

It's Time to Make the Administrative Procedure Act Administrative

Edward Rubin

Follow this and additional works at: <http://scholarship.law.cornell.edu/clr>

 Part of the [Law Commons](#)

Recommended Citation

Edward Rubin, *It's Time to Make the Administrative Procedure Act Administrative*, 89 Cornell L. Rev. 95 (2003)
Available at: <http://scholarship.law.cornell.edu/clr/vol89/iss1/2>

This Article is brought to you for free and open access by the Journals at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell Law Review by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.

IT'S TIME TO MAKE THE ADMINISTRATIVE PROCEDURE ACT ADMINISTRATIVE

Edward Rubin†

The Administrative Procedure Act (APA) has been out of date from the day it was written because it fails to address the administrative character of the modern state. The APA imposes procedural requirements on agency rulemaking and adjudication, two activities that are singled out because they resemble legislation and judicial decision making in the premodern state. The requirements for adjudication are based on the procedural rules that govern courts; the requirements for rulemaking would be based on the procedural rules that govern legislatures, but because very few such rules exist, they are also based on the rules that govern courts. Courts then enforce these requirements according to vague, nearly incomprehensible standards, further judicializing the APA's requirements.

This Article recommends that a new, administratively oriented APA be drafted. The statute should reflect the premise that the modern administrative state is a distinctively new mode of governance, founded on the principle of instrumental rationality. Procedural requirements should be based on this principle and should apply to all administrative action—not only rulemaking and adjudication, but also the policy making and implementation functions that comprise the bulk of administrative action. These requirements would ensure that agency action be reasonably designed to achieve the goals stated by the legislature or by the agency itself. They would be enforced by Congress and the administrative hierarchy as well as by courts, and the standards for court enforcement would be clarified to avoid judicialization.

INTRODUCTION	96
I. PERPLEXITIES OF THE APA	100
A. The Dominant Principle: Control Through Private Participation	100
B. Categories of Administrative Action	106
C. Modes of Administrative Action: Rulemaking	110
1. <i>The Notice Requirement</i>	112
2. <i>The Statement of Basis and Purpose Requirement</i>	114
3. <i>Ex Parte Contacts and Impartial Decision Makers</i> ...	119
D. Modes of Administrative Action: Informal Adjudication	123
E. Legislative and Executive Supervision	131

† Theodore K. Warner, Jr. Professor of Law, University of Pennsylvania. I would like to thank the Smith Richardson Foundation for its generous support of this project.

F. Judicial Control	137
II. SUGGESTIONS FOR AN ADMINISTRATIVE APA.....	146
A. The Nature of Administrative Government.....	146
1. <i>Purpose</i>	147
2. <i>Mechanisms</i>	151
3. <i>Conflicts and Complexities</i>	155
B. The Dominant Principle: Instrumental Rationality ..	157
C. Rulemaking	162
1. <i>Required Procedures</i>	162
2. <i>Applicable Standards</i>	169
D. Executive Action.....	173
E. External Control	181
CONCLUSION	189

INTRODUCTION

It is time to rewrite the Administrative Procedure Act (APA).¹ The reason is that the APA is out of date. This is not because of some significant event that occurred between 1946, when the APA was promulgated, and the present time. There have, of course, been vast increases in the scope and scale of regulation during the intervening half century, as several important innovations in regulatory strategy have been implemented,² and further changes have been widely discussed.³ Nevertheless, the basic structure of our administrative state has remained relatively unchanged and will probably remain unchanged for the foreseeable future. The real problem is that the APA was out of date at the time it was enacted. The cause of this premature obsolescence was the American government's epochal transformation in the half century preceding the APA's enactment. This change was the advent of the administrative state itself, the transition from a system of rules elaborated and implemented by the judiciary to a system of comprehensive regulation elaborated and implemented by administrative agencies.⁴

¹ 5 U.S.C. §§ 551-559 (2000).

² See, e.g., Paperwork Reduction Act of 1980, 44 U.S.C. §§ 3501-3536 (2000); Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (Feb. 17, 1981) (Ronald Reagan), *amended by* Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993) (William Clinton), *amended by* Exec. Order No. 13,258, 67 Fed. Reg. 9,385 (Feb. 26, 2002) (George W. Bush).

³ See, e.g., JOHN BRAITHWAITE, RESTORATIVE JUSTICE & RESPONSIVE REGULATION 29-43 (2002); JAMES S. FISHKIN, THE VOICE OF THE PEOPLE: PUBLIC OPINION AND DEMOCRACY 134-76 (1995); AL GORE, FROM RED TAPE TO RESULTS: CREATING A GOVERNMENT THAT WORKS BETTER & COSTS LESS 33-34 (1993); LAWRENCE K. GROSSMAN, THE ELECTRONIC REPUBLIC: RESHAPING DEMOCRACY IN THE INFORMATION AGE 190-217, 218-36 (1995).

⁴ With respect to the development of the administrative state in the United States, see, for example, RICHARD FRANKLIN BENSEL, YANKEE LEVIATHAN: THE ORIGINS OF CENTRAL STATE AUTHORITY IN AMERICA, 1859-1877, at ix (1990); 7 HAROLD U. FAULKNER, THE DECLINE OF LAISSEZ FAIRE: 1897-1917, at 366-82 (1951); WILLIAM E. NELSON, THE ROOTS OF

The APA responds to these changes operationally, but not conceptually. While it imposes several procedural requirements on the manner in which administrative agencies may act, these requirements are derived from pre-administrative modes of governance, namely legislative rulemaking and judicial adjudication. More basically, they are derived from an essentially judicial concept of governance in which laws are discovered rather than invented and policy making is always incremental. The statute fails to recognize the new modes of governance that characterize the administrative state, such as priority setting, resource allocation, research, planning, targeting, guidance, and strategic enforcement. It fails to craft requirements that are appropriate to these activities, either leaving them essentially unregulated or subjecting them to inappropriate procedural rigidities. Most significantly, it never addresses the administrative process itself, the essential and distinctive mode of governmental action that results from the existence of administrative agencies and from the underlying public purposes that led to their creation.

Criticism of the APA is nothing new. According to one group of critics, the statute imposes too many legal requirements and restrictions on the administrative process, impeding the ability of agencies to carry out their assigned responsibilities.⁵ According to another group, it imposes too few requirements and restrictions, allowing agencies to act over-aggressively and irresponsibly.⁶ These opposing

AMERICAN BUREAUCRACY: 1830-1900, at 113-55 (1982); JOHN A. ROHR, TO RUN A CONSTITUTION: THE LEGITIMACY OF THE ADMINISTRATIVE STATE 13-53 (1986); STEPHEN SKOWRONEK, BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877-1920, at 3-35 (1982); CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE 12-31 (1990). With respect to the more general development of bureaucracy worldwide, see, for example, ERNEST BARKER, THE DEVELOPMENT OF PUBLIC SERVICES IN WESTERN EUROPE: 1660-1930 (Archon Books 1966) (1944); HOWARD G. BROWN, WAR, REVOLUTION, AND THE BUREAUCRATIC STATE: POLITICS AND ARMY ADMINISTRATION IN FRANCE, 1791-1799 (1995); THE FORMATION OF NATIONAL STATES IN WESTERN EUROPE (Charles Tilly ed., 1975); SAMUEL P. HUNTINGTON, POLITICAL ORDER IN CHANGING SOCIETIES (1968); HENRY PARRIS, CONSTITUTIONAL BUREAUCRACY: THE DEVELOPMENT OF BRITISH CENTRAL ADMINISTRATION SINCE THE EIGHTEENTH CENTURY (1969); GIANFRANCO POGGI, THE DEVELOPMENT OF THE MODERN STATE 1-15 (1978).

⁵ See ROBERT A. KATZMANN, INSTITUTIONAL DISABILITY: THE SAGA OF TRANSPORTATION POLICY FOR THE DISABLED 152-87 (1986); R. SHEP MELNICK, REGULATION AND THE COURTS: THE CASE OF THE CLEAN AIR ACT 387-93 (1983); Jerry L. Mashaw & David L. Harfst, *Regulation and Legal Culture: The Case of Motor Vehicle Safety*, 4 YALE J. ON REG. 257, 289-302 (1987); Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1385-1436 (1992); Richard J. Pierce, Jr., *Two Problems in Administrative Law: Political Polarity on the District of Columbia Circuit and Judicial Deterrence of Agency Rulemaking*, 1988 DUKE L.J. 300, 308-13; Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 NW. U. L. REV. 173, 217-36 (1997); Patricia M. Wald, *Regulation at Risk: Are Courts Part of the Solution or Most of the Problem?*, 67 S. CAL. L. REV. 621, 625-32 (1994).

⁶ See KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 27-51 (1969); THEODORE J. LOWI, THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED

groups mirror the debate that occurred when the APA was drafted⁷ and, to a large extent, the continuing division between progressive and conservative, or proregulatory and antiregulatory, opinion.⁸ In fact, both groups of critics are correct. The APA imposes excessive and counterproductive constraints on administrative agencies, while imposing too little control on agency action to the detriment of both fairness and efficiency in the administrative process. This remarkable feat of failing in opposite ways at the same time is achieved by a division of responsibility. In those areas where the APA imposes rules, it frequently imposes the wrong rules, leading to counterproductive constraints; in many other areas, however, the APA fails to impose any rules at all, leaving agencies unguided and unsupervised. Thus, the APA generously provides its critics, whether liberal or conservative, with a great deal of empirical ammunition, but the noise of the resulting bombardment has tended to drown out the recognition that the two groups are responding to the same underlying problem, a problem that is more basic than many of the critics have acknowledged:⁹ the APA fails to address the true character of the administrative state, and to recognize both the virtues and the dangers of this relatively recent mode of governance.

A number of writers, including John Stuart Mill,¹⁰ Charles Dickens,¹¹ and Nikolai Gogol,¹² had noted the advent of the administrative

STATES 92-126 (2d ed. 1979); DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* 135-52, 165-79 (1993); Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311, 1312-19 (1992); Peter H. Aranson et al., *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 52-62 (1982); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1237-41 (1994); W. Kip Viscusi, *Regulating the Regulators*, 63 U. CHI. L. REV. 1423, 1457-60 (1996).

⁷ See ROHR, *supra* note 4, at 111-70; Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1262-72 (1986); Martin Shapiro, *APA: Past, Present, Future*, 72 VA. L. REV. 447, 452-54 (1986) [hereinafter Shapiro, *APA*].

⁸ See Martin Shapiro, *Administrative Discretion: The Next Stage*, 92 YALE L.J. 1487, 1495-1500 (1983); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1713-16 (1975).

⁹ But see Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 6 (1998) (stating that the differing theories share commonalities).

¹⁰ See JOHN STUART MILL, *UTILITARIANISM, ON LIBERTY, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT* 360-64 (Geraint Williams ed., 1993).

¹¹ See CHARLES DICKENS, *LITTLE DORRIT* 104-23 (1992). Dickens names his archetypical agency the Circumlocution Office; it is staffed by a number of officials from the Barnacle family, and its motto is: "How Not to Do It." See *id.*

¹² Most of Gogol's best-known works address the issue of bureaucracy in one form or another. See NIKOLAI GOGOL, *DEAD SOULS* 49-61 (George Gibian ed., 1985) (a swindler buys title to serfs, or "souls," who have died but are still listed as alive on the public tax registry); N.V. GOGOL, *THE GOVERNMENT INSPECTOR* (M. Beresford ed., 1996) (a lowly clerk is mistaken for a government inspector by the officials of a small town); Nicolai V. Gogol, *The Nose*, in *THE OVERCOAT AND OTHER TALES OF GOOD AND EVIL* 203 (David Magarshack trans., 1957) (a civil servant of the eighth rank finds his nose traveling around town as a civil servant of the fifth rank); Nicolai V. Gogol, *The Overcoat*, in *THE OVERCOAT AND OTHER*

state by the end of the nineteenth century. The classic characterization of it as a novel and distinctive mode of governance was formulated by Max Weber about three decades before Congress drafted the APA.¹³ In essence, Weber identified administrative, or bureaucratic, government, as a rational-legal regime in which groups of full-time, salaried officials, chosen on the basis of their credentials and placed within hierarchical organizations, conduct official business according to established rules within a defined jurisdiction and for defined instrumental purposes.¹⁴ It is unfair to expect American legislators, working during World War II, to pay attention to the work of a German sociologist. But it is not unfair to expect us to do so now. Weber's conception has become the dominant account of modern government, and the basis for a massive body of research in political science, sociology, economics, and related fields.¹⁵

There has been, particularly in recent years, sustained criticism of the Weberian model of government. Government, it is argued, should be made less bureaucratic; authority should be decentralized, with subordinate bureaucrats becoming more responsible,¹⁶ and private entities possessing greater responsibility.¹⁷ Many of these suggestions are creative and potentially advantageous, though some are nostalgia-driven and unrealistic.¹⁸ But all are modifications of a massive bureaucratic system whose basic structure has evolved during the last two hundred years, that has defined the texture of the modern world and remains securely in place at the present time. Serious proposals for government reform must be framed against the background of this incontrovertible reality.¹⁹ The problem with the APA is that

TALES OF GOOD AND EVIL, at 233, 261–64 (a poor clerk whose overcoat is stolen is viciously abused when he complains to the Very Important Person about police inefficiency in retrieving it).

¹³ 1, 2 MAX WEBER, *ECONOMY AND SOCIETY* 217–26, 956–1003 (Guenther Roth & Claus Wittich eds., Ephraim Fischhoff et al. trans., 1978); see also 2 WEBER, *supra*, at 1393–1405 (discussing the role of the bureaucracy in “reconstructed” Germany).

¹⁴ See 2 WEBER, *supra* note 13, at 956–63.

¹⁵ 1 WEBER, *supra* note 13, at xxxiii–cvii; see REINHARD BENDIX, *MAX WEBER: AN INTELLECTUAL PORTRAIT* 458–68 (1977); 1 JÜRGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION* 143–271 (Thomas McCarthy trans., 1984); KARL LÖWITH, *MAX WEBER AND KARL MARX* (Tom Bottomore & William Outhwaite eds., 1993).

¹⁶ See, e.g., GORE, *supra* note 3, at 39–40; PHILIP K. HOWARD, *THE DEATH OF COMMON SENSE: HOW LAW IS SUFFOCATING AMERICA* 57–110 (1994); DAVID OSBORNE & TED GAEBLER, *REINVENTING GOVERNMENT: HOW THE ENTREPRENEURIAL SPIRIT IS TRANSFORMING THE PUBLIC SECTOR* 12–16 (1992).

¹⁷ See WILLIAM D. EGGERS & JOHN O’LEARY, *REVOLUTION AT THE ROOTS: MAKING OUR GOVERNMENT SMALLER, BETTER, AND CLOSER TO HOME* 58–93 (1995); FISHKIN, *supra* note 3, at 134–76; GROSSMAN, *supra* note 3, at 218–36; Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 316–23 (1998).

¹⁸ Weber was among those who were repelled by the grim reality of the bureaucratic state. See BENDIX, *supra* note 15, at 458–63.

¹⁹ See Jerry L. Mashaw, *Reinventing Government and Regulatory Reform: Studies in the Neglect and Abuse of Administrative Law*, 57 U. PITT. L. REV. 405, 410–15 (1996).

this basic reality is nowhere in sight. The statute is derived from traditional models of government and is simply oblivious to the transformative developments that Weber identified, and that contemporary reformers must acknowledge.

This Article has two purposes. The first, which animates Part I, is to demonstrate that the APA is largely based on premodern conceptions of government, specifically on the idea that governmental action consists of legislation and adjudication, and more specifically on the idea that government is an essentially judicial function. The second purpose, which animates Part II, is to suggest an alternative approach to regulating administrative agencies based on the contemporary understanding of the administrative state that we have inherited from Weber. The Article does not attempt to draft a new statute or resolve all of the issues that must be addressed before a new statute could be drafted. Rather, its purpose is to suggest alternatives to the basic provisions of the APA and to provide a new perspective on the task of imposing legal controls on a modern administrative state.

I

PERPLEXITIES OF THE APA

A. The Dominant Principle: Control Through Private Participation

The APA imposes three types of requirements on the administrative process. First, it requires that various governmental actions be publicized, or made available to public scrutiny.²⁰ This requirement, the least developed of the three in the original statute, has been the subject of its most extensive amendments, which include the Freedom of Information Act²¹ and the Government in the Sunshine Act.²² Second, the APA imposes various procedural requirements on rulemaking and adjudication. To make a rule, an agency²³ must publish a proposed version of the rule or a statement of the rule's subject mat-

²⁰ 5 U.S.C. § 552(a) (2) (2000).

²¹ Pub. L. No. 89-487, 80 Stat. 250 (1966) (codified as amended at 5 U.S.C. § 552).

²² Pub. L. No. 94-409, 90 Stat. 1241 (1976) (codified as amended at 5 U.S.C. § 552b).

²³ The APA defines an agency as "each authority of the Government of the United States, whether or not it is within or subject to review by another agency." 5 U.S.C. § 551(1). This definition will be used throughout this Article. It leaves unresolved some complex theoretical questions regarding the way a group of individuals functions as an entity, and the way boundaries are defined so that the group is separated from its surroundings and maintains its identity. See NIKLAS LUHMANN, *SOCIAL SYSTEMS* 16-41 (John Bednarz, Jr. & Dick Baecker eds., 1995); OLIVER E. WILLIAMSON, *MARKETS AND HIERARCHIES: ANALYSIS AND ANTITRUST IMPLICATIONS* 41-57 (1975); Mary Douglas, *Converging on Autonomy: Anthropology and Institutional Economics*, in *ORGANIZATION THEORY: FROM CHESTER BARNARD TO THE PRESENT AND BEYOND* 98, 109-11 (Oliver E. Williamson ed., 1990). However, the basic principle that any identifiable group of government officials capable of taking collective action is an agency suffices for present purposes.

ter, allow a period of time for private parties to file written comments with the agency and, after the comments have been received, publish a final version of the rule with a statement of basis and purpose.²⁴ To adjudicate an issue, the agency must provide interested parties with notice of the subject matter to be decided, conduct a hearing, and then issue a decision based upon the record of the hearing.²⁵ Third, the APA grants aggrieved parties the opportunity to challenge agency action in court on the grounds that it violates the Constitution or federal statutory law, including, of course, the procedural requirements of the APA.²⁶

Commentators have written at length about alternative models of administration that might serve as the basis for imposing legal restrictions on agencies, such as the formalist model, the expertise model, or the pluralist model.²⁷ But the structure of the APA itself reveals that the statute is essentially a one-trick pony. All of its basic provisions rely on a single method for controlling the actions of administrative agencies, namely, participation by private parties. The publication provisions inform private parties of the agencies' actions.²⁸ The rulemaking and adjudication provisions enable private parties to communicate their views to the agency decision makers.²⁹ The judicial review provisions give private parties an opportunity to challenge the legality of those decisions.³⁰ Any other methods of controlling administrative action, including executive, legislative, and internal supervision, are largely absent from the statute, although one means of legislative supervision, the report and wait requirement,³¹ was added in the aftermath of the Supreme Court's decision in *INS v. Chadha*.³² This represents a significant lacuna because an Administrative Procedure Act should address the entire range.

One obvious difficulty with the APA's reliance on public participation is that it forces the statute to depend for its effectiveness on

²⁴ 5 U.S.C. § 553(b), (c).

²⁵ *Id.* § 554.

²⁶ *Id.* §§ 702, 704.

²⁷ See Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276, 1296–1377 (1984) (discussing and rejecting the formalist, expertise, judicial review and pluralist models for justifying agency action); Thomas O. Sargentich, *The Reform of the American Administrative Process: The Contemporary Debate*, 1984 WIS. L. REV. 385, 392–97 (distinguishing among formalist, instrumentalist, and participatory models of agency action); Stewart, *supra* note 8, at 1688–1711, 1802–05 (examining the formalist and expertise models of agency discretion in the context of evaluating agency alternatives, and rejecting the pluralist model).

²⁸ See 5 U.S.C. § 552.

²⁹ See *id.* §§ 553, 554.

³⁰ See *id.* §§ 702, 704.

³¹ *Id.* § 801 (requiring INS to present proposed agency rules to Congress and allowing the legislature to pass a “joint resolution of disapproval” invalidating “major” rules).

³² 462 U.S. 919 (1983) (holding one of these legislative vetoes unconstitutional).

large organizations—business firms, labor unions and, most characteristically, organized interest groups.³³ Very few people other than professional lobbyists or lawyers employed by such organizations read the Federal Register, send comments to agencies regarding proposed rules, or challenge the legality of such rules in federal court. The litigants in leading cases involving the legality of rulemaking are generally entities such as the Natural Resources Defense Council (NRDC), the Sierra Club, the Defenders of Wildlife, the Motor Vehicle Manufacturers Association, the Association of Data Processing Service Organizations, the Chocolate Manufacturers Association, and the Toilet Goods Association.³⁴ Adjudications involve individuals, of course, and the APA does grant them important mechanisms for controlling the agency's decision.³⁵ But even in this case, sustained challenges to general agency practices under the judicial review provisions are often mounted by large organizations.³⁶

The disadvantages of the APA's monochromatic approach to agency control goes well beyond the obvious unfairness of relying on large private organizations, however. Supervision exercised by private parties is necessarily external, and usually adversarial as well. It is external in that it comes from individuals and organizations outside the administrative apparatus and, indeed, outside the government in its

³³ See WILLIAM F. WEST, ADMINISTRATIVE RULEMAKING: POLITICS AND PROCESSES 86–88 (1985) (stating that participation in rulemaking is generally limited to well-organized, well-funded interests); Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 66–87 (1991) (observing that litigation is subject to similar limits as participation in the legislative process); see generally MANCUR OLSON, JR., THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 53–57 (1965) (noting that only small groups whose members have high stakes in the outcome are able to participate in government). Olson's insight regarding the size of the group has been undermined by the subsequent development of mass social movements. See, e.g., BARRY D. ADAM, THE RISE OF A GAY AND LESBIAN MOVEMENT (2d ed. 1995); DENNIS CHONG, COLLECTIVE ACTION AND THE CIVIL RIGHTS MOVEMENT (1991); SARA EVANS, PERSONAL POLITICS: THE ROOTS OF WOMEN'S LIBERATION IN THE CIVIL RIGHTS MOVEMENT AND THE NEW LEFT (Vintage Books 1980); ANDREW SZASZ, ECOPOPULISM: TOXIC WASTE AND THE MOVEMENT FOR ENVIRONMENTAL JUSTICE (1994); Edward L. Rubin, *Passing Through the Door: Social Movement Literature and Legal Scholarship*, 150 U. PA. L. REV. 1, 5–12, 76–83 (2001). However, these sources emphasize the importance of organization and the ability to obtain resources.

³⁴ These specific illustrations are amongst the leading rulemaking cases in modern administrative law: *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983); *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519 (1978); *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150 (1970); *Toilet Goods Ass'n v. Gardner*, 387 U.S. 158 (1967); *Chocolate Mfrs. Ass'n v. Block*, 755 F.2d 1098 (4th Cir. 1985); *Sierra Club v. Costle*, 657 F.2d 298 (D.C. Cir. 1981).

³⁵ See 5 U.S.C. §§ 702, 705; *supra* note 26 and accompanying text.

³⁶ See, e.g., *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305 (1985); *FTC v. Cement Inst.*, 333 U.S. 683 (1948); *Portland Audubon Soc'y v. Endangered Species Comm.*, 984 F.2d 1534 (9th Cir. 1993); *Prof'l Air Traffic Controllers Org. v. Fed. Labor Relations Auth.*, 685 F.2d 547 (D.C. Cir. 1982).

entirety. This limits the effectiveness of the control, since those exercising it, however assiduous, are less likely to understand the internal operation of the agency, less likely to speak in its own language, and less capable of imposing direct sanctions for disobedience. Second, private party control is often adversarial. Adjudications and judicial review are necessarily so.³⁷ Rulemaking comments may support the agency's proposal, but most private comments are motivated by disapproval. Thus, private parties can be relied upon to tell the agency what it is doing wrong, but not how it might improve.

Perhaps the most serious limitation of private party participation, however, is that it is almost always incremental. Private parties tend to be reactive; they will review published regulations, comment on regulatory proposals, lobby for or against regulatory initiatives, and sue when they feel aggrieved, but they are less likely to generate any of these proposals or initiatives, and are even less likely to plan a long-term administrative strategy. Even if they did so, the APA provides them with no opportunities for communicating such initiatives or long-term strategies to the agency. Rather, it restricts their role to the ambit of particular agency decisions—to the rule on which they are commenting, the adjudication in which they are making an appearance, or the agency action that they are challenging in court.³⁸

³⁷ See generally ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 3–6 (2001) (describing the general culture of adversarial, litigation-oriented dispute resolution in the United States, in contrast to the means employed in other advanced, industrial nations).

³⁸ Some observers, notably those who subscribe to public choice theory, would argue that most government institutions reflect private party views, and that there is very little likelihood that supervision or control by such institutions, as opposed to private parties, will make any difference. See, e.g., JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT* 283–95 (1962); JOHN A. FEREJOHN, *PORK BARREL POLITICS* 47–68 (1974); MORRIS P. FIORINA, *REPRESENTATIVES, ROLL CALLS, AND CONSTITUENCIES* 29–40, 83–86 (1974); OLSON, *supra* note 33. For general descriptions of public choice theory, see DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* 12–37 (1991); DENNIS C. MUELLER, *PUBLIC CHOICE II* (1989). This position has been sharply contested, however. See DONALD P. GREEN & IAN SHAPIRO, *PATHOLOGIES OF RATIONAL CHOICE THEORY: A CRITIQUE OF APPLICATIONS IN POLITICAL SCIENCE* 47–71 (1994); RICHARD L. HALL, *PARTICIPATION IN CONGRESS* 157–61 (1996); STEVEN KELMAN, *MAKING PUBLIC POLICY* 231–70 (1987); Mark Kelman, *On Democracy-Bashing: A Skeptical Look at the Theoretical and "Empirical" Practice of the Public Choice Movement*, 74 VA. L. REV. 199 (1988). Nonetheless, virtually any legislative proposal is premised on some incremental advantage to particular statutory mechanisms. The extreme and fatalistic claim that nothing makes a difference should not be accepted and acted upon without much stronger evidence than that which public choice can advance. See Steven P. Croley, *Public Interested Regulation*, 28 FLA. ST. U. L. REV. 7 (2000); Edward L. Rubin, *Beyond Public Choice: Comprehensive Rationality in the Writing and Reading of Statutes*, 66 N.Y.U. L. REV. 1, 24–30 (1991); Edward L. Rubin, *Legislative Methodology: Some Lessons from the Truth-in-Lending Act*, 80 GEO. L.J. 233, 240–41 (1991). This is particularly true in light of the fact that public choice insights can be incorporated into proposals for improving governmental processes. See FARBER & FRICKEY, *supra*, at 116–43; JERRY L. MASHAW, *GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IM-*

The inherently incremental nature of the control functions that the APA prescribes is hardly accidental. Rather, it emerges from the conception of government that prevailed in premodern times, and that survives in contemporary governance as the rationale for common law. In the Middle Ages, government was regarded as an essentially judicial function and all its officials, including the king, were viewed as magistrates.³⁹ Their purpose was to discern, apply and extrapolate the eternal verities that were conceived in terms of natural law, that is, as law that God had inscribed in the nature of the universe.⁴⁰ In fact, kings and other officials in medieval times did a good deal of genuine legislating, and often demonstrated impressive legal creativity,⁴¹ but the justification for their exercise of political authority was that they were discovering existing law or legislating in its interstices. The common law preserves this rationale⁴²—it allows judges to make new doctrine,⁴³ while simultaneously maintaining that they are not authorized to do so, by asserting that judges are simply discerning the principles embedded in Anglo-American legal culture. This con-

PROVE PUBLIC LAW (1997); Edward L. Rubin, *Public Choice, Phenomenology, and the Meaning of the Modern State: Keep the Bathwater, but Throw Out That Baby*, 87 CORNELL L. REV. 309 (2002).

³⁹ CHARLES HOWARD MCILWAIN, *THE HIGH COURT OF PARLIAMENT AND ITS SUPREMACY* 42-44, 109-13 (Archon Books 1962).

⁴⁰ FRITZ KERN, *KINGSHIP AND LAW IN THE MIDDLE AGES* 149-65 (S.B. Chrimes trans., 1968); MCILWAIN, *supra* note 39, at 44-45; R. van Caenegem, *Government, Law and Society, in THE CAMBRIDGE HISTORY OF MEDIEVAL POLITICAL THOUGHT*, C. 350-C. 1450, at 174, 192-95 (J.H. Burns ed., 1988).

⁴¹ See JOSEPH CANNING, *A HISTORY OF MEDIEVAL POLITICAL THOUGHT*, 300-1450, at 22-25 (1996); JANET L. NELSON, *POLITICS AND RITUAL IN EARLY MEDIEVAL EUROPE* 61-62 (1986).

⁴² J.G.A. POCOCK, *THE ANCIENT CONSTITUTION AND THE FEUDAL LAW* 30-55 (1987); GERALD J. POSTEMA, *BENTHAM AND THE COMMON LAW TRADITION* 4-29 (1986); MARTIN SHAPIRO, *COURTS: A COMPARATIVE AND POLITICAL ANALYSIS* 35-37 (1981).

⁴³ There is virtually universal agreement among political scientists who study the legal system that judges make new policy in essentially the same sense that legislators do. See, e.g., LAWRENCE BAUM, *AMERICAN COURTS: PROCESS AND POLICY* 310-59 (4th ed. 1998); HENRY R. GLICK, *COURTS, POLITICS, AND JUSTICE* 352-418 (3d ed. 1993); CHARLES A. JOHNSON & BRADLEY C. CANON, *JUDICIAL POLICIES: IMPLEMENTATION AND IMPACT* (1984); VICTOR G. ROSENBLUM, *LAW AS A POLITICAL INSTRUMENT* 4-11 (1955); C.K. ROWLAND & ROBERT A. CARP, *POLITICS AND JUDGMENT IN FEDERAL DISTRICT COURTS* 3-6 (1996); GLENDON SCHUBERT, *JUDICIAL POLICY MAKING: THE POLITICAL ROLE OF THE COURTS* (rev. ed. 1974); JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* 1-31 (1993); HAROLD J. SPAETH, *SUPREME COURT POLICY MAKING* (1979); BARBARA M. YARNOLD, *POLITICS AND THE COURTS: TOWARD A GENERAL THEORY OF PUBLIC LAW* 3-52 (1992); Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957). Even the opposing view that doctrine matters does not deny that judges make public policy in many cases. See LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUDGES MAKE* 22-23 (1998); MALCOLM M. FEELEY & EDWARD L. RUBIN, *JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS* 204-48 (1998).

ception is now described as formalism,⁴⁴ and is generally rejected,⁴⁵ but its revival in the work of Ronald Dworkin indicates its continuing appeal.⁴⁶

Because judges are merely “discovering” law, in the medieval and common law conception, they must proceed on a case-by-case basis as the specifics of each case reveal a new aspect of the pre-existing legal rules.⁴⁷ The administrative state displaces this approach. Its defining feature is conscious policy intervention in the economic and social system by various means, among them the promulgation of explicitly new laws.⁴⁸ While incremental decision making is not necessarily precluded, the hallmarks of the administrative state—the rationale behind the creation of administrative agencies—are its comprehensive programs and long-term planning in pursuit of these policy objectives.⁴⁹ Thus, by relying on the necessarily incremental device of private party participation, the APA ignores the essential feature of the administrative state and adopts a means of control characterized by a specifically pre-administrative approach to governance.

⁴⁴ See Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1, 6–11, 32–39 (1983); Dennis Patterson, *Langdell's Legacy*, 90 NW. U. L. REV. 196 (1995); G. Edward White, *The Impact of Legal Science on Tort Law, 1880–1910*, 78 COLUM. L. REV. 213, 220–25 (1978); John Henry Schlegel, *Langdell's Legacy or, The Case of the Empty Envelope*, 36 STAN. L. REV. 1517, 1528–33 (1984) (book review).

⁴⁵ In the United States, the initial critique came from legal realism, with subsequent schools of scholarship, including legal process, law and economics and critical legal studies, building on that critique. See BRIAN BIX, *JURISPRUDENCE: THEORY AND CONTEXT* 164–75, 177–202, 203–20 (2d ed. 1999); GARY MINDA, *POSTMODERN LEGAL MOVEMENTS: LAW AND JURISPRUDENCE AT CENTURY'S END* 13–61 (1995); Edward L. Rubin, *The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions*, 109 HARV. L. REV. 1393, 1394–1402 (1996). The work of political scientists who study the legal system can also be seen as a critique of the formalist position, see *supra* note 44, although they generally do not identify their observations in these terms.

⁴⁶ See RONALD DWORKIN, *LAW'S EMPIRE* (1986); RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977). Dworkin argues that there is always a right answer in a legal controversy and that this answer, if not immediately apparent, can be found in principles that inhere in the legal system. While the specifics of this thesis have changed over time, see Ronald Dworkin, *A Reply by Ronald Dworkin*, in RONALD DWORKIN AND CONTEMPORARY JURISPRUDENCE 247, 248 (Marshall Cohen ed., 1983), the central point is that judges do not make policy in the same sense that legislators do, see *id.* It is thus opposed to the position taken by most legal scholars and political scientists. See *supra* notes 42–46 and accompanying text.

⁴⁷ See BIX, *supra* note 45, at 133–36; MELVIN ARON EISENBERG, *THE NATURE OF THE COMMON LAW* (1988); EDWARD H. LEVI, *AN INTRODUCTION TO LEGAL REASONING* 1–27 (1948); SHAPIRO, *supra* note 42, at 28–35; CASS R. SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* (1996).

⁴⁸ See HABERMAS, *supra* note 15, at 243–71; NIKLAS LUHMANN, *A SOCIOLOGICAL THEORY OF LAW* (Elizabeth King & Martin Albrow trans., 1972); 1 WEBER, *supra* note 13, at 217–26 (describing displacement of the patriarchal system of justice by the rational-formalistic approach that characterizes bureaucratic governance).

