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Public Interest Regulation

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PUBLIC INTEREST REGULATION

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PUBLIC INTERESTED REGULATION

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I. INTRODUCTION

Critiques of regulatory government are as old as government regulation itself. They are also often compelling. Indeed, today confidence in public regulatory institutions—in the modern administrative state—risks dismissal as idealistic and uninformed. No doubt this is true in part because of the power of familiar critiques. Often, regulatory bodies appear to cater to the powerful, the well-funded, or the organized. This general dynamic is widely taken to be a consequence of the basic “rules” of modern politics, and not without justification. The combination of elected legislators who require economic resources to maintain their positions, on the one hand, and regulatory agencies that enjoy considerable regulatory power but depend on the legislature for political and budgetary resources, on the other, provides a recipe for a regulatory state that works to advantage well-funded yet narrowly focused political interest groups (“special interests”), at least according to conventional wisdom. Such groups ex-

* Professor of Law, University of Michigan Law School. Thanks to Matthew Adler, David Chambers, Bob Cooter, Charlotte Crane, David Dana, Cynthia Farina, Phil Frickey, Elizabeth Garrett, Rick Hills, Nancy King, Kevin Karty, Andy Koppleman, Kyle Logue, Rob Merges, Joe Sax, Mark Seidenfeld, Matt Spitzer, Chris Yoo, and Nick Zeppos for comments and helpful discussion. Thanks also to the legal theory workshop participants at the University of California, Boalt Hall; Florida State University Law School’s Symposium on Regulatory Theory and Administrative Law; Northwestern University Law School; and Vanderbilt University Law School. Finally, thanks to the University of Michigan Law School Cook Research Fund for funding portions of this research.

change economic and political resources for what are essentially regulatory rents. Regulators deliver those rents as parties to an illicit exchange.

But sometimes they don't. At times, regulatory institutions instead appear to advance broad, diffuse interests, even at the expense of more powerful, concentrated interests. How is this possible? More specifically: Under what set of conditions, politically and especially legally, can regulatory bodies, federal administrative agencies in particular, deliver broad-based benefits—"public interest" or, better, "public interested" rather than "special interest" regulation?¹ How, and perhaps more to the point, why do they at times seem to deliver broad-based benefits even over the strong opposition of well-organized and well-funded interests? Are even these instances, upon close scrutiny, simply examples of certain powerful interests getting what they want, albeit under the guise of purportedly beneficial regulation, and thus confirmation of the conventional wisdom rather than exceptions to it? If not, what particular channels of agency authority, what decisionmaking tools, are insulated from the consequences of interest group politics? Perhaps more urgently, why would interests thwarted by those channels tolerate decisionmaking envi-

1. For treatments of the concept of "the public interest," see generally VIRGINIA HELD, *THE PUBLIC INTEREST AND INDIVIDUAL INTERESTS* 1-15 (1970), GLENDON SCHUBERT, *THE PUBLIC INTEREST: A CRITIQUE OF THE THEORY OF A POLITICAL CONCEPT* 5-29 (1960), Clarke E. Cochran, *Political Science and "The Public Interest"*, 36 J. POL. 327 (1974), Norton Long, *Conceptual Notes on the Public Interest for Public Administration and Policy Analysts*, 22 ADMIN. & SOC'Y 170 (1990), and Barry M. Mitnick, *A Typology of Conceptions of the Public Interest*, 8 ADMIN. & SOC'Y 5 (1976). Some students of regulation associate "the public interest" with the amelioration of market failures. See, e.g., Michael E. Levine & Jennifer L. Forrence, *Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis*, 6 J.L. ECON. & ORG. 167, 168 (1990). For a classic distinction between public-interested and self-interested interest groups, see E.E. SCHATTSCHEIDER, *THE SEMISOVEREIGN PEOPLE: A REALIST'S VIEW OF DEMOCRACY IN AMERICA* 26 (1960). See also JEFFREY M. BERRY, *LOBBYING FOR THE PEOPLE: THE POLITICAL BEHAVIOR OF PUBLIC INTEREST GROUPS* 7 (1977) (distinguishing "public interest groups" from other types of interest groups); KAY LEHMAN SCHLOZMAN & JOHN T. TIERNEY, *ORGANIZED INTERESTS AND AMERICAN DEMOCRACY* 29 (1986) (same). Here and throughout, "public interested" regulation is used in contradistinction to "special interest" regulation, where the former refers to regulation that promotes diffuse interests while the latter describes the delivery of rents to narrow groups. Interest group and public choice theorists of many stripes have long lamented the consequences of regulatory favoritism towards narrow, rent-seeking interest groups as antithetical to general, but not highly specified, notions of the general welfare. "Public interested" regulation represents the category of "benign" regulation that stands in opposition to the "bad" regulation interest group theorists usually fear. Public interested regulation needs no further specification than to say that it aims at vindicating the preferences of diffuse interests, and it delivers no regulatory rents. Thus, a publicly interested regulator is motivated to advance some conception of the general welfare. Whether publicly interested regulators in fact advance general interests effectively is a separate question touched upon in the conclusion of this Article but outside of its principal focus. The point for now is that public choice theorists are estopped from objecting to an argument that regulation sometimes advances public interests on the grounds that such an argument requires a well-developed conception of the public interest.

ronments that allow agencies to deliver broad-based benefits at their expense? Or is there little they can do about it?

This Article will address these questions, though it does not purport to answer them definitively. Part II articulates and evaluates certain claims about the “logic” of regulatory government commonly made by versions of “interest group,” “capture,” or “public choice” accounts of regulation. Part III presents an alternative approach to understanding regulation that places greater explanatory weight on administrator ideology and especially administrative procedure as important determinants of regulatory outcomes. In so doing, Part III explores the relationship between Congress and agencies by considering the motivations for agency behavior, the role of the administrative process in constraining or liberating agencies, and extralegislativ influences on agency behavior. Part IV attempts to ground the analyses of Parts II and III by exploring three recent major regulatory initiatives that appear inexplicable by conventional interest-group accounts of regulation. Part V draws conclusions about the limitations of interest group theory and the promise of an administrative process approach to regulation, based on the common features of the examined initiatives that made broad-based regulation possible, emphasizing the administrative decisionmaking processes the agencies employed and examining the larger legal and institutional environments in which those agencies operated.

II. INTEREST GROUP THEORY

A. *Theme*

You’ve heard all of this before: Elected politicians prefer to remain in office. They are able to remain in office only so long as they continue to win the favor of their constituencies. Winning the support of their constituencies requires substantial political resources, in particular, votes and money to attract votes through political campaigning. Because very few politicians can finance their own political causes independently, they seek to attract resources from supporters and potential supporters.

Enter organized interest groups. Interest groups possess the very resources politicians require for their political survival. Sometimes such groups are large and well disciplined such that their membership can deliver a significant number of votes to a member of Congress. Much more often, interest groups do not themselves contribute significant numbers of votes directly to politicians, but instead contribute financial support to political campaigns, which turn money into votes through television advertising and the like. In any event,

the important point is that interest groups can supply invaluable resources to those politicians who garner their support.²

Naturally, interest groups have their own goals as well; they hardly exist simply to meet elected politicians' needs. Rather, they seek to advance particular policies that further the interests of their members and, similarly, to defeat or dismantle policies that retard their members' interests. Politicians, as policymakers and policy-breakers, are well positioned to advance interest group goals. They can do so by providing the very policies that an organized interest group seeks or by defeating one that a group opposes, powers they exercise in exchange for the group's support. Each side gains: Politicians receive the political resources necessary for their continued political survival, and interest groups enjoy the benefits of the regulatory policies they favor.

Although this exchange relationship between elected politicians and organized interest groups constitutes the linchpin of most critiques of regulatory government,³ it tells only half of the story, or rather two-thirds of it. Administrative agencies figure into the exchange equation as well. After all, because so much of modern government is administrative government, agencies, not legislatures, typically hold the levers of state. While Congress occasionally legislates with considerable specificity, it is federal regulatory agencies that implement legislative directives by filling in the innumerable gaps in virtually all legislation. For powerful pragmatic reasons, given the scarcity of congressional time, attention, and other resources, Congress must delegate to administrative agencies the power to make countless regulatory decisions. Agencies in turn exercise that power, within the often very broad parameters of their delegated authority, by creating, defining, and enforcing the legal rules that govern much of modern society, a condition that students of ad-

2. See generally FRED S. MCCHESNEY, *MONEY FOR NOTHING: POLITICIANS, RENT EXTRACTION, AND POLITICAL EXTORTION* (1997); FRANK J. SORAUF, *INSIDE CAMPAIGN FINANCE: MYTHS AND REALITIES* (1992); M. Margaret Conway & Joanne Connor Green, *Political Action Committees and the Political Process in the 1990s*, in *INTEREST GROUP POLITICS* 155 (Allan J. Cigler & Burdett A. Loomis eds., 4th ed. 1995); Frank Sorauf, *Adaptation and Innovation in Political Action Committees*, in *INTEREST GROUP POLITICS*, *supra*, at 175.

3. This idea of an exchange relationship between suppliers and demanders of regulation is the distinctive characteristic of the public choice account of regulation. See, e.g., Levine & Forrence, *supra* note 1, at 169; Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & ECON. 211, 212 (1976); Richard A. Posner, *Theories of Economic Regulation*, 5 BELL J. ECON. & MGMT. SCI. 335, 344 (1974); George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 11-12 (1971) [hereinafter Stigler, *The Theory*]. On the state's special position as the sole supplier of regulation, see, for example, *id.* at 4, noting, "The state has one basic resource which in pure principle is not shared with even the mightiest of its citizens: the power to coerce." See also Posner, *supra*, at 346 n.27 (1974) ("The government has a monopoly on the sale of regulation . . .").

ministrative law often point out.⁴ Thus, “regulation” is best understood as the work product of agencies; “regulatory decisionmaking” almost always (though sometimes implicitly) references the administrative implementation of general and often dusty legislative directives, as the discussion later below will illustrate.

The implication here is crucial: Because regulation infrequently takes the form of highly specified legislation, interest groups seeking to advance their regulatory policy goals require much more than a cooperative legislator or legislature. They also require a cooperative bureaucrat or agency. This means either that interest groups must press their concerns directly before administrative agencies, or that legislators must be able to control agencies well enough to deliver the policies that interest group constituencies seek, or both. If agencies are not sympathetic to interest group goals, and if legislators cannot influence agencies enough to implement the regulatory policies sought by their interest group supporters, then all of the votes and campaign contributions in the world (resources of no use to agencies themselves) will not generate the regulatory outcome an interest group seeks.

Fortunately for groups demanding favorable regulation, as well as for legislators seeking to earn electoral-political support from appreciative interest groups, Congress has at its disposal a set of carrots and sticks (mostly sticks) with which to influence agency behavior. That influence extends ultimately from Congress’ fundamental power of legislation, including the power to repeal legislation, and its corollary power to spend, or refuse to spend, money. From an agency’s point of view, the possible consequences of these powers are straightforward. Congress can increase or decrease an agency’s budget, depending in part on Congress’ assessment of the agency’s performance. Similarly, Congress can expand or contract the scope of an agency’s authority by amending or, in the extreme, by repealing the agency’s enabling act or other important pieces of legislation that give an agency its power. Agencies unresponsive to congressional cues about what regulation should look like may thus see their authority curtailed. Finally, though cumbersome, Congress can also by legislation undo any agency decision, giving Congress a certain veto power over agencies. Conversely to all of these possibilities, Congress can provide cooperative agencies with more generous funding, greater statutory responsibility, legislative blessing of agency decisions, and so on.

4. See, e.g., STEPHEN BREYER, *REGULATION AND ITS REFORM* 6 (1982); CORNELIUS M. KERWIN, *RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY* 85 (1994); John Ferejohn & Charles Shipan, *Congressional Influence on Bureaucracy*, 6 J.L. ECON. & ORG. 1, 13 (1990); Levine & Forrence, *supra* note 1, at 185.

Of course, exercising these powers requires Congress to keep abreast of what an agency does; punishment and reward presuppose information about which of them is deserved. Here too, Congress has several mechanisms in its repertoire.⁵ For example, it can order studies and reports of agency action. Congress can also hold oversight hearings to evaluate specific agency behavior or proposed behavior. In addition, Congress can and does monitor agencies through congressional offices, informal staff contacts, and agency liaisons. And if all of that is not enough, Congress can also rely on information from interest groups themselves, who have their own incentives to keep abreast of agency behavior.⁶

Now for the punch line: These various methods of congressional control allow legislators to satisfy interest group regulatory demands by prompting agencies, the ground-level regulators, to make the regulatory decisions interest groups seek. Obtaining favorable budgetary and statutory treatment from legislators motivates agencies to supply desired regulatory treatment.⁷ Interest groups are happy to provide electoral resources to legislators who can inspire desired regulatory treatment by agencies. Legislators, in order to secure needed electoral resources, are motivated to ensure that agencies supply the regulation that their interest group supporters seek. Hence the "iron triangle"⁸ or, less darkly, the "issue network"⁹ rela-

5. See generally Jeffrey S. Banks, *Agency Budgets, Cost Information, and Auditing*, 33 AM. J. POL. SCI. 670 (1989); Arthur Lupia & Mathew D. McCubbins, *Learning from Oversight: Fire Alarms and Police Patrols Reconstructed*, 10 J.L. ECON. & ORG. 96 (1994); Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, in CONGRESS: STRUCTURE AND POLICY 426 (Mathew D. McCubbins & Terry Sullivan eds., 1987); see also Kathleen Bawn, *Political Control Versus Expertise: Congressional Choice About Administrative Procedures*, 89 AM. POL. SCI. REV. 62, 62 (1995); McNollgast, *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 248-51 (1987).

6. See, e.g., McNollgast, *supra* note 5, at 250.

7. For one classic statement, see WILLIAM A. NISKANEN, *BUREAUCRACY AND REPRESENTATIVE GOVERNMENT* (1971). See also THE BUDGET MAXIMIZING BUREAUCRAT: APPRAISALS AND EVIDENCE (Andrea Blais & Stephane Dion eds., 1991).

8. See, e.g., THEODORE J. LOWI, *THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES* (2d ed. 1979). For important earlier presentations, see generally DOUGLASS CATER, *POWER IN WASHINGTON* (1964); J. LEIPER FREEMAN, *THE POLITICAL PROCESS: EXECUTIVE BUREAU-LEGISLATIVE COMMITTEE RELATIONS* (rev. ed. 1965); and ERNEST S. GRIFFITH, *THE IMPASSE OF DEMOCRACY: A STUDY OF THE MODERN GOVERNMENT IN ACTION* (1939). See also James Q. Wilson, *The Politics of Regulation*, in *THE POLITICS OF REGULATION* 357 (James Q. Wilson ed., 1980). Contributors to the "information" species of capture theory include, for example, MARVER BERNSTEIN, *REGULATING BUSINESS THROUGH INDEPENDENT COMMISSION* (1969), GABRIEL KOLKO, *RAILROADS AND REGULATION, 1877-1916* (1965) and, more recently, Clayton P. Gillette & James E. Krier, *Risks, Courts, and Agencies*, 138 U. PA. L. REV. 1027 (1990). See also GEORGE J. STIGLER, *Can Regulatory Agencies Protect the Consumer?*, in *THE CITIZEN AND THE STATE: ESSAYS ON REGULATION* 178, 181 (1975) [hereinafter STIGLER, *The Consumer*] (discussing the inevitability of industry influence on the proverbial Washington commissioner).

9. See generally Jeffrey M. Berry, *Subgovernments, Issue Networks, and Political Conflict*, in *REMAKING AMERICAN POLITICS* 239 (Richard A. Harris & Sidney M. Milkis eds.,

tionship among groups, legislators, and administrative agencies that typically characterizes the interest-group account of regulation. According to this account, agencies become “captured” by the very parties whose behavior the agencies are supposed to shape; ironically, control runs in the direction from interest group to agency, opposite from what might be hoped for or supposed.¹⁰

But it’s a free country. Stated so far, nothing about the dynamic described indicates what is normatively undesirable about the legislator/agency/interest group triad. Indeed, the image of legislators who are sensitive to the preferences of their constituencies, of interest groups that mobilize to advance lawful goals by contributing to open elections, and of legislators who control (unelected) agencies that they themselves have (after all) created is hardly an undemocratic one. The question thus becomes what makes the interest group theory of regulation so troubling.

The trouble is two-fold. First, it is by no means clear that interest group competition for the loyalties of elected legislators is balanced. To the contrary, most students of interest-group politics conclude that certain types of interest groups dominate the electoral system because they are unusually effective at mobilizing.¹¹ Borrowing from Mancur Olson,¹² the interest group theory holds that small groups

1989); William P. Browne, *Organized Interests and Their Issue Niches: A Search for Pluralism in a Policy Domain*, 52 J. POL. 477 (1990).

10. This is not to say, however, that satisfying powerful constituencies’ demands is itself what motivates Congress to delegate in the first place. According to conventional wisdom, Congress delegates lawmaking power to administrative agencies who have the time, attention, personnel and, critically, the scientific and technical resources to address regulatory problems in a way that Congress, given the scarcity of its own institutional resources, cannot. Naturally, once Congress has delegated regulatory power to agencies, it runs the risk that agencies may pursue their own agendas at the possible expense of Congress’ own preferences. In a recent set of interesting works, David Epstein and Sharyn O’Halloran have systematized this basic wisdom by presenting what they call a “transaction costs” approach to delegation. According to their formulation, Congress will either delegate, or directly legislate, depending on the relative costs “of making policy internally,” given “the inefficiencies of the committee system,” and the costs of delegating, given “congress’s principal-agent problems of oversight and control.” DAVID EPSTEIN & SHARYN O’HALLORAN, *DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS* 7-9 (1999). See generally David Epstein & Sharyn O’Halloran, *Administrative Procedures, Information, and Agency Discretion*, 38 AM. J. POL. SCI. 697 (1994); David Epstein & Sharyn O’Halloran, *Divided Government and the Design of Administrative Procedures: A Formal Model and Empirical Test*, 58 J. POL. 373 (1996); David Epstein & Sharyn O’Halloran, *A Theory of Strategic Oversight: Congress, Lobbyists, and the Bureaucracy*, 11 J.L. ECON. & ORG. 227 (1995); see also Morris P. Fiorina, *Legislative Choice of Regulatory Forms: Legal Process or Administrative Process?*, 39 PUB. CHOICE 33 (1982).

11. See, e.g., SCHLOZMAN & TIERNEY, *supra* note 1, at 200-20; see also William C. Mitchell & Michael C. Munger, *Economic Models of Interest Groups: An Introductory Survey*, 35 AM. J. POL. SCI. 512 (1991); Peltzman, *supra* note 3; Posner, *supra* note 3; Stigler, *The Theory*, *supra* note 3.

12. The classic work is MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1965). A clearer exposition is found in RUSSEL

are better situated, relative to groups with many would-be members, to overcome the collective-action problems that generally impede group mobilization.¹³ Similarly, groups whose individual members have a large absolute stake in the matter are also better able to mobilize; from their members' points of view, more depends on their successful mobilization.¹⁴ Often these two characteristics—few members and large member stakes—coincide, which makes mobilization easier still. The flip side is that groups whose members are numerous, and groups whose members have a small individual stake in a given matter, will tend not to organize, which is to say that they will not exist in a group structure at all.¹⁵

Interest group participation in regulatory politics will tend to be lopsided, the story continues, given that many regulatory decisions either generate diffuse benefits but impose concentrated costs—consider many workplace safety or pollution-reduction proposals, for example—or provide concentrated benefits while imposing diffuse costs—as is true for regulation that restricts market entry. Either way, parties on one side of a regulatory program will be spread much more thinly than those on the other. That distribution translates into pitting a mobilized group against an unorganized one, with the predictable result that regulators will feel pressure from, and will respond to, only one side of the regulatory transaction. Far from the balanced interest group competition contemplated by pluralist theories of politics,¹⁶ which the Olson-inspired interest group theory ex-

HARDIN, *COLLECTIVE ACTION* (1982). For recent treatments and applications, see DENNIS CHONG, *COLLECTIVE ACTION AND THE CIVIL RIGHTS MOVEMENT* (1991); MARK IRVING LICHBACH, *THE COOPERATOR'S DILEMMA* (1996); GERALD MARWELL & PAMELA OLIVER, *THE CRITICAL MASS IN COLLECTIVE ACTION: A MICRO-SOCIAL THEORY* (1993); ELINOR OSTROM, *GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION* (1990); TODD SANDLER, *COLLECTIVE ACTION: THEORY AND APPLICATIONS* (1992); and JOE B. STEVENS, *THE ECONOMICS OF COLLECTIVE CHOICE* (1993).

13. See, e.g., OLSON, *supra* note 12, at 28, 35; Posner, *supra* note 3, at 345; George J. Stigler, *Free Riders and Collective Action: An Appendix to Theories of Economic Regulation*, 5 BELL. J. ECON. & MGMT. SCI. 359, 360-62 (1974).

14. See OLSON, *supra* note 12, at 28-29.

15. See *id.* at 28.

16. Important contributions to the development of interest group pluralism include, for example, ARTHUR F. BENTLEY, *THE PROCESS OF GOVERNMENT: A STUDY OF SOCIAL PRESSURES* (1908), ROBERT A. DAHL, *A PREFACE TO DEMOCRATIC THEORY* (1956), ROBERT A. DAHL, *DEMOCRACY IN THE UNITED STATES: PROMISE AND PERFORMANCE* (3d ed. 1976), ROBERT A. DAHL, *WHO GOVERNS?: DEMOCRACY AND POWER IN AN AMERICAN CITY* (1961), EARL LATHAM, *THE GROUP BASIS OF POLITICS: A STUDY IN BASING-POINT LEGISLATION* (1952), and DAVID B. TRUMAN, *THE GOVERNMENTAL PROCESS: POLITICAL INTERESTS AND PUBLIC OPINION* (1951). For important critiques outside of the public choice tradition, see LOWI, *supra* note 8, and Peter Bachrach & Morton S. Baratz, *Two Faces of Power*, 56 AM. POL. SCI. REV. 947 (1962). Useful secondary sources include JEFFREY M. BERRY, *THE INTEREST GROUP SOCIETY* (2d ed. 1989); RONALD J. HREBENAR & RUTH K. SCOTT, *INTEREST GROUP POLITICS IN AMERICA* (2d ed. 1990); GRAHAM K. WILSON, *INTEREST GROUPS IN THE UNITED STATES* (1981); and J. David Greenstone, *Group Theories*, in 2 HANDBOOK OF POLITICAL SCIENCE: MICROPOLITICAL THEORY 243 (Fred I. Greenstein &

PLICITLY rejects, interest group activity in this light essentially means that the organized few accomplish their regulatory aims over the unorganized many.¹⁷

That's not the worst of it. More disturbing, self-serving interest groups are able to advance their policy goals even where their gains are outweighed by greater losses borne by the unorganized.¹⁸ Precisely because the many are no competition for the few, there are many occasions for those able to mobilize to achieve regulatory successes that harm the unorganized substantially.¹⁹ Although the losses to any individual among the unorganized may be imperceptible, their total magnitude may far outweigh the gains enjoyed by members of the special interest group. And even where those losses are perceptible to the regulatory losers, by hypothesis there is little regulatory losers can do about it.²⁰

The consequences of lopsided interest group influences on regulatory policy, in other words, are not merely distributional. Instead, powerful and narrowly interested groups often realize their policy preferences to the much greater expense of those who, unorganized or poorly funded, are unable to advance their competing regulatory preferences very far. That regulatory policies generate net social losses is what gives the interest group theory its pejorative ring. Interest group rents are detrimental to society as a whole.

B. Complications

Now turn up the microscope. On close analysis, this familiar account, while compelling on one level of generality and appealing in its parsimoniousness, shows its holes. Seeing them clearly requires careful consideration of the main argument underlying the conventional wisdom. Boiled down, its key propositions hold:

Nelson W. Polsby eds., 1975); see also ARTHUR MAASS, CONGRESS AND THE COMMON GOOD 3, 5 (1983) (discussing the extent to which pluralists perceived the consequences of interest group competition as being benign); BERRY, *supra*, at 9-11 (same).

17. See Posner, *supra* note 3, at 344; Stigler, *The Theory*, *supra* note 3, at 3, 10; see also Mitchell & Munger, *supra* note 11, at 525-26 (noting that market privileges gained through rent seeking "[inform] consumers (and potential industry entrants) of the gains to collective action . . ."); Peltzman, *supra* note 3, at 212-13.

18. See, e.g., Richard A. Posner, *The Social Costs of Monopoly and Regulation*, 83 J. POL. ECON. 807 (1975) (arguing that the social costs of regulation are probably greater than the social costs of monopoly); Stigler, *The Theory*, *supra* note 3, at 10 (arguing that interest group rents usually "fall short of the damage to the rest of the community"); see also JAMES M. BUCHANAN ET AL., TOWARD A THEORY OF THE RENT-SEEKING SOCIETY (1980); GORDON TULLOCK, RENT SEEKING (1993).

19. See Stigler, *The Theory*, *supra* note 3, at 18; see also STIGLER, *The Consumer*, *supra* note 8, at 181.

20. See STIGLER, *The Consumer*, *supra* note 8, at 181, 186-87 (citing OLSON, *supra* note 12); Peltzman, *supra* note 3, at 212-13 (citing Stigler, *The Theory*, *supra* note 3); Richard A. Posner, *The Federal Trade Commission*, 37 U. CHI. L. REV. 47, 83 (1969).

(1) Interest groups seek regulatory decisions that advance the self-interests of their members—the “interest group motivation claim.”

(2) Small, narrowly focused interests groups, whose members individually have much at stake, are unusually well able to overcome the collective action problem that generally impedes interest group mobilization. This ability creates a strong bias in the demand for regulation in favor of narrow interests—the “collective action claim.”

(3) Legislators seek to trade favorable regulatory treatment for needed political resources from the interest groups best able to provide them—the “legislator motivation claim.”

(4) Legislative control over administrative agencies is sufficient to allow legislators to deliver the regulatory treatment interest groups seek from agencies—the “legislative dominance claim.”

And each step is necessary. The coupling of the interest group motivation and the collective action claims is what raises concerns about interest group activity in the first place: Interest groups are out for only their own good, and only narrowly focused groups whose members have a lot at stake will be able to mobilize to press their respective agendas. The collective action claim in particular is important to the theory because it establishes the type of interest groups that make the most effective demands upon legislators in exchange for electoral support. If many equally powerful groups were able to mobilize to compete for legislative sympathies, then the pluralist theory might appear stronger. To the extent that legislators hear from many types of interest groups with different and opposing regulatory preferences, the implications of a legislator’s reelection-minded calculus become more complicated: The legislator may be pushed and pulled in different directions, sometimes deciding that satisfying the regulatory preferences of broad-based groups is more politically rewarding than siding with business interests. By a similar token, if only a few groups were able to mobilize, but did so to advocate general interests rather than only their members’ interests, one would not worry so much about the consequences of interest group influence. However, because interest group activity is instead selfish and lopsided, legislators have more to gain from being solicitous of certain interests, and necessarily less solicitous of more general interests.

The legislator motivation claim is similarly indispensable to the interest group theory’s capture vision. Were legislators by and large immune to interest groups’ regulatory preferences, it would not matter much how lopsided interest-group activity was. Because legislators are motivated to satisfy those preferences in order to preserve their own positions, however, lopsided interest group pressure trans-

lates into lopsided regulatory consideration. Finally, the legislative influence claim is similarly crucial. Were legislators unable to control agencies enough to generate the regulatory outcomes favored by their interest-group constituencies, legislator motivation would mean very little. The problem is that legislators can prompt agencies to provide the regulatory benefits that powerful yet narrowly interested groups seek. The theory concludes, accordingly, that agencies, responsive to legislative signals, provide those benefits thereby consummating the exchange between legislators and interest groups, even at the greater expense to the rest of society.

While not all students of regulation see socially beneficial regulation as an impossible proposition, this basic picture enjoys wide academic recognition. The interest group theory holds considerable sway over much scholarly discourse about public law institutions generally, and regulatory bodies in particular. Even those—perhaps, especially those—who approach public law regulation indirectly often seem osmotically influenced by the interest group theory's conclusions.²¹ The theory accounts for much skepticism towards public law regulation.²²

Yet all of its key claims are questionable. While an exhaustive treatment of the conceptual and empirical dimensions of each of these claims is beyond the scope of this analysis, several general observations are in order, after which the balance of this Article will focus on the interest group theory's legislative dominance claim in particular.

First, the claim that interest groups seek to advance only the interests of their members overstates matters, in at least two ways. For one, many interest groups, even those representing well-financed, business-oriented interests, often at least purport to represent general interests. That is, they claim that the regulatory policies they support would benefit society generally, by boosting American competitiveness, benefiting consumers, promoting new technologies, and so on. Interest groups making such claims may be wrong about them, and they may often make them disingenuously, but at least part of the time even groups organized to promote a specific trade or industry appear to favor regulatory policies that plausibly do advance broad interests. It is often the case, for example, that competing business-oriented interest groups seeking diametrically opposed regulatory decisions both invoke the argument that their preferred

21. For one recent example, see DANIEL N. SHAVIRO, *WHEN RULES CHANGE: AN ECONOMIC AND POLITICAL ANALYSIS OF TRANSITION RELIEF AND RETROACTIVITY* (2000).

22. See, e.g., DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW & PUBLIC CHOICE: A CRITICAL INTRODUCTION* 24 (1991); LOWI, *supra* note 8, at 57-61; GLEN O. ROBINSON ET AL., *THE ADMINISTRATIVE PROCESS* 17 (3d ed. 1986); cf. Levine & Forrence, *supra* note 1, at 171; Roger G. Noll, *Government Regulatory Behavior: A Multidisciplinary Survey and Synthesis*, in *REGULATORY POLICY AND THE SOCIAL SCIENCES* 9, 52 (Roger G. Noll ed., 1985).

regulatory outcome would most benefit society as a whole. (The controversy in recent years surrounding bank deregulation, which pitted banks against insurance companies and investment companies, provides a case in point, as discussed below.²³) Opposing groups cannot both be right that the outcome they favor would most benefit society in general, but then neither can both be wrong about that. As regulators will act or fail to act in a way that most promotes one side's interests or the other's, regulators who deliver what one interest group wants may in fact advance broad public interests. Moreover, whenever opposing groups can credibly claim that the regulation they favor will advance social interests, such claims seem likely to increase that group's chance of success—by providing regulators with political cover, by giving regulators a means to resolve close cases, and so on—even if one assumes that agencies otherwise satisfy groups' regulatory demands as a general matter.

Second, and more importantly, some organized interest groups appear primarily to promote interests extending beyond those of their own membership.²⁴ In fact, the very purpose of environmental groups, consumer groups, and other public-interest groups is to promote the broad-based interests of large segments of society, not the selfish interests of their members.²⁵ Here again, such groups' claims about whether the regulation they favor truly advances broad societal interests are certainly open to dispute,²⁶ but the point remains that the existence of these groups complicates the theory's interest group motivation claim; accommodating public interested groups requires some adjustment to the theory. A proponent of interest group theory might respond that broad-based groups are outnumbered and

23. See *infra* Part IV.C.

24. See BERRY, *supra* note 1, at 8-10; HARDIN, *supra* note 12, at 101-08; SCHLOZMAN & TIERNEY, *supra* note 1, at 30-34; CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* 3 (1990); Terry M. Moe, *Toward a Broader View of Interest Groups*, 43 J. POL. 531, 536 (1981); Cass R. Sunstein, *Participation, Public Law, and Venue Reform*, 49 U. CHI. L. REV. 976, 987 (1982); see also Harold H. Bruff, *Legislative Formality, Administrative Rationality*, 63 TEX. L. REV. 207, 244 (1984) (arguing that the development of public-oriented interest groups is incompatible with interest group theory expectations); Herbert Hovenkamp, *Legislation, Well-Being, and Public Choice*, 57 U. CHI. L. REV. 63, 99-100 (1990) (same); Edward L. Rubin, *Beyond Public Choice: Comprehensive Rationality in the Writing and Reading of Statutes*, 66 N.Y.U. L. REV. 1, 12 (1991) (same).

25. See, e.g., BERRY, *supra* note 1, at 8-10; HARDIN, *supra* note 12, at 101; STEPHEN MILLER, *SPECIAL INTEREST GROUPS IN AMERICAN POLITICS* 113-33 (1983).

