federal regulatory agencies than is the potential for undue interest group influence, and seek a return to the era of greater trust in agency processes.<sup>121</sup> They seem to have forgotten, however, the warnings from a previous generation of scholars of regulation who found capture to be pervasive during the 1950s and 1960s.<sup>122</sup> Studies of agencies as diverse as the Tennessee Valley Authority,<sup>123</sup> the Federal Maritime Commission,<sup>124</sup> the Federal Communications Commission,<sup>125</sup> and the Interstate Commerce Commission<sup>126</sup> found evidence of capture. Although these studies may have overestimated the influence on agency staff of opportunities for jobs in regulated industries,<sup>127</sup> they consistently found that agencies harbored biases in favor of focused interest groups affected by agency decisions.

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congressional oversight of agency action is likely to empower few isolated interest groups that are able to persuade committee chairs to express their concerns to agency).

120. Tom Merrill hypothesizes that active judicial review stemmed from judge's attempts to constrain agency biases, which capture theory purported to reveal. See Merrill, *supra* note 46, at 1065-67. Merrill suggests that current political attitudes distrust all branches of government, *see id.* at 1069, which explains the push by political conservatives for deregulation, but not that of reformers who call for increased agency discretion.

121. See, e.g., McGarity, *Ossification of Rulemaking*, *supra* note 36, at 530 (describing agencies as institutions trying to implement a statutorily sanctioned progressive agenda, and courts as driven by conservative political agenda); Pierce, *Unintended Effects*, *supra* note 5, at 22-27 (attributing natural gas shortage to effects of judicial review of FERC rules, and predicting electricity shortage because of nature of such review).

122. For example, Marver Bernstein hypothesized capture as a necessary part of the life-cycle of independent regulatory agencies. See MARVER BERNSTEIN, *REGULATING BUSINESS BY INDEPENDENT COMMISSION* 86-90, 155-60 (1955).

123. See, e.g., PHILIP SELZNICK, *TVA AND THE GRASS ROOTS* 141-45 (1949). But see WILSON, *supra* note 6, at 73-74 (giving alternative explanation for TVA's seeming preoccupation with building power plants and its ignorance of such statutory goals as regional planning and agricultural development).

124. See, e.g., Edward Mansfield, *Federal Maritime Commission*, in *THE POLITICS OF REGULATION* 42, 64-68 (James Q. Wilson ed., 1980).

125. See, e.g., ROGER G. NOLL ET AL., *ECONOMIC ASPECTS OF TELEVISION REGULATION* 123-24 (1973) (noting that "for most high level FCC [staff members, their agency] job is an entry into a career in the industry," and asserting that these individuals "must find themselves — at least some of the time — in the difficult position of sorting out the public interest from their own interest as future employees of regulated firms").

126. See, e.g., ROBERT C. FELLMETH, *THE INTERSTATE COMMERCE OMISSION: THE PUBLIC INTEREST AND THE ICC* 1-39 (1970).

127. See QUIRK, *supra* note 113, at 164-74.

Although evidence suggests that traditional capture mechanisms are not a pervasive problem today,<sup>128</sup> that does not mean that domination is not a potential threat or that particular interest groups no longer exert undue influence on agency decisionmaking. Capture has been kept somewhat in check by changes in the structure of agencies, in the regulatory processes by which they make decisions, and by increased public and judicial oversight of agency decisions. The composition of agency staffs is less monolithic today than it was thirty years ago. Norms shared by staff members greatly influence the policies that the staff will promote. Prior to the statutory requirement that agencies evaluate the environmental impact of their decisions,<sup>129</sup> and judicial development of the "hard look doctrine,"<sup>130</sup> agencies tended to assign total responsibility for administering discrete regulatory responsibilities to a particular program office within the agency, whose staff members often shared a common professional background with employees of the industry being regulated.<sup>131</sup> Hence, these staff members were likely to view their role as facilitating the provision of goods or services by the industry, and would not question whether accepted industry practices were in need of change.<sup>132</sup> Today, agencies promulgate regula-

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128. See WILSON, *supra* note 6, at 83-88. While perhaps not pervasive, industry influence on regulators' incentives still can pressure administrators to make unwise and often unfortunate regulatory decisions. See WARREN, *supra* note 7, at 65-66, 193 (suggesting that industry pressure made FAA decisions to ground DC-10s following several crashes difficult, and contributed to NASA's ill fated decision to launch Challenger space shuttle); *The FAA Should Inspect Itself*, WASH. POST, May 23, 1996, at A20 (reporting, in aftermath of ValuJet crash in Everglades, that National Transportation Safety Board had raised questions over the years about FAA's responses to airlines' pressures on safety issues).

129. See National Environmental Policy Act, 42 U.S.C. §§ 4321-4370d (1994).

130. See Seidenfeld, *Syncopated Chevron*, *supra* note 33, at 128 n.239 (citing cases in which D.C. Circuit developed hard look doctrine); Stewart, *Reformation*, *supra* note 25, at 1756-60 (detailing development of "the adequate consideration" doctrine for review of agency decisionmaking).

131. See Thomas O. McGarity, *The Internal Structure of EPA Rulemaking*, 54 LAW & CONTEMP. PROBS., Autumn 1991, at 57, 60 [hereinafter McGarity, *Internal Structure*] (asserting that prior to development of social regulatory programs, agency experts were "compartmentalized," and decisions rarely required application of multitude of types of expertise that could precipitate clash between offices within agency); Seidenfeld, *Demystifying*, *supra* note 39, at 493-94 (relating structure of agencies' staffs and decisionmaking processes to requirements of NEPA and development of hard look review). A program office exemplifies what Herb Simon has called "unitary organization." See SIMON ET AL., *supra* note 94, at 268 (defining unitary organization as "the lowest level at which the combined efforts of specialized persons or groups can be integrated by relating them to a common, socially meaningful goal").

132. See SIMON, *supra* note 71, at 290-91 (describing how administrator's identification with office compromises ability to evaluate questions of trade offs between goals of office and other social goals); see also SIMON ET AL., *supra* note 94, at 160-61 (describing how

tions only after the office primarily responsible for them has consulted with staff members from various other offices.<sup>133</sup> Staff scientists, engineers, economists, lawyers, and representatives of an office responsible for interacting with beneficiaries of the regulatory scheme all have some internal influence on proposed agency regulations. Thus, if one office within an agency, employing individuals predominantly from a single profession to serve a particular role in the agency, were to push pro-industry regulation, its position would likely be challenged by another office assigned a different role in the process.

In addition, technological advances and an awareness of interest group politics have fostered access to agency proceedings by representatives of groups with diffuse interests — the so called public interest groups. Public interest group representatives, together with an active and diverse press, bring pro-industry agency decisions to light.<sup>134</sup> Congress today monitors agency decisions more closely than ever before.<sup>135</sup> Public interest groups retain staff members who monitor and evaluate agency policies and lobbyists who bring adverse agency decisions to the attention of legislative committee staffs or even committee members.<sup>136</sup> These groups also frequently file citizen suits challenging such decisions in court.<sup>137</sup> Thus, today

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grouping of functions into office for efficiency can result in expansion of and increased emphasis on programs of office).

133. See McGarity, *Internal Structure*, *supra* note 131, at 73-76 (describing how EPA utilizes workgroups with members from different offices and with different professional backgrounds to develop proposed rule).

134. See Quirk, *supra* note 113, at 84-85.

135. Recently Congress has provided for fast track legislative review of all agency rules. See 5 U.S.C. §§ 801-808 (Supp. III 1997); see also Shapiro, *Political Oversight*, *supra* note 58, at 25-26 (describing trend towards increased congressional micromanagement of agency policy).

136. See KAY L. SCHLOZMAN & JOHN T. TIERNEY, ORGANIZED INTERESTS AND AMERICAN DEMOCRACY 289-310 (1986) (discussing various ways that interest groups interact with legislators and their aids); Diana M. Evans, *Lobbying the Committee: Interest Groups and the House Public Works and Transportation Committee*, in INTEREST GROUP POLITICS, *supra* note 114, at 257, 258-70 (using interest group activity with respect to particular bill to demonstrate various means by which groups lobby Congress); Robert H. Salisbury, *Putting Interests Back into Interest Groups*, in INTEREST GROUP POLITICS, *supra* note 114, at 371, 382 (stating that in addition to lobbying, significant amount of interest group resources are "devoted to monitoring, tracking and assessing the activities of government officials and of other groups in the policy domain").

137. See Michael S. Greve, *Private Enforcement, Private Rewards: How Environmental Citizen Suits Became an Entitlement Programs*, in ENVIRONMENTAL POLITICS: PUBLIC COSTS, PRIVATE REWARDS 107 (Michael S. Greve & Fred L. Smith eds., 1992); David R. Hodas, *Enforcement of Environmental Law in a Triangular Federal System: Can Three Not Be a Crowd When Different Authority Is Shared by the United States, the States, and Their Citizens*, 54 MD. L. REV. 1552, 1618 (1995).

rarely are agencies captured in the sense of operating across-the-board with the single-minded goal of fulfilling the political demands of a particular focused interest group, precisely because agencies no longer have substantive discretion to ignore the interests of other groups that regulatory statutes purport to protect.

Nonetheless, within niches of an agency's policy domain, firms in regulated industries and interest groups with strong central staffs still occupy a favored position in regulatory and political structures that allows them an advantage in influencing agency decisions.<sup>138</sup> They have the incentive and means to monitor what the agency does on a day-to-day basis. They often have information without which a regulatory agency cannot do its job.<sup>139</sup> A regulated entity frequently is a large corporation with resources to appeal agency decisions at every level. Finally, regulated entities and special interest groups often contribute significantly to political campaigns.<sup>140</sup> For all of these reasons, administrators have a strong incentive to cooperate with entities directly subject to their regulatory decisions and other interest groups that regularly participate in the agency's proceedings. Decreasing controls over agency discretion could reinvigorate a special interest variant on capture as a regulatory problem.

Recent concerns about the Nuclear Regulatory Commission (NRC) demonstrate the potential for domination when an agency is not subject to legal constraints on its discretion. Because building new nuclear power plants is not a competitive option for power companies today,<sup>141</sup> the NRC's

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138. See William P. Browne, *Issue Niches and the Limits of Interest Group Influence*, in INTEREST GROUP POLITICS, *supra* note 114, at 345, 346-47 (concluding that, to avoid inter-group competition, agricultural special interest groups today divide policy domains into niches, with each group having influence over particular niche).

139. According to one scholar of the process by which interest groups wield influence, "information, knowledge, and analysis are the primary currencies of interest groups in the policy subsystems." See James A. Thurber, *Dynamics of Policy Subsystems in American Politics*, in INTEREST GROUP POLITICS, *supra* note 114, at 339; see also Arthur Lupia & Mathew D. McCubbins, *Designing Bureaucratic Accountability*, 57 LAW & CONTEMP. PROBS., Winter & Spring 1994, at 91, 109 (arguing that interest groups preserve value of their access to legislators by making sure information they provide is "accurate and succinct").

140. See James A. Thurber, *Dynamics of Policy Subsystems in American Politics*, in INTEREST GROUP POLITICS, *supra* note 114, at 339 (noting that campaign contributions provide access to legislators and their staffs that in turn can lead to reciprocal relationships of trust, and ultimately to interest group influence over such matters as selection of high level agency personnel); Lupia & McCubbins, *supra* note 139 (stating that campaign contributions grant affluent interest groups access to Congress, but do not ensure influence).

