

1994

Redeeming Judicial Review: The Hard Look Doctrine and Federal Regulatory Efforts to Restructure the Electric Utility Industry

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ARTICLES

REDEEMING JUDICIAL REVIEW: THE HARD LOOK DOCTRINE AND FEDERAL REGULATORY EFFORTS TO RESTRUCTURE THE ELECTRIC UTILITY INDUSTRY

JIM ROSSI*

Recent "policy-effect" studies denounce judicial review for its adverse effects on agency decisionmaking. In its strong version, the policy-effect thesis suggests that judicial review has paralyzed innovative agency decisionmaking. In this Article, Professor Rossi reacts to policy-effect studies, particularly as they have been used to attack the "hard look" doctrine in administrative law. He revisits Professor Richard J. Pierce's policy-effect description of the effects of judicial review on the Federal Energy Regulatory Commission (FERC). Professor Rossi's survey of recent FERC decisionmaking provides some support for an attenuated version of the policy-effect thesis, but leads him to reject the strong version of the thesis.

Much of the policy-effect literature hastily condemns judicial review because it is costly, unpredictable, and counter-majoritarian. However, Professor Rossi defends judicial review against the policy-effect attack as a protector of deliberative democratic values. He suggests that reforms to agency adjudicative mechanisms could alleviate the problems identified by policy-effect critics, while also allowing judicial review an opportunity to achieve its benefits.

Contents

Introduction	764
I. Pierce's Account of the Effects of Judicial Review	769
A. The Rulemaking/Adjudication Distinction	769
B. Judicial Review of FERC's Natural Gas Restructuring Rulemakings	773
C. Pierce's Prediction of the Effects of Judicial Review on Electric	

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	Utility Industry Restructuring	777
II.	The Constraints of Substantive Law	779
	A. The Changing Structure of the Electric Utility Industry	779
	B. Statutory Constraints on FERC's Discretion to Increase Competition in Bulk Power Generation	781
	C. Statutory Constraints on FERC's Discretion to Require "Open Access"	784
	D. The Role of the FPA in Constraining FERC's Discretion	785
III.	Electric Utility Restructuring at FERC: Precedential Decisionmaking in Adjudicative Proceedings	793
	A. The Development of Transmission Access Policy	794
	B. Competition-Enhancing Bulk Power Reforms	799
	C. Revisiting the Policy-Effect Theses	801
IV.	Redeeming Judicial Review: Congress, Agencies, the Courts—and the Affirmation of Deliberative Democratic Values	806
	A. Inter-Institutional Effects: Congressional Choice	807
	B. Deliberative Democracy and Judicial Review	811
	1. The Inadequacy of Congressional and Executive Control	812
	2. Competitive Electricity Restructuring Is Not a Pareto Improvement—Even for Consumers	816
	3. The Hard Look Doctrine and Affirmation of Deliberative Democratic Values	818
	4. Judicial Discretion and the Hard Look Doctrine	822
V.	Reforms to Rulemaking and Adjudication	826
	A. Why Not Presumptive Rulemaking?	827
	B. Increasing the Accountability and Deliberation of Adjudication	833
VI.	Coda	835

INTRODUCTION

Judicial review of agency decisionmaking is under attack. "Policy-effect" studies from the past decade suggest that judicial review of discretionary decisionmaking has deterred systematic policymaking at agencies such as the Environmental Protection Agency (EPA),¹ the

1. R. SHEP MELNICK, REGULATION AND THE COURTS: THE CASE OF THE CLEAN AIR ACT 344 (1983) ("Court action has encouraged legislators and [EPA] administrators

Occupational Safety and Health Administration (OSHA),² the National Highway Traffic Safety Administration (NHTSA),³ and the Federal Trade Commission (FTC).⁴ By heaping formidable new tasks on regulators, judicial review has, in the words of one commentator, subjected agencies to “debilitating delay and uncertainty,” forced them to “substitute trivial pursuits for important ones,” and “discouraged administrators from taking responsibility for their actions and for educating the public.”⁵

In a recent article, Professor Richard Pierce urges us to supplement the list of agencies paralyzed by judicial review with the Federal Energy Regulatory Commission (FERC),⁶ the independent agency that oversees federal regulation of the nation’s natural gas and electricity industries. Pierce is especially critical of the “adequate consideration” doctrine, one

inefficiency and inequities, has made rational debate and conscious political choice difficult, and has added to frustration and cynicism among participants of all stripes.”).

2. JOHN MENDELOFF, *THE DILEMMA OF TOXIC SUBSTANCE REGULATION* 121 (1988) (contending that strict judicial review causes “OSHA leaders [to] hesitate about issuing standards for the same reason that graduate students postpone taking their comprehensive exams: They aren’t sure they will pass.”); see also Sidney A. Shapiro & Thomas O. McGarity, *Reorienting OSHA: Regulatory Alternatives and Legislative Reform*, 6 *YALE J. ON REG.* 1 (1989); Elinor P. Schroeder & Sidney A. Shapiro, *Responses to Occupational Disease: The Role of Markets, Regulation, and Information*, 72 *GEO. L.J.* 1231 (1984).

3. Losses in court because of uncertainties concerning the “practicability” of NHTSA’s rules have, according to Mashaw and Harfst, made the agency cautious about using any safety devices which have not been “road-tested.” This has thwarted NHTSA’s statutory mission—to “force the technology” of automobile safety. JERRY L. MASHAW & DAVID L. HARFST, *THE STRUGGLE FOR AUTO SAFETY* 69-105, 121-23 (1990) [hereinafter MASHAW & HARFST, *STRUGGLE FOR AUTO SAFETY*]; see also Jerry L. Mashaw & David L. Harfst, *Regulation and Legal Culture: The Case of Motor Vehicle Safety*, 4 *YALE J. ON REG.* 257 (1987).

4. Barry Boyer, *The Federal Trade Commission and Consumer Protection Policy: A Postmortem Examination*, in *MAKING REGULATORY POLICY* 93, 102 (Keith Hawkins & John Thomas eds., 1989) (“[T]he courts reviewing trade regulation rules not only failed to create a strong incentive for high-quality data and analysis; in some respects, they seemed to reward poor empirical analysis.”).

5. R. Shep Melnick, *Administrative Law and Bureaucratic Reality*, 44 *ADMIN. L. REV.* 245, 246 (1992). For further criticism of the role of courts in reviewing administrative decisionmaking, see ROBERT A. KATZMANN, *INSTITUTIONAL DISABILITY: THE SAGA OF TRANSPORTATION POLICY FOR THE DISABLED* (1986); JEREMY RABKIN, *JUDICIAL COMPULSIONS, HOW PUBLIC LAW DISTORTS PUBLIC POLICY* (1989); MARTIN M. SHAPIRO, *WHO GUARDS THE GUARDIANS? JUDICIAL CONTROL OF ADMINISTRATION* (1988); Robert A. Kagan, *Adversarial Legalism and American Government*, 10 *J. POL’Y ANALYSIS & MGMT.* 369 (1991).

6. Richard J. Pierce, Jr., *The Unintended Effects of Judicial Review of Agency Rules: How Federal Courts Have Contributed to the Electricity Crisis of the 1990s*, 43 *ADMIN. L. REV.* 7 (1991) [hereinafter Pierce, *Electricity Crisis*].

example of the hard look doctrine which the D.C. Circuit and other lower federal courts⁷ have applied to FERC's rulemaking efforts.⁸ According to Pierce, the manner in which courts have applied the adequate consideration doctrine to FERC's law and policy choices has left the agency's staff awash in uncertainty, demoralized, and unable to make new choices. As a result, Pierce predicts that federal efforts to continue reform of the natural gas industry and to commence competitive reform of the electric utility industry will be thwarted. The consequences which Pierce predicts are harsh: he considers it likely that we will face a series of serious electricity shortages in the near future if courts do not get out of the way.⁹ Pierce's article is significant because it is the first scholarly examination of the effects of judicial review on FERC's policymaking. If supported by the evidence, his account would support broad judicial deference to FERC's legal and policy decisions and provide additional empirical grounding for those who have argued that judicial review of agency rulemaking leads to policy paralysis.

In this Article, I revisit some of Pierce's predictions and examine critically Pierce's observations of the effects of appellate court applications of the adequate consideration doctrine to agency policymaking in the energy context, particularly federal efforts to restructure competitively the economic norms and institutions of the

7. Over 70% of appeals of FERC orders from the past seven years were filed with the D.C. Circuit and the Fifth Circuit, according to a review of data from the Administrative Conference of the United States. The overwhelming majority of these appeals were filed with the D.C. Circuit; in 1992, over 80% of all appeals were filed with the D.C. Circuit alone. This percentage has continued to increase each year recorded. See 5 DAVID J. MUCHOW & WILLIAM A. MOGEL, ENERGY LAW & TRANSACTIONS § 143.03[2] (1993).

8. To date, the doctrine has been invoked against FERC primarily in the natural gas context. See, e.g., American Gas Ass'n v. FERC, 888 F.2d 136 (D.C. Cir. 1989) (reversing Order No. 500 on the basis that FERC did not engage in "reasoned decisionmaking" when it chose to rely on cross-contract crediting, rather than an alternative regulatory measure, in its attempt to allocate a higher proportion of transition costs to gas producers), cert. denied, 498 U.S. 952 (1990); Public Util. Comm'n v. FERC, 817 F.2d 858, 862-63 (D.C. Cir. 1987) (reversing FERC's authorization for pipelines to retain accumulated tax reserves because FERC had not "adequately considered" the alternative of effecting an "equitable" allocation of accumulated tax reserves between pipelines and their customers); see also *infra* note 50 and cases cited therein.

9. The social implications of a serious electricity shortage are dire. Historically, electricity has comprised a crucial sector of the American economy, not only as a means of sustaining current industrial operations, but also as an integral agent for technological progress and improvements in standards of living. See SAM H. SCHURR ET AL., ELECTRICITY IN THE AMERICAN ECONOMY: AGENT OF TECHNOLOGICAL PROGRESS (1990).

electric utility industry.¹⁰ I use Pierce's account as a springboard for discussing judicial review and the hard look doctrine in the electric utility industry restructuring context. However, my discussion also responds in general to others who have denounced judicial review on the basis of its policy effects on the reviewed agency.

Following a brief description of Pierce's article in Part I, Part II suggests that his account fails to control for non-judicial factors which may affect FERC's policy decisions, such as statutory constraints on FERC's discretion under the Federal Power Act (FPA).¹¹ Considering statutory constraints on an agency's discretion, I argue, is an issue logically prior to and doctrinally distinct from reviewing the agency's exercise of discretion. Because statutory constraints have significantly curtailed FERC's ability to make certain reforms in the electricity context, it is difficult to attribute regulatory inaction to judicial review absent a comprehensive study which takes into account their role. This descriptive problem with Pierce's account, I suggest, foreshadows a more systemic problem with policy-effect critiques generally. Thus, it is prudent to approach these critiques with an informed skepticism and to hesitate to generalize from them prior to a comprehensive study of the specific regulatory context at hand.

Part III surveys some regulatory developments at FERC in the electric utility context over the last several years. Pierce makes sweeping predictions about the impact of judicial review on FERC's decisionmaking processes; however, he does not present any evidence of judicial review's actual effect on FERC's restructuring of the electric utility industry. While this Article does not purport to provide a comprehensive and conclusory empirical examination, it does draw on the vantage point of hindsight to revisit some of Pierce's predictions. In the few short years since Pierce penned his critique, the electric utility industry *has*

10. The scope of my analysis is limited to *federal* regulatory efforts to restructure the background *economic* institutions and norms within which electricity industry players (utilities, consumers, etc.) conduct their long-term supply and demand planning and day-to-day transactions, specifically at the wholesale level. I do not address regulatory activities directed towards retail transactions or conservation measures, such as demand-side management and integrated resource planning. Although these regulatory activities are clearly related to the economic structure activities at wholesale which are the primary subject of my analysis, I exclude them from consideration here because, as a general matter, they fall outside of FERC's jurisdiction. For a general discussion of some of the state regulatory efforts directed towards conservation, see Daniel Yergin et al., *Caught in the Muddle: The Dilemma of Today's Electric Power Industry*, NAT. RESOURCES & ENV'T, Winter 1994, at 3 (noting conflicts between state regulation of conservation efforts and federal efficiency-driven restructuring efforts).

11. The FPA, the primary statute governing regulation of the electricity industry at the federal level, appears at 16 U.S.C. §§ 791a-825r (1988 & Supp. IV 1992).

experienced a very dynamic transformation, in part due to regulatory innovations developed in proceedings before FERC. In addition, Congress passed the Comprehensive National Energy Policy Act of 1992 (Energy Policy Act),¹² broadening significantly FERC's statutory authority to restructure the industry. Transformation of the electric utility industry, while still fledgling, is irreversible. These developments counter Pierce's apocalyptic prediction that courts' applications of the hard look doctrine will portend regulatory stalemate, but do lend some support to an attenuated version of the policy-effect thesis.

However, Part IV argues that even if a weak interpretation of the policy-effect thesis is empirically supportable, this alone should not lead us to constrict application of the hard look doctrine in the energy context. Pierce's account, like other policy-effect critiques, focuses on the narrow, intra-agency effects of judicial review, but ignores inter-institutional incentive effects, particularly impacts on legislative choice. Especially where an agency's decisionmaking authority is constrained by statute, it is appropriate for Congress to make policy choices extending jurisdiction, rather than allow the agency unfettered discretion to reformulate its direction as it sees fit. Judicial review, I argue, may have prompted congressional action on issues such as transmission access in the Energy Policy Act, and may similarly lead Congress to broaden FERC's jurisdiction in the future on issues such as retail transactions.

Perhaps more importantly though, many policy-effect critics, including Pierce, fail to adequately address normative arguments in favor of the hard look doctrine. While Pierce has presented a theory minimizing the judiciary's role in reviewing agency discretion,¹³ deliberative democratic theory provides a compelling normative argument in favor of judicial review as a protector of increased citizen participation and deliberative government. The affirmation of these normative values, I argue, comprises the core of the hard look doctrine. In many instances, including the context of electric utility industry restructuring, the hard look doctrine, properly applied, is a legitimate and fully warranted exercise of judicial authority.

Part V makes some recommendations for reform. The primary concern voiced by policy-effect critics of judicial review, such as Pierce, is agency failure to make law and policy by means of systematic

12. Pub. L. No. 102-486, 106 Stat. 2776 (1992).

13. Richard J. Pierce, Jr., *The Role of Constitutional and Political Theory in Administrative Law*, 64 TEX. L. REV. 469, 520 (1985) [hereinafter Pierce, *Political Theory*] (arguing that agencies should only be delegated discretion under heavy oversight from the President, and arguing that such oversight is the *only* solution to the problem of broad congressional delegation compatible with constitutional and political theory).

rulemaking, as opposed to ad hoc adjudication.¹⁴ Even if we can pinpoint judicial review as a significant cause of this regulatory problem, however, there is a way to solve it without curtailing the judiciary's role. One option is a default mechanism favoring rulemaking as a methodology for formulating law and policy. After rejecting this option, I explore reforms to adjudicative mechanisms. FERC's ability to make prospective policy choices of precedential effect in adjudicative proceedings may belie the rulemaking/adjudication distinction, canonical to administrative law. If this is so, I argue, conceptual and institutional reforms to adjudication, designed to increase agency accountability and deliberation, are the soundest route for reform. Statutory reforms or court-driven modifications to FERC's adjudicative mechanisms may enhance systematic policymaking, legitimacy, and accountability in a manner fully compatible with judicial review.

I. PIERCE'S ACCOUNT OF THE EFFECTS OF JUDICIAL REVIEW

After introducing the rulemaking/adjudication option available to most agencies making law and policy, this Part describes Pierce's account of the adverse effects of judicial review on FERC's policy choices. At his most general level, Pierce argues that the current attitude of federal courts toward reviewing FERC rules is bad for public policy. Drawing on the analysis in Pierce's article, I present two versions of the policy-effect thesis: one strong, the other weak. In its strongest form, the policy-effect thesis predicts that applying the hard look doctrine will paralyze FERC's efforts to restructure systematically the natural gas and electric utility industries. An attenuated version of the policy-effect thesis predicts that application of the hard look doctrine increases the costs to FERC of engaging in rulemaking and thus encourages the agency to shift its policymaking resources to adjudicative proceedings.

A. *The Rulemaking/Adjudication Distinction*

Before presenting in full Pierce's account and its implications, it is useful to lay out two distinctive methodologies available to agencies in formulating law and policy: rulemaking and adjudication. As defined in the Administrative Procedure Act (APA), a rule is a statement of general applicability and future effect that implements, interprets, or prescribes law or policy, or the organization, procedures, and standards for practice before an agency.¹⁵ Rules arise from formal or informal rulemaking

14. See *supra* notes 1-6 and accompanying text.

15. 5 U.S.C. § 551(4) (1988).

proceedings before the issuing administrative agency. Rules create law in the form of statements which are binding on those persons or entities to whom they are addressed, regardless of whether those persons or entities participated in the rulemaking proceeding which generated the rule. Rules bind the agency in future cases; however, in certain instances, and within limitation, they may be waived.¹⁶

An adjudicative order, on the other hand, is an agency statement of particular applicability determining the rights of, or applying law or policy to, specific individuals or entities on the basis of their special circumstances.¹⁷ Such orders generally arise as the result of an adjudicative proceeding involving persons who have asserted an interest sufficient to meet the agency's intervention standards.¹⁸ An individualized adjudicative proceeding, which often, but not always, involves a hearing, allows the agency to tailor application of its law or policy to the specific time, place, and context of persons affected. Such an order generally adopts principles or rules of law as necessary to solve the specific case before the agency. The impact of adjudicative orders, however, is often broader than the specific case at hand, as an order may serve as precedent in similar future cases.

As a general matter, agencies should adopt and elaborate principles of law and policy by rulemaking rather than by ad hoc adjudication.¹⁹ Because rules overlook the particularities of time, place, and context, they

16. See, e.g., Jim Rossi, *Making Policy Through the Waiver of Regulations at the Federal Energy Regulatory Commission*, 47 ADMIN. L. REV. (forthcoming Winter 1995).

17. It is a recurring theme in jurisprudence that rules cannot fully achieve justice. For example, Aristotle distinguished between "legal" justice, which is based on general rules, and "equity," which corrects the imperfections and injustices in legal rules. ARISTOTLE, NICHOMACHEAN ETHICS 166-68 (J.A.K. Thompson trans., 1953). Acts IV and V of Shakespeare's play *The Merchant of Venice* raise the theme of whether mercy should season justice, as equity would season legal rules. The character Portia (disguised as a male jurist) symbolizes mercy; her character is juxtaposed against Shylock, who stands for legal justice—the Rule of Law. This play and the tension between Portia and Shylock have generated much discussion among law and literature and feminist scholars. See, e.g., Symposium, *Merchant of Venice*, 5 CARDOZO STUD. L. & LITERATURE 1 (1993); Carrie Menkel-Meadow, *Portia Redux: Another Look at Gender Feminism and Legal Ethics*, in LEGAL ETHICS (Stephen Parker ed., forthcoming 1994); Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Woman's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39 (1985).

18. 5 U.S.C. § 551(6), (7) (1988).

19. See, e.g., Pierce, *Electricity Crisis*, *supra* note 6, at 11-13; Merton C. Bernstein, *The NLRB's Adjudication-Rulemaking Dilemma Under the Administrative Procedure Act*, 79 YALE L.J. 571 (1970); David L. Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921 (1965).

have the inherent values of predictability, stability, uniformity, and control. Yet, adjudication is skeptical about these very values. In addition to the inherent values of final rules, there are several reasons why rulemaking is preferable as a decisionmaking methodology.²⁰

First, as a matter of procedural fairness, a rulemaking proceeding allows all persons who might be affected by agency lawmaking the opportunity to participate.²¹ Adjudication, on the other hand, generally affords a right of participation only to those persons who meet the agency's intervention rules and are parties to an actual dispute.²² However, adjudicative orders can have the same precedential effect as rules.²³ Thus, persons ultimately affected by a particular adjudicative decision will often not have had the effective opportunity to participate in its formulation.

Second, rulemaking is a more democratic, and hence more legitimate, mechanism for making law and policy. The general public does not have a meaningful opportunity to evaluate and influence law or policy made on a case-by-case, precedential basis. Rulemaking is more quasi-legislative in nature than is an adjudicative proceeding; it is likely to be simpler for members of the general public to discern current agency law from rules than from case-by-case adjudication because decisional law is generally more voluminous, technical, and difficult to understand. In addition, case-by-case proceedings allow agencies to bypass formidable legislative and executive oversight mechanisms designed to ensure that

20. Of course, I am not suggesting that rulemaking should be favored in all instances. Adjudication has an inherent value in its particularism, which is antithetical to rulemaking. In many instances, particularism may be preferable to generic rules. For example, where due process considerations demand individualized determinations, agencies should be required to proceed by adjudication rather than rulemaking. See, e.g., *Londoner v. City & County of Denver*, 210 U.S. 373, 385-86 (1908) (requiring adjudication because a small number of persons were exceptionally affected, in each case upon individualized grounds); see also *Mobil Oil Corp. v. FPC*, 483 F.2d 1238 (D.C. Cir. 1973), in which the D.C. Circuit required the Federal Power Commission, FERC's predecessor, to render decisions through adjudicative procedures in order to "realistically tailor the proceedings to fit the issues before it, the formation it needs to illuminate those issues and the manner of presentation." *Id.* at 1252 (quoting *City of Chicago v. FPC*, 458 F.2d 731, 744 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 1074 (1972)).

21. See 5 U.S.C. § 553 (1988) (formal rulemaking); 5 U.S.C. §§ 556, 557 (1988) (formal adjudication).

22. 5 U.S.C. § 554(c) (1988) (limiting participation to "interested parties"). FERC's application of a strict intervention standard in precedent-setting adjudicative proceedings is discussed *infra* note 300.

23. The precedential effect of case-by-case decisionmaking at FERC is discussed further *infra* part III.

agency lawmaking is not inconsistent with the will of the community at large.²⁴

Third, rulemaking is generally a more efficient mechanism for making law and policy than adjudication. Lawmaking by adjudication requires litigation before the agency in a series of highly fact-specific cases, whereas a single rule may settle policy questions across multiple case-specific scenarios. Fact-specific litigation as a decisionmaking mechanism places a serious burden on an agency's scarce resources. For example, adjudicative proceedings before FERC sometimes have required a decade or more to complete, after which time the record is often "stale" or the important policy issues are moot.²⁵ Lawmaking by rule is also more efficient than lawmaking by adjudication because it allows agencies to focus on a few proceedings raising major policy issues, rather than spread their resources and attention thinly over large numbers of cases which raise a combination of major and minor policy issues.²⁶

Thus, rulemaking is generally preferable to ad hoc adjudication because it contributes to procedural fairness, democratic legitimacy, and efficiency. However, despite the strong preference of most administrative law commentators for rulemaking over adjudication, under existing law there is no judicial mechanism for requiring federal agencies to make law by rule rather than by ad hoc adjudication. In *SEC v. Chenery Corp.*,²⁷ the United States Supreme Court refused to require the Securities and Exchange Commission to issue a prospective rule prior to determining that certain corporate insiders could not profit from trading in the stock of their corporation while it was being reorganized. The Court stressed that there was a clear place for lawmaking on a case-by-case basis: "[T]he choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the

24. *Pierce, Electricity Crisis*, *supra* note 6, at 12 (noting that ad hoc adjudication permits agencies to avoid the high costs of publicly visible policy-making).

25. *Id.* at 12-13.

26. *Bernstein, supra* note 19, at 590-92 ("The principal advantage of rule making is that it provides a clear articulation of broad agency policy. By contrast, the entire array of [an agency's] adjudicative decisions on a subject often gives a diffuse, overly subtle mosaic of current [agency] doctrine."). For similar reasons, rulemaking has a general advantage over adjudication for regulatory counsel representing small clients. Smaller clients are unwilling to invest their scarce resources on interventions in scattered adjudicative proceedings because it is extremely expensive to have an impact on such proceedings, assuming the agency is willing to entertain interventions in the first place. Rulemaking proceedings, on the other hand, provide counsel with broader, more compelling policy reasons to formulate client groups. As they are more highly publicized and visible, it is simpler for counsel to inspire client interest.