26. On the one hand, members of such groups might be considered to represent the ends of the political spectrum, rather than the median voter. On the other hand, however, some see such groups as representative of many citizens' interests, see, e.g., BERRY, *supra* note 1, at 3; MILLER, *supra* note 25, at 118; Jeffrey M. Berry, *Citizen Groups and the Changing Nature of Interest Group Politics*, 528 ANNALS AM. ACAD. POL. & SOC. SCI. 30, 31 (1993). This view enjoys some empirical support. See LAWRENCE S. ROTHENBERG, *LINKING CITIZENS TO GOVERNMENT: INTEREST GROUP POLITICS AT COMMON CAUSE* 36-37 (1992).

out-resourced by other groups, as indeed they are,²⁷ but whether their lesser resources means that legislators are less attentive to their preferences raises empirical questions without obvious answers. It is plausible, for example, that legislators' reelection goals at times inspire careful attention to the preferences of broad-based groups, whose views may matter to a large number of voters, and less attention to the preferences of narrow groups whose campaign contributions may or may not yield large numbers of votes.²⁸ It is also possible that administrators may be as attentive to broad-based interest groups as they are to narrow groups.²⁹

The observation that the existence of seemingly broad-based interest groups is inconvenient for the interest group theory brings no news, but it helpfully exposes certain conceptual difficulties with the interest group theory's collective action claim as well. Again, that claim holds that small, narrowly interested groups whose members have considerable individual stakes in some collective undertaking are peculiarly able to overcome the logic of the collective action problem, which ordinarily prevents the emergence of organized groups.³⁰ To refresh memories, Olson's formulation of that logic, on which the interest group theory relies heavily,³¹ posits that individual members of a potential group will not contribute toward some group good—a public good for the group in question—whenever the costs of doing so outweigh the benefits of contributing. Because the benefits of group contributions are shared across the entire group, whereas the costs are borne by the individual contributor alone, the individual member will tend to reason that contributing toward a collective good is not worthwhile, and certainly will not contribute at what would be the

27. See, e.g., HARDIN, *supra* note 12, at 11, 124; SCHLOZMAN & TIERNEY, *supra* note 1, at 34-36.

28. See, e.g., Posner, *supra* note 3, at 347.

29. See, e.g., DAVID VOGEL, *FLUCTUATING FORTUNES: THE POLITICAL POWER OF BUSINESS IN AMERICA* 112 (1980). For empirical evidence suggesting that administrators are at times quite attentive to public interest groups, see, for example, Scott Furlong, *Interest Group Influence on Regulatory Policy* (unpublished Ph.D. dissertation) (on file with author), and Steven P. Croley & William F. Funk, *The Federal Advisory Committee Act and Good Government*, 14 *YALE J. ON REG.* 451, 500-01 (1997). On the political significance of public interest groups in the legislative arena generally, see BERRY, *supra* note 1; MICHAEL T. HAYES, *LOBBYISTS AND LEGISLATORS: A THEORY OF POLITICAL MARKETS* (1981); WILSON, *supra* note 16, at 138-39; Burdett A. Loomis & Allan J. Cigler, *Introduction: The Changing Nature of Interest Group Politics*, in *INTEREST GROUP POLITICS* 1, 1-26 (Allan J. Cigler & Burdett A. Loomis eds., 2d ed. 1986); and Jack L. Walker, *The Origins and Maintenance of Interest Groups in America*, 77 *AM. POL. SCI. REV.* 390, 397-99 (1983).

30. See OLSON, *supra* note 12, at 143; see also sources cited *supra* note 13.

31. See, e.g., FARBER & FRICKEY, *supra* note 22, at 23 (noting that economic theory of interest groups can be traced to Olson); Jack Hirshleifer, *Comment*, 19 *J.L. & ECON.* 241, 241 n.2 (1976) (describing Peltzman's topic as closely related to OLSON, *supra* note 12); Moe, *supra* note 24, at 533-35 (characterizing "the Olson perspective" as the foundation of the main alternative to pluralist theory of interest groups).

optimal level (for the group).³² What is true for one potential member is true for all similarly situated, potential members. Group goods therefore are often not produced at all; at best, they are under-produced.³³

Only in unusual circumstances, the argument continues, will there be enough contributions to the collective enterprise to finance any organizational structure and political apparatus, and thus allow a group to emerge; most groups will remain, in Olson's lexicon, "latent."³⁴ First, some groups ("privileged groups") will just happen to have one or more members who have so much individually at stake that they are willing to make significant contributions to the group enterprise themselves.³⁵ The other members of such groups are simply the lucky beneficiaries of the sponsoring members' efforts; the group mobilizes thanks to the sponsoring members' contributions. Alternatively, and more importantly according to Olson's framework, some groups ("intermediate groups") may be small enough that their members can bargain their way to an agreement governing contributions to their collective endeavor.³⁶

The difficulty for the theory concerns the exact mechanism by which intermediate groups mobilize. That is, the very same logic that concludes that large groups will tend not to organize, because each individual member reasons that it is not in her individual interest to contribute toward the collective enterprise, should predict the same for any group, no matter its size. After all, to devise and participate in some bargaining arrangement is to contribute toward a group good. Enforcing such an arrangement, once established, requires additional contributions to a group good. If a group is not privileged, then, none of its members will expect to receive benefits from contributions to the group enterprise that are commensurate with her own costs. Taken to its conclusion, the logic of collective action really implies that groups as such, as opposed to individual group members whose behavior happens to provide a beneficial externality for other members, are not as central to understanding political behavior as is commonly supposed.

Of course there are answers. Group members contribute for reasons having to do with their own sense of fairness, for political or ideological reasons, and to show solidarity, for example.³⁷ In addition, some groups are founded and maintained through the efforts of political entrepreneurs.³⁸ But the answers Olson and, following him,

32. See OLSON, *supra* note 12, at 33-34.

33. See *id.* at 33-52.

34. *Id.* at 50.

35. *Id.* at 49-50.

36. *Id.* at 50.

37. See HARDIN, *supra* note 12, at 103-12.

38. See *id.* at 35-36.

George Stigler, who provides much of the theoretical foundation for the interest group theory, offer to explain why some interest groups mobilize and others do not are not compelling. For instance, Stigler attributes interest group mobilization to small group size and an asymmetry of preferences among a group's members,³⁹ neither of which convincingly explains why some groups (representing narrow interests) but not others (broad-based interests) can overcome the collective-action barriers to mobilization.⁴⁰ Taken on its own terms, the theory is fuzzy, incomplete.⁴¹

This conceptual indeterminacy notwithstanding, assume that legislators are pressured exclusively by narrow, industry- or trade-oriented business interest groups, and that those interest groups pursue only rent-seeking regulatory policies that would further their memberships' interests at society's expense. The next question becomes whether the interest group theory's separate claim about legislative motivations, according to which legislators respond to interest group pressures in exchange for needed political resources, is itself compelling. One fair criticism of the theory's legislator motivation claim is that it seems to imply that reelection-minded legislators inevitably satisfy interest group demands.

But that implication is misplaced. Even legislators for whom reelection is by far the single most important, overriding goal need not always supply resourceful interest groups with the regulatory policies they prefer. For one thing, not all legislators are electorally vulnerable.⁴² Legislators from "safe" districts, even those who would never jeopardize their reelection prospects, have no strong incentive to satisfy all interest group regulatory demands, since the benefits of doing so would not, for them, be substantial. Whether a reelection-minded legislator would determine that satisfying a group's regulatory preferences were necessary would depend on how close a legislator considered herself to be to some comfortable reelection threshold, as well as on her calculations about whether supporting or failing to

39. See Stigler, *supra* note 13, at 359-60.

40. For a fuller treatment, see Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 16-19, 45-49 (1998).

41. See Posner, *supra* note 3, at 349 (noting the conceptual limitations of the logic of collective action); Eric A. Posner, *The Regulation of Groups: The Influence of Legal and Nonlegal Sanctions on Collective Action*, 63 U. CHI. L. REV. 133, 139-40 (1996) (same); Robert D. Tollison, *Public Choice and Legislation*, 74 VA. L. REV. 339, 341-42 (1988) (same).

42. See generally GARY C. JACOBSON, *THE POLITICS OF CONGRESSIONAL ELECTIONS* (3d ed. 1992); Morris P. Fiorina, *The Case of the Vanishing Marginals: The Bureaucracy Did It*, in CONGRESS: STRUCTURE AND POLICY, *supra* note 5, at 30-31; Gary C. Jacobson, *The Effects of Campaign Spending in Congressional Elections*, 72 AM. POL. SCI. REV. 469 (1978); Gary C. Jacobson, *The Effects of Campaign Spending in House Elections: New Evidence for Old Arguments*, 34 AM. J. POL. SCI. 334 (1990); David R. Mayhew, *Congressional Elections: The Case of the Vanishing Marginals*, 6 POLITY 295, 297-304 (1974).

support some interest group's cause would likely move her above or below that threshold.⁴³ Moreover, while the interest group theory's portrayal of legislative incentives usually seems to contemplate some electorally vulnerable member of the House of Representatives, the story becomes much more complicated remembering the Senate's contribution to regulatory policy.⁴⁴ To be sure, senators too need to be reelected, but longer terms, generally safer tenure, and the real possibility of conflicts between the two chambers on matters of regulatory policy make the interest group legislative motivation claim much more intricate than it first appears.

Legislator ideology complicates matters further still, as others have shown.⁴⁵ Assuming that reelection is one very important goal for any given legislator, but one that may be traded off against other important goals, the question becomes how much weight reelection gets vis-à-vis other legislator goals. In fact, there is evidence that legislators serve different roles over the course of their legislative careers—as ombudspersons, policy experts, senior statespersons—not all of which are consistent with meeting interest groups' regulatory preferences, and during which legislators have more or less room to advance their own ideological commitments.⁴⁶

43. See Steven P. Croley, *Imperfect Information and the Electoral Connection*, 47 POL. RES. Q. 509, 514-18 (1994).

44. See, e.g., Terry Moe, *An Assessment of the Positive Theory of "Congressional Dominance"*, 12 LEG. STUD. Q. 475 (1987); John T. Woolley, *Conflict Among Regulators and the Hypothesis of Congressional Dominance*, 55 J. POL. 92 (1993).

45. See generally KEITH T. POOLE & HOWARD ROSENTHAL, CONGRESS: A POLITICAL-ECONOMIC HISTORY OF ROLL CALL VOTING (1997); Joseph P. Kalt & Mark A. Zupan, *The Apparent Ideological Behavior of Legislators: Testing for Principal-Agent Slack in Political Institutions*, 33 J.L. & ECON. 103 (1990); James B. Kau & Paul H. Rubin, *Self-Interest, Ideology, and Logrolling in Congressional Voting*, 22 J.L. & ECON. 365 (1979); Keith T. Poole & Howard Rosenthal, *A Spatial Model for Legislative Roll Call Analysis*, 79 AM. J. POL. SCI. 357 (1985).

46. The interest group theory might accommodate considerations of legislative ideology in one of two ways, neither of which is entirely satisfactory. First, the theory might allow for ideologically motivated legislative behavior, but posit that ideologically motivated regulation and interest group regulation line up rather neatly. According to this view, legislators might as a psychological matter be driven by ideology, but their ideological beliefs about desirable regulatory policy happen to match interest groups' preferences. Only legislators whose convictions lead them to the same place interest groups would have them go will enjoy the political resources that interest groups have to offer, creating a selection bias in favor of legislators who do groups' bidding. But this is just to say that those who prevail in elections are not bought out by interest groups; rather, they are the candidates who happen to attract the most interest group support. *But see* Kau & Rubin, *supra* note 45 (presenting empirical findings that legislators' votes cannot be reduced either to the economic interests of their constituents or to logrolling and that ideology appears to be a significant determinant of legislator voting decisions). To be sure, interest group support is still crucial, but in this light, that support is a consequence of a legislative behavior, not a cause of it. Thus, interest group support for certain regulatory policies should, as a normative matter, be somewhat less troubling. At the very least, the interest group theory's legislator motivation claim should now cause alarm only to the extent one can be confident that

But this speaks only to the complications introduced by considerations of legislative ideology. To the extent that administrators too are motivated by ideological commitments, the interest group theory is threatened again, for a separate set of reasons. As discussed below, administrators motivated by ideological considerations or their own sense of what constitutes the public good, rather than exclusively by calculations of how their decisions will affect their budgets and scope of authority, are less susceptible to legislative control. Here again, the link between interest group preferences and regulatory policy outcomes becomes more attenuated.

Administrative motivation is not all that raises questions about the legislative influence claim. Although the interest group theory implies that Congress can design and employ the administrative process to ensure that agencies (whatever their own motivations) deliver the regulation sought by legislative constituencies,⁴⁷ it is unclear whether administrative process rules really facilitate congressional control of agencies more than they liberate agencies from the legislature—an issue to be explored in much more detail shortly. This leads to a related complicating factor: Agencies are not influenced by Congress alone. Rather, they must answer to a president and to the courts. Nor is it clear that institutions like judicial review facilitate agency delivery of regulatory rents, as many scholars have pointed out.⁴⁸ Although on the one hand judicial review can be seen as furthering congressional influence of agencies (by holding agencies faithful to the language of regulatory statutes), on the other hand judicial review also makes it difficult for agencies to cater to the regulatory preferences of one group without due consideration of facts or arguments that may support the regulatory preferences of an opposing group. To the extent that judicial review promotes regulatory

a legislature full of ideologically committed persons is, though motivated by general interest intentions, consistently wrong about what makes good regulatory policy.

Another accommodation of legislative ideology allows trade-offs between principles and political expediency, but maintains that ideology, while complicating the analysis, does not often enough triumph over reelection goals. Once again the pressing question becomes how often regulation reflects ideologically driven motivations, and how often it instead reflects special-interest capitulation. If ideology does not always lead legislators to provide regulation favored by powerful interest groups, if to the contrary ideology regularly leads legislators to resist interest group pressures, especially whenever they can politically afford it, then it is not clear that regulation will on balance harm society more than it will benefit society.

47. See STIGLER, *The Consumer*, *supra* note 8, at 181; Posner, *supra* note 20, at 82-87; Posner, *supra* note 3, at 350, 351; Stigler, *The Theory*, *supra* note 3, at 17-18.

48. See SUSAN ROSE-ACKERMAN, *RETHINKING THE PROGRESSIVE AGENDA: THE REFORM OF THE AMERICAN REGULATORY STATE* 36-37 (1992); SUNSTEIN, *supra* note 24, at 212-14; Mathew D. McCubbins et al., *Positive and Normative Models of Procedural Rights: An Integrative Approach to Administrative Procedures*, 6 J.L. ECON. AND ORG. 307, 315-18 (1990).

evenhandedness by agencies, Congress' ability to direct agencies to satisfy interest group preferences becomes more precarious.

To summarize, the interest group theory of regulation is vulnerable to the extent that interest groups advocate regulatory policies that benefit more than their own members; broad-based interest groups representing diffuse interests compete with more narrow groups for legislative favor; legislators are not motivated only by electoral considerations and therefore do not seek only to satisfy interest groups' regulatory preferences; and finally legislators cannot control agencies, whether due to agencies' own motivations, the processes through which agencies make regulatory decisions, or the influences of other branches of government. Because it seems undeniable that interest groups represent more than their own members' interests, that legislators have mixed motivations, and that legislative control over agencies is limited, one can credibly question whether the dominant theory of regulation today advances the understanding of regulation very far. The interest group theory's conclusions notwithstanding, it could well be that regulation often serves public interests, even if it also sometimes caters to special interests. All things considered, then, the regulatory state's merits might well outweigh its demerits.

All of this sounds naïve, no doubt. The argument, however, is not that the administrative state regulates in a happy manner that always ensures due consideration of broad-based interests, or that self-serving interest groups are uninfluential participants in regulatory decisionmaking. The point is more subtle and modest: The interest group theory's parsimoniousness masks several complications that attenuate the theory. Once those complications are introduced, the theory's usefulness ultimately turns on a number of empirical questions about which the theory itself provides little guidance. Once groups advocating broad-based interests enter the picture, in competition with special interest groups, for example, one must consider whether and how often they succeed in their regulatory goals. Similarly, once legislative motivation encompasses not only reelection goals but also ideology, new questions arise concerning the trade-offs legislators are willing to make between electoral success, on the one hand, and the personal and professional satisfaction that comes with fidelity to one's principles, on the other. Finally, and no less fundamentally, once legislative influence over administrative decisionmakers is understood to depend on issues such as administrators' own motivations, on the extent to which the administrative process effectively disciplines rather than liberates administrators, and on whether external institutional constraints such as presidential control and judicial review reinforce (rather than undermine) legislative control, the interest group theory's power is properly seen as resting

on contestable answers to such issues. In the end, the interest group theory of regulation might explain or predict regulatory outcomes successfully, but if so that is because each of its questionable conditions holds. Part III will focus on the strength of the theory's legislative dominance claim. First, however, the following section sketches an alternative perspective.

C. Alternatives

Counter-punching is easy. Providing an alternative to the interest group theory that is not vulnerable to similar types of criticisms is the hard part. And indeed, even some of the most thoughtful critics of the interest group theory have offered little by way of any alternative theory comparable in sophistication or scope. Rather, they have shown how the interest group theory is too sweeping, how it is conceptually incomplete, and how it rests on shaky empirical ground, but all without supplying any compelling replacement. To date, there is no thoroughgoing alternative theoretical framework for understanding regulation or predicting regulatory outcomes.⁴⁹

Civic-republican-inspired accounts of regulation, for example, provide the greatest contrast to the interest group theory.⁵⁰ They see regulatory decisionmaking, at least potentially, as a deliberative exercise aimed to identify policies which best advance shared regulatory values and goals. In the civic-republican view, private participants in regulatory decisionmaking processes, whether individuals or groups, do not come to those processes with fixed preferences about what desirable regulation looks like. Rather, their regulatory preferences are, at least potentially, shaped by the very process of deliberation over the possibilities.⁵¹ Accordingly, public decisionmakers do more than broker deals among competitors; they aid the discovery of regulatory policies most compatible with collective judgments about shared regulatory commitments.⁵² Regulatory outcomes reflect those judgments.

49. See, e.g., STEPHEN G. BREYER ET AL., *ADMINISTRATIVE LAW AND REGULATORY POLICY* 4-12 (4th ed. 1999); FARBER & FRICKEY, *supra* note 22, at 15-16 & n.14.

50. See FARBER & FRICKEY, *supra* note 22, at 57-62; SUNSTEIN, *supra* note 24, at 12. See generally Robert B. Reich, *Public Administration and Public Deliberation: An Interpretive Essay*, 94 *YALE L.J.* 1617 (1985); Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 *HARV. L. REV.* 1511 (1992); Cass R. Sunstein, *Factions, Self-Interest, and the APA: Four Lessons Since 1946*, 72 *VA. L. REV.* 271 (1986) [hereinafter Sunstein, *Factions*]; see also IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE* 54-100 (1992).

51. See AYRES & BRAITHWAITE, *supra* note 50, at 91; Reich, *supra* note 50, at 1632; Seidenfeld, *supra* note 50, at 1514; Sunstein, *Factions*, *supra* note 50, at 282; Cass R. Sunstein, *Interest Groups in American Public Law*, 38 *STAN. L. REV.* 29, 63-68 (1985).

52. See, e.g., SUNSTEIN, *supra* note 24, at 12; Reich, *supra* note 50, at 1625, 1637-39; Seidenfeld, *supra* note 50, at 1514-15; Sunstein, *Factions*, *supra* note 50, at 282-84.

Unfortunately, however, the civic republican theory does not explain what motivates deliberating decisionmakers, how private decisionmakers emerge, when and how their regulatory preferences are transformed by decisionmaking processes, or what decisionmakers do in the face of an impasse concerning preferred regulatory alternatives.⁵³ Nor is the theory forthcoming about issues such as what animates legislators and administrators, or exactly how regulatory decisionmaking procedures ensure or even promote collective deliberation. In short, while civic-republican accounts seek to challenge the interest group theory—in fairness, in part by providing an alternative normative, not entirely descriptive, vision of regulation—the alternative picture they provide is neither very clear nor, where clear, very convincing.

Another alternative approach, developed below, builds upon a position very different from what the interest group theory's legislative influence claim implies about agency autonomy and the administrative process. According to this alternative, the administrative process can be understood as a source of control of interest groups, not control of agencies. That is, by delegating substantial lawmaking authority to agencies, the legislature insulates itself as well as administrative regulators from interest group pressures. It does so, specifically, by equipping agencies with legal authority and political autonomy sufficient to advance broad-based interests. This is not to say that agencies never respond to narrow interest group demands, whether applied directly on agencies or channeled through Congress. Rather, the thesis here is that agency authority exercised through administrative procedure provides important opportunities for advancing broad-based regulatory interests—opportunities that Congress itself lacks. Whereas the interest group theory sees delegation as a vehicle for interest group capture of regulatory decisionmaking, the alternative administrative process “theory”⁵⁴ of regulation sees delegation as an impediment to interest group capture. As a result,

53. See Croley, *supra* note 40, at 81-82.

54. “Theory,” a term sometimes used casually in legal-academic literature, serves to explain empirical phenomena, to predict empirical phenomena, or to organize and systematize existing knowledge in a field. See, e.g., ALAN C. ISAAK, SCOPE AND METHODS OF POLITICAL SCIENCE 167-69 (4th ed. 1985); POLITICAL SCIENCE RESEARCH METHODS 24-26 (Janet Buttolph Johnson & Richard A. Joslyn eds., 3d ed. 1995). The theory presented in this Article attempts to do mainly the first and third of these. It does not make any broad predictions about regulatory outcomes. See *infra* Part V.B (discussing limits of the extent to which the framework provided here generates predictions about regulatory outcomes). This thesis does predict, however, that where administrative regulators happen to be motivated to advance general-interest regulation, certain rules of the administrative process, as well as the legal-institutional context in which they operate, will tend to equip them to realize their general-interest regulatory aims, and that regulatory outcomes may therefore reflect those aims, congressional objections to the contrary notwithstanding. See *infra* Part V.C (discussing conditions under which general-interest regulation is most likely).

where the interest group theory laments the growth of the administrative state on the grounds that it provides expanded opportunities for regulatory rent seeking, the administrative process theory sees administrative growth as benign on the grounds that it shifts regulatory power away from Congress to decisionmakers who are more inclined and better situated to advance broad-based interests. In this light, the bigger the administrative state, the more public interested its decisions might be. Given the nature of the administrative process, particularly in contrast to the legislative process, administrators motivated by commitments to public interests can do what similarly motivated legislators may find difficult to do themselves. And, for their part, legislators might not mind that so much.

Of course, for this alternative account to be plausible several things must be true. First, administrators themselves must be in part committed to ideology or principle (that is, some vision of the public interest) when exercising their regulatory decisionmaking authority. To the extent that administrators instead seek to cater to interest group preferences, out of expectations of favorable future employment opportunities, for example, then one would not expect administrative regulation to reflect considerations of broad-based interests, even if the interest group theory's legislative influence claim is false. Second, administrative decisionmakers must truly enjoy some substantial degree of legal and political decisionmaking autonomy. That is, they must first occupy some legal terrain within which their regulatory decisions are controlling absent some trump, congressional or otherwise. Legally powerless administrators can do nothing to advance general interests, no matter how motivated to do so they may be. In addition, agencies must also have sufficient political autonomy to exercise their legal authority with some measure of independence. If instead agencies do little more than exercise their legal authority simply according to congressional fancy, then again the administrative process theory must be abandoned.

In sum, several conditions must be met if the administrative process theory of regulation is to have any bite. For purposes of easy comparison with the interest group theory, the administrative process theory holds that:

- (1) Administrative regulators are motivated by more than concerns about matters such as the impact of their decisions on their budgets or on the scope of their authority, and in particular, they are often motivated by concerns for general, public-oriented interests.
- (2) Administrative process rules governing regulatory decisionmaking by agencies, such as those embodied in the Administrative Procedure Act, promote agency autonomy more than they advance legislative control.

(3) By fostering procedural independence, extralegislatve influences on agency decisionmaking, including presidential oversight and judicial review, further promote agency autonomy more than they advance legislative control of agencies.

The theory concludes that, given the above, regulation may very well serve broad-based interests much more than conventional wisdom suggests.

Part III returns the focus to the interest group theory's claim about legislative control of agencies, challenging that proposition by developing the administrative process theory's competing picture. Later, Parts IV and V turn to the competing theories' claims about the causes and consequences of regulation.

III. AN ADMINISTRATIVE PROCESS APPROACH: THE LIMITS OF LEGISLATIVE INFLUENCE

The analysis up to this point highlights the centrality of the relationship between Congress and agencies to any theory of regulation: Does Congress control agencies, as the "congressional dominance" school suggests,⁵⁵ in the specific sense that agencies regularly answer to powerful if narrow congressional constituencies (assuming that is what Congress wants)? But of course the question is not of the yes-or-no variety; rather, the issue concerns the degree of congressional influence. Plainly Congress is not without influence over the agencies whose authority Congress defines and whose budgets Congress sets. Just as plainly, however, agencies are not legislative puppets. The question then becomes whether agencies are independent from Congress to an extent sufficient to allow them to advance regulatory policies aimed to benefit society as a whole and, if so, whether the social benefits of those instances outweigh the social costs of successful regulatory rent seeking where that occurs. The prior question is whether agencies would have any motivation to advance broad-based interests in the first place. The discussion below takes up these questions, focusing on certain procedural and institutional limits on congressional control of agencies.

A. Administrator Motivation

Just as legislators are undoubtedly motivated by more than securing interest group favor,⁵⁶ however heavily that particular motivation may weigh in the mind of any given legislator in any given instance, so too agencies are certainly motivated by more than preserving their budgets and authority, however heavily those motivations may weigh

55. See generally sources cited *supra* note 44.

56. See sources cited *supra* note 45.

against others. After all, administrators are not drafted into public service. Nor are they seduced by irresistible salaries. It hardly seems far-fetched, then, that administrators self-select into an employment pool consisting of individuals who share some kind of ideological commitment to a given agency's mission or, more generally, who believe that regulation can ameliorate difficult social and economic problems. Put differently, those whose career paths take them to public service seem likely to be those most committed to serving the public.⁵⁷

Granted, some regulatory policymakers may choose to work for an agency temporarily for career reasons, to enhance their future job prospects at a law firm or lobbying firm for example, as interest group theorists sometimes point out.⁵⁸ But by hypothesis they leave. Over time, then, those who remain with an agency are those who tend to believe in its mission and who reap personal satisfaction from a sense that public service truly serves the public. Those who spend much of their careers working for an agency probably do so out of commitment to the environment, consumer safety, or fair competition, for example. Indeed, it seems quite possible that, whatever one's original motivation for spending part of a career working for an agency, over time agency culture fosters a belief in the legitimacy of an agency's regulatory mission and a certain confidence in its efficacy, a possibility that finds some empirical support.⁵⁹ Those for whom such feeling does not develop will be among those most likely to leave. So, again, one might expect administrators to consist largely of those with some real level of ideological commitment to and confidence in their agency's stated purpose.

Of course, some administrators, and regulatory policymakers at the highest levels specifically, "earn" their jobs as a reward for their loyalty to a political party or presidential candidate. For them, a longstanding commitment to a particular agency's mission cannot explain their employment. But for them, the claim that ideology is likely to be an important motivator seems especially strong. After all,

57. See generally HERBERT KAUFMAN, *THE FOREST RANGER: A STUDY IN ADMINISTRATIVE BEHAVIOR* (1960); ALFRED A. MARCUS, *PROMISE AND PERFORMANCE: CHOOSING AND IMPLEMENTING AN ENVIRONMENTAL POLICY* (1980).

58. See Posner, *supra* note 20, at 82-87 (suggesting that career motivations of administrators may compromise the integrity of their regulatory decisions). For background, see Edna Earle Vass Johnson, "Agency Capture": *The "Revolving Door" Between Regulated Industries and Their Regulating Agencies*, 18 U. RICH. L. REV. 95 (1983), and Beth Nolan, *Public Interest, Private Income: Conflicts and Control Limits on the Outside Income of Government Officials*, 87 NW. U. L. REV. 57 (1992).

59. See Steven Kelman, *Occupational Safety and Health Administration*, in *THE POLITICS OF REGULATION* 236, 250 (James Q. Wilson ed., 1980) (finding that the best explanation of the agency's actions was the "pro-protection values of agency officials, derived from the ideology of the safety and health professional and the organizational mission of OSHA").

those rewarded by political appointment tend to be those whose prior political loyalty demonstrates some kind of philosophical commitment to a party's or candidate's platform; political principles seem especially likely to inform their understanding of their own roles and missions. In that light, such persons seem least likely to be motivated entirely by concerns about their agency's budget or authority. Such persons also seem least likely to be motivated by considerations about past or future employment,⁶⁰ as their prospects in that latter regard are likely very bright in any event. Thus, there are reasons to suspect that the regulatory decisions of high-level appointees, as well as long-term agency lawyers and other professionals, are motivated in part by principle and ideology.

In fact, it seems especially unlikely that regulators would make decisions hoping to improve their future employment prospects, notwithstanding the well-known "revolving door"⁶¹ metaphor, an image that reinforces the interest group theory. For one thing, it is not entirely clear what incentive an industry group would have to hire former administrators who made decisions favorable to that group when in public service. Because the industry would have already gotten what it wanted, hiring a formerly favorable administrator would not do the group any good. Nor would any uncommunicated "deal" between a regulator and the industry be enforceable, informally much less legally, once the administrator left public service. And the idea that an interest group would hire a former administrator who had made favorable regulatory decisions simply as a signaling device to present administrators who may be looking for a job later seems far-fetched indeed.

It seems more likely that the future employment prospects of administrative regulators depend entirely on the regulators' experiences with regulatory issues, not on particular decisions that were friendly to an interest group or groups. If so, regulated interests might well seek to hire those administrators who were most aggressive against them. These are the administrators whom the industry may most want to co-opt, whose minds it most wants to tap, or whose efforts it most wants to enlist. To that extent, future employment opportunities would make administrators less friendly towards groups who might hire them later—exactly the opposite of what the wisdom informed by "revolving door" imagines.

60. Here too the argument finds empirical support. See William T. Gormley, *A Test of the Revolving Door Hypothesis at the FCC*, 23 AM. J. POL. SCI. 665, 676 (1979) (finding that political party affiliation is more predictive of agency decisionmaking than is previous employment with a regulated firm).

61. According to the "revolving door" hypothesis, agency personnel move between government service and the private sector, thus behavior is consequently shaped by their expectations of changing employment. See generally sources cited *supra* notes 58, 60.

The above discussion simply explains that regulatory decision-makers at the agency level—which is to say those actually making most regulatory decisions—surely make decisions in part according to ideological commitments, political principles and platforms, conceptions of the common good, and complicated combinations of the above. Put in negative terms, it seems implausible that administrative regulators are motivated entirely by worries about legislative rewards and sanctions for their decisions or by efforts to secure private sector employment in the future. This is not to say that the interest group theory's legislative dominance claim is necessarily false, but rather that the claim is a strong one. If Congress ultimately controls agencies to the extent that the interest group theory requires, it seems likely that Congress must do so by swamping whatever ideological commitments motivate agency personnel in the first place. Interestingly, available empirical evidence on the subject suggests that budget controls—often emphasized by the legislative dominance school—are not sufficient for the task: A study of senior-level administrators intended to probe the effect that budget concerns and future private sector employment prospects have on agency personnel concludes that such motivators do not result in agency bias favoring business-oriented interest groups,⁶² and a study of the relationship between agencies' growth and the size of agency salaries finds no positive relationship.⁶³

B. Administrative Procedure

But perhaps administrators have no effective choice but to deliver regulatory benefits to important congressional constituencies. Administrators might have—or might once have had—the best intentions coupled with confidence in government's ability to ameliorate complicated social and economic problems, but little occasion for putting their ideological commitments into regulatory practice. The extent to which they do have such ability, and the extent to which they are instead constrained by Congress' ability to monitor and control agencies, will depend very heavily on the legal process rules according to which agencies make their regulatory decisions. Thus, one might examine agencies' regulatory decisionmaking processes with an eye towards how those procedures might promote agency autonomy, on the one hand, and how amenable they are to congressional and interest group pressures, on the other. Proponents of the interest

62. See PAUL J. QUIRK, *INDUSTRY INFLUENCE IN FEDERAL REGULATORY AGENCIES* 176-77 (1981) (concluding that inconsistency in the effect of such motivators among agencies "supports skepticism toward the assertion that regulatory agencies tend to favor regulated industry interests").

63. See Ronald N. Johnson & Gary D. Libecap, *Agency Growth, Salaries and the Protected Bureaucrat*, 27 *ECON. INQUIRY* 431, 434 (1989).

group theory imply or assert that administrative procedures facilitate regulatory rent seeking.⁶⁴ The question becomes, then, whether that is so.

While surprisingly few students of regulation actually focus on the details of the administrative process directly, majority wisdom among those who do supports the interest group theory's legislative influence claim. In other words, most scholars considering the question argue that administrative procedure serves as a disciplining device that Congress uses to control agencies. The collaborative works of Mathew McCubbins, Roger Noll, and Barry Weingast ("McNollgast") provide the most thoroughgoing and intelligent treatment of this view.⁶⁵ After persuasively arguing that the repertoire of congressional tools most commonly mentioned as sources of legislative control—budget powers, committee oversight, and so on—do not go very far to solve Congress' principal-agent problem,⁶⁶ McNollgast argue that most of administrative law "is written for the purpose of helping elected politicians retain control of policymaking."⁶⁷ Indeed, according to McNollgast, administrative procedure is an indispensable solu-

64. See Stigler, *The Theory*, *supra* note 3, at 17-18 (stating that features of administrative decisionmaking lend themselves to rent seeking); Posner, *supra* note 20, at 82-89 (same); Posner, *supra* note 3, at 337-39.

