

ARTICLES

THE PRESIDENCY AND ADMINISTRATIVE VALUE SELECTION

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INTRODUCTION

Much of the job of modern administration requires agencies to make difficult and critical value choices that affect myriad aspects of our lives.¹ Administrative agencies address value-laden issues ranging from conflicts between environmental, health and safety, and economic values, to conflicts between different moral, ethical, or political visions of society.² Although agencies' governing legislation sometimes prescribes these value choices,³ often the legislation fails to identify relevant values⁴ or instead acknowledges conflicting goals and values yet fails to resolve the conflicts.⁵ Thus, the legislation leaves the agency to fill in the gaps.⁶ Accordingly, an agency is often forced to make policy in a value void and, before it acts under

1. Cf. BERNARD SCHWARTZ, *ADMINISTRATIVE LAW* 168-69 (3d ed. 1991) (explaining that administrative rulemaking allows broad participation in administrative process, which permits agencies to develop integrated plans in important policy areas).

2. See *id.* at 177 (stating that modern administrative agencies are faced with determinations dealing with products, personnel, and environmental concerns versus cost considerations); see also *infra* notes 64-84 and accompanying text (discussing role of value selection in administrative policymaking).

3. See, e.g., Occupational Safety and Health Act (OSH Act), § 6(b)(5), 29 U.S.C. § 655(b)(5) (1988) (authorizing agency to prescribe minimum exposure standards for hazardous substances in workplace that must be met regardless of substantial economic cost to employer); see also *American Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 509 (1981) (holding that in enacting OSH Act, Congress itself defined relationship between costs and benefits by placing benefit of worker health above all other cost considerations; thus Occupational Safety and Health Administration is required to set standards for worker safety that are limited not merely by cost to employer but by capability of employer to implement standards).

4. See *infra* note 68 (providing examples of statutes that permit agencies to make value choices).

5. See, e.g., Clean Air Act Amendments of 1977, §§ 101-102, 42 U.S.C. §§ 7401-7402 (1988) (seeking to protect conflicting goals of improving air quality through increased state and local pollution regulation while promoting economic productivity associated with continued industrial development, motor vehicle use, and general urbanization).

6. See, e.g., *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 851-52 (1984) (acknowledging that Clean Air Act Amendments of 1977 sought to protect conflicting goals and holding that statute delegated resolution of conflicting goals to administrative agency). In *Chevron*, the Court deferred to the Environmental Protection Agency's (EPA) "reasonable interpretation" of the Clean Air Act's definition of "pollution source." *Id.* EPA decided to adopt a more economically protective "plant-wide" definition of the term "pollution source," rather than a more environmentally protective "single smokestack" definition. *Id.* at 859, 865. The Court explained that "[t]he power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." *Id.* at 843 (quoting *Morton v. Ruiz*, 415 U.S. 199, 231 (1974)). The Court continued by stating:

If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.

its governing statute, must explicitly or implicitly decide which values are not only relevant, but controlling.

These agency value choices are crucial decisions that may direct the society's future;⁷ thus, the process by which the decisions are made is critically important.⁸ In the recent past, many people have argued for increased presidential management of federal administrative rulemaking.⁹ Many of these commentators applauded a series of Executive orders by the Reagan administration that sought to bring much of administrative rulemaking under the control of the Presidency.¹⁰ The earliest of these orders requires executive agencies to evaluate the costs and benefits of major proposed rules,¹¹ to prepare annual regulatory planning agendas,¹² and to submit both

7. See SCHWARTZ, *supra* note 1, at 168-69 (stating that legislative delegation of rulemaking to agencies is so vast that impact of agency regulation on society is comparable to impact of statutes).

8. See *infra* notes 213-20 and accompanying text (arguing that processes for value selection should protect values of consensus building, participation, deliberation, and diffusion of power).

9. See, e.g., ABA COMM'N ON LAW AND THE ECONOMY, FEDERAL REGULATION: ROADS TO REFORM 79 (1979) [hereinafter ABA COMM'N, ROADS TO REFORM] (recommending increased presidential control of administrative rulemaking); Harold H. Bruff, *Presidential Power and Administrative Rulemaking*, 88 YALE L.J. 451, 454 n.11 (1979) [hereinafter Bruff, *Presidential Power*] (limiting arguments for increased presidential influence to administrative rulemaking because Administrative Procedure Act (APA) restrictions on *ex parte* communications in adjudicatory processes do not permit third parties to participate in adjudication process).

10. See, e.g., NATIONAL ACADEMY OF PUBLIC ADMIN., PRESIDENTIAL MANAGEMENT OF RULEMAKING ON REGULATORY AGENCIES: A REPORT BY A PANEL OF THE NATIONAL ACADEMY OF PUBLIC ADMINISTRATION 10-14 (1987) [hereinafter NAPA REPORT] (describing perceived improvements resulting from Reagan's presidential regulatory management program by comparing Reagan's Executive Orders Nos. 12,291, requiring agency cost-benefit analysis of proposed rules, and 12,498, requiring agency regulatory planning and establishing procedures for implementing Executive Order No. 12,291, to regulatory programs of prior administrations that procedurally resembled Reagan's program yet lacked coordination of Reagan orders); Harold H. Bruff, *Presidential Management of Agency Rulemaking*, 57 GEO. WASH. L. REV. 533, 594-95 (1989) [hereinafter Bruff, *Presidential Management*] (stating that Reagan's Executive order program is constitutional and beneficial in promoting political accountability in regulatory processes); Christopher C. DeMuth & Douglas H. Ginsberg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075, 1085 (1986) (observing that Reagan's Executive Orders Nos. 12,291 and 12,498 result in agencies more carefully considering proposed rules because Office of Management and Budget (OMB) subsequently reviews rules); Peter M. Shane, *Presidential Regulatory Oversight and the Separation of Powers: The Constitutionality of Executive Order No. 12,291*, 23 ARIZ. L. REV. 1235, 1263-65 (1981) (stating that Executive Order No. 12,291 is useful test of presidential ability to efficiently manage multiple agencies); Peter L. Strauss & Cass R. Sunstein, *The Role of the President and OMB in Informal Rulemaking*, 38 ADMIN. L. REV. 181, 205 (1986) (supporting extension of Executive Orders Nos. 12,291 and 12,498 to other independent agencies based on success of these orders with respect to executive agencies).

11. See Exec. Order No. 12,291, 3 C.F.R. 127, 128 (1981), *reprinted in* 5 U.S.C. § 601 (1988) (instructing agencies to consider costs and benefits when preparing new regulations or reviewing existing regulations and requiring written "Regulatory Impact Analyses" for submission to OMB outlining all cost-benefit analyses considered by any agency).

12. See Exec. Order No. 12,498, 3 C.F.R. 323, 323 (1985), *reprinted in* 5 U.S.C. § 601 (1988) (requiring agencies to create and publish yearly agendas reflecting plans to promulgate new rules or review current ones, including those that are under agency review pursuant to Executive Order No. 12,291).

reports to the Office of Management and Budget (OMB) for its approval.¹³ A later stage of the Reagan administration's regulatory management program included a series of Executive orders that, unlike the earlier Executive orders, direct agencies to consider specified values in the rulemaking process.¹⁴

This Article argues that although the President may have a legitimate managerial role in administration,¹⁵ the President should have only a limited, non-exclusive voice in administrative value selection. In particular, unilateral presidential selection of the values to be advanced through administrative decisionmaking impoverishes rather than enriches the process for administrative value selection and is an inappropriate and perhaps unconstitutional exercise of presidential power.¹⁶ Instead, agency value selection should be made through broadly participatory processes designed to build societal consensus about basic values and to protect legislative process ideals such as participation, deliberation, and diffusion of decisionmaking power.¹⁷ In contrast, presidential decisionmaking processes are insular and generally exclude the voices of political outsiders.¹⁸ Because presidential decisionmaking processes are less democratic and deliberative than administrative decisionmaking processes, the presidential role in agency value selection should be limited.

I. REAGAN'S REGULATORY MANAGEMENT PROGRAM AND ADMINISTRATIVE VALUE SELECTION

A number of commentators have noted that although previous Presidents sought to increase the control of the Presidency over the bureaucratic state, the Reagan administration's Executive orders

13. See Exec. Order No. 12,291, 3 C.F.R. 127, 129 (1981), *reprinted in* 5 U.S.C. § 601 (1988) (requiring submission of Regulatory Impact Analysis to OMB); Exec. Order No. 12,498, 3 C.F.R. 323, 323 (1985), *reprinted in* 5 U.S.C. § 601 (1988) (requiring submission of regulatory planning agendas to OMB).

14. See Exec. Order No. 12,606, 3 C.F.R. 241, 241 (1987), *reprinted in* 5 U.S.C. § 601 (1988) (requiring consideration of "family value criteria" during rulemaking process); Exec. Order No. 12,612, 3 C.F.R. 252, 253 (1987), *reprinted in* 5 U.S.C. § 601 (1988) (requiring consideration of "federalism" principles during rulemaking process); Exec. Order No. 12,630, 3 C.F.R. 554, 554 (1988), *reprinted in* 5 U.S.C. § 601 (1988) (requiring agencies to choose broad construction of takings clause to reduce government intrusion on private property rights).

15. See *infra* parts III, IV (discussing constitutional limits on presidential value selection and examining appropriate presidential role in administrative value selection process).

16. See *infra* part III (exploring scope of presidential value selection authority under U.S. Constitution).

17. See *infra* part IV.A.1-4 (advocating value selection process that incorporates legislative process values).

18. See *infra* part IV.B (discussing insularity of presidential deliberations and providing reasons why administrative value selection processes are preferable to presidential value selection processes).

represent the most ambitious such attempt to date.¹⁹ While earlier Presidents made only isolated and sporadic attempts to bring agencies within the control of the Executive,²⁰ President Reagan sought, through OMB, a direct and comprehensive role in administrative rulemaking. For example, President Reagan's first Executive order requires agencies to perform exhaustive analyses of the costs and benefits of significant proposed rules.²¹ The order provides that "regulatory action shall not be undertaken unless the potential ben-

19. See, e.g., Bruff, *Presidential Management*, *supra* note 10, at 549 (observing that presidential oversight has had its place in modern administrative law and noting that Reagan administration's plan is most ambitious exercise of presidential influence to date); Frank B. Cross, *Executive Orders 12,291 and 12,498: A Test Case in Presidential Control of Executive Agencies*, 4 J.L. & POL. 483, 484-95 (1988) (comparing Reagan's far-reaching Executive orders to historical efforts of Presidents from Washington to Carter to increase presidential control over federal bureaucracy).

President Bush has also sought to exert control over the administrative bureaucracy through, for example, his 90-day moratorium dated January 28, 1992, and extended for another 120 days on April 29, 1992. This moratorium asks both executive and independent agencies to refrain from issuing new agency regulations during the moratorium period and to review existing regulations with the goal of minimizing the net economic impact of regulation. Memorandum from President George Bush to Certain Department and Agency Heads (Jan. 28, 1992) [hereinafter Memorandum of Jan. 28, 1992]; Memorandum from President George Bush to Certain Department and Agency Heads (Apr. 29, 1992). President Bush also formed the Council on Competitiveness, established on March 31, 1989 and headed by Vice President Quayle, which exercises the authorities given to the Presidential Task Force on Regulatory Relief under Reagan's Executive Orders Nos. 12,291 and 12,498. The Council on Competitiveness has come under attack for its strong anti-regulatory positions. See Michael Arndt, *Democrats Target Quayle's Regulations Panel*, CHI. TRIB., Sept. 6, 1992, at C6 (arguing that Council on Competitiveness is secretive council that provides business with way to escape congressional and administrative mandates). Additionally, President-elect Clinton has announced plans to issue several Executive orders during the opening days of his term, which would repeal many of the value selection initiatives of the Bush administration, such as the "gag rule" on abortion counseling at federally funded clinics. See Michael Kelly, *The Transition: The President-Elect; Clinton, Sketching Plan for Economy, Counsels Patience*, N.Y. TIMES, Nov. 13, 1992, at A1 (noting President-elect Clinton's plan to repeal Executive order banning abortion counseling at federally financed health clinics); J. Jennings Moss, *Clinton Sketches His Plans for Change; Haiti, Abortion Rules To Go*, WASH. TIMES, Nov. 13, 1992, at A1 (commenting on President-elect Clinton's proposal to lift gag rule on abortion counseling). To the extent that these Bush and Clinton initiatives entail presidential value selection, they may implicate the concerns addressed in this Article. For example, the Bush regulatory moratorium both establishes a preference for economic values over other values and exempts certain regulations from the moratorium based on their value content, such as regulations that are "essential to a criminal law enforcement function of the United States." Memorandum of Jan. 28, 1992, *supra*, at 3. President-elect Clinton's proposed Executive orders, by repealing, for example, the federal gag rule on abortion counseling in federally funded clinics, similarly involves a presidential value choice, although the proposed Clinton orders seem less problematic because they simply repeal arguably improper value selections by the Bush administration.

20. See Bruff, *Presidential Power*, *supra* note 9, at 463-65 (discussing President Carter's 1978 Executive Order No. 12,044, which required expanded public participation and analytical review of executive agencies' administrative rulemaking, and President Ford's 1974 Executive Order No. 11,821, which required agencies to generate inflation impact statements regarding agency actions for submission to OMB review); see also Alan B. Morrison, *OMB Interference with Agency Rulemaking: The Wrong Way to Write a Regulation*, 99 HARV. L. REV. 1059, 1061-62 (1986) (describing Nixon, Ford, and Carter regulatory management programs as arising in response to agency regulatory mistakes and lack of policy coordination).

21. See Exec. Order No. 12,291, 3 C.F.R. 127, 129 (1981), *reprinted in* 5 U.S.C. § 601 (1988) (requiring agencies to thoroughly evaluate rules' potential costs and benefits and to

efits to society from the regulation outweigh the potential cost to society."²² The order requires that each agency's cost-benefit analysis clear OMB before the agency publicly proposes or promulgates the rule.²³ The second Reagan Executive order also requires each agency to submit an annual regulatory agenda to the OMB for approval,²⁴ thus giving the President advance notice of agency regulatory plans and increasing the power of the OMB over agency regulatory priorities.²⁵

Reagan's unilateral efforts to control agency rulemaking came after legal commentary had advocated an increased presidential role in agency rulemaking.²⁶ This commentary stressed the difficult problem of coordination that arose from the existence of a multiplicity of agencies, each with overlapping and conflicting statutory directives and policy goals, and recommended a centralized coordination of agency rulemaking to avoid duplicative or inconsistent regulations and to ensure that agencies consider the impact of their regulations on governmental goals beyond those statutorily mandated.²⁷ The commentators argued that the decentralized nature of agency policymaking left individual agencies far too manipulable by powerful interests ranging from congressional subcommittees to regulated industries, single-cause lobbying groups, and others.²⁸ A centralized presidential coordinating function was seen as an effec-

provide written rationales supporting promulgation of rules to OMB director for review prior to approval of proposed rules).

22. *Id.*

23. *See id.* (requiring transmittal of major rules to OMB accompanied by Regulatory Impact Analysis of costs and benefits to society).

24. *See* Exec. Order No. 12,498, 3 C.F.R. 323, 323 (1985), *reprinted in* 5 U.S.C. § 601 (1988) (providing coordinated process by which agencies submit annual Regulatory Impact Analysis reports for OMB review).

25. *See* Ann Rosenfield, Note, *Presidential Policy Management of Agency Rules Under Reagan Order 12,498*, 38 ADMIN. L. REV. 63, 71 (1986) (arguing that Executive Order No. 12,498 improperly gives President, through OMB, control over agency policies by requiring that agencies' regulatory policies reflect "consistency . . . with the Administration's policies and priorities").

26. *See, e.g.*, Bruff, *Presidential Power*, *supra* note 9, at 461 (stating that President is uniquely qualified for agency oversight role); Paul R. Verkuil, *Jawboning Administrative Agencies: Ex Parte Contacts by the White House*, 80 COLUM. L. REV. 943, 953 (1980) (arguing that presidential electoral accountability supports oversight of administrators); *see also* ABA COMM'N, ROADS TO REFORM, *supra* note 9, at 73 (recommending presidential involvement in coordination of administrative regulations and resources).

27. *See, e.g.*, ABA COMM'N, ROADS TO REFORM, *supra* note 9, at 68-76 (identifying need for coordination of agency goals and finding President highly qualified to act in this capacity); Bruff, *Presidential Power*, *supra* note 9, at 455-56, 461 (discussing problems associated with overlapping and fragmented jurisdictions among multiple agencies that give rise to perceived bureaucratic need for coordination and supervisory functions of Presidency).

28. *See* ABA COMM'N, ROADS TO REFORM, *supra* note 9, at 18 (outlining problems associated with inadequate public and consumer influence and excessive industry influence on regulatory process); Bruff, *Presidential Power*, *supra* note 9, at 458-59 (positing that decentralized agencies are vulnerable to "capture" by special interest groups).

tive counterbalance to these narrow, concentrated interests.²⁹ The commentators also decried the lack of accountability of agencies headed by appointed officials and staffed by Civil Service employees³⁰ and therefore urged a greater presidential role to provide increased policymaking accountability.³¹ Finally, the commentators collectively argued that a stronger presidential role in regulatory management could rationalize and unify the agency rulemaking process.³²

Not surprisingly, much academic commentary published subsequent to the initiation of the Reagan regulatory program tracked these same concerns approvingly, characterizing the Reagan initiatives as overall improvements to the agency rulemaking process.³³ Much of the early academic reaction to the Reagan Executive orders found them to be constitutionally valid assertions of the President's role in the rulemaking process, provided that the President and the OMB, in implementing the presidential directives, did not override the statutory and procedural constraints that normally limit agency action.³⁴ Other academic commentary was not so charitable, how-

29. See ABA COMM'N, *ROADS TO REFORM*, *supra* note 9, at 73 (supporting greater presidential role in regulatory oversight based on President's ability to make coordinated and balanced decisions on critical issues); Bruff, *Presidential Power*, *supra* note 9, at 461-62 (stating that President may be less influenced by special interests and thus better suited to agency oversight than congressional oversight committees).

30. ABA COMM'N, *ROADS TO REFORM*, *supra* note 9, at 69 (positing that one problem facing administrative law is independence of agencies and lack of accountability to President or Congress); Bruff, *Presidential Power*, *supra* note 9, at 454 (noting that major criticism of regulatory practices is that agencies are staffed with appointed bureaucrats who are not sufficiently responsive to public will).

31. See Bruff, *Presidential Power*, *supra* note 9, at 461-62 (stating that President is uniquely qualified to coordinate agency rulemaking on basis of his or her national constituency, which could be drawn on to prevent formation of agency factions, and additionally discussing President's greater ability to execute numerous statutes simultaneously); Richard M. Neustadt, *The Administration's Regulatory Reform Program: An Overview*, 32 ADMIN. L. REV. 129, 144 (1980) (describing Carter administration's successful Regulatory Analysis Review Group (RARG), which increased agency accountability by encouraging agencies to consult directly with President, and arguing for increased presidential participation in agency rulemaking to enhance accountability in administrative policymaking and prevent low-level official inaction in administrative rulemaking process).

32. See ABA COMM'N, *ROADS TO REFORM*, *supra* note 9, at 84-88 (recommending presidential order to provide increased agency unity by coordinating overlapping and inconsistent goals of various agencies); see also Verkuil, *supra* note 26, at 957 (outlining ways in which presidential management can ensure cohesive control of agencies without usurping decisionmaking power of agency heads).

33. See, e.g., NAPA REPORT, *supra* note 10, at 13 (stating that OMB and agency officials have reported improved rulemaking processes since issuance of Executive Order No. 12,291); Strauss & Sunstein, *supra* note 10, at 188 (stating that growing professional consensus confirms desirability of increased presidential oversight initiated by Executive Order No. 12,291).

34. See Bruff, *Presidential Management*, *supra* note 10, at 594 (concluding that Reagan's executive oversight program is constitutional and beneficial but must be kept within bounds of discretion conferred by statutory policies and administrative records of agencies); Cass R. Sunstein, *Cost-Benefit Analysis and the Separation of Powers*, 23 ARIZ. L. REV. 1267, 1270-71 (1981) (accepting constitutional validity of Reagan's Executive orders and arguing that "if [the exec-

ever.³⁵ One commentator denounced the Reagan initiatives as a license for the OMB to undermine regulatory programs established by Congress and to corral agency discretion into OMB paddocks so that agencies simply became puppets of the administration's political agenda.³⁶ The commentator cited as evidence of this license the OMB's use of its power under the Executive orders to delay and thus eliminate or weaken regulation that was consistent with or even mandated by statute.³⁷

Recent academic commentary has been considerably more balanced than these previous analyses. Recent scholarship recognizes both regulatory improvements and abuses by the OMB and suggests that the presidential coordination of rulemaking reflected in the Reagan program is useful.³⁸ The scholarship also advocates, however, certain limits on presidential rulemaking authority to fend off politically motivated executive abuses of the rulemaking process.³⁹

Reagan expanded his regulatory management program in the latter part of his second term by issuing a series of Executive orders that, unlike his earlier orders, sought to mandate specific agency value preferences.⁴⁰ Reagan's earlier Executive orders did not expressly mandate any particular agency policies or value choices but sought only to establish institutional procedures that would give the President a greater voice in rulemaking processes.⁴¹ For example,

utive branch] is acting consistently with statute," that branch of government affords best position for making cost-benefit value determinations).

35. See Morrison, *supra* note 20, at 1064-65 (arguing that OMB control improperly introduces delay, incompetence, and secrecy into administrative rulemaking and prevents consideration of potentially beneficial rules).

36. Morrison, *supra* note 20, at 1064-65.

37. Morrison, *supra* note 20, at 1064-65.

38. See NAPA REPORT, *supra* note 10, at 4-7 (outlining criticisms of OMB involvement as displacing congressional authority in rulemaking process yet praising OMB for centralized review effort that eliminates regulatory duplication and overlap).

39. See, e.g., Bruff, *Presidential Management*, *supra* note 10, at 595 (arguing that executive oversight program is beneficial if oversight does not exceed agencies' statutory discretion or conflict with administrative rulemaking record); see also NAPA REPORT, *supra* note 10, at 32 (recognizing benefit of OMB oversight of agencies' cost-benefit analyses but recommending that Congress and President collaborate in future to guide decisionmaking processes of agencies).

40. See *supra* note 14 and accompanying text (discussing Reagan administration Executive Orders Nos. 12,606 and 12,612, which require agencies to consider values of family and federalism, respectively, in rulemaking processes).

41. See *supra* notes 11-13 and accompanying text (discussing Reagan administration Executive Order No. 12,291, which requires agencies to develop regulatory programs and make cost-benefit analyses in rulemaking processes, and Reagan administration Executive Order No. 12,498, which requires agencies to submit regulatory programs and cost-benefit analyses to OMB).

