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Recommended Citation

Cass R. Sunstein, "Factions, Self-Interest, and the APA: Four Lessons Since 1946 Administrative Law Symposium," 72 *Virginia Law Review* 271 (1986).

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FACTIONS, SELF-INTEREST, AND THE APA: FOUR LESSONS SINCE 1946

*Cass R. Sunstein**

MUCH of administrative law is common law. Despite Justice Jackson's suggestion that the Administrative Procedure Act (APA) furnished "a formula upon which opposing social and political forces have come to rest,"¹ the common law process has converted that statute into something very different from what its drafters anticipated. This phenomenon should not be surprising. In light of the diversity of administrative functions and the rapidity of changes in regulatory policy, it would be quite difficult, and probably undesirable, to achieve consistent application of a general framework over time. Flexibility—in some respects a hallmark of the common law—is especially valuable in administrative law.

In attempting to control administrative processes, the drafters of the APA responded to two quite general constitutional themes, both of which have played a central role in administrative law since its inception. The first concerns the usurpation of government by powerful private groups.² The second involves the danger of self-interested representation: the pursuit by political actors of interests that diverge from those of the citizenry.³ The relative insulation of administrators from electoral control has given rise to particularly intense fears about these two risks. But the forty years since the enactment of the APA have brought significant advances in knowledge about regulation and administrative law—advances that have important implications for the question of how the legal

* Professor of Law, University of Chicago. I am grateful to Frank H. Easterbrook, Richard A. Epstein, Michael W. McConnell, Geoffrey P. Miller, Richard A. Posner, Stephen H. Schulhofer, Geoffrey R. Stone, and David A. Strauss for helpful comments on a previous draft, and to Jeremy Friedman and Cathryn Ruggeri for research assistance and useful ideas.

¹ *Wong Yang Sung v. McGrath*, 339 U.S. 33, 40, modified, 339 U.S. 908 (1950).

² See generally *The Federalist* No. 10 (J. Madison) (discussing the dangers of faction).

³ See generally *id.* No. 51 (A. Hamilton) (checks and balances regulate self-interest of political actors).

system should respond to the risks of factional tyranny and self-interested representation.

Four of these advances have been of particular importance. First, it is now possible to identify, with far more sophistication, the functions and malfunctions of regulation. Second, it is clear that dangers to statutory standards lie in unlawful inaction and deregulation as well as in overzealous regulation. Third, faith in administrative expertise has diminished in the wake of a more refined understanding of the complementary roles of technical sophistication on one hand and "politics" on the other. That understanding has brought forth what might be called a deliberative conception of the role of the administrator—a conception that is, however, threatened by a still-tentative trend in the Supreme Court. Fourth, courts have shown themselves to suffer from serious limitations as supervisors of agency discretion; there is a corresponding need for nonjudicial mechanisms of supervision.

This article will outline these advances, describe their implications for administrative action and judicial review, and relate them to the general effort to guard against factional power and self-interested representation. Some of these lessons have already begun to find their way into regulatory statutes, agency behavior, and doctrines used in judicial review. Others have not, but one may hope that they will be incorporated into the law in the reasonably near future.

I. THE FUNCTIONS AND MALFUNCTIONS OF REGULATION

The legislative history of the APA shows almost no sign of interest in substantive issues of regulation. But one of the principal lessons of the past forty years is that questions of administrative law cannot be answered without some understanding of the possible functions of regulation. In the years since enactment of the APA, it has become possible to be quite explicit about those functions.⁴

First, regulation may protect interests that are considered entitlements—with the class of entitlements being defined by reference to values apart from positive law. The best example is protec-

⁴ For different accounts of the functions of regulation, see S. Breyer, *Regulation and its Reform* 15-35 (1982); Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. Chi. L. Rev. 263, 288-90 (1982).

tion against discrimination on the basis of race and sex.⁵ At least for some observers, protection against discrimination has assumed the role played by protection of private contract and property in the common law era.

Second, regulation may redistribute wealth to people who are thought to be badly off. The minimum wage is a good example. Whether and how regulation will redistribute resources is a complex question,⁶ but improving the lot of the unfortunate is often an intended effect of regulation.

Third, regulation may promote economic "efficiency." Occupational safety and health standards, for example, may be a response to lack of information or to externalities, and regulation of air pollution may be a product of a collective good problem.⁷

Fourth, regulation may be designed to shape or discourage certain preferences or—a related point—to reflect the public's "preferences about preferences." Like Ulysses confronted with the Sirens,⁸ the public may decide to bind itself with laws that prohibit the gratification of short-term consumption choices.⁹ Prevention of discrimination illustrates the phenomenon of shaping preferences, as do the laws prohibiting sexual harassment.¹⁰ Seat-belt laws, social security provisions, and laws prohibiting cigarette advertisements¹¹ may be efforts to foreclose misguided consumption choices.

Fifth, regulation may be paternalistic, reflecting a desire to prevent people from making decisions that will harm them.¹² Here,

⁵ See Stewart & Sunstein, *Public Programs and Private Rights*, 95 Harv. L. Rev. 1193, 1314 (1982).

⁶ On the minimum wage, see F. Welch, *Minimum Wages: Issues and Evidence* 34 (1978); on redistribution in general, see, e.g., Kennedy, *Distributive and Paternalistic Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 Md. L. Rev. 563 (1982).

⁷ See S. Breyer, *supra* note 4, at 23-28. There is considerable literature about the different sorts of "market failure" that may call for a regulatory solution. See, e.g., *id.* at 15-35; R. Noll & B. Owen, *The Political Economy of Deregulation* 53-64 (1983).

⁸ See J. Elster, *Ulysses and the Sirens* 36-37 (1979).

⁹ See Sax, *The Claims for Retention of the Public Lands*, in *Rethinking the Federal Lands* 125 (S. Brubaker ed. 1984).

¹⁰ See generally C. MacKinnon, *Sexual Harassment of Working Women* (1979) (analyzing the law of sexual harassment).

¹¹ See Sunstein, *Legal Interference with Private Preferences* (unpublished manuscript 1986) (copy on file with the Virginia Law Review Association).

¹² For discussion of paternalism, see Kennedy, *supra* note 6; Kronman, *Paternalism and*

however, the government, and not the public itself, prohibits the satisfaction of consumption choices.¹³ Some occupational safety and health regulations may be thus understood.

Finally—and this is an important point—regulation may reflect little or nothing more than interest-group pressures and thus serve no public purpose.¹⁴ Many regulatory programs, including regulation of utility price levels¹⁵ and licensing of interstate motor carriers,¹⁶ have been described in this way. This notion is the “dark side” of the redistribution-of-resources rationale for regulation: the redistribution may turn out to benefit particular classes for no reason other than political power.

These understandings of the possible functions of regulation have led to refined attacks on regulatory schemes. Such attacks—and the current enthusiasm for deregulation¹⁷—usually rely on a critique of one or another of these functions. Advocates of deregulation may conclude that a particular justification for regulation is inapplicable in the circumstances or insufficient to justify the burdens regulation imposes. One may argue, for example, that some interests protected through regulation should not be regarded as entitlements at all:¹⁸ the interests of the trucking and airline industries in avoiding competition, for example, are hard to place in the category of “rights.” For some, moreover, regulation does not protect rights but instead violates them.¹⁹ Alternatively, the redistribution that regulation brings about may be perverse or have unfortunate collateral consequences.²⁰ Instead of promoting

the Law of Contracts, 92 Yale L.J. 763 (1983).