27. 332 U.S. 194 (1947).

administrative agency.”²⁸ To require rulemaking, the Court reasoned, would “stultify” the administrative process and would “exalt form over necessity.”²⁹ A majority of the Court has since insisted that if agencies desire to issue rules of future effect and general applicability they must use rulemaking proceedings;³⁰ however, as a principle of positive law, *Chenery’s* basic principle remains unmodified—the choice of a methodology for making and elaborating law or policy will not be imposed by the federal courts.

B. Judicial Review of FERC’s Natural Gas Restructuring Rulemakings

In the Natural Gas Policy Act (NGPA),³¹ enacted in 1978, Congress established a complicated framework for the partial decontrol of natural gas at the wellhead, giving FERC a clear directive to implement a competitive market structure in the natural gas industry.³² Following this unambiguous directive, FERC promulgated a series of rules to clarify and implement the NGPA. Within two years of the NGPA’s passage, the industry faced a relatively clear and comprehensive set of rules. Reviewing courts affirmed most of these rules,³³ Pierce observes, because of “the high degree of deference courts accord an agency’s initial

28. *Id.* at 203.

29. *Id.* at 202.

30. *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 765-66 (1969) (plurality opinion); *id.* at 775 (Douglas, J., dissenting); *id.* at 780 (Harlan, J., dissenting).

31. 15 U.S.C. §§ 3301-3432 (1988 & Supp. IV 1992).

32. The framework was implemented by a series of regulatory changes. First, federal wellhead price controls were to be extended to all gas production, and natural gas transportation between interstate and intrastate markets was authorized. This eliminated the dual markets for interstate and intrastate natural gas, originally established in the Natural Gas Act. Second, statutory ceiling prices for all categories of gas production were established in lieu of rates determined just and reasonable by the Federal Power Commission. The ceiling prices for certain categories of gas production were set at levels intended to provide an incentive for developing new sources of supply. Third, approximately one-half of the nation’s natural gas supply was scheduled to be deregulated in a series of steps between 1979 and 1987. The elimination of the dual market, the establishment of incentive ceiling prices for certain categories of gas production, and the expectations which accompanied the plan for phased wellhead decontrol created strong incentives for increased natural gas production. These incentives, coupled with the NGPA’s demand-saving regulations and decreases in consumption brought about by the recession of the early 1980s, transformed the natural gas market from a condition of shortage to excess supply. For a discussion of these statutory-driven changes, see generally Charles G. Stalon & Reinier H.J.H. Lock, *State-Federal Relations in the Economic Regulation of Energy*, 7 YALE J. ON REG. 427, 477-78 (1990); Donald F. Santa, Jr. & Patricia J. Bencke, *Federal Natural Gas Policy and the Energy Policy Act of 1992*, 14 ENERGY L.J. 1, 5-6 (1993).

33. See, e.g., *ECEE, Inc. v. FERC*, 645 F.2d 339 (5th Cir. 1981).

interpretations of a recently enacted statute.”³⁴ Following this initial rulemaking activity, and blessed with an unprecedented surplus of deliverable gas in the industry,³⁵ FERC issued several rules intended to restructure the natural gas industry so as to make it competitive, including FERC Order Nos. 380,³⁶ 436,³⁷ and 500.³⁸

In reviewing FERC’s restructuring rules, appellate courts have applied the hard look doctrine, first endorsed by the Supreme Court in *Motor Vehicle Manufacturers Ass’n v. State Farm Mutual Automobile Insurance Co.*³⁹ Courts applying the hard look doctrine examine the basis for an agency’s decision in order to determine whether the agency engaged in reasoned decisionmaking by taking a “hard look” at the salient problems. The *State Farm* Court said a rule

would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.⁴⁰

When courts apply this doctrine, they generally examine an agency’s decision to determine whether the agency has explained the basis for its rule, whether the agency’s decision is consistent with substantive law. If, in adopting a final policy choice, the agency failed to consider relevant alternatives or based its decision on factors Congress did not intend it to have considered, the court will reverse the agency’s decision and remand to the agency for further explanation.

34. *Pierce, Electricity Crisis*, *supra* note 6, at 14.

35. Robert J. Michaels, *The New Age of Natural Gas: How the Regulators Brought Competition*, REGULATION, Winter 1993, at 68, 69.

36. Elimination of Variable Costs from Certain Natural Gas Pipeline Minimum Commodity Bill Provisions, 49 Fed. Reg. 22,778 (1984) (codified at 18 C.F.R. § 154).

37. Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, 50 Fed. Reg. 42,408 (1985) (codified as amended at 18 C.F.R. §§ 2, 157, 250, 284, 375, 381).

38. Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, 52 Fed. Reg. 30,334 (1987) (codified as amended at 18 C.F.R. §§ 2, 284).

39. 463 U.S. 29 (1983). The doctrine was originally enunciated by the D.C. Circuit in *Greater Boston Television Corp. v. FCC*, 444 F.2d 841 (D.C. Cir. 1970) (taking a “searching and careful” review of the basis for the agency’s decision in order to ensure that the agency has engaged in reasoned decisionmaking), *cert. denied*, 403 U.S. 23 (1971).

40. 463 U.S. at 43.

FERC's restructuring rulemakings in the natural gas context initially fared well under appellate court applications of the hard look doctrine. The District of Columbia Circuit affirmed FERC Order No. 380 in *Wisconsin Gas Co. v. FERC*.⁴¹ In a pair of 1985 opinions, the District of Columbia Circuit urged FERC to adopt a previously proposed agency policy—the provision of consumer access to pipeline transportation of gas available from alternative suppliers.⁴² FERC responded to these decisions by issuing Order No. 436, which contained a de facto requirement that pipelines provide equal access to their facilities, thus exposing them to competition in the wholesale natural gas market. In *Associated Gas Distributors v. FERC (AGD)*,⁴³ the District of Columbia Circuit held that FERC had the power to coerce pipelines into accepting equal access to create a competitive market designed to yield “just and reasonable” wholesale gas prices. However, the *AGD* court remanded Order No. 436 to FERC on the basis that FERC had not adequately considered the potential transition effects of its new policy.⁴⁴

FERC responded with Order No. 500, an elaborate new plan to allocate the costs of the transition to its new market-based policy. Order No. 500 conditioned producer access to a pipeline system on the producer's willingness to allow the pipeline to credit one unit of contractual purchase obligation for each unit of gas the pipeline transported on behalf of that producer, one of the reallocation methods mentioned by the *AGD* court. However, in *American Gas Ass'n v. FERC (AGA)*,⁴⁵ the District of Columbia Circuit reversed Order No. 500 on two grounds, one substantive and the other procedural. First, the court held that FERC did not, as required by *AGD*, “reassess its refusal to act [against uneconomic contracts] under § 5 [of the Natural Gas Act]” or explain “its reasons for inaction . . . clearly enough for us to determine the legality of its analysis.”⁴⁶ Secondly, the court noted, FERC had failed to adequately consider the alternatives when it chose to rely on cross-contract crediting, rather than on an alternative regulatory measure, in its attempt to allocate a higher proportion of transition costs to gas producers.⁴⁷

41. 770 F.2d 1144 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1114 (1986).

42. *Maryland People's Counsel v. FERC*, 761 F.2d 780 (D.C. Cir. 1985); *Maryland People's Counsel v. FERC*, 761 F.2d 768 (D.C. Cir. 1985).

43. 824 F.2d 981 (D.C. Cir. 1987) [hereinafter *AGD*].

44. *Id.* at 1028-30.

45. 888 F.2d 136 (D.C. Cir. 1989), *cert. denied*, 498 U.S. 952 (1990) [hereinafter *AGA*].

46. *Id.* at 147 (citing *AGD*, 824 F.2d at 1028).

47. *Id.* at 142-48.

AGA is a misapplication of the hard look doctrine, Pierce argues, because FERC *had* considered an alternative to its final policy choice—modifying the terms of price or quantity in jurisdictional contracts.⁴⁸ The District of Columbia Circuit found FERC's consideration of this alternative, without an explanation that contained a reasoned discussion of other alternatives, insufficient. In a later case, the District of Columbia Circuit ultimately affirmed Order No. 500.⁴⁹

Because of appellate court application of the hard look doctrine in *AGA* and other cases reversing FERC restructuring rules,⁵⁰ Pierce's article predicts that "FERC will not complete the process of transition to a market-based regulatory regime in the gas industry."⁵¹ But events following publication of Pierce's article render this prediction incorrect: in 1992, FERC issued Order No. 636, which was the final step necessary to create a truly competitive natural gas market.⁵² Thus, FERC's actual policy choices in the natural gas context seem to contradict Pierce's thesis, in both its strong and its weaker forms. To the extent, however, that Pierce is critical of judicial review for delaying final judgment as to the legality of FERC's regulations, his prediction may prove correct. If past cases are any indication, the industry and FERC are unlikely to have a non-appealable court decision on Order No. 636 for several years.

48. Pierce, *Electricity Crisis*, *supra* note 6, at 20.

49. American Gas Ass'n v. FERC, 912 F.2d 1496 (D.C. Cir. 1990), *cert. denied*, 498 U.S. 1094 (1991).

50. See, e.g., Associated Gas Distribs. v. FERC, 893 F.2d 349 (D.C. Cir. 1989) (reversing FERC's method of allocating transition costs from pipelines to distributors), *cert. denied sub nom.* Berkshire Gas Co. v. Associated Gas Distribs., 498 U.S. 907 (1990); Mobil Oil Exploration and Producing Southeast, Inc. v. FERC, 885 F.2d 209 (5th Cir. 1989) (reversing Order No. 451 on the basis that FERC did not adequately consider transition costs), *rev'd*, 498 U.S. 211 (1991); Consolidated Edison Co. v. FERC, 823 F.2d 630 (D.C. Cir. 1987) (reversing relaxation of barriers to market exit on the basis that FERC did not adequately consider the potential reallocation of transition costs).

51. Pierce, *Electricity Crisis*, *supra* note 6, at 19.

52. On April 8, 1992, FERC issued Order No. 636, which, according to FERC, "complete[d] the evolution to competition to the natural gas industry." 57 Fed. Reg. 13,268 (1992). Order No. 636 unbundled pipeline sales from transportation, required pipelines to provide no-notice transportation service to replace (and replicate) the traditional pipeline sale, mandated capacity brokering programs on all interstate pipelines, and allowed parties to make sales at negotiated rates. Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, 57 Fed. Reg. 13,267 (1992), *order on reh'g*, 57 Fed. Reg. 36,128 (1992), *order on reh'g*, 57 Fed. Reg. 57,911 (1992), *appeals filed*, Northern Ind. Pub. Serv. Co. v. FERC, No. 92-1342 (D.C. Cir. 1992), Atlanta Gas Light Co. & Chattanooga Gas Co. v. FERC, No. 92-8782 (D.C. Cir. 1992); see also Michaels, *supra* note 35.

C. *Pierce's Prediction of the Effects of Judicial Review on Electric Utility Industry Restructuring*

Pierce does not limit his critique of the hard look doctrine to FERC's restructuring rulemakings in the natural gas context. He also extends his critique to FERC's regulatory efforts to reform the competitive structure of the electric utility industry. The adequate consideration doctrine has been applied in cases like *AGA*, Pierce suggests, as "a pretext for rejecting any policy decision that displeases the reviewing judges."⁵³ Due to agency uncertainty of reviewing court expectations and higher anticipated probabilities of reversal, Pierce predicts that the adequate consideration doctrine, as applied in cases like *AGA*, will hamper competitive restructuring of the electric utility industry at FERC. Although reviewing court actions have not directly stopped FERC initiatives, according to Pierce their lack of hospitality to FERC's rulemaking efforts has demoralized and delegitimated the agency's policymaking process.⁵⁴ Judicial review has resulted in nothing more than a "battle among lawyers," casting FERC "awash in a sea of uncertainties."⁵⁵

Two versions of the policy-effect thesis emerge from Pierce's article. According to the stronger version of this thesis, the hard look doctrine as applied by lower courts destroys *any* incentives for FERC to develop a systematic regulatory structure which encourages investment in generating capacity sufficient to avoid an electricity shortage in the 1990s.⁵⁶ The strong version of the policy-effect thesis views judicial review as paralyzing. Pierce also at times invokes a weaker version of the policy-effect thesis—that reviewing courts' applications of the hard look doctrine may decrease FERC's tendency to resolve difficult policy issues through rulemaking and encourage FERC instead to engage in "unprincipled, ad hoc" adjudicative decisionmaking.⁵⁷ This weaker thesis views judicial

53. Pierce, *Electricity Crisis*, *supra* note 6, at 28.

54. According to Pierce:

Even when a major change in regulatory policy is desperately needed, urged on an agency by the courts, welcomed by Congress, and implemented in a manner that yields enormous improvements in the performance of a regulated market, FERC's experience has shown that an agency and its staff can be publicly labeled lawless and incompetent for making such a change.

Id. at 18.

55. *Id.* at 26 (citing Thomas O. McGarity, *Regulatory Analysis and Regulatory Reform*, 65 TEX. L. REV. 1243, 1290 (1987)).

56. *Id.* at 19; *see also id.* at 9 (stating that rulemaking is *necessary* to address the problem).

57. *Id.* at 27. Pierce notes that, even before the rise of the hard look doctrine in the 1970s, FERC opted to make its choices in adjudicative rather than rulemaking

review as delaying, hindering somewhat, and limiting—but not paralyzing—FERC-driven competitive reforms.

Pierce does not proffer any data in support of these theses; his evidence is, at best, anecdotal. Nevertheless, he warns us that if either thesis is correct, unencumbered judicial review will have apocalyptic consequences for consumers, utilities, and others in the electric utility industry: blackouts and brownouts will likely ensue.⁵⁸

In light—or, perhaps, in the potential darkness—of these “unintended” adverse effects, Pierce makes two suggestions for regulatory reform. First, he suggests that the Supreme Court set out doctrinal changes reducing the discretion of lower court judges to apply the adequate consideration doctrine. Second, he recommends that the federal courts of appeals change their internal procedures for reviewing agency policy decisions in ways that reduce the discretion of individual judges and three judge panels to send inconsistent messages to agencies.⁵⁹

Pierce’s second recommendation echoes suggestions similar to those made elsewhere in the literature.⁶⁰ It is not the primary topic of this Article. This Article focuses on Pierce’s first recommendation—that the Supreme Court pull in the reins on the discretion of lower courts to apply the hard look doctrine. As I will argue, we should be skeptical about this recommendation due to both descriptive and normative faults with the account of judicial review’s effects presented in Pierce’s article. His account is descriptively inaccurate because, as argued in Part II, it fails to take into account statutory constraints on FERC’s discretion and, at least with respect to his stronger thesis, his account does not “fit” FERC’s recent policy choices as described in Part III. Part IV presents a normative theory that, I argue, can redeem judicial review from some of Pierce’s criticisms. In Part V, I present some reforms designed to enhance the compatibility of judicial review with this normative theory.

proceedings: “By pretending to be a specialized court, ‘storing’ policy issues by referring them to ‘nigh-interminable’ adjudicatory hearings, and hiding policy issues under a mountain of idiosyncratic facts, FERC minimized its political risks.” *Id.* at 18.

58. *Id.* at 7.

59. *Id.* at 28-29.

60. Pierce suggests modeling such reforms on the Tax Court’s system of internal checks and balances. For an alternative, but similarly motivated, reform suggestion, see Harold H. Bruff, *Coordinating Judicial Review in Administrative Law*, 39 UCLA L. REV. 1193, 1247 (1992) (advocating a national panel which allocates en banc review to particular regional circuits, but noting whatever reforms are adopted “there is [a] special need for a coordinating institution in administrative law”).

II. THE CONSTRAINTS OF SUBSTANTIVE LAW

Pierce claims that the hard look doctrine, as applied by reviewing courts, is one cause of FERC's failure to restructure the electric utility industry towards competition. The hard look doctrine is a judicially-enunciated twist⁶¹ on two standards in the APA: (1) the requirement that an agency "incorporate in the rules adopted a concise general statement of their basis and purpose";⁶² and (2) the "arbitrary and capricious" review standard.⁶³ The purpose of the doctrine is to facilitate review of the reasonableness of an agency's exercise of discretion, *not* to ascertain whether agency action is consistent with the court's reading of governing substantive law. However, determining statutory constraints on an agency's discretion is an issue prior to, and doctrinally distinct from, reviewing the appropriateness of an agency's exercise of its discretion.⁶⁴ Thus, Pierce's general thesis regarding the effects of judicial review presupposes that FERC had the discretion, under governing substantive law within its jurisdiction, to comprehensively restructure the industry in competitive ways. However, as this Part shows, statutes constrained FERC's discretion to achieve substantial pro-competitive reforms for the electric utility industry at the time Pierce wrote his article.⁶⁵

A. *The Changing Structure of the Electric Utility Industry*

As an initial matter, some industry background is in order. Traditionally, most regulators considered the electric utility industry a

61. The doctrine was first endorsed by the Supreme Court in *State Farm*, discussed *supra* notes 39-40 and accompanying text.

62. 5 U.S.C. § 553(c) (1988). The legislative history of § 553 suggests that Congress intended to require more than a purely formal and routine explanatory burden on agencies. See S. DOC. NO. 248, 79th Cong., 2d Sess. 201 (1946) ("The agency must analyze and consider all relevant matter presented. The required statement of the basis and purpose of rules issued should not only relate to the data so presented but with reasonable fullness explain the actual basis and objectives of the rule."); *id.* at 20 ("The statement of the 'basis and purpose' of rules issued will vary with the rule, but in any case should be fully explanatory of the complete factual and legal basis as well as the real object or objects sought.").

63. 5 U.S.C. § 706(2)(A) (1988).

64. See *infra* notes 102-22 and accompanying text.

65. Pierce is not the only commentator who has ignored statutory constraints in examining agency decisionmaking. For a similar critique of studies of the International Trade Commission informed by public choice theory, see Keith B. Anderson, *Agency Discretion or Statutory Direction: Decision Making at the U.S. International Trade Commission*, 36 J. L. & ECON. 915, 915 (1993) (noting others' "failure to consider the extent to which agency decisions are based on the statutory requirements under which the agency operates").

paradigmatic natural monopoly. The electricity rate for customers within a utility's government-defined franchise area was regulated on a cost-of-service basis. States implemented such regulation at the retail level. At the wholesale level, FERC exercised its jurisdiction over sales of power for resale under the FPA.⁶⁶ Traditional utilities, most of which are investor-owned and operate pursuant to local monopoly franchises, occupied the dominant market position under this regulatory paradigm.⁶⁷

Recent technological innovations and realized economic efficiencies, coupled with the deregulatory climate of the 1980s,⁶⁸ have led many to rethink this regulatory paradigm. Although there is disagreement over the details of restructuring the industry, today there is a strong consensus that the industry can be separated into (at least) two types of markets: a market for bulk power (or wholesale electric generation) and a market for transmission services. Most commentators, including Pierce, believe that while bulk power markets are characterized by competitive conditions and should be "deregulated" to allow market forces and competition to work, transmission services remain a natural monopoly, and should be regulated to provide "open access" to the power grid on competitive terms and conditions.⁶⁹ Thus, to be effective, regulatory reform must focus on two

66. FERC's jurisdiction under Part II of the FPA, which regulates the activities of electric utilities engaged in interstate commerce, is limited to sales "at wholesale in interstate commerce." 16 U.S.C. § 824(a) (1988). Regulation of retail transactions is generally reserved to the states, unless otherwise noted by Congress.

67. Approximately 75% of U.S. electric consumers are served by private, profit-making electric companies. Public power systems—utilities owned by the taxpayers of a city, county, or other public area—serve approximately 15% of all consumers. The remaining 10% of consumers are served by about 1,000 rural electric cooperatives, non-profit entities owned and managed by their users. See AMERICAN PUBLIC POWER ASSOCIATION, PUBLIC POWER FACTS (1992).

68. The deregulation movement has focused primarily on structurally competitive industries, such as airlines, railroads, buses, cable television, oil, and natural gas. In most of these cases, unlike the electric utility industry, the original justification for regulation was not natural monopoly. For general background, see ALFRED E. KAHN, THE ECONOMICS OF REGULATION, at xv-xvii (1988). On the adverse societal effects of deregulation, see Theodore P. Harris, *The Disaster of Deregulation*, 20 TRANSP. L.J. 87 (1991); Paul S. Dempsey, *The Dark Side of Deregulation: Its Impact on Small Communities*, 39 ADMIN. L. REV. 445 (1987).

69. See, e.g., Richard J. Pierce, Jr., *A Proposal to Deregulate the Market for Bulk Power*, 72 VA. L. REV. 1183 (1986) [hereinafter Pierce, *Deregulate*]. The most comprehensive summary of these issues from an economic perspective is PAUL L. JOSKOW & RICHARD SCHMALENSEE, MARKETS FOR POWER: AN ANALYSIS OF ELECTRIC UTILITY DEREGULATION (1983). Recent changes in transmission service technologies, if made available at economic costs, could lead to more competitive transmission services as well. Mathew L. Wald, *Smoothing the Flow of Electricity in Bulk*, N.Y. TIMES, May 10, 1992, at F12. However, because of its network nature, transmission may continue to require some sort of regulation to ensure access, reliability and efficiency.

key issues: (1) "deregulation" of bulk power generation⁷⁰ and (2) modification of transmission regulation to provide "open access" on competitive terms and conditions.

With respect to both of these issues, however, FERC lacked discretion to achieve competitive reforms until Congress passed the Energy Policy Act in late 1992. Prior to this time, FERC did not have the clear and comprehensive authority to level the competitive playing field in bulk power markets, or to require "open access" to the power grid.

B. Statutory Constraints on FERC's Discretion to Increase Competition in Bulk Power Generation

The first regulatory attempt to interject competition into bulk power markets was the Public Utility Regulatory Policies Act of 1978 (PURPA),⁷¹ passed by Congress in reaction to the energy crisis of the early 1970s. PURPA's primary purposes were to encourage the conservation of electric energy, to protect customers, and to increase efficiency in the use of transmission and generation. Unlike the NGPA, which gave FERC a clear directive to restructure the natural gas industry and encourage competition, PURPA did not give FERC carte blanche to introduce competition to all sectors of the electric utility industry.⁷²

70. "Deregulation" is probably too strong a word to describe the desirable nature of regulatory reform in the electric utility industry. There is disagreement concerning the appropriate level of deregulation and privatization of bulk power generation. In a thoughtful analysis, the economist Carl Pechman has recently argued that the *role* of regulation, not its degree, needs to adapt to facilitate information exchange and eliminate informational abuse by utilities. CARL PECHMAN, *REGULATING POWER: THE ECONOMICS OF ELECTRICITY IN THE INFORMATION AGE* (1993); see also KENNETH E. TRAIN, *OPTIMAL REGULATION: THE ECONOMIC THEORY OF NATURAL MONOPOLY* (1991) (arguing for a prudential mix between regulation and deference to market forces); Douglas Gegax & Kenneth Nowotny, *Competition and the Electric Utility Industry: An Evaluation*, 10 *YALE J. ON REG.* 63 (1993) (arguing that, although there are clearly problems with regulation of the electricity industry, deregulation is not the answer). Similarly, Professor Susan Rose-Ackerman has noted that deregulation with respect to one issue can lead to regulation with respect to other issues. SUSAN ROSE-ACKERMAN, *RETHINKING THE PROGRESSIVE AGENDA: THE REFORM OF THE AMERICAN REGULATORY STATE* 153 (1992). Therefore, with a few exceptions, I generally describe what are commonly referred to as "deregulatory" efforts in bulk power generation markets—efforts more akin to incentive regulation to equalize or improve competition than pure deregulation—under the rubric of "restructuring."

71. Pub. L. No. 95-617, 92 Stat. 3117 (codified as amended at 16 U.S.C. §§ 824a-1 to a-3, 824i-k, 2601-2645, and scattered sections of 16 and 42 U.S.C.).