The Reagan administration's earlier Executive orders, such as the two just mentioned, apply only to executive agencies and not to independent agencies. See Exec. Order No. 12,291, 3 C.F.R. 127, 128 (1981), *reprinted in* 5 U.S.C. § 601 (1988) (exempting 44 U.S.C. § 3502(10) "independent regulatory agencies" from requirements of Executive order); Exec. Order No.

the cost/benefit Executive order requires executive agencies to consider the costs and benefits of proposed rules⁴² but does not prescribe any particular agency values or policy choices. Thus, despite the order's requirement that agencies analyze rules in light of their costs and benefits, the Executive order fails to define either the term "cost" or "benefit" and leaves the agencies free to determine which economic or non-economic costs and benefits to consider in proposed regulations.⁴³

In contrast, the more recent Executive orders explicitly dictate particular value preferences for agencies to consider during the rulemaking process. For example, one Executive order establishes "family policymaking criteria"⁴⁴ and requires agencies to analyze each rule with respect to its impact on "family formation, maintenance and general well-being."⁴⁵ A rule that might have a significant negative impact on family well-being could be enacted only after an agency head justifies the rule in writing to OMB.⁴⁶ Similarly, another Executive order establishes federalism as a policy goal for agencies⁴⁷ and requires them to be guided by "fundamental federalism principles."⁴⁸ The order does not merely assert, however,

12,498, 3 C.F.R. 323, 323 (1985), *reprinted in* 5 U.S.C. § 601 (1988) (stipulating that order applies only to agencies subject to Executive Order No. 12,291). *But see* Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 592-93 (1984) (stating that many independent agencies voluntarily follow requirements of Executive Order No. 12,291). Independent regulatory agencies include the Board of Governors of the Federal Reserve System, the Commodity Futures Trading Commission, the Consumer Product Safety Commission, the Federal Communications Commission, the Federal Deposit Insurance Corporation, the Federal Energy Regulatory Commission, the Federal Home Loan Bank Board, the Federal Maritime Commission, the Federal Trade Commission, the Interstate Commerce Commission, the Mine Enforcement Safety and Health Review Commission, the National Labor Relations Board, the Nuclear Regulatory Commission, the Occupational Safety and Health Review Commission, the Postal Rate Commission, the Securities Exchange Commission, and "any other similar agency designated by statute as a federal independent regulatory agency or commission." 44 U.S.C. § 3502(10) (1988).

42. Exec. Order No. 12,291, 3 C.F.R. 127, 128 (1981), *reprinted in* 5 U.S.C. § 601 (1988).

43. *See id.* at 129, *reprinted in* 5 U.S.C. § 601 (allowing agencies to consider in their analyses "potential" costs and benefits that could not be quantified in monetary terms). Although Executive Order No. 12,291 is facially neutral as to policy choices, the order gives the OMB considerable leverage over administrative policy by authorizing the OMB to delay rules that it determines have not satisfied the requirements of Executive Order No. 12,291. *Id.* Indeed, early criticism of this order charged OMB with improperly influencing administrative policy choices under the auspices of the order. *See, e.g.,* Morrison, *supra* note 20, at 1061 (arguing that OMB, since promulgation of Executive Order No. 12,291, dominates rulemaking processes). However, any influence that OMB exercises over administrative values or policies is the result of OMB enforcement of the Executive order and is not required by the order itself. *See* Exec. Order No. 12,291, 3 C.F.R. 127, 127-29 (1981), *reprinted in* 5 U.S.C. § 601 (1988) (failing to assign explicit policymaking authority to OMB in its capacity as proposed agency rule reviewer).

44. Exec. Order No. 12,606, 3 C.F.R. 241, 241 (1987), *reprinted in* 5 U.S.C. § 601 (1988).

45. *Id.*

46. *Id.* at 242, *reprinted in* 5 U.S.C. § 601.

47. Exec. Order No. 12,612, 3 C.F.R. 252, 253 (1987), *reprinted in* 5 U.S.C. § 601 (1988).

48. *Id.* (declaring that "federalism is rooted in the knowledge that our political liberties

that administrative agencies should generally respect federalism values.⁴⁹ Rather, it additionally requires agencies to take a particular position on certain contested legal issues. For example, the order provides that agencies should limit the policymaking discretion of the states only when constitutional authority is "clear and certain,"⁵⁰ and constitutional authority is clear and certain "only when authority may be found in a specific provision of the Constitution . . . and the action does not encroach upon authority reserved to the state."⁵¹ Furthermore, the order prohibits the agencies from submitting legislation to Congress that impinges on certain federalism values.⁵²

Finally, another Executive order requires executive agencies to adopt a value choice that places comparatively greater emphasis on protection of private property than on government regulation.⁵³ This Executive order requires agencies to "be sensitive to . . . the obligations" imposed by the takings clause of the Fifth Amendment so that agencies do not impose "undue . . . burdens on the public fisc."⁵⁴ Although on its face this Executive order merely directs agencies to comply with recent Supreme Court decisions concerning takings,⁵⁵ the standards that the order establishes for evaluating

are best assured by limiting the size and scope of the national government," and that "the people of the States are free, subject only to restrictions in the Constitution itself or in constitutionally authorized Acts of Congress, to define the moral, political, and legal character of their lives").

49. *See id.* at 254, *reprinted in* 5 U.S.C. § 601 (directing executive agencies to strictly adhere to constitutional principles with respect to fundamental concept of federalism).

50. *Id.*

51. *Id.*

52. *See id.* at 255, *reprinted in* 5 U.S.C. § 601 (proscribing legislative proposals that attach conditions on federal grants that are not "directly related" to grants' purposes).

53. *See* Exec. Order No. 12,630, 3 C.F.R. 554, 554 (1988), *reprinted in* 5 U.S.C. § 601 (1988) (directing agencies to place emphasis on private property interests to prevent governmental takings of property without paying just compensation).

54. *Id.* at 556, *reprinted in* 5 U.S.C. § 601. The order provides in part that "physical invasion or occupancy of . . . and regulations imposed on private property that substantially affect its value or use, may constitute a taking of property . . . [e]ven though the action results in less than a complete deprivation of all use or value . . . and even if the action constituting a taking is temporary in nature." *Id.* The Executive order also specifies that agencies should adhere to particular criteria when "implementing policies that have takings implications." *Id.* at 557, *reprinted in* 5 U.S.C. § 601. The criteria used in evaluating potential takings were later implemented pursuant to an order by the Attorney General. *See* OFFICE OF THE ATTORNEY GEN., ATTORNEY GENERAL'S GUIDELINES FOR THE EVALUATION OF RISK AND AVOIDANCE OF UNANTICIPATED TAKINGS 1-2, 13-14 (1988) (reflecting fundamental changes in takings law based on evolving Supreme Court decisions).

55. *See* Exec. Order No. 12,630, 3 C.F.R. 554, 554 (1988), *reprinted in* 5 U.S.C. § 601 (1988) (requiring agencies to carefully evaluate regulatory impact on economic value of private property). The Executive order was apparently promulgated in response to then-recent Supreme Court decisions that had held that money damages could be obtained for even temporary regulatory takings, thereby appearing to increase the risk that government regulation may be construed as a taking. *See* *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 832 (1987) (holding that even temporary governmental preclusion of private use of property con-

whether a government regulation is a taking appear far broader than those existing under contemporaneous Supreme Court doctrine.⁵⁶

Each of the later Reagan orders directly imposes presidential value preferences on agency decisionmaking.⁵⁷ Thus, for example, the family Executive order requires agencies to assume that family stability is a good to be preferred over other goods and that agency policy is presumptively irrational if it interferes with this good.⁵⁸ Similarly, the federalism and takings orders require agencies to go beyond existing constitutional law in protecting their adopted values.⁵⁹ These Executive orders thus seek to mold the values that agencies use in decisionmaking to more closely fit the policy priorities of the Reagan administration.

Furthermore, the presidential value preferences in the later orders are enshrined in the Executive orders and thus have the force of law.⁶⁰ In contrast, the strictly procedural requirements governing agency policymaking that the President imposed in earlier Executive orders permitted the President to influence agency policy or value decisions only indirectly, through the leverage provided to the President by OMB review of agency rules.⁶¹ This legislation by Executive order of agency value choices contained in the later orders implicates a need for limits on presidential involvement in rulemaking much more significantly than do the earlier, more managerial Executive orders.⁶² In particular, these Executive orders raise

stitutes taking); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 318 (1987) (holding that temporary takings are no different in kind from permanent takings and must be compensated accordingly).

56. See Exec. Order No. 12,630, 3 C.F.R. 554, 556 (1988), reprinted in 5 U.S.C. § 601 (1988) (stating that governmental action that substantially affects value or use of property may be considered as taking). As one commentator stated, the order "ignores the fact that the threshold for a taking to occur continues to be quite high: denial of all reasonable use or return to an affected property owner." Richard J. Roddewig, *Recent Developments in Land Use, Planning and Zoning: Section of Urban, State & Local Government Law of the American Bar Association*, 21 URB. LAW. 769, 817 (1989).

57. See *supra* notes 44-56 and accompanying text (discussing Reagan administration's Executive orders imposing values of family, federalism, and protection of private property rights on agency decisionmaking processes).

58. See *supra* notes 44-46 and accompanying text (discussing Executive Order No. 12,606, which requires agencies to take into account family values when promulgating rules).

59. See *supra* notes 47-56 and accompanying text (discussing mechanics and constitutional law implications of Executive Orders Nos. 12,612 and 12,630, which require agencies to consider values of federalism and property rights, respectively, when promulgating rules).

60. See *supra* notes 44-56 and accompanying text (discussing Reagan Executive orders requiring that agencies take into account substantive values of family, federalism, and private property rights when developing rules).

61. See *supra* notes 21-25 and accompanying text (discussing Reagan Executive orders requiring agencies to develop cost-benefit analyses of proposed rules and annual regulatory planning agendas and submit both to OMB for review).

62. It should be noted, however, that the later Executive orders do not necessarily change any particular administrative agency policies, because administrative agencies usually comply with the orders by simply placing boilerplate language in *Federal Register* rulemaking

the question of whether the President, whose legislative role as policymaker is constitutionally limited,⁶³ should be able to direct governmental value selection.

II. THE ROLE OF VALUE SELECTION IN ADMINISTRATIVE POLICYMAKING

It is textbook wisdom that Congress delegates many of the nation's most important and controversial policy decisions to administrative institutions.⁶⁴ These policy choices often turn on sharp underlying value conflicts. For example, an administrative agency that is deciding whether to permit oil development in previously pristine coastal areas must decide whether to favor environmental values over economic ones.⁶⁵ Similarly, an administrative agency deciding whether to authorize scientific fetal tissue research or to approve an abortion pill as "safe and effective" must decide what protection should be given to fetuses in light of the explosive social debate about the morality of abortion.⁶⁶

notices that a rule will not have any impact or will have only a beneficial impact on the required policy goals. See, e.g., *HUD Final Rule: Public Housing Lease and Grievance Procedures*, 56 Fed. Reg. 51,560-75 (1991) (to be codified at 24 C.F.R. pt. 966) (stating that rule which permits housing authority to evict tenants for drug-related or criminal activity "does not have significant impact on family formation, maintenance and general well-being and, thus, is not subject to review" under Executive Order No. 12,606). Thus, agencies may avoid the analytical requirements of the order altogether. The Executive orders nevertheless affect administrative value choices because they require agencies to at least consider the President's sanctioned values in their policymaking. See *infra* notes 64-84 and accompanying text (discussing role played by value selection in administrative policymaking). A decision that a particular value is important enough to warrant consideration in policymaking is itself a value choice, whether or not policy changes. Furthermore, administrative contemplation of presidentially prescribed values probably diverts scarce agency resources from other values that the agency might otherwise have considered.

63. See *infra* part III (examining constitutional limits of presidential policymaking power).

64. See SCHWARTZ, *supra* note 1, at 10, 168-69 (describing congressional delegation of administrative power to agencies through statutes and recognizing vast amount of authority bestowed on agencies because of this delegation). Much of the extensive literature exploring the advisability of broad legislative delegations of authority to administrative agencies addresses this very point. See, e.g., Symposium, *The Uneasy Constitutional Status of the Administrative Agencies*, 36 AM. U. L. REV. 277 (1987) (presenting debates over proper scope of congressional delegation to agencies in following articles: Theodore J. Lowi, *Two Roads to Serfdom: Liberalism, Conservatism and Administrative Power* 295; Richard B. Stewart, *Beyond Delegation Doctrine* 323; Ernest Gellhorn, *Returning to First Principles* 345; David Schoenbrod, *Separation of Powers and the Powers That Be: The Constitutional Purposes of the Delegation Doctrine* 355; Richard J. Pierce, Jr., *Political Accountability and Delegated Power: A Response to Professor Lowi* 391; Thomas O. Sargentich, *The Delegation Debate and Competing Ideals of the Administrative Process* 419).

65. See 43 U.S.C. §§ 1340-1346, 1351 (1988) (delegating authority to Department of Interior to decide whether to lease offshore coastal areas for oil exploration or to withhold authorization of leases based on environmental concerns).

66. See, e.g., Food and Drug Administration Imports Alert, No. 66-47, [1989-1990 Transfer Binder] Fed. Drug Cosm. L. Rep. (CCH) ¶ 41,519, at 42,216 (June 6, 1989) (setting forth Food and Drug Administration order requiring seizure of abortifacient drugs such as RU-486, which is commonly known as "morning after" birth control pill); Gary Silverman, *Sullivan Extends Ban on Fetal Tissue Research*, WASH. POST, Nov. 3, 1989, at A5 (quoting letter from

Sometimes Congress, in governing legislation, will recognize that particular values are important or preferred. For example, Congress may simply specify in a particular statute that an agency should protect health and safety values exclusively or should prefer them over economic values.⁶⁷ Frequently, however, Congress delegates value decisions to administrative agencies without deciding which values are significant.⁶⁸ Thus, while the agency decision necessarily requires a value choice, the legislature has given the agency little or no guidance on how to make that choice. Even when Congress does direct an agency to consider particular values, it may specify conflicting values, thus requiring the agency to decide on its own which values should be preferred.⁶⁹ For example, a statute granting an agency authority to control pollution may expressly protect both environmental and economic considerations, but the stat-

Health and Human Services Secretary Louis W. Sullivan to acting Director of National Institutes of Health (NIH) indicating that NIH has imposed moratorium on federal fetal tissue implant research); *cf.* S. 2268, 102d Cong., 2d Sess. (1992) (containing legislation that would overturn RU-486 import alert).

67. *See, e.g.*, Occupational Safety and Health Act (OSH Act), § 6(b)(5), 29 U.S.C. § 655(b)(5) (1988) (requiring Occupational Safety and Health Administration to place preeminent value on health and safety of workers by setting minimum exposure standards for hazardous substances in workplace, despite substantial economic cost of standards to employers). Even the OSH Act, however, requires the agency to make a value choice by introducing a vague "feasibility" limitation into the agency's standard-setting authority, thus requiring the agency to weigh economic considerations against health and safety concerns with little congressional guidance. *See id.* § 655(b)(5) (requiring agencies to set standards at level that "most adequately assure[s], to the extent feasible . . . that no employee suffer material impairment of health"); *see also* Industrial Union Dep't v. American Petroleum Inst., 448 U.S. 607, 653 (1980) (holding that OSH Act gives broad value selection authority to administrative agencies).

68. Classic examples of this type of statute come from New Deal regulatory legislation. *See, e.g.*, Federal Trade Commission Act, § 5, 15 U.S.C. § 45 (Supp. II 1990) (granting comprehensive authority to Federal Trade Commission to prevent "unfair or deceptive acts or practices in or affecting commerce"); Federal Communications Act, § 309(b), 47 U.S.C. § 309(b) (1988) (assigning sweeping authority to Federal Communications Commission to grant broadcast licenses if "public interest, convenience, or necessity will be served thereby"). A recent example of such vague statutory authority appears in the 1978 Amendments to the Endangered Species Act. *See* 16 U.S.C. § 1536(h)(1)(A)(ii)-(iii) (1988) (permitting Endangered Species Committee, which is comprised of members of executive branch and administrative agency heads, to grant exemptions to requirements of Endangered Species Act if "the benefits of such action clearly outweigh the benefits of alternative courses of action consistent with conserving the species or its critical habitat, if such action is in the public interest" and "the action is of regional or national significance"). Recently, the Endangered Species Committee convened for only the third time in its history and applied these standards to approve certain timber sales in the Pacific Northwest, notwithstanding the resulting threat of extinction to the northern spotted owl that lives in the forests opened to logging. *See* Notice of Decision, 57 Fed. Reg. 23,405, 23,406 (1992) (allowing 13 bulk timber sales in Northwest forests inhabited by spotted owls to go forward, based on local economic needs).

69. *See* Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 851-52 (1984) (acknowledging that in Clean Air Act, Congress sought to protect conflicting goals, but by failing to elevate one goal over another, Congress implicitly delegated reconciliation of competing goals to administrative agency, in this case, to Environmental Protection Agency).

ute may require the agency to decide in particular cases, or as general policy, whether environmental values are preferred over economic ones.⁷⁰

Of course, it may be argued that the idea of an administrative agency making value choices presupposes that the agency acts in a reasoned, deliberate way and that its choices are thus choices of principle.⁷¹ This, it may be argued, is not an accurate depiction of administrative practice.⁷² Instead, administrative decisions are more often the result of power politics, or "incrementalist risk aversion,"⁷³ and the agency never makes an actual value choice. Yet even where administrative decisions are the result of political struggle, the decisions of the agency still result in decisions exalting one value over another. Thus a decision to protect environmental interests over economic ones exalts the value of environmental protection over the value of economic protection, whether the agency reached that decision through reasoned consideration of the issues or through simple backroom bargaining with affected interest groups.⁷⁴ The decision in the latter instance is no less a value choice than the decision in the former instance.

Agency action therefore often represents a choice of one value over another value.⁷⁵ Indeed, the most difficult issues in our society often require the preference of one deeply held social value over another.⁷⁶ The political fights for these preferences are often fights

70. See Clean Air Act Amendments of 1977, §§ 101-102, 109, 113, 42 U.S.C. §§ 7401-7402, 7409, 7413 (1988) (providing legislation seeking to protect conflicting goals of reducing or preventing air pollution and protecting economies of affected states through federal technical and financial assistance, while granting agency broad authority to set national air quality standards and enforce standards against any business entity).

71. See Colin S. Diver, *Policymaking Paradigms in Administrative Law*, 95 HARV. L. REV. 393, 396-401 (1981) (discussing competing theories of "comprehensive rationality," four-step decisionmaking method based on achieving greatest possible net progress toward specified goals, and "incrementalism," method of decisionmaking seeking to prevent drastic change by focusing on status quo).

72. See *id.* at 396-99 (arguing that actual administrative functions may follow incrementalist theory of operation).

73. See, e.g., DANIEL H. HENNING & WILLIAM R. MANGUN, *MANAGING THE ENVIRONMENTAL CRISIS* 50-81 (1989) (arguing that agency environmental policy decisions often do not properly take into account environmental values, in part because of incrementalist decisionmaking that focuses on short-term practical solutions while ignoring long-term values); Diver, *supra* note 71, at 396-99 (arguing that political pressures force incrementalists to sidestep important value considerations).

74. See, e.g., *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 53 (D.C. Cir. 1977) (stating that FCC cable television rules were heavily influenced by unrecorded *ex parte* agency discussions with cable television industry representatives), *cert. denied*, 434 U.S. 829 (1977).

75. See ABA COMM'N, *ROADS TO REFORM*, *supra* note 9, at 9-10 (recognizing that under modern administrative law, agencies make important choices among competing and conflicting economic and social goals).

76. See ABA COMM'N, *ROADS TO REFORM*, *supra* note 9, at 9 (asserting that balancing conflicting and competing interests is perhaps most difficult task for democratic governments).

not only between people whose self-interest is affected by a particular agency action, but also between people who fervently believe in the transcendency of certain values. Frequently, the agency is the forum for the resolution of these societal issues.⁷⁷

These value conflicts are, not surprisingly, some of the most divisive conflicts within our society. For example, the Environmental Protection Agency, the Fish and Wildlife Service, and the U.S. Forest Service are currently refereeing debates between environmental protectionists and the logging industry over the proper balance of economic development and environmental protection.⁷⁸ The Food and Drug Administration is at the center of controversy between abortion rights groups and anti-abortionists over the future of a French-made abortion pill called RU-486.⁷⁹ The National Institutes of Health (NIH) is currently at the center of controversy over fetal tissue research.⁸⁰ And the Department of Education recently spearheaded controversy concerning the appropriate balance of academic freedom and protection of cultural diversity on college campuses.⁸¹ Each of these issues involves value choices that are controversial, perhaps to the point of causing political warfare. Indeed, some analysts argue that Congress often avoids hard political value choices by delegating that function to administrative agencies.⁸² In the aggregate, these delegated administrative value

77. See ABA COMM'N, *ROADS TO REFORM*, *supra* note 9, at 9 (discussing regulatory agencies' difficulty in coordinating and implementing procedures to choose between competing goals delegated by statute to agency decisionmaking process).

78. See *supra* note 68 (discussing administrative and executive branch action concerning applicability of Endangered Species Act to logging in Pacific Northwest forest land that is habitat of threatened northern spotted owl species). The spotted owl controversy is now under consideration by Congress. See S. 2762, 102d Cong., 2d Sess. (1992) (containing legislation intended to protect spotted owl).

79. See Food and Drug Administration Import Alert, *supra* note 66, at 42,216 (banning imports of RU-486, French-made abortifacient used as "morning after" abortion pill); Philip J. Hiltz, *U.S. Is Sued over Ban on Importing Abortion Pill*, N.Y. TIMES, July 8, 1992, at A16 (reporting on citizen's protest of Government's ban on abortion pill, which has culminated in lawsuit in federal court).

80. See Silverman, *supra* note 66, at A5 (reporting that amidst controversy, NIH, under instructions from Secretary of Health and Human Services, has issued moratorium banning federal scientists from research that transplants fetal tissue into human cells such as brain cells, on ground that use of fetal tissue will "increase the incidence of abortion").

81. See Kenneth J. Cooper, *Campus Diversity: Is Education Department Interfering on Standards?*, WASH. POST, Sept. 17, 1991, at A17 (reviewing and questioning wisdom of Secretary of Education Lamar Alexander's decision to block renewal of federal recognition of university accrediting association because association required universities to foster racial, ethnic, and gender diversity as condition of accreditation).

82. See JOHN H. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 131-33 (1980) (providing broad overview of Congress' delegation of legislative value choices to administrative agencies). Note, however, that particularly controversial administrative value choices often find their way back to Congress for ultimate resolution. See, e.g., S. 2762, 102d Cong., 2d Sess. (1992) (introducing bill to preserve spotted owl); S. 2268, 102d Cong., 2d Sess. (1992) (introducing bill to overturn RU-486 import alert). Many other difficult adminis-

choices may influence American society for decades to come.⁸³ For example, consistent decisions by particular agencies to prefer safety or environmental values over economic concerns may determine how society will function well into the next century. Despite the social significance of these value choices, however, the fundamental selection of values is often made by an agency and not by Congress.⁸⁴ That is, when Congress delegates questions of societal values to administrative authorities, the administrative agency supplants Congress as the forum for governmental value choices. Thus, the question arises of whether the President should similarly be allowed to supplant agencies in value selection.