⁴⁹ See Edward L. Rubin, *Law and Legislation in the Administrative State*, 89 COLUM. L. REV. 369, 369, 372–85 (1989).

B. Categories of Administrative Action

In order to define opportunities for private party participation in the administrative process, the APA must characterize that process and identify the specific junctures where participation is to be encouraged. It does so by making two distinctions, one between rulemaking and adjudication, and the other between formal and informal process. A rule is defined as "the whole or a part of an agency statement of general or particular applicability and future effect."⁵⁰ Any other agency action is an adjudication.⁵¹ The APA defines a formal process as one "required by statute to be made on the record after opportunity for an agency hearing."⁵² Any other process is informal.

These two categorizations, each with a defined and a residual concept, might appear to represent a conceptual advance, an effort to describe modern administrative government on its own terms. In fact, like the reliance on private party participation, the categorization merely reproduces the conceptual framework of the pre-administrative state.⁵³ Rulemaking is a generic term for legislation, and thus one that can be used when the legislation, that is, an authoritative government pronouncement of general applicability, is not being enacted by a legislature. Adjudication likewise is a generic term that can be used for a judicial process that is carried out by someone who is not a judge.⁵⁴ Similarly, the formal and informal distinction largely tracks the division between nonjudicial and judicial action, although formal action is certainly a more capacious term than legislation.

As observers have pointed out since the enactment of the APA, the statute's two independent dichotomies, when combined, produce a classic four-box grid.⁵⁵ The four boxes, or cells, are formal rulemaking, informal rulemaking, formal adjudication and informal adjudication. Of these, however, formal rulemaking has turned out to be a null set. It requires the agency to provide private parties potentially affected by the rule with an oral hearing in which they can present witnesses and cross examine opposing witnesses.⁵⁶ In a complex regu-

⁵⁰ 5 U.S.C. § 551(4) (2000).

⁵¹ See *id.* § 551(6), (7).

⁵² *Id.* § 553(c); see *id.* § 554(a).

⁵³ See *supra* Part I.A.

⁵⁴ At the time the APA was drafted, the officials who presided over administrative adjudications were described as hearing officers. But the statute's traditionalism enabled some of them to demand that they be described as judges, a demand that they were able to achieve through viciously effective lobbying. See PAUL VERKUIL ET AL., *THE FEDERAL ADMINISTRATIVE JUDICIARY* (1992); Charles H. Koch, Jr., *Administrative Presiding Officials Today*, 46 ADMIN. L. REV. 271 (1994); Jeffrey S. Lubbers, *Federal Administrative Law Judges: A Focus on Our Invisible Judiciary*, 33 ADMIN. L. REV. 109 (1981).

⁵⁵ See *The Federal Administrative Procedure Act: Codification or Reform?*, 56 YALE L.J. 670, 705 (1947).

⁵⁶ See 5 U.S.C. § 556(d).

latory setting, with multiple parties, multiple issues and assiduous attorneys, the direct, cross, redirect and recross examinations of hundreds of witnesses by dozens of parties on dozens of issues produces interminable and often terminal delay.⁵⁷ The notorious example is the hearing, held pursuant to the Federal Food, Drug, and Cosmetic Act,⁵⁸ to determine whether the peanut content of peanut butter should be 87.5% or 90%, which spanned a nine-year period and produced a 7,736 page transcript.⁵⁹ Because the impracticalities of formal rulemaking are well known, Congress rarely requires this technique, and courts avoid interpreting statutes to require it, even in the rare cases where the statute seems to do so.⁶⁰ In effect, the Court has made clear that if Congress wants formal rulemaking—rulemaking “on the record after opportunity for an agency hearing”—it must enact a statute that uses the words “on the record after opportunity for an agency hearing.”⁶¹

One of the other cells in the grid, informal adjudication, suffers from the opposite problem. Defined by two residual principles,⁶² it includes the vast majority of administrative action. That is, all actions that do not fit within the fairly narrow categories of rulemaking or formal adjudication fall under informal adjudication.⁶³ Every time an agency plans its future actions or evaluates its prior ones, allocates its resources, gives advice, makes a promise, issues a threat, negotiates,

⁵⁷ See Robert W. Hamilton, *Procedures for the Adoption of Rules of General Applicability: The Need for Procedural Innovation in Administrative Rulemaking*, 60 CAL. L. REV. 1276, 1283–1313 (1972); Robert W. Hamilton, *Rulemaking on a Record by the Food and Drug Administration*, 50 TEX. L. REV. 1132, 1142–50 (1972) [hereinafter Hamilton, *Rulemaking*]; Richard J. Pierce, Jr., *The Choice Between Adjudicating and Rulemaking for Formulating and Implementing Energy Policy*, 31 HASTINGS L.J. 1, 5–30 (1979).

⁵⁸ 21 U.S.C. § 341.

⁵⁹ Paul M. Booth, *FDA Implementation of Standards Developed by the International Conference of Harmonization*, 52 FOOD & DRUG L.J. 203, 214 n.79 (1997); see *Ass'n of Nat'l Advertisers v. FTC*, 627 F.2d 1151, 1167 n.34 (D.C. Cir. 1979) (describing rulemaking); *Corn Prods. Co. v. Dep't of Health, Educ. & Welfare*, 427 F.2d 511 (3rd Cir. 1970) (upholding resulting rule regarding content of peanut butter against a procedural challenge); see also Hamilton, *Rulemaking*, *supra* note 57, at 1143–45 (describing the peanut butter proceedings and eventual rule affirmation by the Third Circuit). Nor was this the most extensive proceeding under the FDA's formal rulemaking provision. An ultimately unsuccessful effort to promulgate rules for foods that were claimed to have special dietary uses generated a record about five times as long, with 162 witnesses and more than 2,000 documents. See *id.* at 1145–50.

⁶⁰ See *United States v. Fla. E. Coast Ry. Co.*, 410 U.S. 224, 225 n.1, 241 (1973) (finding that statute requiring the Interstate Commerce Commission to act only “after hearing” and authorizing it to make specified findings of fact did not trigger formal rulemaking); *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 756–57 (1972) (same).

⁶¹ The Supreme Court denies that this is the case, however. See *Allegheny-Ludlum*, 406 U.S. at 757.

⁶² See *supra* notes 50–54 and accompanying text.

⁶³ See James O. Freedman, *Summary Action by Administrative Agencies*, 40 U. CHI. L. REV. 1, 1 (1972).

conducts an investigation, and most of the time it denies an application or makes an exception, it is at least arguably engaged in informal adjudication. Thus, this cell of the APA's four-box grid, unlike the formal rulemaking cell, does not lack content. Unfortunately, however, the APA is virtually silent with respect to it. Whereas the statute imposes such elaborate requirements on formal rulemaking that the mechanism is virtually unusable, it imposes few, if any, requirements on informal adjudication.⁶⁴ In fact, the APA does not actually use the term informal adjudication at all, and barely acknowledges the concept. Rather, the term and its underlying concept are simply logical emanations of the statute's structure that commentators have noted and discussed.⁶⁵ The drafters have so little to say about it because they did not conceptualize it as an identifiable category of governmental action.

The fact that the APA does not impose any practical procedural requirements on either formal rulemaking or informal adjudication results from very different difficulties, but springs from a similar source. Both are conceived as adjudication, while neither one actually is. Formal rulemaking is called rulemaking, not adjudication, but the requirements that accompany it are entirely adjudicatory in nature. All its specified features—oaths, subpoenas, depositions, settlement conferences, direct examinations, cross examinations, transcripts, exhibits—are familiar attributes of judicial trials.⁶⁶ The problem, of

⁶⁴ The one possible exception is the APA section dealing with "ancillary matters." 5 U.S.C. § 555 (2000). Section 555(e) states: "Prompt notice shall be given of the denial in whole or in part of a written application, petition, or other request of an interested person made in connection with any agency proceeding." It further requires that "the notice shall be accompanied by a brief statement of the grounds for denial." This is, in essence, a decision without a hearing. It provides something, in that the applicant or petitioner is told that his application has been denied and is given some reason for the denial. However, the provision's effect seems restricted to settings that bear some relationship to a traditional adjudication, in that the outcome of an informal adjudication constitutes a determination of a person's status. Apparently, courts have interpreted the provision's scope in this way. See *Roelofs v. Sec'y of the Air Force*, 628 F.2d 594, 599–601 (D.C. Cir. 1980) (holding that reasons must be given for denial of a serviceman's request that his discharge resulting from conviction for heroin possession be upgraded to an honorable discharge); *Bowman v. U.S. Bd. of Parole*, 411 F. Supp. 329, 330 (W.D. Wis. 1976) (holding that reasons must be given for denial of parole application). *But cf.* *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 653–56 (1990) (requiring statement of reasons under § 555(e) violates the principle set forth in *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519 (1978), which states that courts may not add to the APA's procedural requirements).

⁶⁵ See, e.g., David P. Currie & Frank I. Goodman, *Judicial Review of Federal Administrative Action: Quest for the Optimum Forum*, 75 COLUM. L. REV. 1, 54–61 (1975); Freedman, *supra* note 63, at 41–42; Paul R. Verkuil, *A Study of Informal Adjudication Procedures*, 43 U. CHI. L. REV. 739 (1976); Keith Werhan, *Delegalizing Administrative Law*, 1996 U. ILL. L. REV. 423, 442 & n.143.

⁶⁶ This adjudicatory character is apparent from the structure of the statute. The rulemaking requirements appear in § 553, which describes the notice and comment pro-

course, is that rulemaking is not an adjudicatory process, and any effort to treat it as one is bound to produce an unusable monstrosity. Informal adjudication, on the other hand, is described, at least implicitly, as adjudication, but it is not adjudication at all.⁶⁷ It would be much more accurately described as executive action, or some similar term that did not refer to adjudication. Most of the innumerable administrative actions that fall within this category are unrelated to adjudication, as that term is generally conceived. What is adjudicatory about planning a strategy, allocating resources, giving advice, or conducting an investigation? Conceiving these models of administrative action as adjudications brings absolutely nothing to mind. Like orange music or a rainy principle, it is an inapposite juxtaposition, a koan that cannot generate criteria for addressing a real situation.

Because the APA proceduralizes formal rulemaking out of existence and ignores informal adjudication, the four-box grid that it establishes reduces to two usable sets of procedural requirements, one for informal rulemaking and the other for formal adjudication. These are, of course, immediately recognizable as analogues of legislation and judicial trials, the two standard modes of governmental action in the traditional, pre-administrative state. Legislatures are regarded as making rules, that is, statements with future effect, and the amorphous, open-ended process that they employ strongly suggests informality. Courts, conversely, are regarded as determining the rights of private parties. Civil trials, the means of adjudicating non-criminal matters, are essentially reproduced in §§ 556 and 557. These are the most ritualized, carefully defined governmental processes that exists in our society; as such, they are properly described as formal. Thus, the APA's apparent aspiration to conceptualize the administrative process reduces to the reproduction of existing pre-administrative categories of governmental action. Its implicit four-box grid morphs into a simple dichotomy between legislation and adjudication, a dichotomy that emerges directly from our standard, three-branch

cess. But the section states: "When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection." 5 U.S.C. § 553(c) (2000). Sections 556 and 557 impose requirements on formal adjudication and are obviously designed with adjudication in mind. See 5 U.S.C. §§ 556, 557.

⁶⁷ See *supra* notes 63–65 and accompanying text.

model of government,⁶⁸ and from the pages of Baron Montesquieu's mid-eighteenth century discussion of separated powers.⁶⁹

C. Modes of Administrative Action: Rulemaking

The APA's treatment of formal adjudication has created relatively few difficulties. We are, after all, a society that knows how to adjudicate disputes between private parties or between private parties and the state. We have been adjudicating such disputes for at least eight hundred years, ever since trial by ordeal was abolished and trial by battle began to fall into disuse,⁷⁰ and this lengthy cultural experience has provided us with a deep reservoir of skills and knowledge. As a result, the APA provisions for formal adjudication meet American cultural standards of adjudicatory fairness reasonably well.⁷¹ A greater concern with formal adjudication is that it may be too formal, and that the civil trial standards it imposes encumber agencies that must adjudicate thousands, or, in the case of the Social Security Administration, millions of cases annually.⁷² Jerry Mashaw has explored this issue at some length, but his general conclusion is that agencies have been

⁶⁸ For arguments that this model is not fully applicable to a modern administrative state, see Edward Rubin, *Independence as a Governance Mechanism*, in JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH 56 (Stephen Burbank & Barry Friedman eds., 2002); William C. Banks, *Efficiency in Government: Separation of Powers Reconsidered*, 35 SYRACUSE L. REV. 715, 730-33 (1984); M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. PA. L. REV. 603, 603-06 (2001); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 581-83 (1984).

⁶⁹ MONTESQUIEU, *THE SPIRIT OF THE LAWS* 156-66 (Anne M. Cohler et al. eds & trans., 1989).

⁷⁰ Trial by ordeal was abolished by the Fourth Lateran Council in 1215, while trial by combat gradually sank into disfavor as a result of changing social conditions. See ROBERT BARTLETT, *TRIAL BY FIRE AND WATER: THE MEDIEVAL JUDICIAL ORDEAL* 34-69, 103-26 (1986); 1 SIR WILLIAM HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 308-12 (7th ed. 1956); GEORGE NEILSON, *TRIAL BY COMBAT* 122-26, 160-61 (1890); R.C. VAN CAENEGEM, *THE BIRTH OF THE ENGLISH COMMON LAW* 68-70 (1973).

⁷¹ Some questions continue to arise, however. Controversy continues, for example, surrounding the requirements of impartiality for agency adjudicators. See *Arnett v. Kennedy*, 416 U.S. 134, 196-99 (1974) (White, J., concurring in part and dissenting in part) (asserting that decision maker in hearing regarding fairness of employee's dismissal should not have been the employee's regular supervisor); *Wong Yang Sung v. McGrath*, 339 U.S. 33, 46-47 (1950) (concluding that the APA could not have intended that same person serve as prosecutor and decision maker in deportation hearing), *judgment modified by* 339 U.S. 908 (1950). Nonetheless, the basic requirements are well understood and almost universally applied, even in the absence of a specific statutory requirement. See, e.g., *Gibson v. Berryhill*, 411 U.S. 564, 578-79 (1973) (holding that board composed of optometrists in private practice may not rule on question of whether other optometrists should have their licenses revoked for being employed by business corporations); *Ward v. Vill. of Monroeville*, 409 U.S. 57, 57-60 (1972) (holding that mayor who benefits from traffic fines may not adjudicate traffic offenses); *In re Murchison*, 349 U.S. 133, 136-39 (1955) (finding that judge may not also act as one-person grand jury).

⁷² See JERRY L. MASHAW, *BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS* 18 (1983).

able to adapt the APA requirements to produce a practical yet fair adjudicatory process.⁷³ In *Heckler v. Campbell*,⁷⁴ the Supreme Court validated one of the most extensive of these adaptations: an effort to replace individualized fact-finding regarding vocational opportunities with generally-applicable guidelines.⁷⁵

Experience with the APA's rulemaking requirements has been much less satisfactory.⁷⁶ Courts and commentators have disagreed about the core meaning of these requirements: their scope, content, and value. Perhaps the most important reason for this conceptual instability is that the pre-administrative model on which informal rulemaking is based, the enactment of a statute by a legislature, does not include procedural requirements. While there are techniques for legislation, and every legislature adopts internal rules of procedure, the only procedural requirements involve the rules for valid enactment. Hans Linde has proposed to remedy this situation by defining a due process of lawmaking,⁷⁷ but his suggestion has not been adopted. In any event, his suggestions do not correspond to the procedures the APA requires. Instead, the APA, finding that the analogy between informal rulemaking and legislation provides no guidance for procedural requirements, resorts to the only other model of traditional governmental action, namely, adjudication. The APA's requirements of notice, comments, and a statement of basis and purpose reiterate, in a diluted and adapted form, the due process requirements of notice, a hearing, and an impartial decision maker for adjudicatory decisions.⁷⁸ As Peter Strauss, Todd Rakoff, and Cynthia Farina have suggested, courts expand the adjudicatory implications of the statute because of their own familiarity with the adjudicatory process.⁷⁹ The result is that rulemaking, although conceived as agency

⁷³ See *id.* at 222–27; see also JERRY L. MASHAW ET AL., *SOCIAL SECURITY HEARINGS AND APPEALS: A STUDY OF THE SOCIAL SECURITY ADMINISTRATION HEARING SYSTEM* xix (1978) (“While the problems that have been identified . . . do infect the . . . system in various degrees, we do not find the problems to be so overwhelming that an entirely new system is required.”).

⁷⁴ 461 U.S. 458 (1983).

⁷⁵ See *id.* at 466–68.

⁷⁶ But see Peter L. Strauss, *Changing Times: The APA at Fifty*, 63 U. CHI. L. REV. 1389, 1391–93 (1996) (contending that the open-ended nature of the APA's provisions has enabled them to be applied, without amendment, for fifty years.) Professor Strauss suggests, however, that the APA's survival resulted from flexible judicial interpretation, and that the more rigid interpretive approach of the current Supreme Court may lead to its ultimate demise. See *id.* at 1393, 1422.

⁷⁷ See generally Hans A. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197 (1976) (comparing absence of due process concerns in lawmaking with the prevalence of due process considerations in adjudication).

⁷⁸ See *Goldberg v. Kelly*, 397 U.S. 254, 266–71 (1970) (discussing the requirements of the Due Process Clause in an administrative hearing).

⁷⁹ See PETER L. STRAUSS, TODD D. RAKOFF & CYNTHIA R. FARINA, *GELHORN AND BYSE'S ADMINISTRATIVE LAW: CASES AND COMMENTS* 510–15, 549 (10th ed. 2003).

legislation, has been subjected to requirements that are largely judicial in nature.

1. *The Notice Requirement*

The first element under the APA informal rulemaking provisions requires that the agency give general notice of "either the terms or substance of the proposed rule or a description of the subjects and issues involved."⁸⁰ Some of the disputes arising under this provision involve behavior that might trouble us in a truly legislative context. For example, in *AFL-CIO v. Donovan*,⁸¹ the court struck down a proposal to make amendments to an existing federal regulation because the agency had simply published the entire regulation, running forty pages in the Federal Register, without indicating the sections it wished to amend.⁸² Had a legislature adopted the same approach, interest groups could complain, quite plausibly, that they were not informed of the issues at stake, even though they would not have a legal cause of action.

The more typical challenge involving the notice requirement occurs when the agency changes the proposed rule in the course of its decision making process. In *Chocolate Manufacturers Ass'n v. Block*,⁸³ the court overturned a Department of Agriculture regulation regarding the foods that would qualify for government subsidies because it excluded chocolate milk, although the notice did not indicate that such an exclusion was contemplated.⁸⁴ Similarly, in *Shell Oil Co. v. EPA*,⁸⁵ the District of Columbia Circuit overturned a regulation specifying criteria for the identification of hazardous wastes because the final rules included materials derived from hazardous wastes and materials that mixed hazardous wastes with nonhazardous substances, even though no notice was given that such materials were under consideration.⁸⁶ However, in *United Steelworkers of America v. Schuylkill Metals Corp.*,⁸⁷ the Fifth Circuit upheld a regulation that set wage levels for

⁸⁰ 5 U.S.C. § 553(b)(3) (2000).

⁸¹ 757 F.2d 330 (D.C. Cir. 1985).

⁸² *See id.* at 337-40.

⁸³ 755 F.2d 1098 (4th Cir. 1985).

⁸⁴ *Id.* at 1106-07. The agency argued, in its defense, that the prohibition resulted from comments received in response to the proposed regulation. *See id.* at 1102.

⁸⁵ 950 F.2d 741 (D.C. Cir. 1991).

⁸⁶ *See id.* at 747-52; *see also* Natural Res. Def. Council v. EPA, 279 F.3d 1180, 1186-88 (9th Cir. 2002) (overturning final rule because it represented a "paradigm shift" from one-acre zones of deposit for woody debris to zones exceeding one acre); Am. Frozen Foods Inst. v. Train, 539 F.2d 107, 135 (D.C. Cir. 1976) (overturning final rule because a new substance was added to list of controlled pollutants).

⁸⁷ 828 F.2d 314 (5th Cir. 1987), *appeal after remand*, 916 F.2d 294 (5th Cir. 1990).

employees transferred for health reasons, although the regulation had been extended to overtime pay and bonuses.⁸⁸

Such cases illustrate the inapposite character of the APA's notice requirement for agency rulemaking.⁸⁹ The entire point of the comment process is to effect changes in the proposed rule.⁹⁰ Agency rulemaking is a policy process that should involve the collection of new information and the use of that information to design optimal solutions. Giving notice that definitively determines the boundaries of the matter under consideration is an essentially judicial concept. It derives from the due process concern that the government should not determine the legal position of a particular party without giving that party an opportunity to be heard. Clearly, this opportunity is undermined if the party cannot prepare for the hearing, and preparation will often be seriously impaired if the party does not know the exact nature of the matters that the court will consider. Such due process considerations, however, do not apply to policy formation. When a legislature or an agency is setting a generally applicable policy, the issue is not the fair treatment of particular individuals, but the allocation of benefits and burdens to groups for the overall advantage of society.⁹¹ One may argue, of course, that policy making will be more

⁸⁸ See *id.* at 317–18. This is the more common result of challenges to the adequacy of notice. See, e.g., *Am. Med. Ass'n v. United States*, 887 F.2d 760, 768–69 (7th Cir. 1989) (finding that the adoption of an allocation scheme that differed from the one originally proposed did not violate the notice requirement); *S. Terminal Corp. v. EPA*, 504 F.2d 646, 656–59 (1st Cir. 1974) (concluding that the adoption of more extensive rules for controlling pollution than originally represented, including a freeze on new parking structures and on-street parking, did not violate the notice requirement); *Int'l Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 622, 632 & n.51 (D.C. Cir. 1973) (finding that adoption of a new methodology for analyzing auto emissions data does not violate notice requirement).

⁸⁹ The prevailing judicial test for determining whether changes to the proposed rule violate the notice requirement signals this disjunction. This test requires that the final rule be a “logical outgrowth” of the initial notice. See, e.g., *Shell Oil Co.*, 950 F.2d at 750–52 (discussing and employing the logical outgrowth test). But logic refers to a process for deriving statements from prior principles by reasoning alone, i.e., All men are mortal, Socrates is a man, therefore Socrates is mortal. The ways in which the final rule differs from the initial proposal should be the result of new information gathering; that is, they should be empirical. To paraphrase Justice Holmes, the life of the administrative rulemaking process is not logic but experience. See OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (1881). Thus, the logical outgrowth test, in its effort to make sense of the APA's notice requirement, inaccurately describes the administrative process and provides no clarification of the way that notice should be applied to informal rulemaking.

⁹⁰ See *Trans-Pac. Freight Conference v. Fed. Mktg. Comm'n*, 650 F.2d 1235, 1249 (D.C. Cir. 1980) (“The whole rationale of notice and comment rests on the expectation that the final rules will be somewhat different—and improved—from the rules originally proposed by the agency.”).

⁹¹ Compare *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441 (1915) (holding that a hearing was not required before the Colorado Tax Commission could increase the valuation of all taxable property in the city by forty percent) with *Londoner v. City of Denver*, 210 U.S. 373 (1908) (holding that a hearing was required before taxes could be assessed on individual properties). See Edward L. Rubin, *Due Process and the Administrative*

effective if all parties know the issues and have the opportunity to contribute their views, but policy formation concerns a much less strict conception of notice, grounded in considerations of optimal information flow, not fairness to individuals. As such, notice would be tested by the quality of the agency's decision making, not by the rights or opportunities of any particular private party.

Moreover, the idea of definitive notice only makes sense if the ultimate decision must be based entirely on the record. This is precisely the criterion that the APA recognizes as the essence of formality and the opposite of informal rulemaking.⁹² Notice establishes the subject matter on which a record, based on evidence presented in a hearing, is to be compiled. Because evidence on any other matter can be declared irrelevant, the notice determines the range of factual evidence that can be collected and provides a standard against which the record requirement can be enforced. If there is no requirement that the decision need not be based on a record—if the agency can consider any evidence it chooses—then its deliberations cannot be contained within the boundaries of a prior notice.

2. *The Statement of Basis and Purpose Requirement*

Once the notice is given, anyone may send the agency a comment, and agencies always accept these comments (indeed, how could they not, unless they returned the envelope for insufficient postage?). The fighting issue is the extent to which the agency must take the comments into consideration in formulating its final rule, or, as more commonly stated, the extent to which it must give reasons for rejecting comments in the statement of basis and purpose that accompanies the final rule. The APA does not explicitly require agencies to respond to the comments they receive, and there may thus be good reason for concluding that such a requirement does not exist. But if the agency is not required to respond to comments, how much control do they really impose on the rulemaking process?

As is well established from its statutory history, the APA represents a compromise between those who wanted to place restrictions on the regulatory process and those who wanted to leave the process unencumbered.⁹³ The comment requirement, in its present form, reflects this compromise in that the opposing factions met each other

State, 72 CAL. L. REV. 1044, 1050–51 (1984) (discussing the *Londoner-Bi-Metallic* distinction). This distinction is central to the theory of the legal process school. See JESSE M. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 60–128 (1980); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 7–8 (1980); LON L. FULLER, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 394–404 (1978).

⁹² See *supra* notes 60–61 and accompanying text.

⁹³ See ROHR, *supra* note 4, at 154–70; Rabin, *supra* note 7, at 1263–66; Shapiro, *APA*, *supra* note 7, at 452–54.

halfway. Unfortunately, they were meeting each other halfway on the wrong path—the path toward adjudicatory procedures.⁹⁴ A judge, in the interest of fairness, should respond to all the parties' relevant claims, since their legal status is at stake. In addition, the adversary system demands such responses because the parties' assertions are the judge's only source of information. This task will not be overly burdensome because there are a small number of parties, typically two, and the issues have been limited by the notice and record requirements.

In the more open-ended, diffuse, and complex rulemaking process, the obligation to respond to every argument advanced by private parties is much more cumbersome as well as conceptually unstable. There is no limit to the number of comments that the agency can receive, nor is there any requirement that commentators have a significant stake in the issue under consideration. One comment may come from a public interest group working exclusively in the field that the proposed regulation covers, and thus would represent the considered judgments of many leading experts in that field; another may be the casual ravings of a deranged or dyspeptic amateur. As a result, requiring the agency to respond to every comment, and to justify its final decision in its response, would have as sclerotic an effect as the formal rulemaking procedures. More importantly, responding to comments by interested parties is not a promising approach to making public policy. It precludes systematic analysis, is likely to ignore creative and long-term solutions, which private parties have no incentive to propose, and provides no method for distinguishing among alternative proposals. As a result, while the compromise was intended to control informal rulemaking through the adjudication-inspired idea of private comments, it effectively reduces that control to a weak formality by not requiring any particular response to the comments. Moreover, even this weak formality was thought to be too burdensome to be applied to the innumerable rules that govern the agency's internal practices and management of resources.⁹⁵ Consequently, these actions were exempted from the notice and comment procedure, and thus from legal restriction by the APA.⁹⁶

⁹⁴ It is in precisely this sense that the requirements for informal rulemaking, stated exclusively in § 553 of the statute, are a weakened version of the fully adjudicatory formal rulemaking requirements, which begin with the same section and include the additional obligations of §§ 556 and 557, which also govern formal adjudication.

⁹⁵ Such rules are necessary for any agency, even if it does not engage in regulation. See JAMISON COLBURN, *TOWARD AN ARCHITECTURE OF ADMINISTRATIVE ADAPTATION* (forthcoming).

⁹⁶ See 5 U.S.C. § 553(a)(2) (2000) (excluding from coverage "matter[s] relating to agency management or personnel or to public property, loans, grants, benefits, or contracts"); *id.* § 553(b)(3) ("this subsection does not apply (A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice"). For argu-

The APA's halfhearted effort to judicialize the informal rulemaking process has produced a dilemma and a tribulation for reviewing courts. The adjudicatory instinct behind the statutory requirement creates the impression that the statute's drafters contemplated some level of judicialization.⁹⁷ But the emptiness of the requirement that the statute actually imposes suggests that any effort to exercise real control, by adjudicatory mechanisms or otherwise, has been renounced. Thus, the statute tempts its interpreters to begin proceeding down the path toward judicialization, only to abandon it at some indeterminate but very early point along the way. This has proven to be particularly excruciating for reviewing courts, which, as Strauss, Rakoff, and Farina note, are singularly susceptible to temptations of this sort.⁹⁸

Courts have responded in a variety of ways, but the leading response is certainly the "hard look" doctrine.⁹⁹ There is some question whether this doctrine means that the agency must take a hard look at the evidence or that the court will take a hard look at the agency's decision making process.¹⁰⁰ Under either interpretation, the agency is required to provide more specific responses to the comments it receives.¹⁰¹ This provides substance for the comment requirement, but the resulting judicialization of informal rulemaking creates the bur-

ments supporting this exemption, see Anthony, *supra* note 6, at 1372 (arguing that rules with a binding effect on the public should be subject to notice and comment procedure); Michael Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 DUKE L.J. 381, 382 (arguing that nonbinding rules should be subject to post-adoption comments); Arthur Earl Bonfield, *Some Tentative Thoughts on Public Participation in the Making of Interpretative Rules and General Statements of Policy Under the A.P.A.*, 23 ADMIN. L. REV. 101, 105-06 (1971) (contending that the imposition of notice and comment procedure would discourage adoption of interpretive rules and policy statements); Ronald M. Levin, *Nonlegislative Rules and the Administrative Open Mind*, 41 DUKE L.J. 1497, 1499 (1992) (asserting that agencies should not be discouraged from stating policies publicly by requiring notice and comment on these policies); Kevin W. Saunders, *Interpretative Rules with Legislative Effect: An Analysis and a Proposal for Public Participation*, 1986 DUKE L.J. 346 (stating that rules with binding effect on public should be subject to notice and comment procedure); Peter L. Strauss, *The Rulemaking Continuum*, 41 DUKE L.J. 1463, 1480-87 (1992) (arguing that interpretative rules should be exempt from comment procedure providing that notice is provided).

⁹⁷ For an argument that this is a plausible interpretation of the statute, see Nathaniel L. Nathanson, *The Vermont Yankee Nuclear Power Opinion: A Masterpiece of Statutory Misinterpretation*, 16 SAN DIEGO L. REV. 183, 189-90 (1979).

⁹⁸ STRAUSS, RAKOFF & FARINA, *supra* note 79, at 510-15, 549.

⁹⁹ The term originated in a decision by Judge Harold Leventhal. See *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970) (stating that a court must intervene if it becomes aware that "the agency has not really taken a 'hard look' at the salient problems, and has not genuinely engaged in reasoned decision-making" (footnote omitted)).

¹⁰⁰ See *Nat'l Lime Ass'n v. EPA*, 627 F.2d 416, 451 n.126 (D.C. Cir. 1980) (Wald, J.); Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505, 525-42 (1985).

¹⁰¹ For discussions of this understanding, see James V. DeLong, *Informal Rulemaking and the Integration of Law and Policy*, 65 VA. L. REV. 257, 301-09 (1979); Garland, *supra* note 100, at 525-42; William F. Pedersen, Jr., *Formal Records and Informal Rulemaking*, 85 YALE L.J.

dens and complexities discussed above. While courts are often able to distinguish between comments that merit a response and those that do not, they are not always able or willing to make the distinction, or they may not choose to do so if they are hostile to the agency for other reasons, or, worst of all, courts may not believe that the distinction can be validly made because they are conscientiously extrapolating from a judicial model where every relevant claim is entitled to a hearing.

Difficulties such as these motivated the Supreme Court to restrict the hard look doctrine in the case of *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*¹⁰² *Vermont Yankee* declared that courts may not impose procedural requirements on agencies beyond those provided by the APA.¹⁰³ The Court's conclusion was bolstered by the fact that Congress sometimes specifically requires a particular agency to respond to comments, one element of a mechanism revealingly dubbed hybrid rulemaking.¹⁰⁴ The resulting lack of

38, 59–64 (1975); Stephen F. Williams, "Hybrid Rulemaking" Under the Administrative Procedure Act: A Legal and Empirical Analysis, 42 U. CHI. L. REV. 401, 417–25 (1975).

¹⁰² 435 U.S. 519 (1978). On remand, the regulation was again invalidated, this time on substantive grounds. *Natural Res. Def. Council, Inc. v. Nuclear Regulatory Comm'n*, 685 F.2d 459 (D.C. Cir. 1982). Once again, however, the Supreme Court reversed, concluding that the substantive result lay within the agency's zone of discretion. *Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87 (1983).

¹⁰³ *Vermont Yankee*, 435 U.S. at 525. For commentary endorsing the Court's rationale, see Stephen Breyer, *Vermont Yankee and the Courts' Role in the Nuclear Energy Controversy*, 91 HARV. L. REV. 1833 (1978) (arguing that agencies should be free to use their scientific expertise); Clark Byse, *Vermont Yankee and the Evolution of Administrative Procedure: A Somewhat Different View*, 91 HARV. L. REV. 1823 (1978) (responding to Stewart, *infra*, and arguing that the *Vermont Yankee* decision provides the agency with the correct amount of discretion and decision making power); Thomas O. McGarity, *Substantive and Procedural Discretion in Administrative Resolution of Science Policy Questions: Regulating Carcinogens in EPA and OSHA*, 67 GEO. L.J. 729, 750–53 (1979) (positing that, to be effective, agencies must be permitted to act in a flexible manner). For criticism of the decision, see Nathanson, *supra* note 97, at 189–202 (asserting that the *Vermont Yankee* opinion misinterprets the APA's commitment to judicial review of agency action); Richard B. Stewart, *Vermont Yankee and the Evolution of Administrative Procedure*, 91 HARV. L. REV. 1805, 1811–20 (1978) (contending that *Vermont Yankee* quashes judicial efforts to develop standards for review of agency rulemaking). For comments stating that the decision is not as significant as it seems, see CHRISTOPHER EDLEY, *ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF THE BUREAUCRACY* 227–29 (1990) (arguing that because substantive and procedural controls are relatively interchangeable, courts will find other ways to intervene); Antonin Scalia, *Vermont Yankee: The APA, The D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345, 406–07 (forecasting that Congress will enact more hybrid statutes, thereby circumventing *Vermont Yankee's* effect); Strauss, *supra* note 76, at 1408–13 (arguing that the decision is more limited than its rhetoric suggests, as it has not been applied, either at the time or subsequently, to foreclose all procedural innovations).