65. See generally McNollgast, *supra* note 5; McNollgast, *Positive and Normative Models of Procedural Rights: An Integrative Approach to Administrative Procedures*, 6 J.L. ECON. & ORG. 307, 309 (1990) [hereinafter McNollgast, *An Integrative Approach*]; McNollgast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 432 (1989) [hereinafter McNollgast, *Structure and Process*]; see also Jeffrey S. Banks & Barry Weingast, *The Political Control of Bureaucracies Under Asymmetric Information*, 36 AM. J. POL. SCI. 509, 510 (1992); Arthur Lupia & Mathew D. McCubbins, *Designing Bureaucratic Accountability*, LAW & CONTEMP. PROBS., Winter & Spring 1994, at 91, 96; McNollgast, *The Political Origins of the Administrative Procedure Act*, 15 J.L. ECON. & ORG. 180 (1999). Others emphasize, as McNollgast themselves also do, see *infra* note 75, agency structure or design. See, e.g., Jonathan R. Macey, *Organization Design and the Political Control of Administrative Agencies*, 8 J.L. ECON. & ORG. 93, 94 (1992); see also D. RODERICK KIEWIET & MATHEW D. MCCUBBINS, THE LOGIC OF DELEGATION: CONGRESSIONAL PARTIES AND THE APPROPRIATIONS PROCESS (1991); Randall Calvert et al., *A Theory of Political Control and Agency Discretion*, 33 AM. J. POL. SCI. 588, 589 (1989); Jonathan R. Macey, *Separated Powers and Positive Political Theory: The Tug of War over Administrative Agencies*, 80 GEO. L.J. 671, 673 (1992); John T. Woolley, *Conflict Among Regulators and the Hypothesis of Congressional Dominance*, 55 J. POL. 92, 93 (1993).

66. See generally McNollgast, *supra* note 5.

67. *Id.* at 246. Because McNollgast do not commit themselves to a position with respect to legislative motivations, their argument does not imply that regulation serves mainly the interests of rent-seeking interest groups. (As far as McNollgast imply, Congress could be composed entirely of legislators motivated by the public interest.) However, the interest group theory under examination is only a small step away from McNollgast, and in any event it is compelling only if McNollgast's control thesis is correct. And even McNollgast themselves at times contemplate that legislators are motivated by reelection goals rather than a "search for the 'public interest.'" McNollgast, *An Integrative Approach*, *supra* note 65, at 310, 315.

tion to Congress' otherwise insurmountable bureaucratic compliance problem.⁶⁸

Specifically, McNollgast argue that administrative procedure facilitates legislative control by reducing the costs of congressional monitoring and thereby ensuring that agency decisions reflect congressional will.⁶⁹ They argue, for example, that by standardizing agency decisionmaking procedures in the federal Administrative Procedure Act (APA),⁷⁰ Congress enabled itself to keep abreast of what agencies are doing.⁷¹ Because all agencies use the same basic procedures, the costs to Congress of following agency action are lower. For another example, McNollgast suggest that by requiring agencies to provide notice of their proposed rulemaking and to solicit commentary on proposed rules, Congress made it easier for affected constituencies to register directly with Congress, as well as with agencies, their opposition to pending agency action.⁷² Thus, the notice-and-comment rulemaking process specifically serves to give Congress advanced warning of agencies that may be attempting to thwart congressional wishes.⁷³ Administrative procedure therefore makes it hard for agencies to surprise Congress with decisions Congress would not like.⁷⁴ By simultaneously slowing agencies down and providing affected interests with opportunities to express opposition to agency action, Congress solves its monitoring problem by exerting *ex ante* control over agencies.⁷⁵

But one could argue as forcefully in exactly the opposite direction—that administrative decisionmaking procedures actually foster agency autonomy and independence from the legislature.⁷⁶ For ex-

68. See McNollgast, *supra* note 5, at 273-74.

69. See *id.* at 253-54, 273.

70. 5 U.S.C. §§ 551-559, 701-706 (1994 & Supp. V 1999).

71. See McNollgast, *supra* note 5, at 255.

72. See *id.* at 259-60.

73. See *id.*

74. See *id.*

75. See McNollgast, *supra* note 5, at 255. It should be noted that McNollgast's argument that Congress exercises *ex ante* control over agencies is not limited to their claims about administrative procedure as such. They also argue that Congress' "structural" choices concerning the scope of agency power and the level of agency resources constitute independent constraints on agency regulators. See McNollgast, *Structure and Process, supra* note 65, at 432, 440-44. While the argument in the text above challenges McNollgast's procedural claims, their observations about structure seem wholly unobjectionable: Undoubtedly Congress enjoys *ex ante* control over agencies in the sense that Congress establishes the range of possible agency decisions. The more interesting and difficult question remains, however, how much Congress influences agency decisionmaking within that broad range, and whether administrative procedure promotes or undermines that influence.

76. In a very thoughtful set of recent articles, Professor David Spence takes issue with the McNollgast thesis and thus represents the alternative view that Congress can do fairly little to control agencies *ex ante* and must therefore rely on traditional tools of *ex post* control. See David B. Spence & Frank Cross, *A Public Choice Case for the Administrative State*, 89 GEO. L.J. 97 (2000); David B. Spence, *Administrative Law and Agency Policy-*

ample, while it is true that notice-and-comment rulemaking enables regulated interest groups and Congress to monitor agencies more easily, the rulemaking process also allows other types of groups—public-interest law firms, the media, the public, government watchdog groups—to keep abreast of agency action more easily as well. Relative to these groups, Congress and regulated parties would certainly have a comparative advantage at monitoring agencies, if agency rulemaking processes were not standardized. Thus, the question is really not, as McNollgast suggest, whether standardized processes make it easier for Congress and powerful congressional constituencies to monitor agencies, but whether, all things considered, standardized processes make it easier for those constituencies to get the regulation they want. If standardized rulemaking processes are even more useful to broad-based interests, watchdog groups, and so on—if they do more to subject agencies to pressures and influences beyond the legislature and legislative constituencies—then their existence does not support the view that administrative procedure facilitates congressional control.

Another difficulty with the McNollgast view is its implicit suggestion that agencies defy Congress—upset prior legislative coalitions—only through action, not inaction.⁷⁷ But most often implementing a legislative deal requires affirmative agency action. Thus, an agency can thwart congressional will by failure to regulate, just as it may do so by regulating. Yet existing administrative process rules do very little to allow interest groups, or Congress, to compel agency action that is not forthcoming. If Congress really intended the administrative process to hold agencies faithful to congressional will, it should have provided mechanisms to overcome recalcitrant inaction as well

making: Rethinking the Positive Theory of Political Control, 14 YALE J. ON REG. 407 (1997) [hereinafter Spence, *Rethinking the Positive Theory*]; David B. Spence, *Agency Discretion and the Dynamics of Procedural Reform*, 59 PUB. ADMIN. REV. 425 (1999); David B. Spence, *Agency Policy Making and Political Control: Modeling Away the Delegation Problem*, 7 J. PUB. ADMIN. 199 (1997); David B. Spence, *Managing Delegation Ex Ante: Using Law to Steer Administrative Agencies*, 28 J. LEGAL STUD. 413 (1999). In challenging the view represented by McNollgast, Spence makes several excellent points that resonate with the propositions made in the text below. He argues, for example, that administrator motivation is more complicated than the McNollgast view implies, and that structural decisions about the scope of agency power are infrequent and thus not so important. See, e.g., Spence, *Rethinking the Positive Theory*, *supra*, at 422-25. But while Spence states that McNollgast's procedural claims are "overstated," he does not go very far to explain how so. Spence also concedes a lot to McNollgast concerning Congress' ability to control agencies through rulemaking, arguing in response that agencies can "evade procedural control" by relying on informal decisionmaking processes as an alternative to notice-and-comment rulemaking, as well as on formal adjudication. *Id.* at 428-29. The argument in this Article that follows, in contrast, sees rulemaking (and other formal agency decisionmaking procedures) as promoting agency autonomy, rather than congressional control. Having said that, it sides with Spence in the Spence-McNollgast debate and aims to provide further support for Spence's side of the debate.

77. See Spence, *Rethinking the Positive Theory*, *supra* note 76, at 421-23.

as recalcitrant action. The fact that Congress did not provide such mechanisms further suggests that legislative control is not the major purpose or effect of administrative procedure.

Consider some specifics. According to section 553 of the APA, a crucial section governing agency rulemaking, an agency commencing the rulemaking process is required to provide a notice of its proposed rule which includes the rule's basic scope, purpose, justification, and authority.⁷⁸ Thereafter, the agency is obliged to solicit commentary on its proposed rule from any interested party.⁷⁹ Following the comment period, the rulemaking agency is to take into account all relevant facts, arguments, and other information gathered during the rulemaking process—both by the agency itself and as generated from the comments the agency receives—and render a final rule that reflects all relevant considerations.⁸⁰ To ensure that interested parties have the benefit of whatever information the agency deems especially important to its rule, the agency is prohibited from withholding from the public any such information during the rulemaking process.⁸¹ Section 553 further requires the agency to promulgate, along with its final rule, an explanation for the final rule form, justifying the final rule and addressing arguments the agency heard along the way.⁸²

It is a little hard to see how section 553 rulemaking, the dominant procedural form of agency regulation, is especially amenable to powerful congressional constituencies or, therefore, especially well suited for congressional monitoring and control of agencies. Any party, weak or powerful, can petition the agency to begin the rulemaking process (though the decision to initiate a rule rests with the agency).⁸³ An agency must provide public notice of any rule it intends to develop, and receive comments from any party, no matter how well or poorly funded, who undertakes to contact the agency. Of course, the rulemaking agency may choose simply to ignore some comments, but it may do so at its peril if a party supplies relevant data or argument that a subsequent court determines the agency's rule unjustifiably failed to consider.⁸⁴ Comments received during the notice-and-comment period become part of the rulemaking record, which is subject to public and judicial inspection.

78. Administrative Procedure Act § 1, 5 U.S.C. § 553 (1994).

79. See *id.* § 553(c).

80. See, e.g., *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240, 252-53 (2d. Cir. 1977).

81. See, e.g., *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1030-31 (D.C. Cir. 1978); *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 400 (D.C. Cir. 1973), *superseded in not relevant part by statute*, 15 U.S.C. § 793(c)(i).

82. See 5 U.S.C. § 553(c)(i); see also *Kooritzky v. Reich*, 17 F.3d 1509, 1513-14 (D.C. Cir. 1994).

83. See 5 U.S.C. § 553(e).

84. See, e.g., *Nova Scotia Food Prods. Corp.*, 568 F.2d at 251.

Moreover, notice-and-comment rulemaking levels the interest group playing field to some extent in the sense that, unlike election campaign contributions for example, the value of comments is not closely proportional to their volume: A single, small interest group submitting important arguments during a rulemaking can potentially have as much influence on an agency's final rule as many groups that present the same argument duplicatively. Unlike campaign dollars, the arguments and information that make up rulemaking comments are not fungible, and redundant comments are virtually worthless. To be sure, participating in a rulemaking at all requires some organizational and financial wherewithal, but the costs of participation are not so overwhelming that only very well-funded interests can participate.⁸⁵ Interest groups with fewer resources than others certainly can have an effect on a rulemaking vastly disproportionate to the relative size of their budgets. Because section 553 rulemaking is open to any party that wishes to participate, and because influence on rulemaking is not necessarily coextensive with a party's size or wealth, the section 553 rulemaking process constitutes a poor mechanism for delivering regulatory rents to favored constituencies. Relative to decisionmaking by congressional committees, for example, whose members are very likely to be more influenced by a greater volume of constituent letters and campaign support, agency rulemaking is likely less sensitive to interest group pressures.

Of course, section 553 does not exhaust the procedural requirements for agency rulemaking. Other statutes supplement the APA in that respect. One especially important example is the National Environmental Policy Act (NEPA),⁸⁶ which requires an "Environmental Impact Statement" for major federal actions that have a significant effect on the quality of the environment.⁸⁷ But here too it is hard to see how such additional requirements constitute useful procedural constraints for ensuring that agencies serve important congressional constituencies. On the one hand, one might argue that a statute like NEPA may advance the interests of some polluters by creating a barrier to entry. On the other hand, however, NEPA is clearly costly to polluters in that it forecloses certain regulatory outcomes available to polluters because those outcomes have an adverse impact on the environment. It is hard to say how these offsetting effects stack up. To

85. See Croley, *supra* note 40, at 120-25 (outlining costs of participating in agency decisionmaking); see also *National Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672, 683 (D.C. Cir. 1973) ("[U]tilizing rule-making procedures opens up the process of agency policy innovation to a broad range of criticism, advice and data . . ."); Ernest Gellhorn, *Public Participation in Administrative Proceedings*, 81 *YALE L.J.* 359, 390 (1972) (noting that agencies can waive requirements of multiple submissions of written materials for parties claiming financial hardship).

86. 42 U.S.C. §§ 4321, 4343-47 (1994).

87. See *id.* § 4332(2)(C).

be sure, NEPA may be easy to understand if attributed to Congress' desire to achieve some level of environmental protection,⁸⁸ but that assumption undermines the interest group premise that the legislature is motivated to promote the regulatory interests of narrow but powerful groups, not environmentalists.⁸⁹

Nor does the adjudication side of administrative procedure seem especially well designed as a congressional control device; in fact, it seems even less well suited for that purpose. According to sections 554, 556, and 557 of the APA,⁹⁰ which govern formal adjudication, agency adjudicators must enjoy some measure of independence from the rest of their agencies. Section 554 imposes an administrative "separation of powers" norm by forbidding administrative law judges (ALJs) from being supervised by others in the same agency who bring cases before the ALJs.⁹¹ The APA's adjudication provisions also prohibit *ex parte* communications between the adjudicator and parties to the adjudication.⁹² Evidence forming the basis of the adjudication is instead introduced formally, and where fairness requires, opposing parties ordinarily enjoy the benefits of cross-examination of adverse witnesses.⁹³ Finally, ALJ decisions must include written rulings on material factual questions and statements of applicable agency policy and law.⁹⁴

Intra-agency appeals (appeals through the agency's own "judiciary") are similarly formalized. And, while agency heads can ultimately overrule ALJs and appellate adjudicatory bodies, agency adjudications are subject to the "substantial evidence" test upon appeal to a federal court.⁹⁵ A reviewing court will affirm the agency's ultimate decision only for reasons supported by the adjudication record.⁹⁶ Though higher levels in an agency may reverse an ALJ decision, reviewing courts require some explanation for why they have done so.⁹⁷

88. Which it did. See, e.g., H.R. REP. NO. 91-765 (1969), reprinted in 1969 U.S.C.C.A.N. 2767.

89. See Cynthia R. Farina, *Faith, Hope, and Rationality: Or, Public Choice and the Perils of Occam's Razor*, 28 FLA. ST. U. L. REV. 109, 132-33 (2000) (explaining that some environmental statutes were passed in spite of powerful interest group opposition).

90. 5 U.S.C. §§ 554, 556-57 (1994).

91. See § 554(d).

92. See *id.*

93. See § 556(d); see also, e.g., *Richardson v. Perales*, 402 U.S. 389, 402 (1971); *Demech v. Secretary of HHS*, 913 F.2d 882, 884 (11th Cir. 1990); *Cellular Mobile Sys. of Pa., Inc. v. FCC*, 782 F.2d 182, 198 (D.C. Cir. 1985).

94. See § 557(c).

95. See 5 U.S.C. § 706(2)(E).

96. See, e.g., *American Smelting and Refining Co. v. Federal Power Comm'n*, 494 F.2d 925, 945 (D.C. Cir. 1974); *Marco Sales Co. v. FTC*, 453 F.2d 1, 7 (2d Cir. 1971); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 850 (D.C. Cir. 1970).

97. See, e.g., *International Brotherhood of Teamsters v. NLRB*, 587 F.2d 1176, 1178, 1181 (D.C. Cir. 1978); *Alabama Ass'n of Ins. Agents v. Board of Governors of the Fed. Reserve*, 533 F.2d 224, 248 (5th Cir. 1976), *vacated in part*, 558 F.2d 729 (5th Cir. 1977); *ITT Continental Baking Co. v. FTC*, 532 F.2d 207, 219-20 (2d Cir. 1976). See generally MORTON

As in the case of rulemaking, then, it is a little hard to see how the formal adjudication process serves as a useful vehicle for ensuring that agencies supply desired regulation to important congressional constituencies. The formalized process does not lend itself to interest group manipulation, nor is it very susceptible to congressional or lobbyist pressure. In fact, the prohibition against *ex parte* communications during an adjudication extends even to members of Congress.⁹⁸ To be sure, the costs of participating in formal adjudication, which include the cost of counsel, are greater than those typically associated with rulemaking, and to that extent the process is less inviting to many interests.⁹⁹ More importantly, formal adjudication is not open to any interested party, as rulemaking is, but rather, like ordinary litigation, is limited to the parties to the hearing and to whoever can qualify as an intervenor. And indeed, some agencies that for a time supported "public intervenor" programs have since abandoned them.¹⁰⁰ But while the exclusivity associated with formal adjudication may raise worries that those involved have special access to the agency that translates into regulatory favoritism, in fact the very trappings that make this procedure expensive and quasi-judicial—the semi-independence of ALJs, the submission of evidence, the opportunity to challenge contrary evidence, the promulgation of written decisions that explain the facts and the law underlying the agency's decision—also make the process rather inconvenient for delivering regulatory favors.

Apart from rulemaking and formal adjudication, other procedural mechanisms also appear to further promote openness and agency independence. Perhaps most notably, the Federal Advisory Committee Act (FACA)¹⁰¹ insulates agencies politically by providing an external,

ROSENBERG & JACK H. MASKELL, CONGRESSIONAL INTERVENTION IN THE ADMINISTRATIVE PROCESS: LEGAL AND ETHICAL CONSIDERATIONS (Cong. Res. Serv. No. 90-440A, 1990).

98. See, e.g., *Action for Children's Television v. FCC*, 564 F.2d 458 (D.C. Cir. 1977); *Pillsbury Co. v. FTC*, 354 F.2d 952 (5th. Cir. 1956); see also HOUSE COMM. ON STANDARDS OF OFFICIAL CONDUCT, 98TH CONG., ETHICS MANUAL FOR MEMBERS AND EMPLOYEES OF THE U.S. HOUSE OF REPRESENTATIVES 69 (1984) (explaining prohibitions on *ex parte* communications in formal agency proceedings). For an example of judicial unease with respect to congressional pressures on specific agency decisions outside of the formal adjudication context, see *Koniag, Inc. v. Andrus*, 580 F.2d 601, 610 (D.C. Cir. 1978), which set aside the Secretary of Interior's determination on the grounds that a letter from a Congress member "compromised the appearance of the Secretary's impartiality." *Id.*

99. See Croley, *supra* note 40, at 121-24.

100. See generally SCHLOZMAN & TIERNEY, *supra* note 1, at 351-53; Barry B. Boyer, *Funding Public Participation in Agency Proceedings: The Federal Trade Commission Experience*, 70 GEO. L.J. 51 (1981); Susan B. Flohr, Comment, *Funding Public Participation in Agency Proceedings*, 27 AM. U. L. REV. 981 (1978). The Magnuson-Moss Act specifically authorized the FTC to "provide compensation for reasonable attorneys fees, expert witness fees, and other costs of participating" in its adjudications, for a time. 15 U.S.C. § 557a(h)(1) (repealed 1994); see also WILLIAM F. WEST, ADMINISTRATIVE RULEMAKING: POLITICS AND PROCESSES 122-40 (1985).

101. 5 U.S.C. app. (1994 & Supp. V 1999).

neutral source of expert policy recommendations that can be difficult for legislators and interest groups to ignore or discredit. The FACA requires any agency seeking policy advice or recommendations from a group of persons outside of government, which agencies do fairly often in the development of regulatory policy, to charter that group as a federal advisory committee.¹⁰² The chartered advisory committee then must open its meetings to the public,¹⁰³ announce them in advance,¹⁰⁴ keep minutes of its meetings,¹⁰⁵ make available to the public any documents on which the committee relies in rendering advice to an agency,¹⁰⁶ and similarly make available its own documents and reports.¹⁰⁷ And both the FACA and its implementing regulations, promulgated by the General Services Administration, require that the membership of an advisory committee represent diverse points of view concerning the issue at hand.¹⁰⁸

Given the FACA's many good-government requirements, advisory committees chartered under it are not easily captured by narrow interests; advisory committees whose meetings and records are open and accessible make inconvenient vehicles for delivering biased advice to an agency. Of course, the transparency of advisory committees does not speak to the issue of who actually serves on them. If the FACA required openness while advisory committees' memberships were nevertheless dominated by special interest groups, then the institution might provide an effective avenue for interest group domination of agencies. It appears, however, that the FACA procedures for establishing and running an advisory committee go far to ensure balanced representation among many different types of interests. An investigation of advisory committee membership reveals that memberships are reasonably well balanced. Approximately twenty-five percent of sampled advisory committee members represent either broad-based interest groups or some scientific or other academic discipline, as compared with approximately thirty-five percent of members representing businesses and trade groups.¹⁰⁹ Further, approximately two-thirds of sampled advisory committees have at least one member representing some broad-based interests, whereas about two-thirds of committees have one or more members representing a trade association, and three-fourths have one or more members representing business interests.¹¹⁰ Thus, by providing a source of expert

102. See Federal Advisory Committee Act § 9.

103. See *id.* § 10(a)(1).

104. See § 10(a)(2).

105. See § 10(c).

106. See *id.*

107. See § 10(b)-(c).

108. See § 5(b)(2)-(3); see also 41 C.F.R. § 101-6.1007(b)(2)(iii) (1999).

109. See Croley, *supra* note 40, at 137 & tbl.2.

110. See Croley, *supra* note 40, at 139 & tbl.3.

advice that aids agency record-building and can form a strong scientific or technical basis for agency action, through procedures that do not seem vulnerable to over-representation by special interests, the FACA seems to promote agency independence and evenhandedness more than it facilitates congressional or interest group control.

Much the same is therefore true of the Negotiated Rulemaking Act (NRA),¹¹¹ which expressly triggers the FACA by requiring a FACA-chartered advisory committee for the development of any rule under the NRA;¹¹² the same openness requirements apply. In fact, much like the FACA, the passage of the NRA reflected concerns about the dangers of agency communications with parties interested in the development of a rule prior to the publication of a proposed rule's notice.¹¹³ Of course, agencies commonly communicate with parties early in a rule's development, even before the notice of a proposed rule,¹¹⁴ but the NRA requires agencies that assemble private parties to write the text of a negotiated proposed rule to do so in an open, inclusive, evenhanded manner. The negotiation process then promotes discussion, argumentation, and compromise among those interested in a negotiated rule's development. Negotiated rulemaking, as a procedural institution, thus does not resonate very well with the interest group theory, although not much turns on that observation given that negotiated rulemakings are, unlike advisory committees, uncommon.¹¹⁵

Like the FACA and the NRA, other important appendages of the APA also passed in the "good-government" reform era of the 1970s similarly present serious obstacles to, and moreover deter, regulatory favoritism. The Freedom of Information Act (FOIA),¹¹⁶ for one, requires agencies to publish in the *Federal Register* items such as their rules of procedure, contact information through which the public may obtain information or make requests for agency decisions, statements of general policy, and interpretations of general applicability formu-

111. 5 U.S.C. §§ 561-70 (1994 & Supp. V 1999) (reauthorized by the Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, § 11, 110 Stat. 3870, 3873).

112. See *id.* § 582.

113. See generally Steven P. Croley & William F. Funk, *The Federal Advisory Committee Act and Good Government*, 14 YALE J. ON REG. 451 (1997).

114. See, e.g., JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 155 (3d ed. 1998).

115. See, e.g., Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L.J. 1255, 1276 (1997); see also Jody Freeman, *Collaborative Governance and the Administrative State*, 45 UCLA L. REV. 1, 36-37 (1997). On the other hand, the NRA might accomplish something by discouraging illicit and unofficial negotiations that provide regulatory favors to certain groups. The point is that the Act's success is not necessarily to be measured solely by reference to how many regulatory negotiations have been conducted under it. Agencies may credibly avoid communications with rent-seeking interest groups on the ground they do not wish to trigger the NRA.

116. 5 U.S.C. § 552 (1994).

lated and adopted by an agency.¹¹⁷ The FOIA also requires agencies to provide any requesting party any information pertaining to any other agency records not falling within an exempted category of information such as information pertaining to trade secrets and national defense.¹¹⁸ (Other statutes, including the Federal Records Act and the Presidential Records Act, require agencies to maintain all of their records.¹¹⁹) And the Sunshine Act¹²⁰ requires multi-member agencies, which include independent agencies, to hold open, publicized meetings, except in one of a number of exempted circumstances roughly similar to those of the FOIA.¹²¹ To the extent that making regulatory decisions benefiting favored congressional constituencies is facilitated by administrators who operate outside the awareness of the public, the media, and watchdog groups, here again the good-government procedural ground rules stymie the kind of regulatory decisionmaking the interest group theory contemplates.¹²²

Of course, the APA does not prescribe a particular process for every agency decision. Agencies make interpretive rules, procedural rules, and sundry other informal decisions for which there is no prescribed decisionmaking process,¹²³ although perhaps tellingly they sometimes design their own processes which then become routine. One could say, then, that agencies are best able to supply the regulation sought by powerful congressional constituencies through informal decisionmaking. But on the other hand, this is just to say that administrative procedure as such does not facilitate regulatory rent seeking, but rather that the absence of procedure (coupled with delegation of significant discretionary power) does so; procedure itself can no longer be a constraint on agencies if informal—that is, a-procedural—decisionmaking is where all of the interest group action

117. See § 552(a).

118. See *id.*

119. Federal Records Act, 44 U.S.C. § 1501 (1994); Presidential Records Act, 44 U.S.C. § 2204 (1994).

120. 5 U.S.C. § 552(b) (1994).

121. See § 552(b)-(c).

122. See SCHLOZMAN & TIERNEY, *supra* note 1, at 348 tbl.13.1 (finding that 82% of surveyed citizen groups, and 19% of surveyed corporate groups, indicate that the FOIA has made it easier for them to operate effectively within the bureaucracy, and that 48% of citizen groups and 23% of corporate groups say the same thing about the Sunshine Act).

123. See generally LUBBERS, *supra* note 114, at 56-69; 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 (1992) [hereinafter Anthony, *Interpretive Rules*]; Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 YALE J. ON REG. 1 (1990); Warner W. Gardner, *The Procedures by Which Informal Action Is Taken*, 24 ADMIN. L. REV. 155 (1972); Peter L. Strauss, *The Rulemaking Continuum*, 41 DUKE L.J. 1463 (1992); Paul R. Verkuil, *A Study of Informal Adjudication Procedures*, 43 U. CHI. L. REV. 739 (1976). Informal agency orders were characterized by the Attorney General's final report on administrative procedure as "the life blood of the administrative process." ATTORNEY GEN.'S COMM'N ON ADMIN. PROCEDURE, FINAL REPORT, S. DOC. NO. 76-186, at 35 (3d Sess. 1941).

is. Moreover, if delegation itself is the worry, it is worth emphasizing that now much turns on administrators' motivations in predicting or explaining regulatory outcomes. If an agency has strong incentives to provide illicit benefits to some particular interest group, informal decisionmaking would probably help it to do so. If, on the other hand, administrators are motivated to promote general interests, then informal decisionmaking power would help them do so. Thus, wherever agencies regulate by exercising raw discretion rather than according to statutorily prescribed procedures, much turns on what administrators' motivations really are.

Administrators' motivations are also important in the context of agency record-building outside of notice and comment. That is, nothing about section 553 rulemaking prohibits agencies from making informal, *ex parte* contacts with any party at any point prior to, or for that matter following, a notice of a proposed rulemaking.¹²⁴ And, of course, such contact is extremely common.¹²⁵ Agency communications with those affected or potentially affected by a rule usually precede rather than follow the agency's notice of a proposed rulemaking. Thus, an agency motivated to advance the cause of powerful interest groups might most effectively do so by defining the parameters of a rulemaking or even drafting the proposed rule in a way that advantages some groups, before the rulemaking ever becomes public. But here again, much turns on administrator motivation. Agencies might be motivated to structure their prenotice rulemaking process in a way that favors powerful interest groups—wherever they can do so without triggering the NRA or the FACA—but then they might not be so motivated; the mere opportunity for informal prenotice communications with affected parties does not mean that agencies will advance special interests. Again, to the extent agencies do use *ex parte* rulemaking communications to advance special interests, it is not procedure itself but rather the absence of procedure which allows agencies to do so. The section 553 procedure itself is not a source of agency discipline.

In sum, an examination of many of the specific provisions of the APA and related parts of Title 5 suggests that administrative procedure is not so well suited for congressional or, by extension, interest group domination of agencies, nor is it inaccessible to groups representing broad-based interests. The only specific features of administrative decisionmaking procedures that provide some support for the interest group theory's legislative dominance claim include the elimination of some agencies' public intervenor programs for formal

124. See 5 U.S.C. § 553 (1994).

125. See LUBBERS, *supra* note 114, at 225-33.

adjudication, the relative exclusivity of formal adjudication,¹²⁶ and the existence of informal decisionmaking mechanisms entirely within agencies' own discretion. The interest group theory ultimately finds rather modest support from formal adjudication, however, given that that process involves the quasi-formal submission of evidence, prohibitions on *ex parte* communications, and the more searching "substantial evidence" standards of judicial review. And, similarly, the theory finds only modest support from informal, agency-prescribed decisionmaking mechanisms given that these do not make very good substitutes for rulemaking and other APA-prescribed procedures.¹²⁷

To consider this issue from another angle, it is certainly not difficult to imagine an administrative process regime better suited to congressional control than that set forth in the APA. For example, one can well imagine a world without an APA—such as the United States before 1946, most local governments to this day, and all but a few countries—in which each agency made decisions in various ways not easily discernable by those outside of the industry or population most directly affected by an agency's work. Such a world would be harder for the public, the press, public interest groups, and even courts to navigate. Such a world would also be more costly for those seeking to participate in many agencies' decisionmaking processes or to otherwise influence many different agencies' decisions. In the absence of procedural consistency across agencies, such parties would have to learn each agency's procedural practices anew. Those regularly seeking rents from a single, familiar agency, on the other hand, would enjoy an informational advantage. Indeed, as discussed below, efforts to render agency decisionmaking processes more open and accessible by making them more consistent across agencies are part of what originally motivated the passage of the APA.¹²⁸

But even with an administrative procedure statute, decisionmaking processes more consonant with the interest group theory are easy to imagine. For one example, rulemaking provisions might allow agencies simply to announce a final rule following a comment period without any explanation about why the agency settled on the rule it did. On the adjudication side, allowing *ex parte* communications concerning the merits of a pending decision, as the APA did until an

126. This conclusion finds support from a Congressional Research Service review of the law governing congressional intervention in administrative processes. See ROSENBERG, *supra* note 97; see also *McCain's Letter to FCC and Excerpts from Replies*, N.Y. TIMES, Jan. 6, 2000, at A22 (reporting that FCC commissioners refused to comply with a senator's status inquiry in a television licensing matter).

127. See generally LUBBERS, *supra* note 114, at 56-69; Anthony, *Interpretive Rules*, *supra* note 123, at 1319-27.

128. See *infra* p. 47.

amendment in 1976¹²⁹—one of the very few substantive changes to the act in its fifty-year history,¹³⁰ prompted by worries that some agencies were unduly influenced by powerful interests on one side of a case—would make it easier for agencies to understand and satisfy the regulatory preferences of powerful constituencies. More generally, the APA could require agencies to seek congressional approval before their decisions become final, as might be possible through some version of a “negative veto” (as opposed to the “affirmative veto” invalidated by the Supreme Court¹³¹). Better still, Congress could make it clear through the APA that members of Congress could communicate directly with agency personnel concerning any pending agency decision. Instead, various prohibitions on congressional influence on agency decisionmaking processes call into further question the idea that administrative procedure is largely a tool of congressional control.¹³² Finally, the APA might provide for judicial review that instructs courts to invalidate agency decisions only for blatantly ignoring APA-prescribed procedures, rather than for the more expansive “without observance of procedure required by law” standard under APA section 706.¹³³

On that latter note, Congress could have provided for very limited, bare-rationality review, with no judicial inquiry into matters such as the adequacy of an agency’s factual record supporting its decision, which would have had procedural implications relating to agencies’ factual record-building practices. After all, while it is true that the federal courts have imposed many administrative process norms through the course of ruling on APA cases, to some extent Congress invited them to do so by supplying the terms of APA review and including inflatable words like “capricious” among them.¹³⁴ Thus, the APA’s judicially articulated procedural requirements are not really *entirely* court-imposed. In any event, the important point is simply that different conceivable processes would promote legislative control more than existing APA procedures do.

