HAVE ADMINISTRATIVE AGENCIES ABANDONED REASONABILITY?

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I. INTRODUCTION

At common law, reasonableness[1] determined whether a person's actions in a given situation were proper.[2] Today, the reasonable decisions derived by balancing competing ideals for a specific factual situation[3] are often supplanted by decisions utilizing highly generalized and often irrational statutes and regulations,[4] or decision-making by some agency which is ill-equipped to function in that role. The traditional common law standard of "reason" has collapsed under the weight of an unruly and uncontrolled federal bureaucracy.

On a federal level, the problem of rational decision-making is magnified because, in many instances, Congress is called upon to regulate various activities without a proper understanding of the nuances of those

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[1]Webster's Third New International Dictionary defines reasonable as "being in agreement with right thinking or right judgement; not conflicting with reason; not absurd; not ridiculous; possessing good sound judgement; well balanced." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1892 (1971).

[2]PHILIP K. HOWARD, THE DEATH OF COMMON SENSE 22-23 (1994). Howard discussed the differences between the common law method of solving problems and the statutory method. *Id.* In particular, he argued that the statutory approach does not always consider the specific factual situation. *Id.* In discussing the common law approach, he stated:

> The common law is the opposite of ironclad rules that seek to predetermine results. Application of the common law always depends on the circumstances: The accident caused by swerving to avoid the child is excusable; falling asleep at the wheel is not. The most important standard is what a reasonable person would have done.

Id.

[3]*Id.*

[4]*Id.* at 26. Statutes and regulations encompass one hundred million words in the United States alone. *Id.*

activities.[5] To address the problems of the country, Congress has chosen to act through generalized statutes or has created large agencies in an attempt to address specific problems.[6] Ironically, Congress has created a bureaucracy encompassing a variety of administrative agencies designed to accomplish a multitude of tasks in an effort to respond to the unreasonable decisions that result from abstract statutes and regulations.[7]

The numerous statutes and regulations which comprise the rule of law[8]

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[5]*Id.* at 44-45. Howard offered an example of Congress's attempt to regulate the cable industry:

> And there was the effort by Congress in 1992 to protect consumers from high cable TV prices, hailed as the "most important consumer victory in the past 20 years." Five hundred pages of detailed rules knocked down high rental charges for converter boxes and remote control units. A formula would ensure that prices were related to actual cost; basic service charges would be based on the number of channels offered. The effect? Nothing, except that prices edged up.

Id. The multitude of existing administrative agencies evidences the extent in which Congress is called upon to act. The variations of the services and topics agencies deal with, indicate the multiple issues Congress is required to regulate. *See* WORKING ON THE SYSTEM V-XI (James R. Michael ed., 1974). Michael's examination of various administrative agencies provided proof of the widely disparate functions they serve. A partial listing includes: the Federal Trade Commission, the Interstate Commerce Commission, the Federal Communications Commission, the Atomic Energy Commission, the Federal Power Commission, the Food and Drug Administration, the Department of Agriculture, the National Highway Traffic Safety Administration, the Internal Revenue Service, the Environmental Protection Agency and the Occupational Safety and Health Administration. *Id.*

[6]U.S. CONST. art. I, § 1. "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." *Id.*

[7]L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 37-40 (1978) ("Where not only technical skill but continuous judgement is demanded the legislature is helpless."); K. DAVIS, ADMINISTRATIVE LAW TREATISE § 3:3, 152-53 (2d ed. 1978) (noting that because of the complexity of particular problems, some policy decisions must be made on a case by case analysis); Federal Trade Comm'n v. Ruberoid Co., 343 U.S. 470, 487 (1952) (Jackson, J., dissenting) ("The rise of administrative bodies probably has been the most significant legal trend of the last century . . . . They have become a veritable fourth branch of the Government, which has deranged our three-branch legal theories. . . .").

[8]*Black's Law Dictionary* defines the rule of law as:

are not capable of solving every legal dispute,[9] nor are they totally divorced from a common understanding of reasonableness. Nevertheless, American jurisprudence has summarily replaced the common law approach to handling problems, with rigid, uniform, statutory law.[10] At some point in time, the flexible ideals of reasonableness revealed a lack of certainty in lawmaking, a characteristic of law which society has come to demand.[11]

Society's demand for flexible laws emanates from society's complex nature, which requires equally complex rules to govern various societal

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> A legal principle, of general application, sanctioned by the recognition of authorities, and usually expressed in the form of a maxim or logical proposition. Called a "rule," because in doubtful or unforeseen cases it is a guide or norm for their decision. The rule of law, sometimes called the "supremacy of law," provides that decisions should be made by the application of known principles or laws without the intervention of discretion in their application.

BLACK'S LAW DICTIONARY 1196 (5th ed. 1979).

[9]HOWARD, *supra* note 2, at 23. Philip Howard noted the thoughts of various legal minds who have commented on the inadequate solutions obtained by relying on written rules. "Oliver Wendell Holmes . . . 'General propositions do not decide concrete cases.'" *Id.* "Justice Benjamin Cardozo . . . said in the 1920's that common law 'is at bottom the philosophy of pragmatism. Its truth is relative, not absolute.'" *Id.* "Cardozo . . . 'over-emphasis on certainty may lead us to . . . intolerable rigidity. Justice . . . is a concept by far more subtle and indefinite than is yielded by mere obedience to a rule.'" *Id.*

[10]HOWARD, *supra* note 2, at 23 ("[W]ith the Constitution guaranteeing freedom and the common law guaranteeing justice, we have long taken pride that America is a 'government of laws, not of men.'"); *see also* CORNELIUS KERWIN, RULEMAKING 2 (1994) ("Reliance on rulemaking to provide essential details of our law is commonplace and has been for some time.").

[11]HOWARD, *supra* note 2, at 29. Howard argued that the more specific laws become, the more likely truth will emerge. *Id.* He stated:

> To most experts, the highest art of American lawmaking is precision. Only with precision can law achieve a scientific certainty. By the crafting of words, lawmakers will anticipate every situation, every exception. With obligations set forth precisely, everyone will know where they stand. Truth emerges in the crucible of the democratic process, and legal experts use their logic to transform it into a detailed guide for action. The greater specificity, the more certain we are that we are providing a government of laws, not of men.

Id.

relationships. Undoubtedly, situations arise which demand an individualized review.[12] Statutory laws or regulations are often unable to adequately resolve situations through rules of decision which are often hyper-technical.[13] On the other hand, administrative agencies may provide the mechanism through which Congress can respond to specific issues in a reasonable manner without having to draft highly technical legislation.

The vast bureaucracy created by Congress to address issues, for which statutes or regulations only produce irrational solutions, has generated many questions regarding the proper role of agencies. Has reasonable decision-making been supplanted by statutory rules, which fail to provide for rational decisions in specific situations? Further, have agencies satisfactorily fulfilled the role of rational decision-making as envisioned in their creation by Congress?

This Comment will address whether administrative agencies can provide reasonable decision-making in specific factual situations. Particularly, this Comment will explore Congress's view that administrative agencies are the best mechanism through which rational decision-making can be achieved.[14] Next, the problems with administrative agencies will be examined, including constitutional limitations,[15] lack of accountability for

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[12]JEFFREY L. LOWELL, LAW AND BUREAUCRACY 27 (1975). As Lowell explicated:

> Rules . . . are in a sense nonrational . . . . The adjudicator's obligation to reason will provide a check against the use of criteria that are improper, arbitrary, or legalistic, or fail to achieve congruence between the effect of the decision and official objectives.

Id.

[13]HOWARD, *supra* note 2, at 52. In recognizing the impossible task of developing a set of statutory laws to effectively address every factual situation, Howard recognized Justice Cardozo's statement that:

> No doubt the ideal system, if it were attainable, would be a code at once so flexible and so minute, as to supply in advance for every conceivable situation the just and fitting rule. But life is too complex to bring the attainment of this idea within the compass of human power.

Id.

[14]*See infra* notes 19-62 and accompanying text.

[15]*See infra* notes 63-89 and accompanying text.

lawmakers,[16] and their inability to provide rational decisions.[17] Finally, alternatives will be suggested which allow agencies to provide reasonable, rational decisions, tailored to meet the specific problems.[18]

II. THE REASONS ADMINISTRATIVE AGENCIES EMBODY THE ROLE OF RATIONAL DECISION MAKERS

The realities of present day society and the demands of modern government compel Congress to delegate certain government functions to administrative agencies.[19] The justifications for the delegation of congressional power to administrative agencies include Congress's inability to handle technical issues[20] and act efficiently and effectively.[21] In addition, Congress's limited resources[22] often make it unable to articulate

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[16]*See infra* notes 90-103 and accompanying text.

[17]*See infra* notes 104-122 and accompanying text.

[18]*See infra* notes 122-150 and accompanying text.

[19]Brian Cook, *The Representative Function of Bureaucracy; Public Administration in Constitutive Perspective*, 23 ADMINISTRATION AND SOCIETY 4, 107 (1992) ("[M]any of the routine tasks of governing a nation are neither rights nor powers, and seem to have always been in the original province of the bureaucracy, providing a source of legitimacy independent of delegation."); K. DAVIS, *supra* note 7, at 157 ("[T]he kind of government we have developed is impossible except through delegation without meaningful standards . . . ."); J. LANDIS, THE ADMINISTRATIVE PROCESS 10-16, 46-50 (1938) (discussing the expectations of government in requiring an administrative state).

[20]JAFFE, *supra* note 7, at 36 (stating that Congress will delegate when the area is highly technical or requires continuing supervision).