¹⁰⁴ See, e.g., Federal Trade Commission Improvement Act of 1975, 15 U.S.C. § 57a; Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651, 655 (2000); Consumer Product Safety Act of 1972, 15 U.S.C. §§ 2051, 2058; and Toxic Substances Control Act of 1976, 15 U.S.C. §§ 2601–2629, § 2618(c) (2000). These statutes represent a hybrid between informal rulemaking and adjudication, or between informal rulemaking and formal rulemaking, which is essentially adjudication. Hybrid rulemaking statutes also include other adjudication-derived procedures, such as oral hearings and a right of cross-examina-

constraint on agency behavior, however, continues to trouble the courts. As a result, the hard look doctrine remains alive, *Vermont Yankee* notwithstanding, as courts continue to add procedural requirements to the minimal and readily circumvented comment procedure that the statute specifies.¹⁰⁵

This oscillation between imposing excessively burdensome requirements on agency rulemaking and leaving the process largely free of legal supervision is not primarily the fault of the courts or the agencies, but of the underlying statute. In essence, the APA has provided all the participants in the regulatory process with an ill-fitting tool to achieve their purposes. If one needs to tighten a screw, and only owns a hammer, one can either leave the screw alone or try to smash it into the wood by brute force. To supervise informal rulemaking, and administrative policy making in general, courts and agencies have been given a largely vapid set of requirements derived from a judicial model. Their only choice is to leave rulemaking essentially unsupervised or to add further judicial features which then, because of their inapposite nature, encumber and rigidify the process.

One might imagine that this instinctive reliance on judicial models hearkens back to the premodern belief that government fulfills an essentially judicial function and that the agency is simply discovering or extrapolating existing rules rather than creating new ones. But surely this is not a correct description of modern government, and only people who reject the administrative state and the last two hundred years of social theory think that such a description is normatively desirable. The judicial model persists because of its familiarity, combined with the unfamiliarity of more modern administrative alternatives. In its persistence, however, it smuggles incremental, law-discovering, adversarial approaches into a comprehensive law-creating context, where they encumber the process without providing any significant control on its outcome.

tion. See Clark Bye, *The Department of Energy Organization Act: Structure and Procedure*, 30 ADMIN. L. REV. 193, 204-07 (1978); Ralph F. Fuchs, *Development and Diversification in Administrative Rule Making*, 72 NW. U. L. REV. 83, 104-08 (1977); Hamilton, *Rulemaking*, *supra* note 57, at 1281-82; Lionel Kestenbaum, *Rulemaking Beyond APA: Criteria for Trial-Type Procedures and the FTC Improvement Act*, 44 GEO. WASH. L. REV. 679, 685-90 (1976).

¹⁰⁵ See, e.g., *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983) (invalidating Department of Transportation's rescission of passive restraint requirements for automobiles, finding that the agency had failed to consider the use of airbags and certain types of seatbelts); *Ober v. EPA*, 84 F.3d 304 (9th Cir. 1996) (invalidating EPA's acceptance of Clean Air Act plan because the State of Arizona had submitted additional information without offering commentators a chance to respond); *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240 (2d Cir. 1977) (invalidating FDA rules for processing fish because the notice of proposed rulemaking had not included an account of the scientific data upon which the agency had relied in formulating the rule).

3. *Ex Parte Contacts and Impartial Decision Makers*

Two other areas where courts have been tempted to judicialize the informal rulemaking process involve the prohibition on *ex parte* contacts and the requirement of an impartial decision maker. Neither of these closely related principles finds direct support in the text of the APA's informal rulemaking requirements. Because they are standard features of adjudicatory procedure, however, courts naturally try to give substance to the statute's flimsy controls on informal rulemaking.

The prohibition of *ex parte* contacts emanates from the basic character of adjudication as an adversary proceeding with a decision "on the record" by an impartial decision maker. *Ex parte* contacts deprive one party of an opportunity to become aware of and contest the assertions that the other party is advancing.¹⁰⁶ To the extent that *ex parte* contacts serve as the basis for decision, they violate the principle that the decision may refer only to evidence presented as part of a formal record.¹⁰⁷ In addition, because these contacts are not monitored by any outside party, they create a risk that the decision maker's neutrality may be compromised by threats, bribes, or flattery. The original APA briefly addressed the issue of *ex parte* contacts in adjudication.¹⁰⁸ The 1976 Government in the Sunshine Act¹⁰⁹ added de-

¹⁰⁶ See *Portland Audubon Soc'y v. Endangered Species Comm.*, 984 F.2d 1534, 1539-40 (9th Cir. 1993); *Prof'l Air Traffic Controllers Org. v. Fed. Labor Relations Auth.*, 685 F.2d 547, 563-64 (D.C. Cir. 1982); Harvey J. Shulman, *Separation of Functions in Formal Licensing Adjudications*, 56 NOTRE DAME LAW. 351, 388-89 (1981).

¹⁰⁷ This is not meant to suggest that all proceedings in a formal adjudication must be "on the record." Current case management practices allow for many less formal contacts between the judge and the parties. While these practices have raised concerns, see Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075-87 (1984) (discussing the problems that settlement practice raises, including problems involving *ex parte* contacts); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 424-31 (1982); Judith Resnik, *Whose Judgment? Vacating Judgments, Preferences for Settlement, and the Role of Adjudication at the Close of the Twentieth Century*, 41 UCLA L. REV. 1471 (1994), they have become an integral part of modern judicial decision making, and they are even more appropriate in the administrative context. But information obtained in these off-the-record contacts may not be used as the basis for decision. See Shulman, *supra* note 106, at 388-89. Moreover, all parties must be present, both in the interest of general fairness and to enforce the prohibition against relying on information obtained in this setting. Thus, despite the prevalence of off-the-record proceedings, the prohibition against *ex parte* contacts and the link between this prohibition and a decision on the record remains part of our adjudicatory practice.

¹⁰⁸ 5 U.S.C. § 554(d) (2000) ("The employee who presides at the reception of evidence . . . may not (1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate."); see also *id.* § 556(e) ("The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision . . ."). In addition, courts relied on general considerations of due process to prohibit *ex parte* contacts. See, e.g., *WKAT, Inc. v. FCC*, 296 F.2d 375, 383 (D.C. Cir. 1961) (invoking due process concerns to prohibit *ex parte* contacts in administrative adjudication).

¹⁰⁹ Pub. L. No. 94-409, 90 Stat. 1246 (1976) (codified as amended at 5 U.S.C. § 557(d)).

tailed provisions to § 557 that prohibited "an ex parte communication relevant to the merits of the proceeding," required that any ex parte contact that did occur be "place[d] on the public record of the proceeding" and prescribed sanctions for private parties who violated the prohibition.¹¹⁰

These provisions do not apply to informal rulemaking under § 553, of course, and their underlying rationale is equally inapplicable. Informal rulemaking is not an adversarial proceeding—it is explicitly not a decision on the record—and it does not require an impartial decision maker. On the contrary, policy makers are expected to collect empirical data on a wide variety of issues from a wide variety of sources, and much of this data gathering is necessarily ex parte. Moreover, the diffuse and open-ended nature of the comment process means that there will be no parties, in the traditional sense, but rather a number of interest groups with complex, cross-cutting relationships to each other.

The quasi-adjudicatory conception that lies behind the notice and comment provisions of § 553, however, seems to demand some limit on ex parte contacts. If the agency can consult anyone it chooses at any time, what is the point of the comment process? There is something vaguely troubling, especially to a judge, about the image of all those legally required written comments flowing in, to be time-stamped and filed by the back-room myrmidons, while interest group representatives whisper into the ears of the agency's top officials over steak and champagne dinners. Having promulgated its preliminary regulation and established a delimited comment period of sixty or ninety days, it would seem that these officials should devote their attention to the comments and make their revisions on the basis of the ideas and information they receive. A ban on ex parte contacts during this period seems necessary if the ultimate decision is to be based on the reasoned arguments of the commenting parties.¹¹¹

The leading case that advances this principle is *Home Box Office, Inc. v. FCC*,¹¹² which involved an FCC regulation that severely restricted the ability of cable and subscription television providers to broadcast sports events and feature films.¹¹³ The court's adjudicatory

¹¹⁰ 5 U.S.C. § 557(d). The sanction for private parties compels the decision maker to "require the party to show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation." *Id.* §557(a)(1)(D).

For cases reviewing adjudicatory decisions on the basis of this provision, see *Portland Audubon Soc'y*, 984 F.2d at 1542-48; *Prof'l Air Traffic Controllers*, 685 F.2d at 557-75.

¹¹¹ See Fuller, *supra* note 91, at 388-91 (positing that a decision based upon the arguments presented is the essence of the judicial process).

¹¹² 567 F.2d 9 (D.C. Cir. 1977) (per curiam).

¹¹³ *Id.* at 18-19. More precisely, the regulation continued, with some modifications, a previous restriction to this effect. *Id.* at 17-18. In the proceeding at issue, the television

instincts, set in motion by the implications of § 553's comment requirement, were further stimulated because the regulation represented a final determination of extremely valuable commercial opportunities, and because the agency had chosen to hold oral hearings on the matter. The court's response was a complete prohibition on ex parte contacts during the comment period, and a requirement that any such contacts that occur be documented in the rulemaking record.¹¹⁴ In imposing these controls on informal rulemaking, the court relied on rationales drawn from the adjudicatory context, highlighting the benefits of "adversarial discussion,"¹¹⁵ insisting on "fundamental notions of fairness implicit in due process,"¹¹⁶ and citing the Sunshine Act's parallel provisions governing formal adjudication.¹¹⁷

From a doctrinal perspective, *Home Box Office* is a mess, but it responds to the deeply felt instinct that private party comments, the APA's one means of controlling informal rulemaking, should count for something.¹¹⁸ Because the opinion lacks any statutory foundation, however, the principle it established was quickly undermined by subsequent decisions.¹¹⁹ In *Sierra Club v. Costle*,¹²⁰ the District of Columbia Circuit Court of Appeals refused to apply this principle to ex parte contacts by the President, on the ground that the President possesses constitutional authority to monitor agency decision making, and to members of Congress on the ground that they have constitutional authority to express their views to agency officials.¹²¹

networks argued that subscription television and pay cable could outbid the networks for the most desirable programs, thus leaving free television in a weakened financial condition and leaving nonpaying viewers without desirable programming. The cable and subscription companies countered that the restriction would leave them in a weakened financial condition and deprive the entire viewing public of program diversity. *Id.* at 25.

¹¹⁴ *See id.* at 57.

¹¹⁵ *Id.* at 55. The court also uses the phrase "adversarial critique." *Id.*

¹¹⁶ *Id.* at 56.

¹¹⁷ *Id.* In a footnote, the court acknowledged that these provisions "are couched as an amendment to 5 U.S.C. § 557, and as such the rules do not apply to rulemaking under [§ 553]." *Id.* at 56 n.125. Judge MacKinnon, in a concurring opinion, justified the decision by noting that "[t]he rule as issued was in effect an adjudication of the respective rights of the parties vis-a-vis each other." *Id.* at 62 (MacKinnon, J., concurring). While the regulation certainly allocated valuable broadcast rights to one group of private parties at the expense of another, to characterize it as an adjudication runs counter to the entire structure of the APA.

¹¹⁸ *See* Ernest Gellhorn & Glen O. Robinson, *Rulemaking "Due Process": An Inconclusive Dialogue*, 48 CHI. L. REV. 201, 239-43 (1981); Glen O. Robinson, *The Federal Communications Commission: An Essay on Regulatory Watchdogs*, 64 VA. L. REV. 169, 227-30 (1978).

¹¹⁹ *See, e.g.,* Action for Children's Television v. FCC, 564 F.2d 458, 473-75 (D.C. Cir. 1977) (refusing to apply the rule stated in *Home Box Office* because to do so would be "a clear departure from established law when applied to informal rulemaking proceedings").

¹²⁰ 657 F.2d 298 (D.C. Cir. 1981).

¹²¹ *See id.* at 404-10. Commentators have generally supported these conclusions, particularly regarding the President. *See* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2331-46 (2001); Paul R. Verkuil, *Jawboning Administrative Agencies: Ex Parte Con-*

Concerns about the impartiality of agency decision makers are closely related to the issue of *ex parte* contacts, since a predominant fear associated with such contacts is that they will compromise impartiality. The idea of an impartial decision maker, one who knows the applicable rules but has no prior knowledge or views about the facts until she hears the presentations of the opposing parties, is inherently linked to adjudication. In contrast, policy makers are expected to have prior knowledge of the situation and to initiate the rule making process on the basis of that knowledge. If the agency decision maker is a member of an executive agency, her task is to move policy in particular directions dictated by the President. If the decision maker is a member of an independent agency, her task is to develop her own policy directions within the general, and often capacious, ambit of the statutory authorization. In doing so, the policy maker is expected to draw upon an accumulated knowledge of the complex subject matter she is regulating. Thus, the quintessential image of an effective administrator becomes a person with both expertise and vision.¹²² This image of a decision maker with definitive views and extensive knowledge is problematic because it is not the image of an open-minded individual who will pay attention to comments and reach conclusions on the basis of the views that they present. Without an impartiality inappropriate to the policy making context, the statutorily required comments are once again reduced to readily ignored annoyances.

Judges are intimately familiar with issues of impartiality, of course, and they are alert to the distinction between rulemaking and adjudication. While they have overturned the results of adjudications because the decision maker had expressed strong views on its subject matter prior to the proceedings,¹²³ they have been quite reluctant to do so for informal rulemaking. Very often, courts have based this refusal on the nature of the policy making process.¹²⁴ Unwilling to

tacts by the White House, 80 COLUM. L. REV. 943, 961-62 (1980); Patricia M. Wald & Jonathan R. Siegel, *The D.C. Circuit and the Struggle for Control of Presidential Information*, 90 GEO. L.J. 737, 764-67 (2002).

¹²² See, e.g., THOMAS K. McCRAW, PROPHETS OF REGULATION 17-56, 261-99 (1984) (describing Charles Francis Adams as exemplary member and chair of the Massachusetts Board of Railroad Commissioners and Alfred Kahn as visionary chair of the Civil Aeronautics Board). See generally CORNELIUS M. KERWIN, RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY 144-54 (2d ed. 1999) (discussing the process that occurs within an agency when it generates and writes rules).

¹²³ See, e.g., *Cinderella Career & Finishing Schs., Inc. v. FTC*, 425 F.2d 583, 589-92 (D.C. Cir. 1970) (vacating order and remanding for further proceedings); *Texaco, Inc. v. FTC*, 336 F.2d 754, 760-63 (D.C. Cir. 1964), *vacated on other grounds*, 381 U.S. 739 (1965) (remanding to FTC with instructions to dismiss).

¹²⁴ See, e.g., *PLMRS Narrowband Corp. v. FCC*, 182 F.3d 995, 1002 (D.C. Cir. 1999); *C & W Fish Co. v. Fox*, 931 F.2d 1556, 1564-65 (D.C. Cir. 1991); *United Steelworkers of Am. v. Marshall*, 647 F.2d 1189, 1208-09 (D.C. Cir. 1980); *Ass'n of Nat'l Advertisers, Inc. v. FTC*, 627 F.2d 1151, 1168-69 (D.C. Cir. 1979); see Gellhorn & Robinson, *supra* note 118, at

abandon the adjudicatory principle of impartiality in its entirety, however, they have declared that a decision maker must be disqualified if there is clear and convincing evidence that he has “an unalterably closed mind on matters critical to the disposition of the proceeding.”¹²⁵ The double hurdle of a demanding standard of proof and an extremely exacting substantive rule testifies to the judges’ lurking sense that adjudicatory standards are simply inapplicable in the rulemaking context. Yet the rule itself remains, and serves as an indication that judges feel the need to exercise some control despite having no conceptual alternative to the judicial standards they recognize as inappropriate.

D. Modes of Administrative Action: Informal Adjudication

As already noted, informal adjudication is the APA’s residual category, the undefined artifact of the statute’s simultaneous distinctions between rulemaking and adjudication on one hand, and between formal and informal action on the other. The APA defines adjudication as an “agency process for the formulation of an order,”¹²⁶ and it defines order as “the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form.”¹²⁷ In theory, the definitions suggest that orders represent some subset of administrative actions, namely “final dispositions,” and that other agency actions lie outside the defined category. Because the statute imposes no procedural limits on informal adjudication, however, nothing turns on the question of inclusion or exclusion at the present time.

For the purpose of rewriting the APA and deciding whether to impose some procedural requirements, the problem with the existing definition of adjudication is that its categories of “affirmative, negative, injunctive and declaratory” action, and the term “adjudication” itself, are irretrievably judicial. What the drafters seem to have envisioned for informal adjudication, if they were envisioning anything at all, is a hearing of some sort, where evidence is taken or arguments are heard and a decision is rendered, even though that decision would not involve the rights of private parties and thus demand a formal process.¹²⁸ Civil trials, at least in England, had their origin in

216–17; Peter L. Strauss, *Disqualifications of Decisional Officials in Rulemaking*, 80 COLUM. L. REV. 990, 994–95 (1980).

¹²⁵ *Ass’n of Nat’l Advertisers*, 627 F.2d at 1170.

¹²⁶ 5 U.S.C. § 551(7) (2000).

¹²⁷ *Id.* § 551(6).

¹²⁸ As noted above, the “prompt notice” requirement of § 553(e), the one provision that imposes procedural requirements on informal adjudications, seems to be limited to situations of this kind. See *supra* note 64.

proceedings of this sort,¹²⁹ and they still constitute an important mode of administrative action, but they obviously represent only a small portion of the actions that fall outside the categories of rulemaking and formal adjudication. If one ignores the term "final" in the definition of an order, on the ground that any definitive action can be regarded as final, many more agency actions will be included in the category of informal adjudication, but one is still left without a description or framework for conceptualizing these actions, other than the attenuated and irrelevant judicial one.

Considering some of the administrative actions that are neither rulemaking nor formal adjudication illustrates the problem. One of the most distinctive and important aspects of administration is strategic planning, the process by which an agency decides how it will allocate its human, legal and physical resources in the future to achieve its goals.¹³⁰ For example, a regulatory agency might decide to devote more staff time to information gathering, a public health agency might decide to increase its stock of a vaccine, and a school district might decide to sell off some of its land or buildings. At what point does a conclusion reached in the planning process become a "final disposition?" More importantly, does answering this question tell us anything useful about the kinds of legal controls that should be imposed upon these actions?

Another important category of decisions, and one that implicates the same issues regarding the fair treatment of individuals as formal adjudications, involves policy implementation. Even in a situation where the agency is ultimately required to engage in formal adjudication, many of its crucial decisions lie outside the adjudicatory frame-

¹²⁹ In the Middle Ages, the government often obtained information by royal inquest. For example, Domesday Book, which represented the dawn of administrative government in England, was compiled by convening twelve knights or lawful men from every hundred to provide the desired information. 1 SIR WILLIAM HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 313 (A.L. Goodhart & H.G. Hanbury eds., 7th ed. 1956) (1931); F.W. MAITLAND, *THE CONSTITUTIONAL HISTORY OF ENGLAND* 122-23 (1911); THEODORE PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 111 (5th ed. 1956); 1 FREDERICK POLLOCK & FREDERIC MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I* 642 (2d ed. 1959). When trial by ordeal was abolished in 1219, see *supra* note 70 and accompanying text, England adapted the inquest to resolve disputes, see 1 HOLDSWORTH, *supra*, at 310-14; PLUCKNETT, *supra*, at 119; VAN CAENEGEM, *supra* note 70, at 73-76. As Maitland points out, the "royal process of ascertaining facts and rights by the sworn testimony of a body of neighbours [was] now placed at the disposal of ordinary litigants." MAITLAND, *supra*, at 125.

¹³⁰ See, e.g., JOHN FRIEDMANN, *PLANNING IN THE PUBLIC DOMAIN: FROM KNOWLEDGE TO ACTION* (1987); KELMAN, *supra* note 38, at 88-93; E.S. QUADE, *ANALYSIS FOR PUBLIC DECISIONS* 19-20 (1975). With respect to organizations generally (as opposed to specifically governmental organizations), see ROBERT N. ANTHONY, *PLANNING AND CONTROL SYSTEMS: A FRAMEWORK FOR ANALYSIS* 24-68 (1965); NORMAN MACINTOSH, *MANAGEMENT ACCOUNTING AND CONTROL SYSTEMS: AN ORGANIZATIONAL AND BEHAVIORAL APPROACH* (1994); HENRY MINTZBERG, *STRUCTURE IN FIVES: DESIGNING EFFECTIVE ORGANIZATIONS* 72-81 (1983).

work. A regulatory agency must investigate before it brings an enforcement proceeding, and because it typically lacks the resources to investigate all, or even a significant proportion, of the potential violators, it must make choices about the deployment of its scarce resources.¹³¹ These targeting decisions often have a greater impact upon regulated parties than does the sanction imposed by the resulting adjudication.¹³² An indictment, civil complaint, citation or cease and desist order produces an immediate effect on a firm's employees, investors, coventurers and contracting parties—the punishment or vindication will come many years later, often as an anticlimax. Moreover, many implementation decisions are unrelated to adjudication. Agencies can use investigations themselves—repeated visits by inspectors or demands for documents—as sanctions. In addition, they regularly negotiate, cajole, threaten, and plead with firms and individuals.¹³³ The agencies' ability to affect private behavior in these situations may not come from the possibility of imposing a formal sanction, but from granting or withholding a benefit or facilitating compliance with a regulation that the private party feels compelled to obey. Once again, it is difficult to know which of these actions represents a final disposition, and still more difficult to derive anything useful from this inquiry. The kinds of controls that might alleviate some of the fairness concerns raised by these administrative processes are absent from the APA.

It is notable that the APA was drafted with regulatory agencies in mind and that scholarship and teaching in administrative law have focused almost entirely upon such agencies. They are, of course, enormously important, but their staff members constitute a small fraction of federal employees, and their expenditures represent a correspondingly small proportion of the federal budget.¹³⁴ Most administrators work for, and most of the money is spent by, agencies that deliver services, generally through institutions. At the federal level, these include the armed forces, the veteran's hospitals, the intel-

¹³¹ See EUGENE BARDACH & ROBERT A. KAGAN, *GOING BY THE BOOK: THE PROBLEM OF REGULATORY UNREASONABLENESS: A TWENTIETH CENTURY FUND REPORT* 165–71 (1982).

¹³² See IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE* 19–53 (1992); EUGENE BARDACH, *THE IMPLEMENTATION GAME: WHAT HAPPENS AFTER A BILL BECOMES A LAW* 119–24 (1977); BARDACH & KAGAN, *supra* note 131, at 31–39; JOHN BRAITHWAITE, *TO PUNISH OR PERSUADE: ENFORCEMENT OF COAL MINE SAFETY* (1985); John Braithwaite et al., *An Enforcement Taxonomy of Regulatory Agencies*, 9 L. & POL'Y 323 (1987).

¹³³ See BARDACH & KAGAN, *supra* note 131, at 123–51.

¹³⁴ It is difficult to separate operational from regulatory employees. At the agency level, the independent agencies having primarily regulatory functions (i.e., excluding the General Services Administration, the National Archives, NASA, the Peace Corps, the Postal Service, and the Smithsonian) employ about 7.5% of all federal employees. See U.S. Census Bureau, *Statistical Abstract of the United States: 2002*, at 321 tbl. 475 (2002).

ligence services, such as the CIA and NSA, the national parks, monuments, wildlife refugees and forests, embassies and consulates, prisons, and the Federal Reserve Banks.¹³⁵ Nearly all the activities involved in the operation of these institutions—all the planning, budgeting, training, supervision, and actual implementation—presumably fall into the category of informal adjudication, at least to the extent that they are final. Clearly, therefore, the APA offers few conceptual resources for controlling the manner in which these institutions carry out their functions and interact with the public.

Judicial interpretation has not closed this lacuna in the APA. Even in the federal courts' more adventuresome days before *Vermont Yankee*, the APA simply provided no foothold, no conceptual framework, for imposing requirements on most actions that lay beyond the ambit of rulemaking and formal adjudication. Courts have been able to intervene only in certain types of cases, most notably when the action is sufficiently similar to an adjudication so that they could rely on their judicializing instincts, or when some legal requirement external to the APA provided them with a conceptual entry point.

Perhaps the best known example of the first type of judicial intervention is *Citizens to Preserve Overton Park, Inc. v. Volpe*.¹³⁶ The case involved the Department of Transportation's decision to route an interstate highway through a public park in Memphis, despite two federal statutes stating that parkland should not be used for highways unless there was no "feasible and prudent alternative."¹³⁷ Clearly the Department was subject to some sort of legal limitation, but the statute seemed to afford it considerable latitude and provided no standards for reviewing its decision. In responding to a citizens' group challenge, the district court¹³⁸ and the Supreme Court¹³⁹ had to rely on the APA. Under the APA, however, the decision fell into the category of informal adjudication, since it involved an allocation of a government resource, specifically a reallocation of land from one use to another.¹⁴⁰

¹³⁵ The Federal Reserve is also a major regulatory agency. Most of its staff and budget, however, are devoted to direct services: collecting checks, processing electronic payments, supplying cash, and buying and selling government securities to control the money supply. See MARTIN MAYER, *THE BANKERS* 125-83 (1974).

¹³⁶ 401 U.S. 402 (1971).

¹³⁷ See *id.* at 404-06, 404-05 nn.2, 3 (citing 23 U.S.C. § 138 (2000) and 49 U.S.C. § 1653(f) (2000)).

¹³⁸ See *Overton Park*, 309 F. Supp. 1189, 1193-95 (D. Tenn. 1970), *rev'd*, 401 U.S. 402 (1971).

¹³⁹ 401 U.S. at 413-21.

¹⁴⁰ See *id.* at 411-15. There were, of course, several levels of government involved, since the State of Tennessee, through its municipal creature, the City of Memphis, owned the land, and the federal Department of Transportation was making the challenged decision. *Id.* at 404-06. Under the federal highway program, states made the basic decisions on highway routing, and the Department of Transportation, which provided the bulk of

The Court was able to obtain a conceptual framework for analyzing the case because the Department of Transportation held a public hearing on the proposed route through the park. Hearings create a record, and that record can be reviewed by an appellate court to determine whether the challenged party—in this case, the Department of Transportation—violated the law.¹⁴¹ Moreover, hearings invoke public participation, and thus place the Department's decision making process within the range of APA procedures. Of course, since this hearing related to a decision that fell within the category of informal adjudication, there was no requirement that the decision be made "on the record after the opportunity for a hearing," and no requirement that the Department elicit public participation, but this gave the Court only momentary pause.¹⁴² While the decision did not need to be based on the record and no findings of fact were required, the Court nonetheless declared that a record was necessary so that the reviewing court could assess the legality of the agency's action.¹⁴³ This record must consist of "the full administrative record that was before the Secretary at the time he made his decision."¹⁴⁴ Moreover, if this record failed to disclose "the factors that were considered or the Secretary's construction of the evidence,"¹⁴⁵ the reviewing court "may require the administrative officials who participated in the decision to give testimony explaining their action."¹⁴⁶ Thus, although the APA does not require the agency to create a formal record in informal adjudications, it must nonetheless create some form of a record so that courts can review their actions, and that record must be comprehensive or the reviewing court can compel agency officials to testify.

the funding, approved them. See Oscar S. Gray, *Section 4(f) of the Department of Transportation Act*, 32 MD. L. REV. 327, 330–31 (1973). Despite the fact that the state and federal government were acting jointly, the decision was nonetheless an allocation of a governmental resource. Hence, the decision did not provide a general rule, nor did it affect any individual's legal rights.

¹⁴¹ See, e.g., *Goldberg v. Kelly*, 397 U.S. 254, 256 n.2 (1970); Henry J. Friendly, "Some Kind of Hearing," 123 U. PA. L. REV. 1267 (1975).

¹⁴² See *Overton Park*, 401 U.S. at 417.

¹⁴³ See *id.* at 419–21. The Court deepened the confusion that the case engendered by declaring that judicial review would aim to determine whether the agency had made a "clear error of judgment." *Id.* at 416. The clear error, or clearly erroneous standard, is what an appellate court uses to review the findings of fact in a bench trial. See FED. R. CIV. P. 52. This is almost certainly a more demanding standard than the Court intended. See *NAACP v. FCC*, 682 F.2d 993, 998 n.4 (D.C. Cir. 1982) ("Clear error of judgment is not synonymous with 'clearly erroneous.' It is a more limited criterion of review." (citation omitted)); *infra* note 216 (discussing use of clearly erroneous standard as part of substantial evidence test).

¹⁴⁴ *Overton Park*, 401 U.S. at 420.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

The expansion of the APA's procedural requirements that *Overton Park* effects is readily apparent.¹⁴⁷ Here the Department of Transportation, like most agencies in most cases, was subject to legislatively prescribed standards, and such standards should not be ignored or unreasonably distorted. Yet the controlling statute did not require a hearing, and thus the Court was only able to effect the expansion in *Overton Park* because the agency voluntarily decided to hold a hearing for an informal adjudication in the particular instance. It would be difficult to imagine the Supreme Court requiring the Department of Transportation to create a record had it decided, in a meeting of high-ranking administrators, to devote more resources to traffic safety research, or to allocate discretionary funds to public transit. It is equally difficult to imagine such a requirement if the Department had reached some agreement in a negotiation with a state or private firm. The procedural requirements that *Overton Park* devised are therefore parasitic on the agency's fortuitous choice to engage in trial-type procedure for collecting information. Reliance on such procedures will attract judicial attention the way honey attracts bears, and any agency that wants to avoid the added scrutiny attendant to an informal adjudication would be well advised to use some other mechanism for obtaining the public's views.

A second situation where judges tend to impose procedures on informal rulemaking is the cases that implicate some legal requirement external to the APA. The challenges to administrative information-gathering provide a prime example. Effective regulation demands large quantities of information, and this is frequently obtained by on-site inspections of regulated facilities.¹⁴⁸ But the entry of government investigators onto private property for the purpose of discovering violations of the law necessarily raises search and seizure concerns under the Fourth Amendment. Of course, the courts could have simply required the agency to obtain a warrant, which would have produced an extension of Fourth Amendment doctrine, but no distinctive body of administrative law. Instead, courts have discerned

¹⁴⁷ See Nathaniel L. Nathanson, *Probing the Mind of the Administrator: Hearing Variations and Standards of Judicial Review Under the Administrative Procedure Act and Other Federal Statutes*, 75 COLUM. L. REV. 721, 767-68 (1975) (arguing the *Overton Park* outcome was a "distortion[] of the original meaning of the APA"); Peter L. Strauss, *Revisiting Overton Park: Political and Judicial Controls Over Administrative Actions Affecting the Community*, 39 UCLA L. REV. 1251, 1328-29 (1992) (criticizing decision as imposing unjustified standard of review).

¹⁴⁸ There are, of course, numerous other ways in which agencies obtain information, and some of these have also been challenged on constitutional grounds. See, e.g., *Braswell v. United States*, 487 U.S. 99 (1988) (rejecting Fifth Amendment challenge to agency subpoena of business records); *United States v. Morton Salt Co.*, 338 U.S. 632 (1950) (rejecting Fourth Amendment challenge to agency requirement of special reports regarding compliance with prior cause and desist order).

that inspections by a regulatory agency are not quite the same as searches by the police, reasoning that while the two have obvious similarities, the imposition of a regulatory program by the legislature alters the balance between privacy and state necessity.

In *Camara v. Municipal Court of the City and County of San Francisco*¹⁴⁹ and *See v. Seattle*,¹⁵⁰ the Supreme Court held that both private residences and businesses may not be subjected to administrative inspections unless the agency obtains a warrant.¹⁵¹ However, the Court has subsequently recognized an exception for closely or pervasively regulated industries, such as firearms and ammunition, alcoholic beverages, mining, and, somewhat surprisingly, automobile junkyards.¹⁵² More significantly, the Court held in *Camara* and reiterated in the subsequent decision *Marshall v. Barlow's, Inc.*,¹⁵³ involving inspections under the Occupational Safety and Health Act (OSHA), that the agency did not need to demonstrate "probable cause in the criminal law sense" in order to obtain a warrant.¹⁵⁴ Rather, as the Court said in *Barlow's*, the agency need only demonstrate that "a specific business has been chosen for an OSHA search on the basis of a general administrative plan for the enforcement of the Act derived from neutral

¹⁴⁹ 387 U.S. 523 (1967) (requiring compliance with Fourth Amendment prior to entry by health inspector to determine whether building was being improperly used as a personal dwelling).

¹⁵⁰ 387 U.S. 541 (1967) (requiring compliance with Fourth Amendment prior to entry by fire department inspector to determine whether warehouse complied with fire code). The result in *See* extended Fourth Amendment protection to commercial properties as well as to administrative inspections. *See id.* at 544–46.

¹⁵¹ *Camara*, 387 U.S. at 540; *see id.* at 546. *Camara* and *See* were companion cases that overruled *Frank v. Maryland*, 359 U.S. 360 (1959) (holding that an entry by city health inspector to determine whether home was infested with rats did not require a warrant because it was part of a regulatory scheme).

