

Administrative Law and Agency Policy-Making: Rethinking the Positive Theory of Political Control

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In the last decade, positive political theory (PPT) models of agency policy-making have emphasized the tools politicians can use to control or influence agency decisions. These models are, in part, a reaction to earlier economic and other models of agency policy-making which emphasized the agency losses attendant to the delegation of decision-making authority to agencies by politicians. The more recent PPT works contend that politicians use the tools of ex post and ex ante control to overcome some of the agency problems associated with delegation (such as the inability to foresee the issues the agency will face), in part by enlisting interest groups in the battle to control agencies. These recent PPT models of political control do a good job of illustrating how and why politicians try to influence agency policy-making; but they overstate politicians' ability to do so, for two reasons. First, commonly-employed methodological assumptions in positive models tend to obscure the most important impediments to political control. Second, the antecedents to the current PPT literature posed a false dichotomy between agency autonomy and good government, one which some positive theorists seem to continue to accept, at least implicitly. This article examines these positive and normative biases in the PPT literature on the political control of agencies, and argues that PPT policy models which abandon these assumptions will do a better job of (1) describing the agency policy-making process and (2) accommodating the fact of agency autonomy in the policy process.

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Introduction

What can the tools of economics tell us about who controls the agency policy-making process? Economics may be the dismal science, but its impact on legal scholarship has been anything but dismal. To the contrary, recent legal scholarship has been energized by analytical methods borrowed from economics.¹ Nowhere is this more evident than in the field of public law, which has been transformed by the so-called "public choice" scholarship growing out of the work of economist Kenneth Arrow.² Economic models of legislative choice have demonstrated the inherent instability of majority rule,³ and economic models of regulation have challenged the legitimacy of the policy process by portraying policy-makers as the willing instruments of self-

1. Nearly every traditional subject of legal education has been the subject of economic analysis. Two general texts are ROBIN PAUL MALLOY, *LAW AND ECONOMICS: A COMPARATIVE APPROACH TO THEORY AND PRACTICE* (1990); A. MITCHELL POLINSKY, *AN INTRODUCTION TO LAW AND ECONOMICS* (1989).

2. Arrow's theorem demonstrated formally the impossibility of constructing a collective choice process that simultaneously satisfies several desirable democratic objectives. KENNETH ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (1951). See also MALLOY, *supra* note 1, at 42-45 (providing concise summary of Arrow's theorem). For a good summary of the impact of public choice literature on public law, see DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* (1991); GLEN O. ROBINSON, *AMERICAN BUREAUCRACY: PUBLIC CHOICE AND PUBLIC LAW* (1991).

3. For a summary of the formal economic models which explore the instability or irrationality of majority rule after Arrow's pioneering work, see FARBER & FRICKEY, *supra* note 2, at 38-62; NORMAN FROHLICH & JOE A. OPPENHEIMER, *MODERN POLITICAL ECONOMY* 15-31 (1978); WILLIAM H. RIKER, *LIBERALISM AGAINST POPULISM* 115-92 (1982); Keith Krehbiel, *Spatial Models of Legislative Choice*, 13 *LEGIS. STUD. Q.* 259, 273-94 (1988).

interested “rent-seekers.”⁴ These works have provoked a healthy debate over the motives of the interest groups, politicians, and bureaucrats who participate in the policy process, and over the purpose of the process itself.⁵ A recent line of scholarship spawned by these economic models of public law is the so-called “positive political theory” (PPT)⁶ of administrative agency behavior, which has engaged political scientists, economists, and legal scholars in a series of ongoing debates.⁷ One focal point of these debates is the question of how much control elected politicians can or should exert over agency policy-making. While there continues a lively debate within this literature between the champions of congressional control and the champions of presidential control, advocates of the view that administrative agencies can or should exert a significant degree of policy-making independence irrespective of politicians’ preferences are virtually absent within PPT.⁸ Like other economic models of law, PPT is gaining increasing influence over administrative law scholarship. Therefore, the time is right to explore the reasons for this bias against agency autonomy and, in so doing, to evaluate the contributions of PPT scholarship to our understanding of administrative policy-making.

Of course, the view that agencies can or should exert significant policy-making independence is well represented outside of the PPT literature, within

4. In this context, “rent-seeking” refers to the use of the political process by a discrete constituent group to garner private benefits. See FARBER & FRICKEY, *supra* note 2, at 12-37 (discussing theories of public law that emphasize rent-seeking by interest groups). See also Edward L. Rubin, *Public Choice in Practice and Theory*, 81 CALIF. L. REV. 1657, 1658 (1993) (reviewing FARBER & FRICKEY, *supra* note 2); Daniel Shaviro, *Beyond Public Choice and Public Interest: A Study of the Legislative Process as Illustrated by Tax Legislation in the 1980s*, 139 U. PA. L. REV. 1, 7 (1990).

5. This literature is far too large to summarize here. For excellent summaries of legal scholarship on point, see generally FARBER & FRICKEY, *supra* note 2; ROBINSON, *supra* note 2. I discuss some of the contributors from the social sciences in Sections I.A. and Subsection II.A.2. One of the best known and most vehement critics of the public choice literature, particularly its view of political actors as rent-seekers, is Judge Mikva. See Abner Mikva, *Foreword to Symposium on the Theory of Public Choice*, 74 VA. L. REV. 167, 167-69 (1988).

6. By “positive political theory,” I mean all rational choice approaches to the study of administrative agency policy-making, including formal and informal models. I use the term “positive political theory” (PPT) rather than “rational choice” because it seems to be more commonly used within this literature. For a discussion of these terms in the context of the political control literature, see Daniel A. Farber & Phillip P. Frickey, *Foreword: Positive Political Theory in the Nineties*, 80 GEO. L.J. 457 (1992) (discussing compatibility of PPT with conventional public law theory).

7. These debates are memorialized in the proceedings of several research symposia. See Symposium, *Conference on the Economics and Politics of Administrative Law and Procedures*, 8 J.L. ECON. & ORG. 1 (1992); Symposium, *Conference on the Organization of Political Institutions*, 6 J.L. ECON. & ORG. (1990); Symposium, *Positive Political Theory and Public Law*, 80 GEO. L.J. 457 (1992); Symposium, *Regulating Regulation: The Political Economy of Administrative Procedures and Regulatory Instruments*, 1994 LAW & CONTEMP. PROBS. 1.

8. Among the active participants in the PPT debates, Jerry Mashaw has argued directly that agencies should exert significant policy-making independence. Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 91-99 (1985). There are scholars who claim that agencies are able to exert significant policy-making discretion when it serves politicians’ policy objectives to grant agencies that discretion. See discussion *infra* Section I.C. and Part II. While PPT scholars appreciate some aspects of agency autonomy, they overlook many others. See discussion *infra* Part II.

both political science⁹ and legal scholarship,¹⁰ and the “problem” of agency independence sparked the PPT debate over the political control issue.¹¹ Why then do so few positive theorists credit agencies with a large degree of policy-making independence irrespective of what politicians want? And why do even fewer positive theorists advocate such independence? Critics have challenged PPT models on several grounds,¹² but none have explored the roots of the problem, which lie in positive theory’s methods and history.

Some of the methodological assumptions that PPT models employ tend to obscure important aspects of agency policy-making, and to overstate the leverage political actors have over that process. Specifically, positive theorists tend to gloss over (1) how policy expertise and professional norms drive the development and content of the relevant actors’ policy preferences, (2) the importance of substantive policy foresight at the legislative stage in the struggle to exert *ex ante* control, (3) the *political* reasons why politicians prefer to leave some important policy issues to the agency’s discretion, and (4) the ability of agencies to evade political controls. PPT grew out of an earlier literature that poses a false dichotomy between bureaucratic autonomy and good government. As a consequence, some positive theorists employ the unstated normative assumption that a well-functioning democracy requires a high degree of political control over agency policy-making. I argue that, depending upon the goals we set for agency policy-making and the characteristics and distribution of policy preferences among the agency, politicians, and the public, the public is sometimes better served by less political control over agency policy-making.

This Article challenges the methodological and normative assumptions of PPT from within the PPT paradigm and suggests that these assumptions ought to be reexamined. In Part I, I trace the evolution of this sometimes

9. There are far too many examples to summarize here. However, a good summary of the political science literature, including works advocating agency independence, is found in KENNETH J. MEIER, *POLITICS AND THE BUREAUCRACY: POLICYMAKING IN THE FOURTH BRANCH OF GOVERNMENT* 48-79 (1993). This point of view is common among political scientists within the subfields of public administration and public policy. For an interesting normative defense of agency policy-making independence by a political scientist, see JOHN A. ROHR, *TO RUN A CONSTITUTION: THE LEGITIMACY OF THE ADMINISTRATIVE STATE* 171-94 (1986).

10. Once again, this is an enormous literature, some of which I discuss in Part II. One recent and prominent example is SUSAN ROSE-ACKERMAN, *RETHINKING THE PROGRESSIVE AGENDA* (1992).

11. See *infra* Section I.A.

12. Some critics object to the notion that policy-making can be modeled as a rational choice at all, an idea which is fundamental to the PPT approach. See discussion *infra* Section I.A. and note 24. Others, primarily political scientists, have charged that rational choice/PPT analyses are unscientific, over-ambitious, and of little practical value. See, e.g., DONALD P. GREEN & IAN SHAPIRO, *PATHOLOGIES OF RATIONAL CHOICE THEORY* (1994); Theodore J. Lowi, *The State in Political Science: How We Became What We Study*, 86 AM. POL. SCI. REV. 1 (1992). Most relevant to this analysis is the critique that objects to the motives ascribed to policy-makers by early economic models. See, e.g., FARBER & FRICKEY, *supra* note 2, at 37; Jerry L. Mashaw, *Explaining the Administrative Process: Normative, Positive, and Critical Stories of Legal Development*, 6 J.L. ECON. & ORG. 267, 280 (1990); Mikva, *supra* note 5, at 167-74.

technical literature from the early economic models of agency behavior to the current PPT debate between proponents of congressional and presidential control. In Part II, I explore the various tools of ex post and ex ante control advanced by PPT scholars, and the specific methodological reasons why PPT models tend to both overestimate their effectiveness and overlook or minimize the amount of policy-making independence agencies routinely exert. In Part III, I examine the origins of the PPT normative bias against political control, and the extent to which that bias continues to inform current PPT scholarship. Finally, I conclude in Part IV by arguing that a closer examination of the role these assumptions play within the PPT ought to show us how that literature can accommodate a greater role for agency expertise and discretion in future analyses of the agency policy-making process.¹³

I. PPT Models of Agency Policy-Making and Political Control

One cannot fully understand the current PPT debate over agency policy-making without first examining the scholarly theories from which it arose. As I describe below, some of the methodological and normative biases against agency policy-making discretion in current PPT models are traceable to their historical antecedents, including (1) the view from principal-agent and

13. This critique is based on some assumptions about the objectives of PPT work. First, it may be argued that “positive” theory by definition purports to be neither descriptive nor prescriptive, and that these criticisms are therefore beside the point. If PPT models do not claim to be descriptive—that is, to represent or illuminate real agency policy-making processes—then they do little to advance our understanding of the political control issue. Like Mashaw, I will assume that PPT does aspire to explain real world agency policy-making, an assumption which is supported by PPT theorists’ use of examples and empirical data from real world agencies to buttress their theoretical arguments. See Mashaw, *supra* note 12, at 288. Second, an alternative defense of PPT against this kind of critique is the commonly cited axiom of the positivist philosophy of science that attacking a model’s assumptions does little to advance knowledge; and that we ought to judge the value of a model by the accuracy of its predictions, something that ought to be tested empirically. However, because many political phenomena are not easily amenable to definitive empirical challenge, this positivist axiom would have the effect of insulating many positive models from direct challenge at all. I will proceed on the assumption that this is not a satisfactory state of affairs. If we credit positive models of political phenomena with producing interesting results in the absence of empirical support (which I, for one, do), we ought not to consider those models invulnerable to all but systematic empirical attack. Positive models can clarify that which we suspect is true and can illuminate the hidden; therein lies their appeal. Where apparently interesting and important results are derived from faulty assumptions, those assumptions ought to be assailable. Such is the case with the positive theory of agency control. Positivism is a relatively recent import into political science from economics and, before that, the natural sciences. For a discussion of positivism in physics, see generally ISAAC ASIMOV, *UNDERSTANDING PHYSICS* (1988). For a discussion of positivism in economics, see generally DONALD N. MCCLOSKEY, *THE RHETORIC OF ECONOMICS* (1985). For a discussion of positivism in law, see Avery Katz, *Positivism and the Separation of Law and Economics*, 94 MICH. L. REV. 2229 (1996). Thanks to Lloyd Cohen of George Mason University for helping me to clarify these points. Finally, as to the question of whether positive arguments can be said to carry a normative bias, there seems to be a bias in the current PPT debate in favor of greater political control by elected politicians. See discussion *infra* Part III. To the extent that PPT theorists acknowledge and accept the proposition that the public interest may be better served by less political control over agency policy-making rather than more, the arguments I raise in Part III are redundant or unnecessary. However, to the extent that this bias exists and remains implicit within the debate, it is worth re-examining now.

science of administration models that agencies merely implement the policy choices of elected politicians, (2) the view of some organization theorists that there is no useful distinction to be made between agency policy-making and agency policy implementation, and (3) the economics of regulation view that policy-making by self-interested bureaucrats tends not to benefit the interests of the general public.

A. *Tracing the Lineage of PPT Models*

The earliest models of the administrative process stressed the value of public administrators as guardians of the public interest, technical experts insulated from political influence by civil service rules, practitioners of the science of administration.¹⁴ Growing out of widespread public distrust of elected politicians during the progressive era, this view of administrators turned the republican principle on its head by classifying political control over administrative agencies as a threat to the public interest. While policy-making was the rightful province of politicians, administration of that policy was not; indeed, political interference in administration was seen as counter-productive.¹⁵

The popularity of the science of administration model peaked before World War II.¹⁶ Since then, however, it has been challenged on several fronts. One such challenge came from sociology's organization theory and focused on the constraints that prevent the bureaucrat from fulfilling the role of dispassionate technocrat,¹⁷ including both the limits of human cognition and

14. Some of the most famous proponents of this "rational, dispassionate bureaucrat" view were Woodrow Wilson, Frank Goodnow, and Max Weber. See FRANK GOODNOW, *POLITICS AND ADMINISTRATION* (1900); Max Weber, *Bureaucracy*, in *CLASSICS OF PUBLIC ADMINISTRATION* (Jay M. Shafritz & Albert C. Hyde eds., 1978); Woodrow Wilson, *The Study of Administration*, 2 *POL. SCI. Q.* 197 (1887). This view had a contemporaneous private sector counterpart: the "scientific management" movement in the study of business organizations. That movement was most closely associated with the work of Frederick Taylor, and was sometimes called "Taylorism." See Frederick W. Taylor, *Scientific Management*, in *CLASSICS OF PUBLIC ADMINISTRATION*, *supra*, at 15.

15. In Wilson's words:

We have enthroned public opinion . . . [t]he very fact that we have realized popular rule in its fulness [sic] has made the task of organizing that rule just so much the more difficult. . . . Civil-service reform . . . is clearing the moral atmosphere of official life by establishing the sanctity of public office as a public trust, and, by making the service unpartisan, it is opening the way for making it business like.