72. See 16 U.S.C. § 2601 (1988) (PURPA's preamble, noting purposes of increased conservation and increased efficiency, but not directing FERC to increase

Incident to its goals of promoting conservation and increasing efficiency, PURPA did contain several pro-competitive reforms. Most notably, PURPA created regulatory benefits for a type of non-utility generator (NUG) which could compete with traditional utilities—the qualifying facility (QF) which meets certain size, engineering, fuel use, and ownership criteria.⁷³ Since PURPA's passage, QFs have interjected an element of supply competition into bulk power markets.

However, by the mid-1980s, limited incentives for QFs in PURPA had created two types of inefficiencies. First, it was difficult for any entity but an industrial generator (which could show a useful purpose for the steam byproduct of the cogeneration process) or a very small generator (also known as a "small power production" facility) to meet PURPA's strict size, engineering, fuel use, and ownership criteria for QFs. Some industrial suppliers continued to ensure a beneficial regulatory structure by building inefficient generators known as "PURPA machines"—power-plants which supply only enough thermal energy to ensure minimum qualification under PURPA's rules.⁷⁴ PURPA QFs, in many instances, imposed unnecessary costs on consumers because entities had structured their projects to maintain exemptions from regulation and, in some instances, sought inefficient steam hosts to maintain QF status.⁷⁵ Further, the ability of QFs alone to even the competitive playing field in bulk power markets were generally limited to states with booming economies and large industrial bases.⁷⁶

competition or deregulate rates); *see also infra* notes 99-101 (discussing continuing contrasts between the electric and natural gas statutory frameworks).

73. These criteria, as promulgated by FERC, appear at 18 C.F.R. §§ 292.201-.206 (1993).

74. Lynne C. Capehart & Barney L. Capehart, *Efficiency Trends for Industrial Cogeneration*, PUB. UTIL. FORT., Apr. 1, 1991, at 28.

75. *See, e.g., id.*; Richard S. Rosenzweig, *The Energy Policy Act of 1992*, PUB. UTILS. FORT., Jan. 1, 1993, at 14; *see also National Energy Strategy (Pt. 4): Hearings Before the Subcomm. on Energy and Power of the House Comm. on Energy and Commerce*, 102d Cong., 1st Sess. 8, 10 (1991) [hereinafter *Hearings*] (prepared statement of Linda J. Stuntz, Deputy Under Secretary, U.S. Dep't of Energy) (noting "some parties have asserted that the bulk of the low-cost potential for QF development has already been tapped . . ."); *id.* at 17, 37 (statement of Cynthia A. Marlette, Associate General Counsel, Hydroelectric and Electric Power, FERC) ("[T]echnology and fuel use restrictions under PURPA limit the amount and type of capacity that could qualify for [QF status]. The potential for QF capacity is also limited by the growing scarcity of steam hosts for cogeneration."). *But see* Peter S. Fox-Penner, *Cogeneration After PURPA: Energy Conservation and Industry Structure*, 33 J.L. & ECON. 517, 546 (1990) ("[N]o analysis has yet quantified the impacts of PURPA on consumer prices, the quality of service, and structural change.").

76. *See Hearings, supra* note 75, at 9 (prepared statement of Linda J. Stuntz, Deputy Under Secretary, U.S. Dep't of Energy) (noting that most QF development has

Second, although FERC had limited authority to lighten the degree of its regulation of some non-QF NUGs,⁷⁷ until 1992 FERC lacked broad discretion to level competition in bulk power markets, especially with respect to non-QF NUGs subject to costly Securities and Exchange Commission (SEC) jurisdiction under the Public Utility Holding Company Act of 1935 (PUHCA).⁷⁸ NUG power developers ineligible for QF status under PURPA were forced to utilize convoluted and expensive corporate structures, often referred to as "PUHCA pretzels," to avoid the burdensome regulation of PUHCA.

In the Energy Policy Act, Congress attempted to obviate these inefficiencies by creating a class of PUHCA-exempt wholesale generators which could be leased or wholly owned by utilities.⁷⁹ Prior to passage of the Energy Policy Act, FERC did not have the statutory authority to establish, through rulemaking or adjudication, a comprehensive set of incentives for NUGs to compete with traditional public utilities in the provision of bulk power supply.⁸⁰

been limited to 15 states).

77. FERC's application of light-handed regulation in adjudicative proceedings is discussed further below.

78. 15 U.S.C. §§ 79 to 79z-6 (1988). Prior to 1992, the SEC, under PUHCA, regulated entities exclusively in the business of owning or operating facilities used to generate power for sale exclusively at wholesale or facilities leased to a public utility. PUHCA was originally passed in response to popular sentiments that the unbridled growth of utility holding companies had "given tyrannical power and exclusive opportunity to a favored few." Message from the President of the U.S., H.R. DOC. NO. 137, 74th Cong., 1st Sess. 2 (1935). President Roosevelt described the holding company empire of 1935 as a "none too benevolent private paternalism." *Id.* PUHCA's regulatory scheme was not unwarranted at the time. In the early 1930s, 15 holding companies controlled 80% of interstate transmission of electricity. Holding companies, built from pyramids of security issues, deceived public investors of utility stock and overcharged consumers. "The unknowing investor could purchase what were ostensibly shares in a public utility but which were in fact shares in a subsidiary that existed on paper alone. The accumulation of capital and subsidiaries under the name of one parent company created an oligopoly in the provision of electricity and, as a result, high rates for consumers." ANNE M. KHADEMIAN, *THE SEC AND CAPITAL MARKET REGULATION: THE POLITICS OF EXPERTISE* 46-47 (1992).

79. Energy Policy Act § 711, 15 U.S.C. § 79z-5a(e) (Supp. IV 1992). The idea of PUHCA reform originated in the early 1980s, when the Reagan administration proposed the complete repeal of PUHCA. See U.S. SECURITIES AND EXCHANGE COMM'N, STATEMENT CONCERNING PROPOSALS TO AMEND OR REPEAL THE PUBLIC UTILITY HOLDING COMPANY ACT OF 1935 (1982).

80. FERC's authority to comprehensively "deregulate" NUGs remains imperfect because, at the state level, most public utility commissions heavily regulate the siting and retail sales of NUGs.

C. Statutory Constraints on FERC's Discretion to Require "Open Access"

Competition in bulk power supply is also not achievable absent open access to the power grid on competitive terms and conditions. Yet, prior to late 1992, FERC lacked the statutory authority to provide comprehensive "open access" for wholesale transmission markets through rulemaking or adjudication. If competition is to thrive in bulk power markets, NUGs and consumers must have access to the essential transmission facilities which are owned and operated exclusively by utilities.⁸¹

FERC's ability to implement "open access" was severely limited by Section 211(c)(1) of the FPA, which barred FERC from requiring wholesale wheeling service "unless the Commission determined that such order would reasonably preserve existing competitive relationships."⁸² The Second Circuit held that section 211 clearly indicated that wheeling cannot be ordered solely on the basis of the public interest and the enhancement of competition.⁸³ In addition, the Fifth Circuit rebuked an effort by FERC to foster competition through mandatory wheeling, noting that although FERC's goal was "laudable," the agency "is without authority under the FPA to compel wheeling."⁸⁴ Following these decisions, FERC itself interpreted section 211 to "prohibit[] the issuance of wheeling orders that have a significant procompetitive effect."⁸⁵

81. Pierce has argued that competition in bulk power markets cannot thrive absent access to the power grid on competitive terms and conditions. *Pierce, Deregulate, supra* note 69, at 1215-18 ("Every scholar who has analyzed the structure and performance of the electricity industry has concluded that effective competition cannot exist in the bulk power market without mandatory equal access to transmission facilities.").

82. 16 U.S.C. § 824j(c) (1988 & Supp. IV 1992). This section was added to the FPA by PURPA and was amended by the Energy Policy Act.

83. *New York Elec. & Gas Corp. v. FERC*, 638 F.2d 388, 402 (2d Cir. 1980) ("[I]t is clear from the express requirements of §§ 211 and 212 that the public interest and the enhancement of competition are not alone sufficient justification for compelling wheeling."), *cert. denied*, 454 U.S. 821 (1981).

84. *Florida Power & Light Co. v. FERC*, 660 F.2d 668, 677-79 (5th Cir. 1981) (reversing FERC order compelling utility to file amended tariff schedule for interchange transmission service on the basis that the order would impermissibly impose common carrier status on utility), *cert. denied*, 459 U.S. 1156 (1983).

85. *Southeastern Power Admin.*, 26 F.E.R.C. ¶ 61,127, at 61,323 (1984). This interpretation limited FERC's wheeling power to address fuel shortage situations or to promote coordination of electricity among utilities. *Southeastern Power Admin.*, 25 F.E.R.C. ¶ 61,204, at 61,539 (1983).

Subsequently, FERC did not issue a single order requiring pro-competitive wheeling.⁸⁶

In 1991 hearings before the House Subcommittee on Energy and Power, FERC witnesses spoke in favor of legislative clarification and expansion of FERC's wheeling authority.⁸⁷ Responding to FERC's "lack of clear authority" under the FPA to require utilities to transmit power for others, Congress amended the FPA to require FERC to order wheeling upon petition, where it "is in the public interest, maintains system reliability, and serves one or more additional goals—including the promotion of wholesale competition, conservation, efficiency, and the prevention of discriminatory practices."⁸⁸ The Energy Policy Act broadened section 211 significantly, allowing FERC to grant pro-competitive wholesale wheeling requests which satisfy the traditional public interest standard of the FPA and additional procedural requirements.⁸⁹

D. The Role of the FPA in Constraining FERC's Discretion

In 1988, FERC commenced a series of rulemakings in the electricity context which addressed competitive bidding,⁹⁰ independent power producers,⁹¹ and avoided cost determinations.⁹² Pierce's article

86. Pierce has argued that FERC has the authority to mandate open access under §§ 205 and 206 of the FPA, which contain the "just and reasonable" rate standard. Richard J. Pierce, Jr., *Who Will Mandate Open Access to Transmission: FERC or the Courts?*, PUB. UTIL. FORT., Mar. 29, 1990, at 28. Pierce's reading of the FPA is based on the premise that FERC has a comparative advantage in making sound policy in this area and the general interpretive principle that the FPA should be read *in pari materia* with the NGA, which also contains a "just and reasonable" standard. What this argument ignores is that the NGA contains no analog to §§ 211 and 212 of the FPA, which prior to passage of the Energy Policy Act had been interpreted by courts to effectively preclude FERC's mandatory provision of open access. In recent remarks, Pierce has acknowledged significant jurisdictional differences between the natural gas and electricity contexts over issues such as retail wheeling, transmission service and conditions, and the construction and expansion of transmission lines. Dennis Wamsted, *Electricity Transmission to Be Difficult, Painful, Complicated and Unpredictable—Pierce*, THE ENERGY DAILY, May 20, 1994.

87. H. R. REP. NO. 474, 102d Cong., 2d Sess., pt. 1, at 139 (1992).

88. *Id.* at 139-40. "The bill balances the clarification of FERC's transmission authority by recognizing state and local jurisdiction over siting and environmental decisions, and by prohibiting FERC from forcing utilities to engage in 'retail wheeling,' the transmission of power directly to a retail customer." *Id.* at 140.

89. Energy Policy Act § 721, 16 U.S.C. § 824 (Supp. IV 1992).

90. Regulations Governing Bidding Programs, 53 Fed. Reg. 9324 (1988) (to be codified at 18 C.F.R. §§ 35, 293).

91. Regulations Governing Independent Power Producers, 53 Fed. Reg. 9327 (1988) (to be codified at 18 C.F.R. §§ 38, 382).

correctly predicts that FERC would not complete these rulemakings: in September 1993, FERC finally put the nail in the coffin of the first two of these three rulemakings, although it left the third on its agenda for consideration at some future time.⁹³ Among the reasons FERC gave for abandoning these rulemakings were: 1) passage of the Energy Policy Act and its statutory reforms addressing some of the issues raised in the proposed rulemakings; 2) the remarkable growth of the independent power production industry since 1988; 3) the establishment of market-based pricing on a case-by-case basis; and 4) the growth of state competitive bidding programs from only a few in 1988 to over thirty in 1993.⁹⁴ There is no evidence that FERC abandoned these rulemakings because of appellate courts' application of the hard look doctrine, as Pierce's account suggests. In any event, Pierce concedes that had these rules alone been promulgated, they would have constituted an "imperfect" attempt at regulatory reform.⁹⁵

Pierce clearly has much more comprehensive restructuring of the industry in mind. For example, he states that FERC is the only government institution "in a position to create a new regulatory structure conducive to adequate investment in generating capacity."⁹⁶ Pierce goes on to compare FERC's authority to achieve reform as equal in breadth to Congress'.⁹⁷ And in his most passionate plea for reform, he analogizes FERC's task to Mikhail Gorbachev's efforts to implement perestroika.⁹⁸ However, statutory constraints on FERC's ability to introduce competition into bulk power markets prior to 1992 precluded such radical reform.

Even after passage of the Energy Policy Act, FERC's jurisdiction to achieve competitive reforms in the electric utility context remains imperfect. First, while Congress expanded FERC's authority to mandate wholesale transmission access, it expressly denied FERC the power to require access for retail customers.⁹⁹ Retail access was important to FERC's policies in making the transition to a competitive structure in the natural gas industry. FERC had exercised the power to authorize interstate pipelines to bypass local distribution companies to provide

92. Administrative Determination of Full Avoided Costs, Sales of Power to Qualifying Facilities, and Interconnection Facilities, 53 Fed. Reg. 9331 (1988) (to be codified at 18 C.F.R. § 292).

93. See Order Terminating Proceedings, 64 F.E.R.C. ¶ 61,364 (1993).

94. *Id.* at 63,491.

95. Pierce, *Electricity Crisis*, *supra* note 6, at 9.

96. *Id.* at 8.

97. *Id.*

98. *Id.* at 10.

99. Energy Policy Act § 722(h), adding 16 U.S.C. § 824k(h) (Supp. IV 1992).

access for retail end-users, primarily industrial customers.¹⁰⁰ Second, the FPA's bright-line jurisdictional split between wholesale and retail transactions, which has no parallel in the natural gas context, makes it difficult, if not impossible, for FERC alone to allocate the costs of transmission service among customer classes. Third, FERC lacks jurisdiction to authorize construction and expansion of transmission lines. Decisions to build or expand electricity transmission lines remain at the state and local level. By contrast, FERC has jurisdiction to authorize construction and expansion of gas pipelines. This jurisdiction preempts state environmental and statutory laws.¹⁰¹

Given these statutory constraints, it would be fanciful to expect FERC to embark on much more systematic or comprehensive rulemaking than the series it promulgated in 1988. Whether FERC had discretion to restructure the electric utility industry is a question logically prior to and doctrinally distinct from the issue of whether FERC's policy choices were appropriate exercises of its discretion.¹⁰² If FERC had interpreted its authority under the FPA more broadly, to allow comprehensive competitive reforms of the industry through rulemaking, courts would not have been obligated to defer entirely to FERC's statutory interpretation. Complete deference to FERC's interpretation of its own discretion under the FPA would be an abdication of federal courts' responsibility to contribute to the definition of agency discretion.

In *Chevron U.S.A. v. NRDC*,¹⁰³ the United States Supreme Court set forth a deferential approach to agency interpretations of law. After *Chevron*, courts are to apply a two-step analysis when reviewing agency interpretations of law: first, they are to examine whether Congress spoke "precisely" to the statutory issue in question; and second, they are to determine whether or not Congress' intent on that issue was "unambiguously" clear.¹⁰⁴ If the statute is silent or ambiguous with

100. See, e.g., *Cascade Natural Gas Corp. v. FERC*, 955 F.2d 1412 (10th Cir. 1992). Order No. 436 foreshadowed the availability of retail bypass at FERC. 50 Fed. Reg. at 42,468.

101. See *Louisiana Ass'n of Independent Producers & Royal Owners v. FERC*, 958 F.2d 1101 (D.C. Cir. 1992).

102. Perhaps this distinction depends upon whether one believes, as Wittgenstein did, that there is a way of understanding rules which is not an interpretation imposed by the listener. For a thoughtful discussion of this issue, see the recent exchange between Dennis Patterson and Stanley Fish. Dennis Patterson, *The Poverty of Interpretive Universalism: Toward the Reconstruction of Legal Theory*, 72 TEX. L. REV. 1 (1993); Stanley Fish, *How Come You Do Me Like You Do? A Response to Dennis Patterson*, 72 TEX. L. REV. 57 (1993); Dennis Patterson, *You Made Me Do It: My Reply to Stanley Fish*, 72 TEX. L. REV. 67 (1993).

103. 467 U.S. 837, *reh'g denied*, 468 U.S. 1227 (1984).

104. 467 U.S. at 843.

respect to the specific issue, *Chevron* suggests that courts defer to the agency's construction so long as it is "permissible."¹⁰⁵ In order to uphold the agency's interpretation, courts "need not conclude that the agency construction was the only one it permissibly could have adopted . . . or even the reading the court would have reached if the question initially had arisen in a judicial proceeding."¹⁰⁶

Strong *Chevron* deference would honor agency interpretations of law even where an agency is discerning the scope of its discretion. This doctrine is similar to a deferential approach to judicial review in the constitutional law context known as "Thayer's doctrine"—that courts, in reviewing the constitutionality of statutes, defer to legislators' interpretations of the Constitution, even where the Constitution is defining the legislature's institutional role. A clear error, rather than de novo, standard applies in reviewing the institution's choices.¹⁰⁷ Just as Thayer's doctrine requires that courts always defer to legislators' understandings of the Constitution, *Chevron* suggests that courts defer to agency understandings of the substantive law under which they are making policy. Thus, assuming deference to an agency's interpretation of the contours of its own discretion may in effect "Thayerize" *Chevron*.¹⁰⁸

It would be a mistake, however, to read *Chevron* as precluding any role for courts in reviewing FERC's interpretation of its discretion under substantive law. This Article, written with the benefit of the reams of pages previously written on *Chevron*, views strong *Chevron* deference as

105. *Id.*

106. *Id.* at 843 n.11.

107. Thayer's doctrine holds that legislators are the primary judges of the constitutionality of the laws they make, and that courts should review challenges to those laws under a clear error test, rather than de novo. See James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893). One commentator has demonstrated a close parallel between Thayer's theory of judicial review and the *Chevron* doctrine, although that commentator acknowledges that both Thayer's doctrine and the strong deference of *Chevron* have been rejected by the courts. Nicholas S. Zeppos, *Deference to Political Decisionmakers and the Preferred Scope of Judicial Review*, 88 NW. U. L. REV. 296 (1993). For a critical examination of the acceptance of Thayer's doctrine by academics and jurists, see Mark Tushnet, *Thayer's Target: Judicial Review or Democracy?*, 88 NW. U. L. REV. 9 (1993).

108. In a previous article, Pierce explicitly embraced such an approach. See Richard J. Pierce, Jr., *Chevron and its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VAND. L. REV. 301, 303 (1988) (arguing that the "strong reading of *Chevron* is the proper interpretation because agencies are the best equipped institutions to resolve policy questions in the statutes that grant the agency its legal power").

“a siren’s song, seductive but treacherous.”¹⁰⁹ I reject strong, or Thayerized, *Chevron* deference for several reasons.¹¹⁰

First, *Chevron* involved agency interpretations of a substantive standard in a statute, not of statutory constraints on the agency’s discretion.¹¹¹ *Chevron* did not speak to an agency’s construction of the contours of its discretion; rather, the *Court* determined whether Congress had delegated decisionmaking discretion to the agency. The *Court* was clear that its decision to defer applied only to the construction of words which depend “upon more than ordinary language respecting the matters

109. Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 456 (1989). Similarly spirited oppositions to strong *Chevron* deference have been made by Professor Cass Sunstein and Justice Stephen Breyer. See Kenneth W. Starr et al., *Judicial Review of Administrative Action in a Conservative Era*, 39 ADMIN. L. REV. 353, 366-71 (1987) (comments of Sunstein); Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 372-82 (1986).

110. Theorists of the post-modern persuasion, who have questioned the usefulness of courts’ attempts to formulate rules and policies for general application and apply them neutrally, might find strong *Chevron* deference attractive. Cf. ALLAN C. HUTCHINSON, DWELLING ON THE THRESHOLD: CRITICAL ESSAYS ON MODERN LEGAL THOUGHT 40 (1988) (“The Rule of Law is a sham; the esoteric and convoluted nature of legal doctrine is an accommodating screen to obscure its indeterminacy and the inescapable element of judicial choice. Traditional lawyering is a clumsy and repetitive series of bootstrap arguments and legal discourse is only a stylized version of political discourse.”). If these post-modern theorists are correct, judicial interpretation of the Rule of Law, like many of the other misguided relics of modernity, such as the plain meaning doctrine or originalism, should be abandoned.

However, the post-modernist argument for deference is based on misplaced understandings of interpretation and authority. Only if the Rule of Law is considered as positivist text, the words of which have fixed meaning, is one compelled to accept a single institution’s interpretation. Especially for the post-modernist, however, such a view embraces an overly empirical and passive understanding of text. If we instead accept the practice of judicial review as an application of the tests of tradition which constitute the Rule of Law, we need not abandon the use of judicial authority as a means of discovering and applying the Rule of Law in statutory text. The Rule of Law forces us to embrace a truthful relation to tradition, and to engage in a dialogue about the nature of this relation. See Francis J. Mootz III, *Is the Rule of Law Possible in a Postmodern World?*, 68 WASH. L. REV. 249, 305 (1993).

111. In *Chevron*, the *Court* reviewed a regulation promulgated by the EPA which had interpreted the term “stationary source” under § 172(b)(6) of the Clean Air Act. 42 U.S.C. § 7502(b)(6) (1988) (current version at 42 U.S.C. § 7502(c)(5) (Supp. III 1991)). EPA had adopted a plantwide definition of “stationary source,” under which an existing plant that contained several pollution remitting devices could install or modify one piece of equipment without meeting its permit conditions if the alteration did not increase total emissions. EPA’s interpretation was the result of its “single bubble” policy, praised by policy analysts for moving beyond the arcane, command-and-control policy previously implemented at a single source.

subjected to agency regulations.”¹¹² The particular rationales for deference to EPA’s interpretation of that statute were its expertise and its ability to consider differing points of view from the affected constituency. The *Chevron* court made clear that the judiciary retains its role as the final authority on the issue of whether an agency’s statutory construction is “permissible”; courts must reject interpretations contrary to the plain language of the statute or clear congressional intent, and need only defer to agency interpretations where they involve either expertise or more publicly informed interpretations.¹¹³

Second, Thayerization of *Chevron* is inconsistent with the APA. The judicial review provisions of the APA recognize a role for courts in setting aside agency action “in excess of statutory jurisdiction, authority, or limitations”¹¹⁴ If the APA’s drafters had intended agencies alone to determine the existence and contours of such jurisdiction, authority, and limitations, these words would be but dead letters.¹¹⁵

A third reason against Thayerizing *Chevron* is that it ignores that the agency is the regulatory body most likely to be swayed by powerful interests in the regulated industry. Many regulatory statutes conceived in the early-twentieth century, including the NGA and FPA, were initially passed out of legislative distrust of state regulation of monopoly.¹¹⁶ An absolute rule of deference in the face of ambiguity would be inconsistent with Congress’ fundamental purpose in passing the FPA—to protect consumers from monopoly capture of regulation.

A fourth reason is that strong *Chevron* deference ignores the practical constraints of language. Ambiguity in legislation is not the same as an affirmative choice by Congress to delegate decisionmaking discretion to an agency. Ambiguity in language is often present not by an affirmative choice on behalf of the speaker, but as a necessary attribute of the limited

112. 467 U.S. at 844 (citations omitted).

113. *Id.* at 843 n.9.

114. 5 U.S.C. § 706(2)(C) (1988 & Supp. IV 1992).

115. As Sunstein has pointed out, strong *Chevron* deference is also inconsistent with *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), because courts possess the exclusive responsibility to decide issues of law. Starr et al., *supra* note 109, at 367-68.

116. According to Professor Ellis Hawley, a leading historian of the 1920s and 1930s:

Too often, it seemed, the local regulatory commissions had degenerated into “boards of arbitration,” agencies that were concerned chiefly with adjusting private disputes rather than protecting the public. Too often, rate bases had been inflated and regulation turned into a safe haven for guaranteed profits.