141. See Richard Goldsmith, *Regulatory Reform and the Revival of Nuclear Power*, 20 HOFSTRA L. REV. 159, 159 (1991). The last nuclear power plant to come on line in the United States was that in Seabrook, New Hampshire in 1990. No new nuclear power plants

current major role is oversight of management and enforcement of regulations at existing plants.<sup>142</sup> Oversight and enforcement are agency activities especially prone to domination. They both involve exercises of discretion by field investigators that are not easily second-guessed by those in the NRC's central office responsible for guiding agency policy. They are also the regulatory functions subject to the least judicial oversight: Courts have little opportunity to consider inspection policies and generally do not review agency decisions not to enforce violations.<sup>143</sup> Thus, there is little incentive for the NRC to require deliberation by staff members with varied perspectives. Staff members tend to have a common background in nuclear engineering and many come from the Navy nuclear program.<sup>144</sup> This background instills in the NRC staff a common confidence in technology's ability to overcome basic problems. In addition, political oversight is not likely to prevent interest group domination. Decisions not to enforce often are based on information to which the agency is privy that is protected from public disclosure. Moreover, the nuclear power industry contributes heavily to the campaigns of key congressional committee members, who have stymied efforts to beef-up agency monitoring and enforcement of rule violations.<sup>145</sup> Not surprisingly, the NRC is perceived as an agency heavily beholden to the industry it regulates.<sup>146</sup>

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have been ordered since before the accident at Three Mile Island, in 1979. See Michael B. Gerrard, *The Victims of NIMBY*, 21 *FORDHAM URB. L.J.* 495, 496 n.6 (1992); Goldsmith, *idsupra*, at 159.

142. See JOSEPH V. REES, *HOSTAGES OF EACH OTHER: THE TRANSFORMATION OF NUCLEAR SAFETY SINCE THREE MILE ISLAND* 30-40 (1994) (describing how change in NRC's role from promoter of rapid development of nuclear power to ensurer of safe operations at existing plants led agency to change from specifying safety hardware to overseeing utility management of nuclear plants); Michael Remez & Mike McIntire, *Critics Say NRC and Utilities Have an Unholy Alliance*, *HARTFORD COURANT*, Dec. 2, 1996, at A1.

143. See *Heckler v. Chaney*, 470 U.S. 821, 832-33 (1985) (holding that agency refusal to enforce regulation is presumptively unreviewable, and suggesting that review will be limited to particular situation where Congress indicated that enforcement was mandatory and regulatory scheme represented only means for vindication of personal statutory interest).

144. See Remez & McIntire, *supra* note 142.

145. See *id.* (reporting how Senator Faircloth, chairperson of subcommittee that oversees regulation of nuclear industry, blocked appointment to NRC of former subcommittee staffer who had aggressively investigated power plant operating companies' alleged harassment of safety whistleblowers).

146. The perception of problems with NRC enforcement of safety requirements prompted the General Accounting Office to issue a report blaming the NRC's lax enforcement for troubles at several nuclear plants. See Michael Remez, *NRC Oversight Faulted for Nuclear Plant Woes*, *HARTFORD COURANT*, June 18, 1997, at A1; Jenny Weil, *GAO Report of NRC Oversight of Nuclear Plants*, *INSIDE NRC*, June 23, 1997, available in 1997 WL 9131911. Recent evidence indicates, however, that the agency enforcement staff may be

## 2. *The Potential for Unwarranted Political Influence*

Discretion may also foster unwarranted political influence over agency decisionmaking. Agencies frequently operate in a politically charged arena and much of what occurs in this arena is hidden from public view. Mid-level bureaucrats ultimately must account for their day-to-day activity to political appointees in the agency who may in turn mirror the concerns of the current administration regarding regulatory policy. Agency staff members frequently must also explain their activities to congressional staffers who continuously monitor agency decisions on behalf of particular members of congressional committees that control the agency's substantive mandate or budget.<sup>147</sup> The White House and Capitol Hill have each established more formal mechanisms for reviewing the wisdom of agency rules. Executive agencies must prepare a cost-benefit analysis for every major rule they propose, and they cannot adopt a rule over OMB's objection without appealing to the Vice President.<sup>148</sup> Pragmatically, this results in executive agencies negotiating with OMB about differences in proposed rules. Under provisions adopted as part of the Small Business Regulatory Enforcement Fairness Act,<sup>149</sup> Congress now reviews every legislative rule on a fast-track basis. Such a rule does not go into effect until Congress has had sixty days to consider whether to pass legislation rescinding the rule on an up-down vote.<sup>150</sup> Thus, it is not surprising that agency discretion about regulation can translate into greater influence on policy by individuals in the political branches of government.<sup>151</sup>

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breaking out of its historical industry mindset under the current NRC Chairperson. See Jonathon Rabinovitz, *A Push for New Standards in Running Nuclear Plants*, N.Y. TIMES, Apr. 11, 1998, at A1; see also REES, *supra* note 142, at 156-57 (concluding that meltdown at Three Mile Island prompted emergence of "industrial morality" within utilities operating nuclear power plants).

147. See PETERS, *AMERICAN PUBLIC POLICY*, *supra* note 79, at 305-06; JOEL D. ABERBACH, *KEEPING A WATCHFUL EYE: THE POLITICS OF CONGRESSIONAL OVERSIGHT* 79-104 (1990); cf. Morris S. Ogul, *Congressional Oversight: Structures and Incentives*, in CONGRESS RECONSIDERED 317, 322-25 (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 2d ed. 1981) (describing gap between perceptions of need for oversight and actual oversight by committees, but noting that some of gap can be explained by much oversight being done informally by committee staff and latently as part of hearings on legislation).

148. See Executive Order No. 12,866, § (8), 3 C.F.R. 638, 648 (1994), *reprinted at* 5 U.S.C. § 601 (1994).

149. See 5 U.S.C. §§ 801-808 (Supp. III 1997).

150. See 5 U.S.C. § 801(a)(3)(A) (Supp. III 1997).

151. The political branches may prefer delegation to an agency because without it, the courts will have a greater say in implementing a regulatory scheme, and the president and legislators have more ability to constrain legislators than they do judges. See Henry Manne, *Individual Constraints and Incentives in Government Regulation of Business*, in THE INTERACTION OF ECONOMICS AND THE LAW 23, 28 (Bernard H. Siegan ed., 1977) (stating



Granting an agency discretion about regulatory policy therefore does not eliminate the potential for elected officials to influence agency decision-making. Nor should it. Political influence at some level is imperative to justify the wide substantive latitude that I have already argued is needed for a workable administrative state. The politically accountable branches must be able to ensure that the values underlying an agency's policies do not deviate greatly from those generally held by the polity.<sup>152</sup> In addition, legislation may explicitly impose a compromise worked out by a coalition of interest groups.<sup>153</sup> To the extent that the compromise reflects public debate about the regulatory issues and a deliberate decision by the full Congress that compromise may be the best course of action, the agency should not be free to ignore the legislative deal and pursue the vision of only a subset of the coalition. Otherwise, the United States could not call itself a democracy. But, in some instances, political influences on agency decisions are inappropriate and lead to illegitimate or plainly unwise decisions.

The threat of improper political influence is greatest in the context of particular agency adjudications, which often are resolved outside of the public limelight. Recognizing that much policy is set via adjudicatory decisions and that fact-finding can affect the implementation of policy, the APA allows agency heads to reverse the facts found as well as the ultimate decision of an administrative law judge (ALJ) who presides over a formal adjudication, as long as the record supports the agency's determination.<sup>154</sup> But, without meaningful review of fact-finding and inquiry into the consistency of application of policy in adjudications, the broad discretion given agencies to decide particular cases invites efforts to induce agencies to rely on illegitimate political factors, such as the identity or political leanings of regulated entities.

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that "one reason legislators like bureaucratic regulation of private activities so much is because they have considerable power to stop or reverse a particular line of regulation if it becomes beneficial to them to do so").

152. See HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 700 (William N. Eskridge & Philip P. Frickey eds., 1994) (asserting that only generally accountable legislature "has the toughness and resiliency to hammer out solutions [to major policy dilemmas] which will command acceptance").

153. See Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 540-41 (1983).

154. Some courts have read into the requirement that agency decisions be supported by substantial evidence, a restriction on agencies overruling determinations that hinge on credibility of witnesses whom the ALJ actually heard and the agency did not. See *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074, 1078-79 (9th Cir. 1977); see also *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 493 (defining substantial evidence standard of review in APA as requiring agency to consider ALJ decision as part of whole record in proceeding).

An example of such improper political influence appears to have occurred in FCC television licensing decisions during the Eisenhower administration. Many have criticized the FCC's comparative licensing process as unprincipled.<sup>155</sup> The FCC relies on a host of factors without indicating the importance of each;<sup>156</sup> it seemingly can use these factors to justify awarding the license to any of the competing applicants that meet the FCC's minimum qualifications. In light of the FCC's breadth of discretion, it is at least suspicious that, during Eisenhower's presidency, no newspaper with Democratic leanings and no major newspaper that had supported Eisenhower's opponent for President, Adlai Stevenson, was awarded a license in such a proceeding.<sup>157</sup>

Improper political influence can also enter an adjudicatory decision when an agency relies on means other than announcement of a new policy to alter the outcome of particular adjudications. In response to political pressure, an agency may couch a change of policy as a modification of factual presumptions or burdens of proof to alter outcomes, or it may try to influence its lower level decisionmakers by managerial techniques such as evaluating performance based on outcomes in agency adjudications. Such backhanded methods of influencing particular adjudications decrease the ability of the full Congress to evaluate whether the agency's policy has political support, and the courts to discern whether the policy comes within the agency's statutory authority.<sup>158</sup>

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155. See Robert A. Anthony, *Towards Simplicity and Rationality in Comparative Broadcast Licensing Proceedings*, 24 STAN. L. REV. 1, 39 (1971); Henry Geller, *The Comparative Renewal Process in Television: Problems and Suggested Solutions*, 61 VA. L. REV. 471, 500 (1975); Bernard Schwartz, *Comparative Television and the Chancellor's Foot*, 47 GEO. L.J. 655, 678-79 (1959).

156. See Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393, 394-400 (1965).

157. See William B. Ray, *FCC: The Ups and Downs of Radio-TV Regulation* 45 (1990); Bernard Schwartz, *The Professor and the Commissions* 162-64 (1959).

158. For example, the difficulty for political and judicial monitoring of a surreptitiously implemented agency policy has prompted criticism of the NLRB's creative use of factual presumptions essentially to conclude that a majority of striker replacements would support a striking union, despite the obvious risk to their jobs if the union prevails. See *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 817 (1990) (Scalia, J., dissenting). Because of the means the NLRB chose to implement what is essentially a policy choice, courts will often dispose of particular appeals to cases under that policy "without ever knowing the substance of the actual policy." Joan Flynn, *The Costs and Benefits of "Hiding the Ball": NLRB Policymaking and the Failure of Judicial Review*, 75 B.U. L. REV. 387, 413-15 (1995). The NLRB use of factual presumptions and closing its eyes to factual reality about the views of striker replacements also shields the NLRB's factual predicates for the policy from review, *id.* at 417, and allows the agency policy to escape the scrutiny of a potentially hostile Congress. *Id.* at 412.