Wilson, *supra* note 14, at 207, 210.

16. William F. West has chronicled the rise and fall of the science of administration model, which he calls the "traditional model." WILLIAM F. WEST, *CONTROLLING THE BUREAUCRACY: INSTITUTIONAL CONSTRAINTS IN THEORY AND PRACTICE* 5-8 (1995).

17. Prominent works in this tradition include Michael D. Cohen et al., *A Garbage Can Model of Organizational Choice*, 17 *ADMIN. SCI. Q.* 1 (1972); Charles E. Lindblom, *The Science of Muddling Through*, 19 *PUB. ADMIN. REV.* 79 (1959); and Herbert A. Simon, *The Proverbs of Administration*, 6 *PUB. ADMIN. REV.* 53 (1946). For a good review of this literature and its more modern counterparts, see WOOD & WATERMAN, *BUREAUCRATIC DYNAMICS: THE ROLE OF THE BUREAUCRACY IN A DEMOCRACY* 13-26 (1995); John Brehm & Scott Gates, *Working, Shirking and Sabotage: Bureaucratic Response to a Democratic Public* 1-11 (unpublished manuscript, on file with author).

decision-making ability¹⁸ and contextual constraints, such as information limitations and organizational complexity.¹⁹

A second challenge to the science of administration model was launched by the direct precursors of the current PPT literature, economists and others who used a principal-agent framework to analyze the relationship between administrative agencies and elected politicians.²⁰ While the principal-agent model shared with the science of administration model the view that politicians ought to make policy, it challenged the latter's conception of bureaucrats. Rather than assuming bureaucrats to be politically neutral administrators guided only by their expertise and the desire to serve the public interest, proponents of the principal-agent model instead characterized bureaucrats as rational, self-interested individuals whose faithfulness to their legislative mandate could be neither assumed nor trusted.²¹ Proponents of the principal-agent model used this assumption to analyze the impact of the agency's information advantages on the relationship between the agency and elected politicians. Based on their analysis, they concluded that information asymmetries enabled the agency to shirk its legislatively-imposed duties.²²

For several reasons, these early works had little to say about agency policy-making per se. Neither the science of administration model nor early principal-agent models explicitly recognized the delegation of policy-making functions to agencies. The science of administration model was based on the notion that Congress retained policy-making authority, delegating to administrative agencies only the authority to implement those policies.²³ For its part, organization theory examined agency choices, but denied the ability

18. See Lindblom, *supra* note 17, at 88.

19. See Simon, *supra* note 17, at 65-67.

20. Prominent examples of this literature include WILLIAM A. NISKANEN, JR., *BUREAUCRACY AND REPRESENTATIVE GOVERNMENT* (1971); Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & ECON. 211 (1976); George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971). For an update of this literature, see generally THE BUDGET-MAXIMIZING BUREAUCRAT: APPRAISALS AND EVIDENCE (Andre Blais & Stephane Dion eds., 1991) [hereinafter BUDGET MAXIMIZING BUREAUCRAT].

21. This literature is similar to and indeed part of the "economics of regulation" literature discussed *supra* note 4. That literature comprises studies of legislation and agency policy-making as the product of self-interested or rent-seeking behavior by interest groups, and includes some versions of the hypothesis that agencies can become "captured" by the industries they are charged with regulating. See, e.g., Stigler, *supra* note 20; Peltzman, *supra* note 20. This literature is a relative of PPT in that they both apply the tools of economics to the study of political phenomena.

22. See, e.g., NISKANEN, *supra* note 20.

23. See WEST, *supra* note 16, at 5-8. Courts perpetuated this myth with the "nondelegation doctrine," which implied that Congress made the law while agencies merely served as "transmission belts for attaining policy objectives articulated in the legislative process." *Id.* For a good discussion of the nondelegation doctrine, cases thereunder, and the doctrine's continuing importance, see BERNARD SCHWARTZ, *ADMINISTRATIVE LAW: A CASEBOOK* 78-119 (3d ed. 1988). Finally, it is important to recognize the relationship between this issue and the science of administration scholars' antipathy toward control by politicians. Neither Wilson nor Weber advocated independent policy-making by agencies; rather, each advocated noninterference by politicians in agency administration, in part because they saw administration as distinct from policy-making. See Weber, *supra* note 14; Wilson, *supra* note 14.

of agencies to pursue identified policy goals;²⁴ indeed, some organization theorists denied the importance of policy choices in the first instance, choosing instead to define agency policy-making as the product of individual acts of policy implementation rather than any conscious policy choice.²⁵ Likewise, early principal-agent models also tended to focus on non-policy-making functions, or to treat all forms of agency “drift” or “shirking” as one and the same problem.

For example, economist William Niskanen modeled the relationship between an agency and Congress as a constrained optimization problem in which the agency seeks to maximize its budget (B), subject to the constraint that the budget must cover the agency’s costs of producing the requisite level of output (Q).²⁶ In Niskanen’s model, the agency is rent-seeking—that is, it is motivated not by ideology or policy goals but rather by the desire to pad its own pockets. Agency output, Q , is a quantifiable amount of some good that the agency provides, such as the level of provision of a public service or the degree of enforcement of some rule or policy. Niskanen demonstrated that the agency will be capable of commanding more of B than is necessary to provide the desired amount of Q .²⁷ The important point, however, is that the provision of Q is not policy-making; rather, it is policy implementation.²⁸ An agency’s choice of a policy rule (with which the principal may be unhappy) and its decision not to adhere to a rule established by the principal are two different things.²⁹ These early economic models of agency action presupposed the existence of a policy or organizational goal, and thus need to be distinguished

24. See, e.g., Lindblom, *supra* note 17, at 83. Actually, Lindblom denies that agencies can pursue their goals directly. Rather, he says, agencies can move toward identified goals, but only incrementally. *Id.*

25. A more recent example of this view is MICHAEL LIPSKY, *STREET-LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICES* (1980). See also Brehm & Gates, *supra* note 17, at 4.

26. See NISKANEN, *supra* note 20, at 120-22.

27. *Id.* This view of bureaucrats as “resource maximizers” is part of a large literature on budgeting and the size of government. A prominent source in this literature is AARON WILDAVSKY, *THE POLITICS OF THE BUDGETARY PROCESS* (4th ed. 1984).

28. There is also a substantial literature that arose in response to Niskanen’s model and that addresses the same dependent variable—agency “output” levels. Indeed, nearly every empirical study examining the political control issue uses some measure of agency output (such as rates or distribution of agency enforcement actions, inspections, etc.) as the dependent variable. On the theoretical side, Miller and Moe sought to modify Niskanen’s model by adding the notion of committee oversight, concluding that the legislature can often get more agency output per budget dollar than Niskanen’s model suggests. Gary J. Miller & Terry M. Moe, *Bureaucrats, Legislators, and the Size of Government*, 77 AM. POL. SCI. REV. 297 (1983). See also Jonathan Bendor & Terry M. Moe, *An Adaptive Model of Bureaucratic Politics*, 79 AM. POL. SCI. REV. 755 (1985); Jonathan Bendor & Terry M. Moe, *Agenda Control, Committee Capture, and the Dynamics of Institutional Politics*, 80 AM. POL. SCI. REV. 1187 (1986); Michael E. Levine & Jennifer L. Forrence, *Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis*, 6 J.L. ECON. & ORG. 167 (1990).

29. Similarly, much of the empirical literature on “shirking” focuses on agency or bureaucrat decisions (some discretionary, some not) which fall outside of the realm of policy choice as defined here. See, e.g., WOOD & WATERMAN, *supra* note 17; Brehm & Gates, *supra* note 17.

from models that purport to explain the content of agency-made policy.³⁰

In large part, the PPT debate of the last fifteen years was triggered by these early economic models of agency independence, and it is important to be clear about exactly how the more recent scholarship parts company with its ancestors. As explained below, more recent PPT scholarship improves upon earlier economic models by attempting to address the agency policy-making process (at least in theory), and by depicting agencies as “policy maximizers” rather than “resource maximizers.” Indeed, as political scientists and legal scholars have joined this discussion, more attention has been focused on agencies’ policy choices, though there remains disagreement over who controls those choices. Furthermore, early economic models portrayed agency independence as both a threat to the public interest, and a problem endemic to the delegation of legislative authority. As I explain in Part III, much of the current PPT literature seems to challenge only the latter proposition, and implicitly to accept the former. That challenge focused initially on the possibility of “ex post” political control over agency decisions—the prospect that agency policy choices might be vetoed or overturned by Congress or the President. Most recently, the focus has turned to “ex ante” controls—prior limits on agency policy choice imposed by Congress through legislation, or by the President.

B. *Theories of Ex Post Control*

In a series of articles published in the mid 1980s, a group of positive theory scholars from political science and economics advanced the so-called “congressional-dominance hypothesis,” which answered arguments like Niskanen’s by emphasizing the considerable tools of influence available to Congress in its dealings with agencies.³¹ The earliest incarnation of this hypothesis stressed Congress’s ability to use ex post oversight to control agency policy-making through the selective application of legislative rewards and sanctions to bureaucrats. This argument emphasized two types of ex post control. These were “police patrols” (monitoring agency activities by oversight committees) and “fire alarms” (congressional reliance on

30. This difference in perspective may reflect, in part, a disagreement over which aspect of agency activity is most important. It is true, of course, that policy choices mean little if the chosen policies are not applied or enforced by front-line bureaucrats. This is a fundamental tenet of the study of public management. On the other hand, policy choices are important in their own right: they define that which front-line bureaucrats may apply or enforce, or that from which they may shirk. Furthermore, conscious policy choices represent the product of an enormous amount of agency effort and activity and have profound effects on American social and economic life.

31. See generally Matthew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 2 AM. J. POL. SCI. 165 (1984); Barry R. Weingast & Mark J. Moran, *Bureaucratic Discretion or Congressional Control?: Regulatory Policymaking by the Federal Trade Commission*, 91 J. POL. ECON. 765 (1983).

constituents to voice their discontent with agency actions).³² Congressional-dominance scholars argued that because Congress can overturn agency action and cut agency budgets, police patrols are effective. They also argued that, in practice, fire alarms rarely go off because bureaucrats are constrained in their behavior by the knowledge that Congress can punish them.³³

In response to this congressional-dominance argument, political scientist Terry Moe advanced his own president-centered view of agency policy-making, which I will refer to as the “presidential-dominance hypothesis.”³⁴ The central tenet of this hypothesis is that the President is both more motivated and better able than Congress to exercise control over the bureaucracy.³⁵ Part of Moe’s argument emphasizes ex post controls. He notes that agency policies must pass by the President and his appointees on their way to formal passage, and that the President can centralize the decision-making process by imposing new procedural rules. The classic example of centralization is regulatory review, a strategy begun by the Carter Administration, and intensified by the OMB during the Reagan Administration³⁶ and the Competitiveness Council during the Bush Administration.

PPT scholars recognized that these theories of ex post political control lent themselves nicely to formal spatial models of agency policy choice as a sequential, full-information game.³⁷ Most of these formal models conceive of

32. McCubbins & Schwartz, *supra* note 31, at 165-66. The ex post/ex ante distinction can become a bit muddled in this literature. As explained in greater detail below, these tools of ex post control are alleged to have ex ante effect—that is, they constrain agency choices, informally, before those choices are made. Nevertheless, the tools of control are used, if at all, after the agency’s decision. Furthermore, I am distinguishing here between “fire alarms” (appeals by constituents to Congress) as instruments of ex post control, and the provision of procedural remedies to constituents for use before agencies or the courts. I classify the latter as a form of ex ante control. See discussion *infra* Section I.C.

33. See McCubbins & Schwartz, *supra* note 31, at 166-67; Weingast & Moran, *supra* note 31, at 777-79, 792-93.

34. Moe’s critique is developed in Terry M. Moe, *Political Institutions: The Neglected Side of the Story*, 6 J.L. ECON. & ORG. 213 (1987); Terry M. Moe, The Politics of Structural Choice: Towards a Theory of Public Bureaucracy, Address Before the American Political Science Association Annual Meetings (Sept. 1, 1988) (transcript on file with author). The presidential-dominance hypothesis is alluded to in these sources, but is most fully developed in Terry M. Moe & Scott A. Wilson, *Presidents and Political Structure*, 1994 LAW. & CONTEMP. PROBS. 1. I should note that Moe might eschew the positive-theorist label. I include him here because he is an important participant in the PPT debate, and because his presidential-dominance argument mirrors the PPT congressional-dominance argument. Indeed, both arguments suffer from some of the same shortcomings. See discussion *infra* Part II.

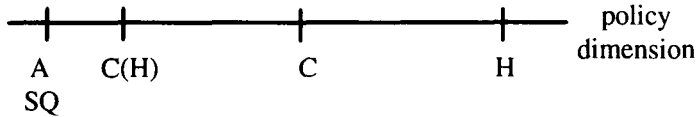
35. See Moe & Wilson, *supra* note 34, at 11-13.

36. See *id.* at 37-42.

37. Of course, the reduction of arguments to formal models or games is common in economic analysis and in PPT. Some prominent examples from this literature are William N. Eskridge & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523 (1992) [hereinafter Eskridge & Ferejohn, *Article I, Section 7*]; William N. Eskridge & John Ferejohn, *Making the Deal Stick: Enforcing the Original Constitutional Structure of Lawmaking in the Modern Regulatory State*, 8 J.L. ECON. & ORG. 165 (1992) [hereinafter Eskridge & Ferejohn, *Making the Deal Stick*]; John A. Ferejohn & Charles Shipan, *Congressional Influence on the Bureaucracy*, 6 J.L. ECON. & ORG. 1 (1990); and Arthur Lupia & Matthew D. McCubbins, *Learning From Oversight: Fire Alarms and Police Patrols Reconstructed* (1993) (unpublished manuscript, on file with author).

agency policy-making as the product of strategic choices made by bureaucrats, subject to reversal or veto by Congress, the President, or the courts. For example, as shown in Figure 1, a simple one-dimensional model³⁸ places the key actors—the agency (A), the unicameral legislature (H), and the legislature’s oversight committee (C) in this example—at different points (or ideal points) on a spectrum of policy choice.³⁹

Figure 1



The “full-information” assumption means that each actor is aware of the policy options and of the others’ preferences and likely actions. The rules of this game provide that the legislature can overturn the agency’s choice of policy, but only the committee can propose legislation. Therefore, the legislature can produce the outcome it wants (its ideal point) only if the committee proposes legislation in the first place. Knowing this, the agency will only propose policies which will not provoke a legislative proposal overruling the agency’s choice. The policy at point C(H), which is the same distance from C as H is from C, represents just such a policy.⁴⁰ In this way, politicians’ preferences and the threat of an ex post veto constrain agency policy choices. Other, more nuanced models of ex post control employ this

38. This example is drawn from Ferejohn & Shipan, *supra* note 37, at 5-9.

39. Each actor is assumed to try to maximize its utility over policy outcomes and to have “single-peaked preferences,” or a single-peaked utility function over this range of policy choices. The ideal points represent the location of each actor’s preferred policy option, or point of highest utility for each actor (actually, in this example points C and H represent the ideal points of the median member of the committee and the legislature, respectively.) In other words, it is assumed that policy options are ordered along this spectrum of choice such that each actor’s utility declines for each option that is further away from her ideal point. Therefore, under these assumptions, the desirability of each point on the spectrum of choice is inversely related to its distance from the actor’s ideal point. For an explanation of the significance of the assumption of single-peakedness for models of this kind, see FROHLICH & OPPENHEIMER, *supra* note 3, at 119-24.