And too often the regulatory agencies had passed under the domination of the very interests they were supposed to regulate.

ELLIS W. HAWLEY, *THE NEW DEAL AND THE PROBLEM OF MONOPOLY: A STUDY IN ECONOMIC AMBIVALENCE*, 325-26 (1966).

capacity of words to create determinate meanings.¹¹⁷ Such indeterminacy is further exacerbated by sloppy or imprecise speaking, a particular problem that plagues legislation drafted in congressional committees. To the extent that *Chevron* elides the distinction between legislative ambiguity and an affirmative delegation of lawmaking power to an agency in all circumstances, including where a statute is defining that agency's discretion, it was decided incorrectly.

Fifth, such a reading of *Chevron* thwarts separation-of-powers principles, as conceived by the framers,¹¹⁸ and the contributions of such principles to legitimacy. According to Professor Cass Sunstein, "[T]he basic case for judicial review depends on the proposition that foxes should not guard henhouses."¹¹⁹ Historically, it has been widely accepted that courts should not defer to congressional or state interpretations of constitutional provisions where there is ambiguity in the constitutional text.¹²⁰ Congress' relation to the Constitution parallels the relation between regulatory statutes and agencies. We should not allow "[i]nstitutions limited by a legal restriction [to] . . . determine the nature of the limitation, or to decide on its scope."¹²¹ In such instances, courts are in a unique position to shed light on the Rule of Law in light of the congressional purposes behind it. To defer to an agency's interpretation would be to do violence to the statutory text and the traditions and purposes which underlie it.¹²²

117. Cf. RONALD DWORKIN, *LAW'S EMPIRE* 45 (1986).

118. "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." *THE FEDERALIST* NO. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961).

119. CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* 143 (1990).

120. Of course, Thayer's doctrine, discussed *supra* note 107 and accompanying text, is the exception.

121. SUNSTEIN, *supra* note 119, at 143. Sunstein has denounced Pierce's understanding of judicial deference because it would apply "in cases involving pure questions of law in which agency bias or self-dealing is involved." Cass R. Sunstein, *Principles, Not Fictions*, 57 U. CHI. L. REV. 1247, 1251 (1990).

122. For example, in *NAACP v. FPC*, 425 U.S. 662 (1976), the Supreme Court struck down FERC's proposed rules designed to eradicate employment discrimination in the companies it regulates. The Court held that use of the words "public interest" in the FPA was not "a directive to the Commission to seek to eradicate discrimination, but, rather, is a charge to promote the orderly production of plentiful supplies of electric energy . . . at just and reasonable rates." *Id.* at 670. Interpretation of the FPA's "public interest" standard does not invoke FERC's technical expertise, and it would be absurd to conclude that usage of these words was an affirmative act of delegation by Congress that the FERC act to make social policy writ large. The agency is in no better position to interpret the meaning of these words than a court.

Those who would Thayerize *Chevron* bear the burden of showing why we should extend the case beyond its holding to include deference to agency interpretations of constraints on the agency's discretion. Appropriately read, *Chevron* does not require complete deference to FERC's interpretation of its discretion under the FPA. Rather, *Chevron*'s scope should be limited to only those regulatory matters in which Congress has clearly delegated decisionmaking discretion to the agency's technical or scientific expertise, or in which the agency is closer to the relevant viewpoints Congress clearly intended to be considered. Thus, courts need not afford strong *Chevron* deference to FERC's interpretation of its own discretion.

The role of statutory constraints cannot be ignored when examining the appropriateness of an agency's exercise of discretion. Because statutory constraints on FERC's discretion have significantly curtailed FERC's ability to promulgate rules in the electricity context, it is difficult to attribute regulatory inaction at FERC to judicial review without a detailed study which takes into account the scope of FERC's jurisdiction.

Yet Pierce's account of judicial review's effects fails to unpack the possible impact of this "cause" on agency decisionmaking processes and muddles the distinction between statutory constraints and other possible "causes," such as judicial review. Pierce's failure to identify and isolate the influence of non-judicial factors on agency decisionmaking may foreshadow a more systemic problem with other policy-effect criticisms of judicial review.¹²³ Indeed, other policy-effect studies have also failed to unpack systematically non-judicial factors which may have influenced agency decisionmaking. The factor I have discussed in this Part is statutory constraints as enacted by Congress and interpreted by courts, but other factors may include congressional oversight, executive oversight, scientific expertise, and public acceptance of the agency's choices.¹²⁴

These studies' failure to separate the influence of different factors affecting agency decisionmaking may well have led E. Donald Elliott, former General Counsel of the Environmental Protection Agency, to remark, "I would take issue with the assertion that we know that the effects of judicial review on the administrative process and on the internal deliberations within agencies are huge."¹²⁵ Perhaps we should bring an informed skepticism to these studies before attributing the policy decisions

123. These policy-effect criticisms are described briefly *supra* notes 1-5 and accompanying text.

124. For further discussion of the relevance of such factors, see Jerry L. Mashaw, *Improving the Environment of Agency Rulemaking: An Essay on Management, Games, and Accountability*, 57 LAW & CONTEMP. PROBS., Spring 1994, at 185.

125. *Administrative Law Symposium: Question and Answer with Professors Elliott, Strauss, and Sunstein*, 1989 DUKE L.J. 551, 553.

we do not like, or policy inaction, to judicial review. We should proceed cautiously, examining in detail the regulatory problem at hand, and hesitate to generalize about judicial review's effects.

III. ELECTRIC UTILITY RESTRUCTURING AT FERC: PRECEDENTIAL DECISIONMAKING IN ADJUDICATIVE PROCEEDINGS

In its strongest form, the policy-effect thesis suggests that applying the hard look doctrine will result in regulatory paralysis at FERC. Without competitive reforms through rulemaking, Pierce predicts, "[T]he nation is virtually certain to confront a serious electricity shortage in the 1990s."¹²⁶ I will not dispute this Draconian prediction of blackout in this Article,¹²⁷ but will focus on the claim, both explicit and implicit in Pierce's analysis, that application of the hard look doctrine will hamper altogether regulatory reform at FERC. Regulatory developments at FERC over the last few years do not support the strong version of the policy-effect thesis. Rather, these developments suggest that FERC has made legal- and policy-oriented reforms in adjudicative proceedings, and thus lend support for a weaker version of Pierce's thesis. Reforms through adjudication have occurred in two general contexts: transmission access and increased incentives for NUGs. In addition, following passage of the Energy Policy Act, FERC has made further reforms in both adjudicative and rulemaking proceedings.

126. Pierce, *Electricity Crisis*, *supra* note 6, at 19; *see also id.* at 9 ("rulemaking is necessary to address the problem.") (emphasis added).

127. Others in the literature also make this prediction; *see, e.g.*, PETER NAVARRO, *THE DIMMING OF AMERICA: THE REAL COSTS OF ELECTRIC UTILITY REGULATORY FAILURE* (1985). Navarro's predictions have been chastised for their ideological presuppositions. Joseph P. Tomain, Book Review, *Electricity and Ideology*, 7 J. ENERGY L. & POL'Y 315 (1986). Pierce could, on his theory, also arrive at the opposite prediction regarding generation capacity. If FERC is too conservative with its regulatory mechanisms, it is more likely that rates will be too high. Under the status quo utilities face strong incentives to increase rate base by building new plants, since that is how they earn a return on investment under cost-of-service regulation. It is not difficult to find data contesting Pierce's predictions. For example, one comprehensive forecast of supply and demand predicts that no region will suffer an electricity shortage prior to the year 2000. EDISON ELEC. INST., *MEETING ELECTRICITY NEEDS IN THE 1990s*, at 2 (1991); *see also EEI Sees No Shortages, Increasing Reliance on DSM Programs and NUGs*, ELEC. UTIL. WK., Dec. 9, 1991, at 7. The possibility of an electricity shortage varies widely from area to area, depending upon both capacity and demand forecasts. It also depends on fuel availability.

A. The Development of Transmission Access Policy

Despite FERC's narrow jurisdiction under section 211 of the FPA to require wheeling, in recent years FERC has issued pro-competitive transmission access orders in the adjudicative context as a voluntary condition to a benefit or approval conferred under other sections of the FPA.

For example, FERC has imposed open access transmission terms as a condition to approval of "market-based" rates¹²⁸ under its general rate regulation authority, contained in sections 205 and 206 of the FPA.¹²⁹ FERC initiated this policy with a flexible pricing experiment in bulk power transactions known as the "Southwest Experiment."¹³⁰ A broader test followed in the Western Systems Power Pool which permitted flexible pricing not only for bulk power sales, but also for transmission service.¹³¹ These experiments have led to the development of a general market-based pricing policy in a number of adjudicative cases,¹³² in which FERC routinely has required wholesale transmission access as a condition to its approval of market-based rates.¹³³ Recently, FERC has

128. Market-based rates are rates established through a competitive bidding process or set by a utility deemed by FERC to lack market power or lack barriers to entry, rather than on the basis of a traditional cost-of-service filing and rate hearing. In theory, market-based rates should approach the marginal cost of service.

129. Sections 205 and 206, the basic rate provisions of the FPA, contain the "just and reasonable" rate standard. 16 U.S.C. §§ 824d, 824e (1988 & Supp. IV 1992).

130. Under this experiment, utilities made transmission service available more openly to competitors, and in return had pricing flexibility to sustain this competitive market. Public Serv. Co. of N.M., 25 F.E.R.C. ¶ 61,469, at 62,029-31 (1983).

131. Pacific Gas & Elec. Co., 38 F.E.R.C. ¶ 61,242 (1987) (authorizing experimental market-based rates with strictly voluntary transmission access), *experiment extended*, 47 F.E.R.C. ¶ 61,121 (1989) and 50 F.E.R.C. ¶ 61,339 (1990), *modified sub nom.* Western Sys. Power Pool, 55 F.E.R.C. ¶ 61,099, at 61,319 (rejecting further extension of pricing experiment for bulk power because applicants had failed to mitigate market power in generation or transmission), *granting stay*, 55 F.E.R.C. ¶ 61,154, *reh'g granted in part*, 55 F.E.R.C. ¶ 61,495, at 62,713-14 (1991) (denying permanent authorization for market-based rates, but allowing capped market-based rates to continue), *modified*, 59 F.E.R.C. ¶ 61,249 (1992), *remanded on other grounds*, Environmental Action, Inc., v. FERC, 996 F.2d 401 (D.C. Cir. 1993), *order on remand*, 66 F.E.R.C. ¶ 61,201 (1994) (allowing access for QFs without requiring them to waive their PURPA rights).

132. Discussed further *infra* notes 159-61 and accompanying text.

133. See, e.g., Entergy Serv., Inc., 58 F.E.R.C. ¶ 61,234, at 61,760-68 (authority to sell up to 100 megawatts at negotiated rates authorized together with adoption of transmission service tariffs), *order on reh'g*, 60 F.E.R.C. ¶ 61,168 (1992), *rev'd sub nom.* Cajun Elec. Power Coop., Inc. v. FERC, 28 F.3d 173 (D.C. Cir. 1994) (per curiam); United States Dep't of Energy-Bonneville Power Admin., 53 F.E.R.C. ¶ 61,193, at 61,668 (1990) (market-based rates authorized only because accompanied by

announced that it will no longer rely solely on a utility's generation dominance in evaluating requests for market-based rates, but will instead focus on transmission access.¹³⁴

FERC has also used its merger approval authority to develop transmission policy on a case-by-case basis. In the 1980s, electric utility mergers increased dramatically and FERC took the opportunity to act on merger applications.¹³⁵ These proceedings have served as an important vehicle for the development of transmission policy. FERC has consistently imposed "open access" transmission terms as a condition to its approval of mergers under section 203 of the FPA.¹³⁶ In *Utah Power & Light Co.*,¹³⁷ for example, FERC imposed an absolute duty to satisfy firm wheeling requests on the merged utility as a condition to its approval of the merger within five years, even at the expense of increased costs to native load customers (the "Utah Hammer"). Similar conditions were imposed on the merged utility in *Northeast Utilities Service Co.*¹³⁸ and in several other merger cases.¹³⁹

transmission access commitments to formerly captive customers); *Pub. Serv. Co. of Ind.*, 51 F.E.R.C. ¶ 61,367 at 62,186, 62,190-204, *reh'g granted in part*, 52 F.E.R.C. ¶ 61,313 (1990) (authorization to sell up to 450 megawatts to unspecified customers at market-based rates conditioned on system wide access conditions), *appeal dismissed for lack of ripeness*, Northern Ind. Public Service Co., 954 F.2d 736 (D.C. Cir. 1992); *Pacific Gas & Elec. Co.*, 46 F.E.R.C. ¶ 61,390 (market-based rates approved in exchange for transmission access commitments to formerly captive customer); *Pacific Gas & Elec. Co.*, 42 F.E.R.C. ¶ 61,406 (market-based rates approved in exchange for transmission access conditions to formerly captive customers), *modified*, 43 F.E.R.C. ¶ 61,403 (1988).

134. *Kansas City Power & Light Co.*, 67 F.E.R.C. ¶ 61,183 (1994).

135. See UNITED STATES GEN. ACCOUNTING OFFICE, *ELECTRICITY SUPPLY: REGULATING UTILITY HOLDING COMPANIES IN A CHANGING ELECTRIC INDUSTRY* 4 (1992) (noting that over 53 utilities have been merged with or acquired between 1980 and 1991); Edward Tirello, *Consolidation Coming to Industry Says Analyst*, *ELC. LIGHT & POWER*, May 1987, at 17-18 (predicting consolidation will occur as a result of continued increases in competition).

136. 16 U.S.C. § 824b (1988).

137. 47 F.E.R.C. ¶ 61,209 (1989) (imposing transmission conditions on authorization of merger of Pacific Power & Light and Utah Power & Light into Pacificorp, a large holding company), *remanded on other grounds sub nom. Environmental Action, Inc. v. FERC*, 939 F.2d 1057 (D.C. Cir. 1991) (finding inadequate basis for denying QF access and retail wheeling), *order on remand*, 57 F.E.R.C. ¶ 61,363 (1991).

138. 56 F.E.R.C. ¶ 61,269, *reh'g granted*, 57 F.E.R.C. ¶ 61,340 (1991), *modified*, 58 F.E.R.C. ¶ 61,070, *reh'g dismissed as moot*, 59 F.E.R.C. ¶ 61,089 (1992).

139. See, e.g., *Public Serv. Co. of Col.*, 58 F.E.R.C. ¶ 61,322, at 62,034 (1992) ("Colorado . . . attempted to model the proposed tariff after transmission conditions imposed or approved by the Commission in other merger cases" including *Utah Power & Light*); *Kansas Power & Light Co.*, 56 F.E.R.C. ¶ 61,356 (1991) (transmission access conditions accepted in connection with acquisition settlement); *Montana Power Co.*, 56

Many of these conditions were troublesome for traditional utilities in the industry which owned transmission capacity. The "Utah Hammer" met sharp criticism by the traditional utility industry and many customer groups.¹⁴⁰ In addition, in *Northeast Utilities*, FERC imposed on the merging utility an absolute duty to satisfy all requests for transmission system expansion.¹⁴¹ FERC asserted that "five years is a reasonable maximum period of time for the merged company to obtain sufficient additional transmission capacity . . . to satisfy all bona fide requests by other utilities for long-term firm wheeling, as well as its own needs."¹⁴² This condition contradicted the position of the North American Electric Reliability Council,¹⁴³ as well as FERC's own Transmission Task Force's determination that completing transmission projects may take as many as sixteen years.¹⁴⁴

In the Energy Policy Act, Congress removed many of the statutory restrictions on FERC's wheeling authority in sections 211 and 212 of the FPA. The Act contains several provisions intended to protect native load customers, including provisions which ensure that a transmitting utility will recover the cost of providing wheeling to third parties.¹⁴⁵ In addition, the new law requires FERC to terminate or modify a wheeling order if "the ordered transmission services require enlargement of transmission capacity and the transmitting utility subject to the order has failed, after making a good faith effort, to obtain the necessary approvals or property rights under applicable Federal, State, and local laws."¹⁴⁶ The legislative history of the Energy Policy Act also raises ambiguity regarding the "Utah Hammer."¹⁴⁷

F.E.R.C. ¶ 61,296 (1991) (conditioning merger authorization in part on modified transmission access provisions).

140. See *FERC Okays NU/PSNH Merger; Imposes New Transmission Access Conditions*, ELECTRIC UTIL. WK., Aug. 5, 1993, at 1.

141. 56 F.E.R.C. ¶ 61,269, at 62,022-24 (1991) (overruling administrative law judge's due diligence exception and requiring applicant to satisfy all requests for firm transmission service within five years).

142. *Id.*

143. NORTH AM. ELEC. RELIABILITY COUNCIL, RELIABILITY ASSESSMENT 1991-2000: THE FUTURE OF BULK ELECTRICITY SYSTEM RELIABILITY IN NORTH AMERICA 23 (1991).

144. FERC TRANSMISSION TASK FORCE, THE TRANSMISSION TASK FORCE'S REPORT TO THE COMMISSION 39-43 (1989).

145. Energy Policy Act of 1992, § 722(1), 106 Stat. 2776 (1992) (establishing new § 212(a)).

146. *Id.* § 721(5)(D), 106 Stat. 2776 (1992) (codified at 16 U.S.C. § 824j(d)(1)(C) (Supp. IV 1992)).

147. Some of the conferees asserted that they were repealing the "Utah Hammer." See 138 CONG. REC. S17,617 (daily ed. Oct. 8, 1992) (statement of Sen. Wallop) (interpreting "good faith" exemption from wheeling order and stating that "[u]nder the

Since passage of the Energy Policy Act, at least nine requests for wholesale transmission service have been filed with FERC.¹⁴⁸ Despite a spirited opposition by the utility industry, FERC's initial treatment of these requests has erased any remaining doubt that it would, in certain circumstances, use its new authority under section 211 to push the industry towards open access and increased competition.¹⁴⁹

In a watershed decision issued in October 1993, FERC voted unanimously to require Florida Power & Light (FP&L) to provide network transmission service to members of the Florida Municipal Power Agency.¹⁵⁰ Interpreting its new authority broadly, FERC noted that section 211(c)(2) of the FPA did not bar issuance of a wheeling order due to pre-existing transmission contracts, effectively allowing existing transmission customers the opportunity to "upgrade" the service they received under existing contracts.¹⁵¹ Given the FPA's purpose of "encourag[ing] the orderly development of plentiful supplies of

provisions of the Conference Report, the FERC cannot legally re-institute the so-called 'hammer clause' of the *Utah Power & Light-Pacificorp* merger"). The House proponents of transmission access, however, generally praised FERC's transmission pricing policies as established in the *Northeast Utilities* decision. See 138 CONG. REC. H11,413 (daily ed. Oct. 5, 1992) (colloquy between Reps. Moorhead and Sharp).

148. See, e.g., *Tex-La Elcc. Coop.*, 58 Fed. Reg. 6632 (1993) (request for an order requiring Texas Utilities Electric Company to provide transmission service); *City of Bedford*, 58 Fed. Reg. 34,576 (1993) (request for order requiring provision of transmission service by operation companies of the American Electric Power Company, Inc., system); *Wisconsin Elec. Power Co.*, 58 Fed. Reg. 39,808 (1993) (request for order requiring Upper Peninsula Power Company to provide transmission service to isolated Greenstone service area) (request withdrawn for purposes of negotiation); *Florida Mun. Power Agency*, 58 Fed. Reg. 38,123 (1993) (request for order requiring transmission service from Florida Power & Light); *Minnesota Mun. Power Agency*, 58 Fed. Reg. 58,546 (1993) (request for order requiring service from Northern States Power for purposes of purchasing power off-system from United Power Association, a generation and transmission cooperative).

149. See *City of Bedford*, 64 F.E.R.C. ¶ 61,381 (1993) (setting proceeding for expedited hearing for purposes of determining meaning of electric service agreements); *Tex-La Elcc. Coop.*, 64 F.E.R.C. ¶ 61,162 (1993) (interpreting the term "transmission service" in § 211 broadly, but denying *Tex-La*'s request because it sought a remedy for a generation billing dispute).

150. *Florida Mun. Power Agency*, 65 F.E.R.C. ¶ 61,125 (1993) (granting request for transmission service as establishing further proceedings to investigate the rates, terms, and conditions of such service). Florida Municipal Power Agency is a bulk power agency representing 26 municipal utility members throughout the state of Florida, who sought to transmit power across the transmitting utility's system from generators in which they own interests used to meet a portion of their customers' needs. *Id.* at 61,599.

151. *Id.* at 61,614 (rejecting utility's argument that pre-existing transmission service agreements bar issuance of a wheeling order).

electricity . . . at reasonable prices,"¹⁵² FERC found the public interest in favor of issuance of a wheeling order to be compelling under the circumstances:

As a general matter, the availability of transmission service (or increased flexibility to use transmission) will enhance competition in the market for power supplies over the long run because it will increase both the power supply options available to transmission customers (thereby benefiting their customers) and the sales options available to sellers. This should result in lower costs to consumers. In addition, if a transmission customer determines that flexible service, such as network service, will allow it to serve its customers more efficiently, we believe that the public interest will be served by requiring that service to be provided so long as the transmitting utility is fully and fairly compensated and there is no unreasonable impairment of reliability.¹⁵³

FERC's order emphasized that the rates, terms, and conditions under which the service is offered must be nondiscriminatory and comparable to what the utility provides other customers.¹⁵⁴ This represents the first step in imposing on the industry the "comparability" standard FERC had adopted in the natural gas context.¹⁵⁵ This precedent-setting decision was widely recognized by industry experts as a clear message that FERC was serious about "leveling the competitive playing field" between transmission users and transmission-owning utilities.¹⁵⁶ FERC has continued to adopt competitive transmission mechanisms by requiring

152. *Id.* at 61,615 (citing *NAACP v. FERC*, 425 U.S. 662, 669-70 (1975)) (purpose of FPA is to assure the abundant supply of electric energy throughout the United States with the greatest possible economy).

153. *Id.*

154. FERC stated:

If Florida Power seeks to charge a rate for network service that exceeds what it charges for point-to-point service, it must provide the information necessary for us to determine that such a charge is justified. Florida Power's rates, charges, terms and conditions for this network service must not be unduly discriminatory when compared to rates, charges, terms and conditions of transmissions [sic] used to serve Florida Power's other customers and must meet the other requirements of section 212(a).

Id. at 61,613.

155. *See, e.g., ANR Pipeline Co.*, 56 F.E.R.C. ¶ 61,293, at 62,205 (1991) (requiring pipeline to offer natural gas transportation service customers transportation service comparable to firm sales customers).

156. *See FERC, In a Precedent-Setting Decision, Orders Network Service, Comparability*, ELEC. UTIL. WK., Nov. 1, 1993, at 1, 14.

transmission to the distribution level¹⁵⁷ and requiring the open access tariffs filed in merger proceedings to provide network service.¹⁵⁸

B. Competition-Enhancing Bulk Power Reforms

In addition, FERC has, in adjudicative proceedings, created limited pro-competitive incentives for NUGs in bulk power markets. FERC has developed policies of approving market-based rates and, in limited circumstances, lightening the regulatory burden on NUGs. FERC's NUG policy, as developed in ad hoc adjudicative proceedings, has decreased the regulatory burden on NUGs and given them additional incentives for entering power generation markets.