The Reagan administration's attempts to limit Social Security disability payments exemplifies the potential for such indirect methods of changing policy to allow improper political influence over agency decisions. In 1980, the Social Security Administration (SSA) adopted the Bellmon Review program, a screening process targeting particular ALJs' decisions for review based in part on the percentage of cases in which an ALJ awarded benefits to claimants.<sup>159</sup> The SSA thereby encouraged ALJs to deny more claimants disability benefits.<sup>160</sup> By failing to announce any explicit change in Social Security disability policy, the administration denied Congress and the courts any concrete rule or statement of policy to evaluate to ensure its consistency with political constraints and legal prescriptions.<sup>161</sup> The only

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159. The SSA program responded to an explicit call by Congress for an ALJ review program to improve the productivity and consistency of ALJ determinations in disability cases. See Social Security Disabilities (Bellmon) Amendment of 1980, Pub. L. No. 96-265, 94 Stat. 441, 456 (codified as amended at 42 U.S.C. § 1305 (1994)). But, the nature of the review provisions, which were triggered by an ALJ's extraordinary rate of allowing claims, but not by an ALJ's unusual rate of denying claims, see *Barry v. Bowen*, 825 F.2d 1324, 1327 (9th Cir. 1987) (reporting that SSA targeted ALJs who allowed benefits in greater than 66.67% of their cases), suggest an intent on the part of the Reagan administration to cut back on the number of disability claims allowed. See *Stieberger v. Heckler*, 615 F. Supp. 1315, 1332 (S.D.N.Y. 1985) (noting that Congress explicitly removed language calling for ALJ review based on claim allowance rates that had been included in original bill by Senator Bellmon); Charles H. Koch, Jr. & David A. Koplow, *The Fourth Bite at the Apple: A Study of the Operation and Utility of the Social Security Administration's Appeals Council*, 17 FLA. ST. U. L. REV. 199, 241 n.229, 247 (1990) (suggesting that ALJs and members of SSA Appeals Council perceived pressure to deny more claims under Reagan administration than under previous administrations); F. William Hessmer IV, Note, *Own Motion Review of Disability Benefit Awards by the Social Security Administration Appeals Council: The Improper Use of an Important Procedure*, 2 ADMIN. L.J. 141, 155-56 (1988) (noting that some viewed Bellmon review as unmistakable attempt to pressure ALJ's to err on side of denial of benefits).

160. See Koch & Koplow, *supra* note 159, at 246-47 (stating that ALJs interpreted targeted review under Bellmon Amendment as attempt to pressure them into denying more claims).

161. The debate over the SSA program focused primarily on the independence of agency fact-finders under the APA. See, e.g., Jeffrey S. Lubbers, *The Federal Administrative Judiciary: Establishing an Appropriate System of Performance Evaluation for ALJs*, 7 ADMIN. L.J. AM. U. 589, 595-61 (1993). Even commentators who focused on the need for the SSA to maintain control over the policy implemented by ALJs, however, admitted that the lack of the agency's use of rulemaking either to change the substantive criteria for disability benefits or to authorize the review program impeded communication and political evaluation of the agency's policy. See Daniel J. Gifford, *Adjudication in Independent Tribunals: The Role of an Alternative Agency Structure*, 66 NOTRE DAME L. REV. 965, 1019 (1991) (suggesting that rulemaking would have been more effective way for SSA to communicate its policy concerning distinguishing valid from invalid disability claims to ALJs); Richard J. Pierce, Jr., *Political Control Versus Impermissible Bias in Agency Decisionmaking: Lessons from Chevron and Mistretta*, 57 U. CHI. L. REV. 481, 515 (1990) [hereinafter

effective means to ensure that the SSA policy did not prompt ALJs to deny benefits to statutorily deserving claimants was for the courts to scrutinize ALJ fact-finding in virtually thousands of disability petitions for review.<sup>162</sup>

Politics can have an undue influence even outside of particular adjudications. When behind-the-scenes politics influences agency policy in a manner at odds with the public explanations for the agency decision, such influences do not represent democratic government.<sup>163</sup> This is especially true when political influence is exercised by particular legislators rather than the legislative body as a whole,<sup>164</sup> and when the influence appears to be motivated by the desire to appease special interest groups. Thus, secret deals between interest group lobbyists, particular legislators, and agency decisionmakers seem not to qualify as legitimate means of political influence. A salient example of such suspicious behind-the-scenes political influence occurred when Senate Majority Leader Robert Byrd pressured the EPA to set new source performance standards for coal fired plants in a manner that protected the interests of eastern coal producers.<sup>165</sup>

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Pierce, *Political Control*] (stating that "notice and comment rulemaking [to implement the Bellmon program] would have provided a higher degree of confidence that the SSA's decision to lower mean reversal [i.e., claim allowance] rates was consistent with Congress's views on this important policy issue"); Stieberger, 615 F. Supp. at 1332-33 (giving reasons to believe that SSA intentionally tried to shield Bellmon review from public and congressional oversight).

162. See Koch & Koplow, *supra* note 159, at 227 (reporting that courts handle 10,000 petitions for review of social security claims each year). The rate of judicial reversal of SSA disability cases rose from 20% to 57% following the SSA institution of non-acquiescence to judicial statutory interpretation and the ALJ review program. See Pierce, *Political Control*, *supra* note 161, at 518. This would seem to indicate that the politically motivated move to decrease the number of social security claims did lead the agency to contradict the courts' reading of the statute in awarding disability benefits. But see *id.* (attributing increase in reversal rate to anger of judges in reaction to Reagan administrations use of Bellmon review, increased use of non-acquiescence and policy of reopening cases of individuals receiving disability benefits).

163. This is the basis for one scholar advocating that courts use legislative history in which proponent's of legislation make public pronouncements regarding statutory purposes as a tool for interpreting statutes. See Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COL. L. REV. 223, 262 (1986).

164. See, e.g., *Hazardous Waste Treatment Council v. EPA*, 886 F.2d 355, 365-66 (D.C. Cir. 1989) (reversing and remanding rule which agency sought to justify as response to comments by eleven members of Congress).

165. See ACKERMAN & HASSLER, *supra* note 119, at 114 (reporting this political deal unfavorably). But see *Sierra Club v. Costle*, 657 F.2d 298, 410 (affirming resulting EPA rule on sulphur dioxide emissions from coal fired power plants because petitioner could demonstrate neither that Senator Byrd had sought to force EPA to consider factors other than those Congress made statutorily relevant nor that EPA had considered such extraneous factors).

For some critics of politics as it is currently practiced, pure interest group politics is suspect even if it takes place in the sunshine.<sup>166</sup> Such politics is biased. Groups with power and money have an advantage in the political free-for-all between interest groups for political benefits.<sup>167</sup> Entities can influence politicians by contributing their money to PACs and by using their power to deliver votes for particular candidates.<sup>168</sup> Moreover, those with money and power tend to share interests with a small number of others and have a lot to gain or lose from political battles. In other words, the rich and powerful often have focused interests, and therefore face fewer free-rider problems and lower cost of organizing to lobby political decisionmakers.<sup>169</sup> Thus, the system tends to deliver benefits to these focused interest groups to the detriment of the remainder of society.

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166. See Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1542-47 (1988) [hereinafter Sunstein, *Republican Revival*] (discussing differing theories of political participation); Seidenfeld, *Civic Republican*, *supra* note 48, at 1533 (discussing problems with pluralistic democracy).

167. See Seidenfeld, *Civic Republican*, *supra* note 48, at 1535.

168. Some studies show a substantial impact of special interest campaign spending on legislation. See, e.g., James B. Kau et al., *A General Equilibrium Model of Congressional Voting*, 97 Q.J. ECON. 271, 274-75 (1982) (finding significant impact of business campaign contributions on some regulatory legislation); Allen Wilhite & John Theilmann, *Labor PAC Contributions and Labor Legislation: A Simultaneous Logit Approach*, 53 PUB. CHOICE 267, 274 (1987) (finding that labor PAC contributions influenced legislators' votes). Other studies, however, show little influence of campaign spending. See, e.g., Janet M. Grenzke, *PACs and the Congressional Supermarket: The Currency Is Complex*, 33 AM. J. POL. SCI. 1, 19-20 (1989) (finding that PAC contributions generally do not affect voting patterns by members of House, but noting that powerful interest groups can mobilize electoral support, which influences legislators' voting); John R. Wright, *PACs, Contributions, and Roll Calls: An Organizational Perspective*, 79 AM. POL. SCI. REV. 400, 412 (1985) (concluding that "campaign contributions of PACs appear to take (sic) substantial effect [on roll call votes in the House] only infrequently"). Most likely, the influence of campaign contributions varies with the circumstances surrounding consideration of particular legislation. See Diana M. Evans, *PAC Contributions and Roll-Call Voting: Conditional Power*, in INTEREST GROUP POLITICS 114, 115 (Allan J. Cigler & Burdett A. Loomis eds., 2d ed. 1986.) (stating that "the impact of PAC contributions differs from bill to another"); Jean Reith Schroedel, *Campaign Contributions and Legislative Outcomes*, 39 WEST. POL. Q. 371, 386-87 (1986) (finding that campaign contributions influence House members' voting on committees, but only for decisions that occur outside public limelight). What is clear is that, to a significant extent, money influences elections, see HERBERT E. ALEXANDER, *FINANCING POLITICS: MONEY, ELECTIONS, AND POLITICAL REFORM* 20-25 (3d ed. 1984), from which it follows that candidates cannot ignore PACs' abilities to target campaign spending.

169. See MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 48 (1965); Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & ECON. 211, 213 (1976).

In addition, interest group politics cannot transcend a notion of the public good that merely aggregates the preferences of individuals.<sup>170</sup> Such politics can do no better than to allocate benefits among various competing groups. In many instances, government regulation allows special interest group members to garner monopoly rents.<sup>171</sup> Political dealmaking in these instances will actually reduce overall social welfare. It can never transcend what is at best a zero sum game by, for instance, fostering understanding and empathy for the plight of others, or using the political process to alter individuals' values and thereby achieve a more acceptable vision of the common good.<sup>172</sup>

These critics of interest group politics look skeptically on political influence that benefits powerful special interest groups. The FCC give-away of spectrum to existing television licensees for the development of high-definition television fits nicely into this category of regulatory action dictated by special interest group politics to the detriment of the public interest. Although auctioning the spectrum would have raised as much as seventy billion dollars,<sup>173</sup> the FCC loaned the spectrum to existing television licensees until the year 2006 to allow them to broadcast traditional and digital high definition signals simultaneously.<sup>174</sup> In 1990, the FCC had reasoned that the simulcast approach would encourage the development of truly high definition television while enabling the continued reception of

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170. See Sunstein, *Republican Revival*, *supra* note 166, at 1542; see also Richard A. Epstein, *Modern Republicanism — Or the Flight from Substance*, 97 YALE L.J. 1633, 1639 (1988) (describing political pluralism as accepting “that there is no collective way to define what constitutes the good life”).

171. Monopoly rents in the political context refer to super-normal profits that firms in the economic market can earn because the government has used its power to make and enforce law to restrict participation in, or otherwise bias the workings of, those markets. See James M. Buchanan, *Rent Seeking and Profit Seeking*, in TOWARD A THEORY OF THE RENT-SEEKING SOCIETY 3, 8-11 (James M. Buchanan et al. eds., 1980); George J. Stigler, *The Theory of Economic Regulation*, 21 BELL J. ECON. & MGMT. SCI. 3, 3 (1971).

172. See Seidenfeld, *Civic Republican*, *supra* note 48, at 1533-34.

173. See Paul Farhi, *Their Reception's Great*, WASH. POST, Feb. 16, 1997, at H1 [hereinafter Farhi, *Reception's Great*].