40. In this game, the agency moves first by selecting a policy, after which the committee may propose a new policy if it so chooses. To see why the agency will choose policy C(H), remember that the committee will move only if it would prefer the legislature’s ideal point to the policy selected by the agency, and that the agency will seek to avoid that outcome. For a more detailed explanation of this process, see Ferejohn & Shipan *supra* note 37, at 12-15. Ferejohn and Shipan first explore the implications of this basic model, later adding judicial review, presidential veto, and legislative override mechanisms to their model. They conclude, among other things, that (1) a partnership between an outlying committee and a like-minded agency can sometimes frustrate the will of the legislature under the basic model, and (2) judicial review increases the agency’s responsiveness to legislative preferences (to those of the current legislature, not the legislature which authorized the agency to act). For an evaluation and critique of Ferejohn and Shipan’s model, see Matthew L. Spitzer, *Extensions of Ferejohn and Shipan’s Model of Administrative Agency Behavior*, 6 J.L. ECON. & ORG. 29 (1990).

same basic approach, and most also describe a high degree of political control over agency policy choices.⁴¹

C. *Theories of Ex Ante Control*

Criticism of this congressional-dominance argument has led some of its proponents to shift their focus to Congress's ability to exert ex ante control over agency policy-making. The "structure and process" hypothesis, advocated in the "McNollgast" articles,⁴² emphasizes congressional use of enabling legislation to shape the agency policy-making process.⁴³ According to this view, Congress does this in three ways: (1) by providing for interest group representation in the administrative process; (2) by "stacking the deck" in favor of the enacting coalition by specifying how the statute will be implemented; and (3) by structuring the agency so that it tends to favor

41. See generally Eskridge & Ferejohn, *Article I, Section 7, supra* note 37, at 558 (contending that President enjoys advantages in struggle to exert ex post (and ex ante) control over agencies). Eskridge and Ferejohn explore how broad delegations of authority to agencies can inure to the benefit of the President in the absence of legislative vetoes or court enforcement of the nondelegations doctrine. See also Lupia & McCubbins, *supra* note 37 (exploring some conditions under which legislators will use police patrols versus fire alarms, as well as circumstances under which legislators can learn from oversight). Lupia and McCubbins conclude that (1) because any costly agency policy proposal will involve a large change from the status quo, and because legislators have the ability to use police patrols to learn about proposed policies, the agency will only propose large changes from the status quo that benefit the legislator, and (2) legislators can learn from fire alarms when those sounding the fire alarm face some sort of penalty for lying and have preferences similar to those of the legislator.

It is worth noting that PPT scholars have long appreciated the ability of the agency to exercise autonomy when multiple principals disagree. Mashaw's two-dimensional model explores how agencies can sometimes play political principals off against one another to maximize preferred policy outcomes. See Jerry L. Mashaw, *Improving the Environment of Agency Rulemaking: An Essay on Games, Management and Accountability*, 1994 LAW & CONTEMP. PROBS. 185. See also Thomas H. Hammond & Jack H. Knott, *Who Controls the Bureaucracy?: Presidential Power, Congressional Prominence, Legal Constraints, and Bureaucratic Autonomy in a Model of Multi-Institutional Policymaking*, 12 J.L. ECON. & ORG. 119 (1996) (explaining when a bureaucracy will have autonomy); McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 435-38 (1989) (exploring problem of controlling bureaucratic agents). My critique focuses not on this problem but on the reasons why the tools of control available to each principal are often ineffective irrespective of any disagreement among the principals.

42. See Matthew McCubbins et al., *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 253-64 (1987); McCubbins et al., *supra* note 41. "McNollgast" are Mathew McCubbins, Roger Noll, and Barry Weingast.

43. This is essentially a problem presented by the divergence between the agency's policy preferences not from those of the current Congress, but from those of the enacting Congress. Horn and Shepsle argue that the enacting Congress can only limit agency drift in this way by exposing agency policy-making to the problem of "legislative" or "coalitional drift," "that is, by exposing the agency to greater outside influence in the future." Murray J. Horn & Kenneth A. Shepsle, *Commentary, Administrative Arrangements and Political Control of Agencies: Administrative Process and Form as Legislative Responses to Agency Costs*, 75 VA. L. REV. 499, 504-07 (1989). Macey disputes this contention. See Jonathan R. Macey, *Organizational Design and Political Control of Administrative Agencies*, 8 J.L. ECON. & ORG. 93, 95-99 (1992).

particular interests (“autopilot” characteristics).⁴⁴ The “structure” part of this argument, encompassing the last two of these three items, focuses on the initial decisions politicians make at the legislative stage about the agency’s structure or mission, such as the agency’s location within the executive branch, its likely client group, its organizational structure, etc. The “process” part of this argument focuses on Congress’s ability to establish ex ante procedural rights for the “enacting coalition”⁴⁵ (item one above) to participate in agency policy-making. Proponents of ex ante control contend that these rights, combined with the original structural choices and ex post oversight, can help to ensure that the enacting coalition’s goals will be enforced by interest groups—through the courts if necessary—in the agency policy-making process.⁴⁶

In response to the ex ante congressional control argument, Moe argues that presidents exert more ex ante control over agency policy-making than does Congress, noting that presidents are endowed with Constitutional and statutory powers which enable them to control agency structure.⁴⁷ The power of appointment is the most important power, because presidents can use this power to place political appointees in key agency positions—a process known as “infiltrating alien territory.”⁴⁸ Moe buttresses his claim that presidents can control agency policy-making in ways Congress cannot by noting both that the President oversees the regulatory review process and that the President can set the public agenda and thereby frame policy debates. The latter power is especially important in that it can act as an indirect constraint on Congress’ ability to influence agency policy-making.⁴⁹

The ex ante control argument engaged legal scholars in the PPT debate and did so by design. The McNollgast argument that administrative procedures were instruments of political control challenged legal scholars’ traditional view of administrative procedures as a means to democratize, and therefore to legitimize, the agency policy-making process.⁵⁰ Similarly, Moe’s analysis of presidential control of agencies referred to a large existing literature in the legal scholarship that had been triggered by the Reagan

44. McCubbins et al., *supra* note 42, at 256-64. Macey’s explanation of how agencies are “hardwired” is essentially a more nuanced version of McNollgast’s notion of “autopilot” characteristics. See Macey, *supra* note 43, at 99-103.

45. The enacting coalition is the coalition of interest groups who supported the enabling legislation.

46. McCubbins et al., *supra* note 42, at 263.

47. Moe & Wilson, *supra* note 34, at 13-15.

48. *Id.* at 17-19.

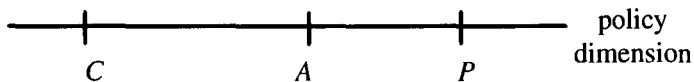
49. *Id.*

50. See Mashaw, *supra* note 12, at 267-70. Mashaw characterizes the traditional view as the “idealist vision” of administrative procedures and describes the PPT approach as one type of “realist critique” of that vision. *Id.* For two of the better known expositions of the more traditional view of administrative procedures, see KENNETH C. DAVIS, *ADMINISTRATIVE LAW* 4-10 (1972); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1715-16 (1975).

Administration's Executive Order 12291.⁵¹ Some legal scholars did embrace the PPT approach and even more joined the debate.⁵² Nevertheless most scholars ascribed greater ex ante control to the President than to Congress.⁵³

As shown in Figure 2, the politics of structure argument can be expressed very simply in a one-dimensional spatial model. Given that the President and Congress have preferences over a policy issue, they will select an agency with a preference for, or create an agency designed to pursue, the policy at Point A.

Figure 2



David Epstein and Sharyn O'Halloran⁵⁴ and Karen Bawn⁵⁵ offer more complicated formal models of this ex ante control process by examining Congress's assessment of how much policy-making discretion to delegate to agencies. Epstein and O'Halloran contend that legislatively established limits on agency policy choice are consciously and strategically chosen by Congress, based upon Congress's determination of the other actors' policy preferences.⁵⁶ In their model, the amount of discretion Congress delegates decreases as the amount of distance between congressional and presidential ideal points increases because presidents can influence agency policy-making within the parameters set by Congress. Its tools of ex post control enable Congress to grant some minimum amount (or "floor") of discretion regardless of presidential preferences.⁵⁷ Bawn models legislators' choice of whether to delegate policy issues or to address them legislatively as a function of the actors' preferences and outcome uncertainty. She contends that legislators can use structure and process not to dictate the agency's ideal point (as in Figure

51. See, e.g., ROSE-ACKERMAN, *supra* note 10; Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123 (1994); Susan Rose-Ackerman, *Deregulation and Reregulation: Rhetoric and Reality*, 6 J.L. & POL. 287 (1989); Peter L. Strauss & Cass Sunstein, *The Role of the President and OMB in Informal Rulemaking*, 38 ADMIN. L. REV. 181 (1986); Cass Sunstein, *The Myth of the Unitary Executive*, 7 ADMIN. L.J. AM. U. 299 (1993).

52. Examples include Eskridge & Ferejohn, *supra* note 37; Jonathan R. Macey, *Separated Powers and Positive Political Theory: The Tug of War Over Administrative Agencies*, 80 GEO. L.J. 671 (1992); Macey, *supra* note 43.

53. See, e.g., Eskridge & Ferejohn, *Article I, Section 7*, *supra* note 37, at 563; Greene, *supra* note 51, at 196.

54. See David Epstein & Sharyn O'Halloran, *Administrative Procedures, Information and Agency Discretion*, 38 AM. J. POL. SCI. 697 (1994).

55. Kathleen Bawn, *Political Control Versus Agency Expertise: Congressional Choices About Administrative Procedures*, 89 AM. POL. SCI. REV. 62 (1995).

56. Epstein & O'Halloran, *supra* note 54, at 704-06.

57. *Id.* at 708-12.

2) but to dictate the characteristics of the distribution from which it is drawn, and thereby to dictate the agency's likely ideal point.⁵⁸

II. PPT Methodology and the Limits of Political Control

PPT models provide insight into how Congress or the President sometimes attempts to influence agency policy-making. However, as I explain in this Section, these models exaggerate politicians' ability to manage the delegation of policy-making authority to agencies. Commonly used PPT assumptions about preference structures and information tend to overstate the leverage politicians have over agency policy-making and to obscure some of the basic reasons why politicians have no choice but to delegate policy-making authority to agency experts in the first place. As a consequence, the picture painted by most PPT models does not accurately represent most agency policy-making—a process which is dominated more often by agency bureaucrats pursuing their goals than by external forces.

Before these observations can be further developed, two caveats must be presented. First, some of the variables that PPT models (particularly formal models) continue to ignore—such as asymmetries in information and resources—are some of the variables on which earlier economic models focused. Ironically, while PPT scholarship grew out of this earlier work, it does not seem to have fully appreciated its implications. Second, there is a distinction to be made between (1) those PPT models that describe issue-by-issue policy control by politicians over agency choices and (2) those that explain broad policy-making discretion by agencies as a function of strategic choices by politicians that serve their policy goals.⁵⁹ While the latter acknowledges that agencies have broad policy-making discretion, both ascribe ultimate policy control to elected politicians. I argue that, more often than not, neither form of political control is present when agencies make policy decisions.

A. *Structure, Process and Ex Ante Control*

The ex ante control argument understates or ignores (1) the importance of legislative foresight to the exercise of influence over subsequent agency policy decisions, (2) certain reasons why politicians cannot and do not structure agency decisions in the ways the ex ante control arguments suggest,

58. In Bawn's model, the legislative coalition uses procedures to specify the mean and the variance of the distribution of agency preferences. Bawn, *supra* note 55, at 63.

59. Examples of the latter include Bawn's model, *supra* note 55, and Epstein and O'Halloran's model, *supra* note 54. Another, similar model is proposed by Martin. Elizabeth M. Martin, *The Impact of Costly Decision Making on Congressional Delegation* (Aug. 31, 1995) (unpublished paper presented before 1995 meeting of American Political Science Association, on file with author).

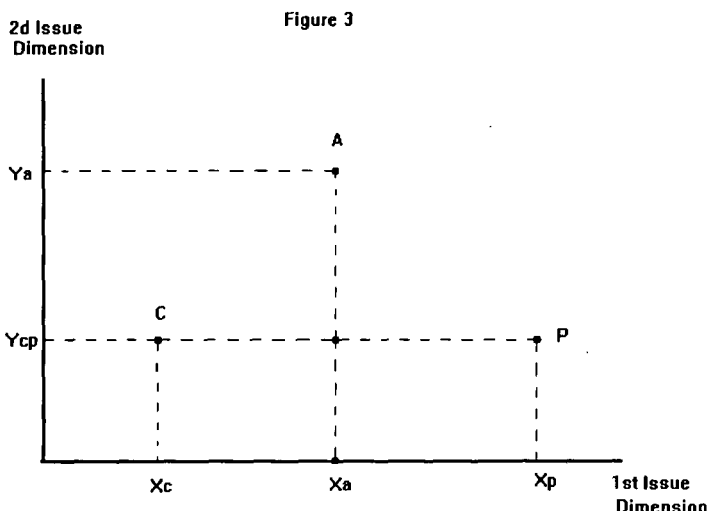
and (3) the ways agencies can evade political control by using informal or other policy-making procedures that exclude interest group input.

1. *Preferences, "Legislative Bargain," and the Problem of Foresight*

The simple politics of structure illustration in Figure 2 presupposes presidential and congressional preferences over the policy issue in question, implying foresight of that issue at the legislative stage. It may be that the spatial depiction of this "structural choice" is appropriate for some of the policy issue dimensions that politicians can foresee. Yet, as an agency encounters new policy problems and issue dimensions within its jurisdiction, the preferences of agency experts may or may not reflect those of elected politicians. Figure 3 illustrates a problem in which the President and Congress have created an agency designed to produce policy X_a on the first issue dimension, an issue that the President and Congress were able to foresee at the agency creation stage. However, as the agency encounters additional issue dimensions like that represented by the vertical axis in Figure 3, its preferences may begin to reflect influences other than those of Congress or the President.⁶⁰ When the enabling legislation is silent, agencies do not merely attempt to read and implement the preferences of Congress and the President. Rather, legislation authorizes agency experts to apply their expertise to new problems, subject to specified constraints. The agency's policy preferences will be, in part, a function of that expertise. Congress and the President recognize that they cannot foresee many important policy issues and that their ability to exercise *ex ante* influence is, therefore, limited. For these unforeseen issues, there is no legislative bargain to enforce. This foreseeability problem goes to the heart of the delegation issue and is the key reason why politicians delegate policy-making authority to agencies in the first place.⁶¹

60. Thanks to William Bianco for suggesting this illustration.

61. This "issue foreseeability" phenomenon is analogous to but distinguishable from "outcome uncertainty"—the notion that legislators cannot foresee the policy outcomes that result from legislative action and the "potential preferences" of their constituents over those outcomes. Outcome uncertainty and its effects on the legislator-constituent relationship are addressed in R. DOUGLAS ARNOLD, *THE LOGIC OF CONGRESSIONAL ACTION* 35-87 (1991); and WILLIAM T. BIANCO, *TRUST: REPRESENTATIVES AND CONSTITUENTS* (1994). Both Bawn and Epstein & O'Halloran attempt to incorporate outcome uncertainty into their formal models of the delegation process; neither, however, makes any allowance for issue foreseeability. To the contrary, both model the delegation process as a function of politicians' known preferences over policy outcomes, implying that politicians can foresee issues. See Bawn, *supra* note 55, at 64; Epstein & O'Halloran, *supra* note 54, at 703-04. McCubbins et al. acknowledge the importance of issue foreseeability in the *ex ante* control argument, but contend that the full panoply of *ex ante* and *ex post* control devices available to politicians, taken together, gives politicians a substantial amount of political control over agencies. See McCubbins et al., *supra* note 42, at 257. See also Macey, *supra* note 43, at 99 (acknowledging importance of issue foreseeability problem).