[21]DAVIS, *supra* note 7, at 156 (noticing that constitutional requirements for enacting legislation cause rapid Congressional decision to be practically impossible).

[22]*Id.* at 155-56 (stating that due to the eclectic areas of law Congress must deal with, and the limited amount of time available, it is virtually impossible to formulate standards for every issue).

meaningful standards for particular problems.[23] Indeed, one commentator postulates that the Constitution requires an administrative bureaucracy.[24]

These traditional justifications for broad delegations of congressional power have provided ample ammunition for advocates of delegation.[25] In addition, the absence of any express constitutional authorization for the myriad of congressionally created agencies has not provided a successful argument for limiting the delegation of power to agencies.[26] Indeed, agencies have survived as decision makers and have expanded their roles, touching the lives of all American citizens.[27]

The history of administrative agencies can provide some insight into why these agencies are so essential to modern government.[28] Administrative agencies have existed since the beginning of organized American government.[29] The first administrative agency was created in 1789 and its purpose was to "estimate the duties payable" on imports and to

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[23]*Id.* at 152, 156.

[24]Cook, *supra* note 19, at 116 ("The bureaucracy can be shown . . . to 'fulfill the design' of the Constitution with respect to separation of powers." (citing J.A. ROHR, TO RUN A CONSTITUTION: THE LEGITIMACY OF THE ADMINISTRATIVE STATE (1986))). For a complete discussion of this non-traditional view of the Constitution, see *infra* notes 54-58 and accompanying text.

[25]*See* Richard Stewart, *Beyond Delegation Doctrine*, 36 AM. U. L. REV. 323, 324 (1987) (stating that the delegation doctrine should remain unenforceable by the judiciary as it could not produce manageable standards and more detailed legislation would only further hamper government's ability to be responsive).

[26]Ernest Gellhorn, *Returning to First Principles*, 36 AM. U. L. REV. 345, 345 (1987) ("[W]hile it was generally accepted that the terms of the Constitution and the framers' intent did not envision the sweeping powers given the agencies by the legislature, conventional wisdom held that the needs of both a modern society and an international economy required nothing less in an often hostile world.").

[27]MICHAEL, *supra* note 5, at 4-6 (discussing the impact of agencies in the life of a "typical citizen").

[28]For a general history of administrative agencies, see DAVIS, *supra* note 7, at 14-51. The history of administrative agencies is unimportant for this Comment except to the extent history provides justifications for agency creation. The purpose of this Comment is to address the role and function of administrative agencies in modern society. As this Comment will address, in the United States today administrative agencies are an integral part of every person's life.

[29]*Id.* at 15.

perform other related duties.[30] It was not until the 1930's, during the Roosevelt administration, that the number of agencies began to grow toward the current level and administrative law was recognized as an independent and complex legal field.[31] The focus of agencies has developed and changed from providing a purely regulatory function,[32] to an adjudicative role,[33] to the present role which combines regulatory, judicial and rulemaking authority.[34] In reality, today, agencies are individual mini-

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[30]*Id.* at 17.

[31]*Id.* at 16. Davis asserted that administrative law existed well before the term "administrative law" was commonly used. He said:

> In 1893 Frank J. Goodnow published a book on Comparative Administrative Law, asserting that "the general failure in England and the United States to recognize an administrative law is really due, not to the non-existence in these countries of this branch of the law but rather to the well-known failure of English writers to classify the law. For . . . there [has] always existed in England, as well as this country, an administrative law. . . ."

Id. at 17 (citation omitted).

[32]*Id.* at 16. Davis argued that during the 1930's the proponents and the opponents of administrative agencies over emphasized the role of agencies in regulation. *Id.* at 22. In his opinion, the more important task of agencies "had little or nothing to do with regulation." *Id.*; *see also* MICHAEL, *supra* note 5, at 13. Michael asserted that "[t]he crash of the 1929 stock market pointed out some of the defects of corporate America, and the need for new approaches." *Id.* The "alphabet soup" agencies of the New Deal "[p]artook of a confidence in the ability of intelligence and expertise exerted in the public interest to produce regulatory solutions which would further that interest." *Id.*

[33]DAVIS, *supra* note 7, at 16 ("The judicial role in requiring agencies to use fair procedure was accentuated by the Morgan cases, 1936 to 1941."). In addition, the advent of agencies performing judicial roles brought extreme criticisms. As early as 1934, a special committee on administrative law appointed by the American Bar Association concluded:

> The judicial branch of the federal government is being rapidly and seriously undermined . . . . The committee naturally concludes that, so far as possible, the decision of the controversies of a judicial character must be brought back into the judicial system.

Id. at 21 (citation omitted).

[34]*Id.* at 16. In discussing agencies preference for rulemaking, Davis stated:

governments, encompassing the power of the executive, the legislature and the judiciary.[35]

One of the most commonly cited reasons for delegating power to administrative agencies is the notion that agencies are composed of experts with the requisite technical skill to continually monitor and understand highly specialized civilian activities.[36] During the New Deal era,[37] the legislature

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> Agencies for several decades probably overused trial procedures for developing policies, but by 1970 they were often preferring rulemaking procedure, partly because Congress was more often prescribing it. . . . Also during the 1970's, partly because of the new substantive legislation, the increase in rulemaking has been so rapid that it is often called an explosion.

Id.

[35]The historical development of agencies and their concurrent expansion of power begs the question of whether agencies continue to perform the essential tasks for which they were created. The rationales supporting the delegation of power from Congress to agencies must have been extremely convincing. Even in the early history of administrative agencies, the very creation of these agencies was questioned:

> In 1937 came the report of the President's Committee on Administrative Management: "Commissions . . . constitute a headless 'fourth branch' of the government, a haphazard deposit of irresponsible agencies and uncoordinated powers . . . ." President Franklin D. Roosevelt praised this report in submitting it to Congress: "I have examined this report carefully and thoughtfully, and am convinced that it is a great document of permanence importance . . . . The practice of creating independent regulatory commissions, who perform administrative work in addition to judicial work, threatens to develop a 'fourth branch' of the Government for which there is no sanction in the Constitution."

Id. at 21-22 (citation omitted).

[36]JAFFE, *supra* note 7, at 35-37. Jaffe stated:

> Power should be delegated where there is agreement that a task must be performed and it cannot be effectively performed by the legislature without the assistance of a delegate or without an expenditure of time so great as to lead to the neglect of equally important business. Delegation is most commonly indicated where the relations to be regulated are highly technical or where their regulation requires a course of continuous decision.

Id.; Cook, *supra* note 19, at 118. Cook, discussing how the bureaucracy can fulfill the function of adequate representation of the people, argued:

was viewed as helpless when issues involving technical skill and continuous judgment arose.[38] The rise of administrative agencies during the 1930's was in part due to the way people viewed the Congress. Since technical problems were seemingly too difficult for Congress to handle,[39] a mechanism was adopted which permitted Congress to make general laws and allowed the agency, through its expertise, to fill in the gaps.[40]

> Bureaucracy . . . possess special qualities. One such quality is expertise. The stock in trade of the bureaucrat is knowledge and ideas. Professional training and special knowledge and skills are the qualities for which civil servants are hired through the merit system. Administrative agencies are structured to make effective use of knowledge and specialized skills. Expertise thus allows the bureaucracy to fulfill a critical representative function in modern democratic regimes.

Id.; Mourning v. Family Publications Serv., Inc., 411 U.S. 356, 372-73 (1973). The Court, in declaring that the authors of statutes creating agencies do not address every specific problem that the agency may consider under the statute, said:

> [The absence of specificity in a statute creating an agency] is precisely one of the reasons why regulatory agencies such as the Commission are created, for it is the fond hope of their authors that they bring to their work the expert's familiarity with industry conditions which members of the delegating legislatures cannot be expected to possess.

Id.

[37]*See* DAVIS, *supra* note 7, at 20. Davis asserted that the advent of the New Deal in the 1930's ushered in many new agencies. *Id.* For example, the National Recovery Administration, the Security and Exchange Commission and the National Labor Relations Board were a few of the agencies that can claim birth during the New Deal. *Id.* Davis stated that "[i]f before the New Deal the antagonism toward bureaucracy was fast reaching the breaking point, the reasons for alarm had now been multiplied many times." *Id.*

[38]JAFFE, *supra* note 7, at 37.

[39]*Id.* at 37.

[40]*Id.* at 37-39 (discussing the idea that a general agreement on a broad principle by Congress, with an agency defining the specifics, is preferable to Congress not addressing the issue at all). As Jaffe further explicated:

> It may be a sufficient reason for delegation that the legislature can agree on general policy but not on the details. This lack of agreement may be due to a difference of opinion on what the policy implies or to the opposition of forces who wish to limit or defeat it by indirection. The proponents will prefer to take their chances on a favorable administration. It has been

Another justification for delegating powers to agencies is based on efficiency.[41] In a continually changing environment, Congress is unable to efficiently and effectively provide answers to the various problems which arise on a daily basis.[42] Promulgating legislation is the extent to which

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> suggested that one of the virtues of delegation is a more disinterested application of policy. This is particularly true of a delegation resting on technical standards.
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> . . . .
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> In some of the New Deal statutes the delegation was not much more explicit than a direction to deal with the situation, be it the demoralization of industry or of farming. . . .
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> The process appears to be legitimate one, preferable to the possible alternatives of not dealing at all with a felt need or of cutting legislative formulas out of whole cloth. Delegation involves a permanent creative partnership between legislation and administration. There is no aboriginal, final creation of the creature by the Lord. "Basic policy" does not stand in absolute contrast to administration since the latter is continuously developing new situations which demand policy decisions. The conditions of delegation change. The legislature forms policy within the limits of its current competence. The administration is faced with the demand for action. It isolates the problem, gathers material, frames answers. Once more the legislature may address itself to the problem.