174. See In the Matter of Advanced Television Systems and Their Impact on Existing Television Broadcast Service, Fifth Report and Order, 12 F.C.C.R. 12,809, 12,850 (1997) [hereinafter *Fifth Report and Order*]; see also Paul Farhi, *FCC to Approve Plan for Digital Television*, WASH. POST, Apr. 3, 1997, at E1 [hereinafter Farhi, *Digital Television*]; JOEL BRINKLEY, *DEFINING VISION: THE BATTLE FOR THE FUTURE OF TELEVISION* 202 (1997). Congress and the President have now endorsed this loan: The Telecommunications Act of 1997 limits the eligibility for licenses for “advanced television services” to “persons that . . . are licensed to operate a television broadcast station.” See 47 U.S.C. § 336(a)(1) (Supp. II 1996).

free television by those who did not buy high definition television sets.<sup>175</sup> By 1992, the FCC had committed the nation to digital high definition television by providing free spectrum to existing television broadcasting licensees.<sup>176</sup> Under political pressure from Congress and the National Association of Broadcasters, the FCC mandated only that a portion of the spectrum given to television stations be devoted to high definition TV, and allowed stations to devote the additional spectrum to other highly remunerative uses if the station so desired.<sup>177</sup> Moreover, the FCC did not explain why an auction would not allocate the spectrum to those best able to use it for high definition television. The FCC also declined to impose any public service obligation on the recipients of the additional spectrum.<sup>178</sup>

The FCC's rationale for the spectrum give-away appears weak, but the political pressure the National Association of Broadcasters brought to bear on the FCC was substantial.<sup>179</sup> Current licensees have used their broadcasting capability to run advertisements promoting granting free second channels.<sup>180</sup> Television licensees, as a group, also donated large sums of money to PACs during the most recent congressional races.<sup>181</sup> Moreover, television stations gained influence from their mere ability to control how much exposure a politician got on the six o'clock news.<sup>182</sup> Although the pressure put on the FCC by individual members of Congress and by the

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175. In the Matter of Advanced Television Systems and Their Impact on Existing Television Broadcast Service, First Report and Order, 5 F.C.C.R. 5627, 5628 (1990). The alternative, which the FCC had originally considered, would have required high definition systems to allow for normal quality reception on existing televisions. This would have allowed at most enhanced analog systems, rather than digital systems supposedly capable of much better resolution. See BRINKLEY, *supra* note 174, at 116.

176. See In the Matter of Advanced Television Systems and Their Impact on Existing Television Broadcast Service, Second Report and Order, 7 F.C.C.R. 3340, 3340 n.1, 3344; BRINKLEY, *supra* note 174, at 202.

177. See Farhi, *Digital Television*, *supra* note 174. The FCC did maintain a partial simulcast requirement beginning in April of 2003, and a full simulcast requirement beginning in April, 2005, and continuing until the licensees had to return the "borrowed" spectrum in 2006. See *Fifth Report and Order*, *supra* note 174, at 12,832.

178. See *Fifth Report and Order*, *supra* note 174, at 12,829-30. The FCC, however, did not foreclose the possibility that it would impose additional public service requirements on providers of HDTV in the future. *Id.*

179. See Farhi, *Reception's Great*, *supra* note 173.

180. See Farhi, *Reception's Great*, *supra* note 173.

181. See Farhi, *Reception's Great*, *supra* note 173.

182. See Farhi, *Reception's Great*, *supra* note 173 (quoting Adam Thierer, economic policy fellow at Heritage Foundation).

President is unclear, the lack of willingness of Congress and the President to take on the established television media was transparent.<sup>183</sup>

### 3. *The Problem of Idiosyncratic Agency Values*

Agency discretion may permit regulation that promotes administrators' idiosyncratic values. By idiosyncratic values, I mean values that the regulator promotes that are inconsistent with those held generally by the polity. In most cases, one cannot easily define, let alone determine, values held by such an amorphous entity as the polity. But, at times, an agency decision can be identified as clearly at odds with identifiable political leanings of the electorate manifested in consistent election of legislators who make an issue of a particular regulatory value, as well as in press reports of public concern about that value.

Idiosyncratic agency values can be consistent with either a rational actor model of agency decisionmaking, which posits that agency heads and staff members rationally seek to maximize their personal well being, or an institutional model of agency decisionmakers, which assumes that agency personnel follow norms dictated by their professional and personal environments.<sup>184</sup> Under rational actor models, idiosyncratic decisions result from agency staff and decisionmakers not bearing the direct cost of the decisions they make. This leads to a deviation between the costs a regulatory scheme imposes on society and the costs it imposes on agency decisionmakers, which in turn leads agency staff to seek outcomes that are not in the best interests of society.<sup>185</sup> Under institutional models, the staff and agency head may have internalized different norms from those shared by the general public, stemming from their professional training,<sup>186</sup> or the role they play within the agency.<sup>187</sup>

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183. See Farhi, *Reception's Great*, *supra* note 173 (noting that Newt Gingrich supported idea of auctioning the spectrum for high definition television, but quoting Speaker of the House asserting that "[t]he practical fact is, nobody's going to take on the broadcasters").

184. For a discussion of the distinction between rational actor and institutional models of organizational decisionmaking, see James G. March, *Understanding How Decisions Happen in Organizations*, in ORGANIZATIONAL DECISION MAKING 4, 10-20 (Zur Shapira ed., 1997).

185. See Diver, *supra* note 21, at 101-05. For examples of several different economic models of administrative behavior, see, for example, WILLIAM A. NISKANEN, JR., BUREAUCRACY AND REPRESENTATIVE GOVERNMENT 36-42 (1971) (positing that regulators seek to maximize their wealth, power, and fame); Peltzman, *supra* note 169, at 214 (1976) (assuming that regulators are legislators seeking to maximize votes); Manne, *supra* note 151, at 29-30 (postulating several interests that politically appointed bureaucrats and career staff at agencies might pursue).

186. See WILSON, *supra* note 6, at 59-65 (discussing how and why professional norms affect bureaucrats' behavior); CHARLES T. GOODSSELL, THE CASE FOR BUREAUCRACY: A



Agencies can pursue idiosyncratic values because the political appointees at the head of the agency have an agenda for the agency that deviates from that envisioned by public. Especially for executive branch agencies, this deviation of agendas can occur because, on matters with which the agency deals, the President has a different set of values than that which predominates in the legislature or the public at large. For example, Ronald Reagan was elected on a platform of reducing the burdens of government regulation, but by all accounts the polity did not intend to give Reagan a mandate to dismantle environmental protections.<sup>188</sup> Thus, when Reagan's Environmental Protection Agency (EPA), led by Anne Gorsuch Burford, undermined enforcement of environmental laws by granting industrial polluters sweetheart settlements and assuring others that they need not worry about violations of water pollution regulations,<sup>189</sup> the EPA acted contrary to strongly expressed values of the electorate.<sup>190</sup>

Agency heads can also pursue idiosyncratic values if they manage to get appointed without fully revealing their agendas, or if the values of the pol-

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PUBLIC ADMINISTRATION POLEMIC 131-32 (2d ed. 1985) (noting administrators' propensity to follow professional norms); Charles Pruitt, *People Doing What They Do Best: The Professional Engineers at NHTSA*, 39 PUB. ADMIN. REV. 363, 365-66 (1979) (noting how engineer's backgrounds at NHTSA resulted in their independence from both auto industry and factors such as consumer acceptance and cost); Frederick C. Mosher, *Professions in Public Service*, 38 PUB. ADMIN. REV. 144, 148 (1978) (noting that specialized educational training and service within particular professional office contribute to unique socialization of public servants from particular profession).

187. See SAMUEL KRISLOV & DAVID H. ROSENBLUM, REPRESENTATIVE BUREAUCRACY AND THE AMERICAN POLITICAL SYSTEM 119-20 (1981) (noting that bureaucrats are often socialized to take on viewpoint of clientele they serve in their official capacities); WILSON, *supra* note 6, at 36-49 (demonstrating how immediate tasks facing officials affect their attitudes and behavior); Meidinger, *supra* note 82, at 373-74 (observing that socialization within agency may be more important than professional background in determining how regulator will act in particular context).

188. See GEORGE C. EADS & MICHAEL FIX, RELIEF OR REFORM?: REAGAN'S REGULATORY DILEMMA 255 (1984); Philip Shabecoff, *Ruckelshaus Says Administration Misread Mandate on Environment*, N.Y. TIMES, July 27, 1983, at A1; Percival, *supra* note 57, at 191.

189. See PETER CLEARY YEAGER, THE LIMITS OF LAW: THE PUBLIC REGULATION OF PRIVATE POLLUTION 318-19 (1991); Richard N. L. Andrews, *Deregulation: The Failure at EPA*, in ENVIRONMENTAL POLICY, *supra* note 60, at 161, 171; Ronald L. Claveloux, Note, *The Conflict Between Executive Privilege and Congressional Oversight: The Gorsuch Controversy*, 1983 DUKE L.J. 1333, 1340-44 & n.59.

190. According to President Carter's EPA Administrator Douglas Costle, Burford's actions at the EPA went clearly beyond the boundary allowed by political consensus concerning the need for environmental protection. HARRIS & MILKIS, *supra* note 59, at 262 (reporting personal interview with Costle); see also Robert Cameron Mitchell, *Public Opinion and Environmental Politics in the 1970s and 1980s*, in ENVIRONMENTAL POLICY, *supra* note 60, at 51, 61.

ity, as expressed through the legislative electoral process, change. Thus, in the late 1970s, Michael Pertschuk inherited a Federal Trade Commission (FTC) that actively pursued a consumer protection agenda. He took that agenda to the point of an anti-industry crusade that deviated from what the public and ultimately Congress thought appropriate.<sup>191</sup> Some commentators attributed this idiosyncratic agenda, in good part, to Pertschuk's radicalism regarding consumer issues.<sup>192</sup> Commentators, however, also have recognized that the backlash to such an active FTC agenda also reflected a change in the attitudes of the public and key members of Congress towards protectionist regulation.<sup>193</sup> On this score, Pertschuk stands guilty of simply failing to stay attuned to the direction of strong political winds. Under either scenario, however, the fact remains that by 1979, the FTC agenda was at odds with what the public and the political process would tolerate.

An agency can engage in idiosyncratic regulation even if the political appointees who head the agency do not have an agenda at odds with pre-dominate public values when the agency staff has internalized values not shared by the public as a whole. Utility maximizing staff members may seek to set unambitious goals to maximize their leisure and hedge against unforeseen future demands on their time.<sup>194</sup> Alternatively they may seek to maximize their power vis-à-vis other offices within the agency or industry representatives and legislative staff who work within the same regulatory issue subsystem.<sup>195</sup> Staff members who never think about maximizing their utility may nonetheless share a unique educational background that has inculcated in them norms of a particular profession.<sup>196</sup> Additionally, their perceived regulatory role may induce them to see the problems the agency faces from a perspective that others do not share and this too can dictate the

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191. See HARRIS & MILKIS, *supra* note 59, at 183-85.

192. See HARRIS & MILKIS, *supra* note 59, at 177; Ernest Gellhorn, *The Wages of Zealotry: The FTC Under Siege*, REGULATION (Jan./Feb. 1980), at 33, 37-40.

193. See HARRIS & MILKIS, *supra* note 59, at 185-86; Gellhorn, *supra* note 192, at 40. One analysis concludes that the FTC agenda was always more radical than that supported by most of Congress, and was instead consistent with the agendas of key members of the subcommittees that oversaw the agency. A change in the membership of those subcommittees resulted in loss of support for this radical agenda. See Barry R. Weingast & Mark J. Moran, *The Myth of Runaway Bureaucracy: The Case of the FTC*, REGULATION (May/June 1982) 33; HARRIS & MILKIS, *supra* note 59, at 191.

194. See MARCH, *supra* note 10, at 29 (describing how organizations build "slack" into their search for rational solutions).

195. See SIMON ET AL., *supra* note 94, at 297-98 (discussing interest of "unitary organization" (e.g., program offices) within an agency to engage in "empire building").