III. CONSTITUTIONAL LIMITS ON THE PRESIDENTIAL ROLE IN ADMINISTRATIVE VALUE SELECTION

It is difficult to determine the constitutional limits on the presidential role in administration generally, and in value selection particularly, for two reasons. First, the Constitution is generally silent with regard to the overall scope of the executive power in government.⁸⁵ Second, the massive transfer to administrative agencies of the powers that the Constitution assigned to the three branches of government complicates issues of constitutional structure.⁸⁶ This transfer of power places the President at the apex of a governmental

trative value choices, however, are decided finally by the agency. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 859 (1984) (holding that Environmental Protection Agency definition of term "pollution source" reflected reasonable agency accommodation of both clean air and economic values); *American Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 509 (1981) (holding that Occupational Safety and Health Administration policy, which interpreted statutory "feasibility" requirement as mandating that agency set standard for level of worker exposure to carcinogens at lowest level "technologically and economically" feasible, reflected appropriate agency balancing of health and economic values).

Indeed, once an agency has adopted a value choice and made policy based on that choice, it is difficult for Congress to reverse the policy because new legislation would be required to effect reversal. Congressional inaction or a presidential veto in the face of an agency's policy will no longer merely maintain the status quo, but rather will retain the agency's value choice. *See, e.g., INS v. Chadha*, 462 U.S. 919, 951-59 (1983) (invalidating "legislative veto" provisions for agency rulemaking processes, which in some circumstances permitted Congress to veto agency policies by majority vote of one or two houses of Congress, thus avoiding normal requirement for legislation of majority vote of both houses of Congress, with presidential assent, subject to override of presidential veto by two-thirds vote of both houses).

83. *See* SCHWARTZ, *supra* note 1, at 168 (arguing that modern administrative state regulates individuals from cradle to grave and that agencies' rules and regulations now far outnumber laws passed by Congress through traditional legislative processes).

84. *See* ABA COMM'N, *ROADS TO REFORM*, *supra* note 9, at 9-12 (discussing congressional delegation of choices hinging on sensitive social, economic, and philosophical factors to administrative agencies).

85. *See infra* notes 88-95 and accompanying text (discussing cursory description of Executive power in Article II of U.S. Constitution).

86. *See* Strauss, *supra* note 41, at 581-83 (discussing elaborate administrative function in modern government).

bureaucracy that is far more powerful than anything contemplated by the Framers of the Constitution.⁸⁷ The Constitution consequently provides very little guidance for understanding the President's role in managing that bureaucracy, particularly with respect to policy formation and value selection.

Any argument for presidential assertion of authority to influence governmental value selection must first find its source in Article II of the Constitution.⁸⁸ Unfortunately, the language of Article II simply provides that the "executive Power shall be vested in a President of the United States."⁸⁹ The Article is virtually silent concerning the scope of the executive power in general and the President's role in managing the administrative bureaucracy in particular.⁹⁰ Article II does contain isolated references to a bureaucracy, providing that on the advice and consent of the Senate, the President may appoint "Officers" of the United States,⁹¹ and that the President "may require the Opinion, in writing, of the principal Officer in each of the executive Departments."⁹² Beyond this, the Article says nothing of the appropriate relationship between the President and these officers other than generally requiring the President to "take Care that the Laws be faithfully executed."⁹³ Furthermore, exegesis from either the views of the Framers or of the early Congresses adds little meaning to the text of Article II. Both the Framers and the early Congresses were divided on the question of the scope of executive power.⁹⁴ Indeed, the vagueness of the Article itself may have re-

87. See Strauss, *supra* note 41, at 582 ("[T]he size alone of contemporary American administrative government places strains on the eighteenth-century model. The minimalist federal government outlined in Philadelphia in 1787 envisioned a handful of cabinet departments Significant regulatory responsibilities were not in view.").

88. See U.S. CONST. art. II (setting forth parameters of executive power). Of course, Congress could probably authorize the President to exercise control over administrative policymaking and value selection even if Article II did not directly authorize such control. See, e.g., *id.* art. I, § 8, cl. 3 (vesting Congress with authority to regulate commerce with foreign nations and among "the several States"); *id.* cl. 18 (authorizing Congress to make all laws "necessary and proper" for carrying out enumerated powers). For the purposes of this analysis, however, the central issue is whether the President has inherent Article II authority to direct or influence administrative value selection *in the absence of* congressional authorization.

89. U.S. CONST. art. II, § 1.

90. *Id.* § 2 (providing generally that President shall serve as Commander in Chief of armed forces; has authority to grant reprieves and pardons for offenses against United States; may enter into treaties and make various appointments with advice and consent from Senate; and may have power vested by Congress to make appointments "in the Heads of Departments").

91. *Id.*

92. *Id.*

93. *Id.* § 3.

94. See generally PETER M. SHANE & HAROLD H. BRUFF, *THE LAW OF PRESIDENTIAL POWER—CASES AND MATERIALS* 4-12 (1988) (stating that although there was consensus support at Constitutional Convention for "stronger, more national" Executive than was provided for in Articles of Confederation, significant differences of opinion existed over scope of presi-

sulted from the Framers' failure to agree on a view of executive power.⁹⁵

The Supreme Court has similarly failed to clarify the meaning of Article II; the Court's decisions merely mirror the indecision of the Framers with respect to the appropriate role of the President in supervising administrative authority. Beginning with the *Myers v. United States*⁹⁶ and *Humphrey's Executor v. United States*⁹⁷ duo of cases and continuing through to the more recent *INS v. Chadha*⁹⁸ and *Mistretta v. United States*⁹⁹ sequence of cases, the Court has vacillated between two sharply divergent visions of the constitutional role of the President in administrative decisionmaking. Under one vision of the Presidency, first set forth in substantial dicta in *Myers*, the President is the head of the executive branch, and the power that is vested in the administrative agencies by Congress accrues to the President as well.¹⁰⁰ As the Court stated in *Myers*, "the discretion to be exercised is that of the President in determining the national public interest and in directing the action to be taken by his [or her] executive subordinates to protect it. In this field [the President's] cabinet officers must do his [or her] will."¹⁰¹ Read most broadly, this view suggests that the President may have the ultimate authority to direct administrative rulemaking, unless specifically precluded from doing so by Congress.

In contrast, less than a decade after *Myers*, the Supreme Court in *Humphrey's Executor* set forth a significantly narrower vision of presidential power in which the President's Article II managerial authority does not include supervisory power over congressionally delegated administrative authority.¹⁰² In *Myers*, the Court used language to suggest that the authority delegated to the executive

dential power, with some delegates wanting Executive largely subordinate to Congress and others wanting more independent President). The final draft of the Constitution opted for ambiguity by conferring an "executive power" on the Presidency, with little additional explanation or elaboration. *Id.* at 9-10.

95. See Strauss, *supra* note 41, at 600 (stating that members of Constitutional Convention were ambivalent in their expectations concerning President's relations with individuals responsible for administering laws).

96. 272 U.S. 52 (1926).

97. 295 U.S. 602 (1935).

98. 462 U.S. 919 (1983).

99. 488 U.S. 361 (1989).

100. See *Myers v. United States*, 272 U.S. 52, 125-27 (1926) (concluding that President has constitutional authority to discharge U.S. Postmasters at will, notwithstanding existence of federal statutory provision providing that Postmasters can be discharged only with advice and consent of Senate). The opinion stated that the President is the sole head of the executive branch and therefore should have exclusive authority over federal officers. *Id.* at 135.

101. *Id.* at 134.

102. *Humphrey's Executor v. United States*, 295 U.S. 602, 627-29 (1935).

branch inheres to the President.¹⁰³ The Supreme Court in *Humphrey's Executor*, however, appeared to view administrative agencies as constitutionally independent from the Executive or perhaps even as arms or extensions of Congress.¹⁰⁴ Agencies might be arms of Congress, according to the Court, at least in their exercise of what the Court termed the "quasi-legislative" or "quasi-judicial" administrative authority of the modern regulatory agency.¹⁰⁵ As the Court in *Humphrey's Executor* explained about the Federal Trade Commission (FTC) agency:

[The FTC] is an administrative body created by Congress to carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed, and to perform other specified duties as a legislative or as a judicial aid. Such a body cannot in any proper sense be characterized as an arm or an eye of the executive. . . . [T]o the extent that it exercises any executive function—as distinguished from executive power in the constitutional sense—it does so in the discharge and effectuation of its quasi-legislative or quasi-judicial powers, or as an agency of the legislative or judicial departments of the government.¹⁰⁶

Construed broadly, this language sharply conflicts with the Court's position in *Myers* by giving the President virtually no power over administrative officers, perhaps including cabinet members, beyond the President's constitutionally mandated role in appointment.¹⁰⁷

103. See *Myers*, 272 U.S. at 133-35 (asserting that President controls actions of executive officers notwithstanding statute stating otherwise).

104. See *Humphrey's Executor*, 295 U.S. at 628-31 (noting that presidential power over agencies is limited and explaining that agencies act both as if they were part of legislative and judicial branches in fulfilling their duties).

105. *Id.*

106. *Id.* at 628.

107. See U.S. CONST. art. II, § 2 (providing that President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . all other Officers of the United States"). The Constitution also provides that "Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." *Id.* cl. 2.

A broad reading of the language in *Humphrey's Executor* suggests that administrative officers, perhaps even cabinet members, who are traditionally considered to be included within the executive department, are not exercising an "executive function" in carrying out their duties and thus are not constitutionally required to be subject to presidential control when performing tasks delegated to them by Congress. See *Humphrey's Executor*, 295 U.S. at 628 (asserting that administrative bodies that effect legislative policies cannot be characterized as arms of Executive). Because virtually all cabinet officers carry legislative policies into effect as part of their congressionally delegated duties, they would be permissible targets for congressional restrictions on presidential removal or other presidential controls. SCHWARTZ, *supra* note 1, at 18-19.

Not surprisingly, *Humphrey's Executor* has never been read this broadly, with the traditional wisdom being that even though Congress may restrict presidential management and removal of so-called "independent officers," the Constitution requires the President to have at-will control of his or her cabinet. See Paul R. Verkuil, *The Status of Independent Agencies After Bowsher*

The Court in *Humphrey's Executor* sought to reconcile these seemingly inconsistent precedents by drawing distinctions based on the administrative offices at issue.¹⁰⁸ The Court concluded that under *Myers*, the President has broad managerial authority over "purely executive officers" such as postmasters but limited managerial authority over "quasi-legislative" or "quasi-judicial" officers such as Federal Trade Commissioners.¹⁰⁹ The Court further dismissed the strong Presidency position of *Myers* as dicta.¹¹⁰

Any view, however, that the Supreme Court in *Humphrey's Executor* permanently abandoned or transcended its *Myers* vision of Article II was contradicted by the *Chadha* to *Mistretta* sequence of cases in the early 1980s. Those cases reawakened the *Humphrey's Executor/Myers* conflict without, unfortunately, resolving it.¹¹¹ In cases such as *Bowsher v. Synar*¹¹² and *INS v. Chadha*,¹¹³ the Court seemed to accept the concept of a "unitary executive" insulated from even congressional control.¹¹⁴ Indeed, much of the justification for the Court's decisions in these cases stemmed from its apparent perception that Congress, by retaining some control over authority delegated to administrative officers, was seeking to usurp an exclusively executive

v. Synar, 1986 DUKE L.J. 779, 794 (1986) (stating that it is generally agreed that Congress cannot impose restrictions on or remove executive officers such as cabinet members who serve at President's pleasure). The issue, however, has never been conclusively resolved. See Paul R. Verkuil, *The American Constitutional Tradition of Shared and Separated Powers: Separation of Powers, the Rule of Law and the Idea of Independence*, 30 WM. & MARY L. REV. 301, 338 (1989) (recognizing existence of argument that unquestioned unilateral removal of cabinet officials is not automatic Article II presidential power).

108. *Humphrey's Executor*, 295 U.S. at 627-28.

109. *Id.*

110. *Id.* The language in *Humphrey's Executor*, however, arguably supports a very narrow definition of the category "executive officers." See *id.* at 628 (suggesting that if Congress created administrative officer to effectuate legislative policies, officer could not be considered solely as executive officer).

111. See Morton Rosenberg, *Congress's Prerogative over Agencies and Agency Decisionmakers: The Rise and Demise of the Reagan Administration's Theory of the Unitary Executive*, 57 GEO. WASH. L. REV. 627, 639 (1989) (noting that *Chadha* decision contradicted *Humphrey's Executor* decision and heralded return to expansive vision of presidential authority enunciated in *Myers*).

112. 478 U.S. 714 (1986).

113. 462 U.S. 919 (1983).

114. See *Bowsher v. Synar*, 478 U.S. 714, 727-32 (1986) (limiting congressional nonlegislative control over administrative agencies by invalidating delegation of certain budget functions to Comptroller General on ground that such delegation violates separation of powers); *INS v. Chadha*, 462 U.S. 919, 952-55 (1983) (insulating administrative agencies from nonlegislative congressional control by invalidating legislative veto over executive branch's immigration law actions on grounds that such veto violates bicameralism and presentment precepts). The theory of the "unitary executive," or the centralizing of authority over administrative agencies within the executive branch, was a pet project of the Reagan administration, which sought to use the theory to justify efforts to assume extensive presidential control over administrative rulemaking. See Rosenberg, *supra* note 111, at 628-29 (noting that in order to achieve President Reagan's deregulatory agenda, Reagan administration attempted to centralize government and ensure that decisionmaking would rest primarily in Executive and regulatory agencies and thus within control of President or his delegates).

function. For example, in striking down a legislative veto¹¹⁵ as an unconstitutional violation of bicameralism and presentment,¹¹⁶ the Court in *Chadha* emphasized the importance of presentment as a mechanism for ensuring presidential participation in lawmaking.¹¹⁷ The Court cited *Myers* for the proposition that the presentment clause is designed, at least in part, to ensure that the President's national perspective is made a part of the lawmaking process.¹¹⁸ The Court in *Chadha* also adopted a strict notion of separation of powers, explaining that the branches of government are connected to each other only minimally through their common functions and dependence on society¹¹⁹ and characterizing the administrative exercise of delegated authority as "executive" or "Article II" authority.¹²⁰

Similarly, in *Bowsher*, the Court characterized the Comptroller General's use of delegated authority to calculate certain budget reductions as "executive authority"¹²¹ and thus, according to the Court's separation of powers doctrine, not legitimately subject to congressional supervision.¹²² This view of the use of legislatively delegated administrative authority as an exercise of executive power seems to imply that the President, who is granted executive power under the Constitution, is the ultimate repository of administrative

115. See Immigration and Nationality Act of 1952 (INA), Pub. L. No. 82-414, § 244(c), 66 Stat. 163, 216 (current version at 8 U.S.C. § 1254 (1988)) (providing that Attorney General's decision to suspend deportation of any alien, as permitted by § 244(a)(1) of INA, can be reversed by resolution of either Senate or House of Representatives).

116. *Chadha*, 462 U.S. at 951; see U.S. CONST. art. I, § 7 (requiring legislation to be passed by both houses of Congress and presented to President, who shall either sign it or veto it, subject to override by two-thirds vote of both Houses).

117. See *Chadha*, 462 U.S. at 946-48 (discussing careful planning of Framers in creation of Constitution's Presentment Clause to ensure that President participated in lawmaking).

118. *Id.* at 948 (citing *Myers v. United States*, 272 U.S. 52, 123 (1926)).

119. *Id.* at 950.

120. *Id.* at 953 n.16 (stating that when Attorney General administers INA, he or she acts in his or her presumptive Article II capacity).

121. *Bowsher v. Synar*, 478 U.S. 714, 732-34 (1986). At issue in *Bowsher* was a provision of the Balanced Budget and Emergency Deficit Control Act of 1985, also known as the Gramm-Rudman-Hollings Act, which authorized the Comptroller General of the United States to calculate annually a number of statutorily mandated deficit reduction spending cuts, based on estimates provided by the directors of the OMB and of the Congressional Budget Office (CBO). Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, § 251, 99 Stat. 1038, 1063 (current version at 2 U.S.C. § 901 (1988)). After calculating the spending cuts, the Comptroller General was required to report his or her conclusions to the President, *id.* § 251(b), 99 Stat. at 1068 (current version at 2 U.S.C. § 901(a)(2)(B)(iii)), who in turn was required to issue a sequestration order mandating spending reductions. *Id.* § 252, 99 Stat. at 1072 (current version at 2 U.S.C. § 902(a)(1)). The Court held that this delegation of authority to the Comptroller General was unconstitutional because the officer was subject to removal, for specified cause, by a joint resolution of the Congress. *Bowsher*, 478 U.S. at 727-32. This removal power, the Court held, violated separation of powers doctrine by reserving to Congress authority over an official "charged with the execution of the laws." *Id.* at 726.

122. *Bowsher*, 478 U.S. at 732-34.

power, despite titular congressional delegation to an administrative officer. Accordingly, one could argue that the President should be able to control this delegated power and perhaps even exercise the administrative officer's policymaking discretion, at least within statutory limits.¹²³ In contrast to this view, however, the Court in *Morrison v. Olson*¹²⁴ and *Mistretta v. United States*¹²⁵ reemphasized the permissibility of legislative restriction of presidential control over administrative decisionmaking. In *Morrison* the Court upheld the constitutionality of the independent counsel's office under the Ethics in Government Act,¹²⁶ and in *Mistretta* the Court upheld the U.S. Sentencing Commission's authority to issue federal sentencing guidelines.¹²⁷ In both of these decisions, the Court refused to accept the notion that the President has an exclusive right to control administrative discretion.¹²⁸

For example, the Court in *Morrison* held that the mere fact that an administrative officer might reasonably be characterized as exercising executive power does not necessarily mean that the President, under Article II, has an exclusive right of control over that officer.¹²⁹ Instead, the Court held that Congress could legitimately restrict the President's exercise of control over the officer up to the point where the restriction would impermissibly undermine the President's ability to exercise his or her constitutionally assigned function.¹³⁰ The Court interpreted this point as being reached when a restriction would either structurally undermine the Presidency or functionally interfere with the President's ability to ensure that administrative

123. See *supra* note 114 and accompanying text (discussing unitary executive theory and Reagan administration's use of theory to justify gaining control over administrative rulemaking processes).

124. 487 U.S. 654 (1988).

125. 488 U.S. 361 (1989).

126. *Morrison v. Olson*, 487 U.S. 654, 693-96 (1988). The Ethics in Government Act of 1978 authorizes the creation of an office of independent counsel, 28 U.S.C. § 592 (1988), partially restricts the Attorney General's ability to appoint and remove the independent counsel, *id.* § 593, and provides for some judicial oversight of the counsel. *Id.* § 595. The Court upheld the constitutionality of the Act in all respects. *Morrison*, 487 U.S. at 693-96.

127. *Mistretta v. United States*, 488 U.S. 361, 412 (1989). The Sentencing Reform Act of 1984 delegates authority to the U.S. Sentencing Commission to promulgate sentencing guidelines for judges to use in sentencing federal criminal offenders. 28 U.S.C. § 994 (1988).

128. See *Mistretta*, 488 U.S. at 384-90 (commenting that power to appoint inferior officers is not strictly executive function because Congress has power to delegate that function to courts of law); *Morrison*, 487 U.S. at 673-77 (noting that no limitation on interbranch appointments exists and that Congress has discretion to determine who should control various inferior officers).

129. *Morrison*, 487 U.S. at 691 (noting that presidential need to control administrative officers' exercise of discretion is not central enough to functioning of executive branch to require removal-at-will authority on part of President).

130. *Id.*

officers faithfully execute the law.¹³¹

Similarly, in *Mistretta*, the Court held that the creation of the U.S. Sentencing Commission, its placement within the judicial branch, and its grant of authority to establish binding federal sentencing guidelines do not violate the separation of powers.¹³² The Court held this to be so even though the Sentencing Commission enabling statute delegates considerable policymaking authority to an independent agency that is subject only to limited control by the President.¹³³ Indeed, the Court's opinion primarily focused on and rejected petitioner's argument that the statute involved too much presidential influence over the Commission and thus impaired the independence and integrity of the judiciary.¹³⁴

In the foregoing cases, the Court seems to repudiate the notion that it had advanced only a few terms before that administrative agencies are the fiefdom of the Presidency and that delegated administrative power, by default, reverts to the exclusive control of the President as part of the President's Article II power.¹³⁵ Perhaps

131. *Id.* at 693.

132. *Mistretta v. United States*, 488 U.S. 361, 380-84 (1989).

133. *Id.* at 368; *see* 28 U.S.C. § 994 (1988) (delegating authority to U.S. Sentencing Commission to promulgate sentencing guidelines for federal judges). The Court also held that the Sentencing Reform Act does not violate the nondelegation doctrine. *See Mistretta*, 488 U.S. at 371-79 (noting that nondelegation doctrine dissuades Congress from delegating legislative authority to another branch but that Sentencing Reform Act does not violate doctrine because Act specifically sets out policies, goals, and guidelines to which Commission must adhere). Members of the U.S. Sentencing Commission are appointed by the President with the advice and consent of the Senate. 28 U.S.C. § 991(a) (1988). However, the Commission is designated by statute as an "independent commission in the judicial branch of the United States," *id.*, and the members are subject to removal by the President during their six year terms only for "neglect of duty or malfeasance in office or for other good cause shown." *Id.* At least three of the members of the Commission are required to be federal judges and are to be selected by the President after he or she considers a list of six judges recommended by the Judicial Conference of the United States, which is a committee headed by the Chief Justice of the U.S. Supreme Court and comprised of judges representing the U.S. courts of appeals, district courts, and Court of International Trade. *Id.*

134. *See Mistretta*, 488 U.S. at 408-11 (noting that President's ability to appoint Commission positions does not corrupt judiciary's integrity). In contrast, Justice Scalia, the sole dissenter in the case, argued vigorously that the Sentencing Commission is unconstitutional because it is insulated from the control of the President and exercises policymaking power exclusively, as opposed to as an incident of other executive or judicial authority. *Id.* at 416-26 (Scalia, J., dissenting).

135. *See supra* notes 112-23 and accompanying text (discussing Court's opinions in *Bowsher* and *Chadha*). It may be argued that *Morrison* is consistent with a *Chadha/Bowsher* notion of broad inherent presidential authority over administrative decisionmaking because *Morrison* merely provided that Congress could restrict this presidential role, but did not limit presidential power under Article II to manage administrative decisionmaking, absent congressional restriction. *See Morrison v. Olson*, 487 U.S. 654, 681 (1988) (holding that fact that administrative officer may be characterized as exercising executive power does not in itself mean that Congress must grant executive branch exclusive control over officer). The finding in *Morrison* that Congress could restrict presidential control of administration, however, was based on a repudiation of the underlying idea that the President must necessarily, under Article II, have plenary control over administrative decisionmaking. *See id.* at 691-93 (asserting that statutory

Morrison and *Mistretta* are for the time being the Court's final word on the scope of the President's Article II executive power, at least regarding Congress' ability to limit the President's power over the federal bureaucracy. Historically, however, the Court's pattern has been to waffle between the broad and narrow interpretations of the President's Article II power.¹³⁶ Indeed, it may be argued that the Court conveniently cites to one or the other line of cases depending on whether the Court perceives the primary difficulty at hand as presidential or congressional aggrandizement.¹³⁷ If this is the case, it is likely that in the future the Court will continue to be inconsistent in its theory of the President's Article II authority.¹³⁸

Nevertheless, in the aforementioned cases the Court appears to reject the theory of the unitary executive¹³⁹ and carefully restricts the influence that Congress may exercise over administrative decisionmaking.¹⁴⁰ The Court does not specifically address, much less

good cause limitation on removal of certain executive officers does not disrupt President's Article II authority). In this respect, the *Morrison* decision is inconsistent with *Chadha* and *Bowsher* and thus does little to resolve the Supreme Court's underlying conflict concerning the scope of the President's Article II power over administrative authority.