Id.

[41]Fein, *Get Rid of Regulatory Agencies-They Aren't Independent and They're Unconstitutional*, WASH. POST, July 27, 1986, at D5 col. 4 ("[F]ederal regulatory agencies were romantically conceived as institutions headed by expert citizens who could not be removed by the president, and who could therefore exert public power with speed and disinterest.").

[42]*See* Federal Trade Comm'n v. Gratz, 253 U.S. 421, 436-37 (1920) (Brandeis, J., dissenting) (discussing how the administrative process can regulate unfair competition). Justice Brandeis proffered:

> Experience with existing laws has taught that definition, being necessarily rigid, would prove embarrassing and, if rigorously applied, might involve great hardship. Methods of competition which would be unfair in one industry, under certain circumstances, might, when adopted in another industry under different circumstances, be entirely unobjectionable. Furthermore, an enumeration, however comprehensive, of existing methods of unfair competition must necessarily soon prove incomplete, as with new conditions constantly arising novel unfair methods would be devised and developed.

Id.

Congress can effectively address problems.[43] Furthermore, the constitutional requirements which mandate the entire legislative process are formidable.[44] Indeed, the American legislative process, in itself, demands lengthy debates which delay congressional action.[45] When Congress delegates legislative authority to agencies, however, this arduous process is bypassed since agencies are not encumbered with the same constitutional burdens.[46]

The American people often require that Congress provide answers to a myriad of issues, causing the costs incurred by this vast deliberative body in its decision-making process to increase enormously.[47] In addition,

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[43]KERWIN, *supra* note 10, at 2 ("For a variety of reasons Congress is unwilling or unable to write laws specific enough to be implemented by government agencies and complied with by private citizens.").

[44]Stewart, *supra* note 25, at 331.

[45]*Id.* While discussing the inherent difficulties Congress has in acting expeditiously on any one issue, Stewart states:

> The demands of Congress' agenda far exceed its capacity to make collective decisions. Securing agreement by a majority of 435 representatives, a majority of 100 senators, and the President is typically an arduous, time-consuming, and difficult process. This eighteenth century legislative procedure is incapable of responsibly making even the more basic of the myriad decisions entailed by a regulatory strategy of centralized prescriptions.

Id.

[46]Richard J. Pierce, *Political Accountability and Delegated Power: A Response to Professor Lowi*, 36 AM. U. L. REV. 391, 404 (1987) ("[G]iven the nature and level of governmental intervention that Congress now authorizes, it could not possibly make the hundreds, or perhaps thousands, of important policy decisions that agencies make annually.").

[47]Stewart, *supra* note 25, at 329-30. Stewart noted how it would be to Congress's advantage to shift the burden of making decisions to agencies, as Congress could not create adequate standards for making decisions and the costs to Congress are tremendous:

> For the past several decades we as a nation have relied increasingly on centralized command and control regulation to achieve national goals of social and economic justice. This reliance has created serious institutional strains. One is peculiar to Congress. Faced with a crowded agenda and relatively high costs of reaching agreement on specific measures, Congress has often delegated the formulation of regulatory command to federal

because of the snail's pace at which Congress acts, congressional action is often moot as the subject problem may have resolved itself.[48] The delay and expense created by these inherent congressional deficiencies provide further evidence that agencies must be utilized to fulfill the lawmaking demands of the populace.[49]

Still another justification for delegating power to administrative agencies is Congress's inability to develop meaningful standards for regulating issues.[50] Limited congressional resources inhibit the Congress's

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administrators.

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> Central decision makers would face intolerable burdens if they sought to adjust general commands to the individual circumstances of each actor in each regulated business firm or other organization. Standardized, inflexible prescriptions, however, are bound to be excessively costly, burdensome, impractical, or simply irrational in many particular applications, creating widespread resentment on the part of those regulated.

Id.; *see also* Pierce, *supra* note 46, at 404 ("Agencies encounter much lower costs than Congress.").

[48]Pierce, *supra* note 46, at 405 ("Rules promulgated with the best of intentions can become rapidly obsolete.").

[49]The argument that Congress was created as a slow moving body in order not to be influenced by political factions is addressed in the Federalist papers. Indeed, in Section III this Comment addresses the idea that if Congress cannot adequately handle an issue, than possibly it should not be passing laws dealing with it. The Framers, however, probably did not realize the extent of the problems which Congress justifiably would be called upon to address. Therefore, there are some issues which do demand Congressional attention in a swift manner.

[50]KERWIN, *supra* note 10, at 29-30 (discussing the ability of agencies "[t]o respond in a timely manner to unanticipated and changed conditions, and most especially emergencies" by rulemaking without congressional interference). *Id.* Kerwin described the advantages of having the FAA handle airline problems. When the FAA discovers a problem in the design, operation, or maintenance of an airplane, the organizational structure of the FAA permits swift communication to the FAA headquarters. *Id.* The FAA headquarters can immediately deal with the problem. In contrast, if Congress had to deal with the situation, an amendment would have to be passed. As Kerwin noted:

> For such an amendment to come to pass, the information would have to work its way up the FAA organization and be communicated to the appropriate House and Senate subcommittees; legislation would have to be drafted; hearings would have to be held; votes would have to be taken in subcommittee, full committee, and the floors of both houses; possibly conference committee deliberations and another round of votes required; and

ability to set reasonable standards for most problems which they are required to address.[51] Undoubtedly, Congress may realize that there is a problem which needs to be addressed through regulation or legislation. It, however, may be unable to recognize the full scope of the problem or devise clear and workable standards through legislation to deal with the issue.[52] An agency is often a more able organization to fashion meaningful standards and benchmarks against which individualized actions can be compared.[53]

A final argument attempting to legitimize the administrative agency in American government is that the administrative bureaucracy fulfills the intent

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> then the President would have to sign the legislation. If real danger existed, a tragedy could occur long before action of this sort was completed.

Id. at 30; *see also* Heckler v. Chaney, 470 U.S. 821, 851 (1985) (Marshall, J., concurring) ("One of the very purposes fueling the birth of administrative agencies was the reality that governmental refusal to act could have just as devastating an effect upon life, liberty, and the pursuit of happiness. . . .").

[51]Professor Sargentich addressed Congress's inability to articulate meaningful standards by arguing that agencies can rationally and effectively fulfill broad statutory goals. Sargentich, *The Delegation Debate and Competing Ideals of the Administrative Process*, 36 AM. U. L. REV. 419, 432-33 (1987). Sargentich argued that the "public purposes ideal" legitimizes the role of administrative agencies in our governmental system. *Id.* "The public purposes ideal takes for granted that the mission of agencies is to be instrumentalist in the broad sense of rationally and efficiently pursuing statutory objectives." *Id.* at 432. Professor Sargentich further argued that the public purposes ideal substantiates agencies' functions in government because agencies are "instruments of policymaking empowered and, sometimes, well-attuned to advance given objectives in a hopefully rational manner." *Id.* at 433.

[52]T. LOWI, THE END OF LIBERALISM 125 (2d. ed. 1979) ("[T]he complexity of modern life forces Congress into vagueness and generality in drafting its statute.").

[53]DAVIS, *supra* note 7, at 156-57. Davis articulated the reasons why agencies can better address individualized problems even when Congress is able to provide some standard:

> Most delegations to agencies rest on the understanding that, even when Congress can identify the policy questions that have to be answered in order to carry out a governmental program, answers that stem from Congress, which cannot know the facts and circumstances of the detailed applications of the answers, are likely to be seriously inferior to answers given by an agency which lives over a period of time with facts and circumstances of detailed applications.

Id.

of the Constitution. Arguably, agencies can prevent the influence of factions, fit within the separation of powers principle, and provide adequate representation for the people.[54]

One scholar argues that the administrative bureaucracy can divert the influence of powerful interest groups better than the single congressional body.[55] A bureaucracy, which unlike the Congress, is removed from the nation's spotlight, can obstruct Federalist-feared factions in their attempt to unduly influence lawmakers on politically sensitive topics.[56] In addition, taking a less traditional view of the separation of powers doctrine,[57] administrative agencies function as the body which can most effectively

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[54]*See infra* notes 55-59 and accompanying text.

[55]David Schoenbrod, *Separation of Powers and the Powers That Be: The Constitutional Purposes of the Delegation Doctrine*, 36 AM. U. L. REV. 355, 381 (1987) ("Richard Stewart and other important figures in administrative law argue that the administrative process provides safeguards against discretionary power that are equal to or better than those provided in Article I.").

[56]Cook, *supra* note 19, at 115. Cook argued that the Federalists, in constructing the Constitution, attempted to shield lawmakers from being carried away by the uncharted political wave on a frequent basis:

> The Federalists feared direct and frequent recourse to the people not only because, in the fractious atmosphere surrounding debate on a highly charged political issue, the people might in the short run misperceive the long-term or permanent interests of the community, but also because unscrupulous, self interested representatives might lead the people away from their true interests. The Federalists conceived of representative government, and expressed their conception in various constitutional devices, as increasing the chances that true deliberation would take place and thus good public policy would emerge. Representation would increase the odds that reason rather than passion and demagoguery, would prevail in public debate.

Id. at 115 (citations omitted).