196. See WILSON, *supra* note 6, at 60 (defining professional as individual with "reference group whose membership is limited to people who have undergone specialized formal education and have accepted a group-defined code of proper conduct").

use of an idiosyncratic norm for resolving the problem.<sup>197</sup> Frequently internal checks on bureaucratic decisionmaking, such as oversight by political appointees at the top of the agency, will suffice to prevent the agency from imposing a regulatory scheme at odds with predominate public values. Sometimes, however, despite these checks, staff norms can drive idiosyncratic regulatory decisions.<sup>198</sup>

The size of an agency's docket and the need for it to resolve many particular regulatory matters requires political appointees who head agency departments to sub-delegate most aspects of adjudicatory or enforcement decisions and even many rulemaking or policy setting decisions to career staff not subject to direct political influence. These political appointees usually do not have the time or resources to monitor all but the most salient decisions to assure that they are consistent with the agency head's policy vision.<sup>199</sup> Moreover, even when political appointees make the ultimate decision on a matter, they must rely on information and analyses supplied by staff.<sup>200</sup> Without a detailed independent evaluation of the staff's position,

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197. See Susan J. Miller et al., *Decision-Making in Organizations*, in HANDBOOK OF ORGANIZATIONAL STUDIES 293, 296 (Stewart R. Clegg et al. eds., 1996) (stating that "the reality of organizations appears to be that once organizational groups are given different tasks they also begin to formulate their own sets of norms and goals"); Sally Coleman Selden et al., *Bureaucracy as a Representative Institution: Toward a Reconciliation of Bureaucratic Government and Democratic Theory*, 42 AM. J. POL. SCI. 717, 720 (1998) (noting that "it is the [administrator's] received role that is 'the immediate influence on . . . behavior and the immediate source of . . . motivation to role performance.'" (quoting ROBERT L. KAHN ET AL., ORGANIZATIONAL STRESS: STUDIES IN ROLE CONFLICT AND AMBIGUITY 16 (1964))); see also SIMON, *supra* note 71, at 287-90 (administrators who identify with goals of office in which they work tend to measure decisions in terms of adequacy for office's goals rather than in broader terms). Essentially, a staff office is a community of experts and as such its members solve problems using the office's rules, which fit into prevailing paradigms. The tendency of individuals to adhere to prevailing paradigms is a powerful deterrent to discovery of other approaches to solving problems that might prove more fruitful. See THOMAS S. KUHN, 2 THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 64 (2d ed. 1970); see also ROURKE, *supra* note 79, at 32 (asserting that bureaucratic routines manifest great inertia).

198. See Stefan H. Krieger, *An Advocacy Model for Representation of Low-Income Intervenors in State Public Utility Proceedings*, 22 ARIZ. ST. L.J. 639, 672 & n.168 (1990) (reporting that in formal proceedings before state utility regulatory commissions, commissioners treated views of agency staff as more important than those of outside participants and even some other commissioners).

199. See WARREN, *supra* note 7, at 270.

200. See PETERS, BUREAUCRACY, *supra* note 86, at 225-26; ROURKE *supra* note 79, at 20-22; cf. SIMON, *supra* note 71, at 225-27 (noting that increased ability to discover and transmit information requires improved systems for processing and analyzing this information, and that for such functions "the most numerous and crucial elements will continue to be people"). Agency staff members act as a filter for the information that reaches the ultimate decisionmaker in the agency; they limit the information that the decisionmaker must

the ultimate decisionmaker cannot easily detect subtle but pervasive biases in the staff provided information, analyses and advice, even when such biases push the decision consistently toward one end or the other of the political spectrum. Thus, staff's idiosyncratic perspectives on regulatory issues affect almost every agency decision to some degree, and in some instances have led to decisions that fail to accord with strongly held values of the polity.

The National Highway Traffic Safety Administration's (NHTSA) requirement that car manufacturers disable an automobile's ignition unless the occupants of the car had buckled their seatbelt is an example of staff driven idiosyncratic regulation. Congress had given NHTSA authority and a mandate to impose technology based regulation to make automobiles safer and, as part of this mandate, NHTSA adopted the ignition interlock as a backup to a requirement that auto manufacturers install passive restraint systems.<sup>201</sup> When the courts invalidated the passive restraint requirement,<sup>202</sup> the unpopular interlock was left as the only means for auto manufacturers to meet the NHTSA safety standard.<sup>203</sup> The public outcry to Congress was quick and substantial, and Congress reacted by overturning the interlock requirement and mandating that NHTSA not impose such a requirement in the future without explicit legislative authorization.<sup>204</sup> The scientifically oriented NHTSA staff had failed to factor into its evaluation of the interlock the political ramifications of American culture's view of the automobile as a provider of freedom and excitement.<sup>205</sup>

Overall, agency discretion cannot be checked adequately by *ex ante* constraints. Such constraints are insufficiently flexible, and cannot alleviate problems that stem from unconscious use of decisionmaking norms. Yet constraint is needed to check interest group domination, political influence, and idiosyncratic agency perspectives that often lead to poor regulatory policy. That constraint must be *ex-post* review. The question that remains to be answered is how to structure *ex-post* review to induce agency deci-

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consider, analyze it and explain its significance. This allows the decisionmaker to focus on pertinent information and to ignore information that the agency deems irrelevant to the decision, but also gives the staff great influence over the way the decisionmaker perceives the issues. See Seidenfeld, *Demystifying*, *supra* note 39, at 506; Wallace S. Sayre, *Dilemmas and Prospects of the Federal Government Service*, in *THE FEDERAL GOVERNMENT SERVICE* 1, 2 (Wallace S. Sayre ed., 2d ed. 1965).

201. See MASHAW & HARFST, *supra* note 1, at 133.

202. *Chrysler Corp. v. Department of Transp.*, 472 F.2d 659, 675-78 (6th Cir. 1972) (reversing and remanding NHTSA's original passive restraint rule for failing to specify test dummy criteria sufficiently objectively).

203. See MASHAW & HARFST, *supra* note 1, at 134-38.

204. 1974 Amendments to the National Traffic and Motor Vehicles Safety Act, Pub. L. No. 93-492 (1994) (codified at 15 U.S.C. § 1410b (1994)), *repealed by* 108 Stat. 745, 1379.

205. See MASHAW, *supra* note 7, at 66-67.

sionmaking that minimizes the triple threat of interest group domination, improper political influence, and idiosyncratic agency biases.

#### IV. LESSONS FOR REFORM OF EX-POST REVIEW

The problems that can stem from agency exercises of discretion freed from ex-post constraints provide a framework for evaluating the structure of ex-post review. Reformers who propose methods to “deossify” the administrative rulemaking process focus on the burden review imposes on the agency. They seek to reduce the particular requirements that the decision-making process must satisfy. One can do so by restricting review to consideration of the outcomes of agency decisions without any regard to the process or reasoning that the agency uses to reach them.<sup>206</sup> Alternatively, one can attempt to structure review to reinforce decisionmaking processes that minimize the potential for interest group domination, undue political influence and idiosyncratic regulation.

##### A. Structuring Outcome Review

Outcome review minimizes the burdens of the regulatory process on agencies but is unlikely to avoid problems caused by broad grants of discretion to agencies to set policy and decide how to apply it in particular contexts. Much as the competitive market induces efficient production by leaving manufacturers free to produce as they see fit but sending signals to consumers and other producers via prices,<sup>207</sup> outcome review signals the agency about whether its regulation is good while letting agencies decide how best to regulate. Thus, reformers have proposed what pragmatically would be some sort of outcome review by the judiciary,<sup>208</sup> Congress,<sup>209</sup> or

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206. I use outcome review to refer to any review that merely compares the final agency decision to some standard of acceptability, whether it be legal, factual or political. I use process review to refer to any oversight that evaluates the path the agency took in reaching its decision. Cf. Gary Lawson, *Outcome, Procedure and Process: Agency Duties of Explanation for Legal Conclusions*, 48 RUTGERS L. REV. 313, 317-18 (distinguishing outcome review from procedural and process review).

207. See EDWIN MANSFIELD, *MICROECONOMICS: THEORY/APPLICATIONS* 10 (8th ed. 1994).

208. See, e.g., McGarity, *Deossifying*, *supra* note 3, at 1453 (calling for pass-fail standard of judicial review that would depend primarily on determination of whether agency rule was, on the whole, rational response to problem confronting agency).

209. See, e.g., Paul R. Verkuil, *Comment: Rulemaking Ossification — A Modest Proposal*, 47 ADMIN. L. REV. 453, 457-58 (proposing fast track review of major rules on up-down basis by Congress); see also notes 102-09 *supra* and accompanying text (discussing fast track congressional review recently authorized by statute).

the President.<sup>210</sup> Unfortunately, in the realm of traditional governmental regulation, there is no competitive market to discipline decisionmaking. Although outcome review by the political branches provides a necessary component of meaningful ex-post review, outcome review by itself cannot curb problems stemming from the three pathologies of agency decision-making.

Courts are particularly ill-suited for reviewing agency decisions by evaluating whether they are substantively good enough. As already noted, the complexity of regulatory environments renders comprehensive *ex ante* specification of criteria for assessing the substantive wisdom of rules impossible. Thus, an evaluation of the "goodness" of an outcome of regulatory decisionmaking necessarily leaves the definition of the evaluative criteria to the reviewing body.<sup>211</sup> Even within a particular factual context, the definition of such criteria are not matters on which everyone would agree. In essence, substantive outcome review is, at least in part, inherently political. It depends on the ability of the agency to convince the public that the decision is good, or at least that attempting to improve on it would not be a worthwhile endeavor. One need not be eagle-eyed to observe that the judiciary is not the appropriate institution to impose such value laden constraints.

One might counter that, despite the seemingly manifest nature of this observation, courts have effectively engaged in some degree of substantive outcome review both with respect to constitutional challenges to governmental action, and under the APA's prohibition of arbitrary and capricious agency action. But neither body of judicial experience provides an adequate yardstick for courts to measure whether a regulation is sufficiently justified, a measure they would have to make under judicial outcome review. In the constitutional context, courts evaluate governmental decisions meaningfully only if those decisions implicate fundamental rights, which ordinary majoritarian politics cannot be trusted to protect.<sup>212</sup> In constitu-

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210. See, e.g., Richard J. Pierce, Jr., *The Role of Constitutional and Political Theory in Administrative Law*, 64 TEX. L. REV. 469, 507-08 (1985) [hereinafter Pierce, *Constitutional and Political Theory*].

211. See Seidenfeld, *Big Picture Approach*, *supra* note 101, at 9.

212. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 780 (2d ed. 1988) (positing that institutional role of political branches and courts is dimension that affects determination of what rights are judicially protected); JOHN HART ELY, *DEMOCRACY AND DISTRUST* 102-03 (1980) (arguing that heightened judicial scrutiny of governmental decisions should apply to reinforce inclusiveness of political representation); Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 750-68 (1991) (demonstrating that judicial rights decisions between 1937 and 1971 comport with political process theory of judicial review, but decisions after 1971 may have recognized rights beyond those justifiable under political process based theory).

tional challenges to socioeconomic legislation, legislation that involves the kinds of trade-offs which agencies evaluate in the normal course of regulation, courts have asked only whether there is a possible rational connection between the problem to be solved and the governmental decision.<sup>213</sup> In the administrative law context, courts applying the hard look test have incorporated outcome review only to the extent that they ask whether a decision is patently unjustified in light of the administrative record.<sup>214</sup> Such a permissive standard for agency decisions cannot inhibit decisionmaking due to interest group domination, political influence, or idiosyncratic agency values. The problem with such decisionmaking is not the outright illegitimacy of the interests they serve, but rather the skewed nature by which the agency balances such interests. Such decisionmaking may promote an interest that either an interest group, a politician, or the agency would favor, but barring cases involving outright bribery, these interests are usually within the realm that the government can legitimately seek to further. Thus, the kind of outcome based judicial review that the legal system has tolerated does not provide the needed constraints on agency regulation.

Congressional review of substantive outcomes of agency policymaking is more promising. Such review has, on occasion, provided an important check against agencies imposing idiosyncratic values via their regulatory decisions. When EPA Administrator Burford attempted to undermine enforcement of environmental protection laws, Congress politically forced President Reagan to appoint William Ruckleshaus, who had a proven track record of supporting and enforcing the environmental laws, as Administrator.<sup>215</sup> Forcing this appointment was especially noteworthy in the Reagan administration because Reagan, more than any previous president, otherwise appointed agency heads who shared his regulatory vision.<sup>216</sup> Congress's response was also remarkable because the EPA had imposed its anti-environmental values in a multitude of particular decisions such as

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213. Courts have almost never reversed governmental action under the rational relation test applied to cases that do not involve suspect classes or fundamental rights. See *TRIBE*, *supra* note 212, at 582 (describing extreme level of deference courts have accorded Congress when reviewing constitutionality of socioeconomic legislation).

