ARTICLES

BEYOND ACCOUNTABILITY: ARBITRARINESS AND LEGITIMACY IN THE ADMINISTRATIVE STATE

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This Article argues that efforts to square the administrative state with the constitutional structure have become too fixated on the concern for political accountability. As a result, those efforts have overlooked an important obstacle to agency legitimacy: the concern for administrative arbitrariness. Such thinking is evident in the prevailing model of the administrative state, which seeks to legitimate agencies by placing their policy decisions firmly under the control of the one elected official responsive to the entire nation—the President. This Article contends that the "presidential control" model cannot legitimate agencies because the model rests on a mistaken assumption about the sufficiency of political accountability for that purpose. The assumption resonates with the premise, familiar in constitutional theory, that majoritarianism is the hallmark of legitimate government. This premise, brought to the fore by Alexander Bickel, now is questioned among constitutional theorists. Moreover, majoritarianism is not enough to legitimate administrative decisionmaking under our constitutional structure for the reason that it does not reliably address the concern for arbitrariness. This Article argues for a more direct focus on the concern for arbitrariness—an approach that has at its core a concern for good government, not simply "accountable" government in the post-Bickel, majoritarian sense of that word. The Article demonstrates how a more direct approach suggests new possibilities for resolving the time-honored problem of agency legitimacy and new ways of understanding the perennial puzzles of administrative law.

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INTRODUCTION

From the birth of the administrative state, we have struggled to describe our regulatory government as the legitimate child of a constitutional democracy. That is, we have sought to reconcile the administrative state with a constitutional structure that reserves important policy decisions for elected officials and not for appointed bureaucrats.[1] In this Article, I argue that we have become so fixated on the concern for political accountability lately that we have overlooked an

[1] Some scholars, frustrated with grand efforts to legitimate administrative discretion, have abandoned such efforts for a more direct focus on the ills of administrative power. See, e.g., Edward L. Rubin, Discretion and Its Discontents, 72 Chi.-Kent L. Rev. 1299, 1303 (1997) ("Discretion, like so many other terms and concepts, reflects our effort to describe our government in non-administrative or anti-administrative terms. This is a drug

important obstacle to agency legitimacy: the concern for administrative arbitrariness. Perhaps more accurately, we have relegated this ubiquitous concern to "ordinary" administrative law—such as the Administrative Procedure Act (APA)[2]—rather than "constitutional" administrative law—such as the nondelegation doctrine. We have bifurcated the routine concerns about agency policymaking from the legitimacy concerns, consigning issues of arbitrariness to the former while conserving issues of accountability for the latter.

Indeed, this dichotomous thinking has colored the recent scholarly turn toward a model of the administrative state that seeks to legitimate agencies by placing their policy decisions firmly under the control of the one elected official responsive to the entire nation—the President. In this Article, I argue that the "presidential control" model cannot legitimate agencies, for a reason no critic of that model ever has explored.[3] I claim that the model rests on a mistaken assumption about the appropriate role of political accountability in the constitutional scheme. The presidential control model misleads us into thinking that accountability is all we need to assure ourselves that

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that often makes us feel better, but, in the long run, we always pay a price for our indulgence.").

[2] 5 U.S.C. §§ 551-559, 701-706 (2000).

[3] There are many critics of the presidential control model, though perhaps diminishing in number as the model captures both Democratic and Republican hearts. See, e.g., Cynthia R. Farina, The Consent of the Governed: Against Simple Rules for a Complex World, 72 Chi.-Kent L. Rev. 987, 988 (1997) [hereinafter Farina, The Consent of the Governed] (arguing that presidentialism is "premised upon a fundamentally untenable conception of the consent of the governed"); Cynthia R. Farina, Undoing the New Deal Through the New Presidentialism, 22 Harv. J.L. & Pub. Pol'y 227, 227 (1998) [hereinafter Farina, Undoing the New Deal] (arguing that "new presidentialism" is "a profoundly anti-regulatory phenomenon"); Michael A. Fitts, The Paradox of Power in the Modern State: Why a Unitary, Centralized Presidency May Not Exhibit Effective or Legitimate Leadership, 144 U. Pa. L. Rev. 827, 841-57 (1996) (arguing that very singularity and visibility of presidency may exaggerate its flaws); Martin S. Flaherty, The Most Dangerous Branch, 105 Yale L.J. 1725, 1729 (1996) (arguing that unitary executive is incorrect as matter of original understanding); Abner S. Greene, Checks and Balances in an Era of Presidential Lawmaking, 61 U. Chi. L. Rev. 123, 187-95 (1994) (arguing that unitary executive is incorrect as matter of constitutional interpretation); Thomas O. McGarity, Presidential Control of Regulatory Agency Decisionmaking, 36 Am. U. L. Rev. 443, 462-63 (1987) (arguing that presidential control interferes with agency independence); Peter M. Shane, Political Accountability in a System of Checks and Balances: The Case of Presidential Review of Rulemaking, 48 Ark. L. Rev. 161, 212-14 (1995) (arguing that presidential review of rulemaking disrupts "dialogue, openness, and responsiveness" important to system of checks and balances); Sidney A. Shapiro, Political Oversight and the Deterioration of Regulatory Policy, 46 Admin. L. Rev. 1, 24 (1994) (arguing that presidential control interferes with agency expertise); Peter L. Strauss, Presidential Rulemaking, 72 Chi.-Kent L. Rev. 965, 968 (1997) (arguing that presidential involvement in rulemaking "insufficiently respects the tension inherent in the Constitution between Congress's power to create the instruments of government and allocate authority among them and the fact of a single chief executive at the head of the agencies thus created, with intended and inevitable political relationships with all").

agency action is constitutionally valid. Moreover, by focusing on accountability purportedly to resolve the tension between the administrative state and the constitutional structure, the model overlooks the ever-present risk of arbitrariness. I suggest that a focus on the avoidance of arbitrary agency decisionmaking lies at the core of both a theoretical justification of administrative legitimacy and a practical evaluation of administrative law doctrines. The presidential control model contains no such focus.

Of course, the presidential control model is not the first theory of the administrative state to fall short in some respect.[4] Several theories predate it, and tracing their evolution helps to illuminate exactly where we went astray. I will contend that—contrary to the conventional account—the early models of the administrative state, though flawed, reflected a more accurate picture of the constitutional pitfalls of agency lawmaking. They better balanced the concerns about accountability and arbitrariness, as well as using both "ordinary" administrative law and "constitutional" administrative law to legitimate agency policymaking. The difficulty with the early models was that they described a government that, while perhaps legitimate, simply did not exist. Agencies did not merely implement legislative directives, as the "transmission belt" model posited, or merely execute technocratic judgments, as the "expertise" model supposed.[5]

But rather than repair those models, we replaced them with (or at least subordinated them to) models fixated on accountability. This development, I will show, tracks closely a similar development in constitutional theory: the preoccupation with majoritarianism as a first premise of legitimate government, exemplified and popularized by Alexander Bickel.[6] In the 1960s, Professor Bickel introduced his famous "countermajoritarian difficulty" to explain a prevailing scholarly

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[4] For the classic account of the models of the administrative state through the 1970s, see Richard B. Stewart, The Reformation of American Administrative Law, 88 Harv. L. Rev. 1667 (1975).

[5] See id. at 1675-78 (describing these models and their shortcomings); infra Part I.A (same).

[6] On the "fixation" or "obsession" with majoritarianism in constitutional theory, see generally Rebecca L. Brown, Accountability, Liberty, and the Constitution, 98 Colum. L. Rev. 531 (1998); Barry Friedman, The History of the Countermajoritarian Difficulty, pt. 1: The Road to Judicial Supremacy, 73 N.Y.U. L. Rev. 333 (1998) [hereinafter Friedman, The Road to Judicial Supremacy]; Barry Friedman, The History of the Countermajoritarian Difficulty, pt. 3: The Lesson of *Lochner*, 76 N.Y.U. L. Rev. 1383 (2001) [hereinafter Friedman, The Lesson of *Lochner*]; Barry Friedman, The History of the Countermajoritarian Difficulty, pt. 4: Law's Politics, 148 U. Pa. L. Rev. 971 (2000); Barry Friedman, The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, pt. 5, 112 Yale L.J. 153 (2002) [hereinafter Friedman, The Birth of an Academic Obsession]; Laura Kalman, Law, Politics, and the New Deal(s), 108 Yale L.J. 2165 (1999).

queasiness with judicial review of legislative decisionmaking.[7] Bickel cast judicial review as "deviant" precisely because it undermines policy decisions made by government officials who represent and answer to the people.[8] And Bickel thereby inspired a generation of scholars to embrace the legitimacy of judgments made by popular majorities and the presumptive illegitimacy of nonmajoritarian judgments when the two conflicted. Although many constitutional law scholars have challenged Bickel's conclusion about the narrow role for judicial review, few have challenged the essential premise underlying the countermajoritarian difficulty—namely, the primacy of majority preference in conferring legitimacy within our constitutional order.[9]

Administrative law scholars, for their part, have said little about matters of such "high" constitutional theory. This does not mean, however, that they have not reflected its mood. In fact, the majoritarian premise almost intuitively explains the transition from the early models of administrative law to the most recent ones. It is no accident that the model emerging contemporaneously with the countermajoritarian difficulty was the "interest group representation" model, which consciously characterized the administrative process as a perfected legislative process for the formulation of policy.[10] That model transformed the administrative process to fit the majoritarian premise—the primacy of popular preference. Put simply, it ensured that administrative decisionmaking reflected the policy preferences of participants in agency proceedings. Furthermore, it understood judicial review as consistent with the majoritarian premise to the extent such review facilitated the access of representative parties—for example, by requiring agencies engaged in notice-and-comment rulemaking to provide the type of notice and paper "record" parties needed to participate effectively in that process as well as to challenge the outcome of that process.[11] Judicial review, in this way, was not *counter*majoritarian but *pro*majoritarian. It was a kind of "represen-

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[7] Alexander M. Bickel, The Least Dangerous Branch (2d ed. 1986).

[8] Id. at 18.

[9] See Brown, supra note 6, at 551 (noting that after Bickel introduced his countermajoritarian difficulty, "[t]he challenge for academics was now to see who could 'justify' judicial review in spite of its indisputable 'countermajoritarian' or 'undemocratic' nature," and collecting sources).

[10] See infra Part I.B.

[11] See Ethyl Corp. v. EPA, 541 F.2d 1, 110 (D.C. Cir. 1976) (en banc) (reflecting development of "paper record" requirement); Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 402 (D.C. Cir. 1973) (Leventhal, J.) (same); Int'l Harvester Co. v. Ruckelshaus, 478 F.2d 615, 649 (D.C. Cir. 1973) (Leventhal, J.) (same); Richard B. Stewart, The Development of Administrative and Quasi-Constitutional Law in Judicial Review of Environmental Decisionmaking: Lessons from the Clean Air Act, 62 Iowa L. Rev. 713, 731-33 (1977) (coining term "paper hearing procedure").

tation reinforcement." to borrow John Hart Ely's words.[12] This model failed not because of its focus on majoritarianism, but because it relied on an overly optimistic conception of the administrative process.

Viewing the interest group representation model in this light helps to explain the model of the administrative state that subsequently emerged and continues to flourish today—the presidential control model. That model places administrative policymaking under the direction of the government official who, it is said, is the most responsive to the people.[13] The President represents and answers to a national constituency, which makes him even more responsive to the people as a whole than Congress.[14] While bringing administrative decisionmaking within this potent form of political—and hence popular—rule, the presidential control model also casts intrusive judicial review of agency action as illegitimate interference with political—and hence popular—determinations.[15] Courts have no business second-guessing administrative agencies (particularly executive branch agencies) when they make policy decisions. The presidential control model thus calls for great judicial respect of administrative decisions.[16]

The difficulty is that the whole premise on which this model is based has come under scrutiny in constitutional theory—that is, constitutional theorists no longer assume that majoritarianism best explains the features of our constitutional structure.[17] Given the burgeoning debate in constitutional theory, administrative law scholars should not be complacent about the dominance of majoritarianism as a constitutional value. At a minimum, they must question whether it is enough that agencies respond to majoritarian preferences.

I argue that it is not. The reason is that majoritarianism fails to account for an additional concern of paramount constitutional significance: the risk of arbitrary administrative decisionmaking. This con-

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[12] See John Hart Ely, Democracy and Distrust 87-88 (1980) (understanding judicial review as "representation reinforcing" because it ensures adequate representation and no more); Brown, supra note 6, at 532 & n.2 (describing Ely's representation reinforcing theory as "paramajoritarian").

[13] See infra Part I.D.

[14] See infra note 145 and accompanying text.

[15] See infra text accompanying note 310.

[16] See infra text accompanying note 310.

