



1987

Orphaned Rules in the Administrative State: The Fairness Doctrine and Other Orphaned Progeny of Interactive Deregulation

Susan Low Bloch

Georgetown University Law Center, bloch@law.georgetown.edu

This paper can be downloaded free of charge from:
<https://scholarship.law.georgetown.edu/facpub/1566>

Susan Low Bloch, *Orphaned Rules in the Administrative State: The Fairness Doctrine and Other Orphaned Progeny of Interactive Deregulation*, 76 *Geo. L.J.* 59 (1987).

This open-access article is brought to you by the Georgetown Law Library. Posted with permission of the author.
Follow this and additional works at: <https://scholarship.law.georgetown.edu/facpub>



Part of the [Legislation Commons](#)

ARTICLE

Orphaned Rules in the Administrative State: The Fairness Doctrine and Other Orphaned Progeny of Interactive Deregulation

SUSAN LOW BLOCH*

I. INTRODUCTION

The recent trend toward deregulation has revealed a fundamental weakness in our administrative state. Agencies that have decided to eliminate agency-created rules that no longer serve their statutory mandate are effectively prevented from doing so by pressure from members of Congress who want to preserve the rule but are unable or unwilling to enact it as law. Typically, an agency desirous of reforming a rule issues a notice of proposed rulemaking, receives and evaluates comments from the public, and announces a decision to maintain, modify, or eliminate the rule.¹ Occasionally, members of Congress enter the picture seeking to prevent or reverse the agency's decision. In many of these instances, through a process I have called "interactive deregulation," the agency is ultimately able to reach a resolution satisfactory to both the agency and Congress.² At other times, however, the

* Associate Professor, Georgetown University Law Center. B.A., Smith College; M.A., Ph.C., J.D., University of Michigan. I wish to thank Professors Steven Goldberg, Vicki Jackson, Tom Krattenmaker, Louis M. Seidman, Girardeau Spann, and Mark Tushnet for their valuable comments on earlier drafts; Professor E. Donald Elliott for his insightful conversations on the subject; and Debra Antziz, Michael Colella, Laurie Fulton, and Lauren Mills for their helpful research assistance.

1. Under the Administrative Procedure Act (APA), agency rulemaking is defined as "formulating, amending, or repealing a rule." 5 U.S.C. § 551(5) (1982). Procedures for "informal" or "notice and comment" rulemaking are set forth in § 553. This section requires that an agency publish a notice of proposed rulemaking in the *Federal Register*, provide interested persons an opportunity to participate in the rulemaking through the submission of written comments (occasionally supplemented by an oral presentation), and after considering the relevant matter presented, incorporate in its final action a statement explaining the "basis and purpose" for its decision. 5 U.S.C. § 553(b), (c) (1982). These "informal rulemaking procedures" apply to modifying and eliminating existing rules as well as to promulgating new ones. *Action on Smoking & Health v. Civil Aeronautics Bd.*, 713 F.2d 795, 800 (D.C. Cir. 1983) (agency must comply with notice and comment procedures in an attempt to remedy a rulemaking that had been vacated); *Consumer Energy Council of Am. v. FERC*, 673 F.2d 425, 446 (D.C. Cir. 1982) (agency must follow APA procedures even though such procedures were used only a year earlier when rule was promulgated), *aff'd sub. nom. Process Gas Consumers Group v. Consumer Energy Council of Am.*, 463 U.S. 1216 (1983).

2. Congress, for example, strongly opposed the Federal Communications Commission's (FCC) efforts to modify and eventually eliminate its restrictions on group ownership of media interests. Shortly after the agency announced its final decision to replace the rule with a more lenient version

dialogue between Congress and the agency breaks down, and congressional pressure effectively quashes agency efforts to repeal or modify rules. The agency, intimidated by congressional pressure, refuses to act and abandons its effort to reform the rule, despite its conclusion, often final and on the record, that the rule is no longer appropriate. In effect, the rule becomes "orphaned"—disowned by the agency that created it, never enacted by Congress, but still in force as law.³

The most dramatic examples of rule orphaning have occurred recently in the Federal Communications Commission's (FCC or Commission) efforts to deregulate the communications industry, particularly its efforts to eliminate the fairness doctrine and the related right to reply rules—the personal attack and political editorializing rules.⁴ The FCC's initiation of proceedings to eliminate these rules provoked intense outrage from a few key congressmen. Representative (now Senator) Timothy Wirth, Chairman of the House Subcommittee on Telecommunications, Consumer Protection and Finance,

that would sunset in five years, Report and Order, 49 Fed. Reg. 31,877 (1984), Congress imposed a moratorium on the agency's implementation of the revision. Act of Aug. 22, 1984, Pub. L. No. 98-396, § 304, 98 Stat. 1369, 1423 (1984). During the moratorium, the agency suspended its "final order," considered the legislators' views, and ultimately decided upon a rule similar to the lenient one previously announced but with a few additional features and without the automatic sunset provision. Amendment of 73.3555, 100 F.C.C.2d 74, 50 Fed. Reg. 4666 (1985) (to be codified at 47 C.F.R. § 73.3555).

Congress and the FCC were also able to reach an accommodation on the question of access charges that arose in the process of deregulating the telephone industry. The FCC had decided to impose a substantial monthly "customer access line charge." *In re MTS and WATS Market Structure*, 93 F.C.C.2d 241, 315-16 (1982) (computation of charge). However, as a result of strenuous congressional opposition, the Commission delayed the imposition of any access charges for 18 months. After the delay, the agency imposed the charge for a transitional period until 1990, adding supplemental measures designed to assist low income families meet the increased charges. *MTS and WATS Market Structure; and Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board*, 49 Fed. Reg. 48,325 (1984) (proposal); *MTS and WATS Market Structure; and Establishment of a Joint Board; Amendment*, 50 Fed. Reg. 939 (1985) (adoption of amendment).

3. When "agencies are authorized to prescribe law through substantive rulemaking, the administrators' regulation is not only due deference, but is accorded 'legislative effect.'" *INS v. Chadha*, 426 U.S. 917, 986 (1983) (White, J., dissenting); see *Batterton v. Francis*, 432 U.S. 416, 425 n.9 (1977) (substantive agency regulations have "force and effect of law").

4. The fairness doctrine was first explicitly articulated by the FCC in a 1949 report called *In re Editorializing by Broadcasting Licensees*, 13 F.C.C. 1246, 1249 (1949). See *infra* note 23 (discussing development of doctrine). The Commission also developed two related rules, the personal attack and political editorializing rules, that it formalized in 1967. See *infra* note 102 (discussing development of these rules).

The movement to deregulate communications began in the 1970s during the Carter Administration and "accelerated to a gallop" with President Reagan's election and subsequent appointment of Mark Fowler as FCC Chairman. J. TUNSTALL, COMMUNICATIONS DEREGULATION: THE UNLEASHING OF AMERICA'S COMMUNICATIONS INDUSTRY 30 (1986). As the pace quickened and the Commission began to attack politically sensitive rules, Congress began to take a more active interest.

clearly warned Mark Fowler, Chairman of the FCC, not to “meddle in any way” with the fairness doctrine:

[I]f the Commission meddles in any way with the ability of the American public to receive a balanced view of various issues—if the Commission, through some kind of backdoor regulation, attempts to meddle with the fairness doctrine or equal time or the political attack rules or the political editorial rules—you will see a *very vehement reaction from Congress*.⁵

Fowler clearly understood the warning: “Yes sir,” he responded, “I understand exactly what you are saying.”⁶ Senator Ernest Hollings was even more direct in his message to Fowler:

I have often said that there is no education in the second kick of a mule. During the last Congress, the Chairman of the FCC proved that old adage correct. He, however, appears to be showing that three kicks might do the trick.

. . . .

I understand that the Chairman of the FCC claims to have learned, and recent decisions are certainly headed in a better [direction]. However, I remain wary. Communications is too important, and the Commission’s agenda is too crowded for us to let down our guard.

*I am particularly concerned about the various proceedings concerning the fairness doctrine, including the proposals to repeal or alter the personal attack and political editorializing rules. Since the beginning of Chairman Fowler’s tenure, I have put him on notice not to weaken in any way the various political broadcasting laws or rules. So that there is no misunderstanding, the Chairman should consider such notice to be again issued.*⁷

The threats produced their intended effect: the FCC backed off. It issued a 110-page report condemning the doctrine:

[T]he fairness doctrine is an unnecessary and detrimental regulatory mechanism. . . . After careful evaluation of the evidence of record, our experience in enforcing the fairness doctrine, and fundamental constitutional principles, we find that the fairness doctrine disserves the public interest [and probably violates the Constitution].⁸

5. *Federal Communications Commission Oversight Hearings Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce*, 98th Cong., 2d Sess. 53 (1984) (emphasis added).

6. *Id.*

7. *Reauthorization and Oversight of the FCC: Hearing before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transportation*, 99th Cong., 1st Sess. 2-3 (1985) [hereinafter *Reauthorization and Oversight Hearing*] (statement of Sen. Hollings) (emphasis added). Sen. Hollings indicated that the prior “kicks” had occurred in the proceedings reassessing media ownership rules, access charges, and the syndication and financial interest rules. *Id.* at 2; see *supra* note 2, *infra* notes 110-124 (discussing various legislative “kicks” that occurred in FCC’s efforts to reform these rules).

8. *Inquiry into Section 73.1910 of the Commission’s Rules and Regulations Concerning the Gen-*

But it decided to do nothing further. Instead, it would “defer” to Congress.⁹ The doctrine would remain in effect and be enforced, notwithstanding the Commission’s conclusion that it both disserved the public interest and was constitutionally infirm. The threatened “vehement reaction” and “kicks” had worked. The Commission had been intimidated by Congress, and the fairness doctrine, as a result, had become what I have called an “orphaned rule”—disowned by the agency that created it, never “enacted” as a statute, yet still the law.¹⁰

This example of congressional intimidation and consequent “rule orphaning” is not unique. As will be shown, the same phenomenon occurred with the FCC’s attempt to eliminate the syndication and financial interest rules that restrict network ownership interests in television programming, as well as with other agencies’ attempts to reform their rules.¹¹ While the specifics of these interactions vary, in each case congressional pressure effectively quashed agency efforts to repeal or modify regulations the agency believed no longer served the statutory mandate. These incidents demonstrate that, by leaning on the agency, a few well positioned, forceful Congressmen are able to veto an agency’s attempted repeal; a fraction of the legislature can unofficially but effectively “enact” a rule. This “rule by intimidation” requires society to comply with a rule of law that Congress as a whole has never enacted and the promulgating agency believes should be repealed.¹²

The existence of these “orphaned rules” is a graphic reminder of the dangers inherent in a system of shared policymaking. Legislators favoring a controversial rule undoubtedly find the informal technique of “leaning” easier than enacting the rule itself; agencies, for their part, find capitulation easier

eral Fairness Doctrine Obligations of Broadcast Licensees, 102 F.C.C.2d 143, 225 (1985) [hereinafter *1985 Fairness Doctrine Report*].

9. *Id.* at 247.

10. Congress ratified the fairness doctrine in its 1959 amendments to the Communications Act of 1934; however, Congress did not codify the doctrine or otherwise preclude the Commission from modifying or eliminating it. See *infra* notes 26-27, 60 (discussing history of doctrine). The personal attack rule and political editorializing rules, which are also “orphaned,” have never been explicitly ratified by Congress. See *infra* notes 101-09 and accompanying text (discussing development and orphaning of these rules).

11. See *infra* notes 110-34 and accompanying text (history of orphaning of syndication and financial interest rules, as well as rules promulgated by the Food and Nutrition Service and Environmental Protection Agency).

12. In the orphaning of the fairness doctrine, the FCC explicitly stated its intent to continue enforcing the doctrine, and, as will be seen, it made good on that promise. See *infra* notes 72-76 (discussing *Meredith* case). Thus, it was clear that those subject to regulation should still comply, notwithstanding the agency’s desire to distance itself from the rule. But an “orphaned rule” can have continuing legal effect even if the promulgating agency is inclined not to continue enforcing it or to enforce it “with reduced rigor.” The regulated must be aware that the agency may decide at any time to enforce the rule, since it is still “on the books.” Moreover, there may also be the risk that a third party can invoke the “orphan” in something like a breach of contract or tortious interference with contract suit.

than confrontation. But the process threatens to undermine the constitutional requirements that Congress make law bicamerally, with presentment to the President, and that it not execute the laws it enacts.¹³ When a suspect rule is allowed to remain in effect at the behest of a congressional committee or a few influential members, the legislature is either “legislating” informally or “executing” improperly. A system that permits this clearly warrants further scrutiny.¹⁴

This article explores whether there are or should be legal constraints on the dialogic process that generates these orphans.¹⁵ It focuses on the institutions primarily responsible for creating them—Congress and the agencies. In

13. See *infra* notes 181-222 and accompanying text (discussing *INS v. Chadha* and *Bowsher v. Synar*). While congressional pressure and agency capitulation can occur in the context of both rule promulgation and rule elimination, only in the latter context does capitulation create orphans. If, as a result of congressional pressure, an agency declines to adopt new regulations, no regulation with the force of law exists. While legislators' leaning on an agency to prevent regulation may be unfortunate for the proposed rule's intended beneficiaries, a less than ideal procedure for determining policy, and a distortion of the agency's judgment, leaning that prevents regulation at least leaves no suspect rules in place and thus does not raise the constitutional concerns discussed herein.

14. It is no secret that administrative agencies with broad rulemaking authority are constitutional anomalies that threaten to undermine the fundamental constitutional requirement that laws be made by a representative body that is both politically accountable and separate from the body charged with their execution. As Justice Jackson observed:

The rise of administrative bodies probably has been the most significant legal trend of the last century and perhaps more values today are affected by their decisions than by those of all the courts, review of administrative decisions apart They have become a veritable fourth branch of the Government, which has deranged our three-branch legal theories as much as the concept of a fourth dimension unsettles our three-dimensional thinking.

FTC v. Ruberoid Co., 343 U.S. 470, 487 (1952) (Jackson, J., dissenting). It need not follow, however, that acceptance of administrative agencies requires the abandonment of all constitutional safeguards. See generally S. BREYER & R. STEWART, *ADMINISTRATIVE LAW AND REGULATORY POLICY* 127-81 (2d ed. 1985) (discussing problems of controlling administrative discretion); Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975) (analyzing traditional model of American administrative law and suggesting interest group representation and expanded judicial review as means of controlling agency discretion); Stewart & Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1195, 1313 (1982) (suggesting that private right of action can usefully serve as means of monitoring agency actions); Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984) (noting anomalous position of administrative agencies and suggesting a checks and balances approach under which agencies are not viewed as belonging to any of the three named branches, but are structured to permit and encourage tensions among the three).

15. The continued existence of a regulation that no longer serves the public interest is similar to the problem of obsolete statutes that Dean Guido Calabresi fears are “choking” our legal system. G. CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 6-7 (1982). For other writings on the problem of statutory obsolescence, see G. GILMORE, *THE AGES OF AMERICAN LAW* 95-97, 143 n.58 (1977); R. KEETON, *VENTURING TO DO JUSTICE* (1969); Friendly, *The Gap in Lawmaking—Judges Who Can't and Legislators Who Won't*, 63 COLUM. L. REV. 787 (1963); Langevoort, *Statutory Obsolescence and the Judicial Process: The Revisionist Role of the Courts in Federal Banking Regulation*, 85 MICH. L. REV. 672 (1987). The existence of an orphaned regulation is arguably even more troubling than an obsolete statute—at least Congress and the President once enacted the obsolete statute. But Congress and the President never formally enact an orphaned regulation; it

contrast to the issue of judicial control of agency decisionmaking, which has been well explored,¹⁶ the relationship between Congress and the agencies has been less closely examined.¹⁷ The last few years have witnessed increased efforts by Congress and the President to control agency rulemaking,¹⁸ a trend that has met with mixed reviews.¹⁹ This article examines one aspect of that

remains in effect merely because a few influential members of Congress have intimidated the enacting agency.

16. For useful discussions of the role of courts in the context of deregulation, see Edwards, *Judicial Review of Deregulation*, 11 N. KY. L.J. 229 (1984); Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505 (1985); Sunstein, *Deregulation and the Hard-Look Doctrine*, 1983 SUP. CT. REV. 177. For more general discussions of the role of judicial review of agency action, see DeLong, *New Wine for a New Bottle: Judicial Review in the Regulatory State*, 72 VA. L. REV. 399 (1986); Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 592-99 (1985); Scalia, *Two Wrongs Make A Right: The Judicialization of Standardless Rulemaking*, REGULATION, July-Aug. 1977, at 38, 40; Stewart, *supra* note 14, at 1681-98; Stewart & Sunstein, *supra* note 14.

17. Focusing on the responsibilities of legislators and administrators is an attempt to remedy the unfortunate reality that too little attention is generally paid to the constitutional responsibilities of nonjudicial actors. As Professor Laurence Tribe recently observed:

The United States Constitution addresses its commands not only to federal judges but to all public authorities in the United States. It is at least ironic that generations of students and lawyers preoccupied with lamenting judicial excess have paid so much less attention to the substantive meaning of the Constitution as a guide to choice by nonjudicial actors.

L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 16 (2d ed. 1988). There have been studies of legislative-administrative interaction, but not in the context of deregulation. See, e.g., R. ARNOLD, *CONGRESS AND THE BUREAUCRACY: A THEORY OF INDIFFERENCE* (1979); W. NISKANEN, *BUREAUCRACY AND REPRESENTATIVE GOVERNMENT* 138-68 (1971); Fiorina & Noll, *Voters, Legislators and Bureaucracy: Institutional Design in the Public Sector*, 68 Am. Econ. Rev. (Papers and Proceedings) 256-60 (1978); *infra* notes 151-52.

18. For increased efforts by legislators to control agency rulemaking, see S. TOLCHIN & M. TOLCHIN, *DISMANTLING AMERICA: THE RUSH TO DEREGULATE* 26-35 (1983) (legislative interventions into agency actions have "reinforced uncertainty surrounding regulation and done little to improve its troubled future"); Shooshan & Krasnow, *New Checks, Balances Affect FCC Policymaking*, Legal Times (Wash.), Apr. 8, 1985, 12, 12-13 [hereinafter Shooshan & Krasnow, *FCC Policymaking*] (discussing congressional influence on FCC policymaking through periodic authorizations and riders on appropriations bills); Shooshan & Krasnow, *Congress and the Federal Communications Commission: The Continuing Contest for Power*, 9 COMM/ENT 619, 619-21 (1987) [hereinafter Shooshan & Krasnow, *Congress and the FCC*] (discussing increased involvement of Congress in FCC's rulemaking).

For examples of increased Presidential control, see Exec. Order No. 12,291, 3 C.F.R. 127 (1982) (setting forth OMB approval requirements for agency promulgation of new regulations and revision of existing regulations), *reprinted in* 5 U.S.C. § 601 note (1982); Exec. Order No. 12,498, 3 C.F.R. 323 (1986) (establishing OMB involvement in regulatory planning process).

19. Some have advocated and praised an enhanced Presidential role. See, e.g., Cutler & Johnson, *Regulation and the Political Process*, 84 YALE L.J. 1395, 1399 (1975) (suggesting success of regulatory agencies depends on mechanism of intervention by politically accountable entities); Davis, *Presidential Control of Rulemaking*, 50 TUL. L. REV. 849, 878 (1972) (Presidential input beneficial to agency rulemaking); DeMuth & Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075, 1088 (1986) (discussing benefits and answering criticisms of White House review of agency rulemaking). Others have been less enthusiastic. See, e.g., G. EADS & M. FIX, *RELIEF OR REFORM? REAGAN'S REGULATORY DILEMMA* 263 (1984) (Reagan's regulatory program costly, time-consuming, and unnecessary); J. LASH, *A SEASON OF SPOILS: THE REAGAN*

trend—the inclination of Congress to control by informal pressures.²⁰

The article begins with an empirical study of the process of interactive deregulation and its potential to create orphaned rules. Part II examines several case studies of the orphaning phenomenon, including an in-depth analysis of the orphaning of the FCC's fairness doctrine and related personal attack and political editorializing rules, followed by briefer studies of several other orphans at the FCC, the Environmental Protection Agency, the Nuclear Regulatory Commission, and the Department of Agriculture. Part III then explores the institutional factors that produce orphaned rules and the extent to which they are likely to be endemic features of our administrative state. Finally, part IV seeks to identify potential constraints on Congress and

ADMINISTRATION'S ATTACK ON THE ENVIRONMENT (1984) (discussing effects of Reagan Administration's environmental policy); Morrison, *OMB Interference with Agency Rulemaking: The Wrong Way to Write a Regulation*, 99 HARV. L. REV. 1059, 1059 (1985) (Congress should limit role of OMB in regulatory process); Morrison, *Presidential Intervention in Informal Rulemaking: Striking the Proper Balance*, 56 TUL. L. REV. 879, 881 (1982) (stating that Congress should limit the role of President in regulatory process).

The enhanced congressional involvement has also met with mixed reviews. Compare Shooshan & Krasnow, *FCC Policymaking*, *supra* note 18, at 13 (legislative interaction with FCC is undermining agency's independence) and Fein, *Fighting Off Congress: A Bill of Rights for the Independent Agency*, DISTRICT LAW., Nov.-Dec. 1983, at 37, 41 (directing agencies to resist congressional intrusions into rulemaking process) with Ross & Brand, *Fighting Off Congress: A Bill of 'Wrongs' for the Independent Agency*, DISTRICT LAW., Jan.-Feb. 1984, at 12, 14 (stating that Congress on firm constitutional ground when directing agency action).

See generally Diver, *Policymaking Paradigms in Administrative Law*, 95 HARV. L. REV. 393 (1981) (describing two competing models of policymaking process—comprehensive rationality and incrementalism); Gellhorn & Robinson, *Rulemaking Due Process: An Inconclusive Dialogue*, 48 U. CHI. L. REV. 201, 249-56 (1981) (discussing positive and negative aspects of *ex parte* interventions in agency rulemaking); Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 452-83 (1987) (advocating a return to original commitment to checks and balances, including a strong supervisory role over agencies by each of the three branches of government); Verkuil, *Jawboning Administrative Agencies: Ex Parte Contacts by the White House*, 80 COLUM. L. REV. 943 (1980) (discussing institutional and constitutional propriety of Presidential intervention in agency decisionmaking, indicating greater concern with such interventions in adjudications and formal rulemakings than in informal rulemaking).

20. The topic of congressional-agency interaction can be classified along two dimensions—the nature of the legislative input (formal enactments, informal-public interventions, or informal-secret interventions), and the nature of the agency action (rulemaking or adjudication). In this “interactional matrix,” formal congressional actions in the form of duly enacted statutes, by definition always public, generally raise few constitutional issues. Informal interventions by interested legislators, however, present more difficulties, particularly those legislative interventions—whether public or secretive—into agency adjudications and other “on the record” proceedings. As will be noted, these interactions raise issues concerning both separation of powers and fundamental fairness to the participants, *see infra* note 270. This article focuses on the cell of the interactional matrix less frequently discussed—public congressional involvement in informal agency rulemaking. Given that legislative oversight is a vital part of congressional responsibilities, such involvement is assumed to be not only inevitable, but generally desirable. However, as this article shows, this form of interaction can also have potentially undesirable consequences, especially in the context of deregulation, and therefore warrants closer scrutiny.

the agencies that can help to avoid, or at least shorten, the orphaning process.

II. CASE STUDIES OF THE ORPHANING PROCESS

A. ORPHANING OF THE FAIRNESS DOCTRINE

The merits of the fairness doctrine are not the focus of this article, but knowledge of the doctrine's background is an essential ingredient in understanding the interaction between Congress and the Commission.²¹

1. Background

Adopted by the FCC pursuant to its statutory mandate to ensure the use of the airwaves in the "public interest, convenience, and necessity,"²² the fairness doctrine is designed to promote the "right of the public in a free society to be informed and to have presented to it . . . different attitudes and viewpoints concerning . . . vital and often controversial issues which are held by the various groups which make up the community."²³ The doctrine im-

21. The wisdom and constitutionality of the fairness doctrine has been the subject of many fine, often passionate discussions. *See, e.g.*, Ferris & Kirkland, *Fairness—The Broadcaster's Hippocratic Oath*, 34 CATH. U. L. REV. 605, 605 (1985) ("The case for the Fairness Doctrine and the similar provisions affecting political broadcasting is stronger now than it was when the Supreme Court decided *Red Lion*."); Fiss, *Why the State?*, 100 HARV. L. REV. 781, 788 (1987) (arguing that state must allow the public "to hear voices and viewpoints that otherwise would be silenced or muffled"); Fowler & Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207, 209 (1982) ("perception of broadcasters as community trustees should be replaced by a view of broadcasters as marketplace participants"); Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 57 (market reform proposals either continue the status quo bias of the marketplace or create new and potentially dangerous problems); Krattenmaker & Powe, *The Fairness Doctrine Today: A Constitutional Curiosity and an Impossible Dream*, 1985 DUKE L.J. 151, 176 (doctrine "violates every accepted principle of first amendment jurisprudence, represents an ill-advised and inefficacious regulatory policy, and has no ascertainable content").

22. Under the Communications Act of 1934, as amended, the FCC is authorized to regulate interstate and foreign communication by wire or radio. 47 U.S.C. § 152 (1982). The Commission may grant broadcast licenses if it determines that the "public interest, convenience, and necessity" will be served thereby; and no one can broadcast without a license. 47 U.S.C. §§ 301, 307, 309 (1982). The Commission may also "make such rules and regulations, not inconsistent with law, as may be necessary to carry out the provisions" of the Act. 47 U.S.C. § 303(r) (1982).

23. *In re Editorializing by Broadcasting Licensees*, *supra* note 4, at 1249. In this 1949 proceeding, the Commission first explicitly articulated the doctrine in its current two-pronged form, providing:

The Commission has . . . recognized the necessity for licensees to devote a reasonable percentage of their broadcast time . . . to the consideration and discussion of public issues of interest in the community served by the particular station. And we have recognized, with respect to such programs, the paramount right of the public in a free society to be informed and to have presented to it for acceptance or rejection the different attitudes and viewpoints concerning these vital and often controversial issues which are held by the various groups which make up the community.

poses two obligations on broadcasters; each broadcaster must: (1) "devote a reasonable percentage of broadcast time to the coverage of public issues,"²⁴ and (2) ensure that its coverage of controversial issues of public importance is "fair in the sense that it provides an opportunity for the presentation of contrasting points of view."²⁵

In 1959, Congress ratified the FCC's power to impose the fairness doctrine. In the course of adding several exemptions to section 315 of the Communications Act, which requires broadcasters to provide equal opportunities to opposing political candidates, Congress provided that the newly created exemptions were not to undermine the fairness obligation the Commission had imposed.²⁶ As will be seen, however, Congress did not thereby enact the fairness doctrine or otherwise prohibit the Commission from modifying it.²⁷

In 1969, the Supreme Court found, in *Red Lion Broadcasting Co. v. FCC*,²⁸ that the fairness doctrine was within the mandate of the Communications Act of 1934 and did not violate broadcasters' first amendment rights to freedom of speech and press. The Court recognized broadcasters' first amendment interests, but because there were "substantially more individuals who [wanted] to broadcast than there [were] frequencies to allocate, it [was] idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish."²⁹ Everyone has the

24. *The Handling of Public Issues under the Fairness Doctrine and the Public Interest Standards of the Communications Act*, 48 F.C.C.2d 1, 7 (1974) [hereinafter *1974 Fairness Doctrine Report*].

25. *Id.* at 17. The Commission does not engage in its own surveillance of broadcasters' programming but relies on complaints from the public. While complaints are relatively numerous, the Commission is reasonably aggressive in screening out those that lack merit. *1985 Fairness Doctrine Report*, *supra* note 8, at 147-48 (most complaints lack "colorable" validity).

The first prong receives much less attention than the second. The FCC has stated that it has no intention of becoming involved in the selection of issues to be discussed. *In re Complaint of Brent Buell*, 97 F.C.C.2d 55, 57 (1984); *The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act*, 89 F.C.C.2d 916, 925 (1982); *1974 Fairness Doctrine Report*, *supra* note 24, at 10. It has sustained very few complaints relating to the first obligation. See *National Citizens Comm. for Broadcasting v. FCC*, 567 F.2d 1095, 1100 n.13 (D.C. Cir. 1977) (FCC has only once sustained complaint relating to first obligation) (citing *In re Complaint of Patsy Mink*, 59 F.C.C.2d 987, 997 (1976)), *cert. denied*, 436 U.S. 926 (1978).

Similarly, in enforcing the second prong, the Commission has attempted to preserve licensee discretion in the choice of topics, the amount of time devoted to them, and the best way to achieve balanced coverage. *1985 Fairness Doctrine Report*, *supra* note 8, at 233. The reasonableness of the balance depends on a variety of factors, including the amount of time allotted each side, the frequency of presentation of each side's position, and the audience size during such presentations. *Id.* at 224. If the broadcaster cannot find a sponsor for the contrasting views, he must provide the spot for free. *In re Cullman Broadcasting Co.*, 40 F.C.C. 576, 577 (1963).

26. Pub. L. No. 86-274, 73 Stat. 557 (codified as amended at 47 U.S.C. § 315(a) (1982)).

27. *Cf. Telecommunications Research & Action Center v. FCC*, 801 F.2d 501, 517 (D.C. Cir. 1986) (noting Congress did not enact doctrine), *cert. denied*, 107 S. Ct. 3196 (1987); *infra* note 60 (arguing that doctrine not mandated by Congress).

28. 395 U.S. 367 (1969).

29. *Id.* at 388.

same “right” to a license and those granted a license “stand no better . . . as far as the First Amendment is concerned . . . than those to whom licenses are refused.”³⁰ Therefore, the Court concluded, “there is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community which would otherwise, by necessity, be barred from the airwaves.”³¹ Thus, the Court articulated the famous “scarcity rationale”:

Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium. But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.³²

Scarcity, however, was not sufficient to justify imposing a right to reply requirement on the print media. The Supreme Court in *Miami Herald Publishing Co. v. Tornillo*³³ unanimously struck down a Florida statute that required a newspaper to make reply space available to candidates it had criticized. Without discussing *Red Lion*, the Court made it clear that the increasing scarcity of major newspapers, a scarcity caused by economic as opposed to technological factors, was not sufficient under the first amendment to justify the imposition of an access requirement on the print medium.³⁴

The scarcity rationale, crucial in *Red Lion* and irrelevant in *Tornillo*, came under attack on both logical and empirical grounds. Scarcity, critics point out, is a universal fact and cannot explain regulating broadcasting differently from print.³⁵ Attempts to distinguish technologically induced scarcity from

30. *Id.* at 389.

31. *Id.* The Court applied the same analysis to uphold the related personal attack and political editorializing rules. *Id.* at 393-94.

32. *Id.* at 390. The idea that scarcity of broadcast frequencies could provide constitutional justification for regulating broadcasting first arose in Justice Frankfurter’s majority opinion in *NBC v. United States*, 319 U.S. 190, 226-27 (1943). Justice Frankfurter used the rationale to reject a first amendment challenge to the chain broadcasting rules that the FCC had promulgated to limit the networks’ power over broadcast licensees. *Id.* *Red Lion* marked the first time the Court used the rationale to justify content regulation. 395 U.S. at 396-401.

33. 418 U.S. 241 (1974).

34. *Id.* at 258 (contingent reply space requirement unconstitutionally interfered with newspapers’ “editorial control and judgment”).

35. As Professor Ronald Coase observed as early as 1959:

[I]t is a commonplace of economics that almost all resources used in the economic system (and not simply radio and television frequencies) are limited in amount and scarce, in that people would like to use more than exists. . . . [S]ome mechanism has to be employed to

that created by economics are not convincing; the line is hard to draw and seems to be constitutionally irrelevant. Moreover, even if there is a logical and constitutional difference between technological and economic scarcity, the level of technological scarcity has been reduced; today the real factor limiting entry of new broadcasters is primarily economic.³⁶

The Supreme Court has not been deaf to these criticisms. Even in *Red Lion*, it recognized that the number of available frequencies was increasing; nonetheless, the Court said, “[s]carcity is not entirely a thing of the past.”³⁷ By 1984, the Court was showing a little more concern. In *FCC v. League of Women Voters*, while reaffirming the distinction between the regulation of the print and the electronic media,³⁸ the Court noted in a significant footnote:

Critics, including the incumbent Chairman of the FCC, charge that with the advent of cable and satellite television technology, communities now have access to such a wide variety of stations that the scarcity doctrine is

decide who, out of the many claimants, should be allowed to use the scarce resource. . . .
[T]his is usually done in the American economic system [by] . . . the price mechanism

Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 1, 14 (1959); see *Telecommunications Research & Action Center v. FCC*, 801 F.2d 501, 508 (D.C. Cir. 1986) (using scarcity, a universal fact, as distinguishing principle leads to analytic confusion), *cert. denied*, 107 S. Ct. 3196 (1987); B. OWEN, *ECONOMICS AND FREEDOM OF EXPRESSION: MEDIA STRUCTURE AND THE FIRST AMENDMENT* 144 (1975) (scarcity of electromagnetic spectrum does not justify specialized treatment); Fowler & Brenner, *supra* note 21, at 221 (scarcity is common but broadcasting regulation is anomalous). *But see* Van Alstyne, *The Mobius Strip of the First Amendment: Perspectives on Red Lion*, 29 S.C.L. REV. 539, 562 (1978) (stating Coase failed to perceive how market pricing mechanism can also abridge freedom of speech). Moreover, even if the government can constitutionally justify its controlling the allocation of scarce media outlets, it does not automatically follow that the government can justify regulating the content or that a lower level of justification for content control is appropriate.