¹³ Paternalism is of course a highly controversial basis for intervention. See Dworkin, *Paternalism, in Morality and the Law* 107 (R. Wasserstrom ed. 1971); D. Parfit, *Reasons and Persons* 321 (1984); Regan, *Justifications for Paternalism*, in *The Limits of Law: XV NOMOS* 189 (J. Pennock & J. Chapman eds. 1974); Kronman, *supra* note 12, at 774-97.

¹⁴ See Jordan, *Producer Protection, Prior Market Structure and the Effects of Government Regulation*, 15 *J.L. & Econ.* 151 (1972); Stigler, *The Theory of Economic Regulation*, 2 *Bell J. Econ. & Mgmt. Sci.* 3 (1971).

¹⁵ See Jordan, *supra* note 14, at 155-60; Stigler, *supra* note 14, at 5.

¹⁶ See Stigler, *supra* note 14, at 7-9.

¹⁷ See Office of Management and Budget, *Regulatory Program of the United States Government* vii (1985); see also R. Noll & B. Owen, *supra* note 7 (study advocating regulatory reform).

¹⁸ See Mashaw, “Rights” in the Federal Administrative State, 92 Yale L.J. 1129 (1983).

¹⁹ Consider the debate over the fairness doctrine. See, e.g., Powe, “Or of the [Broadcast] Press,” 55 *Tex. L. Rev.* 39 (1976).

²⁰ See R. Posner, *Economic Analysis of Law* 356-59 (2d ed. 1977) (housing codes); F.

“efficiency,” regulation may impede innovation,²¹ stifle competition,²² and impose costs that outweigh whatever benefits it produces.²³ The process of regulation is expensive to taxpayers, and compliance costs may be high as well. It is a familiar point that “political failure” may turn out to be more harmful than the “market failure” that gave rise to regulation in the first place.

Moreover, the notions of shaping preferences, reflecting the public’s “preference about preferences,” and paternalism may mask a naked interest-group transfer, amount to unjustified meddling in the affairs of others, or impose the tastes of one group rather than another in circumstances where there is no basis for choice between them.²⁴ Where regulation has been an interest-group deal serving no public purpose, there is of course no reason to retain it.

One cannot say in the abstract whether the affirmative case for regulation, or the corresponding critique, is more persuasive. Nevertheless, it is easy to identify the general presumptions that underlie the views of those with disparate attitudes toward market ordering: some are skeptical of regulatory interventions on the ground that they will generally do more harm than good,²⁵ while others will be receptive to change because of their skepticism about the existing distribution of entitlements and income and the existing set of preferences.²⁶ In particular cases, however, a decision whether to regulate²⁷ should not turn only on presumptions.

Welch, *supra* note 6, at 33-44 (minimum wage laws); Kronman, *Contract Law and Distributive Justice*, 89 *Yale L.J.* 472, 507-08 (1980) (minimum wage and rent control laws); Shavell, *A Note on Efficiency vs. Distributional Equity in Legal Rulemaking: Should Distributional Equity Matter Given Optimal Income Taxation?*, 71 *Am. Econ. Rev.* 414 (1981) (arguing against use of regulation to redistribute resources).

²¹ See Stewart, *Regulation, Innovation, and Administrative Law: A Conceptual Framework*, 69 *Calif. L. Rev.* 1256, 1288-1307 (1981).

²² See Ackerman & Stewart, *Reforming Environmental Law*, 37 *Stan. L. Rev.* 1333, 1336 (1985).

²³ See Office of Management and Budget, *supra* note 17, at vii.

²⁴ See Stewart, *Regulation in a Liberal State: The Role of Non-Commodity Values*, 92 *Yale L.J.* 1537, 1547-56 (1983).

²⁵ See, e.g., Office of Management and Budget, *Regulatory Program of the United States Government*, April 1, 1985-March 31, 1986 (1985); Epstein, *Takings: Private Property and the Power of Eminent Domain* 263-82 (1985).

²⁶ See, e.g., Kennedy, *supra* note 6, at 571.

²⁷ It is now well accepted that the common law system is itself a regulatory scheme. See M. Horwitz, *The Transformation of American Law 1780-1860* 1-30 (1978); R. Posner, *supra* note 20, at 179-91. For this reason, a decision to abandon federal regulation should not be understood as a return to an “unregulated” system. See generally, Kennedy, *The Role of*

Proper regulatory decisionmaking requires inquiries into the actual goals of the regulatory scheme, the extent to which those goals may be promoted, and the collateral costs of regulation.

Knowledge about the functions and malfunctions of regulation has contributed significantly to the performance of regulatory agencies. For example, the decision of the National Highway and Traffic Safety Administration to reduce the minimum performance standard for automobile bumpers was based on a conclusion that such reductions would reduce costs without increasing risks to safety and health.²⁸ The decision of the Federal Communications Commission to remove guidelines for nonentertainment programming in the radio industry depended on the FCC's finding that, under current conditions, the market would provide sufficient diversity.²⁹ The conclusion of the Federal Energy Regulatory Commission that oil pipeline rate regulation should serve only as a cap on extreme prices, and that competitive forces can ensure proper rate levels,³⁰ derived from a perception that the modern economic setting does not pose the same risk of monopoly that concerned the Congress that enacted the statute requiring "just and reasonable" pipeline rates.

Knowledge of the possible functions and malfunctions of regulation has also played an important role in the courts. Decisions upholding deregulation illustrate the point particularly well.³¹ Moreover, many of the cases invalidating deregulation are based on a perceived "mismatch" between the justification for deregulation and the goals of the regulatory scheme. For example, the decision of the Supreme Court in *Motor Vehicle Manufacturers Associa-*

Law in Economic Thought: Essays on the Fetishism of Commodities, 34 Am. U.L. Rev. 939, 964-67 (1985). The term "regulate" is used here to conform to common usage.

²⁸ See Denial of Petitions for Reconsideration, Bumper Standard (rule codified at 49 C.F.R. § 581 (1985)); see also *Center for Auto Safety v. Peck*, 751 F.2d 1336, 1344-49 (D.C. Cir. 1985) (upholding deregulation).

²⁹ See Report and Order, Deregulation of Radio, 84 F.C.C.2d 968, 975-77 (1981); see also *Office of Communication of the United Church of Christ v. FCC*, 707 F.2d 1413, 1420 (D.C. Cir. 1983) (upholding deregulation of nonentertainment programming).

³⁰ See *Williams Pipe Line Co.*, 21 FERC (CCH) ¶ 61,260, at 61,597 (Nov. 30, 1982). But see *Farmers Union Cent. Exch. v. FERC*, 734 F.2d 1486 (D.C. Cir.) (invalidating the action taken by the FERC), cert. denied, 105 S. Ct. 507 (1984).

³¹ See *supra* notes 28-29. See also *Wold Communications v. FCC*, 735 F.2d 1465 (D.C. Cir. 1984) (deregulation of satellite transponder sales upheld based on finding of market competition); *NAACP v. FCC*, 682 F.2d 993 (D.C. Cir. 1982) (deregulation of television station acquisitions upheld based on finding of no problem of concentration of ownership).