For example, aspects of the Model State Administrative Procedures Act¹³⁵ seem better designed to promote legislative control than does the APA. For instance, the Model Act provides for the establishment of a legislative “Administrative Rules Review Committee,” which allows for legislative review of rules, including proposed or

129. Pub. L. No. 94-409, § 6, 90 Stat. 1247 (1976) (codified at scattered parts of 5 U.S.C.).

130. See, e.g., William H. Allen, *The Durability of the Administrative Procedure Act*, 72 VA. L. REV. 235, 236-40 (1986).

131. See *Immigration and Naturalization Serv. v. Chadha*, 462 U.S. 919, 958-59 (1983).

132. See sources cited *supra* notes 97- 98, 126.

133. 5 U.S.C. § 706(2)(D) (1994).

134. § 706(2)(A).

135. MODEL STATE ADMIN. PROC. ACT (1981).

possible future rules,¹³⁶ and provides that the legislative committee may certify that an agency's rules are in the legislature's view contrary to the agency's authority.¹³⁷ Many states make approval by a legislative committee the final step in a rulemaking before a rule becomes final, although some state supreme courts have held that such requirements violated state constitutional separation of powers principles by in effect giving the legislature a veto over executive decisions.¹³⁸ The point remains, however, that relative to Congress, state legislatures typically enjoy more control over their agencies. Compared with some state acts, the APA seems less suited for ensuring that agencies heed legislative will. If Congress intended the APA primarily to secure congressional dominance, its choice of provisions seems in many respects puzzling.

But wait. If federal administrative process rules really liberate agencies from the legislature and from powerful legislative constituencies, one must wonder why Congress, or for that matter those interest groups which would benefit from tight legislative control over agencies, would ever allow such a state of affairs to develop. If Congress prefers to control agencies, which it presumably does, and if Congress creates administrators' decisionmaking processes in the first place, which it certainly does, why wouldn't Congress devise administrative process rules that make certain agencies do what Congress and its powerful constituencies want?

This compelling question has several compelling answers. First, as discussed further below,¹³⁹ Congress is not the sole source of the basic ground rules of administrative procedure. Rather, the President and especially the courts have supplemented or refined the text of the APA in ways that give the act its bite. Thus, to some extent, Congress itself has limited authority in the matter.

Second, it is less clear than many apparently believe that Congress would be able to adopt administrative procedures that give it tight control over agencies' regulatory decisions. For one thing, doing so would require legislators to overcome their own public-goods problem, and an intergenerational one at that.¹⁴⁰ Devising rules that will preserve a future legislature's dominance over agencies may not be something very many legislators in the present care much about. In the abstract, legislators presumably care about the extent to which they will be able to influence agencies in the future, but determining which administrative process rules would most accomplish that re-

136. *Id.* § 3-201.

137. *Id.* §§ 3-203 to -204.

138. See, e.g., *State v. Broom*, 439 So. 2d 357 (La. 1983); *Opinion of the Justices*, 431 A.2d 783, 786 (N.H. 1981).

139. See *infra* Part III.C.

140. For a nice exception to the tendency to overlook Congress' own collective action problems, see KIEWIET & MCCUBBINS, *supra* note 65, at 22.

quires substantial legislator investment in the future, at the opportunity costs of focusing on immediate interest group demands—and various other demands on legislators' time—in the present. Structuring such rules would also require difficult *ex ante* calculations about whether and how different kinds of interest groups might participate in alternative processes, and how courts will interpret and apply statutory procedural rules. To the extent considerable uncertainty would surround those questions, the expected returns from legislative attention to administrative procedure will be small. An anthropomorphized legislature might care very much about future agency control, but for a legislature composed of hundreds of individuals whose own time horizons are limited and who have many conflicting demands on their time, it is not clear that administrative process rules will command the attention that ensuring future legislative dominance would require. The same is true for regulated interest groups: In the abstract, interest groups that would benefit from close legislative control over agencies would have an incentive to lobby for administrative process rules that promoted legislative control, but any given interest group's incentive to invest in securing a set of such rules for the benefit of all other similarly situated groups, especially given the uncertainty that would inevitably surround such an undertaking, is less clear. Powerful interest groups too might prefer to focus instead on more immediate and self-serving gains.

That's not all. Perhaps more importantly, Congress might well prefer to use administrative procedure to insulate itself from interest groups, rather than to control agencies to thereby deliver demanded regulation. That is, by prescribing generally open and accessible rules of administrative procedure, such as those embodied in section 553—and devising open and accessible rules is a much simpler task than determining which rules would best exclude certain interests but not others—Congress might use administrative procedure to resist interest group demands for favorable regulation. After all, why would legislators be motivated simply to act as interest group agents if they could avoid doing so without sacrificing whatever interest group political support they require? It is one thing to hold, as the interest group theory does, that legislators are solicitous of special interest groups' demands, but quite another to hold that they enjoy it. By delegating substantial regulatory powers to agencies, which do not require the same type of political support from interest groups that members of Congress themselves do, and then by creating a set of rules that raise the costs of regulatory rent seeking, Congress may employ the administrative process as a defense against interest group demands even while it can appear to champion its interest group supporters. Congress can always later deflect blame toward agencies, and the courts which back them up, for regulatory decisions

its interest group supporters do not like. Congress can growl at agencies too, under the eye of powerful constituencies. But individual legislators who are motivated at least in part to advance general interests might not regret much that agencies enjoy sufficient autonomy to do what Congress itself can do directly only at great political cost.

Overlooking this possibility, the interest group theory too quickly assumes instead that a Congress dependent on the support of interest groups which have only their narrow and self-regarding regulatory interests in mind can do nothing to limit the malignant consequences of that dependence. But if Congress can properly be anthropomorphized at all, maybe Congress is more resourceful than the theory gives it credit for.¹⁴¹ To be sure, interest groups might prefer that Congress not use administrative procedure to liberate agencies, and therefore to some extent liberate itself, but again it would take an unusually focused and far-sighted set of interest groups to do much about it. In sum, serious questions about Congress' institutional incentives to devise administrative procedures that successfully control agencies, as well as about its ability to do so, lend support to the arguments above that existing administrative process rules seem ill-designed to promote congressional control and regulatory rent seeking.

But there is a relevant history here, which casts still further doubts on the interest group theory's legislative dominance claim. At the time leading up to the Administrative Procedure Act's passage in 1946, efforts to standardize and codify agency decisionmaking processes were born largely out of a concern that, in the wake of the New Deal, federal agencies enjoyed too much power and discretion vis-à-vis regulated industries.¹⁴² In response, those subject to agency power sought decisionmaking procedures that were open, accessible, and fair.¹⁴³ Today, concerns about agency power are very different; the modern worry—one certainly embodied by the interest group theory—is that agencies and regulated industries will cooperate in ways that sacrifice public interests. The difficulty for the theory, however, is that the very same procedural rules that were adopted to protect industry in the 1940s make it harder—because they are generally open, accessible, and fair—for industry to capture agencies today. Historical circumstances, in other words, produced a procedural template which makes regulatory rent seeking difficult.

141. See Farina, *supra* note 89, at 132-33 (identifying examples of Congress' institutional response to the particularism of its individual members).

142. See generally Walter Gellhorn, *The Administrative Procedure Act: The Beginnings*, 72 VA. L. REV. 219 (1986); George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1560-61 (1996).

143. See Shepherd, *supra* note 142, at 1569-75.

In fact, in the late 1930s industry lost in its effort to secure alternative legislation that would have limited agency power (and thus the potency of New Deal reforms) considerably,¹⁴⁴ an historical fact inconvenient for the interest group theory. It got, instead, an act which preserved agency power over industry—specifically, one that legislatively sanctioned agency rulemaking—but conditioned the use of that power on conformity with certain good-government decision-making procedures.¹⁴⁵ Those procedures, helpful to regulated parties in an era that pitted industry against the government, undermined regulated parties' attempts to secure favorable regulation to the detriment of broad-based interests in a later era.¹⁴⁶

A final point remains. In recent years, Congress has perceived a need to exercise greater control over agencies, suggesting that Congress itself doubts its own capacity to influence agencies on regulatory matters. For example, the 104th Congress passed legislation, part of the Small Business Regulatory Enforcement Fairness Act of 1996¹⁴⁷ (in turn a piece of the Contract with America Advancement Act of 1996¹⁴⁸), that amended Title 5 of the U.S. Code to require agencies to submit all of their new rules to Congress and to the General Accounting Office for review.¹⁴⁹ This new procedure stays the effective date of major rules under congressional review for sixty days,¹⁵⁰ and further provides for Congress to enact a joint resolution disapproving rules it considers to be undesirable.¹⁵¹ The same Congress also established a legislative "Corrections Day" in the House,¹⁵² a mechanism for fast-track consideration of bills that would "correct" agencies' decisions that Congress deemed misguided, which required a change in the House's rules rather than legislation. That these de-

144. See *id.* at 1598-1618.

145. See *id.* at 1675-78.

146. Thus President Franklin D. Roosevelt, upon his veto of the Walter-Logan Bill, H.R. 6324, 76th Cong. (1939), the main alternative to the Administrative Procedure Act which he supported, stated:

Wherever a continuing series of controversies exist between a powerful and concentrated interest on one side and a diversified mass of individuals, each of whose separate interests may be small, on the other side, the only means of obtaining equality before the law has been to place the controversy in an administrative tribunal.

President Franklin D. Roosevelt, Veto Message, reprinted in 86 CONG. REC. 13,942-43 (1940).

147. Pub. L. No. 104-121, tit. II, 110 Stat. 847, 857-74 (currently codified at 5 U.S.C. § 601 note (Small Business Regulatory Fairness) and other scattered sections of Titles 5 & 15 U.S.C.).

148. Pub. L. No. 104-121, 110 Stat. 847.

149. See *id.* sec. 251, § 801, 110 Stat. at 868 (codified at 5 U.S.C. § 801 (Supp. V 1999)).

150. See sec. 251, § 801(a)(3)(A), 110 Stat. at 869.

151. See *id.*

152. See H.R. Res. 168, 104th Cong. (1995). See generally Elizabeth Garrett, *Legal Scholarship in the Age of Legislation*, 34 TULSA L.J. 679, 690 (1999); John Copeland Nagle, *Corrections Day*, 43 UCLA L. REV. 1267 (1996).

velopments, which some observers attribute to political chest-beating,¹⁵³ will change the legislature-agency relationship in a significant way seems unlikely. Certainly they do not change the essential fact that Congress must pass legislation to undo what an agency has legally done. Nevertheless, it seems reasonable to conclude that such efforts reflect some amount of congressional frustration about Congress' ability to influence agencies. For this reason as well as those already mentioned, existing administrative process rules do not seem to square with the interest group theory's legislative dominance claim, not without a lot of pushing and grease.

C. Agencies' Legal-Institutional Environment

Of course, agencies do not regulate in an APA-vacuum. Rather, their decisionmaking processes are guided or otherwise influenced by powerful legal and political forces besides Congress. Once again, then, one might ask whether those influences make the legislative influence claim more or less plausible. However motivated legislators may be to direct agencies to deliver regulatory benefits to legislative constituencies, other political institutions might complicate or even undermine congressional control.

Presidential oversight is one important example, perhaps especially lately. Though created, empowered, and funded by Congress, agencies answer to the President as well. While agencies' institutional position relative to the President is more subtle than the formal-constitutional model of a government composed of three branches suggests, still agencies are in many important ways directly answerable to the White House. This is certainly true of executive branch agencies, whose heads serve at the President's pleasure.

In recent administrations, the President has exercised his constitutional power over the executive branch to assert greater and greater control over agencies, as many have observed.¹⁵⁴ Several important executive orders have centralized agency decisionmaking, both by directing agencies to submit major rules to the White House for review and by articulating principles to guide regulatory deci-

153. See, e.g., Daniel Cohen, *S. 981, The Regulatory Improvement Act of 1998: The Most Recent Attempt to Develop a Solution in Search of a Problem*, 50 ADMIN. L. REV. 699 (1998).

154. See, e.g., Erik D. Olson, *The Quiet Shift of Power: Office of Management & Budget Supervision of Environmental Protection Agency Rulemaking Under Executive Order 12,291*, 4 VA. J. NAT. RESOURCES L. 1 (1984); Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1 (1995). See generally Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541 (1994); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1 (1994); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 587 (1984).

sionmakers.¹⁵⁵ Recent vice presidents also have taken a much greater interest in regulatory policymaking and agency decisionmaking specifically.¹⁵⁶ As a result, agencies are often in close contact with the White House during the development of important regulatory policy initiatives.¹⁵⁷ Agency decisionmakers are not answerable to the White House only as a formal-constitutional matter, in other words, but rather as a practical, day-to-day matter—a relationship that seriously challenges any easy control of agencies by Congress.¹⁵⁸

This is not to deny that the chief executive may seek to use agencies to deliver regulatory goods to important presidential constituencies, much as Congress may attempt the same for its own constituencies.¹⁵⁹ But for obvious geographical reasons, those two constituencies are not neatly overlapping. The President's "district" composes the entire country, and reelection-minded administrations will have to reconcile competing interests spread out across the country, even while presidents may be especially solicitous of interests in electorally important states. In short, the "electoral connection" between interest groups and the presidency, while perhaps as strong as that between groups and legislators, is longer and more twisted. Presidential control therefore challenges rather than reinforces legislative control over agencies.

More importantly, given a very different electoral dynamic, presidents have fewer incentives to be solicitous of interest group demands than does the proverbial House member, whose next, difficult election is always just around the corner. For one thing, presidents are more responsive to, and have much greater capacities to shape, public opinion as compared with individual legislators, as issues like gun control illustrate. Presidents can also—in part therefore—better afford to advance general interests over the objections of powerful interest groups than can individual legislators, as issues like free trade illustrate. Thus, presidential control over agencies is not simply interest group control replanted in White House soil. To the extent agency decisionmakers are influenced by the President and not only by Congress, then, presidential influence may enable agencies to ad-

155. See, e.g., Exec. Order No. 12,866, 3 C.F.R. 638 (1994); Exec. Order No. 12,498, 3 C.F.R. 323 (1986); Exec. Order No. 12,291, 3 C.F.R. 127 (1982).

156. See, e.g., VICE PRESIDENT AL GORE, FROM RED TAPE TO RESULTS: CREATING A GOVERNMENT THAT WORKS BETTER AND COSTS LESS: REPORT OF THE NATIONAL PERFORMANCE REVIEW (1993). Subsequent "status reports" on the reinvention initiative can be found at <http://www.npr.gov/>.

157. See, e.g., LUBBERS, *supra* note 114, at 160-64.

158. For an early argument along these lines, see Terry Moe, *Regulatory Performance and Presidential Administration*, 26 AM. J. POL. 197 (1982).

159. See, e.g., Cynthia R. Farina, *The Consent of the Governed: Against Simple Rules for a Complex World*, 72 CHI.-KENT L. REV. 987 (1997).

vance diffuse interests, legislative pressures to the contrary notwithstanding.

That leaves the least dangerous branch, which may further empower agencies to advance broad-based interests. On the one hand, judicial review promotes congressional control of agencies by ensuring that agency decisions are faithful to the text of the legislation an agency is implementing. An agency that strays from the will of Congress as expressed in that legislation is likely to see its decision invalidated by a reviewing court as outside of the agency's authority. In this formal sense at least, judicial review promotes congressional monitoring and thus control of agencies, or serves as a proxy for it.

But of course the real question is whether judicial review makes it easier or harder for agencies, when acting within the broad parameters of their statutory authority, to exercise that authority in ways that effectively deliver regulatory rents, in other words, that advance narrow congressional constituencies over greater, broad-based interests. There are several reasons to suspect that judicial review makes regulatory rent seeking more difficult. For one, judicial review promotes a certain political neutrality in agency decisionmaking, by requiring such things as consideration of all relevant facts, advance notice of the facts upon which an agency intends to rely, openness with respect to access to the relevant agency decisionmakers, and so on. By vindicating principles embodied in the APA and thereby helping to ensure that agency decisions to some extent reflect all implicated interests, judicial review deters illicit delivery of regulatory rents. In addition, reviewing courts subject agency decisions, unlike legislative decisions, to certain substantive standards that discourage agencies from rendering arbitrary, inexplicable, or unreasonable decisions.¹⁶⁰ Although courts show considerable deference towards the merits of agency decisions, still judicial standards of review make it difficult for agencies to ignore the relevant consequences of their decisions,¹⁶¹ to change course abruptly in response to political pressures for example, where the underlying facts do not so warrant,¹⁶² or to undervalue certain interests in order to advance others.¹⁶³ Both the "procedural" and "substantive" facets of judicial review, in other words, impede easy agency delivery of regulatory rents.

Judicial reinforcement of administrative process norms, like the rulemaking process itself, also to some extent equalizes the interest group playing field. First, subject to standing and similar require-

160. See generally 5 U.S.C. § 706(2)(A)-(D) (1994) (describing judicial review standards for courts reviewing agency action, findings, and conclusions).

161. See, e.g., *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971).

162. See, e.g., *Motor Vehicle Manufacturers Ass'n. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29 (1983).

163. See, e.g., *International Ladies' Garment Workers' Union v. Donovan*, 722 F.2d 795 (D.C. Cir. 1983).

ments, in principle any group or person aggrieved by agency action can seek judicial relief.¹⁶⁴ That is, it does not matter whether ten groups or one perceive that their interests were not adequately considered by an agency; judicial review can be triggered by any party that can afford to file a brief—a significant but not insurmountable hurdle. Second, again subject to the costs of participation, in principle any person or group can participate in agency decisionmaking by, for example, submitting facts or arguments during a rulemaking, thereby getting its view into the regulatory record. All of this is simply to say that, given the nature of judicial review, background disparities in interest group resources or political clout are not neatly translatable into equal disparities in regulatory influence in the way they may be in the legislative arena.¹⁶⁵

Moreover, while none of these observations alters the central fact that courts will hold agencies faithful to legislative text, thereby securing some measure of legislative dominance over agencies, it is also true that statutory text itself often espouses general-interest regulatory principles. That is, it is not everyday that Congress passes legislation that unambiguously grants socially undesirable benefits to favored interest groups. The political consequences of blatant favoritism can be too costly. Legislative favoritism, where present, is thus often more subtle, requiring complicit agencies to interpret text susceptible to general-interest interpretation in some other way. Because courts show considerable deference to agencies in the context of statutory interpretation too, again judicial review can empower agencies to vindicate broad-based interests by interpreting legislation in ways most consonant with public interests. In fact, administrative law scholars have often called on courts to insist that agencies interpret legislation in such a way, where possible, believing judicial review to be an institution particularly suitable for combating special-interest regulation.¹⁶⁶

164. See 5 U.S.C. § 702 (1994).

165. The EPA's "Project XL" is just one illuminating example of the importance of the ability to challenge agency action in court. According to some, the EPA's requirement that companies seeking approval of Project XL proposals first obtain the support of environmental groups—who might otherwise sue the agency for granting exemptions from existing environmental regulations in exchange for a company's own site-specific plan for achieving comparable environmental benefits—has seriously weakened Project XL's success, and certainly empowers such groups. See Rena I. Steinzor, *Reinventing Environmental Regulation: The Dangerous Journey from Command to Self-Control*, 22 HARV. ENVTL. L. REV. 103, 147-49 (1998).

166. See, e.g., ROSE-ACKERMAN, *supra* note 48, at 36; William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 309-14 (1988); Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 227 (1986); Jerry L. Mashaw, *Constitutional Deregulation: Notes Toward a Public, Public Law*, 54 TUL. L. REV. 849, 874-75 (1980); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 74 (1985); Cass R. Sunstein, *Interpreting Statutes in the Regula-*

So grant this much: However uneven interest group pressures on Congress may be, and however inclined legislators may therefore be to use their powers over agencies to generate regulatory policies that favor narrow, organized interests, it is still at least plausible that regulatory decisionmakers at the agency level nevertheless often pursue regulatory policies designed to serve broad-based, even unorganized interests. It is plausible that agency regulators are motivated to do so as a result of their own commitments to certain conceptions of the common good, which might account for why they became regulators in the first place. It is similarly plausible that administrative process rules promote agency independence by conditioning the exercise of agency power on the use of procedures that, because they require some level of openness, notice, and accountability in agency decisionmaking, are not well designed for interest group favoritism. It is also plausible that presidential oversight and judicial review further promote agency autonomy by providing separate sets of incentives for agencies to consider all relevant facts, arguments, and policy consequences in the course of their decisionmaking processes.¹⁶⁷ At a minimum, whether the administrative process broadly understood promotes agency independence rather than legislative influence seems, in the abstract, up for grabs,¹⁶⁸ McNollgast's arguments to the contrary notwithstanding.

But then what is plausible in theory may prove false in fact. Whether regulatory decisions ever advance broad-based interests over narrow interests is of course an empirical question. Whether regulatory decisions advance broad-based interests over narrow interests regularly enough, especially when the regulatory stakes are high, to offset whatever regulatory rents agencies otherwise provide—and thus whether regulation on the whole promotes rather than imperils public interests—is a separate empirical question. By investigating three recent and highly significant regulatory initiatives, Part IV below goes far to answer that first question and provides some hints about the answer to the second.

tory State, 103 HARV. L. REV. 405, 462-502 (1989); Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1695-97 (1984); John Shepard Wiley, Jr., *A Capture Theory of Antitrust Federalism*, 99 HARV. L. REV. 713, 739-88 (1986); see also Emerson H. Tiller, *Controlling Policy by Controlling Process: Judicial Influence on Regulatory Decision Making*, 14 J.L. ECON. & ORG. 114 (1998). But see Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 48-66 (1991).

167. Cf. John Ferejohn & Charles Shipan, *Congressional Influence on Bureaucracy*, J.L. ECON. & ORG., Special Issue 1990, at 1, 9-17.

168. For a refreshingly textured treatment of this issue, which highlights some of the complexities of legislative control of agencies, see Thomas H. Hammond & Jack H. Knott, *Who Controls the Bureaucracy?: Presidential Power, Congressional Dominance, Legal Constraints, and Bureaucratic Autonomy in a Model of Multi-Institutional Policy-Making*, 12 J.L. ECON. & ORG. 119 (1996).

IV. THREE REGULATORY CASE STUDIES

Questions concerning issues such as what motivates administrative decisionmakers, how the administrative process limits congressional control over agencies, and the extent to which judicial review reinforces congressional control or instead liberates agencies are difficult to tackle in the abstract. As there is no measuring stick by which to resolve such issues, it is often hard to know just what to conclude. One can develop a theoretical argument in most any direction, which is not to say all arguments are equally compelling, only that it is never clear what form a decisive test of any given argument is supposed to take.

Consideration of actual examples of regulatory decisionmaking cannot solve that problem. But it sure helps. Accordingly, the following discussion explores three sets of regulatory decisions that may assist both to reveal the limitations of the interest group theory of regulation and to illustrate the promise of an administrative process approach. These include the EPA's decision to develop stricter regulations governing ozone and particulate matter, the Food and Drug Administration's decision to regulate tobacco products, and the Comptroller of the Currency's decision to take steps to liberalize the activities of national banks. These regulatory initiatives are interesting because each appears to be an instance where regulators sought to advance diffuse interests over organized opposition representing powerful, concentrated interests. To that extent, these cases may shed light on whether and under what circumstances administrators regulate in the public interest.

To risk stating the obvious, these three vignettes are not offered as a random selection of regulatory cases with which to adjudicate decisively between competing accounts of regulation, or for that matter to evaluate once and for all the legislative dominance claim. Indeed, the examples in question were chosen in part precisely because they appear to be instances of administrative regulators advancing broad-based interests at the expense of concentrated, mobilized interests (and in part because of their regulatory significance). On the other hand, while these regulatory case studies were not selected randomly, neither are they inconsequential regulatory developments whose discovery required long search—minor exceptions in a sea of special-interest regulation—nor do they exhaust recent examples of regulatory action that appears to advance broad-based interests.¹⁶⁹

169. See generally OFFICE OF MANAGEMENT & BUDGET, 2000 REPORT TO CONGRESS ON THE COSTS AND BENEFITS OF FEDERAL REGULATIONS (2000) (outlining agencies' cost-benefit approaches to regulation and providing several examples of regulatory programs with clear net social benefits, as well as some examples of programs questionable on cost-benefit grounds); OFFICE OF MANAGEMENT & BUDGET, 1998 REPORT TO CONGRESS ON THE COSTS AND BENEFITS OF FEDERAL REGULATIONS (1998) (same).

To the contrary, each involves enormously important regulatory decisions that sparked intense national debates and implicated billions of dollars. Indeed, the EPA's regulatory action concerning ozone and particulate matter, the FDA's with respect to tobacco, and the Comptroller's liberalization of activities permissible by national banks would all clearly make a short list of some of the most significant regulatory activity in recent years, unquestionably so in the environmental, consumer protection, and financial services arenas. Thus, while the case studies considered here cannot provide grounds for rejecting any theory of regulation, except one that admits no variation,¹⁷⁰ they are nevertheless suggestive about whether, and how, the administrative state is capable of advancing broad-based interests.

These regulatory initiatives will be analyzed with the following questions in mind: First, are these examples instances of public-interested regulation, or are they something else in disguise? Second, what made the initiatives possible? In particular, what motivations did the relevant administrators appear to have? What legal decisionmaking processes did they employ, and which interests participated in those administrative processes? And what role did the agencies' institutional relationships with the President and the courts play? Third, how did important congressional constituencies line up in favor of or against the regulatory actions in question, how did Congress react, and what monitoring and sanctioning techniques did Congress use in response to agency action? Later, Part V will identify the common denominators linking these cases, and consider what conclusions they might therefore support about the interest group and administrative process theories.

A. *The EPA and Ozone and Particulate Matter*

In what was widely considered to be one of the most significant environmental policy decisions in recent years,¹⁷¹ the EPA in July of

170. Stigler, who again provides much of the foundation of the interest group theory, sets the stakes high on this issue. The great virtue of his approach is that it provides falsifiable predictions. The great danger is that it provides falsifiable predictions. He writes:

It is of course true that the theory would be contradicted if, for a given regulatory policy, we found the group with larger benefits and lower costs of political action being dominated by another group with lesser benefits and higher cost of political action. Temporary accidents aside, such cases simply will not arise: our extensive experience with the general theory in economics gives us the confidence that this is so.

GEORGE J. STIGLER, *Old and New Theories of Economic Regulation*, in *THE CITIZEN AND THE STATE: ESSAYS ON REGULATION* 137, 140 (1975). The examples of such regulatory policies in the text below contradict at least Stigler's influential presentation of the interest group theory.

171. See, e.g., Dan Balz & Joby Warrick, *President May Endorse Tougher Clean Air Rules; Backing EPA Would Upset Some Political Allies*, WASH. POST, June 25, 1997, at A1 [hereinafter Balz & Warrick, *Tougher Clean Air Rules*] (EPA's proposals constitute the

1997 issued final rules under the Clean Air Act tightening restrictions on ozone and particulate matter.¹⁷² The EPA's rules (one rule for ozone, one for particulate matter) constituted a revision to the agency's National Ambient Air Quality Standards (NAAQS), which set maximum levels for listed pollutants.¹⁷³ Sections 108 and 109 of the Clean Air Act require the EPA to identify and list maximum levels of air pollutants that threaten human health and welfare,¹⁷⁴ and to update those levels periodically, and at least once every five years, to reflect changes in science and technology concerning the effects of listed pollutants and their prevention.¹⁷⁵ Ozone and particulate matter are two of six NAAQS-listed pollutants.¹⁷⁶

The EPA had last reviewed its restrictions relating to ozone in 1993, and to particulate matter in 1987.¹⁷⁷ Since then, the EPA initiated rulemakings under section 553 of the APA by issuing notices of proposed rulemaking in December of 1996.¹⁷⁸ The agency had come to believe, on the basis of intervening scientific research, that its existing standards were inadequate to protect human health and welfare.¹⁷⁹ At that time, the agency explained the grounds on which it found existing standards inadequate, and made available to the public scientific studies the agency considered in reaching that conclu-

"most significant tightening of federal air quality standards in at least a decade"); John H. Cushman, Jr., *Administration Issues Its Proposal for Tightening of Air Standards*, N.Y. TIMES, Nov. 28, 1996, at A1 [hereinafter Cushman, *Administration Issues Its Proposal*] (noting that EPA changes prompted vigorous debate and were among the most disputed in years); Joby Warrick & John E. Yong, *Stricter Air Quality Rules May Test Hill's New Veto: Several GOP Chairmen Critical of EPA Move*, WASH. POST, Nov. 28, 1996, at A1 (reporting that industry's "multimillion-dollar war chest," prepared to oppose the new rules, would make for "one of the biggest environmental battles since the debate over the Clean Air Act amendments of 1990"); Joby Warrick, *White House Taking a Hands-On Role in Writing New Clean Air Standards*, WASH. POST, May 22, 1997, at A10 [hereinafter Warrick, *Hands-On Role*] (EPA rules were one of most "far-reaching environmental initiatives of the Clinton presidency").

172. See generally National Ambient Air Quality Standards for Particulate Matter, 62 Fed. Reg. 38,652 (1997) (codified at 40 C.F.R. pt. 50) [hereinafter PM NAAQS] (amending the air quality standards for particulate matter); National Ambient Air Quality Standards for Ozone, 62 Fed. Reg. 38,856 (1997) (codified at 40 C.F.R. pt. 50) [hereinafter Ozone NAAQS] (amending the air quality standards for ozone).

173. See 40 C.F.R. pt. 50 (2000).

174. See 42 U.S.C. §§ 7408-09 (1994 & Supp. V 1999).

175. See § 7409(d)(1).

176. See 40 C.F.R. pt. 50.

177. See 58 Fed. Reg. 13,008 (1993) (declining to revise standards relating to ozone); 52 Fed. Reg. 24,854 (1987) (revising standards relating to particulate matter).

178. See National Ambient Air Quality Standards for Particulate Matter, 61 Fed. Reg. 65,637 (1996) (proposed Dec. 13, 1996) [hereinafter Proposed PM NAAQS]; National Ambient Air Quality Standards for Ozone, 61 Fed. Reg. 65,715 (1996) (proposed Dec. 13, 1996) [hereinafter Proposed Ozone NAAQS]. The EPA had also provided an "advance notice of proposed rulemaking." See 61 Fed. Reg. 29,719 (June 12, 1996).

179. See Proposed PM NAAQS, *supra* note 178, at 65,639-49; Proposed Ozone NAAQS, *supra* note 178, at 65,719-26.

sion.¹⁸⁰ It also presented proposed rules to replace existing standards and invited comments on its proposals and on the issue of the adequacy of existing standards more generally,¹⁸¹ all as required by section 553.¹⁸² While the EPA's decision took the procedural form of ordinary rulemaking, the decisionmaking process in this case was far from ordinary. To understand why, a bit more background is necessary.

Ozone and particulate matter are not themselves emissions, not usually (particulate matter can be).¹⁸³ Rather, they are the byproducts of emissions from a wide range of sources,¹⁸⁴ which begins to explain why the EPA's action here was so significant. Ozone (O₃), specifically tropospheric ("ground level") ozone—not to be confused with stratospheric ozone, which protects the earth from harmful ultraviolet rays and differs from tropospheric ozone only in its location—results from atmospheric transformations of volatile organic compounds, nitrogen oxides, and oxygen in the presence of heat and sunlight.¹⁸⁵ Particulate matter is a generic term for tiny liquid and solid particles of varying size and composition that lodge in the lungs and other parts of the body (for example, the head) after inhalation.¹⁸⁶ Much like ozone, particulate matter results from transformations of gaseous emissions such as sulfur oxides, nitrogen oxides, and volatile organic compounds.¹⁸⁷

Both ozone and particulate matter are indisputably harmful to human health and welfare, though debatable questions remain about what the tolerable level of each is.¹⁸⁸ And both are particularly threatening to young children, older persons, and asthmatics, as well as to a subset of the otherwise "normal" population that just happens to be particularly susceptible to health problems from these pollutants.¹⁸⁹ Particulate matter is also particularly threatening to individuals with heart or lung disease, as is ozone to completely healthy persons who perform moderate physical work out of doors, and to those who exercise out of doors.¹⁹⁰

180. See Proposed PM NAAQS, *supra* note 178, at 65,638; Proposed Ozone NAAQS, *supra* note 178, at 65,716.

181. See *id.*

182. 5 U.S.C. § 553(b)-(c) (1994).