Justice Douglas, who had not participated in *Red Lion*, criticized the case in a concurring opinion in *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 154 (1973) (“The Fairness Doctrine has no place in our First Amendment regime.”).

36. Broadcast frequencies are more numerous now than they were when the scarcity rationale first arose in *NBC v. United States*, 319 U.S. 190, 216 (1943). Today “the number of broadcast stations . . . rivals and perhaps surpasses the number of newspapers and magazines in which political messages may be effectively carried.” *Loveday v. FCC*, 707 F.2d 1443, 1459 (D.C. Cir. 1983), *cert. denied*, 464 U.S. 1008 (1983). In fact, many markets have a far greater number of broadcasting stations than newspapers. *Telecommunications Research & Action Center v. FCC*, 801 F.2d 501, 508 n.4 (D.C. Cir. 1986), *cert. denied*, 107 S. Ct. 3196 (1987); see Powe, “*Or of the [Broadcast] Press*,” 55 TEX. L. REV. 39, 56 (1976) (radio stations more numerous than newspapers).

37. 395 U.S. at 396-97.

38. 468 U.S. 364 (1984). As the Court noted, a broadcaster does not have “the absolute freedom to advocate one’s own positions without also presenting opposing viewpoints—a freedom enjoyed, for example, by newspaper publishers and soapbox orators” *Id.* at 380. At the same time, however, the Court warned, even for broadcasters, government restrictions designed “to secure the public’s First Amendment interest in receiving a balanced presentation of views on diverse matters of public concern . . . have been upheld only when we were satisfied that the restriction is narrowly tailored to further a substantial governmental interest, such as ensuring adequate and balanced coverage of public issues.” *Id.* (citations omitted).

obsolete. . . . We are not prepared, however, to reconsider our longstanding approach without some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required.³⁹

39. *Id.* at 376 n.11.

But even if one concludes that there is no factual basis or legal significance to a distinction between the scarcity of the print and broadcast media, it does not follow that the fairness doctrine is unconstitutional. There are at least two ways of upholding it. First, one can contend that the fairness doctrine, or something analogous to it, can constitutionally be imposed on both the electronic and the print media. See J. BARRON, *FREEDOM OF THE PRESS FOR WHOM?* (1975) (Constitution should permit, if not require, right of access to both printed and electronic media); Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967) (same); see also B. SCHMIDT, *FREEDOM OF THE PRESS V. FREE ACCESS* 237-40 (1976) (examining both whether there is a constitutionally rooted right to access to electronic and print media and whether there are constitutional constraints that limit statutory rights of access).

Alternatively, one can try to find other legally significant distinctions between the print and broadcast media. Thus some have suggested that broadcasting is more powerful and persuasive than print and therefore can constitutionally be subject to more regulation than the print media. See Ferris & Kirkland, *supra* note 21, at 605-06 (recounting power of press in presenting information to people); see also *FCC v. Pacific Found.*, 438 U.S. 726, 748 (1978) (broadcasting has limited first amendment protection in part because of broadcasting's pervasive influence); cf. Bollinger, *Freedom of the Press and Public Access: Towards a Partial Regulation of the Mass Media*, 75 MICH. L. REV. 1, 6-7 (1976) (suggesting that goals of first amendment are promoted by allowing government to require access to a part, but only a part, of mass media and that electronic media is the preferable part to be so regulated). But, critics argue, to justify the regulation of broadcasting because it is a powerful medium is to turn the first amendment on its head. Fowler & Brenner, *supra* note 21, at 213; Krattenmaker & Powe, *supra* note 21, at 155.

Despite the significant logical and empirical difficulties with the Court's bifurcated approach to the print and electronic media, the Court's apparent attachment to it is not surprising. By using this divided approach, the Court has been able to promote simultaneously two attractive, but conflicting, views of first amendment jurisprudence. While scholars vigorously debate the principal values served by protecting free expression, no one seems to deny that at least part of its value lies in its utilitarian contribution to the marketplace of ideas and its enhancement of political debate. See, e.g., T. EMERSON, *TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT* 3-15 (1966) (values furthered by protecting the right to freedom of expression include: (1) ensuring individual self-fulfillment, (2) attaining the truth, (3) securing participation by members of society in social and political decision making, (4) maintaining balance between stability and change in society); M. REDISH, *FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS* 9-86 (1984) (describing variety of values of free speech, including checking function, marketplace of ideas concept, liberty model); F. SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 86 (1982) (freedom of speech based in large part on distrust of governmental determinations of truth and falsity); BeVier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle*, 30 STAN. L. REV. 299, 304-22 (1978) (first amendment protects speech that serves to make political process work); Blasi, *The Checking Function in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 527 (first amendment serves valuable function of checking abuse of power by public officials); Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 26 (1971) (first amendment protects political speech); Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 255 (first amendment protects activities and thoughts necessary for self-government). Even those who believe the principal value of freedom of expression is the enhancement of autonomy or "individual self-realization" agree that free speech is also important for enhancing debate. See Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 594 (1982) (values of promoting political process and enhancing marketplace of ideas are legitimate "subvalues of self-realization"); cf. Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 1026-29 (1978) (liberty model

It was in this context that the FCC began its attack on the doctrine.

2. The FCC Attacks, Legislators Threaten, and the FCC Retreats

The FCC Refuses to Apply the Fairness Doctrine and Political Broadcasting Rules to New Technologies. On May 20, 1983, the FCC released a report and order authorizing television stations to begin operating teletext systems, new technology in which previously unused portions of the broadcast signal are used to transmit text and graphics to viewers.⁴⁰ The Commission decided, in this report, *not* to impose the fairness doctrine on the broadcasters' operation of teletext.⁴¹

In explaining its decision with respect to the fairness doctrine, the FCC relied on its conclusion that the fairness doctrine was an agency policy neither mandated nor codified by Congress, and that it therefore remained in the FCC's "sound judgment and discretion" to choose whether to apply it to teletext services.⁴² The FCC chose not to apply it because it believed the scarcity rationale did not apply to broadcasting teletext,⁴³ and because it

better promotes key value justified by marketplace of ideas theory: value of furthering search for truth).

But this value—enhancing the marketplace of ideas and robust political debate—can be encumbered both by government intervention and by private economic distortions. The Court's first amendment jurisprudence in the context of the print media focuses on the risks potentially created by government regulation and the distortions it can produce. Thus, in *Tornillo*, the Court made clear: "It has yet to be demonstrated how governmental regulation of [the editorial process] can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time." *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974). At the same time, in its first amendment jurisprudence applied to the electronic media, the Court focuses primarily on the risks to free debate caused by private economic distortions. The Court's distinct treatment of the electronic media has allowed it to permit active government intervention to enhance the opportunities for political debate and to curtail the effect of private distortions, while minimizing, and even ignoring, the risks such regulation can pose. Thus, the Court's current bifurcated approach to media regulation has allowed it simultaneously to embrace and to reject government regulation, an arguably useful characteristic that the Court may be reluctant to give up.

40. *Amendment to the Commission's Rules to Authorize the Transmission of the Teletext*, 53 Rad. Reg. 2d (P & F) 1309, 1320 (F.C.C. 1983).

Teletext signals are transmitted in the brief and hitherto unused time periods between the pulses of regular television broadcasting signals, the so-called "vertical blanking intervals," and can be viewed on televisions equipped with special decoders. Sets with decoders can tune in a table of contents, enabling viewers to "flip" to the desired page of news, sports, weather, community events, entertainment schedules, or advertising. *Id.*

41. *Id.* at 1322-24. In addition, the Commission decided not to apply either the agency-created personal attack and political editorializing rules or the congressionally-created statutory requirements regarding access (i.e., 47 U.S.C. §§ 312(a)(7), 315 (1982)). *Id.* at 1320.

42. *Id.* at 1323.

43. *Id.* at 1324. In an attempt to rewrite the scarcity rationale, the Commission asserted: "Implicit in the 'scarcity' rationale . . . is an assumption that broadcasters, through their access to the radio spectrum, possess a power to communicate ideas through sound and visual images in a manner that is significantly different from traditional avenues of communication because of the immediacy of the medium." *Id.* Because teletext employs neither sound nor pictures and because it "more

feared that the regulations might frustrate development of the new service.⁴⁴

The Court of Appeals for the District of Columbia upheld this decision.⁴⁵ Significantly, it agreed that the doctrine was not statutorily mandated by Congress⁴⁶ and concluded that the FCC had adequately explained its determination not to apply the agency-controlled doctrine.⁴⁷

The FCC Attacks the Fairness Doctrine Directly. In May 1984, the FCC issued a notice of inquiry "to reassess the wisdom of applying general fairness doctrine obligations to broadcast licensees" and invited comments on "all facets of the doctrine."⁴⁸ Specifically, the FCC questioned whether the doctrine was constitutionally permissible under current marketplace conditions and first amendment jurisprudence, whether it remained "necessary to further the governmental interest in an informed electorate," whether it had "an impermissible 'chilling' effect on the free expression of ideas," and, finally, whether the doctrine was "codified either by Section 315 or by the general public interest standard embodied in the Communications Act."⁴⁹ With this notice of inquiry, the FCC launched its third comprehensive review of the fairness doctrine,⁵⁰ a proceeding that generated comments from

closely resembles, and will largely compete with, other print communication media such as newspapers and magazines," there was no justification for according teletext less first amendment protection "to protect the public's right of access to conflicting views on issues of public importance." *Id.*; see *Memorandum Opinion and Order in the Matter of the Commission Rules to Authorize the Transmission of Teletext by TV Stations*, 101 F.C.C.2d 827, 832 (1985) [hereinafter *Memorandum and Order Denying Reconsideration*] (indicating that Commission's opinion was strongly influenced by first amendment concerns).

44. *Memorandum and Order Denying Reconsideration*, *supra* note 43, at 833 (expressing reluctance to add burdens to emerging technologies).

45. *Telecommunications Research & Action Center v. FCC*, 801 F.2d 501, 513 (D.C. Cir. 1986), *cert. denied*, 107 S. Ct. 3196 (1987).

46. *Id.* at 517-18. The Court held that the FCC did not have the same discretion with congressionally mandated rules and reversed the agency's decision not to apply § 315 of the Communications Act to teletext. *Id.* at 513-16.

47. *Id.* at 518. For cases requiring adequate agency explanations, see *UAW v. NLRB*, 459 F.2d 1329, 1341 (D.C. Cir. 1972) (agency must conform to own precedents or explain departure from them); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970) (agency must provide reasoned analysis if it alters views of what is in public interest), *cert. denied*, 403 U.S. 923 (1971).

48. Notice of Inquiry Into the General Fairness Doctrine Obligations of Broadcast Licensees, 49 Fed. Reg. 20,317, 20,317-18 (1984).

49. *1985 Fairness Doctrine Report*, *supra* note 8, at 102. The wisdom and constitutionality of the related personal attack and political editorializing rules were under consideration in a separate proceeding and thus were not part of this inquiry. See *infra* note 101 and accompanying text (discussing FCC notice of proposed rulemaking to eliminate personal attack and political editorializing rules because they did not serve public interest).

50. See generally *1974 Fairness Doctrine Report*, *supra* note 24 (FCC's second comprehensive review); *In re Editorializing by Broadcasting Licensees*, *supra* note 4, at 1249 (FCC articulates fairness doctrine). The Commission indicated that if the comments showed that substantive changes in the policy were appropriate, the Commission would then institute a notice of proposed rulemaking.

more than one hundred parties and involved two days of oral presentations to the FCC sitting en banc.⁵¹

On August 23, 1985, after more than a year of study, the FCC concluded that it "no longer believe[s] that the fairness doctrine, as a matter of policy, serves the public interest."⁵² The FCC stressed that in the sixteen years since *Red Lion*, the information marketplace had expanded substantially; therefore, it was no longer necessary or permissible "to rely on government intrusion in order to assure that the public has access to the marketplace of ideas."⁵³ Moreover, contrary to its representation in *Red Lion*,⁵⁴ the FCC found that "the doctrine impedes the public's access to the marketplace of ideas and poses an unwarranted intrusion upon the journalistic freedom of broadcasters."⁵⁵ Given these new findings, the FCC now believed that the doctrine not only disserved the public interest, but also was constitutionally

Notice of Inquiry Into the General Fairness Doctrine Obligations of Broadcast Licensees, 49 Fed. Reg. 20,317, 20,318 (1984). Alternatively, if changes would be more appropriately made by Congress, the Commission would "consider submitting [its] proposals to Congress in the form of legislative recommendations." *Id.* at 20,318. Finally, the Commission noted, it might conclude that no further agency action was warranted, in which case it hoped that the inquiry would nonetheless have been useful in providing a clear understanding of the doctrine and its operation. *Id.*

51. The comments fell into essentially three groups. Broadcasters, such as CBS and the Radio-Television News Directors Association, argued (1) that the doctrine is not codified, *1985 Fairness Doctrine Report, supra* note 8, at 233 n.347, and (2) that the Commission should eliminate it because it inhibits the coverage of controversial issues, *id.* at 164-75, and is no longer necessary in light of the increase in the number of information sources available to the public. *Id.* at 205 n.221. At the other extreme were groups like the Media Access Project, the Telecommunications Research and Action Center, and the American Legal Foundation who contended that the doctrine should be maintained because, *inter alia*, (1) it is codified, *id.* at 233 n.347, and (2) it is constitutionally justified because it is necessary and does not chill speech but, on the contrary, emboldens broadcasters to withstand pressure not to air controversial views, *id.* at 163 n.75, 201 n.212, 222 n.304.

There were also intermediate positions that suggested that the implementation of the doctrine should be modified to reduce its potential burden and chilling effect. Some proposed that compliance with the doctrine be ascertained (1) only at renewal time and (2) under a "malice" standard under which there would be a violation only if the licensee had acted with malice by deliberately violating the doctrine or recklessly disregarding its requirements. *Id.* at 226. In addition, some proposed that licensees be able to meet the fairness obligation by providing some form of access analogous to the "op-ed" page in the print media. *Id.* Other proposals included exempting all advertising from application of the doctrine and imposing a two-year moratorium on enforcement of the doctrine "as a means of empirically evaluating the impact of the doctrine on broadcast speech." *Id.* ABC urged modification of the *Cullman* doctrine, which requires licensees to give free time if paying sponsors for a controversial view are unavailable. See *In re Cullman Broadcasting Co.*, 40 F.C.C. 576, 577 (1963) (public's right to hear opposing view is not nullified by licensee's failure to obtain sponsorship; if necessary licensee must give time for free). Specifically, ABC proposed exempting from the *Cullman* doctrine ballot proposition advertising by political committees; the network proposed that this advertising time should be made available but at a fee. *1985 Fairness Doctrine Report, supra* note 8, at 226.

52. *1985 Fairness Doctrine Report, supra* note 8, at 147.

53. *Id.* at 148.

54. *Id.* at 156.

55. *Id.*

infirm.⁵⁶

Notwithstanding this death sentence, the FCC left the doctrine unchanged, neither modifying, eliminating, nor suspending its enforcement. It did not even evaluate any of the alternatives that commentators had proffered to reduce the asserted chilling effect. Though the Commission was "firmly convinced that the fairness doctrine, as a matter of policy, disserves the public interest,"⁵⁷ it announced its intention to "continue to administer and enforce the fairness doctrine obligations of broadcasters and to underscore our expectation that broadcast licensees will continue to satisfy these requirements."⁵⁸

Instead of taking steps to eliminate or ameliorate the defects, the Commission said it would do nothing and would "defer" to Congress.⁵⁹ This was not because it had concluded that Congress had mandated the doctrine and the Commission lacked the power to act. On the contrary, it had concluded only two years before in the teletext proceeding that Congress had not mandated or codified the doctrine. Moreover, as the District of Columbia Circuit subsequently held in the teletext case and as is shown below,⁶⁰ the agency *did*

56. *Id.* ("Were the balance ours alone to strike, the fairness doctrine would fall short of promoting those interests necessary to uphold its constitutionality."). As noted, the Supreme Court had suggested that it would reassess the constitutional standards traditionally applied to broadcast regulation upon receiving some "signal" from either the Congress or the FCC that spectrum scarcity had become obsolete. *See supra* note 39 and accompanying text (discussing *FCC v. League of Women Voters*, 468 U.S. 364, 370 n.11 (1984), and Supreme Court's need for "signal"). The Commission used its 1985 report to send such a "signal." *See 1985 Fairness Doctrine Report, supra* note 8, at 197-221 (information source increase suggests need to reevaluate first amendment standard for broadcast regulation).

57. *1985 Fairness Doctrine Report, supra* note 8, at 148.

58. *Id.* at 247; *Fairness Doctrine: The FCC Doesn't Like It but Says It Will Be Enforced*, BROADCASTING, Aug. 12, 1985, at 30, 31.

59. *1985 Fairness Doctrine Report, supra* note 8, at 247.

60. As noted earlier, the fairness doctrine was first articulated in its present form, not by Congress, but by the FCC in its 1949 report on editorializing, *see supra* notes 4, 23. The first and only statutory reference to an obligation to present contrasting views on controversial issues came in Congress' 1959 amendments to the Communications Act's "equal opportunities" provision for political candidates, 47 U.S.C. § 315. Therefore the codification debate usually focuses on this amendment. *See Telecommunications Research & Action Center v. FCC*, 806 F.2d 1115, 1116 (D.C. Cir. 1986) (Mikva, J., dissenting from denial of petition to rehear en banc) (arguing that 1959 amendments represented statutory enactment of FCC doctrine), *cert. denied*, 107 S. Ct. 3196 (1987). However, as will be shown, the amendment merely ratified the FCC's power to impose the fairness doctrine; it did not codify the doctrine and certainly did not freeze the doctrine in its 1959 form.

In response to an FCC interpretation that § 315 obligations were triggered every time a political candidate appeared on a newscast, and that had the unfortunate effect of making broadcasters reluctant to cover political campaigns, Congress in 1959 amended § 315 to exempt news programs. At the end of the exemptions, Congress added the provision that is cited by some as language codifying the fairness doctrine:

Nothing in the foregoing sentence [the exemptions] shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news docu-

have the power to modify and eliminate the doctrine. In this inquiry, however, it purported to find it unnecessary to explore the full extent of its powers because, it concluded, the "intense congressional interest in the fairness doctrine" suggested that the agency should "defer" to Congress.⁶¹ Given that the "fairness doctrine has been a longstanding administrative policy and

mentaries, and on-the-spot coverage of news events, from the obligation imposed upon them *under this Act* to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

Pub. L. No. 86-274, 73 Stat. 557, 557 (codified as amended at 47 U.S.C. § 315 (1982)) (emphasis added).

This proviso clearly indicates congressional approval of the doctrine, but it does not enact the doctrine as a statute that the Commission would then be powerless to change. The crucial sentence is a disclaimer, seeking to insure that the exemptions being added would not free broadcasters from the obligation imposed elsewhere. "[U]nder this Act" cannot be a reference to the amending legislation because there is no other provision in the amending legislation dealing with any fairness concern. "This Act" must be the Communications Act of 1934. The language in question is protecting an obligation previously imposed under the Communications Act. While the amending text does not make clear whether the obligation being protected is one created by Congress or the FCC, consideration of the law prior to 1959 makes it clear that the obligation being protected is Commission-created, not congressionally mandated.

The Communications Act of 1934 did not mandate the fairness doctrine. Congress had never explicitly enacted a fairness requirement; on the contrary, all prior efforts to do so had failed. Both in 1927, when it enacted § 18 of the Radio Act, and in 1934, when it reenacted § 18 as § 315 of the Communications Act, Congress rejected numerous attempts to impose explicitly a fairness requirement for controversial public issues. See STAFF STUDY OF THE HOUSE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE, 90TH CONG., 2D SESS., LEGISLATIVE HISTORY OF FAIRNESS DOCTRINE 10-15 (Comm. Print 1968) (Manelli Report). Moreover, as the FCC observed in the 1985 fairness inquiry, *1985 Fairness Doctrine Report, supra* note 8, at 227-32, and as the District of Columbia Circuit held in the teletext case, the "public interest" standard of the Act did not mandate the fairness doctrine as the FCC has defined it. *Telecommunications Research & Action Center v. FCC*, 801 F.2d 501, 516-19 (D.C. Cir. 1986), *cert. denied*, 107 S. Ct. 3196 (1987). Thus, the obligation being protected by the 1959 proviso is the obligation previously imposed by the Commission "under this Act." The 1959 Congress was disclaiming any intent to let the new exemptions be used to dismantle or interfere with the Commission's fairness doctrine; it was ratifying the Commission's power, not freezing it.

Not only does the language of the disclaimer appear neither to impose an obligation nor to freeze the agency's discretion, but it is unlikely Congress would take such a serious step without more discussion. Congress has consistently shown both that it can enact language explicitly requiring "equal opportunities" when it wants such a requirement, and that it does not want to adopt a statutory requirement imposing broad equal opportunities obligations for public issues generally. Given that Congress has continuously accorded the Commission broad, flexible power to evolve rules to serve the "public interest," it is unlikely that the 1959 Congress intended, without any discussion, to strip the Commission of all further discretion in this area by codifying the fairness doctrine in its 1959 form.

Finally, even in the unlikely event that Congress intended to have the 1959 amendment codify a fairness requirement, it could not have mandated the precise doctrine that exists today; many of the features that are said to cause chilling effects, such as (1) investigating complaints as they arise throughout the license period instead of making an overall assessment at renewal time, and (2) requiring licensees to offer free time if paid sponsorship is unavailable, were introduced after 1959. Thus, there can be no question that the FCC had the power at least to modify the doctrine and, I believe, to eliminate it.

61. *1985 Fairness Doctrine Report, supra* note 8, at 247.

central tenet of broadcast regulation that Congress has chosen not to eliminate, [and that] there are proposals pending before Congress to repeal the doctrine," the Commission chose to do nothing further and to "afford Congress an opportunity to review the fairness doctrine in light of the evidence adduced in this proceeding."⁶² The FCC thereupon terminated the proceeding and ordered the secretary to forward "copies of the *Fairness Report* to the appropriate Committees and Subcommittees of the House of Representatives and the Senate."⁶³

The agency had been intimidated. Congressman Wirth's threatened "vehement reactions" and Senator Hollings' promised "third kick" had had their intended effect.⁶⁴ The Commission would proceed as if nothing—no

62. *Id.* Throughout the late 1970s and early 1980s, a variety of bills were introduced in Congress that would have modified or eliminated the statutory provisions for equal opportunities for candidates as well as the fairness doctrine. *See, e.g.*, S. 1917, 98th Cong., 1st Sess., 129 CONG. REC. S13,475-76 (daily ed. Oct. 3, 1983) (introduced by Sen. Packwood); H.R. 5585, 97th Cong., 2d Sess., 128 CONG. REC. 2233 (1982) (introduced by Rep. Broyhill); S. 1178, 94th Cong., 1st Sess., 121 CONG. REC. 6454-58 (1975) (introduced by Sen. Hruska); S. 2, 94th Cong., 1st Sess., 121 CONG. REC. 211 (1975) (introduced by Sen. Proxmire). In 1979, Sen. Goldwater introduced a bill, S. 622, 96th Cong., 1st Sess., 125 CONG. REC. 4652-56 (1979), that would have prohibited the FCC from imposing the fairness doctrine on radio broadcasters. None of these bills was ever reported out of committee.

During this period there were also several unsuccessful efforts to amend the Communications Act to mandate a fairness requirement. *See, e.g.*, H.R. 3333, 96th Cong., 1st Sess., 125 CONG. REC. 6849 (bill introduced by Rep. Van Deerlin that would have required FCC to require television broadcasters to devote a "reasonable amount of time to controversial issues of public importance"), reprinted in *The Communications Act of 1979: Hearings on H.R. 3333 Before the Subcomm. on Communications of the House Comm. on Interstate and Foreign Commerce*, 96th Cong., 1st Sess. 124 (1979); H.R. 13,015, 95th Cong., 2d Sess., 124 CONG. REC. 16,729 (bill introduced by Rep. Van Deerlin that would have amended Communications Act to require television broadcasters to "treat controversial issues of public importance in an equitable manner"), reprinted in *The Communications Act of 1978: Hearings on H.R. 13,015 Before the Subcomm. on Communications of the House Comm. on Interstate and Foreign Commerce*, 95th Cong., 2d Sess. 91 (1978). These, too, failed to get out of committee.

Only one bill addressing these issues was ever reported out of committee. The Broadcast Deregulation Act of 1981 did not explicitly deal with § 315 or the fairness doctrine, but would have required the FCC to "review all rules directly or indirectly applicable to broadcast licensees and eliminate those that are not necessary or those which limit competition." S. 1629, 97th Cong., 2d Sess. § 2(2), 128 CONG. REC. 6189, 6189 (daily ed. Mar. 31, 1982). The bill passed the Senate but died in the House.

63. *1985 Fairness Doctrine Report*, *supra* note 8, at 247-48

64. FCC counsel admitted that the agency had been intimidated by threatened budget cuts. Explaining why the Commission "deferred" to Congress in the 1985 inquiry, Jack Smith, General Counsel for the Commission, said: "Congress has told [the Commission] in no uncertain terms by statement agreed to by both Houses, you shall not advance on this proceeding." Transcript of Proceedings at 40, *Radio-Television News Directors Ass'n v. FCC*, 809 F.2d 860 (D.C. Cir. 1987) (No. 85-1691). Observing that Smith was referring to the conference report accompanying a 1985 appropriations act containing funding for the FCC and that Congress had not passed any legislation ordering the agency to stop or defer, one of the judges responded: "That is not legislation. You are not contending that you are under a legislative mandate." *Id.* Smith agreed, and the judge continued: "You are contending that you are being, if I understand you correctly, your budget is being

inquiry, no indictment—had happened.

3. The Fairness Doctrine As Classic “Orphan”

Congress appeared content to maintain the doctrine in this orphaned state, with no intention of either enacting the doctrine or eliminating it. Shortly after the *1985 Fairness Doctrine Report* came out, Tom Rogers, senior counsel to the House Telecommunications Subcommittee, reportedly said that broadcasters should forget about getting relief in Congress.⁶⁵ Noting that Representative Wirth disagreed with the FCC on the fairness doctrine issue, Rogers said: “[T]he public can rest assured that this is one FCC recommendation which will not get any action out of the House.”⁶⁶ Representatives Dingell and Wirth confirmed that position in an editorial in March 1986, in which they pledged not to pass the legislation requested by Fowler, “con-signing it to the ash-heap.”⁶⁷

These congressional supporters also showed no sign of affirmatively enact-ing the doctrine as a statute, apparently content to continue maintaining the doctrine principally by pressuring the agency not to repeal it. In addition to the aforementioned informal threats issued by key legislators, supporters tried to pursue a few more formal actions to deter the FCC from repealing the doctrine. The Senate inserted language in its report accompanying the 1986 appropriations act that funded the FCC urging the agency neither to “weaken or eliminate any current political broadcasting protections,” nor to reduce the level of enforcement.⁶⁸ But no such language ever appeared in the

threatened by certain committees of Congress if you go ahead and exercise your responsibility under the Constitution.” *Id.* Smith reluctantly agreed again: “That is a harsh way to say it, but that is political reality. We are not talking law school enforcement and legal textbook arguments. We are talking political reality.” *Id.*; *Meredith Corp. v. FCC*, 809 F.2d 863, 873-74 (D.C. Cir. 1987) (“[B]ecause the Commission felt intense political, if not legal, pressure from Congress, it chose not to reach a final conclusion regarding the origins of the doctrine.”); *cf.* Shooshan & Krasnow, *Congress and the FCC*, *supra* note 18 (noting that when faced with congressional pressure, FCC abandoned its efforts to repeal the personal attack and political editorializing rules).

Frustrated by the FCC’s unwillingness to act, the Radio-Television News Directors Association and other parties sought to get the District of Columbia Circuit to do what they could not get the Commission to do. They sought a ruling that the doctrine was unconstitutional and that the Commission’s decision to continue enforcing it was arbitrary and capricious. The court never did rule on the merits of the Radio-Television News Directors Association’s petition. *See infra* notes 274, 285 and accompanying text (discussing complex saga of Association’s petition).

65. *Fairness Doctrine: The FCC Doesn’t Like It But Says It Will Be Enforced*, BROADCASTING, Aug. 12, 1985, at 30, 31.

66. *Id.*

67. Dingell & Wirth, *The Fairness Doctrine Can Help*, Wash. Post, Mar. 1, 1986, at A21, col. 1.

68. S. REP. NO. 150, 99th Cong., 1st. Sess. 74 (1985). This report, accompanying the 1986 Senate appropriations bill for the Departments of Commerce, Justice, State, the Judiciary, and related agencies, H.R. 2965, provided:

The Federal Communications Commission has the important responsibility of administering and enforcing the various political broadcasting laws, including the equal time rule,

act or the conference report.⁶⁹ In 1986, supporters of the doctrine inserted a provision in the continuing resolution that contained funding for the FCC that ordered the FCC to consider alternative administrative and enforcement techniques for the doctrine and to report back to Congress.⁷⁰ More restrictive language, seeking to prevent the Commission from changing the doctrine before submitting the report to Congress, appeared in the conference report that accompanied the continuing resolution but was not included in the resolution itself.⁷¹

Notwithstanding the fact that these actions did not legally prevent the FCC from reforming the doctrine, they were sufficient to keep the agency from acting. Indeed, the doctrine likely would have remained in this orphaned state indefinitely had the Court of Appeals for the District of Columbia not entered the picture in the case of *Meredith Corp. v. FCC*.⁷² The FCC had, as promised, continued to enforce the fairness doctrine, notwithstanding its conclusion that it contravened the public interest. In a fairness complaint processed while the fairness inquiry was underway, the FCC concluded that Meredith Corp., licensee of station WTVH in Syracuse, New York, had violated the doctrine by providing one-sided coverage of the controversial issue

the fairness doctrine, and the reasonable access provision. The Committee believes that these laws must be effectively and promptly administered and enforced. In addition, the Commission should not in any way weaken or eliminate any current political broadcasting protections without congressional approval, including weakening or eliminating any regulations, such as the personal attack and political editorializing rules. The staff assigned to administer and enforce these laws should not be reduced below current levels, and all inquiries and complaints should be responded to as promptly as in the past.

Id. The Senate had put the identical provision in its report accompanying the 1984 appropriations bill funding the FCC. S. REP. NO. 206, 98th Cong., 1st Sess. 23 (1983) (accompanying S. 1721); *see infra* note 107 (discussing legislative response to FCC's attempt to repeal personal attack and political editorializing rule).

69. Department of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act of 1986, Pub. L. No. 99-180, 99 Stat. 1136 (1985) (enacting H.R. 2965). While no such language appeared in the conference report, S. CONF. REP. NO. 414, 99th Cong., 1st Sess. (1985), the Senate report accompanying H.R. 2965 contained a section providing that "[a]ny limitation, directive, or earmarking contained in either the House or Senate report, which is not contradicted by the other report nor specifically denied in the other report, shall be considered as having been approved by both Houses of Congress." S. REP. NO. 150, 99th Cong., 1st Sess. 3 (1985).

70. Continuing Appropriations for Fiscal Year 1987, Pub. L. No. 99-591, § 101(b), 100 Stat. 3341, 3341-67 (1986). The Act stated that "funds appropriated to the Federal Communications Commission by this Act shall be used to consider alternative means of administration and enforcement of the Fairness Doctrine and to report to the Congress by September 30, 1987." *Id.* at 3341-67. In effect, Congress ordered the Commission to complete its inquiry.