136. See *supra* notes 96-135 and accompanying text (discussing Court's fluctuating positions in series of opinions regarding President's Article II power).

137. Compare *INS v. Chadha*, 462 U.S. 919, 946-48 (1983) (adopting rigid separation of powers analysis, lambasting congressional aggrandizement, and citing approvingly to *Myers'* salute to strong Executive en route to invalidating congressional legislative veto) with *Morrison*, 487 U.S. at 690-93 (upholding office of independent special prosecutor established to investigate alleged criminal activity of high-ranking executive officials by adopting flexible approach of separation of powers analysis, which gives Congress broad authority to restrict presidential power over bureaucracy, and dismissing *Myers* as merely "correct in its holding").

138. Perhaps the recent cases of *Morrison* and *Mistretta* can be explained as simply representing an abandonment of the Court's flirtation with the idea of a unitary executive in *Chadha* and *Bowsher*. See *supra* notes 112-23 and accompanying text (discussing Court's opinions in *Chadha* and *Bowsher*). The Court's opinion in *Morrison*, however, appeared to be tailored to sustaining the particular exercise of congressional power in the case at hand, rather than to be a permanent repudiation of the concept of broad presidential authority over administrative decisionmaking. See *Morrison*, 487 U.S. at 670-73 (engaging in very case-specific analysis of whether President's limited power under Ethics in Government Act to control independent counsel was sufficient to satisfy separation of powers review). Thus, an alternative explanation is perhaps more persuasive: these decisions reflect the Court's schizophrenia about the appropriate role of the Presidency in administrative governance.

139. See *supra* notes 124-35 and accompanying text (discussing Court's refusal in *Morrison* and *Mistretta* to grant Executive exclusive control over certain administrative officers).

140. See *supra* notes 112-23 and accompanying text (discussing Court's refusal in *Chadha* and *Bowsher* to sanction Congress' proposals to influence administrative decisionmaking). In both *Chadha* and *Bowsher*, the Court was fairly strict in limiting any formal nonlegislative congressional role in directing administrative action. See *Bowsher*, 478 U.S. at 730-33 (prohibiting grant of executive power to Comptroller General because Congress has limited removal power over that official); *Chadha*, 462 U.S. at 954-55 (commenting that when Framers of Constitution intended for single house of Congress to act independently, they prescribed precise procedures for such actions). Of course, Congress retains considerable informal influence over agency rulemaking through the congressional oversight functions, in addition to Congress' traditional power over administrative budgets and appropriations. See RICHARD J. PIERCE, JR. ET AL., *ADMINISTRATIVE LAW AND PROCESS* 39 (2d ed. 1992) (noting that Congress has wide variety of means to control agency discretion, including altering jurisdiction of agen-

resolve, however, the question of constitutional limits on presidential influence over administrative decisionmaking, particularly in agency policymaking or value selection. Thus, none of these cases provides direct authority defining the scope of the President's inherent power over administrative value selection.

Notwithstanding the ambiguity surrounding the President's constitutional role in supervising administrative agencies, strong arguments exist that exclusive presidential selection of values for administrative decisionmaking is beyond the scope of executive authority under Article II. Article II, for instance, does not grant the President exclusive policymaking authority. Rather, the Constitution clearly prescribes legislative processes as the primary vehicle for policymaking and sets forth the President's role in governmental policymaking as participatory, not unilateral.¹⁴¹ Thus, the Constitution grants the President power to recommend legislation to Congress¹⁴² and to veto legislation passed by Congress.¹⁴³ These provisions provide for the President's participation with Congress in policymaking, but they clearly do not provide for unilateral presidential policymaking because the President needs Congress' approval for legislation to become law.¹⁴⁴ Even the President's Article II power to appoint administrative officers, which appears to provide the strongest presidential authority under the Constitution over administrative policymaking, is not an exclusive power, but may instead be exercised only with the advice and consent of the Senate.¹⁴⁵ These restrictions on presidential policymaking evidence a constitutional judgment that governmental policymaking should be made through participatory legislative processes, which require the cooperation of both the Congress and the President,¹⁴⁶ and not through unilateral executive processes alone.¹⁴⁷

cies, calling investigatory hearings regarding agencies' actions, and instructing General Accounting Office to investigate agencies' conduct).

141. *Cf.* U.S. CONST. art. II, §§ 2-3 (providing that presidential actions such as appointments and treaty-making require prior advice and consent of Senate).

142. *Id.* § 3.

143. *Id.* art. I, § 7.

144. *See id.* (providing that bills must pass House of Representatives and Senate before being presented to President for approval).

145. *Id.* art. II, § 2; *see supra* notes 90-93 and accompanying text (arguing that President's role in managing bureaucracy is poorly defined by Constitution).

146. *See* U.S. CONST. art. I, § 7 (setting forth President's authority to veto legislation and Congress' authority to override veto by two-thirds vote).

147. *See* THE FEDERALIST NO. 73 (Alexander Hamilton) (defining presidential role in policymaking primarily as participatory check on legislative excesses and not as unilateral function). Hamilton argued that a strong Presidency would enhance, not diminish, the participatory and deliberative characteristics of legislative policymaking. *See id.* (defending proposed Constitution's limited presidential veto power on grounds that it not only protects Presidency from legislative attacks but also inhibits bad lawmaking by increasing diversity of

The Supreme Court's decision in *Youngstown Sheet & Tube Co. v. Sawyer*¹⁴⁸ supports this limited view of the President's Article II policymaking power. In *Youngstown*, the President had ordered the Secretary of Commerce to avoid a steelworkers labor strike by seizing steel mills because the President considered such a strike to be detrimental to the nation's Korean War effort.¹⁴⁹ Despite the fact that Congress had been aware of the presidential order and had failed to reverse it, the Court found the President's action to be unconstitutional.¹⁵⁰ The Court determined that Congress' power to make law does not divert to the President by default, even in the absence of contrary congressional action.¹⁵¹ By relying on separation of powers principles, the Court reasoned instead that the development of national labor policy is the exercise of a policymaking function that is within the power of Congress but beyond the power of the Presidency.¹⁵² The Court therefore seemed to eschew an exclusive or even a substantial presidential role in policymaking.¹⁵³

persons who create laws, thus decreasing any likelihood of errors for lack of consideration or contagious common passion in any one branch of government).

148. 343 U.S. 579 (1952).

149. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 582-83 (1952).

150. *See id.* at 589 (holding that seizure order could not be enforced because Congress alone retains lawmaking power).

151. *Id.* at 587-89.

152. *See id.* at 587-88 (asserting that although President may recommend policy, only Congress can mandate that such policy be enacted into law).

153. It should be noted, however, that in *Youngstown* the President had ordered an administrative officer to take an action that appeared to be inconsistent with the applicable statute. *See id.* at 583-86 (noting that President's seizure order contradicted Taft-Hartley Act, which rejected seizure as method of settling labor disputes). Indeed, the Court recognized that Congress had specifically rejected a statutory amendment that would have given the President the very emergency seizure powers that he had asserted in the *Youngstown* scenario. *Id.* at 583. Thus, *Youngstown* may be read to merely preclude the President from requiring an administrative officer to exceed the discretion given to him or her by Congress and not to restrict the President from influencing or managing permissible administrative discretion. *Cf.* Sunstein, *supra* note 34, at 1278 (noting that President cannot selectively refuse to enforce congressional policies). The Court in *Youngstown*, however, clearly disparaged the institutional competence of the President to promulgate critical social policy choices. *See Youngstown*, 343 U.S. at 588 (noting that recounting of fears of centralized power held by nation's founders would only confirm Court's holding that President cannot legislate). This seems to imply a limited presidential role in value selection, regardless of previous congressional preemption of the field.

The *Youngstown* decision was also premised on a rigid, formalistic notion of separation of powers doctrine that seems to forbid any participation of one branch in the powers of another. *See Youngstown*, 343 U.S. at 588-89 (noting distinct and different positions of President and Congress in legislating). Although briefly resuscitated in *Chadha* and *Bousher*, *see supra* notes 112-23 and accompanying text (discussing *Chadha* and *Bousher*), it is not clear that this notion of separation of powers survives. In *Morrison* and *Mistretta*, for example, the Court explicitly adopted a more flexible "functional" analysis, which acknowledged that some commingling of powers is inevitable and looked instead to the principles of checks and balances to determine the tolerable limits on this commingling. *See Mistretta v. United States*, 488 U.S. 361, 380-84 (1989) (recognizing that flexible approach to separation of powers encourages system of checks and balances to limit powers of governmental branches); *Morrison v. Olson*, 487 U.S. 654, 693-96 (1988) (observing that branches of government are not absolutely in-

These constitutional limits on unilateral presidential direction of administrative decisionmaking are particularly important for administrative value selection. As opposed to policymaking generally, which is often as much a determination of means as of ends,¹⁵⁴ value selection requires a society to make fundamental decisions about societal goals. Although Presidents may be well suited to decide what means will most effectively achieve specified ends, they are not necessarily well suited to choose those ends.¹⁵⁵ Thus, instead of using

dependent of one another); *see also* Strauss, *supra* note 41, at 578 (arguing generally that separation of powers analysis should focus more on checks and balances than on strict notions of separation of powers). *Morrison*, however, addressed limits on congressional power to alter the balance of power between the branches of government. *See Morrison*, 487 U.S. at 670-73 (concluding, e.g., that Congress may authorize interbranch appointments within limitations). One might argue that the Court's flexible approach to constitutional interpretation is more appropriate to issues of Congress' Article I authority to manipulate governmental structure than it is to issues of the President's direct Article II power to make policy without prior congressional approval. In the latter case, a formalistic approach may be necessary to effectively restrain unilateral presidential aggrandizement. Accordingly, the Court may still apply the more formalistic *Youngstown/Chadha* approach to Article II analysis.

Of course, the President may be able to influence administrative value selection through the practical leverage of the position's appointment and removal power and other managerial authority. Bruff, *Presidential Power*, *supra* note 9, at 462-63 n.56 (noting, for example, that President may formulate policy or repay political debts through appointment power). This does not imply, however, that the President should direct administrative value selection. *See id.* at 463-65 (distinguishing procedural oversight through which President can suggest policy but cannot ensure that it is promulgated, from substantive presidential direction of agency decisionmaking). When the President acts as manager, his or her role in administrative value selection is limited, by and large, to powers of persuasion. *See id.* at 470 (noting that President's power of administration is limited to policy initiation, response, and persuasion). In contrast, when the President *directs* administrative agency value selection, the President is the sole arbiter of that value choice. *See id.* at 468-69 (noting that presidential direction of agencies, particularly value selection, would eliminate pluralism and provide President with task of unmanageable proportions). A presidential role as decisionmaker rather than as advocate poses serious constitutional problems. *See supra* notes 141-47 and accompanying text (discussing Article II limitations on presidential power). For example, in the Reagan administration's early managerial Executive orders, the agencies make final policy decisions. *See supra* notes 21-39 and accompanying text (discussing Executive Orders Nos. 12,291 and 12,498). Although the President has substantial power through the OMB to influence the administrative agency's policy and value choices, the agency retains the final decisionmaking power. *See supra* notes 23-39 and accompanying text. In contrast, the later Reagan administration Executive orders make the final decision on critical value choices directly in the order, which has the force of law. *See supra* notes 40-63 and accompanying text (discussing Executive Orders Nos. 12,606 and 12,612).

154. *See, e.g.*, National Traffic and Motor Vehicle Safety Act (NTMVSA), § 103, 15 U.S.C. § 1392 (1988) (requiring that National Highway Traffic Safety Administration (NHTSA) establish rules creating automobile safety standards). The goal of the NTMVSA is to require the auto industry to build safer, more "crashworthy" passenger automobiles. *Id.* § 1381. This goal is to be realized, however, through standards set by the NHTSA. *See id.* § 1392 (charging NHTSA with establishing "appropriate" and "practicable" safety standards). Thus, the task of the NHTSA policymaking under the statute is not primarily goal selection, but rather is primarily to decide what means would best effectuate the specified statutory goal. Indeed, the Supreme Court struck down a NHTSA rescission of a prior NHTSA safety standard in part because the rescission ran contrary to the statutory goal of safety. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 34 (1983) (reversing NHTSA order revoking prior safety standard that required automobile manufacturers to install passive restraint devices such as airbags and automatic seatbelts in passenger automobiles).

155. *See infra* notes 323-66 (setting forth reasons why President is not well suited to make

authoritarian executive processes to choose societal goals, government should select ends through more broadly participatory and deliberative processes. Indeed, one might argue that the need to provide broadly participatory and deliberative processes for ends selection may be at the root of the constitutional judgment to grant primary policymaking authority to Congress rather than to the President.¹⁵⁶

Juxtaposed against the constitutional concept of a limited Presidency and a preeminent legislative role in governmental policymaking is the reality of the administrative state and the delegation of much of congressional policymaking authority to administrative agencies.¹⁵⁷ This delegation has led many persons to champion a substantial presidential role in administrative decisionmaking despite arguments that such a role violates constitutional restrictions on the Executive.¹⁵⁸ Indeed, the administrative state suffers from many congenital defects, including the absence of the direct political accountability of either congressional or presidential decisionmaking.¹⁵⁹ Although administrative agencies may be more or less responsive to the political branches of government,¹⁶⁰ federal administrators are appointed and thus are not electorally accountable.¹⁶¹ Additionally, administrative agencies suffer from the plagues of institutional decisionmaking that include inherent inefficiencies and irrationalities.¹⁶² Furthermore, the decentralization of deci-

administrative value selections). Presidents and their staffs may be better suited than Congress and sometimes perhaps even better suited than administrative agencies to perform the factual and analytical work necessary to determine what the best approach is to achieve certain ends. *Cf.* *Amalgamated Meat Cutters & Butcher Work v. Connally*, 337 F. Supp. 737, 747-52 (D.D.C. 1971) (upholding delegation to President by Congress of authority to determine whether and when to institute wage and price controls in order to curb inflation, because President was perceived to have direct control over inflation and could therefore more easily satisfy immediate timing requirement of controls).

156. See U.S. CONST. art. I, §§ 1, 8 (vesting "all" legislative powers in Congress).

157. See JERRY L. MASHAW ET AL., *ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM, CASES AND MATERIALS* 3-7 (3d ed. 1992) (summarizing Federal Government's shift away from fairly limited executive model envisioned by Alexander Hamilton, as described in *Federalist No. 75*, to current state where national administrative policymaking touches every significant economic, political, and social activity of American society).

158. See *supra* notes 9-10 (citing authorities generally supportive of increased presidential role in administrative decisionmaking).

159. See ABA COMM'N, *ROADS TO REFORM*, *supra* note 9, at 68 (recognizing that problem facing administrative state is lack of agency accountability to Congress or President and ultimately to electorate).

160. See, e.g., U.S. CONST. art. I, § 8 (granting Congress power of purse and power to make necessary and proper laws for execution of enumerated powers); *id.* art. II, § 2 (providing that officers are appointed by President with advice and consent of Senate).

161. See U.S. CONST. art. II, § 2 (providing for appointment of administrative officers by President, courts, or agency department heads, thereby rendering federal administrators not directly accountable to public).

162. See ABA COMM'N, *ROADS TO REFORM*, *supra* note 9, at 92-104 (discussing problems with administrative procedures ranging from cumbersome hearing and appeal procedures to

sionmaking authority, which is a feature of the administrative state,¹⁶³ can lead to tunnel vision by individual agencies, inconsistent or duplicative regulations by agencies with shared jurisdiction, and, in the worst case, co-option of some agencies by certain interest groups that have vested interests in influencing agency policy.¹⁶⁴

In the face of such glaring deficiencies, the prospect of the Presidency as a unifying and rationalizing force in agency policymaking is an attractive one.¹⁶⁵ Given that so much policymaking power has been delegated to unaccountable, cumbersome, and irrational agencies, it is argued, a presidential role in policymaking, even if constitutionally problematic, would be the lesser of two evils.¹⁶⁶ First, it is argued that the President, as the sole nationally elected federal official, provides needed electoral accountability to administrative policymaking and counters possible distorting political influences of interest groups that may "capture" the agencies.¹⁶⁷ Second, the President can centrally manage administrative policymaking, thus improving its efficiency, and, by coordinating administration across the Federal Government, can avoid duplicative and inconsistent regulation.¹⁶⁸

The President's Article II executive authority, the argument continues, should be interpreted broadly to permit the President to

lack of comprehensive policy guidance and ineffective and inefficient management techniques).

163. See Diver, *supra* note 71, at 406-08 (discussing decentralization of policymaking and adjudication as key features of incrementalism model of administrative policymaking).

164. See Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1684-87 (1975) (explaining contemporary criticism of agency exercise of autonomy and discretion).

165. See ABA COMM'N, ROADS TO REFORM, *supra* note 9, at 78-84 (recommending that in light of bureaucratic inefficiencies of modern agencies, Congress give President new statutory authority to manage administrative policymaking); Bruff, *Presidential Power*, *supra* note 9, at 461-62 (describing President's unique position at head of government to oversee regulatory process).

166. See ABA COMM'N, ROADS TO REFORM, *supra* note 9, at 78-79 (arguing that despite constitutional ambiguities and separation of powers doctrine, Congress should give President statutory authority to direct certain regulatory activities and to make final determinations on whether or not to issue critical regulations).

167. See Richard J. Pierce, Jr., *The Role of Constitutional and Political Theory in Administrative Law*, 64 TEX. L. REV. 469, 520-23 (1985) (arguing that since Congress often delegates policymaking authority to agencies because it is institutionally unwilling or incapable of resolving details of policy disputes, and because courts often cannot distinguish legislative failure from legislative refusal, Presidency is most capable and accountable institution to oversee agency policymaking); see also Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 YALE J.L. ECON. & ORG. 81, 95-99 (1985) (arguing that broad delegation to administrative agencies is means of facilitating responsiveness to voter preferences expressed in presidential elections, which in turn enhances accountability).

168. See Strauss, *supra* note 41, at 663 (arguing that President should have power to shape administrative discretion because "individual agencies . . . lack the political accountability and the intellectual and fiscal resources necessary to achieve . . . balancing and coordination" of agencies' competing goals and interests).

have this strong role in managing administrative policymaking and, implicitly, in managing administrative value selection as well.¹⁶⁹ Indeed, over the last fifteen years much of the literature concerning the permissible presidential role in administrative policymaking has strongly argued that the Constitution authorizes the President to exercise a significant role in administrative policymaking.¹⁷⁰ Some commentators even contend that Article II permits the President to actually direct administrative regulation, at least within the limits of discretion delegated to the administrative agency by Congress.¹⁷¹

These arguments may have some force. The President plainly should have some managerial authority over administration under Article II,¹⁷² and concerns about the need to better control administrative decisionmaking may support the idea of interpreting the executive power broadly enough to permit the President to exercise a fairly strong managerial role in agency policymaking.¹⁷³ Indeed, given the range of problems facing administrative agencies, from

169. See Bruff, *Presidential Power*, *supra* note 9, at 467-70 (arguing that to perform many disparate functions consistently, President needs power to influence direction of federal regulatory policies). Although the proponents of presidential management of administrative policymaking do not expressly focus on value selection, strong presidential influence over the substance of administrative policymaking necessarily includes control over value selection as well. See *supra* notes 64-82 and accompanying text (discussing role of value selection in administrative policymaking).

170. See, e.g., ABA COMM'N, *ROADS TO REFORM*, *supra* note 9, at 76-79 (arguing that President's constitutional charge to "take care that the laws be faithfully executed" and authority over executive branch officers demand establishment of significant presidential role in administrative policymaking); Bruff, *Presidential Power*, *supra* note 9, at 467-70 (arguing that to fulfill constitutional role, President should be able to direct regulatory activity); Shane, *supra* note 10, at 1245-55 (discussing constitutionality of Executive Order No. 12,291 and arguing that responsibility to execute laws faithfully requires that President have power to coordinate agency decisionmaking so that President, within congressional limitations, can require agencies to fulfill their statutory responsibilities without disturbing statutory responsibilities of other agencies).

171. See, e.g., ABA COMM'N, *ROADS TO REFORM*, *supra* note 9, at 78 (arguing that President has constitutional power to supervise executive branch officers in exercise of their statutory discretion); Strauss, *supra* note 41, at 662-67 (arguing that President has constitutional authority to direct administrative action, at least to extent necessary to coordinate possible conflicting perspectives of different agencies with overlapping jurisdictions, or to balance competing goals of those agencies). Strauss and others, however, seem to agree that the President does not have the authority to direct agencies to violate statutory restrictions. See, e.g., ABA COMM'N, *ROADS TO REFORM*, *supra* note 9, at 80 (proposing that President be limited to initiating agency's primary and subsidiary statutory goals when modifying proposed regulations); Strauss, *supra* note 41, at 662-67 (noting that agency discretion "must be exercised within the legal bounds set for it").

172. See *Myers v. United States*, 272 U.S. 52, 110 (1926) (discussing President's expressly delineated managerial authority under Article II of Constitution, including President's appointment power, removal power, and power to ensure that laws are faithfully executed).

173. See Strauss & Sunstein, *supra* note 10, at 198 (stating that "the case for [executive] supervision rests largely on the need for a centralizing and coordinating role").

overregulation¹⁷⁴ and internal agency mismanagement¹⁷⁵ to agency capture and bias,¹⁷⁶ some presidential oversight with respect to the agencies seems clearly beneficial.¹⁷⁷

Any presidential oversight authority over administrative agencies, however, should not include presidential direction of administrative value selection. First, arguments that presidential control of administrative decisionmaking increases the coordination and effectiveness of such decisionmaking may warrant the imposition of procedural, value-neutral, but not substantive, presidential controls.¹⁷⁸ The President may procedurally coordinate administrative policymaking across agencies without directing the content of the administrative policy.¹⁷⁹ Moreover, the President may police the efficiency or effectiveness of administrative policymaking without requiring agencies to adopt particular values or policies.¹⁸⁰ Thus,

174. See ABA COMM'N, *ROADS TO REFORM*, *supra* note 9, at 5-6 (arguing that federal, state, and local government regulatory activities "have increased to the point where it is difficult to find any economic activity that is not now subject . . . to regulatory mandates or restraints," and that regulatory activities increasingly control, restrain, and limit many of society's productive elements while imposing enormous costs on government).

175. See ABA COMM'N, *ROADS TO REFORM*, *supra* note 9, at 92-104 (discussing procedural causes of inefficient and ineffective agency performance).

176. See Stewart, *supra* note 164, at 1684-87 (describing problem of agency capture and bias in favor of regulated interests at expense of consumers and other diffuse and comparatively unorganized interests as not necessarily due to corruption but as product of four subtle reasons: (1) regulators lack power and depend on industry cooperation; (2) regulatory activities tend to inhibit competition, thereby reinforcing position of established firms; (3) regulators have limited resources and must compromise to accomplish "anything of significance"; and (4) regulators are dependent on outside sources of information, policy development, and political support, and regulated firms are usually best organized to supply these needs).