¹⁵² *New York v. Burger*, 482 U.S. 691 (1987) (automobile junkyards); *Donovan v. Dewey*, 452 U.S. 594 (1981) (mining); *United States v. Biswell*, 406 U.S. 311 (1972) (firearms and ammunition); *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970) (alcoholic beverages). While firearms, liquor and mining can all be reasonably described as businesses that pose distinctive dangers to either the workers or the public, and that have been historically subject to stringent regulation (a point for which, with respect to liquor, one can offer a rare citation to the Eighteenth Amendment), automobile junkyards do not appear to fall into this category. In *Burger*, New York's stated concern was that some junkyards provided parts for stolen vehicles, *see* 482 U.S. at 708–09, but that is merely the sort of concern about crime that leads to police searches. The State's regulatory scheme simply required junkyards to register the business and maintain records of the vehicles and parts in the junkyard. *See id.* at 694 n.1. That is far removed from the usual idea of pervasive regulation, where entry is restricted by licensing, regular reports are required, and a specialized administrative agency, with its own officials, regularly monitors the activities of the licensed firms. There was no such agency in New York for junkyards, and the administrative agents who searched Burger's junkyard were uniformed police officers. *See id.* at 693–94.

¹⁵³ 436 U.S. 307 (1978) (invalidating warrantless inspection of electrical and plumbing installation business by OSHA official).

¹⁵⁴ *Id.* at 320.

sources.”¹⁵⁵ To complete the circle, the Court has also held, in the auto junkyard case *New York v. Burger*, that the creation of such a general administrative plan by the agency was an important factor in determining whether a pervasively regulated industry could be subjected to warrantless searches.¹⁵⁶

These administrative inspection cases are a doctrinal farrago. The recognized meaning of the warrant requirement is that a police officer must demonstrate to a judge that there is probable cause to conclude that the person has committed an offense before searching the person's residence or business.¹⁵⁷ If one eliminates probable cause and substitutes a completely different standard, such as “a general administrative plan,” there is little reason to describe the new requirement as a warrant. While this can certainly be regarded as diluting Fourth Amendment protection,¹⁵⁸ the accusation is beside the point. The judges who decided these cases had no intention of undermining the use of warrants in criminal law; rather, they were using the claim that a warrant is required to fashion an essentially new procedural requirement for one form of informal adjudication. Federal judges are fully aware that administrative agencies must collect large quantities of information, and they know that the probable cause requirement, designed for criminal cases, would be unacceptably disruptive in a regulatory context.¹⁵⁹ However, they are also

¹⁵⁵ *Id.* at 321.

¹⁵⁶ *Burger*, 482 U.S. at 701. *Burger* identified three criteria for determining whether an industry was pervasively regulated: whether there was a substantial government interest in the regulatory scheme, whether warrantless searches were necessary to further the regulatory program, and whether the government's inspection scheme, because of the “certainty and regularity of its application,” was a “constitutionally adequate substitute for a warrant.” *Id.* at 702–03 (citation omitted) (internal quotation marks omitted). Because *Burger* established a rather permissive test for pervasive regulation, *see supra* note 152 and accompanying text, and because the necessity of warrantless searches is easy to assert, this test will often reduce to the third criterion. Thus, the certainty and regularity of the inspection plan is simultaneously the basis for obtaining a warrant and the test for determining that no warrant is required.

¹⁵⁷ *See* FED. R. CRIM. P. 41(c).

¹⁵⁸ *See Barlow's, Inc.*, 436 U.S. at 326–28 (Stevens, J., dissenting); Geoffrey G. Hemphill, *The Administrative Search Doctrine: Isn't This Exactly What the Framers Were Trying to Avoid?*, 5 REGENT U. L. REV. 215, 217 (1995).

¹⁵⁹ The *Barlow's, Inc.* decision is positively apologetic about imposing any kind of warrant requirement on OSHA. Requiring warrants, it assures us, will not “impose serious burdens on the inspection system or the courts.” *Barlow's, Inc.*, 436 U.S. at 316. To begin with, “the great majority of businessmen can be expected in normal course to consent to inspection without warrant.” *Id.* (This is a bit like arguing that we should allow free speech because most people will keep their mouths shut.) Moreover, the agency inspector, having obtained a warrant, will still be able to show up and surprise the property owner. *See id.* at 317. Having provided these reassurances, the Court goes on to dispense with probable cause. *Id.* at 320. The dissent, written by Judge Stevens and joined by Justices Blackmun and Rehnquist, was grounded in concern for the integrity of the Fourth Amendment, not for the privacy of the regulated parties, and would have authorized administrative searches without a warrant. *See id.* at 328–29 (Stevens, J., dissenting). Thus, the Court

aware that such inspections can serve as an independent sanction and can be used in an unfair or abusive manner. Unfortunately, the APA provides no standards whatsoever for assessing the propriety of on-site inspections or most other forms of informal adjudication. So the judges fashioned the new requirement of a general administrative plan and used the Fourth Amendment as a vehicle to impose it on administrative agencies.¹⁶⁰ This provides some measure of supervision for on-site inspections, but it is something of a gimmick, and, as such, is unavailable for the great majority of other actions that reside within the vast, vacuous APA category of informal adjudication.

E. Legislative and Executive Supervision

Apart from prescribing procedures for rulemaking and formal adjudication, the original APA accomplishes one further task—it establishes standards for judicial review of administrative decisions. These standards and their application in particular cases have attracted a great amount of scholarly attention in the ensuing years,¹⁶¹ but the more basic and important point about the APA's judicial review provisions is that they codify only one mechanism for supervising and controlling administrative agencies. That mechanism, not surprisingly, is the one that prevailed in the pre-administrative era. When courts were the government's primary implementation mechanism, as well as the primary public policy makers, the only institution that had the authority and expertise to provide ongoing supervision of courts were other courts. Courts, in this supervisory or appellate role, remain an important source of legal control, and it would be wasteful and precipitous to dispense with them after eight hundred years of experience with this mechanism. In the modern administrative state, however, courts are only one means of controlling administrative agencies, and they are possibly the least important of the government's three traditional branches. The legislature, even excluding the act of legislation itself,¹⁶² and the executive, defined as comprising

was unanimously unopposed to permitting administrative searches without a finding of probable cause.

¹⁶⁰ It is common for courts, when engaged in policy making, to use positive law authorizations such as constitutional or statutory provisions as a basis for judicial jurisdiction, but not as a source of standards. For a general description and a justification of this approach, see FEELEY & RUBIN, *supra* note 43, at 14–15, 204–48. On-site inspection cases discussed above are a particularly clear example of judicial policy making.

¹⁶¹ See, e.g., Ronald M. Levin, *Understanding Unreviewability in Administrative Law*, 74 MINN. L. REV. 689 (1990); Cynthia Triyi, *Availability of Judicial Review in Administrative Action*, 55 GEO. WASH. L. REV. 729 (1987).

¹⁶² If control of the sort that the courts exercise means the supervision of an existing institution, then legislation creating an institution, such as the Federal Trade Commission Act, 15 U.S.C. §§ 41–58 (2000), or giving it a major new assignment, such as the Wheeler-Lea Act, Pub. L. No. 75-447, 52 Stat. 111 (1938) (amending the Federal Trade Commission Act and charging the FTC to regulate the advertising of products under the purview of the

the President and his immediate advisors,¹⁶³ exercise much more regular and powerful control over the administrative apparatus.

The APA, in its original form, made no attempt to codify these non-judicial means of controlling administrative agencies; in fact, it barely acknowledged their existence. The only exception is that the statute allows for, but does not require, agency review of adjudicatory decisions, following the pattern of appellate review.¹⁶⁴ The APA's failure to address nonjudicial supervision may be a wise decision, because some of these control mechanisms are either too basic, such as legislation, or too informal, such as intra-agency communication, to be captured by a procedural statute. But many other mechanisms have been subsequently codified, albeit haphazardly,¹⁶⁵ or are clearly amenable

FDA) is not properly regarded as control. Less major legislation, designed to restructure or redirect an agency, such as the Federal Trade Commission Improvements Act of 1980, 15 U.S.C. § 57a, may be properly regarded as a form of control, however. See JAMES R. BOWERS, *REGULATING THE REGULATORS: AN INTRODUCTION TO THE LEGISLATIVE OVERSIGHT OF ADMINISTRATIVE RULEMAKING* 79-99 (1990) (discussing "corrective legislation"). Even if such legislation is excluded, the legislature exercises extensive control of the administrative apparatus through the oversight process, the budget process, and the ongoing interaction with administrative staff. See *id.* at 18; MORRIS S. OGUL, *CONGRESS OVERSEES THE BUREAUCRACY: STUDIES OF LEGISLATIVE SUPERVISION* 11-22 (1976); Richard J. Lazarus, *The Neglected Question of Congressional Oversight of EPA: Quis Custodiet Ipsos Custodes (Who Shall Watch the Watchers Themselves)?*, 54 *LAW & CONTEMP. PROBS.* 205, 208-10 (1991); Matthew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 *AM. J. POL. SCI.* 167 (1984) (comparing the various styles of oversight and discussing the types of oversight that Congress tends to employ in deciding the regulatory issues); Matthew D. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 *VA. L. REV.* 431, 434 (1989). With respect to the legislative veto, see *infra* notes 166-72 and accompanying text.

¹⁶³ The traditional three branch model of government places the President and the administrative agencies together in the executive branch. As modern legal and political science scholarship fully recognizes, the President is separate from the agencies, and one of his principal responsibilities is to control them. See, e.g., AARON WILDAVSKY, *THE POLITICS OF THE BUDGETARY PROCESS* 18-31, 181-87 (4th ed. 1984); Elena Kagan, *Presidential Administration*, 114 *HARV. L. REV.* 2245 (2001); Peter M. Shane, *Political Accountability in a System of Checks and Balances: The Case of Presidential Review of Rulemaking*, 48 *ARK. L. REV.* 161 (1995). In contrast, the President's immediate staff, individuals, and small groups that interact directly with him and are not responsible for program implementation are properly regarded as part of his own office as chief executive, and not as administrative agencies that he is trying to control. See BRADLEY H. PATTERSON, JR., *THE WHITE HOUSE STAFF: INSIDE THE WEST WING AND BEYOND* 9-11 (2000); NELSON W. POLSBY, *CONGRESS AND THE PRESIDENCY* 77-84 (4th ed. 1986).

¹⁶⁴ 5 U.S.C. § 557(b) (2000). Most agencies provide some sort of internal review for adjudicatory decisions. See, e.g., 12 CFR § 19.40 (2003) (Comptroller of the Currency, Treasury); 16 CFR § 3.52 (2003) (Federal Trade Commission); 17 CFR §§ 9.1-9.33 (2003) (Commodity Futures Trading Commission); 47 CFR § 1.276 (2002) (Federal Communications Commission).

¹⁶⁵ See, e.g., 5 U.S.C. §§ 801-808 (review of regulation by Congress); Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (Fed. 17, 1981), amended by Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993), amended by Exec. Order No. 13,258, 67 Fed. Reg. 9,385 (Feb. 26, 2002) (regulatory analysis by OIRA); Exec. Order No. 12,866, 58 Fed. Reg. 57,735 (Sept. 30, 1993) (regulatory planning by OIRA).

to codification, and their continued omission from the APA creates uncertainty and makes the statute incomplete.

First, neither the oversight process nor the innumerable staff-to-staff contacts that occur between Congress and the administrative agencies make any appearance in the APA. Although these are well-developed practices, or sets of practices, following rules that are well-known to those involved in them, they have eluded any systemization and often eluded much official scrutiny as well. In fact, the only legislative control mechanism that has been scrutinized and ultimately codified is the legislative veto. Before 1983, a significant number of statutes, including several enacted before passage of the APA in 1946, were drafted with legislative veto provisions.¹⁶⁶ These allowed one house of Congress, or the relevant Congressional committee, to countermand the legislation and thereby exercise supervisory control over agency rulemaking.¹⁶⁷ When the Supreme Court invalidated the legislative veto in *INS v. Chadha*¹⁶⁸ on rather questionable separation of powers grounds,¹⁶⁹ Congress responded by openly disobeying the decision and enacting legislative vetoes despite the decision,¹⁷⁰ or by switching to "report and wait provisions," which require the agency to submit a regulation to Congress, and then wait for some designated period of time before implementing it.¹⁷¹ In 1996, Congress enacted a general report and wait provision for all "major" regulations, and this was codified as an amendment to the APA.¹⁷² It seems unlikely that such codification would have occurred, however, without the rather extreme provocation that the Supreme Court provided. Cer-

¹⁶⁶ See BARBARA CRAIG, *THE LEGISLATIVE VETO* 26–30 (1983); James Abourezk, *The Congressional Veto: A Contemporary Response to Executive Encroachment on Legislative Prerogatives*, 52 IND. L.J. 323, 324 (1977).

¹⁶⁷ See Abourezk, *supra* note 166, at 323–24; William N. Eskridge, Jr. & John Ferejohn, *Making the Deal Stick: Enforcing the Original Constitutional Structure of Lawmaking in the Modern Regulatory State*, 8 J. L. ECON. & ORG. 165, 177 (1992).

¹⁶⁸ 462 U.S. 919 (1983). For an account of the case, see BARBARA HINKSON CRAIG, *CHADHA: THE STORY OF AN EPIC CONSTITUTIONAL STRUGGLE* (1988).

¹⁶⁹ See E. Donald Elliott, *INS v. Chadha: The Administrative Constitution, the Constitution, and the Legislative Veto*, 1983 SUP. CT. REV. 125, 173–76; Peter L. Strauss, *Was There a Baby in the Bathwater? A Comment on the Supreme Court's Legislative Veto Decision*, 1983 DUKE L.J. 789, 794–801. *But see* Harold H. Bruff, *Legislative Formality, Administrative Rationality*, 63 TEX. L. REV. 207, 221–22 (1984) (defending the decision as "ensuring the fairness of legislation").

¹⁷⁰ LOUIS FISHER, *CONSTITUTIONAL DIALOGUES* 224–27 (1988); Joseph Cooper, *The Legislative Veto in the 1980s*, in CONGRESS RECONSIDERED 364 (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 3d ed. 1985); Joseph Cooper, *Postscript on the Congressional Veto: Is There Life After Chadha?*, 98 POL. SCI. Q. 427, 428 (1983) [hereinafter *Postscript*].

¹⁷¹ FISHER, *supra* note 170, at 227–29; Cooper, *Postscript*, *supra* note 170, at 429. During the waiting period, Congress of course has the opportunity to enact legislation that would prohibit the regulation. More practically, it has the opportunity to express its disapproval, something few agencies will have the temerity to ignore.

¹⁷² 5 U.S.C. §§ 801–808 (2000); see Daniel Cohen & Peter L. Strauss, *Regulatory Reform & the 104th Congress: Congressional Review of Agency Regulations*, 49 ADMIN. L. REV. 95, 96–97 (1997).

tainly, no effort has been made to systematize the oversight process, or any aspect of the ongoing, staff-level contact between Congress and the agencies.

The President and his immediate staff play an even more central role in supervising administrative agencies.¹⁷³ The Constitution apparently designates the President as the head of the executive branch,¹⁷⁴ but it is rather vague about his relationship with executive agencies, and says nothing about the identity or structure of these agencies. This lacuna became increasingly troublesome during the Progressive Era, as the number of executive officials and independent agencies proliferated without any organizing principle or internal logic.¹⁷⁵ In 1926, the massive, highly contested, and weakly argued decision in *Myers v. United States*¹⁷⁶ confirmed the President's authority to remove politically appointed officers in executive agencies, and, by natural implication, held that these administrators serve at his will, and must therefore follow his instructions. Nine years later, *Humphrey's Executor v. United States*¹⁷⁷ clarified the scope of the President's removal power and effectively insulated politically appointed officers in independent agencies from termination at will. Despite this history of ambiguity, controversy and ad hoc evolution, the APA chose to say nothing about the authority structure of the executive. Congress made no effort to specify the differences between executive and independent agencies, the nature of Presidential commands with respect to each type of agency, the internal command structure of those agencies, or any other aspect of executive supervision and control.

Even with respect to the executive agencies alone, it has long been apparent to students of the Presidency, and to Presidents themselves, that the President cannot personally supervise this massive ap-

¹⁷³ See THEODORE J. LOWI, *THE PERSONAL PRESIDENT: POWER INVESTED, PROMISE UNFULFILLED* 55-58 (1985); PATTERSON, *supra* note 163, at 16; PETER M. SHANE & HAROLD H. BRUFF, *THE LAW OF PRESIDENTIAL POWER* 343-66 (1988); Kagan, *supra* note 163, at 2281-2318 (examining Presidential oversight of agencies during the Clinton administration).

¹⁷⁴ U.S. CONST. art. II, § 1, cl. 1 ("The executive Power shall be vested in a President"); *id.* § 2, cl. 1 ("[The President] may require [an] Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices"); *id.* § 2, cl. 2 ("[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . all other Officers of the United States").

¹⁷⁵ See LEWIS L. GOULD, *REFORM AND REGULATION: AMERICAN POLITICS FROM ROOSEVELT TO WILSON* (2d ed. 1986); MORTON KELLER, *REGULATING A NEW ECONOMY: PUBLIC POLICY AND ECONOMIC CHANGE IN AMERICA, 1900-1933*, at 23-34 (1990); GABRIEL KOLKO, *THE TRIUMPH OF CONSERVATISM: A REINTERPRETATION OF AMERICAN HISTORY, 1900-1916*, at 94-112 (1963); Thomas K. McCraw, *Regulation in America: A Review Article*, 49 *BUS. HIST. REV.* 159, 161-62 (1975).

¹⁷⁶ 272 U.S. 52 (1926).

¹⁷⁷ 295 U.S. 602 (1935).

paratus. A formal response to this problem began when Richard Nixon created what was to become the Office of Information and Regulatory Affairs (OIRA) within the statutorily-established Office of Management and Budget (OMB).¹⁷⁸ This regulatory effort expanded during the two subsequent administrations.¹⁷⁹ In 1981, President Reagan issued an executive order¹⁸⁰ that required every executive agency to submit to OIRA any regulation with significant economic impact, together with a cost-benefit analysis of the regulation's impact.¹⁸¹ OIRA then reviews this material and disallows promulgation of any regulation whose benefits do not exceed its costs in OIRA's judgment.¹⁸² In 1985, Reagan extended OIRA review to earlier stages of the rulemaking process.¹⁸³ Every agency, including independent agencies, was also required, by executive order, to prepare an annual regulatory plan, describing all the initiatives that it expected to under-

¹⁷⁸ The creation of OMB coincided with the reorganization of the Bureau of the Budget. See Budget and Accounting Act of 1921, Pub. L. No. 67-13, § 207, 42 Stat. 20, 22 (1921) (codified as amended at 31 U.S.C. § 702 (2000) (creating the Bureau of the Budget); Morton Rosenberg, *Beyond the Limits of Executive Power: Presidential Control of Agency Rulemaking Under Executive Order 12,291*, 80 MICH. L. REV. 193, 221-24 (1981) [hereinafter Rosenberg, *Executive Power*]; Morton Rosenberg, *Presidential Control of Agency Rulemaking: An Analysis of Constitutional Issues that May Be Raised by Executive Order 12,291*, 23 ARIZ. L. REV. 1199, 1217-18 (1981) [hereinafter Rosenberg, *Presidential Control*]. The process was called "Quality of Life" review under Nixon, and focused primarily on the regulations of the Environmental Protection Agency. See Harold H. Bruff, *Presidential Management of Agency Rulemaking*, 57 GEO. WASH. L. REV. 533, 546-47 (1989).

¹⁷⁹ See Exec. Order No. 11,821, 39 Fed. Reg. 41,501 (Nov. 27, 1974) (Gerald Ford); Exec. Order No. 11,949, 42 Fed. Reg. 1,017 (Dec. 31, 1974) (Gerald Ford); Exec. Order No. 12,044, 43 Fed. Reg. 12,661 (Mar. 32, 1978) (Jimmy Carter). Carter created the Regulatory Analysis and Review Group (RARG) to carry out the review of regulations. See Regulatory Reform Message to Congress, 1 PUB. PAPERS OF JIMMY CARTER: 1979, at 492 (1980); GEORGE C. EADS & MICHAEL FIX, RELIEF OR REFORM? REAGAN'S REGULATORY DILEMMA 54-57 (1984).

¹⁸⁰ Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (Feb. 17, 1981) (Ronald Reagan), amended and combined with Exec. Order No. 12,498, 50 Fed. Reg. 1,036 (Jan. 4, 1985) (Ronald Reagan) in Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993) (William Clinton), amended by Exec. Order No. 13,258, 67 Fed. Reg. 9,385 (Feb. 26, 2002) (George W. Bush).

¹⁸¹ OIRA was created by the Paperwork Reduction Act of 1980, Pub. L. No. 96-511, § 3503, 94 Stat. 2812, 2814-15 (codified as re-enacted at 44 U.S.C. §§ 3501-3520 (2000)). Reagan's Executive Order 12,291 then assigned regulatory review to OIRA, thus making it the functional successor of Carter's RARG (although not the legal successor, because RARG was created by Presidential order, while OIRA was created by statute).

¹⁸² For descriptions of this process, see James F. Blumstein, *Regulatory Review by the Executive Office of the President: An Overview and Policy Analysis of Current Issues*, 51 DUKE L.J. 851, 863-70 (2001); Bruff, *supra* note 178, at 549-51; Harold H. Bruff, *Presidential Power and Administrative Rulemaking*, 88 YALE L.J. 451 (1979); Rosenberg, *Executive Power*, *supra* note 178, at 193-94; Rosenberg, *Presidential Control*, *supra* note 178, at 1203-04.

¹⁸³ Exec. Order No. 12,498, 50 Fed. Reg. 1,036 (Jan. 4, 1985) (Ronald Reagan), amended and combined with Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (Feb. 17, 1985) (Ronald Reagan) in Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993) (William Clinton), amended by Exec. Order No. 13,258, 67 Fed. Reg. 9,385 (Feb. 26, 2002) (George W. Bush).

take in the upcoming year.¹⁸⁴ This regulatory analysis has been supplemented by at least three legislative enactments: the Regulatory Flexibility Act,¹⁸⁵ which requires OMB to pay particular attention to the impact of regulation on small businesses; the Paperwork Reduction Act,¹⁸⁶ which gives OMB authority to review and approve agency requests for information; and the Unfunded Mandate Reform Act of 1915,¹⁸⁷ which requires cost-benefit analysis of regulations that have economic impact on state and local governments, as well as private parties.

The evolution of regulatory analysis has been a major and controversial development in modern administrative practice.¹⁸⁸ It occurred subsequent to the enactment of the APA and has not been incorporated into the statute, perhaps because the APA does not address executive supervision of the agencies, and thus provides no obvious site for attachment of these new requirements. The ad hoc and uncodified character of this evolution has led to a number of lacunae and ambiguities, regardless of what one thinks of the regulatory analysis. First, most aspects of regulatory analysis, because the President establishes them by order, do not apply to independent agencies,¹⁸⁹ although little rationale exists for distinguishing these agencies from their executive counterparts. Second, the procedural mechanism of regulatory review has been unnecessarily tied to the substantive technique of cost-benefit analysis, reducing the range of the technique and tinting it with an antiregulatory tone that is not always either intended or justified. Finally, OIRA and OMB, because they must approve new regulations, have become a locus for lobbying efforts, a

¹⁸⁴ Exec. Order 12,866 § 4(C).

¹⁸⁵ Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. §§ 601-612 (2000)).

¹⁸⁶ Pub. L. No. 96-511, 94 Stat. 2812 (1980) (codified as re-enacted at 44 U.S.C. §§ 3501-3520).

¹⁸⁷ Pub. L. No. 104-4, 109 Stat. 48 (1995) (codified in scattered sections of 2 U.S.C.).

¹⁸⁸ See, e.g., Christopher C. DeMuth & Douglas H. Ginsberg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075, 1081 (1986) (contending that OIRA review improves the quality of regulation by "encourag[ing] policy coordination, greater political accountability, and more balanced regulatory decisions"); E. Donald Elliott, *TQM-ing OMB: Or Why Regulatory Review Under Executive Order 12,291 Works Poorly and What President Clinton Should Do About It*, 57 LAW & CONTEMP. PROBS. 167, 168-71 (1994) (asserting that OIRA review is reactive and uncoordinated, failing to realize its potential for effectiveness); Alan B. Morrison, *OMB Interference with Agency Rulemaking: The Wrong Way to Write a Regulation*, 99 HARV. L. REV. 1059, 1064-71 (1986) (arguing that OIRA review improperly interferes with the rulemaking processes of administrative agencies); Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 43-95 (1995) (positing that OIRA review undermines agency authority and imposes the wrong values).

¹⁸⁹ Executive Order 12,291, § 2. The exception, as noted above, is that independent agencies are required to submit a regulatory agenda. This is merely a reporting requirement, however. In contrast, executive agencies are required to obtain OIRA approval before proceeding. Independent agencies have been urged to engage in regulatory review of their own, see U.S. REGULATORY COUNCIL, *A SURVEY OF TEN AGENCIES' EXPERIENCE WITH REGULATORY ANALYSIS* (1981), and sometimes do so.

second bite at the proverbial apple of governmental action for those who wish to delay or derail the administrative process.¹⁹⁰ These matters might benefit from systematic legislative resolution; moreover, they are precisely the kinds of issues that an act governing administrative procedure would be expected to address.

F. Judicial Control

The one control mechanism specified in the APA—and thus the only one incorporated into the general statutory scheme of administrative procedure—is judicial review. This Article has already discussed the inherently premodern nature of the judicial approach to governance. Having done so, it might seem otiose to describe the statute's approach to judicial review as itself premodern. Indeed, if judicial review is to be utilized—and this would certainly seem to be advisable¹⁹¹—then the resulting supervision would likely be judicial in character. Perhaps the APA should have provided for special administrative courts, similar to those in France,¹⁹² or to those that Congress subsequently created for the review of patent cases.¹⁹³ Administrative cases are often brutally complex, and judges who hear them regularly clearly benefit from the repeated exposure, while judges who do not may find their ordinary docket disrupted and their lives made rather

¹⁹⁰ See Erik D. Olson, *The Quiet Shift of Power: Office of Management & Budget Supervision of Environmental Protection Agency Rulemaking Under Executive Order 12,291*, 4 VA. J. NAT. RESOURCES L. 1, 55–64 (1984); Morrison, *supra* note 188, at 1067; Pildes & Sunstein, *supra* note 188, at 4–6.

¹⁹¹ Courts tend to agree, and display marked hostility to claims that a particular statute precludes judicial review. See *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479 (1991) (holding that Immigration Reform and Control Act's preclusion of judicial review of decisions regarding application does not preclude review of procedures employed for making these decisions); *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667 (1986) (holding that while Medicare Act precludes review of "amount determinations," it does not preclude substantial statutory and constitutional challenges); *Johnson v. Robison*, 415 U.S. 361 (1974) (holding that statute declaring that decisions by Veterans Administration shall be final and conclusive does not preclude judicial review in case of constitutional challenge); *Abbott Labs. v. Gardner*, 387 U.S. 136 (1967) (holding that Food, Drug, and Cosmetic Act, by specifying procedures for review of certain decisions, did not intend to preclude review of other decisions where procedures were not specified); Daniel B. Rodriguez, *The Presumption of Reviewability: A Study in Canonical Construction and Its Consequences*, 45 VAND. L. REV. 743, 751–65 (1992).

¹⁹² See L. NEVILLE BROWN & JOHN S. BELL, *FRENCH ADMINISTRATIVE LAW* 41–165 (4th ed. 1993); BERNARD SCHWARTZ, *FRENCH ADMINISTRATIVE LAW AND THE COMMON-LAW WORLD* (1954).

¹⁹³ See KENNETH J. BURCHFIEL, *BIOTECHNOLOGY AND THE FEDERAL CIRCUIT* (The Bureau of National Affairs, Inc., 1995); GILES S. RICH, *A BRIEF HISTORY OF THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS* (1980); Arti Rai, *Engaging Facts and Policy: A Multi-Institutional Approach to Patent System Reform*, 103 COLUM. L. REV. 1035 (2003). In 1982, the Court of Customs and Patent Appeals was merged with the appellate functions of the Court of Claims to form the Court of Appeals for the Federal Circuit. See Pub. L. No. 97-164, 96 Stat. 36 (1982) (codified at 28 U.S.C. § 1295 (2000)); Harold H. Bruff, *Specialized Courts in Administrative Law*, 43 ADMIN. L. REV. 329, 332–33 (1991).

miserable for the duration of the case.¹⁹⁴ But specialized courts bring disadvantages as well, and the emergence of the District of Columbia Circuit as the dominant administrative venue secures many of the countervailing advantages.¹⁹⁵

On a deeper level, however, the APA's judicial review provisions are indeed premodern and overly judicial. The problem does not reside in the authorization of judicial review, or in the structure or procedures of the reviewing courts, but in the APA's characterization of the decision being reviewed. APA cases generally review the decisions of an administrative agency, a massive, hierarchical, specialized organization, with different decision-making levels and its own internal procedures for appeal and review. The APA, however, treats the decision under review as either legislation or a judicial adjudication. That is, it relies on the dichotomous division of government action that emerged from the pre-administrative era and ultimately prevailed in the statute's implicit four-box grid. This has the virtue of familiarity, but since an agency is a very different institution from either a legislature or a court, the approach creates serious perplexities.

In providing for judicial review, the APA states two substantive standards which apply to actions that the court is reviewing. All actions, including rules, must be struck down if they are "arbitrary and capricious,"¹⁹⁶ while formal adjudications must be reversed if they are "unsupported by substantial evidence."¹⁹⁷ These standards have proven difficult to apply, and many commentators have noted that there is little difference in the ways in which they are employed.¹⁹⁸ In addition, the statute does not provide any procedural standard for the court to follow in making these substantive determinations.¹⁹⁹ Evi-

¹⁹⁴ See Bruff, *supra* note 193 (suggesting the creation of a separate administrative court to hear cases that have certain characteristics).

¹⁹⁵ Venue rules centralizing review in the District of Columbia Circuit have generally been replaced by the general venue statute, allowing a person to sue an agency in her district of residence, where the action arose, or where a defendant resides. 28 U.S.C. § 1391(e) (2000); see Cass R. Sunstein, *Participation, Public Law, and Venue Reform*, 49 U. CHI. L. REV. 976, 978-79 (1982). Because most important cases are brought by organizations, see *supra* notes 34-37, and because these organizations, or their government relations departments, are located in Washington, the D.C. Circuit remains the court of choice for litigation against administrative agencies.

¹⁹⁶ See 5 U.S.C. § 706(2)(A) (2000).

¹⁹⁷ See *id.* § 706(2)(E).

¹⁹⁸ Friendly, *supra* note 141, at 1313-14; Garland, *supra* note 100, at 533-34; Pedersen, *supra* note 101, at 48-49; Antonin Scalia & Frank Goodman, *Procedural Aspects of the Consumer Product Safety Act*, 20 UCLA L. REV. 899, 935 n.138 (1973); Paul R. Verkuil, *Judicial Review of Informal Rulemaking*, 60 VA. L. REV. 185, 222-23 (1974).

¹⁹⁹ One possible exception is the *de novo* standard. Section 706(2)(F) states that courts should overturn any agency action "unwarranted by the facts to the extent that the facts are subject to trial *de novo* by the reviewing court." 5 U.S.C. § 706(2)(F). In other words, the substantive standard is "unwarranted by the facts" and the procedural standard is "trial *de novo*," that is, the court exercises its own judgment, giving no weight to the

dently the authors of the Act were so focused on the idea that agency action was either legislation-like or adjudication-like that they neglected to consider the institutional realities of the courts, and specifically the need to tell courts by what standard the moving party would need to prove its claim that the agency action was arbitrary and capricious or lacking in substantial evidence.

An action that violates the more lenient arbitrary and capricious standard appears to lack any possible justification and thus to be irrational. As a result, this standard of review appears equivalent to the modern due process standard of minimum rationality, which applies to legislation that does not implicate a specified constitutional right.²⁰⁰ In fact, Justice Brandeis authored a unanimous Supreme Court decision to this effect a few years before Congress began drafting the APA.²⁰¹ The problem is that the actions involved are not those of a legislature—a popularly elected body with supreme policy making authority—but of an agency, an institution composed of appointed officials that must operate according to the commands of, and within the confines established by, that policy making authority. Therefore, to uphold any agency action that meets such a lenient standard seems inappropriate, and courts have instinctively resisted this result. Their resistance provides a way to understand what Merrick Garland has described as the substantive aspect of the “hard look” doctrine, the aspect that courts have used to guide their own decision making

agency decision. This standard was common at the time the APA was drafted, see Ronald M. Levin, *Scope-of-Review Doctrine Restated: An Administrative Law Section Report*, 38 ADMIN. L. REV. 239, 273–77 (1986), but it has largely been abandoned, see *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971); Levin, *supra*, at 273–74. A rare exception is *Porter v. Califano*, 592 F.2d 770 (5th Cir. 1979), in which the appellate court concluded that facts related to constitutional claims should be considered on a *de novo* basis. *Id.* at 782.

²⁰⁰ See *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 314 (1993) (“On rational-basis review, a classification in a statute such as the Cable Act comes to us bearing a strong presumption of validity” (citation omitted)); *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (“Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest.”); *Williamson v. Lee Optical*, 348 U.S. 483, 488 (1955) (“It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.”); *Nebbia v. New York*, 291 U.S. 502, 537 (1934) (“So far as the requirement of due process is concerned, . . . a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare. . . .”). See generally JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* (1980) (arguing that judicial review should be reserved for situations involving human rights or fundamental interests where there is a breakdown in the political process); ELY, *supra* note 91, at 43–72, 181–83 (same).

²⁰¹ *Pac. States Box & Basket Co. v. White*, 296 U.S. 176, 186 (1935) (“[W]here the regulation is within the scope of authority legally delegated, the presumption of the existence of facts justifying its specific exercise attaches alike to statutes . . . and to orders of administrative bodies.”).

process.²⁰² What Garland called the quasi-procedural hard look doctrine, the requirement that agencies take a hard look at the evidence provided in the notice and comment process, was ostensibly rejected by the Supreme Court in *Vermont Yankee*.²⁰³ But the substantive hard look doctrine, which announces that courts will take a hard look at the quality of the agency's overall decision making, remains in force. Reviewing courts are not willing to accept the APA's implication that they should treat an agency like a legislature. Further, the APA provides no guidance on procedural standards, and, as a result, courts may feel more free to fashion such standards for themselves.