[57]*Id.* at 116. In offering an alternative to the traditional checks and balances view of separation of powers, Cook stated:

> Powers were separated and structures of each branch differentiated in order to equip each branch to perform different tasks. Each branch would be superior (although not the sole power) in its own sphere and in its own way. The purpose of separation of powers was to make effective governance more likely.

Id. (citations omitted).

implement the steady administration of law.[58] Finally, one legal scholar argues that agencies adequately function as representative institutions of the people by participating in reasoned deliberations of issues.[59]

In summary, the need for administrative agencies is arguably irrefutable. In some capacity, agencies are necessary for government to adequately and efficiently address the country's various concerns.[60] Congress does not have the necessary expertise nor technical skill for many of the more complex problems. Moreover, the lawmaking process and the structural capacity of the Congress prohibit efficiency and swift reaction to current issues. Further, agencies arguably promote constitutional objectives by preventing factions from influencing lawmaking, by effectively implementing the steady administration of law, and by providing adequate representation of the populace.

The complexities of modern life and modern government force Congress to delegate some responsibility for making daily decisions to

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[58]*Id.* (distinguishing the branches of government in accordance with their different objectives and priorities). When viewing the presidency from a separation of powers perspective, Cook concludes that the President's top priority is "self preservation of the nation." Therefore, the President cannot give full attention to another function which is "steady administration of law." "The institution best equipped to give top priority, if not exclusive emphasis . . . [to steady administration of law] is clearly [the] bureaucracy because of its stability and permanence." *Id.*

[59]*Id.* at 115-16. In discussing how agencies fulfill the representative role embodied within the Constitution, Cook argued:

> The Federalists were obviously confident in their representational scheme, because with the exception of the House of Representatives all federal officers were to be chosen by indirect methods. Thus a modern executive establishment that participates in, indeed adds to, reasoned deliberation and "sedate reflection" on major public issues is quite consistent with the theory of representation embodied in the Constitution. More fundamentally, the republicanism of the Constitution holds that the people, who are the ultimate sovereigns, and the institutions of government in their representative and governing capacities, together constitute the regime. If Congress, the president, and the judiciary can be said to be constitutive of the American regime, then that must also be said of the bureaucracy.

Id.

[60]WALTER GELLHORN, FEDERAL ADMINISTRATIVE PROCEEDINGS 5 (1941) ("The striking fact is that new agencies have been created or old ones expanded not to satisfy an abstract governmental theory, but to cope with the problems of recognized public concern.").

administrative agencies.[61] The vast deliberative body of Congress is functionally unable to adjudicate every dispute, resolve every statutory interpretation or solve every problem which the federal government needs to address. At least in the abstract, agencies are more equipped to exercise reason in individualized circumstances than a vast congressional body.[62]

III. DIFFICULTIES WITH ADMINISTRATIVE AGENCIES

Despite the apparent need for administrative agencies, problems surface as a result of their use. Agencies may appear to provide the mechanism for rational decision-making, however, questions remain as to whether they do in fact act reasonably. Even though agencies may assist Congress with certain complex problems, they cannot circumvent constitutional prohibitions regarding the delegation of power because they are needed. Finally, the use of agencies may provide a shield for politicians who attempt to escape political accountability.

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[61]*Id.* at 5-6. Gellhorn acknowledged:

> If human relationships within society had remained unchanged, if the Nation's territorial limitations had been unexplained, if the arts and sciences had not progressed with the years, the machinery of government might similarly have remained undeveloped. Instead, in the span of a century and a half, new rights and duties among men have emerged, and the Government has responded to demands for their adjustment, their execution, and their protection.

Id. (citation omitted).

[62]Jerry Marshaw, *Prodelegation: Why Administrators Should Make Political Decisions* in PETER H. SCHUCK, FOUNDATIONS OF ADMINISTRATIVE LAW 178 (1994). In discussing the different prodelegation theories, Marshaw stated:

> Yet, while focusing on the rule of law and its undeniable importance in maintaining liberty, we should not forget the apparent equal importance of a contradictory demand: the demand for justice in individual cases. Moreover, the demand for justice seems inextricably linked to the flexibility and generality of legal norms, that is, to the use of vague principles (reasonableness, fairness, fault, and the like) rather than precise . . . .

Id.

A. CONSTITUTIONAL LIMITATIONS OF ADMINISTRATIVE AGENCIES

Congressionally created administrative agencies are subject to constitutional prohibitions to an extent equal to that of the traditional branches of government. In developing the Constitution, the Framers attempted to separate the executive, legislative and judicial branches of government in order to frustrate any tyrannical actions by the other branches[63] and prevent factious groups from improperly influencing the government.[64] Nevertheless, as time has separated our society from the Framers', agencies have developed into mini-governments which characteristically embody the powers of all three branches within themselves.[65] How is this seemingly unconstitutional combination of government authority permitted?

The Framers feared that liberty would be sacrificed if they created a government in which the lawmaking power, executory power and judicatory power were embodied in one department.[66] They desired to separate the

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[63]Samuel W. Cooper, *Considering "Power" in Separation of Powers*, 46 STAN. L. REV. 361, 362 (1994).

[64]Schoenbrod, *supra* note 55, at 372.

[65]K. DAVIS, ADMINISTRATIVE LAW OF THE EIGHTIES 22 (1989).

[66]Cooper, *supra* note 63, at 362-63. In discussing the Founders' justifications for separating governmental powers Cooper stated:

> The Founders' desire to separate the three powers of government can be traced in part to the philosophical milieu of the period. Montesquieu, in particular, was a strong proponent of separating powers:
>
> > When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.
> >
> > Again there is no liberty, if the judiciary power be not separated from the legislative and executive. . . .
> >
> > There would be an end to everything, were the same man or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals.

Id. (citations omitted).

governmental branches in order to prevent tyranny and foster the principles of free and democratic government.[67]

The Framers, however, did not create explicit barriers to the interaction of the branches.[68] Instead, a system of checks and balances was created in order to ensure that one branch did not circumvent the others.[69]

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[67]DAVIS, *supra* note 7, at 67. In discussing the historical background of separation of powers, Davis commented:

> The general idea of separation of powers goes far back into history. It stems from Aristotle, Plato, Polybius, Cicero, Machiavelli, Harrington, Locke, and Montesquieu. . . . Blackstone stated the basic principle: "In all tyrannical governments, the supreme magistracy, or the right both of making and enforcing laws is vested in one and the same man, or one and the same body of men; and wherever these two powers are united together, there can be no liberty."

Id. at 67-68 (citing 1 BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 146 (7th ed. 1775)).

[68]JAMES R. BOWERS, REGULATING THE REGULATORS 13 (1990). Bowers argued that the separation of powers doctrine is not a "wooden, inflexible principle," but that the Framers intended the doctrine to perform a practical function. As he noted:

> But the Framers "never proposed that the exercise of all of each power be entrusted to one . . . body." To the contrary, their understanding was flexible and recognized the importance of shared or blended powers among the three branches of government in order to achieve the purposes of separation of powers.

Id. (citation omitted).

[69]Cooper, *supra* note 63, at 363-64 ("The Founders felt that each branch could not protect its independence without some influence over decisions by coordinate branches."). In the great debate concerning the adoption of the Constitution, the Federalists made arguments advancing a checks and balances theory. James Madison said:

> If a Constitutional discrimination of the departments on paper were a sufficient security to each against encroachments of the others, all further provisions would indeed be superfluous. But experience had taught us to distrust of that security; and that it is necessary to introduce such a balance of powers and interests, as will guarantee the provisions on paper. Instead therefore of contenting ourselves with laying down the Theory in the Constitution that each department ought be separate and distinct, it was proposed to add a defensive power to each which should maintain Theory in practice. In so doing we did not blend departments together. We erected effectual barriers for keeping them separate.

Nevertheless, the Constitution does not expressly provide for a separation of powers.[70] The extent to which the separation of powers principle is found within the four corners of the Constitution is expressly enumerated in Articles I,[71] II,[72] and III,[73] each article pertaining to a separate branch of government.

The ambivalence with which the Framers expressed their desire to create a government of separate powers, and their resulting action embodied within the Constitution, left ample range for dispute concerning the principle of separation of powers. As with any political compromise, the Constitution embodies facets of both the strict separation of power view and the view which advocates a practical interaction between the branches.[74] The United

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Id. at 364; THE FEDERALIST NO. 51, at 321-22 (James Madison) (Clinton Rossiter ed., 1961). Madison, continuing to argue for checks and balances, stated:

> [T]he great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition. . . .
>
> . . . [T]he constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other—that the private interest of every individual may be a sentinel over the public rights.

Id.

[70]DAVIS, *supra* note 7, at 69.

[71]U.S. CONST. art. I, § 1. "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." *Id.*

[72]U.S. CONST. art. II, § 1. "The executive power shall be vested in a President of the United States of America." *Id.*

[73]U.S. CONST. art. III, § 1. "The judicial power of the United States shall be vested in one supreme Court and in such inferior Courts as the Congress may from time to time ordain and establish." *Id.*

[74]Cooper, *supra* note 63, at 367. Cooper argued that the Founders did not adopt a general theory of separation of powers in drafting the Constitution, but instead the document is a result of political compromise. He stated:

> The ambiguity of the Founders' final views on separation of powers should come as no surprise. The Founders fought a war to free themselves

States Supreme Court has advocated both the strict separation doctrine,[75] as well as the practicality of interaction approach.[76]

The vagueness of the Constitution in directly addressing separation of powers bodes particularly troublesome for administrative agencies. In many instances, agencies are created to act as a legislator, executor, and judge.[77]

> from a government they viewed as both unrepresentative and oppressive. . . . This climate ensured that there could be no truly dominant set of views on separation of powers. The Founders' concerns can, at best, provide only insights to guide separation of powers jurisprudence.