177. See Bruff, *Presidential Power*, *supra* note 9, at 461-62 (summarizing advantages of presidential oversight of regulatory agencies and policies).

178. For instance, early proponents of regulatory reform were primarily concerned about procedural issues, duplicative regulatory activity by multiple agencies, and "tunnel-vision," which arguably makes agencies vulnerable to capture by regulated interests. See, e.g., ABA COMM'N, *ROADS TO REFORM*, *supra* note 9, at 92-104 (discussing problems with administrative procedures ranging from cumbersome hearing and appeal procedures to lack of comprehensive policy guidance and inefficient, ineffective management techniques); Stewart, *supra* note 164, at 1684-1702, 1790-1813 (reviewing criticisms of agency autonomy and discretion, including charges of bias and capture, and critiquing proposals for greater direct political control of regulatory process as means of regulatory reform). One proposal to remedy the procedural defects included increased White House coordination of regulatory activities and changes in hearing and appeal procedures. Bruff, *Presidential Power*, *supra* note 9, at 461-62.

179. See Strauss, *supra* note 41, at 665 (noting that presidential coordination of agency policymaking is not incompatible with agency remaining ultimately responsible for decision); see also Stewart, *supra* note 164, at 1684-1702, 1790-1813 (proposing increased executive management and coordination of interagency regulatory activities).

180. Cf. Exec. Order No. 12,291, 3 C.F.R. 127, 127-28 (1981), *reprinted in* 5 U.S.C. § 601 (1988) (requiring agencies to conduct cost-benefit analyses on significant proposed rules but not explicitly requiring that agencies adopt values or policies pursuant to those analyses). Examples of such procedural "value-neutral" presidential coordination might include the establishment of a central governmental clearinghouse for agency regulation to minimize duplicative regulations, or the establishment of internal administrative procedures to improve agency efficiency. With these programs, the President would not seek to prescribe particular

these managerial arguments do not justify presidential direction of administrative value selection.

Second, although presidential oversight may increase the electoral accountability of administrative decisionmaking, accountability alone is not sufficient to countenance overriding foundational constitutional restrictions on unilateral presidential policymaking.¹⁸¹ The Constitution's choice of legislative processes as opposed to executive processes for governmental value selection is not accidental.¹⁸² The preference ensures not merely that basic societal value choices will be made by persons accountable to the public—a grant of full legislative authority to the President would have accomplished this—but also protects important legislative process values such as consensus building, citizen participation, deliberation, and diffusion of power.¹⁸³ Legislative value selection processes ensure that the Government makes value choices only through a deliberative and participatory political struggle, and accordingly, legislative selection requires considerable national consensus with respect to policy and value choices before any bill becomes law.¹⁸⁴ Additionally, legislative value selection processes ensure that the power to define societal ends is not concentrated in the hands of one individual, the President, but instead is broadly diffused among the different political branches of government and the many persons who comprise them.¹⁸⁵ These legislative process values are more impor-

administrative value choices or policies, but rather would seek only to ensure that administrative decisionmaking is effective and efficient.

181. See, e.g., Peter M. Shane, *Independent Policymaking and Presidential Power: A Constitutional Analysis*, 57 GEO. WASH. L. REV. 596, 621-23 (1989) (arguing that other constitutional principles besides electoral accountability, especially diffusion of power and policymaking primacy of Congress, are important to domestic policymaking).

182. See William N. Eskridge & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523, 528-33 (1992) (describing original constitutional notions of balanced lawmaking and corresponding roles of Congress and President); Shane, *supra* note 181, at 621-23 (arguing that Framers believed legislative processes for policymaking would produce political stability and preserve liberty because power would be diffused in bifurcated Congress so that even strong majority could produce only incremental policy changes over short periods of time, and minority views could always be heard in other political fora).

183. See *infra* part IV.A (arguing that legislative process values are preferable to unilateral presidential process values for administrative value selection).

184. See *INS v. Chadha*, 462 U.S. 919, 951 (1983) (implicating constitutional requirements of bicameralism and presentment and stating that "[t]he division of the Congress into two distinctive bodies assures that the legislative power would be exercised only after opportunity for full study and debate in separate settings"); see also Eskridge & Ferejohn, *supra* note 182, at 528-29 (discussing bicameral presidential model of legislation and arguing that it reflects Framers' fear of "short-sided policies not in the public interest" and desire for political stability through deliberation and consensus building).

185. See Shane, *supra* note 181, at 621-22 (discussing constitutional value of "diffusion of power," its manifestation in bifurcated Congress, staggered Senate elections, and presentment of legislation to President, and its positive role in legislative value selection wherein diffusion of power helps maintain political stability by avoiding dramatic changes in policy over short periods of time).

tant than electoral accountability for protecting the soundness and legitimacy of governmental value selection; they are an important part of the structural protections for governmental policymaking and value selection within the Constitution.¹⁸⁶ Accordingly, Article II should be interpreted to preserve rather than to override these important legislative process values. Because presidential value selection does not protect these necessary legislative values,¹⁸⁷ it should not be permitted under Article II.

One might contend, however, that an argument that the Constitution strongly protects legislative process values is inconsistent with Supreme Court doctrine permitting congressional delegation of broad value selection and policymaking authority to agencies.¹⁸⁸ That is, congressional delegation substitutes nonlegislative administrative processes for the legislative processes that would otherwise be applicable and thus arguably does not protect these legislative values.¹⁸⁹ Accordingly, one could argue that the Supreme Court's sanctioning of such delegation¹⁹⁰ is inconsistent with recognition of legislative process values.

The latitude given to Congress to decide just how much delegation is appropriate, however, is not based on a rejection of the constitutional preference for legislative decisionmaking processes.¹⁹¹

186. See *supra* note 181; see also *infra* part IV.A (providing reasons why administrative value selection processes should respect legislative process values).

187. See *infra* part IV.B (arguing that administrative processes better respect legislative process values than unilateral and insular presidential processes).

188. See, e.g., *Mistretta v. United States*, 488 U.S. 361, 371-79 (1989) (upholding congressional delegation of authority to U.S. Sentencing Commission to promulgate federal sentencing guidelines and reviewing evolution of "intelligible principle" standard (which requires Congress to set broad limits on agency authority and give general guidance on exercise of authority) in decisions upholding congressional delegations of policymaking authority to agencies); *Lichter v. United States*, 334 U.S. 742, 785-86 (1948) (upholding congressional delegation of authority to all federal agencies to determine scope of "excessive profits" under Renegotiation Act, which enabled efficient and equitable national mobilization for World War II); *American Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946) (sanctioning legislative delegation of authority to SEC to prevent unfair or inequitable distribution of voting power among owners of corporate securities); *Yakus v. United States*, 321 U.S. 414, 426 (1944) (approving congressional delegation of authority to Price Administrator to fix commodity prices that would be fair and equitable and would effectuate purposes of Emergency Price Control Act of 1942); *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 600 (1944) (upholding delegation to Federal Power Commission to determine just and reasonable utility rates); *National Broadcasting Co. v. United States*, 319 U.S. 190, 225-26 (1943) (sanctioning congressional delegation of authority to FCC to regulate broadcast licensing "as public interest, convenience, or necessity" requires).

189. Cf. *Stewart*, *supra* note 164, at 1676-88 (discussing traditional bureaucratic model of administrative law and exploring criticisms of agency autonomy and discretion in policymaking, including lack of legislative procedural characteristics such as openness, deliberation, and accountability).

190. See *supra* note 188 (citing Supreme Court cases upholding numerous congressional delegations of authority to administrative agencies).

191. See *Mistretta*, 488 U.S. at 372 (sustaining legislature's delegation of authority to

Instead, the Court's grant of congressional latitude is supported by traditional judicial principles of deference to congressional judgments,¹⁹² judicial concern that some delegation to administrative agencies is needed to permit the Government to function,¹⁹³ and judicial unwillingness to become involved in the difficult business of distinguishing between permissible and impermissible legislative delegations.¹⁹⁴ Thus, the judicial tolerance of legislative delegation of policymaking and value selection authority to administrative agencies does not imply that legislative process values are not important to governmental policymaking and value selection and that they can therefore be easily disregarded in favor of presidential direction.

Moreover, administrative value selection processes are protective of the legislative process values of consensus, participation, deliberation, and diffusion of power.¹⁹⁵ Even the most basic administrative value selection processes protect these goals far better than would

agency not by rejecting constitutional preference for legislative processes but by finding, in part, that complexities of modern society necessitate delegation).

192. *See id.* (stating that Court's jurisprudence has been "driven" by recognition that Congress must be permitted to delegate authority to other branches of government). Congressional delegation of authority to administrative agencies stands on surer constitutional footing than does unilateral presidential assumption of authority to direct administrative value selection. Under the necessary and proper clause, U.S. CONST. art. I, § 8, cl. 18, Congress has significantly broader power to structure the organization of government than does the President acting alone under his or her Article II authority. Accordingly, the Court has consistently upheld congressional power to delegate to administrative agencies. *See supra* note 188 (listing numerous Supreme Court cases that uphold congressional delegations of value selection and policymaking authority to administrative agencies). In contrast, the Court has dealt considerably less favorably with unilateral presidential expansions of Article II authority. *See, e.g.,* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587-89 (1952) (reviewing Article II powers and rejecting argument that Article II grants policymaking authority to President); *Kendall v. United States*, 37 U.S. (12 Pet.) 524, 610-13 (1838) (rejecting argument that President has inherent "dispensing power" to counteract legislative directions to executive office, which would give President power to control legislation of Congress entirely). Thus, even if Congress, under the necessary and proper clause, can decide to override these legislative process values in favor of administrative delegation, the President does not necessarily have similar authority under Article II to evade these process values.

193. *See* *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (finding that in "increasingly complex society" Congress is unable to perform its function without authority to delegate power to agencies "under broad general directives").

194. *See id.* at 416 (Scalia, J., dissenting) (arguing that Court has "never felt qualified to second-guess Congress regarding permissible degree of policy judgment" that may be delegated). A considerable body of scholarship is critical, however, of the judiciary's reluctance to limit congressional delegations of authority to administrative agencies. *See, e.g.,* Theodore J. Lowi, *Two Roads to Serfdom: Liberalism, Conservatism and Administrative Power*, 36 AM. U. L. REV. 295, 303-04 (1987) (recognizing that courts rarely define restrictions on agency power in constitutional terms and questioning courts' rationales for considering themselves incompetent to judge presence or absence of enforceable rules in statutes); David Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 MICH. L. REV. 1223, 1229-49 (1985) (positing that Supreme Court's failure to clearly define permissible congressional delegations of authority to agencies invites judicial usurpation of legislative power).

195. *See generally infra* part IV.A (discussing how administrative processes incorporate and nurture legislative process values).

presidential processes.¹⁹⁶ In particular, administrative rulemaking procedures ensure that whenever value decisions are made within an agency, the agency serves as a forum for public debate about the issues to be decided.¹⁹⁷ For example, the rulemaking procedures of the Administrative Procedure Act (APA)¹⁹⁸ provide in some cases for formal hearings at which interested parties can bring their perspectives to bear upon the issues and can challenge agencies' preliminary positions and subsidiary fact findings.¹⁹⁹ Although in most cases the APA permits informal notice and comment rulemaking procedures,²⁰⁰ the judicial gloss on the notice and comment statutory provisions provides for a fairly elaborate system of public participation in the overall rulemaking process.²⁰¹ Additionally, other administrative statutes often establish even more elaborate rulemaking procedures than the APA.²⁰² The Supreme Court's decisions have similarly levied additional deliberative requirements on administrative policymaking by imposing requirements of "comprehensive rationality" and full administrative consideration of policymak-

196. See *infra* text part IV.B (detailing reasons why administrative processes are preferable to presidential processes for value selection).

197. See JAMES T. O'REILLY, ADMINISTRATIVE RULEMAKING 92-97 (1983) (describing agencies' notice and comment rulemaking procedures as "efficient channel" through which "interested persons rebut or endorse agency rulemaking proposals").

198. 5 U.S.C. §§ 551-559 (1988).

199. See 5 U.S.C. §§ 556-557 (1988) (establishing formal procedures for public administrative rulemaking hearings and subsequent appeals of rules adopted by agencies after such hearings). Formal rulemaking is a relatively rare administrative procedure, however. The APA authorizes such rulemaking only when an agency's enabling statute requires rules to be made "on the record after opportunity for an agency hearing." *Id.* § 553(c). Additionally, courts rarely interpret language in an agency's enabling statute as specifically triggering formal rulemaking procedures. See, e.g., *United States v. Florida E. Coast Ry. Co.*, 410 U.S. 224, 238-46 (1973) (holding that general statutory hearing requirements did not trigger full-scale formal hearings pursuant to 5 U.S.C. §§ 556-557 because statutory language did not clearly indicate congressional selection of formal rulemaking procedures).

200. See 5 U.S.C. § 553 (1988) (setting forth procedures for informal notice and comment rulemaking, including (1) agency publication of notice of proposed rulemaking in *Federal Register*, along with "the terms or substance of the proposed rule or a description of the subjects and issues involved"; (2) provision of opportunity for interested parties to submit written comments regarding proposed rule to agency concerned; and (3) publication of final rules in *Federal Register* along with brief statements of their basis and purpose).

201. See *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240, 251-53 (2d Cir. 1977) (requiring administrative agency in informal rulemaking to disclose scientific data for public consideration in agency's "Notice of Proposed Rulemaking" under 5 U.S.C. § 553(b), and further requiring agency to respond specifically to comments of public in agency's "Statement of Basis and Purpose" required under 5 U.S.C. § 553(c) for each newly adopted rule). Decisions such as *Nova Scotia Food Products* transform the informal notice and comment rulemaking process from a potential monologue by the administrative agency into a dialogue between the agency and the public in which the exchange of data and views is considered to be an integral part of the rulemaking process.

202. See, e.g., Magnuson-Moss Act, § 202, 15 U.S.C. § 57a (1988) (imposing hybrid formal/informal rulemaking requirements that go beyond APA methodologies to establish new procedures such as informal hearings and advance notice of proposed rulemakings to provide for public participation at earlier stage in development of rules).

ing.²⁰³ As a result, normal administrative policymaking processes include considerable debate and deliberation prior to agency decisionmaking.²⁰⁴

In contrast, presidential value selection processes are insular and do not require the direct participation of the public, but rather only the participation of presidential staff and advisors.²⁰⁵ Consequently, even basic administrative value selection processes protect the goals of consensus building, participation, deliberation, and diffusion of power better than presidential ones.²⁰⁶ Of course, this is not to say that the President may not participate in or influence administrative value selection. It is fairly clear that some presidential participation in administrative policymaking and value selection is an important component of the President's Article II role, at least within the modern administrative state.²⁰⁷ Indeed, particularly with respect to executive agencies, modern Presidents assume that a major portion of the power of the Presidency, given the position's ap-

203. See, e.g., *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42-43 (1983) (interpreting APA's arbitrary and capricious review standard for administrative rulemaking to require administrative agencies to examine relevant data and articulate rational explanations for its rulemaking actions); *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285 (1974) (holding that reviewing courts must consider whether administrative decision is based on "consideration of the relevant factors and whether there has been a clear error of judgment"); *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962) (holding that administrative agency must examine relevant data and demonstrate "rational connection between the facts found and the choice made" in rulemaking process); see also Diver, *supra* note 71, at 409-28 (reviewing key judicial decisions that, taken together, require "comprehensive rationality" in administrative policymaking).

204. See Diver, *supra* note 71, at 409-28 (discussing modern comprehensive rationality model of administrative policymaking with its emphasis on specifying goals, identifying alternatives, analyzing consequences, and optimizing choices); see also Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 61-64 (1985) (arguing that primary rationale for Supreme Court's "hard look" approach to judicial review of administrative action, as exemplified in *Motor Vehicle*, is to foster deliberative decisionmaking in administrative rulemaking). Even where agencies make policy through adjudicative processes, agency hearing requirements provide some opportunity for deliberation and debate, at least between the agency and the particular parties before the agency. See 5 U.S.C. §§ 556-557 (1988) (setting forth procedures for administrative hearings and subsequent appeals). Agency adjudication, however, is generally immune from presidential participation. See Bruhl, *Presidential Power*, *supra* note 9, at 454 n.11 (pointing to restrictions on *ex parte* communications as limitation on President's involvement in adjudicatory process).

205. See *infra* part IV.B (detailing shortcomings of presidential value selection processes).

206. See *infra* part IV.B (arguing that administrative processes, which have characteristics of legislative processes, are preferable to unilateral and insular presidential decisionmaking processes).

207. See, e.g., William V. Luneberg, *Civic Republicanism, the First Amendment, and Executive Branch Policymaking*, 43 ADMIN. L. REV. 367, 367-70 (1991) (arguing that predominant power of Presidency over bureaucracy is and should be that of "persuasion," which is power that not only includes ability to control by rational argument but also involves many other factors including President's status as only nationally elected official, President's power over agency budgets, President's access to media to rivet popular attention, and President's control over future appointments to important governmental positions). Luneberg also argues that the First Amendment should be interpreted to protect deliberative speech between the President and the bureaucracy. *Id.* at 380-94.

pointment and removal authority over cabinet-level agency heads, is the power to influence administrative policies.²⁰⁸

The permissibility of some presidential participation in and influence over administrative policymaking and value selection does not imply, however, that unilateral presidential direction of administrative value selection is equally permissible. A participatory presidential role in influencing administrative policymaking is considerably less problematic than unilateral presidential direction of administrative value selection. Where the President merely participates in value selection or policymaking, final decisions are made by the agencies in accordance with ordinary administrative processes, and therefore the legislative process values respected by administrative procedure are preserved.²⁰⁹ In such instances the President can influence value selection only with the cooperation of the bureaucracy and the participation of the public. These constraints are a considerable check on presidential power.²¹⁰

In contrast, unilateral presidential value selection circumvents both legislative and administrative processes and permits the President to simply pronounce, by executive fiat, that henceforth, society shall honor the family, federalism, or some other favorite issue as a preferred value.²¹¹ It is this executive fiat that impairs important legislative process values and exceeds constitutional limits on presidential policymaking authority within Article II.²¹² Although the

208. See, e.g., Peter Goldman et al., *Jimmy Carter's Cabinet Purge*, NEWSWEEK, July 30, 1979, at 22 (reporting that President Carter fired nearly half of his cabinet at one time on ground that they were not loyally following his policies); see also *Sierra Club v. Costle*, 657 F.2d 298 (D.C. Cir. 1982) (sanctioning *ex parte* contacts between administrative agencies and White House during administrative rulemaking, reasoning that President's managerial authority over administration under Article II implies concomitant need for White House/agency communications); Strauss, *supra* note 41, at 587-91 (describing President's influence over governmental agencies and President's policymaking activities through central management of security issues by National Security Council and of budget preparation by OMB and observing that Presidents also have considerable influence over nominally independent agencies, particularly through selection of regulatory commission chairpersons).

209. See Strauss, *supra* note 41, at 662-66 (arguing that presidential influence of agency policymaking is not incompatible with agency remaining ultimately responsible for policy decisions).

210. See Bruff, *Presidential Power*, *supra* note 9, at 461-62, 467-70 (suggesting that due to limited institutional competence of Presidency, President never has controlled and is never likely to control vast federal bureaucracy).

211. See *supra* notes 44-56 and accompanying text (discussing Reagan administration's Executive Orders Nos. 12,606, 12,612, and 12,630, which require agencies to consider values of family, federalism, and private property rights, respectively, in rulemaking processes).

212. See Shane, *supra* note 181, at 618-23 (arguing that Article I vests Congress with primary authority and responsibility for policymaking and value selection because lawmaking process would promote political stability by producing only incremental changes in policy while fostering legislative process values of deliberation and diffusion of power, and that plenary presidential direction of administrative value selection, while serving constitutional values of accountability, coordination, and perhaps "obstruction of factionalism," does not serve

President may have some managerial authority over administrative policymaking under Article II, this managerial authority should not be interpreted so broadly as to permit the President to unilaterally direct administrative value selection and override constitutionally protected legislative processes for governmental value selection.

IV. APPROPRIATENESS OF THE PRESIDENT'S EXERCISE OF AUTHORITY OVER ADMINISTRATIVE VALUE SELECTION

Even if Article II authorizes the President to direct administrative value selection, such a presidential role would probably be, as a matter of policy, an unwise exercise of presidential power. Presidential value selection impoverishes rather than enriches the process for governmental value selection. By substituting unilateral presidential value selection for more broadly participatory agency procedures, presidential value selection impairs important process values of deliberation, participation, consensus, and diffusion of power that governmental value selection should respect.

A. Preferred Process Values for Administrative Value Selection

As discussed earlier, the Constitution assigns the task of making governmental value choices to Congress and the legislative process.²¹³ To some extent, this constitutional preference for legislative value selection advances principles of democratic accountability, that is, the belief that social value choices should be made by persons who are accountable to the public.²¹⁴ The rationale for using legislative processes for value selection, however, is more complex than the simplistic notion that the legislature's electoral accountability will ensure sound governmental decisionmaking.²¹⁵

legislative process values and tends to submerge them); *supra* part III (discussing constitutional limits on presidential role in administrative value selection).

213. See *supra* note 182 and accompanying text (discussing constitutional scheme of conferring value selection and legislative power on Congress).

214. See *Industrial Union Dept., AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 686-87 (1980) (Rehnquist, J., concurring) (stating that fundamental policy decisions and "hard choices . . . must be made by the elected representatives of the people"). One argument in support of a strong presidential role in making agency value choices is that the elected President is more democratically accountable than are unelected agency decisionmakers. See Bruff, *Presidential Management*, *supra* note 10, at 595 (arguing that executive oversight of administrative agencies provides needed electoral accountability). If one argues that significant choices of value in a democratic society should be made by the most democratically accountable officer, barring a legislative alternative, the President is the sole choice. This argument, however, presupposes that the linchpin for the legitimacy of legislative value choices in our society is simple electoral accountability of the decisionmaker. Cf. Shane, *supra* note 181, at 621-23 (arguing that constitutional principles of diffused governmental power and congressional policymaking primacy also play important role in domestic policymaking).

215. See Shane, *supra* note 181, at 622 (arguing, for example, that primacy of Congress in domestic policymaking is supported by need to make changes in public policy incrementally

If this notion were true, a legislative process would be unnecessary; unilateral presidential policymaking could satisfy the need for electoral accountability because the popularly elected President is accountable to the public.²¹⁶ Rather, legislative decisionmaking processes protect other values beyond mere electoral accountability, such as consensus building, public participation in decisionmaking processes, deliberation, and diffusion of power.²¹⁷

Administrative value selection processes should also seek to protect these decisionmaking values. Although Congress substitutes administrative processes for legislative ones by delegating value selection authority to the agencies,²¹⁸ this substitution should not be allowed to undermine the important decisionmaking values that legislative processes would otherwise protect. Of course, administrative processes do not always have to mimic legislative processes; indeed, advantages unique to administrative processes are part of the justification for the delegation of authority from the legislature to administrative agencies.²¹⁹ These legislative process values, how-

and on basis of political consensus to achieve broad public support for changes, and explaining that legislative processes, in context of divided structure of Congress and staggered Senate elections, reinforce "the bias towards incrementalism [in decisionmaking] that we value as a source of stability").