71. "It is the intent of the conferees that the Federal Communications Commission shall not change the regulation concerning the Fairness Doctrine without submitting the required report to Congress on this matter." H.R. REP. NO. 1005, 99th Cong., 2d Sess. 431 (1986); 132 CONG. REC. H10,599, H10,720 (daily ed. Oct. 15, 1986) (conference report on House Joint Resolution 738, continuing appropriations for 1987).

72. 809 F.2d 863 (D.C. Cir. 1987).

of whether to build a nuclear power plant known as Nine Mile II.⁷³ On a motion for reconsideration issued two months after the *1985 Fairness Doctrine Report*, the FCC decided that since the licensee had presented sufficiently balanced coverage on the controversial issue in question after the complaint was filed, no remedial action was warranted.⁷⁴ It refused to address Meredith's claim that the doctrine was unconstitutional.⁷⁵ Referring to its recently delivered *1985 Fairness Doctrine Report*, the FCC repeated its conclusion that "irrespective of our view concerning the constitutionality of the Fairness Doctrine, the question of its repeal or its constitutionality is best left to Congress and the courts . . . [and] full enforcement of the Fairness Doctrine will continue."⁷⁶

Meredith sought relief in the Court of Appeals for the District of Columbia Circuit, arguing both that the FCC had misapplied the doctrine and that the doctrine violated the first amendment.⁷⁷ The FCC sought to avoid the merits, claiming that Meredith had not been aggrieved by the FCC's decision and therefore lacked standing.⁷⁸ At the same time, the agency acknowledged

73. *Syracuse Peace Council v. Television Station WTVH*, 99 F.C.C.2d 1389, 1389 (1984). The Syracuse Peace Council (SPC) alleged that during the summer of 1982, Meredith Corp., licensee of WTVH, had violated the fairness doctrine by broadcasting three advertisements sponsored by the Energy Association of New York that promoted the construction of the Nine Mile II nuclear power plant "as a sound investment for New York's future" without presenting opposing viewpoints. *Id.* On Dec. 20, 1984, after reviewing the responsive pleadings by the parties, the FCC agreed. *Id.* at 1401. Finding unreasonable Meredith's contention that the only issues addressed were the need to eliminate dependence on foreign oil and the need for electricity, *id.* at 1394-95, the Commission concluded that the advertisements had advocated construction of Nine Mile II as a sound investment, *id.* at 1395, that economic soundness of the plant was a controversial issue of public importance in the summer of 1982, *id.* at 1395-98, and, thus, that Meredith had acted unreasonably in failing to present viewpoints opposed to constructing the plant. *Id.* at 1406. It ordered Meredith to explain how it would comply with its fairness obligations. *Id.*

74. *Syracuse Peace Council v. Television Station WTVH*, 59 Rad. Reg. 2d (P & F) 179, 184-85 (F.C.C. 1985), *denying reconsideration of* 99 F.C.C.2d 1389 (1984). The Commission found "nothing in the licensee's petition for reconsideration and associated filings" that persuaded it to alter its earlier conclusion that WTVH had violated the fairness doctrine. *Id.* at 182. Nonetheless, since WTVH had demonstrated its "good faith in complying with the Fairness Doctrine [after the complaint] and shows its intention to do so in the future," and since the Commission was "satisfied that the public is receiving and will continue to receive contrasting points of view on the sound investment issue in accordance with the Fairness Doctrine," the Commission concluded that "no further action is warranted." *Id.* at 185.

75. Meredith first filed a petition for reconsideration challenging the application of the doctrine and then filed a supplemental pleading raising the constitutional claim. *Id.* at 182 n.4.

76. *Id.*

77. *Meredith Corp. v. FCC*, 809 F.2d 863, 865 (D.C. Cir. 1987).

78. Brief for Respondents at 14, *Meredith Corp.* (No. 85-1723). The Commission argued that notwithstanding its prior determination that Meredith violated the fairness doctrine, Meredith had *won* on reconsideration because the Commission had found that Meredith demonstrated good faith in carrying out its fairness doctrine obligations after the violation. Moreover, the Commission argued, Meredith was not injured because it had not been ordered to do anything. *Id.*

Intervenor SPC also contended that under 47 U.S.C. § 405 the court lacked jurisdiction to consider the constitutional challenge, which Meredith had not raised in its original motion for reconsid-

that Meredith's constitutional challenge was "persuasive,"⁷⁹ but suggested that the court should not decide it in this proceeding: "The Commission's position . . . is that the appropriate place to present generalized challenges to the continuing validity of the Fairness Doctrine is in the case which seeks direct review of the recent *Fairness Doctrine Report*."⁸⁰

The court rejected the FCC's claim that Meredith lacked standing,⁸¹ but was reluctant to address the merits of Meredith's constitutional claim. Wishing to avoid "premature or unnecessary constitutional adjudication," the court sua sponte challenged the FCC's failure to address the merits of Meredith's constitutional claim and concluded that such failure was arbitrary and capricious.⁸² In the court's view, the FCC had erred in refusing to decide whether the doctrine had been codified by Congress; political pressure from Congress was not a permissible basis for the FCC to refuse to decide on the origins of the doctrine.⁸³ And, once it was clear that the doctrine was not

eration. SPC argued that § 405's 30-day time limit for petitions for reconsideration precluded both the Commission and the court from considering Meredith's constitutional challenge. Final Brief of Intervenor Syracuse Peace Council at 20-23, *Meredith Corp.* (No. 85-1723).

79. Brief for Respondents at 23, *Meredith Corp.* (No. 85-1723).

80. *Id.* at 18.

81. The court refused to accept the contention that Meredith had won. "We find this interpretation of the Commission's decision impossible to reconcile with its ultimate conclusion: the Commission's memorandum and order denying Meredith's petition for reconsideration." *Meredith Corp.*, 809 F.2d at 868. The court decided that the Commission's adverse determination was "an implicit admonition as to future conduct and could be used against the licensee in a renewal hearing . . ." Therefore, the court held, Meredith "unquestionably has standing." *Id.* at 868-69.

82. *Id.* at 872. The court found no merit in SPC's timeliness objection to Meredith's constitutional claims. Observing that the Commission had not raised the issue, had not found the pleading untimely, and had received a "fair opportunity" to pass on the issue but had declined to do so for a substantive reason, the court found no jurisdictional impediment to either the Commission's or the court's review of the constitutional question. *Id.* at 869-70.

The court also rejected Meredith's claim that the agency had misapplied the doctrine. *Id.* at 871. Meredith had argued that the economic soundness of Nine Mile II was not controversial at the time it aired the advertisements in question. The Commission had found that judgment to be "unreasonable" and the court deferred to the Commission. *Id.*

83. *Id.* at 872-73. "[B]ecause the Commission felt intense political, if not legal, pressure from Congress, it chose not to reach a final conclusion regarding the origins of the doctrine. We think, however, the Commission was obliged to resolve that issue, at least in the context of an enforcement proceeding in which a party raises a constitutional defense." *Id.*

The court assumed that if the Commission had found that the doctrine had been codified by Congress, it would have been justified in not ruling on its constitutionality, relying, in the court's words, on the "well known principle that regulatory agencies are not free to declare an act of Congress unconstitutional." *Id.* at 872 (citing *Johnson v. Robison*, 415 U.S. 361, 368 (1974)); cf. Note, *The Authority of Administrative Agencies to Consider the Constitutionality of Congressional Statutes*, 90 HARV. L. REV. 1682, 1684-94 (1977) (traditional rule against agency ruling on the constitutionality of statute is "mere canon of statutory construction," not constitutional commandment.)

But the court did not believe the agency really doubted its power to repeal the rule. In the court's opinion, "the fair inference to be drawn from the Commission's [1985 Fairness Doctrine] report was that the Commission believed the doctrine was not specifically mandated; otherwise, it would have

codified, the agency *had* to address the constitutional challenge.⁸⁴ Since the District of Columbia Circuit had made clear in the teletext case that the doctrine was not constitutionally mandated,⁸⁵ the court remanded so that the FCC could consider Meredith's constitutional objections on the merits.

The *Meredith* remand finally galvanized Congress into more affirmative action. Fearful that the informal pressure would no longer suffice to preserve the doctrine in the face of the *Meredith* remand, congressional supporters of the doctrine moved actively to enact it as law.⁸⁶ The bill, entitled the "Fair-

been irresponsible for the Commission to gratuitously cast doubt on a congressional command." 809 F.2d at 872.

84. The court wrote:

It is patently obvious that *because of non-legislative expressions of congressional concern*, the Commission does not wish to weaken enforcement of the fairness doctrine. . . . The Commission, however, confuses its quasi-judicial role with its quasi-legislative one. . . . [W]e are aware of no precedent that permits a federal agency to ignore a constitutional challenge to the application of its own policy merely because the resolution would be politically awkward. . . . To enforce a Commission-generated policy that the Commission itself believes is unconstitutional may well constitute a violation of [the] oath [to support and defend the Constitution], but, in any event, the Commission *must* discharge its constitutional obligations by explicitly considering Meredith's claim that the FCC's enforcement of the fairness doctrine against Meredith deprives it of its constitutional rights. The Commission's failure to do so seems to us the very paradigm of arbitrary and capricious administrative action.

809 F.2d at 873-74 (footnotes omitted) (emphasis added).

85. As noted in the teletext case, the District of Columbia Circuit had upheld the FCC's earlier determination that the doctrine had not been mandated by Congress. *Television Research & Action Center v. FCC*, 801 F.2d 501 (D.C. Cir. 1986), *cert. denied*, 107 S. Ct. 3196 (1987); *see supra* notes 46, 60 (discussing court's decision that doctrine was not statutorily mandated).

86. Sen. Hollings decided the threatened "third kick" was not sufficient and, on Mar. 12, 1987, introduced S. 742, "The Fairness in Broadcasting Act":

[W]hile the FCC decided it should do a Fairness Doctrine inquiry, it did not have the intellectual honesty to do it correctly. It never examined whether there were alternative ways of administering and enforcing the Fairness Doctrine so as to lessen any concerns. It took an act of Congress to achieve this, and the FCC has until the end of this fiscal year to complete this study.

[D]espite an act of Congress, the FCC took its time—more than 3 months after the legislation was signed into law—before it initiated this study into the alternatives. At the same time, the FCC took only 6 days after the recent Appeals Court decision in Meredith to begin an inquiry into whether the FCC should find the Fairness Doctrine not in the public interest or unconstitutional. *The FCC acted despite the clear intent of Congress that the Commission take no action regarding the Fairness Doctrine until it completes the study mandated by law.*

[T]he FCC was under no mandate of the court to begin its inquiry in such a short time. In fact, the Meredith decision is not even effective yet. . . .

The Commission's relentless and misguided vendetta against the Fairness Doctrine is truly astounding. Under this regime, statutory language and congressional intent are not taken seriously. We have reached the point where we all know what the Chairman and the Commissioners will do with Fairness Doctrine—repeal it. That is why Sen. Inouye, Sen. Danforth, and I are introducing today this simple bill to redo what we already thought we had done some 30 years ago: codify the Fairness Doctrine.

ness in Broadcasting Act," passed both Houses⁸⁷ but was vetoed by President Reagan on June 19, 1987.⁸⁸ Apparently believing that an override was unlikely, the Senate voted to return the bill to committee without an override attempt.⁸⁹ The doctrine was still an orphan.

The *Meredith* remand also prompted the agency to act. With the protection afforded by the District of Columbia Circuit's order that it rule on Meredith's first amendment objection, the FCC was willing to confront Congress. On August 4, 1987, in an unusual, somewhat confusing opinion issued in the context of the *Meredith* remand, the FCC announced that the fairness doctrine was unconstitutional.⁹⁰ At the same time, it issued the congressionally-mandated study of alternatives.⁹¹

The exact implications of the FCC's actions are uncertain. Contrary to press assertions,⁹² the Commission did not clearly eliminate the doctrine. While the Commission broadly proclaimed that the doctrine "violates the First Amendment and contravenes the public interest,"⁹³ the only orders entered in the proceeding were specific to the complaint against Meredith. The Commission ordered that the complaint be dismissed and that the orders

133 CONG. REC. S3130 (daily ed. Mar. 12, 1987) (statement of Sen. Hollings) (emphasis added).

Sen. Inouye, joining Hollings, did not try to claim that the doctrine had already been codified. He more accurately noted:

This bill enacts the Federal Communications Commission's rules and policies governing the Fairness Doctrine, a principle which has governed broadcasting for 40 years. . . . The time has come to codify it, a goal which I share with the Chairman of the Commerce Committee, Sen. Hollings, and our distinguished ranking member, Sen. Danforth.

Id. at S3131 (statement of Sen. Inouye).

87. S. 742, 100th Cong., 1st Sess., 133 CONG. REC. S5232 (daily ed. Mar. 3, 1987), was passed by the Senate on Apr. 21, 1987, and H.R. 1934, 100th Cong., 1st Sess., 133 CONG. REC. H4160 (daily ed. Apr. 2, 1987), was passed by the House of Representatives on June 3, 1987.

88. Veto of Fairness in Broadcasting Act of 1987, 23 WEEKLY COMP. PRES. DOC. 715 (June 29, 1987). In his message accompanying the veto, President Reagan indicated that the legislation was "antagonistic to the freedom of expression guaranteed by the First Amendment." *Id.*

89. 133 CONG. REC. S8348 (daily ed. June 23, 1987); *Senate Democrats Halt Push for Fairness Doctrine*, N.Y. Times, June 24, 1987, at C26, col. 5 (Senate reported veto to Commerce Committee, avoiding floor vote).

90. *In re Complaint of Syracuse Peace Council Against WTVH*, 2 F.C.C. Rec. 5043 (1987) (*Meredith remand*), *reconsideration denied*, F.C.C. No. 88-131 (Apr. 7, 1988). The *F.C.C. Record* is the new official reporter for the FCC.

91. *Inquiry into Section 73.1910 of the Commission's Rules and Regulations Concerning Alternatives to the General Fairness Doctrine Obligations of Broadcast Licensees*, 2 F.C.C. Rec. 5272 (1987) (although there are alternative methods of enforcing and administering fairness doctrine that are preferable to current scheme, none is preferable to eliminating doctrine entirely).

92. See, e.g., *FCC Abolishes Fairness Doctrine, Arousing Debate*, Wall St. J., Aug. 5, 1987, at 8, col. 3; *FCC Votes Down Fairness Doctrines in a 4-0 Decision*, N.Y. Times, Aug. 5, 1987, at A1, col. 6; *The FCC, On the Attack Against Fairness*, Wash. Post, Aug. 5, 1987, at C1, col. 1.

93. *In re Complaint of Syracuse Peace Council against WTVH*, 2 F.C.C. Rec. 5043, 5043 (1987), *reconsideration denied*, F.C.C. No. 88-131 (Apr. 7, 1988).

finding Meredith in violation of the doctrine be vacated.⁹⁴ The Commission took no specific action to eliminate the doctrine generally. Instead, asserting that this proceeding was only an adjudication and that the only issue before it was the “continued viability of the fairness doctrine *as it is currently administered*,” the Commission contended that it was not required to engage in any “evaluation of alternative policies.”⁹⁵ Further, it noted: “Because this decision will serve as precedent in future cases, we need not—and do not—decide here what effect today’s ruling will have on every conceivable application of the fairness doctrine.”⁹⁶ Indeed, Chairman Dennis Patrick recently emphasized that issues such as the application of the fairness doctrine to ballot issues were not covered by the *Meredith* remand and that the staff had been instructed to continue to investigate and process complaints concerning such matters.⁹⁷ Thus, the doctrine still has some life in its orphaned state.

The drama of the fairness doctrine will undoubtedly continue. Congressmen, enraged by what they perceived as betrayal by the FCC,⁹⁸ promised

94. *Id.* at 5057-58.

95. *Id.* at 5062 n.60 (emphasis in original). The only substantive orders issued in the case were the granting of Meredith’s petition for reconsideration, the vacating of the Oct. 16, 1984, order finding that Meredith had violated the doctrine, and a denial of the complaint against Meredith. *Id.* at 5058.

96. *Id.* at 5063 n.75.

97. In response to an inquiry from Congressman John Dingell, Chairman of the House Committee on Energy and Commerce, Chairman Patrick indicated that the staff had been explicitly instructed to continue to “accept, investigate, and resolve” all fairness complaints not clearly within the scope of the *Meredith* decision, including complaints concerning the application of the fairness doctrine to ballot issues and political campaigns, the personal attack rule, and the political editorial rule. Letter from FCC Chairman Patrick to Representative Dingell (Sept. 22, 1987) (copy on file at *Georgetown Law Journal*). According to Chairman Patrick, at the time of his letter, there were 27 complaints “in the fairness doctrine area” pending before the Commission. *Id.*

The status of the first prong of the doctrine is also unclear. The Commission reasoned that the second prong—the balancing requirement—unnecessarily chilled broadcasters’ speech and was therefore unconstitutional. *Id.* at 5048-49. The first prong—the affirmative requirement to cover controversial issues—has never been said to chill speech and the Commission did not find that alone it would be unconstitutional. Nonetheless, it said that it was inappropriate to sever the second prong and to continue enforcing only the first prong. *Id.* at 5048. But the use of the doctrine of severability in this context is bizarre. Severability is a device the courts use to ascertain the intent of the promulgating body—what would it have wanted to do with the rest of the statute or rule if it had known that part of it was constitutionally infirm. Here the adjudicating body is also the promulgating body. It can decide what to do with the rest. Perhaps that is what the agency is doing here; but that is rulemaking, not adjudication, and should be accomplished by the appropriate procedures. For the agency lawfully to eliminate this requirement, it should analyze its merits and potential alternatives. But in all its pages of voluminous reports on the doctrine—the *1985 Fairness Doctrine Report*, the study submitted to Congress with the *Meredith* decision, and the *Meredith* remand itself—the Commission has never really addressed the wisdom of eliminating the first prong, a question that warrants serious attention.

98. FCC Chairman Fowler seemed to have promised that the FCC would not decide the *Meredith* remand before submitting the mandated fairness report to Congress. *Department of State, Year 1988 Budget Estimates: Hearings Before a Subcomm. of the Senate Comm. on Appropriations*, 100th Cong., 1st Sess. 642 (1987) (testimony of Chairman Fowler). Many legislators believed that an-

further legislative actions that the President would find more difficult to veto.⁹⁹ Judicial challenges to the FCC's unorthodox actions will also proceed apace.¹⁰⁰ But it is unnecessary for present purposes to predict the future chapters of this saga. The significance of this case study is that it alerts us to the possibility that the process of interactive deregulation can break down and leave in its wake an orphaned rule. Although it is an extraordinary tale of deregulation, the orphaning of the fairness doctrine is not unique. As the next section indicates, there are other orphaned rules that show no sign of being either eliminated by the promulgating agency or enacted by Congress. Moreover, with rules that are more arcane and/or less constitutionally vulnerable than the fairness doctrine, the orphaning process is likely to be less visible, less subject to judicial scrutiny, and therefore longer lasting and ultimately more troublesome.

nouncing them simultaneously was not complying with Chairman Fowler's promise. Wash. Post, Aug. 5, 1987, at A1, col. 1 (calling Commission's tactic of sending report simultaneously with deciding remand tricky "in the Nixonian sense."). Labeling the action "a thinly veiled attempt to end-run Congress," House Energy and Commerce Committee Chairman Dingell warned the FCC that it was acting "at very substantial peril." *FCC Abolishes Fairness Doctrine, Arousing Debate*, *supra* note 92, at 8, col. 3. Senate Commerce Committee Chairman Hollings called the FCC action "wrongheaded, misguided, and illogical." *Id.* According to the *Washington Post*, "legislators and their staffs are so incensed about what they see as a 'double-cross' by the FCC, that there is talk of immediate retaliation, like, perhaps, eliminating the Commission's travel budget." *The FCC, On the Attack Against Fairness*, *supra* note 92, at C6, col. 4.

99. *Id.* The President, for his part, seemed equally adamant. Asked if he would veto an appropriations bill if the fairness doctrine were attached, President Reagan responded:

In 1879, the Congress tried to repeal sections of the federal election laws by attaching 'riders' to various appropriations bills. President Rutherford B. Hayes vetoed five successive appropriations bills that summer before Congress finally relented. In his personal diary, Hayes wrote that to abandon principle in the face of this congressional tactic would be to violate a public trust. I do not intend to limit my options, but I will say that I sit at the very desk President Hayes used in the White House—and it may provide some inspiration in the months ahead.

BROADCASTING, June 29, 1987, at 30.

To date, as this article goes to press, the President is still winning this battle. Congress was close to including the doctrine in the continuing resolution it passed in December 1987, but in the eleventh hour—3:30 a.m., December 22, to be exact—it agreed to remove the provision. President Reagan had threatened a veto, and Congress decided not to see if he was bluffing. *The Rise and Fall of the Fairness Doctrine: The President Stands Firm* (pt. 2), BROADCASTING, Dec. 28, 1987, at 30, 31; *Fight Isn't Over*, Comm. Daily, Dec. 23, 1987, at 1-2.

100. Judicial challenges to the FCC's action began within days of the *Meredith* remand. Three days after the FCC's decision, the Syracuse Peace Council sought review of the order in the Second Circuit. The petition for review raised three claims: (1) the FCC lacked the statutory authority to do away with the doctrine; (2) *Meredith's* constitutional rights were not adversely affected; and (3) the fairness doctrine is constitutionally favored and statutorily sound. *Media Access Project Continues Its Fairness Fight*, BROADCASTING, Aug. 17, 1987 at 38, 38-39. According to the District of Columbia Circuit, the case has been transferred to that Circuit where it is still pending. *Syracuse Peace Council v. FCC* (No. 87-1516).

B. THE ORPHANING OF OTHER AGENCY RULES

1. The Personal Attack and Political Editorializing Rules

On June 21, 1983, about a year before it began its fairness doctrine inquiry, the FCC issued a notice of proposed rulemaking to examine the possible repeal or modification of the personal attack and political editorializing rules.¹⁰¹ These rules, officially promulgated by the FCC in 1967, are "right to reply" rules that require broadcasters to give access time to specific individuals. Under the former, one whose integrity has been attacked must be given an opportunity to respond; under the latter, political candidates competing with a candidate who is endorsed by a broadcaster must be given response time.¹⁰² Although similar to the fairness doctrine in their concern for balance, they are significantly different in that they provide the broadcaster with little or no discretion in choosing how to provide that balance.

Issuing the notice of proposed rulemaking in response to a petition by the National Association of Broadcasters, the Commission indicated that the "rules do not serve the public interest"¹⁰³ and should be subjected to a reexamination that was "especially searching."¹⁰⁴ Concerned that these rights of

101. Repeal or Modification of the Personal Attack and Political Editorial Rule, 48 Fed. Reg. 28,295 (proposed June 21, 1983) [hereinafter NPRM to Repeal Right to Reply Rules].

While these rules are closely related to the fairness doctrine, there are several reasons why it is instructive to consider them separately here. First, as will be seen, the agency has considered their elimination separately from that of the fairness doctrine. In fact, these were the first rules the agency thought it should eliminate; it issued a notice of proposed rulemaking to eliminate them in 1983. Second, they are, as the FCC recognized, significantly different from the fairness doctrine in that they give a right to reply to particular individuals and give the broadcaster no discretion. Third, Congress never codified or otherwise mandated them. Finally, as will be seen, they are still clearly orphaned.

102. The personal attack rule provides that when an attack is made on the honesty, character, integrity, or other personal qualities of an individual or group during a broadcast of a controversial issue of public importance, the licensee must within a week notify the attacked person or group, provide a script, tape, or summary of the attack, and offer a reasonable opportunity to respond using the licensee's facilities. *Amendment of Part 73 of the Rules to Provide Procedures in the Event of a Personal Attack or Where a Station Editorializes as to Political Candidates*, 8 F.C.C.2d 721, 726 (1967) (codified at 47 C.F.R. § 73.1920 (1986)). The political editorial rule requires that when a licensee endorses (or opposes) a legally qualified candidate, it must notify the opponents of the candidate endorsed (or notify the candidate opposed) within 24 hours, transmit a script or tape of the editorial, and offer a reasonable opportunity for the candidates or their spokespersons to respond using the licensee's facilities. *Id.* at 726-27 (codified at 47 C.F.R. § 73.1930 (1986)).

These agency-devised rules complement, but differ from, the statutory requirements of 47 U.S.C. §§ 312(a)(7), 315 (1982), which give political candidates special rights to access and equal opportunities. Under § 315, if a political candidate "uses a broadcasting station" the broadcaster must offer an equal opportunity to competing candidates. Section 312(a)(7) provides that the Commission may revoke any license for failure to allow federal candidates reasonable access to the broadcasting station.

103. NPRM to Repeal Right to Reply Rules, 48 Fed. Reg. 28,295, 28,301 (proposed June 21, 1983).

104. *Id.* at 28,298.

access exceeded its statutory mandate, chilled political debate, and violated the Constitution, the FCC concluded that "the petitioner and other commentors have presented a compelling case that the personal attack and political editorializing rules do not serve the public interest."¹⁰⁵

The FCC's attack triggered an angry response from two key Congressmen. Representative John Dingell, Chairman of the House Energy and Commerce Committee, and Representative Wirth, Chairman of the House Telecommunications Subcommittee, made known their opposition in a letter to FCC Chairman Fowler. "These proposals represent yet another disturbing step in the FCC's pattern of systematic retreat from the principles of public service and accountability that form the cornerstone of a broadcaster's responsibilities under the Communications Act."¹⁰⁶ They were "deeply troubled" by Fowler's "ideological crusade": "We believe your deregulatory crusade is being conducted with such unrelenting ideological fervor that it threatens to compromise the integrity of the FCC as an independent regulatory agency."¹⁰⁷

In November 1983, several representatives introduced a bill to bar the FCC from repealing these rules before January 1, 1985, to require the FCC to notify Congress if it planned to change the rules, and to give Congress 120 legislative days to prevent such action.¹⁰⁸ The bill never got out of committee. Nonetheless, it appears to have accomplished even more than it attempted. The rules are intact to this day—well beyond the date at which the proposed House bill aimed. The rulemaking remains open, but unofficially abandoned, notwithstanding the FCC's indictment of the scarcity rationale with which the rules were justified, the rules' constitutional vulnerability, and the persistent efforts of many organizations to get the FCC to complete the proceeding, pending since 1983.¹⁰⁹ Without the equivalent of a *Meredith*

105. *Id.* at 28,301.

106. *Letter to FCC: Let Personal Attack, Political Editorial Rules Stay Intact*, BROADCASTING, June 27, 1983, at 86, 86.

107. *Id.* In the Aug. 2, 1983, report accompanying the Senate's proposed 1984 appropriations bill containing funding for the FCC, S. 1721, the Senate Committee on Appropriations urged the Commission not to "in any way weaken or eliminate any current political broadcasting protections, including by weakening or eliminating any regulations." S. REP. NO. 206, 98th Cong., 1st Sess. 23 (1983).

108. H.R. 4324, 98th Cong., 2d Sess., 129 CONG. REC. 9354 (1983); BROADCASTING, Nov. 28, 1983, at 34.

109. After the *Meredith* remand, several groups including the Radio-Television News Directors Association, the National Association of Broadcasters, the Media Institute, the Reporters Committee for the Freedom of the Press, the Society of Professional Journalists, the Tribune Broadcasting Company, and the Freedom of Expression Foundation petitioned the FCC to complete the proceeding begun in 1983. See *Petitioners Ask FCC to Ax Fairness Doctrine Corollaries*, BROADCASTING, Aug. 31, 1987, at 89, 89. But the Commission has made it clear that the *Meredith* remand did not affect these rules, and that the staff has been instructed to continue to "accept, investigate, and resolve" complaints concerning the personal attack and political editorial rules. Letter from FCC

remand as an impetus and a shield, the agency appears unwilling to confront this informal legislative opposition.

2. The Network Syndication and Financial Interest Rules

The orphaning of the fairness doctrine cannot be dismissed as simply the result of the uncertain legal status of the doctrine. As shown, the "right to reply" rules have been similarly orphaned, notwithstanding the fact that Congress never mandated them. Moreover, the FCC's network syndication and financial interest rules, clearly within the Commission's discretionary orbit, have been orphaned since 1983.

In 1970, concerned with the national television networks' domination of prime-time programming, the FCC adopted syndication and financial interest rules to regulate the rights networks could acquire or retain in programming used for network distribution.¹¹⁰ In 1982, in response to a severely critical report from a specially appointed task force, the FCC's Network Inquiry Special Staff,¹¹¹ the FCC issued a notice of proposed rulemaking to repeal these rules.¹¹² A year later, after examining extensive comments, the FCC concluded that the financial interest rules were not fulfilling their goal of promoting the development of new programming and should be eliminated entirely; the restrictions imposed by the syndication rules, it decided, should be significantly reduced.¹¹³

Chairman Dennis Patrick to Representative John Dingell (Sept. 22, 1987) (copy on file at *Georgetown Law Journal*); see *In re Complaint of Syracuse Peace Council v. Television Station WTVH*, F.C.C. No. 88-131, slip. op. at 5, ¶ 8 (Apr. 7, 1988), *denying reconsideration of 2 F.C.C. Rec. 5043* (1987). It has given no indication of when, if ever, it intends to complete the proceeding it began in 1983 to repeal or reform these rules.

110. *In re Amendment of Part 73 of the Commission's Rules and Regulations with Respect to Competition and Responsibility in Network Television Broadcasting*, 23 F.C.C.2d 382, 401 (1970). In 1972, the effective dates were changed. *Amendment of Part 73 of the Commission's Rules and Regulations with Respect to Competition and Responsibility in Network Television Broadcasting*, 35 F.C.C.2d 411, 421 (1972) (codified at 47 C.F.R. § 73.658(j) (1986)) (current version of rules).

111. FEDERAL COMMUNICATIONS COMM'N NETWORK INQUIRY SPECIAL STAFF FINAL REPORT, NEW TELEVISION NETWORKS: ENTRY, JURISDICTION, OWNERSHIP, AND REGULATIONS 293-313 (Oct. 1980). In general, the Special Staff concluded that the rules were unnecessary, misguided disruptions of an essentially efficient risk sharing arrangement between networks and program suppliers. Not only did the rules create no new outlets or viewing options to further the Commission's goal of enhancing diversity in programming, but they posed the risk of actually increasing concentration in the program supply market. *Id.*

112. Amendment of the Commission's Syndication and Financial Interest Rules, 47 Fed. Reg. 32,959 (proposed July 30, 1982).

113. *In re Amendment of 47 C.F.R. § 73.658(j)(1)(i) & (ii), the Syndication and Financial Interest Rules, Tentative Decision & Request for Further Comments*, 94 F.C.C.2d 1019 (1983). The Commission found there was "no credible evidence that the rules have fostered the development of first-run syndicated programming or have increased the diversity or competitiveness of the program supply market." *Id.* at 1094. Therefore, the financial interest rules were to be eliminated and the syndication rules were to be modified. In order to give the public an opportunity to comment on and "fine-tune" the proposed modification, it termed its decision on the syndication rules "tenta-

Several Congressmen, including Representative Henry Waxman from Hollywood, California—home of many of the independent producers who support the rules, were upset by the proposed deregulation: “The rules don’t need an FCC repairman to fix what is already working smoothly. We in Congress have no choice but to act decisively to save the rules.”¹¹⁴ Representative Waxman introduced a bill designed to prevent the FCC from repealing the rules for at least five years.¹¹⁵ He was able to get the House to agree only to a six-month moratorium,¹¹⁶ but, as it turned out, a formal moratorium was unnecessary. The FCC voluntarily capitulated. Apparently seeking to avoid a “final up-or-down vote,” the Senate convinced Fowler to delay implementation voluntarily.¹¹⁷ Chairman Fowler sent a letter to Senator Ted Stevens indicating that the FCC would delay the proposed deregulation until May 10, 1984, then six months away, to give the networks and their opponents time to negotiate and compromise.¹¹⁸ The unofficial morato-

tive.” *Id.* at 1022-23, 1101-02. Its conclusion that the financial interest rules had to be eliminated was final because, in the Commission’s opinion, the Network Inquiry Special Staff study showed the rules were not having the desired effect on the network-supplier relationship. *Id.* at 1101.

As the FCC recognized, these rules were not the only constraints on the networks. There were also outstanding consent decrees, entered into between the Department of Justice and each of the major networks to resolve an antitrust action brought by the United States, which imposed similar restrictions on the networks. *Id.* at 1025 (citing *United States v. NBC*, 449 F. Supp. 1127 (C.D. Cal. 1978)). Nonetheless, the existence of the consent decrees did not make the Commission’s efforts less pertinent. As the FCC properly observed, the consent decrees should not “constrain this Commission in carrying out its own responsibilities.” *Id.* at 1097 n.110. The Commission recommended that the modifications it was proposing for its own rules, which incorporated suggestions proffered by the Department of Justice, should also be made in consent decrees. *Id.*

114. *Wirth Hearing Goes To Hollywood*, BROADCASTING, June 6, 1983, at 75 (statement of Rep. Waxman).