*tion v. State Farm Mutual Auto Insurance Co.*³² resulted in part from a conclusion that the agency had undertaken an inquiry into costs and benefits that conflicted with the special status the statute conferred upon the safety of automobile passengers.³³ Other cases invalidating deregulation reflect a related inquiry into substantive regulatory issues.³⁴ Finally, several of the decisions invalidating regulatory initiatives rest on a sophisticated understanding of the possible malfunctions of regulation.³⁵

Perhaps surprisingly, the use of these theories of regulation has made agencies and courts better able to deal with the risks of self-interested representation and factional power over the regulatory process. The fact that regulation may amount to an interest-group deal serving no public purpose carries important implications for review of agency action under the "arbitrary and capricious" standard of the APA.³⁶ If an agency-promulgated regulation amounts to such a deal, it is likely to be unlawful under that standard. The judicial ability to untangle the various purposes of regulation, and to determine whether the challenged agency action serves those purposes, has made it far easier for courts to "flush out" impermissible bases for regulatory action. Increasing sophistication about the functions and malfunctions of regulation has thus played an important role in improving the performance of both regulatory agencies and reviewing courts.

II. THE DANGERS OF INACTION AND DEREGULATION

The past forty years have demonstrated that risks to statutory schemes are posed by unlawful inaction and deregulation as well as by unlawful regulation. The original purpose of administrative law was to protect private autonomy—most important, private property—from unauthorized governmental intrusions.³⁷ Judge-made

³² 463 U.S. 29 (1983).

³³ 463 U.S. at 48-49.

³⁴ See, e.g., *Farmers Union Cent. Exch. v. FERC*, 734 F.2d 1486, 1500-10 (D.C. Cir.) (regulation contravenes statutory directive), cert. denied, 105 S. Ct. 507 (1984).

³⁵ See, e.g., *Aqua Slide 'N' Dive Corp. v. CPSC*, 569 F.2d 831, 839-40 (5th Cir. 1978) (holding that swimming pool slide regulations must be evaluated on the basis of actual potential for improving safety and the effects of the regulation on the utility, cost, and availability of the product.)

³⁶ 5 U.S.C. § 706(2)(A) (1982).

³⁷ See, e.g., Stewart, *The Reformation of American Administrative Law*, 88 Harv. L. Rev.

doctrines primarily sought to enable regulated entities to fend off unlawful government action: rules governing reviewability ensured that members of the regulated class would have access to judicial review,³⁸ and the principle of standing limited that access to the regulated class, excluding the beneficiaries of regulation.³⁹ In the face of ambiguity in the APA on the point,⁴⁰ however, courts have abandoned the notion that protection of traditional private rights, as defined by the common law, is the sole function of the regulatory process.⁴¹

This development is a product of three perceptions. The first is that statutes may be undermined through inaction and deregulation as well as through overzealous enforcement. In recent years, litigants have made at least plausible and sometimes powerful arguments that agencies have unlawfully failed to enforce laws protecting the environment, civil rights, labor unions, consumers, and others.⁴² As Louis Jaffe suggested nearly half a century ago, "[i]nterests intended as the beneficiaries of legislative munificence will have cold comfort from embracing the dry, unmoving skeleton of the statute."⁴³

The second perception is that the "rights"⁴⁴ created by regula-

1667, 1671-76 (1975); see also J. Vining, *Legal Identity: The Coming of Age of Public Law 20* (1978) (discussing the legal interest test).

³⁸ See, e.g., *Vaca v. Sipes*, 386 U.S. 171, 181-83 (1967).

³⁹ See, e.g., *Alabama Power Co. v. Ickes*, 302 U.S. 464, 478-81 (1938).

⁴⁰ The APA allows courts to "compel agency action unlawfully withheld or unreasonably delayed." See 5 U.S.C. § 706(1) (1982). It also defines agency action to include "failure to act." *Id.* § 551(13). At the same time, it immunizes from review those decisions that are "committed to agency discretion by law," *id.* 701(a)(2). In light of the then-prevalent presumption in favor of prosecutorial discretion, see, e.g., *Dunn v. Retail Clerks Int'l Ass'n, Local 1529*, 307 F.2d 285 (6th Cir. 1962), it would be difficult to conclude that the APA authorized review of inaction in all circumstances.

⁴¹ Congress has often endorsed such developments, specifically authorizing beneficiaries of regulatory programs to bring suit to compel action. See, e.g., *Surface Mining Control and Reclamation Act*, § 520, 30 U.S.C. § 1270 (1982); *Energy Policy and Conservation Act*, § 336, 42 U.S.C. § 6305 (1982); *Clean Air Act Amendments of 1970*, § 12(a), 42 U.S.C. § 7604 (1982).

⁴² See *Community Nutrition Inst. v. Young*, 757 F.2d 354 (D.C. Cir.), cert. granted, 106 S. Ct. 565 (1985); *Carpet, Linoleum & Resilient Tile Layers Local 419 v. Brown*, 656 F.2d 564 (10th Cir. 1981); *Adams v. Richardson*, 480 F.2d 1159 (D.C. Cir. 1973); *EDF v. Ruckelshaus*, 439 F.2d 584 (D.C. Cir. 1971); *Public Citizen Health Research Group v. Aucther*, 554 F. Supp. 242 (D.D.C.), *aff'd*, 702 F.2d 1150 (D.C. Cir. 1983).

⁴³ Jaffe, *The Individual Right to Initiate Administrative Process*, 25 *Iowa L. Rev.* 485 (1940).

⁴⁴ There are difficulties, however, in treating statutory benefits as "rights." See generally

tory schemes are no less deserving of legal protection than those recognized at common law. The traditional focus on private rights, a holdover from the *Lochner*⁴⁵ era, became untenable with a recognition that those rights grew out of a highly controversial understanding of the relationship between the state and the citizenry, an understanding repudiated during the New Deal. Under this traditional view, private ordering within the constraints of the common law was natural and inviolate; government "intervention" was therefore subject to special standards.⁴⁶ But in the post-*Lochner* era, there is nothing "natural" about private ordering pursuant to common law standards.⁴⁷ In these circumstances, an approach that would treat statutory rights differently from common law rights—because the latter seemed more important than the former—became difficult to defend.

Finally, courts have recognized that, as a general rule, political remedies are no more readily available to beneficiaries of regulation than to members of the regulated class. Indeed, regulated class members are often well-organized and may be better able to take advantage of the political process. Members of the beneficiary class, on the other hand, may be quite diffuse and thus unable to overcome transactions costs barriers to the exercise of political influence.⁴⁸

These understandings suggest that the dangers of factional power over governmental processes are no greater in the context of too much regulation than in the context of too little. Administrative law, including doctrines of judicial review, should therefore reflect a concern with unlawful inaction and deregulation as well as with unlawful regulation. This understanding, a significant depar-

Stewart, *supra* note 24, at 1556-59 (difficulty of determining "holders" of rights and appropriate degree of protection of those rights).

⁴⁵ *Lochner v. New York*, 198 U.S. 45 (1905).

⁴⁶ See B. Ackerman, *Reconstructing American Law* 6-11 (1983); Kennedy, *Form and Substance in Private Law Adjudication*, 89 *Harv. L. Rev.* 1685, 1746-48 (1976); Kennedy, *supra* note 27, at 964-67.

⁴⁷ Decisions to allow the common law system to remain intact are themselves choices that must be justified. See B. Ackerman, *On Getting What We Don't Deserve*, 1 *Soc. Phil. & Pol'y* 60 (1983); Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 *Pol. Sci. Q.* 470, 470 (1923).