216. See *supra* notes 165-67 and accompanying text (setting forth argument that President should oversee administrative policymaking because President is accountable to electorate).

217. See *infra* part IV.A.1-4 (discussing legislative process values of consensus building, public participation, deliberation, and diffusion of power). These values are similar, but not identical, to those defined by Cass Sunstein as a feature of civic republicanism. See Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1542-58 (1988) (describing pluralistic and republican conceptions of American political processes as including deliberation in politics, equality of political actors, universalism, and citizenship with broadly guaranteed rights of participation); see also Luneberg, *supra* note 207, at 371-74 (discussing central principles of civil republicanism); Robert B. Reich, *Public Administration and Public Deliberation: An Interpretive Essay*, 94 YALE L.J. 1617, 1625-32 (1985) (focusing on deliberation in administrative policymaking as means for "social learning about public values" and setting stage for future public choices). Sunstein also identifies as a feature of civic republicanism the decisionmaking value of "universalism," which apparently means the ability to reach "substantively correct" outcomes by agreement. Sunstein, *supra*, at 1554. By its focus on agreement, this feature approximates the value of consensus. Sunstein's description of universalism, however, appears to consider agreement not as independently legitimating, but instead as evidence of a rationally determined "common good." See *id.* at 1554-55 (stating that republican belief in agreement and republican conception of political truth are pragmatic in character and useful as means of achieving "common good"). Although he states that republicans do not believe in a "unitary public good," *id.*, such a concept appears to be precisely the meaning of "universalism." Instead, I believe that deliberative processes should be focused toward achieving consensus, or agreement, for its own sake, as a means of empowering persons within the society, rather than as a means of arriving at a rational, objective conception of the common good. Also, when consensus is achieved through administrative decisionmaking, the value of diffusion of power is implicated as well. See Shane, *supra* note 181, at 621-23 (arguing that significant advantage of administrative decisionmaking is diffusion of governmental power).

218. See *supra* notes 191-94 and accompanying text (discussing congressional delegation of policymaking authority to administrative agencies).

219. See Mashaw, *supra* note 167, at 91-94 (arguing that broad legislative delegations of

ever, are critical to the soundness and legitimacy of governmental value selection and should not be dismissed lightly in evaluating processes for administrative value selection.²²⁰

1. *Consensus building*

To the greatest extent possible, government should seek to select values based on societal consensus rather than on the bias of the decisionmaker or the political clout of "insiders." Governmental value choices are fundamental decisions that help to define a society's ideals, goals, and self-image and, by influencing a society's policies, can determine its future.²²¹ When governmental choices are this critical to a society's future, the optimal governmental value choice would include the values of the public as a whole and would not exclude the values of major segments of society.²²² Indeed, stripped of its racist and elitist antecedents,²²³ the very concept of representative democracy is at least in principle an effort to make governmental policy reflect the values of the polity as a whole, rather than of a self-interested or biased few.²²⁴ Without consensus

authority to administrative agencies often enhance social welfare because specialist administrators are often more efficient and certainly more knowledgeable decisionmakers than are legislators).

220. See Sunstein, *supra* note 217, at 1542-58 (discussing critical importance of legislative process values of deliberation, equality of political actors, universalism, and citizenship in maintenance of individual and political freedoms, which in turn provide check on governmental processes).

221. See *supra* part II (listing types of value choices that agencies make within our society as including conflicts over abortion rights, fetal tissue research, proper balancing of economic development and environmental protection, and balancing of academic freedom and cultural diversity on college campuses).

222. See Derrick Bell & Preeta Bansal, *The Republican Revival and Racial Politics*, 97 YALE L.J. 1609, 1620 (1988) (arguing that proper political vision must include, rather than sacrifice, participation of African Americans and other historically oppressed persons within society); John Rawls, *The Domain of the Political and Overlapping Consensus*, 64 N.Y.U. L. REV. 233, 250 (1989) (arguing that stable, legitimate, liberal political structure requires political conception of justice founded on overlapping consensus, such as fundamental political and constitutional values that "all citizens may still be reasonably expected to endorse"); Sunstein, *supra* note 217, at 1552 (defining "political equality" as requirement that all individuals and groups have access to political process).

223. See Bell & Bansal, *supra* note 222, at 1610-14 (noting that nation's founders sanctioned slavery and excluded blacks from federalist/antifederalist debate and that Jim Crow laws effectively excluded blacks from democratic process for 100 years after emancipation, and generally describing ways in which whites have defined republicanism's notion of "common good" to mean good of whites and have suppressed experiences and needs of blacks, other minorities, and poor).

224. See THE FEDERALIST NO. 10 (James Madison) (advocating representative democracy to control effects of special-interest factions on government); see also Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1500-01 (1988) (arguing that "self-rule" and "rule-of-law" are essentially identical, and that popular lawmaking, i.e., politics, provides protection against abuse of individual rights by arbitrary power). An argument that governmental policy should reflect the values of the polity does not necessarily mean that value choices are legitimate merely because they are based on consensus, regardless of their content. See Rawls, *supra* note 222, at 250 (arguing that political conception of justice must provide "coherent view of the

value selection, the stability of society is jeopardized because people often support the Government only to the extent that the Government's decisionmaking is consistent with their values.²²⁵ Recent acts of civil disobedience by members of the right to life and animal rights movements, who simply refuse to support laws that are inconsistent with their deeply held values,²²⁶ demonstrate the importance of consensus value selection in public policymaking.

Public acceptance is particularly important for administrative decisions that, unlike legislative decisions, lack the legitimacy of express constitutional sanction.²²⁷ Administrative value selection, unlike legislative value selection, is authorized only by Congress and not by the Constitution.²²⁸ Indeed, the public often perceives administrative value selection as the legislature's dubious abdication of its constitutionally prescribed value selection responsibility in favor of less institutionally competent administrative agencies.²²⁹

very great (moral) values applying to the political relationship and to set out a public basis of justification for free institutions in a manner accessible to free public reason"). It may be that some minimum moral content of sound governmental value choices exists so that, for example, a government should not be able to adopt slavery as a value merely because it is supported by consensus. Of course, any consensus advocating slavery would be illegitimate because the polity reaching such a consensus would be underinclusive unless it included slaves themselves. On the other hand, even slaves' agreement could probably not legitimate a consensus choice for slavery because the slaves' condition of servitude would preclude any real freedom of thought. Other moral choices, such as encouragement of indiscriminate homicide, for example, also seem to be so clearly unsound that they could not be properly validated by consensus even if such a consensus would ever occur. On the other hand, perhaps the only reason why certain values seem self-evidently correct is because they *are* clearly supported by a consensus of the population, perhaps for no other reason than that of self-preservation. It may be, therefore, that the consensus, rather than the value itself, validates the value choice. Thus, without consensus, perhaps one can never assert that a particular value choice is axiomatically correct. Further, even if there are "right answers" with respect to values, it is likely that no one has the omniscience to discover them.

225. Cf. Rawls, *supra* note 222, at 250 (suggesting that popular support of government depends on government reflecting citizens' "fundamental political and constitutional values").

226. See, e.g., Eric Harrison, *Arrests Soar in Abortion Clashes*, L.A. TIMES, June 21, 1992, at A5 (reporting on anti-abortion protesters' illegal attempts to close Milwaukee abortion clinic); Marla Williams, *Saving Animals Through Violence—Shadowy ALF Leaves Costly Trail of Destruction*, SEATTLE TIMES, June 18, 1991, at A1 (describing dramatic actions taken by Animal Liberation Front to stop use of animals for food and clothing and as subjects in scientific and medical research).

227. See U.S. CONST. art. I, § 8 (empowering Congress to make legislation but failing to define role of administrative agencies in legislating).

228. See *supra* notes 64-68 and accompanying text (discussing congressional delegation of authority to administrative agencies). The Constitution does not directly grant any authority to administrative agencies, although it does generally refer to "Departments" and "Officers." See U.S. CONST. art. I, § 8, cl. 18 (granting Congress authority to make laws carrying into execution powers vested by Constitution in any "Department" or "Office"); *id.* art. II, § 2 (granting President authority to appoint "Officers" and granting Congress authority to delegate appointments of inferior officers to "Heads of Departments").

229. See, e.g., Lowi, *supra* note 194, at 309-11 (ascribing "collapse of liberalism" in part to "increasingly discretionary character" of administrative agencies, and criticizing Congress for turning legislative proposals "that embody clear rules" into "vague and meaningless delega-

This perception of legislative irresponsibility can lead the public to doubt the legitimacy of administrative decisions.²³⁰ Public skepticism is likely to decrease significantly, however, if administrative value selection is consistent with consensus values of the public.²³¹ Even persons who disagree with the ultimate policy choices of administrators will be more likely to accept the validity of those choices if they accept the values underlying the administrators' decisions.²³²

Of course, complete public consensus regarding values is an impossible dream. Even in perfectly homogeneous societies, public opinion differs about values and about the relative importance of those values.²³³ In broadly diverse societies such as ours, the divisions can be seismic. For example, our society may never reach consensus on such divisive issues as abortion or gun control. This fact, however, does not diminish the value of the ideal of consensus as a touchstone for governmental value selection. Indeed, the impor-

tions of power" in name of compromise); Thomas O. Sargentich, *The Delegation Debate and Competing Ideals of the Administrative Process*, 36 AM. U. L. REV. 419, 424-25 (1987) (describing formalist view of nondelegation doctrine in context of public support for rule of law as subscribing to notion that "Congress, as the article I lawmaker, has a basic and nondelegable duty to be the primary source of public legal norms"); Schoenbrod, *supra* note 194, at 1229-49 (arguing that in its repeated approvals of congressional delegations of decisionmaking authority to administrative agencies, Supreme Court has inarticularly and incoherently applied delegation doctrine, thereby inviting judicial usurpation of legislative powers).

230. Cf. Shane, *supra* note 181, at 621 (suggesting that stability of society is enhanced by people's perception of fairness of administrative policymaking processes).

231. See Rawls, *supra* note 222, at 250 (suggesting that to attain legitimacy in eyes of public, governmental decisionmaking must reflect values of citizens). One might argue that the public's faith in the legitimacy of administrative decisionmaking would be enhanced by a strong presidential role in that decisionmaking process. See Bruff, *Presidential Power*, *supra* note 9, at 461-62 (noting electoral accountability as one advantage of presidential oversight of administrative decisionmaking). What is likely to be of greater importance in enhancing public trust in governmental decisionmaking, however, is ensuring that government's decisions actually reflect the values of the public. See Rawls, *supra* note 222, at 250 (tying political legitimacy to governmental conduct that reflects "fundamental political and constitutional values," particularly "justice," and is intelligible and acceptable to all citizens as reasonable and rational). Accordingly, processes for governmental value selection should seek to maximize the likelihood that such a result will occur.

232. See Rawls, *supra* note 222, at 250 (suggesting that access to and participation in fair policymaking processes increases likelihood of public acceptance of government decisions).

233. See Rawls, *supra* note 222, at 236-38 (arguing that even in absence of prejudice and bias, self- and group-interest, blindness, and willfulness, there may be reasonable disagreement among reasonable people because: (1) evidence may be conflicting and complex and therefore difficult to evaluate; (2) there may be disagreement about relative weight of various relevant factors; (3) indeterminacy of moral and political concepts and values may exist, leading to range of interpretations within which persons may differ; (4) individuals' life experiences shape their interpretation and judgment, and "total experiences of citizens are disparate enough for their judgments to diverge"; (5) there may be equally compelling normative reasons to select two or more incompatible actions; and (6) social institutions work within ranges of values, and in selecting among values there may be great difficulties in setting priorities and making decisions that have no clear answers). However, in my understanding of consensus, reasonableness perhaps should not necessarily be a prerequisite for having one's value choice reflected in the consensus.

tance of consensus, at least as an objective in making governmental value choices, is probably enhanced when society is deeply conflicted about its values.²³⁴

For example, a significant breakdown has occurred since the 1960s in America's previously existing social order and its conception of preferred societal values.²³⁵ In the past, the composition of the recognized polity was more homogeneous than it is today, and as a result, a discernible public consensus as to values existed, at least among the power elite and mainstream portions of American society.²³⁶ Before the 1960s, governmental value decisions were less controversial because everyone who "counted," that is, those within the power structure, agreed on the general composition of basic societal values.²³⁷ The essential political debate was less about what values were important and more about how best to effectuate the values that were commonly accepted.²³⁸ The Reagan administration's Executive orders in part seek to revive that era by espousing values such as family²³⁹ and states' rights²⁴⁰ that were then

234. See Rawls, *supra* note 222, at 233 n.1, 245 (arguing that history of religion and philosophy shows that many reasonable ways exist in which wider realm of values can be understood, and that plurality of these "not unreasonable comprehensive doctrines" can lead to divergent value selection, thus making "overlapping consensus" of religious, philosophical, and moral doctrines necessary to achieve political conception of justice).

235. See William N. Eskridge & Gary Peller, *The New Public Law Movement: Moderation as a Postmodern Cultural Form*, 89 MICH. L. REV. 707, 738-43 (1991) (critiquing democratic pluralism and legal proceduralism of 1950s that "suppressed openness and diversity in our public culture," and noting challenges to political and legal systems in 1960s and 1970s raised by civil rights movement, women, Hispanics, urban poor, migrant workers, disabled, and homosexuals that led to collapse of "artificially imposed 1950s consensus about values").

236. See E.J. DIONNE, JR., WHY AMERICANS HATE POLITICS 117 (1991) (arguing that "vital center" existed from World War II through 1960s, characterized by almost monolithic mainstream national agreement on certain fundamentals as free-market economy, globalist foreign policy, modest welfare state, rising standard of living, and child-centered family lives); Allen Hunter, *The Role of Liberal Political Culture in the Construction of Middle America*, 42 U. MIAMI L. REV. 93, 101-06 (1987) (describing post-World War II political, economic, and social consensus of "a privatized, homogeneous, 'middle-classless' society of white nuclear families"). Hunter argues that the central value of this society was the "social structure of accumulation," an organization of the society around the "capitalist accumulation process." Hunter, *supra*, at 101.

237. See GODFREY HODGSON, AMERICA IN OUR TIME 75-76 (1976) (arguing that America in 1950s was gripped by "secular religion" characterized by consensus on basic economic, political, and social values including belief in capitalism, democracy, equality of opportunity, and perfectability of American society, and by virulent hatred and distrust of Marxism and Communism); Hunter, *supra* note 236, at 101-06 (arguing that post-World War II political, economic, and social consensus existed in mainstream America).

238. See, e.g., DIONNE, *supra* note 236, at 117 (stating that neither Kennedy nor Nixon in 1960 presidential race challenged widely held societal values and goals, but rather simply disputed how best to preserve values and accomplish goals); see also Hunter, *supra* note 236, at 103 (arguing that this "Wonder-bread" society [my term] was actually apolitical, having substituted economic interests for political ones).

239. Exec. Order No. 12,606, 3 C.F.R. 241, 241 (1987), *reprinted in* 5 U.S.C. § 601 (1988).

240. Exec. Order No. 12,612, 3 C.F.R. 252, 252 (1987), *reprinted in* 5 U.S.C. § 601 (1988).

noncontroversial, at least within certain power circles.²⁴¹ The pre-1960s homogeneity of the recognized polity meant that the need to affirmatively protect the ideal of consensus as a method for governmental value selection was relatively unimportant because the consensus values themselves were readily apparent to those in power.²⁴²

One result of the post-civil rights/post-Vietnam war era, however, has been the breakdown of the preexisting mainstream societal consensus about basic values.²⁴³ Mainstream society had procured that consensus by excluding the voices of all those who may not have shared in its common viewpoint, such as African Americans, Hispanic Americans, Asian Americans, Native Americans, women, homosexuals, Communists, and "fringe" intellectuals.²⁴⁴ Often, mainstream society used the consensus values themselves to justify exclusion of these other voices.²⁴⁵ For example, the views of Communists were excluded from the mainstream on the ground that their values were unAmerican, or inconsistent with those of the prevailing consensus.²⁴⁶

The civil rights struggle broadened the societal definition of "pol-

241. See, e.g., DIONNE, *supra* note 236, at 117 (arguing that American mainstream society of 1950s largely agreed on values regarding family and establishment of modest welfare state).

242. See, e.g., DIONNE, *supra* note 236, at 117 (commenting that in 1960 presidential election, Kennedy and Nixon did not dispute identification of values that were important to society). An argument that a prevailing mainstream value consensus existed, particularly during the post-World War II, pre-1960s era, does not necessarily preclude the notion that ideological differences also existed within empowered American society, particularly at the margins. See generally *id.* at 23-29 (discussing development of "liberal" and "conservative" political ideology in United States over last 30 years, development whose origins are traceable on both "left" and "right" to 1950s and earlier periods).

243. See DIONNE, *supra* note 236, at 12, 118 (arguing that America has been in cultural war since 1960s over issues of civil rights, feminism, and value clashes remaining from disagreements about morality of Vietnam War).

244. See, e.g., *Regents of the Univ. of Calif. v. Bakke*, 438 U.S. 265, 390-96 (1978) (Marshall, J., dissenting) (recounting history of segregation and exclusion of African Americans from mainstream American society); HODGSON, *supra* note 237, at 89-90 (arguing that America's history as country of immigrants and slaveholders substituted ethnic solidarity, racial allegiance, and belief in homogeneous "Americanism" for class identification and conflict, thus buttressing 1950s "classless" economic and political value consensus); Hunter, *supra* note 236, at 101-06 (arguing that African Americans, women, and other minorities were not necessarily included in post-World War II American consensus).

245. See *Bakke*, 438 U.S. at 394 (Marshall, J., dissenting) (offering President Wilson's decision to segregate Federal Government buildings, ostensibly to achieve such purported values as reducing discrimination against African Americans and making racial minorities "more safe in their possession of office," as example of such justification).

246. See DIONNE, *supra* note 236, at 161 (discussing anticommunism of 1950s as being based on traditional American values such as freedom, antiauthoritarianism, free markets, and objective moral order). *But see id.* at 117, 164 (arguing that virulent anticommunism of 1950s had its roots in pre-war isolationist movement of 1940s and thus was more attack on prevailing "mainstream liberal orthodoxy" than weapon of it); see also DAVID HALBERSTAM, *THE NEXT CENTURY* 52 (1991) (noting that Sen. Joseph McCarthy's strongest support existed in previously isolationist regions of country).

ity" to include persons who had been previously excluded.²⁴⁷ Additionally, the civil rights movement exposed underlying hypocrisies and conflicts concerning the society's values. For example, the civil rights movement exposed the inconsistency between the society's trumpeting of principles of freedom and equality and the horror of its legally sanctioned discrimination against racial minorities.²⁴⁸ Likewise, the Vietnam War broadened the American consciousness regarding the morality of war and triggered generational conflicts that caused many young persons to reject many of the society's basic underlying consensus values.²⁴⁹

Minority groups today have increased their political and social power and continue to challenge established assumptions about society's basic values.²⁵⁰ At the same time, ideological conservatives gained political prominence during the Reagan and post-Reagan years.²⁵¹ The ensuing conflict between those who reject the old consensus values and those who wish to reclaim them has accelerated the breakdown of societal consensus about value choices and led to sharp divisions within the polity.²⁵² Thus society today is

247. See Eskridge & Peller, *supra* note 235, at 739-42 (describing civil rights movement's rejection of exclusionary political processes and adoption of direct political action that included citizens who were formerly left out of process).

248. See HALBERSTAM, *supra* note 246, at 62-64 (contrasting American idea of egalitarianism where all persons are viewed as equal with reality of racial discrimination that views people as superior or inferior in some fashion on basis of skin color). Women, the underclass, and white ethnic groups suffered similar discrimination, but to a lesser extent than racial minorities. See Eskridge & Peller, *supra* note 235, at 739 (stating that values of women, Hispanics, urban poor, migrant workers, handicapped, and homosexuals were also excluded from mainstream and suppressed, "though in varying degrees"); Sunstein, *supra* note 217, at 1585 (noting that African Americans, women, disabled, homosexuals, and other disadvantaged groups have historically been excluded from political process). Indeed, apparently everyone except a relatively small ruling class of white male elites was denied equality. See, e.g., HALBERSTAM, *supra* note 246, at 62-63 (arguing that improvements in equality were monoracial).

249. See LOUIS W. KOENIG, *THE CHIEF EXECUTIVE* 97-98 (3d ed. 1975) (arguing that horrors of Vietnam War caused idealistic young people to reject fundamental views held by older people and political establishment).

250. See, e.g., Robert Pear, *Major Fight Expected over Efforts to Extend Voting Rights Measure*, N.Y. TIMES, Mar. 9, 1981, at A1, B6 (reporting that advocates of Voting Rights Act contend that it has resulted in increased political power for African Americans in South); *Right and Wrong in Aiding Blacks*, CHI. TRIB., Jan. 25, 1989, at C14 (arguing that African Americans in most large urban areas have greatly increased their political power); see also Kenneth J. Cooper, *Congress's Hispanic Membership Likely to Grow 50% for Next Term*, WASH. POST, Oct. 3, 1992, at A11 (reporting likelihood that Hispanic congressional candidates, who are perceived as being sympathetic to minority values, will win elections in districts created by Voting Rights Act and stating that wins will increase Hispanic power in Congress).

251. See GUY SORMAN, *THE CONSERVATIVE REVOLUTION IN AMERICA* 21 (1984) (arguing that liberal political model has been losing power since 1978 and that conservative ideologues have displaced liberals in influential governmental positions); see also DIONNE, *supra* note 236, at 25 (observing that conservatives became increasingly powerful during Reagan era). However, with the election of Gov. Bill Clinton to the Presidency in 1992, the political influence, and perhaps the social influence as well, of ideological conservatives has probably been considerably lessened.

252. See DIONNE, *supra* note 236, at 10-11 (arguing that conflicting values and ideologies

splintered between those who espouse traditional values and those who espouse broader, more diverse values.

In these circumstances, the fact that the old exclusionary consensus has been destroyed reinforces the importance of governmental processes that seek to advance the development of a new, more inclusionary societal consensus about values.²⁵³ In the context of a sharply divided polity, a governmental choice of values is a choice between the conflicting moral or social visions of various persons or groups of persons within the society.²⁵⁴ Where such public conflict exists, the governmental process for value selection should seek to develop a new public consensus as to values rather than arbitrarily choose one value over another.²⁵⁵ Otherwise, governmental selection of values illegitimately excludes the voices and values of political outsiders, who then feel marginalized by insider power plays. This exclusion can seriously undermine the stability and cohesiveness of a society.²⁵⁶

Although the goal of complete societal consensus will probably never be reached, the process of attempting to arrive at consensus itself can serve to repair critical fissures within the society;²⁵⁷ left untended, these fissures will imperil the society's future stability.²⁵⁸ Accordingly, when administrators make value choices, the administrative decisionmaking processes should be designed to help the agency discover consensus values. Where significant conflict exists within the society regarding the composition of consensus values, the administrative process must help the public reach either consensus judgments about values or at least a shared vision of social ideals.²⁵⁹

of liberalism and conservatism are preventing American society from acquiring sense of community, common purpose, and concern for citizens' rights).

253. See HODGSON, *supra* note 237, at 499 (stating that America needs to build "new consensus on the ruins of illusion," to substitute for failed consensus of 1950s).