[17] See generally Sotirios A. Barber, The Constitution of Judicial Power (1993); Ronald Dworkin, Taking Rights Seriously (1978); Christopher L. Eisgruber, Constitutional Self-Government (2001) [hereinafter Eisgruber, Constitutional Self-Government]; Brown, supra note 6; Christopher L. Eisgruber, Birthright Citizenship and the Constitution, 72 N.Y.U. L. Rev. 54 (1997) [hereinafter Eisgruber, Birthright Citizenship and the Constitution]; James E. Fleming, Securing Deliberative Autonomy, 48 Stan. L. Rev. 1 (1995); Lawrence G. Sager, The Incorrigible Constitution, 65 N.Y.U. L. Rev. 893 (1990). Others have challenged the majoritarian premise as a matter of original understanding. See, e.g., Farina, The Consent of the Governed, supra note 3, at 1007-18.

cern was reflected in the earliest models of the administrative state.[18] Those models recognized that tampering with the constitutional structure of government raises potential risks of arbitrariness, and that the administrative state must find a compensating means to protect against those risks. The concern for arbitrariness did not abate with the discovery that the earliest models did not describe the government we have realistically. Some of the most prominent administrative law scholars—Professor Kenneth Culp Davis, Judge Henry J. Friendly, and Professor Louis L. Jaffe—pressed for solutions to the problem of arbitrary administrative decisionmaking beyond legislative direction or agency expertise.[19] And well-known judges, such as Judge Harold Leventhal of the D.C. Circuit, worked to incorporate those solutions into the law.[20]

But these efforts at preventing arbitrariness mainly have been taking place under the rubric of "ordinary" administrative law rather than "constitutional" administrative law. As such, they have been understood as important to the project of improving the *quality* of agency policymaking, but not its *legitimacy*. The only major place (in recent times) that the concern for arbitrariness has been an acknowledged part of "constitutional" administrative law is procedural due process.[21] Indeed, a recent effort to address that concern in another area of "constitutional" administrative law was met with bewilderment and, ultimately, rejection. Judge Stephen F. Williams, another respected judge of the D.C. Circuit, attempted to reconfigure the constitutional nondelegation doctrine to permit agencies rather than Congress to supply the standards that prevent arbitrary administrative decisionmaking under broad delegating statutes[22]—something Professor Davis and Judge Leventhal themselves proposed.[23] However, the

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[18] See infra Part I.A (describing transmission belt and expertise models as concerned with risk of arbitrariness).

[19] See generally Kenneth Culp Davis, Discretionary Justice (1969); Henry J. Friendly, The Federal Administrative Agencies (1962); Louis L. Jaffe, Judicial Control of Administrative Action (1965).

[20] See, e.g., Amalgamated Meat Cutters v. Connally, 337 F. Supp. 737, 758-59 (D.D.C. 1971) (Leventhal, J., for three-judge panel).

[21] See, e.g., Goldberg v. Kelly, 397 U.S. 254, 260-61 (1970) (holding that Due Process Clause requires hearings before termination of welfare benefits to allegedly ineligible recipients).

[22] See Am. Trucking Ass'ns v. EPA, 175 F.3d 1027, 1034-38 (D.C. Cir. 1999), modified in part and reh'g en banc denied, 195 F.3d 4 (D.C. Cir. 1999), rev'd in part sub nom. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457 (2001).

[23] See *Amalgamated Meat Cutters*, 337 F. Supp. at 758-59 (finding that requirement of subsidiary administrative standards "blunts the 'blank check rhetoric'" of nondelegation doctrine); Davis, supra note 19, at 58 ("The slight change I suggest in the non-delegation doctrine merely moves from a requirement of guides furnished by a legislative body, which

Supreme Court found illogical the suggestion that agencies possess the power to render their own power constitutional.[24]

This divide between "ordinary" and "constitutional" administrative law has obscured an essential point: The possibility that the concern for arbitrariness, a staple of administrative law, actually emanates from the constitutional structure. The concern for arbitrariness can be seen as one of the primary evils at which our traditional checks and balances are aimed. So understood, the concern must be addressed, not only as a matter of agency quality, but of agency legitimacy. That does not mean it must be addressed under constitutional law. But it *can* be addressed there without the idea seeming so illogical. Furthermore, the concern can be addressed under nonconstitutional administrative law without the idea seeming so inconsequential. Many think that administrative law occupies a second-class status in legal theory precisely because administrative law attends to matters of arbitrariness rather than accountability. They are wrong. If the concern for arbitrariness stems from the constitutional structure, then the principles that speak to it—whether grounded in administrative law or constitutional law—enjoy first-class status. Thus, any hierarchy between "ordinary" and "constitutional" administrative law, or between arbitrariness and accountability, is artificial if our goal is truly as we have presented it to be: squaring the administrative state with the constitutional structure.

Part I of this Article describes the past and present models of the administrative state, showing a shift in the emphasis of those models from preventing arbitrariness to promoting accountability, and linking this shift to the emergence of the majoritarian paradigm in broader constitutional theory. Part II argues that the presidential control model, premised on the majoritarian paradigm, is inadequate to address the abiding concern for arbitrary administrative decisionmaking, and that efforts to rectify its shortcomings must fail. Part III advocates an account that better addresses the arbitrariness concern, showing how that account solves many of the conventional puzzles of the law in this area and sketches the outlines of future developments.

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has little or no hope of success, to a requirement of guides furnished by the administrators themselves, which has great hope of success.").

[24] *Am. Trucking Ass'ns*, 531 U.S. at 473.

I
THE MODELS OF THE ADMINISTRATIVE STATE: FROM ARBITRARINESS TO ACCOUNTABILITY

The twentieth century saw the emergence of the modern regulatory state and, with it, a series of models attempting to explain that state in a constitutional structure that was designed without anything resembling modern government in mind. Scholars are careful to note that these models did not so much succeed each other as "bleed into each other"—that is, each model still exists today in some combination with the other models.[25] What scholars often fail to note, however, is that these models have shifted in emphasis over time. Most scholars describe the models as if each viewed the principal obstacle to administrative legitimacy as the accountability deficit. But the early models focused on a different problem: the arbitrariness danger. It was not until the later models that the concern for arbitrariness became the recessive theme and the concern for accountability became the dominant one.

Section A shows that the early models focused primarily on the concern for arbitrariness, not accountability. Section B demonstrates that the interest group representation model inverted the order. In this, Section C explains, the interest group representation model resonated with a contemporaneous trend in constitutional theory—an increasing preoccupation with Alexander Bickel and the countermajoritarian difficulty.[26] After Bickel, scholars more than ever came to regard majoritarian decisionmaking as the key to politi-

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[25] Gerald E. Frug, The Ideology of Bureaucracy in American Law, 97 Harv. L. Rev. 1276, 1284 (1984); Elena Kagan, Presidential Administration, 114 Harv. L. Rev. 2245, 2254 (2001).

[26] I am not the first to observe a connection between the early models of administrative law and the prevention of arbitrary administrative decisionmaking. Nor am I the first to observe a transformation in later administrative law theory. In his seminal article reviewing the course of administrative law through the mid-1970s, Professor Richard Stewart described the origins of the early transmission belt model and the expertise model, which together comprised what he called the "traditional model" of administrative law, as efforts to prevent arbitrary administrative lawmaking. See Stewart, supra note 4, at 1671-81. He also described the adoption of the interest group representation model in the 1970s as a shift in theory to "the provision of a surrogate political process to ensure the fair representation of a wide range of affected interests in the process of administrative decision." Id. at 1670. Other scholars have described the early models of the administrative state as aimed at preventing arbitrary administrative decisionmaking or protecting individual liberty. See, e.g., Frug, supra note 25, at 1282; Robert B. Reich, Public Administration and Public Deliberation: An Interpretive Essay, 94 Yale L.J. 1617, 1618-19 (1985); Cass R. Sunstein, Factions, Self-Interest, and the APA: Four Lessons Since 1946, 72 Va. L. Rev. 271, 277 (1986). Other scholars have noted a transition from expertise to politics as a justification for agency rulemaking. See, e.g., Peter L. Strauss, From Expertise to Politics: The Transformation of American Rulemaking, 31 Wake Forest L. Rev. 745, 755-60 (1996).

cal accountability, and political accountability as the key to governmental legitimacy. Part D documents the influence of this logic on the subsequent and still prevailing model of the administrative state: the presidential control model.

A. The Early Models

The early models of administrative law were premised on a constitutional theory that understood the aim of constitutional structure as the protection of individual liberty from arbitrary governmental intrusions. Thus, when scholars worried about the legitimacy of the new administrative state, they expressed those worries in terms of the risks of arbitrary regulations, not antimajoritarian ones. Consider first the "transmission belt" model, named as such by Professor Richard Stewart in his seminal article describing the early models of the administrative state.[27] That model conceived of agencies as merely implementing clear legislative directives.[28] Understood this way, agencies, given administrative procedures and judicial review to ensure compliance with legislative directives, posed minimal risks of arbitrary action. The absence of statutory controls was problematic because it "would deprive citizens of effective protections against the abusive exercise of administrative power."[29] Legislative directives protect individual liberty by confining administrative decisionmaking within identifiable and determinate bounds. Simply put, they reduce opportunities for arbitrariness by providing agencies with specific instructions rather than general licenses.[30]

Of course, the transmission belt model had other salutary effects. For example, it "legitimate[d] administrative action by reference to higher authority."[31] It addressed the concern that the constitutional structure provides no "inherent" authorization of administrative power over individuals by tying such authority back to the legislature.[32] In addition, the transmission belt model met the conditions of the contractarian theory of Hobbes and Locke, under which "consent is the only legitimate basis for the exercise of the coercive power of government."[33] Because private individuals only consent to the exer-

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[27] See Stewart, supra note 4, at 1675 ("The traditional model of administrative law thus conceives of the agency as a mere transmission belt for implementing legislative directives . . . .").

[28] Id.

[29] Id. at 1673 (arguing that transmission belt model "curbs officials' exploitation of the governmental apparatus to give vent to private prejudice or passion").

[30] Id. at 1673-75.

[31] Id. at 1673.

[32] Id. at 1672.

[33] Id.

cise of legislative power, they only consent to the exercise of administrative power that is legislatively authorized.

The transmission belt model, however adequate in theory, was inadequate in practice. It simply did not describe the government we had after about 1930. Regulatory statutes designed to stimulate the economy in the wake of the Depression did not contain the type of legislative rules, standards, or even goals that would (or could) control administrative discretion in the ways that the transmission belt envisioned.[34] Instead, they provided broad grants of legislative authority with little guidance or limits on the administrative exercise of such authority. Thus, the transmission belt model failed to explain the utility of bureaucratic government and, more importantly, failed to legitimate that government because it could not deliver on its promise. It could not tie administrative action to legislative directives as a means for protecting individual liberty from arbitrary intrusion: "Insofar as statutes do not effectively dictate agency actions, individual autonomy is vulnerable to the imposition of sanctions at the unruled will of executive officials . . . ."[35]

A new model soon arose to describe the virtues of bureaucratic government and to legitimate that government in the absence of legislative directives. That model also conceived of the legitimacy problem as how to prevent arbitrary exercises of administrative discretion. But rather than employing external constraints for this purpose, the model relied on internal ones. It conceptualized agencies as professionals or experts, disciplined in their craft by "the knowledge that comes from specialized experience."[36] The expertise model was the brainchild of the New Dealers who offered science and economics as a solution to the market failures that created the Depression.[37] By remitting decisions to administrative expertise, the model afforded protections against arbitrary action:

> For in that case the discretion that the administrator enjoys is more apparent than real. The policy to be set is simply a function of the goal to be achieved and the state of the world. There may be a trial and error process in finding the best means of achieving the posited goal, but persons subject to the administrator's control are no more

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[34] Id. at 1676-77.

[35] Id. at 1676.

[36] Id. at 1678.

[37] Id. Of course, James Landis was responsible for much of the characterization of agencies as experts and the reliance on their professionalism to solve the nation's economic woes without inviting the abuse of discretion (indeed, without involving the use of discretion whatsoever). See James M. Landis, The Administrative Process 10-17, 33, 39, 46-47, 98-99 (1938).

> liable to his arbitrary will than are patients remitted to the care of a skilled doctor.[38]

The principal purpose of the model, again, was to dampen concern over discretion. The model also achieved distance from politics by creating a realm of administrative decisionmaking in which insulation from politics was both explicable (i.e., political judgment simply was not implicated) and justifiable (i.e., political judgment would only serve to disrupt technocratic judgment).[39] But it was the distance from discretion, rather than distance from politics per se, that purported to address the constitutional concern of the time.[40]

From the start, the expertise model attracted criticism, but not about the lack of political accountability. The earliest academic commentators thought that the model focused on agency competence to the exclusion of agency procedures. However expert administrators were, they too often decided matters without a hearing, on the basis of matters outside their purview, with preformed biases, and without regard to the combination of functions that might impugn their impartiality—such as the combination of rulemaking, investigation, and prosecution.[41] Every one of these actions had the potential to affect individual liberty in the most basic sense. If they did not pose literal threats to constitutional due process, they raised the same sorts of concerns for fairness and participation.