⁴⁸ See Ackerman, *Beyond Carolene Products*, 98 *Harv. L. Rev.* 713, 723-28 (1985); Fiorina, *Legislative Choice of Regulatory Forms: Legal Process or Administrative Process?*, 39 *Pub. Choice* 33, 49 (1982).

ture from the original conception of the APA,⁴⁹ is to some extent reflected in current law. Even after the recent decision in *Heckler v. Chaney*,⁵⁰ inaction is frequently reviewable,⁵¹ and deregulation is subject to the same standards as regulation.⁵² Moreover, congressional and executive mechanisms of oversight apply to failure to regulate as well as to regulation.⁵³

This is not to suggest that inaction and deregulation will frequently be overturned by courts. Indeed, the absence of compliance costs and enforcement costs will often argue in favor of both inaction and deregulation. In some settings, moreover, inaction stems from special considerations that call for judicial deference. For example, agencies that fail to act often are responding to a limited budget from which enforcement resources must be allocated. In addition, statutes will sometimes fail to set forth standards by which to assess a claim of unlawful inaction, and in such settings inaction should be unreviewable.⁵⁴

These factors suggest that administrative inaction should not always be treated the same as action; but they do not undermine the basic conclusion that threats to statutory programs have been generated by inaction and deregulation as well as by regulation. This understanding has brought about and should continue to produce significant changes in administrative law from both Congress and reviewing courts.

⁴⁹ See Sunstein, *Deregulation and the Hard-Look Doctrine*, 1983 Sup. Ct. Rev. 177.

⁵⁰ 105 S. Ct. 1649 (1985). For a discussion of the implications of *Chaney* for judicial review of agency inaction, see Sunstein, *Reviewing Agency Inaction After Heckler v. Chaney*, 52 U. Chi. L. Rev. 653 (1985).

⁵¹ See, e.g., *Florida Power & Light Co. v. Lorion*, 105 S. Ct. 1598 (1985); *United Auto., Aerospace & Agricultural Workers v. Brock*, 783 F.2d 237 (D.C. Cir. 1986); *Schering Corp. v. Heckler*, 779 F.2d 683, 686 (D.C. Cir. 1985) (agency inaction reviewable where substantive statute provides guidelines for agency to follow in exercising its enforcement power); *Robbins v. Reagan*, 780 F.2d 37, 44 (D.C. Cir. 1985) (per curiam) (same); *Iowa ex rel. Miller v. Block*, 771 F.2d 347, 350 n.2 (8th Cir. 1985).

⁵² See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983); *Drummond Coal Co. v. Hodel*, 610 F. Supp. 1489, 1502 (D.D.C. 1985).

⁵³ See, e.g., *Role of the Office of Management and Budget in Regulation: Hearings Before the Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce*, 97th Cong., 1st Sess. (1981).

⁵⁴ See *Heckler v. Chaney*, 105 S. Ct. 1649, 1656-57 (1985); Sunstein, *supra* note 50, at 673.

III. EXPERTISE AND POLITICS: A DELIBERATIVE CONCEPTION OF ADMINISTRATION

A. *Faction, Deliberation, and Technical Expertise*

The debate over the respective roles of “expertise” and “politics” in agency decisionmaking has proved to be one of the most persistent in administrative law.⁵⁵ Agencies were created in a period of faith in administrative expertise, but this faith has been severely undermined in the last two decades. Indeed, the fortieth anniversary of the APA comes in the midst of a revival, still somewhat tentative, of the view that regulatory decisions are almost entirely “political” in character and that expertise has at most a derivative role to play.⁵⁶ But that view is as misleading as its opposite.

The principal virtue of technical knowledge is that it informs regulatory decisions by shedding light on their potential effects. Those effects may turn out to be different from what was expected, and the differences—showing substantial benefits or substantial costs—may persuade people with disparate views to agree on a particular regulatory question. For example, a study may show that the benefits of regulating a particular carcinogen are likely to be high and that the regulation is justified by almost any standard.

Information of this sort will rarely be conclusive, however, and its usefulness will often depend upon value judgments, which must be made in accordance with the governing statute. If, as will often be the case, the statute is silent, there is considerable room for discretion. Of central importance here is the task of ensuring that the relevant considerations, including the actual value judgments by the agency, are disclosed to the public and subjected to general scrutiny and review. Administrative and judicial efforts to solve

⁵⁵ See J. Landis, *The Administrative Process* 23 (1938); Frug, *The Ideology of Bureaucracy in American Law*, 97 *Harv. L. Rev.* 1276, 1296-1334 (1984).

⁵⁶ See *Chevron, U.S.A. v. NRDC*, 104 S. Ct. 2778, 2782-83 (1984), reh'g denied, 105 S. Ct. 28 (1984); Exec. Order No. 12,498, 50 *Fed. Reg.* 1036 (1985) (subjecting regulatory process to OMB control). See also Scalia, *Two Wrongs Make a Right: The Judicialization of Standardless Rulemaking*, *Regulation* July-Aug. 1977, at 38, 40 (regulation should “reflect the same forces that work upon the legislature itself”); Shapiro, *On Predicting the Future of Administrative Law*, 6 *Reg.*, May-June 1982, at 18, 20-21 (describing a “political theory” of regulation).

this problem have come in the form of a deliberative conception of administration, a conception that amounts to a significant reformulation of previous understandings.⁵⁷

It is useful to begin here with the idea that the role of the administrator is not merely to reflect constituent pressures or to aggregate private interests.⁵⁸ Instead, the purpose of the regulatory process is to select and implement the values that underlie the governing statute and that, in the absence of statutory guidance, must be found through a process of deliberation. This is not to deny that the promotion of (particular) private interests is often a legitimate function of regulation; a decision to aid welfare beneficiaries, workers, or consumers is of course permissibly "public" in the post-*Lochner* era. In deciding how to implement the statute, however, the administrator must deliberate about the relevant interests and not respond mechanically to constituent pressures.⁵⁹ In some respects, this understanding constitutes the core requirement of the APA review provisions.

⁵⁷ See *infra* text accompanying notes 64-68.

⁵⁸ See Reich, *Public Administration and Public Deliberation: An Interpretive Essay*, 94 *Yale L.J.* 1617, 1626-27 (1985).

⁵⁹ Judge Easterbrook argues that courts should study the "deal" set up by the various "parties" to statutes, and that courts have no authority to impose requirements that go beyond the terms of the deal. Easterbrook, *Statutes' Domains*, 50 *U. Chi. L. Rev.* 533, 540-44 (1983); Easterbrook, *Legal Interpretation and the Power of the Judiciary*, 7 *Harv. J.L. & Pub. Pol.* 87, 87-89 (1984). In the context at hand, this argument would suggest that courts should inspect statutes to determine whether the deal requires mechanical reactions or, instead, agency deliberations.

This argument is vulnerable, however, on three grounds. First, "deals" are generally indeterminate. Often Congress intentionally leaves issues open for judicial resolution; if courts are to be faithful to the "deal" itself, statutory silence should not be read as a negation of judicial authority. Second, the "deals" conception is usually a misleading characterization of statutes because it grossly oversimplifies the nature of the political process. See A. Maass, *Congress and the Common Good* 3-5 (1983); Stewart, *supra* note 24, at 1547-54. Finally, even where a statute is properly understood as a "deal," it is by no means clear that courts should treat it as such: the constitutional framework may be understood as an effort to ensure that statutes are in the public interest, and laws should be read with that purpose in mind. See Macey, *Special Interest Groups and Statutory Interpretation*, 86 *Colum. L. Rev.* (forthcoming 1986); Sunstein, *Interest Groups in American Public Law*, 38 *Stan. L. Rev.* 29 (1985). It is thus highly artificial to suggest that Congress intended agencies to respond mechanically to constituent pressures—especially in light of underlying APA standards—and, even if there is evidence that it did, courts should at least employ "clear statement" principles against that result.