214. Courts have rarely exercised this substantive outcome component of the hard look doctrine to reverse agency decisions; judges appear to be much more comfortable reversing decisions under the process based components of this doctrine. See Cass R. Sunstein, *Deregulation and the Hard-Look Doctrine*, 1983 SUP. CT. REV. 177, 183 [hereinafter Sunstein, *Deregulation*].

215. See Mitchell, *supra* note 190, at 55.

216. One indication of the remarkable nature of Ruckleshaus's appointment was the fact that, during Burford's tenure at the EPA, staff members who had close ties to Ruckleshaus were considered untrustworthy and even slated to be removed from the agency. See *LASH ET AL.*, *supra* note 59, at 36 & n\*.

settlements with owners of particular CERCLA sites and refusals to enforce Clean Water Act regulations. Thus, Congress did not have a single salient agency decision that it could simply reverse.<sup>217</sup> Congress also proved capable of reining in the FTC's consumer protection agenda, significantly curtailing ongoing rulemaking proceedings, eliminating the Commission's authority to regulate children's advertising that was not deceptive, and for the first time, subjecting decisions of an independent commission to a legislative veto.<sup>218</sup> Congress was even able to counter at least one decision driven by idiosyncratic staff norms when it reversed NHTSA's rule requiring automobile manufacturers to equip cars with seat-belt ignition interlocks and withdrew from the agency the power to impose ignition interlocks.<sup>219</sup>

These examples demonstrate that congressional review of regulatory outcomes does check against unacceptable agency decisionmaking at the extremes. By itself, however, such review is not a sufficient check against the problems caused by increased agency policymaking discretion. Legislative inertia and the gatekeeping function of congressional committees can prevent Congress from responding even when there is a general consensus on the need for legislative action.<sup>220</sup> Moreover, because of the structure of congressional decisionmaking, when Congress does react to agency regulation, that reaction tends to be uncoordinated and responsive only to the most vociferous interest groups.<sup>221</sup> Fast track review, to which Congress

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217. Congress's reining in of the EPA, however, was prompted at least in part by the refusal of the Reagan administration to hand over to a congressional committee documents relating to the EPA's handling of hazardous waste dump sites. See LASH ET AL., *supra* note 59, at 73-81.

218. See HARRIS & MILKIS, *supra* note 59, at 191-92.

219. This reversal, however, did not alleviate other problems stemming from NHTSA's technological focus on designing the safe car without regard to the political realities of industry resistance and consumer reaction to its regulations. See MASHAW & HARFST, *supra* note 1, at 131.

220. See Seidenfeld, *Big Picture Approach*, *supra* note 101, at 10 n.54; see also CHARLES TEIFER, CONGRESSIONAL PRACTICE AND PROCEDURE: A REFERENCE, RESEARCH, AND LEGISLATIVE GUIDE 57-58 (1989) (noting that committees can bury legislation and put spins on bills that alter their likelihood of adoption); Percival, *supra* note 57, at 195 (asserting Congress often fails to address environmental problems for fear of harming significant interest group). *But cf.* Steven S. Smith & Eric D. Lawrence, *Party Control of Committees in the Republican Congress*, in CONGRESS RECONSIDERED 163, 188 (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 6th ed. 1997) (reporting that Republican majority in House of Representatives recently changed rules to limit committee influence and to increase influence of centralized House leadership).

221. See ABERBACH, *supra* note 147, at 200-01 (concluding that congressional oversight can only improve regulatory policy at margins); Morris P. Fiorina, *Congressional Controls of the Bureaucracy: A Mismatch of Incentives and Capabilities*, in CONGRESS RECONSIDERED, *supra* note 147, at 332, 344-46 (asserting that lack of coordinated political



now subjects all agency rules,<sup>222</sup> can help alleviate some of these problems with respect to congressional oversight, but it may do so at the expense of informed voting by members of Congress.<sup>223</sup> And even fast track review will not provide a means for Congress to pass judgment on every significant agency decision affecting regulatory policies; there are simply too many such decisions.<sup>224</sup> Pragmatically, fast track review most likely will encourage Congress to consider the acceptability of rules with a major social or economic impact, in addition to rules whose effects are egregiously inconsistent with publicly held values.

A corollary to this observation is that, even with fast track review, Congress cannot effectively curtail idiosyncratic regulatory policy that results from a multitude of small decisions. Given the limits on congressional attention, no such single decision warrants congressional response. Moreover, reversal of a few such decisions is unlikely to curtail the idiosyncratic behavior. Because Congress's focus in performing such review is the bottom-line acceptability of the agency decision,<sup>225</sup> outcome review does not communicate to an agency how to structure its process to ensure that subsequent decisions satisfy Congress. Even repeated reversals are unlikely to induce necessary changes in agency behavior when regulatory idiosyncrasy results from staff norms, because such norms are often deeply inculcated and staff members usually will not identify them as the cause of the repeated rejection of its decisions. Hence, to get at the root of the problem, Congress would have to fundamentally change the structure of the agency decisionmaking process. As Congress's response to the Burford EPA illustrates, when the overall impact of agency decisions is sufficiently salient, Congress will take such action. Assuming, however, that idiosyncratic agency decisionmaking occurs with some regularity, the very notoriety of such a congressional response indicates that such a response is exceptional.

Congressional outcome review is even less valuable as a means of preventing interest group domination and minimizing undue political influence

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control over bureaucracy stems from decentralized institutional structure of Congress); Ogul, *supra* note 147, at 327-28 (blaming shortcomings in congressional oversight on lack of incentives for congresspersons to engage in meaningful oversight).

222. See 5 U.S.C. §§ 801-808 (Supp. III 1997).

223. See Cohen & Strauss, *supra* note 102, at 103 (expressing concern that volume of rules subject to congressional review will require reliance on analysis by few staffers or members of Congress); see also Shimburg, *supra* note 47, at 245-46 (noting constraints on congressional oversight of EPA because "oversight work is detailed, complex, and tedious").

224. See Cohen & Strauss, *supra* note 102, at 103 (noting that current fast track review provisions commits Congress to review over 4600 rules per year).

225. See Seidenfeld, *Demystifying*, *supra* note 39, at 512 (arguing that "bottom-line" focus of political review limits its effectiveness in changing how agencies engage in regulation).

on agency decisions. Congress operates by the very political dealmaking that is of questionable validity when it puts pressure on agency decisions. Congresspersons ask for and usually obtain assignments on committees that address agency matters crucial to their constituents or financial supporters.<sup>226</sup> Classic scenarios of capture involved legislators on agency oversight committees forming an “iron triangle” within a “policy subsystem” with regulated entities and regulators.<sup>227</sup> The regulators provide monopoly rents to the entities, which use some of the rents to fund reelection campaigns for the legislators, who then ensure that the agency retains its budget and jurisdiction. Some of the worst examples of interest group domination, such as lack of enforcement of questionable savings and loan practices, are closely tied to legislative involvement or at least intentional ignorance of improper agency decisions.<sup>228</sup> Again, one might posit that fast track review, which bypasses the committee system, would provide a meaningful check on interest group domination and improper political influence. Although such review involves up-down floor votes, legislators will still have to rely on members of oversight committee staff members, lobbyists or in-

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226. See KENNETH A. SHEPSLE, *THE GIANT JIGSAW: DEMOCRATIC COMMITTEE ASSIGNMENTS IN THE MODERN HOUSE* 231-38 (1978); C. Lawrence Evans & Walter J. Oleszek, *Congressional Tsunami? The Politics of Committee Reforms*, in *CONGRESS RECONSIDERED*, *supra* note 147, at 193, 197-98; Richard L. Hall & Gary J. McKissick, *Institutional Changes and Behavioral Choice in House Committees*, in *CONGRESS RECONSIDERED*, *supra* note 147, at 212, 215-16; see also Irwin N. Gertzog, *The Routinization of Committee Assignments in the U.S. House of Representatives*, 20 *AM. J. POL. SCI.* 693, 704 (1976) (noting that about two-thirds of freshman representatives in 89th-91st Congresses were appointed to committees they most preferred, and that almost all House members got their desired committee assignments by their fifth year); cf. Smith & Lawrence, *supra* note 220, at 181 (reporting essential failure of House leaders' efforts to use denial of committee assignment as punishment for freshman representative's deviation from position of leadership on committee vote).

227. Some have questioned the current relevance of iron triangles, believing that much of American politics is characterized by “issue networks” — open, fragmented and complex interactions between government decision makers and interest groups. See Hugh Hechlo, *Issue Networks and the Executive Establishment*, in *THE NEW AMERICAN POLITICAL SYSTEM* 87, 102 (Anthony King ed., 1978). More accurately, iron triangles and issue networks represent competing idealized images of the interaction of interest groups and decisionmakers within a policy subsystem. See James A. Thurber, *Dynamics of Policy Subsystems in American Politics*, in *INTEREST GROUP POLITICS*, *supra* note 114, at 323; A. Grant Jordan, *Iron Triangles, Woolly Corporatism and Elastic Nets: Images of the Policy Process*, 1 *J. PUB. POL'Y* 95, 99-103 (1981).

228. See Edwin J. Gray, *Warnings Ignored: The Politics of the Crisis*, 2 *STAN. L. & POL'Y REV.* 138, 142-43 (1990); Thomas Romer & Barry R. Weingast, *Congress: The Genesis of the Thrift Crisis*, 2 *STAN. L. & POL'Y REV.* 37, 37-38 (1990); Michael Waldman, *The S&L Collapse: The Cost of a Congress for Sale*, 2 *STAN. L. & POL'Y REV.* 47, 48-50 (1990).

dividual members of Congress for information about how to vote,<sup>229</sup> and members are apt to trade votes on such review for others on unrelated matters. Rather than preventing domination, congressional outcome review might exacerbate it.

Some procedural reformers have suggested that presidential oversight of particular agency decisions is best suited to constrain administrative discretion.<sup>230</sup> The President can act unilaterally and therefore does not face the problem of having to form a coalition or reach a consensus that plagues Congress. The President also answers to the entire electorate; in theory, therefore, he should have no incentive to placate special interest groups at the expense of the country as a whole. Thus, some see OMB review of agency rules as a means of alleviating regulatory paralysis without forfeiting limitations on bureaucratic regulatory decisions.<sup>231</sup> The realities of presidential politics, however, suggest that having the White House pass on the outcome of agency decisions suffers from some of the same problems as review by Capitol Hill.

The number of decisions that the White House would have to review would preclude personal review by the President or even his close aides.<sup>232</sup> Review of major rules requires its own sub-bureaucracy within the executive office — the Office of Information and Regulatory Affairs (OIRA). There are agency costs created by the need for low-level staff members in OIRA to conduct the reviews; the President cannot specify in advance all the criteria for acceptability, and he cannot screen all such staff members to ensure that they would see regulatory issues as he does.<sup>233</sup> Moreover, un-

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229. See Cohen & Strauss, *supra* note 102, at 103.

230. See, e.g., Lloyd N. Cutler & David R. Johnson, *Regulation and the Political Process*, 84 YALE L.J. 1395, 1410-11 (1975); Pierce, *Constitutional and Political Theory*, *supra* note 210, at 507-13.

231. See Christopher C. DeMuth & Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075, 1080-82 (1986); Peter L. Strauss & Cass R. Sunstein, *The Role of the President and OMB in Informal Rulemaking*, 38 ADMIN. L. REV. 181, 188-92 (1986).

232. See GLEN O. ROBINSON, AMERICAN BUREAUCRACY: PUBLIC CHOICE AND PUBLIC LAW 103 (1991); Harold H. Bruff, *Presidential Management of Agency Rulemaking*, 57 GEO. WASH. L. REV. 533, 557-58 (1989); Seidenfeld, *Big Picture Approach*, *supra* note 101, at 14; Percival, *supra* note 57, at 180.