It was these concerns that the Administrative Procedure Act principally addressed.[42] The APA, despite the many political compromises that its vague language manifests,[43] intended overall to guard against overreaching or unfair regulation by providing affected parties increased hearing and participation rights.[44] It also intended to prevent tyranny by fortifying judicial review of administrative deci-

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[38] Stewart, supra note 4, at 1678.

[39] See Mark Seidenfeld, A Syncopated *Chevron*: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes, 73 Tex. L. Rev. 83, 90 n.34 (1994) (noting that subsidiary issue for New Dealers in creating expert agencies was to insulate them from politics, and collecting sources).

[40] See Landis, supra note 37, at 48-50; Stewart, supra note 4, at 1678.

[41] See Robert L. Rabin, Federal Regulation in Historical Perspective, 38 Stan. L. Rev. 1189, 1264 (1986) (describing comments of Roscoe Pound, chairman of special committee of ABA on administrative law, published in 1938).

[42] Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551-559, 701-706 (2000)). The Administrative Procedures Act (APA) grew out of a report by a special committee appointed by President Franklin D. Roosevelt's attorney general to address "the need for procedural reform in the field of administrative law." S. Doc. No. 8, at 1 (1941) [hereinafter Attorney General Committee's Report] (internal quotations omitted), available at www.law.fsu.edu/library/admin/1941report.html; Rabin, supra note 41, at 1265 (describing origins of APA).

[43] See Rabin, supra note 41, at 1265 n.244, 1266.

[44] As the introduction to the Attorney General's Committee Report stated:

sions and reducing agency discretion to satisfy private or selfish interests at public expense. One need not reduce the APA to a single set of purposes to note that, whatever else the statute set out to achieve, it aspired to strengthen administrative procedures and judicial review to prevent arbitrary agency action.

But the APA provided only a "brief respite" from skepticism over the ability of expertise to constrain the arbitrary exercise of administrative discretion.[45] Scholars continued to argue that agencies performed poorly, notwithstanding their professional abilities and procedural reinforcements. Some contended that agencies failed to use rulemaking to establish clear regulatory standards that would facilitate planning and promote consistency, choosing instead to proceed through case-by-case adjudication.[46] Others maintained that agencies also failed to afford adequate procedural protections when they did engage in adjudication.[47] For example, agencies did not provide hearings often enough before depriving individuals of governmental entitlements. These complaints also sounded in administrative arbitrariness and individual due process.

Courts revealed their doubts about the effects of expertise on agency power, intensifying the scrutiny and enforcement of agency procedures designed to control broad administrative discretion.[48] For example, they performed more searching review of the substantiality of the evidence supporting agency factfinding and required more hearings prior to the deprivation of property.[49] Most significantly, they began to insist that agencies provide a reasoned explanation for

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> It is well recognized that the purpose of Congress in creating or utilizing an administrative agency is to further some public interest or policy which it has embodied in law . . . . But everyone also recognizes that these public purposes are intended to be advanced with impartial justice to all private interests involved and with full recognition of the rights secured by law. Powers must be effectively exercised in the public interest, but they must not be arbitrarily exercised or exercised with partiality for some individuals and discrimination against others. Procedures must be judged by their contribution to the achievement of these ends.

Attorney General Committee's Report, supra note 42, at 2; see also Robert A. Anthony, The Supreme Court and the APA: Sometimes They Just Don't Get It, 10 Admin. L.J. 1, 1 (1996) (quoting Justice Jackson, who as then-attorney general supervised special committee that wrote report on which APA was based, for point that APA "created safeguards even narrower than the constitutional ones, against arbitrary official encroachment on private rights"); Rabin, supra note 41, at 1265 (describing origins of APA); Sunstein, supra note 26, at 271 (same).

[45] See Rabin, supra note 41, at 1286 (describing two groups of critics).

[46] See, e.g., Friendly, supra note 19, at 5-6; Rabin, supra note 41, at 1286.

[47] See Rabin, supra note 41, at 1286; Charles A. Reich, The New Property, 73 Yale L.J. 733, 751-56 (1964); Stewart, supra note 4, at 1681-82.

[48] See Stewart, supra note 4, at 1679.

[49] Id.

their policy decisions.[50] The "reasoned consistency" requirement forced agencies to substantiate their decisions with a public rationale to prevent deviation for nonpublic purposes.[51] In addition, it forced agencies to render consistent decisions or at least explain departures from past practice to promote predictability and fairness.[52]

The purpose of these judicial innovations was to prevent arbitrary administrative decisionmaking. The purpose "was, and is, simply to ensure that the agency's action is rationally related to the achievement of some permissible societal goal, and to promote formal justice in order to protect private autonomy."[53] Confronting the reality that delegating statutes involved—and agencies exercised—policy rather than technical judgment, or at least some combination of the two, courts prodded agencies to exercise their judgment in ways that recognized and safeguarded individual rights. That is not to deny the other effects of these innovations, for example, to increase or ensure participation in the administrative process. Rather, it is to emphasize the initial motivation for these developments—to prevent arbitrariness. In this way, judicial review came to reinforce administrative decisionmaking as the main protection against abuse of discretion.[54]

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[50] Id. at 1679-80.

[51] Id. Judge Harold Leventhal supplied the more common label for the requirement that agencies offer reasons "that do not deviate from or ignore the ascertainable legislative intent"—that is, "reasoned decision-making." Greater Boston Television Corp. v. FCC, 444 F.2d 841, 850-51 (D.C. Cir. 1970); see also Seidenfeld, supra note 39, at 134 (defining "reasoned decisionmaking" as requirement that agency "justify its policy decision in terms of the goals underlying the statute[s]" it implements, and arguing that such requirement "will make the agency think twice before pursuing a special interest agenda").

[52] See Stewart, supra note 4, at 1680.

[53] Id.

[54] Stewart notes that courts sometimes used doctrine designed to restore putative legislative control. For example, he points to the Supreme Court's use of the clear statement canon of statutory construction in Kent v. Dulles, 357 U.S. 116 (1958), to preclude the Secretary of State from exercising authority in a manner that threatened individual liberty. Id. at 1680-81. This form of review had a constitutional legitimacy dimension. It kept the agency faithful to its legislative principal and functioned as part of the checks and balances that attach, in our constitutional system, to the exercise of policymaking authority. See Cynthia R. Farina, Statutory Interpretation and the Balance of Power in the Administrative State, 89 Colum. L. Rev. 452, 486-87 (1989).

Rabin notes that Congress also played a direct role in policing administrative discretion during this time. For example, in 1969, Congress enacted the National Environmental Policy Act (NEPA), Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified at 42 U.S.C. § 4331 (2000)), which requires federal agencies to "give focused consideration to the impact of their decisions on the environment." Rabin, supra note 41, at 1287. NEPA requires agencies to engage in a specific process with a specific mandate in mind prior to making major regulatory decisions. Id. at 1287. In 1970, Congress enacted the Clean Air Act (CAA), Pub. L. No. 91-604, 84 Stat. 1676 (1970) (codified at 42 U.S.C. § 7401 (2000)), which directs the Environmental Protection Agency (EPA) to set air quality standards by specified deadlines. Rabin, supra note 41, at 1288-89. Rabin writes:

B. The Interest Group Representation Model

By the 1970s, the idea of agencies as experts had fallen apart. Scholars came to question not only "the agencies' ability to protect the 'public interest,' but to doubt the very existence of an ascertainable 'national welfare' as a meaningful guide to administrative decision."[55] The reason was that "[e]xposure on the one hand to the complexities of a managed economy in a welfare state, and on the other to the corrosive seduction of welfare economics and pluralist political analysis, has sapped faith in the existence of an objective basis for social choice."[56] The 1930s idealism about administrative expertise had given way to the 1970s realism about administrative discretion.

Administrative law and scholarship reacted to this change by reinventing the administrative process as a perfected political process, attempting to legitimate it by affording access to a wider range of affected interests. In so doing, it altered the entire focus of administrative law. The concern of administrative law no longer was to prevent the arbitrary exercise of administrative authority, as a "negative instrument for checking governmental power."[57] It was to ensure a more inclusive administrative process, "'the affirmative side' of government 'which has to do with the representation of individuals and interests' and the development of governmental policies on their behalf" rather than in the service of narrow groups and interests.[58] Through an interest group representation model, agencies' decisions would gather legitimacy "based on the same principle as legislation."[59] In the absence of an objective basis for administrative judgment, such judgment would reflect the preferences of all affected parties.

> What unites the Clean Air Act with NEPA as a real innovation in regulatory design is congressional recourse to an action-forcing principle. The CAA, like NEPA, rejects the prevailing New Deal wisdom that agency experts could best bring their technical expertise to bear on problems of public policy if they were pointed in the right direction .... NEPA was meant to widen the administrator's horizons. ... In setting stringent deadlines for administrative action, the CAA questioned the very will of the regulatory agencies to act. It warned that if air pollution controls were to be enforced by the New Deal strategy, 40 years of experience suggested that the regulators would delay, equivocate, and generally fail to establish in any precise way what 'the public interest' required.

Id. at 1289.

[55] Stewart, supra note 4, at 1683.

[56] Id.

[57] Id. at 1687.

[58] Id. (quoting Ralph F. Fuchs, Concepts and Policies in Anglo-American Administrative Law Theory, 47 Yale L.J. 538, 540 (1938) and citing Attorney General Committee's Report, supra note 42, at 76).

[59] Id. at 1712.

Courts implemented the interest group representation model through a variety of clearly perceptible doctrinal changes. Lower courts, confronting a huge shift from formal adjudication to notice-and-comment rulemaking, sought to open up that process to public participation and challenge by requiring agencies to produce a record reflecting consideration of relevant interests and facilitating judicial review. Some lower courts required procedures beyond those that the APA required for record-generating purposes.[60] These courts converted notice-and-comment rulemaking into a "hybrid" process somewhere between informal rulemaking and formal adjudication. The Supreme Court foreclosed this effort in 1978, permitting more procedures than the APA allowed only where Congress required them or agencies supplied them, and not where lower courts demanded them.[61]

But lower courts also pursued a strategy for spurring agency resolve that the Supreme Court would embrace. Chief Judge David Bazelon and Judge Harold Leventhal of the D.C. Circuit seized on the "arbitrary and capricious" standard of review in the APA to require an administrative record in notice-and-comment rulemaking.[62] They interpreted the "arbitrary and capricious" standard to contain more than the minimal rationality requirement it suggested.[63] Rather, they grounded in this language the formidable requirement that agencies articulate the factual and analytical basis for their decisions, including their chain of logic, as well as demonstrate consideration of relevant policy alternatives and relevant party comments.[64] This requirement, which had begun to surface earlier, now assumed new significance. By ensuring that agencies respond to criticisms and explain their rejection of alternative solutions, the requirement served the now critical role of facilitating participation as well as rationality. That is, it ensured the consideration of party input among the relevant factors. The Supreme Court, which endorsed some version of this so-called "reasoned decisionmaking" requirement or "hard look" doctrine as early

[60] See, e.g., Appalachian Power Co. v. EPA, 477 F.2d 495 (4th Cir. 1973) (requiring limited trial-type hearing in notice-and-comment rulemaking); Int'l Harvester Co. v. Ruckelshaus, 478 F.2d 615 (D.C. Cir. 1973) (same).

[61] See Vt. Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519 (1978).

[62] See *Int'l Harvester Co.*, 478 F.2d at 629-31 (Leventhal, J.); Harold Leventhal, Environmental Decisionmaking and the Role of the Courts, 122 U. Pa. L. Rev. 509, 511 (1974); Ethyl Corp. v. EPA, 541 F.2d 1, 33-37 (D.C. Cir. 1976) (en banc); Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 394 (D.C. Cir. 1973) (Leventhal, J.).

[63] See *Ethyl Corp.*, 541 F.2d at 33-37; *Portland Cement Ass'n*, 486 F.2d at 394; *Int'l Harvester Co.*, 478 F.2d at 629-31; Leventhal, supra note 62, at 511.

[64] Judge Leventhal proposed a stronger version, under which courts also would assess whether the agency's policy decision is substantively irrational. See *Ethyl Corp.*, 541 F.2d at 68-69 (Leventhal, J., concurring).

as 1971,[65] adopted it officially for notice-and-comment rulemaking in 1983.[66]

Other doctrinal changes also underscored the importance of broad public participation. Formal adjudication officially expanded to afford parties possessing "new," statutorily created property rights a hearing prior to deprivation.[67] Principles governing standing, ripeness, and exhaustion also expanded to allow more parties to seek judicial review of administrative action more easily.[68]

While readily identified, the transformation occurring in administrative law was not so readily explained. Professor Stewart speculated that the transition away from what he dubbed the "traditional" liberty protection model might be explained in either of two ways. First, it might reflect a "general and irremediable loss of faith in the possibility of authoritative, generally-applicable rules or procedures for governing collective choice."[69] The traditional model and the constitutional principles that underlie it were doomed from the start because they posit a form of legislative control that administrative law cannot produce. On this thinking, the interest group representation model is grounded in skepticism. It does not offer another "unified model of administrative law" in place of the older model.[70] Rather, it provides interest group representation to courts "as a technique for dealing with specific problems of administrative justice."[71] Courts might employ interest group representation selectively "where the desirability of fully and formally assessing the effect of alternative policies on various affected interests clearly outweighs the burdensome delays and other costs involved."[72]

Alternatively, the transition away from the old, traditional model might reflect "a passing, interim phase" on the way toward a new uni-

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65 See Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 415-17 (1971) (requiring reasoned decisionmaking for informal adjudication under arbitrary and capricious test of APA).