254. See Diver, *supra* note 71, at 396 (stating that value selection requires reconciliation of competing interests in society); Reich, *supra* note 217, at 1618-19 (arguing that since World War II, Americans have recognized that society is pluralistic and that broad administrative discretion cannot represent interests of pluralistic public without employing inclusive procedural model).

255. See Reich, *supra* note 217, at 1637-40 (advocating public administration through public deliberation).

256. See Reich, *supra* note 217, at 1630-31 (discussing potentially provocative impact of administrative decisions on individuals' perceptions of government).

257. See Reich, *supra* note 217, at 1631-32 (arguing that deliberative process can bring community together to resolve differences in individual goals and to "forge collective purposes").

258. See Rawls, *supra* note 222, at 250 (arguing that stable political structure requires societal consensus on fundamental values).

259. See Reich, *supra* note 217, at 1637-40 (arguing that administrators should facilitate public debate and deliberation).

2. Participation

Processes for administrative value selection should also include the direct participation of the public, just as administrative processes provide for public participation in agency policymaking generally.²⁶⁰ Indeed, through much of the last quarter century, courts and public policy analysts have championed the importance of public participation in the process of agency policymaking.²⁶¹ Although the goal of expanded public participation in certain forms has come under attack,²⁶² no one seriously argues that public participation is not important to governmental decisionmaking in general and administrative policymaking in particular.²⁶³

Public participation is even more important to agency value selection than it is to administrative policymaking.²⁶⁴ First, participation by the public provides an additional check on administrative decisionmaking that is critical to the value selection process.²⁶⁵ Unlike agency policymaking, which generally requires rational factfinding and rational analysis and accordingly may be subject to judicial review,²⁶⁶ agency value selection is not a product of rational decisionmaking.²⁶⁷ By definition, agency value selection is the *a priori* adoption of some particular value as significant.²⁶⁸ In these circumstances, few external checks on administrative value selection exist;²⁶⁹ instead, the agency's value choice is primarily an exercise of

260. See *supra* notes 197-203 and accompanying text (discussing role of public participation in agency rulemaking processes).

261. See Stewart, *supra* note 164, at 1760-61 (stating that judges and commentators have endorsed public participation in agency decisions and adjudications); Sunstein, *supra* note 204, at 63 (stating that courts ensure that agencies identify and implement public values rather than respond to political pressure).

262. See Sunstein, *supra* note 204, at 77-87 (arguing for republican, deliberative conception of political process rather than pluralist, interest group-driven model).

263. See Thomas O. McGarity, *Public Participation in Risk Regulation*, 1 RISK 103, 103 (1990) (stating that no one has seriously questioned public participation in health and safety regulatory decisions since "the consumer/environmental decade of 1967-1977"); cf. Sunstein, *supra* note 217, at 1555-58 (arguing for participatory values as feature of civic republicanism).

264. See *supra* notes 178-80 and accompanying text (distinguishing between administrative policymaking and administrative value selection).

265. See PETER L. STRAUSS, AN INTRODUCTION TO ADMINISTRATIVE JUSTICE IN THE UNITED STATES 208 (1989) (discussing public participation as means of controlling administrative action).

266. See Diver, *supra* note 71, at 409-13 (discussing modern agency policymaking and noting that stringent judicial review of such policymaking requires agencies to base policies on solid factual foundations and rational analyses).

267. See Diver, *supra* note 71, at 397-98 (arguing that comprehensive rationality model of administrative decisionmaking depends on a *a priori* selection of values, which itself is not a rational process).

268. See Diver, *supra* note 71, at 397 (recognizing that value selection, which is first stage of policymaking, is independent of rigors of analytical system); see also Bruff, *Presidential Power*, *supra* note 9, at 454-55 (discussing central importance of values in many administrative decisions).

269. See PIERCE ET AL., *supra* note 140, at 39-43, 78-87 (noting that agencies are subject to

administrative will.²⁷⁰ Accordingly, public participation in agency value selection appears to be a minimally necessary check to satisfy the demands of democratic theory.

Second, as discussed earlier, an administrative choice of value should seek to represent the consensus values of the public and not merely reflect the private values of government policymakers.²⁷¹ Public participation serves to assist agencies in reaching this end.²⁷² Obviously, however, determining the society's consensus values or moving the society toward consensus are particularly difficult undertakings, especially in the face of significant public conflict regarding values.²⁷³ Without public participation in the process, administra-

checks by political branches of government that arise through legislative control of statutes, agency oversight activities and appropriations, and executive control over appointment and removal of administrative officers).

270. See PIERCE ET AL., *supra* note 140, at 21 (stating that even internal organizational and professional norms and pressures placed on administrative agencies have only limited influence that can be brought to bear on administrators and, therefore, administrators are relatively free to make policy judgments on any basis).

271. See *supra* notes 221-59 and accompanying text (advocating governmental selection of values based on societal consensus). My discussion of the "values of the public" is somewhat distinct from the civic republican concept of "public values." Cf. William N. Eskridge, *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1007-08 (1989) (defining "public values" as "background norms that contribute to and result from the moral development of our political community"). Civic republican scholars use the concept of public values to differentiate their community-minded "republican" thinking from "pluralist" theories, which conceive of politics as merely a marketplace in which "preexisting private interests" compete and negotiate for ascendancy. See Michelman, *supra* note 224, at 1503-08 (arguing that republicanism relies on normative consensus at expense of inclusivity while pluralism mirrors entire marketplace of individual ideals). It should be possible, however, to talk coherently about "values of the public" without distinguishing between whether these values are aggregated preexisting private values or, as civic republicans advocate, communitarian "public values" that themselves have been shaped by the political process or are the result of someone's notion of optimal or "correct" values. See generally Frank I. Michelman, *Politics and Values or What's Really Wrong with Rationality Review*, 13 CREIGHTON L. REV. 487, 506-10 (1979) (discussing influences of politics and values on each other). Consider also the argument that even to articulate a goal of public values, as opposed to private values, is dangerous. After all, it is unclear who will determine what the public values are and whether there will be any constraints on the decisionmaker's freedom to announce any given value as a "public value," thus according it considerable normative authority. See Bell & Bansal, *supra* note 222, at 1616 (questioning whether republican principle of normative consensus can be achieved without "lapsing into one person's liberal theory of prepolitical rights"). Furthermore, it may be that an emphasis on the articulation of "public values" versus "private goods" will give power to elite individuals and by corollary, to privileged exclusive groups within the society, which may be defined perhaps by race or gender considerations, or more likely, by income or educational status. See Bell & Bansal, *supra* note 222, at 1611 (arguing that experiences and private needs of African Americans have historically been suppressed in order to promote "public good" and that "shared values," for example, informed and enabled whites to enslave and subordinate blacks).

272. See Reich, *supra* note 217, at 1635 (arguing that encouraging public participation prompts citizens to voice their concerns, listen to others, and engage in public discussion, from which administrators can learn about and thus properly incorporate broad-based societal values into agency policies).

273. See Reich, *supra* note 217, at 1640 (noting possibility that public participation may fail to result in consensus).

tors cannot even begin to ascertain society's consensus values.²⁷⁴ Are the values of the public the values of societal institutions? If so, which institutions should we consider? Can we discover the values of the institutions? Perhaps the administrators should conduct a poll to determine the public's values? If the polls reveal divisions within society, however, the administrators face yet another obstacle. These examples are extreme, but they highlight the difficulty of reaching consensus value judgements using processes that do not include public participation.

When administrative attempts at discovering consensus values of the public fail or where consensus does not exist, public participation can turn the administrative agency into a forum for public debate about values.²⁷⁵ This public discussion about values can help the public reach consensus²⁷⁶ and can move the Government toward consensus value choices.²⁷⁷ The recent spotted owl controversy exemplifies how value selection issues rooted in agency decisions often foster intense public debate.²⁷⁸ Although the debate in the spotted owl controversy has yet to yield a consensus, it illustrates an agency's potential to generate consensus by bringing together opposing factions of the public to work through issues.²⁷⁹

Public participation can also help to legitimate nonconsensus administrative value selection.²⁸⁰ Indeed, it may be true that in a diverse society, despite attempts to reach consensus, it is impossible to define any values that are truly collective societal values.²⁸¹ Yet, in the end, the administrator must make a policy decision, a "choice" of value.²⁸² In this circumstance, how can a legitimate

274. See *supra* notes 197-202 and accompanying text (discussing ways in which current administrative rulemaking procedures use agencies as fora for public debate).

275. See Reich, *supra* note 217, at 1635-40 (arguing that administrative processes serve as fora for deliberative process).

276. See Reich, *supra* note 217, at 1636 (arguing that public deliberation enables participants to discover previously unrecognized values and to develop new consensus values).

277. See Reich, *supra* note 217, at 1627 (arguing that only public participation can transform private concerns into subjects of public debate).

278. See *supra* notes 68, 78 (discussing Endangered Species Act and spotted owl controversy).

279. See Bryan M. Johnston & Paul J. Krubin, *The 1989 Pacific Northwest Timber Compromise: An Environmental Dispute Resolution Case Study of a Successful Battle That May Have Lost the War*, 27 WILLAMETTE L. REV. 613, 614-15 (1991) (discussing failure of administrative attempt to reach political consensus in spotted owl controversy but noting that attempt nevertheless fostered continuing public debate and discussion about appropriate balance between environmental and economic values).

280. Cf. Reich, *supra* note 217, at 1637 (positing that absence of community participation may cast doubt on legitimacy of resultant policy decisions).

281. See *supra* notes 273-75 and accompanying text (examining problems attendant in building of societal consensus).

282. See Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 445 (1987) (arguing that regulatory decisions necessarily involve value selection).

choice of value be made? The public could merely trust policymakers, whether administrative or presidential, to autocratically make valid value choices. But if the public does this, the policymakers must necessarily exclude choices of value held by one segment of the public in favor of values held by another. Accordingly, the issue remains as to whether the policymakers' value choices are legitimate without some form of public participation in the process.²⁸³

As with the value of consensus decisionmaking, public participation in the decisionmaking process can enhance the public's perception of the fairness of administrative value selection.²⁸⁴ Consequently, the public's willingness to accept administrative value selection as sound will also increase. If the agency, for example, adopts a value that is antagonistic to the values of a portion of the population, the public may be more likely to perceive the process as fair and the agency's value choice as legitimate if the process used to make the value choice was open to public input.²⁸⁵ In contrast, a process that excludes the public from the governmental definition of preferred values and instead adopts a particular value as significant based, for example, on presidential decree is likely to lead a significant portion of the public to believe the process is biased, exclusionary, and unfair.²⁸⁶ A lack of public participation is therefore likely to significantly weaken the public's overall faith in the legitimacy of administrative decisionmaking.

283. See Reich, *supra* note 217, at 1632 (stating that public participation helps to forge collective purposes, transform individual valuations into social values, and define public morality). Administrative value choices generally raise more troubling questions of legitimacy than congressional choices, however, because administrative agencies are not established by the Constitution. See Lowi, *supra* note 194, at 296 (arguing that delegation of broad discretionary power from legislature to executive branch is contrary to constitutional intent). Of course, because administrative agencies receive their authority through congressional delegation, one might argue that the administrative agency simply inherits whatever stamp of legitimacy accrues to congressional decisionmaking. See Ernest Gellhorn, *Returning to First Principles*, 36 AM. U. L. REV. 345, 348 (1987) (arguing that administrative legitimacy derives from congressional authority); Stewart, *supra* note 164, at 1673 (arguing that legislative directives legitimate administrative action). But see Lowi, *supra* note 194, at 306 (arguing that Congress and administrative agencies operate as though delegation of legislative powers to executive branch endangers legitimacy of Government). Administrative agencies clearly possess a different place within our system of government than does Congress, however, and if agencies are antidemocratic, the simple act of delegation to them by Congress is not sufficient to resolve the question of the legitimacy of their making fundamental value choices. See Industrial Union Dep't, AFL-CIO v. American Petroleum Inst., 448 U.S. 607, 671 (1980) (Rehnquist, J., concurring) (reasoning that delegation of fundamental value choices to administrative agencies is unconstitutional because such delegation permits Congress to evade its responsibility to make these value choices).

284. See Stewart, *supra* note 164, at 1761 (stating that public participation in agency decisions increases public confidence in fairness of such decisions).

285. Cf. Shane, *supra* note 181, at 621 (arguing that stability of society suffers when political minorities believe that they "lose everything" in governmental policy or value battle).

286. Shane, *supra* note 181, at 621.

Finally, public participation may be important for its own sake. Civic republicans consider public participation to be a means of personal growth and social unity.²⁸⁷ They view such participation as a means of enhancing "civic virtue," which they consider to be an independent good.²⁸⁸ Others claim that the sense of involvement that individuals derive from participating in administrative processes is in itself valuable.²⁸⁹

3. *Deliberation*

A central theme in much recent public law literature is an emphasis on the role of "deliberation" in the democratic tradition²⁹⁰ and its importance to the selection of values in governmental decision-making.²⁹¹ For example, Cass Sunstein has argued that a deliberative model of democracy is preferable to the pluralist version of democracy that has informed much of current public law theory.²⁹² This deliberative model would be based on a revival of true Madisonian theory, which, Sunstein argues, attempted a synthesis of republicanism and pluralism.²⁹³ True Madisonian theory viewed

287. See *supra* note 271 (discussing civic republicans' understanding of public values).

288. See Sunstein, *supra* note 217, at 1556 (arguing that in opinion of civic republicans, political participation is its own reward). "Civic virtue" is the willingness of individuals to subordinate their personal interests to the public good. See Sunstein, *supra* note 204, at 31 (introducing republican conception of politics in which notion of civic virtue plays central role).

289. See Stewart, *supra* note 164, at 1761 (explaining that private citizen participation in agency decisionmaking is valuable in and of itself because it creates personally rewarding sense of involvement in governmental processes).

290. See, e.g., Reich, *supra* note 217, at 1631-40 (using "deliberation" to mean process by which citizens discuss individual concerns, discover common values, and adopt shared goals); Sunstein, *supra* note 204, at 31 (discussing importance of deliberation in republican model of politics). "Deliberation" as used by civic republicans refers to policymaking processes that value "dialogue and discussion amongst the citizenry." Sunstein, *supra* note 204, at 31. Civic republicans also use the term to refer to political processes that incorporate some notion of politics as focused toward the common good and that do not view policymaking as simply the aggregation of preexisting political preferences, but which assume instead that people's policy preferences can be changed over time. See Eskridge, *supra* note 271, at 1042 (defining "deliberative statutory evolution" as gradual, orderly, measured development of policy by agencies); Sunstein, *supra* note 217, at 1545 (using "deliberative" to mean "transformative"). In this Article, I use the term "deliberation" solely to refer to a process of "dialogue and discussion" with respect to value selection.

291. See Reich, *supra* note 217, at 1631-40 (arguing that public deliberation is fundamental to democracy and should be cultivated by public administrators); Sunstein, *supra* note 217, at 1548-52 (arguing that deliberation is paramount in republican political theory).

292. See Sunstein, *supra* note 217, at 1544-45 (arguing that pluralism breeds skepticism regarding legitimacy of legislation while deliberation, meaning dialogue and discussion, does not); see also *supra* note 271 (distinguishing between republican and pluralist theories).

293. See Sunstein, *supra* note 204, at 46-48 (discussing development of Madisonian theory in which representatives were "neither to respond blindly to constituent pressures nor to undertake their deliberations in a vacuum"); Sunstein, *supra* note 217, at 1561 (describing Madisonian theory as hybrid of republican and pluralist theories, which accommodated need for both autonomy in deliberation and accountability in representation).

representative democracy as a way of fostering deliberative decisionmaking by both insulating representatives from and exposing them to majoritarian pressures.²⁹⁴ Similarly, Robert Reich argues that a significant goal of public administrators should be to act as teachers or guides to help the public gain understanding of shared values.²⁹⁵ The process of deliberation, Reich argues, is critical to sound decisionmaking and to ensuring that the public takes responsibility for the difficult value choices that are bound up in administrative policymaking.²⁹⁶

Deliberation in processes for administrative value selection is also necessary to assist administrators in discovering or developing consensus value choices.²⁹⁷ Just as public participation can help to expose administrators to the values of the public,²⁹⁸ deliberative processes can help to ensure that administrators fully consider divergent public views and values in their decisionmaking.²⁹⁹ Deliberative processes also provide the public itself with a forum in which competing ideas about values can be debated, discussed, and to some extent resolved.³⁰⁰ Neither deliberation nor public participation will ensure that administrators actually base their value choices on the views of the public,³⁰¹ but deliberative and participatory processes are necessary at least to give agencies a chance at doing so.

294. Sunstein, *supra* note 217, at 1561.

295. See Reich, *supra* note 217, at 1635-38 (describing administrator's ideal pedagogical role in deliberation).

296. See Reich, *supra* note 217, at 1635-39 (arguing that deliberation forces public to face difficult issues and leads public to discover and define common values and goals).

297. Cf. Reich, *supra* note 217, at 1637 (arguing that administrative decisionmaking without public deliberation may prevent development or discovery of comprehensive societal values).

298. See *supra* notes 260-89 and accompanying text (discussing role of public participation in administrative value selection).

299. Cf. Reich, *supra* note 217, at 1637-40 (arguing that administrators should base decisionmaking on public deliberation, which fosters discussion and sometimes reconciliation of competing public values and concerns).

300. See Reich, *supra* note 217, at 1635-40 (suggesting that deliberation fosters public discussion and resolution of conflicting concerns involved in administrative decisions).

301. See HENNING & MANGUN, *supra* note 73, at 50-51, 56, 61 (arguing that administrators often do not consider proper values in their decisionmaking, but instead adopt distorted values such as institutional preservation or self-aggrandizement). If it is true that agencies adopt self-centered values in their rulemaking processes, this fact might appear to support presidential value selection as an important managerial check to ensure that agencies at least consider appropriate values. This concern, however, could be addressed by value-neutral presidential action such as a presidential request that agencies specify the values that they rely on in their decisionmaking. In contrast, Executive orders such as the Reagan administration's Executive Orders Nos. 12,606 (the "family" order) and 12,612 (the "federalism" order), substantively specify the values that the agencies should consider. See *supra* notes 44-63 and accompanying text (discussing Reagan administration's Executive orders charging agencies to consider prescribed values in rulemaking processes). It is this type of unilateral substantive value choice that is problematic.

4. *Diffusion of power*

Other commentators have noted the importance of diffusion of power in a society that is in significant conflict about questions of value.³⁰² For example, Peter Shane argues that a central value of the Constitution is the diffusion of governmental power and that the dispersal of power among the various components of administrative governance advances this value.³⁰³ Shane argues that such diffusion preserves societal stability by ensuring that majorities can only effect incremental change.³⁰⁴ Similarly, a diffusion of governmental power guarantees that the losers in any particular battle will survive to fight again in another arena, which leaves them less likely to feel resentment that could undermine societal stability.³⁰⁵

Because of the division of authority amongst different government agencies, administrative decisionmaking promotes the value of governmental power diffusion.³⁰⁶ Any particular agency's value choice extends no further than that agency's jurisdiction and often no further than the matter currently before the agency.³⁰⁷ In contrast, Presidents can impose value choices on the Government as a whole through Executive orders,³⁰⁸ which excessively concentrates value selection authority within one governmental institution, the White House.

In summary, the legislative process values of consensus, participation, deliberation, and diffusion are essential elements of legitimate governmental value selection in a divided society. These legislative values are attributes of collective as opposed to unilateral decisionmaking. Thus, collective administrative value selection processes better respect these values than unilateral executive decisionmaking processes. Accordingly, administrative processes are better suited

302. See Shane, *supra* note 181, at 621 (arguing that diffusion of governmental power furnishes stability and enhances liberty in deeply divided society); cf. Sunstein, *supra* note 204, at 60 (arguing that aggregation of legislative, executive, and administrative powers in administrative agencies creates danger that influential private groups will control agencies).

303. Shane, *supra* note 181, at 621 (stating that late eighteenth-century political theory greatly valued diffusion of regulatory power).

304. Shane, *supra* note 181, at 621.

305. Shane, *supra* note 181, at 621-22.

306. See Shane, *supra* note 181, at 622 (arguing that lack of coordination among administrative agencies diffuses regulatory power and promotes stability).

307. JERRY L. MASHAW & RICHARD A. MERRILL, *ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM* 2 (2d ed. 1985) (recognizing that agency jurisdiction, purposes, and powers are limited by enabling legislation).

308. See *id.* at 141 (observing that Executive orders have "enormous range of uses" and that they may be directions to whole of bureaucracy concerning conduct and organization of their operations); see also JOHN HART, *THE PRESIDENTIAL BRANCH* 41 (1987) (arguing that as result of being implied power, power to issue Executive orders "has been stretched to its limits and even beyond").

to governmental value selection than presidential processes.³⁰⁹

B. Administrative Value Selection Preferred to Presidential Value Selection

Under current law, administrative agency processes for value selection are more protective of these democratic, legislative ideals than are presidential processes for value selection.³¹⁰ Indeed, one significant current function of administrative procedure is to structure agency decisionmaking processes to minimize the potential loss of these legislative values.³¹¹ Although early public law analysts viewed administrative agencies as repositories of technical expertise and deemphasized the significance of value choices in administrative decisionmaking,³¹² once analysts recognized the central role of value choices in such decisionmaking, the debate became how to protect democratic ideals within the bureaucratic process.³¹³ From the "public choice" interest group participation debate of the 1970s and 1980s³¹⁴ to the current "new public law" debate of the 1990s,³¹⁵ public policy analysts have considered democratic values in designing and evaluating administrative value selection processes.³¹⁶

309. See Shane, *supra* note 181, at 614 (arguing that multi-membered organization would provide greater popular representation than unitary office of Presidency).

310. Compare *supra* part IV.A (discussing administrative agency decisionmaking processes as protecting legislative, democratic ideals of consensus building, participation, deliberation, and diffusion of power) with THEODORE C. SORENSON, *DECISIONMAKING IN THE WHITE HOUSE* 11 (1963) (arguing that legislative models of decisionmaking are not employed by President).

311. See STRAUSS, *supra* note 265, at 156 (describing statutory requirements of public notice and comment provisions in agency rulemaking procedures, which allow for public participation and deliberation in rulemaking process).

312. See McGarity, *supra* note 263, at 103 (describing agencies that were created during New Deal era as "great repositories of expertise"); see also Sunstein, *supra* note 282, at 445 (arguing that New Deal political analysis overlooked importance of value judgments in most issues submitted for agency resolution).

313. See Bruff, *Presidential Powers*, *supra* note 9, at 454-55 (discussing attempts to improve political accountability of administrative agencies and increase public participation in agency process that arose in response to new appreciation of role that values play in agency decisionmaking).

314. See Daniel A. Farber & Phillip P. Frickey, *In the Shadow of the Legislature: The Common Law in the Age of the New Public Law*, 89 MICH. L. REV. 875, 879-80 (1991) (describing public choice theory as model in which political decisions result from competition among individuals or groups of individuals working to further their own interests, and arguing that organizational difficulties result from use of model because small special interest groups become politically dominant).