183. See Proposed PM NAAQS, *supra* note 178, at 65,639; Proposed Ozone NAAQS, *supra* note 178, at 65,718.

184. See Proposed PM NAAQS, *supra* note 178, at 65,639; Proposed Ozone NAAQS, *supra* note 178, at 65,718.

185. See Proposed Ozone NAAQS, *supra* note 178, at 65,718.

186. See Proposed PM NAAQS, *supra* note 178, at 65,639.

187. See *id.*

188. See *id.* at 65,638; Proposed Ozone NAAQS, *supra* note 178, at 65,716.

189. See Proposed PM NAAQS, *supra* note 178, at 65,664; Proposed Ozone NAAQS, *supra* note 178, at 65,719-22.

190. See Proposed PM NAAQS, *supra* note 178, at 65,644; Proposed Ozone NAAQS, *supra* note 178, at 65,719-22.

Reacting to research findings by a number of medical researchers about the health effects of ozone and particulate matter at levels below those allowed by existing NAAQS,¹⁹¹ and prompted by a judicial order following a lawsuit in which the agency was sued for not updating its NAAQS in a timely manner,¹⁹² the EPA undertook to revise its standards. The revision process actually had in a sense begun in 1992 for ozone and in 1994 for particulate matter, at which times the EPA began reviewing the latest scientific research on the health and welfare effects of the pollutants.¹⁹³ Following its review, the agency decided in 1996 to propose a rule reducing ambient ozone levels to 0.08 part per million (ppm), calculated using a specific eight-hour average standard.¹⁹⁴ It similarly proposed a rule to reduce levels of particulate matter first by distinguishing between "fine" particulate matter (up to 2.5 microns in diameter, "PM_{2.5}") and "coarse" particulate matter (from 2.5 to 10 microns, "PM₁₀," 10 microns being about 1/7th the diameter of a human hair),¹⁹⁵ and then by limiting newly defined PM_{2.5} to certain annual-mean and twenty-four-hour concentration maximums, and PM₁₀ to a revised twenty-four-hour standard (fifty micrograms per cubic meter).¹⁹⁶ The agency also invited comment on several specified alternative standards.¹⁹⁷ The EPA estimated that its proposed new limitations would yield a number of benefits in various forms: fifteen thousand lives saved annually; one million fewer annual incidences of significant decreases in children's lung functions requiring medical treatment, medication, or reduced activity; hundreds of thousands fewer annual incidences of aggravated asthma; hundreds of thousands fewer annual cases of aggravated coughing and difficult or painful breathing by children; tens of thousands fewer annual cases of symptoms associated with chronic bronchitis; thousands fewer hospital and emergency-room visits and admissions by individuals with asthma; reduced risks of illnesses such as inflammation of the lung, impairment of the lung's defense mechanisms, respiratory infection, and irreversible changes in lung structure leading to emphysema and chronic bronchitis or premature aging of the lungs; reduced risks of susceptibility to childhood diseases; between \$50 and \$120 billion annual savings in reduced medical expenditures and lower absenteeism from work; \$500 million worth of avoided yield losses of major agricultural crops; reduced damage to other vegetation; and improved visibility over large re-

191. See Proposed Ozone NAAQS, *supra* note 178, at 65,719-33.

192. See *American Lung Ass'n v. Browner*, 884 F. Supp. 345, 346 (D. Ariz. 1994).

193. See PM NAAQS, *supra* note 172, at 38,654.

194. See Proposed Ozone NAAQS, *supra* note 178, at 65,719, 65,727-30.

195. See Proposed PM NAAQS, *supra* note 178, at 65,654-62.

196. See *id.*

197. See Proposed PM NAAQS, *supra* note 178, at 65,664-65; Proposed Ozone NAAQS, *supra* note 178, at 65,716, 65,733.

gions of the eastern United States and over urban areas.¹⁹⁸ The EPA estimated that compliance costs would range from \$6 to \$9 billion annually for ten years.¹⁹⁹

While the EPA is charged under the Clean Air Act with setting the NAAQS standards, the agency does not implement them itself. Rather, the Act requires states to develop their own "State Implementation Plans" (SIPs),²⁰⁰ to be submitted to the EPA for the agency's approval.²⁰¹ The EPA's role is one of assistance to states in developing SIPs that will achieve compliance with the NAAQS. By the time of the EPA's proposed new rules in 1996, some parts of the country had achieved compliance with the existing limits, while other regions were not in compliance.

Because ozone and particulate matter are not typically discharged themselves, the important consequence of the new limitations was that states developing SIPs would have to restrict levels of pollutants by sources whose emissions contributed to their formation. This is where the case gets interesting, for those sources include chemical plants, construction operations, factories, incinerators, oil refineries, motor vehicles, power plants, and various other industrial and fuel-combustion sources.²⁰² In short, numerous large industries were implicated. The new NAAQS limits would require many industries to make significant new investments in emission-reduction technologies. Not surprisingly, those forces mobilized aggressively against the proposed new standards.

But this gets slightly ahead of the story. Appreciating the significance of its proposed decision, and anticipating that its proposal would generate considerable political resistance, the EPA went to great lengths to solicit public input concerning its proposals. For one thing, it established a national toll-free telephone hotline to facilitate public commentary on the proposed rules.²⁰³ It also solicited electronic comments via the Internet.²⁰⁴ In addition, the EPA held several public hearings at major cities across the country, where hundreds of organizations and individuals responded to the proposed rules,²⁰⁵ and several of the EPA's regional offices held their own public meetings and workshops as well.²⁰⁶ The agency also participated

198. See Proposed PM NAAQS, *supra* note 178, at 65,668; Proposed Ozone NAAQS, *supra* note 178, at 65,736-37.

199. See sources cited *supra* note 198; see also Cushman, *Administration Issues Its Proposal*, *supra* note 171 (summarizing expected costs).

200. 42 U.S.C. § 7410(a), (c) (1994).

201. See *id.* § 7410(a)(1) (1994).

202. See, e.g., PM NAAQS, *supra* note 172, at 38,654.

203. See *id.*

204. See *id.*

205. See *id.*

206. See *id.*

in numerous meetings on the proposed rules organized by the Air and Waste Management Association.²⁰⁷ Finally, the EPA also held two national satellite telecasts to answer questions on the proposed standards.²⁰⁸

The agency also made available two important documents that informed the public about each proposed rule, a "Staff Paper" and a "Criteria Document,"²⁰⁹ both of which were developed, made available for public comment (via the Internet and otherwise), and revised prior to the EPA's notices of proposed rulemaking.²¹⁰ The Criteria Documents were the work-product of the EPA's Clean Air Scientific Advisory Committee (CASAC), an independent advisory committee required by the Clean Air Act, chartered under the FACA, and composed of scientific and technical experts.²¹¹ The CASAC played a crucial role in the agency's decision to revise the NAAQS by reviewing and commenting upon the latest scientific data and studies on ozone and particulate matter.²¹² The EPA's Office of Air Quality Planning and Standards also provided a review and assessment of relevant scientific and technical information in the form of a Staff Paper for each pollutant.²¹³ Like the Criteria Documents, the Staff Papers were also made available for public comment and in addition were reviewed by the CASAC.²¹⁴ Relying on the Staff Papers and Criteria Documents, as well as on public commentary and CASAC advice, the EPA determined to tighten the ozone and particulate matter standards.²¹⁵

Interest group opposition to the proposed rules was intense. A large coalition composed of automakers, coal producers, electric companies, oil companies, and other major industries, and led by the National Association of Manufacturers and the Air Quality Standards Coalition (another industry group), spent millions of dollars opposing

207. *See id.*

208. *See id.*

209. *See id.*

210. *See id.*

211. *See id.* at 38,653.

212. *See, e.g., id.* at 38,655-63 (noting that the agency repeatedly relied on CASAC expertise, particularly CASAC evaluation of scientific literature, when explaining the agency's rationale for its final particulate matter rule); Ozone NAAQS, *supra* note 172, at 38,859-78 (noting the same for the final ozone rule); *see also Review of EPA's Proposed Ozone and Particulate Matter NAAQS Revisions, Part 1: Hearings to Review EPA Proposed New National Ambient Air Quality Standards (NAAQS) for Ozone and Particulate Matter (PM) Under the Clean Air Act Before the Subcomm. on Health and Env't and Subcomm. on Oversight and Investigations of the House Comm. on Commerce, 105th Cong. 161-65 (1997) [hereinafter Proposed NAAQS Hearings]* (prepared statement of Mary D. Nichols, Assistant Administrator, Office of Air and Radiation, EPA).

213. *See sources cited supra* note 178.

214. *See sources cited supra* note 212.

215. *See id.*

the standards through lobbying and publicity.²¹⁶ Those opposed to the stricter limitations voiced their opposition in two main ways. First, they contested the soundness of the agency's proposals, including their scientific bases and the agency's assessments of their economic consequences, before the EPA during the notice-and-comment rule-making process.²¹⁷ The EPA received 14,000 phone calls pertaining to the rules, 4000 e-mail messages, and 50,000 sets of oral and written comments.²¹⁸ Second, interest groups opposed to the proposed new rules simultaneously took their complaints to Congress, which exerted heavy pressures on the agency to abandon, soften, or delay its new standards. And, following promulgation of the final rules, those opponents sought relief from the courts as well.²¹⁹

Not that opposition to the new rules was universal. Numerous academic researchers and medical research groups, including the American Lung Association, supported the proposed new standards,²²⁰ though they argued that the rules did not go far enough to protect human health adequately,²²¹ as did the Association of State and Territorial Health Officials, representing state health agencies.²²² The government of Canada took the same line, also arguing that the state of the scientific research counseled in favor of stricter standards than those the agency proposed.²²³ Environmental groups like the Natural Resources Defense Council and private citizens such as Olympic marathon winner Joan Benoit Samuelson also supported

216. See, e.g., Scott Allen, *Plan to Curb Ozone Draws Pros, Cons at EPA Hearing*, BOSTON GLOBE, Jan. 15, 1997, at B2 (discussing the broad coalition of industries opposed to the EPA's proposals); Balz & Warrick, *Tougher Clean Air Rules*, *supra* note 171 (stating that major corporations and industry trade groups spent millions of dollars generating opposition to proposed rules); John H. Cushman, Jr., *Top EPA Official Not Backing Down on Air Standards*, N.Y. TIMES, June 1, 1997, at 1 [hereinafter Cushman, *Top EPA Official*] (noting that the National Association of Manufacturers, representing electric companies, oil and coal producers, auto makers, and other major industries, led lobbying effort against the EPA).

217. See, e.g., Allen, *supra* note 216 (noting that the proposal's opponents argued that proposed restrictions were based on incomplete science and would cost billions, with no proof that public health would improve as a result); John H. Cushman, Jr., *Canada Says U.S. Falls Short with Proposal to Bolster Air Quality*, N.Y. TIMES, Mar. 18, 1997, at A17 [hereinafter Cushman, *Canada Says*] (stating that major industry groups filed voluminous comments deriding EPA's proposals and the science on which they were based); Warrick, *Hands-On Role*, *supra* note 171 (noting that EPA proposals have been the target of endless attacks by industry since first unveiled).

218. See sources cited *supra* note 178.

219. See, e.g., *Dozens of Parties Sue EPA over Air Rules; Small Business, Scientific Issues Dominate*, NAT'L ENV'T DAILY (BNA) (Sept. 22, 1997) (noting that at least 37 groups including two states sued the EPA over the rules), LEXIS, News Library, BNANED File.

220. See, e.g., Allen, *Plan to Curb Ozone*, *supra* note 216 (stating that environmentalists, medical and scientific professionals, and private citizens supported the EPA).

221. See, e.g., Cushman, *Administration Issues Its Proposal*, *supra* note 171 (noting that environmentalists and public health officials said EPA proposals were too weak in some respects).

222. See, e.g., Cushman, *Canada Says*, *supra* note 217.

223. See *id.*

the proposed regulation, though they too argued that the proposed standards did not go far enough. Notwithstanding such support, the proposed rules' mobilized opponents vastly outnumbered and outspent their organized supporters.

Because these pollutants travel well, small particulate matter especially, states and local governments also entered the fray. On one side, northeastern states—that is, downwind states—supported the EPA's proposals,²²⁴ while Midwestern states—upwind states—many local governments, and the U.S. Conference of Mayors joined the rules' opponents.²²⁵ Curiously enough, Midwestern states reached the conclusion that the science underlying the proposed rules did not unambiguously support what the EPA contemplated²²⁶ and relatedly concluded that the resulting costs imposed on industry would outweigh the rules' uncertain health and welfare benefits, while northeastern states found the evidence concerning the proposed rules and their expected benefits overwhelming. And interestingly, this geographic division transcended partisan alignments: Republican governors from New York and New Jersey rushed to the EPA's defense,²²⁷ long before the President decided whether to support the agency, while many Democratic governors and mayors (as well as members of Congress) from the Midwest, including Administration loyalists like Detroit's mayor, sharply criticized the agency and urged the White House to slow the EPA down.²²⁸

Given the strength of interest group opposition to the proposed new standards, it was very unclear during the months between the EPA's commencement of its rulemakings and the announcement of the final ozone and particulate matter rules whether the agency would adopt the standards it contemplated. This was true in part because for a time the White House equivocated about whether to sup-

224. See, e.g., Cushman, *Top EPA Official*, *supra* note 216 (stating that Republican Governor William Weld of Massachusetts supported the EPA); Edward Epstein, *Mayors Want Role in Welfare Reform*, SAN FRANCISCO CHRON., June 25, 1997, at A7 (noting that U.S. Conference of Mayors voted 319 to 1 in favor of a resolution against the EPA rules).

225. See, e.g., Peter Kendall, *Tougher Air Rules Still Have Some Breathing Room*, CHICAGO TRIB., June 26, 1997, at 1.

226. See sources cited *supra* note 224.

227. See *id.*; see also John H. Cushman, Jr., *D'Amato Vows to Fight for EPA's Tightened Air Standards*, N.Y. TIMES, June 25, 1997, at A13 [hereinafter Cushman, *D'Amato Vows*] (noting support for the EPA by Republican governors of New Jersey and Massachusetts, as well as by two Republican senators from Maine); George E. Pataki, Editorial, *Holding Our Breath*, N.Y. TIMES, June 13, 1997, at A25 (supporting the EPA proposals).

228. See, e.g., Balz & Warrick, *Tougher Clean Air Rules*, *supra* note 171 (quoting Detroit's Democratic Mayor Dennis Archer, who led the U.S. Conference of Mayors in opposition to EPA, as saying the proposed rules go "too far, too fast"); Cushman, *Top EPA Official*, *supra* note 216 (explaining that Congressman John Dingell, Democrat of Michigan, ranking member of the Commerce Committee, which oversees the Clean Air Act, led the effort among House Democrats against the rules); Warrick, *Hands-On Role*, *supra* note 171 (noting that many Democratic governors and mayors opposed the EPA proposals).

port the agency. Some within the White House supported stricter limits, while others questioned whether the benefits of new limits would justify the costs.²²⁹ According to several reports, the proposed rules were particularly controversial within the National Economic Council and to some extent the Office of Management and Budget.²³⁰ At any rate, for a period of several months, the EPA's Administrator, Carol M. Browner, found herself defending her agency's proposed rules before many enemies, with the help of few allies, and under the awkward cloud of a conspicuously silent White House.²³¹

Congress was not so ambivalent. Congressional opponents of the proposed new rules voiced their views far more often and more loudly than did congressional supporters.²³² Led largely by legislators from states housing industries with potentially high compliance costs, and Democrats at least as much as Republicans,²³³ Congress held several oversight hearings, on both the House and Senate sides.²³⁴ The House Science Committee's Subcommittee on Energy and Environment also issued a report criticizing the proposed rules on the grounds that, as

229. See, e.g., Balz & Warrick, *Tougher Clean Air Rules*, *supra* note 171 (detailing the "fierce" internal administration struggle "that strained relations between the White House and the Environmental Protection Agency"); John McQuaid, *Breaux, Landrieu Against EPA Rules: New, Stricter Regulations Unreasonable, They Say*, THE TIMES-PICAYUNE, June 16, 1997, at A1 (noting that the President's economic advisors encouraged him to soften the proposed rules, and that the administration was "deeply split" over the proposed rules).

230. See, e.g., Balz & Warrick, *Hands-On Role*, *supra* note 171.

231. See, e.g., Cushman, *D'Amato Vows*, *supra* note 227 ("To the dismay of environmental groups, the White House has left the environmental agency's Administrator, Carol M. Browner, to defend the proposals nearly single-handedly.").

232. See, e.g., Katherine Bouma, *Groups Tell Congress to Clean Air: Many in Congress Oppose Tighter EPA Rules for Air Pollution That Could Save Thousands of Lives*, ORLANDO SENT., June 12, 1997, at A10 (noting widespread and bipartisan congressional opposition to EPA's proposed rules); McQuaid, *supra* note 229 (noting proposal by Senator Breaux to amend the Clean Air Act in response to EPA's proposed rules and the possibility of a general congressional "backlash" to stringent rules). See generally A. Tina Batra & Marcia C. Sugrue, Note, *EPA's Not-So-Final Rules: Congress' Attack on EPA's New Ozone and Particulate Matter Rules*, 4 ENVTL. LAW. 611 (1998). The EPA did have some supporters in Congress, however. See *Congressmen Say They Have Sufficient Votes to Uphold Air Quality Standards*, UTIL. ENV'T REP., Aug. 15, 1997, at 5 (noting the effort by Rep. Henry Waxman and two east-coast Republicans to show support in Congress sufficient to defeat an override of a presidential veto of a bill undoing the EPA's rules).

233. See Cindy Skrzycki, *GOP's Best Shot at Curbing EPA: A Democrat Named Dingell*, WASH. POST, July 18, 1997, at G1 (stating that Representative John D. Dingell led dozens of House Democrats in writing the President to oppose rules and sharply criticizing Browner at the oversight hearings); see also Noelle Knox, *Dingell Leads Fight to Delay Stringent New Clean Air Rules*, DETROIT NEWS, July 30, 1997, at B3.

234. See, e.g., *Proposed NAAQS Hearings*, *supra* note 212; *Science Behind the Environmental Protection Agency's (EPA's) Proposed Revisions to the National Ambient Air Quality Standards for Ozone and Particulate Matter, Parts I-III: Hearings to Examine the Scientific Basis for EPA Proposed New National Ambient Air Quality Standards (NAAQS) for Ozone and Particulate Matter (PM) Before the Subcomm. on Energy and Env't of the House Comm. on Science*, 105th Cong. (1997).

one member put it, the agency had put "the regulatory cart before the scientific horse."²³⁵

The congressional hearings were no picnic, for Browner especially. Some within Congress went so far as to charge that Browner from the very beginning took a results-oriented approach to the rulemakings and refused to consider seriously the uncertainties surrounding the rules' benefits or the great burdens the rules would create.²³⁶ That charge was echoed by certain interest groups which vilified the Administrator,²³⁷ as well as by the Washington Legal Foundation, which took the unusual step of formally petitioning the EPA seeking Browner's recusal from the rulemakings on the ground that she could not give meaningful, open-minded consideration to the proposed rules because she had already determined to tighten the ozone and particulate matter standards.²³⁸ Others within Congress accused the EPA (and the White House) of withholding all relevant factual information.²³⁹ Still others threatened to utilize the new "Corrections Day" or other congressional review procedures to invalidate the new standards legislatively.²⁴⁰ Moderate congressional voices urged the EPA to loosen rather than abandon its proposed standards.²⁴¹ All of

235. SUBCOMM. ON ENERGY AND ENV'T OF HOUSE COMM. ON SCIENCE, 105TH CONG., REPORT ON SCIENCE BEHIND THE U.S. EPA'S PROPOSED REVISIONS TO THE PRIMARY NATIONAL AMBIENT AIR QUALITY STANDARDS FOR OZONE AND PARTICULATE MATTER: HEARING SUMMARIES, FINDINGS, AND RECOMMENDATIONS (Comm. Print 1997) (quoting Science Comm. Chairman F. James Sesenbrenner, Jr.).

236. See, e.g., Batra & Sugrue, *supra* note 232, at 626-38 (explaining congressional opposition to rules and contemplated congressional responses, including freestanding legislation to undo the rules).

237. See, e.g., Kyle Niederpruem, *EPA Chief Takes Naysayers in Stride*, INDIANAPOLIS STAR, Nov. 14, 1997, at C1 (referring to a *Forbes* magazine cover story on Browner characterizing her as a "mission creep").

238. See PM NAAQS, *supra* note 172, at 38,708-09 (responding to a request for recusal).

239. See, e.g., *Proposed NAAQS Hearings*, *supra* note 212, at 3-4 (providing statements of Chairmen Thomas Bliley, Jr., criticizing the EPA on the grounds that the agency withheld information concerning the scientific evidence underlying its standards as well as information about its benefits in the "EPA's repeated attempts to shield the proposals from legitimate Congressional scrutiny").

240. See, e.g., Cushman, *D'Amato Vows*, *supra* note 227 (noting that congressional opponents threatened to use the new regulatory review procedure enacted by the 104th Congress); Skrzycki, *supra* note 233 (explaining that legislative reactions included proposals to kill the rules through legislation, to use the new "resolution of disapproval," and to pass a bill stalling the rules' implementation); Vicki Torres, *Firms Push for Some Breathing Room*, L.A. TIMES, Oct. 22, 1997, at D9 (stating that House and Senate bills would impose moratoria on new rules); *Congress May Override EPA's Rules, Gramm Warns*, PESTICIDE & TOXIC CHEMICAL NEWS, Sept. 17, 1997, at 9 (discussing how proposed legislation in both houses would postpone standards for five years pending further study, and quoting Senator Gramm: "I have no doubt that we have the votes [to stop the EPA's rules].").

241. See, e.g., Warrick, *Hands-On Role*, *supra* note 171 (stating that Senator John Chafee, Chair of the Environment Committee, urged the White House to seek a middle ground between the EPA and the proposed rules' opponents, to avoid a showdown with Congress).

these congressional reactions were bolstered by testimony from the rules' opponents, including industry representatives, Midwestern governors, and interestingly, several former chairs of the EPA's CASAC.²⁴²

But the Administrator defended the agency's proposals and its decisionmaking processes steadfastly, both in testimony before a mostly unsympathetic Congress and more generally before the public.²⁴³ And in the end, the EPA, over intense objections from many powerful interest groups, though with a last-minute boost from downwind Senator Alfonse D'Amato (four of whose seven grandchildren suffer from asthma),²⁴⁴ as well as support from a White House that ultimately decided to support the proposed rules rather than advocate softening modifications²⁴⁵ as some had predicted,²⁴⁶ issued final rules that resembled its proposed rules quite closely. For example, the final ozone rule limits ozone to .08 ppm, as proposed, calculated using a three-year average of the annual fourth-highest (rather than third-highest, as originally proposed) daily maximum eight-hour concentration.²⁴⁷ The final particulate matter rule limits PM_{2.5} to fifteen micrograms per cubic meter calculated on an annual basis, and sixty-five micrograms per cubic meter calculated on a twenty-four hour basis (rather than the stricter standard of 50 micrograms per cubic meter on a twenty-four hour basis, as originally proposed), and PM₁₀ to fifty micrograms per cubic meter annually and 150 micrograms per cubic meter on a twenty-four hour basis.²⁴⁸ Following the agency's announcement of its final rules on July 17, 1997, bills were introduced in both the House and Senate to impose moratoria on the new standards.²⁴⁹ The implementation of the new standards was first put on hold judicially, however, when the U.S. Court of Appeals for the D.C. Circuit ruled in a case brought by the American Truckers Association

242. See, e.g., *Proposed NAAQS Hearings*, *supra* note 212, at 33-58.

243. See, e.g., Cushman, *Top EPA Official*, *supra* note 216 (explaining that Browner defended the proposals in "grueling" congressional testimony and public debates with opponents, notwithstanding conspicuous White House silence).

244. See Cushman, *D'Amato Vows*, *supra* note 227.

245. See, e.g., Balz & Warrick, *Tougher Clean Air Rules*, *supra* note 171 (noting that the President ultimately sided with EPA's more stringent rules); Warrick, *Hands-On Role*, *supra* note 171 (noting that environmental groups feared that the active role of the White House in developing standards indicated an intent to soften the proposals).

246. See, e.g., Cushman, *Top EPA Official*, *supra* note 216 (discussing environmentalists' fear that the White House would overrule Browner and weaken restrictions, given economic advisors' concerns about costs, and noting that the White House decision to take a hands-on approach to crafting the final rule prompted speculation that the EPA's proposals would be softened).

247. See PM NAAQS, *supra* note 172, at 38,871.

248. See *id.* at 38,668-79.

249. See, e.g., H.R. Res. 1984, 105th Cong. (1997); see also Alec Zaccaroli, *Air Quality Standards: House Democrats Seek to Pull Legislation to Block Ozone-PM Rules from Committee*, 28 *Env't Rep.* (BNA) 1201 (Oct. 17, 1998); *Inhofe Continues Search for Vehicle to Block New Air Rules*, *INSIDE EPA'S CLEAN AIR REP.*, Oct. 30, 1997, at 17.

that the portion of the Clean Air Act on which the EPA based its rules constituted, in light of the agency's interpretation of it, an unconstitutional delegation of legislative power,²⁵⁰ a decision reversed by the Supreme Court.²⁵¹

B. *The FDA and Tobacco*

In August of 1996, the federal Food and Drug Administration took a bold step. It issued its much-discussed rule regulating the advertising, sale, and distribution of cigarettes and smokeless tobacco, and explained the statutory basis for its decision to do so.²⁵² The decision culminated a year-long rulemaking which began with the agency's proposed rule in August of 1995.²⁵³ Following publication of the proposed rule, the FDA accepted comments from August until November, at which time it extended the public comment period until January, 1996, after which it reopened the comment period for one month during the spring of 1996.²⁵⁴

Comment on the proposed tobacco rule was voluminous, to say the least. The rulemaking generated 700,000 pieces of written commentary (though 300,000 of such pieces came from one particular mail campaign), the most in the history of FDA rulemaking.²⁵⁵ Ninety-five thousand people mailed the agency their individual views.²⁵⁶ The FDA also received 500 different form letters.²⁵⁷ One comment on the proposed rule, submitted by the cigarette industry, consisted of some 2000 pages of commentary with 45,000 pages of supporting documents.²⁵⁸ For its part, the FDA assembled 200,000 pages of factual materials concerning the medical, scientific, and social-scientific basis for its rule.²⁵⁹

250. See *American Trucking Ass'ns v. EPA*, 175 F.3d 1027, 1034 (D.C. Cir. 1999) (per curiam), *modified*, 195 F.3d 4 (1999), *rev'd in relevant part sub nom.* *Whitman v. American Trucking Ass'ns*, 121 S. Ct. 903, 911-14 (2001).

251. See *Whitman v. American Trucking Ass'ns*, 121 S. Ct. 903, 911-14 (2001).

252. See *Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents*, 61 Fed. Reg. 44,395 (1996) [hereinafter *FDA Tobacco Rule*], *invalidated*, *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000).

253. See *Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco Products to Protect Children and Adolescents*, 60 Fed. Reg. 41,314 (1995) (proposed Aug. 11, 1995) [hereinafter *Proposed FDA Tobacco Rule*].

254. See *Notice of Extension of Comment Period*, 60 Fed. Reg. 53,620 (1995); *FDA Tobacco Regulation Comment Period Extended*, L.A. TIMES, Oct. 15, 1995, at A24 (observing that the FDA was "[i]nnundated by public comments to its proposed tobacco regulations" and extended its comment period in response).

255. See *FDA Tobacco Rule*, *supra* note 252, at 44,418.

256. See *id.*

257. See *id.*

258. See *id.*

259. See *id.* at 44,400; *Nicotine in Cigarettes and Smokeless Tobacco Products Is a Drug and These Products Are Nicotine Delivery Devices Under the Federal Food, Drug, and Cosmetic Act: Jurisdictional Determination*, 61 Fed. Reg. 44,619 (1996) [hereinafter

The stakes were that high. Among other things, the proposed rule restricted access to cigarettes sales by minors,²⁶⁰ limited tobacco advertising in the media,²⁶¹ prohibited the distribution of free tobacco samples and non-tobacco promotional items such as clothing,²⁶² conditioned corporate sponsorship of sporting and other events by tobacco companies,²⁶³ and required tobacco manufacturers to finance a national public education program aimed to reduce smoking by minors.²⁶⁴ The FDA estimated that its rule would impose an initial cost on the tobacco industry of between \$174 and \$187 million, and thereafter annual costs of between \$149 and \$185 million.²⁶⁵ (The industry estimated annual costs of \$1 billion, excluding the losses from reduced sales.²⁶⁶) The agency also estimated that the rule would generate between \$28 and \$43 billion in annual benefits, mostly due to savings in health-related expenditures.²⁶⁷

As in the case of the EPA's ozone and particulate matter rules, the FDA's tobacco rulemaking process began before the agency's formal promulgation of its notice of proposed rulemaking in 1995. In early 1994, prompted by petitions submitted by the Coalition on Smoking or Health—a public interest group representing the American Cancer Society, the American Heart Association, and the American Lung Association—and others,²⁶⁸ the FDA began to consider whether it had statutory jurisdiction to regulate tobacco products containing nicotine.²⁶⁹ At the same time, the agency began investigating whether cigarette manufacturers controlled the levels of nicotine in their

Jurisdictional Determination]; see also Peter Hardin, *140-Page Brief Defends FDA Tobacco Regulation*, RICHMOND TIMES DISPATCH, Dec. 3, 1996, at A3. The FDA's final rule, excluding its textual revisions to the Code of Federal Regulations, was 219 pages long. See FDA Tobacco Rule, *supra* note 252.

260. See Proposed FDA Tobacco Rule, *supra* note 253, at 41,322-26.

261. See *id.* at 41,329-36.

262. See *id.* at 41,336-38.

263. See *id.*

264. See *id.* at 41,326-28.

265. See *id.* at 41,359-61; see also FDA Tobacco Rule, *supra* note 252, at 44,569-70 tbl.1c.

266. See Bob Geiger, *Companies Strike Back*, ATLANTA J. & CONST., Jan. 3, 1996, at A4 (reporting estimates of Steven Parrish, Senior Vice President of Philip Morris, of annual costs of the rule to tobacco industry, retailers, and advertisers).

267. See FDA Tobacco Rule, *supra* note 252, at 44,569.

268. See Jeff Nesmith, *Restrictions on Cigarette Sales at Least 5 Years in the Making*, ATLANTA J. & CONST., Aug. 31, 1996, at 2A (explaining that the FDA had received several citizens' petitions in 1990 seeking FDA action on tobacco).

269. See generally *Reducing Children's Use of Tobacco, A Chronology*, at <http://www.hhs.gov/news/press/1996pres/960823f.html> (last modified Aug. 23, 1996); see also *Regulation of Tobacco Products (Part 1): Hearings to Examine Possible Application of FDA Regulation Under the Federal Food, Drug, and Cosmetic Act to Cigarettes, Including a Proposal to Classify Nicotine in Tobacco Products as a Drug Before the Subcomm. on Health and the Env't of the House Comm. on Energy and Commerce*, 103d Cong. 68-69 (1994) [hereinafter *Tobacco Hearings*] (statement of David A. Kessler, M.D., Commissioner, FDA).

products in ways that create and sustain addiction.²⁷⁰ And in August of 1994, the FDA's Drug Abuse Advisory Committee, an advisory committee established under the FACA, held a public hearing on the addictiveness of cigarettes and produced a report concluding that tobacco products contain nicotine at levels that create and sustain addiction.²⁷¹ The FDA's proposed rule then followed the agency's investigations of the medical and social-scientific evidence concerning patterns of smoking among children and adults, the addictive qualities of nicotine, and the marketing, sales, and distribution techniques of tobacco companies.²⁷²

The sheer magnitude of the FDA's rulemaking was not its only distinguishing feature. Somewhat unusually, the agency issued as an "Annex" to its final rule, a "Determination of Jurisdiction" over cigarettes and smokeless tobacco as nicotine delivery devices under the Federal Food, Drug, and Cosmetic Act (FDCA).²⁷³ In fact, in its proposed rule the FDA solicited comments specifically relating to its statutory authority over tobacco products.²⁷⁴ Under the APA, the FDA was under no legal obligation to do what was tantamount to a sibling notice-and-comment rulemaking on the question of its statutory authority to regulate tobacco products.²⁷⁵ Instead, it might have promulgated an interpretive rule before issuing its rule regulating tobacco sales, marketing, and distribution, which need not follow notice and comment.²⁷⁶ Or, the agency might have issued its proposed rule and included a short statement identifying the statutory authority under which the agency was operating and explaining why the agency determined that its authority supported its rule, as the APA does require and as agencies do as a matter of course.²⁷⁷ But, anticipating the significance of what it proposed to do, and expecting forceful opposition by tobacco companies in particular, the FDA essentially invited briefs on the question of its statutory authority, and it committed considerable space to that issue in its over two-hundred page final rule.²⁷⁸

270. See *Reducing Children's Use of Tobacco, A Chronology*, *supra* note 269.

271. See *id.*

272. See *FDA Proposes Some Regulation; Targets Youth Smoking*, TOBACCO INDUS. LITIG. REP., July 17, 1995, at 13,248 (reporting that the FDA had concluded that nicotine is a drug that should be regulated, and that it had begun consultations with the White House about what regulatory options to pursue).