FERC has exempted non-QF Independent Power Producers (IPPs) from its traditional cost-of-service rate regulation by approving IPP market-based rate schedules.¹⁵⁹ In limited instances, FERC has approved IPP market-based rates established through competitive bidding without any substantive discussion of market power.¹⁶⁰ Since 1988, FERC has acted on over fifty requests, many by IPPs, for market-based rates.¹⁶¹ The availability of market-based rates allows power generators and affiliated entities to avoid the regulatory burdens of filing an extensive

157. Tex-La Electric Coop. of Texas, Inc., 67 F.E.R.C. ¶ 61,019 (1994).

158. American Electric Power Service Corp., 67 F.E.R.C. ¶ 61,168 (1994).

159. See, e.g., Dartmouth Power Assocs. Ltd. Partnership, 53 F.E.R.C. ¶ 61,117, at 61,359-60 (1990) (affirming market-based rates because applicant lacked market power in generation or transmission); Enron Power Enter. Corp., 52 F.E.R.C. ¶ 61,193, at 61,708-09, 61,711 (1990) (accepting market-based rates because no potential existed for self-dealing and applicant lacked market power over generation and transmission); Commonwealth Atl. Ltd. Partnership, 51 F.E.R.C. ¶ 61,368, at 62,244-46 (1990) (affirming market-based rates because no potential for self-dealing was present, and applicant was not dominant supplier and neither owned nor operated any transmission facilities other than interconnection capacity in the relevant market); Chicago Energy Exch., 51 F.E.R.C. ¶ 61,054, at 61,112 (1990) (approving market-based rates because applicant did not own generation facilities or control transmission facilities directly or indirectly); National Elec. Assocs. Ltd. Partnership, 50 F.E.R.C. ¶ 61,378, at 62,156-57 (1990) (accepting market-based rates for power brokering because no potential for self-dealing abuse existed, and because applicant owned no generation or transmission facilities and was not affiliated with entity that controlled transmission); Doswell Ltd. Partnership, 50 F.E.R.C. ¶ 61,251, at 61,757-58 (1990) (approving request for market-based pricing because applicant was not dominant in generation and was not directly or indirectly in control of transmission); Orange & Rockland Utils., Inc., 42 F.E.R.C. ¶ 61,012, at 61,028-29 (1988) (approving market-based rates for purchase from IPPs). See also *supra* notes 132-34; *Hearings, supra* note 75, at 32-36 (statement of Cynthia A. Marlette) (summarizing market-based pricing requests to date).

160. See, e.g., Wallkill Generating Co., L.P., 56 F.E.R.C. ¶ 61,067 (1991).

161. For a discussion of these proceedings, see Order Terminating Proceedings, *supra* note 93, at 63,491.

cost-of-service analysis and undergoing a rate hearing at FERC prior to rate approval.

In order to encourage further development of IPPs, FERC has also found ways to exempt entities in competitive markets from certain burdensome regulatory requirements, subjecting such entities to what is often called "light-handed" regulation. One way in which FERC can "waive" its costly reporting and cost-of-service requirements is by making a finding, on the basis of statutory interpretation, that an entity is not a "public utility" within the meaning of section 201(e) of the FPA.¹⁶² In *Bechtel Power Corp.*,¹⁶³ for example, FERC exempted an engineering firm involved with the day-to-day operations of a 633 megawatt IPP from FERC regulation as a "public utility" under section 201(e) of the FPA, including rate, cost-of-service, and reporting requirements. In reasoning that Bechtel, which coordinated day-to-day operation and maintenance of the facility under an agreement with the owner, did not "own or operate" jurisdictional facilities, FERC noted that Bechtel had no control or decisionmaking authority concerning the sale or transmission of electric energy from the IPP project, so "no regulatory purpose would be served by asserting jurisdiction"¹⁶⁴

FERC has also, in limited circumstances on a case-by-case basis, temporarily waived PURPA regulations for QFs.¹⁶⁵ In *Kramer Junction Co.*,¹⁶⁶ the Commission granted solar-powered QFs a temporary waiver of a regulation which limited fossil fuel use by small power production facilities to twenty-five percent in order to allow the QFs to increase their use of natural gas-fired generation during a 120 day period in 1992.¹⁶⁷ In a series of decisions, FERC began to standardize its criteria for granting cogenerators temporary waivers of operating and efficiency regulations during initial startup and testing.¹⁶⁸ FERC granted waivers

162. The statutory term "public utility" triggers jurisdiction for many requirements under part II of the FPA. 16 U.S.C. § 824 (1988 & Supp. IV 1992).

163. 60 F.E.R.C. ¶ 61,156 (1992).

164. *Id.* at 61,573.

165. See generally Rossi, *supra* note 16. For a thoughtful discussion of how waiving rules through a case-by-case exceptions process can undermine the administrative values enhanced by rulemaking, see Peter H. Schuck, *When the Exception Becomes the Rule: Regulatory Equity and the Formulation of Energy Policy Through an Exceptions Process*, 1984 DUKE L.J. 163.

166. 61 F.E.R.C. ¶ 61,309 (1992).

167. *Id.* at 62,160 (noting that granting the waiver would encourage application of novel technologies, whereas denial "would send the wrong signal to potential developers of facilities powered by solar resources").

168. See, e.g., O.L.S. Energy Agrems, Inc., 61 F.E.R.C. ¶ 61,293 (1992); KES Kingsburg, L.P., 59 F.E.R.C. ¶ 62,279 (1992); Hadson Power 12-Altavista, 59 F.E.R.C. ¶ 62,167 (1992).

in these decisions on public interest grounds, citing to factors such as the limited duration of the waiver request, the fact that noncompliance was during testing and thus further waiver would be unnecessary, and that waiver would fulfill PURPA's goal of encouraging cogeneration.¹⁶⁹ More recent decisions, however, suggest that future waiver requests will face a heavier burden.¹⁷⁰

In part due to FERC's development of legal- and policy-oriented incentives in an adjudicative context, the presence of NUGs has increased dramatically in the past few years.¹⁷¹ NUGs now account for more than half of all planned generating capacity.¹⁷² The growth of the NUG industry poses a formidable layer of bulk power supply competition, chiseling away at the monopoly of traditional public utilities over power generation.

C. Revisiting the Policy-Effect Theses

In adjudicative proceedings, FERC has systematically made policy by requiring transmission access as a condition to its approval of utility market-based rate and merger applications. FERC's willingness to address transmission issues in the adjudicative context has allowed it to develop knowledge and expertise on a complex technical issue which regulation must address prior to the implementation of competition in bulk power markets. Further, FERC has developed policy and law on a systematic basis in its approval of IPP market-based rates and light-handed regulation for NUGs.

The legal- and policy-oriented principles pronounced in these adjudicative proceedings concerning transmission access and NUGs have precedential value. For utilities, IPP developers, and consumers, these principles have created expectations and have influenced subsequent

169. *KES Kingsburg, L.P.*, 59 F.E.R.C. at 63,618.

170. *Dagget Leasing Corp.*, 64 F.E.R.C. ¶ 61,148, *order on reh'g*, 65 F.E.R.C. ¶ 61,143 (1993). Applying this heavier standard, FERC has refused to grant one such waiver. *New Charleston Power*, 64 F.E.R.C. ¶ 61,378 (1993), *order on reh'g*, 66 F.E.R.C. ¶ 61,221 (1994) (refusing to grant request from developer of 15-MW manure-fired facility to waive fuel use requirements). For criticism of this higher level of scrutiny for QF waiver requests, see Rossi, *supra* note 16.

171. *Bechtel: NUGs Capture Dominant Share of Growing Market for Baseload Power*, INDEPENDENT POWER REP., July 16, 1993, at 6.

172. *See id.* (noting that NUGs occupied a 60% share of marginal capacity in bulk power markets in 1992, and are expected to supply at least half of the new generating capacity over the next ten years); David Step, *Utility Deregulation Sparks Competition, Jolting Electric Firms*, WALL ST. J., June 30, 1992, at 1A (stating that NUGs occupy more than half of planned capacity).

regulatory filings, purchase decisions, and investments.¹⁷³ Thus, in the minds of market decisionmakers in the industry, these policies have the same status and practical and binding effect as rules, even though many who have been affected by them did not participate in their formulation.¹⁷⁴

Given the precedential nature of these general policies, however, it perhaps would have been preferable for FERC to have developed them through rulemaking rather than adjudicative proceedings. In addition to its other inherent and procedural advantages over adjudication,¹⁷⁵ rulemaking would have allowed those bound by precedent to have some participation in formulating the law and policy decisions which bind them.

Many constraints on FERC's ability to make further regulatory reforms on these issues, I have suggested, had their source in the FPA, not the hard look doctrine.¹⁷⁶ Even if we could determine with certainty that application of the hard look doctrine had some effect on FERC's internal decisionmaking choices, the transmission access and IPP examples suggest that judicial review has not deterred FERC from voluntarily adopting systematic pro-competitive regulatory reforms on a case-by-case basis. Application of the hard look doctrine has not led to complete regulatory stalemate, as the strong form of Pierce's thesis would

173. Many utilities filing for merger or market-based rate approval, for instance, have voluntarily proposed tariffs which include the open access conditions imposed by FERC in previous cases. *See, e.g.*, Public Serv. Co. of Col., 58 F.E.R.C. ¶ 61,322, at 62,034 (1992) (noting that merging utility modeled proposed transmission tariff after conditions imposed by FERC in previous merger cases). The anticipated availability of transmission access on merged systems or systems offering market-based rates has caused some transmission-dependent customers to enter into contracts for purchasing power off-system. Undoubtedly, FERC's approach to market-based rates and light-handed regulatory policies directed towards some IPPs have affected utility decisions to invest in and build their own generating capacity. *See* Barry J. Moline, *Prospecting for Energy*, PUB. POWER, Mar.-Apr. 1992, at 19.

174. Commissioner Trabandt, in his partial dissent to FERC's decision in Utah Power & Light Co., 47 F.E.R.C. ¶ 61,209 (1989) (discussed *supra* note 137 and accompanying text), noted that the transmission access conditions adopted in that adjudicative proceeding "have no precedential status or weight in any subsequent proceeding." *Id.* at 61,758 (Trabandt, Comm'r, dissenting). He referenced a letter from Senator J. Bennett Johnston, of the Committee on Energy and Natural Resources, U.S. Senate (Dec. 20, 1988), which "strongly urge[d] the Commission (most importantly) to clarify that there is no precedential effect to whatever specific conditions it may place upon the merger." *Id.* (Trabandt, Comm'r, dissenting in part). Although the majority explicitly disclaimed any precedential impact of its decision, *id.* at 61,733, the decision was treated as if it had precedential effect by utilities which subsequently filed merger applications and transmission tariffs with FERC, as well as by FERC itself in subsequent merger and transmission tariff proceedings.

175. *See supra* notes 19-26 and accompanying text.

176. *See supra* part II.

suggest. FERC's development of reforms in adjudicative proceedings should lead us to reject this form of Pierce's thesis.

In the shadow of court applications of the doctrine, FERC *has* found ways to innovate and achieve many pro-competitive reforms in adjudicative proceedings. FERC's consistent willingness to implement pro-competitive reforms in adjudicative proceedings does lend support to a weaker reading of Pierce's thesis: the hard look doctrine may increase the perceived costs to FERC of policy innovation through rulemaking, and thus may cause FERC to implement competitive regulatory transformation in an adjudication context, even where it may have been more efficient to pursue such reform through rulemakings.¹⁷⁷

Fueled by the Energy Policy Act, FERC initiated several efforts to systematically reform the electric utility industry in 1993, despite vigorous protest from traditional electric utilities. Two of these rulemakings were prescribed by the Energy Policy Act.¹⁷⁸ FERC has, however, gone beyond the Energy Policy Act's mandate and voluntarily initiated rulemakings and generic policy inquiries on several additional issues.¹⁷⁹

177. Although Pierce correctly predicts that hard look review may increase FERC's tendency to resolve difficult policy issues through adjudication (Pierce, *Electricity Crisis*, *supra* note 6, at 27), his consistent invocation of a stronger, more apocalyptic version of the policy-effect thesis weakens this insight.

178. In an aggressive rulemaking, which for the first time takes some of the guesswork out of transmission access issues, FERC required transmission-owning utilities to make publicly available previously confidential information regarding transmission capacity and usage. New Reporting Requirement Implementing Section 213(b) of the Federal Power Act and Supporting Expanded Regulatory Responsibilities Under the Energy Policy Act of 1992, 58 Fed. Reg. 52,240 (1993) (to be codified at 18 C.F.R. § 141). FERC completed this rulemaking, which the Energy Policy Act required to be completed by October 24, 1993 (FPA § 213(b), 16 U.S.C. § 824(b) (Supp. IV 1992)), despite a spirited opposition by the utility industry. The Energy Policy Act also required FERC to promulgate a rulemaking implementing new PUHCA § 32 by October 24, 1993, one year after enactment. 15 U.S.C. 79z-5a(a)(1). To the surprise of many, FERC promptly formulated a final rule within months of the Act's passage. Filing Requirements and Ministerial Procedures for Persons Seeking Exempt Wholesale Generator Status, 58 Fed. Reg. 8897 (1993) (corrected at 58 Fed. Reg. 11,886) (to be codified at 18 C.F.R. §§ 365, 381).

179. In the most aggressive of these, FERC commenced a transmission pricing inquiry, which will address pricing standards under open access transmission. Inquiry Concerning the Commission's Pricing Policy for Transmission Services Provided by Public Utilities Under the Federal Power Act, 58 Fed. Reg. 36,400 (proposed July 7, 1993). FERC also issued a policy statement regarding regional transmission groups, voluntary associations of transmission owners and users established for planning, coordination, and operation purposes. Policy Statement Regarding Regional Transmission Groups, 58 Fed. Reg. 41,626 (1993) (to be codified at 18 C.F.R. § 2). (FERC issued a policy statement rather than a rulemaking on this issue because it lacked statutory authority to require regional transmission groups and it perceived a need for flexibility in

If judicial review of FERC's natural gas rulemaking immediately following passage of the NGPA is any indication,¹⁸⁰ courts will be likely to defer to FERC's expertise in promulgating these initial rules as an agency's interpretation of a recently enacted statute. Thus, the time is ripe for FERC to engage in more comprehensive rulemaking to restructure the electric utility industry.

Whether reviewing court applications of the hard look doctrine have delayed or slowed the development of regulatory reform at FERC is an empirical question that, absent further study, cannot be answered.¹⁸¹ But any theory of judicial review's effects on FERC's policy choices must be able to explain two anomalies in FERC's decisionmaking practice. First, although FERC did not complete the 1988 series of rules in the electric utility context, it did promulgate its final rule to restructure the natural gas industry. Furthermore, in 1993 FERC promulgated several rules and initiated policy inquiries in the electric utility context.¹⁸² Pierce's account does not explain these rulemaking efforts. Second, as Pierce acknowledges, FERC has traditionally opted to make its policy choices through adjudication rather than rulemaking.¹⁸³ It thus seems

addressing different geographic, historical, and operational scenarios.) In addition, FERC initiated and completed a series of ministerial and procedural rulemakings as a first step in implementing the Energy Policy Act. *See, e.g.*, Policy Statement Regarding Good Faith Requests for Transmission Services, 58 Fed. Reg. 38,964 (1993) (to be codified at 18 C.F.R. § 2); Provisions for Applications for Transmission Service Under Section 211 of the Federal Power Act, 58 Fed. Reg. 57,735 (1993) (to be codified at 18 C.F.R. pt. 36); *see also* Electronic Filing of FERC Form No. 1 and Delegation to Chief Accountant, 58 Fed. Reg. 40,606 (1993) (to be codified at 18 C.F.R. §§ 141, 375, 385).

180. *See supra* notes 33-34 and accompanying text.

181. Other than reference to natural gas adjudicative proceedings in the 1970s, Pierce gives no evidence of delay. He only speculates skeptically that such delay will occur in electric utility adjudicative proceedings. Pierce, *Electricity Crisis*, *supra* note 6, at 12-13. Indeed, adjudication in the electric utility context may well differ from the natural gas context because of jurisdictional limitations which restrict the number of potential issues to be addressed and the limited number of affected parties in electric utility adjudications. Compare Richard J. Pierce, Jr., *The Choice Between Adjudicating and Rulemaking for Formulating and Implementing Energy Policy*, 31 HAST. L.J. 1, 7 (1979) (noting that in major natural gas curtailment adjudicative proceedings litigation ranged from four to nine years, with hearings ranging from 48 to 194 days) with U.S. GENERAL ACCOUNTING OFFICE, ELECTRICITY REGULATION FACTORS AFFECTING THE PROCESSING OF ELECTRIC POWER APPLICATIONS, REPORT TO THE CHAIRMAN, ENVIRONMENT, ENERGY, AND NATURAL RESOURCE SUBCOMMITTEE, COMMITTEE ON GOVERNMENT OPERATIONS, U.S. HOUSE OF REPRESENTATIVES 5 (1993) (processing time for market-based rate and jurisdictional applications during 1990-92 averaged 169 days; contested applications set for a trial-type hearing averaged 2.8 years prior to completion).

182. *See supra* notes 58, 178-79 and accompanying text.

183. Pierce, *Electricity Crisis*, *supra* note 6, at 18.

odd to attribute to the hard look doctrine, which developed in the 1960s and 1970s, a practice which existed prior to its application.¹⁸⁴

In addition to these anomalies, FERC's experiences in making policy through adjudication may have been more successful than ad hoc attempts in other agency contexts, such as EPA, OSHA, or NHTSA, for several reasons.¹⁸⁵ First, FERC, in its prior incarnation as the Federal Power Commission, was originally designed as an adjudicative agency, not as an agency intended to promulgate broad substantive rules. Designed as such, FERC's adjudicative discretion was defined broadly.¹⁸⁶

Second, FERC's historically adjudicative function allowed it to develop technical expertise and made it much more astute in the exercise of its adjudicative function than younger agencies.¹⁸⁷ For its first fifty years, FERC issued virtually no rules at all. Licensing and rate proceedings, not generic rulemakings, were FERC's historical decisionmaking mechanisms. In such proceedings, FERC was forced to focus on specific, highly technical factual scenarios and was able to develop much of the expertise necessary to effectively regulate a complex industry. FERC is currently struggling to develop policies for the pricing of transmission services on a case-by-case basis. Through concrete cases, FERC can best decide which policies are suited to current technological, regulatory, and market conditions. FERC's experiences in such proceedings may have allowed it to develop an intra-agency process for making prospective rules through adjudication. By contrast, younger

184. Although the Supreme Court did not explicitly enunciate the doctrine until the *State Farm* case in 1983, discussed *supra* notes 39-40 and accompanying text, it had previously been adopted by several lower courts, beginning with Judge Leventhal's decision in *Greater Boston Television Corp. v. FCC*, 444 F.2d 841 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971).

185. Studies of the EPA, OSHA, and NHTSA are described briefly at *supra* notes 1-3 and accompanying text. The FTC (referenced *supra* note 4), unlike these other agencies, was designed as an adjudicative agency and bears historical similarities to FERC. The same could be said of the Interstate Commerce Commission, the National Labor Relations Board, and the Federal Communications Commission.

186. Professor Jerry Mashaw has suggested that many other agencies, such as NHTSA, do not have broad discretion to make precedent through adjudication, as does FERC. NHTSA was established by Congress as a rulemaking agency to force the technology of automobile safety design. MASHAW & HARFST, *STRUGGLE FOR AUTO SAFETY*, *supra* note 3, at 10. NHTSA's adjudicative mechanism was the recall, which Congress intended to be limited in use. FERC, in contrast, was designed to determine "just and reasonable" rates after an adjudicative hearing: Congress thus intended FERC's adjudicative function to be used more broadly, to include pronouncements of prospective policy.

187. NHTSA, for example, was established in 1966. *Id.* at 4. OSHA, EPA, and the Consumer Product Safety Commission were also created in the 1960s and early 1970s. *Id.*

agencies, such as EPA, OSHA, and NHTSA, could not draw on the same base of historically-developed institutional expertise and procedural sophistication.

Third, most of FERC's regulatory efforts have been concerned with "deregulation" and re-regulation, not with developing and implementing an initial regulatory structure for the industry. While adjudication may be an inefficient and ineffective methodology for implementing new regulatory programs at EPA, OSHA, and NHTSA, it may have proved itself more efficient and effective for FERC's recent regulatory project of undoing and revising existing rules and policies to implement competitive reforms.¹⁸⁸

IV. REDEEMING JUDICIAL REVIEW: CONGRESS, AGENCIES, THE COURTS—AND THE AFFIRMATION OF DELIBERATIVE DEMOCRATIC VALUES

Accepting a weaker version of Pierce's thesis is not alone sufficient to condemn the hard look doctrine. Because of the manner in which appellate courts have applied judicial review,¹⁸⁹ and the potential effects of such review on FERC policymaking,¹⁹⁰ Pierce recommends limiting the discretion of lower courts to invoke the hard look doctrine. One way of restricting the judicial threat to agency policymaking prescribed by Pierce is that the Supreme Court implement doctrinal changes restricting the scope of the adequate consideration doctrine.¹⁹¹

188. See Schuck, *supra* note 165 (examining how case-by-case exceptions process allowed agency to undermine effectively existing rules without the visibility and costs of formal rulemaking processes).

189. See *supra* part I.B.

190. See *supra* part I.C.

191. Pierce, *Electricity Crisis*, *supra* note 6, at 29. Although narrow in scope, Supreme Court decisions in two recent cases have imposed some limitations on judicial review. In *Pension Benefit Guarantee Corp. v. LTV Corp.*, 496 U.S. 633 (1990), the Court held that the "plain language" of the Employee Retirement Income Security Act of 1974 (ERISA) required PBGC to consider only the policies and goals of ERISA, and not policies and goals advanced by other statutes governing bankruptcy and labor law. The Court's restriction was pragmatic: the plethora of statutes which touch upon any one agency's decision may, if invoked by a reviewing court, lead to mass judicial invalidation of agency decisions. *Id.* at 646. Notably, the Court did not restrict judicial review of PBGC's implementation of ERISA in isolation of other statutes.

In *Mobil Oil Exploration v. United Distrib. Co.*, 498 U.S. 211 (1991) (holding that FERC Order No. 451 does not exceed FERC's authority under the NGPA), the Court held that an agency that chooses to solve one problem in a rule is not required to address related problems in the same rulemaking, even if its attempt to solve one problem increases the severity or urgency of related problems. The Court, citing *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978),

This Part argues that Pierce makes this recommendation without considering two important aspects of the hard look doctrine: (1) inter-institutional effects outside of the agency, particularly incentives for policy choice; and (2) the affirmation of deliberative democratic values. Failure to consider these aspects of judicial review has led policy-effect critics generally to adopt an overly narrow understanding of judicial review's benefits. A fuller account, I argue, can redeem judicial review from the myopic, anti-democratic role many of these critics have attributed to it.

A. Inter-Institutional Effects: Congressional Choice

Pierce denounces the hard look doctrine solely on the basis of its effects *within* FERC. A public choice analysis would suggest a broader study of judicial review's effects. Public choice theory recognizes that, due to the effect of interest groups, reviewing court decisions may have an impact on policymaking by institutions beyond the agency subject to review.¹⁹² To understand the public choice effects of the hard look doctrine, we must not limit our analysis of the effects to the agency subject to review. In addition, we must ask the following question: what were the effects of judicial review on interest group pressure upon other policymaking bodies, such as Congress or the states?

In certain instances, it may be preferable for institutions other than agencies to make policy. One such instance is the definition of an agency's discretion. When an agency's discretion is being expanded, an agency will likely push in favor of broadening its jurisdiction. Congress, a generally more accountable body responsible for legislative structures governing the interrelationship between agencies, is generally the best decisionmaking body to specify the terms of an agency's expansion. Such expansion should be done through legislation, not agency decisionmaking. As discussed above,¹⁹³ courts should play an integral role in interpreting the statutory terms which define the contours of such discretion.

At the time Pierce wrote his article, Congress' ability to pass pro-competitive legislation in the electricity context was highly uncertain and

concluded unanimously that agencies have broad discretion "in determining how best to handle related, yet discrete, issues in terms of procedures . . . and priorities." *Id.* at 230.

192. Public choice is generally accepted to mean the application of economics to political decisionmaking. In its simplest formulation, a public choice model would analyze the behavior of those who stand to benefit from a political decision and how these constituencies have an impact on the dynamics of the decisionmaking process, operating within the institutional constraints of the existing political system. For a good general background survey, see DENNIS C. MUELLER, PUBLIC CHOICE II (1989).

193. See *supra* part II.D.

politically volatile.¹⁹⁴ In late 1992, Congress overcame its nearly fifteen-year stalemate to pass the Energy Policy Act, which significantly broadened FERC's authority to require wheeling under section 211 of the FPA and created a class of PUHCA-exempt wholesale generators.¹⁹⁵ Reviewing court applications of the hard look doctrine may have had an effect on congressional choice by playing an agenda-setting role and helping to nudge passage of the Energy Policy Act.