Id.

[75]Immigration and Naturalization Serv. v. Chadha, 462 U.S. 919 (1983). Chief Justice Warren Burger's majority opinion illustrated a strict separation of powers principle:

> The Constitution sought to divide the delegated powers of the new federal government into three defined categories . . . to assure, as nearly as possible, that each Branch of government would confine itself to its assigned responsibility. The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted.

Id. at 951; *see also* Bowsher v. Synar, 478 U.S. 714 (1986) (enunciating the Court's decision which declared unconstitutional a feature of the Gramm-Rudman-Hollings Act and advocated a rigid separation of powers principle).

[76]Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935). Discussing Congress's flexibility, Chief Justice Charles Evans Hughes proffered:

> [T]he Constitution has never been regarded as denying to Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the Legislature is to apply.

Id. at 530; *see also* Youngstown Steel Co. v. Sawyer, 343 U.S. 579, 635 (1952). In *Sawyer*, Justice Robert Jackson stated, "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity." *Id.*

[77]DAVIS, *supra* note 7, at 71 ("The very identifying badge of the modern administrative agency is the combination in the same hands of the judicial power to adjudicate cases and the legislative power of rulemaking, along with the executive powers to enforce, to investigate, to initiate, and to prosecute.").

If one were inclined to advocate a strict separation of powers view, then practically all agencies would be unconstitutional delegations of power.[78] Nonetheless, the ambiguity of the Constitution regarding separation of powers permits one to make a reasonable argument that the Constitution does not forbid commingling of the branches within one department, but requires separation as much as practicable.

The judiciary has addressed the constitutionality of administrative agencies on a number of occasions.[79] In reviewing the Court's role, it is important to keep in mind the rationales articulated for delegating power to agencies.[80] If the Court was to adopt a strict separation of powers theory, which would invalidate most agencies, American government would be drastically changed.[81] Rigid adherence to the strict separation of powers doctrine would relegate the decision-making function of the agencies to an inept and arguably, unwilling Congress. The inevitable difficulties in forcing Congress to handle numerous problems for which it is ill-equipped, in addition to the established parameters of the Constitution, have compelled the Court to reject a strict separation of powers doctrine.[82]

In the past, the judiciary has been inconsistent in its decisions on the scope of the separation of powers doctrine. Wavering between a strict

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[78]*See infra* note 81.

[79]*See infra* notes 130-138 and accompanying text.

[80]*See supra* notes 19-60 and accompanying text.

[81]Kenneth Davis, *The Problem of Administrative Discretion*, *in* SCHUCK, FOUNDATIONS OF ADMINISTRATIVE LAW 164 (1994). In discussing the nondelegation doctrine, Davis said:

> The Supreme Court at one time paid lip service to a nondelegation doctrine embodying something like the extravagant version of the rule of law: "That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution." If that were true, one would have to say that as of the 1960's we no longer have the system of government ordained by the Constitution.

Id.

[82]*Id.* ("The Supreme Court was yielding to realism when it acknowledged: 'Delegation by Congress has long been recognized as necessary in order that the exertion of legislative power does not become a futility.'").

application of the doctrine[83] and a "practicable" view,[84] the court has demonstrated the difficulty with interpretating the nature and impact of constitutional limits upon the interaction of the three branches. Under the current Court, however, the separation of powers doctrine as an obstacle for agency delegation is practically obsolete.[85] For example, in the seminal case of *Chevron v. Natural Resources Defense Council, Inc.*, the Supreme Court did not even nominally address the issue of whether Congress had the power to delegate.[86] The Court merely considered the question of when an agency's interpretation of its enabling statute would control as compared with Congress's clear intention.[87]

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[83]Kilbourn v. Thompson, 103 U.S. 168, 168 (1881) (holding that the Constitution of the United States does not vest in either House of Congress the power to punish a congressional member for contempt). In arguing that all powers of government are divided into executive, legislative and judicial, the Supreme Court stated:

> It is also essential to the successful working of this system that the persons intrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other.

Id. at 191.

[84]Nixon v. Administrator of Gen. Serv., 433 U.S. 425, 484 (1977) (holding constitutional an act of Congress judged according to the terms of the act, the intent of members of Congress, and legitimate explanations of its effect). In quoting precedent the Court stated:

> Although acknowledging that each branch of the government has the duty initially to interpret the Constitution for itself, and that its interpretation of its powers is due great respect from the other branches, the Court squarely rejected the argument that the Constitution contemplates a complete division of authority between the three branches . . . . [W]e therefore find that appellant's argument rests upon an 'archaic view of the separation of powers as requiring three air tight departments of government.'

Id. at 442-43 (citation omitted).

[85]*See* Davis, *supra* note 65, at 164.

[86]467 U.S. 837 (1984) (holding that the Environmental Protection Agency's definition of a term in a statute, which enabled it to act to reduce air pollution, was a permissible construction of the statute).

[87]*Id.* at 842-43.

While at first glance the Constitution may seem to provide a formidable barrier for delegating power to administrative agencies that perform all the functions of government, in reality, it provides nothing more than a smoke screen for Congress.[88] Through abstention, the judiciary allows Congress to create agencies that perform all the lawmaking tasks.[89] Despite the ambiguity found in the Constitution with respect to the separation of powers, the rationale underlying the doctrine itself lends considerable support for a strict separation. Despite the unwillingness of the Court to enforce a strict separation, Congress should realize that its ability to delegate broad powers to agencies is limited and therefore should demand that agencies use that power in a reasonable manner.

B. ADMINISTRATIVE AGENCIES WEAKEN DEMOCRACY

Administrative agencies weaken government for several reasons. Delegating power to administrative agencies allows Congress to shield itself from political accountability. By delegating the lawmaking power to administrative agencies, Congress is able to take credit for addressing politically popular issues, while detaching itself from politically unpopular problems.[90] Arguably, Congress is breaching the original contract between the American people and its government, which the the Constitution embodies, by redelegating its constitutional lawmaking power specifically granted to it.[91] Despite early signs that the Supreme Court would adopt a

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[88]*See supra* notes 74-77 and accompanying text.

[89]*See supra* notes 74-77 and accompanying text.

[90]Sargentich, *supra* note 51, at 430. In discussing how Congress has the "best of both worlds" by using administrative agencies to make policies, Sargentich stated:

> That is, capacious delegations serve Congress' interests of appearing to address public problems through legislation and thereby to respond to whatever constituent interests support the legislation. At the same time, Congress maintains the ability to distance itself from unpopular policies implemented by agencies by claiming that those, after all, were not what it had in mind.

Id. (citations omitted).

[91]BOWERS, *supra* note 68, at 10. In discussing the impact of congressional redelegation on representative government, Bowers argued:

> A central objective of representative government is to secure the accountability of the lawmakers to the governed. One way in which this

nondelegation theory,[92] the Court has since permitted Congress to delegate.[93] The apparent need for Congress to administer its power has even overcome the visible concern that the administration of such power would weaken the American republic.

The Constitution expressly provides "[a]ll legislative powers herein granted shall be vested in a Congress."[94] The Congress is the governmental body that attempts to provide the most effective and efficient representation of the American people.[95] Nevertheless, when Congress delegates this express power to agencies through broad statutes, it is encouraging irrational

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> accountability is secured is through free and open elections in which those who will be governed choose those who will do the actual governing. Under a scheme of representative government, elections substitute consent to be governed for being ruled as the foundation of the state's power. Implicit in this consent is an expectation that those persons or institutions to whom consent is extended will actually exercise the lawmaking authority granted to them. But in redelegating lawmaking authority to administrative agencies, legislatures violate this expectation because they transfer lawmaking authority to unelected administrative agencies, something to which the people had not originally consented.

Id.

[92]United States v. Shreveport Grain & Elevator Co., 287 U.S. 77, 85 (1932) ("That the legislative power of Congress cannot be delegated is, of course, clear.").

[93]Sunshine Anthractite Coal Co. v. Adkins, 310 U.S. 381, 398 (1940) ("Delegation by Congress has long been recognized as necessary in order that the exertion of legislative power does not become a futility."); Federal Power Comm'n v. New England Power Co., 415 U.S. 352, 352-53 (1974) (Marshall J., concurring in part and dissenting in part). Justice Marshall stated:

> The notion that the Constitution narrowly confines the power of Congress to delegate authority to administrative agencies, which was briefly in vogue in the 1930's, has been virtually abandoned by the Court for all practical purposes, at least in the absence of delegation creating 'the danger of overbroad, unauthorized, and arbitrary application of criminal sanctions in an area of [constitutionally] protected freedoms.'

Federal Power Comm'n, 415 U.S. at 352-53.

[94]U.S. CONST. art I, § 1.

[95]DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY 99-106 (1993) (discussing that the Congress, and to a lesser extent the President, provide accountability to the American people).

policy decisions.[96] Furthermore, it erodes the effective representation that Congress was created to provide.[97]

When the Framers developed our republican form of government, the American people entered into a contract relinquishing their inherent, absolute control over their own affairs, in exchange for a limited government that was composed of elected representatives.[98] The people maintained the power and control of laws and lawmakers by reserving the power to duly elect the officials.[99] Agency delegation, however, upsets the people's power to

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[96]Gellhorn, *supra* note 26, at 347. Gellhorn, in arguing that Congress has not fulfilled its Constitutional responsibilities by delegating power to administrators via broad statutes, stated:

> Statutes that allow administrators to determine what is in the 'public interest, convenience or necessity' simply fail as exercises of that power. To legislate is to make normative policy choices, and the broad delegations are defective because they leave basic normative issues unanswered and thus within the realm of the delegate.