233. See MARC K. LANDY ET AL., THE ENVIRONMENTAL PROTECTION AGENCY: ASKING THE WRONG QUESTIONS 67 (1990) (quoting one regulatory review staff member who admitted that “[s]ince I never knew what decision the president . . . would have made if an issue ever got to him, I had no choice but to pursue my own vision of what was good”); Margaret Gilhooley, *Executive Oversight of Administrative Rulemaking: Disclosing the Impact*, 25 IND. L. REV. 299, 311 (1991); Thomas O. McGarity, *Presidential Control of Regulatory Decisionmaking*, 36 AM. U. L. REV. 443, 451 (1987) [hereinafter McGarity, *Presidential Control*].

like agency staff members, OIRA staff members are not chosen based on their knowledge or experience with a regulatory area; they are not necessarily constrained by professional norms that make monitoring and oversight practicable. Hence, White House review could increase the extent to which regulatory decisions become unpredictable.

Even if White House review did not suffer from an agency cost problem, such review could encourage improper political influence. Imperfections in the political process permit the President to garner political advantages from catering to special interest groups. In what has been denoted "the rise of candidate centered politics," most voters respond to perceptions of how the nation as a whole has performed under an incumbent running for reelection or on candidates' general ideologies rather than on particular decisions made or policies proposed by the various candidates.<sup>234</sup> Outcomes on all but the most salient regulatory decisions matter only to those voters who feel strongly about the issue. Hence, incumbents pay little price but stand to reap substantial rewards by providing regulatory benefits to special interest groups.<sup>235</sup> Moreover, unlike agency proceedings, political access to the White House is restricted and conversations between presidential staff members and interest group representatives occur behind closed doors.<sup>236</sup> Thus, White House review might be more conducive to improper political influence and special interest influence than is the agency proceeding.

Experience with OMB review of proposed rules is illuminating. Although such review purported to weed out rules that were not cost-justified, during the Reagan years, many criticized such review as a means of allowing industry increased influence over agency rules.<sup>237</sup> The Clinton administration has opened OMB rules review to greater public scrutiny and lim-

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234. See generally MARTIN P. WATTENBERG, *THE RISE OF CANDIDATE-CENTERED POLITICS: PRESIDENTIAL ELECTIONS OF THE 1980S* 13-30, 130-55 (1991); see also MICHAEL S. LEWIS-BECK, *ECONOMICS AND ELECTIONS: THE MAJOR WESTERN DEMOCRACIES* 155-57 (1988) (concluding that voters focus on economic state of nation as whole rather than on whether particular decisions or policies improved their personal well being); David O. Sears et al., *Self-Interest vs. Symbolic Politics in Policy Attitudes and Presidential Voting*, 74 AM. POL. SCI. REV. 670, 679-82 (reporting that candidate's general ideology influences voters more than his detailed economic and regulatory programs).

235. See ROBINSON, *supra* note 232, at 104; Percival, *supra* note 57, at 195.

236. See Shapiro, *Political Oversight*, *supra* note 58, at 21-23 (describing advantages in oversight White House gains from secrecy it can maintain about outside contacts); Seidenfeld, *Big Picture Approach*, *supra* note 101, at 46 (noting that even disclosure provisions of President Clinton's Executive Order 12,866 still permit special interest groups to affect rulemaking secretly via White House connections).

237. See, e.g., McGarity, *Presidential Control*, *supra* note 233, at 454-57; Alan B. Morrison, *OMB Interference with Agency Rulemaking: The Wrong Way to Write a Regulation*, 99 HARV. L. REV. 1059, 1064-65 (1986).

ited its application to rules with a major impact.<sup>238</sup> This seems to have eliminated the most controversial special interest group influences but, by the same token, the overall influence of OMB review has decreased under President Clinton. Thus, one cannot easily assess whether greater openness has reduced only the propensity of such review to foster interest group influence and improper politicking, or whether it has decreased the constraints such review imposes on agency rulemaking altogether. Regardless of one's evaluation of Clinton's use of OMB rules review, experience outside of the rules context indicates that the mere ability to gain access to the Clinton White House has influenced some agency decisions whether to prosecute even egregious regulatory violations.<sup>239</sup>

In summary, outcome review is best effectuated by the political branches, especially Congress, rather than the courts. Given the nature of agency decisions, however, such review can at best prevent or overrule decisions that reflect an agency culture or an agency head's values egregiously out of sync with those of the mainstream polity. Outcome review will do little to alleviate the threats of undue interest group and political influence, and will not likely even ameliorate more subtle biases in decisions caused by idiosyncratic agency values.

### B. Structuring Process Review

Process review can constrain agency discretion by empowering staff offices outside the dominant cultures of the agency in the decisionmaking process. Some sort of process review is needed given the limited ability of outcome review to prevent interest group domination, undue political influence, and agency imposition of potentially idiosyncratic values. Process review has the advantage of maintaining the agency as the ultimate decisionmaker. Agencies bring to a problem technical expertise and experience that allow them to make informed decisions efficiently.<sup>240</sup> Their structure allows staff deliberation about the issues they face. They have at their dis-

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238. See Exec. Order No. 12,866, § 6(b), 3 C.F.R. 646 (1994), reprinted in 5 U.S.C. § 601 (1994).

239. See Ralph Frommolino & Glenn F. Bunting, *Penalties Averted by DNC Donor, Records Show*, L.A. TIMES, Apr. 14, 1997, at A1 (describing how EPA official in Washington directed agency staffers on West Coast not to press for major fines or criminal sanctions against developer, who had "a direct line to the White House," for ignoring Army Corps of Engineers cease and desist order).

240. Cf. Peter L. Strauss, *Presidential Rulemaking*, 72 CHI.-KENT L. REV. 965, 971 (1997) (suggesting that administrative action involves intertwining of both political and scientific considerations).

positional procedures for involving the public in setting policy.<sup>241</sup> Agencies also ultimately answer to the political branches for the outcomes of their decisions. Agency heads are appointed by the President with the advice and consent of the Senate;<sup>242</sup> executive branch agency heads are subject to the threat of removal at the will of the President;<sup>243</sup> Congress can slash the appropriations of agencies that ignore political winds.<sup>244</sup> In short, agencies have the potential to engage in deliberative yet democratic decisionmaking.<sup>245</sup> For this reason, as well as that Congress already retains the ability to overrule agency policy when that policy is an egregious deviation from what the political process will tolerate, process review should not substitute the reviewing institution's decision for that of the agency.

A significant attribute that adds to agencies' potential for deliberative democratic decisionmaking is their ability to include in the decisionmaking process staff members from diverse backgrounds who approach problems

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241. The APA explicitly requires public notice and an opportunity for the public to comment before an agency can issue a substantive rule. *See* 5 U.S.C. § 553 (1994 & Supp. III 1997). Some advocates of a more collaborative regulatory process complain that notice and comment procedures do not provide regulatory stakeholders with access to policy-making at a point or in a manner conducive to deliberative consideration of public input. *See, e.g.*, Harter, *supra* note 103, at 19-23; Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1, 11-12 (1997). My short answer to these complaints is that it is not clear that the government can provide a more meaningful opportunity for public involvement outside of limited contexts. I will provide a longer answer in a forthcoming article.

242. *See* U.S. CONST. art. II, § 2, cl. 2.

243. *See* *Humphrey's Ex'r v. United States*, 295 U.S. 602, 610-11 (1935) (distinguishing between members of independent agencies who perform quasi-judicial and quasi-legislative functions and whom Congress can shield from at will dismissal by President, and heads of executive branch agencies); *Morrison v. Olson*, 487 U.S. 654, 690-91 (1988) (determining bounds of Congress's power to restrict President's ability to remove agency head from office according to whether that restriction impedes President's ability to perform his constitutionally appointed functions). Of course, if the President terminates an executive official for making a decision with which the President disagrees, he pays a price in not having that official's abilities available to make other decisions as well as a political price if the termination is seen as being for illegitimate reasons. *See also* Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 590, 667 n.402 (1984).

244. *See* PETER L. STRAUSS, AN INTRODUCTION TO ADMINISTRATIVE JUSTICE IN THE UNITED STATES 55-56 (1989) (describing how Congress can exercise control over agencies via appropriations process); CHRISTOPHER H. FOREMAN, JR., SIGNALS FROM THE HILL: CONGRESSIONAL OVERSIGHT AND THE CHALLENGE OF SOCIAL REGULATION 89 (1988).

245. *See* Robert B. Reich, *Public Administration and Public Deliberation: An Interpretive Essay*, 94 YALE L.J. 1617, 1631-41 (1985); Seidenfeld, *Civic Republican*, *supra* note 48, at 1541.

facing agencies from differing perspectives.<sup>246</sup> In essence, agencies hold the potential for implementing the conception of republican government that Madison explained was the backbone for the Constitution: Having representatives of one faction counteract those of another.<sup>247</sup> Within each agency, informed individuals who do not have a direct stake in the outcome of their decisions discuss the decisions facing the agency with other such individuals who may not see the problem from the same perspective and with whom they do not share all relevant values. For this system to work, however, representatives of all factions must be able to participate meaningfully; the agency must listen to what each representative has to say with an open mind about how it might affect the ultimate decision. Hence, the point of process review should be to empower groups within an agency's staff who hold alternative values to those that have traditionally dominated an agency, and to encourage agencies to meaningfully involve offices with a variety of backgrounds and roles in the decisionmaking process.<sup>248</sup>

Empowerment of diverse perspectives among agency staff provides a powerful palliative for the triple threat of domination, political influence, and agency idiosyncrasy. Staff members who see themselves aligned with different offices, which in turn see their role as representing particular perspectives or interest groups affected by a decision, will not allow the agency surreptitiously to favor one such group over another. At the very least, the influence of staff favoring an alternative position will force the agency to explain to such staff members how its decision comports with its statutory mandate. Similarly, decisions made to appease political pressures will be subjected to questioning in staff deliberations. Finally, empowerment of diverse interest representatives on staff will ensure that decisions do not reflect inappropriate norms applied without question. Empowerment can guarantee that internal concerns of staff members fosters external publicity.

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246. See Seidenfeld, *Civic Republican*, *supra* note 48, at 1555-56; see also THOMAS O. MCGARITY, *REINVENTING RATIONALITY: THE ROLE OF REGULATORY ANALYSIS IN THE FEDERAL BUREAUCRACY* 226 (1991) [hereinafter MCGARITY, *REINVENTING RATIONALITY*] (noting how team model of agency decisionmaking allows team members to serve as advocates for particular positions).

247. See THE FEDERALIST No. 10 (James Madison).

248. See Pedersen, *supra* note 112, at 59 (noting how hard look review can empower otherwise marginalized members of agency staff). The idea of empowering non-traditional constituencies parallels calls for doing so within corporations as a means of instilling an institutional desire to comply with regulations. Cf. JAY A. SIGLER & JOSEPH E. MURPHY, *CORPORATE LAWBREAKING AND INTERACTIVE COMPLIANCE: RESOLVING THE REGULATION-DEREGULATION DICHOTOMY* 154 (1991) (contending that key inducing ethic of regulatory compliance within corporation is identifying and empowering existing "compliance constituencies" such as legal departments, auditors, and safety engineers).

Empowerment, however, should not be absolute or universal. Offices within an agency might engage in power struggles or turf battles over control of an agency decision. In such a situation, giving each office within an agency the power to prevent the agency from issuing a decision could stymie agency decisionmaking.<sup>249</sup> Conflict rather than cooperation between various offices certainly threatens to increase the cost and delay of agency action unnecessarily. Empowerment also should not be pro-forma. An agency that need only include members from different offices within the decisionmaking group without giving these members some power to influence the decision will allow the agency to ignore the input from these members regardless of its merit.<sup>250</sup> The extent to which the various groups within an agency should be empowered depends on the context of the decision. Ideally, process review should force an agency to pay attention to the views of those outside the office primarily responsible for a decision when that office is likely to make the decision without considering whether it reflects values at odds with those held by mainstream society or whether the office is unthinkingly relying on a decisionmaking norm that is inappropriate for the situation. It should not force, however, the agency to reanalyze a policy it has already adopted every time the agency applies it. In other words, process review must depend on the details of the environment in which the regulatory decision is made.