Proponents of *ex ante* control contend that politicians can exert a good measure of influence over subsequent agency decisions, despite the foreseeability problem, by using structures and procedures to favor the winning legislative coalition at the agency policy-making stage. Recall that the structure portion of this argument says that decisions about agency structure that politicians make at the agency or program-creation stage constrain subsequent agency policy choices.⁶² However, structural choices like these are infrequently made (new legislative programs are relatively rare, and agencies are very infrequently created or restructured).⁶³ In addition, many important intervening variables exist between the original structural choice and the agency policy choices that follow it. For these reasons, structural choice is at best a very blunt instrument of influence.

That is not to say that structural choice is meaningless—rather, that its importance as a determinant of agency policy choice is seriously overstated. It is one thing to say that structural choices about the agency’s jurisdiction and mission influence the agency’s subsequent policy preferences.⁶⁴ It is quite another to contend that structure influences most agency policy choices. Indeed, a more circumspect and persuasive version of the structural choice argument is consistent with well-established works from outside the PPT

62. See Bawn, *supra* note 55, at 63-69; McCubbins et al., *supra* note 42, at 440-45.

63. Structural choices are made infrequently, and most are made by the enacting Congress. This makes structural choices particularly susceptible to the “legislative drift” problem discussed at *supra* note 43.

64. See Macey, *supra* note 43, at 99-104.

tradition that describe how an agency can become populated by bureaucrats with certain shared values. For example, Kaufman⁶⁵ and Marcus⁶⁶ have noted that an agency with a well-defined mission will tend to attract bureaucrats whose goals are sympathetic to that mission. Consequently, the Environmental Protection Agency's (EPA) Office of Water tends to attract people who place a high value on protecting water quality, while the Federal Energy Regulatory Commission's (FERC) Office of Hydropower Licensing tends to attract people who place a high value on encouraging the development of hydroelectric power. Politicians' structural choices can therefore point the agency toward a general goal. Nevertheless, agencies must face many policy choices while attaining that goal which are orthogonal to the original structural choice (as shown in Figure 3). For these policy choices, factors unrelated to the original structural choice—bureaucrats' technical expertise, professional norms, or the influence of the relevant policy network—will determine the agency's policy preferences. Consider the FERC hydroelectric licensing example mentioned above. Congress has made very few structural choices affecting the program since the passage of the Federal Power Act in 1935.⁶⁷ Yet the FERC has made countless policy decisions about how to achieve its goals during that time. These aging structural choices exerted little influence over decisions profoundly affecting national energy and environmental policy.⁶⁸

Similarly, the process portion of the structure and process argument seems overstated and equates openness in the administrative process with congressional influence over that process. However, absent a specific expression of legislative intent governing the agency policy choice in question, procedural rights cannot ensure *ex ante* influence over that policy choice because most administrative procedures are substantively neutral.⁶⁹

65. HERBERT KAUFMAN, *THE FOREST RANGER: A STUDY IN ADMINISTRATIVE BEHAVIOR* (1967).

66. ALFRED MARCUS, *PROMISE AND PERFORMANCE* (1980).

67. 16 U.S.C. § 791(a) (1994). The first and only major amendment to the hydroelectric licensing provisions of the Federal Power Act was contained in the 1986 Electric Consumers Protection Act, Pub. L. 99-495, 100 Stat. 1243 (1986).

68. For example, political scientist Jeffrey Hill describes how the FERC circumvented or ignored important parts of the 1978 Public Utility Regulatory Policies Act (PURPA), a policy choice which he credits to the dominance of lawyers in the agency decision-making process. Jeffrey S. Hill, *Agency Latitude and Congressional Control: An Alternative to Capture and Dominance* 197-213 (1987) (unpublished Ph.D. dissertation, University of Rochester, on file with author). Perhaps a better example of the dominating influence of professional norms over congressional goals is the Clean Air Act example described in Subsection II.A.2.

69. Indeed, those procedural provisions which have real substantive effect, such as those assigning the burden of proof in subsequent agency proceedings, might reasonably be classified as "quasi-substantive" rather than procedural. Whereas McCubbins et al. ascribe substantive effect to procedures which increase the transaction costs of agency decision-making, these more quasi-substantive procedures tend to raise the costs of making a *particular* decision. For example, McCubbins et al. discusses how the different burdens of proof assigned to proponents and opponents of new toxic chemicals in the Toxic Substances Control Act have made it much easier for environmental opponents of new toxic chemicals to be successful under the latter statute than the former. McCubbins et al., *supra* note 42, at 260. This kind of provision alters the substantive status quo and might be considered more than "procedural."

PPT scholars point to the notice and comment procedures required by the Administrative Procedures Act (APA) as an example of a procedural control device; yet, depending on the substantive standards governing conflict over policy-making at the agency or court stage, disfavored interests (those which were not part of the enacting coalition) may be just as able as favored interests to use procedure to influence agency policy-making.⁷⁰ This point is illustrated by Steven Balla, who found that notice and comment rule-making procedures used by the Health Care Financing Administration benefited the opponents of the coalition that supported the enabling legislation.⁷¹ Indeed, in the usual absence of legislative guidance, the *ex ante* procedural control argument seems weak.⁷²

How often are agency policy choices guided by legislative intent? The answer to this question is a point of contention among PPT scholars.⁷³ In the legislative process, Congress makes many important policy choices that place boundaries on agency action. These legislative boundaries influence agency action more effectively than *ex post* controls because agency bureaucrats almost always respect these boundaries.⁷⁴ However, even if legislatively imposed limits are commonly included in statutes, Congress does not necessarily impose limits on most agency policy choices. The number of policy issues addressed in legislation is a small fraction of the number addressed by agencies.

In addition, Congress is often silent on important policy questions that are left to the agency to resolve.⁷⁵ Returning to the hydroelectric licensing

70. In response to this procedural control argument, Mashaw has noted that statutes do not typically enfranchise only the winning coalition. See Mashaw, *supra* note 12, at 281-84. Macey argues that courts often tailor rules of standing to benefit those who were the losers at the legislative stage. See Macey, *supra* note 52, at 684-92.

71. See Steven J. Balla, Administrative Procedures and Political Control of the Bureaucracy, Address at the Annual Meeting of the Midwest Political Science Association 15 (Apr. 18, 1996). Likewise, Coglianese demonstrates that business interests participate disproportionately in EPA hazardous waste rule-makings, yet were not the intended beneficiaries of the statute under which those rules were promulgated. See Cary Coglianese, Challenging the Rules: Litigation and Bargaining in the Administrative Process 47-51 (unpublished manuscript, on file with author).

72. Even procedures that grant access to previously excluded groups may have little substantive influence on policy outcomes. One frequently cited example of a procedural control device is the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-70(d) (1994), which gave environmental groups and environmental issues greater exposure in the administrative process. See, e.g., McCubbins et al., *supra* note 42, at 264. However, NEPA is generally understood to have had little substantive effect on agency decisions, except for the increased transaction costs due to NEPA compliance that may effectively kill marginal agency projects. See JOEL F. HANDLER, SOCIAL MOVEMENTS AND THE LEGAL SYSTEM 44-48 (1978).

73. Compare Ferejohn & Shipan, *supra* note 37, at 3 (suggesting that vague delegations of policy-making authority to agencies is the norm) with Epstein & O'Halloran, *supra* note 54, at 701 (suggesting the opposite).

74. Traditional bureaucratic politics or public administration scholars might attribute this response to a bureaucrat's sense of professionalism. See, e.g., MEIER, *supra* note 9, at chs. 5, 7; ROHR, *supra* note 9, at ch. 11. PPT scholars might point to other incentives, such as the fact that interest groups are likely to enforce *ex ante* boundaries through the courts. See, e.g., McCubbins et al., *supra* note 42, at 263.

75. Professor Kenneth Culp Davis notes that agencies are left to "decide many major questions" of policy. See DAVIS, *supra* note 50, at 35. He characterizes the delegation process this way: "Congress

example, the Federal Power Commission (later renamed the Federal Energy Regulatory Commission) was charged for more than five decades with granting hydroelectric licenses to those applicants whose projects will serve "the public interest." The Commission was left with the task of giving meaning to that standard.⁷⁶ Similarly, the 1980 federal Superfund law left unanswered important questions about how hazardous waste sites were to be cleaned up and by whom.⁷⁷ It is the inability of politicians to foresee important policy choices that makes vague delegations like these relatively common, hindering the ability of favored interest groups to translate procedural access into policy success.

2. *Collective Choice Problems and "Passing the Buck"*

Collective choice problems further illustrate why delegation to agency experts can be useful politically rather than strategically, and why delegations are frequently vague, even when Congress can foresee policy issues that may arise. Congress delegates important issues to the agency because of (1) preference cycles within Congress over the policy issue in question and (2) what William Riker called the "manipulation of alternatives."⁷⁸ Preference cycles refer to collectively intransitive preferences that can occur when there are more than two policy alternatives, such as when a legislative body prefers alternative A to alternative B, B to C, and C to A.⁷⁹ Manipulation of alternatives can be used to create cycles over one issue dimension, as can manipulation of issue dimensions within a single legislative proposal—it may be that preferences are single peaked over one issue but not over two or more.⁸⁰ These problems can defuse or frustrate a majority and prevent Congress from making a policy choice in the enabling legislation, even when it can foresee the issue. For example, a strong majority of legislators and voters may support the proposition that women should have a right to an abortion; but, there may be no majority in support of any set of specific abortion restrictions, such as parental consent, waiting periods and the like.

may say to the agency, in effect: 'Here is the problem. Deal with it.' . . . The non-delegation doctrine does not prevent delegation of legislative power. . . . And it does not even assure meaningful legislative standards." *Id.* at 27.

76. See 16 U.S.C. § 800 (1994).

77. See 42 U.S.C. § 9601 (1994). Environmental statutes are often cited as examples of legislative specificity. Yet even the Clean Air Act, 42 U.S.C. § 7401 (1994), and the Clean Water Act, 33 U.S.C. § 1251 (1994), despite their complexity and length, charged EPA (and delegated state agencies) with much of the task of determining which emitters of pollution to regulate and how to regulate them. For additional examples, see DAVIS, *supra* note 50, at 26-41.

78. See generally WILLIAM H. RIKER, *LIBERALISM AGAINST POPULISM: A CONFRONTATION BETWEEN THE THEORY OF DEMOCRACY AND THE THEORY OF SOCIAL CHOICE* 140-41 (1982).

79. This is a violation of the assumption used in formal models of single-peaked preferences. The significance of single-peaked preferences is described at *supra* note 39 and *infra* note 131. This is one aspect of the instability of majority rule literature described at *supra* note 3.

80. See RIKER, *supra* note 78, at 137-68.

Administrative Law and Agency Policy-Making

Positive theorists are well aware of this problem but seem to understate its importance in models of agency control. As Riker⁸¹ and others⁸² argue, this type of impasse is not uncommon. More importantly, it seems likely that this would be a particularly common problem for policy choices facing agencies because Congress can “solve” collective choice problems by leaving politically difficult issues for decision by the agency. The temptation to “pass the buck” in this way means not only that agencies face many policy questions on which legislation is silent, but also that many of these policy questions will be important, or at least controversial.⁸³ With these policy choices, there is no position from which the agency can drift and, once again, no legislative bargain to enforce.

This is essentially the problem the Supreme Court addressed in *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*⁸⁴ The Court upheld the EPA’s right to reverse a prior agency policy choice (contained in agency regulations) under the Clean Air Act in the absence of any discernible legislative intent on the policy issue in question. The Court explained:

Perhaps [Congress] consciously desired the Administrator to strike the balance at this level, thinking that those with great expertise and charged with responsibility for administering the provision would be in a better position to do so; perhaps it simply did not consider the question at this level; and perhaps Congress was unable to forge a coalition on either side of the question, and those on each side decided to take their chances with the scheme devised by the agency. For judicial purposes, it matters not which of these things occurred.⁸⁵

Certainly the plaintiffs in *Chevron*, an environmental group, were among the members of the coalition whom the Clean Air Act intended to benefit. Both the Clean Air Act statute and the Administrative Procedures Act afforded the plaintiffs the right to participate in the agency policy-making process and to seek review of agency policy decisions in court. Yet absent legislative intent guiding the agency on the policy issue in question, the agency was free within the bounds of reasonableness to make its own policy choices irrespective of the wishes of the plaintiffs.⁸⁶

81. *Id.* at 213.

82. *See* Moe & Wilson, *supra* note 34, at 24-28.

83. Electoral concerns reinforce this tendency among legislators toward “nondecisions.” Representative Pat Williams (D-MT) recently put it this way: “For a number of years, Americans have been in a negative mood, so voting no on legislation is the safest of all positions.” Robin Toner, *For Democrats on the Ropes, The Best and Worst of Times*, N.Y. TIMES, Oct. 30, 1995, at A1.

84. 467 U.S. 837 (1984).

85. *Id.* at 865.

86. It should be noted that, under the *Chevron* doctrine, the reviewing court must make an initial determination whether the enacting Congress evinced an intent to guide the agency on the policy issue in question. If the court reads an intent into the language of the statute, that intent will be controlling. Some commentators contend that the Supreme Court has used this approach to retreat from *Chevron*, at least

The *Chevron* decision reinforces the notion that members of the winning coalition at the legislative stage can enforce the legislative bargain only if procedural access is supplemented by substantive rights. Frequently, because politicians are unwilling to address or unable to foresee the policy issues that will arise, agency policy choice is not constrained by *ex ante* controls.

3. *Evading Procedural Controls: Informal and Ad Hoc Policy-Making*

The *ex ante* procedural control argument seems to contemplate agency policy-making by notice and comment rule-making only. However, agencies have the ability to evade procedural control in two basic ways. First, agencies can make broad policy decisions through informal means.⁸⁷ Second, agencies can make policy on a case-by-case basis, using formal adjudication to establish policy precedent.