Id.

[97]SCHOENBROD, *supra* note 95, at 99. Schoenbrod maintained that proponents of administrative governmental agencies disregard the fact that the agencies have inherent the power to implement policies without any parameters. In addition, he stated:

> In the words of Robert Dahl, proponents of such a government [administrative agencies] maintain that it grafts "the expertness of [Platonic] guardianship to the popular sovereignty of the demos," but he warns that it may instead graft "the symbols of democracy to the defacto guardianship of the policy elites." When the elected lawmakers delegate, the people lose control over the laws that govern them.

Id. (citation omitted).

[98]Gellhorn, *supra* note 26, at 347-48. Gellhorn, in discussing the theoretical foundation of the idea that legislators be made responsible for their decisions, stated:

> The legislator's authority to delegate its lawmaking power is severely constrained not so much because of a fear of its possible misuse, but because of a conviction that the people agreed to relinquish their most important power only to representatives that they alone have chosen.

Id. at 348 (citation omitted).

[99]SCHOENBROD, *supra* note 95, at 99. Schoenbrod expanded on this idea:

> One way that the Constitution gives people control over the laws is to require majorities in the House and Senate to enact them. Constituents can

control their representatives and their respective policy decisions because the policy decisions originate in an agency which is controlled by unelected bureaucrats who are not directly responsible to the American people.[100]

The lack of accountability resulting from the delegation of lawmaking powers to agencies further explains why agencies have difficulty providing reasonable decisions. By adopting a constitutional democracy, Americans entrusted their inherent rights to the government with the condition that the power would only be exercised by elected officials.[101] The American people realized that government would need to be constrained because it could not provide all the solutions to all of America's problems.[102] Thus, the people retained a vital element of control over the legislators through the power of the vote and used that power to decide what issues they wanted their officials to address. If the American people believed that government

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refuse to reelect a legislator who has voted for a bad law.

Id.

[100]Cook, *supra* note 19, at 106-07. Cook discussed the competing views of the representative function of the bureaucracy. In addition he stated:

> [T]he hierarchical view states, in essence, that only certain public officials can fulfill the role of representative: those authorized to act by and for the citizenry through popular elections and held accountable through the same device. Bureaucracy is viewed as a subservient institution, however, not acting for but serving both elected officials and ultimately, citizens. Hence, bureaucrats are never representatives, in particular because they are not authorized to act, not held accountable for their actions, nor able to receive instructions or policy mandates directly through popular elections.

Id.; *see also* BOWERS *supra* note 68, at 11 (discussing how the legislators themselves lose control when power is redelegated).

[101]*See* Gellhorn, *supra* note 26, at 347-48. Gellhorn argued that the Congress has breached the Constitution by abdicating its power to make the laws. *Id.* at 349. Further, Gellhorn contended that "Locke's contractarian view, whereby the people accept collectively imposed obligations over private authority, was accepted by the framers." *Id.* at 348 (citation omitted). The evidence of the early American's aversion in granting the lawmaking power to a representative body is reflected in the Constitution. *Id.* Gellhorn posited that the people granted the government the power to put restrictions on their personal authority in exchange for a separation of powers, a "special and detailed process[] outlined in the Constitution for selecting legislators and for regulating the consideration and adoption of the laws," and "article I's provision that all lawmaking power resides in Congress and by implication, nowhere else." *Id.*

[102]*Id.*

could provide all reasonable answers to all problems, then the people would not have created and adopted a limited government with strict constraints on its power.[103]

Administrative agencies thwart the Constitution's attempt to provide limited government and effective representation. Even though agencies are needed in some capacity to alleviate the overwhelming workload of the Congress, congressional members should not be permitted to avoid controversial issues by delegating them to agencies. Agencies, beholden to no one, have little incentive to abide by the people's mandate which is to provide reasonable decisions that are in the nation's best interests.

C. INABILITY OF AGENCIES TO PRODUCE REASONABLE DECISIONS

Arguably, administrative agencies that combine the powers of all three branches of government violate the Constitution every time these powers are exercised.[104] In addition, when unelected bureaucrats act within agencies to create and implement law, they undermine the fundamental principle originally contracted for by the American people, representative democracy.[105] Despite these arguable infringements on the fundamental principles of the American people, the role of administrative agencies in American government is well established.[106] In some capacity, agencies are regarded as a necessity for a burdened Congress, to create, implement and adjudicate policy.[107]

The realistic constitutional and accountability concerns existent when government utilizes agencies, suggest powerful incentives for agencies to use their authority in a rational and reasonable manner. Agencies waver on the

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[103]*See supra* note 98.

[104]*See supra* notes 68-70 and accompanying text.

[105]*See supra* notes 90-91. The American people surrendered the inherent right to control themselves when they formed the United States. Undoubtedly, relinquishing the power to make the laws which govern them to a government was an extremely important decision. If there was a proposition to restart the United States today, the American people would most definitely reject relinquishing the power to make the laws to a behemoth national government. Yet, that is exactly what we have. Not only have elected officials obtained massive amounts of power to make laws and control the populace, but even more troubling is that unelected bureaucrats are given the power to make laws, which is the power to destroy.

[106]*See supra* note 81.

[107]*See supra* note 76.

edge of constitutional life,[108] therefore, they should refrain from making arbitrary determinations and be cautious to exercise reasonable decision-making. The reality, however, is that agencies often act in unreasonable or irrational ways.[109]

Administrative agencies' inability to act reasonably results directly from congressional allocation of power. Finding a medium where agencies are afforded enough power to make reasonable decisions is difficult. An inevitable tension exists between the granting of power to an agency and constraining its actions. On the one hand, Congress wants to give agencies enough freedom so that they can utilize their expert knowledge and exercise discretion in deciding particular cases. On the other hand, the granting of total unfettered power to agencies may lead to decisions which are not in the best interests of the American people.

The actions taken by the Federal Communications Commission ("FCC") provide an excellent example of how and why an agency acts unreasonably even when it is granted broad discretionary power.[110] When the FCC was delegated the power to regulate cable television, it had difficulty deciding what specific action should be taken.[111] Even with broad power, the FCC switched its decision by first adopting a rule which supported the status quo of over-the-air broadcasting, then adopted a position which supported cable television.[112] The irratic decision-making process by the FCC evidences one agency's inability to formulate the proofs needed to make a decision. Ironically, the FCC was unable to produce a reasonable decision as to how it should regulate cable television even when Congress delegated broad authority to it without any parameters.

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[108]This is evident by the extreme positions taken by the Supreme Court throughout history. *See infra* notes 130-137 and accompanying text.

[109]When elected representatives, such as Congress, act in a unreasonable or irrational manner, the American people are given the choice at some point to express their dissatisfaction via an election. The problem with administrative agencies is that they are far enough removed from the political mechanism to be shielded from election accountability and close enough to politicians when agencies decisions are favorably and politicians want to take credit.

[110]L. Jaffe, *The Illusion of the Ideal Administration*, *in* ROBERT RABIN, PERSPECTIVES ON THE ADMINISTRATIVE PROCESS 131-32 (1979).

[111]*Id.* at 131 ("Even the adoption of regulations was marked by indecision.").

[112]*Id.*

The FCC's unpredictable decision-making process was explained well by the chairman of the FCC during the Reagan administration, Marc Fowler.[113] In discussing the deliberations of a telecommunications bill which 'unnaturally' shed regulatory power from Congress, Fowler states that "'soft corruption' flourishes because the underlying legislation is so complicated. . . . As a result, lawmakers abdicate their policy setting role. Instead of deciding the issues, Congress decides which regulatory forum they should be decided in."[114]

In addition, the former FCC chairman explained how certain Congressmen lobbied the FCC intensively for their particular agendas which were often not in the American people's best interests.[115] The FCC example is distressing. The Congress abdicates the power to regulate an industry because it does not understand the legislation and, at least, in theory, believes an agency can better decide the issues. Thus, when the agency, here the FCC, utilizes this power, individual Congressmen put political pressure on the agency to conform to unreasonable demands.[116]

Another example of unreasonable agency decision-making occurred when the Federal Trade Commission ("FTC") recommended the imposition

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[113]Marc Fowler, *How Washington Corrupts Telecom*, WALL ST. J., Oct. 11, 1995, at A14.

[114]*Id.* Fowler acknowledged competing situations occurring when legislation is pending on a politically interested issue such as telecommunications. *Id.* He argued that "the best products or services don't win out, the best lobbying does." *Id.* "[T]elecom brings out soft corruption designed to coerce actions at the FCC, to which Congress often punts the hard questions." *Id.*

[115]*Id.* Fowler stated:

> [A] key House Telecommunications Subcommittee member lobbied the FCC intensively to retain a regulatory structure that we found had impermissibly generated a rate of return of more than 1,000% for one rural telephone company. The lobbying effort was all the more remarkable because the company was not located in the member's district. But the member had gotten a $1,000 campaign donation from the company principal.

Id.