115. H.R. 2250, 98th Cong., 1st Sess., 129 CONG. REC. H1560 (daily ed. March 22, 1983) (bill that would prevent FCC from changing financial and syndication rules for five years).

116. The House Committee on Energy and Commerce amended H.R. 2250 to pare the moratorium time down to six months, explaining that six months was sufficient time to review rules. H. REP. NO. 483, 98th Cong., 1st Sess. 4 (1983). The House passed the moratorium on Nov. 8, 1983. See 129 CONG. REC. H9308-11 (daily ed. Nov. 8, 1983) (statements of Reps. Wirth, Waxman, and Downey in favor of passage of H.R. 2250).

117. Chairman Fowler was apparently influenced both by the activity in Congress and by President Reagan’s announced support for a two-year moratorium. According to *Broadcasting*:

Both sides in the dispute had taken the matter to friends in Congress as well as the White House, and while those favoring retention of the rules won every legislative test of strength, no one wanted to participate in a final up-or-down vote. As a result, friends and foes of the rules in the Senate prevailed on Chairman Fowler . . . to agree to a six-month moratorium to give the parties a chance to work out a compromise.

Goldwater Asks Chairman Fowler to Put Off Fin-Syn for Two Years, BROADCASTING, Mar. 26, 1984, at 27, 28.

118. 39 CONG. Q. ALMANAC 560-61 (1983). Chairman Fowler’s letter prompted Jack Valenti, president of the Motion Picture Association of America, a major proponent of the rules, to proclaim victory. “This is what we sought—a six-month moratorium.” *Fowler Backs Down off Fin-Syn*, BROADCASTING, Nov. 21, 1983, at 26, 26.

rium was then unofficially extended when, in March 1984, Senator Barry Goldwater, Chairman of the Communications Subcommittee, and fourteen other Senators sent a letter to Fowler urging the FCC to take no further action on the rules for another two years.¹¹⁹ After this letter, the Commissioners "showed no inclination to do anything else."¹²⁰ As Commissioner James Quello put it: "We are an arm of Congress, and there seems to be an overwhelming sense in both the Senate and House for a delay."¹²¹

Thus, May 10, 1984, the unofficial end of the unofficial moratorium, came and went, and the FCC did nothing. It has done nothing to date. The rules are still in effect, unmodified, notwithstanding the special task force's indictment and the agency's final conclusion, on the record, that they deserve the public interest.¹²² Congressman Wirth accurately claimed this as a legislative victory. Reviewing the issues addressed by the Ninety-Eighth Congress, he announced: "We spent a good deal of time on [the] financial interest [rules], and that issue is pretty well taken care of."¹²³ A few vocal congressional supporters of the rules, this time with the concurrence of the President, had vetoed, or in the words of Senator Hollings "overturned," the FCC's attempted repeal, effectively "enacting" the rules without ever passing a statute.¹²⁴ The expert agency's indictment stands, but so also do the rules.

3. Assorted Other Orphans

These experiences with the FCC cannot be dismissed as isolated examples of a particularly intimidated agency or unusually intimidating legislators. An informal search reveals the presence of orphaned rules in a variety of other administrative agencies.¹²⁵

119. *Goldwater Asks Fowler to Put Off Fin-Syn for Two Years*, *supra* note 117, at 27. According to *Broadcasting*, the Senators' letter "noted that they 'appreciate the efforts' the Commission has made to work with Congress on the financial interest syndication rules issue and 'other important and-complex issues of mutual interest.' That was a reference at least to the Commission's willingness to back down on a key issue involving the implementation of the breakup of AT&T after Congress made clear its opposition." *Id.* at 28.

120. *Fin-Syn Repeal Doubtful*, *BROADCASTING*, Apr. 2, 1984, at 70, 70.

121. *Id.* Documentary evidence of this "overwhelming sense" of legislative desire consisted of one letter from 15 Senators. Moreover, their informal request was only for a two-year moratorium, not for the permanent perpetuation of the rules they seemed to have achieved.

122. *See supra* note 111 and accompanying text (discussing rules, special staff report, and FCC's decision to reform).

123. *Wirth Extends an Olive Branch*, *BROADCASTING*, Apr. 1, 1985, at 39, 40.

124. Sen. Hollings, in an oversight hearing in 1985, reminded Chairman Fowler of instances in which Congress has "overturned" decisions of the FCC: the access charge, the financial interest syndication rules, and the effort to permit increasing national ownership of broadcast stations. *Reauthorization and Oversight Hearing*, *supra* note 7, at 24.

125. Given the nature of the beast, an informal search seems to be all one can presently do to find orphaned rules. It is to be hoped, however, that by identifying and naming the phenomenon, this article may raise the consciousness of administrators, legislators, and the public and make it easier in the future to identify orphans when they occur.

Thus, for example, efforts by the Food and Nutrition Service (FNS) of the Department of Agriculture to modify the standards for the food to be included in food packages for needy women and children has been stalled by legislative opposition. Pursuant to the Child Nutrition Act of 1966, the FNS sets standards for food packages to be distributed to women and children under the Special Supplemental Food Program for Women, Infants, and Children (WIC).¹²⁶ In 1982, the FNS proposed revising some of the standards for the foods included in the packages.¹²⁷ But numerous legislators objected. Members of the Senate tried unsuccessfully to add a rider to the Agriculture, Rural Development, and Related Agencies Appropriation Bill for 1983 that would have thwarted the agency's proposed rule change.¹²⁸ The best they could do was to get an ambiguous provision inserted in the conference report accompanying the agriculture appropriations bill.¹²⁹

Despite the fact that the warning was both ambiguous and not part of a statute, it was sufficient to make the FNS abandon its efforts midstream. To date, the effort to modify the rules remains open and incomplete.¹³⁰

Similarly, the Environmental Protection Agency's (EPA) effort to modify its liquid hazardous waste disposal regulations was abandoned midstream because of legislative pressure. In 1982, the EPA announced that its rules regulating the disposal of liquid hazardous wastes in landfills were "too extreme for real-world application."¹³¹ It issued a notice of proposed rulemaking proposing to modify the restrictions.¹³² Several members of Congress strenuously objected to the proposed modifications and held extensive hear-

126. The WIC was established pursuant to the Child Nutrition Act of 1966, Pub. L. No. 89-642, § 13, 80 Stat. 885, 889 (1966) (codified as amended at 42 U.S.C. §§ 1771-1789 (1982)).

127. 47 Fed. Reg. 48,304 (1982) (proposing to modify permissible sugar content in cereals, authorize distribution of flavored milk, and eliminate requirement that peanut butter and beans be included in the supplement). These standards are codified at 7 C.F.R. § 246.8(c)(3)-(6) (1985).

128. S. REP. NO. 566, 97th Cong., 2d Sess. 83 (1982) (report accompanying appropriations bill H.R. 7072 indicating disapproval of the FNS's proposed modifications and prohibiting the use of any funds to accomplish the change).

129. H.R. CONF. REP. NO. 957, 97th Cong., 2d Sess. 22 (1982) (accompanying Agriculture, Rural Development, and Related Agencies Appropriations Act for 1983, Pub. L. No. 97-370, 96 Stat. 1787 (1982), deleting Senate's proposed restriction). The provision that was included warned that "[any changes made in the] national standards for the composition of the food package should be made on comprehensive scientific evidence, necessitating the consideration of a food item as a whole and not eliminate any food item based on a single component thereof." *Id.*

130. The only action taken by the FNS has been to comply with a court order mandating the inclusion of flavored milk. *Chocolate Mfrs. Ass'n of United States v. Block*, 755 F.2d 1098 (4th Cir. 1985).

131. 47 Fed. Reg. 8307, 8308 (Feb. 25, 1982) ("The agency believes that the current . . . prohibition is too extreme for real-world application. In its literal interpretation, landfill disposal of containerized wastes containing only 'one drop' of free liquid is banned."). The proposal was to amend the rules promulgated in 1980 and codified at 40 C.F.R. §§ 265.312-.314 (1982). In addition to announcing proposed modifications to the rules, the EPA also announced that the application of the 1980 rules would be suspended. 47 Fed. Reg. 8304 (Feb. 25, 1982).

132. 47 Fed. Reg. 8304 (1982).

ings; this pressure was apparently enough to prevent the EPA from proceeding.¹³³ The existing regulations continued unmodified and the rulemaking remained open but abandoned for several years. Fortunately, in this instance of interactive deregulation, Congress finally acted affirmatively to end the impasse.¹³⁴

These examples of rule orphaning are less dramatic than the foregoing FCC examples because, unlike the FCC, these agencies had neither formally announced a final conclusion before congressional pressure deterred them from proceeding nor clearly indicated that, in their opinion, the existing rule disserved the statutory mandate.¹³⁵ Nonetheless, the examples suggest that

133. In response to considerable congressional opposition, *see* 12 Env't Rep. (BNA) 1443, 1443-44 (Mar. 12, 1987) (describing strenuous opposition by Reps. Levitas, Molinari, Fenwick, Marks, and Sen. Kennedy), the EPA reconsidered its decision to suspend the rules and announced on Mar. 22, 1982, that the 1980 restrictions would remain in effect while it continued its efforts to modify them. 47 Fed. Reg. 12,316 (Mar. 22, 1982). It extended the comment period for its proposed rulemaking to modify the restrictions for an additional 90 days. *Id.* But the legislators continued their opposition and held more hearings. *See* 12 Env't Rep. (BNA) 1544, 1545 (Mar. 26, 1986); *Hazardous Waste Contamination of Water Resources: Hearings Before the Subcomm. on Investigations and Oversight of the House Comm. on Public Works and Transportation, 97th Cong., 2d Sess.* (1982) (record of extensive hearings in March and July 1982 opposing EPA's proposed modifications).

134. In § 201(c) of the Hazardous and Solid Waste Amendments of 1984 (HSWA), Pub. L. No. 98-616, 98 Stat. 3221, 3226, Congress explicitly addressed the issue of liquid hazardous waste disposal and ordered the EPA not to modify the existing regulations. It provided that effective six months after the enactment of the HSWA, "the placement of bulk or noncontainerized liquid hazardous waste or free liquids contained in hazardous waste . . . in any landfill is prohibited." *Id.* § 201(c)(1), 98 Stat. 3226. Prior to that date, the Administrator was instructed to maintain "in force and effect" the existing regulations. *Id.* Section 201(c)(2) provided that within 15 months after enactment of the HSWA, the Administrator was to promulgate final regulations to minimize both the disposal of containerized liquid hazardous waste and the presence of free liquids in containerized waste to be disposed in landfills. *Id.* § 201(c)(2), 98 Stat. 3227. In the interim, the Act required that existing regulations remain "in force and effect." *Id.*

135. Another potential orphan that appeared to be developing at the Nuclear Regulatory Commission (NRC) was resolved as this article went to press. Pursuant to its existing regulations, the NRC will not issue an operating license for a nuclear power plant until the applicant has demonstrated effective emergency evacuation procedures, including an actual dry run. 10 C.F.R. §§ 50 app. E (1986). Responding to two situations in which state and local officials refused to cooperate in designing and demonstrating such procedures, the NRC considered modifying the requirement to deal with state or local government non-cooperation. Before the NRC officially announced the proposed rulemaking, Congressman Edward Markey unofficially released a draft of the NRC's proposal and stirred up enormous opposition. *Wash. Post*, Feb. 6, 1987, at A4, col. 1. In response, the NRC took the unusual step of inviting key Congressmen and Governors to meet with the Commissioners to express their views. *N.Y. Times*, Feb. 25, 1987, at A14, col. 3 (describing meeting of legislators). Several days later the NRC decided, notwithstanding the opposition, to issue the notice of proposed rulemaking. 52 Fed. Reg. 6980 (1987).

Angry legislators sought to block the proposed revision by introducing bills to prevent the change, *N.Y. Times*, Feb. 27, 1987, at D18, col. 1; by demanding the resignation of one of the commissioners, *N.Y. Times*, Apr. 22, 1987, at 1, col. 5; by calling for the recusal of the executive director, *id.*; and by holding congressional hearings. *N.Y. Times*, Apr. 29, 1987, at A26, col. 1. While none of these legislative attempts was actually implemented, the cumulative effect seemed to keep the NRC from acting at all. Ultimately, however, as this article went to press, the agency

orphaned rules are not unique to the FCC and that the same forces that intimidated the FCC can effectively paralyze any agency's efforts to reform rules it believes are no longer appropriate.¹³⁶

III. ELEMENTS OF THE ORPHANING PROCESS

As these case studies suggest, breakdowns in what I have called interactive deregulation are most likely to occur and produce orphaned rules when three factors coincide: (1) an agency with broad rulemaking power decides to modify or repeal an agency-created rule, (2) influential members of Congress favor the rule, cannot or will not get Congress as a whole to enact it, and instead pressure the agency to retain it, and (3) the agency defers or capitulates, either explicitly or implicitly, to this legislative pressure.¹³⁷ As will be shown, these factors are likely to coincide frequently.

For a variety of powerful political and institutional reasons, Congress tends to delegate broad rulemaking powers to agencies. Politically, broad delegation of legislative power permits Congress to address a problem while avoiding the difficult policy determinations that frequently divide coalitions and impede enactment of legislation. Congress is thereby able to get credit for attending to a problem, while deflecting blame for unpopular choices to administrators.¹³⁸ Institutionally, Congress often lacks the technical expertise to draw up detailed standards. Especially in an area where technology is rapidly changing and it is difficult to predict the questions that will arise, Congress wants an expert agency to have the flexibility to deal with new problems. Therefore, it is not surprising to find that broad delegation has become "the dynamo of the modern social service state."¹³⁹

These broad delegations provide the agency with considerable discretion in

acted to end the impasse; notwithstanding the legislative pressure, the NRC finally acted and adopted the controversial rule to deal with those instances where state and/or local governments decline to participate in off-site emergency planning. 52 Fed. Reg. 42078 (1987).

136. There are, however, important differences among the examples. Unlike the fairness doctrine, most of the others involve rules that are constitutionally less vulnerable than the fairness doctrine. They also appear to be less frequently the subject of adjudications. Thus, their orphaning is less likely to generate a case like *Meredith Corp.*, the case that provided the impetus to get the FCC to move toward ending the impasse with the fairness doctrine.

137. It is not surprising that the FCC's recent, deregulatory efforts generated such an array of orphans. As discussed *infra* at notes 148, 151, and 154, all three of these factors frequently characterize the FCC-Congress interactions. See generally E. KRASNOW, L. LONGLEY & H. TERRY, *THE POLITICS OF BROADCAST REGULATION* (1982); Robinson, *The Federal Communications Commission: An Essay on Regulatory Watchdogs*, 64 VA. L. REV. 169 (1978).

138. Aronson, Gellhorn & Robinson, *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 32-33 (1982); see M. FIORINA, *CONGRESS—KEYSTONE OF THE WASHINGTON ESTABLISHMENT* 41-49 (1977) (discussing reelection goals of members of Congress and methods used to obtain them); D. MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* (1974) (same).

139. A. BICKEL, *THE LEAST DANGEROUS BRANCH* 161 (1962) (quoting Jaffe, *An Essay on Delegation of Legislative Power* (pt. 2), 47 COLUM. L. REV. 561, 592 (1947)).

deciding how to fill the gaps left open by the legislators.¹⁴⁰ As Judge (now Justice) Scalia has observed:

Where Congress chooses not to be specific in a statute, where it leaves something open, where it leaves interstices in the strict meaning of the law, the general principle is that the filling-in of those interstices has been left to the agency, and the agency may choose to fill it in one way today and another way tomorrow, but that is part of the discretion that is written into the statute.¹⁴¹

Thus, the agency may, at any time, reconsider the wisdom of an existing rule. Whether because of changes in the underlying economic or social environment for which the rule was designed,¹⁴² discovery of new empirical data,¹⁴³ reevaluation of old data,¹⁴⁴ new technological developments,¹⁴⁵ or simply a revised assessment of the best way to serve the statutory mandate,¹⁴⁶ the

140. "The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to *fill any gap left, implicitly or explicitly, by Congress.*" *Morton v. Ruiz*, 415 U.S. 199, 231 (1974) (emphasis added).

141. Scalia, *The Role of the Judiciary In Deregulation*, 55 ANTITRUST L.J. 191, 193 (1986); see *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 594 (1981) (general rulemaking authority permits FCC to implement "its view of public interest" standard as long as view is based on consideration of permissible factors and is otherwise reasonable).

142. See, e.g., *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 797 (1978) (because of greater pool of qualified applicants for station licenses and fear of undue concentration, FCC no longer permits common ownership of broadcast station and daily paper in same community); *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 265-66 (1975) (NLRB policy regarding presence of union representative changed because of changing pattern in industrial life); *American Trucking Ass'n v. Atchison, T. & S.F. Ry.*, 387 U.S. 397, 416 (1967) (ICC changed policy regarding provision of services because of transportation pattern changes).

143. See *Environmental Defense Fund, Inc. v. EPA*, 510 F.2d 1292, 1300 (D.C. Cir. 1975) (discovery regarding danger of pesticide caused EPA reversal).

144. See *FTC v. Texaco, Inc.*, 555 F.2d 862, 893-94 (D.C. Cir.) (Leventhal, J., concurring) (agency may change way it perceives and evaluates critical facts), *cert. denied*, 431 U.S. 974 (1977); *Environmental Defense Fund, Inc. v. EPA*, 510 F.2d at 1300 (reevaluating data prepared by FDA contributed to EPA Administrator's reversal regarding pesticide registration).

145. See *Office of Communications of the United Church of Christ v. FCC*, 707 F.2d 1413, 1434 (D.C. Cir. 1983) (new economic and technological conditions suggest that permitting stations to specialize will offer more diversity of programming and thus better serve the statutory mandate); *Computer & Communications Indus. Ass'n v. FCC*, 693 F.2d 198, 202-03 (D.C. Cir. 1982) (FCC overhaul of regulatory regime governing relationship of telecommunications and data processing motivated by monumental changes in technological and economic conditions of communications market), *cert. denied*, 461 U.S. 938 (1983).

146. This is what Judge (now Justice) Scalia described as a "shift" in agency policy: "Take an agency that in the past has thought that within the area of discretion that the law provides it, it is better to do things this way rather than that way. Caught up in the zeal for deregulation, it now thinks that it is better to do it that way rather than this way. It could have done it either way originally, but has shifted." Scalia, *supra* note 141, at 191; see *American Trucking Ass'n v. Atchison, T. & S.F. Ry.*, 387 U.S. 397, 416 (1967) (change in ICC policy regarding trailer-on-flatcar services may appropriately be prompted by new developments or reconsideration of relevant facts); *Pinellas Broadcasting Co. v. FCC*, 230 F.2d 204, 206 (D.C. Cir.) (FCC licensing of nonlocal applicant for TV station construction prompted by change in Commission's evaluation of importance of local ownership), *cert. denied*, 350 U.S. 1007 (1956); see also *Greater Boston Television Corp. v.*

agency may conclude that a rule must be reformed or eliminated. As long as Congress has not mandated or codified the rule, the agency remains empowered to make such changes.¹⁴⁷

But legislators may disagree with the agency's revised opinion and want to preserve the existing rules; and the broader the interstices or gaps, the more likely that such disagreements will occur.¹⁴⁸ If there is sufficient legislative sentiment for the rule, Congress can, of course, act affirmatively to save the rule; it can enact it as a statute or redefine the agency's mandate so as to require the agency to retain the rule. As Congress' enactment of the Hazardous and Solid Waste Amendments of 1984 demonstrates, Congress occasionally responds in precisely this manner.¹⁴⁹

FCC, 444 F.2d 841, 852 (D.C. Cir. 1970) ("Agency's view of what is in the public interest may change, either with or without a change in circumstances."), *cert. denied*, 403 U.S. 923 (1971).

147. The line between impermissible repeals that are inconsistent with the statutory mandate and those that are acceptable reevaluations of the exercise of agency discretion is often difficult to ascertain. For interesting discussions on how to interpret statutes to ascertain that line, see Diver, *supra* note 19; Eskridge, *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1985); *Conference on Statutory Interpretation*, 1987 DUKE L.J. 361 (discussion between Judge Starr and Judge Mikva). Legally, however, the difference is significant. To the extent that Congress has mandated particular rules or policy judgments, the agency has no discretion to eliminate them. Scalia, *supra* note 141, at 198 (suggesting that one of the only mandates that gives virtually no discretion is the Delaney Amendment that forbids all additives that "induce cancer in man or animals," citing 21 U.S.C. § 348(c)(3)(A) (1982)). However, as the Supreme Court recently emphasized in reviewing a Department of Transportation decision to repeal its passive restraint regulations for automobiles, as long as Congress has not mandated a rule, the agency is free to rescind it. *Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 45 (1983).

148. Given the breadth of the FCC's authority, its recent conflicts with legislators is not surprising. The Commission is authorized to "implement *its view* of the public-interest . . . 'so long as that view is based on consideration of permissible factors and is otherwise reasonable.'" *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 594 (1981) (emphasis added) (citing *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 793 (1978)) (Court noted that Commission's decision could be based on judgment and prediction, not necessarily on factual determinations).

149. See *supra* notes 131-34 and accompanying text. Congress, for example, passed the Consumer Product Safety Commission Improvements Act of 1976 to specifically limit the Commission's jurisdiction to regulate firearms. Pub. L. No. 94-284, § 3(e), 90 Stat. 503, 504 (1976) (codified at 15 U.S.C. § 2080 note (1982)). Similarly, in 1980, Congress passed the Soft Drink Interbrand Competition Act, Pub. L. No. 96-308, §§ 2, 3, 5, 94 Stat. 939, 939 (1980) (codified at 15 U.S.C. §§ 3501-3503 (1982)), removing some soft drink trademark licensing agreements from the reach of the antitrust laws. A dramatic example of congressional action to prevent disfavored agency action occurred with Congress' series of moratoria preventing the Food and Drug Administration from banning saccharin or saccharin products. Saccharin Study and Labeling Act Extension, Pub. L. No. 99-46, 99 Stat. 81, 81 (1985) (codified at 21 U.S.C. § 348 (Supp. III 1985)) (moratorium extended additional 24 months); Saccharin Study and Labeling Act Amendment of 1983, Pub. L. No. 98-22, § 2, 97 Stat. 173, 173 (1983) (codified at 21 U.S.C. § 348 (Supp. III 1985)) (moratorium extended additional 24 months); Saccharin Study and Labeling Act Amendment of 1981, Pub. L. No. 97-42, § 2, 95 Stat. 946, 946 (1981) (codified at 21 U.S.C. § 348 (1982)) (moratorium extended additional 24 months); Saccharin Study and Labeling Act—Extension of Time, Pub. L. No. 96-273, 94 Stat. 536, 536 (1980) (codified at 21 U.S.C. § 348 (1982)) (moratorium extended additional 25 months); Saccharin Study and Labeling Act of 1977, Pub. L. No. 95-203, § 3, 91 Stat. 1451, 1452 (1977) (codified at 21 U.S.C. § 348 (1982)) (original 18-month moratorium).

However, as the experience with the fairness doctrine dramatically illustrates, enacting laws is often difficult. A majority of the two Houses is not enough; the President must also concur or two-thirds of both Houses must agree. In addition to these demanding constitutional requirements, there are also the time-consuming and burdensome procedural steps of committee hearings, reports, and conference committees.¹⁵⁰ Procedurally, therefore, it is easier for congressional supporters of a rule to prop it up by applying informal pressure in oversight hearings and speeches, essentially negative techniques which are frequently used and often effective.¹⁵¹

Gaps and pressure alone will not produce an orphan; the third critical factor in creating an orphan is the agency's capitulation to congressional pressure and abandonment of its effort to reform the rule in question. And the incentives to yield to these congressional threats are substantial. While the primary incentives of administrators are open to debate,¹⁵² it seems clear

150. See generally W. OLESZEK, CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS (2d ed. 1984) (explaining legislative process and analyzing effects of process on efficiency of administration).

151. See generally J. HARRIS, CONGRESSIONAL CONTROL OF ADMINISTRATION (1966) (evaluating different types of legislative controls); Krasnow & Shooshan, *Congressional Oversight: The 92nd Congress and the Federal Communications Commission*, 10 HARV. J. ON LEGIS. 297 (1973) (overview of congressional goals and methods in overseeing agencies); Newman & Keaton, *Congress and the Faithful Execution of Laws—Should Legislators Supervise Administrators?*, 41 CALIF. L. REV. 565, 566 (1953) (agencies frequently subjected to significant legislative pressure); Pierce & Shapiro, *Political and Judicial Review of Agency Action*, 59 TEX. L. REV. 1175 (1981) (conflicting political interests, as well as lack of time and technical expertise, frequently drive legislators to use nonstatutory controls); Weingast & Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 J. POL. ECON. 765 (1983) (legislators use threat of *ex post* sanctions to create *ex ante* incentives to control administrators).

A general fondness for using informal pressure to "guide" agencies is particularly apparent in Congress' interaction with the FCC:

Statutory control, the most obvious congressional activity, is noteworthy for *its relative unimportance in broadcast regulation*. In fact, Congress rarely chooses to influence the administration or formation of FCC policy with specific legislation. . . . [Congress prefers to use] nonstatutory controls"

Krasnow & Shooshan, *supra*, at 304, 305 (emphasis added); see L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 49 (1965) (FCC has never received the slightest positive guidance from Congress, only an occasional critical negative). Newton Minow, former Chairman of the FCC, described the phenomenon graphically. Shortly after being appointed Chairman, Minow was embraced by Speaker of the House Sam Rayburn and told: "Just remember one thing, son. Your agency is an arm of the Congress. You belong to us. Remember that, and you'll be all right." Minow, Book Review, 68 COLUM. L. REV. 383, 383-84 (1968). The Speaker went on to warn Minow to expect pressure, but Minow recalls, "What he did not tell me was that most of the pressure would come from the Congress itself." *Id.* at 384.

152. See S. BREYER, REGULATION AND ITS REFORM 10 (1982) (view that regulators and politicians motivated only by politics and self-interest is "far too narrow"); E. KRASNOW, L. LONGLEY & H. TERRY, *supra* note 137, at 33-48 (describing variety of forces operating on FCC Commissioners); K. MEIER, REGULATION: POLITICS, BUREAUCRACY AND ECONOMICS 14-15 (1985) (discussing range of bureaucrats' goals); J. WILSON, THE POLITICS OF REGULATION 392 (1980) (much of what appears to be result of "bureaucratic ineptitude, agency imperialism, or political meddling" is

that regulators are often motivated, at least in part, by a desire to please their legislative overseers who influence their budget, power, and even tenure.¹⁵³ Moreover, as a former chairman of the FCC candidly admitted, “[i]t is easy—very easy—to confuse the voice of one Congressman or one Congressional committee, with the voice of Congress.”¹⁵⁴

Given the power and prevalence of these institutional and political forces, orphaned rules are likely to occur frequently. The question is whether anything can and should be done to avoid or reduce their incidence.

IV. POTENTIAL CONSTRAINTS ON THE ORPHANING PROCESS

Administrative agencies are constitutional anomalies. In particular, Congress’ delegation of broad rulemaking power to agencies, both executive and

result of magnitude of many regulatory tasks); *see also infra* note 267 (additional discussion of administrators’ incentives).

153. A. DOWNS, *INSIDE BUREAUCRACY* (1967) (bureaucrats seek to maximize their budget, their jurisdiction, and their output); Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & ECON. 211, 214 (1976) (regulators’ pursuit of political support motivated by desire for tenure and budget increases); Posner, *The Federal Trade Commission*, 37 U. CHI. L. REV. 47, 85 (1969) (administrators primarily motivated by private gain, including not just money, but security, prestige, and power) (citing Stigler, *The Regulation of Industry* (Apr. 10, 1969) (unpublished paper)). *See generally* Stigler, *The Process of Economic Regulation*, 17 ANTITRUST BULL. 207, 220-35 (1972); Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI., 3 (1971).

154. Minow, *supra* note 151, at 385. The FCC has been particularly susceptible to such pressure, usually from a few key legislators. *See* J. LANDIS, 86TH CONG., 2D SESS., REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT 53 (Comm. Print 1960) (the FCC “has been subservient, far too subservient, to the subcommittees on communications of the Congress and their members”); Krasnow & Shooshan, *supra* note 151, at 304, 321-23 (“The Congress that oversees the FCC . . . is not the Congress in its entirety. It is a few select committees and often just a few individuals.”). *See generally* K. DAVIS, *DISCRETIONARY JUSTICE* 146-48 (1969).

Public choice theory indicates that regulators, both administrative and legislative, respond to those interests that are sufficiently numerous to have a major stake in the political process and sufficiently cohesive to be able to organize for political action. *See supra* notes 152, 153 (discussing variety of regulators’ motives). These theories are potentially useful in attempting to identify the relevant parameters for predicting where and when orphans are most likely to occur—when sufficient congressional pressure in favor of the status quo is likely to develop and outweigh the countervailing pressure that moved the agency to decide, at least initially, to eliminate or modify the rule. The likely pertinent factors would seem to include the type of agency (independent, executive; single administrator, multi-headed); source and degree of congressional interest; level of Presidential interest; nature of third-party interest and relative degree of its influence on the agency, Congress, and the President; past interactions between the agency and Congress (including experiences with other reforms contemplated or already implemented by the agency); nature of delegation (industry-specific regulation (FCC, ICC) or problem-specific regulation (OSHA, EPA, CPSC)); and type of regulation at issue (broad policy regulation, technologically complex rules). *See* R. NOLL & B. OWEN, *THE POLITICAL ECONOMY OF DEREGULATION, INTEREST REGULATORY PROCESS* 26-68 (1983) (examining factors involved in politics of deregulation); J. WILSON, *supra* note 152, at 357-94 (discussing dynamics of regulation and deregulation); Weingast, *Regulation, Reregulation and Deregulation: The Political Foundations of Agency Clientele Relationships*, 44 LAW & CONTEMP. PROBS. 147, 175 (Winter 1981) (noting trend of deregulation during period of social regulation).

independent,¹⁵⁵ threatens the fundamental constitutional premise that laws are to be made by an elected group that is both politically accountable and separate from those responsible for executing the laws. Orphaned rules dramatically illustrate the weakness of this shared policymaking. Nonetheless, some form of delegated lawmaking is essential today. The central question is how to control it;¹⁵⁶ the specific question for this article is how to control orphaning. Given the three elements that comprise the orphaning process, three types of control must be considered: (1) constraints on the breadth of congressional delegation, (2) limits on Congress' ability to control powers once delegated, and (3) constraints on the agency's exercise of the delegated powers.

A. CONSTRAINTS ON CONGRESSIONAL DELEGATION

The nondelegation doctrine purports to limit Congress' ability to share its lawmaking powers. The Constitution vests the legislative power in Congress,¹⁵⁷ and Congress can only delegate it "under the limitations of a prescribed standard."¹⁵⁸ Chief Justice Taft attempted to elaborate on the required standards in *J.W. Hampton & Co. v. United States*: "If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to con-

155. The definition of an "independent agency" is not precise. Generally, it means one whose head or heads are protected from removal by the President except upon statutorily prescribed grounds. See Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41, 50-52 (discussing various meanings for phrase "independent agency"). See generally *Humphrey's Ex'r v. United States*, 295 U.S. 602, 626, 630 (1935) (holding that under certain circumstances Congress may constitutionally limit President's removal power to remove to specified causes and acknowledging thereby the existence of independent agencies). Notwithstanding *Humphrey's Executor* and its progeny, *Wiener v. United States*, 357 U.S. 349 (1958), the constitutionality of independent agencies has come under attack again in recent years. See *infra* note 259 (discussing recent legal attack on the constitutionality of independent agencies).

156. "There is now general agreement about the necessity for delegated legislation; the real problem is how this legislation can be reconciled with the processes of democratic consultation, scrutiny, and control." A. Bevan, *The Select Committee on Delegated Legislation*, 1953 *Minutes of Evidence* 144, quoted in Stewart, *supra* note 14, at 1669.

The constitutional status of administrative agencies is the subject of a great deal of scholarship. For a valuable examination of the various models for controlling agency discretion, see S. BREYER & R. STEWART, *supra* note 14, at 41-126 (discussing problems of controlling administrative discretion); Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276 (1984) (critiquing principal models of American legal doctrine that define and perpetuate bureaucracy); Stewart, *supra* note 14 (analysis of traditional agency model); Strauss, *supra* note 14 (analyzing place of agencies in constitutional scheme and their relation to the three named branches of government).