Notwithstanding its vagueness, this conception of politics has considerable descriptive⁶⁰ and normative⁶¹ power. In contrast, the theoretical foundations of interest-group pluralism have been undermined in recent years,⁶² with a growing recognition that efforts to aggregate private preferences may be incoherent⁶³ or may conceal usurpation of governmental processes by powerful private factions. A deliberative understanding of administration has therefore played an important role in modern administrative law.

The deliberative approach has significant advantages over its major competitors and predecessors, each of which fails to provide an adequate conception of the role of the administrator. Under one view, prominent at the time the APA was enacted, the role of the courts is to require fidelity to statute.⁶⁴ Although that function should be uncontroversial, the notion, standing by itself, often fails adequately to constrain agency action because of the open-ended character of many statutory standards—an especially disturbing problem in light of the courts' express authority to invalidate "arbitrary and capricious"⁶⁵ decisions. Another view is that, where statutes do not provide to the contrary, courts may constrain the exercise of discretion by requiring administrative agencies to measure and balance the costs and benefits of regulatory action.⁶⁶ Although an understanding of costs and benefits is a necessary component of review for arbitrariness, such an assessment is a political rather than a judicial responsibility. A third approach, prominent in the 1970's,⁶⁷ sought to ensure participation on the part of all affected interests. That approach foundered in light of four considerations: the fact that the relevant representatives were self-selecting; the weaknesses in the notion that the purpose of administra-

⁶⁰ See A. Maass, *supra* note 59, at 5.

⁶¹ See Sunstein, *supra* note 59, at 81-85. Indeed, this understanding of the importance of deliberation by national political actors captures an important strain in the theory underlying the Constitution itself.

⁶² See, e.g., J. Habermas, *Legitimation Crisis* 123-24 (1975); T. Spragens, *The Irony of Liberal Reason* 301-10 (1981).

⁶³ See W. Riker, *Liberalism versus Populism* (1983); K. Arrow, *Social Choice and Individual Values* (1951); see also Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 *J.L. Econ. & Org.* 81, 98-99 (1985) ("responsiveness to the will of the people is not a unitary phenomenon").

⁶⁴ See Garland, *Deregulation and Judicial Review*, 98 *Harv. L. Rev.* 507, 586-91 (1985).

⁶⁵ See 5 U.S.C. § 706(2)(A) (1982).

⁶⁶ See *Aqua Slide 'N' Dive Corp. v. CPSC*, 569 F.2d 831, 839-40 (5th Cir. 1978).

⁶⁷ See Stewart, *supra* note 37, at 1711-12.

tion is to aggregate preferences; the unlikelihood that, even if preference-aggregation were desirable, it would be accomplished by a judicially-administered system of interest-representation; and the possibility that such procedures would impose costs not justified by improvements in administrative outcomes.⁶⁸

Although the deliberative approach to administration avoids most of the problems associated with these alternatives, significant difficulties do arise in the effort to implement this approach. The principal question for administrative agencies and reviewing courts is how to define the relevant values. When the values are set out in the governing statute, the answer is easy: the statutory resolution will govern in the absence of a constitutional defect. The major difficulties arise where, as is frequently the case, the statute is ambiguous, and the administrator must ascertain values through a more open-ended process. The statutory prohibition set out in the APA applies to decisions that are "arbitrary and capricious," but that standard is by no means self-defining. Certainly the standard suggests that some decisions may be unlawful although they are not prohibited by statute: the APA calls for a reasonably aggressive judicial role for review of discretion even where the governing statute is silent. A central purpose of the standard is to ensure that agency decisions are not simply bows in the direction of powerful private groups.⁶⁹ This general instruction in the APA provides a "background rule" against which any legislative "deal" must be read.⁷⁰

To manage this problem of defining relevant values, and to accommodate permissible uses of both expertise and politics, courts have created a four-pronged notion of "reasoned decisionmaking."⁷¹ First, regulatory decisions should be based on a detailed inquiry into the advantages and disadvantages of proposed courses of action—where advantages and disadvantages are not defined merely as "costs" and "benefits" in the economic sense of willingness to pay—and an examination of reasonable alternatives. Second, issues involving value judgments must be resolved consist-

⁶⁸ For a discussion of some of these problems, see *id.* at 1760-89.

⁶⁹ See Sunstein, *supra* note 49, at 198-99 (discussing the legislative history of the APA).

⁷⁰ See *supra* note 59.

⁷¹ See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 40-44 (1983).

ently with the governing statute.⁷² Some factors will be irrelevant under the statute, others must be considered, and some are relevant but may not be made dispositive. This component borrows from the “fidelity” approach to administrative law⁷³ but provides a less mechanical understanding of the process of statutory construction. Under this view, statutes do not simply dictate or prohibit choices; they also suggest the values that must inform agency decisions that fall within statutory “gaps.”⁷⁴

Third, to the extent that issues of value are to be resolved through an exercise of administrative discretion, the relevant considerations and the actual bases for decision must be explicitly identified and subjected to public scrutiny and review.⁷⁵ Finally, the agency’s resolution must reflect a reasonable weighing of the relevant factors. “Reasonable” is defined by reference to the governing statute and, if the statute offers no help, to an approach based on common sense and social consensus.⁷⁶ At this stage, the administrator is accorded considerable deference.⁷⁷

These guidelines furnish considerable aid to administrators and courts. In *State Farm*,⁷⁸ for example, the principal problem was that the agency decided to abandon the passive restraint regulation altogether and failed to address the question of airbags simply because the industry had decided to comply with the regulation by using possibly ineffective nondetachable belts.⁷⁹ The lurking concern was that some other motivation, not expressed by the agency or subject to public review, accounted for the decision.⁸⁰ Under the

⁷² For example, a strong preference for private ordering—at least if it “trumps” other considerations—may be inconsistent with the congressional decision to create the regulatory scheme in the first instance.

⁷³ See *supra* text accompanying note 64.

⁷⁴ See *infra* text accompanying note 101.

⁷⁵ The requirement of scrutiny of the actual basis of decision does not mean examining the subjective motivations of the agency official, see *United States v. Morgan*, 313 U.S. 409, 420 (1941), but instead that agency decisions will not be upheld on any basis not articulated by the agency, see *SEC v. Chenery Corp.*, 318 U.S. 80, 95 (1943).

⁷⁶ See *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 48 (1983).

⁷⁷ For a striking recent example, see *Center for Auto Safety v. Peck*, 751 F.2d 1336, 1347-49 (D.C. Cir. 1985).

⁷⁸ 463 U.S. 29 (1983).

⁷⁹ *Id.* at 49.

⁸⁰ *Cf. id.* at 43 (administrative judgment reflected “not a change of opinion on the effectiveness of the technology, but a change in plans by the automobile industry”).

APA and implementing doctrines,⁸¹ this is an impermissible use of "politics" in administration; the motivation may have been irrelevant under the statute and, in any event, had not been subject to the normal process of scrutiny.