[116]*See id.* This example is very interesting because in some ways it may be arguing for greater agency discretion. However, even the FCC chairman said that Congress should be deciding these regulatory proposals. The problem occurs when Congress as a whole abdicates is responsibility and then individual congressmen use the agency for their own political purposes.

of restrictions on television advertisements aimed at young children.[117] The FTC proposed a complete ban on television advertising for children under the age of eight and a ban on advertisements aimed at children under twelve for "sugared food products."[118] The intense opposition to this proposal forced the Congress and the President to halt all consumer activism by the agency.[119] "Not only were measures proposed by the agency that smacked of censorship, but the proceeding was also run in such a way that affected business interests could claim, with considerable justification, that they were not granted a fair hearing during the commission's deliberations."[120] The passionate opposition to the FTC recommendation demonstrates that the populace viewed the measure as unreasonable in light of alternative methods for protecting children from sugared foods.

Whether the agency is given strict rules to follow, or unfettered discretion, the potential for unreasonable decision-making is evident.[121] Ironically, agencies may suffer from the same inability to produce reasonable decisions that forced the Congress to abdicate their power to the agencies originally.[122] In fact, in some instances, where Congress does delegate

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[117]HARRIS & MILIKIS, THE POLITICS OF REGULATORY CHANGE 184-86 (1989).

[118]*Id.* at 184.

[119]*Id.* at 185.

[120]*Id.* at 185 (citation omitted).

[121]Surely this is not an attempt to extrapolate from these examples that all agencies decisions are irrational or unreasonable. However, there are many instances when agencies do not adequately perform their duties. The American people should not be required to accept a system of government agencies in which a large proportion of the agencies produce unreasonable results, despite the good a small number of agencies may do.

[122]There are a host of examples of agencies acting unreasonably or irrationally. Scouring the daily newspapers will undoubtedly uncover some agency action that the American people find offensive or unreasonable. Some recent examples include: James Bovard, *The EEOC's War on Hooters*, WALL ST. J., Nov. 17, 1995, at A14. Bovard argued that "the [Equal Employment Opportunity Commission] EEOC is on the verge of destroying the persona of one of America's fastest-growing restaurant chains." *Id.* Despite the fact that Hooter's hiring policy is admittedly to "[provide] entertainment, diversion and amusement based on the sex appeal of the Hooters Girl," the EEOC is demanding that Hooters owes $22 million in back pay to males who never worked in the restaurant. *Id.* Probably the most insidious aspect of this agency is the fact that "EEOC regulations allow any commissioner to accuse any company of discrimination, after which EEOC investigators seek supporting evidence." *Id.* "[B]ecause a handful of EEOC officials believe it is reprehensible for a restaurant to use titillation to sell beer and greasy

power to an administrative agency, Congress itself may be the barrier to reasonable decision-making. Given the tenuous constitutional nature of agencies and the political shield from behind which they act, the American people should not have to settle for the inadequate in the agencies fulfillment of their responsibilities. Rather the American people require that agencies act responsibly and reasonably when making decisions.

IV. CAN ADMINISTRATIVE AGENCIES FULFILL THE TASK OF MAKING DECISIONS IN A RATIONAL AND REASONABLE MANNER?

The current shackles administrative agencies are burdened with may foil them in their attempt to make reasonable decisions. In addition, the constitutional separation of powers doctrine and the lack of accountability for lawmakers using agencies may provide formidable obstacles for agencies if the courts were to adopt a strict view of the Constitution. Despite these inextricable weaknesses of administrative agencies, the reality of modern government demands some type of administrative bureaucracy.[123]

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food, the weight of the federal government is falling on Hooters' head." *Id.*; Mathew L. Wald, *In Hearings on Jet Crash, Certification is New Issue*, N.Y. TIMES, Nov. 16, 1995, at A16. The National Transportation Safety Board is an independent agency that makes recommendations to the FAA to certify airplanes. *Id.* Hearings are being conducted to determine if the agency improperly certified a Boeing 737 which crashed on two separate occasions killing a total of 187 people. *Id.*; Terry Anderson, *How the Government Keeps Indians in Poverty*, WALL ST. J., Nov. 22, 1995, at A14. Anderson argued that the reason American Indians are impoverished is because their land is controlled by the Bureau of Indian Affairs ("BIA"). *Id.* He stated:

> The land that is privately owned is far more productive than [the land allotted to individual Indians by the BIA or to the tribes of Indians by the BIA.] Indeed, a study of agricultural land on a large cross-section of Western reservations indicates that tribal trust land is 80% to 90% less productive than privately owned land. Individual trust land is 30% to 40% less productive. . . .
>
> BIA trusteeship imposes layers of bureaucracy and legal constraints on Indian land-use decisions.

Id.; *see* SIDNEY A. SHAPIRO & JOSEPH P. TOMAIN, REGULATORY LAW AND POLICY (1993) (discussing numerous examples of how regulation is developed and whether the agency's actions are reasonable in light of the legislation's objectives).

[123]MICHAEL, *supra* note 5, at 12-15 (discussing "[h]ow [did] the American citizen get to the point where so may vital decisions about how he lives are made by anonymous agencies").

Nonetheless, the current administrative bureaucracy should not sacrifice the more abstract constitutional principles that give rise to government authority in the first instance.

The rise of the administrative bureaucracy in American lawmaking does not supersede the original contract the American people made with their government.[124] Emerging from the constitutional debate was a government in which representatives, acting in a deliberative process, making decisions balancing their personal views, interests of their constituents and the public in general.[125] The Constitution embodies the principle that in a representative government, decisions should not be based on personal feelings but that "'practical reason' [should] be used to settle social issues."[126] Agencies have become a "fourth branch of government,"[127] therefore they must conform to the constitutional limitations placed on all other branches of government and exercise practical reasoning when making decisions that affect the American people.[128]

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[124]Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 45-46 (1985). In discussing the type of government the Framers envisioned from their political compromise, Sunstein stated:

> The picture that emerges has been aptly termed 'deliberative democracy.'. . . Instead, the national representatives were to be above the fray of private interests. Above all, their task was deliberative. Indeed, the task of the legislator was very close to the task of the citizen in the traditional republican conception.

Id. (citation omitted).

[125]*Id.* at 47 ("The result was a hybrid conception of representation, in which legislators were neither to respond blindly to constituent pressure nor to undertake their deliberations in a vacuum.").

[126]*Id.* at 31-32.

[127]Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State* in SCHUCK, FOUNDATIONS OF ADMINISTRATIVE LAW 26 (1994) ("Administrative agencies—the so called fourth branch of government—may be the only institutions capable of fulfilling the civic republican ideal of deliberative decisionmaking.").

[128]Bowen v. American Hosp. Assoc., 476 U.S. 610, 627 (1986). In enunciating the requirement that an agency's decision be rationally connected to the facts, the Supreme Court stated:

> Our recognition of Congress' need to vest administrative agencies with ample power to assist in the difficult task of governing a vast and complex industrial Nation carries with it the correlative responsibility of the agency

A. REMOVAL OF AGENCIES FROM THE PROCESS

Probably the most deliberate method of ensuring that agencies exercise reasonable decision-making would be a revival of the nondelegation doctrine.[129] The nondelegation doctrine would void a delegation of power by Congress to an agency at the initial stage of the transfer.[130] In effect, the agency would be prevented from exercising any decision-making, whether reasonable or not, because the delegation would be constitutionally impermissible at the outset.

Although early Supreme Court decisions accepted the nondelegation doctrine as a viable constitutional theory,[131] the Court recognized Congress's need to exercise some delegation of power.[132] In attempting to balance these competing interests, the Court struggled with the precise role of the nondelegation doctrine. The nondelegation doctrine's constitutional significance has radically changed over the years as a result of this tension. The doctrine has decreased in significance beginning with the Court's attempt

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> to explain the rationale and factual basis for its decision, even though we show respect for the agency's judgement in both.

Id.

[129]*See infra* notes 130-134.

[130]Field v. Clark, 143 U.S. 649 (1892).

[131]*Id.* at 692. Justice Harlan argued, "That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution."; United States v. Shreveport Grain & Elevator Co., 287 U.S. 77, 85 (1932) ("That the legislative power of Congress cannot be delegated is, of course, clear."); Wayman v. Southard, 23 U.S. 1, 42 (1825) ("It will not be contended that Congress can delegate to the Courts, or to any other tribunals, powers which are strictly and exclusively legislative.").

[132]*Clark*, 143 U.S. at 694 ("There are many things upon which wise and useful legislation must depend which cannot be known to the law-making power, and must therefore be a subject of inquiry and determination outside of the halls of legislation."). In addition, there are many later decisions in the Court's history that recognize the need for delegations of power. *See, e.g.*, Mistretta v. United States, 488 U.S. 361, 364-65 (1989); United States v. Robel, 389 U.S. 258, 274 (1967) (Brennan, J., concurring); American Power & Light Co. v. SEC, 329 U.S. 90, 105 (1946); Yakus v. United States, 321 U.S. 414, 424 (1944); Opp Cotton Mills v. Administrator, 312 U.S. 126, 145 (1941); Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 398 (1940); Schecter Poultry Corp. v. United States, 295 U.S. 495, 552 (1935) (Cardozo, J., concurring).

to set standards for its application,[133] then, to arbitrary applications of the doctrine,[134] and finally to a total withdrawal from using the doctrine.[135] In modern day constitutional jurisprudence, the nondelegation doctrine does not appear to provide any authority for prohibiting delegations of Congressional authority.[136]

Despite the opinion of Justice Marshall that the nondelegation doctrine was "virtually abandoned by the Court for all practical purposes,"[137] the doctrine may have some modern day applications. The resuscitation of the nondelegation doctrine may be an initial step toward forcing agencies to take more responsibility for their decisions. For example, if Congress was threatened to be deemed not to have the constitutional power to delegate certain specific authority, the risk of total annihilation of an agency may

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[133]J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 406 (1928). "In determining what it [Congress] may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the governmental co-ordination." *Id.* at 406. Further, delegation of power is permissible, "if Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform." *Id.* at 409.