157. Article I provides: "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." U.S. CONST. art. I, § 1. Congress has authority "[t]o make all Laws which shall be necessary and proper for carrying into execution" its vested powers. U.S. CONST. art. I, § 8, cl. 18.

158. *United States v. Chicago, Milw., St. P. & Pac. R.R. Co.*, 282 U.S. 311, 324 (1931) (citing *Union Bridge Co. v. United States*, 204 U.S. 364, 384-85 (1907)).

form, such legislative action is not a forbidden delegation of legislative power."¹⁵⁹

The nondelegation concept, derived from the principle of separation of powers and the contract notion of government based on the consent of the governed, is more than an eighteenth century formalism;¹⁶⁰ it serves several useful purposes. It attempts to promote political accountability by ensuring that the difficult policy decisions are made by elected representatives rather than by appointed administrators.¹⁶¹ The doctrine also seeks to protect against arbitrary or discriminatory agency action by minimizing the discretion of the administrator and facilitating judicial review; if Congress delegates very broadly, the courts have no effective way of ensuring that agencies stay within bounds set by the politically accountable legislature.¹⁶² Most important for present purposes, the nondelegation doctrine, if strictly enforced, would reduce the gaps or interstices that agencies can fill and thus would reduce the probability of generating orphans.

Notwithstanding these salutary objectives, the Supreme Court, either sympathetic to Congress' need to delegate broadly or resigned to its inevitability,

159. 276 U.S. 394, 409 (1928).

160. The concept behind the nondelegation doctrine dates back to the 18th century writings of John Locke:

The legislature cannot transfer the power of making laws to any other hands; for it being but a delegated power from the people they who have it cannot pass it over to others . . . [N]or can the people be bound by any laws but such as are enacted by those, whom they have chosen and authorized to make laws for them. The power of the legislature, being derived from the people by a positive voluntary grant and institution, can be no other than what that positive grant conveyed, which being only to make laws, and not to make legislators, the legislature can have no power to transfer their authority of making laws and place it in other hands.

2 J. LOCKE, TWO TREATISES OF GOVERNMENT 193 (T. Cooke ed. 1947).

161. See J. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 131-34, 177 (1980) (discussing early application and modern perceptions of nondelegation doctrine); Schoenbrod, *The Delegation Doctrine: Could the Court Give it Substance?*, 83 MICH. L. REV. 1223, 1224 (1985) ("Unchecked delegation undercuts the legislature's accountability to the electorate and subjects people to rule through ad hoc commands rather than democratically considered general laws."); Stewart, *supra* note 14, at 1676 (without effective directives from the legislature, major questions of social and economic policy are determined by officials who are not formally accountable to the electorate).

162. Chief Justice Stone emphasized the importance of facilitating judicial review in *Yakus v. United States*, 321 U.S. 414, 424-26 (1944). In upholding the Emergency Price Control Act of 1942, which directed the Price Administrator to fix maximum prices which "in his judgment will be generally fair and equitable," the Court said: "Only if we could say that there is an absence of standards for the guidance of the Administrator's action, so that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed, would we be justified in overriding its choice of means for effecting its declared purpose of preventing inflation." *Id.* at 426; see Stewart, *supra* note 14, at 1673 (absence of meaningful statutory controls deprives citizens of protection against abusive exercise of administrative power; without guiding statutory directive, courts have no benchmark against which to measure assertions of agency power).

has been notably tolerant of extremely broad delegations. It has not used the nondelegation doctrine to strike down an act of Congress since 1935 when the Court was generally hostile to much of the New Deal legislation.¹⁶³ In the fifty years since these cases, the Court has consistently rejected delegation challenges. While purportedly applying the same test throughout the years—scrutinizing the challenged statute for intelligible standards and statements of purpose to guide the officials to whom authority is delegated,¹⁶⁴ in reality, the Court's decisions display an increasingly greater deference to Congress' broad delegations.¹⁶⁵ Thus, some observers have declared the doctrine dead, or at least dying.¹⁶⁶

But the doctrine is not as lifeless as some have suggested. The Court has never officially repudiated it and still uses it in interpreting statutes, construing a delegation narrowly when a broader interpretation might suggest an unconstitutional delegation.¹⁶⁷ Moreover, Chief Justice Rehnquist, former Chief Justice Burger, and a growing number of lower court judges and schol-

163. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 530 (1935) (striking down as impermissibly broad the National Industrial Recovery Act's delegation of power to private industry and the President to draw up "codes of fair competition" to govern trade practices in specific industries); *Panama Refining Co. v. Ryan*, 293 U.S. 388, 430 (1935) (holding unconstitutional the section of the National Industrial Recovery Act that authorized the President to prohibit interstate transportation of certain petroleum products because it failed to provide adequate standards to govern the President's exercise of the power); *cf. Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936) (holding unconstitutional congressional delegation of authority to private employers and workers to establish industry-wide rates and maximum hours in Bituminous Coal Conservation Act). For general analysis of the Court during the New Deal, see R. McCLOSKEY, *THE AMERICAN SUPREME COURT 136-80* (1960); Currie, *The Constitution in the Supreme Court: The New Deal, 1931-40*, 54 U. CHI. L. REV. 504 (1987).

164. *See, e.g., United States v. Mazurys*, 419 U.S. 544, 556-57 (1975) (delegation in Indian Intercourse Act not overbroad); *Lichter v. United States*, 334 U.S. 742, 774-86 (1948) (finding "intelligible principle" in renegotiation Act); *Woods v. Lloyd W. Miller Co.*, 333 U.S. 138, 144-45 (1948) (Housing and Rent Act of 1947 is not grant of "unbridled administrative discretion"); *Fahey v. Mallonee*, 332 U.S. 245, 248-54 (1947) (Home Owners Loan Act of 1933, distinguishing *Schechter*); *NBC v. United States*, 319 U.S. 190, 225-26 (1943) (Federal Communications Act not overbroad delegation); *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 397 (1940) (standards sufficiently specific in Bituminous Coal Act).

165. "In an increasingly complex society Congress obviously could not perform its functions if it were obliged to find all the facts subsidiary to the basic conclusions which support the defined legislative policy . . ." *Opp Cotton Mills, Inc. v. Administrator*, 312 U.S. 126, 145 (1941); *Yakus v. United States*, 321 U.S. 414, 424-26 (1944) (upholding Price Administrator's power to fix fair and equitable maximum prices).

166. *See, e.g., Federal Power Comm'n v. New England Power Co.*, 415 U.S. 345, 352-53 (1974) (Marshall, J.) (declaring nondelegation doctrine moribund); Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85, 118-19 ("the nondelegation doctrine is a name without a doctrine"); Elliott, *INS v. Chadha: The Administrative Constitution, the Constitution, and the Legislative Veto*, 1983 SUP. CT. REV. 125, 173-74 (broad delegations are a fact of life).

167. For example, in *National Cable Television Ass'n v. United States*, 415 U.S. 336, 342 (1974), the Court narrowly construed a statute that authorized agencies to charge for benefits conferred by their regulatory activity, fearing that a broader construction would raise serious questions concerning Congress' power to delegate the taxing power. *Id.*; *Industrial Union Dep't, AFL-CIO v. Ameri-*

ars have recently been urging the Court to revitalize the doctrine.¹⁶⁸ As Professor Theodore Lowi, who has been urging revitalization of the nondelegation doctrine since 1969, recently argued: “[T]he delegation of broad and undefined discretionary power from the legislature to the executive branch deranges virtually all constitutional relationships”¹⁶⁹

Congress’ delegation to the FCC is a classic example of an exceedingly broad delegation, the “granddaddy of delegations,” according to Justice Scalia.¹⁷⁰ By authorizing the agency to promulgate any rules it believes serve the “public interest, convenience, and necessity” as long as those rules are not inconsistent with other laws, Congress can hardly be said to have given the agency an “intelligible principle.”¹⁷¹ As Professor Jaffe has observed: “In [broadcasting] . . . there never has been a statutory policy. The FCC was

can Petroleum Inst., 448 U.S. 607, 646 (1980) (delegation to OSHA narrowly construed); *Zemel v. Rusk*, 381 U.S. 1, 17-18 (1965) (Passport Act of 1926 narrowly construed and delegation upheld).

168. See *American Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 543 (1981) (Rehnquist, J., dissenting) (OSHA delegation to establish standard “which requires conditions . . . reasonably necessary or appropriate to provide safe or healthful . . . places of employment” unconstitutionally broad) (citing 29 U.S.C. § 652(f)); *Industrial Union Dep’t, AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 671 (1980) (Rehnquist, J., concurring) (finding same delegation unconstitutionally broad).

Lower court judges have also been critical of Congress’ broad delegations. See H. FRIENDLY, *THE FEDERAL ADMINISTRATIVE AGENCIES: THE NEED FOR BETTER DEFINITION OF STANDARDS* 163-75 (1962) (asserting desirability of more detailed legislative directions to agencies); Wright, *Beyond Discretionary Justice* (Book Review), 81 *YALE L.J.* 575, 582-87 (1972) (advocating revival of nondelegation doctrine to control agency discretion despite difficulty of distinguishing permissible from impermissible delegations); see also McGowan, *Congress, Court, and Control of Delegated Power*, 77 *COLUM. L. REV.* 1119, 1127-30 (1977) (suggesting that delegation doctrine should be enforced only in those instances where congressional lack of specificity is due to lack of will and not lack of expertise).

The academics have also been concerned with broad delegations. See generally J. ELY, *supra* note 161, at 131-33 (little point in worrying about distribution of the franchise if important policy choices are made by unelected administrators). See generally T. LOWI, *THE END OF LIBERALISM: IDEOLOGY, POLICY AND THE CRISIS OF PUBLIC AUTHORITY* 146, 154-55, 297-99 (1969) [hereinafter T. LOWI, *END OF LIBERALISM*] (calling for judicial extension of the “still valid but universally disregarded *Schechter* rule” to declare “invalid and unconstitutional any delegation of power to an administrative agency that is not accompanied by clear standards of implementation”); T. LOWI, *THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES* (2d ed. 1979) (same); Gellhorn, *Returning to First Principles*, 36 *AM. U.L. REV.* 345 (1987) (nondelegation doctrine needed to prevent agencies from creating “private goods,” in conflict with both Constitution and public interest); Lowi, *Two Roads to Serfdom: Liberalism, Conservatism, and Administrative Power*, 36 *AM. U.L. REV.* 295, 296 (1987) [hereinafter Lowi, *Roads to Serfdom*] (reduction of agency discretion essential as “antidote to government by patronage”); Schoenbrod, *Separation of Powers and the Powers that Be: The Constitutional Purposes of the Delegation Doctrine*, 36 *AM. U.L. REV.* 355, 357-58 (1987) (broad delegation undoes article I safeguards without providing alternative safeguards).

169. Lowi, *Roads to Serfdom supra* note 168, at 296.

170. Scalia, *supra* note 141, at 196.

171. *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 594 (1981).

simply told to go ahead and regulate in 'the public interest.'"¹⁷² In light of this broad mandate, it is no surprise to find legislators and administrators disagreeing over what is statutorily required.

Nonetheless, it is highly unlikely that the delegation to the FCC in the Communications Act would be found overbroad. The Court has not only consistently rejected such challenges to the Act,¹⁷³ but has been notably tolerant of the FCC's expansive reading of its powers.¹⁷⁴

Moreover, the nondelegation doctrine is not likely to be useful in controlling orphans in other contexts either. Despite the pleas of judges and scholars, the Court is unlikely substantially to restrict Congress' ability to delegate. Detailed legislative specifications of policies are often impossible and undesirable. When, for example, Congress is regulating a technologically complex subject or rapidly developing field, it needs the flexibility afforded by broad delegations.¹⁷⁵ Moreover, judicial enforcement of

172. Jaffe, *The Independent Agency—A New Scapegoat* (Book Review), 65 YALE L. REV. 1068, 1073 (1956).

173. In *NBC v. United States*, 319 U.S. 190, 216 (1943), the Supreme Court upheld the Commission's chain broadcasting rules that limited the control networks could exert over licensees, even though networks were not licensed by or otherwise within the direct control of the FCC. The Court noted that the "public interest, convenience, or necessity" criterion "is as concrete as the complicated factors for judgment in such a field of delegated authority permit. 'This criterion is not to be interpreted as setting up a standard so indefinite as to confer an unlimited power.' " *Id.* (citation omitted); see *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940) ("underlying the whole law is recognition of the rapidly fluctuating factor characteristic of the evolution of broadcasting and of the corresponding requirement that the administrative process possess sufficient flexibility to adjust itself to these factors").

174. In *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968), for example, the Court sustained the Commission's asserted authority to regulate the relatively new technology of cable television under the 1934 grant of power to regulate communications by wire and radio, as long as the cable regulations were "reasonably ancillary" to the agency's responsibilities to regulate broadcasting. A few years later, the Court upheld the FCC's authority to require cable operators to initiate their own programming or cablecasting. *United States v. Midwest Video Corp.*, 406 U.S. 649, 670 (1972). *But cf.* *FCC v. Midwest Video Corp.*, 440 U.S. 689, 708 (1979) (FCC's access requirements imposed on cable operators not reasonably ancillary to responsibilities to regulate broadcasting because FCC was statutorily forbidden to impose an analogous requirement on broadcasters).

175. While no law may, in some instances, be preferable to a vaguely worded delegation to unelected bureaucrats, it is not always the desired course. The significant criticism directed at the detailed provisions Congress established in the Amendments to the Clean Air Act of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (codified at 42 U.S.C. §§ 7401-7642 (1982)), suggests that legislative specification of policy is not universally desirable. See B. ACKERMAN & W. HASSLER, *CLEAN COAL, DIRTY AIR 3-4* (1981) (specificity of Clean Air Amendments denied EPA discretion needed to use technical expertise); K. DAVIS, *supra* note 154, at 49 (congressional guidelines for agencies may be undesirable if the regulatory subject is new or society divided); J. WILSON, *supra* note 152, at 392 (it may be possible to have Lowi's "juridical democracy" with a limited government and minimal public intervention in the market, but the larger the role of government, the more diverse the range of interests it must reconcile and thus the greater the scope of administrative discretion required); Jacoby & Steinbruner, *Salvaging the Federal Attempt to Control Auto Pollution*, 21 PUB. POL'Y 1, 1-3 (1973) (noting excess specificity of Clean Air Act mechanisms); see also Mashaw, *Why*

nondelegation constraints is not risk free; prescribing when and how broad delegations are constitutional requires judgments that are necessarily subjective, inherently manipulable, and often partisan.¹⁷⁶ Accordingly, while enhanced self-restraint on the part of Congress is generally desirable,¹⁷⁷ a significant revitalization of the nondelegation doctrine by the Court to substantially curtail broad delegations is neither probable nor advisable.¹⁷⁸

Furthermore, even if the Court were to constrain delegation to some extent, it is not likely to impose constraints sufficiently stringent to eliminate the types of policy disputes between Congress and the agencies that lead to the creation of orphaned rules. As one of the more ardent advocates of a strong nondelegation doctrine, Professor Lowi, admits, even with a revitalized doctrine, a substantial residuum of agency discretion would remain.¹⁷⁹ Thus, there will continue to be gaps for agencies to fill and the possibility of policy disputes between legislators and administrators regarding these gaps. If impasses and orphans are to be avoided, other control devices must be considered.

B. CONSTRAINTS ON CONGRESSIONAL CONTROL OF AGENCIES

Congress has a wide variety of means, both statutory and nonstatutory, through which it can control agency discretion. It can use the enabling legislation that establishes the agency, subsequent legislation modifying the agency's jurisdiction or affecting its budget, oversight and budgetary hearings, as well as confirmation hearings for commissioners or agency heads.¹⁸⁰

Administrators Should Make Political Decisions, 1 J.L. ECON. & ORG. 1 (1985) (criticizing arguments of Lowi and Ely, and arguing for broad delegations especially where there is need for individualized justice and localized decisionmaking).

176. Notwithstanding the late Judge McGowan's suggestion, it is virtually impossible for courts to differentiate coherently between delegations made for acceptable reasons, such as providing flexibility in a field of rapidly changing technology, and those made for less appropriate reasons, such as avoiding political responsibility. See generally McGowan, *supra* note 168, at 1127-30; Stewart, *Beyond Delegation Doctrine*, 36 AM. U.L. REV. 323 (1987); Stewart, *supra* note 14, at 1696-97.

177. Cf. THE FEDERALIST No. 10 (J. Madison) (hoping structure of republican government coupled with "enlightened statesmen" would be able to control factions and promote "public good"); Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 31-32 (1985) (advocating a return to republican conception of politics, which emphasizes civic virtue and deliberation, instead of focusing exclusively on pluralist conception, which emphasizes uninhibited interest group bargaining); *infra* note 234 (discussing debate concerning extent to which Constitution contemplates more than "interest group pluralism.").

178. Elliott, *supra* note 166, at 173-74 ("It is hard to imagine any proposition of constitutional law that is more firmly established de facto than that law may be made by administrative institutions acting under broad delegations."); Gellhorn & Robinson, *supra* note 19, at 202 ("Despite recurrent hints of vitality in the doctrine that broad delegations of legislative power to agencies are constitutionally circumscribed, this phase of administrative law passed into history along with the New Deal legislation that occasioned its brief life.").

179. T. LOWI, *END OF LIBERALISM*, *supra* note 168, at 299-303.

180. See R. PIERCE, S. SHAPIRO & P. VERKUIL, *ADMINISTRATIVE LAW AND PROCESS* 43

But there are constitutional constraints on this ability to control an agency's exercise of its delegated powers, constraints the Supreme Court has recently had occasion to explore. The following sections examine those constraints to see to what extent they can or should restrain Congress and the agencies in the process of interactive deregulation.

1. Controlling By Legislative Veto

In *Immigration & Naturalization Service v. Chadha*,¹⁸¹ the Supreme Court addressed the constitutionality of legislative vetoes, devices by which Congress reserves the power to veto agency decisions.¹⁸² The particular provision at issue in *Chadha*, section 244(c)(2) of the Immigration and Nationality Act, authorized either House of Congress to disapprove by resolution a decision by the Attorney General to suspend deportation of an alien.¹⁸³ Jagdish Chadha, a deportable alien who had overstayed his visa, was able to convince the Attorney General's delegate, the Immigration and Naturalization Service (INS),¹⁸⁴ that deportation would cause him "severe hardship,"¹⁸⁵ and his deportation was suspended.¹⁸⁶ Unfortunately for Chadha, the House of Representatives disagreed and, with no debate or recorded vote, adopted a reso-

(1985) (discussing variety of techniques Congress uses to influence agency behavior); Kaiser, *Congressional Action to Overturn Agency Rules: Alternatives to the Legislative Veto*, 32 ADMIN. L. REV. 667, 710-11 (1980) (describing five types of statutory mechanisms for agency oversight other than legislative veto); Krasnow & Shooshan, *supra* note 151, at 317-20 (examining exercise of continuous agency oversight by standing committees of Congress). For a discussion of internal House and Senate procedures, see SENATE COMM. ON GOVERNMENTAL AFFAIRS, CONGRESSIONAL OVERSIGHT OF REGULATORY AGENCIES, S. DOC. NO. 26, 95th Cong., 1st Sess. (1977); L. DODD & R. SCHOTT, CONGRESS AND THE ADMINISTRATIVE STATE 155-275 (1979); M. KIRST, GOVERNMENT WITHOUT PASSING LAWS (1979); A. MAASS, CONGRESS AND THE COMMON GOOD 172-253 (1983); W. OLESZEK, *supra* note 150.

181. 462 U.S. 919 (1983).

182. The term "legislative veto" typically refers to a statutory provision in which Congress reserves to itself, one of its Houses, or a committee, the power to override actions by the executive branch by means which fall short of the full legislative process of bicameralism and presentment. See Spann, *Deconstructing the Legislative Veto*, 88 MINN. L. REV. 473, 475 (1984) (describing legislative veto more generally as an invalidation by any subset of Congress of an action of the executive branch by less than the full legislative process).

183. Section 244(c)(2) of the Act, 8 U.S.C. § 1254(c)(2) (1982), provides, in pertinent part, that if either House of Congress "passes a resolution stating in substance that it does not favor the suspension of such deportation, the Attorney General shall thereupon deport such alien"

184. Congress delegated the major responsibilities for enforcement of the Immigration and Nationality Act to the Attorney General. 8 U.S.C. § 1103(a) (1982). The Attorney General discharges his responsibilities through the Immigration and Naturalization Service, *id.*, a division of the Department of Justice, *id.* § 1101(a)(34).

185. Under § 244(a)(1) of the Immigration and Nationality Act, the Attorney General "may, in his discretion," suspend deportation and grant permanent resident status to an alien who has been in the United States not less than seven years, is of good moral character, and whose deportation would "in the opinion of the Attorney General, result in extreme hardship" to the alien or other persons including the alien's spouse. 8 U.S.C. § 1254(a)(1) (1982).

186. *Chadha*, 462 U.S. at 924-26.

lution opposing the INS's decision. Under section 244(c)(2), the resolution was dispositive; it vetoed the INS's order and Chadha was to be deported.¹⁸⁷ Chadha filed a petition for judicial review of the deportation proceedings, contending that the House's veto of the agency's suspension order was unconstitutional. The Court of Appeals for the Ninth Circuit agreed,¹⁸⁸ and the INS appealed to the Supreme Court.

The Supreme Court affirmed in an opinion that was more surprising for its breadth and inflexibility than for its result.¹⁸⁹ The Court could have written *Chadha* narrowly, emphasizing the adjudicatory nature of the agency decision being vetoed. For example, Justice Powell concurred because, in his view, use of the legislative veto to override INS's individual deportation order was an unconstitutional assumption by Congress of "a judicial function in violation of the separation of powers."¹⁹⁰ But the Court wrote in much more sweeping terms. The legislative veto was unconstitutional because it interfered with the President's veto power and, in the case of a one-House veto, with the constitutional principle of bicameralism as well.¹⁹¹

The scope of the Court's indictment caused Justice White in dissent to

187. *Id.* at 926-27.

188. 634 F.2d 408, 411 (9th Cir. 1980), *aff'd*, 462 U.S. 919 (1983).

189. Numerous scholars and members of the Department of Justice had questioned the constitutionality of the legislative veto. *See, e.g.*, Bruff & Gellhorn, *Congressional Control of Judicial Administrative Regulation: A Study of Legislative Vetoes*, 90 HARV. L. REV. 1369, 1439-40 (1977) (legislative vetoes intrude upon executive veto power, violate separation of powers, and do not increase administrative efficiency); Dixon, *The Congressional Veto and Separation of Powers: The Executive on a Leash?*, 56 N.C.L. REV. 423, 433-57 (1978) (surveying constitutional problems with congressional veto); Fitzgerald, *Congressional Oversight or Congressional Foresight: Guidelines from the Founding Fathers*, 28 ADMIN. L. REV. 429, 437-41 (1976) (legislative veto circumvents separation of powers); Martin, *The Legislative Veto and the Responsible Exercise of Congressional Power*, 68 VA. L. REV. 253, 292-93 (1982) (noting legislative veto permits legislators to pass "unfinished" legislation); McGowan, *supra* note 168, at 1134-45 (1977) (discussing veto in terms of post-legislation control); Scalia, *The Legislative Veto: A False Remedy for System Overload*, REGULATION, Nov.-Dec. 1979, at 1, 19, 20-22 (legislative veto incompatible with Constitution).

The device, however, also had its supporters. *See, e.g.*, Dry, *The Congressional Veto and the Constitutional Separation of Powers*, in THE PRESIDENCY IN THE CONSTITUTIONAL ORDER 195, 230 (1981) (legislative veto effective check against agency power); Abourezk, *Congressional Veto: A Contemporary Response to Executive Encroachment on Legislative Prerogatives*, 52 IND. L.J. 323, 327 (1977) (legislative veto integral part of efficiency of administrative state); Javits & Klein, *Congressional Oversight and the Legislative Veto: A Constitutional Analysis*, 52 N.Y.U. L. REV. 455, 462 (1977) (calling the legislative veto "the most efficient means Congress has yet devised to retain control over the evolution and implementation of its policy as declared by statute"); Miller & Knapp, *The Congressional Veto: Preserving the Constitutional Framework*, 52 IND. L.J. 367, 370 (1977) (legislative veto effective check against agency power); *cf.* Nathanson, *Separation of Powers and Administrative Law: Delegation, the Legislative Veto, and the "Independent" Agencies*, 75 NW. U. L. REV. 1064, 1109-11 (1981) (noting that legislative veto is undesirable and should not be encouraged, but its constitutionality should be left unresolved).

190. *Chadha*, 462 U.S. at 960 (Powell, J., concurring). The Court also rejected several threshold arguments that might have precluded it from reaching the merits. Elliott, *supra* note 166, at 129-37.

191. *Chadha*, 462 U.S. at 956-57.

predict that: “[*Chadha* has] sounded the death knell for nearly 200 other statutory provisions in which Congress has reserved a legislative veto Today’s decision strikes down in one fell swoop provisions in more laws enacted by Congress than the Court has cumulatively invalidated in its history.”¹⁹² While dissents are notorious for exaggerating the effects of a majority opinion, Justice White had accurately forecast the Court’s next move. Within days of *Chadha*, the Court summarily affirmed two decisions declaring legislative vetoes unconstitutional in circumstances arguably distinguishable from *Chadha*—cases in which Congress had used one-House and two-House vetoes as checks on the rulemaking activities of regulatory agencies.¹⁹³ There was little doubt after *Chadha* and these summary affirmances that the Court’s sweeping indictment of legislative vetoes applied to agency rulemaking as well as agency adjudication;¹⁹⁴ the rationale, however, was less clear.¹⁹⁵

The question framed by the Court was whether a legislative veto unconstitutionally circumvented the article I requirements of bicameralism and Presidential presentment.¹⁹⁶ There was no question that in enacting new

192. *Id.* at 1002 (White, J., dissenting). Justice White attempted to list in an appendix all the statutes with legislative veto provisions in effect at the time *Chadha* was decided. *Id.* at 1003-13.

193. *Process Gas Consumers Group v. Consumer Energy Council of Am.*, 463 U.S. 1216 (1983), *aff’g mem.* *Consumer Energy Council of Am. v. FERC*, 673 F.2d 425 (D.C. Cir. 1982) (invalidating one-House veto with respect to rulemaking); *United States Senate v. FTC*, 463 U.S. 1216 (1983), *aff’g mem.* *Consumers Union of the United States v. FTC*, 691 F.2d 575 (D.C. Cir. 1982) (en banc) (per curiam) (invalidating two-House veto with respect to rulemaking by independent agency). The Court refused to hear arguments in these cases or to remand them to the lower courts for reconsideration in light of *Chadha*.

194. *See Alaska Airlines, Inc. v. Brock*, 107 S. Ct. 1476, 1478-80 (1987) (ruling on severability of unconstitutional legislative veto in the context of agency rulemaking).

195. The opinion spawned considerable academic commentary. *See generally* Breyer, *The Legislative Veto After Chadha*, 72 GEO. L.J. 785 (1984); Elliott, *supra* note 166; Kaiser, *Congressional Control of Executive Actions in the Aftermath of the Chadha Decision*, 36 ADMIN. L. REV. 239 (1984); Spann, *supra* note 182, at 473; Strauss, *supra* note 14, at 633-40; Strauss, *Was There a Baby in the Bathwater? A Comment on the Supreme Court’s Legislative Veto Decision*, 1983 DUKE L.J. 789; Tribe, *The Legislative Veto Decision: A Law by Any Other Name?*, 21 HARV. J. ON LEGIS. 1 (1984).

196. *Chadha*, 462 U.S. at 945-46. Article I, § 7, cl. 2-3 of the Constitution provides:

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. . . .

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the

legislation Congress must comply with those requirements; nor was there any dispute as to the purpose of the two requirements. Bicameralism is designed to reduce the risk of legislative abuse¹⁹⁷ and to ensure the concurrence of the different constituencies represented in the House and the Senate;¹⁹⁸ presentment gives the President a qualified veto with which to defend against legislation that unduly infringes on the executive branch or is otherwise improvident.¹⁹⁹ The difficult question in the case was whether these requirements applied to the legislative veto.

The majority concluded that bicameralism and presentment were required because the veto was "legislative in purpose and effect."²⁰⁰ In exercising the veto, the House "took action that had the purpose and effect of altering the legal rights, duties, and relations of persons, including the Attorney General, Executive Branch officials and Chadha, all outside the Legislative Branch."²⁰¹ Therefore, the Court concluded, the House had to comply with the constitutional prerequisites for enacting laws.²⁰²

While the Court's analysis is formalistic and somewhat arbitrary,²⁰³ its

Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

197. A bicameral Congress "doubles the security to the people, by requiring the concurrence of two distinct bodies in schemes of usurpation or perfidy, where the ambition or corruption of one will otherwise be sufficient." THE FEDERALIST No. 62, at 418 (J. Madison) (J. Cooke ed. 1961).

198. The House of Representatives is of a national character, "deriv[ing] . . . its powers from the people of America"; the Senate is of a federal character, "deriv[ing] . . . its power from the States, as political and coequal societies . . . represented on the principle of equality." THE FEDERALIST No. 39, at 254-55 (J. Madison) (J. Cooke ed. 1961). While there is no debate regarding these basic principles, there is debate whether legislators are to do more than simply aggregate their constituents' preferences. Compare Sunstein, *supra* note 177, at 81-85 (legislators are to vote according to "common good" and not merely to aggregate private preferences) with Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. ECON. 371, 371-73 (1983) (technical explanation of why interest group tradeoffs more likely to promote economic welfare than alternatives).

199. *Chadha*, 462 U.S. at 948 (presentment clause serves "important purpose of assuring that a 'national' perspective is grafted on the legislative process"); THE FEDERALIST No. 73, at 495 (A. Hamilton) (J. Cooke ed. 1961) (primary inducement to conferring veto power upon executive is to enable him to defend himself; secondary one is to protect community against the "passing of bad laws through haste, inadvertence, or design"); Black, *Some Thoughts on the Veto*, 40 LAW & CONTEMP. PROBS. 87, 89-90 (Spring 1976) (suggesting veto designed mainly to protect President from legislative encroachments); McGowan, *The President's Veto Power: An Important Instrument of Conflict in Our Constitutional System*, 23 SAN DIEGO L. REV. 791, 804-08 (1986) (describing historical uses of veto, including a discussion of controversy regarding its principal purpose).

200. *Chadha*, 462 U.S. at 952.

201. *Id.*

202. *Id.*

203. The Court's assertion that the House veto altered the rights of Chadha and the powers of the Attorney General is just that—an assertion. It is not a reasoned conclusion. The Court could just as easily have concluded that the House's exercise of the veto did not alter any rights or duties. Arguably, the Attorney General's decision to suspend Chadha's deportation order only gave Chadha a contingent right, provided that neither House exercised the veto that Congress (and the President) had reserved in the Immigration and Nationality Act. Similarly, the House resolution

intention is reasonably clear. Congress may only make policy or modify a delegation of agency authority in accordance with bicameral passage and presentment to the President: “Congress must abide by its delegation of authority until that delegation is legislatively altered or revoked.”²⁰⁴ Legislative disagreement with the INS’s decision to exempt Chadha from deportation was as much a policy determination as Congress’ original choice to delegate authority to the agency; both can be made in only one way—bicameral passage and presentment to the President. The legislative veto was unconstitutional, according to the majority, because it allowed legislators to make policy while evading the constitutional steps required for lawmaking—concurrence of both Houses of Congress and presentment to the President.

The breadth of the *Chadha* opinion, coupled with the Court’s summary affirmation of the unconstitutionality of one-House and two-House vetoes in the context of agency rulemaking,²⁰⁵ indicates that the Court was troubled by Congress’ delegating any authority, including rulemaking authority, to an agency while retaining for itself, or a subset of itself, the power to veto the exercise of that authority without the safeguards of bicameralism and presentment.²⁰⁶ In the Court’s view, allowing an agency rule to become law only if Congress failed to veto it was constitutionally equivalent to Congress’ enacting the rule by silence, a process the Court found constitutionally infirm: “To allow Congress to evade the strictures of the Constitution and in effect enact Executive proposals into law by mere silence cannot be squared with Article I.”²⁰⁷ Thus, under *Chadha* and its progeny, Congress cannot delegate rulemaking authority to an agency and reserve for itself, or for a subset of itself, a veto power; vetoes require the concurrence of both Houses and presentment to the President.

did not necessarily modify the Attorney General’s powers; they were also contingent on neither House’s vetoing his decision. As Justice White accurately observed, the veto provision was authority that Congress had “reserved” in a statute that had been properly passed by both Houses with presentment to the President. *Id.* at 990 (White, J. dissenting).