In this light, it should not be surprising that the notion of "capture" has proved of special importance in the cases. The *State Farm* Court referred to industry influence,⁸² and in *Public Citizen v. Steed*,⁸³ the court emphasized the agency's reliance on the tread-wear grading practices of tire manufacturers. To be sure, both regulation and deregulation are frequently attacked as the product of faction.⁸⁴ In general, however, courts define the phenomenon of "capture" not by reference to outcomes, but by reference to the process the agency has followed in implementing its program: has it reacted to pressure, or has it deliberated? Of course, such an approach creates difficulties for judicial review of administrative processes, and these difficulties are aggravated when administrators act on the basis of mixed motivations or when numerous administrators are responsible for the ultimate decision. This approach also creates a danger of judicial usurpation⁸⁵ in the form of decisions that invalidate agency action because of substantive views on the part of courts that cannot be tied to underlying statutory policies.

Moreover, the notion of mechanical-reaction-to-pressure must sometimes be understood as a metaphor for a complex process in which administrators come to share the values of particular affected parties and their approaches to regulatory issues.⁸⁶ Regardless of whether the agency's response is mechanical or more complex, however, it is inconsistent with an approach to administration that would properly accommodate expertise and

⁸¹ See, e.g., *SEC v. Chenery Corp.*, 318 U.S. 80, 95 (1943) (courts may not uphold agency action for reasons not articulated by the agency).

⁸² *State Farm*, 463 U.S. at 49.

⁸³ 733 F.2d 93, 102-03 (D.C. Cir. 1984).

⁸⁴ On regulation as "capture," see, e.g., R. Noll & B. Owen, *supra* note 7, at 26-65; G. Stigler, *The Citizen and the State: Essays on Regulation* 178-88 (1975). On deregulation as capture, see Garland, *supra* note 64, at 518-19.

⁸⁵ See R. Melnick, *Regulation and the Courts: The Case of the Clean Air Act* 3-4, 10-13 (1983).

⁸⁶ See generally P. Quirk, *Industry Influence in Federal Regulatory Agencies* 43-174 (1981) (examining forces shaping administrators' attitudes); L. Schlozman & J. Tierney, *Organized Interests and American Bureaucracy* (1985).

politics in the regulatory process. The various components of the deliberative approach may be understood as a means of simplifying the judicial inquiry.⁸⁷ Those components are designed to help “flush out” impermissible motivations without looking into subjective states of mind, and at the same time to minimize judicial intrusions on the merits. The goal, imperfectly realized in practice, is to guard against the dangers of self-interested representation and of factional tyranny in the regulatory process.

B. Formalism and the Chevron Approach

The rise of a deliberative conception of administration holds out considerable promise for accommodating both expertise and politics in regulatory policy. In a potentially important development, however, the Supreme Court has sharply restricted the scope of judicial review of agency decisions with respect to “policy.”

In *Chevron, U.S.A. v. NRDC*,⁸⁸ the Court confronted the EPA’s “bubble policy,” which allows states to adopt a plantwide definition of the term “stationary source.” Under this policy, an existing plant with several pollution-emitting devices may install one piece of equipment that does not meet the plant’s permit conditions if the alteration does not increase total emissions from the plant. All pollution-emitting devices are thus treated as if they were encased in a single “bubble.”⁸⁹ In reviewing the EPA’s policy, the Court concluded that the agency was due considerable deference if “Congress has not directly addressed the precise question at issue.”⁹⁰ More recently, in *Chemical Manufacturers Association v. NRDC*,⁹¹

⁸⁷ The *State Farm* case is again an example. At issue there was a passive restraints regulation rescinded in large part because the automobile industry had selected an ineffective means of compliance with the regulation. Instead of imposing an effective means of restraint, the agency rescinded the regulation entirely. Inspection of the connection between statutory goals and the means chosen by the agency to promote those goals—and the finding that the connection was attenuated—suggested that other goals may have been at work. See *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 42-43 (1983). The failure to explore reasonable alternatives may also suggest an absence of deliberation. If the means-ends connection is weak, or if the evidence invoked in justification of deregulation is insubstantial, there is reason to believe that something else—illegitimate considerations, including factional pressure—accounts for the action.

⁸⁸ 104 S. Ct. 2778, reh’g denied, 105 S. Ct. 28 (1984).

⁸⁹ See *id.* at 2778-79; 40 CFR §51.18 (j)(i)-(ii) (1983).

⁹⁰ *Id.* at 2782.

⁹¹ 105 S. Ct. 1102, 1108 (1985).

the Court required deference to the agency "unless the legislative history or the purposes and structure of the statute clearly reveal a contrary intent on the part of Congress."⁹²

These cases set out a "clear statement" principle of the sort that has played an important role in recent Supreme Court decisions.⁹³ The appeal of the principle is straightforward and closely connected with the positivist notion of law as the will of the sovereign: if the sovereign has not expressed a preference on the precise issue, the agency's decision is unconstrained. At the same time, the principle appears sharply to limit judicial authority, attempting to ensure that judicial outcomes will reflect something other than the value choices of judges. Finally, the principle might be thought to serve an important separation of powers function: it ensures that when Congress has not expressly resolved an issue, the decision will be made by a specialized, politically accountable administrator, rather than by technically unsophisticated, unaccountable judges. In particular, those subject to presidential control will set policies.⁹⁴

The "clear statement" principle could have dramatic implications, for Congress has rarely "directly addressed the precise question at issue" in any particular case. But for three reasons, the *Chevron* approach is an unacceptable basis for judicial review:⁹⁵ the approach is unlikely to serve Congress' own goals and expectations; it undervalues the possibility of extrapolating principles from statutory standards; and its conception of separation of powers fails in light of the uneasy constitutional position of the administrative agency. The *Chevron* understanding cannot, therefore, provide a shield against the twin dangers of self-interested representation and factional power, and its failure to do so does not serve the legislative will.

⁹² Id.

⁹³ See generally Note, Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court, 95 Harv. L. Rev. 892, 899-912 (1982) (discussing range of cases in which the Supreme Court has invoked clear statement principle in reading statutes).

⁹⁴ See Mashaw, *supra* note 63, at 95-99.

⁹⁵ See Stewart & Sunstein, *supra* note 5, at 1199-1201 (flaws of "formalist thesis"); Note, *supra* note 93, at 904-07 (rationales behind clear statement approach are flawed).

1. "Meta-intent"

It is a commonplace that Congress cannot anticipate every problem that will arise in the administration of a statute; indeed, this is an important reason for the delegation of administrative power in the first place. In these circumstances, the judicial role cannot be limited to cases in which Congress has decided issues "expressly." The APA reflects a congressional desire to strengthen judicial review, a desire based largely on concerns about self-interested representation and factional influences over administrative processes.⁹⁶ Judicial review increases both agency conformity to statute⁹⁷ and, where the statute is unclear, the likelihood that the agency will exercise its discretion in a way that does not reflect the agency's self-interest and that avoids the undue influence of private groups. The provisions of the APA, in particular review for substantial evidence and for arbitrariness, call for a significant role for the courts even without "express" congressional judgment on the matter. In this regard, it is important to keep in mind that the APA drafters may well have intended informal rulemaking to be subject to *de novo* review from the courts.⁹⁸

If there has been evidence of congressional preference since the adoption of the APA, and if that evidence is thought to be relevant,⁹⁹ the legislative concern is that there is too much judicial def-

⁹⁶ See H.R. Rep. No. 1149, 76th Cong., 1st Sess. 2 (1939), reprinted in Senate Comm. on the Judiciary, *Legislative History of the Administrative Procedure Act*, at 244 (1946) [hereinafter referred to as "Legislative History"] ("the law must provide that the governors shall be governed and the regulators shall be regulated, if our present form of government is to endure"); 92 Cong. Rec. 2149 (1946), reprinted in *Legislative History*, supra, at 299 (agencies "are in reality miniature independent governments . . . constitut[ing] a headless 'fourth branch' of the Government The evils resulting from this confusion of principles are insidious and far-reaching. . . . Pressures and influences . . . constitute an unwholesome atmosphere in which to adjudicate private rights . . ."). See also Sunstein, supra note 50, at 199.