[134]*Schecter*, 295 U.S. at 529. Chief Justice Hughes stated, "The Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested." *Id.*; Panama Refining Co. v. Amazon Petroleum Corp., 293 U.S. 388, 415, 430 (1935) (striking down § 9(c) of the NIRA because it failed to create a framework in which the President was to act). In *Panama Refining Co.*, the Court said, "[I]n every case in which the question has been raised, the Court has recognized that there are limits of delegation which there is no constitutional authority to transcend. We think that § 9(c) goes beyond those limits." *Id.* at 430.

[135]Skinner v. Mid-America Pipeline Co., 490 U.S. 212, 219 (1989). In reiterating its position on the nondelegation doctrine, the Supreme Court stated:

> Earlier this Term, in Mistretta v. United States, we revisited the nondelegation doctrine and reaffirmed our longstanding principle that so long as Congress provides an administrative agency with standards guiding its actions such that a court could "'ascertain whether the will of Congress has been obeyed,'" no delegation of legislative authority trenching on the principle of separation of powers has occurred.

Id. (citations omitted).

[136]*Id.*

[137]Federal Power Comm'n v. New England Power Co., 415 U.S. 345, 353 (1974) (Marshall, J., concurring).

force it to respond to the people and produce reasonable decisions. In addition, the threat of reviving the nondelegation doctrine would, undoubtedly, ensure the full attention of the Congress because of the added workload accompanying such a revival.[138]

Nevertheless, the nondelegation doctrine does not seem to provide an adequate or feasible solution to force agencies to act reasonably. The complexities of modern government demand some level of delegation and the Supreme Court's recent decisions affirm the ability of Congress to delegate.[139] The nondelegation doctrine could be useful as a threat to get the attention of Congress and the agencies. Reality suggests, however, that the Court would be unwilling to revive the doctrine for such purposes.

Since a resuscitation of the nondelegation doctrine does not seem forthcoming, a less extreme method of removing power from agencies may be acceptable. Two approaches that Congress may consider in attempting to restore reasonable actions by agencies include privatization and greater state delegation.

A possible alternative to completely obliterating administrative agencies may be to remove certain of their activities to the private sector. In a move that is sure to cause controversy, President Clinton signed into law a bill which allocated $13 million to the Internal Revenue Service "to start a program to use law firms and private collection agencies to collect unpaid

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[138]The burdens imposed on Congress by implementing the nondelegation doctrine would not be any less substantial because the Constitution would require it to act and not delegate. The Courts decision in Mistretta v. United States, 488 U.S. 361 (1989), may provide an example when the Court recognizes the potential effects of finding a delegation of Congress unconstitutional. If the Court had found the delegation of Congress unconstitutional, the judiciary would have had to resentence approximately 4500 individuals. *See* Kamen, *Court Backs Rules on Sentencing; Decision Removes Doubts on Validity of the 1984 Reform Act*, WASH. POST, Jan. 19, 1989, at A1, col. 6:

> Of the nearly 40,000 federal defendants who were sentenced in the 12 months after the guidelines went into effect Nov. 1, 1987, 5,651 committed crimes after that date and could have been sentenced under the guidelines, according to the commission. Of that number, only 1,187 were sentenced under the old system. . . . In addition, some defendants have already completed their sentence and others are likely to face stiffer sentences under the guidelines and are not expected to appeal.

Id.

[139]*See supra* note 135 and accompanying text.

taxes."[140] This is currently only a pilot program and critics of the plan question whether the IRS has to even spend the money on such a program.[141] Nevertheless, passed legislation allocating money for private debt collection may provide a signal for the future of privatizing some activities traditionally allocated to federal agencies.[142]

Another option, in lieu of completely eliminating agencies, may be to reassess the relationship between the Federal and state governments. If Congress cannot effectively and efficiently solve an issue, then Congress may leave the matter for the States, instead of delegating the issue to an unelected bureaucratic administrative agency.[143] The mere fact that Congress cannot adequately address a problem and is resigned to delegating it to an agency should not supersede the American people's right to control those who make vital decisions concerning their lives. If the Congress were to only delegate those responsibilities to agencies in which they could be held politically accountable for, then all other issues could be addressed by the States and by duly elected state officials.[144]

B. JUDICIAL CONTROL OF ADMINISTRATIVE AGENCIES

Besides approaches that would in some way either remove all power from agencies or strip them of power in lieu of private authorities or the States, the current method most often followed attempts to control and

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[140]Tom Herman, *U.S. to Explore Private Tax Collection*, WALL ST. J., Nov. 22, 1995, at A2.

[141]*Id.*

[142]There are undoubtedly many agency activities which could not be privatized. However, privatization may introduce more efficiency and effectiveness into traditional agency functions that drain the taxpayers dollars. Especially with the current political climate, privatization may be a viable solution despite outside (or inside agency) opposition. "The IRS itself clearly isn't happy with the measure, which originated among House Republicans." Herman, *supra* note 140, at A2.

[143]*See* U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

[144]The role of the Federal government and state governments is being discussed in the context of the 1996 Presidential election. In fact, Senator Dole is noted for carrying a copy of the Constitution's 10th Amendment in his pocket. If the current political climate is an indicator of the future, then there is a possibility that more of the Federal government's responsibilities will be shifted to the states.

monitor agencies via the judiciary. The ways in which courts have attempted to control agencies is endless and could not be fully explored here. A brief comment on judicial control of agencies is warranted however, because it is the most accepted method for restraining agencies.

The case law on administrative agencies is vast and in many instances extremely convoluted.[145] As administrative law has developed, the method courts have utilized to control agencies has in turn changed. In early years, the Court did invalidate agency decisions based on a constitutional theory of separation of powers.[146] Yet, this judicial interpretation of the Constitution does not function as a barrier to agencies today.[147] In another attempt to control agencies, the Court attempted to review the substance of agency decisions by reviewing the agency's interpretation of the law and findings of fact. The Court, however, has shown great deference to the agency in this area as well because of the technical nature of many agency decisions.[148] Nevertheless, this temporary setback did not forestall the courts attempts at supervise agencies. The substantive review of agencies was unsuccessful in controlling agencies, therefore the Court adopted a more familiar and arguably fairer review mechanism, reviewing the procedure used by the

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[145]*See* DAVIS, *supra* note 7.

[146]*See supra* note 131 and accompanying text.

[147]*See supra* note 135 and accompanying text.

[148]*See* Chevron v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984). Indicating the deference that is to be given to agencies even with respect to findings of law and fact, the Court stated:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, as always, is the question whether Congress has directly spoken to the issue. If the intent of Congress is clear, that is the end of the matter; for the court as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent, or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construct of the statute.

Id. (citations omitted).

agency. Perhaps ironically, the Court even curtailed its own ability to impose limitations and requirements on procedure used by agencies.[149]

Judicial review of agency actions has undoubtedly been effective to some extent in limiting unreasonable actions by agencies. Despite the good faith efforts by the courts, agencies still are given tasks which they perform in an irrational and sometimes harmful manner.[150] Even with stricter judicial control, the Court can only do so much to limit an agency's unreasonable actions. The very nature of judicial review prevents imposing limitations on agencies until after they have acted. If the agency decision is particularly egregious, judicial review may be an inadequate remedy.[151]

V. CONCLUSION

The American people have a right to demand that the people in charge of making decisions concerning their lives act in a reasonable manner. In addition, the complexities of modern life demand that many of those decisions be made on an individualized basis. Statutory laws are simply unable to be written to such precision that each nuance of a problem would be addressed. Administrative agencies which theoretically encompass the ability to handle technical issues, act efficiently, and set meaningful standards seem to be the organizations which can act on an individualized issue with reason and rationality.

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[149]*See* Vermont Yankee v. Natural Resources Defense Council, 435 U.S. 519, 525 (1978) (remanding case to the Court of Appeals because the lower court had engrafted "their own notions of proper procedures upon agencies entrusted with substantive functions by Congress"). The Court strictly cautioned lower courts from imposing additional procedural impediments upon agencies by stating:

> [A]dministrative agencies and administrators will be familiar with the industries which they regulate and will be in a better position than federal courts or Congress itself to design procedural rules adapted to the peculiarities of the industry and the tasks of the agency involved.

Id. (citation omitted).

[150]*See supra* note 122 and accompanying text.

[151]This instance recognizes the inherent limitation of a court system in general. A court review, in most instances, can only provide a remedy after the particular action has occurred. The exception is the injunction. However, the reach of agencies in every aspect of our lives, undoubtedly, results in some harmful action by the agency before we can act or before we may even realize what is occurring.

Nevertheless, the proliferation of agencies is shadowed by the realities of a bureaucratic administrative government. Coupled with the constitutional considerations and the accountability concerns of agencies, is the fact that current agencies themselves act unreasonably. The irrational decision-making of an agency is particularly troublesome because they do waver on the edge of constitutionality, and the bureaucrats themselves are not directly responsible to the American people.

Admittedly, imposing reasonability requirements on agencies is much easier to advocate than implement. An additional problem is in identifying whether the particular agency needs more discretion to make decisions, or whether tighter restraints are necessary. Regardless, some action should be taken to restore rationality to a bureaucratic system which affects every person's life daily.