204. *Id.* at 955 (emphasis added).

205. See *supra* note 193 and accompanying text (discussing summary affirmation of unconstitutionality of legislative veto in rulemaking context).

206. Notwithstanding these observations, one can argue that *Chadha* did not invalidate the use of a legislative veto in the context of legislation such as the War Powers Resolution, where Congress attempts to articulate the respective constitutional powers of the President and Congress. See, e.g., Levinson, *Congressional Oversight of Agency Rulemaking: Options Available After Chadha*, published in ADMINISTRATIVE CONFERENCE OF THE U.S., LEGISLATIVE VETO OF AGENCY RULES AFTER *INS V. CHADHA* app. B, at 2-3 (1983) (“[Chadha and its companion] cases do not appear to control in systems such as that established by the War Powers Resolution, which attempts to accommodate the constitutional powers of the President as commander-in-chief with the constitutional power of Congress to declare war.”); cf. Strauss, *supra* note 195, at 817-18 (veto threatens no unconstitutional rearrangement of initiative and authority when (1) it concerns internal arrangement of government, (2) both President and Congress have important interest in subject matter, and (3) President himself takes action subject to veto).

207. *Chadha*, 462 U.S. at 958 n.23 (emphasis added).

Justice White, by contrast, took a more functional approach in his dissents from *Chadha* and the rulemaking cases.²⁰⁸ In his view, the legislative veto was a particularly desirable device to control rulemaking by independent agencies. The retention of such control by Congress was necessary and did not come at the expense of any Presidential influence over rulemaking. Not only had the President authorized Congress to retain such control when he signed the bill containing a veto provision,²⁰⁹ but, with or without the legislative veto, the President has virtually no role in rulemaking.²¹⁰

The majority, however, was unmoved by what it referred to as "the utilitarian argument" of those who contend that the veto is a useful "political invention" necessary for congressional control of agency discretion: "[P]olicy arguments supporting even useful 'political inventions' are subject to the demands of the Constitution which defines powers and, with respect to this subject, sets out just how those powers are to be exercised."²¹¹

The Court recently reaffirmed both its concern with congressional use of new devices to control administrative agencies and its disdain for "utilitarian arguments" in *Bowsher v. Synar*,²¹² another notably formalistic opinion by former Chief Justice Burger that provoked another angry dissent from Justice White. At issue in *Bowsher* was the Balanced Budget and Emergency Deficit Control Act of 1985, popularly known as the "Gramm-Rudman-Hollings Act."²¹³ In that Act, Congress established a complex scheme of annual budgetary targets designed to eliminate the federal budget deficit by 1991. In the event the projected budget deficit exceeded the maximum targeted amount specified by Congress, the Act delegated to the Comptroller General the authority to specify particular spending reductions that the President was

208. *Id.* at 967 (White, J. dissenting); *United States Senate v. FTC*, 463 U.S. 1216, 1217-19 (White, J. dissenting); *Process Gas Consumers Group v. Consumer Energy Council of Am.*, 463 U.S. 1216, 1217-1219 (White, J., dissenting).

209. White's argument assumes the law was not enacted over a Presidential veto.

210. In his dissent from the Court's summary affirmance of the decision invalidating the legislative veto in *United States Senate v. FTC*, Justice White observed:

Where the veto is placed as a check upon the actions of the independent regulatory agencies, the Article I analysis relied upon in *Chadha* has a particularly hollow ring. . . . To invalidate the device which allows Congress to maintain some control over the lawmaking process, merely guarantees that the independent agencies, once created, for all practical purposes are a fourth branch of the Government not subject to the direct control of either Congress or the Executive Branch. I cannot believe that the Constitution commands such a result.

463 U.S. at 1218-19. Justice White had expressed this view earlier in dictum in *Buckley v. Valeo*, 424 U.S. 1, 284-85 (1976) (White, J., concurring in part and dissenting in part), as well as in his dissent in *Chadha*, 462 U.S. at 967-68, 972-73.

211. *Chadha*, 463 U.S. at 945.

212. 106 S. Ct. 3181 (1986).

213. Pub. L. No. 99-177, 99 Stat. 1037 (codified as amended at 2 U.S.C. §§ 901-922 (Supp. IV 1986)).

required to implement. Because Congress could remove the Comptroller General by means that were arguably less demanding than the constitutionally sanctioned route of impeachment, the Court held that Congress had undue control over that officer and thus could not constitutionally assign him the power to execute the law.²¹⁴ Reciting Madison's quotation of Montesquieu, the Court warned that "there can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates."²¹⁵ To avoid that danger, the Court said, the "Framers provided a vigorous legislative branch and a separate and wholly independent executive branch" and did not "contemplate an active role for Congress in the supervision of officers charged with the execution of the laws it enacts."²¹⁶ The Constitution provided that Congress could remove officers of the United States by impeachment;²¹⁷ any other role in their removal, said the Court, gave Congress the potential of too much control over the execution of the laws and was "inconsistent with separation of powers."²¹⁸

The formalistic majority opinion in *Bowsher* will, no doubt, generate an impressive array of critical articles comparable to that generated by *Chadha*.²¹⁹ Justice White, calling the result in *Bowsher* "even more misguided" than that in *Chadha*, was severely critical of the "wisdom of the Court's willingness to interpose its distressingly formalistic view of the separation of powers as a bar to the attainment of governmental objectives through means chosen by the Congress and the President in the legislative process established by the Constitution."²²⁰ Justice White thought that Congress' power to remove the Comptroller General by concurrent resolution for limited causes, established in 1921 but never exercised, did not give the Congress undue control over the Comptroller.²²¹ But White did not dispute the

214. 106 S. Ct. 3181, 3187-88 (1986).

215. *Id.* at 3186 (quoting THE FEDERALIST No. 47, at 325 (J. Madison) (J. Cooke ed. 1961)).

216. *Id.* at 3186-87.

217. Article II provides: "The President, Vice President, and all Civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other Crimes and Misdemeanors." U.S. CONST. art. II, § 4.

218. *Bowsher*, 106 S. Ct. at 3187. The *Bowsher* Court relied not only on *Chadha* but also on an earlier case, *Buckley v. Valeo*, 424 U.S. 1, 141 (1976). In *Buckley*, the Court held that, given Congress' role in appointing several of the members of the Federal Election Commission, the Constitution precluded assigning the Commission such executive/administrative functions as rulemaking and adjudication.

219. The criticism has begun. See generally Bruff, *On the Constitutional Status of the Administrative Agencies*, 36 AM. U.L. REV. 491 (1987); Currie, *The Distribution of Powers After Bowsher*, 1986 SUP. CT. REV. 19; Elliot, *Regulating the Deficit After Bowsher v. Synar*, 4 YALE J. ON REG. 317 (1987); Schwartz, *Administrative Law Cases During 1986*, 39 ADMIN. L. REV. 117 (1987); Verkuil, *The Status of Independent Agencies After Bowsher v. Synar*, 1986 DUKE L.J. 779; *Bowsher v. Synar*, 72 CORNELL L. REV. 421 (symposium including articles by Aman, Sargentich, Strauss, Levinson, and Osgood).

220. 106 S. Ct. at 3205-06 (White, J., dissenting).

221. *Id.* at 3213.

central principle relied on by the *Bowsher* majority: the “constitutional scheme of separated powers [prevents] Congress from reserving an executive role for itself or its ‘agents.’”²²²

Criticism of *Chadha* and *Bowsher* is not, however, the purpose of this article. While the opinions may be unduly formalistic,²²³ they reflect attempts to promote fundamental principles supported even by those who favor a more pragmatic approach to separation of powers issues—the principles of responsibility, accountability, and shared deliberation served by the constitutional requirements of bicameralism and presentment.²²⁴ It is the purpose of this article to explore the extent to which these principles are adversely affected by Congress’ assorted techniques for controlling agencies. In *Chadha*, the Court said: “Congress must abide by its delegation of authority until that delegation is legislatively altered or revoked.”²²⁵ In *Bowsher*, the Court expansively restated that holding: “[A]s *Chadha* makes clear, once Congress makes its choice in enacting legislation, its participation ends. Congress can thereafter control the execution of its enactment only indirectly—by passing new legislation.”²²⁶ In both cases, the Court was concerned with Congress’ attempt to use control devices not set forth in the Constitution to influence an agency’s exercise of delegated powers. Both opinions focus on formal control devices and either overlook or are unconcerned with the reality, well illustrated by the significant legislative involvement in the FCC’s deregulation.

222. *Id.* at 3209. As noted, this principle had been articulated earlier in *Buckley*, 424 U.S. at 120-41.

223. The debate between a formalistic and a pragmatic approach to separation of powers issues is also raging in the area of Congress’ power to assign the “judicial power of the United States” to non-article III courts. Compare *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 74 (1982) (formalistic approach by plurality rejecting Justice White’s proposed “rule of broad legislative discretion,” contending that it has no limit and would eviscerate constitutional guarantee of an independent judicial branch) with *Commodity Futures Trading Comm’n v. Schor*, 106 S. Ct. 3245, 3258 (1986) (in determining extent to which a given congressional decision to authorize adjudication of article III business in a non-article III tribunal unconstitutionally threatens the integrity of the judicial branch, “the Court has declined to adopt formalistic and unbending rules”).

224. As Prof. Tribe, who has criticized the Court’s formalistic approach, recently observed:

Yet even if the Court has failed to explain fully its return to a form of constitutional exegesis that appears to deal in “legislative” and “executive” essences, the decision in *Chadha* is not without considerable intuitive appeal. The framers regarded the legislature as the most dangerous branch, and even two centuries later it remains a plausible proposition to many that there is more to fear when Congress—which is the source of all statutorily-delegated authority—delegates not to the other branches, but to itself.

L. TRIBE, *supra* note 17, at 216. Similarly, Prof. Strauss, while preferring a more pragmatic approach, concludes that because the legislative veto in the rulemaking context excludes the President, rather than “mediating a dialogue between the President and Congress,” the Court reached a “sound result” in concluding that it was unconstitutional both in *Chadha* and in the rulemaking context. Strauss, *supra* note 195, at 816-17.

225. *Chadha*, 462 U.S. at 955.

226. *Bowsher*, 106 S. Ct. at 3192.

latory efforts, that Congress frequently influences agencies with less formal, more ad hoc devices. The question addressed here is to what extent these control techniques undermine the constitutional principles the Court sought to protect in *Chadha* and *Bowsher*.

2. Alternative Control Devices

Enacting the Rule as Law. Congress has a variety of alternative devices by which it can “veto” an agency’s proposed repeal of one of its rules. The most obvious way is for Congress to enact the rule as a statute or formally modify the agency’s mandate to require the agency to retain the rule. This presents no *Chadha* problem, avoids any orphaning concern, and is the preferred congressional response. In effect, Congress is belatedly narrowing the agency’s delegation and restricting the scope of the agency’s discretionary authority. As discussed earlier, narrower, clearer delegations are generally desirable. In particular, rules like the fairness doctrine that pose difficult constitutional issues are best promulgated by a politically accountable, representative body dedicated to the balancing of diverse interests. “The more fundamental the issue, the nearer it is to principle,” observed Alexander Bickel, “the more important it is that it be decided in the first instance by the legislature.”²²⁷

But enacting substantive legislation is difficult. While Congress does occasionally respond with affirmative enactments of rules, the legislative hurdles, well illustrated by Congress’ frustration with the fairness doctrine, are substantial.²²⁸

227. A. BICKEL, *supra* note 139, at 161. It is often also desirable for Congress to act affirmatively to eliminate a rule if it agrees with the agency. As the District of Columbia Circuit stated in reviewing the FCC’s deregulation of radio:

Congress, and not the Commission, may be the more appropriate source of such significant deregulation. It was Congress, after all, that created and oversaw the evolution of the original regulatory scheme for radio and television. . . . It should thus be Congress, and not the unrepresentative bureaucracy and judiciary, that takes the lead in grossly amending that system. . . . And yet, in the absence of more specific congressional direction, we cannot say that the Commission has overstepped either the bounds of its statutory authority or its administrative discretion in undertaking most of the deregulatory actions under review.

Office of Communications of the United Church of Christ v. FCC, 707 F.2d 1413, 1443 (D.C. Cir. 1983).

Congressional enactments are not always the preferred solutions, however. *See, e.g.*, B. ACKERMAN & W. HASSLER, *supra* note 175, at 3-4 (EPA should be given more discretion to use technical expertise); Mashaw, *supra* note 175, at 81 (questioning proposition that more specific legislation increases legitimacy and accountability of government decisionmaking).

228. *See supra* text accompanying notes 150-51 (discussing procedural obstacles encountered in enacting substantive legislation) and notes 86-89 (discussing Congress’ unsuccessful efforts to enact the fairness doctrine into law).

Limitation Riders. Alternatively, Congress can veto the proposed repeal, at least temporarily, by adding a "limitation rider" to an appropriations bill. A typical limitation rider provides, for example, that the monies appropriated for the agency may not be spent on the elimination or modification of a particular rule.²²⁹ Such provisions reflect a judgment by both Houses of Congress and the President (or two-thirds of both Houses without the President) that the rule should remain in effect at least through the appropriation period. They, in effect, adopt the rule, at least for a limited period, and thus create no orphan.²³⁰

But appropriation riders are frequently not the product of legislative deliberation and consensus and thus, arguably, undermine the spirit of *Chadha*. They are often added as last minute measures, not by legislative committees responsible for and experienced in substantive legislation, but rather by appropriations committees that generally lack both substantive expertise and the benefit of hearings and committee reports, and then passed by the Congress with little or no debate.²³¹ Certainly the fact that a majority of the two Houses voted for such a provision does not ensure that they deliberated, concurred, or even focused on the issue. On the contrary, as illustrated by the recent uproar over the provisions that Senators Hollings and Inouye "slipped into" the 1987 continuing budget resolution, Congress itself is often surprised by the last minute additions to spending bills.²³² Thus, the process of enact-

229. Limitation riders are provisions in appropriations bills that prohibit spending funds for specific purposes. W. OLESZEK, *supra* note 150, at 50. For a discussion of Congress' efforts to curb FCC action on the fairness doctrine through appropriation provisions, see *supra* notes 68-71 and accompanying text.

230. A rider can, however, play a role in creating an orphan, if its effect lasts beyond its official life. Generally limitation riders are valid only for the appropriations period, typically one year. When a spending limitation expires, as it often does at the end of an appropriations period, the agency is free to act as it could before the rider was added. If, notwithstanding the expiration, the agency continues to act as if it could not eliminate the rule and continues to "defer" to Congress, the rule may then appropriately be classified as an orphan.

231. W. OLESZEK, *supra* note 150, at 43-49. Congress requires a two-step process for all expenditures: funds must be both authorized by an authorization committee and appropriated by an appropriations committee. Authorizing committees are substantive policymaking panels, proposing legislative solutions to public problems and advocating the desired levels of appropriations for federal programs. Appropriations committees then recommend how much money federal agencies and programs should receive based on available fiscal resources and economic conditions. The purpose of providing for two steps is "to ensure that substantive and financial issues are subject to separate and independent analysis." *Id.* at 46; see STAFF OF HOUSE COMM. ON THE BUDGET, 95TH CONG., 1ST SESS., CONGRESSIONAL CONTROL OF EXPENDITURES 19 (Comm. Print 1977) (summarizing respective roles of authorization and appropriations committees); A. MAASS, *supra* note 180, at 119-50 (1983) (same).

232. In the \$605 billion catch-all spending measure passed by Congress on Dec. 21, 1987, Pub. L. No. 100-202, 101 Stat. 1329, two controversial provisions that were added in the final hours provoked considerable public criticism. Sen. Hollings added a provision that prohibited the FCC from modifying its rules limiting newspaper-television cross-ownership and from extending any existing waivers from those limits. See H.J. RES. No. 395, 100th Cong., 1st Sess., 133 CONG. REC. H12,805,

ing these riders is, in some respects, not significantly different from the short-cut veto provision disapproved in *Chadha*. Moreover, like the legislative veto, the use of appropriation riders to enact substantive provisions arguably undercuts the ability of the President to participate in the policymaking process; even if the President disapproves of a particular rider, he cannot excise it and may be politically unable to veto the entire appropriations measure.²³³

But the Constitution does not mandate that Congress deliberate, that it limit the range of topics included in a single bill, or that the President have a line-item veto. It simply establishes the minimal requirements of bicameralism and presentment; as long as those are met, the judiciary can and should require no more. While careful legislative deliberation is desirable, there is no acceptable way for the judiciary either to define or to measure the appropriate level of deliberation or "real concurrence." It is up to Congress and the people to demand more. As Justice White has observed, "The Constitution does not and cannot guarantee that legislators will carefully scrutinize legislation and deliberate before acting. In a democracy it is the electorate that holds the legislators accountable for the wisdom of their choices."²³⁴

Fortunately, Congress has recognized the disadvantages of using appropriation riders to enact substantive legislation, and each House has promulgated internal rules limiting that practice.²³⁵ While these self-imposed, prophylac-

H12,814 (daily ed. Dec. 22, 1987). Sen. Inouye added a section providing eight million dollars to build a school in France for Jews from North Africa, 133 CONG. REC. H12,805, H12,849. For the Senators' "ex post" efforts to defend these inclusions, see Wash. Post, Jan. 6, 1988, at A5, col. 3; Wash. Post, Feb. 2, 1988, at A25, col. 5.

233. Devins, *Regulation of Government Agencies Through Limitation Riders*, 1987 DUKE L.J. 456 (appropriations process is not proper vehicle for substantive policymaking); Strauss, *supra* note 195, at 813 n.95 predicting that Congress will make more use of appropriations controls after its loss of the legislative veto); cf. *American Fed'n of Gov't Employees v. Pierce*, 697 F.2d 303, 305-06 (D.C. Cir. 1982) (holding unconstitutional an appropriations provision to HUD that prohibited use of any of the appropriated funds for reorganization without prior approval of relevant appropriations committees).

234. *INS v. Chadha*, 462 U.S. 919, 997 (1983) (White, J., dissenting). A related debate, beyond the scope of this article, concerns the extent to which the Constitution contemplates, even if it does not guarantee, more than "interest group pluralism." See, e.g., Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1020-31 (1984) (contending that lesson of *Federalist No. 10* is that Constitution contemplates more than just interest group pluralism); Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 247-50 (1986) (Constitution designed to promote public rather than private interests); Eskridge, *supra* note 147, at 1513-16 (suggesting that Constitution commits our polity to deliberative government that promotes common good, not just "enforcement of private deals"); cf. Kalt & Zupan, *Capture and Ideology in the Economic Theory of Politics*, 74 AM. ECON. REV. 279, 298 (1984) (economic model of legislators' behavior in Surface Mining Control and Reclamation Act suggests that "altruistic—ideological factors," not simply narrow self-interest of constituents, affect course of public policy).

235. See, e.g., HOUSE RULE XXI(2), reprinted in CONSTITUTION, JEFFERSON'S MANUAL, AND RULES OF THE HOUSE OF REPRESENTATIVES, H.R. Doc. No. 279, 99th Cong., 2d Sess. 573 (1987); SENATE RULE IV(4), reprinted in STANDING RULES OF THE SENATE, S. Doc. No. 4, 100th Cong.,

tic rules are not constitutionally compelled and are frequently waived,²³⁶ they can nevertheless play a significant role in both legislative debate as well as judicial interpretation. Courts assume Congress did not intend to modify existing law in an appropriations measure unless the intent to do so is clear.²³⁷ That is as far as the courts should go.²³⁸

Moratoria on Agency Action. Congress can also veto a proposed agency repeal by passing a statute that imposes a moratorium on an agency repeal, as it did with the FCC multiple ownership rules and almost did with

1st Sess. 10-12 (1987). Fisher, *Budget Concepts and Terminology: The Appropriations Phase*, in 1 STUDIES IN TAXATION, PUBLIC FINANCE AND RELATED SUBJECTS—A COMPENDIUM 436, 437-38 (1977).

236. W. OLESZEK, *supra* note 150, at 47-50. There are numerous exceptions to the general effort to avoid substantive legislation in appropriations bills. Limitation riders are generally justified by the logic that "because the House can refuse to appropriate funds for programs that have been authorized, it can also prohibit the use of funds for any part of a program or activity." *Id.* at 50. There is a guidebook replete with precedents that have distinguished permissible from impermissible limitations, and "House members and staff aides devote endless hours to carefully drafting provisions that make policy in the guise of limitations." *Id.*; see Fisher, *The Authorization-Appropriation Process in Congress: Formal Rules and Informal Practices*, 1979 CATH. L. REV 51, 78-81 (discussing proposals to prohibit riders and to "prevent limitations that are actually efforts designed to effect legislative changes").

237. Congress can modify existing law in appropriation bills, but it must make that intent clear. See, e.g., *Ramah Navajo School Bd. v. Bureau of Revenue*, 458 U.S. 832, 842 n.6 (1982) (suggesting courts should be hesitant in inferring congressional intent to modify law through appropriations bills); *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 189-93 (1978) (holding doctrine against repeals by implication "applies with even greater force when the claimed repeal rests solely on an appropriations act"); *United States v. Dickerson*, 310 U.S. 554, 561 (1940) (inferring congressional intent to repeal law in appropriations bill when appropriations bill specifically repealed law).

238. Legislative self-restraint may not be impossible. The public outrage over the omnibus continuing resolution recently submitted to President Reagan has generated some legislative response. Sen. Inouye ultimately confessed error and indicated that he would be proposing to rescind the eight million dollars earmarked for the school in France. "I have made an error in judgment and I intend to correct that error, for I fear I have embarrassed my colleagues." 134 CONG. REC. S315 (daily ed. Feb. 1, 1988); Wash. Post, Feb. 2, 1988, at A13, col. 5. In addition, 49 Democrats publicly "pledged to oppose any future omnibus appropriations bills, known in congressional parlance as continuing resolutions." Wash. Post, Feb 1, 1988, at A17, col. 1. And Sen. Hollings sought to vindicate his provision by pointing out in an article in the *Washington Post* that an attempt to repeal his provision had been rejected by a two to one margin. Wash. Post, Feb. 2, 1988, at A25, col. 2. As this article went to press, the Court of Appeals for the District of Columbia Circuit, in a two to one decision, struck down the portion of the Hollings amendment that prohibited the FCC from extending the time period of any "current grants of temporary waivers." *News Am. Publishing Inc. v. FCC*, No. 88-1037, slip op. at 1 (Mar. 29, 1988). The court held that the provision aimed at and affected only K. Rupert Murdoch, owner of extensive broadcast and newspaper holdings in this country, Australia, and Europe and the only person with outstanding waivers from the Commission. *Id.* at 9-21. Finding that the provision "strikes at Murdoch with the precision of a laser beam," the majority concluded that it violated Murdoch's rights under both the first and fifth amendments. *Id.* at 29-33. The more general provision that prohibited the FCC from modifying or repealing the existing rules was not affected by the court's decision. *Id.* at 2 n.1.

the syndication rules.²³⁹ Such a provision is essentially a temporary restriction of the agency's authority and reflects a judgment by a majority of both Houses and the President (or two-thirds of both Houses without the President) that the rule should be temporarily preserved.

While moratoria, like limitation riders, create no orphans and raise no serious constitutional issues,²⁴⁰ both have disadvantages for Congress. They must receive the approval of both Houses and the President and are generally short-term measures. Riders tied to appropriations bills are generally effective only for the fiscal year. Moratoria, too, are usually in force for relatively short periods.²⁴¹ It is these limitations that frequently make informal threats the preferred control device of legislators.

The Path of Least Resistance—Informal Threats. Because of the vagaries and complexities of complying with the constitutional requirements of statutory enactment, the informal veto—the threat of “vehement reactions,” “kicks,” and cuts in the travel budget, issued in oversight hearings, speeches, letters, and op-ed pages—is often the congressional control device of choice. Although easier to implement than legislation and not specifically limited in duration, it is the device that generates orphans and raises constitutional questions under *Chadha*.

The effect of informal threats is not substantially different from that of the formal legislative veto condemned in *Chadha*. As the experiences with the fairness doctrine, right to reply rules, and financial interest regulations demonstrate, proposed agency action can be as effectively vetoed by threats as by formal legislative vetoes. The FCC, influenced by these warnings, decided not to proceed further to eliminate or modify rules it had determined disserved the public interest; the views of a few Congressmen were able to prevail over the agency's considered judgment.

Is an informal veto brought about by a few vocal legislators consistent with the principles of *Chadha*? If Congress and the President had required the FCC to submit all proposed rule eliminations to Congress, to become effective only if a designated subset of Congress did not veto the proposed elimination, then under *Chadha* the attempted veto by the designated subset

239. See *supra* note 2 and accompanying text (multiple ownership rules); notes 115-20 and accompanying text (syndication rules); note 149 (saccharin products).

240. Moratoria, like riders, can also play a role in creating an orphan if they effectively paralyze an agency beyond their expiration date. For a critical view of the use of riders and moratoria, see Shooshan & Krasnow, *Congress and the FCC*, *supra* note 18 (suggesting that devices such as appropriation riders and moratoria undercut independence of agency and are therefore undesirable).

241. The various moratoria on the FDA's ban of saccharin, for example, have generally been between 18 and 24 months. See *supra* note 149 (detailing various extensions of saccharin ban moratorium); see also *supra* text accompanying notes 115-16 (discussing House's preference for a six-month, as opposed to proposed five-year, moratorium on syndication rules).

would be ineffective, the agency's preferences would prevail, and the rules would be eliminated.²⁴² Can it not be said that by intimidating the agency into retaining a doctrine the agency believes should be repealed, a few influential legislators have in effect vetoed the repeal while "evading the strictures of the Constitution"?²⁴³

There are two questions here that should be considered separately. First, should the Constitution be read to regulate Congress' use of informal control devices such as these warnings and entreaties? Second, as discussed in the next section, should the Constitution be read to limit the effects such threats can have on the agency?

Looking at the first question, it is significant to note that the informal veto not only has an effect on the agency similar to that of a formal veto, it also has similar adverse side-effects on the lawmaking process.²⁴⁴ Like the formal veto, the informal veto gives Congress a means to control the agency's exercise of delegated authority after the delegation and may thereby have the unfortunate incentive effect of increasing Congress' initial willingness to delegate broadly. The availability of an "*ex post*" veto, either formal or informal, may "encourage Congress both to employ vague standards of delegation to its proxy statute-shapers and to respond to its proxies' 'excesses' with unexplained, ad hoc negatives rather than with the construction of revised statutory prescriptions."²⁴⁵ Thus, the ability to veto, both formally and informally, is likely "to be harmful, not helpful, to Congress' 'designated role'—to make laws and not to make legislators."²⁴⁶

242. More precisely, this would occur if the veto were severable from the provisions delegating the rulemaking authority to the agency.

243. *Chadha*, 462 U.S. at 958 n.23.

244. The *Chadha* majority purported to rely only on the text of the Constitution and did not explicitly address the policy arguments against the veto. Nonetheless, as Prof. Elliott accurately observed, the Court's literal approach does not really exclude policy judgments; "it only drives them underground, where it is more difficult to scrutinize and criticize them. It would be better if the Court were open and aboveboard about its conclusions concerning the pernicious effects of the legislative veto, rather than slipping hints into footnotes, while insisting that the language of the Constitution is dispositive and that the utility of the legislative veto is not in question." Elliott, *supra* note 166, at 145 (footnote omitted).

245. Strauss, *supra* note 195, at 809. As Prof. David Martin has observed, the legislative veto gives Congress a means to "make a public show of addressing an important issue, while yet evading direct responsibility for the necessary affirmative choices." Martin, *supra* note 189, at 273; see Rabin, *An Overview of the Chadha Case*, 35 SYRACUSE L. REV. 703, 712 (1984) (arguing legislative veto allows Congress to avoid addressing important issues); Spann, *supra* note 182, at 477-78, 518 (discussing argument that legislative veto leads to inefficiency and increased lobbying by special interest groups).

246. Strauss, *supra* note 195, at 810. The Lockean principle that the grant of legislative power is one 'only to make laws and not to make legislators' has not withstood the dynamics of the administrative state. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 25 (1983). Nonetheless, as Prof. Strauss has observed, "Congress may be seen more fully to have acted 'to make legislators' when the authority it confers is subject to its own informal controls and perhaps, removed from executive controls." Strauss, *supra* note 195, at 810 n.81.

Similarly, the availability of the informal veto may, like its formal counterpart, increase public and private rulemaking costs, by increasing the incentives to lobby Congress. Both the formal and informal legislative veto offer well organized, well financed special interest groups additional opportunities and motivation to lobby Congress, not only before but also after it has delegated rulemaking authority to the agency.²⁴⁷ While one cannot say a priori whether opponents or proponents of a rule benefit from the additional lobbying, it seems reasonably clear that it increases the cost of rulemaking.²⁴⁸ This additional dialogue in the "private area of congressional offices,"²⁴⁹ with its attendant costs, has led both public interest lawyers as well as some Congressmen to oppose the formal veto.²⁵⁰ Given that informal vetoes also invite additional lobbying and thus increase costs, they are vulnerable to the same criticism.

Moreover, in some respects the informal veto is even more objectionable than the formal one. Unlike its formal counterpart, the informal veto is not even officially reserved. Neither Congress nor the President has explicitly focused or voted on whether to reserve a veto power. Nor have they desig-

247. Bruff & Gellhorn, *supra* note 189. Bruff and Gellhorn studied the legislative veto in five federal programs and concluded that "[i]n certain subtle ways the presence of congressional review allowed the influence of special interest groups in Congress to affect the substance of rules outside the comment process." *Id.* at 1413. The congressional review process adds a second stage to rulemaking, one in which not all interested persons now participate, and in which not all interests receive equal attention. *Id.* at 1438.

248. In general, when the costs of a regulation are concentrated and the benefits diffuse, opponents find it relatively easy to organize and become politically effective. Conversely, when the benefits are concentrated and the costs diffuse, proponents can organize well. J. WILSON, *supra* note 152, at 366-72 (describing four different types of politics depending on distribution of costs and benefits: "majoritarian politics"—costs and benefits widely distributed; "interest group politics"—costs and benefits narrowly concentrated; "client politics"—benefits concentrated and costs widely distributed; "entrepreneurial politics"—costs concentrated and benefits widely distributed); see D. MAYHEW, *supra* note 138, at 137 (discussing Congress' favoring of transfer programs championed by strong interest groups with unorganized opposition).

249. *Hearings Before the Subcomm. on Administrative Law and Government Relations of the House Comm. on the Judiciary on H.R. 3658, H.R. 8231, and Related Bills*, 94th Cong., 1st Sess. 257 (1975) (statement of Prof. Walter Gellhorn).

250. Green & Zwenig, *The Legislative Veto Is Bad Law*, NATION, Oct. 28, 1978, at 434, 434. The authors, then Director and staff attorney of Congress Watch, claim that legislative vetoes only increase the influence of industry and other "wealthy, well-organized and experienced special interests." The authors quote former Rep. Robert Eckhardt as saying that "[r]ather than increasing Congressional control," the legislative veto simply provides "more business for the high-priced Washington lobbyist." *Id.* Sen. Joseph Biden argues that instead of enhancing accountability, the veto might push "Senate staffs beyond the bounds of manageability." Biden, *Who Needs the Legislative Veto?*, 35 SYRACUSE L. REV. 685, 693 (1984). In Biden's view, "[t]he Chadha decision . . . has done Congress a service. By doing away with the legislative veto, the Court may have helped clear the lobbyists off Capitol Hill, and has stemmed the movement toward full-blown congressional review of agency regulations. . . . It is almost possible to say that the Supreme Court has saved Congress from itself." *Id.*

nated the appropriate wielder of the veto power or defined the circumstances for its exercise.

Furthermore, the informal veto, by virtue of its informality, lacks the safeguards associated with a public floor vote and is likely to reflect the views of only a few individual legislators. One of the serious criticisms leveled at the formal veto is that it is generally exercised without the benefit of hearings, reports, and committee deliberations.²⁵¹ Members of Congress, therefore, find it difficult to reach informed independent decisions and instead rely on the views of a few interested members of Congress and their staff.²⁵² As indicated by the experiences with the political broadcasting rules, financial interest and syndication rules, and other aborted agency attempts to reform regulations found to be outdated, the informal veto is even more vulnerable to such criticism. It is exercised casually and unpredictably, typically by only a few influential subcommittee chairpersons.