⁹⁷ Oddly, this effect is acknowledged but criticized as allowing for insufficient flexibility in R. Melnick, supra note 85, at 8-16.

⁹⁸ See 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, 754-55 (1975); Nathanson, *The Vermont Yankee Nuclear Power Opinion: A Masterpiece of Statutory Misinterpretation*, 16 San Diego L. Rev. 183, 190-91 (1979).

⁹⁹ It probably should not be so regarded; the meaning of the governing statute, rather than intervening expressions of congressional intent not embodied in law, is controlling. But it is at least informative to find congressional concern that there is too little judicial control.

erence to agency decisions.¹⁰⁰ The evidence suggests that Congress itself would hardly be satisfied with the *Chevron* standard.

2. *Extrapolating Principles*

In the positivist view, the realm of discretion and the realm of constraint are sharply distinct: if Congress has not "specifically" prohibited agency action, the agency may do whatever it chooses. This vision is a highly artificial and inflexible approach to statutory interpretation, however, because it disregards the possibility of extrapolating from statutes principles that guide the exercise of discretion even when Congress has not specifically addressed the problem.¹⁰¹ Statutory standards are designed to guide the exercise of discretion even in unforeseen cases. Congress may have decided that some factors are entitled to little or no weight, even if it has not addressed the specific problem to which those factors are applied.

The *State Farm*¹⁰² case is a good illustration here. Congress had not specifically addressed the issue of passive restraints, but it had concluded that safety merited particular emphasis in the regulatory process—more emphasis than it would receive under a (conventional) cost-benefit analysis.¹⁰³ It was thus possible to conclude that the agency's discretion was constrained even in a setting to which Congress had given no thought. The conclusion holds even if, after proper findings had been made, it would be lawful to forego passive restraints altogether.

The point that emerges is quite general: statutory provisions furnish guidance even if Congress has not expressly dealt with a particular question. Agency decisions may be unlawful when they depend on judgments of value—for example, disregarding some

¹⁰⁰ A version of the "Bumpers Amendment," S. 86, 95th Cong., 1st Sess., 123 Cong. Rec. 639 (1977), a proposed revision of the APA that would increase judicial scrutiny of agency decisions, has been reintroduced in Congress in every session since 1977. J. Mashaw & R. Merrill, *Administrative Law: The American Public Law System* 383 (2d ed. 1985).

¹⁰¹ There are of course risks in such an approach. Courts may extrapolate principles at a level of generality that tends to undermine the statutory rule itself. Thus, the principles must to the extent possible be defined by reference to the rule and must not be separated from it. See Easterbrook, *Statutes' Domains*, *supra* note 59, at 544. It is therefore necessary to use extrapolated principles only to fill in actual gaps in statutes, not to defeat statutes where there are no such gaps.

¹⁰² *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 462 U.S. 29 (1983).

¹⁰³ *Id.* at 54-55.

factors and underemphasizing others—that the statute forecloses. The notion that the process of statutory construction consists of a search for an “explicit” legislative decision, and that enforceable constraints disappear if the search is unavailing, rests on an un-supportable understanding of the interpretative process.

3. *The Uneasy Position of the Administrative Agency*

Many of the dilemmas in administrative law arise from the uneasy constitutional position of the administrative agency.¹⁰⁴ Statutory guidelines rarely provide much in the way of clear constraints, and Congress as a whole exercises little control during the implementation process.¹⁰⁵ Recent Presidents have exercised more supervisory power,¹⁰⁶ but such control is necessarily intermittent, and in any event it does not appear to be a complete solution.¹⁰⁷

The uneasy position of the administrative agency has produced relatively strict judicial supervision, usually with the authorization of Congress. The fear is that the absence of the usual electoral safeguards renders agencies particularly susceptible to the pressures imposed by powerful private groups.¹⁰⁸ In the context of reviewing agency conduct, the vices of the courts turn out to be virtues, and separation of powers concerns tend to argue in favor of an aggressive judicial role. Although there are risks in both directions, judicial insulation from political accountability is a safeguard, even if an imperfect one, against the risks of violation of statute and of decision in accordance with agency self-interest or private pressures.¹⁰⁹ Because Congress shares this view,¹¹⁰ it is

¹⁰⁴ See S. Breyer & R. Stewart, *Administrative Law and Regulatory Policy* ch. 1 (2d ed. 1985).

¹⁰⁵ See R. Litan & W. Nordhaus, *Reforming Federal Regulation* 66 (1983).

¹⁰⁶ See, e.g., Exec. Order No. 12,291, 3 C.F.R. § 127 (1982), reprinted in 5 U.S.C. § 601 app. at 431-34 (1982); Exec. Order No. 12,498, 50 Fed. Reg. 1036 (1985). See also *infra* text accompanying notes 118-125.

¹⁰⁷ For an exploration of the dangers of factionalism raised by such control, see Morrison, *Presidential Intervention in Informal Rulemaking: Striking the Proper Balance*, 56 Tul. L. Rev. 879, 890-93 (1982); see also Morrison, *The Administrative Procedure Act—A Living and Responsive Law*, 72 Va. L. Rev. (1986); Morrison, *OMB Interference With Agency Rulemaking: The Wrong Way to Write a Regulation*, 99 Harv. L. Rev. 1059 (1985).

¹⁰⁸ Many judge-made doctrines are a response to this fear. Consider, for example, the requirement of disclosure of ex parte contacts. See *Home Box Office v. FCC*, 567 F.2d 9, 51-59 (D.C. Cir. 1977).

¹⁰⁹ See L. Jaffe, *Judicial Control of Administrative Action* 322-23 (1965).

¹¹⁰ See *supra* text accompanying notes 99-100.

quite odd to argue that deference to the legislature argues against rather than in favor of a moderately aggressive judicial role.

These considerations suggest that a deliberative approach to administration, accommodating expertise and politics, is a far better judicial strategy than the "clear statement" principle of *Chevron*. Taken to its logical extreme, the *Chevron* principle would authorize agencies to respond to the available information and to constituent pressures however they choose, absent an express congressional judgment on the point. Such an approach would sacrifice much of what has been gained in our understanding of the relationship between technical knowledge on one hand and politics on the other, and one might therefore hope that the Court will retreat from this view in the near future.

IV. THE LIMITATIONS OF JUDICIAL REMEDIES AND THE NEED FOR ALTERNATIVE MECHANISMS OF CONTROL

The considerations that support a deliberative approach to administration argue in favor of a moderately aggressive judicial role, but it has become increasingly clear in the last decade that reviewing courts have difficulty handling many of the malfunctions of the administrative process. Although the drafters of the APA believed such malfunctions to be one-shot deviations subject to judicial correction,¹¹¹ the most important problems are structural or systemic in character. An agency may adopt an agenda that serves its own interests¹¹² or that helps powerful private groups and no one else. This phenomenon of "government failure" parallels the "market failure" that often gives rise to a regulatory scheme in the first instance. Judicial review, operating on a case-by-case basis, is an imperfect remedy for these problems.¹¹³

¹¹¹ See, e.g., 92 Cong. Rec. 5659 (1946), reprinted in Legislative History, *supra* note 96, at 383-84 (1946).

¹¹² See, e.g., P. Quirk, *supra* note 86, at 96-142.