The leading case on this point, and one of the most important in modern administrative law, is *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*²⁰⁴ *State Farm* challenged the National Highway Traffic Safety Administration's (NHTSA) rescission of a regulation.²⁰⁵ NHTSA, apparently responding to the policy objectives of the Reagan administration,²⁰⁶ had rescinded its regulation requiring the installation of passenger safety devices on automobiles.²⁰⁷ In this decision and a separate opinion, every member of the Court agreed. The Court held that an agency could not simply rescind a previously enacted regulation without explaining why its previous conclusions concerning the necessity for the regulation no longer applied.²⁰⁸ Clearly, this is a different standard from the one imposed on a legislature, which can repeal a statute without explanation, and is regarded as fully justified if it does so on the basis that the majority of the repealing legislature has a different political affiliation from the majority of the enacting one.

Further judicial resistance to the APA's apparent analogy between legislation and rulemaking is provided by the Supreme Court's decision in *Chevron, U.S.A., Inc. v. NRDC*,²⁰⁹ perhaps the most important case in modern administrative law. Decided one year after *State*

²⁰² See Garland, *supra* note 100, at 532-42.

²⁰³ See *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 439 U.S. 961 (1978); Garland, *supra* note 100, at 528-31.

²⁰⁴ 463 U.S. 29 (1983).

²⁰⁵ *Id.* at 33-34.

²⁰⁶ See *id.* at 59 (Rehnquist, J., concurring in part and dissenting in part) ("The agency's changed view of the standard seems to be related to the election of a new President of a different political party."); CHRISTOPHER F. EDLEY, JR., *ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREAUCRACY* 63-65 (1990); Garland, *supra* note 100, at 543; Mashaw & Harfst, *supra* note 5, at 312-13.

²⁰⁷ *State Farm*, 463 U.S. at 34.

²⁰⁸ See *id.* at 57. In so doing, the Court specifically rejected the assertion that arbitrary and capricious review was equivalent to minimum rationality review of a statute: "We do not view as equivalent the presumption of constitutionality afforded legislation drafted by Congress and the presumption of regularity afforded an agency in fulfilling its statutory mandate." *Id.* at 43 n.9.

²⁰⁹ 467 U.S. 837 (1984).

Farm, *Chevron* grappled with the standard that courts should employ when evaluating an agency's interpretation of a statute in the rulemaking process, that is, the procedural standard for review of agency interpretations. Again, the APA is silent on the subject. There is no question that the agency, in carrying out its statutory authority to make rules, is interpreting the statute itself, because its rules are supposed to implement the statute's policy.²¹⁰ Recognition of this obvious fact, however, acknowledges the breakdown of the APA's implicit analogy between legislation and agency rulemaking, because a legislature generally does not engage in statutory interpretation.²¹¹ When the legislature speaks, at least through legislation, it does so with the same level of authority as it did in drafting prior legislation.²¹² Therefore, even if the legislature refers to a pre-existing statute, its new pronouncement changes that statute to whatever extent it is inconsistent rather than interpreting the statute.²¹³ Simply asking the initial question in the *Chevron* case, even before the Court provided its answer, thus represented a rejection of the idea that an agency rulemaking is equivalent to legislation.

Chevron's answer reveals further conceptual difficulties. The case holds that agency interpretations are to be reviewed according to a two-step formula. First, "[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."²¹⁴ Second, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a

²¹⁰ See Jerry L. Mashaw, *Agency Statutory Interpretation*, in ISSUES IN LEGAL SCHOLARSHIP (2002): Article 9, at <http://www.bepress.com/ils/iss3/art9>; Edward Rubin, *Dynamic Statutory Interpretation in the Administrative State*, in ISSUES IN LEGAL SCHOLARSHIP (2002): Article 2, at <http://www.bepress.com/ils/iss3/art2>.

²¹¹ It does, of course, interpret legislation through the oversight process and staff level contacts. See BOWERS, *supra* note 162, at 18–27; MARCUS E. ETHRIDGE, LEGISLATIVE PARTICIPATION IN IMPLEMENTATION: POLICY THROUGH POLITICS 38–66 (1985). But this is not the analogy upon which the APA's rulemaking procedures are based.

²¹² There is nothing to stop the legislators from enacting a statute that binds them, see H.L.A. HART, THE CONCEPT OF LAW 42–43 (1961), but there is likewise nothing to stop them from repealing the statute. The Constitution places at least one limit on the repeal of legislation by means of the Contracts Clause, but it is only applicable to state legislation, U.S. CONST. art. I, § 10, cl. 1; see *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977) (invalidating repeal of statutory covenant limiting use of bond funds); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810) (invalidating legislation annulling land titles granted by legislature), but this simply forbids one type of statute, just as the First Amendment forbids certain types of statutes, and does not affect the legislature's general ability to repeal its prior enactments.

²¹³ It is theoretically possible that the legislature could make a statement in a statute that declared itself to be merely an interpretation of a prior statute, that is, say something about a prior statute but declare that the prior statute controlled, and that judicial interpretations of the prior statute would take precedence over the legislature's own interpretation.

²¹⁴ *Chevron*, 467 U.S. at 842–43.

permissible construction of the statute.”²¹⁵ Thus, if the statute is clear, the agency interpretation will be reviewed *de novo*, with no deference given to the agency, but if the statute is deemed ambiguous, deference will be extensive. This is reminiscent of the standard that an appellate court uses when reviewing a bench trial: the appellate court will review questions of law *de novo*, but will recognize a zone of discretion for matters that lie within the special expertise of the trial court, and will reverse only if the trial court’s decision is “clearly erroneous.”²¹⁶ *Chevron* seems to analogize unambiguous law in the rulemaking setting to legal conclusions in the bench trial, and ambiguous law to factual determinations by the judge.²¹⁷ In other words, once the analogy between rulemaking and legislation failed, as it necessarily did when the Court envisioned the agency as an interpreter of law, the *Chevron* Court had recourse to the only other model that the APA suggests and the only model that was conceptually available—the model of judicial adjudication. Just as the APA and the courts, in attempting to impose procedural requirements on rulemaking, have turned to the judicial model because their preferred model, legislation, offers no procedural requirements, the *Chevron* Court, in its effort to fashion a standard of review for statutory interpretation in agency rulemaking, turned to the judicial model because the legislation model offered no standards of its own for interpreting a statute.²¹⁸

²¹⁵ *Id.* at 843. For discussions of this two-step test, see Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 456–67 (1989); Ronald M. Levin, *The Anatomy of Chevron: Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253 (1997); Richard J. Pierce, Jr., *Chevron and its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VAND. L. REV. 301 (1988); Mark Seidenfeld, *A Synco-pated Chevron: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV. 83, 103–24 (1994); Kenneth W. Starr, *Judicial Review in the Post-Chevron Era*, 3 YALE J. ON REG. 283, 287–88 (1986); Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court’s Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1117–26 (1987); Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2083–85 (1990).

²¹⁶ FED. R. CIV. P. 52(a) (“Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.”). This is likely not the clearly erroneous standard that the Court adopted in *Overton Park*. See *supra* note 143 and accompanying text; *infra* note 229 and accompanying text.

²¹⁷ The analogy between ambiguous statutes and findings of fact is buttressed by the idea that, in both cases, the decision maker being reviewed—the agency or the trial court—has been authorized to use its expertise to gather evidence and make a judgment. This judgment is based on direct exposure to the evidence, which would be difficult for an appellate court to second-guess. The agency gathers its evidence in the notice and comment process, which is, as noted above, a partial judicialization of agency rulemaking.

²¹⁸ The Court’s recent decision in *United States v. Mead Corp.*, 533 U.S. 218 (2001), held that agency interpretations that are not based on an explicit grant of Congressional authority are not entitled to deference under the *Chevron* rule, but only to a lower level of deference specified in the earlier case of *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). These additional distinctions will only add to the complexity of a rule that is already difficult for

The APA's substantial evidence standard for reviewing adjudication is somewhat similar to the *Chevron* doctrine.²¹⁹ The reviewing court examines questions of law *de novo*, while questions of fact—when the decision maker being reviewed has direct exposure to the evidence—are to be treated with deference. The analogy that underlies this standard, however, is not found in appellate practice, but rather in the review of a jury finding by a trial judge. The federal courts established the substantial evidence test²²⁰ in a series of pre-APA cases interpreting the National Labor Relations Act,²²¹ and described substantial evidence as being “enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.”²²² When the APA was drafted, it incorporated the judicially developed substantial evidence test, in preference to formulae that were perceived as more demanding, thus implying Congressional acceptance of the trial verdict analogy.²²³ The statute did add, however, that the court, in making this determination, “shall review the whole record.”²²⁴

A judicial analogy of this sort might not appear to create the same conceptual difficulties with respect to adjudication as it does when applied to rulemaking. While it may be problematic to treat agency rulemaking like a bench trial, it would appear, at first, to be much less troublesome to treat an agency adjudication like a jury determination. Both agency adjudications and jury verdicts are, after all, fact finding decisions in an adjudicatory context. Nonetheless, an agency is not comparable to a jury; it is a multilevel, hierarchical institution with its own internal review procedures. Once agency decision makers other than the original hearing officer or administrative law judge become involved in the decision, the analogy between an agency and a jury breaks down. A breakdown of this sort was apparent in the most fa-

courts to follow. See Peter H. Schuck & E. Donald Elliott, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 1023–36.

²¹⁹ See 5 U.S.C. § 706(2)(E) (2000).

²²⁰ See *NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300 (1939) (stating that substantial evidence “must do more than create a suspicion of the existence of the fact to be established”); *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938) (explaining that substantial evidence “means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion”); *Wash., Va. & Md. Coach Co. v. NLRB*, 301 U.S. 142, 146–47 (1937) (implicitly construing the term “evidence” in the statute to mean “substantial evidence”).

²²¹ Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151–169 (2000)). The Act provides: “The findings of the Board as to the facts, if supported by evidence, shall be conclusive.” *Id.* § 10(e), 49 Stat. at 454.

²²² *Columbian Enameling*, 306 U.S. at 300.

²²³ One of these more demanding standards was the “clearly erroneous” standard for review of a judge’s findings of fact by an appellate court, see *FED. R. CIV. P.* 52(a), or a master’s findings by a trial court, see *id.*

²²⁴ 5 U.S.C. § 706.

mous case construing the APA's substantial evidence test, *NLRB v. Universal Camera Corp.*²²⁵

In *Universal Camera*, the National Labor Relations Board's trial examiner found that the dismissal of an employee, who was somewhat confusingly named Chairman, was not an unfair labor practice.²²⁶ The Board reversed, finding that Chairman had been dismissed in retaliation for his pro-union testimony at a representation hearing, and ordered his reinstatement.²²⁷ When the case was appealed, the Court of Appeals for the Second Circuit had to determine the meaning of the substantial evidence test in this procedural setting. Judge Hand, writing for the majority,²²⁸ concluded that taking the trial examiner's conclusion into consideration would necessarily impose a higher standard of review than the substantial evidence test allowed.²²⁹ The only way to preserve the relatively lenient standard of review that the substantial evidence test required was to ignore the conclusions of the trial examiner, and look only to the facts that the examiner had found and to the plausibility of the Board's decision.²³⁰ In assessing this decision, Judge Hand declared, the proper institutional analogy was to a

²²⁵ 179 F.2d 749 (2d Cir. 1950), *vacated by* 340 U.S. 474 (1951).

²²⁶ *See id.* at 750.

²²⁷ *See id.* at 751.

²²⁸ Judge Frank joined the opinion, and Judge Swan dissented. *Id.* at 775 (Swan, J., dissenting).

²²⁹ *Id.* at 753. Hand reasoned:

[I]t is practically impossible for a court, upon review of those findings which the Board itself substitutes, to consider the Board's reversal as a factor in the court's own decision. This we say, because we cannot find any middle ground between doing that and treating such a reversal as error, whenever it would be such, if done by a judge to a master in equity.

Id. Analogizing review of the Board's response to its trial examiner to review of a trial judge's response to a master is problematic because the latter situation involves a higher level of scrutiny, due to the fact that a trial judge is only supposed to reverse the master's findings when they are "clearly erroneous." FED. R. CIV. P. 53(e)(2) ("In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous."). In contrast, an agency board is permitted to review the facts found by the trial examiner de novo—the board is allowed to substitute its own findings for those of the trial examiner.

The clearly erroneous standard, as discussed above, *see supra* note 143 and accompanying text, is considered more demanding than the substantial evidence test. In the latter test, the clearly erroneous standard is not used as the standard by which an appellate court reviews an agency decision but as a comparison with the standard by which the court should judge that agency's treatment of its trial examiner's conclusions. In that context, it appears to be too weak a standard because the agency has the authority to review its trial examiner's findings de novo, that is, to substitute new findings. To hold the agency to the clearly erroneous standard that a district court must use to evaluate a master's findings would excessively restrict the agency's authority. Judge Hand wanted to avoid this result, which he anticipated if a reviewing court treated an agency reversal of its hearing officer as less authoritative than an agency affirmation.

²³⁰ Of course, the trial examiner's finding of fact would still be considered, as it was part of the record.

special verdict of a jury, which must be sustained if the conclusion was “within the bounds of rational entertainment.”²³¹

The Supreme Court, in an opinion written by Justice Frankfurter, reversed the Court of Appeals.²³² Citing the statutory language, the Court held that the substantial evidence test required an examination of the entire record, excluding the trial examiner’s conclusions, and could not be limited to an assessment of the Board’s decision alone.²³³ Justice Frankfurter rejected Judge Hand’s binary choice between ignoring the conclusions of the hearing examiner and applying the more demanding clearly erroneous standard. “[W]e do not find ourselves pinioned between the horns of his dilemma,”²³⁴ Frankfurter wrote, while conceding that “to give the examiner’s findings less finality than a master’s and yet entitle them to consideration in striking the account, is to introduce another and an unruly factor into the judgmental process of review.”²³⁵ The rule of *Universal Camera* is still the leading interpretation of the APA’s substantial evidence test.

This rule does not resolve the conceptual difficulties of treating an agency like a jury, however, and criticisms of the substantial evidence test’s coherence have bedeviled it ever since.²³⁶ One of the best indications of these difficulties is the disposition of the case on remand.²³⁷ Although Judge Hand was famous as a judicial craftsman, he simply refused to follow the Supreme Court opinion. Having one horn of his dilemma—that is, ignoring the trial examiner’s decision—cut off by the Court, he simply chose the other horn. He reversed the Board’s order, holding that the trial examiner’s “findings on veracity must not be overruled without a very substantial preponderance in the testimony as recorded.”²³⁸ Apparently, Judge Hand felt it would be impossible to formulate a coherent standard of review if one read substantial evidence an assessment of the entire record, including the conclusions of the trial examiner. This quandary, of course, arises from the complexity of reviewing a decision by the Board of an administrative agency that is itself an appeal from an administrative hearing

²³¹ 179 F.2d at 754.

²³² *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).

²³³ *See id.* at 488–89.

²³⁴ *Id.* at 493.

²³⁵ *Id.*

²³⁶ *See, e.g.*, Louis L. Jaffe, *Judicial Review: “Substantial Evidence on the Whole Record,”* 64 HARV. L. REV. 1233 (1951); Sidney A. Shapiro & Richard E. Levy, *Judicial Incentives and Indeterminacy in Substantive Review of Administrative Decisions*, 44 DUKE L.J. 1051 (1995); Paul R. Verkuil, *An Outcomes Analysis of Scope of Review Standards*, 44 WM. & MARY L. REV. 679, 682–93 (2002).

²³⁷ *See NLRB v. Universal Camera Corp.*, 190 F.2d 429 (2d Cir. 1951).

²³⁸ *Id.* at 430. Judge Frank, in a concurring opinion, took issue with Judge Hand’s intransigence, but he did so very gently, characterizing it as excessive modesty. *See id.* at 431.

officer. The APA's analogy to judicial practice in this setting, like that analogy in other settings, and like the APA's analogies to legislation, is too perplexing to serve as an effective means of controlling and legalizing the administrative apparatus.²³⁹

II

SUGGESTIONS FOR AN ADMINISTRATIVE APA

As stated at the outset, the purpose of this second Part of the Article is not to draft a new statute or even to resolve all the issues that would arise if such an effort were to be undertaken. Rather, drawing from Weber's theory of bureaucracy, it suggests general principles that should govern an administrative procedure act for the administrative state, and uses these principles to identify the major provisions that such an act would include.²⁴⁰ This Part will present these principles in the order of the existing act—rulemaking, adjudication, informal rulemaking or executive action, and judicial review. This is not meant to suggest that the order should be used in drafting a revised statute, but only to facilitate a comparison between the proposal and the existing APA.

A. The Nature of Administrative Government

The natural starting point for drafting an effective administrative procedure statute is a basic understanding of administrative government.²⁴¹ Max Weber, writing at the beginning of the twentieth century, provided such an understanding,²⁴² and while some of his specific conclusions have been challenged,²⁴³ his underlying insight

²³⁹ Nor does the Supreme Court itself seem willing to live with the standard it articulated. In *Allentown Mack Sales and Service, Inc. v. NLRB*, 522 U.S. 359 (1998), the Court reversed an NLRB adjudication by re-evaluating the evidence presented to the ALJ in a much more searching manner than its opinion in *Universal Camera* would suggest. *See id.* at 366–71. The decision was at least partially motivated by the Court's longstanding dissatisfaction with the NLRB's refusal to use its rulemaking authority, and to instead make policy through adjudication, *see NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 764–66 (1969) (upholding NLRB adjudicatory decision, but stating that the Board violated APA procedures in establishing a rule through adjudication); *id.* at 781 (Harlan, J., dissenting) (reasoning that the decision could not stand because the NLRB violated the APA); Joan Flynn, *The Costs and Benefits of "Hiding the Ball": NLRB Policymaking and the Failure of Judicial Review*, 75 B.U. L. REV. 387 (1995); William T. Mayton, *The Legislative Resolution of the Rulemaking Versus Adjudication Problem in Agency Lawmaking*, 1980 DUKE L.J. 103, 117–19, but it also indicates the instability of the Court's standard of review for agency adjudication.

²⁴⁰ For the view that some of the suggested results could be achieved through a different interpretation of the existing APA, *see COLBURN, supra note 95.*

²⁴¹ *See Croley, supra note 9*, at 166–68.

²⁴² 1, 2 WEBER, *supra note 13*, at 212–26, 956–1002, 1393–1405.

²⁴³ *See ALVIN W. GOULDNER, PATTERNS OF INDUSTRIAL BUREAUCRACY 15–29 (1954)* (arguing that Weber's theory incorporates outmoded ideas about managerial efficiency); WOLFGANG J. MOMMSEN, *THE AGE OF BUREAUCRACY 14–20 (1974)* (contending that Weber's theory uses ideal types, rather than being grounded in actual historical developments);

remains central to almost all contemporary accounts of bureaucracy in sociology, political science and political theory.²⁴⁴ The principal elements of his theory of bureaucracy,²⁴⁵ which will be discussed in turn below, are instrumental rationality, the rational-legal mode of legitimate domination, jurisdiction, hierarchy, vocation, and continuity.²⁴⁶ While Weber is philosophically sophisticated, and made important contributions to epistemology,²⁴⁷ there is nothing abstract about his theory of bureaucracy. He was, and conceived of himself as, a sociologist devoted to describing modern political, social and economic relations as they actually exist.²⁴⁸

1. *Purpose*

According to Weber, there are two kinds of rationality—instrumental rationality and value rationality.²⁴⁹ The simplest explanation of this distinction is that value rationality involves the choice of ultimate ends, while instrumental rationality involves the choice of means that are best suited to achieve a pre-established end.²⁵⁰ This simple

Carl J. Friedrich, *Some Observations on Weber's Analysis of Bureaucracy*, in *READER IN BUREAUCRACY* 27 (Robert K. Merton et al. eds., 1952) (positing that Weber's theory incorporates outmoded management techniques).

²⁴⁴ For contemporary administrative law accounts that highlight the distinctive character of bureaucracy, see COLBURN, *supra* note 95; Croley, *supra* note 9; Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 *HARV. L. REV.* 1511 (1992).

²⁴⁵ Although Weber uses the term "bureaucracy" it will be avoided here, except when quoting or paraphrasing his work, because of its excessively negative associations, see generally MICHAEL BARZELAY, *BREAKING THROUGH BUREAUCRACY* (1992) (expressing the view that bureaucracy creates rigid, unimaginative governance); F.A. HAYEK, *THE ROAD TO SERFDOM* (15th ed. 1994) (asserting that bureaucracy destroys personal freedom); HOWARD, *supra* note 16 (arguing that bureaucracy suppresses beneficial public and private initiatives); HENRY JACOBY, *THE BUREAUCRATIZATION OF THE WORLD* (Eveline L. Kaner trans., 1973) (contending that bureaucracy displaces diversity of culture); LEON TROTSKY, *THE REVOLUTION BETRAYED: WHAT IS THE SOVIET UNION AND WHERE IS IT GOING?* 284–90 (Max Eastman trans., 1937) (positing that bureaucracy destroys genuine Communism); David Luban et al., *Moral Responsibility in the Age of Bureaucracy*, 90 *MICH. L. REV.* 2348, 2348–56 (1992) (claiming that bureaucracy breeds fascism).

²⁴⁶ See 1 WEBER, *supra* note 13, at 217–20.

²⁴⁷ MAX WEBER, *THE METHODOLOGY OF THE SOCIAL SCIENCES* (Edward A. Shils & Henry A. Finch eds. & trans., 1949). See THOMAS BURGER, *MAX WEBER'S THEORY OF CONCEPT FORMATION: HISTORY, LAWS AND IDEAL TYPES* (1976); LÖWITH, *supra* note 15 (same); FRITZ RINGER, *MAX WEBER'S METHODOLOGY: THE UNIFICATION OF THE CULTURAL AND SOCIAL SCIENCES* (1997); W.G. RUNCIMAN, *A CRITIQUE OF MAX WEBER'S PHILOSOPHY OF SOCIAL SCIENCE* (1972) (critiquing Weber's philosophy of the social sciences, while acknowledging that Weber's work was "fundamental" to the subject).

²⁴⁸ 1 WEBER, *supra* note 13, at 3–56; see BENDIX, *supra* note 15, at 41–48, 417–94; LÖWITH, *supra* note 15, at 44–49.

²⁴⁹ See 1 WEBER, *supra* note 13, at 24–26. These are two of the basic modes of "meaningfully oriented" social action, in Weber's view. They are ideal types, which are usually mixed together in actual social behavior. See *id.* at 25–26. For Weber's concept of ideal types, see *id.* at 19–22; WEBER, *supra* note 247, at 89–99; see also RINGER, *supra* note 247, at 110–21 (discussing Weber's concept).

²⁵⁰ See 1 WEBER, *supra* note 13, at 24–25.

distinction, for purposes of understanding administrative government, is problematic because the two terms are relative within a hierarchical governmental structure. As Herbert Simon points out, the means of a superior tend to become the ends of a subordinate.²⁵¹ The police chief's end is fighting crime, for example, and her means is to put more patrol officers on the streets; for her subordinate, putting more patrol officers on the street becomes the end, and reducing the amount time that the officers spend filing reports or attending training sessions becomes the means.

In fact, Weber's distinction is more complex, and ultimately more useful for analyzing modern administrative government. An action is value rational, in his view, when it arises from a truly deontological commitment, that is, a commitment that is carried through regardless of its consequences.²⁵² It acquires its rational character because it stems from a conscious choice, not from either habit or emotion.²⁵³ An action is instrumentally rational when it is governed by the actor's expectations about its consequences, that is, "when the end, the means, and the secondary results are all rationally taken into account and weighed."²⁵⁴ When the ends are determined by value rationality, instrumental rationality will be used only for the choice of means.²⁵⁵ Alternatively, the actor may treat the ends as "subjective wants" rather than predetermined values, and "arrange them in a scale of consciously assessed relative urgency."²⁵⁶ Taking consequences into account, the actor can then satisfy these wants "in order of urgency, as formulated in the principle of 'marginal utility.'"²⁵⁷ Thus, the actor's ordering of his goals, or ends, would be partially determined by his subjective desires, and partially determined by the consequences of his rational efforts to achieve those desires.

According to Weber, instrumental rationality is the dominant principle of modern bureaucratic government.²⁵⁸ We create agencies

²⁵¹ See HERBERT A. SIMON, *ADMINISTRATIVE BEHAVIOR* 62-65 (3d ed. 1976). Simon refers to this as a "means-ends" chain. *Id.* at 62.

²⁵² See 1 WEBER, *supra* note 13, at 24-25.

²⁵³ Weber's other two nonconscious types of social action are affectual, action determined by emotions and feelings, and traditional action "determined by ingrained habituation." See *id.* at 25.

²⁵⁴ *Id.* at 26.

²⁵⁵ See *id.* From the perspective of an instrumentally rational actor, Weber says, value rationality is always irrational because it does not subject the ends to consequentialist assessment. *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ See 1, 2 WEBER, *supra* note 13, at 223-26, 954, 1393-95; see also MICHAEL OAKESHOTT, *Rationalism in Politics*, in *RATIONALISM IN POLITICS AND OTHER ESSAYS* 5, 9 (1991) ("That anything should be allowed to stand between a society and the satisfaction of the felt needs of each moment in its history must appear to the Rationalist a piece of mysticism and nonsense. And his politics are, in fact, the rational solution of . . . practical conun-

and authorize them to act in a far-ranging and often domineering manner because we want them to implement our basic commitments—our value choices—as effectively as possible. We know that our economic system is bureaucratized, that it is dominated by hierarchically organized institutions with credentialed employees possessing high levels of technical expertise,²⁵⁹ and we understand that only an equivalently rational, technical mode of governance can achieve our collective purpose of controlling these institutions. As Weber notes, “the purely bureaucratic type of administrative organization—that is, the monocratic variety of bureaucracy—is, from a purely technical point of view, capable of attaining the highest degree of efficiency and is in this sense formally the most rational known means of exercising authority over human beings.”²⁶⁰

But this effectiveness comes at a price and creates a danger. Weber analyzed the danger most fully in his first major work, *The Protestant Ethic and the Spirit of Capitalism*.²⁶¹ The Protestant ethic, which saw material success as a sign of predestined salvation, was a form of value rationality that induced instrumental rationality in economic behavior.²⁶² But this pursuit of wealth has been “stripped of its religious and ethical meaning”—particularly in the United States, Weber asserts²⁶³—and become a freestanding and self-sustaining mechanism “which [today] determine[s] the lives of all the individuals who are born into [it]” and may do so “until the last ton of fossilized coal is burnt.”²⁶⁴ This is, in Weber’s famous phrase, the “iron cage” of modernity.²⁶⁵ It closes on us because the instrumentally rational mode of action can only evaluate its ends as wants, rather than values, and be-

drums.”). Oakeshott is even more critical of this process than Weber. *See id.* at 41 (“[A]mong much else that is corrupt and unhealthy, we have the spectacle of a set of sanctimonious, rationalist politicians, preaching an ideology of unselfishness and social service to a population in which they . . . have done their best to destroy the only living root of moral [behavior].”).

²⁵⁹ *See* 2 WEBER, *supra* note 13, at 1394 (“The ‘progress’ toward the bureaucratic state, adjudicating and administering according to rationally established law and regulation, is nowadays very closely related to the modern capitalist development.”). Numerous commentators have discussed the prevalence of bureaucracy in modern industry, *see* PETER F. DRUCKER, *THE NEW SOCIETY: THE ANATOMY OF INDUSTRIAL ORDER* (Transaction Publishers, 1993) (1950); EMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* (W.D. Halls trans., 1984); GEORGE J. STIGLER, *THE ORGANIZATION OF INDUSTRY* (1968); OLIVER E. WILLIAMSON, *THE ECONOMIC INSTITUTIONS OF CAPITALISM* (1985).

²⁶⁰ 1 WEBER, *supra* note 13, at 223.

²⁶¹ MAX WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* (Talcott Parsons trans., 1958).

²⁶² *See id.* at 178–81.

²⁶³ *Id.* at 182.

²⁶⁴ *Id.* at 181.

²⁶⁵ *See id.* Certainly, this is one of the best-known metaphors in modern sociology. For indications of its notoriety, *see* ARTHUR MITZMAN, *THE IRON CAGE: AN HISTORICAL INTERPRETATION OF MAX WEBER* v–vi, 107 (1969); Paul J. DiMaggio & Walter W. Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields*, in

cause the consequentialist character of this action repeatedly revises those ends in terms of their practical effects, that is to say, their costs. The same spirit of instrumental rationality, operating in the equivalently bureaucratic political system, generates a governmental system that is divorced from its ethical and moral origins, a soulless mechanism that, because of its technical superiority, becomes "escape-proof."²⁶⁶ We are thus imprisoned in an iron cage of technocratic rule that is impervious to democratic control or redirection.

Habermas, whose work is strongly influenced by Weber, offers an alternative view of modern government. At first, he was inclined to accept Weber's "diagnosis of the times,"²⁶⁷ arguing that bureaucracy created a "legitimation crisis"²⁶⁸ by separating the "instrumental functions of the administration from expressive symbols"²⁶⁹ and the normative resources of civil society.²⁷⁰ But in *The Theory of Communicative Action*,²⁷¹ he expands Weber's concept of value rationality, pointing out that one can engage in a rational debate about norms or deontological ends just as one can engage in such a rational debate about empirical or instrumental means to achieve desired ends.²⁷² The rationalization of government, with its separation from its religious origins and its development into a technocratic, instrumental mechanism, does not foreclose debate about deontological value, he argues, but rather facilitates such a debate.²⁷³ Once norms are separated from governmental mechanisms, rather than being embedded in them, they are easier for social actors to perceive and discuss. Such discussion is carried out, in Habermas's view, through the medium of communicative action, that is, human interaction directed toward achieving understanding.²⁷⁴ In a subsequent work, *Between Facts and Norms*, he argues that this communicative debate about norms can be institutionalized through the mechanisms of liberal democracy.²⁷⁵

THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS 63 (Walter W. Powell & Paul J. DiMaggio eds., 1991).

²⁶⁶ 2 WEBER, *supra* note 13, at 1401; see BENDIX, *supra* note 15, at 458-59.

²⁶⁷ This phrase comes from HABERMAS, *supra* note 15, at 243.

²⁶⁸ See JÜRGEN HABERMAS, LEGITIMATION CRISIS 68-75 (Thomas McCarthy trans., 1975).

²⁶⁹ *Id.* at 70.

²⁷⁰ See *id.* at 97-102 (critiquing Weber's theory of legitimation).

²⁷¹ HABERMAS, *supra* note 15. Habermas' explicit discussion of Weber, see *id.* at 143-286, 345-66, occupies nearly half of the book. In fact, it can be argued that the entire work is a critique and re-evaluation of Weber. The second volume of this work further discusses Weber's work. See HABERMAS, *supra* note 15, at 303-31.

²⁷² HABERMAS, *supra* note 48, at 282-337.

²⁷³ *Id.* at 248-70.

²⁷⁴ *Id.* at 286-337.

²⁷⁵ JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY (William Rehg trans., 1996).

2. Mechanisms

Governance, according to Weber,²⁷⁶ depends on domination, “the probability that certain specific commands (or all commands) will be obeyed by a given group of persons.”²⁷⁶ While physical force or economic incentives may induce such obedience, governments always try to create a belief in their legitimacy, that is, the idea that their commands are to be obeyed.²⁷⁷ Weber’s three pure types of legitimate domination are traditional, “resting on an established belief in the sanctity of immemorial traditions”, charismatic, resting on devotion to an extraordinary individual, and rational, “resting on a belief in the legality of enacted rules.”²⁷⁸ The rational-legal mode of legitimate domination, or governance, to use a more contemporary and palatable term, is typically implemented by a bureaucracy, and it is the growth of a rational-legal approach to governance that provides the basis for modern bureaucratic systems.²⁷⁹

Of course, most traditional societies have law. What makes rational domination uniquely legal, according to Weber, is that it separates law from its traditional or natural law origins, and treats it as a set of positive enactments that can be used to define agreed-upon ends and implement the means by which those ends are achieved.²⁸⁰ In other words, positivized law functions as the essence of the instrumental rationality that characterizes bureaucratic governance. For Weber, this positivization process is part of bureaucracy’s iron cage, the process by which instrumental rationality becomes stripped of its ethical meaning and transformed into a machine for satisfying subjective wants. This is precisely the point that Habermas contests in challenging Weber’s pessimistic prognosis of bureaucracy. According to Habermas, Weber has lost track of his own distinction between instrumental rationality and value rationality.²⁸¹ At the theoretical level, the

²⁷⁶ 1 WEBER, *supra* note 13, at 212.

²⁷⁷ *See id.* (“[E]very genuine form of domination implies a minimum of voluntary compliance”). One of the many gaps in Weber’s account is that he never really defines legitimacy. Contemporary writers have filled that gap by discussing legitimacy at length. For a standard definition, see RODNEY BARKER, *POLITICAL LEGITIMACY AND THE STATE* 11 (1990) (“[L]egitimacy is precisely the belief in the rightfulness of a state, in its authority to issue commands, so that those commands are obeyed not simply out of fear or self-interest, but because they are believed in some sense to have moral authority, because subjects believe that they ought to obey.”). For general discussions of legitimacy, see DAVID EASTON, *A SYSTEMS ANALYSIS OF POLITICAL LIFE* 278–310 (1965); *LEGITIMACY AND THE STATE* (William Connolly ed., 1984); PATRICK RILEY, *WILL AND POLITICAL LEGITIMACY* (1982); RONALD ROGOWSKI, *RATIONAL LEGITIMACY: A THEORY OF POLITICAL SUPPORT* (1974); TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 19–68 (1990).

²⁷⁸ 1 WEBER, *supra* note 13, at 215.

²⁷⁹ *See id.* at 218–20.