66 See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Corp., 463 U.S. 29, 41 (1983) (requiring reasoned decisionmaking for rule rescission under arbitrary and capricious test of APA).

67 See, e.g., Goldberg v. Kelly, 397 U.S. 254 (1970) (holding that Due Process Clause requires hearings before termination of welfare benefits to allegedly ineligible recipients).

68 See, e.g., Ass'n of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 153-55 (1970) (articulating new test broadly construing components of standing); McKart v. United States, 395 U.S. 185, 197-99 (1969) (waiving exhaustion requirement in case of extreme hardship); Abbott Labs. v. Gardner, 387 U.S. 136, 139-41 (1967) (permitting pre-enforcement review of regulations).

69 Stewart, supra note 4, at 1805.

70 Id.

71 Id. at 1807.

72 Id.

fying theory of administrative law.[73] Perhaps a "new conception of administrative law and its relation to political theory [was] forming among the ruins of the old."[74] That new conception, difficult "to see beyond the shards of the immediate present,"[75] "speaks to the condition of the age, reflecting the expansion of governmental functions and a changed conception of the status of the individual in society."[76] Put simply, the new conception suggests modern circumstances have outstripped the old model: "Given the enormous expansion of governmental activity, not only in the regulation of private activity but also in the provision of goods, services, and advantageous opportunities, [the traditional model] is no longer an adequate or even coherent model."[77] Thus, a new understanding of the administrative state in the constitutional structure emerged because the old understanding, hopelessly rooted in classical liberal and common law notions of private liberty, could not accommodate modern law notions of public welfare.

The passage of time has proven Stewart's second explanation at least partly correct. A new unifying theory of administrative law *was* emerging. That theory revealed itself more fully in broader constitutional theory and in a subsequent administrative law model focused on majoritarian control.

C. *The Majoritarian Paradigm in Constitutional Theory*

The development of the interest group representation model of administrative decisionmaking roughly coincided with the development, in constitutional theory, of the "majoritarian paradigm."[78] That paradigm reflected a "belief in the hegemony of popular control of all governmental decisions."[79] It stood, at its core, for the notion that only the people or their representatives could render legitimate governmental policy decisions. Although the notion of majoritarianism had been lurking in constitutional theory, it crystallized into a paradigm when Alexander Bickel (in)famously characterized judicial review of legislative decisionmaking as "countermajoritarian."[80]

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[73] Id. at 1810.

[74] Id. at 1811.

[75] Id. at 1810-11.

[76] Id. at 1812.

[77] Id. at 1811.

[78] Professor Erwin Chemerinsky coined the phrase "majoritarian paradigm." See Erwin Chemerinsky, The Supreme Court, 1988 Term—Forward: The Vanishing Constitution, 103 Harv. L. Rev. 43, 61 (1989).

[79] Brown, supra note 6, at 538.

[80] Bickel, supra note 7, at 16. Although there may be disagreement among scholars about the precise origins of majoritarianism, there is consensus that Bickel captured an

In his 1962 book *The Least Dangerous Branch*, Bickel asserted the idea of majority rule as the precondition of legitimate government.[81] The Progressives first launched that idea in the 1930s, discrediting the view that courts are justified in striking down economic legislation to protect individual liberty under the Due Process Clause of the Fifth and Fourteenth Amendments. The Progressives criticized concepts such as "due process" and "liberty of contract" as lacking any textual basis or functional constraints on the ability of judges to substitute their judgment of sound regulatory policy for that of the people.[82] The whole notion of individual rights, they argued, consists of nothing more than a vehicle for courts to reweigh the social policy considerations that Congress had evaluated when enacting law. This rights skepticism put judicial review on the defensive. Since that time, "the central question of constitutional scholarship . . . has been . . . how a court's interpretation of constitutional rights could justify the court in striking down popularly-enacted legislation."[83]

But this early rights skepticism did not amount to a call for majority control of administrative policymaking.[84] Indeed, the Progressives had demonstrated considerable enthusiasm for independent agencies. Professor Edward Corwin, for example, criticized the Supreme Court for holding in *Myers v. United States*[85] that Congress could not limit the President's ability to remove purely executive officials.[86] Corwin felt that the Court had wrongly interfered with a practical arrangement for "meeting modern conditions."[87] His view, shared by other New Deal enthusiasts, had the effect of unleashing administrative decisionmaking from political control. But neither Corwin nor other scholars focused on this point. Instead, they concentrated on the notion that agencies, as experts, would provide the

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anxiety about the Supreme Court that had been brewing since the New Deal. Compare Friedman, The Birth of an Academic Obsession, supra note 6, at 237-54 (attributing modern academic obsession with majoritarianism in large part to Bickel), and Friedman, The Lesson of *Lochner*, supra note 6, at 1391-92 (arguing that majoritarianism, as it is known now, has roots arising in Progressive era), with Brown, supra note 6, at 532 (noting that majoritarianism, as it is known now, arose with Bickel). It is not the purpose of this Article to take a position on the history of majoritarianism but to show that, whatever the history, the majoritarian critique of judicial review took on a life of its own after Bickel.

81 Bickel, supra note 7, at 16-18.

82 See John C.P. Goldberg & Benjamin C. Zipursky, The Moral of *MacPherson*, 146 U. Pa. L. Rev. 1733, 1781-82 (1998).

83 Id. at 1787.

84 Brown, supra note 6, at 534.

85 272 U.S. 52 (1926).

86 Edward S. Corwin, Tenure of Office and the Removal Power Under the Constitution, 27 Colum. L. Rev. 353, 355 (1927).

87 Id. at 399; see Brown, supra note 6, at 548-49.

best answers to social problems.[88] No one paused to consider whether those technocrats also would provide the answers that the people wanted. Even the critics of the new administrative state attacked agencies not for their unmajoritarian—if not countermajoritarian—quality, but for the inadequate protection they provided against arbitrary decisionmaking.[89]

The majoritarian critique of agency decisionmaking, perhaps looming in early discussions, took flight after Bickel publicized the link between rights skepticism and majoritarianism with respect to judicial review.[90] Post-Bickel, scholars began to distrust not only judicial use of individual rights to invalidate popularly enacted statutes, but *any* policy decision made by unelected officials. As to judicial review, "Bickel conflated very different strains of thought from Thayer to Wechsler into a single, national, commitment to majority rule, or 'democratic faith.'"[91] From this vantage, he labeled judicial review "a counter-majoritarian force in our system" and "a deviant institution in the American democracy."[92] And with that label, he encapsulated the problem of judicial review as never before. The central question was not just how to explain the Court's use of a few vague words in the Constitution to strike down popularly enacted legislation, but how to justify the very *existence* of judicial review in a democracy committed to majority rule.[93]

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[88] See Reich, supra note 26, at 1618 (

> In the half-century prior to the end of World War II, most Americans viewed public administrators as experts who used their experience and training to discover the best means for attaining goals established by statute. The administrator's task was merely to solve the problems identified by democratic processes; the legitimacy of his role was no major issue.

(emphasis and citations omitted)); Martin Shapiro, Administrative Discretion: The Next Stage, 92 Yale L.J. 1487, 1495-97 (1983) (noting that Progressives followed "technocratic tradition" of public administration, which relied on expert administrators rather than administrators "directly representative of and responsive to the people," and explaining that to extent Progressives also incorporated "democratic tradition[ ]," it was in sense that "public administration served 'the public interest'—that is, the interest of the people" and not that public administration aggregated preference of people); see also Linda R. Hirshman, Postmodern Jurisprudence and the Problem of Administrative Discretion, 82 Nw. U. L. Rev. 646, 656 (1988) ("Traditional administrative theory assumed that the application of neutral expertise in administrative regulation would achieve socially desirable ends better than would an imperfect market."); Mark Seidenfeld, A Civic Republican Justification for the Bureaucratic State, 105 Harv. L. Rev. 1511, 1518-19 (1992) (noting that expertise model of administrative law relied on agencies to make sound policy, and in this sense execute "'will of the people'").

[89] See supra notes 57-64 and accompanying text.

[90] Daniel A. Farber & Suzanna Sherry, Desperately Seeking Certainty 144 (2002); Brown, supra note 6, at 550-51.

[91] Brown, supra note 6, at 550.

[92] Bickel, supra note 7, at 16, 18.

[93] See Farber & Sherry, supra note 90, at 144; Brown, supra note 6, at 551.

The majoritarian paradigm, after Bickel, had a pronounced effect on constitutional theory.[94] Scholars widely accepted its premise of popular control, while debating its conclusion about judicial review. Some used the premise as Bickel did, to discredit anything but minimal use of judicial review. Others used it to justify more intensive use of judicial review. John Hart Ely, the leader of this latter group, argued for a judicial role in ensuring popular control of policymaking.[95] Ely called on courts to ensure that no groups systematically were deprived of participation in the process of popular policymaking.[96] He offered those who did care about individual rights the tools to permit the courts to eradicate obvious abuses in the system, like racial segregation, while still characterizing such protection as "representation reinforcement" and thus affording them the opportunity to indulge the seductive assumption that in a democracy it must be the people who make all value judgments.[97]

This majoritarian paradigm also had an effect on constitutional law doctrine. Early Rehnquist Court decisions, for example, displayed reluctance to upset legislative determinations that impinged on individual rights.[98] Indeed, the Rehnquist Court interpreted Bill of Rights provisions in a distinctly majoritarian manner with "a profound majoritarian effect."[99]

The majoritarian paradigm had a great effect on administrative law theory and doctrine, though no one seemed to notice. As a theoretical matter, the question was how to justify the very existence of administrative agencies in a polity committed to a single legitimating

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[94] See Brown, supra note 6, at 538-41 (describing influence of Bickel and his majoritarian premise on constitutional theory and case law).

[95] Ely, supra note 12, at 87-88.

[96] Id.

[97] Brown, supra note 6, at 539. Many other scholars followed Ely in defending judicial review against Bickel's charge. See id. at 532 nn.1-4 (collecting scholars, including Bruce Ackerman, Barry Friedman, Marci A. Hamilton, and Michael J. Klarman).

[98] See Chemerinsky, supra note 78, at 57, 61-74; Barry Friedman, Dialogue and Judicial Review, 91 Mich. L. Rev. 577, 590-609 (1993).

[99] Chemerinsky, supra note 78, at 57. More recent Rehnquist Court decisions on issues such as the extent of Congress's power under the Commerce Clause or Section Five of the Fourteenth Amendment suggest a willingness to invalidate legislative determinations that impinge on states' rights. Of course, this might not signal a retreat from the Court's commitment to majority rule but rather an attempt to perfect it. The Court might be understood, whether rightly or wrongly, as recognizing that Congress frequently invents problems or overbroad solutions to posture with voters rather than represent them. See Lisa Schultz Bressman, Disciplining Delegation After *Whitman v. American Trucking Ass'ns*, 87 Cornell L. Rev. 452, 479 (2002) (characterizing certain Rehnquist Court decisions as efforts to invalidate purely symbolic legislation, intended more to induce public support than honor public preferences); Suzanna Sherry, Haste Makes Waste: Congress and the Common Law in Cyberspace, 55 Vand. L. Rev. 309, 314-15 (2002) (discussing problem of symbolic legislation).

principle of majority rule.[100] Note the change in posture of this question from the question that preoccupied the founders of the administrative state. The whole approach had shifted from the offensive inquiry that characterized the New Deal period—why are administrative agencies necessary and why do they not offend constitutional values—to a defensive inquiry that parallels Bickel's challenge for courts—how do we justify administrative agencies, given that they are here to stay, in a constitutional structure dedicated to their antithesis. In a post-Bickel world, the starting place was the lack of justification for policymaking by agencies insulated from the control of the people. Executive branch agencies were not the primary problem because such agencies were connected to the President, who at least had plenary power to remove their heads over policy disagreements. Independent agencies were a different matter. Such agencies, "like courts, betray the principle that 'all of those given the authority to make policy are directly accountable to the people through regular elections.'"[101]

Notwithstanding the glaring implication of Bickel's view for the legitimacy of administrative agencies, few scholars worried aloud about the countermajoritarian difficulty as it affected administrative agencies.[102] Most scholars who discussed it directed their energy—some might say their obsession—to the legitimacy of the Supreme Court.[103] Scholars who discussed the legitimacy of administrative agencies did not do so in terms of the countermajoritian difficulty. Almost none cited Bickel.[104]

This does not mean, however, that administrative law scholars did not incorporate the majoritarian premise into their thinking. One explanation, novel here, for the administrative law model emerging at this time was the influence of Bickel. The interest group representation model appeared for the first time in the late 1960s and early 1970s, just long enough after Bickel wrote his book for it to have taken root in constitutional theory. That model, so coincident in its

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100 See Reich, supra note 26, at 1618-19 (observing that after World War II, "[b]road grants of administrative discretion seemed inconsistent with [a] vision of society [based on the views of the American polity] because they created the possibility that unelected bureaucrats could impose their own ideas on the public").