A public choice account of the effects of the hard look doctrine might go something like this: because of a very constrained statutory framework¹⁹⁶ and a lack of technical knowledge,¹⁹⁷ FERC was unable

194. At the time he wrote his article in late 1990, Pierce believed that Congress was impotent to make major changes in regulatory policy. Pierce, *Electricity Crisis*, *supra* note 6, at 8-9.

195. For a good survey of the history and substance of the Energy Policy Act, see Jeffrey D. Watkiss & Douglas W. Smith, *The Energy Policy Act of 1992—A Watershed for Competition in the Wholesale Power Market*, 10 YALE J. ON REG. 447 (1993). The Energy Policy Act's history is discussed in Jim Rossi, *Lessons from the Politics and Procedure of the "Comprehensive" National Energy Policy Act of 1992*, 19 HARV. ENVTL. L. REV. (forthcoming 1995).

196. Unlike the natural gas industry, which Congress gave FERC a broad mandate to deregulate in the NGPA (see *supra* note 32 and accompanying text), FERC did not have broad discretion to deregulate the electricity industry. FERC's discretion to restructure the electricity industry was curtailed under the FPA by detailed "bright-line" jurisdictional separation between state and federal jurisdiction, restrictions on FERC's ability to require "open access" transmission service, and limited FERC jurisdiction over NUGs. See Robert J. Michael, *Reason for Pessimism: Politics and Policy Cloud the Future of Electricity Competition*, PUB. UTIL. FORT., Sept. 15, 1993, at 16; see also Stalon & Lock, *supra* note 32; *supra* notes 99-101 and accompanying text.

197. FERC understood the basic technical, engineering, and operational principles behind gas pipelines. Under open access, gas pipelines continue to operate on the same basic principles. Natural gas will only move through a pipeline if the pipeline places pressure behind it and can be controlled by the usage of valves; thus, it is possible to identify specific buyers and sellers under an open access natural gas system. Electricity transmission lines, on the other hand, lack "valves" to control flow in the transmission grid. It is difficult, if not impossible, to pair specific buyers and sellers on the grid. The technical and operational complexities of electricity transmission are multiplied on a connected grid under open access. Electrons, following Kirchoff's laws, move in the path of least resistance. Once a generator plugs into the grid, it affects transmission elsewhere. Thus, open access in the electricity context raises all types of control problems, such as impacts on reliability, which have no analog in the natural gas context and which have never been addressed in a regulatory forum. The traditional regulatory model encouraged firms to deal with these coordination problems through vertical integration of generation, transmission and distribution. See William W. Hogan, *Electric Transmission: A New Model for Old Principles*, ELECTRICITY J., Mar. 1, 1993, at 18. Where knowledge and expertise are lacking, it may be appropriate for regulators to choose to tackle problems of this complexity in isolated contexts, rather than experiment with the industry through mega-rulemakings. Once regulators have developed and tested their knowledge and expertise, the time may be more ripe for them to implement a mega-rule.

to restructure the electric utility industry to be competitive through a comprehensive mega-rulemaking, as it did in the natural gas context. Thus, FERC initiated a series of fragmented rulemakings addressing easily-grasped, narrow issues within its statutory power, such as competitive bidding¹⁹⁸ and IPPs.¹⁹⁹ However, constituent groups in the industry did not unite in support of these different rulemakings. For example, while consumers and IPPs generally favored regulations governing competitive bidding conditioned on open access and lightened regulation of IPPs, the powerful traditional electric utility lobby ardently opposed them.²⁰⁰ Piecemeal reform did not create consensus. Courts' applications of the hard look doctrine posed uncertainty and a high risk of reversal, and thus may have deterred FERC from pursuing its fragmented rulemakings in the face of opposition. Frustrated with their ability to seek comprehensive reform at FERC, consumers, IPPs, and traditional electric utilities in the industry transcended their short-sighted differences and sought relief from Congress. Congress provided relief in the Energy Policy Act, which contained a "compromise"²⁰¹ broadening

198. See *supra* note 90.

199. See *supra* note 91.

200. See, e.g., *Divergent Opinions of Electric NOPRs on Full Display at the Commission*, INSIDE FERC, July 25, 1988, at 4 (noting that, although IPPs liked the proposed rules, most electric utilities in the industry perceived them as conceptually, theoretically, operationally, and empirically unsupported).

201. See *Energy Bill Passage Likely to Prompt a Big Package of Rulemakings at the FERC*, ELECTRIC UTIL. WK., Oct. 12, 1992, at 13 (noting that investor-owned utilities, IPPs, and consumer groups were all reasonably happy with the Senate/House compromise on the electricity title); see also H.R. REP. NO. 474(I), 102d Cong., 1st Sess., pt. 1, at 140 (1992) (noting that PUHCA reform, which would benefit IPPs and utilities, would be accompanied by "a variety of protections for consumers and other competitors"). According to Representative Sharp, the Chairman of the Subcommittee of Energy and Power of the House Committee on Energy and Commerce:

H.R. 776 will . . . introduce historic changes to the electricity industry—increasing competition among suppliers and providing protections for consumer pocketbooks. It is worth noting that this provision, which amends two fundamental New Deal era reforms and had been expected to be very controversial, was the subject of extraordinary cooperative negotiation in the conference.

The final product, a true compromise, is a stronger statement than either the House or Senate bill of the Congress' desire to see competition in the generation of electricity and the availability of access to the Nation's transmission grid for all comers without regard to monopoly or market power. In this case, the Congress has sent a strong message to monopolists to learn to compete and to seek power at prices that will benefit consumers—or get out of the way.

138 CONG. REC. H11,400 (daily ed. Oct. 5, 1992). Representative Dingell, the Chairman of the House Committee on Energy and Commerce stated that the bill "carefully strikes

FERC's ability to implement open access²⁰² and provided incentives to further expand the role of NUGs in competitive bulk power markets, including provisions which would allow electric utilities to benefit from this growth.²⁰³

A related example involves competitive bidding. The presence of the hard look doctrine may have deterred FERC from pursuing its competitive bidding proposed rulemaking further. This may have encouraged consumers and IPPs to lobby more vigorously for competitive bidding at the state level, where utilities would be less likely, due to higher political visibility, to oppose competitive pricing regimes. Thus, the presence of vigorous judicial review could also partially explain the increase in state competitive bidding programs from only a few in 1988 to more than thirty in 1993.²⁰⁴

In addition to the effects of judicial review on the agency, courts should be cognizant of positive and negative inter-institutional choice effects. Pierce's account, like many other policy-effect studies of judicial review, ignores altogether the effects of judicial review on governmental institutions other than the agency reviewed. By looking to the inter-institutional effects of the hard look doctrine, I do not mean to suggest that critical judicial review is the *only* reason the Energy Policy Act won congressional support. Clearly, other factors, such as the Persian Gulf War, worked to dramatically increase the urgency of energy issues at the national level. Rather, I only wish to suggest that the hard look doctrine,

a balance between the concerns of many who are affected by its provisions, namely consumers, ratepayers, municipals, industrials, utility companies, and State and Federal regulators." 138 CONG. REC. H11,428 (daily ed. Oct. 5, 1992).

202. The open access provisions were supported by IPPs, consumer groups, and smaller "transmission-dependent" utilities, such as municipal utilities and rural electric cooperatives. These interests generally took the position that PUHCA reform would be meaningless absent open access. *See, e.g., Hearings, supra* note 75, at 788 (statement of Steven E. Collier on behalf of the National Rural Electric Cooperative Association).

203. Unlike the previous competitive reforms introduced through rulemaking at the FERC, the Energy Policy Act contained benefits for traditional electric utilities in the industry. For example, the Act allows utilities to benefit from the growth of the IPP industry by exempting them and their affiliates from certain lease and ownership roles in PUHCA-exempt wholesale generators. In conference, the PUHCA reform sections of the Act were supplemented with a controversial provision allowing domestic utilities to invest in utility projects abroad with virtually no regulatory oversight. This provision met sharp criticism on the floor, including a promise of "close and careful" oversight of oversea investments by utilities. 138 CONG. REC. H11,428 (daily ed. Oct. 5, 1992) (statement of Rep. Dingell); *id.* at H11,446 (statement of Rep. Markey). In addition, traditional electric utilities in the industry may have benefited from more favorable transmission policy, as suggested by floor statements rejecting the "Utah Hammer." *See supra* note 147 and accompanying text.

204. *See Order Terminating Proceedings, supra* note 93.

as applied by reviewing courts in a political conversation with other governmental branches, may have had at least some impact on policy choice and agenda setting outside of FERC. And it may well continue to have inter-institutional effects in the future, for example, by encouraging Congress or state legislatures or regulatory bodies to address retail wheeling. Policy-effect critics of judicial review must be cognizant of positive and negative impacts on inter-institutional choice in order to assess the full costs and benefits of judicial review.

B. *Deliberative Democracy and Judicial Review*

Pierce's analysis also gives short shrift to some of the most compelling reasons for judicial review in an industry restructuring context. Modern "civic republican" theorists view the Constitution as an attempt to ensure that governmental decisions result from a process which allows participation and deliberation, respecting and reflecting the values of all members of society.²⁰⁵ A civic republican political theory views government's primary responsibility as enabling its citizens to participate in a deliberative manner in the process which leads it to policy choices and their modification.²⁰⁶ Borrowing from this civic republican literature, deliberative democratic political theory envisions a role for the judiciary in contributing to a process of legitimate government.

Competitive restructuring, like deregulation efforts in other industries, is likely to produce both winners and losers in the electric utility industry. It is not a Pareto improvement—even for consumers. Where multiple interests are in conflict, the hard look doctrine compels agencies to affirm deliberative democratic values in the rulemaking process. The hard look doctrine, by sustaining a political conversation among governmental branches, contributes to legitimacy and thus is a fully warranted exercise of judicial authority.

205. See, e.g., MICHAEL J. PERRY, *MORALITY, POLITICS, AND THE LAW* 102-03 (1988); Frank Michelman, *Law's Republic*, 97 *YALE L.J.* 1493, 1513-14 (1988); Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 *HARV. L. REV.* 1512, 1514 (1992); Cass R. Sunstein, *Beyond the Republican Revival*, 97 *YALE L.J.* 1539, 1548-49 (1988); Symposium, *The Civic Republican Tradition*, 97 *YALE L.J.* 1493 (1988). For a critical, although somewhat uncharitable, response to the civic republican legal literature, see Steven G. Gey, *The Unfortunate Revival of Civic Republicanism*, 141 *U. PA. L. REV.* 801 (1993); see also Miriam Galston, *Taking Aristotle Seriously: Republican-Oriented Legal Theory and the Moral Foundation of Deliberative Democracy*, 82 *CAL. L. REV.* 331 (1994) (criticizing civic republican theorists for misinterpreting Aristotle's democratic ideals).

206. Seidenfeld, *supra* note 205, at 1514.

1. THE INADEQUACY OF CONGRESSIONAL AND EXECUTIVE CONTROL

Although Congress is presumptively the lawmaking institution under Article I of the Constitution, in a modern social and economic democracy Congress does not, and should not, have a monopoly over lawmaking.²⁰⁷ One reason that delegation²⁰⁸ to administrative agencies occurs is that it is desirable for Congress to “precommit” itself to deliberative democratic values. In addition to their institutional advantage in focusing on problems and developing expertise, in many instances agencies have a comparative advantage in promoting participation and deliberative government.

Professor Mark Seidenfeld makes two arguments for the comparative advantage of agencies in promoting what he has called “civic republican” values.²⁰⁹ As Seidenfeld notes, congressional “structure and decisionmaking processes are not conducive to deliberation.”²¹⁰ Committee decisionmaking, prevalent throughout Congress, reflects a “myriad of political bargains and compromises.”²¹¹ Thus, even if these processes could be described as “deliberative,” the influence of private interest groups taints the process. Except where Congress debates highly publicized issues of broad public concern, the legislative process is antagonistic towards deliberation.²¹²

207. Cf. FEDERALIST No. 47, *supra* note 118.

208. Suffice it to say that a complete discussion of the merits of delegation is beyond the scope of my analysis. For two spirited, but diametrically opposed, discussions, see DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* (1993) (arguing for a revival of the nondelegation doctrine); Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J. LAW, ECON. & ORG. 81, 99 (1985) (“Delegation to experts becomes a form of consensus building that, far from taking decisions out of politics, seeks to give political choice a form in which potential collective action can be discovered and its benefits realized.”). Pierce has argued that a fatal flaw in the nondelegation argument is that the judiciary is “institutionally incapable of creating and applying a delegation doctrine.” Richard J. Pierce, Jr., *Political Accountability and Delegated Power: A Response to Professor Lowi*, 36 AM. U. L. REV. 391, 393 (1987).

209. Seidenfeld, *supra* note 205. Seidenfeld has since abandoned the “civic republican” ideal for “deliberative democracy.” See Mark Seidenfeld, *A Syncopated Chevron: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretation of Statutes*, 73 TEX. L. REV. (forthcoming 1994).

210. Seidenfeld, *supra* note 205, at 1544.

211. *Id.* at 1545.

212. Notably, Seidenfeld does not address the ability of Congress’ internal constraints to enhance deliberation. The types of constraints imposed by the committee structure, the House Rules Committee, and Senate filibuster rules and unanimous consent devices (which effectively require a super-majority), may work to enhance deliberation. For an excellent discussion of these internal constraints, see CHARLES TIEFER, *CONGRESSIONAL PRACTICE AND PROCEDURE* (1989).

Second, Seidenfeld notes, congressional structure and decisionmaking processes may pose problems for judicial review. If courts were to inquire whether the legislative process passes deliberative democratic muster, which itself could prove a Herculean task in legislative history research, this would subject all congressional enactments to the threat of an irreversible judicial veto.²¹³ If courts struck down legislation which failed to pass deliberative democratic muster, Congress could reenact the same statute, or a new one, after more deliberation. But if a court finds recurring fault with Congress' deliberative processes, Congress could effectively be prevented from passing the legislation.²¹⁴

Some have argued that, if we accept broad delegation of lawmaking power to agencies, congressional oversight of agency decisionmaking is a necessary check on this power.²¹⁵ Congressional oversight may be necessary, but it is hardly sufficient for the realization of deliberative democratic values. Once Congress has chosen to delegate, congressional regulation of executive appointments and removals or oversight alone will not be sufficient to ensure that agency decisionmaking processes are committed to deliberative democratic values. It is doubtful that Congress could effectively review and control agency decisionmaking. It has been recognized that "the outcome of a legislative attempt to rectify an act of noncompliance by an agency will not, in general, reproduce the policy outcome that was sought by the winning coalition, even if the preferences of the members of the legislative body remain unchanged."²¹⁶ Further, there is no reason to suspect that congressional regulation of agency decisionmaking would avoid the same antagonism towards deliberation as first-order congressional decisionmaking. Indeed, there is reason to believe that congressional oversight, by further concentrating power, would further thwart deliberation and participation.²¹⁷

Others, including Pierce,²¹⁸ have argued that executive control of

213. Seidenfeld, *supra* note 205, at 1546.

214. *Id.*

215. See, e.g., Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123 (1994); Peter M. Shane, *Independent Policymaking and Presidential Power: A Constitutional Analysis*, 57 GEO. WASH. L. REV. 596, 619 (1989).

216. Matthew D. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 433 (1989).

217. Ackerman and Hassler, for example, argue that much of the delay and incoherence in EPA's wet scrubber rule resulted from the political influence exerted by two powerful senators. BRUCE A. ACKERMAN & WILLIAM T. HASSLER, *CLEAN COAL/DIRTY AIR* 44-48 (1981).

218. Pierce, *Political Theory*, *supra* note 13, at 471-72, 507-13; see also Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth*

agency discretion is sufficient to sustain democratic decisionmaking. Pierce's earlier writings claim that executive control is the only oversight option which is compatible with political and constitutional theory.²¹⁹ His argument for executive control is based in large part on the agency review program initiated by the Reagan administration and followed by the Bush administration, which required agencies to conform their rules to administration policy and to submit major regulations to the Office of Management and Budget for cost-benefit review by the Office of Information and Regulatory Affairs.²²⁰ The Clinton administration has initiated a similar review program.²²¹ According to Pierce, the executive branch is the superior body for overseeing agency decisionmaking because "policy choices should be made by the most politically accountable branch of government . . ."²²² Courts should have no role in oversight because, in Pierce's view, they are antimajoritarian and hence undemocratic.²²³

But executive control alone is also insufficient for the realization of deliberative democratic values. Imperfections associated with the "top down" nature of executive control may do violence to deliberative democratic ideals. First, the ability of powerful special interests to influence the executive may thwart deliberative decisionmaking.²²⁴

Branch, 84 COLUM. L. REV. 573, 599, 602, 615-16, 640-41, 648-49, 663 (1984).

219. Pierce, *Political Theory*, *supra* note 13.

220. Exec. Order No. 12,291, 3 C.F.R. 127, 128-32 (1982). In 1985, the White House issued a second Executive Order requiring agencies to submit a regulatory plan detailing their priorities for the next fiscal year and reporting regulatory actions taken. Exec. Order No. 12,498, 3 C.F.R. 323 (1985).

221. Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (1993).

222. Pierce, *Political Theory*, *supra* note 13, at 506.

223. *Id.* at 524-25 ("De novo judicial review would result in the substitution of judicial policy making for agency policy making. This shift in power cannot be viewed happily by those who favor policy making by political bodies sensitive to majoritarian preferences."). For a similarly motivated critique of judicial review in the constitutional law context, see ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* (1962) (raising counter-majoritarian difficulty with judicial review). Many constitutional law scholars have since abandoned the attempt to solve Bickel's "difficulty" as a misguided diversion in both historiography and political theory. See, e.g., 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991); Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577 (1993).

224. The recent interference of the White House Council on Competitiveness, chaired by Vice President Dan Quayle, symbolizes the wrath of a "shadow government" which undermined critical safety, health, and environmental regulations—often in secret, non-deliberative ways which limited participation to large business interests. See generally Malcolm D. Woolf, *Clean Air or Hot Air?: Lessons from the Quayle Competitive Council's Oversight of the EPA*, 10 J.L. & POL. 97 (1993); *Quayle Council Recommends Killing Recycling Provision in Incinerator Rule*, 21 Env't Rep. (BNA) 1595 (1990). It is ironic that Pierce relies on the Reagan administration's oversight efforts to

Second, because the President has both a national and an international agenda, he or she will frequently be removed from agency decisionmaking. In most cases, unsupervised staff will be doing the overseeing. This problem is especially pervasive with respect to independent agencies, such as the FERC, which remain formally outside of Presidential influence.²²⁵ Furthermore, it is much easier to control agencies by stopping their regulatory activities altogether than by initiating them. Thus, executive control will be more successful where agencies are implementing deregulatory programs, rather than regulation.²²⁶

Even if executive oversight is coupled with congressional oversight, this will not be without its problems. The executive branch may be caught in a negative sum oversight game with Congress: as the White House escalates its oversight efforts, Congress will respond in a futile attempt to catch up, producing additional oversight by the White House and resulting in increased secrecy and micro-management, not more accountable government which relies on participation and deliberation before the agency.²²⁷

bolster his majoritarian arguments: similar programs had been carried out by the Ford and Carter administrations, but the Reagan oversight plan (as continued by the Bush administration) was more secret and centralized in the White House, and did not provide for public input or public reports from the Office of Management and Budget. See RICHARD HARRIS & SIDNEY MILKIS, *THE POLITICS OF REGULATORY CHANGE: A TALE OF TWO AGENCIES* 104-05 (1989); see also Exec. Order No. 11,821, 3 C.F.R. 926 (1971-1975) (Ford order designed to force agencies to consider the inflationary impacts of their regulations); Exec. Order No. 12,044, 3 C.F.R. 152 (1979) (Carter order requiring regulatory analysis of every "major" rule proposed).

225. On independent agencies, see Susan Bartlett Foote, *Independent Agencies Under Attack: A Skeptical View of the Importance of the Debate*, 1988 DUKE L.J. 223; Glen O. Robinson, *Independent Agencies: Form and Substance in Executive Prerogative*, 1988 DUKE L.J. 238; Aulana L. Peters, *Independent Agencies: Government's Scourge or Salvation?*, 1988 DUKE L.J. 286.

226. For similarly spirited critiques of the executive control model, see Linda R. Hirshman, *Postmodern Jurisprudence and the Problem of Administrative Discretion*, 82 NW. U. L. REV. 646 (1988).

227. This criticism is presented in more detail by Sidney A. Shapiro, *Political Oversight and the Deterioration of Regulatory Policy*, 46 ADMIN. L. REV. 1 (1994) (arguing that increased political oversight over the last 12 years has reduced the discretion of administrative agencies without more democracy or better regulatory policy). Shapiro notes that, although the end of divided government will moderate this game, it is unlikely to end it. *Id.* at 40. His solution is balance and creative dialogue.

2. COMPETITIVE RESTRUCTURING IS NOT A PARETO IMPROVEMENT—EVEN FOR CONSUMERS

Competitive restructuring of the electric utility industry, most would argue, will increase net consumer surplus.²²⁸ Pierce seems to assume that, because consumers as a group will be better off under competitive restructuring of the electric industry, *all* consumers will favor the same reforms.²²⁹ A Pareto improvement is a policy change after which all affected persons are better off.²³⁰ However, competitive restructuring of the industry is not a Pareto improvement, even for consumers.

Pierce sets up “powerful constituencies”²³¹—presumably the entrenched traditional utility industry—as a formidable enemy to competitive restructuring. Others in the industry, however, are also likely to oppose certain aspects of competitive restructuring. Consumer groups in the industry, for example, are far from united on issues of competitive restructuring. While many large-load industrial customers stand to gain both in the short- and long-term from competitive restructuring through lower rates and increased purchasing flexibility, many wholesale customers, such as local municipal utilities, rural electrical cooperatives, and residential and small business consumers, can probably expect to pay higher rates, at least in the short-term.²³² Large transition costs will

228. The experience of other countries with deregulating the electricity industry supports the thesis that competition will increase net consumer surplus. For example, significant savings have been realized by consumers as a group in Norway, which has implemented spot markets and traders on a common carrier grid. See *Deregulation in Norway Reduces Power Rates 50% After 2.5 Years*, INDEPENDENT POWER REP., June 18, 1993, at 14. One author estimates that transmission to a competitive sector utility market in the U.S. would save consumers \$30 billion per year. Charles M. Studness, *Estimating the Financial Cost of Utility Regulation*, PUB. UTIL. FORT., Nov. 1, 1993, at 48.

229. He states with respect to natural gas restructuring: “Consumers and other market participants suffered scores of billions of dollars of costs under that [traditional, cost-plus] policy. . . . The new policy—creation of conditions conducive to a competitive market and to market-based pricing—offers the prospect of saving society scores of billions of dollars in the future.” Pierce, *Electricity Crisis*, *supra* note 6, at 21.

230. A move from one distribution of resources to another is Pareto superior if it makes at least one person better off without making any other person worse off. See Jules Coleman, *Efficiency, Exchange, and Auction*, 68 CALIF. L. REV. 221, 226-31 (1980), reprinted in JULES COLEMAN, *MARKETS, MORALS & THE LAW* 67, 71-76 (1988); Jules Coleman, *Efficiency, Utility, and Wealth Maximization*, 8 HOFSTRA L. REV. 509, 512-26 (1980), reprinted in JULES COLEMAN, *MARKETS, MORALS & THE LAW* 95, 97-105 (1988).