²⁸⁰ *See* 2 WEBER, *supra* note 13, at 866–76, 880–95. For a general discussion of Weber’s sociology of law, see ANTHONY T. KRONMAN, *MAX WEBER* (William Twining ed., 1983).

²⁸¹ HABERMAS, *supra* note 15, at 243–54.

positivization of law does not obviate the need for its moral justification; at the empirical, or historical, level, this positivization can make the need for an independent moral justification more apparent. "Precisely the posttraditional structure of legal consciousness sharpens the problem of justification into a question of principle that is shifted to the foundations but not thereby made to disappear."²⁸²

The structural features of bureaucratic governance emerge from its instrumentally rational mode of action and its use of positive law as a means of rational domination.²⁸³ To begin with, modern bureaucratic agencies are defined by their jurisdiction over specified and rationally described aspects of society.²⁸⁴ Prior to the advent of modern administrative government at the end of the eighteenth century,²⁸⁵ the officials who served Western European monarchs were organized along traditional, path-dependent, or entirely idiosyncratic lines. For example, in the period before the French Revolution, one department of the royal government organized to take advantage of a particular minister's talents exercised control over "agriculture, mining, and postal communications; provincial affairs; stud farms and secretarial matters."²⁸⁶ Second, modern agencies are organized hierarchically, with "a clearly established system of super- and sub-ordination in which there is a supervision of the lower offices by the higher ones."²⁸⁷ Hierarchy, of course, existed in premodern regimes as well,²⁸⁸ but the

²⁸² *Id.* at 261.

²⁸³ Because Weber's discussion focuses on ideal types, see *supra* note 249 and accompanying text, the features of bureaucracy emerge from its underlying conceptual structure, but do not necessarily evolve from that structure. In fact, Weber is quite vague about the historical status of his account. See MITZMAN, *supra* note 265; MOMMSEN, *supra* note 243, at 1-21; 1 WEBER, *supra* note 13, at xxxvii (Guenther Roth's introduction).

²⁸⁴ See 1, 2 WEBER, *supra* note 13, at 218, 956.

²⁸⁵ Periodization is always a contentious point, but there is a general consensus among modernization scholars that the crucial transition to modern administrative government in Western Europe occurred between 1775 and 1825. See BARKER, *supra* note 4, at 6; HOWARD G. BROWN, *WAR, REVOLUTION, AND THE BUREAUCRATIC STATE I* (1995); SIR NORMAN CHESTER, *THE ENGLISH ADMINISTRATIVE SYSTEM 1780-1870* (1981); CLIVE H. CHURCH, *REVOLUTION AND RED TAPE: THE FRENCH MINISTERIAL BUREAUCRACY 1770-1850* (1981); SAMUEL P. HUNTINGTON, *POLITICAL ORDER IN CHANGING SOCIETIES* 93-139 (1968); GILES MACDONOGH, *PRUSSIA* 40-43, 273-76 (1994); PARRIS, *supra* note 4, at 22-35; POGGI, *supra* note 4, at 69-117. In addition, writers who focus on cultural trends, rather than the mechanics of government, also identify this era as a critical one. See E.J. HOBBSAWM, *THE AGE OF REVOLUTION 1789-1848* (1962); PAUL JOHNSON, *THE BIRTH OF THE MODERN: WORLD SOCIETY 1815-1830* (1991); RAYMOND WILLIAMS, *THE LONG REVOLUTION 184-90* (1961).

²⁸⁶ CHURCH, *supra* note 285, at 31. The largest division of the French government during the *Ancien Régime* was the *Contrôle Général*, which Church describes as "a rambling agglomeration of commissions, services, semi-independent functionaries, and others, all held more or less together by a small and still very personal team of clerks." *Id.*

²⁸⁷ 2 WEBER, *supra* note 13, at 957; see 1 WEBER, *supra* note 13, at 218.

²⁸⁸ Current usage of the term can be traced to a sixth-century Christian mystic who assumed the name of Dionysius the Areopagite, and is consequently called Pseudo-Dionysius, or Pseudo-Denis. Hierarchy originally referred to priestly rule; Pseudo-Denis developed the idea that both priests and angels were organized in a set of orderly ranks.

strictly defined levels of command, responsibility and appeal by subordinates to a higher authority is a feature of the administrative state. This is one of the aspects of bureaucracy that contemporary reformers criticize severely,²⁸⁹ but there is no indication that it will disappear in the foreseeable future. It would be a near impossibility to make the Department of Health and Human Services or the Federal Reserve Board nonhierarchical.

A third distinctive feature of modern bureaucracy is that the bureaucrats are full-time, salaried employees, chosen on the basis of their educational or experiential credentials, and expected to use the skills derived from those credentials in performing their tasks.²⁹⁰ Weber's terminology here, which is that office holding in a bureaucracy is a "vocation" or a "calling" does not translate well into English;²⁹¹ thus the word "expert," which is more familiar, will be used instead.²⁹² Prior to the advent of the modern state, governmental positions were regarded as private property, to be awarded to favorites and political allies, or to be purchased by entrepreneurs. Rather than receiving a salary, the official was compensated by retaining the fees that his office entitled him to collect.²⁹³ Thus, a political ally would be placed in control of a port and given the right to retain most of the tariffs, or an entrepreneur would purchase the right to collect taxes in

DIONYSIUS, THE PSEUDO-AREOPAGITE: THE ECCLESIASTICAL HIERARCHY (Thomas L. Campbell trans., 1981); DIONYSIUS THE AREOPAGITE: THE CELESTIAL HIERARCHIES (eds. of the Shrine of Wisdom trans., 1935); see RONALD F. HATHAWAY, HIERARCHY AND THE DEFINITION OF ORDER IN THE LETTERS OF PSEUDO-DIONYSIUS: A Study in the Form and Meaning of the Pseudo-Dionysian Writings (1969).

²⁸⁹ See, e.g., GORE, *supra* note 3, at 23; HOWARD, *supra* note 16, at 62-83; Dorf & Sabel, *supra* note 17, at 292-314.

²⁹⁰ See 1, 2 WEBER, *supra* note 13, at 220-23, 958-59.

²⁹¹ See 2 WEBER, *supra* note 13, at 958-59. The German word that Weber uses is "Beruf." Replacing it with "expert" does some violence to Weber's meaning, since *Beruf* is one of the most important concepts in his opus. See Max Weber, *Politics as a Vocation*, in FROM MAX WEBER 77 (H.H. Gerth & C. Wright Mills eds. & trans., 1946), Max Weber, *Science as a Vocation*, in *id.* at 129; WEBER, *supra* note 261, at 79-183. In *The Protestant Ethic and the Spirit of Capitalism*, Weber translates *Beruf* into the English word "calling," but notes that this term is more clearly "a religious conception, that of a task set by God" in English than it is in German. *Id.* at 79. It is precisely because "calling" has these religious implications that *Beruf* is generally translated as "vocation" when Weber uses it in a secular context. But Weber's use of the same term in both contexts reflects his assertion that modern instrumental rationality is an outgrowth, and a distortion, of the Calvinist religious sensibility. See *supra* notes 261-64 and accompanying text.

²⁹² This approach has its own problems, of course, since it implies that the administrators actually know what they are doing, a contestable claim in many cases. Here, it merely means that they are specially trained, and the word "credentialed" will be added at various points to emphasize this more restricted meaning.

²⁹³ See BARKER, *supra* note 4, at 34-36, 61-64; JOHN P. MACKINTOSH, THE BRITISH CABINET 70-73 (3d ed. 1977); PARRIS, *supra* note 4, at 33-35; 2 WEBER, *supra* note 13, at 966-67. In order to effect the transition to salaried bureaucracy, the British government, lacking the advantage of a revolution, was required to compensate the former office holders for their loss of property.

a given area.²⁹⁴ The replacement of such officials with salaried bureaucrats not only increased government revenues and administrative competence, but also eliminated the autonomous character of the officials and subjected them to hierarchical control.²⁹⁵

This feature of officeholding leads, in turn, to the final feature of bureaucracy: continuity. Because the official is granted her position on the basis of her credentials rather than her political affiliations, she generally holds it as long as she remains competent to perform its functions, or until she is promoted on the basis of her performance.²⁹⁶ Because the official is understood to be filling a predefined role for which she has been selected on the basis of objective criteria such as education, she can be replaced with an equivalent official when she leaves.²⁹⁷ Similarly, the jurisdiction, purposes and procedures of the agency are set by law, and thus remain constant until the authorizing statute is amended. Bureaucracies, moreover, maintain records that provide them with institutional memory.²⁹⁸ This continuity of official action, which sometimes persists through periods of enormous political upheaval, combines with defined jurisdiction, hierarchical organization, and credentialed expertise to give modern bureaucracy its characteristic form.

An important theme in contemporary administrative law scholarship has been the criticism of command and control regulation, which is often characterized as excessively bureaucratic.²⁹⁹ In its place, scholars suggest that the agency recognize the organizational structure of regulated entities, open a dialogue with them, and allow them to play an active role in the implementation process.³⁰⁰ Clearly, this is a promising approach to regulation, but it is important to understand that it does not address the internal structure of the agency or the way it functions with this mode of regulation. In fact, it seems unlikely

²⁹⁴ For a discussion of entrepreneurial tax-farming, see 2 WEBER, *supra* note 13, at 965–66.

²⁹⁵ For accounts of this development in England, see CHESTER, *supra* note 285, at 123–68; EMMELINE W. COHEN, *THE GROWTH OF THE BRITISH CIVIL SERVICE 1780–1939* (Frank Cass & Co., Ltd. 1965) (1941); R.R. NELSON, *THE HOME OFFICE, 1782–1801* (1969); PARRIS, *supra* note 4, at 22–45; SIR EDWARD TROUP, *THE HOME OFFICE, 1908–1922*, at 7–25 (1925).

²⁹⁶ 2 WEBER, *supra* note 13, at 962.

²⁹⁷ *See id.* at 960–61.

²⁹⁸ *See id.* at 957.

²⁹⁹ *See infra* notes 319–20.

³⁰⁰ *See, e.g.*, AYRES & BRAITHWAITE, *supra* note 132; BARDACH & KAGAN, *supra* note 131; BRAITHWAITE, *supra* note 104; NEIL GUNNINGHAM & RICHARD JOHNSTONE, *REGULATING WORKPLACE SAFETY: SYSTEM AND SANCTIONS* 141–72 (1999); CHRISTINE PARKER, *JUST LAWYERS: REGULATION AND ACCESS TO JUSTICE* 121–37 (1999); Jody Freeman, *Collaborative Governance in the Administrative State*, 45 *UCLA L. REV.* 1 (1997); Jody Freeman, *The Private Role in Public Governance*, 75 *N.Y.U. L. REV.* 543 (2000); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 *COLUM. L. REV.* 458, 479–522 (2001).

that the adoption of this creative and promising approach would have any significant effect on the agency's structure. After all, Weber's description of bureaucracy is not tied to command and control regulation; indeed, it does not specify the mode of regulation that the bureaucracy employs.³⁰¹ The development of this or other innovations should not blind us to the very basic, underlying facts about the structure of administrative agencies.

3. *Conflicts and Complexities*

Weber's account of bureaucracy explains its efficacy,³⁰² but underemphasizes its internal tensions and ignores some of the complexities that arise when elected officials supervise, and even control, administrators.³⁰³ General tension exists between the hierarchical structure of the administration and the expertise of its members. Credentialed experts possess the capacity for independent judgment; their training, at least in theory, enables them to devise effective, perhaps optimal, and possibly even creative solutions to the problems that lie within their defined jurisdiction. But hierarchy involves command; thus, this independent judgment will sometimes, or often, be overruled by the expert's superior. The tension becomes even greater, of course, if the superior is not a credentialed expert, but an elected official.³⁰⁴ An elected chief executive can issue instructions to

³⁰¹ In fact, Weber may be regarded as an intellectual progenitor of responsive regulation or collaborative governance, since he is one of the scholars who suggests that an understanding of an individual, organization or cultural form requires active participation by the observer. See MAX WEBER, "Objectivity" in *Social Science and Social Policy*, in WEBER, *supra* note 247, at 49, 59.

³⁰² See 1, 2 WEBER, *supra* note 13, at 223–26, 973–75, 1401–03.

³⁰³ One reason for this is that Weber treats elected officials as charismatic leaders, see 1 WEBER, *supra* note 13, at 266–71, rather than as rational-legal ones. He notes the parallel development of democracy and bureaucratic governance, see 2 WEBER, *supra* note 13, at 983–85, but his main conclusions are that bureaucratization levels social class distinctions and that political parties tend to become bureaucratized, see *id.* at 984–85. This account of electoral government as a form of charismatic domination seems to conflate charisma with charm, or appeal. Certainly, an elected official needs to appeal to the voters, but this appeal operates within the limits of a legal, rationally organized system. When Weber speaks of charisma, he is referring to a personal force that functions as an independent mode of domination. The charismatic leader sweeps pre-existing institutions to the side and attracts followers who are motivated by personal loyalty, not established roles. Few elected officials exercise this level of appeal, or need to do so—they need only be more appealing than their opponent. By treating elected officials as exercising charismatic authority, Weber overlooks their relationship to bureaucratic government as well as the structural connections between electoral democracy and rational-legal domination.

³⁰⁴ Whether these elected officials represent the will of the people, and whether the resulting regime is properly characterized as a democracy, is an issue that will not be addressed here. See Cynthia R. Farina, *The Consent of the Governed: Against Simple Rules for a Complex World*, 72 CHL-KENT L. REV. 987, 997 (1997); Edward L. Rubin, *Getting Past Democracy*, 149 U. PA. L. REV. 711 (2001). The tension arises from the presence of a politically motivated actor as the hierarchical superior of an agency staffed by experts. See Rubin, *supra*, at 711–12. Even if such a political appointee is herself a credentialed expert, her

administrative agents, backed by threat of dismissal, that are based on political will rather than expert judgment.³⁰⁵ In theory, the same statutes bind the President and the agencies alike, but most statutes are open-ended, and all are subject to interpretation. Elected legislators cannot issue instructions, but they can often achieve similar results by threatening budget cuts, conducting aggressive oversight hearings, or, until recently, exercising a legislative veto.³⁰⁶

The tension between executive control and expertise has been partially resolved through the Civil Service System, which preserves the expertise principle by insulating most government officials from political control,³⁰⁷ while preserving the hierarchy principle by allowing the President to appoint the top officials in each agency and terminate the executive agency officials at will. The expertise principle has been reasserted, however, by granting some agencies independence, which prevents the President from dismissing even the top officials.³⁰⁸ This restriction greatly attenuates hierarchical control, al-

commands may not be based on the application of expertise to the particular problem that her subordinate has addressed, but rather on political considerations.

³⁰⁵ This is at least one aspect of the conflict between expertise and pluralist models of administration, although discussions of this conflict often emphasize the imposition of pluralist views at the administrative level, that is, without the direct intervention of elected officials. See Frug, *supra* note 27, at 1318-34, 1355-77; Sargentich, *supra* note 27, at 410-38; Stewart, *supra* note 8, at 1760-81.

³⁰⁶ Of course, the legislature initially defines the agency's mission and thus sets the general goals that its expertise was designed to achieve. But legislative interventions may be motivated by views that are not necessarily consonant with the governing statute or the legislative majority. In addition, as the statute ages, the views of individual legislators and the commands of the statute are likely to diverge even further. See GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 131-35 (1982); WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* 50-57 (1994).

³⁰⁷ See ARI HOOGENBOOM, *OUTLAWING THE SPOILS: A HISTORY OF THE CIVIL SERVICE REFORM MOVEMENT 1865-1883*, at 7-12 (1961); RONALD N. JOHNSON & GARY D. LIBECAP, *THE FEDERAL CIVIL SERVICE SYSTEM AND THE PROBLEM OF BUREAUCRACY: THE ECONOMICS AND POLITICS OF INSTITUTIONAL CHANGE* 12-47 (1994); FRITZ MORSTEIN MARX, *THE ADMINISTRATIVE STATE: AN INTRODUCTION TO BUREAUCRACY* 51-53 (1957).

³⁰⁸ See *supra* note 176-77 and accompanying text. The constitutionality of independent agencies has been a matter of controversy. See Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 593-99 (1994) (arguing that independent agencies violate Constitution's allocation of executive power to the President); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1165-71 (1992) (same); Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725 (1996) (expressing the view that independence of agencies counterbalances shift of power to President); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 40-42 (1994) (asserting that no evidence exists to indicate that Framers intended to prohibit independent agencies); Geoffrey P. Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41 (contending that independent agencies violate text, structure and intent of Constitution); Peter M. Shane, *Independent Policymaking and Presidential Power: A Constitutional Analysis*, 57 GEO. WASH. L. REV. 596, 597 (1989) (positing that the Constitution permits Congress to decide to make some agencies independent); Strauss, *supra* note 68, at 583-86 (arguing that the Constitution does not prevent Congressional innovation below the level of constitutionally-defined institutions); Paul R. Verkuil, *The Status of Independent Agencies After Bowsher v. Synar*, 1986 DUKE

though it does not eliminate it. The tension between legislative control and expertise, in contrast, remains largely unresolved. The Supreme Court intervened to strike down the legislative veto, but, as described above, Congress was able to recapture much of this mechanism's effect through subsequent legislation.³⁰⁹

As elections are regular and frequent occurrences, they tend to disrupt the continuity of administration. Not only will the agency's elected hierarchical superiors change, but the politically appointed officials who head the agency will generally change as well, particularly if the election brings a new party to power. Since agencies implement most of the policies contested in any specific election,³¹⁰ this change of personnel is likely to be accompanied by a demand that the agency make at least some changes to its mission. Such demands are likely to create a conflict with the agency's expert staff members, who will have developed a different sense of mission and style of implementation as a result of their own interpretation of the statute or of the commands of their previous, politically appointed superiors. This conflict between expert staff and political superiors, between the continuity of administration and its political redirection, remains unresolved.

B. The Dominant Principle: Instrumental Rationality

With these very basic considerations of the nature of administrative governance established the principal contours of a new, administrative procedure act can be considered. The first and most basic feature of such an act is that it should be controlled by the overarching principle of instrumental rationality, rather than by the principle of public participation that controls the present APA. Unlike public participation, instrumental rationality is a control that can be imposed on all aspects of the administrative process. Rulemaking and adjudication should be instrumentally rational, but so should planning, resource allocation, prosecution, inspections, advice, promises, threats, denials of applications and all the other actions that currently fall under the category of informal adjudications, but are better described

L.J. 779, 792-94 (concluding that independent agencies serve constitutionally valid purposes). However, the present Article simply recommends revision of a particular law, and does not intend to implicate constitutional issues. Therefore, it takes the current interpretation of the Constitution, which permits Congress to create independent agencies, as a given.

³⁰⁹ See *supra* notes 168-72 and accompanying text.

³¹⁰ There are, of course, exceptions. Some contested issues are largely symbolic, like family values. See JEAN BAUDRILLARD, *IN THE SHADOW OF THE SILENT MAJORITIES* (1983); JEAN BAUDRILLARD, *SIMULATIONS* 147-49 (1983); RONALD COLLINS & DAVID SKOVER, *THE DEATH OF DISCOURSE* 16-22 (1996); MURRAY EDELMAN, *CONSTRUCTING THE POLITICAL SPECTACLE* 12-36 (1988); DOUGLAS KELLNER, *TELEVISION AND THE CRISIS OF DEMOCRACY* (1990). A few other contested matters, such as abortion, involve constitutional matters that can be primarily implemented by Supreme Court nominations.

as executive action. A new APA should establish instrumental rationality as both the controlling principle for agency action and as the substantive standard for executive and judicial review of agency action. Actions based on any motivation other than instrumental rationality—on traditionalism, political favoritism, laziness, arbitrariness, stupidity, cupidity, necromancy or accident—should be struck down.³¹¹

Instrumental rationality is not a free standing principle, however, at least if we want to avoid the iron cage. Rather, it is an internal norm for administrative agencies that exist within a rational-legal mode of legitimate domination or governance. According to this mode of governance, political authority is exercised primarily through legal means, and the primary lawmaker, that is to say, the legislature, is supreme. American constitutionalism leads to the same conclusion, of course, but the principle of rational-legal domination is more basic, since it explains the primacy of the Constitution itself, and is also more informative, because it explains the rationale behind the Constitution's implicit declaration of legislative supremacy. Applied to the administrative apparatus, the rational-legal principle establishes that agencies must obey statutory commands. When combined with the hierarchical principle of administrative governance, this principle establishes that the President must follow these commands, and that those agencies established by the legislature as the President's hierarchical subordinates must follow his interpretation of statutory commands, as well as the policy initiatives that he has established through his own authority.

The administrative agencies' hierarchical superiors are not restricted to the principle of instrumental rationality that controls the agencies themselves. Rather, as Habermas insists, the legislature³¹² and the chief executive,³¹³ as elected officials, can act on the basis of

³¹¹ Such a standard would conform to the civic republican ideal for agency action that Mark Seidenfeld has articulated, *see* Seidenfeld, *supra* note 244, at 1528 ("According to civic republicanism, the state acts legitimately only if it furthers the 'common good' of the political community." (footnote omitted)).

³¹² This is not to say, of course, that legislators may engage in any form of value rationality. Certain value choices, such as theocracy, are forbidden by the Constitution, while others, such as those at a complete variance with the views of their constituents on a non-constitutional matter, can be said to represent bad legislative practice in our system. The point, rather, is that it is never wrong for the legislature qua legislature, to engage in value rationality for at least some set of values.

³¹³ The President's nominations, treaties, and legislative proposals will not have legal effect unless the Senate (and for legislation, the House as well) approves. Congress can countermand many of his military decisions through the war power and can override his veto. This inability to take unilateral action in most areas of constitutional authority does not alter the fact that he may justifiably act, in any of these areas, on the basis of value rationality. In contrast, where his authority stems from his responsibility to "take Care that

value rationality.³¹⁴ It is by virtue of this value-based, deontological approach that the populace exercises policy control over the administrative apparatus and society escapes the iron cage of mindless instrumentalism.³¹⁵ Agencies are obligated to obey these value rational choices of the legislature, and executive agencies are obligated to obey the value rational choices of the chief executive. The judiciary can enforce these obligations.³¹⁶ Judicial decision making incorporates its own value rationality,³¹⁷ but agencies may not engage in value rationality, that is, purely ideological decision making. They are limited to instrumental rationality when implementing the value rational policies of other governmental institutions, or when generating their own policies.

In asserting that the dominant principle for administrative agencies is instrumental rationality, and that they are forbidden from relying on value rationality, the complexity of the principle as defined by Weber must be kept in mind. Instrumental rationality is not limited to identifying the best means for implementing a predetermined end, but also involves a rational assessment of the ends according to their pragmatic consequences.³¹⁸ To subject administrative agencies to a general standard of instrumental rationality, therefore, does not preclude them from defining their own goals in the absence of clear legislative direction, but rather demands that they must establish these goals in a particular way.³¹⁹ More precisely, agencies must make relative assessments among different ends, and “arrange them in a scale of consciously assessed relative urgency.”³²⁰

Defined in this way, instrumental rationality irresistibly suggests cost-benefit analysis, where the social benefits of a particular policy are measured against the costs that it incurs, and only policies that promise net social benefits are implemented. Weber himself makes this

the Laws be faithfully executed,” U.S. CONST. art. II, § 3, there is some expectation that his decisions should be instrumentally rational.

³¹⁴ See 1 HABERMAS, *supra* note 15, at 243–71.

³¹⁵ See *supra* notes 261–70 and accompanying text.

³¹⁶ The obligations of obedience are not necessarily absolute, however. See MORTIMER R. KADISH & SANFORD H. KADISH, *DISCRETION TO DISOBEY: A STUDY OF LAWFUL DEPARTURES FROM LEGAL RULES* 37–95 (1973); Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679, 682–83 (1989) (disputing view that agency’s nonacquiescence with an adverse judicial result is per se unconstitutional).

³¹⁷ See PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* 135–38 (1991) (noting that ethical interpretation is one of the accepted modes of constitutional discourse); MICHAEL J. PERRY, *MORALITY, POLITICS AND LAW* 145–48 (1988) (expressing view that judicial enterprise is inherently ethical); Fiss, *supra* note 107, at 1085 (contending that an essential function of judges is to articulate ethical values of society).

³¹⁸ See *supra* notes 254–57 and accompanying text.

³¹⁹ This is the essence of administrative policy making. See Charles H. Koch, Jr., *Essay, Judicial Review of Administrative Policymaking*, 44 WM. & MARY L. REV. 375, 381–82 (2002).

³²⁰ 1 WEBER, *supra* note 13, at 26.

connection, observing that the instrumentally rational ordering of goals can be performed according to the principle of "marginal utility."³²¹ As Matthew Adler and Eric Posner point out, cost-benefit analysis is best regarded as a "welfarist decision procedure"—the procedure most likely to achieve overall well-being in a large range of situations.³²² Overall well-being, or the eudemonic principle of government, is often regarded as the essential goal of a modern administrative state. Certainly, it is the consensus among citizens at present, and the position an agency should adopt when elected representatives do not provide more specific guidance. But as an aspect of instrumental rationality, rather than a moral principle for governance in general,³²³ cost-benefit analysis must yield to the commands of elected representatives. Because they are elected, these representations are entitled to make decisions based on ideology, or value rationality, which does not imply cost-benefit analysis at all.³²⁴ Moreover, when elected representatives prescribe ends, or goals, for administrative agencies, the agency need not, and often should not, implement these goals by means of cost-benefit analysis.³²⁵ Rather, they should choose whatever method is most likely, on rational grounds, to instantiate the values that the controlling institution has established. To impose cost-benefit analysis on the value rational goal choices of non-administrative institutions is to once again enclose the governmental process in Weber's iron cage.³²⁶

³²¹ *Id.*

³²² Matthew D. Adler & Eric A. Posner, *Rethinking Cost-Benefit Analysis*, 109 YALE L.J. 165, 194–225 (1999).

³²³ See Matthew Adler, *Incommensurability and Cost-Benefit Analysis*, 146 U. PA. L. REV. 1371, 1373 (1998) (clarifying that cost-benefit analysis is a decision procedure, not a moral criterion); Adler & Posner, *supra* note 322, at 216–25 (same).

³²⁴ See Thomas O. McGarity, *The Expanded Debate over the Future of the Regulatory State*, 63 U. CHI. L. REV. 1463, 1464–67 (1996); Alfred S. Neely, Jr., *Statutory Inhibitions to the Application of Principles of Cost/Benefit Analysis in Administrative Decision Making*, 23 DUQ. L. REV. 489, 502–09 (1985). Legislators are free to adopt cost-benefit analysis as their overall approach to governance if they so choose, see Cass R. Sunstein, *Legislative Foreword: Congress, Constitutional Moments, and the Cost-Benefit State*, 48 STAN. L. REV. 247, 292–96 (1996), but the insistent appeal of deontological positions makes it unlikely that legislators would actually do so for any extended period of time.

³²⁵ Thus, Stephen Williams' idea, advanced as both a judge and a scholar, that all regulatory legislation must rely on cost-benefit analysis, is unjustified. See *Am. Trucking Ass'n v. EPA*, 175 F.3d 1027, 1051–53 (D.C. Cir. 1999) (Williams, J.), *aff'd in part, rev'd in part sub nom. Whitman v. Am. Trucking Ass'n*, 531 U.S. 457 (2001); Stephen F. Williams, *The Era of "Risk-Risk" and the Problem of Keeping the APA Up to Date*, 63 U. CHI. L. REV. 1375, 1377–81 (1996).

³²⁶ See generally Steven Kelman, *Cost-Benefit Analysis: An Ethical Critique*, REG., Jan.–Feb. 1981, at 33 (arguing that a cost-benefit analysis is inappropriate in areas of environmental, safety, and health regulation); Duncan Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387 (1981) (arguing that the cost-benefit analysis as employed in policy making is incorrect).

Indeed, the idea that administrative agencies should be guided by a principle of instrumental rationality that includes cost-benefit analysis of goals directly contradicts the work of several contemporary scholars, such as Friedrich Hayek, Theodore Lowi, and David Schoenbrod.³²⁷ In their view, all policy decisions—all decisions about the goals or ends of governance—should be made by the legislature, and the role of administrative agencies should be restricted to the implementation of these decisions.³²⁸ This allocation of responsibility certainly corresponds to our traditional ideas about government,³²⁹ but those traditional ideas are of premodern origin and are unrealistic in a modern administrative state. As described above, the relationship between ends and means is relative, with the means envisioned by a higher level of government becoming the end that its subordinates are expected to achieve.³³⁰ At what point do these subsidiary ends count as means, rather than as the sort of purposes that administrators are not permitted to define? If one must specify goals even a few levels down, the amount of detail that the legislature would need to articulate would be so great that regulation would need to be greatly reduced, contrary to the clear preferences of the citizenry, or the legislature would need to develop a massive bureaucracy of its own.

To summarize thus far, instrumental rationality can serve as a general standard for an administrative procedure act. It can be applied to all actions taken by administrative agencies. To the extent that Congress sets a goal, or the President sets a goal for an executive agency, instrumental rationality demands that the agency implement such a goal in an effective manner. Where no goal is specified, the principle demands that a goal be defined by means of cost-benefit analysis, or some similar technique that ranks goals according to their consequences. Once the goal is defined, the principle then requires that actions taken at each successive stage of the implementation process are plausibly designed to achieve that goal, and are not motivated by avarice, laziness, or traditionalism. Of course, instrumental rationality cannot, by itself, provide a fully articulated set of standards for the administrative process; there are additional standards, such as fairness, that must be incorporated, and other standards that are neces-

³²⁷ See F.A. HAYEK, 3 *LAW, LEGISLATION AND LIBERTY: THE POLITICAL ORDER OF A FREE PEOPLE* 20–40 (1979); LOWI, *supra* note 6, at 92–126; David Schoenbrod, *Goals Statutes and Rules Statutes: The Case of the Clean Air Act*, 30 *UCLA L. REV.* 740, 818–28 (1983); see generally Aranson et al., *supra* note 6 (positing that delegation of policy decisions to administrative agencies enables legislators to enact legislation that sounds publicly oriented while simultaneously allowing agencies to undercut that legislation in favor of special interests).

³²⁸ For the contrary view, see Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 *J.L. ECON. & ORG.* 81 (1985).

³²⁹ See Thomas O. Sargentich, *The Delegation Debate and Competing Ideals of the Administrative Process*, 36 *AM. U. L. REV.* 419, 423–25 (1987).

³³⁰ See *supra* notes 249–50 and accompanying text.

sary to translate this general idea into specific requirements. But the principle of instrumental rationality, like the principle of private participation that the current APA employs, can provide a dominant, organizing theme to guide most major statutory choices.

C. Rulemaking

1. *Required Procedures*

Rulemaking is the most direct, and perhaps the most important, modality by which administrative agencies make public policy.³³¹ The APA rather awkwardly defines a rule as an “agency statement of general or particular applicability and future effect.”³³² Because adjudicatory decisions inevitably exercise future effect, particularly for repeat players like regulated firms, this formulation has proved to be conceptually unstable.³³³ A more appropriate definition in the administrative context would be the one suggested by Justice Holmes’ opinion in *Bi-Metallic Investment Co. v. State Board of Equalization*,³³⁴ which held that the Due Process Clause does not require a hearing when the state takes action that applies generally, rather than to particular individuals.³³⁵ Holmes reasoned that generally applicable government action is policy making, and therefore people must seek recourse in the political process if they are displeased with the outcome.³³⁶ In contrast, when the government is adjudicating a particular individual’s status, the individual has no access to the political process, and trial-type procedures provide a necessary source of fairness.³³⁷ This idea of general

³³¹ See KERWIN, *supra* note 122, at 1–36; Colin S. Diver, *Policymaking Paradigms in Administrative Law*, 95 HARV. L. REV. 393, 409–13 (1981); Keith Hawkins & John M. Thomas, *Rule Making and Discretion: Implications for Designing Regulatory Policy*, in MAKING REGULATORY POLICY 263, 265–70 (Keith Hawkins & John M. Thomas eds., 1989); Seidenfeld, *supra* note 244, at 1559–62.

³³² 5 U.S.C. § 551(4) (2000).

³³³ See Scalia, *supra* note 103, at 382–83. The National Labor Relations Board (NLRB) has avoided the use of its rulemaking authority, and relied almost exclusively on adjudication. See, e.g., *Excelsior Underwear, Inc.*, 156 N.L.R.B. 1236 (1966). *Excelsior Underwear* was an adjudicatory decision with all the indicia of a rule: it was described as a rule, reversed a previous line of decisions, was applied only prospectively, and was declared effective thirty days from the date of decision, as required in the case of informal rules by § 553(d). *Id.* at 1246–47. The decision itself, in addition to the underlying NLRB policy, has been sharply criticized by both courts and commentators, see *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 764–66 (1969); *Bell Aerospace Co. v. NLRB*, 475 F.2d 485, 495–97 (2d Cir. 1973), *aff’d in part and rev’d in part*, 416 U.S. 267 (1974); Flynn, *supra* note 239, at 423–24; Mayton, *supra* note 239, at 117–19, but the Supreme Court has been unable to articulate a principle that would require the agency to use its rulemaking powers in particular situations, see *Bell Aerospace Co.*, 416 U.S. at 294–95.

³³⁴ 239 U.S. 441 (1915).

³³⁵ *Id.* at 445–46.

³³⁶ See *id.* at 445.

³³⁷ See *id.* at 445–46. If this standard were that used in the APA to distinguish between rulemaking and adjudication, it might be possible to counteract the NLRB’s recalcitrant refusal to use its rulemaking power, see *supra* note 333, because courts could recognize a

action should be used as the definition of rulemaking in a revised administrative procedure act. It effectively separates the cases in which specific procedures are needed to ensure fairness those in which fairness is one of several general goals to be achieved through considerations of instrumental rationality.