101 Brown, supra note 6, at 541 (quoting Robert H. Bork, The Tempting of America 4-5 (1990)).

102 Friedman, The Birth of an Academic Obsession, supra note 6, at 163-64 (noting that administrative agencies, though natural targets of majoritarian critique, received little attention from scholars on this issue).

103 See id.

104 But see Stewart, supra note 11, at 714-15 (citing Bickel in discussing argument that environmental interests are "chronically undervalued because of basic structural defects in the political process" and therefore require judicial protection).

timing, also was coincident in its focus. It (1) took the legitimacy question to be the central question and (2) answered that question by substituting popular control for earlier models' reliance on procedural and judicial control of the administrative process. In short, the interest group representation model recreated the administrative process into one that would maximize the satisfaction of popular preferences.[105] In so doing, it presumed that popular control is the "sine qua non" of legitimate governmental decisionmaking.[106]

Furthermore, administrative law scholars soon began making arguments that looked a lot like the arguments their counterparts were making in post-Bickelian constitutional theory. For example, some urged courts to intervene in the notice-and-comment rulemaking process in what, I believe, might be understood as an effort at Ely-esque "representation reinforc[ement]."[107] Specifically, they urged courts to intervene in the process to prevent it from systematically excluding

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[105] See Reich, supra note 26, at 1620 (noting that interest group representation model asked public administrator "to be accessible to all organized interests while making no independent judgment of the merits of their claims. . . . [s]ince, by this view, the 'public interest' was simply an aggregation and reconciliation of these claims," and citing Theodore J. Lowi, The End of Liberalism 71 (1969)); Shapiro, supra note 88, at 1497 (noting that under interest group representation model, "[b]ureacrats would become democrats by reflecting the voice of the people as expressed to them by the interest groups"); Stewart, supra note 4, at 1761 (

> Such participation, it is claimed, will not only improve the quality of agency decisions and make them more responsive to the needs of the various participating interests [citing Arthur Earl Bonfield, Representation for the Poor in Federal Rulemaking, 67 Mich. L. Rev. 511, 511-12 (1969)], but is valuable in itself because it gives citizens a sense of involvement in the process of government [citing Michael E. McLachlan, Democratizing the Administrative Process: Toward Increased Responsiveness, 13 Ariz. L. Rev. 835, 851 (1971)], and increases confidence in the fairness of government decisions [citing Ernest Gellhorn, Public Participation in Administrative Proceedings, 81 Yale L.J. 359, 361 (1972)]. Indeed, litigation on behalf of widely-shared "public" interests is explicitly defended as a substitute political process that enables the "citizen to cast a different kind of vote . . . which informs the court that . . . a particular point of view is being ignored or underestimated" by the agency

[quoting Comment, The Role of the Judiciary in the Confrontation with the Problems of Environmental Quality, 17 UCLA L. Rev. 1070, 1099 (1970)].).

[106] Although academics have not been entirely clear on this point, I understand the majority will as distinct from the public interest. Indeed, the majority will may be adverse to the public interest with respect to a given policy matter. The two are methodologically distinct. Determining the former involves aggregating public preference on a policy matter, while determining the latter involves articulating a public-regarding purpose served by the policy matter. Cf. Shane, supra note 3, at 204-05 (distinguishing "accountability to the 'public interest'" from accountability to "majority opinion" and accountability to "the most affected parties"). For a vision of responsiveness to the public interest as distinct from responsiveness to private interests or public preferences, see generally, Cass R. Sunstein, Beyond the Republican Revival, 97 Yale L.J. 1539 (1988); Cass R. Sunstein, Interest Groups in American Public Law, 38 Stan. L. Rev. 29 (1985).

[107] See Ely, supra note 12, at 88.

representative interests from transmitting their preferences and shaping policy.[108] Scholars also began to assume that more intensive judicial review represented a dubious intrusion on the product of the notice-and-comment process—which was, after all, an idealized legislative process. The only question was whether or to what extent that intrusion was justified. Indeed, this question still dominates the debate.[109]

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[108] See Leventhal, supra note 62, at 515-18 (describing role of courts in ensuring that administrators give due consideration to environmental interests in cases where administrators are least likely to do so); William F. Pedersen, Jr., Formal Records and Informal Rulemaking, 85 Yale L.J. 38, 59 (1975) (noting that, in absence of judicial review, comments of "environmental groups may not be given the kind of detailed consideration they deserve"); Stewart, supra note 11, at 756-62 (advocating judicial review of environmental decisions under ordinary administrative law principles to cure interest-representation defects).

[109] Some scholars argue that intensive judicial review is unjustified because it is too burdensome or "ossifying." See, e.g., Stephen Breyer, Breaking the Vicious Circle 49 (1993) (finding that even "threat" of judicial review has created "complex, time consuming" rulemaking procedures that are unable to keep pace with rapidly changing scientific advances); Jerry L. Mashaw & David L. Harfst, The Struggle for Auto Safety 19, 199-200, 224-54 (1990) (arguing that legal review made National Highway Traffic Safety Administration rulemaking nearly "impossible"); Thomas O. McGarity, Some Thoughts on "Deossifying" the Rulemaking Process, 41 Duke L.J. 1385 (1992); Thomas O. McGarity, The Courts and the Ossification of Rulemaking: A Response to Professor Seidenfeld, 75 Tex. L. Rev. 525 (1997); Peter L. Strauss, Considering Political Alternatives to "Hard Look" Review, 1989 Duke L.J. 538, 549; Peter L. Strauss, The Rulemaking Continuum, 41 Duke L.J. 1463, 1471-72 (1992) (stating that ossification effects of judicial review are "wrongheaded"); Paul R. Verkuil, Comment: Rulemaking Ossification—A Modest Proposal, 47 Admin. L. Rev. 453, 453 (1995) (noting consensus that process of rulemaking is "too time consuming, burdensome, and unpredictable"). These scholars argue that agencies, fearing intensive judicial scrutiny, would devote excessive resources to insulating their rules from reversal or refrain from issuing particular rules at all. But see William S. Jordan, III, Ossification Revisited: Does Arbitrary and Capricious Review Significantly Interfere with Agency Ability to Achieve Regulatory Goals Through Informal Rulemaking?, 94 Nw. U. L. Rev. 393 (2000) (disputing on empirical grounds contention that judicial review ossifies administrative process). Some argue, in a notably majoritarian vein, that intensive judicial review is unjustified because it displaces "political" judgments that "unaccountable" courts should respect rather than impede. See, e.g., Richard J. Pierce, Jr., Seven Ways to Deossify Agency Rulemaking, 47 Admin. L. Rev. 59, 71 (1995) (arguing that intensive judicial review allows politically unaccountable judges to reject administrative policy decisions). Others respond that intensive judicial review is justified because it improves the democratic quality of rulemaking. See, e.g., Jim Rossi, Redeeming Judicial Review: The Hard Look Doctrine and Federal Regulatory Efforts to Restructure the Electric Utility Industry, 1994 Wis. L. Rev. 763; Thomas O. Sargentich, The Critique of Active Judicial Review of Administrative Agencies: A Reevaluation, 49 Admin. L. Rev. 599 (1997); Mark Seidenfeld, Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking, 75 Tex. L. Rev. 483 (1997); Patricia M. Wald, Judicial Review in the Time of Cholera, 49 Admin. L. Rev. 659 (1997). Agencies, fearing intensive judicial scrutiny, would consider the comments of affected parties, deliberate on the difficult issues, and explain the basis for their decisions. Agencies also would factor out or at least reveal inappropriate "political" considerations. See Cass R. Sunstein, On the

The interest group representation model, for all its build-up, was relatively short-lived in robust form. Critics claimed that agencies did not merely aggregate the preferences of the competing interests but served "self-interests deeply entangled with narrow private interests."[110] As a result, interest group representation "was no longer inherently good because, to paraphrase Orwell, some groups were far more equal than others."[111] Given this vulnerability, the interest group representation model could not justify the considerable costs that it imposed on the administrative process.[112] Creating an idealized legislative process was expensive and complicated, if done right. Agencies had to accept comments from all who submitted them and then sift through the materials to determine which required serious consideration. They had to support their policy determinations on the basis of a record sufficient to survive judicial challenge, which was a moving target. None of this was to deprive the interest group representation of a place in administrative law. But that place was not at the center.

D. The Presidential Control Model

The decline of the interest group representation model created "a void and into that void stepped the President: literally in the person of Ronald Reagan; figuratively in the constitutional persona of the Chief Executive."[113] President Reagan and his successors, both Republican and Democrat, have asserted not only managerial but directorial control of the administrative state.[114] By bringing a large part of the administrative bureaucracy under executive control, they have offered a vision of administration that has eased pragmatic and constitutional concerns while crossing partisan political lines. This vision—compelling in its ability to address both efficiency and legitimacy issues—did not, I argue, change the focus on popular control that the

Costs and Benefits of Aggressive Judicial Review of Agency Action, 1989 Duke L.J. 522, 525.

110 Shapiro, supra note 88, at 1498.

111 Id.

112 See Sunstein, supra note 26, at 283-84.

113 Cynthia R. Farina, The "Chief Executive" and the Quiet Constitutional Revolution, 49 Admin. L. Rev. 179, 180 (1997); see also Shapiro, supra note 88, at 1498 ("If the American people rejected both technocracy and group access, what choice of administrative style was left? One answer was none. Jimmy Carter, Ronald Reagan, and a host of other politicians ran for office on a platform of simple opposition to government.").

114 Farina, supra note 113, at 180; Kagan, supra note 25, at 2246, 2250 (describing "era of presidential administration" as "[t]riggered mainly by the re-emergence of divided government and built on the foundation of President Reagan's regulatory review process" and fortified by "President Clinton's articulation and use of directive authority over regulatory agencies, as well as his assertion of personal ownership over regulatory product").

interest group representation model heralded. Rather, it changed the locus of popular control from interest groups to the one governmental actor responsive to the entire nation.

The model that embodies this vision—the presidential control model—grew out of three interrelated stories about the administrative state: a pragmatic story, a political story, and a constitutional story. The stories have been told many times, and I will only briefly recount them here.[115] The pragmatic story begins with the increasing criticism of agencies as insufficiently attentive to cost-effectiveness and coordination.[116] On the cost side, critics charged that agencies fail to consider adequately the need for cost-benefit analysis,[117] incentive-based regulatory strategies, and priority setting.[118] On the coordination side, critics contended that agencies fail to avoid duplication and conflict with each other.[119]

Scholars identified the President, rather than Congress, as best able to remedy these regulatory failures. Some focused on the unique ability of the President to conduct centralized review of agency proposals and improve agency outcomes.[120] The President, as a single actor, could adopt particular decisional methodologies, evaluate alternative strategies, establish priorities, and facilitate government-wide planning. Indeed, the President has been performing these functions in some capacity since the New Deal. Others focused on the utter inability of Congress to regulate beyond the selfish interests of its own

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115 For excellent treatments, see Fitts, supra note 3, at 841-57; Kagan, supra note 25, at 2277-2319; Strauss, supra note 26, 760-72. For a short but compelling account of how the political and constitutional stories reinforced each other and drove the presidential control model, see Farina, supra note 113.

116 See, e.g., W. Kip Viscusi, Fatal Tradeoffs 248-51 (1992) (noting emphasis on efficient regulation in 1980s); Shapiro, supra note 88, at 1499-1500 ("The goal is . . . policies that are not only rationally cost-effective in and of themselves, but fully compatible with maximum economic growth.").

117 See, e.g., Bruce A. Ackerman & William T. Hassler, Clean Coal/Dirty Air 59-78 (1981) (expressing need to adapt environmental goals to economic efficiency); Stephen Breyer, Regulation and Its Reform 346-50 (1982) (expressing need to consider efficiency in course of regulatory reform); Richard B. Stewart, Regulation, Innovation, and Administrative Law: A Conceptual Framework, 69 Cal. L. Rev. 1256, 1261 (1981) (same).

118 See, e.g., Stephen Breyer, Analyzing Regulatory Failure: Mismatches, Less Restrictive Alternatives, and Reform, 92 Harv. L. Rev. 547, 582, 586 (1979).

119 See, e.g., Thomas O. McGarity, Reinventing Rationality 271 (1991) (listing duplication, overlap, and conflict among problems that Office of Management and Budget review of agency regulatory analysis sought to alleviate).