231. Pierce, *Electricity Crisis*, *supra* note 6, at 10-11.

232. There are several reasons why many smaller customers will pay higher rates under competitive regimes in the short-run. Here are a few of the more obvious: (1) Under traditional cost-of-service regulation, capacity allocated to the high-load industrial customer is included in rate base. Most high-load industrial customers prefer to take their

likely be borne by smaller customers.²³³ In addition, smaller customers may suffer long-term increases in cost.²³⁴ In recent remarks, Pierce himself acknowledged the significance of these transitional costs, which some in the industry estimate as falling within the \$200 to \$300 billion range.²³⁵

However, according to Pierce, reviewing judges should ignore transition costs and defer to FERC's assessment of net benefits:

Once an agency makes a change in policy, the costs of the transition to that policy are pure sunk costs. They cannot be eliminated, retrieved, or even reduced.

power on an interruptible basis if they are given a sufficient discount. In a competitive pricing regime, interruptible service would be priced at variable cost and would not be allocated any fixed capacity costs, such as a generation plant. (This is because interruptible service, if properly implemented, would not constrain plant capacity.) By contrast, under traditional cost-of-service regulation, utilities had little incentive to price interruptible power at marginal cost. In many areas in which cost-of-service regulation remains, industrials who take power on an interruptible basis are paying a large portion of fixed costs, and thus are subsidizing smaller consumers. See Agis Salfukas, *How a Staid Electric Company Becomes a Renegade*, N.Y. TIMES, Dec. 12, 1993, at 10F ("Rates paid by large industrial customers have often enabled utilities to keep prices down for their residential customers."). If market-based pricing were fully implemented, smaller consumers could expect to lose this subsidy.

(2) Utilities have built the capacity to serve specific industrial loads under traditional franchise-area regulation. However, as more NUGs arise in bulk power markets and as large-load customers make decisions to purchase their power from outside of the traditional franchise system, many small customers will be left paying the cost of "stranded investment" in utility plants. See *id.* ("If local utilities begin to lose big customers to far away competitors, rates would probably rise for the residential and small commercial customers whose business might seem too small to interest the interlopers.").

(3) Many industrials own QFs or are affiliated with NUGs, and thus stand to gain from long-term purchase agreements with utilities. However, smaller customers may bear the risk of such arrangements, especially if they turn out to be sham, or inadequately financed, arrangements. See, e.g., *NY P.S.C. Okays \$122-Million Con Ed Payment to Buy Out Five NUG Pacts*, ELECTRIC UTIL. WK., Nov. 8, 1993, at 18.

233. Pierce acknowledges: "Any [transition cost] allocation method FERC devises will be vulnerable to plausible allegations of inequity with respect to one or more groups of market participants." Pierce, *Electricity Crisis*, *supra* note 6, at 10.

234. Smaller customers might be worse off in the long run because: (1) the increased risk associated with greater competition will lead to higher financing costs for utilities and, in turn, higher rates; and (2) as more generators tap into power grids, systems will become unreliable, leading to blackouts or "cratered" systems, abandoned if NUGs decide suddenly to shut down or go off-line. This second consideration is especially risky when NUGs have arisen from creative financing arrangements. See generally F. WILLIAM PAYNE, *CREATIVE FINANCING FOR ENERGY CONSERVATION AND COGENERATION* (1984).

235. Wamsted, *supra* note 86.

. . . It would be irrational to jeopardize attainment of scores of billions of dollars in social welfare gains because of a perceived flaw in an agency's treatment of a relatively trivial distributional issue.²³⁶

Pierce is correct to note that, once a decisionmaking body has committed itself to a policy change, distributional effects are a sunk cost. Economic theory would suggest that once we have committed ourselves to a policy choice, we should evaluate social costs *ex ante* at the margin.

However, this is an issue separate from the appropriateness of an agency's exercise of discretion in allocating these costs between consumers and regulated entities, some of which stand to gain while others are likely to lose. Judicial review should not defer to any change in social policy merely because it increases net social benefits. Rather, judicial review should concern itself with ensuring the reasonableness of the agency's exercise of its discretion in deciding how, if at all, to make such changes. The hard look doctrine is not concerned merely with the *ex ante* effects of FERC's decisionmaking at the margin. Rather, at its core, the hard look doctrine is concerned with the reasons the agency has proffered for exercising its discretion as it did. When courts invoke the hard look doctrine, they expose the agency's discretion to scrutiny by evaluating the presence of participation and deliberation of the agency.

3. THE HARD LOOK DOCTRINE AND AFFIRMATION OF DELIBERATIVE DEMOCRATIC VALUES

The first strand of the deliberative democratic model is increased citizen participation. Participatory values have their source in procedural fairness. Fair procedures allow all participants to have their views considered by the agency. Agencies will be more likely to consider all views if they anticipate judicial scrutiny of their decisionmaking processes. Thus, court application of the hard look doctrine ensures participation by precluding agencies from giving one interest the rubber-stamp in the rulemaking process, only to ignore the objections of other interests. Fair procedures will contribute to the legitimacy of government regardless of the substantive outcomes they generate in the form of a final rule. Persons and entities subject to bureaucratic regulation are more

236. Pierce, *Electricity Crisis*, *supra* note 6, at 21-22.

likely to view agency decisions as legitimate if the procedures leading to their formulation are fair.²³⁷

Participatory values are fundamental to the legitimacy of industry restructuring rulemakings, such as FERC's recent efforts to restructure competitively the energy industry. In the context of electric utility industry restructuring, application of the hard look doctrine by the courts creates incentives for the agency to consider all voices, however faint, in reforming regulatory policy. Small customers who will bear many of the short-term transition costs of deregulation in the electric utility industry are likely to raise objections to competitive reform absent equitable allocation of transition costs. Application of the hard look doctrine by reviewing courts ensures that their objections will be heard and adequately considered.²³⁸

The second strand of the deliberative democratic model, reasoned decisionmaking through a process of deliberation, is also protected by judicial review. Through its requirement of "reasoned decisionmaking," the hard look doctrine encourages agencies to engage in deliberation. In *Greater Boston Television Corp. v. FCC*,²³⁹ Judge Leventhal of the D.C. Circuit noted:

[A]n agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored, and if an agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute.²⁴⁰

In applying the doctrine, courts examine whether the agency has considered not only the views of participating parties but other relevant reasons as well.²⁴¹ Thus, the hard look doctrine imposes a

237. Research in social psychology suggests this to be so. See JOHN THIBAUT & LAURENS WALKER, *PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS* 121 (1975) (greater consideration of individualized arguments enhances perceptions of procedural fairness); E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* (1988).

238. A landmark case for the participatory strand of the deliberative democratic model is *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608 (2d Cir. 1968), *cert. denied*, 384 U.S. 941 (1966) (noting that the public interest includes consideration of aesthetic, conversational, and recreation needs, and that the FPC alone could not protect this interest); see also *Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966).

239. 444 F.2d 841 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971).

240. *Id.* at 852.

241. Under the "arbitrary and capricious" test, the court is to "consider whether the decision was based on a consideration of the relevant factors and whether there has

decisionmaking expectation which is stronger than the affirmation of participatory values.

Deliberative government is characterized by the requirement of reasoned analysis, or rationality, in the hard look doctrine. The thrust of a requirement of rationality is this: changes in regulatory law are permitted, but only as a product of reasoned analysis brought to bear on accumulated experience; not just the result of transitory political forces or regulatory appointees.²⁴² To the extent that the hard look doctrine guards against the exercise of such naked preferences in the political process by requiring consideration of all of the relevant reasons as well as deliberation about the public good, it has a legitimacy-enhancing role and is a fully justified use of judicial authority.²⁴³

Rationality also has the indirect effect of ensuring comprehension. Many critics of judicial review argue that courts are likely to misunderstand the technical reasons behind an agency's policy choice, and thus have no business interfering with implementation of the agency's expertise.²⁴⁴ While Max Weber's notion that government's claim to legitimacy derives from its ability to wield power on the basis of knowledge has a certain appeal in a world awash in social complexity and scientific uncertainty,²⁴⁵ it should not be implemented in isolation of the democratic process.²⁴⁶ Major changes in policy should be articulable in common language, easily comprehended by reviewing courts and the

been a clear error of judgment." *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285 (1974) (quoting *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971)).

242. Alfred C. Aman, Jr., *Administrative Law in a Global Era: Progress, Deregulatory Change, & the Rise of the Administrative Presidency*, 73 *CORNELL L. REV.* 1101, 1131-41 (1988).

243. See SUNSTEIN, *supra* note 119, at 57-58.

244. Strands of this assertion emerge from Pierce's analysis, which suggests that reviewing courts may not have understood the reasons behind FERC's policy choices. Pierce, *Electricity Crisis*, *supra* note 6, at 20, 23.

245. MAX WEBER, *ECONOMY AND SOCIETY* 973-80 (Guenther Roth & Claus Wittich eds., 1978).

246. Most regulation involves not pure questions of scientific expertise, but value judgments, such as who should bear certain risks or the costs of a policy choice. With respect to such questions, technical analysis is often inconclusive. CHARLES E. LINDBLOM & DAVID K. COHEN, *USABLE KNOWLEDGE: SOCIAL SCIENCE AND SOCIAL PROBLEM SOLVING* 47, 81 (1979). Moreover, such data is manipulable by experts within the agency hoping to persuade the policymakers in the agency's attempts to appease its overseers. ACKERMAN & HASSLER, *supra* note 217, at 80-84. Value judgments are, in many respects, inevitable. See DONALD MCCLOSKEY, *KNOWLEDGE AND PERSUASION IN ECONOMICS* (1994).

regulated industry, and the beneficiaries of a regulatory scheme.²⁴⁷ Otherwise, we run the risk of divorcing the exercise of bureaucratic expertise from the democratic process. If agencies anticipate that the reasoned basis for their rules and policies will be subject to the scrutiny of reviewing courts, agencies will be more likely to formulate reasons in *understandable* language relating to the policies advanced. Only if the bases for policy changes are articulated in understandable terms will courts be able to review them for rationality, or Congress be able to review them for responsiveness to the will of the people. Thus, by invoking the hard look doctrine to review the sufficiency of an agency's reasoned analysis, courts play a role in ensuring that the dialogue of bureaucratic expertise is compatible with the democratic process.

As a general matter, the role of courts in reviewing agency procedures is widely accepted. When courts review the substantive rationality of an agency's policy choice, however, they are often criticized for imposing their own arbitrary political preferences. Inevitably, however, consideration of a "reasoned analysis" implies a substantive as well as a procedural component to the hard look doctrine.²⁴⁸ When courts invoke the hard look doctrine, they force agencies to adopt a decisional process designed to ensure that the relevant reasons for change—namely, those public values enshrined in the Rule of Law through a democratic process—are identified and implemented, or force agencies to articulate alternative reasons. Judicial review becomes more substantive when a court becomes more demanding in assessing the relationship of an agency's reasoning to the Rule of Law, congressional purposes, and the agency's own stated purposes.²⁴⁹ The judiciary has

247. This focus on conversational legitimacy is consistent with the writings of many contemporary political theorists. *See, e.g.*, BRUCE A. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* (1980); Ronald Dworkin, *Liberalism, in PUBLIC AND PRIVATE MORALITY* 113-43 (Stuart Hampshire ed., 1978). Its most compelling theorist has been Jürgen Habermas, who views truth as intersubjectively determined consensual norms derived through participatory politics. JURGEN HABERMAS, *LEGITIMATION CRISIS* (1975); JURGEN HABERMAS, *TOWARD A RATIONAL SOCIETY* (1970); Jürgen Habermas, *Law and Morality, in THE TANNER LECTURES IN HUMAN VALUES* 219 (S.M. McMurrin ed., 1988). Parallels between dialogic accounts of legitimacy and civic republican theory have been observed in Friedman, *supra* note 223; Steven M. Feldman, *Republican Revival/Interpretive Turn*, 1991 *Wis. L. Rev.* 679.

248. *Cf.* THOMAS O. MCGARITY, *REINVENTING RATIONALITY: THE ROLE OF REGULATORY ANALYSIS IN THE FEDERAL BUREAUCRACY* (1991).

249. *Id.* at 295. In deregulatory contexts, some reviewing courts have demanded that an agency explain the connection between the policy they seek to reverse and the congressional intent they seek to further. *See generally* *International Bhd. of Teamsters v. United States*, 735 F.2d 1525, 1531-32 (D.C. Cir. 1984) (requiring agency to supply reasoned analysis relating to law enforcement function for change in reporting requirement that had been in effect for over 30 years); *Action on Smoking and Health v. CAB*, 699

a role in facilitating agency dialogue on these issues. It is appropriate for courts, through application of the hard look doctrine, to encourage affirmation of the deliberative values in the Rule of Law as a check on the decisionmaking discretion of agencies, as traditional separation of powers doctrine would suggest. This is not to say that judges can impose their own arbitrary political choices on an agency; judges must invoke understandable *legal* reasons for overruling an agency's decision.²⁵⁰

In the electricity restructuring context, reviewing the application of the hard look doctrine ensures that the democratic values enshrined in the FPA—particularly values relating to distributional equities²⁵¹—will be properly identified and implemented. At a minimum, the presence of substantive judicial review will compel an agency to compare different reasons for the way in which it has chosen to exercise its discretion. The ability of courts to add to the dialogue concerning the meaning of the FPA in an open manner contributes to democratic legitimacy.

4. JUDICIAL DISCRETION AND THE HARD LOOK DOCTRINE

The hard look doctrine is a legitimate and fully warranted exercise of judicial authority. However, Pierce suggests that courts have applied the doctrine as “a pretext for rejecting any policy decision that displeases the reviewing judges”²⁵² in cases like *AGA*.²⁵³ He concludes that, in the face of reviewing courts' application of the hard look doctrine, “FERC cannot know what would constitute ‘adequate consideration.’”²⁵⁴ Because of the manner in which the hard look doctrine has been applied, Pierce argues, agencies are unable to predict what reasons will pass

F.2d 1209, 1216-17 (D.C. Cir. 1983) (requiring agency to engage in “reasoned consideration of competing objectives and alternatives” prior to rescinding smoking regulations); *Wheaton Van Lines, Inc. v. ICC*, 671 F.2d 520, 527-28 (D.C. Cir. 1982) (requiring agency to engage in reasoned decisionmaking process “based on supportable facts and conclusions” which “promote equal application of the law” in departing from its past policies regarding purchases of operating rights from dormant carriers).

250. The significance of legal reasons is discussed further *infra* part IV.B.4.

251. *See, e.g.*, FPA §§ 205, 206, 16 U.S.C. §§ 824d, 824e (Supp. IV 1992) (prohibiting rates and charges which are not “just and reasonable,” which grant an undue preference or advantage, or which discriminate on the basis of class of service or locality). Traditional application of §§ 205 and 206 by courts and FERC has included consideration of the inter-customer equities.

252. Pierce, *Electricity Crisis*, *supra* note 6, at 28.

253. *See supra* notes 45-48 and accompanying text.

254. *Id.* at 23.

judicial muster and, in some instances, must attempt to reconcile seemingly contradictory messages from reviewing courts.²⁵⁵

The fact that application of the hard look doctrine is indeterminate, however, should not be a reason for rejecting its use in judicial review. It is perhaps too easy to conclude that, because reviewing courts exercise unconstrained discretion with this doctrine, it invites an unwarranted exercise of judicial authority. Discretion, whether exercised by the agency or courts, is likely to be considered troublesome because two or more outcomes are possible. Members of the legal community will often disagree about an outcome, but this is no reason for judges to defer to legislative or agency choices.²⁵⁶ To the contrary, as Professor Daniel Farber has recently argued, the indeterminacy introduced by judicial review may produce “hysteresis effects,” allowing courts, agencies and regulated players to learn more about the consequences of a regulatory decision. By contrast, if courts were to take an irreversible step, such as deferring to FERC’s findings regarding the impact of “stranded” generation costs on certain customers and allowing transmission access under these terms, this would foreclose further study, debate and acquisition of knowledge on this issue. Judicial review introduces uncertainty and requires the agency and regulated industry to wait for regulatory changes. As Farber notes, “[W]aiting is equivalent to purchasing an option contract, and under many circumstances that option has positive value.”²⁵⁷

Thus, the yearning for determinacy in judicial review is misplaced. Judges will always have discretion of some sort, even in what may appear to be the simplest cases. Notwithstanding this discretion, judges have a duty to uphold the law.²⁵⁸ Judges give reasons for deciding a case in a certain manner. Reasons relating to the relevant set of legal materials, as accepted by the legal community, are legal reasons. Legal reasons

255. “Because agencies must regularly address ‘questions plagued by multiple uncertainties and a scarcity of information . . . [a] bright lawyer . . . can make almost any regulatory analysis document appear to be irrational.’” *Id.* at 26 (citing McGarity, *supra* note 55, at 1329).

256. See DWORKIN, *supra* note 117, at 112-13.

257. Daniel A. Farber, *Environmental Protection as a Learning Experience*, 27 *LOY. L.A. L. REV.* 791, 803 (1994). Farber suggests lowering the scope of review under the hard look doctrine where the agency can demonstrate that: (1) the regulatory action at issue will not cause irreparable injury; (2) the agency has taken steps to discover and generate additional relevant information; and (3) the agency has in place a process that will result in reappraisal of the regulatory action as new information is evaluated. *Id.* at 806. His analysis of “hysteresis” is based on Avinash Dixit, *Investment and Hysteresis*, 6 *J. ECON. PERSP.*, Winter 1992, at 107.

258. MODEL CODE OF JUDICIAL CONDUCT Canon 3(B)(2) (1990) (a judge “should be faithful to the law and maintain professional competence in it”).

include, in addition to the traditional core of legal materials, such as case law and statutes, the background procedural norms and justifications from which the core emanates. Legal reasons can be contrasted with moral and other kinds of reasons which do not in any way depend upon the law, such as a judge's personal political, moral, or policy preferences. Judges exercise their discretion in good faith when they decide cases on the basis of legal reasons—the relevant core of legal materials—and not on the basis of their personal political, moral, or policy preferences.²⁵⁹

It is constructive to distinguish between appropriate and inappropriate exercises of judicial discretion in applying the hard look doctrine. Consider, for example, Pierce's critique of the District of Columbia Circuit's application of the adequate consideration doctrine in *AGA*.²⁶⁰ Judges appropriately apply the adequate consideration doctrine when they examine the reasons the agency would have adopted had it made an alternative policy choice, and when they determine whether the agency, prior to adoption of a final rule, compared those reasons to the reasons that form the basis for the agency's final policy choice.²⁶¹ When applying the adequate consideration doctrine, a court should accept an agency's decision so long as the agency, prior to its adoption of a final policy choice, adequately considered the alternative reasons. A court should not impose a policy choice on an agency. Instead, it should remand to the agency for reconsideration in light of its past mistakes.

Thus, in *AGA*, to the extent the reviewing court rejected FERC's final rule for failure to examine reasons FERC had (prior to adoption of its policy choice) already considered by comparing them to the reasons

259. Professor Steven Burton, in presenting his good faith theory of adjudication, acknowledges that the law is indeterminate. Burton acknowledges, however, that indeterminacy does not matter within the practice of adjudication, internally understood. Unlike Dworkin, Posner, and others who have attempted to "solve" law's indeterminacy, Burton, like most judges and lawyers, is content to live with it. See STEVEN J. BURTON, *JUDGING IN GOOD FAITH* (1992). As most constitutional scholars have moved beyond the attempts of Bickel and others to solve the perceived counter-majoritarian difficulty, see *supra* note 223, Burton suggests that legal theorists move beyond their misguided attempts to "solve" the perceived problem of indeterminacy. The indeterminacy of a policy choice's consistency with the legal landscape may well be accepted within the practice of internal agency decisionmaking. While many critics of judicial review propose deference to agency decisionmaking as a solution to the problem of indeterminacy, perhaps agency decisionmakers have resolved themselves to living with it.

260. See *supra* notes 45-48 and accompanying text.

261. It is crucial, in applying the hard look doctrine, that courts determine whether the agency considered the alternatives prior to the adoption of its final policy choice. Cf. *SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943) (the record cannot include materials produced post hoc, as the agency's attorneys try to justify a decision to the reviewing court). Condoning post hoc rationales would work to thwart affirmation of participatory values.

for its final policy choice in Order No. 500, the court may have inappropriately imposed its own policy choice on the agency. By contrast, if the reviewing court in *AGA* had determined that FERC failed to compare the rejected reasons with the reasons behind its final policy choice, that FERC's reasons were contradicted by other legal reasons (e.g., Congress' intent) or that FERC failed to make this comparison prior to the issuance of a final agency rule, the decision would have been an appropriate, and fully warranted, application of the doctrine.

As described by Pierce, *AGA* appears to be an imprudent intrusion on FERC's discretion and an overly activist application of the hard look doctrine. The *AGA* court, in rejecting FERC's policy choice in Order No. 500, did not examine the nature and sufficiency of the reasons behind alternative choices, but instead focused on the policy choices themselves. Application of the hard look doctrine should be concerned with the adequacy of the agency's reasons, not their results. To the extent the District of Columbia Circuit in *AGA* rejected FERC's decision because of its failure to adopt a policy choice deemed by the court, for non-legal reasons, to be preferable, it is not exemplary appellate judging. However, the court could have invoked alternative grounds for rejecting FERC's decision without doing violence to the hard look doctrine if, for example, it had rejected FERC's policy choices as inconsistent with substantive statutory law or deliberative processes—legal reasons behind the policy choice.

By contrast, in *KN Energy, Inc. v. FERC*,²⁶² the District of Columbia Circuit reached an appropriate balance between its review of the agency's rationale and its deference to the agency's deliberative processes. At issue in *KN Energy* was FERC's implementation of policies regarding the allocation of take-or-pay costs established in Order No. 500. FERC had rejected the pipeline's proposal to implement a take-or-pay cost recovery mechanism by imposing a surcharge only upon sales customers, and instead required the pipeline to impose the surcharge upon all of its customers. *KN Energy*, a section 7(c) transportation customer of the pipeline, appealed, arguing that FERC's decision violated the "cost causation" principle, which traditionally required approved rates to reflect to some degree the costs actually caused by the customers who must pay them.

The District of Columbia Circuit, noting that FERC's interpretation of its own regulations is entitled to more deference than its reading of a statutory mandate, agreed with FERC's reading of Order No. 500.²⁶³ The court also held that FERC's decision was not inconsistent with

262. *KN Energy, Inc. v. FERC*, 968 F.2d 1295 (D.C. Cir. 1992).

263. *Id.* at 1300.

statutory or procedural authority, noting that Order No. 500 "may represent only a minor departure from the cost-causation principle."²⁶⁴ The court, however, found FERC's decision lacking in one crucial respect. Specifically, FERC had failed to demonstrate a meaningful connection between the rationale behind Order No. 500 and the particular circumstances of Section 7(c) transportation customers. After noting that charging Section 7(c) transportation customers some portion of take-or-pay costs is "not inherently inconsistent with the requirement of reasoned decisionmaking," the court vacated the Commission's decision and remanded it to FERC for further consideration.²⁶⁵

The anomaly of *AGA* should not lead us to reject or restrict application of the hard look doctrine in the energy restructuring context. Rather, as I have argued, proper application of the hard look doctrine by lower courts reviewing FERC restructuring rulemakings is a fully warranted and legitimate exercise of judicial authority. Judges, unlike agencies which react to immediate issues, possess the unique capacity to fit to a problem the context of history and the full legal topography.²⁶⁶ The hard look doctrine, properly applied, contributes to the political conversation between governmental branches, enhances deliberative democratic decisionmaking and contributes to legitimacy.

V. REFORMS TO RULEMAKING AND ADJUDICATION

According to the weak version of the policy-effect thesis,²⁶⁷ supported by the descriptive analysis of FERC's policy choices in this Article,²⁶⁸ judicial review has caused FERC to exhaust at least some of

264. *Id.* at 1302. It is not clear from the court's decision, however, whether the court or the agency provided this rationale post hoc, or whether it was provided by FERC prior to its approval of a final rule.

265. *Id.* at 1304; *see also* *Cajun Elec. Power Coop. Inc.*, 28 F.3d 173 (D.C. Cir. 1994) (*per curiam*) (reversing and remanding market-based tariff decision for failure to conduct an evidentiary hearing addressing the impact of "open-access" transmission tariff on utility's market power and for failure of FERC to adequately explain approval of standard investment provision). *Compare* *PUC of California v. FERC*, 988 F.2d 154, 167 (D.C. Cir. 1993) (upholding the sufficiency of FERC's reasoning in a decision which allowed a pipeline to abandon a gas-inventory charge and recover take-or-pay charges from customers through an alternative method).

266. *Cf.* GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 44-58 (1982). Judge Calabresi suggests that common law courts reviewing legislative or agency rules "not be bound to declare or promulgate the new in order to find that the old fails to fit." *Id.* at 165. This suggestion coheres with the hard look doctrine which, if properly applied, would remand a decision to the agency for further deliberative democratic reconsideration.