If an agency wishes to establish a broad policy rule, it may choose to avoid the APA's rule-making procedure by embodying its policy choice in informal rules,⁸⁸ policy guidance memoranda, and other policy-making devices. For example, the U.S. Army Corps of Engineers' wetlands permitting program relies on so-called "regulatory guidance letters" to announce policy decisions.⁸⁹ Similarly, most of EPA's policies concerning the apportionment of liability and cleanup standards under the Superfund program are contained in informal directives.⁹⁰ When agencies make such policy decisions without going through notice and comment rule-making procedures, it becomes much more difficult for interest groups to influence the agency policy-making process. These informal policies may not have the force of law in court, but they are widely used by agencies as if they did. While interest groups can challenge the validity of the policy in court, standing rules and other access doctrines make access to the courts more restrictive than access to the rule-making process. Furthermore, because bureaucrats and some segments of the

informally. *See, e.g.*, Merrill, *supra* note 10, at 980-92. To the extent that courts adopt this approach, Congress may be able to come closer to preserving the original legislative bargain. However, this retreat is not in evidence in the lower courts. Furthermore, *Chevron* is still controlling law, and it portends increasing deference to agency policy decisions.

87. *See* Robert A. Anthony, 'Well, You Want the Permit, Don't You?' Agency Efforts to Make Nonlegislative Documents Bind the Public, 44 ADMIN. L. REV. 31, 31-41 (1988). *See also* James T. Hamilton & Christopher H. Schroeder, *Strategic Regulators and the Choice of Rulemaking Procedures: The Selection of Formal vs. Informal Rules in Regulating Hazardous Waste*, 1994 LAW & CONTEMP. PROBS. 111, 119-27.

88. Traditionally, legal scholars have used the term "informal rule-making" to refer to notice and comment rule-making under Section 553 of the APA to distinguish it from more formal rule-making procedures specified under Sections 556 and 557 of the this Act. *See, e.g.*, JOHN REESE, ADMINISTRATIVE LAW: PRINCIPLES AND PRACTICE (1995). I am referring here, however, to even less formal policy choices, those made without using notice and comment procedures.

89. *See, e.g.*, *Regulatory Guidance Letters Issued by the Corps of Engineers*, 60 Fed. Reg. 13703 (1995).

90. *See, e.g.*, NATIONAL TECHNICAL INFORMATION SERVICE, DIRECTORY OF SUPERFUND GUIDANCE DOCUMENTS (1995).

public seem to be growing increasingly dissatisfied with the rule-making process, the use of informal processes seems to be on the rise.⁹¹

Similarly, when agencies make policy by formal adjudication, interest group access is also restricted. Policy by adjudication is a particularly powerful technique for independent commissions, which have the authority to use adjudicatory proceedings to make policy as a matter of course.⁹² Independent commissions, such as the FCC, the SEC, and the FERC, make many of their policy determinations in quasi-judicial opinions, in which they impose their own rules governing access to these adjudicatory proceedings.⁹³ Interest-group access to these quasi-judicial proceedings tends to be more restricted than access to rule-makings.⁹⁴ Furthermore, these judicial policy decisions stand as precedent until the commissioners decide to change them, and they can do so without the cumbersome notice and comment requirements associated with rule-making.

There is one additional variation on this theme: Sometimes new policy is made outside the usual policy processes by courts. This outcome occurred in a 1976 federal consent decree in which EPA settled a suit initiated by the Natural Resources Defense Council. In the decree, EPA agreed to extend water pollution regulation under the Clean Water Act to new chemicals and industries.⁹⁵ Indeed, an agency can initiate enforcement proceedings, or

91. For a general discussion of this issue, see Bryan G. Tabler & Mark E. Shere, *EPA's Practice of Regulation by Memo*, 5 NAT. RES. & ENVT. 3 (1990). Legal scholars have noted that the increasing formality and rigidity of the notice and comment process—called the “ossification” of rule-making, PHILIP K. HOWARD, *THE DEATH OF COMMON SENSE: HOW THE LAW IS SUFFOCATING AMERICA* 62-89 (1994)—has spurred the move to less formal, less open, and more flexible methods of policy-making. See Thomas O. McGarrity, *Some Thoughts on 'Deossifying' the Rulemaking Process*, 41 DUKE L. J. 1375 (1992). Note also that APA Section 553 requirements do not apply to so-called “interpretive rules,” which the agency may use to explain how it will interpret provisions of its enabling statute. See *Sentana-Hampton Hosp. v. Sullivan*, 980 F.2d 749, 751, 755-59 (D.C. Cir. 1992). In practice, the distinction between filling in the interstices of the legislative mandate (in a substantive rule for which notice was provided) and interpreting statutory provisions (in an interpretive rule) is not always clear. For that reason, the interpretive rule exemption from Section 553 offers a tempting way for agencies to make policy decisions without securing prior public comment.

92. The agency's choice between rule-making and adjudication as a means for making new policy has garnered the attention of both courts and traditional legal scholars for quite some time. The Supreme Court's decisions in *SEC v. Chenery Corp.*, 332 U.S. 194 (1947), and *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969), establish a broad right to use adjudications to announce new policy decisions, though the latter case purported to impose some tentative limits on that discretion. The increasing proclivity of some independent commissions to use adjudications in lieu of rule-making has provoked comment in the law review literature. See, e.g., Richard K. Berg, *Re-examining Policy Procedures: The Choice Between Rulemaking and Adjudication*, 38 ADMIN. L. REV. 149 (1986); Emerson H. Tiller & Pablo T. Spiller, *Strategic Instruments: Politics and Decision Costs in Administration and Judicial Process* (University of Texas at Austin Working Paper No. 96-121, 1996).

93. See, e.g., 18 C.F.R. § 385.214 (1995) (governing intervention in FERC proceedings); 17 C.F.R. pt. 200 (1995) (same).

94. See, e.g., 18 C.F.R. § 385.214 (1995).

95. See *Natural Resources Defense Council v. Train*, 8 Env't. Rep. Cas. (BNA) 2120 (1976). In his dissent from the D.C. Circuit's approval of the decree in *Citizens for a Better Environment v. Gorsuch*, 718 F.2d 1117, 1134-36 (D.C. Cir. 1983) (denying a challenge by industrial plaintiffs who were mostly excluded from the negotiations), Judge Wilkey called the decree a violation of the separation of powers, and complained that the decree insulates the policy choice from the input of interest groups,

intervene in or settle other judicial proceedings, with the aim of obtaining a judicial decision that establishes or endorses the agency's new, yet unannounced, policy choice. R. Shep Melnick describes how factions within EPA used judicial decisions to support their policy goals in the early implementation of the 1970 Clean Air Act.⁹⁶ More recently, several important EPA Superfund policies were first given the force of law by judicial decisions.⁹⁷ All these policy-making techniques limit interest group access to, and influence over, the agency's policy choice, thereby undermining the effectiveness of politicians' attempts to exert procedural control.

4. *Presidents, Structure, and Ex Ante Control*

Many of the proponents of the structure and process ex ante control argument have also been proponents of the congressional-dominance theory. Ironically, the argument for presidential ex ante control is less vulnerable to many of the above criticisms. Presidents do not face collective choice problems and need not rely on interest groups to do their bidding with the agency. Nevertheless, the presidential-dominance argument seems overstated in other ways.

In particular, there are important limits on the effectiveness of the primary tool of ex ante control available to the President: the power to appoint agency heads and thereby to "infiltrate alien territory."⁹⁸ Theoretically, presidentially appointed agency administrators can control the agency's policy-making agenda; however, whether that power can be translated into a tool of influence for the President is uncertain. Absent ongoing communication between the President and the administrator, the administrator can do the President's bidding in the agency policy-making process only if the administrator shares the President's ideology. Just as Congress cannot foresee many important policy issues the agency will face, whether the administrator will be ideologically compatible with the President on an issue-by-issue basis is something that the President will be unable to foresee at the time of appointment. Furthermore, many presidential

politicians, and even future EPA administrators. For a good description of this policy-making decree, see ROSEMARY O'LEARY, ENVIRONMENTAL CHANGE: FEDERAL COURTS AND THE EPA (1993).

96. R. SHEP MELNICK, REGULATION AND THE COURTS ch. 8 (1983).

97. For example, EPA first formally extended Superfund liability to lending institutions by way of court decisions. See *U.S. v. Fleet Factors Corp.*, 901 F.2d 1550, 1554-60 (11th Cir. 1990). EPA only subsequently "codified" that policy in their "Lender Liability Rule." See *Natural Oil and Hazardous Substances Pollution Contingency Plan; Lender Liability Under CERCLA*, 57 Fed. Reg. 18344 (EPA 1992). This rule was ultimately overturned by the D.C. Circuit Court as beyond EPA's statutory authority. See *Kelley v. EPA*, 15 F.3d 1100 (D.C. Cir. 1994), *cert. denied*, 115 S. Ct. 900 (1995). EPA does not have statutory authorization to issue rules limiting a party's liability thereunder.

98. Moe and Wilson also cite regulatory review powers and the power to shape opinion as additional tools of presidential control. See Moe & Wilson, *supra* note 34, at 15-18. The President's regulatory review power can be used as a tool of ex ante or ex post control. I discuss the limits of that power in Section II.C. The limits of the President's opinion-shaping powers are addressed in Part III.

appointments are made for reasons other than ideological compatibility, such as to do political favors or pay political debts. In addition, political scientists have long noted that as political appointees “grow” into the role of agency head and acquire additional expertise in the relevant policy arena, they often adopt the preferences and perspectives of agency careerists on policy issues (called “going native” in the literature).⁹⁹ Finally, even when an appointee’s views mirror those of the President, the ability of even the most dedicated administrator to gain control of the agency policy-making apparatus will be a function of the internal organization of the agency. For example, policy-making authority is typically concentrated at the top in independent commissions, suggesting a more potentially potent appointment power. In contrast, decentralized agencies such as the EPA contain numerous loci of policy-making power, many controlled by careerists, raising second-order agency problems for the President.¹⁰⁰

The Reagan Administration, which may have provided the prototype for the presidential control model, illustrates each of these points. More than any of his predecessors, Reagan selected agency heads for their ideological compatibility. Even this kind of concerted effort to exert *ex ante* control met with mixed results. Despite Reagan’s successes (at the FTC, for example), there were notable failures and retreats as well. Reagan appointee and Surgeon General C. Everett Koop became a voice for liberal social policies.¹⁰¹ The appointment of Anne Burford to head the EPA triggered a protracted struggle over the heart and soul of environmental policy with both Congress and other EPA bureaucrats, a struggle that ended (or for which a truce was called) when Burford was ultimately chased from office and replaced with EPA administrators whose policy preferences were consistently to the left of the President’s.¹⁰² There are numerous other examples.¹⁰³ The Reagan Administration’s experience underscores the danger of concluding that the presidential appointment power implies *ex ante* influence or control over

99. See, e.g., Hugh Heclo, *Issue Networks and the Executive Establishment*, in *THE NEW AMERICAN POLITICAL SYSTEM* 106-15 (1978); RICHARD NEUSTADT, *PRESIDENTIAL POWER: THE POLITICS OF LEADERSHIP* 43-45 (1960).

100. In his seminal analysis of EPA’s implementation of the Clean Air Act, Melnick describes the relative impotence of political appointees in several of the agency’s major policy choices: “The political executives . . . were busy finding their way around the agency and putting together a package of Clean Air Act amendments to send to Congress . . . [T]hus, technical personnel . . . were essentially left on their own.” Melnick, *supra* note 96, at 277. For an interesting analysis of these organizational variables and their impact on attempts at political control, see William J. Pielsticker, *Executive Branch Review and Regulatory Outcomes* (1995) (unpublished manuscript, on file with author).

101. See Sandra G. Boodman, *Chick Koop, Unpredictable Surgeon General*, *WASH. POST NAT’L WKLY. EDITION*, Jan. 11, 1988, at 6-7.

102. This sequence of events is well known. For a good description of these events and their political significance, see JOHN F. KENNEDY SCHOOL OF GOVERNMENT, HARVARD UNIVERSITY, *ENVIRONMENTAL PROTECTION AGENCY: RUCKLESHAUS RETURNS* (Case No. C16-85-638, 1985).

103. Rose-Ackerman and others have noted other failures of the Reagan Administration’s effort to redirect agencies. See, e.g., Susan Rose-Ackerman, *Comment on Ferejohn and Shipan’s Congressional Influence on Bureaucracy*, 6 *J.L. ECON. & ORG.* 21, 25 (1990). Meier summarizes an extensive case study literature on the subject. See MEIER, *supra* note 9, at 167-81.

agency policy-making.

B. *Ex Post Vetoes and Political Control*

Despite the fact that the *ex ante* control argument seems to have garnered more attention recently within the PPT literature, the *ex post* control argument has retained vitality, particularly in a number of recent formal models.¹⁰⁴ Like their *ex ante* counterparts, many of these models of *ex post* control obscure some of the reasons why agencies retain considerable policy-making discretion. In particular, these models overlook important impediments to *ex post* political control by employing some questionable assumptions, namely (1) that Congress and the President know or can learn what the agency is doing and make veto decisions accordingly,¹⁰⁵ (2) that the policy preferences of both the Congress and the President are known to the agency when it makes its policy choice, and (3) that Congress and the President can veto a targeted policy choice.¹⁰⁶ Because the agency's ability to anticipate which policy choices will be vetoed is integral to models of *ex post* control, these models assume that each actor's preferences are single peaked and known to the other actors. For example, in Figure 1, because *A*, *C*, and *H* each know what the others will do, the threat of an *ex post* veto is credible and effectively constrains the agency's policy choice (at point *C(H)*). The problem is that for many agency policy choices, we cannot reasonably assume that (1) politicians know what the agency is doing, (2) politicians have preferences that are known to the agency when it makes its policy choice, or (3) politicians are willing or able to veto those agency policy choices that they dislike.

1. *Monitoring Agency Actions*

The information asymmetry problem analyzed in early principal-agent models is associated with a well established literature,¹⁰⁷ and I will not belabor those arguments here except to reinforce their implications for PPT models of *ex post* control. The important point is that the credibility of any *ex post* veto threat depends upon the politicians' ability to detect and understand the agency's policy choice. Some positive theorists argue that oversight committees can overcome information asymmetries (relative to the agency) by making use of resources at their disposal, such as staff and interest group

104. See discussion *supra* Section I.B.

105. Lupia and McCubbins' model focuses on the difficulty legislators have in obtaining reliable information but argue that legislators can get it when the net benefits of doing so are great enough. See Lupia & McCubbins, *supra* note 37, at 10.

106. Two-dimensional and dual-principal formal models illustrate the difficulty of using legislation to veto an agency policy choice when politicians' preferences are dispersed, and the agency is not an outlier on both dimensions. See, e.g., Spitzer, *supra* note 40.