120 See, e.g., Christopher C. DeMuth & Douglas H. Ginsburg, White House Review of Agency Rulemaking, 99 Harv. L. Rev. 1075, 1076-82 (1986); Jerry L. Mashaw, Prodelegation: Why Administrators Should Make Political Decisions, 1 J.L. Econ. & Org. 81, 82 (1985); Peter L. Strauss, The Place of Agencies in Government: Separation of Powers and the Fourth Branch, 84 Colum. L. Rev. 573, 662-67 (1984); see also Richard H. Pildes & Cass R. Sunstein, Reinventing the Regulatory State, 62 U. Chi. L. Rev. 1 (1995).

members. Public choice theory, now at its height, offered a view of congressional behavior that cast doubt on the practical likelihood of meaningful legislative regulatory reform.[121] Any improvements that legislation would bring in regulatory programs would result, if at all, from a happy coincidence with improvements that those statutes might bring in congressional reelection prospects.

The political story begins with President Reagan. President Reagan leveraged public cynicism about bloated government into a campaign for smaller government. He deployed principles of cost-benefit analysis—promised to promote an efficient regulatory agenda—to support a primarily antiregulatory agenda.[122] He issued Executive Order 12,291,[123] which required agencies to consider cost-benefit analysis "to the extent permitted by law"[124] and to submit their proposed major rules, along with a "regulatory impact analysis" of the rule, for centralized White House review by the Office of Information and Regulatory Activities (OIRA) in the Office of Management and Budget.[125] The result was to reduce the number of agency rules that conflicted with administrative policy, as well as the number that did not follow cost-benefit analysis.[126] And when Vice President George H.W. Bush became President himself, he maintained Executive Order 12,291 and its apparently antiregulatory bias.

But President Clinton demonstrated that the tools of Executive Order 12,291 were not tied to conservative ideology. President Clinton issued his own version—Executive Order 12,866[127]—which harnessed cost-benefit analysis[128] and OIRA review[129] for the purpose of reinventing government rather than reducing it. He also stepped up the practice of issuing agency-specific directives to steer and improve

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121 See, e.g., David Schoenbrod, Power Without Responsibility 73 (1993) (arguing that congressional efforts to set specific statutory guidelines and deadlines are intended actually to delay regulation rather than improve it).

122 See Farina, Undoing the New Deal, supra note 3, at 229 (using term "anti-regulatory" to describe "new presidentialism" associated with President Reagan); Kagan, supra note 25, at 2247 (noting that, during Reagan and Bush years, many administrative law scholars came to doubt propriety of presidential control of agency decisionmaking because of its apparently anti-regulatory effects).

123 Exec. Order No. 12,291, 3 C.F.R. 127 (1981), reprinted as amended in 5 U.S.C. § 601 (2000).

124 3 C.F.R. 128.

125 3 C.F.R. 128-30.

126 See McGarity, supra note 119, at 22 (noting that OMB review resulted in reconsideration or withdrawal of approximately 85 proposed rules each year, including some of most significant ones).

127 Exec. Order No. 12,866, 3 C.F.R. 638 (1993), reprinted as amended in 5 U.S.C. § 601 (2000).

128 3 C.F.R. 639, 645.

129 3 C.F.R. 640, 645.

particular regulatory policies the way that specific legislation might.[130] These directives, typically in the form of formal and published memoranda to executive branch agency heads, "instruct[ed] them to take specified action within the scope of the discretionary power delegated to them by Congress."[131] While President Clinton continued the Reagan-Bush practice of regulatory review under principles of cost-benefit analysis, he also intervened at a much earlier stage by issuing preregulatory directives to the heads of executive branch agencies "to set the terms of administrative action and prevent deviation from his proposed course."[132] In addition, he asserted himself at a later stage by issuing postregulatory statements designed to present "regulations and other agency work product, to both the public and other governmental actors, as his own, in a way new to the annals of administrative process."[133]

Despite some antiregulatory moves,[134] President George W. Bush made few changes to the main architecture of presidential control. He made only minor amendments to Executive Order 12,866, now Executive Order 13,258.[135] And he has continued to issue official directives to agency heads.[136] Whether, in the final analysis, he will do so with the vigor of President Clinton remains to be seen.

The constitutional story begins with a renewed emphasis on the role of the unitary executive in controlling administrative action.[137]

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130 Kagan, supra note 25, at 2290-99 (describing President Clinton's increased use of directive authority).

131 Id. at 2290.

132 Id. at 2249.

133 Id.

134 President George W. Bush, upon taking office, attempted to reverse many end-of-term Clinton decisions. See, e.g., Memorandum for the Heads and Acting Heads of Executive Departments and Agencies, 66 Fed. Reg. 7702 (Jan. 24, 2001). Perhaps this is a predictable response to a change in presidential political affiliation. There is some evidence, however, that it is a return to an antiregulatory agenda. Under President Bush, OMB has rejected proposed rules at the highest rate since President Reagan's first term. See Stephen Power & Jacob M. Schlesinger, Redrawing the Lines: Bush's Rules Czar Brings Long Knife to New Regulations, Wall St. J., June 12, 2002, at A1 (providing graphic demonstrating percentage of rules reviewed by OIRA that were returned to agencies at high of 2.5% in 1980 and 2000).

135 Exec. Order No. 13,258, 67 Fed. Reg. 9385 (Feb. 28, 2002).

136 See Robert W. Hahn & Cass R. Sunstein, A New Executive Order for Improving Federal Regulation? Deeper and Wider Cost-Benefit Analysis, 150 U. Pa. L. Rev. 1489, 1494-95 (2002) (noting that under Bush, "OIRA has issued a series of prompt letters" directing agency heads to issue regulation); Kagan, supra note 25, at 2318 (providing example of Memorandum on Restoration of the Mexico City Policy, 37 Weekly Comp. Pres. Doc. 216 (Jan. 29, 2001), which reinstated ban lifted by President Clinton on federal funding for private organizations engaged in abortion-related activities).

137 Farina, supra note 113, at 181 (noting "renaissance of structural constitutional theory" in 1980s).

Unitary executive theory looked like a return from something modern and unpredictable—interest group pluralism—to something old and dependable—separation of powers. As such, it squarely addressed the question of where exactly a federal bureaucracy fit in our three-branch structure. The answer: under the middle branch. To make this claim, advocates of the unitary executive theory did not need to rely on creative constitutionalism. They could point to the original understanding of the constitutional structure that contains only three branches and not an unenumerated fourth:[138] Once Congress relinquishes the power to determine the details of regulatory policy, the President must assume it because the Constitution permits no other option. Other scholars defended unitary executive theory as a matter of "translation" necessary to maintain fidelity to the original constitutional commitments to accountability and energy in the executive branch:[139] Once Congress relinquishes the power to determine the details of regulatory policy, the President should assume it because the Constitution requires an elected, focused governmental official to exercise that power rather than a bunch of bureaucrats. In either case, unitary executive theory responded powerfully to the accountability concerns raised by the administrative state. It promised a government run by the one official who speaks for all the people.

These three stories—pragmatic, political, and constitutional—separately and together contemplate a form of presidential control that extends beyond coordination or oversight. They confer on the President "not simply some ultimate managerial responsibility for how well the government runs," but "an independent role in shaping domestic public policy."[140] Presidents Reagan and George H.W. Bush asserted their power in a relatively understated fashion, accomplishing a "[q]uiet [c]onstitutional [r]evolution."[141] President Clinton embraced it unabashedly, fairly proclaiming "an era of presidential administration."[142] He announced his intention to make administrative policy decisions his own rather than those of the executive branch agency purportedly charged with the task.[143] President George W.

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138 See Steven G. Calabresi & Saikrishna B. Prakash, The President's Power to Execute the Laws, 104 Yale L.J. 541, 570-99 (1994).

139 See Lawrence Lessig & Cass R. Sunstein, The President and the Administration, 94 Colum. L. Rev. 1, 3 (1994).

140 Farina, supra note 113, at 180.

141 Id. at 179.

142 Kagan, supra note 25, at 2246.

143 Id. at 2248 (

> Whether the subject was health care, welfare reform, tobacco, or guns, a self-conscious and central object of the White House was to devise, direct, and/or finally announce administrative actions—regulations, guidance, enforcement

Bush also has been vocal about his connection to at least some administrative policy decisions.[144]

Whether exercised subtly or stridently, the independent role in shaping administrative public decisions is at the root of the presidential control model. That model purports to legitimate the administrative state by bringing its decisions (or a large many of them) under political—and therefore popular—control. Submit to popular control, the model says to the administrative state, and shed your constitutional troubles. At one level, the model makes a purely formal claim. It contends that popular control legitimates administrative agencies by ensuring that those agencies answer to a governmental actor who is accountable and enumerated, even if they themselves are not. Headless fourth branch solved.

But the model, as most often advanced, runs deeper than this formal claim. The presidential control model seeks to ensure that administrative policy decisions reflect the preferences of the one person who speaks for the entire nation. In this way, it attempts to legitimate administrative policy decisions, through presidential politics, on the ground that they are responsive to public preferences.[145] Advocates of the model have been quite forthcoming about its aim, and rightly so.[146] It is this aim that has allowed the model to meet efficiency and

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strategies, and reports—to showcase and advance presidential policies. In executing this strategy, the White House in large measure set the administrative agenda for key agencies, heavily influencing what they would (or would not) spend time on and what they would (or would not) generate as regulatory product.).

144 See supra note 136.

145 It is worth noting that cost-benefit analysis itself—one of the principle tools of presidential control—can be understood to ask agencies directly to consider popular preferences in policymaking. Cost-benefit analysis requires agencies to consider which policies the public would prefer given the relative costs and benefits (assuming the public consists of rational actors). Of course, cost-benefit analysis also affords politicians a means to prevent agencies from selecting any policy that would impose large costs—or any costs—on the groups that finance their reelection campaigns.

146 See Jerry L. Mashaw, Greed, Chaos, and Governance 152 (1997) (arguing that President is particularly responsive to public preferences because he deals with issues national in scope and has no particular constituency demanding benefits in exchange for votes); Steven G. Calabresi, Some Normative Arguments for the Unitary Executive, 48 Ark. L. Rev. 23, 58-70 (1995) (endorsing presidential control as mechanism that best promotes responsiveness to public preferences); Kagan, supra note 25, at 2331-37 (same); Mashaw, supra note 120, at 95 (arguing that presidential control of administrative decisionmaking will increase "the responsiveness of government to the desires of the electorate"); Richard J. Pierce, Jr., The Role of the Judiciary in Implementing an Agency Theory of Government, 64 N.Y.U. L. Rev. 1239, 1251-54 (1989) (arguing that Constitution is premised on belief that government should act as agent of people, and that President is second best to Congress as agent of people for controlling administrative policymaking); see also Matthew D. Adler, Judicial Restraint in the Administrative State: Beyond the Countermajoritarian Difficulty, 145 U. Pa. L. Rev. 759, 875-76 (1997) (collecting political science

constitutional concerns notwithstanding changes in control of the White House. Whatever administration holds office and whatever regulatory vision that administration implements, the result represents the majority will. If it does not, then the next election cycle, at least in theory, will ensure that it does.[147] The President's unique capacity for public responsiveness—in a word, majoritarianism—ensures that this model is likely to survive into the future.[148]

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literature that describes emergence of President who seeks and claims support of national electorate and that demonstrates President's special connection to "Median National Voter," and noting that law scholars have used this literature to justify President's control over administrative agencies); Matthew D. McCubbins et al., Administrative Procedures as Instruments of Political Control, 3 J.L. Econ. & Org. 243, 246 (1987) (arguing that purpose of administrative law is to help elected politicians retain control of policymaking); Eric A. Posner, Controlling Agencies with Cost-Benefit Analysis: A Positive Political Theory Perspective, 68 U. Chi. L. Rev. 1137, 1141 (2001) (arguing that purpose of cost-benefit analysis is to ensure that elected officials maintain power over agency regulation); David B. Spence & Frank Cross, A Public Choice Case for the Administrative State, 89 Geo. L.J. 97, 102-28 (2000) (arguing that agency decisionmaking maximizes voter preferences); see generally Fitts, supra note 3, at 853 n.77 (

> The theory of a strong unitary president is that the president should take primary responsibility for those activities of the executive branch that are conducive to majoritarian decisionmaking. . . . The primary opponents of a unitary presidency emphasize the need for the exercise of nonmajoritarian influence, either in the form of autonomous expert executive agencies, congressional interest groups, or civic republican elites).

147 This theory of electoral responsiveness assumes that the public understands what the President is implementing through his agency vision and votes on that basis. See Farina, The Consent of the Governed, supra note 3, at 992-1007 (expressing skepticism); Shane, supra note 3, at 197 (noting disconnect between President Reagan's strong electoral support and public's apparent rejection of his policy positions on key issues).