267. Described *supra* part I.

268. *See supra* part III.

its policymaking resources in the adjudicative context, rather than through rulemaking. This is consistent with the general conclusions drawn by policy-effect critics who have examined other agencies, such as EPA, OSHA, NHTSA, and FTC.²⁶⁹ After examining the viability of changes in external incentives designed to compel rulemaking, this Part advocates some reforms to existing statutory mechanisms and judicial doctrine to increase the accountability and deliberation of adjudicative decisionmaking at FERC.

A. Why Not Presumptive Rulemaking?

Pierce, joined by policy-effect critics in other agency contexts, suggests that it is preferable that policy be implemented through rulemaking rather than ad hoc adjudication.²⁷⁰ Pierce identifies the cause of the problem of FERC's choice of adjudication over rulemaking as judicial review, particularly an instantiation known as the hard look doctrine. There may well be some truth to the claim that, as a normative matter, the use of rulemaking vis-a-vis ad hoc adjudication by FERC would have been preferable.²⁷¹ rulemaking increases participatory fairness, has broader legitimacy, and is a more efficient mechanism for making law and policy than ad hoc adjudication.²⁷² However, if we accept the legitimacy of the hard look doctrine when appropriately applied by the good faith exercise of judicial discretion,²⁷³ we might be led to solve the problem without constricting judicial review as Pierce and other policy-effect authors suggest.

Agencies face a variety of incentives for choosing to make law and policy by method of adjudication over rulemaking. Clearly, expectations created by judicial review of agency discretion are one of these incentives, but there are others as well. Agencies are likely to respond to additional external incentives, such as executive oversight,²⁷⁴

269. These studies are described *supra* notes 1-5 and accompanying text.

270. Pierce, *Electricity Crisis*, *supra* note 6, at 11-13; MASHAW & HARFST, STRUGGLE FOR AUTO SAFETY, *supra* note 3, at 5-6, 11-13; MELNICK, *supra* note 1, at 247.

271. We should be careful to distinguish between those situations in which FERC is issuing a de facto rule (a statement of general applicability and future effect) through the use of adjudicative procedures, as opposed to those situations in which FERC is legitimately using its adjudicative functions to make law on a case-by-case basis. The FERC adjudicative proceedings discussed *supra* part III are of the latter, not the former, type.

272. See *supra* notes 19-26 and accompanying text.

273. See *supra* part IV.

274. Notably, although the Office of Management and Budget's cost/benefit review, discussed *supra* notes 220-21, imposes strict requirements on rulemaking that do

congressional oversight, congressionally-imposed statutory requirements and judicially imposed default mechanisms. Changing these other external incentives may have as much, if not more, effect on agency choice of lawmaking methodology as would curtailing judicial review. While recognizing that changes to incentives provided by the executive may also be in order,²⁷⁵ this Section examines potential changes to congressionally or judicially imposed incentives for using rulemaking.

Congress has historically exercised control over delegated authority through its oversight function. Strong congressional oversight of FERC's choice of lawmaking methodology is clearly in order. In a March 1993 hearing addressing implementation of the Energy Policy Act, Representative Philip Sharp, who chairs the Subcommittee of Energy and Power of the House Committee on Energy and Commerce, stated that Congress is ready and willing to provide FERC assistance in resisting opponents to electric industry restructuring through "oversight and any other means we can identify to ensure that consumers benefit from a more competitive wholesale market."²⁷⁶ Commendably, the Environment, Energy, and Natural Resources Subcommittee of the House Operations Committee, which oversees the operation of FERC's electricity regulation program, has solicited and considered witnesses' comments concerning the appropriateness of rulemaking versus adjudication at FERC.²⁷⁷ These committees should continue to exercise their oversight functions with regard to FERC's choice of lawmaking methodology aggressively and with rigor.

However, it is doubtful that congressional oversight alone would be sufficient to induce FERC to exercise a general preference for rulemaking

not apply to adjudication, Pierce does not attribute adverse effects on agency decisions to them. Rather, he operates under the assumption that these executive oversight mechanisms are normatively superior to other types of review. Pierce, *Political Theory*, *supra* note 13, at 520-24.

275. Margaret Gilhoolcy, *Executive Oversight of Administrative Rulemaking: Disclosing the Impact*, 25 IND. L. REV. 299 (1991); Paul R. Verkuil, *Jawboning Administrative Agencies: Ex Parte Contacts by the White House*, 80 COLUM. L. REV. 943 (1980).

276. *Energy Policy Act Implementation: Hearing Before the Subcomm. on Energy and Power of the House Comm. on Energy and Commerce*, 103d Cong., 1st Sess. 2 (1993) (statement of Philip R. Sharp, Chairman, Subcommittee on Energy and Power).

277. *Federal Energy Regulatory Commission's Electricity Regulation Program: Hearing Before the Environment, Energy, and Natural Resources Subcomm. of the House Comm. on Government Operations*, 103d Cong., 1st Sess. (1993). Representative Synar, Chairman of this Subcommittee, solicited witnesses' comments regarding the use of adjudicative determinations for addressing classes of cases as opposed to generic rulemaking, and the impact of case-by-case decisionmaking on the due process rights of those who did not participate as parties in the original proceeding but who might be bound by the precedents it established. *Id.*

where it is making policy of precedential effect. Congress does not have the resources to monitor every agency choice to make policy via adjudication. Further, Congress may face strong political incentives to leave this choice to the agency, as the same special interests which have secured broad congressional delegation may also be able to keep Congress from controlling the agency's procedural choices. Due to budgetary limitations, agencies will always face conflicting congressional signals. More importantly, the stronger Congress' oversight, the more agencies may attempt to protect themselves from congressional review by shifting policymaking into an adjudicative context.²⁷⁸ For such reasons, it is well-recognized that, once decisionmaking discretion has been delegated to an agency, it is very difficult for politicians to punish or correct deviations from intended policies.²⁷⁹

A more effective mechanism for controlling agency choice of lawmaking methodology *ex ante* is necessary. Remarkably, federal courts have followed *Chenery's* deference to an agency's choice of lawmaking methodology for over forty years with little criticism.²⁸⁰ At present, federal law does not create any general preference for rulemaking. Perhaps, in light of the policy-effect critiques of judicial review's adverse effects on rulemaking, the time is ripe to reconsider this decision.

One reform option would be for Congress to amend the APA to provide a default standard of statutory interpretation which obligates agencies to make law through rulemaking rather than adjudication where Congress has delegated discretion to an agency under a vague statutory standard, unless Congress has specified otherwise. Alternatively, Congress might consider amending existing substantive laws such as the FPA, which contain vague standards, in order to create a general obligation for agencies to engage in rulemaking. Where Congress has directed FERC to promulgate rulemakings, as it did in the Energy Policy Act, FERC has responded positively and without hesitation.²⁸¹

But Congress might not have the political courage to implement such requirements, especially given the political incentives it faces from powerful interest groups to delegate hard policy and legal choices to agencies. Even if Congress is able to enact a preference for rulemaking and to decide on rulemaking deadlines, Congress' deadlines may never be met due to conflicts with the agency and executive branch or budgetary limitations.²⁸² Absent effective congressional action, it might be

278. See, e.g., *Pillsbury Co. v. FTC*, 354 F.2d 952, 963-65 (5th Cir. 1966).

279. *McCubbins et al.*, *supra* note 216, at 443.

280. See *supra* notes 27-30 and accompanying text.

281. See *supra* note 178 and accompanying text.

282. See ENVIRONMENTAL AND ENERGY STUDY INSTITUTE AND ENVIRONMENTAL LAW INSTITUTE, STATUTORY DEADLINES IN ENVIRONMENTAL LEGISLATION: NECESSARY

considered a fully warranted and legitimate exercise of judicial authority for federal courts to develop a similar default standard of statutory interpretation for federal agencies. As Professor Kenneth Culp Davis has recognized, reviewing courts at the federal level have inherent authority to create common law requiring agencies to adopt rules to guide the exercise of their administrative discretion.²⁸³ Adoption of such a norm in case law would enhance legitimacy by allowing judicial review, particularly of the critical nature encouraged by the hard look doctrine, to complement a system of agency lawmaking which is more accountable to the will of the community at large.

At the state level, there is a growing movement to impose a legally binding preference for rulemaking as the primary means of agency lawmaking.²⁸⁴ In *Megdal v. Oregon Board of Dental Examiners*, for example, the Oregon Supreme Court imposed a fairly broad obligation to prefer rulemaking over adjudication for agency lawmaking on the State Board of Medical Examiners.²⁸⁵ After rejecting the argument that the due process clause of the Fourteenth Amendment required elaboration of an "unprofessional conduct" standard by rule prior to its application in a particular case,²⁸⁶ the Oregon court based a general obligation for agency rulemaking on the following principle of statutory construction:

[W]hen a licensing statute contains both a broad standard of 'unprofessional conduct' that is not fully defined in the statute itself and also authority to make rules for the conduct of the regulated occupation, the legislative purpose is to provide for

BUT NEED IMPROVEMENT, at ii (1985) (by mid-1985, only 14 percent of EPA's statutory deadlines had been met); see also *Developments in the Law: Toxic Waste Litigation*, 99 HARV. L. REV. 1458, 1474 (1986) (noting that EPA has frequently violated statutory deadlines for the implementation of federal hazardous waste litigation).

283. 2 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 7.26, at 128 (2d ed. 1979). Davis presents four theoretical bases for his claim: (1) the nondelegation doctrine has failed in recent years; (2) in some circumstances, lack of rules or standards would be so unreasonable as to deny due process; (3) it is a way around the harsh consequences of the void for vagueness doctrines; and (4) its an evolving common-law or equitable consideration based on a judicial understanding of fairness and propriety. *Id.* at 131.

284. See Arthur E. Bonfield, *State Administrative Policy Formulation and the Choice of Lawmaking Methodology*, 42 ADMIN. L. REV. 121 (1990) [hereinafter Bonfield, *Lawmaking Methodology*]; see also Arthur E. Bonfield, *Mandating State Agency Lawmaking by Rule*, 2 B.Y.U. J. PUB. L. 161 (1988).

285. 605 P.2d 273 (Or. 1980) (en banc) (requiring Board to give content to "unprofessional conduct" standard by rule prior to application in specific case).

286. *Id.* at 274-78.

the further specification of the standard by rules, unless a different understanding is shown.²⁸⁷

The Oregon Supreme Court excepted from this general obligation, however, rulemaking which is “unfeasible” or impractical.²⁸⁸ Professor Arthur Bonfield, a well-known advocate of the study of state administrative law,²⁸⁹ has summarized *Megdal’s* holding in the following principle of statutory interpretation:

In the absence of clear evidence to the contrary, the legislature is presumed to intend an agency that has been delegated express authority to issue rules and express or implied authority to decide individual cases, subject to a vague statutory standard, to elaborate that standard by rule rather than by order, as soon as feasible and to the extent practicable.²⁹⁰

This default principle of statutory interpretation, backed by a norm of judicial review consistent with the hard look doctrine, could work to enhance agency lawmaking’s promotion of deliberative democratic values.

Clearly, agency failure to use rulemaking is a pervasive problem, not only at FERC but other agencies as well. While undermining, or perhaps overruling, *Chenery* with a court-imposed interpretive norm seems a radical solution, it is not without a strong normative basis. This recommendation addresses concerns similar to those raised by the constitutional scholars Professor Gerald Gunther and Professor John Ely, as well as the economist and administrative law scholar Professor Susan Rose-Ackerman. Ely is concerned with reinforcing democratic representation by adding a greater realism to judicial interpretation of statutes.²⁹¹ Gunther argues that “safeguarding the structure of the political process has been acknowledged as a major judicial obligation

287. *Id.* at 283.

288. *Id.* at 284.

289. *See, e.g.*, Arthur E. Bonfield, *The Federal APA and State Administrative Law*, 72 VA. L. REV. 297 (1986); Arthur E. Bonfield, *State Law in the Teaching of Administrative Law: A Critical Analysis of the Status Quo*, 61 TEX. L. REV. 95 (1982).

290. Bonfield, *Lawmaking Methodology*, *supra* note 284, at 161.

291. JOHN HART ELY, *DEMOCRACY AND DISTRUST* 88, 101-04 (1980) (arguing that a representation-reinforcing approach to judicial review is supportive of the underlying premises of American democracy and involves tasks for which judges are particularly well suited); *id.* at 125 (arguing that courts should help to improve the visibility of the legislative process because “popular choice will mean little if we don’t know what are representatives are up to”).

since the 1930's."²⁹² Rose-Ackerman proposes that courts review regulatory statutes: 1) for internal consistency, requiring a statutory statement of basis and purpose and consistency between this statement and the body of the statute; 2) to determine if appropriations made under a statute are adequate to carry out statutory purpose and, if not, to repeal underfunded provisions; and 3) to give legal status to congressional rules preventing the inclusion of substantive provisions in appropriations acts, which permit statutes to be amended in invisible ways.²⁹³ Rose-Ackerman, like Ely and Gunther, does not envision judicial review as mandating any particular procedure or substantive provision on the legislature; rather, judicial review improves the transparency of the legislative process by encouraging legislative deliberation and improving voters' capacity to monitor congressional actions.

A default norm of statutory interpretation which favors rulemaking where Congress has delegated discretion to an agency under a vague statutory standard may have similar effects. Where rulemaking is not desirable or is beyond an agency's capabilities, such a principle would create incentives for an agency to lobby Congress for changes to substantive law, either granting exceptions allowing the use of adjudication or increasing agency resources for purposes of rulemaking. The net results would be to provide a normatively preferable default principle and, where the agency is unwilling or unable to comply, or where special interests have convinced Congress that rulemaking is not appropriate, to focus congressional attention and deliberation on agency procedures. Special interests may be able to continue to secure their choice of policymaking methodology at the agency, but not without further congressional deliberation and publication. In a recent book,²⁹⁴ Cass Sunstein has argued that courts should revive norms of statutory interpretation designed to promote constitutional purposes and the basic goals of deliberative government. Perhaps it is useful to conceive of this proposed principle as an addition to Sunstein's set of interpretive principles for the regulatory state.

Nevertheless, I am inclined to reject this presumptive approach to rulemaking, whether applied generally by Congress or by the courts. While presumptive rulemaking would encourage deliberative democratic government, it is not without high costs. First, because rulemaking is generally more costly than adjudication, such a presumption might well

292. Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 44 (1972); see also *id.* at 23 (requiring statutes to be a rational means to a legitimate end).

293. ROSE-ACKERMAN, *supra* note 70, at 189-90.

294. See SUNSTEIN, *supra* note 119, at 111-59.

deter agencies from making new policy. Second, such a presumption ignores the necessity of agency discretion in implementing regulations: no set of regulations is comprehensive enough to avoid adjudicative applications that raise new legal and policy issues.²⁹⁵ Thus, in order to ensure deliberative democracy, alternative reforms are needed.

B. Increasing the Accountability and Deliberation of Adjudication

It would be preferable that we focus on reforming adjudication rather than rulemaking. *Chenery* recognized that case-by-case decisions can create new standards of conduct which have precedential effect.²⁹⁶ FERC's reform of electricity regulation through ad hoc decisionmaking, as discussed in this Article, exemplifies the emergence of precedent through adjudication. The legal rules and policies developed in and reinforced through adjudicative proceedings at FERC have had the same practical effect as would rules promulgated through the formal or informal processes of the APA. Professor Glen Robinson has argued that the APA's distinction between rulemaking and adjudication is an arbitrary, overly formalistic distinction which ignores the practical aspects of regulation.²⁹⁷ The analysis of this Article would suggest that, at least with respect to FERC, he is correct. Movement towards a competitively structured electric utility industry appears irreversible. Although it would be a propitious time for FERC to engage in rulemaking,²⁹⁸ FERC will likely continue to bring competition to the industry by adopting legal- and policy-oriented reforms in adjudicative contexts.

Thus, to the extent an agency is using adjudication to perform generic rulemaking functions, courts should ensure that a participatory and deliberative decisionmaking process has occurred by applying a hard look doctrine to adjudicative proceedings.²⁹⁹ To enhance the

295. It has been recognized, for example, that Order No. 636's success has been guaranteed by the willingness of FERC and regulated parties to "bend the rules" and allow flexibility in its implementation. See *Energy Lawyers Told that Cooperation and Rule-Bending Were Crucial Elements of Post-Order No. 636 Success So Far*, FOSTER NATURAL GAS REP., May 19, 1994, at 12. For discussion of the necessity of adjudicative discretion in the implementation of PURPA's rules, see Rossi, *supra* note 16.

296. 332 U.S. at 202-03 ("[T]he agency must retain power to deal with the problems on a case-by-case basis if the administrative process is to be effective. There is thus a very definite place for the case-by-case evolution of statutory standards.").

297. Glen O. Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform*, 118 U. PA. L. REV. 485, 535-36 (1970).

298. See *supra* note 173 and accompanying text.

299. The D.C. Circuit has recently applied heightened scrutiny in the adjudicative context to require further deliberation at the agency. *Cajun Elec. Power Coop., Inc. v.*

compatibility of the pronouncement of policy in adjudication proceedings with the will of the community at large, Congress should consider amending existing substantive laws to require broader intervention rights in agency adjudicative proceedings that make new law and policy, as well as more liberal appeal of such adjudicative decisions. Hybrid procedures, including generic adjudication inviting paper comments from parties, could work to enhance participation. Notably absent from the judicial review provisions of the APA or the Federal Rules of Civil Procedure is any serious mechanism for consolidating agency adjudicative cases on appeal which have raised similar legal and policy issues over time so that reviewing courts are able to evaluate the full precedential effect of the agency's individual adjudicative decisions.

In addition to legislative modification, it would be appropriate for courts to more aggressively review FERC's routine denial of interventions in adjudicative proceedings likely to address legal and policy issues of precedential effect.³⁰⁰ If, as I suppose, the rulemaking/adjudication distinction is somewhat of a fiction in the FERC context, courts should scrutinize more closely what the agency did in adjudicative proceedings, not what the agency has chosen to call its actions. Adoption of such mechanisms could clearly work to enhance the fairness and accountability of adjudication in the context of FERC decisionmaking.³⁰¹

FERC, 28 F.3d 173 (1994) (per curiam) (remanding order approving transmission tariff filing for FERC's failure to explain approval of standard investment provision).

300. Under some existing FERC precedents, an interest that is based solely on the possible precedential effect of the Commission's decision in a particular proceeding does not constitute a sufficient interest to warrant intervenor status in that proceeding. *See, e.g.*, *Northeast Util. Serv. Co.*, 53 F.E.R.C. ¶ 61,135, at 61,456 (1990). Recent cases, particularly those addressing the scope of FERC's authority to order wholesale transmission access, have allowed broader intervention. *Florida Mun. Power Agency*, 65 F.E.R.C. ¶ 61,125, at 61,612 (1993) (granting interventions in first proceeding addressing request for a transmission order under FPA §§ 211, 212, as amended by the Energy Policy Act, because the order "could have the effect of establishing binding precedent on issues affecting the entire industry").

301. Many of the reforms I have in mind echo Professor Susan Bandes' proposed reforms for Article III case and controversy jurisprudence. Bandes views the federal courts' current case and controversy jurisprudence as atomistic, assuming that a case is an even controversy between private individuals for material stakes. This "private rights" model leads to a refusal to recognize the cognizability of collective rights and collective harms, as well as a contorted logic where courts desire to deviate from the private rights model. Susan Bandes, *The Idea of a Case*, 42 STAN. L. REV. 227 (1990).

VI. CODA

In this Article, I have described certain inaccuracies with the policy-effect account of judicial review's effects on the FERC. On the whole, evidence of judicial review's effects on FERC's policy choices is ambiguous, at best. FERC has made many of its choices in the adjudicative context, perhaps in part due to reviewing court application of the hard look doctrine, but also, I would argue, due to statutory constraints on FERC's discretion, structural problems unique to the electricity industry, and a concern for transition costs. Moreover, FERC has been able to muster the political courage to complete restructuring rulemakings in the natural gas context and, in 1993, to commence several rulemakings and generic policy inquiries in the electric utility context. Now would be a propitious time for FERC to continue these efforts.

This Article has also attempted to redeem judicial review as a protector of deliberative democratic values from the myopic anti-majoritarian role its critics have given it. Deliberative democracy, with its emphasis on increased citizen participation and deliberative government, envisions an active role for the judiciary in reviewing the exercise of agency discretion. Where Congress has delegated decisionmaking discretion to administrative agencies, judicial review is more adept at protecting these values than controls such as legislative or executive oversight.

Taken together, the descriptive and normative strands of this Article should help to construct a more accurate and complete understanding of judicial review, its adverse effects, and its virtues in the energy context. Although it is difficult to isolate the effects of judicial review on any agency's policy choices, in the FERC context there is some indirect evidence that judicial review may have caused FERC to exhaust many of its resources in adjudicative proceedings, rather than make generic policy through rulemaking, as a weak version of the policy-effect thesis would suggest. This alone should not lead us to constrict judicial review, I have argued, for reforms to adjudication may work to enhance deliberative democratic values in ways compatible with judicial review.

Before concluding, I should respond briefly to two objections that might be raised to the approach I have taken in this Article. One might, first, accuse me of being an apologist for FERC's recent policy choices. While I have identified many desirable reforms voluntarily initiated by FERC, I do not believe that FERC has gone as far as it can or should in reforming the electric utility industry. By describing what FERC has done in recent years, I hope that I have not suggested that I agree with all of these reforms. My only purpose in describing these reforms has been to revisit the policy-effect account, first presented by Pierce in the energy context, and to understand how the choices available to FERC may differ

from choices available to other agencies, such as EPA, OSHA, or NHTSA.

A second objection is that one might characterize the deliberative democratic defense of judicial review as "court-based," trivializing the roles of the legislature and executive. The theory I have presented, however, should not be taken to suggest that courts have the ability or power to seek out the common values of the general polity and to implement them. At best, courts provide only a partial delineation of these values. But more important is the contribution of courts to political conversation: the primary role of courts is in assuring the expression of these values through more accountable and deliberative institutions. Within the theory I have presented, the traditional legislative and executive branches, as well as administrative agencies, remain active in decisionmaking processes.

The account of judicial review I have presented differs in some respects from the classical administrative law approach, which attempts to understand the role of judicial review as merely controlling agency policymaking discretion. As an alternative to this traditional vision, I have tried to present an account of the hard look doctrine that contemplates a partnership role for courts with Congress and agencies in promoting legitimacy, or what one commentator has called "sound governance."³⁰² Within this account, judicial review does not exist in isolation to be evaluated with respect to its impact upon the agency; rather, judicial review is viewed as a part of an ongoing political conversation that aims to reconcile implementation of the value of technical expertise with the normative dimensions of democracy. Recent comparative legal scholars have noted the normative problems with a weak judiciary and broad deference to agency decisionmaking in countries such as Germany and South Africa.³⁰³ Perhaps American administrative law scholars could benefit from tempering their descriptive accounts of judicial review's adverse effects with a similar dose of normativity. Cautious, comprehensive case-by-case studies of judicial review's

302. In a recent book, Professor Christopher Edley presents a theory of judicial review designed to promote "sound governance," a shift from the predominant "control of discretion" paradigm in administrative law. CHRISTOPHER F. EDLEY, JR., *ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREAUCRACY* 213-14 (1990). Edley's account, however, is rather vague about what sound governance entails.

303. DAVID DYZENHAUS, *HARD CASES IN WICKED LEGAL SYSTEMS: SOUTH AFRICAN LAW IN THE PERSPECTIVE OF LEGAL PHILOSOPHY* 257-70 (1991) (using case study of deferential review of executive actions by South African judges to defend judicial review in the British administrative law context against its critics); Susan Rose-Ackerman, *American Administrative Law Under Siege: Is Germany a Model?*, 107 *HARV. L. REV.* 1279 (1994) (noting sacrifice of democratic value in German public law model, which is highly deferential to agency decisions).

practices, problems, and virtues might support the policy-effect assault on judicial review, but they may just as well have a sobering effect on those who would curtail the judiciary's role in the administrative state.