Direct review of agency decisionmaking processes to ensure that they are truly deliberative is not feasible. The best one can do to ensure a deliberative process directly is to demand that agency procedures not exclude certain affected interest groups *a priori*. Deliberation, however, depends not only on a formal process of including various perspectives, it requires the various members of agency staff who contribute to the ultimate decision to approach their tasks with an open mind. Questioning the state of mind of administrators would not only be a daunting task, it would also greatly intrude into the communications between staff members and has the potential to demoralize individuals whose proffers of open-mindedness are challenged.<sup>251</sup>

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249. See MCGARITY, REINVENTING RATIONALITY, *supra* note 246, at 237 (concluding that turf battles might result when agency structures its internal decisionmaking as adversarial process). *But cf. id.* at 225 (noting that success of team structure of decisionmaking, under which OSHA operated until 1982, later led project officers to institute that structure informally despite fact that doing so risked yielding decisionmaking turf to OSHA's Policy Directorate).

250. See Pedersen, *supra* note 112, at 506-10.

251. Inquiring into whether decisionmakers who claim to have been open-minded really were, raises concerns similar to those that arise when a court considers a claim that the reasons an agency proffers for its decision are pretexts. Both inquiries require the reviewer to question the good faith of the decisionmaker's assertion and to rely on circumstantial evi-



Process review as currently practiced, however, instead evaluates the reasons the agency gives for its action as an indirect means of ferreting out non-deliberative decisions.<sup>252</sup> By asking the agency to explain why it decided as it did and why it rejected alternatives proposed to it, a reviewing body might be able to identify those decisions over which the agency did not deliberate.<sup>253</sup> On review, those who challenge the decision can raise arguments about why alternatives the agency rejected were superior, or why the agency reasons do not make sense in light of the circumstances of the action. The reviewer assesses whether the agency can plausibly assert that its decision was the best available under the circumstances. If, in light of the challenger's arguments, the reviewer finds the agency's reasons for its decision unpersuasive, that finding may provide some indication that those reasons are pretexts, or that the decision was not carefully thought out when care was warranted, or that the agency did not seriously consider the viewpoint and contention of the challenger during the decisionmaking process.

Focusing process review on the reasons an agency proffers for a decision increases the propensity of such review to ameliorate improper interest group influence, undue political influence, and biases that derive from idiosyncratic staff cultures. Such review forces the agency to state publicly reasons for every coercive exercise of state power. This allows private interest groups and the media to monitor agency decisions, and to call public and congressional attention to those decisions seemingly at odds with the agency's explanation.<sup>254</sup> In addition, the requirement that an agency state reasons necessarily trickles down to the ranks of agency personnel. If the

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dence such as communications between those involved in the decision. See, e.g., *United States v. Morgan*, 313 U.S. 409, 420-22 (1941). Such inquiries not only are likely to prove unfruitful, they could adversely affect the very deliberative process review is meant to foster. See Russell L. Weaver & James T.R. Jones, *The Deliberative Process Privilege*, 54 MO. L. REV. 279, 286-90 (1989) (describing how courts developed privilege for deliberative communications between agency personnel to avoid chilling open and frank discussion among government officials necessary to maintain quality of agency decisionmaking); Rossi, *Mass Participation*, *supra* note 37, at 236 (noting propensity for sunshine laws to interfere with agencies abilities to engage in deliberative decisionmaking).

252. See Seidenfeld, *Demystifying*, *supra* note 39, at 491-92; Sunstein, *Deregulation*, *supra* note 214, at 181-83.

253. See Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 63-64 (1985) [hereinafter Sunstein, *Interest Groups*] (asserting that judges have used hard-look doctrine to ensure agency deliberation).

254. Monitoring by having interest groups complain to Congress when an agency decision that they think unjustified harms them has come to be known as "fire alarm" monitoring. See Mathew D. McCubbins et al., *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 250-55 (1987) (coining phrase "fire alarm monitoring" and arguing that judicial enforcement of administrative process requirements generally foster such monitoring).

agency ultimately needs a reason for its decision, then staff members responsible for choices along the path to the ultimate decision will have to provide reasons for their choices. Such reasons, in turn, facilitate monitoring by the political appointees at the apex of the agency structure to ensure against professional staff biases.

That process review is structured as oversight of an agency's announced reasons for its decisions, suggests that courts are better suited than Congress or the President to perform such review.<sup>255</sup> Politics, and therefore the branches most subject to its pressures, tends to focus more on the bottom-line acceptability of a decision rather than on the process of reaching the decision or the reasons for it. Appellate judges, by contrast, regularly evaluate the reasoning process by which lower courts develop legal doctrine. They are trained to think critically and find gaps and flaws in arguments. Also, courts are likely to give better feedback to agencies about the shortcomings of the agency decisionmaking process, because unlike the political branches, courts must give reasons for their own decisions. Some have contended that courts are too fragmented to give a consistent message to agencies about what is required for agency decisions to pass judicial muster.<sup>256</sup> Certainly individual judicial decisions are not all consistent. Inconsistency, however, does not necessarily imply incoherence. Judicial opinions discuss previous cases and explain why the court differed from the outcome seemingly dictated by such cases. Often one judge will emphasize a factor in a decision that another judge would find insignificant. The extent to which judicial opinions explain how judges choose these different emphases mollifies the extent to which inconsistent decisions leave the agency confused about what the courts might require.

One can argue that the potential for judges with varying concerns to focus on different factors actually improves the effect of review on agency decisionmaking. Review of agency reasoning has a substantive as well as process component: At some point the reviewer must be able to reject the

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255. Viewing judicial review as a means of empowering various offices within agency staff is consistent with Cary Coglianese's recent finding that interest groups with the most extensive and long standing relationships with agency staff bring most environmental rules challenges. Cary Coglianese, *Litigation within Relationships: Disputes and Disturbances in the Regulatory Process*, 30 LAW & SOC'Y REV. 735, 743-44 (1996). Coglianese explains that the this type of litigation hardly disturbs the relationship between the interest group challenger and staff and provides a means for the interest group to continue bargaining with the agency about the rule the agency finally adopts. *See id.* at 757. According to my view, an interest groups can use such litigation to increase the influence of staff members who represents the group's perspective in internal agency deliberations.

256. *See* Richard J. Pierce, Jr., *The Role of the Judiciary in Implementing an Agency Theory of Government*, 64 N.Y.U. L. REV. 1239, 1252 n.68 (1989).

agency reasons as simply implausible.<sup>257</sup> Determinations of the plausibility of any particular set of reasons will likely vary with the ideology and background of the reviewer. This suggests that having a single person review all agencies' decisions could induce a bias toward the ideological preferences of that individual in the agency decisionmaking process. In fact, reviewers should not themselves be experts on the matters under review, as review by experts would remove incentives for the agency to counter the biases of similar experts in its decisionmaking structure.<sup>258</sup> Potential review by any one of a multitude of generalists, all of whom may bring their own preconceptions to the regulatory problem, adds uncertainty to the agency's ability to predict which factors the reviewer will find significant, and what values the reviewer will bring to bear on its evaluation of the agency decision. The agency's inability to predict the perspective from which the reviewer will view the decision will encourage the agency to vet the reasons for its decisions before staff members and members of the public with a wide range of ideological viewpoints.

Reformers who call for deossification of agency decisionmaking remind us that encouraging input from those with varying perspectives is not a costless blessing. There is a need to balance the extent to which such input can reduce unwise or illegitimate agency decisions against the increased cost of forcing an agency explicitly to consider decisionmaking criteria that often lead most efficiently to good decisions. The above analysis, however, suggests that process review is a crucial component in ensuring that the vast administrative state that is the government today regulates in pursuit of the public interest embodied in the public's understanding and acceptance of the bases for agencies' authority.<sup>259</sup> In light of this conclusion,

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257. Court applying the hard look doctrine have, on occasion, simply reversed the agency decision as implausible. *See, e.g.,* *California v. FCC*, 905 F.2d 1217, 1231-38 (9th Cir. 1990) (concluding that rulemaking record did not support FCC's determination that benefits of eliminating structural separations for Bell Operating Companies justified harms that might result from such elimination); *Building & Constr. Trades Dep't v. Brock*, 838 F.2d 1258, 1270 (D.C. Cir. 1988) (holding that OSHA's ban on spraying of asbestos products was not supported by rulemaking record); *cf. Sunstein, Deregulation, supra* note 214, at 183 (noting that hard look doctrine includes substantive review component but that courts are loathe to rely on that component to reverse agency decisions).

258. *See* Richard L. Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 U. PA. L. REV. 1111, 1139-53 (1989) (contending that specialized courts will bias review in favor of agency); Bruff, *Specialized Courts, supra* note 87, at 331 (recognizing that costs of review by specialized courts include loss of cross-fertilization of insights from different disciplines and propensity to exaggerate importance of professionally parochial issues).

259. *See* Wald, *Judicial Review, supra* note 110, at 228 (citing agency capture as one of reasons for rebirth of increased judicial scrutiny in 1960s-1970s); Sunstein, *Interest Groups, supra* note 253, at 61-64 (citing "hard-look doctrine" as most important doctrinal innovation

the best manner for reducing the inefficiencies of the regulatory process would not be to abandon process review altogether, but rather to structure such review so that it does not encourage an agency to perform analyses for its own sake, or respond to every contention raised in opposition to the agency's decision.<sup>260</sup>

#### CONCLUSION

Recent perceptions that agencies are mired in a regulatory quagmire have prompted calls for increased flexibility allowing agencies to deviate from rules and to escape meaningful review of the reasons for their decisions. Contrary to popular belief, however, agencies have significant leeway to deviate from rules they have adopted or even those imposed on them by statute. Agencies can grant waivers to rules, can refuse to prosecute violations, and can negotiate cooperative or not-so-cooperative solutions to regulatory problems that avoid perverse outcomes in particular situations. Any additional discretion to deviate from rules threatens to upset the balance between the need to ensure political accountability of agencies and the need for flexibility. In some instances, the trend of the legislative and executive branches to micromanage agency decisionmaking has increased the difficulty agencies face when tailoring regulatory responses to particular circumstances, but such micromanagement by itself has not created a regulatory crisis.

Internal agency norms also contribute to regulatory inflexibility. Bureaucracies, such as agencies, tend to rely on such norms to make decisions efficiently and effectively. But, internal norms can lead agencies into decisionmaking ruts, and with respect to political matters, can generate decisions that reflect parochial values of regulators or undue influence of special interest groups or powerful politicians. Moreover, it is almost impossible to specify *ex ante* criteria for decisions that will correct misuse of decisionmaking norms within agencies.

The problem of the perverse effects of decisionmaking norms, especially in political arenas, suggests that the solution lies in including representatives of various perspectives in the internal decisionmaking process of the agencies. To include such representatives in a meaningful, rather than pro-forma manner, however, requires ex-post review of agency decisions. Such review, moreover, is best accomplished by allowing courts to review agencies' reasons for their decisions, much as courts currently do. Ex-post review does add costs to the decisionmaking process. The analysis in this

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in administrative law and further stating that its effect is to ensure that agencies do more than just respond to political clout and pressure).

260. See Mark Seidenfeld, *Hard Look Review in a World of Techno-Bureaucratic Decisionmaking: A Reply to Professor McGarity*, 75 TEX. L. REV. 559, 567 (1997).

article suggests, however, that reformers of regulation would spend their time more productively trying to structure judicial review to minimize such costs rather than advocating for agencies to have carte blanche to ignore rules and not have to answer for particular regulatory decisions they make.