148 That is not to say that responsiveness is the only asserted goal of the presidential control model or its advocates. Some, though not all, of those advocates connect popular sovereignty with faction reduction. See Kagan, supra note 25, at 2337 ("To the extent that presidential supervision of agencies remains hidden from public scrutiny, the President will have greater freedom to play to parochial interests. . . . It is when presidential control of administrative action is most visible that it most will reflect presidential reliance on and responsiveness to broad public sentiment."); Lessig & Sunstein, supra note 139, at 105-06 ("[B]ecause the President has a national constituency—unlike relevant members of Congress, who oversee independent agencies with often parochial agendas—it appears to operate as an important counterweight to factional influence over administration."). I address below the claim that presidential control reduces faction. See infra notes 197-198 and accompanying text. I do not, however, address the claim that presidential control reduces faction simply because whatever the President does (and the public approves or tolerates) is public-regarding. At best, that claim simply restates the case that presidential control is majoritarian. At worst, it makes an argument that is not satisfying even on public choice theory. See Cynthia R. Farina, Faith, Hope, and Rationality: Or, Public Choice and the Perils of Occam's Razor, 28 Fla. St. U. L. Rev. 109, 125-30 (2000) (explaining public choice critique of claim that presidential control automatically reduces faction). Thus, I consider only the claim that presidential control promotes the values that faction can be understood to subvert, such as fairness and deliberation.

II
THE PRESIDENTIAL CONTROL MODEL: THE INABILITY OF ACCOUNTABILITY TO LEGITIMATE AGENCY DECISIONMAKING

What I have offered thus far is an explanation for the transformation in recent models of the administrative state, including the now dominant presidential control model. Although others have noted the transformation, few have ventured more than a tentative explanation. Moreover, none has related it to Bickel. I have shown that the transformation in recent models of the administrative state, beginning with the interest representation model and culminating in the presidential control model, occurred in the wake of Bickel's 1962 book. That book set off a cabin industry in justifying intensive judicial review against the charge that it positions unelected officials to make policy. Bickel's book, I suggest, set off another cabin industry: justifying administrative decisionmaking against a similar charge. But there was a notable difference. While constitutional theorists became openly consumed with their new "countermajoritarian" project, administrative law scholars took theirs for granted. They began to walk the walk without talking the talk.

If I am correct in diagnosing the transformation of the models, the next question is what inference to draw for the current, presidential control model. The advocates of that model might take my historical narrative as evidence that they are on the right track. Whether consciously or not, they have succeeded in aligning a model of the administrative state with the prevailing theory of the constitutional structure. That, I argue, would be the wrong inference to draw.

Section A shows that many constitutional theorists no longer endorse the majoritarian paradigm as an adequate metric for assessing the legitimacy of judicial review. For this reason alone administrative law scholars should rethink whether the majoritarian paradigm provides an adequate metric for assessing the legitimacy of agency decisionmaking. Once they do, Section A continues, they will discover that the majoritarian paradigm fails to account for a concern of central importance to the agency legitimacy issue—in particular, the concern for arbitrariness. As Section A of Part I demonstrated, this concern has been present from the earliest discussions of the administrative state. Section A of this Part offers an explanation: The concern plausibly emanates from the constitutional structure itself. The concern therefore should be addressed in any model that purports to legitimate the administrative state.

Section B shows that administrative law scholars have begun to acknowledge as much. Indeed, one such scholar has even reworked the presidential control model in what might be understood as an attempt to address the arbitrariness concern. Section B concludes that this attempt, though admirable, cannot entirely resolve the arbitrariness concern. Meanwhile, it imposes a great price on the presidency.

A. A Preliminary Critique of the Majoritarian Paradigm

As an initial matter, constitutionalist theorists have started to move away from the idea of majoritarianism as the linchpin of legitimacy. Some have challenged the assumption on which majoritarianism rests: that the purpose of our complex system of mediated powers is to aggregate popular preferences.[149] These scholars argue that the primary purpose of the traditional checks and balances is to protect individual liberty. Others have questioned the possibility of any true majoritarianism in a system that allows electoral prospects to drive policy commitments. They have argued, with a skepticism grounded in public choice theory, that politicians are less likely to honor popular preferences than the preferences of their most powerful campaign contributors.[150] Thus, according to these two groups of scholars, either majoritarianism was never the proper understanding of our constitutional structure, or it no longer is a feasible one. Another group of scholars does not reject majoritarianism, but implores the legal academy to get past the notion that the problem with judicial review is lack of accountability.[151] These scholars seek to understand judicial review in terms of the contribution it makes to the democratic regime as a whole. Put differently, they seek to understand judicial review for what it offers (e.g., independent judgment) rather than for what it does not (e.g., popular preference).

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[149] See supra note 17.

[150] See Daniel A. Farber & Philip P. Frickey, Law and Public Choice 21-24 (1991) (describing public choice critique of legislation).

[151] See, e.g., Chemerinsky, supra note 78, at 74-77 (arguing that judicial review serves democratic functions other than majoritarianism); Farber & Sherry, supra note 90, at 147-51 (arguing that judicial review must be attuned to variety of democratic goals); Neal Devins & Louis Fisher, Judicial Exclusivity and Political Instability, 84 Va. L. Rev. 83, 90-104 (1998) (arguing that judicial review contributes to open exchange among branches); Friedman, supra note 98, at 653-80 (arguing that judicial review promotes dialogue with body politic); Michael J. Klarman, Majoritarian Judicial Review: The Entrenchment Problem, 85 Geo. L.J. 491, 509-39 (1997) (arguing that judicial review prevents legislative entrenchment); Michael J. Klarman, What's So Great About Constitutionalism?, 93 Nw. U. L. Rev. 145, 188 (1998) (arguing that judicial review "in politically unpredictable ways, imposes culturally elite values in a marginally countermajoritarian fashion" (emphasis omitted)).

Although it is far from clear which, if any, of these views will stick over time, all suggest a growing dispute among constitutional theorists about the role of majoritarianism in understanding judicial review. Given that constitutional theorists no longer are content to assume that majoritarianism provides a satisfactory understanding of our constitutional structure, administrative law scholars should no longer assume that majoritarianism provides an adequate foundation for the administrative state. Rather, they should ask whether it does so.

Once administrative law scholars begin to question whether majoritarianism provides an adequate foundation, they soon will discover that it does not. The reason is that majoritarianism fails to account for a concern of paramount importance in the administrative state—namely, the concern for arbitrary administrative decisionmaking. How do we know this concern is of paramount importance? For one thing, it simply will not go away. The concern, evident in the earliest models of the administrative state, has not abated since. Some of the most prominent administrative law scholars of our time discussed the problem of arbitrary administrative decisionmaking well after the expertise model had begun to collapse. In the 1960s, Professor Kenneth Culp Davis, Judge Henry J. Friendly, and Professor Louis L. Jaffe each offered important books seeking fresh approaches to the problem.[152] Furthermore, Davis et al. were not the only ones who continued to worry about arbitrary administrative decisionmaking. Contemporary administrative law scholars still raise the issue, notwithstanding their overall dedication to majority rule.[153]

Moreover, the possibility exists that the concern for arbitrary administrative decisionmaking stems from the constitutional structure. Perhaps this explains why administrative law scholars have not been able to shake it. In any event, administrative law scholars have not been properly attributing it. While administrative law scholars have been talking about the prevention of arbitrary administrative decisionmaking, they have not connected it to the constitutional structure in an enduring way. They have been discussing the prevention of arbitrary administrative decisionmaking as central to *good* regulatory government, rather than to *legitimate* regulatory government—as if the two were entirely distinct. In addition, administrative law scholars have located the arbitrariness concern in the APA or some other component of administrative law and not in constitutional law. Occasionally, scholars do identify the concern in the Due Process Clause.[154]

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[152] See Davis, supra note 19; Friendly, supra note 19; Jaffe, supra note 19.

[153] See, e.g., Kagan, supra note 25, at 2337; Lessig & Sunstein, supra note 139, at 105-06.

[154] See, e.g., Robert L. Rabin, Job Security and Due Process: Monitoring Administrative Discretion Through a Reasons Requirement, 44 U. Chi. L. Rev. 60, 77-78 (1976) (stat-

But none has linked it to structural concepts like separation of powers or accountability.

Administrative law scholars have suffered the consequences. They have found themselves "ghettoized" in legal theory—as addressing only the pedestrian questions about agency action. They also have had to accept the characterization of administrative law as similarly attentive only to the pedestrian questions. Of most significance, they have failed to establish that, because the concern for arbitrariness is part of the constitutional structure, it must be addressed in any model that purports to reconcile the administrative state with the constitutional structure. That is the project I commence here.

I engage here in open discussion about the ways in which the constitutional structure plausibly reflects a concern for arbitrary governmental decisionmaking. To understand the principles in this fashion is not to deny the importance of majoritarian decisionmaking in a democracy. Nor need one reduce the Constitution to any unified purpose. Rather, I seek only to show that *a* purpose of the constitutional structure is to ensure nonarbitrary governmental decisionmaking. I endeavor to reveal a "good government" paradigm, alongside the majoritarian paradigm, in the constitutional structure. Furthermore, I intend to suggest that this paradigm—and not just the majoritarian paradigm—must play a prominent role in any model that purports to reconcile the administrative state with the constitutional structure. It matters less how or where the good government paradigm is addressed—through "ordinary" or "constitutional" administrative law—than *that* it is addressed.

It is important to begin with a more precise conception of the term "arbitrary." As others have noted, words such as this are often used in ways that mask concrete problems.[155] I will try to avoid that difficulty by foregoing a grand definition of the term "arbitrary." Instead, I will concentrate on the features and causes of arbitrary governmental decisionmaking. I will consider arbitrary administrative decisionmaking before turning to arbitrary legislative, executive, and judicial decisionmaking.

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ing that "[f]undamental to the concept of procedural due process is the right to a reasoned explanation of government conduct," and that "very essence of arbitrariness" is administrative decision rendered without adequate explanation); Edward L. Rubin, Law and Legislation in the Administrative State, 89 Colum. L. Rev. 369, 407 (1987) (stating that "[r]eal protections from administrative arbitrariness are to be found in the due process clause and perhaps the equal protection clause").

[155] See Rubin, supra note 1, at 1303 (suggesting that word "discretion" is often used in this way).

At a basic level, arbitrary administrative decisionmaking is not rational, predictable, or fair. More helpfully, it generates conclusions that do not follow logically from the evidence, rules that give no notice of their application, or distinctions that violate basic principles of equal treatment. Importantly, it also may affect individual rights in the absence of an adequate justification—that is, in the absence of reasons reflecting some sufficiently public purpose.[156] These shortcomings may affect individual liberty in the personal sense—for example, when administrative decisionmaking targets a specific individual for unfavorable treatment without good reason. Often these flaws affect individual liberty in a collective sense—for example, when administrative decisionmaking impairs a statutorily protected public good (such as clean air or workplace safety) without a sufficiently public purpose.

To a certain extent, this definition of "arbitrary administrative decisionmaking" puts the cart before the horse. It describes evidence of a problem rather than its source. Lack of reasoned decisionmaking or lack of public-regarding purpose indicates something amiss—from agency negligence to malfeasance. While negligence is cause for concern, malfeasance is a matter of greater significance because it often results from the corrupting forces that the constitutional structure is designed to inhibit: private interest and governmental self-interest.

Broad delegation of lawmaking authority to administrative agencies facilitates both private interest and governmental self-interest. Broad delegation, by definition, enables Congress to pass statutes, and agencies to exercise authority under such statutes, without any regulatory standards that meaningfully constrain administrative discretion. Public choice theory is largely responsible for asserting that politicians use this space to pressure agencies on behalf of the private groups that finance their reelection campaigns.[157] Public choice theory mostly blames Congress for this phenomenon.[158] Indeed, public choice theory hypothesizes that Congress often writes statutes with few limitations on administrative discretion intentionally to create room for interest groups to dominate the administrative process—all the while

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[156] See Cass R. Sunstein, The Partial Constitution 17 (1993) (describing requirement that government have public-regarding reason for what it does as central to legitimacy).

[157] See Schoenbrod, supra note 121, at 9-12 (applying public choice theory to show that Congress delegates in broad strokes to shift blame for results that favor private interests); Peter H. Aranson et al., A Theory of Legislative Delegation, 68 Cornell L. Rev. 1, 57 (1982) (same).