273. See *Jurisdictional Determination*, *supra* note 259.

274. See *Proposed FDA Tobacco Rule*, *supra* note 253, at 41,314, 41,346-52.

275. See *FDA Tobacco Rule*, *supra* note 252, at 44,558 ("No court . . . has required the degree of public disclosure at the notice stage of a rulemaking proceeding that FDA undertook here."). The FDA provided references directing interested parties "to each and every document, including every study, Government report, journal article, industry document, and agency record on which FDA relied to support the 1995 proposed rule." *Id.*

276. See 5 U.S.C. § 553(d)(2) (1994).

277. See LUBBERS, *supra* note 114, at 185.

278. See *FDA Tobacco Rule*, *supra* note 252, at 44,400-17.

The FDA also sought White House support for its proposed rule prior to its promulgation. Here again, the agency was under no formal obligation to do so; it could have initiated the rulemaking on its own. While informal communication and coordination between agencies and the White House are not at all unusual prior to notice of a proposed rule, in this instance the significance of the proposed rule and the agency's expectations of strong opposition by tobacco companies and a Republican Congress resistant to new restraints on smoking led the FDA not only to "clear" the proposal with the White House, but also to get the White House's official imprimatur before the agency initiated notice and comment.²⁷⁹ Thus, FDA Commissioner David Kessler went so far as to solicit an executive order from the President to begin the process of regulating tobacco sales.²⁸⁰ Following communications between the FDA and the White House concerning possible regulatory strategies proposed by the FDA (disclosed only to the White House),²⁸¹ during which time Democratic governors and legislators from tobacco states urged the White House not to encourage FDA regulation,²⁸² the President announced that he was "directing" the FDA to adopt regulations aimed to limit children's access to tobacco.²⁸³ Without White House support, the agency certainly would not have gone forward.

The FDA did go forward, concluding that it had the authority to regulate tobacco on the grounds that tobacco products met the statu-

279. See, e.g., Marlene Cimon, *Legal Battle Looms over Rules to Curb Teen Smoking*, L.A. TIMES, Aug. 12, 1995, at A24 (noting that the President "approved" the FDA's proposals); *FDA Proposing Regulation of Tobacco Products*, CHI. TRIB., July 13, 1995, § 1, at 10 (explaining that the FDA "[was] not using the authority it ha[d] to act on its own," having concluded that nicotine is a drug that should be regulated, but instead it had moved the issue to the White House, "a sign of the delicacy of the issue—and of the opposition in the Republican Congress to new restraints on smoking"); Bob Hohler, *Clinton to Instruct FDA to Rule Nicotine a Drug: New Regulations to be Aimed at Cutting Smoking by Youth*, BOSTON GLOBE, Aug. 10, 1995, at A1 (explaining that FDA Commissioner Kessler did not need White House approval but that Kessler indicated he wanted White House support given the potential political consequences); Carol Jouzaitis, *Alarm Bell on Teenage Smoking: Increase in Usage May Fuel FDA Bid to Regulate Tobacco*, CHI. TRIB., July 20, 1995, § 1, at 3 ("Facing a Congress hostile to regulation in which several key committees are chaired by tobacco-state Republicans, the FDA has sent the White House proposals for tougher federal controls on cigarette ads . . .").

280. See Hohler, *supra* note 279 (stating that Clinton was planning to issue an order following weeks of negotiations among White House officials, Congressional leaders, and governors).

281. See, e.g., *FDA Proposing Regulation of Tobacco Products*, *supra* note 279 (explaining that the FDA did not disclose proposals it submitted to the White House for possible regulation of tobacco, and that the agency refused to comment on the same).

282. See, e.g., Hohler, *supra* note 279 (noting that Democratic governors of Georgia and North Carolina appealed to the President to reject FDA regulation); Danny Lineberry, *Hunt Says Congress, Not FDA, Should Regulate Tobacco Use*, HERALD-SUN, Aug. 11, 1995, at A8.

283. See President William Jefferson Clinton, Remarks During the Announcement of Food and Drug Administration Rule on Children and Tobacco (Aug. 23, 1996), available at <http://www.pub.whitehouse.gov> [hereinafter President's Remarks].

tory definition of both a “drug” and a “device” under the FDCA because they are “intended to affect the structure or any function of the body.”²⁸⁴ The FDA concluded that tobacco products “affect the structure or function of the body” in that they create and sustain addiction, produce psychoactive effects, and control weight; the agency concluded that tobacco products are “intended” to do so given that the addictive and other pharmacological effects of nicotine are widely known and accepted, that consumers use tobacco predominantly for those purposes, and that manufacturers understand those same effects and design their products to provide consumers with pharmacologically active doses of nicotine with the intended and inevitable consequence that consumers will continue to use tobacco to sustain their addiction.²⁸⁵ Finally, in support of its determination that it had the statutory authority to regulate cigarettes and other tobacco products, the FDA observed that although the agency had in the 1970s concluded that it did not have authority to regulate tobacco, it reached that conclusion on the basis of scientific evidence about tobacco and tobacco manufacturers available at that time, now superseded, and that moreover a court at that time deferred to the agency’s determination not to regulate but expressly left open the possibility that the agency might subsequently decide to regulate as new information developed.²⁸⁶ The FDA added that decades ago it asserted jurisdiction over a brand of cigarettes intended to reduce body weight, and that its decision to regulate tobacco more broadly now, with greater understanding of the effects of tobacco on the body and manufacturers’ intentions with respect to those effects, was consistent with the approach the agency had always taken.²⁸⁷

The FDA’s position won the admiration of medical researchers and health professionals, public health organizations, consumer groups, and organizations such as the National Parent-Teachers Association,²⁸⁸ and the ire of tobacco producers, cigarette manufacturers, advertisers, and groups like the National Smokers Alliance.²⁸⁹

284. FDA Tobacco Rule, *supra* note 252, at 44,400-16; *see also* Jurisdictional Determination, *supra* note 259.

285. *See* sources cited *supra* note 284.

286. *See id.*; *see also* Action on Smoking and Health v. Harris, 655 F.2d 236, 239 (D.C. Cir. 1980).

287. *See* Jurisdictional Determination, *supra* note 259.

288. *See, e.g., Power Grab: Tobacco Lobby Launches Blitz on FDA Plan*, WILMINGTON STAR-NEWS, Jan. 3, 1996, at 3A (noting that cigarette companies, prosmoker groups, advertising and track organizations “filed thousands of pages of documents” with the FDA); John Schwartz, *Smoke, Letters, and Documentation: Tobacco Companies Swamp FDA with Final Comments on Regulation*, WASH. POST, Jan. 3, 1996, at A20; Helen Thomas, *Clinton Asks FDA to Regulate Tobacco*, UPI, Aug. 10, 1995, LEXIS, Nexis Library, UPI File.

289. *See, e.g.,* Marlene Cimon, *Cigarette Regulation Plan Challenged*, L.A. TIMES, Jan. 3, 1996, at A11; Terry Dickson, *Farmers Vow War with FDA*, FLA. TIMES-UNION, Dec. 3, 1996, at B1; Hohler, *supra* note 279; Thomas, *supra* note 288; *see also Tobacco Growers*

Both sides mobilized, though tobacco companies committed the most resources to their cause.²⁹⁰ The rule's opponents simultaneously filed law suits contesting the FDA's authority to regulate in this area²⁹¹ and called on Congress to hold the agency at bay.

Many in Congress, again from both political parties, were sympathetic to those calls. Senior Democratic Senator Wendell Ford of Kentucky, for one example, introduced a bill aimed to reduce minors' access to cigarettes and exposure to cigarette advertising which specifically prohibited the FDA from regulating tobacco.²⁹² Senator Ford characterized the bill as a moderate alternative to the FDA's proposed rule, which he described as the work product of "zealots."²⁹³ Toward the close of the rule's public comment period, thirty-three senators, including both the majority and minority leaders, signed a letter strenuously objecting to the FDA's proposal.²⁹⁴

On the House side, Speaker Newt Gingrich suggested that the "FDA had lost its mind," explaining that "[i]f you want an example of big government interfering, it would be the FDA picking a brand new fight when we haven't won the far more serious fights about crack and cocaine and heroin."²⁹⁵ That sentiment was echoed by Representative Howard Coble of North Carolina, who complained that "the FDA continues to play its role as the officious intermeddler, inserting its nose into an area where it doesn't belong," notwithstanding that "tobacco is legally grown, legally produced, legally processed and legally marketed."²⁹⁶ Even House Minority Leader Richard Gephardt joined a coalition of lawmakers opposing FDA regulation.²⁹⁷ Still others in Congress warned the FDA that there would be a congressional "response" if the agency went ahead with its proposed rule over congressional objections.²⁹⁸ Many in Congress as well as the tobacco industry targeted Kessler specifically, including Senate Majority

Pan FDA Regulation Plan, GREENSBORO NEWS & REC., Nov. 21, 1995, at B4 (quoting the president of the Tobacco Growers Association: "David Kessler's plan is ridiculous.").

290. See, e.g., *Power Grab: Tobacco Lobby Launches Blitz on FDA Plan*, *supra* note 288.

291. See *Coyne Beahm, Inc. v. FDA*, 966 F. Supp. 1374 (M.D.N.C. 1997) (filing a motion for leave to file a second amended complaint reflecting the promulgation of the FDA's final rule on August 23, 1996).

292. See *Kentucky Democrat Introduces Alternative*, WILMINGTON STAR-NEWS, Sept. 21, 1995, at 1A.

293. *Clinton Launches War on Smoking*, CHI. TRIB., Aug. 10, 1995, at C1 (quoting Senator Ford: "My farmers lost out to the zealots.").

294. See Geiger, *supra* note 266.

295. Leslie Lloyd, *FDA Told to Butt Out of Tobacco: Regulation Threat Provokes Farmers*, CHATTANOOGA TIMES, July 14, 1995, at A10.

296. David Daley, *FDA Regulation: Delegation Sends Letter to Clinton; N.C. Lawmakers Fight Tobacco Rules*, WILMINGTON STAR-NEWS, July 14, 1995, at 4A.

297. See Hohler, *supra* note 279.

298. Paul Richter & Marlene Cmons, *Clinton to Weigh Plan to Curb Teen Smoking*, L.A. TIMES, Aug. 4, 1995, at A14 (quoting an aide to Representative Bliley: "There will be a response.").

Leader turned presidential candidate Robert Dole, who made clear that he opposed FDA regulation of tobacco and that, if elected, he would fire Kessler.²⁹⁹ Following promulgation of the final tobacco rule, some in Congress resisted providing appropriations to the FDA for the purposes of enforcing the new rule.³⁰⁰

Congress' involvement in potential tobacco regulation predated the FDA's rulemaking, however, and in fact almost rendered the FDA rule irrelevant. In 1994, Kessler testified repeatedly before the House Energy and Commerce Committee's Subcommittee on Health and the Environment (a subcommittee much more friendly to Kessler before the 1994 congressional elections than after) about evidence the FDA was gathering concerning cigarette companies' control of nicotine levels in their product.³⁰¹ At that time, Congress was considering legislation concerning the FDA's authority over cigarettes,³⁰² and during Kessler's congressional testimony the Commissioner expressly requested guidance from Congress about how the FDA should proceed given the evidence it had gathered about the composition of cigarettes, manufacturers' practices, addiction, and the health effects of smoking.³⁰³

Later the same year, the Subcommittee also heard now-famous testimony from the CEOs of seven tobacco companies concerning the industry's views on addiction and its practices with respect to altering nicotine levels in their products,³⁰⁴ which led to a Justice Department perjury investigation.³⁰⁵ Former tobacco company scientists and other employees testified about matters concerning company re-

299. See Sheryl Stolberg, *Clinton Set to OK FDA Regulation of Tobacco as a Drug*, L.A. TIMES, Aug. 22, 1996, at A1; Edward Walsh, *FDA Can't Regulate Tobacco, Dole Says*, WASH. POST, June 14, 1996, at A18.

300. See John Hoeffel, *Battle Is On for Funds to Enforce FDA Tobacco Regulations*, RICHMOND TIMES DISPATCH, Mar. 20, 1997, at A20; see also Richter & Cmons, *supra* note 298 (observing that some lawmakers drafted a series of FDA "reforms" in response to its tobacco activity); Paul Dellinger, *Burley Growers Protest FDA "Intrusion": Farmers Rally at Tobacco Warehouse Against Proposed Regulations*, ROANOKE TIMES & WORLD NEWS, Nov. 21, 1995, at B6 (noting that Democrat Rick Boucher was cosponsoring legislation affecting the FDA's authority to stop it from regulating tobacco).

301. See Marlene Cmons, *Firm Adjusted Nicotine in Cigarettes, Affidavits Say*, L.A. TIMES, Mar. 19, 1996, at A1 (noting that the FDA collected affidavits from former tobacco employees concerning company adjustments of nicotine levels).

302. See *Tobacco Hearings*, *supra* note 269.

303. See *id.*; see also Keith Glover, *HEALTH: Latest FDA Tobacco Testimony Suggests Regulation Is Near*, CONG. Q. WKLY. REP., June 25, 1994, 1994 WL 3827388.

304. See *Tobacco Hearings*, *supra* note 269, at 542-628, 640-767, 791, 844 (statements of William I. Campbell, President and CEO, Phillip Morris, USA; James W. Johnston, Chairman and CEO, R.J.R. Reynolds Tobacco Co.; Thomas E. Sandefur, Jr., Chairman and CEO, Brown & Williamson Tobacco Corp.; Andrew H. Tisch, Chairman and CEO, Lorillard Tobacco Co.; Donald S. Johnston, President, American Tobacco Co.; Edward A. Horrigan, Jr., Chairman and CEO, Liggett Group; Joseph Taddeo, President, U.S. Tobacco Co.; Alexander W. Spears, Vice Chairman and Chief Operating Office, Lorillard Tobacco Co.).

305. See *Justice Department Opens Tobacco Industry Probe*, THE LEGAL INTELLIGENCER, July 26, 1995, at 8.

search establishing the addictive qualities of nicotine.³⁰⁶ As public opinion formed against the tobacco industry over 1995 and 1996, it appeared (as late as the summer of 1997) that Congress would pass legislation essentially ratifying the unprecedented \$369 billion agreement reached between dozens of states and major tobacco companies, according to which tobacco firms would contribute heavily to funds financing antismoking educational campaigns and past and present medical costs of treatment for smoking-caused illnesses, while getting in return the benefits of substantial restrictions on the types of lawsuits that could be brought against them to recover for injuries caused by their products.³⁰⁷ That national settlement would have specifically provided for legislative codification of several aspects of the FDA's rule, in particular its restrictions aimed to reduce smoking by minors,³⁰⁸ but on the other hand would have restricted the agency's ability to regulate, and certainly to ban, nicotine directly.³⁰⁹ Because the proposed settlement was never "enacted," however, tobacco companies opposed legislative revisions of the agreement which increased the dollar amount they would have to pay,³¹⁰ while antismoking forces opposed the settlement on the grounds that it let tobacco companies off too easily.³¹¹ Ultimately, the FDA's rule-making was not preempted by legislation.

306. See *Tobacco Hearings*, *supra* note 269.

307. See generally *Proposed Resolution* tit. 8, <http://stic.neu.edu/settlement/6-20-settle.htm> (July 20, 1997).

308. See *id.* at tit. 1.A.

309. See, e.g., Marlene Cimons, *The Tobacco Settlement; Fine Print Will Get Close FDA Inspection*, L.A. TIMES, June 21, 1997, at A13 (summarizing the consequences of the national settlement relating to the FDA's regulatory authority); Mark Curriden, *Tobacco Deal Likely This Week: Industry Says It Will Let FDA Regulate Nicotine*, DALLAS MORNING NEWS, June 16, 1997, at 1A (noting that the tobacco industry would agree to FDA regulation so long as congressional approval would be required for an outright ban, and so long as the FDA observed 10-year grace period before reducing nicotine levels, all in exchange for a cap on punitive damages and limits on class-action lawsuits); John Schwartz & Sandra Torry, *Three-Judge Panel Appears Skeptical of FDA Attempts to Regulate Youth Smoking*, WASH. POST., Aug. 12, 1997, at A6; Maria Shao & Joann Muller, *Tobacco Giant Offers Deal on Sales Curbs: Wants FDA to Halt Regulation Efforts*, BOSTON GLOBE, May 16, 1996, at 1 (explaining that Philip Morris would support legislation only if the FDA is precluded from regulating tobacco); Barbara Sullivan, *Philip Morris, UST Offer Plan to Curb Teen Use of Tobacco; Proposal Would Prohibit FDA Regulation, Ban "Loosies" and Vending Machine Sales*, CHI. TRIB., May 16, 1996, at N1 (describing "quid pro quo" and quoting tobacco executive: "If there's FDA involvement [in nicotine], the deal is not on the table.").

310. See, e.g., Hanoch Dagan & James J. White, *Governments, Citizens, and Injurious Industries*, 75 N.Y.U. L. REV. 354, 369-70 (2000).

311. See, e.g., Henry Weinstein, *Cancer Society Urges Revision in Tobacco Deal*, L.A. TIMES, July 25, 1997, at D1 (stating that the American Cancer Society, American Lung Association, C. Everett Koop, and others opposed the proposed settlement on grounds that the FDA's authority was too restricted and tobacco companies' responsibility to reduce teen smoking too lax).

And in the end, the FDA's final rule, like the EPA's ozone and particulate matter rules, resembled its proposed version closely.³¹² Like the proposed rule, the final rule prohibited free samples of cigarettes and distribution of cigarette "kiddie packs,"³¹³ billboard advertising within 1000 feet of school playgrounds,³¹⁴ advertising in publications with significant youth readership,³¹⁵ and the distribution of gym bags, hats, and other clothing items with tobacco brands or logos.³¹⁶ The final rule also prohibited brand-name sponsorship of sporting events and, going further than the proposed version, automobile races and racing teams.³¹⁷ Whereas the proposed rule would have banned cigarette vending machines and colored billboard and in-store advertising altogether,³¹⁸ the final rule permitted both in "adult only" facilities such as nightclubs.³¹⁹ The final rule also required the six tobacco companies with the most significant shares of sales to minors to educate young people about the health risks of their products,³²⁰ whereas the proposed rule would have established a \$150 million annual fund, financed by tobacco manufacturers, to conduct a national education campaign.³²¹

Shortly after the FDA initiated its rulemaking, numerous tobacco companies and advertising firms (joined by the National Association of Convenience Stores, and later by members of Congress and state officials from some tobacco states) filed lawsuits, subsequently consolidated, against the FDA seeking declaratory relief on the grounds that the FDA's rule exceeded the agency's regulatory authority under the FDCA.³²² In 1997, the U.S. District Court for the Middle District of North Carolina ruled that the FDA had not exceeded its statutory authority, although it invalidated certain portions of the rule governing advertisements as contrary to the First Amendment.³²³ On appeal, the U.S. Court of Appeals for the Fourth Circuit reversed in part, holding that the FDA's statutory authority did not extend to to-

312. See FDA Tobacco Rule, *supra* note 252, at 44,616-18 (setting forth the text of the final rule); see also Proposed Tobacco Rule, *supra* note 253.

313. See FDA Tobacco Rule, *supra* note 252, at 44,616-17.

314. See *id.* at 44,617.

315. See *id.*

316. See *id.*

317. See *id.* at 44,618.

318. See Proposed FDA Tobacco Rule, *supra* note 253, at 41,323, 41,324-25.

319. See FDA Tobacco Rule, *supra* note 252, at 44,617.

320. See *id.* at 44,538-39.

321. See Proposed FDA Tobacco Rule, *supra* note 253, at 41,326-28.

322. See *Coyne Beahm, Inc. v. FDA*, 966 F. Supp. 1374 (M.D.N.C. 1997), *rev'd in part sub nom. Brown & Williamson Tobacco Corp. v. United States FDA*, 153 F.3d 155, 167-68 (4th Cir. 1998), *aff'd*, 529 U.S. 120 (2000).

323. See *id.* at 1389-98.

bacco,³²⁴ a decision recently affirmed in a five-four decision by the Supreme Court.³²⁵

C. *The OCC and National Banks*

Over the last several years, the Office of the Comptroller of the Currency (OCC) completed an ambitious effort to liberalize the activities in which national banks may engage, causing great angst among banks' competitors. The agency did so not with any single decision, but rather with a series of closely related regulatory decisions with far-reaching economic and political consequences. Perhaps most significantly, the decisions have allowed banks and their subsidiaries to compete with insurance companies and insurance agents—both among banks' arch rivals—by selling insurance and annuities and to some extent by underwriting insurance. In addition, the OCC has allowed a national bank's subsidiary to underwrite municipal revenue bonds, once an activity well within the domain of securities firms, by inviting national banks to apply to the OCC through their subsidiaries for permission to conduct still other activities that their parent banks themselves could not conduct.

But the effects of the OCC's liberalization extended even beyond dramatically altering the playing field on which providers of financial services compete. No less importantly, its action also helped to prompt equally significant liberalizing decisions by the Federal Reserve Board (the Fed) relating to permissible conduct by bank holding companies.³²⁶ The OCC's liberalization of national banks similarly helped prompt Congress to enact financial services reform legislation last year, after many years of being unable to do so due to interest group deadlock over legislative change. Indeed, the recent legislative reform was considered by many commentators to be absolutely necessary due to mammoth mergers in the financial services markets that were inspired by the OCC's and the Fed's regulatory reforms.³²⁷ Yet, the OCC and the Fed had already largely upstaged Congress; at the very least, Congress recently followed as much as led the agencies by ratifying many administrative developments. To understand how so, and to appreciate the significance of the OCC's recent actions, a very brief discussion of the regulatory background may be helpful.

324. See *Brown & Williamson Tobacco Corp.*, 153 F.3d at 167-68.

325. See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000).

326. See, e.g., Mary Jane Fisher, *Mergers Put Heat on Congress to Take Action*, NAT. UNDERWRITER (LIFE & HEALTH/FINANCIAL SERVICES), Apr. 20, 1998, at 1, 31.

327. See, e.g., *id.*; James M. Cain, *Financial Institution Insurance Activities—Courts and Regulators Continue to Dominate Congress*, 54 BUS. LAW. 1389, 1389 (1999) (arguing that recent mergers like that between Citicorp and Travelers Group merit congressional action).

The OCC has primary regulatory authority over national banks (of which there are approximately 2800)—that is, banks that are chartered by the federal government rather than by one of the states, and banks as opposed to bank holding companies, over whom the Fed has primary regulatory authority.³²⁸ The OCC's mission is to provide a safe, sound, and competitive national banking system.³²⁹ To that end, its main functions include supervising national banks and enforcing federal banking laws, including approving new charters and merger applications by national banks.³³⁰ The agency conducts rule-makings relating to activities that are permissible for national banks, considers applications by banks to engage in certain activities, and conducts adjudications to enforce national banking laws and its own regulations.³³¹

As the primary national bank regulator, the OCC implements the National Bank Act of 1864,³³² the predecessor of which (the National Currency Act of 1863³³³) created the OCC.³³⁴ A critical section of the National Bank Act outlines what national banks may and may not do, providing among other things that a national bank can "exercise . . . all such incidental powers as shall be necessary to carry on the business of banking . . ." ³³⁵ The identification of such powers rests with the OCC, giving the agency enormous power over the banking business and, therefore, its competitors. As a general matter, the Glass-Steagall Act and other federal banking laws have (until recently) prohibited banks from engaging in nonbanking businesses, and likewise nonbanking businesses from engaging in banking.³³⁶ The National Bank Act's "incidental powers" clause was one of the two main possible escape hatches from that general prohibition, the other being a crucial section of the Bank Holding Company Act³³⁷ providing that a bank holding company may engage in a nonbanking activity considered "to be so closely related to banking or managing or controlling banks as to be a proper incident thereto."³³⁸

In recent years, the OCC used the National Bank Act's escape hatch in an increasingly aggressive way. One of the first major examples occurred in 1990, when the OCC determined that sales of

328. See PAULINE B. HELLER & MELANIE L. FEIN, FEDERAL BANK HOLDING COMPANY LAW § 1.01[2] (1998 ed.).

329. See, e.g., The Regulatory Plan, 64 Fed. Reg. 63,885, 64,016 (1999).

330. See *id.*

331. See *id.*

332. Ch. 106, 13 Stat. 99 (codified principally at 12 U.S.C. §§ 21-24 and following scattered sections of 12 U.S.C. (1994 & Supp. V 1999)).

333. Ch. 58, 12 Stat. 665.

334. See *id.* at § 11.

335. 12 U.S.C. § 24 (1994).

336. See, e.g., *id.* §§ 24, 78, 377, 378.

337. *Id.* §§ 1841-50.

338. *Id.* § 1843(c)(8).

fixed or variable annuities qualifies as “part of, or incidental to, the business of banking.”³³⁹ NationsBank and its brokerage subsidiary sought permission from the OCC for the subsidiary to act as an agent in the sale of annuities, which the Comptroller granted on the grounds that banks are empowered to broker a variety of comparable financial investment instruments when carrying out their traditional role of financial intermediaries.³⁴⁰ The Variable Annuity Life Insurance Company and other insurers challenged the agency’s authority to give NationsBank permission to sell annuities by bringing several law suits under the APA, arguing that the OCC misinterpreted the National Bank Act by allowing a bank subsidiary to engage in an activity Congress intended to prohibit.³⁴¹ The Supreme Court ultimately deferred to the Comptroller’s reading of the statute, however, and thus national banks may now sell annuities.³⁴²

In December of 1997, the OCC took a similar approach, this time permitting a bank to sell crop insurance as “incidental” to its business. In its response to an application to do so by the Iowa Bankers Association, the agency reasoned that selling crop insurance constitutes an “incidental” power “necessary” to carry out the business of banking because selling the insurance helps a bank to secure its loans.³⁴³ While perhaps sensible enough, this reasoning too had dire consequences for insurance sellers, for it strongly suggests that any insurance sold in connection with a bank loan that helps the bank secure its loan may be permissible. But then numerous types of insurance may aid in securing a bank loan, and thus banks may be able to sell many types of insurance in addition to crop insurance. This implication was not missed by insurance groups; *National Underwriter*, for example, characterized the OCC’s decision as having “staggering” potential.³⁴⁴

As mentioned, the OCC also recently allowed a national bank’s operating subsidiary (op-sub) to underwrite municipal revenue bonds, as part of the agency’s so-called “Part 5 initiative”—a reference to the part of Title 12 of the Code of Federal Regulations governing the rules, policies, and procedures for banks’ corporate activities, one important provision of which concerns activities that are permis-

339. *NationsBank of North Carolina v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 259 (1995).

340. *See id.* at 254-55.

341. *See id.* at 255.

342. *See id.* at 264.

343. O.C.C. Inter. Ltr. No. 812, [1997-1998 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-260, at 90,240-42 (Dec. 29, 1997).

344. Editorial Comment, *Another Squeeze Play from the Comptroller*, NAT’L UNDERWRITER (LIFE & HEALTH/FINANCIAL SERVICES), Jan. 19, 1998, at 40.

sible for a national bank's subsidiary.³⁴⁵ Permissible activities for an op-sub were long thought to piggyback on activities permissible for the parent bank itself,³⁴⁶ but in 1994 the OCC began a notice-and-comment rulemaking proposing to change the rule to encourage banks in good regulatory standing to apply for permission for one of their op-subs to engage in an activity which its parent bank could not.³⁴⁷ The proposal's critics, which included insurance and securities associations, opposed on several grounds, arguing that the OCC lacked authority to allow subsidiaries to do what banks could not, and furthermore that doing so would be inconsistent with OCC precedent, inconsistent with the Glass-Steagall Act and the Bank Holding Company Act, and would subject national banks to unacceptable safety and soundness risks.³⁴⁸

In the end, however, the OCC did much of what it proposed to do.³⁴⁹ Upon issuing its final Part 5 rule, the agency explained that while it has usually taken the position that banking laws applicable to a national bank should also apply in the same way to a bank's operating subsidiary,³⁵⁰ that rule of thumb never represented "a legal determination that an operating subsidiary may never permissibly conduct activities different from those allowed its parent bank."³⁵¹ In support of its case, the OCC traced the history of rather minor instances where the OCC approved activities by subsidiaries different from those allowed banks.³⁵² The agency also provided an analysis of the Glass-Steagall Act, the Bank Holding Company Act, and other banking laws, arguing that none foreclosed the possibility of op-subs performing activities not permissible for banks, and furthermore that its new rule did not authorize any new activities, but rather allowed for the possibility of them,³⁵³ adding that the agency would not approve any applications that ran counter to federal banking statutes or presented safety and soundness risks.³⁵⁴ Finally, the OCC stressed that subsidiaries' activities still must qualify as part of the business

345. See Conditional Approval No. 262, Application by Zions First National Bank (OCC, Dec. 11, 1997), 1997 WL 816878 [hereinafter OCC Conditional Approval].

346. See, e.g., Rules, Policies, and Procedures for Corporate Activities, 61 Fed. Reg. 60,341, 60,352 (1996) (codified in scattered parts of 12 C.F.R.) [hereinafter Corporate Activities Rules]; Legal Opinion from Julie L. Williams, Chief Counsel, to Eugene A. Ludwig, Comptroller of the Currency, Legal Authority for Revised Operating Subsidiary Regulation (Nov. 18, 1996) [hereinafter Legal Opinion], <http://www.occ.treas.gov/intep/part5.htm>.

347. See Rules, Policies, and Procedures for Corporate Activities, Proposed Rule, 59 Fed. Reg. 61,033 (1994) (codified at 12 C.F.R. pt. 5) [hereinafter Proposed Corporate Activities Rules].

348. See Corporate Activities Rules, *supra* note 346, at 60,351.

349. See *id.* at 60,342.

350. See *id.* at 60,352.

351. *Id.*

352. See *id.*

353. See *id.* at 60,351, 60,353.

354. See Corporate Activities Rules, *supra* note 346, at 60,353-354.

of banking or be incidental thereto, or else be permissible for national banks or their subsidiaries under statutory authority besides the National Bank Act.³⁵⁵

According to the revised Part 5 subsidiary rule, then: “[A] national bank shall file an application and obtain prior approval before acquiring or performing a new activity in an existing subsidiary”³⁵⁶ In its commentary on the final rule, the agency explained:

[A] national bank operating subsidiary remains limited in its activities to those that are part of or incidental to the business of banking as determined by the OCC, or otherwise permissible for national banks or their subsidiaries under other statutory authority. The final rule confirms, however, that this may include activities different from what the parent national bank may conduct directly, if, in the circumstances presented, the reason or rationale for restricting the parent bank’s ability to conduct the activity does not apply to the subsidiary³⁵⁷

The agency’s Part 5 initiative thus made clear that it would entertain applications by banks or their subsidiaries to engage in activities not otherwise permissible for a bank, on the grounds that such activities were part of or incidental to and necessary to carry out the business of banking. In so doing, the OCC explained that its case-by-case evaluations of op-sub applications would focus on the form and specificity of the restriction applicable to the parent bank, the rationale underlying that restriction, and whether granting an application would frustrate the congressional purpose underlying the restriction.³⁵⁸

The OCC’s recent temerity, on this issue and others, owes largely to former Comptroller Eugene Ludwig, aptly characterized as “one of the most aggressive comptrollers in modern times in expanding bank securities and insurance powers,”³⁵⁹ who pushed national bank liberalization about as far as one could within the OCC’s statutory framework. Though criticized by some, and strongly opposed by the insurance industry and often by the Fed as well,³⁶⁰ Ludwig defended the OCC’s Part 5 initiative on the grounds that technological and economic changes required changes in national bank practices allowing banks to compete with other financial service providers if the stability of the national banking system was to be maintained. According to some reports, the OCC postponed the Part 5 rule pending

355. *Id.* at 60,350, 60,353-54.

356. *Id.* at 60,375.

357. *Id.* at 60,352.

358. *See id.*

359. *Ludwig’s Swan-Song Speech Reassures Some Industry Critics*, 25 SEC. WK., Feb. 23, 1998, at 1, 1.

360. *See, e.g.*, Elizabeth Festa, *Campbell Tells Comptroller to Back Off*, AM. BANKER-BOND BUYER, Nov. 24, 1997, at 1.

congressional action, but ultimately promulgated its final rule in 1996 once it became clear that no legislative reform was forthcoming.³⁶¹ Defending his agency's initiative, Ludwig argued that the safety and soundness of the banking system required decisive action, stating:

We cannot wait, because a failure to move ahead prudently in the current dynamic environment is likely to create safety and soundness problems for the banking industry [A] regulator who identifies a safety and soundness issue—whether an issue of immediate concern or one off on the horizon with long-term implications—and does nothing is not doing his job or serving the public interest.³⁶²

The OCC explained upon issuing its new Part 5 rule why the agency believed it always had, though seldom used, the legal authority to allow op-subs to engage in activities not permissible for banks;³⁶³ Ludwig believed exercising that authority made for good public policy.