107. See discussion *supra* Section I.A.

support.¹⁰⁸ Others stress the President's ability to get information and manipulate policy-making by infiltrating agencies.¹⁰⁹ Notwithstanding these arguments, the monitoring capacity of presidential and congressional staffs continues to be overwhelmed by the number of agency policy-makers and the sheer volume of federal agency policy-making which occurs in Washington. Agency policy-makers work full-time on individual policy questions, while oversight is but one of many day-to-day responsibilities facing congressional and presidential representatives and staffs.¹¹⁰ Even when disfavored agency policy-making can be detected, the congressional and presidential agendas place another resource constraint on their ability to respond. Simply put, neither Congress nor the President has enough time to identify, understand, and address every (or even most) important agency policy decision.¹¹¹

These limits on the ability of Congress and the President to detect and understand agency policy choices make the prospect of an ex post veto of an agency policy choice more remote than implied by PPT models. Consider Figure 4, which offers a different and more realistic depiction of the veto boundary of the agency's range of choice. From the agency's point of view, the likelihood that its policy choice will trigger a veto is uncertain. Therefore, in Figure 4 that veto boundary is defined not by a specific point in the issue space (as it was in Figure 1), but by a range of policy choices in which the probability of a veto varies from $p = 0$ (at point A) to $p = 1$ (at point B). Assume further that the agency's utility over that range increases (as shown), so that the agency faces some unknown probability of reversal by the principal (Congress or the President).¹¹²

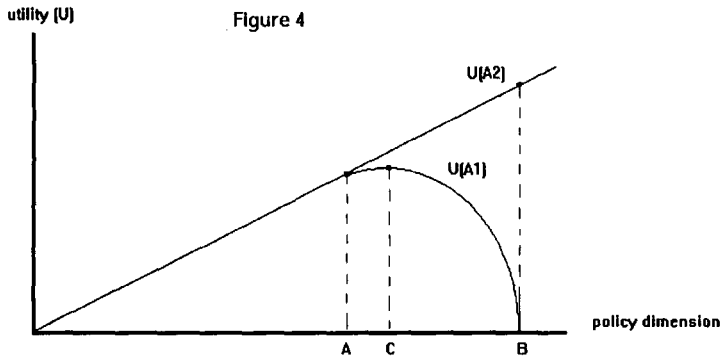
108. See discussion *supra* Section I.B.

109. *Id.* These conclusions are implicit in the complete information assumption used in many formal models.

110. Some PPT scholars acknowledge that, while interest group representatives can help bridge part of the information gap, congressional and presidential staffs cannot rely on such information blindly. Rather, they must evaluate information obtained from interest groups before using it. See Lupia & McCubbins, *supra* note 37, at 3. Limited staff resources act as an information bottleneck, inhibiting effective oversight.

111. This is not a new argument. In addition to Niskanen, Theodore J. Lowi, Steven Skowronek, and others have argued that resource constraints render congressional oversight ineffective and make delegation tantamount to abdication of responsibility. See THEODORE J. LOWI, *THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES* 92-126, 296 (1979) [hereinafter LOWI, *THE END OF LIBERALISM*]; STEPHEN SKOWRONEK, *BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877-1920* at 290 (1982); Theodore J. Lowi, *Two Roads to Serfdom: Liberalism, Conservatism, and Administrative Power*, 36 AM. U.L. REV. 295, 299-309 (1987). Presidents face difficult obstacles when seeking to monitor agencies. See, e.g., HECLD, *supra* note 99, at 106-15; NEUSTADT, *supra* note 99, at 8-9.

112. My example deals with the more interesting case in which the agency prefers a policy that poses some risk of reversal. If the agency's utility function is such that its preferred policy outcome is at some point to the left of A, in the range where the probability of a veto equals zero, then the agency will select that policy.



The agency’s degree of aversion to risk of reversal is reflected by the shape of the net utility function between points A and B. Thus, we can think of the agency bureaucrat’s net utility (U_N) over the issue space as a function of both policy preferences and the prospect for reversal, such that $U_N = U(X,p)$, or

$$U_N = U(X) - pR(X), \quad (1)$$

where p is the probability of reversal, R is some constant amount of negative utility associated with reversal, and $U(X)$ is the agency’s gross utility as a function of policy outcomes.¹¹³

As Figure 4 illustrates, in the absence of any veto threat, $pR = 0$, the agency’s net utility function will look like $U(A2)$, and the agency will prefer a policy at point B to any point to the left of B . When the threat of a veto exists (when the President or Congress knows of and cares enough about the policy choice to act) but is uncertain over part of the range of choice, the agency will choose a policy at point C . Sometimes, the agency’s estimate of the probability of a veto will be wrong, and its policy choice will be overturned. The monitoring problem tends to widen the agency’s range of choice in two ways: first, by lowering the agency’s subjective assessment of the probability of an ex post veto; and second, by lowering the objective probability that a veto will occur.

113. The probability of reversal will be a function of the policy alternative X . If we assume that the agency receives no utility from a vetoed policy (as Figure 4 indicates), then equation 1 could be rewritten as: $U_N = U(X)[1-p(X)]$. Of course, equation 1 is but one of many possible algebraic expressions of the negative influence of a veto on the agency’s utility function. Depending on how the agency values the relationship between $U(X)$ and R , the shape of these curves may be very different. However, assuming that the agency’s utility over policy outcomes (1) is single-peaked, (2) is increasing at point A, (3) includes the discounted (by p) cost of a veto, and (4) R is sufficiently large, the optimal policy will lie somewhere between A and B. Only if the agency values avoiding a veto as its first ordinal preference goal will it choose the policy at A.

2. *Politicians, Preferences, and Anticipated Reactions*

I have already alluded to another reason why the probability of an ex post veto may be low. Frequently, Congress and the President will not have any discernible preferences over the policy issue facing agencies at the time the policy choice is made; or, the intensity or importance of those preferences will be unknown to the agency, such that the point at which the agency's policy choice will trigger a congressional or presidential reaction is uncertain. For example, in Figure 1, if the agency (*A*) does not know where the ideal points of the other actors (points *C* and *H*) lie, it may choose a policy closer to its ideal point than the result dictated by that model—point *C(H)*. Similarly, the choice of a policy to the left of point *C(H)* may not provoke a response if the other actors have not yet formed opinions on the policy issue and do not yet have ideal points.¹¹⁴ To the extent that this information about others' preferences is unknown or unknowable at the time the agency makes its policy choice, the boundaries on its range of choice will disappear, giving the agency more leeway (or perceived leeway) to choose its preferred policy outcome.

Why might agencies lack information about others' preferences? One reason may be a lack of communication among Congress, the President, and the agency at the policy formation stage, or the lack of a prior public debate on the issue. In either case, the agency will be unaware of the preferences of the other actors. More likely, as is the case with much regulatory agency policy-making, the policy issue will be new and one for which information is scarce. In such cases, expert opinion, in the agency and the relevant policy community, is likely to crystallize long before that of Congress, the President, and the public.¹¹⁵ In other words, agency experts are likely to learn about unresolved policy issues first; consequently, agencies will form preferences and make policy choices in the absence of any information about politicians' preferences. For these reasons, the agency often has no reason to believe that a particular policy choice will trigger a veto, and its policy choice will not be constrained by its anticipation of a veto.

3. *Formal and De Facto Veto Authority*

Finally, even when politicians have well-known preferences and can overcome information and resource asymmetries, the power to exercise an ex post veto is far more limited than implied by PPT models. The limits of

114. It is reasonable to assume that agencies attempt to rationally anticipate politicians' preferences; but it is not reasonable to suppose that they are often successful. In a First Circuit opinion that applied the *Chevron* doctrine, then-judge Stephen Breyer argued that bureaucrats should try to anticipate legislators' preferences. See *Mayburg v. Secretary of HHS*, 740 F.2d 100, 106 (1st Cir. 1984).

115. As described in Subsections II.A.1 and A.2, *supra*, this is one reason why policy-making authority is delegated to expert agencies in the first place.

politicians' veto power over agency decisions are well understood, but many positive theorists do not seem to have acknowledged them fully. Most PPT models account for neither these limitations nor for differences in the nature of the authority exercised by Congress versus that exercised by the President.

Formally, Congress has a far more powerful tool of ex post control than any possessed by the President: the legislative gatekeeping power. Theoretically, almost any major agency policy choice can be overturned by legislation. As a practical matter, however, Congress is handicapped by the very same collective choice problems that impede ex ante controls. Indeed, it is not uncommon for Congress to be unable to muster a majority in support of an ex post legislative response to agency provocation, even when a majority is unhappy with the agency policy.¹¹⁶ Once again, Superfund is illustrative. Since its passage in 1980, the program has been universally-condemned by industry and environmental interests alike. During that time period, Congress has had numerous opportunities to overturn many unpopular agency policy choices. However, the two sides of the dispute dislike the program for different reasons, making meaningful ex post reform difficult. As I have argued, these particularly intractable problems are more likely to be shunted to the agency without substantive guidance in the first place. Just as the agency's information and expertise advantages enable it to develop well-ordered preferences on a policy issue before politicians can act, agencies can use those same advantages to produce a decision when Congress cannot.

The President's formal ex post control powers are more limited than those of Congress. While presidents can use regulatory review to oversee and manage the agency policy-making process, they can neither formally dictate agency policy choices for issues that have been delegated to the agency by Congress nor overturn those policy choices after the choices have been made.¹¹⁷ Rose-Ackerman's analysis of the Reagan Administration's unsuccessful attempt to secure the reversal of an IRS decision illustrates these limits.¹¹⁸ Professors Strauss and Sunstein put the issue this way: "[T]he President is not authorized either to make particular decisions statutorily vested in at least some subordinate officials, or to direct those officials to make particular decisions"¹¹⁹ This is true even for executive branch

116. See, e.g., Pablo T. Spiller & Rafael Gely, *Congressional Control or Judicial Independence: The Determinants of U.S. Supreme Court Labor-Relations Decisions, 1949-1988*, 23 RAND J. ECON. 463 (1992). It should be noted that this is one reason why some PPT scholars turned their attention from ex post to ex ante controls. See, e.g., McCubbins et al., *supra* note 41, at 435. However, as I note in Section II.A., *supra*, the ex ante control argument is vulnerable to this same criticism.

117. See, e.g., *Environmental Defense Fund v. Thomas*, 627 F. Supp. 566, 570 (D.C. Cir. 1986) (finding that OMB had illegally interfered in EPA rule-making).

118. See Rose-Ackerman, *supra* note 103, at 25.

119. Strauss & Sunstein, *supra* note 51, at 201.

agencies standing in a direct line of authority running from the President.¹²⁰

On the other hand, the President does have some potentially powerful tools of ex post control. Most important among these is the power to discharge political appointees, which may operate as a de facto authority to veto agency policy choices in certain circumstances.¹²¹ When the President has targeted a policy choice for veto, the agency head will often be willing to carry out the President's veto orders. Nevertheless, as with the use of appointees to exert ex ante control, this power may be more limited than it appears at first blush.¹²² Appointees who "go native" may resist the President's orders. Even when political appointees are willing to do the President's bidding, the exercise of a veto may simply return the policy to the prior status quo, and the selection of a new policy choice may require the expertise of those in the agency who supported the initial, vetoed policy choice. Furthermore, vetoing an agency policy choice can entail significant political costs. For example, during the Bush Administration, when the Vice-President's Council on Competitiveness and the OMB sought to change the content of several EPA policy choices, neither the Council nor OMB was simply able to direct the EPA to reach its preferred choice. Rather, both White House agencies were required to spend considerable time, resources, and political capital before the EPA finally succumbed to White House pressure.¹²³

The President's ex post veto powers are even more severely curtailed in the case of independent commissions, which are designed to insulate agency policy-making from presidential control. In the case of many independent commissions, presidents may remove commissioners only upon a showing that the commissioner has violated some legislatively prescribed criteria, typically a higher showing than that required for removal of an executive agency political appointee. The Supreme Court's decision in *Humphrey's Executor v. United States* confirmed Congress' right to establish these criteria.¹²⁴ Furthermore, even the President's appointment power is tempered

120. For a fuller discussion of the constitutional and case law authority for these propositions, see JERRY L. MASHAW & RICHARD MERRILL, *ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM* 191-231 (2d ed. 1985).

121. One of the first presidents to resort to this method of "persuading" a recalcitrant agency was Andrew Jackson, who fired his Secretary of the Treasury after he refused to follow Jackson's order to withdraw government funds from the National Bank. For a description of this incident, see ALFRED H. KELLY & WINFRED A. HARBISON, *THE AMERICAN CONSTITUTION* 319-21 (5th ed. 1976).

122. As Strauss and Sunstein note, the President "will not always be able . . . to persuade the Senate easily to confirm the official who docilely will do his bidding." Strauss & Sunstein, *supra* note 51, at 200.

123. See, e.g., U. S. GEN. ACCOUNTING OFFICE, *AIR POLLUTION: IMPACT OF WHITE HOUSE ENTITIES ON TWO CLEAN AIR RULES* (1993).

124. 295 U.S. 602 (1935). The Court's opinion included this characterization of one independent commission, the FTC: "Such a body cannot in any proper sense be characterized as an arm or an eye of the executive. Its duties are performed without executive leave and, in the contemplation of the statute, must be free from executive control." *Id.* at 628. The Court reaffirmed *Humphrey's Executor* in *Morrison*

by the fact that commissioners typically serve staggered terms, so that the President can appoint only one commissioner at a time and must be in office for several years before he would have been able to appoint the majority of the commission.¹²⁵

Thus, both the President and Congress face important limits to their ability to exercise *ex post* vetoes over agency policy choices.¹²⁶ Neither has the time or the inclination to attempt to exert influence over all or even most of the important choices. As a consequence, the probability in Figure 4 that any given agency policy choice will trigger an *ex post* veto is very slim.

III. The Normative Implications of Political Control

Not only do positive theorists tend to conclude that a significant amount of political control over agency policy-making does occur, many also operate from the assumption that, in a democratic republic, a great deal of political control ought to occur.¹²⁷ Indeed, some PPT scholars have tended to take the notion that “more political control is better” as an article of faith, characterizing control of agency policy-making by elected politicians as a condition precedent to a well-functioning democracy. For example, Lupia and McCubbins have argued that “[a] fundamental question in the study of democracy concerns the extent to which the will of the governed, as expressed by their elected representatives, affects the actions of the government.”¹²⁸

Of course, elected representatives do not always express the will of the governed. Electoral accountability does not guarantee that politicians will

v. Olson, 487 U.S. 654 (1988). One formal model in the PPT literature which does incorporate this limitation is that of Hammond & Knott, *supra* note 41, at 141-42.

125. *See, e.g.*, 15 U.S.C. § 41 (creating staggered terms for FTC commissioners); 15 U.S.C. § 78(a) (same); 42 U.S.C. § 7171(b)(2) (same).

126. The use of informal policy-making (discussed *supra* Section II.A.3.) further reduces the *ex post* influence of Congress and the President over agency policy choice because informal actions are less likely to be detected by Congress and the President. All else equal, Congress and the President will be slower to learn about, and less likely to address, policy choices contained in unpublished internal memoranda than those proposed as formal rules. In other words, the probability of an *ex post* veto (as described by the “p” term in equation 1 and shown in Figure 4) by Congress or the President is lower when policy is made informally.

127. PPT legal scholars, whose work tends to be more openly prescriptive than that of political scientists and economists, have been particularly active in exploring this issue, debating not only the merits of presidential versus congressional control, but also the questions of how the founding fathers viewed this issue. *See, e.g.*, Eskridge & Ferejohn, *Making the Deal Stick*, *supra* note 37, at 186-88 (lamenting what they see as increasing presidential control).