The standard of instrumental rationality considers whether the rule that the agency has promulgated is likely to achieve its stated goal. Identification of the goal sets the general direction for agency policy making. It represents the embodiment of three different principles, depending on the source of the goal: the rational-legal principle by which the legislature, as supreme lawmaking body, gives commands to the administrative agency; the hierarchical principle, by which the chief executive, as structural superior of an executive agency, gives commands to the agency; and the instrumental rationality principle, by which the agency defines its own goal by consequentialist analysis. Thus, when the agency decides to make a rule, the first step is to identify the goal, or purpose, that the rule is expected to achieve.³³⁸ A new APA should require that a document published at the time the agency decides to proceed with rulemaking explicitly state this goal before any effort has been made to determine the means by which the goal should be implemented. No sustained or detailed consideration of implementation methods should be undertaken without a clearly defined goal.³³⁹ To do so is to imprison oneself in the iron cage.

Goal statements are a familiar feature of the policy planning process,³⁴⁰ and a substantial amount of collective cultural experience exists in formulating them. Generally, the goal statement must recite a measurable outcome, allowing the means of implementation to be analyzed in advance and evaluated in retrospect. "Improving air quality" is not a properly formulated goal; "reducing the number of people who suffer from pollution-related respiratory ailments," although vague, is nevertheless acceptable. While greater specificity is often desirable, it must be directed to a genuine end, and not to a means.

situation in which the agency was acting in a general manner that did not demand procedural protection, but did affect a general category of cases.

³³⁸ See Diver, *supra* note 331, at 413-15.

³³⁹ Rulemaking, when defined as general action, does not implicate issues of fairness to individuals. As Peter Schuck has pointed out, however, clarity regarding the goals of a rule can contribute to fairness by helping adjudicators discern when it is appropriate to make an exception to the rule in the interest of equity. See Peter H. Schuck, *When the Exception Becomes the Rule: Regulatory Equity and the Formation of Energy Policy Through an Exceptions Process*, 1984 DUKE L.J. 163, 176-80.

³⁴⁰ See STUART S. NAGEL, *POLICY EVALUATION: MAKING OPTIMUM DECISIONS* (1982); CARL V. PATTON & DAVID S. SAWICKI, *BASIC METHODS OF POLICY ANALYSIS AND PLANNING* 25-38 (1986); EDITH STOKEY & RICHARD ZECKHAUSER, *A PRIMER FOR POLICY ANALYSIS* 5-6 (1978); Diver, *supra* note 331, at 396.

“Creating a mechanism for auctioning new broadcast licenses” does not state a goal; a proper formulation would be “developing a means to assign new broadcast licenses according to market principles.” Of course, once the agency had established this goal and adopted auctions as its implementation mechanisms through a valid rulemaking procedure, a subsequent rulemaking to modify this mechanism could treat the creation of an effective auction as its goal. Similarly, if Congress enacted legislation requiring auctions, then “creating a mechanism for auctioning new broadcast licenses” would be the goal of agency rulemaking. Whatever the source of the goal, it should be clearly stated. This requirement connects with one of the defining features of the administrative state—its explicit policy intervention in the economic and social system through rational-legal action, that is, the conscious promulgation of new laws and regulations.³⁴¹

The agency should be required to submit its goal statement to all the institutions expected to participate in the rulemaking process: the President, Congress, other agencies, and the general public. Comments from all these sources relating to the validity of the goal and the possible means of implementing it should then be received by the agency within a defined comment period. All this commentary, like the comments currently provided for by the APA, should be submitted in written form and subsequently included in the rulemaking record that is subject to judicial review. Recognizing the hierarchical structure of modern administration, an executive agency could be required to follow comments from the President, if the President so chose. Recognizing the principles of expertise and continuity, however, all other comments would be advisory, including the President’s comments to an independent agency. Despite their precatory character, these other comments coming from important governmental actors as well as private parties are likely to be taken seriously by the agency. It is possible that they will be taken too seriously at this early stage in the process, and disrupt the agency’s ability to deploy its expertise,³⁴² particularly if executive or legislative inputs become a source of additional private party influence. There is evidence, however, that the influence of special interests on government decision

³⁴¹ If an agency were improperly using adjudication in place of rulemaking, see *supra* note 333, its action could be overturned as violating the requirement that all rules must include an explicit statement of their goal.

³⁴² For examples of disruptive influences affecting the rulemaking process, see KATZMANN, *supra* note 5, at 79–151; Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L.J. 1255 (1997); Morrison, *supra* note 188 (discussing OMB review); Rossi, *supra* note 5, at 211–41 (discussing negotiated rulemaking). See generally Michael A. Fitts, *Can Ignorance Be Bliss? Imperfect Information as a Positive Influence in Political Institutions*, 88 MICH. L. REV. 917 (1990) (discussing the disruptive effect of information on political decision making process).

makers is less disproportionate than is often assumed,³⁴³ and the multiplicity of voices may ultimately counterbalance each other. The additional input from other agencies may also have a beneficial effect, since the contributions will often be less adversarial and more comprehensive than private party inputs, speaking directly to the agency's strategic planning efforts that constitute the essence of the rulemaking process.³⁴⁴

Once the agency has received comments from all these sources on its proposed goal, it would be required to publish its goal statement, as revised, before proceeding with the creation of the rule. There would be no judicial review of this goal statement. On a pragmatic level, such review would unnecessarily proceduralize the process, creating the possibility of severe delay. On a more theoretical level, comments on the agency's goal function as part of an ongoing process of supervising the agency, and the judiciary would not be expected to participate until the process is complete and its participation is invoked by an aggrieved party. Although judicial review would only be available at the end of the process, the initial goal statements, written comments, and revised goal statement would all be part of the rulemaking record, and thus be factored into the court's assessment of the rule's validity in any subsequent challenge.³⁴⁵

³⁴³ See ROSS E. CHEIT, *SETTING SAFETY STANDARDS: REGULATION IN THE PUBLIC AND PRIVATE SECTORS* 211–21 (1990); A. LEE FRITSCHLER, *SMOKING AND POLITICS: POLICY MAKING AND THE FEDERAL BUREAUCRACY* 10–11 (4th ed. 1989); WESLEY A. MAGAT ET AL., *RULES IN THE MAKING: A STATISTICAL ANALYSIS OF REGULATORY AGENCY BEHAVIOR* 135–58 (1986); Croley, *supra* note 38, at 54–84.

³⁴⁴ Moreover, the input from governmental actors would be recorded and subject to review. That does not preclude undesirable threats and illegitimate arguments, but the potential for such threats and arguments exists under the present system; the proposed APA would at least subject intragovernmental interactions to some procedural requirements. At a minimum, a revised APA should explicitly endorse the holding in *D.C. Federation of Civic Ass'ns v. Volpe*, 459 F.2d 1231 (D.C. Cir. 1971), that an administrative decision should be invalidated if it can be shown to have been based on irrelevant factors (such as threats of political punishment). See *id.* at 1246. The revised APA would clarify this standard by providing a test for determining relevance—instrumental rationality.

³⁴⁵ An explicit statement of the goal serves as an important aspect of exercising control through the principle of instrumental rationality. As an illustration in a vastly different context, consider the following exchange between Alice and the Dormouse at the Mad Hatter's tea party:

“Once upon a time there were three little sisters,” the Dormouse began in a great hurry; “and their names were Elsie, Lacie, and Tillie; and they lived at the bottom of a well—”

“What did they live on?” said Alice . . .

“They lived on treacle,” said the Dormouse, after thinking a minute or two.

“They couldn't have done that, you know,” Alice gently remarked.

“They'd have been ill.”

“So they were,” said the Dormouse; “*very* ill.”

LEWIS CARROLL, *Alice's Adventure in Wonderland*, in *THE ANNOTATED ALICE* 100 (1960) (annotations omitted). Living on treacle is instrumentally rational, provided one's goal is to

This proposal does not radically depart from existing practice. The annual regulatory plans that executive agencies have been required to submit to OIRA since 1985 are essentially equivalent to presidential review of a goal statement for these agencies.³⁴⁶ Regulatory agencies do not submit a statement of their goals to Congress presently, but each agency's oversight committee is typically aware of the agency's plans at this early stage and can communicate its views about them through informal channels. Private parties also communicate regularly with the agency long before it publishes a preliminary rule. Indeed, the court in *Home Box Office v. FCC*,³⁴⁷ which imposed unexpectedly severe restrictions on ex parte contacts after publication of the proposed rule,³⁴⁸ described these communications received prior to publication as the "bread and butter" of the administrative process, and declined to restrict them.³⁴⁹ In addition, the Negotiated Rulemaking Act of 1990 provides a mechanism for public participation prior to the publication of the preliminary rule.³⁵⁰ Thus, requiring a goal statement and instituting an early comment period are more properly regarded as efforts to systematize and codify existing practice than as endeavors to radically depart from it.

Moreover, some language in the current APA is not very different from the proposed requirement, and highlights the rationale for providing comments to the agency at such an early stage. Section 553 of the APA requires that the notice of a proposed rulemaking include

remain ill. That goal, however, is irrational. An action is almost always instrumentally rational with respect to some goal, but the actor is then compelled to admit to an unacceptable goal, which he typically will not want to do.

³⁴⁶ See Blumstein, *supra* note 182, at 866-67; Bruff, *supra* note 178, at 551; *supra* note 149 and accompanying text.

³⁴⁷ 567 F.2d 9 (D.C. Cir. 1977).

³⁴⁸ See *supra* notes 113-17 and accompanying text.

³⁴⁹ *Home Box Office*, 567 F.2d at 57.

³⁵⁰ 5 U.S.C. §§ 561- 570a (2000); see Philip J. Harter, *Assessing the Assessors: The Actual Performance of Negotiated Rulemaking*, 9 N.Y.U. ENVTL. L.J. 32, 36 (2000) (describing statutory provisions and their operation in practice) [hereinafter Harter, *Assessing the Assessors*]. The practice, see Philip J. Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1 (1982) (describing that negotiated rulemaking, which is voluntary on the agency's part, has both its critics and defenders). For criticisms, see Coglianese, *supra* note 342, William Funk, *When Smoke Gets in Your Eyes: Regulatory Negotiation and the Public Interest—EPA's Woodstove Standards*, 18 ENVTL. L. 55 (1987); Rossi, *supra* note 5, and for endorsements, see Jody Freeman & Laura I. Langbein, *Regulatory Negotiation and the Legitimacy Benefit*, 9 N.Y.U. ENVTL. L.J. 60 (2000); Harter, *Assessing the Assessors*, *supra*. Negotiated rules are a form of prepublication input, but they contemplate a much more intensive involvement of private parties in the process than the proposal presented in this Article, and most of the criticism is directed toward that pervasive involvement. As the range of cited scholarship indicates, the wisdom of negotiated rulemaking is a formidable topic, which cannot be adequately addressed in an Article of this generality. Nothing in the proposed procedures, however, would preclude negotiated rulemaking. Current negotiated rulemaking practice would be modified so that the agency would be required to state its revised goal before initiating the negotiated rulemaking process.

“either the terms or substance of the proposed rule or a description of the subjects and issues involved.”³⁵¹ The second alternative, that is, “a description of the subjects and issues” is similar to the recommended goal statement. But the APA also allows a text of the proposed rule to serve as notice. For the adjudication-inspired purpose of notifying interested private parties, the APA approach is probably correct, because either a description of the subjects and issues or the actual text of the proposed rule will provide sufficient information to elicit relevant comments.³⁵² From the perspective of effectuating control over the agency by outside parties, however, the two forms of notice are almost diametric opposites. One form of the required notice—identifying the subject matter—and the other form of the notice—drafting a proposed rule lies perhaps eighty or ninety percent of the policy making process.³⁵³ Identifying the subject matter or stating the goal is the very first step in policy making. To draft a proposed rule, in contrast, the agency must investigate the problem, identify possible solutions, assess the potential effectiveness of each alternative, select the preferred solution, and draft legal language reflecting that solution.

Thus, while these two forms of notice are close equivalents for the judicially inspired purpose of notifying private parties, they are dramatically different for the administratively oriented purpose of enabling those parties to actually affect the agency’s decision making process. The agency is most likely to be receptive to comments from outside parties at an early stage in the process, such as when the agency has merely identified the goal. By the time the agency has undertaken all the other steps necessary to draft a proposed regulation, it has invested enormous staff resources in that particular regulation, its members have become convinced that the draft represents the ideal solution to the problem. Furthermore, any legal or political deadline for promulgation of the regulation is likely to be fast approaching. Comments suggesting major changes in the regulation at this stage are likely to be viewed as an annoying intrusion to be either ignored, or, if necessary, explained away. Put differently, one of the APA’s alternative forms of notice—providing a statement of the issue—maximizes the impact of the comment requirement, while the other one—releasing the text of the proposed rule—eviscerates it.

³⁵¹ 5 U.S.C. § 553(b)(3) (2000).

³⁵² Barring unusual situations such as *AFL-CIO v. Donovan*, 757 F.2d 330 (D.C. Cir. 1985), where the agency published the entire rule as notice of some relatively minor amendments, *see id.* at 338–39, publication of the proposed rule may be marginally preferable for notice purposes, as it will avoid interpretive ambiguities in the actual nature of the issues.

³⁵³ *See* KERWIN, *supra* note 122, at 40–86; JAMES T. O’REILLY, *ADMINISTRATIVE RULEMAKING*, § 4.02 (1983); Pedersen, *supra* note 101, at 51–59. O’Reilly identifies ten stages of rulemaking—the publication of the draft rule is stage eight on his list. *See* O’REILLY, *supra*, Figure 4-1, at 90.

Whenever the agency chooses the second option, which is by far the more common situation, it creates a real danger that the comment requirement will be reduced to an empty formality. In contrast, requiring comments at the goal definition stage would maximize the informative value of the comments and thereby effectuate instrumentally rational decision making.

Once the agency has received comments on its goal statement, it should proceed with the other stages of policy making free of legal constraints, as is the case under the current APA. This lack of legal control properly reflects the principles of jurisdiction, expertise and continuity that define the structure of the administrative apparatus. It also comports with the principle of hierarchy, since only the President is the hierarchical superior of any agency, and his ability to communicate his views to the executive agencies does not require any further legal facilitation. The rule that the agency drafts and proposes should then be submitted to the President, Congress, and the general public for a second comment period. This comports with current practice—the APA requires submission to the general public, while the Contract With America's report and wait provision, codified as an amendment to the APA, requires submission to Congress, and a Presidential executive order requires submission to OIRA.³⁵⁴ A new APA would simply codify and systematize these requirements, allowing one submission to satisfy all three requirements during a single comment period. Contrary to current practice, rules proposed by independent agencies would be submitted to the President, but, consistent with current practice, only rules proposed by executive agencies could be countermanded by him.

Reliance on sources of supervision other than private citizens provides a solution to the problem of rules that govern internal agency procedures or resource management, as opposed to the so-called legislative rules that are directed toward private citizens. As mentioned above,³⁵⁵ the agency's procedural rules are exempt from the APA's comment requirement and, in the case of resource management, from the notice requirement as well. Critics of this exemption note that internal rules often significantly impact private citizens,³⁵⁶ while defenders respond that permitting public participation would paralyze the agency's ability to organize its internal affairs, control its

³⁵⁴ See *supra* notes 171–72, 180–84.

³⁵⁵ See *supra* note 96 and accompanying text.

³⁵⁶ See Anthony, *supra* note 6, at 1332–55; Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 *YALE J. ON REG.* 1, 42–63 (1990); Asimow, *supra* note 96, at 403–04; Michael Asimow, *Public Participation in the Adoption of Interpretive Rules and Policy Statements*, 75 *MICH. L. REV.* 520, 528–30 (1977); Charles H. Koch, Jr., *Public Procedures for the Promulgation of Interpretative Rules and General Statements of Policy*, 64 *GEO. L.J.* 1047, 1053 (1976).

employees, and operate institutions.³⁵⁷ But the supervisory resources of the administrative state are not limited to entities external to the agency; the principle of hierarchy indicates that most supervision occurs within the agency's command structure. A new administrative APA should require that any rule adopted by agency officials that involves the agency's internal operations must be reviewed and approved by the structural superior of the adopting official. As in the case of legislative rules, the officials adopting the rule would submit a statement of the goal and receive comments on that statement before proceeding to draft the rule itself. That rule would then be submitted to the same hierarchical superior before it could become effective. Internal rules adopted at the highest level of an executive agency would be submitted to OMB, serving as agent for the President. Those adopted by the highest level of an independent agency would not be reviewed, but would still be required to state their goal before proceeding with the design and promulgation of the rule itself.

2. *Applicable Standards*

The standard for the agency's decision making in formulating any rule, whether external or internal, whether subject to notice and comment or exempted from it, should be instrumental rationality: is the final rule a rational way to implement the stated goal, as revised in light of the first set of comments? Of course, the agency would also be required to follow the prescribed procedures; if it neglected to publish its proposed rule, for example, no amount of instrumental rationality could save that rule from judicial invalidation. However, as *Vermont Yankee* held, courts would be explicitly forbidden from imposing additional procedures on the rulemaking process.

As an interpretation of the current APA, *Vermont Yankee* has proven difficult for federal courts—including the Supreme Court—to swallow, and there are numerous decisions that *Vermont Yankee* should have overruled that are still regarded as good law, or that were decided after *Vermont Yankee* and yet are arguably inconsistent with it.³⁵⁸ The courts seem to have choked on *Vermont Yankee* because, if taken literally, the decision would leave courts with no means of supervising most rulemaking proceedings. The only requirements that the current APA imposes on rulemaking are procedural ones; once *Vermont*

³⁵⁷ See Scott H. Angstreich, *Shoring Up Chevron: A Defense of Seminole Rock Deference to Agency Regulatory Interpretations*, 34 U.C. DAVIS L. REV. 49, 112–49 (2000) (defending exemption of interpretive rules from notice and comment procedure); Peter L. Strauss, *Publication Rules in the Rulemaking Spectrum: Assuring Proper Respect for an Essential Element*, 53 ADMIN. L. REV. 803, 804–08 (2001) (positing that interpretive rules should be exempt from comment procedure, so long as notice is provided); Strauss, *supra* note 96, at 1470–71.

³⁵⁸ The leading example of this class is *State Farm*. See *supra* note 105 and accompanying text; Strauss, *supra* note 76, at 1411–13.

Yankee forbid the courts from fabricating new procedures, these requirements are minimal, and thus provide courts with few opportunities for supervision. The proposed statute would impose the substantive standard of instrumental rationality, thus giving the courts a basis for supervision without improvising new procedures that the agency would be required to follow. This proposal thus moves in an exactly opposite direction from the one that Antonin Scalia advanced in response to the *Vermont Yankee* decision.³⁵⁹ Then-Professor Scalia suggested that the APA be amended to include ten or fifteen different procedural formats for agency action.³⁶⁰ Such a multitude of differing procedures, each with its own particular effect upon the agency, and ultimately with its own body of judicial interpretation, would produce doctrinal complexity of epic proportions, and agencies would need to focus increasing amounts of attention on navigating their way through this farrago in order to enact any rules at all. The present proposal shifts both agency and judicial attention away from procedural niceties, and focuses it on the substantive quality of the agency's decision making.

Although a substantive standard of instrumental rationality would obviously be a legal innovation, it would not represent a radical departure from current practice. In fact, instrumental rationality is what many, if not most, of the cases that strike down rulemaking on procedural grounds are really about. Federal judges know that they are not supposed to create new procedural requirements where Congress has explicitly declined to. When confronted with agency rules that violate the broadly accepted, if rarely stated, principle of instrumental rationality, however, they have felt impelled to search for some legal basis to invalidate the rule, and they have seized on the procedural grounds that they know they are not supposed to use because these are the only grounds that are presently available for striking down the regulation.

Consider, for example, *United States v. Nova Scotia Food Products Corp.*³⁶¹ The Food and Drug Administration (FDA) had promulgated regulations regarding the processing of smoked or salted fish for the purpose of minimizing the risk of botulism.³⁶² These regulations, adopted over the objection of various trade associations and the Department of the Interior's Bureau of Commercial Fisheries,³⁶³ re-

³⁵⁹ See Scalia, *supra* note 103, at 406–09.

³⁶⁰ *Id.* at 408.

³⁶¹ 568 F.2d 240 (2d Cir. 1977).

³⁶² *Id.* at 243–44.

³⁶³ This agency is now part of the Commerce Department's National Oceanic and Atmospheric Administration (NOAA). At the time it was part of Interior's Fish and Wildlife Service, having been transferred there in 1939 from the Department of Agriculture. See <http://www.nmfs.noaa.gov/>.

quired whitefish to be processed at a temperature that, the Court concluded, would destroy the commercial marketability of the fish.³⁶⁴ Nova Scotia asserted, without contradiction, that there were only eight known cases of botulism resulting from consumption of smoked whitefish, that all eight cases involved vacuum packed fish and occurred between 1960 and 1963, that the industry abandoned vacuum packing after 1963, that there had not been a single case of botulism caused by any of the 17.25 million pounds of whitefish produced since then, and that Nova Scotia itself had not had a single case of botulism poisoning in its 56 years of doing business.³⁶⁵ Its claim, supported by the Bureau of Commercial Fisheries, was that different processing standards should be developed for each type of smoked fish.³⁶⁶

The FDA regulation at issue in *Nova Scotia* clearly indicates a failure of instrumental rationality, at least as the court interpreted the facts. The stated goal of the regulation was to minimize the risk of botulism, but the regulation would not achieve this goal, because whitefish did not create this risk to any significant extent, particularly after vacuum packing had been abandoned.³⁶⁷ In contrast, the costs that this regulation imposed on whitefish producers and consumers were clearly substantial; even without employing a formal cost-benefit analysis, one could conclude on the basis of the consequentialist approach that instrumental rationality incorporates that these costs should only be imposed with a much greater showing of potential harm than was present in this case. A new APA can reach this result by imposing a substantive requirement of instrumental rationality on agency rulemaking. Lacking such a statute, the *Nova Scotia* court had to choose between upholding an irrational regulation or finding some procedural excuse to strike it down.

The court opted for a procedural excuse. It held that the FDA had failed to disclose the scientific data on which it intended to rely in its notice of proposed rulemaking, and had thereby failed to comply with the notice requirement of § 553.³⁶⁸ This stratagem enabled the court to reach what it regarded as the right result, but it did so only by creating a new procedural hurdle for more scrupulous agencies and new possibilities for challenges by less deserving private firms. Moreo-

³⁶⁴ See *Nova Scotia*, 568 F.2d at 245.

³⁶⁵ *Id.* at 250–51.

³⁶⁶ See *id.* at 250–51.

³⁶⁷ The regulation was instrumentally rational, however, if its stated goal was to destroy the smoked whitefish industry. Such a goal would generally be regarded as improper, however, even if it had been adopted by a legislature, and would certainly be improper for an agency. See *supra* note 345. While this would not be a difficult conclusion for courts to reach, it could be reached more directly if the APA authorized courts to apply the principle of instrumental rationality to the agency's choice of goals.

³⁶⁸ See *Nova Scotia*, 568 F.2d at 251–52.

ver, it did so by interpreting the APA in a manner that was certainly not textual, intentionalist, or even dynamic, but at best strategic, and arguably perverse. One might have thought that this decision would have been effectively overruled by *Vermont Yankee*, but federal appeals courts, apparently unwilling to relinquish this source of authority over rulemaking, have continued to treat *Nova Scotia* as good law.³⁶⁹ Their instinct is understandable, but a substantive requirement that agency rulemaking comport with the principle of instrumental rationality would be preferable.

In general, a substantive standard of instrumental rationality would allow courts to move away from reliance on judicial models in supervising agency rulemaking. It is always troublesome when an agency, as in *Nova Scotia*, entirely ignores well-informed, persuasive comments. Such behavior seems to vitiate the entire purpose of eliciting commentary, and betokens a potentially grave defect in the agency's decision making process. Yet the judicial model to which courts resort in combating this behavior tends to treat the problem as a matter of unfairness to the commentator, a violation of its right to be heard. Imposing this essentially adjudicatory concept on the rulemaking process formalizes it to the point of paralysis; it suggests that the agency must respond to every comment, no matter how ignorant or incoherent, since every party is entitled to equal treatment in a judicial setting. In place of this concern with fairness, the principle of instrumental rationality suggests a concern with validity, with the quality of the comments. The agency need not answer every comment, nor need it be fair to any particular commentator. Rather, it is required to demonstrate that it made a rational decision, by either refuting or adopting a comment that is well considered, well researched and convincing. In other words, in the proposed revision of the APA, giving people a chance to participate in government, or reconciling them to an unfavorable result, would only be a secondary purpose of the comment requirement. The primary purpose would be to provide the agency with information and ideas in order to reach an instrumentally rational decision.

The substantive standard of instrumental rationality also serves to alleviate, though not eliminate, the conflict between hierarchy and

³⁶⁹ For post-*Vermont Yankee* decisions that follow *Nova Scotia*, see, for example, Nat'l Black Media Coalition v. FCC, 791 F.2d 1016, 1018 (2d Cir. 1986); Conn. Light & Power Co. v. Nuclear Regulatory Comm'n, 673 F.2d 525, 530-31 (D.C. Cir. 1982); Idaho Farm Bureau Fed'n v. Babbitt, 839 F. Supp. 739, 748-49 (D. Idaho 1993), *vacated by* 58 F.3d 1392 (9th Cir. 1995).

The *Nova Scotia* decision also overturned the regulation on grounds that the agency's statement of basis and purpose was inadequate, another procedural extension of § 553. *Nova Scotia*, 568 F.2d at 252-53. This part of the decision has also been followed, see, e.g., *Ishtyaq v. Nelson*, 627 F. Supp. 13, 21 (E.D.N.Y. 1983).

continuity or expertise. The leading case on this point is *State Farm*, where the Supreme Court found the Department of Transportation's rescission of a safety regulation, which was clearly in response to the policy preferences of a new President, to be arbitrary and capricious.³⁷⁰ The opinion fails to confront the real quandary present in the case: that executive agencies are simultaneously conceived as neutral experts bound by statutory authorizations and as necessary extensions of the president, implementing the policies that the people endorsed when they elected him. By simply applying the same standard of review to rescissions and to new regulations, the courts tend to sidestep this quandary, treating political control of executive agencies as a dirty secret that is best left undiscussed. The principle of instrumental rationality would allow both the agency and the reviewing court to confront the issue more directly. It requires that a regulation serve as a rational means of achieving a previously-defined goal. If the agency wishes to rescind a rule, it must either demonstrate that it has re-evaluated the regulation's ability to achieve the goal or that it has re-evaluated the goal. Assuming no change in the authorizing statute, a goal can be re-evaluated according to the instrumentally rational process embodied in cost-benefit analysis, that is, the agency can change its goal within the scope of the statute by re-evaluating the goal's pragmatic consequences. Instrumental rationality thus acknowledges the political control of executive agencies, but subjects that control to the dominant standard of administrative government.

Finally, an instrumental rationality standard would address rules designed to organize the agency's internal operations or manage its resources. While it is questionable whether it is as important for the public to participate in the formation of these rules as it is for legislative rules, it is just as important that these rules be designed to achieve their stated purpose. Thus, even in the absence of statutorily required procedure other than submission to the rule maker's structural superior, the substantive nature of an instrumental rationality requirement would hold internal rules to the same standard as legislative ones. The arbitrary and capricious standard, in contrast, being heavily procedural, is difficult to apply in any meaningful way outside of the notice and comment process.

D. Executive Action

The administrative perspective suggested here as the basis for a revised APA would not produce much of an impact on the APA's current provisions governing formal adjudications subject to §§ 554, 556,

³⁷⁰ *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 46-47 (1983).

and 557. Many of our rules for administrative adjudication are governed by the Due Process Clause, rather than by the statutory provisions of the APA. The decisions in *Marcello v. Bonds*³⁷¹ and *Goldberg v. Kelly*³⁷² establish the principle that due process and the APA function independently. *Marcello* held that the applicability of the Due Process Clause to a particular hearing neither implied nor compelled the conclusion that Congress intended that hearing to be governed by the APA rules for formal adjudication.³⁷³ *Goldberg* held that provisions in an administrative statute would not determine the applicability of due process.³⁷⁴ Subsequent case law has weakened *Goldberg's* distinction,³⁷⁵ and administrative considerations have influenced the theory

³⁷¹ 349 U.S. 302 (1955).

³⁷² 397 U.S. 254 (1970).

³⁷³ See *Marcello*, 349 U.S. at 306–07. *Marcello* overruled *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950), which had held that the applicability of the Due Process Clause to deportation hearing indicated a Congressional intent to subject such hearing to the APA's rules for formal adjudication. The *Wong Yang Sung* Court also implied that Congress's decision was constitutionally required by due process. Congress quickly overruled this aspect of *Wong Yang Sung*. See Supplemental Appropriations Act of 1951, Pub. L. No. 81-843, 64 Stat. 1048 (codified at 8 U.S.C. § 1252(b) (2000)). In *Marcello*, the Court upheld this statutory change against a constitutional challenge, overruling the remainder of *Wong Yang Sung*. See *Marcello*, 349 U.S. at 309–10.

³⁷⁴ *Goldberg*, 397 U.S. at 266–67. *Goldberg* abolished the right-privilege distinction, which essentially placed the interests created by administrative statutes outside the reach of the Due Process Clause. *Id.* at 261–62. See generally Charles A. Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245 (1965) (discussing constitutional questions raised by welfare procedures); Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964) (discussing early attempts to distinguish rights and privileges).

³⁷⁵ See *Olim v. Wakinekona*, 461 U.S. 238 (1983) (holding administrative statutes that allow extensive discretion do not create due process interests); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982) (holding that administrative statutes can create interests that trigger due process protection); *Bd. of Regents v. Roth*, 408 U.S. 564 (1972) (holding that applicability of due process depends on whether a state has created a property interest). While these decisions seem to suggest that an administrative statute can determine the applicability of due process, they address only the statute's creation of underlying interests. At some level, this is uncontroversial; there would be no right to a welfare hearing if the statute abolished welfare, and such general action, which is subject to the control of the political process, is not constrained by the Due Process Clause. See *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441 (1915). The Court has definitively held that an administrative statute can only control the applicability of due process by the creation of such underlying interests, and not by directly prescribing procedure. See *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985) (involving the creation of a property interest); *Vitek v. Jones*, 445 U.S. 480 (1980) (involving the creation of a liberty interest); *Arnett v. Kennedy*, 416 U.S. 134, 167 (1974) (Powell, J., concurring in the result, in part) (“Th[e] right [to procedural due process] is conferred, not by legislative grace, but by Constitutional guarantee.”). See generally Cynthia R. Farina, *Conceiving Due Process*, 3 YALE J.L. & FEMINISM 189, 195–96 (1991) (discussing the “bitter with the sweet” analysis rejected by the Court in *Loudermill*); Jerry L. Mashaw, *Dignitary Process: A Political Psychology of Liberal Democratic Citizenship*, 39 U. FLA. L. REV. 433 (1987) (arguing that *Loudermill* “seriously misdirects due process analysis”); Henry Paul Monaghan, *Of “Liberty” and “Property,”* 62 CORNELL L. REV. 405 (1977) (suggesting the restrictive trends in due process analysis call for a reexamination of the definition of liberty and property); Rubin, *supra* note 68 (describing the “fall from grace” of procedural due process); Richard B. Stewart & Cass R. Sunstein, *Public*

of due process itself,³⁷⁶ but the basic distinction remains. In any event, due process, however conceived, controls much of our adjudicatory practice independently of any provisions in the APA.

Second, those parts of the APA's rules for formal adjudication that extend beyond the minimal requirements of due process, and are therefore not controlled by it, function relatively well because of the historical continuity of the underlying task. Although the fact that administrators, as opposed to judges, adjudicate the status of individuals is a relatively novel feature of the administrative state, the adjudications themselves are based on culturally familiar pre-administrative models. To be sure, the massive number of administrative adjudications and their relatively routine character³⁷⁷ creates unique demands, but agencies have been able to modify their procedures to account for these features.³⁷⁸ In turn, courts generally accept the idea that such modifications can meet constitutional standards.³⁷⁹ While the modifications undeniably depart from traditional notions of adjudication in important ways, the strength and depth of our cultural experience with adjudication gives us the capacity to effect these modifications in a relatively uncontroversial manner. There are certainly some advantages to be gained by thinking about adjudications in more modern, administrative terms, but the advantages are compar-

Programs and Private Rights, 95 HARV. L. REV. 1195 (1982); Patricia M. Wald, *Government Benefits: A New Look at an Old Gifthouse*, 65 N.Y.U. L. REV. 247 (1990) (suggesting that the rights-benefits scheme requires constitutional reconsideration).

³⁷⁶ See *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305 (1985) (nonadversarial nature of proceedings alters due process right to counsel); *Mathews v. Eldridge*, 424 U.S. 319 (1976) (fairness and reliability of agency adjudication alters due process right to oral hearing); JERRY L. MASHAW, *DUE PROCESS IN THE ADMINISTRATIVE STATE* (1985) [hereinafter MASHAW, *DUE PROCESS*]; Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28 (1976).

³⁷⁷ This point should not be overemphasized, however. Eighteenth and nineteenth century debt collection cases in civil courts were numerous relative to the scale of government at the time, and they were nonetheless quite routine. See BRUCE H. MANN, *REPUBLIC OF DEBTORS: BANKRUPTCY IN THE AGE OF AMERICAN INDEPENDENCE* 17-33 (2002); Robert A. Kagan et al., *The Business of State Supreme Courts, 1870-1970*, 30 STAN. L. REV. 121, 137-40 (1977).

³⁷⁸ See MASHAW, *DUE PROCESS*, *supra* note 376 (describing modification of standard civil trial mode by Social Security Administration).