Following promulgation of the final Part 5 rule in late 1996, then, the OCC in 1997 authorized Zion First National Bank to use one of its subsidiaries to underwrite municipal revenue bonds.³⁶⁴ Following Zion's application to do so, the OCC published notice of and requested public comment on Zion First National's "application to commence new activities."³⁶⁵ Interestingly, although the agency's decision with respect to an application concerning corporate activities is not itself a rule (but rather the application of one), the OCC's own new Part 5 provisions established a notice-and-comment-type procedure—a miniature rulemaking of sorts—for all applications submitted to the agency for permission to conduct activities not previously approved. Following receipt of an application, the OCC provides notice and invites comments, after which the agency explains the decision it reached with reference to supporting and opposing comments.³⁶⁶ The agency's notice with respect to Zion First National's application generated opposition from the Securities Industry Asso-

361. The two years between the OCC's proposed rule and its final rule lends some support to the claim.

362. Comptroller of the Currency Eugene Ludwig, Remarks Before the Exchequer Club on Financial Modernization and Trends in the Banking Industry, Nov. 1996, reprinted in O.C.C. Q.J., Mar. 1997, at *1, *7; see also *Controversial Rule Change and Financial Modernization Addressed by Comptroller of the Currency Ludwig*, BANK LAW. LIABILITY, Jan. 1997, at 3, 3-5 (quoting Ludwig concerning the Part 5 revision).

363. See *supra* notes 354-359.

364. See Press Release, Office of the Comptroller of the Currency, OCC Approves Zions Application to Underwrite Municipal Revenue Bonds (News Release 97-110, Dec. 11, 1997), <http://www.occ.treas.gov/ftp/release/97-110.txt>; OCC Conditional Approval, *supra* note 345.

365. 62 Fed. Reg. 19,171 (April 18, 1997).

366. See Corporate Activities Rules, *supra* note 346, at 60,351.

ciation, the Securities and Exchange Commission, the Fed, and Consumers Union.³⁶⁷ These opponents argued, among other things, that a subsidiary of a national bank should not be permitted to engage in any activity that is not permissible for a national bank.³⁶⁸ The OCC rejected this argument, observing that underwriting and dealing in revenue bonds is “a functional equivalent or a logical outgrowth of” activities banks are already engaged in, and concluding for a variety of reasons that an activity not permissible for a bank may nevertheless, and under appropriate circumstances, be performed by a bank’s subsidiary.³⁶⁹ The agency has reaffirmed that general position several times since, as for example in 1998, when it approved an application by Fleet National Bank to allow one of its subsidiaries to underwrite credit life insurance as “part of” and “incidental to” Fleet’s credit card activities.³⁷⁰

The OCC’s liberalization has not been limited to interpretations of the “incidental powers” language of the National Bank Act, however. The agency also recently approved a bank’s proposal to use a subsidiary in a small town to facilitate insurance sales through any of the bank’s branches. While for decades banks have been prohibited from selling insurance, longstanding authority allowed banks in towns with fewer than 5000 residents to do so, although state insurance laws sought to restrict them. In 1996, the Supreme Court made clear that state laws purporting to prohibit national banks from selling insurance had to yield to federal law, a ruling that opened the way for insurance sales by national banks.³⁷¹ The OCC subsequently took the small-town exception and ran with it, allowing a national bank to use the exception to support insurance sales by the bank’s other units. What sounds like a technicality has enormous implications: Now a national bank can open a subsidiary in a small town and then market insurance sales anywhere throughout the country, so long as it processes all of its sales through its small-town subsidiary, as for example the OCC recently allowed in connection with Mellon Bank’s application to sell title insurance through a subsidiary’s joint venture. Here again, the agency was met with intense objections from insurance agents.

But insurers (and securities underwriters) have not been the OCC’s only critics. Many in Congress—where insurance companies and insurance agents have traditionally enjoyed considerable influ-

367. See *OCC Ruling on Revenue Bonds Gets Mixed Hill Reaction*, NAT’L J.’S CONGRESS DAILY, Dec. 12, 1997, 1997 WL 16432750 [hereinafter *Mixed Hill Reaction*] (noting the Securities Industry Association’s critical reaction to OCC approval of Zion’s application to underwrite municipal revenue bonds).

368. See OCC Conditional Approval, *supra* note 345.

369. *Id.*

370. *Id.*

371. See *Barnett Bank of Marion Co. v. Nelson*, 517 U.S. 25, 34-35 (1996).

ence³⁷²—have also loudly criticized the agency's liberalizations, on the grounds that the OCC overreached and thwarted congressional will. For example, Senator Alfonse M. D'Amato, the Senate Banking Committee Chair, captured congressional frustration by stating:

We should not sit idly by while the Comptroller of the Currency attempts to unilaterally redesign the financial system and alter the state and federal regulatory framework established by Congress. . . . The Comptroller is deliberately consolidating power within his agency by first approving new powers for national banks and then asserting the authority to regulate such activities.³⁷³

For another example, Representative John Dingell, an influential member on the House Energy and Commerce Committee, repeatedly criticized Ludwig and the OCC during 1994 and 1995 over the agency's approval of "retirement CDS"—an investment product combining features of the traditional CD and an annuity—its treatment of op-subs, and its ability to regulate insurance products.³⁷⁴ In 1994, Dingell, along with D'Amato and other House and Senate members sent a letter to the OCC promising to introduce legislation that would kill the retirement CD if the agency allowed its sale by banks,³⁷⁵ which the OCC nevertheless did.³⁷⁶ In 1996, Representative Gerald Solomon, Chairman of the House Rules Committee (and a former insurance agent), introduced a bill that would have blocked OCC funding if the agency authorized national banks to sell any new products or services.³⁷⁷ Some versions of draft legislation modernizing

372. See, e.g., Patricia A. Murphy, *Is Lobbying Tug-of-War Worth the Strain?*, U.S. BANKER, Oct. 1996, at 26, 26 ("Banks' singular lack of success in the 104th Congress is testimony to the power of opposing forces, especially the insurance agents. But with banks winning in the courts, their focus on Capitol Hill may start to wane."); Richard M. Whiting, *The Bank Insurance Wars: Some Lessons from History*, BANKING POL'Y REP., Apr. 1, 1996, at 2 (noting that "insurance agents have had their greatest success in the Congress").

373. *Bank Regulator Asserts OCC Policies Are Pro-Consumer*, NAT'L J.'S CONGRESS DAILY, Dec. 4, 1997, 1997 WL 11444108 (noting routine criticisms of Ludwig by Senate Banking Chair D'Amato and House Banking Chair James A. Leach).

374. See Barbara A. Rehm, *Comptroller Comes Out in Favor of Controversial Retirement CD*, AM. BANKER, June 30, 1994, at 2, 2; *Commerce Oks Bank Reform Bill Without Amendment*, NAT'L J.'S CONGRESS DAILY, June 14, 1995, 1995 WL 10435455 (quoting Dingell referring to Ludwig's actions relating to preemption of state insurance regulation of national banks: "arrogant, high-handed, stupid and dangerous"). House Banking Chair Leach was also highly critical. See Press Release, James A. Leach, Comment on Recent OCC Circulars about H.R. 10 (July 24, 1997) (on file with author) (criticizing the OCC); *Leach Criticizes OCC Proposal on New Bank Powers*, NAT'L J.'S CONGRESS DAILY, Apr. 24, 1995, 1995 WL 10435769; *Mixed Hill Reaction*, *supra* note 367.

375. See Rehm, *supra* note 374, at 2.

376. See O.C.C. Inter. Ltr. No. 649 [1994 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,556, available at 1194 WL 568029 (May 12, 1994).

377. See *Key Insurance Groups Are Relaxing Stance on Bank Affiliations*, BANKING POLICY REP., Nov. 18, 1996, at 2 [hereinafter *Key Insurance Groups*]; see also *Sources: Bank Insurance Language Expected by Monday*, NAT'L J.'S CONGRESS DAILY, June 1, 1995,

financial services included moratoria on the agency's ability to expand banks' insurance powers.³⁷⁸

But while many within Congress have been highly critical of the OCC, the federal courts have largely sanctioned agency-sponsored reform.³⁷⁹ In the face of repeated judicial challenges to the OCC's decisions by banks' competitors, the agency's decisions allowing national banks and their subsidiaries to do more and more has met with consistent judicial favor.³⁸⁰ Indeed, in several recent opinions the Supreme Court has unanimously sanctioned OCC interpretations of the statute.³⁸¹ Showing considerable deference to OCC interpretations of the National Bank Act, the Supreme Court and lower federal courts have emphasized the agency's expertise concerning banking matters as one justification for deference.³⁸²

Ironically, judicial affirmation of the Comptroller's liberalizations paved the way for Congress finally to enact reform legislation. This is true in large part because insurance groups, having "lost" at the agency level and in the courts, eventually came to support rather than oppose legislative reform. Figuring that bank-supplied insurance products were an unavoidable reality, insurers sought reform legislation that would give broader financial services powers to them too, as well as preserve state regulation of insurance, considered more friendly to insurers.³⁸³ As a result, banks, insurers, and securi-

1995 WL 10435528 (noting Representative Solomon's resistance to reform legislation that would preempt state insurance regulation).

378. See, e.g., Bill McConnell, *Insurance Powers Tiff Puts Reform Bill in a Vise, Again*, AM. BANKER, June 14, 1996, at 2 (noting Representative Solomon's insistence that any new congressional plan include a 10-month moratorium on the Comptroller's ability to give banks new insurance powers); *Insurance Measures Threaten Regulatory Relief Bill*, FIN. SERVICES REP., July 5, 1995, at 6 (noting that different versions of financial services reform legislation contained language placing a moratorium on the OCC's power to expand banking activities).

379. See, e.g., Cain, *supra* note 327; *Courts Sanction Bank Insurance Authority Despite Opposition from Insurance Industry*, THOMSON'S INT'L BANKING REGULATOR, Feb. 17, 1992, at 7, 7 ("The courts gradually are broadening the powers of U.S. banks to sell insurance, even though Congress has been unfriendly to the idea.").

380. There are two important exceptions. Courts invalidated the OCC's treatment of crop insurance and its decision to allow (by not objecting) a bank to underwrite and sell retirement CDs. See *Independent Ins. Agents of Am., Inc. v. Hawke*, 211 F.3d 638, 645 (D.C. Cir. 2000) (crop insurance); *American Deposit Corp. v. Schacht*, 887 F. Supp. 1066, 1082 (N.D. Ill. 1995) (retirement CD).

381. See *Smiley v. Citibank*, 517 U.S. 735, 742 (1996); *Barnett Bank of Marion County v. Nelson*, 517 U.S. 25, 37 (1996); *NationsBank of North Carolina v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 264 (1995).

382. See *NationsBank*, 513 U.S. at 257, 261-64.

383. See, e.g., Fisher, *supra* note 326, at 31 (quoting Gary Hughes, Vice President and Chief Counsel for Securities and Banking, American Council of Life Insurance: "We're really playing an end game here. Banks have won and we are trying to salvage the best environment for competition on a level playing field through functional state regulation. We're willing to give you underwriting—all we ask is functional, fair regulation."); *Insurers Now Supporting Financial Services Integration*, NAT'L J.'S CONGRESS DAILY, Jan. 16, 1997, 1997 WL 7761129. The insurance industry group has abandoned "its longstanding opposi-

ties underwriters ultimately all came together in favor of reform, ending years of legislative deadlock. In truth, Congress had little choice, barring statutory invalidation of what the OCC had done by resurrecting the fire walls separating banking from insurance and securities—which was really out of the question given the breadth of expert and business support for reform³⁸⁴—but to codify much of what the OCC had done. Following skirmishes concerning matters such as the applicability of the Community Reinvestment Act³⁸⁵ to a reformed financial services world,³⁸⁶ Congress passed modernizing legislation in late 1999, following the path the OCC forged.³⁸⁷

V. RESULTS

A. *The Limits of the Interest Group Theory*

Now step back. To assess the reliability of the interest group theory against the administrative process approach in the light of the above examples, it is helpful first to identify some of the common features of the studied cases. First, and most notably, each involved efforts to advance broad-based interests over concentrated and highly mobilized opposition—industrial polluters, tobacco companies and advertisers, and insurers. Nor do the facts of any of the cases plausibly suggest that the agencies were in fact delivering regulatory rents—to small businesses, cigar producers, or banks—disguised as public-interest regulation. In the EPA case, the regulatory “winners” were citizens generally, most especially those who work or exercise outside, elderly persons, children, and asthmatics. Such interests were represented by some organized groups like the American Lung Association and celebrity athletes, but as a general matter they were not highly organized. In the FDA case, the main regulatory winners were children, future potential smokers, and taxpayers, again represented by public interest medical associations but not organized

tion to financial services integration” due to “recent regulations by the Office of the Comptroller of the Currency and a 1996 Supreme Court ruling.” *Id.* Furthermore, Paul Equale, Senior Vice President of Government Affairs, Independent Insurance Agents of America warns that “[t]he world is changing and as a practical issue we have to look at the next 50 years rather than the last 50. . . . Anyone who is still fighting the old wars [to preserve the insurance-banking divide] is wasting time, effort, and money.” *Id.*; see also *Key Insurance Groups*, *supra* note 377, at 2 (“The longest running serial in Washington financial circles—the feud between insurance interests and expansion-minded banking organizations—may be winding down somewhat.”).

384. See, e.g., MATHIAS DEWATRIPONT & JEAN TIROLE, *THE PRUDENTIAL REGULATION OF BANKS* (1993); EMMANUEL N. ROUSSAKIS, *COMMERCIAL BANKING IN AN ERA OF DEREGULATION* (3d ed. 1997).

385. 12 U.S.C. §§ 2901-2908 (1994).

386. See, e.g., *Senate & House Conferences Move Quickly on Financial Services Bill*, *FED. & ST. INS. WK.*, Oct. 18, 1999.

387. See Financial Services Modernization Act, 106 Pub. L. No. 102, 113 Stat. 1338 (Nov. 12, 1999) (codified in scattered sections of 12 U.S.C.).

themselves. Indeed, the EPA and FDA cases are particularly noteworthy in this respect given that the primary regulatory beneficiaries—children and future generations—were not even voters at all, much less organized voters.

The OCC case is more complicated and in some sense therefore more interesting. On the one hand, a concentrated and mobilized special interest—the banking industry—clearly favored the OCC's regulations, while other concentrated and mobilized interests—insurers and securities firms—opposed. To that extent, the OCC's initiative pitted the special interests of banks against those of their competitors. On the other hand, the OCC's liberalization also was widely considered to benefit consumer interests more generally; economists and public policy experts overwhelmingly believed that preserving old distinctions among banks, insurance companies, investment companies, and so on would be contrary to public interests—it would stymie healthy competition and growth in the financial services sector and harm consumers' interests.³⁸⁸ Thus the OCC case cannot fairly be characterized merely as an instance of an agency delivering regulatory rents to the industry it is supposed to regulate. After all, if the OCC were motivated simply to promote the interests of banks over their competitors, and at the expense of consumers, it could have done that long ago; the statutory authority on which the OCC relied was hardly new. Instead, the OCC responded to contemporaneous technological and economic changes that counseled in favor of promoting competition and scale economies by liberalizing the activities national banks could engage in. For example, banks' competitors had only recently started to market on a large scale products that competed with the savings and demand deposit services traditionally offered by banks, such as cash value life insurance (by insurance companies) and money market mutual funds with unlimited check-writing privileges (by investment companies). Because the OCC further encouraged a benign competition that market forces had already generated, its efforts are best understood, like the EPA's and FDA's, as promoting public interests over the opposition of special interests, even though banking interests also benefited.³⁸⁹

The EPA's ozone and particulate matter rules and the FDA's tobacco rule share another common feature in that they both were originally prompted by public interest groups. Unlike the FDA, the EPA had a statutory obligation to revisit its NAAQS rules periodically. But a precipitating factor of the EPA's rules was a successful lawsuit by a public interest group charging that the EPA had failed

388. See, e.g., sources cited *supra* note 384.

389. Certainly consumer groups did not oppose the OCC's liberalizations, objecting only to the privacy and community-development aspects of some of the financial services reform legislation.

to fulfill that obligation in a timely manner. The FDA was not sued by a public interest group, but its initial inquiry into its authority for regulating tobacco products was precipitated by a public interest group's petitions to the FDA asking the agency to consider a tobacco rulemaking.

Speaking of rulemaking, all three cases involved the section 553 rulemaking process. This comes as no great surprise given the nature of the decisions, but it warrants emphasis that the agencies did not attempt to affect significant regulatory change through off-record, informal, or purely discretionary decisionmaking processes. That is somewhat less true with respect to the OCC, whose liberalizations also took, in addition to its Part 5 rulemaking, the informal forms of interpretations of the National Bank Act and the approval of applications to conduct certain activities following procedures the agency established through a rulemaking. While all three agencies employed the rulemaking process, however, their decisionmaking procedures should be considered "rulemaking plus." That is to say, all three rulemakings went well beyond the minimum requirements of section 553: The EPA held public meetings, attended conferences, and held satellite telecasts. The FDA not only conducted a sibling rulemaking on the question of its statutory jurisdiction but provided exhaustive disclosure of the scientific and policy bases of its proposed rule;³⁹⁰ and the OCC's rulemaking established a new mini-rulemaking procedure, not required by statute, through which the agency would consider future applications concerning op-sub activities.

And in each case, the agencies' decisionmaking process preceded its notice of a proposed rule. The EPA began studying the health and welfare effects of ozone and particulate matter a few years before it published its notices of proposed rulemaking. The FDA began inquiries into the health effects of smoking, nicotine addiction, and the marketing and sales practices of tobacco companies over a year before its notice of proposed rulemaking. And the OCC articulated its interpretations of the federal banking laws before it undertook its Part 5 revision. Though all three agencies' initiatives preceded initiation of the 553 process, however, none of the agencies' prenotice activities were clandestine. In fact, both the EPA and the FDA chartered advisory committees under the FACA, which played important roles in the development of the data informing the agencies' rules and by serving as a source of neutral, expert advice to which the

390. As the FDA rightly explained about its notice obligations under the APA, at the time it issued its final rule, "No court . . . had required the degree of public disclosure at the notice stage of a rulemaking proceeding that FDA undertook here." FDA Tobacco Rule, *supra* note 252, at 44,558 (1996) (citations omitted); *see also id.* at 44,563-64 (explaining that the FDA provided more than twice as much time for comment on its rule as the agency's regulations require).

agencies would later appeal. Indeed, the EPA relied on the CASAC more than any other study or source.

During the rulemaking processes proper, participation in notice-and-comment was enormous in the EPA and FDA cases, though not so in the OCC case. In the EPA and FDA cases, the political fault lines were drawn similarly: public interest groups, public health organizations, academic researchers, and some state and local governments supported the EPA's and/or the FDA's proposals, while numerous industry groups and other states and localities opposed them. Those states and industries that would bear most of the costs objected the most, framing their objections both in terms of the evidentiary basis for the agencies' actions (in the EPA and FDA cases) and the statutory authority for what the agencies proposed to do (in all three cases). In all cases, the rules' opponents sought relief from all branches of government. They simultaneously objected before the agencies directly, appealed to Congress to hold the agencies at bay, and filed lawsuits challenging the legality of the agencies' actions.

One especially noteworthy aspect of the cases in question was Congress' general hostility to the agencies' regulatory initiatives: Congress was on the whole extremely critical of each agency's efforts. In each case, Congress threatened to use or used various disciplining devices—hearings, reports, budget power, moratoria, or repeals—in response to the agencies' actions or proposed actions. In each case, elements within Congress characterized the agencies as the enemy and accused the agencies of overstepping the bounds of their authority. Congressional criticism transcended party lines and reflected legislators' attempts to protect important political constituencies (upwind pollution sources, tobacco farmers, and insurance companies) from what would be, for those constituencies, unfavorable regulation.

Yet in no case were the agencies deterred by adverse congressional or interest group responses to their proposed regulations. For in each instance, the agencies' efforts were led by particularly strong-willed administrators who seemed motivated by their own conceptions of the public interest. Commentators consistently described Browner, Kessler, and Ludwig as highly committed and strongly independent regulators, whose behavior appeared unaffected by sometimes intense congressional and interest group criticism. These administrators championed what they considered to be desirable regulatory policy at some political risk, and in the FDA and OCC cases only after Kessler and Ludwig first determined that Congress would not enact the desired policy. Each agencies' final rule resembled its proposed rule rather closely in the end, notwithstanding the intervening political turbulence.

Even so, in each case it was not always clear that the agencies' regulatory efforts would be successful. The White House could have

stopped the EPA from issuing stricter ozone and particulate matter standards, and for a time it appeared that might happen. The White House fully supported the FDA, but for a time it appeared the FDA's rule would be preempted by a legislated national tobacco settlement. And the OCC reportedly dragged its feet on its Part 5 revision pending liberalizing legislation that never came. As it turned out, however, the agencies were never derailed or preempted by the White House or Congress.

As for the courts, judicial treatment of the agencies' regulatory initiatives varied. The courts largely inoculated the OCC from congressional reprisals by vindicating the Comptroller's interpretations of federal banking laws. On the other hand, an appeals court stopped the EPA's rules where a hostile Congress was unable to do so, although that court's difficulty with the EPA's rules was not at all the same as Congress' (and although another court had earlier required the EPA to revisit its standards), but the EPA was subsequently vindicated by the Supreme Court. In the case of the FDA, one court legitimized the FDA's position with respect to its statutory authority, but a higher court, and then the Supreme Court, ultimately rejected that position.

Given these general features of the regulatory examples in question, and given the more particular facts summarized above, the question becomes how they can be reconciled with the interest group theory of regulation. Naturally, the theory would see the most support from findings that the agencies, responding to legislative signals, used their regulatory power to deliver benefits to organized and well-financed interest groups representing powerful congressional constituencies. Again, the interest group theory contemplates that interest groups will seek to advance the selfish interests of their members; that groups representing concentrated interests will dominate the regulatory landscape; that legislators will be motivated to secure the regulatory benefits those groups seek in return for political support; and finally that legislators will exercise sufficient control over agencies to secure the delivery of those benefits, even at the greater expense to the rest of society.

Unfortunately for the theory, however, most of the important facts of the studied cases do not line up very conveniently, for reasons already becoming clear. First, powerful, organized, and congressionally influential interest groups saw their regulatory goals defeated at the agency level. Instead, the EPA, FDA, and OCC promoted broad-based, and less politically powerful, interests. And they did so over the objections of powerful industrial interests, tobacco interests, and insurance interests. They did so also notwithstanding repeated congressional attempts to exercise greater influence over them. In each instance, the interest group theory's defining conclusion—that regu-

lation promotes the interests of the powerful few at the expense of the diffuse many—seems unsubstantiated.

One might object that the EPA and FDA examples should not count so much against the interest group theory based on the fact that those agencies are in the business of “social” rather than “economic” regulation, the latter of which served as the typical focus of scholars developing the interest group theory. But this corrective objection—circumscribing the scope of the theory in the face of contrary evidence—is not compelling. First, the haziness of the social/economic distinction to one side, proponents of the interest group theory in fact never limited their logic to a particular subset of regulation. Rather, they articulated in general terms political dynamics that, they argued, regularly if not inevitably produce regulatory outcomes that are socially undesirable. Furthermore, when they addressed post-1970 consumer regulation specifically, they expressly applied the interest group theory to such regulation, arguing that there, too, regulation is contrary to public interests.³⁹¹

Third, there is no reason within the interest group theory’s conceptual framework why environmental or consumer-protection regulation should be any different from any other type of regulation, or in other words, why interest group theorists should have restricted the scope of their theory. As a general matter, all regulation is ultimately premised on the amelioration of market failures or their consequences, and all regulation involves similar exercises of the state’s monopoly on political power to affect private behavior. In addition, the legal-procedural rules (such as the APA) and institutional relationships (between Congress and agencies) guiding the exercise of that power are the same over different regulatory fields, so if Congress uses procedure to advance some interests over others, it should be able to do so no matter what the particular regulatory field might be.

Indeed, environmental and food- and drug-safety regulation are very well suited for the delivery of regulatory rents.³⁹² For example,

391. See, e.g., STIGLER, *The Consumer*, *supra* note 8, at 187-88. According to Stigler:

We are now going through a new period of salvation by public reform, similar in scale . . . to the muckraking period preceding World War I. Then we had Upton Sinclair . . . now we have Ralph Nader and his graduate and prep school students. . . . [Their reforms] will not amount to much because there is no durable, effective political basis to support—or direct—the efforts of professional . . . reformers. Mr. Nader must flit from automobiles to drugs to local property assessment, cognizant that the public’s interests and sympathies are not forever capturable by his vendetta against the Corvair It is of regulation that the consumer must beware.

Id. at 187.

392. See, e.g., Daniel C. Esty, *Toward Optimal Environmental Governance*, 74 N.Y.U. L. REV. 1495, 1557 (1999) (describing the danger of special-interest manipulation of regulatory issues as, given the nature of environmental issues, “much more severe in the envi-

environmental regulation could be used by powerful interests as a barrier to entry to new firms, thereby protecting those interests' market power. This possibility seems especially strong to the extent that environmental standards can be applied, as in fact they often are, more strictly to new entrants in a market than to existing firms; old technology can be grandfathered in, while new pollution sources have to conform to stricter emission standards, for instance. Just as international environmental standards can be used to avoid competition for domestic standards, so too environmental law could be used to garner rents for existing firms by raising potential competitors' costs. And in famous instances of environmental legislation it has.³⁹³

To be sure, organized public interest groups may be more active with respect to environmental issues than they are in other regulatory fields, although that fact itself is somewhat inconvenient for the interest group theory. But that difference could be overstated, as public interest groups are active in old-fashioned regulatory areas too.³⁹⁴ Moreover, special interest groups are extremely active on environmental issues as well. It just so happens that environmental issues are among the more important modern regulatory issues, and as a result significant interest group activity surrounds them on both sides. And relative to interests representing manufacturers, oil producers, and transportation industries, for example, environmental groups are very small players in the interest group arena.³⁹⁵ So the presence of environmental groups does not distinguish environmental regulation from other types of regulation. There simply is nothing so distinctive about environmental regulation that takes it out of the interest group theory's scope, neither as a matter of intellectual history nor in theory. Thus, the EPA's promulgation of the final ozone and particulate matter rules over the objections of powerful interest groups and their congressional allies weighs heavily against the interest group account. For very similar reasons, the FDA's promotion of the interests of children, smokers, and future smokers over the organized and congressionally influential tobacco and advertising interests does too.

ronmental realm than in other fields of regulation"); see also JOHN CRONIN & ROBERT F. KENNEDY, *THE RIVER KEEPERS* 179 (1997) (arguing that environmental regulation is not immune from capture); EVAN J. RINGQUIST, *ENVIRONMENTAL PROTECTION AT THE STATE LEVEL: POLITICS AND PROGRESS IN CONTROLLING POLLUTION* 194-95 (1993) (finding that special interests, though influential, have not captured pollution control); Bradford C. Mank, *Superfund Contractors and Agency Capture*, 2 N.Y.U. ENVTL. L. J. 34 (1993).

393. See, e.g., BRUCE A. ACKERMAN & WILLIAM T. HASSLER, *CLEAN COAL, DIRTY AIR* (1981).

394. Such areas with meaningful public interest group activity include energy, telecommunications, transportation, and utility regulation, for example.

395. See, e.g., HARDIN, *supra* note 12, at 106-07.

With respect to the OCC, banking regulation fits comfortably within the paradigm of old-fashioned “economic” regulation, so that case too counts against the theory. Had the OCC promoted the banking interests in some illicit way, or had the OCC instead supported banks’ competitors’ interests in some illicit way, either one following cues from Congress, the interest group theory would have appeared stronger. But the OCC did not act at all following congressional prompting, but rather over congressional objection. And rather than deliver regulatory rents to banks, it by numerous accounts advanced broad social interests, which largely happened to line up with banking interests. Furthermore, the OCC did so in an open, procedurally inclusive and evenhanded, and judicially sanctioned way.

None of this is to say that the interest group theory finds no support from the examined cases, however. First, a defender of the interest group theory might point to the volume of activity on the part of powerful interest groups in their attempt to oppose the agencies on the regulatory, congressional, and judicial level. That is, the groups committing the most resources in pursuit of their regulatory goals were concentrated interests. The National Association of Manufacturers’ opposition to the EPA rules and the cigarette industry’s multi-thousand page comment during the FDA rulemaking are illustrative. Interest group activity concerning the proposed regulations in the EPA and FDA cases certainly was lopsided, lending support to the theory’s collective action claim. On the other hand, all three cases involve meaningful interest group activity on both sides of the issues, and thus very strong versions of that claim seem off the mark.

A defender of the interest group theory finds additional support from Congress’ attempts to prevent or discourage the agencies from adopting regulations contrary to the interests of important congressional constituencies. On the whole, legislators did seem motivated to protect their interest group supporters. The importance of geography as the powerful predictor of how legislators resisted (or in a few instances supported) the EPA and the FDA may be especially revealing. In those cases, members of Congress were motivated to protect their political turf, quite literally. In the OCC case, there appeared to be no strong congressional champions of the Comptroller, which may be a measure of the insurance industry’s influence on Congress. In short, the interest group theory’s legislator motivation claim finds substantial support from the evidence, subject, however, to an important caveat mentioned below.³⁹⁶

But the theory’s legislative dominance claim proves fatally weak. In each case, Congress was unable to inspire agencies to deliver the regulatory decisions sought by powerful congressional constituencies,

396. See *infra* at p. 93.

notwithstanding congressional reliance on all of the standard tools Congress might use to discipline agencies. Instead, administrators, motivated to advance broad-based regulatory interests, used administrative procedure—with various degrees of help from public interest groups, the President, and courts along the way—to exercise their delegated authority in pursuit of regulatory policies that had more congressional enemies than friends, as the next Part explains.

B. *The Explanatory Relevance of the Administrative Process*

The administrative process theory fares better, also for reasons already becoming clear. First of all, in each of the studied cases, key agency personnel were motivated to advance public interests, as already discussed. In that light, claims about the irrelevance of bureaucratic motivations seem misguided. It is true, and significant, that some of the agencies' industry opponents had come from the FDA, lending some support to the interest group theory's reliance on the revolving-door phenomenon.³⁹⁷ On the other hand, neither Browner,³⁹⁸ Kessler,³⁹⁹ nor Ludwig acted in any way that can be interpreted as attracting special interest groups as potential employers. Instead, they pursued their own visions of what public interests required, in the face of consistent interest group and congressional resistance. Browner endured difficult congressional hearings, and Kessler and Ludwig were also often the object of congressional criticism. Yet congressional disapproval and repeated threats of various

397. See Schwartz, *supra* note 288 (noting that one tobacco industry lawyer was a former FDA chief counsel); Schwartz & Torry, *supra* note 309 (noting that the same former FDA lawyer argued industry's case).

398. See, e.g., Cushman, *Top EPA Official*, *supra* note 216 (observing that Browner's adamant defense of EPA proposals, based on her belief that good science policy justified proposed rules notwithstanding the volume of industry criticism, constituted personal and political gamble); McQuaid, *Breaux, Landrieu Against EPA Rules*, *supra* note 229 (stating that Browner defended the EPA tenaciously before an "onslaught of lobbying attacks from business groups, and over the opposition of state and local government organizations"); Balz & Warrick, *President May Endorse Tougher Clean Air Rules*, *supra* note 171 (noting Browner's forceful defense of her agency).

399. See, e.g., *Blow to Cigarette Makers; Judge Rules FDA Can Regulate Tobacco*, ATLANTA J. AND CONST., Apr. 25, 1997, at A3 (reporting that Kessler's announced resignation sent tobacco stocks soaring); John Schwartz, *Cigarettes Treated As Medical Devices: New Rules Give FDA Leeway in Regulation*, WASH. POST, Aug. 11, 1995, at A15 [hereinafter Schwartz, *Cigarettes as Medical Devices*] (quoting Matthew Meyers, counsel to the Coalition on Smoking or Health: "David Kessler . . . has given up a spectacular short-term gain for a far more substantial long-term progress [by focusing on children smoking!]"); John Schwartz, *Judge Rules that FDA Can Regulate Tobacco*, WASH. POST, Apr. 26, 1997, at A1 (quoting Kessler: "A small group of very committed people at the agency took on the impossible. The President of the United States supported them, and a federal district judge in North Carolina in very large measure agreed") Shankar Vedantam & Bob Geiger, *Tough Kessler Quits FDA*, DURHAM HERALD-SUN, Nov. 26, 1996, at A1 (explaining Kessler's legacy, reputation, and commitment, whose efforts to regulate tobacco put him "into the history books").

legislative sanctions did not effectively discipline the regulators. As one legislative critic of the EPA's rules observed, for example: "Agencies used to live in fear of what Reps. Dingell and Waxman would say. Now, it's as if committees live in fear of what Carol Browner will say if we issue a resolution of disapproval."⁴⁰⁰

Part of the answer may be that congressional protest and threats are intended partly to appease important constituencies as much as intimidate agencies, as suggested earlier.⁴⁰¹ Consider, for example, Representative Dingell's posture before the National Association of Manufacturers, where he said in a speech to the Association, referring to the EPA's proposed rules: "Let me be clear. I don't want to have to fight the administration or the president, but if this decision is not handled wisely, I am fully prepared to go to war."⁴⁰² As ranking Commerce Committee member, Dingell was well positioned to punish the EPA, had he really determined to do so. Yet ultimately he did not act to stop the EPA's rules. Some war. At least Representative Dingell's bark may be bigger than his bite.⁴⁰³ How far one can generalize from that is not clear. But surely agency personnel discount the rhetoric of legislators to some extent, knowing that some congressional threats serve members' own political purposes and therefore need not always be taken too seriously. Moreover, given the ease with which legislators can voice objections to agency action without taking additional steps to discipline agencies—talk is cheap—the strength of the interest group theory's legislator motivation claim should rest on more than legislative statements.