In light of all this, should legislators be limited as to when and how they can communicate with agencies? Should they be precluded from issuing threats and be constrained to give only their "views on the merits"? As argued in the next section, agencies should not yield to legislative threats. Thus, as a prophylactic measure to assure that agencies do not capitulate, restricting informal congressional communiques may be desirable. However, as will be shown, the Constitution cannot and should not be stretched to impose such judicially enforceable constraints.

Congressional oversight and input is valuable; indeed, the most frequently articulated objection to administrative agencies is that elected officials exer-

251. A resolution of disapproval is easier to pass than a full statute. Not only do such resolutions avoid presentment and, in the case of one-House vetoes, bicameralism, resolutions of disapproval, because they have no substantive content, are also not subject to amendments either on the floor or in committee. Moreover, because of the relatively short time limits imposed on the exercise of the veto, they are rarely examined in hearings or committee reports. Bruff & Gellhorn, *supra* note 189, at 1379, 1410, 1413-20 (influence of committees and interest groups reduces political accountability).

252. This lack of consideration by members of Congress in the formal legislative veto situation was criticized by the *Chadha* Court in one of its "underground" footnotes: "[I]t is not at all clear" that the House "correctly understood the relationship between" the resolution it passed and Chadha's deportation. 462 U.S. at 927 n.3; see Bruff & Gellhorn, *supra* note 189, at 1417 (political accountability likely to be reduced because of substantial deference to the views of committees or subcommittees); Elliot, *supra* note 166, at 152 ("statutes creating legislative vetoes in effect delegate power to review agency actions to the staff of a congressional subcommittee"); Spann, *supra* note 182, at 488 n.65 ("Because of the committee structure under which Congress operates, when a House of Congress retains the power to exercise a legislative veto, the pertinent committees and committee chairpersons effectively wield whatever power derives from the legislative veto."). Even Justice White, who believed that Congress and the President could constitutionally agree to allow one House to veto an agency action, hedged on the legality of a veto by committee even if officially reserved. *Chadha*, 462 U.S. at 978 n.15 (White, J., dissenting) (reserving question of legislative vetoes by committees).

cise too little control over them.²⁵³ The views of interested legislators are likely to be well thought-out positions of informed individuals and should be available to the agency. As the United States Court of Appeals for the District of Columbia Circuit observed in discussing the propriety of Senator Robert Byrd's attempt to influence the EPA Administrator during a rulemaking:

Americans rightly expect their elected representatives to voice their grievances and preferences concerning the administration of our laws. We believe it entirely proper for Congressional representatives vigorously to represent the interests of their constituents before administrative agencies engaged in informal, general policy rulemaking, so long as individual Congressmen do not frustrate the intent of Congress as a whole as expressed in statute, nor undermine applicable rules of procedure. Where Congressmen keep their comments focused on the substance of the proposed rule . . . administrative agencies are expected to balance Congressional pressures with the pressures emanating from all other sources. To hold otherwise would deprive the agencies of legitimate sources of information and call into question the validity of nearly every controversial rulemaking.²⁵⁴

To try to control congressional oversight, constrain it into narrow channels, or limit its content would be unduly inhibiting and judicially unmanageable.²⁵⁵

253. See, e.g., R. LITAN & W. NORDHAUS, REFORMING FEDERAL REGULATION 62-66 (1983) (congressional oversight generally weak and highly sporadic); Cutler & Johnson, *supra* note 19, at 1399 (need to create system for "continuous political monitoring of governmental regulation").

254. *Sierra Club v. Costle*, 657 F.2d 298, 409-10 (D.C. Cir. 1981); see *National Center for Preservation Law v. Landrieu*, 496 F. Supp. 716, 745 (D.S.C. 1980) (elected federal official may lobby for award of federal funds); K. DAVIS, *supra* note 154 (finding cooperation between legislative committees and agencies appropriate mechanism for policymaking where statute offers no guidance).

A recent example of legislative opposition usefully causing an agency to recognize a "bureaucratic goof" and withdraw a notice of proposed rulemaking occurred in the Food and Nutrition Service's short-lived effort to reduce the required minimum size and nutritional content of school meals provided under the National School Lunch, School Breakfast, and Child Care Programs. *National School Lunch, School Breakfast, and Child Care Food Programs; Meal Requirements*, 46 Fed. Reg. 44,452 (proposed Sept. 4, 1981). Dubbed the "ketchup rule" because the proposed revision would have allowed ketchup to be counted as a vegetable, the proposal was opposed by members of Congress as well as by school officials and nutrition professionals. After hostile House hearings and a proposed Senate resolution opposing the changes, 129 CONG. REC. 22,735 (1981) the proposal was officially labeled a "bureaucratic goof," see *Wash. Post*, Sept. 26, 1981, at A1, col. 5, and the notice of proposed rulemaking was formally withdrawn. 46 Fed. Reg. 46,688 (1981).

255. An attempt to draw a judicially enforceable line between "strong feelings on the merits" and "threats" would be arbitrary, highly manipulable, and too restrictive. Professor Elliott seems to agree that *Bowsher* and *Chadha* suggest that any congressional effort to influence the exercise of delegated powers by means short of enacting new legislation is an unconstitutional interference with the affairs of the executive branch. Elliott, *supra* note 219, at 341. But he also believes that adopting such a principle would cause "breathtaking change in the structure of the 'administrative state' that has evolved since the New Deal," and presumably should be avoided. *Id.*; see Bruff, *supra* note 219, at 492-94 (arguing that optimal level of specificity for constitutional rules that organize the government is low). Moreover, an attempt to create a judicially enforceable limit on legislative

Moreover, it is important not to overstate the danger of these threats. While aggressive informal communications aimed at agency administrators share many of the disadvantages associated with the formal veto, the mere fact of their informality is a significant difference that vitiates some of the adverse effects. Most important, informal vetoes are not binding. *Chadha* clearly precludes a subset of Congress from legally modifying the agency's power.²⁵⁶ Thus, the agency may ignore the legislator's input—the advice as well as the threats.²⁵⁷

In addition, one of the principal objections to the legislative veto—enhanced congressional control relative to Presidential control—is not an issue with these informal vetoes. The formal veto arguably gives Congress an advantage over the President; by allowing Congress to reserve for itself a power to veto a rule after the agency has exercised its delegated authority, the formal veto gives Congress a role not available to the President.²⁵⁸ By contrast, the informal veto is available to both; Congress *and* the President are equally

threats would raise serious constitutional questions under the first amendment and the speech and debate clauses. U.S. CONST. art. I, § 6, cl. 1.

256. *Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 45 (1983) (without codification by Congress, agency free to overturn prior rules).

257. In fact, agencies do not always listen. See R. ARNOLD, *CONGRESS AND BUREAUCRACY: A THEORY OF INFLUENCE* 22 (1979) (bureaucrats may be willing to sacrifice small budgetary increases for significant advancement of public interest); L. DODD & R. SCHOTT, *supra* note 180, at 175 (since subcommittees' funding often dependent on viability of agency it supervises, agencies need not heed subcommittees' directives because subcommittee has little leverage with agency). *But cf.* *Pierce & Shapiro*, *supra* note 181, at 1200 (agencies generally succumb to political pressure unless able to cultivate countervailing constituency); Weingast, *supra* note 154, at 152-53 (congressional control of agency decision effectively accomplished by informal means).

258. Indeed, that is the central weakness in Justice White's assertion that the legislative veto should clearly be constitutional in the context of independent agency rulemaking. Justice White argues that, in the context of rulemaking by independent agencies, the legislative veto does not unconstitutionally interfere with the President's role in lawmaking because the President has so little control over independent agencies. *Process Gas Consumers Group v. Consumer Energy Council of Am.*, 463 U.S. 1216, 1218-19 (White, J., dissenting from mem. opin.). Moreover, White argues, precisely because the President has so little control, the veto is especially necessary in the context of independent agencies; without it, neither the President nor Congress has control. But Justice White overlooks the possibility that the availability of the veto makes Congress more willing to use a device, such as the independent agency, that undercuts Presidential control and enhances its own. To the extent Congress has already made it difficult for the President to control an agency, by, for example, making it independent, one may be more concerned, rather than less, with a device that makes it easier for Congress to delegate power to that agency. See Strauss, *supra* note 195, at 808.

Similarly, the principal objection of the *Bowsher* majority, including Justices Stevens and Marshall, was that Congress had constructed a scheme by which it could enhance its policymaking power at the expense of the President's. See 106 S. Ct. at 3203 (if Congress were free to delegate its legislative authority to one of its components, it might be able to evade the constitutional constraints on the legislative process); *Commodity Futures Trading Comm'n v. Schor*, 106 S. Ct. 3245, 3261 (1986) (describing *Bowsher* as case involving "aggrandizement of congressional power at the expense of a coordinate branch").

able to "lobby and lean."²⁵⁹

Further, that the informal veto is not officially reserved means it is less certain to occur. Thus, it may not generate the same enhanced incentives for Congress to delegate broadly and for lobbyists to increase their lobbying.

Finally, even if the ability to use threats to veto an agency's proposed repeal undercuts the congressional incentive to enact the desired rules, other countervailing forces operate on Congress to induce it to act affirmatively. Supporters of a rule, both inside and outside Congress, know they may not be able to retain a rule indefinitely by intimidation. The threats, as noted, may not work. Moreover, supporters of a constitutionally vulnerable rule such as the fairness doctrine should realize that it will better withstand a constitutional challenge if Congress has affirmatively enacted it than if it has merely prevented the agency from repealing it.²⁶⁰

259. The President has a variety of means by which to influence agency decisionmaking, including the appointment of administrators (usually with the advice and consent of the Senate); the removal of administrators (subject to possible statutory restrictions); and artful persuasion (as demonstrated in the context of the financial interest and syndication rules). Recent Presidents have tried a variety of techniques to augment their control, efforts that have met with mixed reviews. *See supra* notes 18-19 (describing President Reagan's efforts to control agencies and reviews of these efforts); *see also* Cutler & Johnson, *supra* note 19, at 1401 (suggesting desirability of presidential intervention in 1975 at a time when the idea was somewhat radical). *See generally* Bruff, *Presidential Power and Administrative Rulemaking*, 88 YALE L.J. 451, 453-63 (1979); Byse, *Comments on a Structural Reform Proposal: Presidential Directives to Independent Agencies*, 29 ADMIN. L. REV. 157 (1977); Strauss, *supra* note 14, at 594-96, 650-53, 662-69 (questioning whether simple disobedience of Presidential directive in rulemaking might constitute "cause" for dismissal).

The President's use of such informal controls, while occasionally controversial, *see supra* note 19, does not generally raise serious constitutional concerns. It is Congress' efforts to limit the President's control that raise difficult constitutional issues. There has been a renewed attack on the constitutionality of statutory restraints on the President's ability to remove administrators. *See generally* Miller, *supra* note 155; Steele & Bowman, *The Constitutionality of Independent Regulatory Agencies Under the Necessary and Proper Clauses: The Case of the Federal Election Commission*, 4 YALE J. ON REG. 363 (1987); *The Uneasy Constitutional Status of the Administrative Agencies*, 36 AM. U.L. REV. 277 (1987) (symposium). The Court in *Bowsher* went out of its way to say that the decision should not be seen as "cast[ing] doubt on the status of independent agencies because no issues involving such agencies were presented [here]." 106 S. Ct. at 3188 n.4. The concurrence of Justices Stevens and Marshall went further, asserting that it is "well settled that Congress may delegate legislative power to independent agencies." 106 S. Ct. at 3205. Nonetheless, the debate and uncertainty continue. *See* *Ticor Title Ins. Co. v. FTC*, 814 F.2d 731 (D.C. Cir. 1986) (finding not yet justiciable the question whether delegation of law enforcement powers to FTC is unconstitutional because not subject to President's supervisory control); *In re Sealed Case*, 838 F.2d 476 (D.C. Cir. 1988) (finding independent counsel unconstitutional because, *inter alia*, not removable by President), *prob. juris. noted sub nom.* Morrison, *Independent Counsel v. Olson*, 56 U.S.L.W. 3568 (U.S. Feb. 23, 1988); *cf.* *Ameron v. United States Army Corp. of Engineers*, 809 F.2d 979 (1986) (questioning constitutionality of Comptroller General's involvement in awarding government contracts), *cert. granted*, 56 U.S.L.W. 3638 (U.S. Mar. 22, 1988).

260. In an orphaned state, a constitutionally suspect rule is particularly vulnerable to a constitutional challenge. The constitutionality of the fairness doctrine, for example, would be easier to defend if Congress and the President, or two-thirds of both Houses without the President, enact it as law. As a practical matter, a congressional decision that the doctrine is necessary for today's marketplace is likely to be accompanied by a record more favorably disposed to the doctrine than

Thus, it is neither necessary nor desirable to extend *Chadha* to restrict informal congressional influences over agency rulemaking. Even the *Chadha* Court did not preclude Congress from passing resolutions or from providing by statute that it might do so; it simply limited the effect such congressional actions could have. Informal communications should be subjected to no greater restrictions; members of Congress should not be judicially constrained in their efforts to communicate with agencies.

This is not to say there should be no checks. The "conscientious legislator"²⁶¹ should be aware of the potential forcefulness of threats—both overt and veiled—and of their tendency to overwhelm agency judgment. Thus, to avoid, or at least minimize, "indirect legislation by a few," the "conscientious legislator" should distinguish between offering views on the merits and issuing threats of retaliation—threats of budget cuts, office moves, or cuts in travel allotments. This line between offering advice and threatening retaliation is murky at best; that is reason enough for not making it judicially enforceable. But it is nonetheless useful. Akin to the "underenforced constitutional norms" discussed by Professor Lawrence Sager, it represents the normative standard toward which the responsible legislator should strive.²⁶²

the hostile "signal" sent by the Commission in its recent reports. See, for example, the favorable reports accompanying the Fairness in Broadcasting Act of 1987, S. REP. NO. 100-34, 100th Cong., 1st Sess. 20-33 (1987), and H.R. REP. NO. 100-108, 100th Cong., 1st Sess. 13-30 (1987), the Act that President Reagan vetoed and that is discussed *supra* at notes 86-89. More significantly, the courts would be inclined to defer, at least to some extent, to a recent congressional determination that the doctrine is narrowly tailored to today's information marketplace. While it may seem anomalous to suggest deferring to a congressional determination in the face of a first amendment challenge, some deference is appropriate in a context where Congress is balancing a variety of competing first amendment interests and there is no reason to suspect that the burdened interests are underrepresented. Cf. Schauer, *The Role Of The People In First Amendment Theory*, 74 CALIF. L. REV. 761, 784 (1986) ("In looking at a first amendment case, it *ought* to matter that the decision to impose sanctions was made by a representative body such as a jury rather than by a bureaucrat accountable to no one.") (emphasis added).

261. Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585 (1975) (conscientious legislator should monitor own motives notwithstanding judicial reluctance to supervise Congress' exercise of its powers).

262. As Prof. Sager has appropriately observed:

Government officials have a legal obligation to obey an *underenforced constitutional norm* which extends beyond its interpretation by the federal judiciary to the full dimensions of the concept which the norm embodies. This obligation to obey constitutional norms at their underenforced margins requires governmental officials to fashion their own conceptions of these norms and measure their conduct by reference to these conceptions. Public officials cannot consider themselves free to act at what they perceive or ought to perceive to be peril to constitutional norms at their margins.

Sager, *Fair Measure: The Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1220-21, 1227 (1978) (emphasis added); see Sunstein, *supra* note 177, at 55 (prohibition of decisions based on raw power may be regarded as a member of the class of underenforced constitutional

C. CONSTRAINTS ON AGENCY EXERCISE OF DELEGATED POWERS

To conclude that there is no judicially enforceable constraint on congressional intimidation does not mean that agencies can or should defer to it. As will be shown, agencies may listen, but they must not capitulate. It is their responsibility to ignore threats and exercise their own judgment.

1. The Responsibility of Agencies in the Interactive Process

Agencies must follow their statutory mandate. When Congress establishes an agency and empowers it to adopt rules that promote a particular statutory objective, it is authorizing the agency to exercise its expertise in fulfilling the statutory directive.²⁶³ The agency must use its expertise not only to promulgate rules that serve the statutory mandate, but also to ensure that its rules continue to serve that mandate. Clearly, if Congress has required a particular rule, the agency cannot decide the rule is no longer appropriate and eliminate it.²⁶⁴ But if Congress has not mandated a particular rule, the agency not only can but must modify or eliminate it when it becomes obsolete. As the Supreme Court noted in affirming the FCC's chain broadcasting regulations: "If time and changing circumstances reveal that the 'public interest' is not served by application of the Regulations, it must be assumed that the FCC will act in accordance with its statutory obligations to promote the public interest."²⁶⁵

norms). As suggested in the next section, reducing the effectiveness of legislative threats should help to reduce legislators' incentives to rely on them.

263. *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984) (agency must conform to clear intent of Congress); *NLRB v. Brown*, 380 U.S. 278, 291-92 (1965) (agency action must be consistent with statutory mandate); *cf. Zuber v. Allen*, 396 U.S. 169, 193 (1969) (court has ultimate responsibility to interpret statutory language); *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 594 (1981) ("this general rulemaking authority permits the Commission to implement its view of the public-interest standard of the Act 'so long as that view is based on consideration of permissible factors and is otherwise reasonable' ") (quoting *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 793 (1978)).

264. If, for example, Congress had either enacted the fairness doctrine in 1927 or 1934, or codified it in 1959, the FCC could not repeal it, no matter how much it believed that it disserved the public interest.

265. *NBC v. United States*, 319 U.S. 190, 225 (1943); *see American Trucking Ass'n v. Atchison, T. & S.F. Ry.*, 387 U.S. 397, 416 (1967) (regulatory agencies are supposed to "adapt their rules . . . to the Nation's needs in a volatile, changing economy"). Agencies have an obligation to repeal rules that no longer serve their statutory mandate. *Building & Constr. Trades Dep't, AFL-CIO v. Donovan*, 712 F.2d 611, 629-30 (D.C. Cir. 1983) (construction salaries on federal projects), *cert. denied*, 464 U.S. 1069 (1984); *NAACP v. FCC*, 682 F.2d 993, 999-1000 (D.C. Cir. 1982) (concentration of ownership of television station); *WWHT v. FCC*, 656 F.2d 807, 819 (D.C. Cir. 1981) (cable television regulations); *Paccar, Inc. v. National Highway Safety Admin.*, 573 F.2d 632, 643 (9th Cir.) (trucking regulations), *cert. denied*, 439 U.S. 862 (1978).

Conversely, if a decision to deregulate turns out to be misguided or no longer appropriate, the agency has an obligation to consider reregulation. *See FCC v. WNCN Listeners Guild*, 450 U.S. 582, 603 (1981) (agency should be amenable to changing deregulatory policy depending on results of deregulation); *Brae Corp. v. United States*, 740 F.2d 1023, 1069-70 (D.C. Cir. 1984) (commission

Orphaned rules are, by definition, rules that Congress has not required. They are rules the agency had the discretion to promulgate and retains the power to repeal.²⁶⁶ Whether one views agency rulemaking as the judgment of an "expert filling in the details" or as a political judgment based on "balancing all the interests essential to a just determination of the public interest,"²⁶⁷

has duty to reexamine periodically effects of rule changes), *cert. denied*, 471 U.S. 1069 (1985); *Office of Communication of the United Church of Christ v. FCC*, 707 F.2d 1413, 1442 n.97 (D.C. Cir. 1983) (same), *cert. denied*, 467 U.S. 1255 (1984).

266. *Morton v. Ruiz*, 415 U.S. 199, 231 (1974) ("The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress."). The fairness doctrine is one of the more ambiguous orphans because of the uncertainty surrounding Congress' ratification of it in the 1959 amendment of the Communications Act. Typically, agency-created rules remain more clearly within the agency's power to repeal. As the Supreme Court noted in *Motor Vehicle Manufacturer's Association of the United States v. State Farm Mutual Auto Insurance Co.*:

While an agency's interpretation of a statute may be confirmed or ratified by subsequent congressional failure to change that interpretation . . . even an unequivocal ratification—short of statutory incorporation . . . would not connote approval or disapproval of an agency's later decision to rescind the regulation.

463 U.S. 29, 45 (1983).

As noted, the agency must follow the APA requirements for repeal. *Id.* at 41. It must rely only on factors Congress has intended to be relevant, must not ignore factors Congress made significant, and must explain its revised policy judgment. *See id.* at 41, 47 (noting presumption Congress established and lack of agency's reasoned analysis); *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984) (courts must ask whether agency's action is permissible construction of statute).

267. The early model of agency rulemaking was that of an expert administrator filling in the details of the enabling statute in accordance with the policies established by Congress. *See generally* J. LANDIS, *THE ADMINISTRATIVE PROCESS* 47-88 (1938). That model came under attack as Congress began to delegate very broadly and courts and commentators (1) became skeptical of the existence of an objective public interest that so-called "experts" could ascertain, and (2) realized that agencies can be "captured" by the industries they regulate. *See Hearing Before the Antitrust Subcomm. of the House Judiciary Comm. on Monopoly Problems in Regulated Industries*, 84th Cong., 2d Sess., pt. 1, at 59, 62 (1956) (statement of Prof. Bernstein) ("[Commissions] gradually lose their sense of mission. In their mature stage, their concept of the public interest is hardly distinguishable from the views of the dominant regulated interests."); M. BERNSTEIN, *REGULATING BUSINESS BY INDEPENDENT COMMISSION* 90-95 (1955) (agencies adopt industry practices in "essence"); Peltzman, *supra* note 153, at 212 (consolidated power of producers gives them technical advantage in swinging agency decisionmaking); Freedman, *Expertise and the Administrative Process*, 28 *ADMIN. L. REV.* 363, 367-68 (1976) (noting judicial skepticism toward ability of agencies to act in public interest).

As commissioners and courts began to realize that most important administrative decisions involve a choice among competing economic interests and social values and that agencies make policy in much the same way that legislatures do, the model for rulemaking began to move to an "interest representation model" where the critical factor was to ensure that the various interests with a stake in agency policy had a right to participate in the rulemaking process. *See generally* Stewart, *supra* note 14; Stewart & Sunstein, *supra* note 14.

Recently, there has been a renewed faith in an agency's ability to pursue a "more or less objective public interest" and a "skepticism toward the idea that the purpose of politics is simply to mediate a struggle among contending social groups." Sunstein, *supra* note 177, at 64. Sunstein urges courts to ensure that the agency has not "merely responded to political pressure, but that it is instead deliber-

the agency is given the responsibility to determine for itself whether the rule it created serves the statutory mandate. Once it determines that it no longer serves that mandate, it can and must repeal it.

When an agency "defers" to pressure from a few representatives and acts as if Congress had retained and exercised a legislative veto, it fails to comply with Congress' mandate and undermines the spirit of *Chadha*. When an agency abdicates its responsibility to exercise its judgment and capitulates to the views of a few individuals in Congress, the informal veto operates as a veto in fact. At that point the agency is allowing itself to be used as a front behind which Congress, or a few members of Congress, can circumvent the article I safeguards of the Constitution.²⁶⁸

ating in order to identify and implement the public values that should control." *Id.* at 63; see S. BREYER, *supra* note 152, at 10 (view that regulators and politicians motivated only by politics and self-interest too narrow; "[m]any surely seek the public good and are swayed by arguments on the merits"); R. NOLL & B. OWEN, *supra* note 154, at 155-62 (contending that the cynical views regarding agency "capture" are unwarranted and do not fit the facts since the 1970s); Levine, *Revisionism Revisited: Airline Deregulation and the Public Interest*, 44 LAW & CONTEMP. PROBS. 179, 179-95 (Winter 1981) (suggesting that record of 1970s should cause a revival of the progressive 'public interest' theory of regulation); cf. Stewart, *The Discontents of Legalism: Interest Group Relations in Administrative Regulation*, 1985 WIS. L. REV. 655 (suggesting that "malaise of regulatory legalism" would be ameliorated if market incentives replaced regulatory legalism wherever feasible).

For insightful overviews of the various models of administrative agencies, see T. MCGRAW, *PROPHETS OF REGULATION* 308 (1984) (analysis of regulatory successes and failures, noting useful theory of "public use of private interest," which advocates exploiting the natural incentives of those regulated); Frug, *supra* note 156 (describing and analyzing what he calls the formalistic model, the expertise model, the judicial review model, and the market pluralist model); Stewart, *supra* note 14 (critiquing traditional and interest representation models).

268. Legislative actions by less than the full legislative process are occasionally relevant in ascertaining congressional intent. Thus, in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), for example, Congress' failure to enact particular proposals was relevant in ascertaining what power Congress intended to give the executive in the provisions that were enacted. *Id.* at 586. Such legislative inactions may be relevant in interpreting ambiguous existing legislation—determining what actions are authorized, required, or proscribed. But once it is clear that an agency has discretion within an area, it is the agency's responsibility to exercise that discretion. It cannot capitulate to informal congressional coercion.

Can one argue that congressional leaning will only be effective and lead to agency capitulation if the agency believes that the rule it intends to repeal would be reenacted following repeal, and therefore, far from being faulty, congressional leaning and agency capitulation is more efficient than going through the formal process of repeal and reenactment? There are several problems with such an argument. First, it assumes we can agree on the relevant time frame in which this prediction is to occur and further that efficiency is the appropriate criterion for the lawfulness of agency actions. More important, this efficiency argument requires that the agency accurately predict the reactions of Congress and the President. If the agency misjudges and retains a rule that Congress and the President would not reenact, then a minority of legislators have effectively preserved a rule without the constitutionally mandated procedural safeguards. But accurate prediction is, of course, highly unlikely. It is difficult even for detached observers to predict accurately the response of 535 legislators and the President. And administrators are not detached. Because of the many institutional incentives motivating agencies to listen to congressional pressure, whatever its form, they will tend to err on the side of deferring to the most powerful objectors, maintaining the status quo, and not

This does not mean agencies must ignore politics or the views of individual Congressmen. Rulemaking inherently involves trade-offs, and a dialogue between elected legislators and unelected experts is generally valuable. The views of individual legislators may usefully inform the agency's decision without undermining the Constitution.²⁶⁹ But they may not substitute for agency judgment. The "conscientious administrator" must draw a line between being informed by congressional advice and capitulating to legislative pressure; he or she must, in the words of (now Chief) Judge Wald, "balance the congressional pressure with the pressure emanating from all other sources."²⁷⁰

reforming existing rules. *See supra* notes 152-53 and accompanying text (regulators motivated by concerns for job security, personal accumulation of power). Finally, even assuming the agency can predict accurately, the efficiency argument assumes that Congress has mandated that the agency only promulgate and retain rules that it predicts the current Congress and President would enact if they had the time and ability to focus on the question. However, even assuming it constitutionally can do so, Congress rarely, if ever, defines an agency's mandate to be a "predictor and mimic" of the present 535 legislators and the President.

269. *See supra* notes 253-55 and accompanying text (noting potential usefulness of dialogues between Congress and agencies).

270. *Sierra Club v. Costle*, 657 F.2d at 409-10. The *Sierra Club* court noted that a rulemaking would be overturned because of congressional pressure if two conditions were met: first, if the content of the pressure was designed to force the decisionmaker to decide on the basis of factors not made relevant by Congress in the applicable statute, and second, if the decision was in fact affected by those extraneous considerations. *Id.* at 409. The court relied on *District of Columbia Federation of Civil Associations v. Volpe*, 459 F.2d 1231 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 1030 (1972), in which the extraneous consideration was a threat by Rep. William Natcher, then Chairman of the House Subcommittee on the District of Columbia, that money earmarked for the construction of the District's subway system would be withheld if Secretary of Transportation Volpe did not designate a proposed bridge as part of the interstate highway system. In *D.C. Federation*, the District of Columbia Circuit held that the Secretary's decision would be invalid if based on the Congressman's unrelated threats concerning the subway and remanded so that the Secretary could make his decision solely on the factors that Congress had made relevant in the applicable statute. *Id.* at 1246; *see Texas Medical Ass'n v. Matthews*, 408 F. Supp. 303, 315 (W.D. Tex. 1976) (HEW ruling invalidated because of influence by a Senator).

As *D.C. Federation* makes clear, the agency's obligation to exercise its own judgment applies in both promulgation and elimination of rules. In neither direction should the agency allow itself to be a "back-door legislating tool" for a few influential legislators.

Current law does not, and probably should not, constrain how agencies learn of legislators' views, as long as the communications are made public. Indeed, in informal rulemaking generally, the law imposes few restraints on the source of information agencies can consider. The APA requires agencies to invite comments, but does not require the agency to limit itself to consider only information filed pursuant to the invitation. 5 U.S.C. §§ 551(14), 553, 554, 556, 557(d) (1982); *see* S. BREYER & R. STEWART, *supra* note 14, at 640-41 (traditional view has been that *ex parte* communications are permissible in informal proceedings such as notice and comment rulemaking); K. DAVIS, *ADMINISTRATIVE LAW TREATISE* 533 (2d. ed. 1978); W. GELLHORN, C. BYSE, P. STRAUSS, T. RAKOFF & R. SCHOTLAND, *ADMINISTRATIVE LAW* 919-21, 927-31 (1987) (excerpting various scholarly views on legality of *ex parte* comments); Gellhorn & Robinson, *Rulemaking "Due Process": An Inconclusive Dialogue*, 48 U. CHI. L. REV. 201, 237-46 (1981) (provocative dialogue between Brutus and Publius regarding extent to which law ought to regulate *ex parte* communications); Peck, *Regulation and Control of Ex Parte Communications with Administrative Agencies*, 76 HARV. L. REV. 233, 253-54 (1962) (discussing ramifications of bans on *ex parte* communications); *cf.* Strauss, *Disqualifi-*

Nor does this mean that an agency that has “balanced the pressures” and

cations of Decisional Officials in Rulemaking, 80 COLUM. L. REV. 990 (1980) (discussing arguments for and against disqualifying agency officials said to lack impartiality); Linde, *Due Process of Law-making*, 55 NEB. L. REV. 197, 225-30 (1976) (agency rulemakers have constitutional obligation of explanation and justification not shared by general purpose legislative bodies). Even the District of Columbia Circuit, while arguably expanding the reach of the APA's *ex parte* rules in *Home Box Office, Inc. v. FCC*, 567 F.2d 9, cert. denied, 434 U.S. 829 (1977), was concerned principally with secret communiques with agency decisionmakers. *Id.* at 56-57. Similarly, agencies such as the FCC that have gone beyond the APA requirements for informal rulemaking and have adopted “permit but disclose” requirements do not limit the timing and nature of input; they simply require that all input be disclosed. See *FCC Ex Parte Presentations*, 47 C.F.R. §§ 1.1201-1251 (1986) (codifying when *ex parte* communications are permissible, when they are prohibited, and when they are permissible if disclosed). There is no reason to subject legislative communications to more stringent time constraints.

One exception to the foregoing is the occasional use of “sunshine agenda periods,” the period commencing with an announcement that a matter is on the “sunshine agenda” (i.e., the Commission meeting agenda) and terminating when the agency finally acts on the matter or deletes it from the agenda. The FCC has such a policy and forbids all communications with the agency concerning a matter on the sunshine agenda during the sunshine period. 47 C.F.R. § 1.1231 (1986). The FCC recently tried to explicitly include legislative communiques in this ban, see *Ex Parte Communications and Presentations in Commission Proceedings*, 2 F.C.C. Rec. 3011 (June 4, 1987); Kircher, *New Rules on Ex Parte Communications in FCC Proceedings*, TELEMATICS, July 1987, at 1, 1-4 (describing FCC's revision), but key legislators objected. In a letter to newly installed FCC Chairman Patrick Dennis, House Telecommunications Subcommittee Chairman Edward Markey urged the Commission to change the rules to exempt Congress from the ban. *Markey Wants Changes in Ex Parte Rules*, BROADCASTING, July 13, 1987, at 47, 47. Noting that the agency understands the “sensitivity” of the issue, the FCC announced that it would treat Markey's correspondence as a “petition for reconsideration” and would “give it a thorough airing.” *Id.*; *In Re Amendment of Subpart H, Part 1 of the Commission's Rules and Regulations Concerning Ex Parte Communications and Presentations in Commission Proceedings*, 2 F.C.C. Rec. 4264 (July 14, 1987). On Sept. 17, 1987, the Commission retreated. It decided that “the public interest would be better served by permitting presentations from Congress during the Sunshine Period. . . . In the case of presentations from members of Congress, we believe that the benefits of the ‘period of repose’ are outweighed by the greater overall public interest for flexibility in exchanging information among policy-makers.” *Ex Parte Communications and Presentations in Commission Proceedings*, 2 F.C.C. Rec. 6053 (1987) (to be codified at 47 C.F.R. §§ 1.1201-1251). The Commission explained that any such presentations, if of “substantial significance,” would have to be disclosed according to the “permit but disclose” procedures. *Id.* at 6055.