³⁷⁹ *Walters*, 473 U.S. 305 (upholding determination of veterans benefits by non-adversarial hearing where applicant is represented, free of charge, by trained service representative); *Heckler v. Campbell*, 461 U.S. 458 (1983) (upholding a statutory scheme permitting the use of medical guidelines for classes of disability benefits claim); *Mathews*, 424 U.S. 319 (validating reliance on written submissions to make social security disability determinations); *Goss v. Lopez*, 419 U.S. 565 (1975) (validating use of highly informal, consultative hearing to determine whether public school student should be suspended). Although the balance that each decision strikes between procedural protection and administrative practicality may be controversial, it is widely accepted that this balance must be struck, and that it leads to significant modifications of the classic understanding of due process protections.

tively minor, and cannot be explored in a discussion of this generality.³⁸⁰

So-called informal adjudications under the APA are a different matter. As discussed above, the descriptive term and the underlying categorization it implies are themselves conceptual errors. The general category is better described as executive action, but this covers such a broad and diverse range of functions and behaviors that generalizations are inevitably problematic. One possible generalization, however, is that all executive action, like administrative action generally, should be guided by the principle of instrumental rationality. All executive action should be designed to achieve a specified goal in an effective manner or to formulate a goal in terms of its pragmatic consequences. In some cases, there may be additional constraints on action, such as a constitutional requirement or statutory provision. But within the limits set by these independent constraints, there is no justification for executive action to be governed by any other standard.

The same substantive and procedural requirements that have been proposed for rulemaking can govern most types of executive action. That is, before taking executive action, the agency should be required to state its goal and identify the source from which that goal was derived. Acceptable sources would include a direct statutory command, a reasonable interpretation of an indirect or ambiguous statutory command, or the command of a hierarchical superior, including, for executive agencies, the President. In the absence of any such source, the agency must provide an account of the way in which the agency itself has developed the goal. Having identified its goal, the agency must then articulate an instrumentally rational plan by which to achieve that goal, and both the goal and plan must be recorded. These requirements would initially be enforced in accordance with the principle of hierarchy—by requiring that statements of the goal and the plan be submitted to the agency's hierarchical superior in the administrative apparatus. Goals and plans developed at the highest level of an executive agency would be reviewed by the president, through the existing mechanism of OMB; those developed at the highest level of an independent agency would not be reviewed. Any hierarchical superior within the administrative apparatus would have authority to countermand any aspect of the proposed implementation plans that were submitted to it. Alternatively, the superior could offer comments or suggestions that would often affect the agency because they were more internal, less adversarial, and more comprehensive than the typical comments that agency receives from the public with respect to rules.

³⁸⁰ One issue, discussed briefly above, *see supra* notes 332–38 and accompanying text, is the choice between rulemaking and adjudication.

These statements of goals and plans would be made available to Congress and to the public, as well to the agency's hierarchical superior,³⁸¹ but there would be no opportunity for participation by these other entities prior to the implementation of the plan. Unlike rulemaking, participation by governmental entities outside the agency's own administrative hierarchy is not necessary. Indeed, such participation would often be counterproductive.³⁸² Rulemaking generally involves the formation of public policy, or the most basic choices involving the implementation of legislatively defined public policy. It not only has the largest impact on society, but, more importantly for present purposes, it sets the direction for subsequent agency action. Quite often, it involves a definition of the agency's goals that would benefit from an instrumentally rational goal assessment by the agency, or from a value rational assessment by the legislature and private parties. Executive action, in contrast, occurs within the framework of the goals that have been thus defined, and generally involves the process by which those goals are implemented at the operational level. This is a more constrained form of instrumental rationality, where the means are developed to achieve a predefined goal. Value rational input is not needed at this point, and might well interfere with the expertise and continuity that the administrative process is designed to embody.³⁸³

There are also more specific problems with allowing entities outside the command structure of the agency to participate in the more detailed aspects of the implementation process. Outside participation always creates the possibility of delay and an opportunity for special interest influence to distort the administrative process. To allow such participation where it offers only limited positive benefits is therefore likely to be counterproductive. In addition, agencies must often engage in strategic behavior in order to implement a policy ef-

³⁸¹ In addition to the publication requirement under the revised APA, plans would be available to the public under the Freedom of Information Act (FOIA), Pub. L. No. 89-487, 80 Stat. 250 (1966) (codified as amended at 5 U.S.C. § 552 (2000)). The FOIA is a complex topic in its own right, see HERBERT N. FOERSTEL, *FREEDOM OF INFORMATION AND THE RIGHT TO KNOW: THE ORIGINS AND APPLICATIONS OF THE FREEDOM OF INFORMATION ACT* (1999) (discussing the history of modern functionality, and future of FOIA); JAMES T. O'REILLY, *FEDERAL INFORMATION DISCLOSURE* (3d ed. 2000) (same); Kathryn M. Braeman, *Overview of FOIA Administration in Government*, 34 ADMIN. L. REV. 111 (1982) (same); Elias Clark, *Holding the Government Accountable: The Amended Freedom of Information Act*, 84 YALE L.J. 741 (1975) (same). A reassessment of it lies outside the scope of this Article.

³⁸² See KATZMANN, *supra* note 5, at 79-151; Coglianese, *supra* note 342; Fitts, *supra* note 342; Morrison, *supra* note 188; Rossi, *supra* note 5.

³⁸³ Thus, even if *INS v. Chadha*, 462 U.S. 919 (1983), were overruled (which would be desirable), and Congress could exercise a legislative veto over proposed rules, this authority should not be extended to implementation plans.

fectively manner.³⁸⁴ For example, an agency that inspects industrial facilities for safety might wish to ignore a certain category of violations in order to save resources, but might not want the subject facilities to know that they can engage in these violations with impunity.³⁸⁵ The hierarchical supervision provided by the agency's superior can enforce the instrumental rationality of such strategic action, while participation by the regulated firms would vitiate it.³⁸⁶

Although the purpose of this goal and plan requirement is to enforce a standard of instrumental rationality on agency executive action, the requirement would also have the collateral advantage of increasing the fairness of this action for individuals. As noted above, executive action, which the APA implicitly describes as informal adjudication, is not adjudication at all as that term is generally understood. At least some executive action, however, resembles real adjudication, since it involves the imposition of governmental authority on particular individuals, and thus implicates issues of fair treatment that are typically absent from rulemaking.³⁸⁷ For example, while the destruction of park land at issue in *Overton Park*³⁸⁸ does not raise any issue of fairness to individuals, the inspection of business premises that was at issue in *Marshall v. Barlow's, Inc.*³⁸⁹ clearly does. At present, general claims to administrative discretion can conceal actions based on unfair motivations such as personal antipathy, bias, politics, or unjustified retaliation.³⁹⁰ The goal and plan requirement

³⁸⁴ See AYRES & BRAITHWAITE, *supra* note 132, at 19–100; BARDACH & KAGAN, *supra* note 131; BRAITHWAITE, *supra* note 3; Robert A. Kagan & John T. Scholz, *The "Criminology of the Corporation" and Regulatory Enforcement Strategies*, in ENFORCING REGULATION 67 (Keith Hawkins & John M. Thomas eds., 1984); John T. Scholz, *Cooperation, Deterrence, and the Ecology of Regulatory Enforcement*, 18 LAW & SOC. REV. 179 (1984) [hereinafter Scholz, *Cooperation*]; John T. Scholz, *Cooperative Regulatory Enforcement and the Politics of Administrative Effectiveness*, 85 AM. POL. SCI. REV. 115 (1991); John T. Scholz, *Voluntary Compliance and Regulatory Enforcement*, 6 LAW & POLICY 385 (1984).

³⁸⁵ The example is obviously drawn from the Occupational Safety and Health Act (OSHA). For an extensive and insightful discussion of the strategic factors that would produce effective OSHA enforcement, see BARDACH & KAGAN, *supra* note 131.

³⁸⁶ As stated, see *supra* note 381, this Article does not attempt a reassessment of the Freedom of Information Act. It is likely, however, that plans for inspection or prosecution would fall into the existing FOIA law enforcement exception, 5 U.S.C. § 552(b)(7) (2000). If not, this exemption would need to be amended to counteract the additional recording requirements that the proposed APA revision would create.

³⁸⁷ To make a rule that affected an individual, rather than a class of individuals with at least theoretical access to the political process, would violate the Due Process Clause as interpreted by *Bi-Metallic Investment Co. v. State Board of Equalization*, 239 U.S. 441 (1915). See Rubin, *supra* note 91, at 1102–04.

³⁸⁸ *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971).

³⁸⁹ 436 U.S. 307 (1978).

³⁹⁰ Retaliation for behavior such as prior noncompliance would be justifiable under an instrumental rationality standard. Tit for Tat, which many observers regard as the optimal enforcement strategy, involves such retaliation. See AYRES & BRAITHWAITE, *supra* note 132, at 20–27; Kagan & Scholz, *supra* note 384; Scholz, *Cooperation*, *supra* note 384. See generally

provides an assurance of fairness in these situations by revealing action based upon such motivations as deviations from the stated plan. In addition, the agency's obligation to defend its implementation action, if challenged by producing a plan, should provide individuals with some sense that there is a purpose and a rationale for the treatment they have received. Thus, instrumental rationality itself may approximate many individuals' sense of fair treatment, and provide the sort of legitimation that Tom Tyler describes.³⁹¹ In any event, this goal and plan requirement necessarily provides more assurance of fairness than the current APA, which imposes no procedural controls on executive action.

It should be noted that the procedural requirements recommended for executive action are essentially the same as those recommended for nonlegislative rules dealing with internal management or resource allocation. These two types of administrative action are essentially the same. Both involve the manner in which an agency implements the policy that has been either established by rulemaking or established by Congress and interpreted by rulemaking. Of course, the APA also treats these two categories of administrative action as essentially the same, not by the manner in which it defines them, but rather by the fact that it does not impose any procedural constraints on them, apart from the notice requirement for management rules. The administrative APA proposed here, however, imposes constraints on both. In doing so, it applies a unified standard that precludes the need to make fine distinctions between the two modes of action.³⁹² This standard, moreover, should not be disruptive of agency operations because its requirements—defining a goal, stating a plan, and communicating both the goal and plan to the actor's hierarchical superior—are drawn from the general administrative standard of instrumental rationality.³⁹³

The proposal is not as different from existing practice as it might first appear. The development of explicit plans is generally consid-

ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* (1984) (engaging in a general analysis of Tit for Tat as an optimal strategy in repeated games). In contrast, retaliation for criticism of the agency would be forbidden, and could be discerned as a deviation from the established plan.

³⁹¹ See TYLER, *supra* note 277, at 115–57 (finding that people who have lost a dispute with government feel more positively toward the government if they perceive that the procedures used to resolve the dispute had been fair).

³⁹² As stated at the outset, this Article does not attempt to draft a new APA. One drafting point worth noting, however, is that management and resource allocation rules are merely forms of executive action and need not be treated as separate categories.

³⁹³ There is, in addition, a similar assurance of fairness. As stated above, *see supra* text accompanying notes 387–91, some executive action involves the rights of individuals, and thus implicates fairness considerations.

ered to be an essential feature of effective administration,³⁹⁴ and most agencies are probably reporting to their superiors in a manner that is quite similar to the one that would be required by the proposal. Moreover, the standards that courts have imposed on informal rulemaking sometimes resemble the proposal as well. In the inspections cases, for example, the Supreme Court held that an agency could comply with the Fourth Amendment's warrant requirement by demonstrating that "a specific business has been chosen for an OSHA search on the basis of a general administrative plan for the enforcement of the Act derived from neutral sources. . . ."³⁹⁵ Eliminating the need to show probable cause in order to obtain a warrant might seem to eviscerate the warrant requirement, but in the administrative context, a "general administrative plan" is the functional equivalent of a warrant. If evaluated on the ground of instrumental rationality, the plan provides assurance that the facility is being inspected in order to implement the agency's safety standards under OSHA, and not to punish political enemies, to extort money, or to further some other impermissible purpose. Of course, it does not ensure that the facility is suspected of wrongdoing, and thus does not preserve its privacy in the sense that this concept applies to private homes. But that level of privacy is not demanded by our constitutional morality, and it has been eliminated, as a matter of positive law, by general legislation. Recognition of this political result, however, does not require us to abandon all constraints on administrative agencies nor does it guarantee that private parties will be treated fairly. Fairness can be secured, within the administrative context, by reinterpreting the warrant clause in terms of the general administrative standard of instrumental rationality.³⁹⁶

*Overton Park*³⁹⁷ provides another example of the way in which courts have approximated the instrumental rationality standard in their efforts to impose requirements on informal adjudication under the current APA. In *Overton Park*, the Supreme Court seized upon the agency's reliance on an oral hearing to demand that the decision must be based on an administrative record, even though no hearing, and indeed no record, would typically be required for decisions of this

³⁹⁴ See FRIEDMANN, *supra* note 130, at 19-48; HARVEY S. PERLOFF, *PLANNING THE POST-INDUSTRIAL CITY* (1980); SIMON, *supra* note 251, at 67; STOKEY & ZECKHAUSER, *supra* note 340.

³⁹⁵ *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 321 (1978).

³⁹⁶ The generality of the instrumental rationality standard, and of the goal and plan statement as a means of securing it, eliminates the need for a complete exclusion from the warrant requirement for "pervasively regulated industries." These industries, like any others, could be fully regulated and inspected under the proposed standard. Thus, a revised APA would obviate the need for this exclusion that was recognized, and inadequately justified, in a series of Supreme Court cases.

³⁹⁷ *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971).

sort.³⁹⁸ The justification provided for this rather odd result was that reviewing courts must be given the information necessary to determine the legality of the agency's action.³⁹⁹ By legality, however, the Court seems to have meant instrumental rationality. Congress's goal was to build highways along routes that minimized the destruction of parkland, and the question was whether the route that the Secretary chose through Overton Park achieved this goal.⁴⁰⁰ Review of a goal statement and plan that the Secretary submitted to the President would provide a better means of making this same judgment, without adding procedural requirements for the creation of a record that can only encumber the implementation process.⁴⁰¹

Further explication of the proposed requirement for executive action would require a discussion of the various categories of action within this enormous area.⁴⁰² The inspection cases belong to the category of enforcement actions, and the Secretary's decision in *Overton Park* can be viewed as urban planning or infrastructure design, with complex questions of cooperative federalism mixed in. If the facts were varied a bit, *Overton Park* could also exemplify the category of resource allocation. Suppose, for example, that the question involved the construction of access roads through a national park, or a decision about whether to provide federal funds to one highway or another. In all these cases, it would be perfectly practical for the agency to state its goal and submit a plan to its hierarchical superior, and entirely desirable that the plan conform to the standard of instrumental rationality. While there may be modes of acceptable executive action that are so casual or ad hoc that a goal and plan statement would be burdensome and disruptive, there are few, if any, where the instrumental rationality standard would be inappropriate. Exceptions for such actions would need to be determined at the time when actual statutory language was being drafted. For the present, the general principle is that a goal and plan statement must be submitted to the agency's superior, and assessed on the basis of its instrumental rationality.

E. External Control

As described in Part I, the President, Congress, and the judiciary all exercise control over the administrative apparatus, but, with the exception of appeals from adjudicatory decisions, only judicial control is codified under the APA. The proposed statute, an administrative

³⁹⁸ See *id.* at 417, 420.

³⁹⁹ See *id.* at 420; *supra* text accompanying note 144.

⁴⁰⁰ See *Overton Park*, 401 U.S. at 404–09.

⁴⁰¹ See discussion *supra* Part II.C.1.

⁴⁰² Cf. Croley, *supra* note 9, at 117 (arguing that the varied nature of informal adjudication creates difficulties in formulating general modes of participation).

APA, would specify certain functions for the President, Congress, and the administrative agencies themselves, and would define the standard by which these functions were to be performed. In the rulemaking process, both the President and Congress would review goal statements and proposed rules for both executive and independent agencies. The President's response, at either stage in the process, would be mandatory for executive agencies, if the president so chose, but all other responses would be merely advisory. The standard of review would be unspecified, thus allowing for value rationality or the role of ideology. In the implementation process, statements of the agency's goal and plan would be reviewed within the administrative hierarchy by the agency's superior, with plans developed at the highest level of executive agencies being reviewed by the president. Here, the standard of review would be specified as instrumental rationality. In both cases, review by these other governmental institutions would generally be phrased in an internal, or governmental, discourse that would speak more directly to the strategic planning efforts of the agency than do the nongovernmental adversarial inputs that agencies receive from private parties.

With respect to judicial review, the final type of control over administrative agencies, an administrative approach would focus on two basic and seemingly obvious aspects of the process: first, that the institutions whose decisions are being reviewed are administrative agencies, and second, that the institutions carrying out the review are not administrative agencies, but courts. In other words, the starting point for the judicial review provisions of an administrative APA is a recognition of the institutional realities that inhere in the process. The agency must be accepted for what it is: a hierarchical institution with a defined jurisdiction, staffed by full-time specialists selected on the basis of their credentials, and organized around the principle of instrumental rationality.⁴⁰³ Similarly, it is important to recognize that courts, although they share certain features with administrative agencies,⁴⁰⁴ are a different type of institution, most notably because their

⁴⁰³ See *supra* notes 259–60, 296–98 and accompanying text.

⁴⁰⁴ They are partially hierarchical, but partially collegial; their jurisdiction is defined, but typically more general; and they are also staffed by full-time credentialed specialists. Both agencies and courts (in their nonconstitutional role) can be regarded as mechanisms for the implementation of legislative policy, the role of courts being typically described as agents of the legislature. See HENRY M. HART & ALBERT M. SACKS, JR., *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 350–62, 915–24 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994); Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 *Geo. L.J.* 281, 283–94 (1989); Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 *CASE W. RES. L. REV.* 179, 189–90 (1986); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 *HARV. L. REV.* 405, 415 (1989).

principles for decision making center on legal doctrine and value rationality.⁴⁰⁵

For rulemaking, the proposed revision of the APA would require the agency to state its goals; receive comments on this goal statement from the President, Congress, and private parties; publish a preliminary rule; and finally receive comments from these same parties. Courts would review both the goal statement and the final rule. The goal must fall within a statutory authorization; if the statute specifies a goal, the agency must adopt that goal, with whatever additional specificity it chooses to provide. If the statute grants broad authority, the stated goal is restricted only by the limits of that authority. In either case, the agency's final rule must be instrumentally rational. If statute specifies a goal, then the rule must constitute a rational means for achieving that specified goal. If the goal is not specified, then the agency must select its goal through a rational process that considers the pragmatic consequences of its choice, and the final rule must then constitute an instrumentally rational means of implementing the stated goal. Courts would review agency rulemaking to determine whether it stated a sufficiently specific goal, whether that goal was authorized by statute or developed through an instrumentally rational process, whether the final rule was an instrumentally rational means of achieving the goal, and whether anything in the final rule contravened the authorizing statute.⁴⁰⁶

Thus, under a revised, administrative APA, courts would be imposing a substantive standard of instrumental rationality on the agencies because this is the dominant principle for administrative governance.⁴⁰⁷ What standard of review should the court use in determining the instrumental rationality of the agency's action or its compliance with the governing statute? As noted above, the APA is silent on this subject due to its concentration on the rulemaking or adjudi-

⁴⁰⁵ Philip Bobbitt identifies six modes of judicial rhetoric or discourse: textual, historical (original intent) structural, doctrinal, ethical and prudential (policy-oriented). PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 93-94 (1982); BOBBITT, *supra* note 317. Of these, courts and agencies both engage in textual, historical, prudential, and structural approaches when interpreting statutes. Judicial decision making is distinguished from agency decision making by the prominence it gives to the features that Owen Fiss has emphasized—legal precedent, or doctrine, and ethical issues, or value rationality. *See* Fiss, *supra* note 107; Owen M. Fiss, *The Bureaucratization of the Judiciary*, 92 *YALE L.J.* 1442 (1983). With respect to doctrine, *see* EPSTEIN & KNIGHT, *supra* note 43, at 10; FEELEY & RUBIN, *supra* note 43, at 211-52.

⁴⁰⁶ This refers only to the review authorized by the revised APA. Constitutional review would remain unchanged.

⁴⁰⁷ This standard bears a certain resemblance to Christopher Edley's proposed standard of sound governance, *see* EDLEY, *supra* note 103, at 213-64, but differs in its derivation of the standard from Weberian principles of bureaucracy, *see* Fiss, *supra* note 405, at 1450-52.

catory character of the agency action under review.⁴⁰⁸ The recognition that judicial review involves a traditional, nonadministrative agency reviewing a modern administrative one brings the issue to the forefront. In designing a modern, administrative APA, one might be tempted to fashion a modern, administrative standard of review for courts to use, but this is probably the wrong instinct. Much of the value of enlisting courts in the task of controlling administrative agencies is to take advantage of our enormous historical and cultural experience with this institution. Therefore, the standard of review that courts should use in an administrative APA should be one of the traditional standards with which courts are familiar, and that takes advantage of their own institutional competencies.⁴⁰⁹

When courts determine questions of fact, the traditional standards that they employ are that the moving party must prove its case by a preponderance of the evidence, by clear and convincing evidence, or beyond a reasonable doubt. This basic metric of persuasion is entirely familiar to courts, and can be applied by them with much greater clarity than any standard that is newly fashioned by either statute or judicial decision. Given the proper substantive standards, it is all that is needed to guide judicial review of agencies. The relevant question, for a court reviewing the decision of an administrative agency, involves the level of persuasiveness that a moving party must achieve in order to overturn an agency decision on the substantive grounds of obedience to hierarchical commands and instrumental rationality. Once the issue is framed in these terms, the preferable choice appears to be the clear and convincing evidence standard. A preponderance of the evidence regime gives far too little weight to the agency's decision, thus undermining the principles of expertise and continuity. The beyond a reasonable doubt standard is essentially the principle of minimum rationality that courts use in reviewing legislative enactments in the postsubstantive due process era, and, for reasons already described, is unacceptably deferential.⁴¹⁰ A clear and convincing standard is sufficiently deferential to instantiate the expertise and continuity principles, but is simultaneously rigorous enough to exercise control over the subordinate policymaking and implementation mechanisms.

The clear and convincing standard is generally applied to factual determinations. In civil procedure, questions of law, at either the trial or appellate level, are to be determined by the judge's direct consider-

⁴⁰⁸ See *supra* note 164 and accompanying text.

⁴⁰⁹ Institutional competence was one of the defining ideas of the legal process school. See LON L. FULLER, *THE MORALITY OF LAW* 152-86 (1964); Fuller, *supra* note 91. For an insightful restatement in contemporary terms, see NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* (1994).

⁴¹⁰ See *supra* notes 200-08 and accompanying text.

ation of the authoritative legal sources. This approach cannot be used for agencies, however, because an agency's expertise and continuity applies equally to its legal interpretations as to its factual determinations. Once again, the court is reviewing an agency, not a court. For this reason, the clear and convincing standard remains the proper one. Its novelty in the context of law interpretation is counterbalanced by its general familiarity, and the greater novelty of any other standard. Thus, the moving party could not ask a court reviewing agency action to interpret the statute anew, the way it could ask a trial or appellate court. Rather, that party would need to demonstrate, according to the clear and convincing standard, that the agency interpretation was incorrect. With respect to the instrumental rationality of the agency's actions, the same clear and convincing standard could be employed.

An additional advantage of the proposed standard is that it displaces the *Chevron* decision. As discussed above, *Chevron* institutes a two-step review; if the statute is deemed unambiguous, the agency interpretation is reviewed de novo; if it is deemed ambiguous, the agency is granted extensive deference.⁴¹¹ Thus, a great deal turns on the difficult determination of ambiguity and on separating one's judgment on this issue from one's judgment on the merits of the regulation, both of which are ferociously difficult, at best. Like *Chevron*, the proposed standard involves a two-step process, but instead of the two steps being alternative analyses of the same subject matter, they review two separate stages of the agency's action: goal and implementation. The agency's interpretation of the statute, whether ambiguous or unambiguous, will characteristically be reviewed in the first stage,⁴¹² and will employ the intermediate standard of clear and convincing evidence.⁴¹³ The court will review agency's implementation of the goal as a second step, using the same clear and convincing standard. This approach uses a traditional and familiar standard of decision while recognizing that an agency is governed by statutory command and instrumental rationality. It eliminates the *Chevron* doctrine's unexplained, and essentially unjustifiable, implication that the agency is a court whose legal interpretations are to be reviewed de novo and

⁴¹¹ *Chevron, USA, Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984).

⁴¹² Statutes offer procedures as well as goals, but those procedures will typically become part of the goal, since they are mandatory for the agency. Some statutes, however, prescribe or restrict particular means of implementing their more general policies.

⁴¹³ Of course, if the court finds the statute unambiguous, it will have clear and convincing evidence to strike down a regulation inconsistent with this unambiguous meaning. The court must inevitably make this determination, however difficult, but at least the proposed standard does not require the court to make an antecedent determination of whether the statute fits into the ambiguous or unambiguous category.

whose factual determinations are to be given nearly determinative deference.⁴¹⁴

Judicial review of executive action under the proposed revision of the APA would follow precisely the same pattern as the review of rulemaking. The court would examine both the agency's statement of its goal and its implementation of that goal. The substantive standards for this review would be whether the agency's actions were a proper interpretation of the governing statute or a superior's order, and whether they were instrumentally rational. The procedural standard would be whether the moving party could make a clear and convincing showing that the agency failed to meet these substantive standards. Of course, executive action is a much broader category than rulemaking, and courts would find themselves applying this approach to enforcement plans, resource allocations, guidelines, grant approvals, and innumerable other types of actions that the APA leaves undefined, unregulated, and essentially unreviewable. Subjecting them to the same standard as rulemaking might appear to risk "ossification" of the implementation process, but this would not be the case, since the standard being imposed is not compliance with a variable set of procedures, but with the statute and the principle of instrumental rationality. If the moving party can demonstrate by clear and convincing evidence that an agency action violates the terms of the controlling statute or lacks instrumental rationality, then that action should be overturned, whether it is a rule, an enforcement plan, a guideline, or anything else.

Nor should it be surprising that the proposed statute merges rulemaking and executive action into a single category for purposes of judicial review. Two basic institutional facts govern the standard of review—the nature of an agency and the nature of a court—and these remain the same across the entire range of administrative action. Rulemaking tends to operate at a more general level and have a greater impact; as a result, there is a larger group of non-judicial participants involved in reviewing the process. However, rulemaking also resembles executive action in its essential feature as a means of implementing Congressional or Presidential policy. Adjudication is a truly separate and distinct category of agency action. It is distinguished by our theory of due process, our basic cultural sense of fairness, which

⁴¹⁴ See *Chevron*, 467 U.S. at 843. Charles Koch argues that agency policy making should be reviewed according to a different and more lenient standard than statutory interpretation by the agency. See Koch, *supra* note 54, at 272–75. The instrumental rationality standard would embody this principle without the need for a separate standard. In administrative policy making, it is the agency, not the legislature, that establishes the goal. Review of the agency's efforts to achieve its own goal would necessarily be more lenient than review of the agency's effort to achieve a legislative goal because there would be no question, in most cases, that the agency was interpreting its own goal correctly.

demands a certain level of formality in the situations where it operates.⁴¹⁵ This factor does not distinguish rulemaking from executive action, however, and there is no similarly significant factor that does. There is thus no reason why these processes should not be subject to the same basic standard of review.

Under the APA, the review of adjudications requires that the agency have substantial evidence to support its decision. As discussed above, this term emerges from a series of cases that analogize an administrative adjudication to a jury trial, and means that there is enough evidence so that the trial judge will refuse to direct a verdict.⁴¹⁶ As also discussed, this is a misleading analogy, because the reviewing court will often be considering an agency decision that is itself a review of the trier of fact's determination.⁴¹⁷ But a standard drawn from a supreme court's review of an appellate court is also wrong because the appellate court receives no deference at all in this situation. A supreme court defers to the trial court's findings of fact, but reviews the appellate court's assessments of those facts *de novo*, and reviews all legal interpretations, whether by the trial or appellate court, *de novo* as well. In fact, the expertise principle suggests that the agency's decision should be granted considerable deference, and that this deference belongs to the agency as a whole, rather than to the hearing officer's findings of fact.⁴¹⁸

In other words, the reviewing court should not cease to treat the agency as an agency simply because it is performing a function—adjudication—that is also performed by traditional, pre-administrative institutions. The adjudicatory decision, whether it is made by a hearing officer, an appeals board, or the individual or board that heads the agency, should be treated in essentially the same manner as other agency decisions. Interpretations of law should be accurate, but the agency's conclusions should be upheld unless the moving party can clearly and convincingly demonstrate that they are wrong. Findings of fact should also be accurate, and that conclusion should also be upheld absent clear and convincing evidence that it is wrong.⁴¹⁹ The substantive standard of accuracy in factfinding is essentially equivalent

⁴¹⁵ The definition of this class of situations, that is, the class of situations where due process demands a formal adjudication akin to that provided by §§ 554, 556 and 557, lies beyond the scope of this Article.

⁴¹⁶ See *supra* note 220 and accompanying text.

⁴¹⁷ See *supra* note 225 and accompanying text.

⁴¹⁸ A separate principle that points in the same direction is the principle of judicial economy. This is not generated by any aspect of the administrative state, other than its mere size, but rather from traditional considerations regarding appellate courts.

⁴¹⁹ Applying a uniform clear and convincing standard would essentially eliminate the need to make the often troublesome distinction between fact and law in adjudication. See LOUIS L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 569–74 (1965); Ronald M. Levin, *Identifying Questions of Law in Administrative Law*, 74 *Geo. L.J.* 1, 12 (1985).

to instrumental rationality. In adjudication, the goal of factfinding remains the same: to determine whether the facts demonstrate that the person whose case is being adjudicated fits within a particular legal category that has been established by some authoritative legal source. The substantive standard of accuracy asks whether the particular adjudication was a rational way to reach that goal, that is, whether it found facts that led to its conclusion. This question can be answered by *de novo* review, or by requiring proof beyond a reasonable doubt that it is wrong, but the appropriate administrative standard, for reasons stated above, is clear and convincing evidence of inaccuracy.⁴²⁰

Because an administrative APA would treat the adjudicatory decision as the action of an agency, it would follow Judge Hand's treatment of the hearing officer's conclusion in the first *Universal Camera* decision. There, Judge Hand held that the hearing officer's conclusions should be ignored, because giving them any credence would impose too high a level of scrutiny on the decision of the agency as a whole.⁴²¹ In other words, the facts found by the trial examiner should be considered in reviewing the agency's determination, but the agency is entitled to reach a different conclusion on appeal, and that interpretation should be given the same deference as an affirmance of the trial examiner's findings. Suppose, for example, the case turns on the veracity of a witness, and the trial examiner concludes that the witness was telling the truth. A reversal by an agency appeals board that failed to supply any reason could be reversed by an appellate court because there would be clear and convincing evidence—the trial examiner's conclusion, as finder of fact—that the appeals board's decision was wrong. But if the appeals board explained that the witness had previously demonstrated the capacity to lie convincingly, or found an internal contradiction in his testimony, then those findings would count against the previous finding of veracity, and no additional weight would be given to the trial examiner's finding. The same principle applies for rulemaking or executive action. If a subordinate official in the agency brings some data to the attention of its decision making body, that data should be considered as part of the reviewing court's assessment of the instrumental rationality of the agency decision, but no extra weight should be given to that data because the subordinate official objected to the agency's decision on that basis.

⁴²⁰ Judge Hand articulated a similar standard when he analogized the agency's fact-finding decision to a special verdict, which must be sustained if the conclusion was "within the bounds of rational entertainment." *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950), *vacated by* 340 U.S. 474 (1951).

⁴²¹ *See id.* at 754.

CONCLUSION

The Administrative Procedure Act is outdated because it treats the administrative state as an ordinary legal development that can be controlled through traditional concepts, rather than as a transformation of our mode of governance that renders those traditional concepts obsolete and installs new ones in their place. The Act relies entirely on public participation, ignoring the hierarchical controls that are characteristic of the legislative process. It conceives administrative rulemaking as a form of legislation, and it conceives administrative adjudication as a form of civil trial. Because procedural rules do not govern legislation, these analogies yield only one set of rules, derived from the judicial model, which the APA then imposes in adapted form on adjudication and, in highly adapted form, on rulemaking as well. Executive action, which the APA implicitly describes as informal adjudication, has no obvious pre-modern analogue, and so the Act imposes no rules at all on this extensive category of regulatory action.

This Article proposes a new administrative procedure act, based on the prevailing conception of administrative governance as an instrumentally rational process carried out by institutions with defined jurisdiction, a hierarchical structure, expert staff, and continuous operation. The essential requirement that such an act would impose is a definition of the agency's goal, and a specification of the means that it would employ to achieve that goal. In the case of rulemaking, which represents the agency's most extensive mode of action, both the goal and the plan would be open to input from the agency's hierarchical superiors, the President, and Congress, in addition to input from the public. In the case of executive action, which includes what is now called informal adjudication and interpretive rules, participation would be limited to the hierarchical superior of the agency or sub-agency proposing the particular action. In establishing these goals and plans, the agency would be guided by the commands of its hierarchical superiors when such commands were issued. For internally generated goals and plans, the substantive standard that the agency would be required to use in formulating its goals and plans in both these areas and for assessing the value of the input it received would be instrumental rationality. Reviewing courts would impose these very same substantive standards of authoritative command and instrumental rationality, but preserve the extensive authority that the administrative state grants agencies by requiring clear and convincing evidence that these standards had been violated.

Finally, the proposed act, with its single standard for rulemaking, executive action, and judicial review of these two functions, is much simpler than the APA, with its welter of different rules for each of

these functions. Such simplicity does not result from any conscious effort to suggest a simple statute. Rather, it occurs because the proposal is based upon a unified, coherent concept of the administrative state as an instrumentally rational mechanism for implementing social policy. The current APA does not rest on any such conception; rather, it grasps at disparate and varied fragments of traditional, pre-administrative models in its effort to understand particular functions of administrative government, without developing an idea of that government as a totality. The inevitable result is a disarticulated mixture of different procedures and standards of review, overlapping in some areas and conflicting in others.

We have over a hundred years of experience with the regulatory state, and over fifty years of experience with a codified effort to subject that state to legal control. It is time to abandon the traditional ideas of governance that we inherited from the pre-administrative era, however noble those ideas may seem, and however strong our nostalgic feelings for them may be. We need to consciously accept the ideas of governance that we ourselves have evolved, and use those ideas as the basis of our legal efforts. In other words, we need to make the Administrative Procedure Act administrative.