In any event, it is worth some emphasis that when Congress threatened the agencies not to adopt the regulations they had proposed, Congress clearly did so to protect contemporaneous congressional constituencies,⁴⁰⁴ not to preserve definite choices previously enacted into statute by some preexisting legislative coalition, as

400. Skrzycki, *supra* note 233, at G8 (quoting Representative David McIntosh). Kessler and Ludwig also regularly endured congressional hostility. For one of many examples, Representative Solomon considered Ludwig a "rogue Clinton administration regulator." McConnell, *supra* note 378, at 2. See also Press Release, James A. Leach, Comments on Recent OCC Circulars About H.R. 10 (July 24, 1997) (on file with author) (criticizing the OCC for its "unseemly" and "misleading" campaign to mobilize banks against legislation).

401. See *supra* at 46-47.

402. Skrzycki, *supra* note 233, at G8.

403. Cf. *Commerce OKs Bank Reform Bill Without Amendment*, NAT'L J.'S CONGRESS DAILY, June 14, 1995, 1995 WL 1043455 (noting that Rep. Dingell offered, but then withdrew, an amendment to financial services reform legislation that would have made clear that state insurance commissions would maintain authority over insurance sold in the states by banks). Interestingly House Banking Chair Jim Leach, a frequent critic of the OCC, characterized the OCC's approval of Zion National Bank's application to underwrite municipal bonds as "extremely credible," after the fact pointing out that it was "fully consistent" with a bill passed by the House Banking Committee, but not yet then by Congress. *Mixed Hill Reaction*, *supra* note 367.

404. See, e.g., Hohler, *supra* note 279.

McNollgast's thesis would suggest.⁴⁰⁵ In the EPA case, Congress had in fact required the EPA to reevaluate its NAAQS standards periodically in light of scientific and economic changes. The Clean Air Act certainly did not codify any particular standard the EPA was supposed to make with respect to ozone or particulate matter. Congressional and other opponents of the EPA's standards resisted not on the grounds that the EPA was undermining some past legislative determination, but rather because the proposed rules were too costly,⁴⁰⁶ notwithstanding that the relevant portions of the Clean Air Act made costs statutorily irrelevant.⁴⁰⁷ Geography, not legislative history, accounted for the opposition to the EPA's proposed rules.⁴⁰⁸

So too in the FDA case was there no clear legislative determination with respect to the proposed rule. On the one hand, one could well argue that Congress never intended the FDA to regulate tobacco products. While that argument is not plainly wrong, it is also not clear that Congress ever focused on that specific question; it seems somewhat far-fetched to imagine that at the time it passed the Food, Drug, and Cosmetic Act, in 1938,⁴⁰⁹ Congress had any will on the issue one way or another. Moreover, the FDA's plausible position was that the Act did not establish which products could and could not be regulated by the FDA, but rather established criteria according to which the agency could determine whether a product fell within the agency's jurisdiction or not. According to the FDA, its tobacco rule was entirely faithful to those congressionally established criteria, a determination two federal courts agreed with. Moreover, during the FDA's investigation into cigarette manufacturing and marketing practices preceding its notice of proposed rulemaking, it appeared possible that Congress would pass legislation explicitly giving the agency jurisdiction over tobacco. That possibility vanished with the 1994 congressional elections, to be revived in a different form when Congress contemplated the national settlement. In the meantime, the agency sought to pursue what it deemed to be desirable regulatory policy within the constraints of what it considered its statutorily defined regulatory authority to be.

405. See McNollgast, *supra* note 5, at 246-47.

406. See, e.g., *supra* notes 216-217, 219, 227-228.

407. See 42 U.S.C. § 7409(b) (1994).

408. Yet state health agencies even from upwind states supported the EPA's rules while their elected counterparts protested, see Cushman, *Canada Says*, *supra* note 217 (noting that the Association of State and Territorial Health Officials, representing health agencies of each state, not only did not oppose the agency's rules but thought the rules should be more stringent than those which the EPA had proposed), a fact which provides some evidence that at the state level, too, agency personnel are more willing or better positioned to advance general interests, relative to elected politicians.

409. Act of June 25, 1938, ch. 675, § 201, 52 Stat. 1041 (1938) (codified at 21 U.S.C. § 321).

A similar point is to be made about the OCC. First, the Comptroller's interpretations of the National Bank Act cannot in any meaningful way be characterized as contrary to Congress' will; the Act predates the end of the Civil War.⁴¹⁰ Nor can the OCC's liberalizations be characterized as contrary to Glass-Steagall, or other major federal banking statutes, as the agency explained at some length, with judicial backing. It is true that Congress itself for years did not enact the reforms the OCC accomplished, given the strength of insurance constituencies. What the OCC did went beyond Congress in that sense. But agencies are supposed to do what Congress itself cannot, so legislative inaction by itself should not be considered to express a regulatory policy beyond which agencies may not go. More importantly, what the OCC did ultimately provided Congress with an opportunity to enact liberalizing legislation, thereby helping to create a legislative coalition as much as it disturbed one. Incidentally, that dynamic—legislative inaction, followed by reform-oriented agency action, followed by confirming legislation—is also inconsistent with the McNollgast thesis that administrative procedure keeps agencies faithful to established legislative coalitions, for if that were true, the OCC should have been prevented from regulating in a way that, given insurance companies' persistent opposition, Congress did not.

In those specific instances where agency decisionmakers exercised considerable discretion rather than followed APA-prescribed procedures, again agency personnel exhibited general-interest motivations. Neither the EPA, the FDA, nor the OCC promoted special interests in the shadows of informal procedure. Although the OCC promoted the particular interests of banks by approving op-sub applications, the OCC did not liberate banks to the greater detriment of society at large: Again, because consumers of financial services undoubtedly benefit from greater competition as well as from economies of scale in the provision of financial services, the OCC's policies did not simply deliver regulatory rents to banks. And while the OCC's decisions harmed the narrow interests of insurance agents and other providers of financial services, the OCC did not do so in response to congressional pressures to advance banks' interests at the expense of insurers, as the interest group theory might predict. As mentioned, insurance companies enjoyed at least as much influence over Congress as banks did; Congress sent no cues to the OCC to help banks out. Moreover, the OCC's discretionary decision to create a notice-and-comment application process for op-sub activities shows agency evenhandedness towards interests adverse to banks: The OCC gave those opposed to applications to conduct new activities an opportu-

410. National Bank Act of 1864, ch. 106, 13 Stat. 99 (codified as amended in scattered sections of 12, 19 & 31 U.S.C.).

nity to explain why granting a particular application would be contrary to good public policy or federal banking laws.

Thus it seems safe to say that the agencies in question consistently showed public-interest motivations. The EPA's, FDA's, and OCC's efforts were not prompted by Congress seeking to deliver promised regulatory benefits to powerful constituencies, but rather by the agencies' own visions of desirable regulatory policy. And when Congress objected to the agencies' actions when they threatened important congressional constituencies, the agencies persisted nevertheless. For two reasons, then, the claim that agency-level regulators are motivated to advance public interests finds support in the studied cases.

And they had the legal-procedural wherewithal to do so. That is, the administrative process theory's claim that regulatory decision-making procedures go far to insulate agencies from Congress also seems supported by the cases in question. Particularly in the case of the EPA and the FDA rules, the agencies utilized APA section 553—and on their own initiatives solicited participation far beyond the requirements of section 553—to build thorough factual records justifying what they proposed to do. Empowered politically and legally by the data and arguments relevant to their proposed rules, and made fully aware of data and arguments against their proposals, the EPA and FDA were very well positioned as a result of the rulemaking process to defend their regulations both before Congress as well as in court. In a sense, initiating the rulemakings committed the agencies in advance to go wherever good science and good public policy counseled, special-interest objections notwithstanding; the APA rulemaking process thus facilitated the development of public-interested regulation.

Rulemaking certainly did not rein the agencies in. It is true, as McNollgast argue, that notice and comment provided an opportunity for congressional constituencies to mobilize against the EPA's, FDA's, and OCC's rules. But, as the examples show, the procedure also provided public interest groups, health organizations, and academic researchers opportunities to register their data and arguments in the agencies' rulemaking record. On balance, then, the information generated by the rulemakings (and not only following the notice of proposed rulemakings) seems clearly to have empowered the agencies vis-à-vis their interest group opponents.

Indeed, if greater participation in the rulemaking process were a source of congressional control over agencies, one would wonder why the agencies went out of their ways to solicit even more participation, including more opposition, than section 553 required them to do. If creating rulemaking procedures that mobilize potential opponents against agency action is how Congress controls the EPA, for example,

why did the EPA on its own initiative attend conferences, hold regional meetings, and provide satellite telecasts to explore its revised ozone and particulate matter standards? And why did the EPA provide an “advance” notice of its proposed rulemaking, giving all concerned additional time to mobilize against what the agency contemplated? The claim that openness and accessibility binds agencies to congressional preferences seems completely unsupported when considering the ozone and particulate matter rules especially: Interest group opposition and congressional disapproval of the agency’s action could not have been much stronger, and yet the EPA undertook to do what according to the McNollgast view should have decreased, not increased, the agency’s regulatory autonomy. By the same token, if notice and comment serves to keep otherwise errant agencies faithful to congressional will, one would wonder why the OCC established its own notice-and-comment procedure for considering op-sub applications. Again, if Congress uses the process to ensure that agencies further the interests of important congressional constituencies rather than pursue their own respective agendas, why would the OCC voluntarily establish its own notice-and-comment process?

The Coalition on Smoking or Health’s and others’ use of section 553’s provision allowing any party to request a rulemaking in prompting the tobacco rule illustrates how rulemaking can facilitate public interest groups’ efforts to put general-interest issues on agencies’ agenda, even where Congress may oppose the agency’s response to the petition.⁴¹¹ If Congress meant to use rulemaking as a procedural alarm bell that allowed interest groups to alert it when an agency threatened unfriendly regulation, a provision allowing groups to petition agencies to undertake regulation seems out of place. Of course, an agency may refuse, although the FDA did not, and a petitioning party has little recourse (although the agency’s refusal would be subject to “arbitrary and capricious” review under the APA⁴¹²). But the observation that an agency may refuse a request to initiate a rulemaking does not explain how the existence of the provision supports the legislative dominance claim.

Nor is the utility of the notice-and-comment process for those opposed to proposed agency action clarified by the regulatory cases in question. For example, consider the 300,000 letters from a single mail campaign, and the hundreds of form letters, that the FDA received in opposition to its proposed tobacco rule. Mass-mailing cam-

411. See generally STAFF OF SENATE COMM. ON GOVERNMENTAL AFFAIRS, 95TH CONG., STUDY ON FEDERAL REGULATION, VOL. III: PUBLIC PARTICIPATION IN REGULATORY AGENCY PROCEEDINGS 14-15 (Comm. Print 1977) (finding that petitions to initiate a rulemaking submitted by representatives of those outside a regulatory industry approximated or exceeded petitions submitted by regulated industries, for examined agencies including the FTC, NRC, and CPSC).

412. 5 U.S.C. § 706(2)(A) (1994).

paings such as this one are an odd institution in the context of the rulemaking process, awkwardly transplanted from the legislative arena, where their purposes seem clearer, to a forum where their efficacy is seriously questionable. For unlike legislators, the FDA was not counting votes or potential votes in favor of and against its tobacco rule. Nor do letter campaigns communicate to agencies something they do not already know. The FDA fully understood the political implications of what it proposed, as evidenced by among other things Kessler's prior requests for guidance from both the White House and Congress. And comments that duplicate other comments add nothing but paper to the agency's rulemaking record. Perhaps those organizing the mass-mail campaigns thought they would send an intimidating signal to the FDA about the political pressures Congress would be under to stop the agency, but if so the campaigns had no such measurable effect. The tobacco rulemaking illustrates not how an agency was cowed by important congressional constituencies who mobilized during the rulemaking process, but rather how an agency used that process to gather data and arguments, from a wide variety of sources, that the agency could use to defend its action against its political adversaries.

Finally, notice-and-comment rulemaking did not itself serve to alert Congress to pending agency action in any of the considered cases, as the McNollgast thesis suggests it does. For in each case, the agency began exploring and gathering data about its yet-to-be-proposed rules far in advance of publishing its notice of a proposed rulemaking in the *Federal Register*. Affected interest groups, and Congress, were keenly aware of what the agencies might do before the commencement of section 553 rulemaking.⁴¹³ The EPA's, FDA's, and OCC's initiation of the section 553 process itself thus served to communicate no new information to Congress. In several ways, then, the agencies' rulemakings seem most compatible with the claim that administrative procedure fosters agency independence more than congressional control.

The EPA and FDA cases also illustrate how the federal advisory committee process can promote agency autonomy. Both agencies employed FACA committees in the course of their background scientific research, both composed, as the FACA and its implementing regulations require, of diverse interests. The EPA case is an especially good example of how the FACA process can promote agency autonomy. The EPA used its advisory committee first to prepare a study of sci-

413. Indeed, in some cases opposing interest groups prepared lawsuits challenging agency action before the agency issued its proposed rule. See, e.g., Cimons, *supra* note 279, at A24 (noting that the five largest cigarette companies and an advertising agency filed a challenging lawsuit "almost simultaneously" with the FDA's announcement of its proposed rule).

entific and medical research relevant to its existing ozone and particulate matter standards and also to review and evaluate the agency's own staff studies and literature reviews. The EPA's final rules then refer to the advisory committee's views and recommendations innumerable times. Subsequently, in her defense of the EPA's proposed rules before Congress, Browner relied heavily on the CASAC's findings. And when congressional opponents enlisted former CASAC members to testify against the agency's proposed rules, Browner pointed out that the EPA relied on reports and recommendations of its advisory committee as a whole, not the views, pro or con, of any particular committee member, whose independent views should not count for very much.⁴¹⁴ Like section 553's notice-and-comment process, then, the FACA process worked to empower the agencies against their congressional and interest group critics.

Administrator motivations and administrative procedure to one side, the studied cases also illustrate how presidential oversight and judicial review further promote agency autonomy. While White House support for the EPA's rules was slow to come, the White House's ultimate support for the EPA reinforced the agency politically, making it possible for the agency to issue final rules that closely resembled their proposed versions. And although the White House was reportedly divided internally over the proposed rules—a division that congressional opponents of the rules emphasized—the Administrator of the White House's Office of Information and Regulatory Affairs testified before Congress to defend the EPA, explaining that White House scrutiny of and questions about agency rules is common and should not be used as evidence that the EPA's rules were misguided.⁴¹⁵ White House oversight of the EPA rules worked as it should, with the White House ultimately supporting an otherwise politically vulnerable agency.

The EPA case further illustrates how presidents and vice presidents can sometimes better afford to support agency attempts to promote general interests than Congress can. According to many commentators, Clinton, and especially presidential candidate Gore, had much more to gain politically by courting midwestern states and cities, which opposed the EPA's rules, than by further demonstrating

414. See *Review of EPA's Proposed Ozone and Particulate Matter NAAQS Revisions, Part 2: Continuation of Hearings to Review EPA Proposed New National Ambient Air Quality Standards (NAAQS) for Ozone and Particulate Matter (PM) Under the Clean Air Act Before the Subcomm. on Health and Env't. and Subcomm. on Oversight and Investigations of the House Comm. on Commerce*, 105th Cong. 378-83 (1997) (testimony of Carol Browner, Administrator, U.S. Environmental Protection Agency).

415. See *Proposed NAAQS Hearings*, *supra* note 212, at 177-78, 188-91 (testimony of Sally Katzen, Administrator, Office of Information and Regulatory Affairs, Office of Management & Budget).

their environmentalist credentials.⁴¹⁶ As one observer aptly put it, shortly before the White House made clear—with decisive vice-presidential involvement⁴¹⁷—that it was supporting the EPA: “Gore doesn’t need to get any greener.”⁴¹⁸ Nevertheless, the White House supported the EPA.

The FDA case also illustrates how the White House can foster agency independence from Congress in ways that allow an agency better to pursue general interests. Although Clinton wanted electoral support from tobacco states in the 1996 elections, and although Democratic governors and senators from those states urged him not to support the FDA’s tobacco initiative, the White House encouraged Kessler’s efforts. While the Administration perceived that limiting access to tobacco by children could become popular with the voters,⁴¹⁹ the White House’s support of the FDA, given strong regional and intraparty opposition constituted, as commentators aptly described, “a high stakes confrontation with the tobacco industry,”⁴²⁰ a “minefield.”⁴²¹ In fact, the Administration appeared to understand fully the potential adverse political consequences from the start, before voters were made much aware of the issue, yet it encouraged the FDA to go forward notwithstanding the political risks.⁴²²

416. See Balz & Warrick, *Tougher Clean Air Rules*, *supra* note 171 (noting that Gore needed the support of Democratic mayors in his bid to win nomination, not the backing of environmental groups).

417. See, e.g., Cushman, *Top EPA Official*, *supra* note 216 (stating that the Vice President’s role was probably decisive in the White House decision to support the EPA rather than weaken proposed rules).

418. Balz & Warrick, *Tougher Clean Air Rules*, *supra* note 171.

419. See William Neikirk, *Clinton Readies Tobacco Crackdown*, CHI. TRIB., Aug. 22, 1996, at 1, 22 (observing that the White House believed the President’s position would hurt him in some states, but earn support in other states by “burnish[ing] his image as a courageous president with strong values”).

420. Thomas, *supra* note 288. See also Jouzaitis, *supra* note 279, at 3 (quoting Representative Richard Durbin: “It’s going to be a very tough fight’ . . . Clinton would be up ‘against what I consider to be the most powerful lobby in Washington. If he’s willing to take (the tobacco industry) on, it speaks volumes about his own values and principles.”); *Clinton Launches War on Smoking*, *supra* note 293 (observing that the President’s decision to support the FDA’s initiative “was fraught with political consequences because Clinton can ill afford to alienate Southerners heading into the 1996 elections” and quoting Clinton: “[Keeping cigarettes away from children] is more important than any political consequences.”); Shankar Vedantam, *FDA Rules to Heavily Filter Tobacco Sales, Marketing; Industry Vows to Beat Back Regulations*, THE TIMES-PICAYUNE, Aug. 24, 1996, at A1 (stating that the President’s and FDA’s action will influence the presidential politics in November).

421. Schwartz, *Cigarettes as Medical Devices*, *supra* note 399 (stating that the Clinton Administration and FDA were striding into a political “minefield”).

422. See, e.g., President’s Remarks, *supra* note 283. President Clinton stated that:

The first time [the Vice President and I] began to discuss this was about the time the FDA opened their inquiry. And he looked at me and I looked at him and I said, well, you know what this might lead to? And he said, I certainly hope so. (Laughter.) And I said, well, you know—I shouldn’t say this, this is our private conversation—I said, you know, it really isn’t an accident that nobody

The White House backed the OCC's liberalizing efforts too. The Administration went on record publicly in support of the OCC's initiative, on the grounds that it believed financial services regulatory reform was overdue. And when the White House signaled to Congress its strong support for financial services reform legislation, it insisted, through the Treasury Department, that the OCC not be written out of any such legislation.⁴²³ The OCC case does not illustrate a White House taking large political risks by supporting a public-interest oriented agency effort, but it too shows how the White House can bolster an agency's position relative to Congress and legislatively influential interest groups.

The judiciary also helped: The EPA's rules were promulgated under judicial order to revisit the NAAQS standards. In the FDA case, a court observed following the agency's earlier decision not to regulate tobacco that the FDA might in the future proceed differently, and following the final tobacco rule a court vindicated the agency's interpretation of its authority under the Food, Drug, and Cosmetics Act, although a higher court reversed that decision. And several federal courts, including the Supreme Court, repeatedly sanctioned OCC readings of the National Bank Act and other banking statutes.

And while an appeals court invalidated the EPA rules, it did so not on the grounds that the EPA had overstepped its statutory authority, but rather on the grounds that that congressional authority was too vaguely interpreted.⁴²⁴ Moreover, the court in that case vindicated the EPA against many of the criticisms its congressional and interest group opponents made against the rules. In any event, the Supreme Court ultimately vindicated the EPA's rules. On the other hand, both an appeals court and subsequently the Supreme Court in the FDA lawsuit did determine specifically that the FDA overstepped its statutory authority, as did other courts with respect to certain of the OCC's liberalizations. The agencies in question did not always survive judicial challenges to their regulatory actions, in other words, but the point remains that courts frequently sided with the agencies

else has ever tried to do this. (Laughter.) It's not an accident. This is not going to be one of those freebies, you know. (Laughter.)

Id.; Neikirk, *supra* note 419, at 22 (quoting Senator Jesse Helms: "The president is in effect declaring war on 76,000 North Carolinians who gain their livelihood in one form or another from tobacco."); Penny Bender, *Tobacco Farmers Protest Gore, FDA Regulations*, THE TENNESSEAN, Nov. 3, 1996, at 4B (reporting that several hundred tobacco farmers gathered at Gore's home town to protest tobacco initiative and to promise to vote against the Administration).

423. See, e.g., *Banking on the Fed*, WASH. TIMES, May 12, 1998, at A20; *White House, OCC Working on Bank Reform "Principles"*, NAT'L JOURNAL'S CONGRESS DAILY, June 18, 1996.

424. See *American Trucking Ass'ns v. EPA*, 175 F.3d 1027, 1034 (D.C. Cir. 1999) (per curiam), *modified*, 195 F.3d 4 (D.C. Cir. 1999), *rev'd in relevant part sub nom.* *Whitman v. American Trucking Ass'ns*, 121 S. Ct. 903, 911-14 (2001).

in important cases where agency decisions were unpopular with powerful congressional constituencies, but where the agencies' positions were well supported by the contents of their rulemaking dockets, even while courts at times concluded that the agencies had gone too far.

To summarize, the cases studied here lend support to the administrative process theory of regulation in that each shows how public-interested administrators pursued general-interest regulatory goals, how administrative procedure—specifically, rulemaking, the advisory-committee process, and informal agency decisionmaking—promoted agency autonomy by insulating agencies from interest group criticism and congressional sanctions, and finally how presidential oversight and judicial review further promoted agency autonomy. The examined cases do not provide much support for the interest group theory, according to which Congress should have been able to discipline the agencies sufficiently well to ensure that they protected the important regulatory interests of powerful interest group constituencies. Organized and well-funded groups representing manufacturers, tobacco producers and advertisers, and insurance groups should have done much better than they in fact did. To be sure, firm conclusions cannot be drawn from three examples. But the cases certainly suggest that administrator motivations, the procedural rules according to which agencies regulate, and agency relationships with the White House and the courts can be at least as determinative of regulatory outcomes as is the constellation of congressional constituencies affected by regulatory choices.

C. Toward A Synthesis

Yet in the end, one need not choose between exaggerated alternative theories. A single-minded focus on administrative process may be just as misguided as a narrow preoccupation with interest groups and legislative motivation. To say that regulators are sometimes motivated to pursue public-interested regulation, or that they may often have the procedural and institutional decisionmaking tools to do so even over interest group and legislative objection, is hardly to gain-say the importance of interest groups or legislative preferences, which after all may carry the day. The cases examined here do not show, for example, that interest groups are irrelevant. To the contrary, opponents of the regulatory initiatives showed considerable strength in the administrative arena, nearly prevailed in the legislative arena, and sometimes prevailed in court. Nor do the cases show that congressional preferences concerning regulatory outcomes are irrelevant; Congress exhibited considerable influence over the agencies, just not enough to prompt the agencies to abandon or substantially redirect their respective courses.

The thesis advanced so far here is simply that there is more—not less—to the story of regulation than interest group politics and congressional control, notwithstanding the great explanatory weight these usually are thought to carry. The interesting question becomes, then, under what circumstances are regulatory decisionmaking processes more likely to yield public-interested outcomes, and under what different circumstances will regulatory outcomes more likely deliver narrow and socially wasteful benefits. While an exhaustive treatment of this issue is beyond the present scope, it is now possible to begin to identify the conditions most likely associated with different types of regulation.

Take the pure cases first. On the one side, one might most expect to find public-interested regulation where:

- (1) administrators are ideologically motivated to advance general interests;
- (2) advancing such interests will not seriously jeopardize an agency's own institutional interests, budgetary or otherwise;
- (3) agency decisionmaking processes promote political autonomy from interest groups and legislators hostile to the agency's motivations;
- (4) there is no easily revolving door between the relevant agency and regulated interest groups;
- (5) the implicated regulatory interests are themselves divided over the merits of the agency's regulatory program;
- (6) the White House is willing to make the agency's agenda a priority worthy of political capital;
- (7) the agency is able to create high public visibility with respect to its regulatory program;
- (8) agency decisionmaking is supported judicially; and
- (9) the relevant scientific or expert community provides consensus support for the agency's general-interest program.

The coincidence of these conditions might be said to constitute the easiest case for public-interested regulation. These conditions begin to specify the circumstances under which administrators seek to advance general interests, possess the legal and political wherewithal to do so, and enjoy an institutional environment compatible with their regulatory aims.

By implication, one would least expect to find public-interested regulation where:

- (1) administrators exhibit no commitment to such regulation;

- (2) any effort to advance general-interest regulatory policies would seriously jeopardize the relevant agency's own institutional interests;
- (3) agency decisionmaking processes constrain rather than liberate the agency politically by facilitating legislative control;
- (4) interest groups have easy access to the agency;
- (5) interest groups are united with respect to their preferred regulatory outcome;
- (6) the White House is unwilling to support the agency politically;
- (7) the agency is unable to create high public visibility that would generate support for a public-interested regulatory program;
- (8) agency decisionmaking is discredited judicially; and
- (9) the agency is unable to enlist broad scientific or expert support for such a program.

The coincidence of these conditions might constitute the easiest case for special-interest regulation; where they are met, public-interested regulation is most unlikely.

Of course, the real world is rarely divided so neatly. Yet, to be more specific than this, one would next have to gauge the relative importance of the above conditions, no easy task. On the other hand, it is quite clear that the conditions most conducive to public-interested regulation are not all necessary conditions. For example, in each of the studied cases, the agencies' institutional interests in budgetary stability was to some extent threatened, and yet the agencies were not disciplined by threats to their budgets. For another example, in the EPA case the White House's support of the agency, although crucial and ultimately forthcoming, came slow and late. Perhaps worse, in the EPA and FDA cases the relevant regulated interests were not divided with respect to the EPA's and FDA's initiatives. And finally, none of the agencies was consistently supported by the courts when interests adverse to the agencies brought judicial challenges.

On the other hand, some of the conditions conducive to public-interested regulation probably are necessary conditions. Agencies will advance public-interested regulation, for example, only where agency decisionmakers themselves are motivated to do so. Unless agencies advance general regulatory interests inadvertently, in other words, they do so only because agency decisionmakers aim to further their own conceptions of the public interest. Others among the specified conditions are probably contingently necessary. For example, if regulated interests and their legislative supporters are united in opposition to an agency's public-interested regulatory initiative, then agency decisionmaking processes that promote agency autonomy are

almost certainly crucial. If instead regulated interests are themselves divided, and that division carries over to Congress, an agency may be able to advance its own vision of public-interested regulation even if it lacked considerable political autonomy.

To say much more about the relative importance of the above conditions would require undertaking many more than three regulatory case studies, gradually isolating the different variables and their possible combinations. For now, the important point is that interest group and legislative preferences are not irrelevant to explaining regulatory outcomes, just as they are not the only relevant considerations. And, where agencies are motivated to advance general interests, where administrative decisionmaking processes promote agency autonomy, and where the White House and the judiciary further insulate agencies from political pressures, the regulatory preferences of powerful interests groups and even Congress are unlikely to prove decisive. To greater and lesser degrees, the studied cases provide support for that much at least.

VI. CONCLUSION

An old cliché familiar to students of political science holds that there are essentially but two theories of government, the corruption theory and the incompetence theory. This Article has explored one fairly well-developed, and certainly influential, version of the former. While visions of incompetence are commonly associated with the regulatory state in popular culture, and while scholars and even politicians regularly document instances of patently undesirable or inconsistent agency decisionmaking,⁴²⁵ there is no developed theoretical model of regulation explaining how the fundamental forces underlying regulatory decisionmaking routinely work to generate incompetent regulatory policy. There is, however, a distinguished theory according to which those forces regularly produce policies that advance narrow interests at the rest of society's greater expense. That theory has provided an academic ballast for various programs of political reform—the deregulation era of the early 1980s, the initiative of the Council on Competitiveness in the late '80s and early '90s, the Contract with America, calls to rely more heavily on private-law regulation, and so on. More generally, the theory accounts for a certain jaundice that many (though by no means all) academicians and commentators of various political and philosophical persuasions exhibit towards public-law regulation.

425. See, e.g., STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* (1993); JOHN M. MENDELOFF, *THE DILEMMA OF TOXIC SUBSTANCE REGULATION: HOW OVERREGULATION CAUSES UNDERREGULATION AT OSHA* (1988); Cass R. Sunstein, *Paradoxes of the Regulatory State*, 57 U. CHI. L. REV. 407 (1990).

Undoubtedly, the regulatory state is at times “corrupt” in the specific sense the interest group theory contemplates. But the interest group theory predicts undesirable regulatory policy as a matter of course, and it reaches that conclusion only because it oversimplifies regulatory decisionmaking, emphasizing the relationship between legislators and interest groups, and assuming that legislators can effectively discipline administrative agencies to ensure delivery of regulatory rents to favored interests. Once the complexities of the relationship between legislators and agencies are taken into account, however—moving beyond tired observations such as the importance of Congress’ budget power—the picture changes. Legislative influence over agency-level regulatory decisions becomes more precarious.

This Article presented an alternative picture. According to that picture, regulatory outcomes are explicable only with due emphasis on the full legal-procedural context in which agencies operate. Given the structure of the administrative-process rules through which agencies make regulatory decisions, and given the nature of presidential oversight and judicial review, there are reasons to believe agencies are fairly well situated—in a legal-procedural sense—to regulate in the public interest, to the extent they are motivated to do so. And indeed, recent regulatory activity in the environmental, consumer protection, and financial services arenas suggests that administrators are at least sometimes—and on very important regulatory policy occasions at that—motivated by general-interest goals. Although scholars such as Stigler have argued that administrators’ motivations are irrelevant to an understanding of regulation—because the forces operating on administrators lead them to provide regulatory rents however benign their intentions⁴²⁶—the examples considered here suggest to the contrary that administrative procedure and administrative law go far to liberate public-interested agencies from Congress and congressional constituencies. Focusing on administrator motivations and the administrative processes through which agencies regulate thus begins to remedy the existing mismatch between academic theory and regulatory reality.

The alternative theory presented here is itself incomplete, to be sure. It emphasizes administrative decisionmaking procedures and the legal-institutional context in which agencies operate, with less to say about matters such as agency decisions not to regulate, for one example. A fuller treatment of the dynamics of regulation would integrate more. A fuller treatment would also specify more completely the circumstances under which administrators are most/least motivated to advance public interests, the conditions under which agen-

426. See, e.g., STIGLER, *The Consumer*, *supra* note 8, at 181; Stigler, *The Theory*, *supra* note 3, at 17-18.

cies are most/least likely to respond to congressional cues about desirable regulatory outcomes, the contexts in which presidential oversight is most/least likely to empower agencies against influential interest groups, and so on. But whatever additional work remains to be done, any account of regulation divorced from administration leaves out a lot in the meantime. And any account of regulation that views the administrative process simply as a(nother) device to ensure congressional control of agencies seems unconvincing.

Of course, none of this directly answers the incompetence theory. Administrative regulators might often aspire to vindicate public interests, and may often enjoy sufficient legal-procedural autonomy to do so, but routinely blow it. Whether regulatory policies truly serve public interests by delivering broad-based policies that are on net socially beneficial, as opposed to broad-based but socially wasteful, will be saved for another day, though it deserves mention that the cases examined here would not support the incompetence theory either.⁴²⁷ In the meantime, students of regulation seem justified in seeking decisionmaking mechanisms most likely to yield socially desirable regulatory policy, rather than capitulating to a conventional wisdom that sees the administrative state as an inevitable failure.

427. For example, in the EPA and FDA cases, the cost-benefit analyses, viewed in the light least favorable to the agencies, still suggest that the regulations were cost-justified.