¹¹³ Experience with systemic problems in the regulatory process has confirmed this perception. See *Women's Equity Action League v. Bell*, 743 F.2d 42 (D.C. Cir. 1984) (injunction requiring Departments of Education and Labor to enforce civil rights laws); see also Note, *Judicial Control of Systemic Inadequacies in Federal Administrative Enforcement*, 88 Yale L.J. 407, 423-25 (1978) (describing litigation over HEW's alleged nonenforcement of the civil rights laws); see generally D. Horowitz, *The Courts and Social Policy* 33-56 (1977) (judicial focus on particular case makes courts ill-suited to resolve issues of social policy); R. Melnick, *supra* note 85, at 14-16 (discussing limitations of case-by-case review).

The principal problem is that courts have difficulty engaging in the kind of managerial tasks that are essential to successful systemic change.¹¹⁴ Continuous supervision of the administrative process is impossible to achieve through adjudication, yet such supervision is of special importance in light of the "polycentric"¹¹⁵ character of administrative decisions, where action in one setting may have unanticipated adverse consequences for other forms of regulatory intervention. These problems are aggravated by the inability of courts to impose a coordinated or hierarchical structure, by their lack of familiarity with the often technically complex issues at hand, and by their lack of political accountability.

Courts should, however, be available to hear complaints of structural or systemic illegalities. To withdraw this function from the courts would be a cure worse than the disease, especially in light of the fact that the prospect of judicial review serves as a deterrent to unlawful agency conduct before decisions are made.¹¹⁶ Indeed, the prospect of review is an important safeguard against both systemic and one-shot illegalities. Nevertheless, experience has demonstrated that nonjudicial review mechanisms are necessary to supplement and, if they are successful, to displace judicial solutions.¹¹⁷

A useful example is the increasing authority of the Office of Management and Budget (OMB) over the regulatory process. Two recent executive orders, building on the budgetary model, have given OMB considerable supervisory power. Executive Order 12291¹¹⁸ requires agencies to submit proposed rules to OMB for review and comment; OMB scrutinizes the proposed rules for consistency with the administration's regulatory program. Executive Order 12498¹¹⁹ requires agencies to submit annual "regulatory programs" to OMB, allowing OMB to perform a supervisory role analogous to that which it plays in the budgetary process.¹²⁰ The two

¹¹⁴ For a general discussion, see D. Horowitz, *supra* note 113, at 33-56.

¹¹⁵ See Fuller, *The Forms and Limits of Adjudication*, 92 *Harv. L. Rev.* 353, 394-404 (1978).

¹¹⁶ For a discussion of the phenomenon of "anticipated reaction," see C. Friedrich, *Constitutional Government and Democracy* 589-91 (1941).

¹¹⁷ See J. Mashaw, *Bureaucratic Justice* 198 (1983).

¹¹⁸ 3 C.F.R. § 127 (1982), reprinted in 5 U.S.C. § 601 app. at 431 (1982).

¹¹⁹ 50 *Fed. Reg.* 1036 (1985).

¹²⁰ See Strauss & Sunstein, *The Role of OMB and the President in Informal Rulemaking*, *Administrative Law Review* (forthcoming in *Ad. L. Rev.*) (manuscript on file with Virginia Law Review Association).

orders are intended to ensure consistency and coordination of the regulatory process, to increase the authority of agency heads over their staffs by bringing matters to political attention at an early stage, to ensure that the regulatory program is both subject to public scrutiny and conducted consistently with the political objectives of the administration, and to promote political accountability over the regulatory process by increasing the power of those close to the President.¹²¹

In some respects, OMB has performed the function of reviewing courts under the "hard look" standard of review.¹²² The OMB initiatives offer considerable promise for remedying structural or systemic defects that courts are ill-suited to solve. For example, problems that arise from an agency's effort to serve its own interests or those of regulated class members may better be solved by presidential supervision than by adjudication. The national constituency of the President and OMB may enable them to avoid the parochial interests of agencies, which sometimes are unduly subject to the power of client industries,¹²³ and they may also bring to bear a broader perspective on the particular problem. In some settings, agencies have an unfortunate mix of insulation and responsiveness: they do not have the independence of courts, which is a safeguard against some kinds of private pressure, and lacking the national constituency of the White House, they are subject to constituent pressures in a way that renders them comparatively unresponsive.

OMB supervision may of course generate risks of its own, principally in the form of increased power by private groups with disproportionate access to OMB officials.¹²⁴ The creation of a second low-visibility decision may also increase rather than diminish the dangers of self-interested representation and factional tyranny. But it

¹²¹ See Exec. Order No. 12,291, 3 C.F.R. § 127 (1982), reprinted in 5 U.S.C. § 601 app. at 431, 432 (1982); Exec. Order No. 12,498, 50 Fed. Reg. 1036 (1985).

¹²² See *National Lime Ass'n v. EPA*, 627 F.2d 416, 451 n.126 (D.C. Cir. 1980) (the "hard look" standard is used to describe "the rigorous standard of judicial review applied to . . . informal rulemaking proceedings or to other decisions made upon less than a full trial-type record").

¹²³ On this phenomenon, see Stewart, *supra* note 37, at 1682-83.

¹²⁴ See 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 Law 1, 28-35 (1984). According to some, the experience under the recent executive orders suggests this possibility. See *id.*; G. Eads & M. Fix, *Relief or Reform? Reagan's Regulatory Dilemma* 135-38 (1984).

is both illuminating and encouraging to find that the debate over the process has focused on whether OMB has in fact improved deliberation by coordinating and centralizing the national regulatory program. There is a common ground in the view that OMB's function is to improve deliberative processes, accommodating both expertise and politics, in the way suggested above.¹²⁵ The rhetoric of the debate thus reveals a similar understanding of the function of the regulatory process.

In any event, if the relevant risks are controlled—as they have been in the budgetary context—mechanisms like OMB supervision will be an important and valuable supplement to judicial review. Such mechanisms are hardly a panacea, but they are far more likely than adjudication to respond to structural or systemic inadequacies in the administrative process.¹²⁶

III. CONCLUSION

The four lessons that have emerged since the enactment of the APA shed considerable light on the continuing reformulation of administrative law. The ability to identify the functions and malfunctions of regulation should improve both regulatory policy and judicial review. Knowledge about the risks of unlawful inaction and deregulation has made it important to redesign legal doctrines and institutions. More refined understandings of the relationship between expertise and politics have generated a conception of administration that is useful both to agency officials and to reviewing courts. Finally, the limitations of the courts in supervising administrative discretion have led to a search for alternative mechanisms of control; some such mechanisms, already in place, constitute an important first step in this regard.

All of these lessons should make it easier to carry out what remains the central effort of administrative law and of the separation of powers more generally: reducing the risks of self-interested representation and of factional control over governmental processes. Recent and still-tentative developments jeopardizing judicial review of agency inaction and the deliberative approach to

¹²⁵ See *supra* text accompanying notes 71-86.

¹²⁶ Other mechanisms for political control on the part of the President and the Congress have similar advantages over judicial review. See, e.g., Litan & Nordhaus, *supra* note 105, at 133-58 (discussing regulatory budget).

administration should be firmly resisted. To be sure, it is important to be cautious about the potential effects of procedural and institutional controls; devices of that sort are unlikely to be able to eliminate the relevant risks, which will exist in any system of representative government. But the experience of the last forty years has not belied the expectation of the APA drafters that institutional mechanisms can provide valuable safeguards.