128. Arthur Lupia & Matthew D. McCubbins, *Designing Bureaucratic Accountability*, 1994 LAW & CONTEMP. PROBS., 91, 91. *See also* McCubbins et al., *supra* note 42, at 243; McCubbins & Schwartz, *supra* note 31, at 166. As noted above, Theodore Lowi has also argued that delegation minus political control equals abdication. *See* LOWI, THE END OF LIBERALISM, *supra* note 111, at 92-94. It should be noted that some positive theorists appear to remain agnostic on this issue, describing how politicians and their constituents exert control without taking a position on the normative implications of control.

produce good or popular policies; similarly, the lack of electoral accountability does not guarantee that agencies will produce bad or unpopular ones.¹²⁹ This assumption by some positive theorists may be a vestige of the principal-agent paradigm or of early economic models that portrayed agency independence as harmful to good government. However, a more immediate reason for this bias in favor of greater political control may be the tendency of PPT models to equate the public's preferences with those of elected officials. This assumption is unwarranted since control of agencies by elected officials is neither necessary nor sufficient to ensure the consistency of agency policy choices with public opinion. In fact, as I explain below, depending upon the distribution of public preferences over the policy choice the agency faces, the public interest may be well served even though Congress and the President exert little or no control over the agency policy-making process.¹³⁰

A. *Public Opinion, Issue Salience, and Political Control*

In assessing the congruence between policy outcomes and public opinion, it is important to distinguish among (1) policy issues for which individual preferences are single-peaked (or "well-ordered") from those for which they are not, (2) policy issues for which collective preferences—as represented by the distribution of individuals' ideal points—are single-peaked (such that the public has an identifiable preferred alternative)¹³¹ and those for which they are not, and (3) policy issues that are highly salient in the eyes of the public and those that are not. For particularly complex or intractable problems, there will often be no generally preferred policy because individual or collective preferences are not single-peaked. Issue salience goes to the question of whether the operative preferences of elected politicians are likely to be their "induced" (by constituent opinion) preferences or their true preferences. If the public cares little about the policy issue in question, elected representatives may opt to act upon their true preferences, believing that the public will give them the leeway to do so.¹³² Consider Table 1.

129. In the words of Susan Rose-Ackerman: "[R]ecent research in political economy should undermine glib confidence that every action of the legislature is in the interest of a majority of the population." ROSE-ACKERMAN, *supra* note 10, at 34.

130. For purposes of Section III.A, I assume that the congruence between public opinion and policy outcomes is the key to this normative debate. I reexamine that assumption in *infra* Section III.B.

131. Technically, under majority rule there will be a median voter on a single issue-dimension, and hence a single "preferred alternative," even when the distribution of individual ideal points is not single-peaked. I use the term "publicly-preferred alternative" here to mean that the distribution of individually preferred alternatives is single-peaked. Thanks to Susan Rose-Ackerman for helping me to clarify this point.

132. For a thorough treatment of this issue, see ARNOLD, *supra* note 61, at 35-87; BIANCO, *supra* note 61, at 63-94; and RICHARD FENNO, CONGRESSMEN IN COMMITTEES (1973).

Table 1: Is there a publicly-preferred alternative?

Issue Salience	Yes	No
High	High degree of political control likely	Controversial, intractable problems
Low	Outcome depends on location of preferences	Unchecked agency independence

PPT formal models tend to fit best with policy issues like those in the upper left cell in the table. High salience issues on which the public has an identifiable preferred alternative are likely to produce congruence between the general public's preferences and those of their elected representatives; elected representatives are likely to attempt to exert political control over agencies in these cases. The likelihood that politicians will be able to veto any agency policy choice that is inconsistent with public preferences may lead the rational agency to constrain its policy decision-making to ensure that it is consistent with public preferences.¹³³ By the same token, these types of policy issues are more likely to produce clear legislative intent at the delegation stage and, therefore, more effective *ex ante* control as well.

The other three cells represent situations in which agency policy choices may be effectively unconstrained by the preferences of elected politicians, assuming (as will often be the case) the absence of controlling legislative intent. In the lower left cell, there is a publicly-preferred alternative on a low-salience issue. If the politicians and the agency are in agreement on a policy choice that is unpopular (as in Figure 5a, where the curve around point O represents the distribution of public preferences), there will be no incentive for politicians to control the agency, and no congruence between public preferences and policy outcomes unless this state of events generates more public interest, shifting the policy choice into the upper left cell. This is one version of the agency capture scenario, one which involves complicity by politicians.¹³⁴ On the other hand, if the agency's preferences differ from those of politicians but are consistent with those of the general public (as in Figure

133. As I describe in Part III, PPT models make the strongest case for control by politicians when politicians' preferences are not dispersed. Therefore, this discussion assumes relative uniformity among politicians. Of course, if politicians are at an impasse, the deviant agency policy choice will not be easily vetoed by legislation.

134. Specifically, this kind of capture might involve complicity by the agency's oversight committee, the agency, and the relevant interest group to form a "subgovernment" or "iron triangle." For a discussion of subgovernments, see RANDALL RIPLEY, CONGRESS: PROCESS AND POLICY 8, 324-27 (2d ed. 1975).

5b), the agency may be able to choose a policy which deviates from the true preferences of elected politicians even though issue salience is low.

Figure 5: Public Opinion (0)

Figure 5a

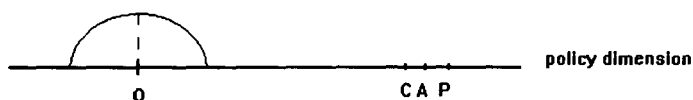


Figure 5b

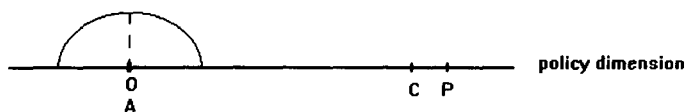
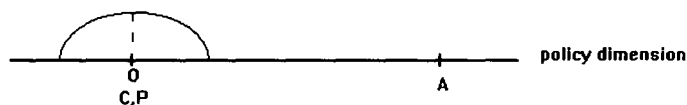


Figure 5c



This is because attempts by politicians to exert ex post control over that policy choice may increase issue salience, thereby increasing both the political costs of attempting to exert control and the likelihood that politicians will be forced to act on their induced, rather than their true, preferences. The Reagan Administration's failed attempts to roll back regulation may fall into this category. Because public opinion opposed those efforts, agencies and interest groups were able to increase public attention to those attempts, ultimately undermining them.¹³⁵ Finally, where public preferences are consistent with the true preferences of elected politicians but inconsistent with the agency's preferences (as in Figure 5c), politicians have an incentive to exert political control and will do so if they can overcome information and resource asymmetries. This kind of policy issue presents the ideal opportunity for reelection-minded politicians to act as political entrepreneurs by seeking to control the agency because the political costs of exerting control are small and the benefits great.

When there is no clear public preference on the policy issue in question, the key question becomes, "Is the issue highly salient?" If the answer is "yes,"

135. See discussion *supra* Subsection II.B.3.

(as in the upper-right cell of Table 1), one common reason why public preferences remain poorly defined is that the policy issue in question is particularly complex—one that is controversial yet intractable. The previously mentioned Superfund example may fall into this category. In that case, the general public preferred that the policy achieve several conflicting goals simultaneously: that waste sites be cleaned up quickly, that they be cleaned thoroughly, and that private industry bear as much of the cost of clean-up as possible.¹³⁶ In these situations, political control is problematic (and therefore less likely) because the choice of any policy alternative will alienate some important subset of the public. As noted above,¹³⁷ this is the kind of policy issue (1) that is most likely to produce collective choice problems in Congress and (2) for which the agency can produce a decision when Congress cannot.

Finally, some policy questions facing agencies are neither salient nor the kind of issue for which the public has any clearly identifiable preferred alternative; these are represented by the lower right cell of the matrix. This situation mirrors the lower left cell, except that if elected officials can overcome information and resources asymmetries in order to learn about the policy issue, the cost of exerting political control over the agency's policy choice will be very low. This difference means that, in the lower right cell, public opinion will not prevent politicians from forcing the agency into an unpopular policy decision, nor will it lead politicians to control or correct unpopular agency choices.¹³⁸

Of course, neither the public's preferences nor the salience of the policy issue in question are fixed. Politicians can try to change the location and intensity of public opinion. Moe and Wilson argue (correctly, I think) that the President holds an advantage over Congress in the contest to shape public opinion,¹³⁹ though Congress' opinion-shaping influence seems to be in ascendance. However, it does not follow that either can frequently exert controlling influence over public opinion. To the contrary, many attempts by recent administrations to steer public opinion have failed.¹⁴⁰ More importantly, politicians' opinion-shaping influence may be particularly limited in clashes with government agencies over agency policy-making issues because the public may perceive regulators as experts who are entitled to deference within their policy arena. In the information age, public opinion is frequently determined by factors beyond Congress' or the President's

136. See MAZMANIAN & MORELL, *BEYOND SUPERFAILURE* ch. 2 (1990).

137. See discussion *supra* Subsection II.A.2.

138. It may be that many of the policy choices that fall into this latter category are relatively unimportant ones, since neither the public nor politicians are interested in their disposition. However, that is not always the case.

139. See Moe & Wilson, *supra* note 34, at 13-15.

140. Once again, the Reagan Administration experience is illustrative. Despite Ronald Reagan's reputation as the "Great Communicator," he was unable to build public opinion majorities behind his positions on many campaign issues, including abortion, rolling back environmental regulations, and eliminating the Departments of Education and Energy.

control, such as interest group public relations campaigns and news coverage of catastrophic events. As voters gain access to more and more sources of information, it seems likely that politicians' opinion-shaping advantages will diminish.

B. *Public Opinion, the Public Interest, and the Courts*

By examining the direction and intensity of public preferences separately from those of elected politicians, we can see that political control is not only less frequent in the agency policy-making process, it is less necessary to ensure consistency between agency policy choices and the public opinion. For most of the situations depicted in Table 1, the public usually gets the policy outcomes it wants, though not necessarily through the avenue of political control by elected politicians. This is true in the two left cells of the matrix in Table 1. In the lower left-hand cell, there will be situations in which an agency will be able to choose policies the public wants precisely because it is able to evade political control by politicians whose true preferences differ from those of the public. Similarly, it is difficult to argue that the public is not well-served by the situation represented in the upper right-hand cell. When controversial, important, and particularly intractable problems are delegated to the agency for resolution, that delegation permits a policy choice to be made where the political process could not produce one. Such choices need not be inconsistent with public opinion; if that agency policy choice eventually becomes unpopular, then it will be shifted into the upper left cell and an *ex post veto* of the policy choice becomes more likely.

Only in two situations represented in Table 1 does the prospect of agency policy-making discretion seem to produce the chance of policy outcomes that run counter to the public's best interests: (1) when the agency is able to evade clearly-expressed public opinion, either with or without politicians' acquiescence, as shown in the lower-left cell (Figure 5a and sometimes Figure 5c); and (2) when an agency chooses policies that are harmful to the public interest in the face of public indifference, with or without politicians' acquiescence, as may occur in the lower-right cell. However, judicial review adds at least a partial safeguard against both of these outcomes. When there is no prior statement of legislative intent on the issue in question, the only standards governing the agency policy choice are the general admonitions that the choice should be supported by substantial evidence in the case and not arbitrary or capricious.¹⁴¹ While these standards provide agencies with wide latitude in the absence of controlling legislative intent after the Supreme Court's decision in *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*,¹⁴² an agency policy decision that is either extremely unpopular

141. Administrative Procedures Act, 5 U.S.C. § 706(2)(a)-(b) (1994).

142. 467 U.S. 837 (1984).

or unsupported in the administrative record may be more likely to be reversed in court.¹⁴³

The *Chevron* Court concluded that the EPA policy choice at issue had adequate support in the administrative record. The relevant policy community had well-developed preferences but was divided on the issue, and the general public was apparently undecided and indifferent, as shown in the lower-right cell of Table 1. Had the Court found inadequate support in the record, it would have reversed the agency's policy choice even in the absence of legislative intent.¹⁴⁴ Similarly, when policy decisions run too far afield of public opinion, the reviewing court may be more inclined to scrutinize carefully the administrative record and to apply a less lenient standard of review.¹⁴⁵ Furthermore, when a court upholds a low-salience but unpopular policy choice, interest groups will likely mobilize to increase its salience, thereby increasing the likelihood that politicians will veto the choice (moving the issue into the upper-right cell of Table 1).¹⁴⁶

Of course, the ability of courts to rein-in agency policy-making in this way will depend on the ability of interest groups to obtain judicial review of agency action. After a long period of liberalization of standing and other access doctrines through the 1960s and 1970s,¹⁴⁷ the Supreme Court has begun to restrict standing in more recent cases.¹⁴⁸ The up-shot of these recent developments is that prospective plaintiffs must now meet a higher standard when demonstrating that they are injured by the agency's action and that their injury is within the "zone of interests" protected by the legislation at issue. When there is no plaintiff who is willing or able to meet that standard, there

143. Some PPT models treat judges as maximizers of their own policy preferences, which seems a particularly unrealistic view. See, e.g., Ferejohn & Shipan, *supra* note 37, at 9-12. Others, however, see courts as constraints on the temptation of agencies to choose policies contrary to the public interest. See Macey, *supra* note 52, at 676. Eskridge and Ferejohn see courts retreating from this role after *Chevron*, and lament the danger that retreat poses. See Eskridge & Ferejohn, *Making the Deal Stick*, *supra* note 37, at 187. Some see courts responding to public opinion because they are conscious of the prospect that Congress will override their decision. See, e.g., Spiller & Gely, *supra* note 116.

144. The converse of this is that decisions for which there is adequate record support will be upheld, despite clear public opposition. Certainly, relatively few cases fail this reasonableness test under *Chevron*. Nevertheless, it stands as an impediment to one form of runaway bureaucracy.

145. *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608 (2d Cir. 1965) may be one such case. The court overturned the FPC's decision to license a hydroelectric project because the agency failed to consider environmental issues, despite the fact that the agency had paid little or no attention to environmental issues in thirty years of granting licenses. While the FPC's policy remained consistent over time, public opinion changed such that the agency's licensing policy was now deemed unreasonable by the court. Whether this decision would be decided similarly in the wake of *Chevron*, however, is debatable.

146. Alternatively, since policy preferences are a function of expertise, the public's preferences may move toward those of the agency as the debate provides the public with additional information and therefore expertise.

147. See, e.g., *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669 (1973). This case is generally considered to be the highwater mark for liberalized standing.

148. See, e.g., *Air Courier Conference of America v. American Postal Workers Union*, 498 U.S. 517 (1991); *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990).

will be no opportunity for judicial review. On the other hand, there is no guarantee that courts or interest groups will have the public's preferences in mind when seeking judicial review. If judges are motivated by their own preferences over policy outcomes, they may forgo opportunities to rein in unpopular or harmful agency choices.¹⁴⁹ Likewise, interest groups whose goals run counter to the wishes of the public may seek judicial remedies; this may be true even in the case of citizen suit litigation.¹⁵⁰ Figure 5 demonstrates how, in such cases, the plaintiffs' preferences may lie far afield of public opinion. These caveats aside, however, it seems reasonable to conclude that judicial review will often act as a beneficial check against unpopular agency action.

Furthermore, it is important to consider whether congruence between policy outcomes and public opinion is the key to policy-making in the public interest. We should consider the possibility that policy decisions may be in the public interest even when they do not reflect public opinion. For some policy issues, the public interest may be best served by unpopular policy choices. For example, politically unpopular policies for which relatively minor economic costs are "front-loaded" and for which substantial benefits accrue to future generations may fall into this category.¹⁵¹ Economists might point to free trade as an example where relatively large future benefits (job growth) accrue to unspecified beneficiaries while relatively smaller current costs (job loss) accrue to identifiable voters. Within the realm of agency policy-making, the use of market-based pollution control regulations (taxes and marketable permits) is another example. EPA economists have championed this concept since the early 1970s, yet it has been very slow to gain popular acceptance.¹⁵² Subject to the same caveats discussed above (about the availability of judicial review and the motives of judges), courts may uphold a decision for which there is substantial evidence justification in the record notwithstanding its popularity.