While the FCC's short-lived ban on legislative input during the relatively brief sunshine period would have been a desirable prophylactic rule, the compromise requirement that all such input be disclosed at least reduces the risk of secret pressures. But the irony of this incident should not be overlooked. While the agency's initial revision of the *ex parte* rules, to include legislative input in the ban, demonstrated a welcome heightened sensitivity to congressional pressure and desire to free itself from potential intimidation and capitulation, the agency's subsequent retreat in the face of Markey's objection emphasized how persuasive individual legislators can be.

In contrast to the relative lack of sensitivity in the context of informal rulemaking, Congress and the agencies (as well as the courts) are considerably more sensitive to the dangers of legislative intervention in the context of adjudications and other proceedings where the agency is deciding “conflicting private claims to a valuable privilege.” *Sangamon Valley Television Corp. v. United States*, 269 F.2d 221, 224 (D.C. Cir. 1959). In particular, the APA, as well as notions of fundamental fairness protected by the due process clause of the Constitution, limits when and how agencies can receive any input, including input from legislators, during adjudications and other “on the record” proceedings. See 5 U.S.C. §§ 556(d), (e) & 557(d) (1982); *Power Authority of New York v.*

concluded that a rule is no longer appropriate must repeal it immediately. There may be legitimate reasons for an agency to decide that retaining a rule temporarily is in the public interest. If, for example, the rule at issue is long-standing, if there is reason to believe Congress may enact it as a statute, and if the agency believes the public would be better served by preserving the status quo in the interim, the agency may properly conclude that a short-term deferral or delay to provide Congress time to act is an appropriate exercise of its discretion.²⁷¹ Giving Congress time to consider enacting the rule and avoiding abrupt regulatory shifts is analogous to the "report and wait" procedure sanctioned by the Court in *Chadha*.²⁷² Both procedures serve the same purpose—providing Congress some time to enact legislation to prevent the agency action—but with one significant difference. With the "report and wait" technique, it is Congress that mandates that there be a wait and specifies the interval; with the variation under discussion, it is the agency's choice

FERC, 743 F.2d 93, 110 (2d Cir. 1984) ("ex parte communications by Congressmen . . . with a judicial or quasi-judicial body regarding pending matter improper and to be discouraged"); SEC v. Wheeling-Pittsburgh Steel Corp., 648 F.2d 118, 130 (3d Cir. 1981) (en banc) (stating that SEC's decision to investigate Wheeling-Pittsburgh "must be supported by an independent agency determination, not one dictated or pressured by external forces" exerted by a member of the Senate); Pillsbury Co. v. FTC, 354 F.2d 952, 963 (5th Cir. 1966) (concluding that Senate subcommittee questioning of Commissioners about an agency adjudication was an improper intrusion and required some Commissioners to disqualify themselves); Center on Corporate Responsibility, Inc. v. Shultz, 368 F. Supp. 863, 871 (1973) (a showing of political influence renders Service's ruling that plaintiff not tax exempt null and void); cf. United States ex rel. Parco v. Morris, 426 F. Supp. 976, 982 (E.D. Pa. 1977) (in agency's judicial or quasi-judicial functioning, consideration of extraneous pressure from Congressmen undermines fairness of hearing accorded the adverse parties).

271. Similarly, if there is reason to believe Congress may itself eliminate the rule, the agency may delay repeal briefly to give Congress time to do so, especially if there is some uncertainty as to whether or not Congress has affirmatively mandated the rule and thus deprived the agency of the authority to repeal it. As Judge Wright observed in the context of the FCC's effort to deregulate radio, it is often preferable for Congress, as opposed to the agency, to determine whether a long-standing rule should be retained or eliminated. Office of Communication of United Church of Christ v. FCC, 707 F.2d 1413, 1443 (D.C. Cir. 1983); see Edwards, *supra* note 16 (suggesting courts should scrutinize revocation of longstanding rules more closely).

Arguably, the FCC could have justified a temporary deferral to Congress in the fairness inquiry; the doctrine was long-standing, popular in Congress, constitutionally sensitive, and in need of careful balancing of conflicting first amendment interests. However, the Commission said nothing to suggest its deferral was temporary. On the contrary, it explicitly disclaimed any intent to return to the matter. See Brief For Federal Communications Commission on Jurisdiction at 6, Radio-Television News Directors Ass'n v. FCC, 809 F.2d 860 (D.C. Cir. 1987) (No. 85-1691) ("It is clear from the context of the entire proceeding that the *Report* is a final action to which the Commission does not intend to return in the foreseeable future.").

272. The *Chadha* Court noted with approval the "report and wait" procedure that it had previously sanctioned in *Sibbach v. Wilson*, 312 U.S. 1 (1941). *Chadha*, 462 U.S. at 935 n.9; see L. TRIBE, CONSTITUTIONAL CHOICES 77 (1985) (*Chadha* does not prevent "report and wait" congressional strategy). Under "report and wait" procedures, agency rules cannot go into effect until a specified period has elapsed in which Congress can act legislatively to prevent the rules from becoming effective. In *Sibbach*, the procedure was applied to the newly developed Federal Rules of Civil Procedure. 312 U.S. at 14-15.

whether and for how long to defer.²⁷³

Any such delay provided by the agency should only be long enough to give Congress time to enact legislation. If, after a reasonable period, Congress fails either to enact or to eliminate the rule, the agency must exercise its own expert judgment and eliminate the rule. Neither Congress' long-standing acquiescence in or ratification of the rule nor its failure to enact it as law can modify the agency's power or its responsibility.

Orphaned rules are not only constitutional anomalies; they in fact represent undesirable policymaking. As the uncertainty created by the FCC's action with the fairness doctrine dramatically illustrates, orphaning rules is irresponsible and confusing. By undermining the fairness doctrine in one proceeding, continuing to enforce it in another, and considering alternatives in a third (reluctantly and only in response to a congressional order), the FCC produced a veritable three-ring circus. The Radio-Television News Directors Association challenged the Commission's original diffidence in the District of Columbia Circuit, Meredith contested its allegedly unfair enforcement decision in the District of Columbia Circuit, and the Syracuse Peace Council attacked the Commission's subsequent determination that the doctrine was unconstitutional in the Second Circuit (from which it was transferred to the District of Columbia Circuit where it is still pending). As one of the participants caught up in this morass aptly noted, the saga resembles *Jarndyce v. Jarndyce*, Charles Dickens' infamous interminable case that "droned on" so long that "no man alive [knew] what it mean[t]."²⁷⁴ With less spasmodic, schizophrenic behavior, the FCC could have avoided much of the ensuing confusion and uncertainty. Having decided that the doctrine was not in the public interest (and, at its discretion, having given Congress some time in which to act), the Commission should have issued a notice of

273. The agency's giving Congress time to act even though it has found that the rule disserves the statutory mandate is analogous to the Supreme Court's deferring implementation of a finding that a procedure is unconstitutional so as to give Congress time to repair the statute. In *Northern Pipeline Constr. Co., v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), the Court found aspects of the bankruptcy procedures unconstitutional, but delayed the effective date of its judgment for six months to give Congress time to modify the bankruptcy statute and eliminate the unconstitutional features. *Id.* at 88; *Northern Pipeline*, 459 U.S. 813 (extension of stay of judgment); *Northern Pipeline*, 459 U.S. 1094 (further extension of stay of judgment denied). Similarly, in *Buckley*, the Court not only retroactively validated the actions of the Federal Election Commission, but also allowed the Commission to continue in operation for some period, notwithstanding the Court's conclusion that the agency's Commissioners were unconstitutionally appointed. *Buckley v. Valeo*, 424 U.S. 1, 193-94 (1976). Unlike the case with an unconstitutional statute, with an orphaned rule, Congress always has the power to grant itself more time by imposing a moratorium.

274. Opposition of Petitioners to Motion to Defer Briefing and Argument at 2, *Radio-Television News Directors Ass'n v. FCC*, 809 F.2d 860 (D.C. Cir. 1987) (No. 85-1691) (quoting C. DICKENS, *BLEAK HOUSE* 7 (Modern Library Ed. 1985)). That observation, appropriate when made in early 1987, became even more appropriate as the convoluted scenario continued to unfold. *See infra* note 285 (discussing subsequent history of these proceedings).

proposed rulemaking, considered the possible alternatives, and announced a decision. That decision would undoubtedly have been challenged in the courts, whichever way it went, but it would likely have been a single orderly proceeding, not the bizarre, confusing mosaic presently underway.²⁷⁵

2. The Judiciary's Limited Ability to Police the Informal Process

That this article has focused on Congress and the agencies should not suggest an intent either to overlook the potentially useful role judicial review may play in deterring even broader legislative delegations or cruder threats than we have seen or to undermine the significant role courts frequently play in controlling and legitimating agency behavior. The availability of judicial review as a constraint on agency decisionmaking has been a crucial factor in the Supreme Court's willingness to tolerate the anomalous fact that unelected agencies make law without the safeguards of bicameralism and presentment.²⁷⁶ Moreover, as the experience with the fairness doctrine docu-

275. Administrators would do well to heed the advice proffered nearly 25 years ago by Newman and Keaton:

If administrators play a scared-rabbit, hangdog role, salaaming whenever a legislator snaps his fingers, legislative administrative relations will of course deteriorate . . . One wonders what would happen if the attitude were rather: 'All right, you are a bigshot on an important subcommittee. Yet, we make the decisions—regardless of your inquiries, comments, criticisms, and requests, your exposes, proddings, harangues, and cajoleries. We listen respectfully but on the basis of all information do what to *us* seems best.' Congressmen could respond, of course by eviscerating the agency with amendments of its laws, or . . . with refusals to consent to the appointment of its best leaders. But are drastic retaliations like these a real threat? At each step the administrator has a chance to defend and to rally his friends, in and out of Congress. If the issue is crucial he can enlist even the President's aid. And it is not easy for a Congressman to persuade his colleagues, say, that appropriations should be cut \$1,000,000 because the agency has denied the claim of one of his constituents (unless we assume log-rolling at its very worst).

A stiff backbone means that the merits of retaliatory action—laws, appropriations, appointments—are exposed. If such a course were routine, is it not conceivable that Congress would have to widen its perspective? Only a pampered overseer can afford to be dilettante; a responsible overseer has to be discriminate. If their bluffs were called, if they were forced to take public responsibility for their demands, more Congressmen might become decently discriminating in their choices. At least, is not the chance worth taking?

Newman & Keaton, *supra* note 151, at 594-595 (emphasis in original).

276. As the Court noted in *Chadha*:

Executive action under legislatively delegated authority that might resemble "legislative" action in some respects is not subject to the approval of both Houses of Congress and the President for the reason that the Constitution does not so require. That kind of Executive action is always subject to check by the terms of the legislation that authorized it; and if that authority is exceeded it is open to judicial review as well as the power of Congress to modify or revoke the authority entirely.

462 U.S. at 953-54 n.16. This is not to say that there is a constitutional right to judicial review of agency action. The Supreme Court has generally tried to avoid having to decide that question. Recognizing that the prohibition of judicial review of at least constitutional issues raises a "serious

ments, the courts may be instrumental in getting Congress and the agency to terminate the impasses that create orphans. Indeed, the *Meredith* case illustrates the potentially valuable role courts may play in both (1) "holding the agency's feet to the fire" and forcing it to decide whether to kill the orphan or adopt it, and (2) serving thereafter as a convenient shield the agency can use to deflect angry legislators: "Don't blame us. The court made us do it."²⁷⁷

constitutional question," *Bowen v. Michigan Academy of Family Physicians*, 106 S. Ct. 2133, 2141 n.12 (1986), the Court "begins with the strong presumption that Congress intends judicial review of administrative action," *id.* at 2135, and has generally construed the relevant statutes to provide for such review. *Id.* at 2137-42; see *Johnson v. Robison*, 415 U.S. 361, 364-67 (1974) (appellants' contention that the statute bars federal courts from deciding the constitutionality of veterans' benefits legislation "would, of course, raise serious questions concerning [its] constitutionality" and therefore the court will construe the statute to avoid the constitutional question); *Bartlett v. Bowen*, 816 F.2d 695, 699 (D.C. Cir. 1987) (noting that it has become something of a "time-honored tradition" for courts to find that Congress did not intend to preclude altogether judicial review of constitutional claims in light of the serious due process concerns such preclusion would raise); *cf.* *United States v. Mendoza-Lopez*, 107 S. Ct. 2148, 2154 (1987) (constitutional issue unavoidable; where administrative determination to play a critical role in the subsequent imposition of a criminal sanction, due process requires that there be some "meaningful review of the administrative proceeding"). See generally *Gunther, Congressional Power to Curtail Federal Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895 (1984); *Hart, The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953).

277. In the *Meredith* remand, the Commission frequently defended its relatively aggressive actions by suggesting that "the court made us do this." For example, in rejecting the SPC's suggestion that the agency avoid the difficult constitutional question by deciding that *Meredith* had satisfied its fairness doctrine obligation, the Commission lamented its inability to do so: "The court expressly affirmed our earlier finding that station WTVH had violated the doctrine. The affirmance of this aspect of the case is final, and we have no power to revisit this determination." *In re Complaint of Syracuse Peace Council v. WTVH*, 2 F.C.C. Rec. 5043, 5045 (1987) (referring to *Meredith Corp. v. FCC*, 809 F.2d 863, 871 (D.C. Cir. 1987)), *reconsideration denied*, F.C.C. No. 88-131 (Apr. 7, 1988).

Similarly, responding to the Democratic National Committee's contention that the Commission should not use an adjudication to eliminate the doctrine but should instead issue a notice of proposed rulemaking wherein it could consider the various alternative proposals to maintain "fairness," the FCC said that the court had nowhere suggested the agency should do this and therefore it would not. In fact, the agency appeared to suggest that it could not. "We reject the contention of those parties who argue that we cannot address the broad policy and constitutional issues involving the fairness doctrine in this proceeding, but must issue an additional rulemaking notice to do so. In *Meredith Corp. v. FCC*, the Court explicitly stated that the Commission could decide this case on broad policy and constitutional grounds. The contention, then, that the Commission lacks authority to consider these issues in this adjudication is *directly at odds with the directive of the Court of Appeals in remanding this case to the agency.*" *Id.* at 5046 (emphasis added).

Even in its contorted conclusion that the first prong of the doctrine was not severable from the second and therefore was also infirm, the Commission used the court as an excuse and shield: "In remanding the case to us, the Court of Appeals did not indicate that we were obligated to consider, or even that we should consider, the two parts of the doctrine separately. . . . Our directive from the court was to consider the constitutionality and propriety of the fairness doctrine as it is currently administered. That doctrine, both on its face and as administered, contains two parts that, together, constitute the fairness doctrine. Accordingly, we consider the entire doctrine in this proceeding and decline to sever its parts from one another." *Id.* at 5048 (emphasis in original).

But it is a mistake to rely too heavily on the judiciary to play such a facilitating role. Its ability to police the legislative-administrative dialogue is, for a variety of reasons, limited.

First, the judiciary can only enter the drama if someone with standing brings a justiciable challenge. As illustrated by the experiences with the syndication and financial interest rules, as well as the other orphans, even relatively blatant agency capitulations may not be challenged in the courts.

Second, even if challenged, agency abdication to legislative pressure is often subtle and hard to identify. Although blatant agency capitulation should not survive close judicial scrutiny,²⁷⁸ agency capitulation is rarely as blatant as the FCC's recent actions have been. In fact, there are a variety of ways an intimidated agency can cover up, and insulate from review, abdication and capitulation. The agency may announce that it is abandoning the proposed reform and terminating the rulemaking proceeding because, "on reflection," it has changed either its opinion of the rule or its priorities. Since it is virtually impossible—and generally undesirable—for a court to try to probe an agency's motives to assess whether it really changed its views on the proposed reform or just capitulated to congressional pressure, the courts generally are deferential to such explanations.²⁷⁹

Moreover, an intimidated agency can simply avoid doing anything; effec-

278. As the preceding section argues, an agency violates its statutory mandate when it decides, because of congressional pressure, to maintain a rule, notwithstanding its conclusion that the rule violates the statutory mandate or is otherwise inappropriate. Such action would not survive the judicial search for a "reasoned analysis" of an agency's decision to change regulatory direction and should not be adequate to explain a decision to retain a rule. As the Court held in *State Farm*: "An agency's view of what is in the public interest may change, either with or without a change in circumstances. But an agency changing its course must supply a *reasoned analysis* . . ." 463 U.S. at 57 (1983) (emphasis added) (quoting *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971)). The Court further stated:

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

463 U.S. at 43. For valuable discussions of judicial review of agency deregulation, see generally Edwards, *supra* note 16; Garland, *supra* note 16; Mikva, *The Changing Role of Judicial Review*, 38 ADMIN. L. REV. 115, 124-26, 129 (1986); Sunstein, *supra* note 16.

Agency fears of retaliatory budget cuts, staff reductions, or office moves to undesirable locations are not factors that Congress generally makes relevant in an agency's mandate; they are factors that, in the words of *State Farm*, Congress has "not intended [the agency] to consider." 463 U.S. at 43. An agency's decision to yield to them ought, therefore, to be found arbitrary and capricious. Thus a challenge to such action by, for example, a person facing an enforcement action, such as Meredith, or someone expected to comply with the orphaned rule, such as the Radio-Television News Directors Association, ought to be found contrary to law.

279. See *United States v. Morgan*, 313 U.S. 409, 422 (1941) (inappropriate to subject administrator's thought processes to probing judicial scrutiny); *cf.* *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971) (remanding to district court to determine basis for agency action);

tively, albeit informally, abandoning the proposed rulemaking midstream. In fact, as several of the examples suggest, an intimidated agency seems most likely to react by simply, quietly, and unofficially, putting the controversial proposed reform on the "back-burner."²⁸⁰ Such agency inaction is difficult to identify and to challenge.²⁸¹ Moreover, even if a reviewing court concludes that the inaction is reviewable,²⁸² that there has been an unreasonable delay,²⁸³ and that the agency must decide, and explain, what it intends to do—modify the rule, eliminate it, or terminate the proceeding without any reform—this remedy should not be overrated.²⁸⁴ It serves the useful function of forcing the agency to act, but the agency still remains free to retain the

inquiry into mental processes generally to be avoided but may be necessary where agency has given no reasons).

280. See, for example, the FCC's apparent abandonment of its efforts to revise the syndication and financial interest rules, discussed *supra* at text accompanying notes 110-24, and the FCC's reluctance to complete the rulemaking to repeal the personal attack and political editorializing rules, discussed *supra* at text accompanying notes 101-09.

281. Courts generally allow agencies broad discretion in controlling their agendas. *Sierra Club v. Thomas*, 828 F.2d 783, 797 (D.C. Cir. 1987) ("Because a court is in general ill-suited to review the order in which an agency conducts its business, we are properly hesitant to upset an agency's priorities by ordering it to expedite one specific action, and thus give it precedence over others.") (citation omitted); *National Congress of Hispanic Am. Citizens v. Marshall*, 626 F.2d 882, 889 (D.C. Cir. 1979) (agency better equipped to allocate resources than courts); cf. *Heckler v. Cheney*, 470 U.S. 821, 837-38 (1985) (agency inaction generally unreviewable).

282. *Environmental Defense Fund, Inc. v. Hardin*, 428 F.2d 1093, 1100 (D.C. Cir. 1970) (at some point administrative delay amounts to refusal to act and may be judicially reviewable; record insufficient to determine whether this delay amounts to refusal to act, remanded for Secretary to explain delay); *Public Citizen Health Research Group v. FDA*, 740 F.2d 21, 35-36 (D.C. Cir. 1984) (agency delay in processing citizen's petition may be judicially reviewable; to see if unreasonable, consider prejudice from delay, reasons for delay, and statutory scheme).

283. *Sierra Club v. Thomas*, 828 F.2d 783, 798 (D.C. Cir. 1987) (three-year delay since initial notice of proposed rulemaking not unreasonable); *Telecommunications Research & Action Center v. FCC*, 750 F.2d 70 (D.C. Cir. 1984) (five-year delay does not warrant mandamus when FCC states intention to proceed); *Air Line Pilots Ass'n v. Civil Aeronautics Bd.*, 750 F.2d 81, 86-87 (five-year delay in processing complaints difficult to justify; because agency is closing, court maintains jurisdiction and demands periodic progress reports from agency).

284. The articulation requirement may make it somewhat harder for an agency to hide improper motivations. See Friendly, *Chenery Revisited: Reflections on Reversal and Remand of Administrative Orders*, 1969 DUKE L.J. 199, 206-17 (noting salutary effect of requiring agencies to articulate reasons for actions); Sunstein, *supra* note 177, at 78 (more difficult to hide bad motives with articulation requirement than without one). But it can neither reveal unstated motives nor thwart an agency desirous of "achiev[ing] a particular result without regard to the facts at hand." *State Farm Mut. Auto. Ins. v. Department of Transp.*, 680 F.2d 206, 242-43 (D.C. Cir. 1982) (Edwards, J., concurring), *vacated and remanded on other grounds*, 463 U.S. 29 (1983); see Sax, *The (Unhappy) Truth About NEPA*, 26 OKLA. L. REV. 239, 239 (1973) (expressing belief no empirical evidence exists that supports proposition that articulation requirement enhances integrity of administration decisions); Stewart, *supra* note 14, at 1780 (National Environmental Policy Act's requirement that agencies consider reasonable alternatives to proposed actions "has not deterred agencies from following their bent in most cases after going through the motions of devising an impact statement"). Indeed, it is particularly easy for an agency with a broad statutory mandate to have its actions upheld. See Garland, *supra* note 16, at 558-59 (when statutory mandate phrased in terms of public interest, range of reasonableness excessively broad); Edwards, *supra* note 16, at 264, 283 (same).

rule, unmodified, for any of the preceding reasons.²⁸⁵

In short, whatever the precise scenario of agency-judicial interaction, the courts' remedial powers are limited. Even if agency capitulation is blatant, challenged, and found to be arbitrary and capricious, the likely remedy is a remand to the agency. Ultimately, therefore, even with relatively intense judicial review, we remain dependent on the agency's sense of responsibility.²⁸⁶

285. See *District of Columbia Fed'n of Civic Ass'ns v. Volpe*, 459 F.2d 1231, 1246 (D.C. Cir. 1971) (returning case to Secretary of Transportation instructing him to "make new determinations based strictly on the merits and completely without regard" to pressure previously exerted by influential Congressman), *cert. denied*, 405 U.S. 1030 (1972); *Pillsbury Co. v. FTC*, 354 F.2d 952, 965 (5th Cir. 1966) (although questioning of Commissioners before Senate subcommittee deprived petitioner of kind of hearing it was entitled to, court found agency not disqualified to decide case and remanded it back to agency for further proceedings); cf. *Scenic Hudson Preservation Conference v. Federal Power Comm'n*, 453 F.2d 463, 482, 484 (2d Cir. 1971) (Oakes, J., dissenting) (objecting to decision to affirm agency ruling because agency reached same decision as before remand by "abusing its discretion while purporting to act under the mandate of the court"), *cert. denied*, 407 U.S. 926 (1972); *Food Mktg. Inst. v. ICC*, 587 F.2d 1285, 1289, 1290, 1295 (D.C. Cir. 1978) (affirming ICC decision, made on remand from D.C. Circuit, in which Commission upheld its previous order).

It is noteworthy that, even with the FCC's open abdication in the 1985 fairness inquiry, the District of Columbia Circuit had difficulty dealing with the chaos the FCC had created. Indeed, this complex saga of the fairness doctrine graphically documents the limited ability of the courts to clean up the uncertainty inevitably caused by an agency's orphaning of a rule. When the Radio-Television News Directors Association challenged the lawfulness of the FCC's capitulation to congressional pressure, the court first concluded, after deliberating for more than a year and a quarter, that it had no jurisdiction to hear the constitutional challenge to the fairness doctrine. *Radio-Television News Directors Ass'n v. FCC*, 809 F.2d 860, 862-63 (D.C. Cir. 1987). Determining that the constitutional challenge had to be made in district court, the court of appeals dismissed the constitutional claim and scheduled argument on the Association's second claim that the FCC had abused its discretion in "deferring to Congress" and retaining the doctrine, notwithstanding its powerful indictment of the rule. *Id.* at 863. Two months later, the panel, apparently uncomfortable with this questionable jurisdictional ruling on the constitutional claim, granted the Association's petition for rehearing and rescheduled argument on the jurisdictional issue. *Radio-Television News Directors Ass'n v. FCC*, No. 85-1691 (D.C. Cir. Mar. 16, 1987). A few days later, however, the court postponed the rescheduled argument, deciding to await the FCC's action in the *Meredith* remand. *Radio-Television News Directors Ass'n v. FCC*, No. 85-1691 (D.C. Cir. Mar. 20, 1987). Finally, on Sept. 23, 1987, the court concluded that the FCC's decision in the *Meredith* remand had made the Association's case moot and dismissed the case. *Radio-Television News Directors Ass'n v. FCC*, No. 85-1691 (D.C. Cir. Sept. 23, 1987). Still concerned about the potential repercussions from the court's earlier disputed jurisdictional ruling, the FCC ultimately convinced the court "to vacate in their entirety" the order and memorandum of Jan. 16, 1987, which held the court had no jurisdiction to review the constitutionality of the fairness doctrine. *Radio-Television News Directors Ass'n v. FCC*, 831 F.2d 1148, 1148 (D.C. Cir. 1987). The *Meredith* part of the saga continues apace. See *supra* notes 100, 274.

286. Whether or not the judiciary should be more aggressive in searching for "orphaned rules" or inducing agencies to reevaluate their regulations is an interesting question. Dean Calabresi has advocated a more aggressive role for the courts in getting Congress to deal with obsolete statutes. G. CALABRESI, *supra* note 15, at 163-66. Dean Calabresi's proposal has been both lauded, see Cox, Book Review, 70 CALIF. L. REV. 1463 (1982), and criticized for getting the courts too far involved in the legislature's domain, see Mikva, *The Shifting Sands of Legal Topography* (Book Review), 96 HARV. L. REV. 534 (1982); Estreicher, *Judicial Nullification: Guido Calabresi's Uncommon Common Law for a Statutory Age* (Book Review), 57 N.Y.U. L. REV. 1126 (1982); MacIsaac, *Common Sense About the Age of Statutes* (Book Review), 81 MICH. L. REV. 754 (1983); Coffin, *The Problem*

V. CONCLUSION

The potential to create and perpetuate these orphans graphically demonstrates the weakness of the modern administrative state where agencies do much of the lawmaking and Congress directs much of its efforts toward controlling agencies, not enacting policy.²⁸⁷ *Chadha* and *Bowsher* attempt to limit Congress' ability to use agencies to circumvent the constitutional safeguards of bicameralism and presentment and to intrude unduly into the execution of the laws. These principles are undermined when members of Congress intimidate an agency into capitulating and retaining a rule the agency has concluded should be eliminated. Nonetheless, we should not preclude members of Congress from conveying their opinions to agencies; their views, likely to reflect considerable knowledge and interest, are valuable contributions to our pluralist political process. But conveying views is different from issuing threats. Concomitantly, accepting advice is distinguishable from capitulating to pressure. Admittedly, these lines are hard to draw. But that does not distinguish them from most legal lines. Nor does it mean the distinctions are nonexistent or irrelevant. It simply means that the pertinent actors—Congress and the agencies—must be particularly diligent in policing themselves.

That there is a need to develop and prescribe normative standards for the conscientious legislator and administrator is apparent from the case studies described in part II. The openness of congressional threats and the ease with which agencies capitulate suggest a failure of both Congress and the agencies even to understand their responsibilities. It would be hopelessly naive to assume that merely urging Congress and the agencies to exercise self-control can offset the strong countervailing political and institutional forces that induce Congress to legislate by leaning and agencies to defer. Still, some heightened sensitivity to the preferred behavior cannot hurt.²⁸⁸

of Obsolete Statutes: A New Role for Courts? (Book Review), 91 YALE L.J. 827 (1982); Hill, *Calabresi: An Addendum* (Book Review), 82 COLUM. L. REV. 1779 (1982); Stimson, *Calabresi on the Problem of Statutory Middle-Age: Judicial Cure or Political Prescription* (Book Review), 18 HARV. C.R.-C.L. L. REV. 599 (1983). But there is more reason and fewer objections for the judiciary to step in with orphaned agency rules than with obsolete statutes. Orphaned rules are more offensive than obsolete statutes since they have never been enacted by Congress and the President. More importantly, the role for the judiciary with orphaned rules is less intrusive than that proposed by Calabresi. With orphaned rules, the institution responsible for creating the rule not only has taken the initiative to reassess it but has in fact officially declared it to be obsolete. The agency has itself initiated a dialogue; thus, for the judiciary to intervene to facilitate the dialogue is less troublesome than initiating the dialogue itself as Calabresi suggests.

287. See Elliott, *supra* note 166, at 166 ("administrative lawmaking has become the central law-making institution and thereby has transformed the functions and relationships among other institutions").

288. As Judge Breyer has observed, a normative approach that assumes regulators act in good faith is worth pursuing, "despite the fact that political and bureaucratic factors obviously play an important role in the outcome of regulatory programs." S. BREYER, *supra* note 152, at 10. See

Given the judiciary's limited ability to deal with the orphaning phenomenon, the principal responsibility must lie with those responsible for creating orphans.²⁸⁹ If Congress is unable or unwilling to delegate more narrowly, it should be vigilant in detecting and rectifying these orphaned situations when they do arise.²⁹⁰ Similarly, an agency with broad lawmaking powers must exercise its power responsibly—neither permitting a few legislators to use the agency as a vehicle for informal legislation nor manipulating the courts into eliminating the rule for it.²⁹¹ When an agency has concluded that a rule is no longer appropriate, it should eliminate it; if Congress disagrees, Congress should enact the rule itself. When Congress legislates by intimidation, and agencies refuse to implement their own expert judgment because of congressional pressure, the spirit of the Constitution is undermined. This should not be dismissed as simple “political reality.” It is the responsibility of Congress and the administrative agencies to avoid this process of “rule by intimidation” and the “orphaned rules” it produces—a process as constitutionally and functionally infirm as “rule by nobody.”²⁹²

generally Brest, *supra* note 260; Sager, *supra* note 261, at 1220-21; Sunstein, *supra* note 177, at 55. This assumes, of course, that articulating appropriate behavior will not make the participants simply cover their real motives better. The FCC's recent efforts to modify its *ex parte* rules to limit legislative input during the sunshine period suggests a welcome heightened sensitivity at least on the agency's part to the problem of legislative pressure and an appropriate desire to control it.

289. Cf. Sunstein, *supra* note 177, at 68 (it is unlikely that the courts can “accomplish a great deal in bringing the political process closer to the Madisonian conception [of avoiding the domination of political factions.] Changes in the nature of politics will depend far more on the practices of legislative and administrative actors”).

290. Congress should enact the rule as law or it should eliminate it, either by repealing it or by discontinuing the pressure on the agency so that the agency will.

291. The FCC's decision to defer to the Congress in the fairness inquiry and to continue prosecuting the fairness complaint against Meredith may have been an effort to set up a situation whereby, without the agency's directly confronting Congress, the rule would be eliminated—either by the court, doing the agency's dirty work for it, or by the agency shielded by the excuse that it only acted because “the court made us do it.” Whether or not that was the premeditated plan of the FCC, hindsight suggests the agency used the court in that way. While such use of the courts may have the beneficial effect of finally getting rid of an orphaned rule, it is an irresponsible exercise on the part of the agency and an inappropriate use of judicial resources. As Judge Silberman noted in the oral argument reviewing the FCC's actions with respect to the Fairness Doctrine: “I doubt . . . that this [agency action] will go down in history as an example of ‘profiles in courage.’” Transcript of Proceedings at 38, *Radio-Television News Directors Ass'n v. FCC* (No. 85-1691).

292. The “rule by nobody” concept comes from the writings of Hannah Arendt and refers to bureaucratic political systems in which rulers are neither identifiable, accountable, nor responsible to the governed. H. ARENDT, *THE HUMAN CONDITION* 40, 45 (1958). As Prof. Arendt points out, rule by nobody does not mean “no-rule,” but may instead turn out to be one of the “cruellest and most tyrannical forms of government.” *Id.* at 40. Like rule by nobody, “rule by intimidation” undermines the constitutional safeguards of accountability and responsibility.