315. See Eskridge & Peller, *supra* note 235, at 743-46, 761 (describing new public law theory as incorporating nonlegal developments in political and economic theories and rejecting legal formalism in favor of contextual, normative approach to legal issues, and including republican constitutional interpretation among examples of new public law analyses); Farber & Frickey, *supra* note 314, at 877 (describing new public law theory as being comprised of two schools of thought: one embracing communitarianism of republican theory and one following public choice theory).

316. See Stewart, *supra* note 164, at 1688 (stating from public interest/public choice perspective that "ultimate problem is to control and validate the exercise of essentially legislative

One clear consequence of these debates is that we have transcended the idea of the insular agency, holed up in back rooms, deciding policy questions solely through sterile technocratic judgments.³¹⁷ Instead, both interest group participation and new public law models require that agency value selection be democratic.³¹⁸ In other words, both models require that agency value selection reflect not merely the personal value choices of the "wise" decisionmakers; rather, value selection must reflect a larger collective judgment.³¹⁹ Administrative decisions must respond in some fashion to external social value selection processes.³²⁰ Whether the agency achieves this through an interest group participation model, a republican deliberative model, or some other model, agency decisionmaking processes are currently held to a standard that requires them to be responsive to larger social debates.³²¹ An agency may not act as a mere "function box" that produces inscrutably wise outcomes.³²²

Accordingly, agency processes, as currently constituted, are better suited than the unilateral presidential decisionmaking process to supporting the legislative values of participation, consensus, deliberation, and diffusion of power. First, in a divided society, administrative processes better protect the value of consensus building than the presidential value selection process.³²³ If there is a clear, pre-ex-

power by administrative agencies that do not enjoy the formal legitimation of one-person one-vote election"); Farber & Frickey, *supra* note 314, at 884 (describing republicanism from new public law perspective as "serving to illuminate the normative possibilities of democratic government" and public choice as "highlighting its potential pitfalls"). Most new public law commentators have addressed the central democratic problem as one of the legitimacy of administrative policymaking. Much of our uneasiness about administrative policymaking, however, is fundamentally a concern about the administrative agency as value selector.

317. See Stewart, *supra* note 164, at 1711-60 (explaining that courts have abandoned traditional expertise model of administrative decisionmaking in favor of "interest group representation" model based on broadened participation in agency decisionmaking process).

318. See Stewart, *supra* note 164, at 1711-60 (describing replacement of traditional agency model with interest group representation model as attempt to foster more democratic agency decisionmaking); Eskridge & Peller, *supra* note 235, at 734 (observing that new public law scholarship emphasizes, among other things, politically aware and involved citizenry and direct democracy).

319. See Sunstein, *supra* note 204, at 49-55 (arguing that Supreme Court treatment of administrative decisionmaking enforces requirements of republican and public interest ideals).

320. Cf. Sunstein, *supra* note 204, at 49-50 (arguing that administrative measures that fail to embody public values will be struck down by judicial review).

321. See Stewart, *supra* note 164, at 1683 (noting that courts have required agencies to consider all interests affected by their decisions).

322. See Stewart, *supra* note 164, at 1682-83 (arguing that model of agency decisionmaking as essentially legislative process has replaced traditional expertise agency model).

323. Compare *supra* notes 274-79 and accompanying text (arguing that administrative agencies foster consensus building by serving as fora for public participation) and notes 297-300 and accompanying text (arguing that administrative agencies facilitate consensus building through public deliberation) with Shane, *supra* note 181, at 614 (arguing that unitary Presidency is not designed to represent public consensus).

isting societal consensus as to values, the President may be as responsive to that consensus as anyone else. The Presidency, however, is not institutionally suited to develop or ascertain social value consensus.³²⁴ Although the President is the only nationally elected government official, his or her decisions do not necessarily aim to develop consensus choices.³²⁵ In fact, the President's decisions often do precisely the opposite; they conveniently cater to segments of the polity that have insider influence within the administration.³²⁶ Moreover, it is not clear that the President is necessarily responsive even to majority views.³²⁷ In recent years, presidential politics have not necessarily been majority politics. Instead, given the intricacies of presidential politics, some minority sectors hold peculiarly disproportionate influence over presidential elections.³²⁸ Presidents thus may respond to the minority sectors, often at the expense of consensus.³²⁹ Indeed, a presidential attempt to build accord might be politically risky; in the process of attempting to reach consensus, the President may antagonize pivotal political segments of the populace.³³⁰

The particular value choices in the Reagan administration Executive orders are an example of a President's response to a disproport-

324. See KOENIG, *supra* note 249, at 111-12 (describing consensus building powers of Presidency as containing inherent weaknesses); SORENSEN, *supra* note 310, at 22 (identifying fundamental forces on presidential decisionmaking as "presidential advisors, presidential politics, and the presidential perspective").

325. See Shane, *supra* note 181, at 614 (arguing that Presidency is not politically representative).

326. See ABA COMM'N, *ROADS TO REFORM*, *supra* note 9, at 158-59 (separate statement of William T. Coleman, Jr., ABA commissioner, dissenting from Recommendations 3 and 5) (arguing that presidential involvement in agency rulemaking leads to President's "over-reliance on [trusted] staff advisors" and to public perception that "the powerful, the super-lawyers, and the major corporate interests have special access to the White House and its staff that the less powerful and the unorganized do not have"); see also Kathleen M. O'Conner, Comment, *OMB Involvement in FDA Drug Regulations: Regulating the Regulators*, 38 CALIF. U. L. REV. 175, 210 (1988) (arguing that OMB involvement in FDA investigational drug regulations causes significant dislocation of agency's "fundamental ethical norms, the better judgment of the expert agency staff, and the agency's congressional mandate").

327. See Shane, *supra* note 181, at 614 (arguing that Presidency is not designed to preserve political accountability).

328. See SORENSEN, *supra* note 310, at 51-56 (arguing that Presidents sometimes accommodate interest groups that have disproportionate power and that may have both electoral and legislative influence because they want to enlist groups' influence or because groups' power could be used politically against them).

329. See SORENSEN, *supra* note 310, at 51-56 (arguing that President's response to pressure from interest groups is not always choice between competing interests; rather, it often involves balancing interests and making compromises).

330. See KOENIG, *supra* note 249, at 98-102 (arguing that Presidents must respond to multiple constituencies, whom they also influence by using tools of Presidency, and noting that Presidents often choose particular target constituencies either for support, vilification, or manipulation purposes).

tionately powerful segment of the political populace.³³¹ The Reagan Executive orders that emphasize family and federalism values do not reflect an attempt to achieve broad-based policy consensus that these values are preferred over other values. Rather, the orders appear to be merely a concession to the politically valuable conservative right wing's early 1980s social agenda.³³²

In contrast, administrative agency processes are more suited to consensus building than is unilateral presidential value selection. First, the prescribed procedures of rulemaking notice and comment and adjudicatory hearings require administrative agencies to listen and respond to the voices of the public.³³³ Thus, administrators are likely to be responsive to broader ranges of views than the President or the President's staff.³³⁴ Second, administrative decisionmaking is by definition bureaucratic.³³⁵ That is, administrative decisions necessarily result from the resolution of competing views within an agency about the direction that the agency's regulations should take.³³⁶ Accordingly, it is more likely that administrative value selections reflect consensus building than presidential value selections.

For similar reasons, unilateral presidential value selection offers little protection for the legislative value of public participation. Presidents do not select values through direct public involvement, but rather through a process of private involvement, namely, the

331. See *supra* notes 44-63 and accompanying text (discussing Reagan Executive orders imposing value choices on agency decisionmaking).

332. See Jack Nelson, *Angry Conservatives Accuse Reagan of Betraying Ideals*, L.A. TIMES, Sept. 6, 1987, Part 1, at 1 (referring to Executive Order No. 12,606, which requires agencies to consider family values in rulemaking processes, and stating that to "placate dissatisfied conservatives," Reagan "resort[ed] to presidential directives to implement social programs that he [could not] persuade Congress to pass").

333. See *supra* notes 198-202 and accompanying text (discussing notice, comment, and hearing requirements of Administrative Procedure Act).

334. See SORENSON, *supra* note 310, at 60-64 (arguing that presidential advisers are often more interested in pleasing the President and "being on the winning side" than in giving sound policy advice); see also RICHARD E. NEUSTADT, *PRESIDENTIAL POWER AND THE MODERN PRESIDENTS* 228 (1990) (criticizing modern presidential staff as haphazardly selected and lacking in continuity and experience in areas of responsibility).

335. See James Q. Wilson, *The Rise of the Bureaucratic State*, 41 PUB. INTEREST 77, 77-84, 87-96, 101-03 (1975), reprinted in *PERSPECTIVES ON THE ADMINISTRATIVE PROCESS*, at 16-33 (Robert L. Robin ed., 1979) (tracing development of administrative agencies into bureaucracies).

336. See, e.g., Jerry L. Mashaw & David L. Harfst, *Inside the National Highway Traffic Safety Administration: Legal Determinants of Bureaucratic Organization and Performance*, 57 U. CHI. L. REV. 443, 478 (1990) (arguing that professional biases, bureaucratic ambitions, and personality conflicts somewhat shaped structure, processes, and behavior of National Highway Traffic Safety Administration, but that ultimate agency decision was product of stream of ideas and arguments, and of internal processes and personnel decisions influenced in part by impact of judicial review). Although the President's staff may similarly harbor competing policy views, the range of views within agencies is likely to be broader. This is because middle and lower level administrative personnel, unlike members of the President's staff, are not selected primarily from persons who agree politically with the President.

participation of the President's personal staff.³³⁷ This process excludes participation by persons who do not have close ties to the White House or who are not close personal advisors to the President.³³⁸

Of course, it may be argued that the President's value choices are the product of indirect public participation through the electoral process. Indeed, the President is the only public official who answers electorally to the public at large rather than to a limited constituency.³³⁹ Accordingly, it may be argued that the President is the best barometer of the public consciousness and will respond to public views without the necessity of direct public participation. This argument, however, seeks to prove too much. Although the President is the only public official who answers to the public at large through a general election, this phenomenon is no guarantee that the President will be responsive to the preferences of all segments of the population.³⁴⁰ What may be more likely is that the President will be politically responsive only to those public preferences that are significant enough to affect future election results or the President's personal power.³⁴¹ These public preferences are not necessarily those of a majority of the population or even of a significant portion of the population, but rather are probably the views of whatever group represents a power bloc or "swing" vote in presidential elections.³⁴²

Furthermore, even if the President is responsive to the majority will, the issue arises as to whether public choices of value should simply be allowed to represent the imposition of the majority will over the will of less politically powerful groups.³⁴³ This question is

337. See STRAUSS, *supra* note 265, at 69 (describing operation of White House staff and stating that "the direction being given is too likely to reflect the understandings and desires of a relatively junior bureaucrat, rather than [of] the President"); ABA COMM'N, *ROADS TO REFORM*, *supra* note 9, at 156 (separate statement of William T. Coleman, Jr., ABA commissioner, dissenting from Recommendations 3 and 5) (arguing that constraints on President's time result in delegation of decisions to staff members who are "experts at the art of appearing for the President or making the President appear to act").

338. See *supra* note 326 and accompanying text (discussing effect of insider influences on President's decisions).

339. See, e.g., Mashaw, *supra* note 167, at 95-99 (arguing that President's role in administration, in light of his or her national constituency, is effective counter to arguments that delegation to administrative agencies necessarily entails loss of accountability).

340. See KOENIG, *supra* note 249, at 327-31 (discussing ways in which Presidents' personal values, rather than values of public, influence their administrative decisions).

341. See KOENIG, *supra* note 249, at 99 (arguing that President decides which groups' support to seek based on assessment of likely political costs of and gains from doing so); SORENSON, *supra* note 310, at 51-56 (arguing that Presidents are most responsive to interest groups that can either help or hurt them politically).

342. See KOENIG, *supra* note 249, at 99 (discussing presidential selection of "affirmative targets" group from whom he or she seeks support).

343. See Lani Guinier, *No Two Seats: The Elusive Quest for Political Equality*, 77 VA. L. REV.

especially troubling when no adequate opportunity exists for the minority's voice to be heard in the process. It does not seem to be enough to say that the minority lost the election, which is an argument that has been used recently to justify the elevation of conservative justices to a virtual monopoly on the Supreme Court.³⁴⁴ Rather, when value choices are at stake, value selection processes should provide room for all voices to be heard and not only an influential few.

In contrast to presidential value selection, agency value selection permits broader public participation in decisionmaking, which better ensures that all persons have an opportunity to be heard.³⁴⁵ APA notice and comment and notice and hearing provisions, as well as open agency provisions such as the Freedom of Information Act (FOIA) and the Government in the Sunshine Act, all expose agencies to public influence and debate in administrative rulemaking.³⁴⁶ While one may argue that agency decisionmaking processes are imperfect in their representation of public interests,³⁴⁷ the agency process is probably more inclusive than the presidential process and more protective of public participation rights.³⁴⁸

1413, 1477-82 (1991) (arguing that disproportionate majority power is (1) destabilizing because winner-take-all majority rule does not give minority groups reason to support ultimate decisional bargain, and (2) unfair if majority consistently excludes identifiable minority groups, such as racial minorities).

344. With the appointment of Justice Clarence Thomas, seven of the nine Supreme Court Justices are probably best characterized as "conservative," including Chief Justice Rehnquist and Justices Kennedy, O'Connor, Scalia, Souter, Thomas, and White. See Dick Lehr, *Centrist Troika Slows the Right on High Court*, BOSTON GLOBE, July 3, 1992, at 1 (referring to above-listed justices as "the seven conservative justices").

345. See McGarity, *supra* note 263, at 112 (arguing that public participation in agency decisionmaking reflects idea of "government by the people" by allowing any individual to be heard). This aspect of agency decisionmaking exists in large part because of the academic, judicial, and legislative focus on public participation over the last quarter century. Agencies now often have a judicially imposed duty to consider all relevant interests. See Stewart, *supra* note 164, at 1757-58 (discussing frequency with which courts require agencies to consider all relevant interests in decisionmaking process).

346. See *supra* notes 197-201 and accompanying text (discussing how APA transforms agencies into fora for public debate and participation); see also Stewart, *supra* note 164, at 1756-60 (recognizing importance of right to appear and present evidence at agency proceedings and arguing that judicially imposed requirement that agencies consider all relevant interests heightens impact of public participation in agency policymaking).

347. See Stewart, *supra* note 164, at 1762-70 (discussing obstacles to representation of community in its entirety, such as standing requirements, high transactional costs of organizing affected parties, financial constraints, and lack of accountability of leaders of organizations and public interest lawyers).

348. See Shane, *supra* note 181, at 614 (arguing that multimember organization provides greater popular representation than unitary office of Presidency). Of course, administrative agencies' decisionmaking processes are not perfectly open to all who want to participate. Some groups may have more "insider weight" than others. See Stewart, *supra* note 164, at 1763 (discussing phenomena of foundation-funded, privately subsidized, and government-sponsored "public interest" representation). Indeed, some may argue that agencies are more insular than the President. *Id.* at 1764 (arguing that private attorneys and foundations primarily decide which "public" interests will be represented before agencies). Even if this is

Similarly, presidential decisions provide little protection for the legislative value of deliberation.³⁴⁹ As previously discussed, presidential decisions about values typically reflect the President's personal preferences, the advice of the presidential staff, and/or the dictates of political expediency.³⁵⁰ This decisionmaking process excludes the voices of those who are not within the President's political circle. In contrast, agencies are fora in which questions of value are openly debated and discussed.³⁵¹ Agency decisions are made only after notice and significant public participation and, additionally, are subject to judicial review.³⁵² Furthermore, agency hearings are more open to the glare of publicity provided by the press than are presidential deliberations because of the existence of agency rulemaking public notice requirements.³⁵³ Thus, administrative processes, including hearings, judicial review, and press coverage generally afforded controversial administrative decisions, better protect the legislative value of deliberation.³⁵⁴

Finally, presidential value selection offers little protection for the legislative value of diffusion of power.³⁵⁵ Presidential decisionmaking concentrates in one person the value selection authority that otherwise would be distributed among several agencies. This concentration of power excessively empowers the Presidency,³⁵⁶

true as to individual agencies, the number of agencies is so large and agencies so diverse that different segments of society are more likely to have some clout within one agency or another than within the Presidency. Further, even if individual agencies are less participatory than the Presidency, the administrative decisionmaking process still more effectively protects other values such as consensus, deliberation, and diffusion of power than does the Presidency. *See supra* notes 323-36 and accompanying text (providing reasons why administrative decisionmaking process better protects value of consensus than presidential decisionmaking process); *infra* notes 349-58 and accompanying text (providing reasons why administrative decisionmaking process better protects values of deliberation and diffusion of power than presidential decisionmaking process).

349. *See* Luneberg, *supra* note 207, at 394 (arguing that President's power to dismiss agency heads at will threatens deliberative process by discouraging free exchange of diversity of perspectives).

350. *See supra* notes 323-42 and accompanying text (discussing bases for presidential value selection).

351. *See supra* part IV.A.2-3 (discussing public participation and deliberation in agency procedures).

352. *See supra* notes 197-204 (discussing ways in which APA rulemaking procedures and judicially mandated deliberative processes open administrative decisionmaking to public).

353. *See supra* notes 197-201 (describing APA notice and comment rulemaking procedures and formal hearing requirements).

354. *See* Reich, *supra* note 217, at 1637-39 (arguing that administrative agencies should act as fora for public deliberation over value-laden issues); *see also* Sunstein, *supra* note 204, at 62 (arguing that administrative rulemaking is designed so that officials will base decisions on public's desires).

355. *Cf.* Luneberg, *supra* note 207, at 369 (suggesting that presidential usurpation of administrative function conflicts with constitutional design for diffusion of governmental power).

356. *See supra* part III (discussing constitutional limitations on power of Presidency).

marginalizes the voices of those whose policies are not favored by the President,³⁵⁷ and eliminates arenas in which differing groups of persons within the society can be heard.³⁵⁸

In summary, a unilateral presidential role in administrative value selection corrupts the value selection process by substituting the President's personal values, or those that he or she finds politically expedient, for values that otherwise would have resulted from administrative processes. For example, the later Executive orders issuing from the Reagan administration³⁵⁹ enable the President to unilaterally select conservative social values by proclamation.³⁶⁰ No public process existed for the adoption of these Executive orders, and accordingly, important legislative process values were not protected.³⁶¹

This presidential value selection appears to be a throwback to the "black box" era in which conventional wisdom held that individuals rather than inclusive participatory processes could be counted on to make wise choices for society.³⁶² Thus, the President's role as value selector suffers from some of the same defects as the early "expertise" model of administrative decisionmaking. The judgment of no one person can be a legitimate mechanism for societal value selection. The fact, for instance, that the President and his or her advisors prefer economic values to environmental ones or family values to privacy values is a questionable basis for creating national policy. Mere individual preferences, even those of a President, are insufficient to justify a governmental choice of one value over another.

357. See *supra* notes 340-44 and accompanying text (discussing limited group of people who are able to influence presidential decisionmaking directly).

358. See *supra* notes 349-54 and accompanying text (discussing lack of deliberative processes in presidential decisionmaking as opposed to those processes available to public for administrative decisionmaking).

359. See, e.g., Exec. Order No. 12,606, 3 C.F.R. 241, 241 (1987), *reprinted in* 5 U.S.C. § 601 (1988) (requiring agencies to consider family values in rulemaking); Exec. Order No. 12,612, 3 C.F.R. 252, 253 (1987), *reprinted in* 5 U.S.C. § 601 (1988) (requiring agencies to consider principles of federalism in rulemaking); Exec. Order No. 12,630, 3 C.F.R. 554, 554 (1988), *reprinted in* 5 U.S.C. § 601 (1988) (requiring agencies to place high value on private property rights in rulemaking processes).

360. See *supra* notes 58-62 and accompanying text (discussing presidential control of agency value selection through issuance of value-laden Executive orders). One question is whether it even makes sense to discuss value choices in the abstract as President Reagan sought to do, that is, whether it is reasonable to say, in a context completely divorced from any particular policy decisions, that family stability or federalism is a preeminent value. These concepts are so vague that without concrete application, they are arguably either meaningless or so salutary as to be axiomatic.

361. See Strauss, *supra* note 265, at 75 (questioning ability of public to affect promulgation of Executive orders).

362. See *supra* note 312 and accompanying text (discussing earlier model of administrative law, which provided that administrative agencies are isolated strongholds of expertise in area for which they are responsible).

Although the President is electorally accountable to the public at large, accountability alone does not compensate for the absence of other democratic and legislative-like checks on a presidential value selection process.³⁶³ The process for governmental value choices should not depend solely on the judgment of one individual when the only structural check on the exercise of that judgment is a quadrennial opportunity for citizens to vote “thumbs up” or “thumbs down” on that individual.³⁶⁴ Instead, value selection processes should protect legislative values of consensus, participation, deliberation, and diffusion.

Again, this is not to suggest that the President should not have any role in administrative value selection. Indeed, a participatory role for the President in value selection, in combination with the public generally, might improve the reliability of administrative value selection.³⁶⁵ Such a participatory role is appropriate considering the President’s limited role in managing the administrative bureaucracy.³⁶⁶ A President acts improperly, however, if he or she attempts to unilaterally impose value choices on administrative decisionmaking.

CONCLUSION

It is both unconstitutional and inappropriate for the President to direct administrative value selection. Presidential value selection exceeds the limits on executive power delineated in Article II of the Constitution by impairing structural protections within the Constitution for basic legislative, democratic decisionmaking values of consensus building, public participation, deliberation, and diffusion

363. See Thomas O. McGarity, *Presidential Control of Regulatory Agency Decisionmaking*, 36 AM. U. L. REV. 443, 457 (1987) (debunking argument that electoral process holds President accountable to public).

364. This limited electoral check on presidential power may, as a practical matter, be even more useless for value selection than for policymaking generally. With value choices, the President, as with the Reagan Executive orders, can comfortably hide behind abstract, bland, general statements of value such as those in the family and federalism Executive orders, which are unlikely to be noticed by the public, much less disputed. See McGarity, *supra* note 363, at 457 (arguing that presidential participation in rulemaking can decrease accountability by providing for secret policy decisions that are unknown to public). In contrast, were the President to incorporate these value choices into concrete policy choices with “real-world” consequences, the public might more easily see and be able to object to the implications of these seemingly noncontroversial value choices.

365. See *supra* notes 208-09 and accompanying text (discussing permissible role of Presidency in administrative value selection).

366. See Bruff, *Presidential Management*, *supra* note 10, at 595 (arguing that presidential managerial programs set up by President Reagan were generally beneficial, although some controls were needed to keep them within bounds of law and policy).

of power.³⁶⁷ Even if these legislative values are not deemed to be constitutionally mandated for administrative decisionmaking processes, they are important values for governmental decisionmaking generally because they provide both stability and democratic legitimacy to administrative value selection. These democratic values extend beyond the mere question of who makes social value choices to broader process issues and additionally are more significant than electoral accountability in legitimizing and justifying administrative value selection.

Agency processes for value selection, as currently constituted, better protect these decisionmaking values than presidential processes because agency processes better provide for the inclusion of the public. This openness of administrative processes to public input supports the values of consensus, participation, deliberation, and diffusion. The insularity of presidential decisionmaking does not. Accordingly, the President should not direct administrative value selection.

367. See *supra* part IV.B (arguing that presidential decisionmaking does not employ ideal value selection methods).