Of course, this potential incongruence between public opinion and the public interest is the fundamental problem addressed by James Madison in Federalist No. 10. Madison predicted that "majority factions" might enact bad policy, and he advocated a constitutional design that would minimize that danger.¹⁵³ When majority opinion runs in favor of "bad" policy, agency

149. Aggressive judicial review of agency policy-making before *Chevron* produced many decisions that were criticized as contrary to the public interest. See DONALD L. HOROWITZ, *THE COURTS AND SOCIAL POLICY* 32-36 (1977); MELNICK, *supra* note 96, at 1-23, 343-93.

150. See Michael S. Greve, *Private Enforcement, Private Rewards: How Environmental Citizen Suits Became an Entitlement Program*, in ENVIRONMENTAL POLICIES: PUBLIC COSTS, PRIVATE REWARDS 107-11 (Michael Greve & Fred Smith eds., 1992).

151. See ARNOLD, *supra* note 61, at 25-34.

152. For a discussion of this issue, see David B. Spence, *Paradox Lost: Logic, Morality, and the Foundations of Environmental Law in the 21st Century*, 20 COLUM. J. ENVTL. L. 144, 175-78 (1995).

153. THE FEDERALIST NO. 10 (James Madison) (Clinton Rossiter, ed., 1961). Madison also believed that forming a majority faction would be more difficult in an extended republic. *Id.* Admittedly, Madison's remedy was not to leave policy decisions to unelected agencies. Yet, Madison could not have

experts ought to be more resistant than politicians to public pressure, not only because of the effects of electoral accountability, but also because bureaucrats' expertise makes them less easily persuaded to the merits of bad policy.¹⁵⁴ This is not to say that agency discretion is always exercised in the public interest. It is not. The point is that the degree of political control politicians exercise over agency policy-making is neither the sole nor the most important determinant of whether agency policy serves the general public.¹⁵⁵ To the contrary, depending on the preferences of the various actors, political control may facilitate agency capture, and agency independence may prevent it.

IV. Concluding Thoughts and an Illustration

I have argued that many positive theorists employ assumptions that tend to obscure the reasons why politicians cannot control agency policy-making discretion, and why that is not necessarily a bad thing. In other words, PPT models often do not address the question they set out to address—that is, whether politicians “may be able to rely on the bureaucracy to formulate policies that they themselves would have formulated if they had spent the time and resources necessary to acquire the bureaucracy’s level of expertise.”¹⁵⁶ The problem is that we cannot answer this question merely by examining politicians’ preferences and the ways politicians try to steer or push the agency toward well-defined policy outcomes. To paraphrase an old adage, “where you stand—and whether you take a stand at all—depends upon where you sit.” In other words, unless and until politicians actually acquire the agency’s expertise, their ability to understand and act upon agency policy choices is far more limited than PPT models imply. One final example will help to illustrate this fundamental point.

As part of the regulatory reform movement of the 1990s, the call for more

foreseen the era of instantaneous information dissemination and continuous public opinion polling, both of which seem to facilitate the formation and effectiveness of majority factions. For an explanation of this argument, see Spence, *supra* note 152, at 168-71.

154. The free trade and environmental policy examples described above illustrate this point. Perhaps a better illustration is provided by the asbestos scare of the mid-1980s. While there is no doubt that exposure to asbestos presents a serious health risk, many experts warned that much of the asbestos in buildings was better left undisturbed. Nevertheless, public fears over exposure risks led to congressional legislation in 1986 which, in turn, prompted the widespread and costly removal of asbestos in schools. Asbestos Hazard Emergency Response Act (AHERA), 15 U.S.C. §§ 2641-2656 (1994).

155. That PPT models continue to depict control by electorally-accountable politicians as a necessary prerequisite to policy-making in the public interest seems ironic, especially given the connections between the PPT and collective choice literature. Clearly, elected politicians often pursue unpopular policies without electoral consequences. The connection between legislative product and public opinion (or even between legislative product and individual legislators’ opinions) is far from perfect.

156. Lupia and McCubbins, *supra* note 37, at 1.

rational risk regulation has grown stronger. Academics,¹⁵⁷ blue ribbon panels,¹⁵⁸ and even a Supreme Court Justice¹⁵⁹ have added their voices to the chorus calling for risk regulation reform. The common theme of these analyses is that if the primary goal of environmental, health, and safety regulation is to reduce risks,¹⁶⁰ then our current public spending priorities are certainly misplaced. We spend relatively little money addressing comparatively serious risks like indoor air pollution, and enormous sums addressing comparatively trivial risks like hazardous waste cleanup.¹⁶¹ Reallocating resources to address the former concern would provide significantly greater health benefits without increasing costs. Citing numerous similar examples,¹⁶² advocates of rational risk-based regulation have proposed various reforms, such as the creation of a risk management agency in the executive branch charged with reorienting regulatory spending to correct this problem,¹⁶³ or presidential directives to individual agencies to reorient their spending accordingly. Not surprisingly, politicians in both parties have embraced these seemingly sensible goals.¹⁶⁴

So why haven't these prescriptions been implemented, and why does it seem unlikely that they will be implemented soon?¹⁶⁵ I submit that a large part of the answer lies in politicians' inability to control agency discretion—that

157. See, e.g., JOHN HIRD, *SUPERFUND: THE POLITICAL ECONOMY OF ENVIRONMENTAL RISK* (1994).

158. See, e.g., EPA, *UNFINISHED BUSINESS: A COMPARATIVE ASSESSMENT OF ENVIRONMENTAL PROBLEMS* (1987); HARVARD GROUP ON RISK MANAGEMENT REFORM, *REFORM OF RISK REGULATION: ACHIEVING MORE PROTECTION AT LESS COST, I HUMAN & ECOLOGICAL RISK ASSESSMENT* 183 (1995).

159. See, e.g., STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE* (1993).

160. Of course, the risk regulation debate includes strong critics of this basic proposition. Some contend that risk-based decision making is inherently undemocratic and elitist, and that there are other equally important goals served by the current system of environmental, health, and safety regulation. This literature is too large to summarize here. For a good description of the problem and arguments on all sides, see HIRD, *supra* note 157, at 181-256.

161. See BREYER, *supra* note 159, at 21; HIRD *supra* note 157, at 100.

162. Some analysts compare risks across regulatory programs. See, e.g., EPA, *supra* note 158 (focusing on EPA spending); BREYER, *supra* note 159; HARVARD GROUP ON RISK MANAGEMENT REFORM, *supra* note 158.

163. Justice Breyer proposes a statutorily-created independent commission, while the Harvard Group proposes a White House agency created by executive order. See BREYER, *supra* note 159, at 61; HARVARD GROUP ON RISK MANAGEMENT REFORM, *supra* note 158, at 190-93.

164. See e.g., *Senators Dole, Johnson Unveil Compromise on Regulatory Reform, Risk Assessment*, UTIL. ENVT. REP. July 7, 1995, at 1.

165. Of course, one obstacle to this type of reform is our piecemeal, problem-centered regulatory scheme, which has created numerous statutory barriers to reallocation of government resources. These include budget allocations to specific programs and agencies, as well as specific legislative provisions prohibiting or limiting the consideration of costs in making risk regulation decisions. Interestingly, the commonly cited examples of the latter have been watered down recently. The Delaney Clause, 21 U.S.C. § 348(c)(3) (1994), which prohibited even minute amounts of carcinogenic additives in foods regardless of risk or cost, was reinterpreted in *Les v. Reilly*, 968 F.2d 986 (9th Cir. 1992). The Clean Air Act of 1970, Pub. L. No. 91-604, 84 Stat. 1685-1686, required EPA to set standards for hazardous air pollutants that provide "an ample margin of safety to protect the public health." This provision effectively limited the EPA's use of risk assessments in regulating hazardous air pollutants prior to its amendment in 1990. See 42 U.S.C. § 7412 (1994). See also *NRDC v. EPA*, 824 F.2d 1146 (D.C. Cir. 1987) (authorizing EPA to consider costs in setting standards as long as safety is assured).

is, to control the exercise of this risk management power once it is delegated. Suppose Congress and the President were to enact legislation creating an executive branch risk management agency. The new agency would have the power to reallocate regulatory resources and priorities so as to maximize the net risk reduction benefits of federal spending. Presumably, this new risk regulation agency's central task would be to effect a massive redistribution of the benefits of regulation. Such a redistribution would create countless political fault lines among interest groups, geographic regions, and existing agencies. In the previously-cited Superfund example, a gain for OSHA would amount to a loss for both the EPA and the citizens of New Jersey. Similarly, if nonpoint source water pollution (runoff) is deemed to be a more important problem than industrial point source pollution,¹⁶⁶ the resulting shift in the focus of regulators' attention would be industry's gain and agriculture's loss.

The number and complexity of these fault lines make it unlikely that Congress could provide *ex ante* legislative guidance to constrain the agency's choices in any meaningful way. Any such attempt to steer the agency would surely alienate important constituent groups, thereby jeopardizing the viability of the majority legislative coalition. It would be easier and wiser politically for legislators to leave these controversial issues to the agency. Furthermore, even if the political will to exert *ex ante* control were present, politicians could not possibly foresee all of the important dimensions of the agency's future policy choices. Risk assessments depend on rapidly-changing scientific knowledge, and the agency will make its choices with the benefit of information and expertise unavailable to politicians at the legislative enactment stage. For these same reasons, structure and process controls would have only limited influence over most of the agency's risk management choices. Certainly, specifications about the makeup, organization, and decision process of the agency could have some impact on its behavior. For example, an independent commission with broad powers and composed only of scientists would be less amenable to presidential control than an executive agency headed by a political appointee whose decisions required the assent of other affected agencies. However, as the agency goes about the business of assessing risks and making choices in the future, new problems and new information will soon overwhelm the effects of structure and process as determinants of the agency's policy choices. Just as we view the risks associated with undisturbed asbestos in buildings much differently than we did a decade ago, even the best agency designer will not be able to foresee the circumstances this new risk management agency would face and cannot hope to design the agency to react to them in predictable ways.

As noted in Part III, introducing the preferences of the public into this calculus complicates the picture considerably. Not only would politicians face

166. See, e.g., EPA, NON-POINT SOURCE POLLUTION IN THE U.S.: REPORT TO CONGRESS (1984); BREYER, *supra* note 159, at 21.

uncertainty about the future policy outcomes that would result from the creation of this risk management agency, they also would face uncertainty about how the public would feel about those outcomes. This uncertainty offers additional incentives for politicians not to exert *ex ante* control over the agency. Moreover, because their electoral vulnerability makes politicians more sensitive to public preferences, the probability of an *ex post* veto of the agency's risk management decisions will be determined, in large part, by those public preferences. For example, suppose our hypothetical risk regulation agency were to shift resources from the Superfund program to the regulation of indoor air. Also suppose that that shift were to be supported by Republicans and their primary constituent groups, but opposed by Democrats and their primary constituent groups. If the issue were not salient to the public or if no majority opinion on the issue were apparent, the prospects for overturning the agency's decision would seem dim. If overruling the agency required legislation (because the agency was either *de jure* or *de facto* independent¹⁶⁷), Democrats could secure a reversal of the decision only if they control both houses of Congress and the Presidency. If the agency were neither *de jure* nor *de facto* independent, a Democratic President would be more likely to be able to influence the agency's decision, although that might depend on the parties' assessment of the public's likely preferences when and if the issue became salient. If the agency could muster public support for its position, its chances of resisting presidential pressure would be enhanced. If, on the other hand, a groundswell of public opposition arose in response to the agency's reordering of regulatory priorities, the prospects for an *ex post* reversal would be improved considerably. First, if the agency was independent, Republicans in control of either house or the Presidency might be unwilling to take the political risk of opposing reversal. Second, if the agency was not independent, a Democratic President would have more leverage with the agency in his attempted to secure a reversal.

Thus, the key will be the public's reaction to these agency choices. That reaction can be shaped by the "education" efforts of interest groups and politicians alike. The important point is that that reaction is unpredictable and unknown at the time the agency makes its policy choice. At that point in time, a hierarchy of knowledge and expertise governs most policy choices (with the agency and other members of the policy network at the top, the public at the bottom, and politicians in the middle). Because politicians have less information than the agency, and because politicians' preferences over outcomes will depend upon future public reactions to those outcomes, most important agency policy choices are constrained neither by enabling legislation nor by the threat of a congressional or presidential veto. This is the

167. That is: (1) the agency as an independent commission; (2) the executive agency head resists the President's attempts to secure a policy reversal and is not fired; or (3) the President's veto is overturned in court.

crucial aspect of the delegation problem that is obscured by models that posit the existence of preferences over outcome for all actors at or before the time the agency makes its decision. PPT has already shed considerable light on the incentive structures facing policy-maximizing politicians who seek to influence certain agency policy choices; it has shed less light on the agency policy-making process itself. Before it can achieve that objective, positive theorists must do a better job of accounting for these common impediments to political control.¹⁶⁸

The input of legal scholars into the political control debate should speed that process and may also contribute to a broader appreciation for the normative implications of political control. Indeed, the political control issue has important implications for ongoing normative debates over the merits of the legislative veto, the proper scope of judicial review, and the effects of presidential and congressional regulatory review proposals. As the risk regulation example illustrates, agency policy-making independence is not synonymous with bad government, nor does it necessarily lead to bad policy. Therefore, positive theorists ought not to take a dim view of agency independence or treat as naive the notion that uncontrolled agencies might serve the public interest. The public may approve of our hypothetical agency's risk management decisions irrespective of what politicians want. Alternatively, some might argue that rational risk regulation is good policy irrespective of what politicians or the public want. The point is that by equating political control of agencies by politicians with a well-functioning democracy, some positive theorists present a false dichotomy. A closer look at the interaction among the preferences of the agency, politicians, and the general public reveals that sometimes the public interest is better served not by more political control, but by less.

168. Newer models which incorporate outcome uncertainty (like Bawn's, *supra* note 55) and some of the legal impediments to political control (like Hammond & Knott's, *supra* note 41) are a step in the right direction. A comprehensive explanation of why PPT models employ methods which omit these important variables is beyond the scope of this article. I have suggested that the answer is, in part, traceable to earlier economic models of agency behavior. We can speculate about other factors which may be at work here as well. For example, some of the political science works which explore the central role of bureaucrats in the policy-making process contend that agency decisions are not rational choices. See discussion *supra* Section I.A. It is therefore not surprising that PPT models have found so little common ground with these approaches. In the case of formal PPT models, another contributing factor may be positive theorists' attempts to play to the strength of rational choice methods—that is, the quest for parsimony and solvability. Without some of their more untenable assumptions, formal models yield fewer results. A third, related potential factor may be the tendency for the theorist's reach to exceed her grasp. Instead of attempting to lay out a single, parsimonious theory of administrative behavior or of the policy process, PPT models of smaller parts of that process might bear more fruit. In particular, more focused inquiries might do a better job of yielding testable hypotheses.