[158] Aranson et al., supra note 157, at 43 ("It is now a commonplace among modern political analysts that members of Congress are the primary agents responsible for generating and perpetuating the collective production of private benefits.").

shifting blame to agencies for unpopular outcomes and claiming credit with voters for superficial responses to public problems.[159]

Public choice theory also posits, though less emphatically, that delegation allows agencies to act in their own self-interest. Agencies, inappropriately focused on maximizing their own authority and resources, favor regulatory responses that do not serve the broader goals of their authorizing statutes.[160] Or agencies, generally valuable for their ideological commitment, improperly pursue that commitment to the detriment of broader goals.[161] These problems, though susceptible to characterization in modern theoretical terms, recall issues familiar to the Framers. They are the twin problems of faction and governmental self-interest—the principal components of governmental tyranny.[162]

Describing the causes of arbitrary administrative decisionmaking in this fashion provides a nice link to discussing the causes of other forms of arbitrary governmental decisionmaking that might occur—legislative, executive, and judicial—and specifically the idea that the Founders put structures in place to prevent such decisionmaking. That is, it provides a transition to identifying a "good government" paradigm alongside the majoritarian paradigm in the constitutional structure. It hardly requires recalling that for Montesquieu and Madison, among others, a pivotal aim of the constitutional design was the prevention of tyranny.[163] One means for achieving that end was to create a government representative of and responsive to the people—a government "by the people." A dictator, however benevolent, could not satisfy this condition. But a democracy, however well intentioned, could not be depended upon to advance the interests of the people; it could not be depended upon to act as a government "for the

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159 See Schoenbrod, supra note 121, at 55-56 (offering example).

160 See generally William A. Niskanen, Jr., Bureaucracy and Representative Government (1971) (arguing that agencies are motivated by maximizing their budgets and power). But see Spence & Cross, supra note 146, at 117-19 (criticizing this view).

161 See Anthony Downs, Inside Bureaucracy 107 (1967) (arguing that agencies are motivated to pursue their mission orientation to exclusion of broader goals); see also Breyer, supra note 109, at 11-19 (noting that agencies tend toward tunnel vision in pursuing their statutory mandates). But see Spence & Cross, supra note 146, at 119-21 (criticizing this view).

162 See The Federalist Nos. 10, 51 (James Madison); Sunstein, supra note 106, at 38-45.

163 See Rebecca L. Brown, Separated Powers and Ordered Liberty, 139 U. Pa. L. Rev. 1513, 1531-40 (1991); Gerhard Casper, An Essay in Separation of Powers: Some Early Versions and Practices, 30 Wm. & Mary L. Rev. 211, 212-24 (1989); Laura S. Fitzgerald, Cadenced Power: The Kinetic Constitution, 46 Duke L.J. 679, 771-73 (1997); M. Elizabeth Magill, The Real Separation in Separation of Powers Law, 86 Va. L. Rev. 1127, 1156-61 (2000); Victoria Nourse, Toward a "Due Foundation" for the Separation of Powers: *The Federalist Papers* as Political Narrative, 74 Tex. L. Rev. 447, 456-64, 472-84 (1996); Cass R. Sunstein, Constitutionalism After the New Deal, 101 Harv. L. Rev. 421, 434-37 (1987).

people." The Framers recognized that corrupting forces existed to derail elected officials from the public interest. Madison identified private interest as one such corrupting force. Private interest concerns the potential for narrowly focused groups to influence governmental decisionmaking at public expense.[164] It is the problem of faction. There is a separate problem of government self-interest, which concerns the potential for governmental actors or institutions to pursue their own ideology (or even private well-being) to the public detriment. The Framers also recognized this problem.[165]

To put the point more concretely, the requirement that officials stand periodically for election was, from the Framers' perspective, insufficient to prevent private interest and government self-interest from diverting their policy decisions from public purposes, and may even facilitate that result. Those steeped in constitutional theory are familiar with the notion that elected officials, responsive to majority will, might enact a law oppressive to individual rights.[166] This is majority tyranny—a type of popular preference aggregation that the First and Fourteenth Amendments, for example, prohibit because of its effect on individual liberty. Apart from majority tyranny, however, is a different brand of tyranny. It is this brand of tyranny that is most relevant to seemingly run-of-the-mill economic legislation. Elected officials might enact a law that benefits private interests at public expense. Responding to their own special agendas, they might pursue these commitments overzealously at public expense. In short, elected officials might succumb to private pressure or self-satisfaction. When they do, they exercise power without an adequate, public-regarding purpose (and without even the support of popular majorities).[167] In this sense, they act tyrannically or arbitrarily.[168]

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[164] See The Federalist Nos. 10, 51 (James Madison); Sunstein, supra note 106, at 39-43.

[165] See Sunstein, supra note 163, at 435.

[166] See, e.g., INS v. Chadha, 462 U.S. 919, 961 (1983) (Powell, J., concurring) ("The Framers were well acquainted with the danger of subjecting the determination of the rights of one person to the 'tyranny of shifting majorities.'"); Ely, supra note 12, at 103 (noting capacity of judges to evaluate charges "that either by clogging the channels of change or by acting as accessories to majority tyranny, our elected representatives in fact are not representing the interests of those whom the system presupposes they are"); Lani Guinier, The Tyranny of the Majority 2-7 (1994) (discussing problem).

[167] Governmental decisions that lack an adequate, public-regarding purpose are not the only ones that are tyrannical or arbitrary. A decision that seeks to achieve a permissible public-regarding purpose through disproportionate or otherwise unreasonable means might also be tyrannical or arbitrary in the sense that I use those words.

[168] I prefer the word "arbitrary" to "tyrannical" because it specifically captures the effect of private pressure and self-satisfaction on the public interest. Administrative law, which always has been attentive to the effect of private pressure and self-satisfaction, employs the word "arbitrary" to describe agency decisions that do not reflect reasoned deliberation and therefore likely reflect improper influences. See, e.g., Motor Vehicle Mfrs.

Many of the checks and balances in the first three Articles of the Constitution can be understood to prevent such instances of arbitrariness and ensure that our government "by the people" also operates as a government "for the people."[169] In other words, they are designed to foster legislation in the interest of the public rather than in the interest of factions, private or governmental. Consider accountability and separation of powers. Perhaps the best understanding of accountability is not that it requires elected officials to make policy decisions simply because they are responsive to the people.[170] Rather, it requires elected officials to make policy decisions because they are subject to the check of the people if they do not discharge their duties in a sufficiently public-regarding and otherwise rational, predictable, and fair manner.[171] Thus, accountability can be understood to enable voters not only to consider whether elected officials have maximized popular preferences in making or executing the law, but also, and equally importantly, whether those officials have inappropriately favored narrow interests in doing so.[172]

Similarly, perhaps the best understanding of separation of powers does not require separation among the branches to ensure that only the branches responsive to the people make or execute the law.[173] Rather, separation of powers prevents the concentration of power in any one branch so as to prevent the tyranny of any one branch.[174] While many acknowledge this function, few embrace it as more than a common constitutional refrain.[175] Taken seriously, it means that separation of powers was intended not merely to require Congress and the President to act independently of one another, but also to act in a

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Ass'n v. State Farm Mut. Auto. Ins. Corp., 463 U.S. 29 (1983) (finding "arbitrary and capricious" agency decision that failed to reflect reasoned decisionmaking).

169 For a discussion of what it would mean to have a government "for the people" as well as "by the people," see generally Eisgruber, Constitutional Self-Government, supra note 17; Rebecca L. Brown, A Government *for* the People, 37 U.S.F. L. Rev. 5 (2002) (reviewing Eisgruber's book and relating further views on issue).

170 See Brown, supra note 6, at 565-71.

171 See id. at 570-71.

172 See id. at 565-66.

173 See Brown, supra note 163, at 1531-32 (making this argument).

174 See The Federalist No. 47, at 324 (James Madison) (Jacob E. Cooke ed., 1961) ("The accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny."); Brown, supra note 163, at 1531-40.

175 See N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 57 (1982) ("To ensure against such tyranny, the Framers provided that the Federal Government would consist of three distinct Branches, each to exercise one of the governmental powers recognized by the Framers as inherently distinct.").

nonarbitrary, public-regarding manner.[176] Congress and the President should make law, and make law well.

In addition to accountability and separation of powers, other structural features also might be understood to ensure that governmental officials make nonarbitrary decisions. For example, the formal procedures for lawmaking of bicameralism and presentment can be understood to operate in this fashion.[177] The Constitution demands concerted political action for lawmaking in part to decrease the power of private interest groups. To achieve a legislative victory, such groups must prevail upon both Houses of Congress as well as the President.[178] Similarly, the constitutional lawmaking requirements impede the production of improvident law by making any law more difficult and politically costly to enact.[179] Finally, the requirements ensure that whatever law results triggers a strong electoral check: both Congress and the President, or at least a supermajority of Congress, stand to pay at the polls.[180]

Most generally, the requirement that legislation evince minimum rationality might be understood to prevent the exercise of arbitrary power. This requirement, though typically associated with the Fourteenth Amendment, also has links to the structural provisions of the Constitution.[181] Indeed, it has roots in the very nature of the legislative power. Congress is constrained by its own "creation and character" to act only for reasons that reflect the national public interest.[182] Actions motivated by purely local, private, or selfish interests might be understood to exceed the scope of Congress's limited powers and,

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176 See e.g., Brown, supra note 163, at 1534.

177 U.S. Const. art. 1, § 7.

178 Cf. Harold H. Bruff & Ernest Gellhorn, Congressional Control of Administrative Regulation: A Study of Legislative Vetoes, 90 Harv. L. Rev. 1369, 1372-81 (1977) (arguing that legislative veto increases power of private groups by allowing them to act upon one House of Congress rather than persuade both Houses plus President); Richard J. Pierce & Sidney A. Shapiro, Political and Judicial Review of Agency Action, 59 Tex. L. Rev. 1175, 1207-09, 1218-19 (1981) (describing potential for legislative veto to facilitate private interests); Pierce, supra note 146, at 1248-50 (arguing that legislative veto makes more likely potential for factionalism at congressional level by removing safeguards of bicameralism and presentment).

179 See William N. Eskridge, Jr. & John Ferejohn, The Article I, Section 7 Game, 80 Geo. L.J. 523, 528-33 (1992).

180 See Farina, The Consent of the Governed, supra note 3, at 1018.

181 See Hodel v. Indiana, 452 U.S. 314, 323-24 (1981) ("A court may invalidate legislation enacted under the Commerce Clause only if it is clear that there is no rational basis for a congressional finding that the regulated activity affects interstate commerce, or that there is no reasonable connection between the regulatory means selected and the asserted ends.").

182 See 1 Laurence H. Tribe, American Constitutional Law 1337 (3d ed. 2000) (emphasis omitted) (discussing view of Justice Chase in Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798)).

in some cases, invade powers reserved to other governmental actors, including the states.

Of course, the Court post-*Lochner* has demonstrated significant discomfort with the idea of enforcing the minimum rationality requirement for economic legislation at least under due process principles. For this reason, it might be thought that the Court has surrendered its role in policing economic legislation, consistent with the majoritarian view that such legislation reflects public preference aggregation and, as such, merits judicial deference. Yet the Court continues to insist on minimal rationality under due process principles even when it does not rigorously enforce that requirement.[183] Moreover, the Court has begun strenuously to enforce the requirement under structural concepts such as limited powers or federalism. For example, the Court has invalidated federal statutes as beyond the scope of Congress's power under the Commerce Clause or Section Five of the Fourteenth Amendment, on the theory that these statutes fail to identify a sufficiently national problem, or any real problem at all.[184] Thus, the Court remains worried both at a rhetorical and practical level about legislative rationality in a way that majoritarian theory cannot explain. When evaluating congressional statutes, for example under the Commerce Clause or the Due Process Clause, perhaps the Court is seeking to ensure that those statutes can "be understood as 'an exercise of judgment' rather than 'a display of arbitrary power'" (whether or not it arrives at the correct conclusion in a particular case).[185] In any event, perhaps that is what the Court *should* be doing.

It is not just the constitutional principles applicable to the political branches that can be understood to function as constraints on arbitrary governmental decisionmaking. Certain requirements of Article III can be understood to deprive courts of power when such power might produce arbitrary results. For example, the jury trial provision carves off from courts factual determinations in felony cases.[186] At one level, the provision injects peer-based judgment in these most im-

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[183] Id. at 1365 (noting that, even when upholding economic legislation under substantive due process analysis from late 1930s to late 1990s, "the Court continually pointed to reasons that could justify such actions in terms of the general public interest," and collecting cases).

[184] See, e.g., City of Boerne v. Flores, 521 U.S. 507 (1997) (Section Five); United States v. Lopez, 514 U.S. 549 (1995) (Commerce Clause).

[185] See Tribe, supra note 182, at 1365 (quoting Mathews v. deCastro, 429 U.S. 181, 185 (1976)).

[186] U.S. Const. art. III, § 2, cl. 3. The Bill of Rights contains additional jury safeguards. See U.S. Const. amend. V (grand jury), amend. VI (petit jury), amend. VII (civil jury).

portant of cases.[187] It recognizes a class of determinations as to which popular opinion matters more than judicial independence, both for the rights of the accused and the people. At another level, the provision provides a check on the excessive concentration of judicial power in cases as to which the consequences of judicial bias would be most severe.[188] Judicial bias, a predisposition to rule against the defendant, is a form of governmental self-interest to the extent that it arises, for example, from solicitude for law enforcement.[189] By depriving courts of fact determinations, the jury trial provision imposes a brake on extreme judicial alignment with the interests of the prosecution. Similarly, Article III in most cases grants the Supreme Court "appellate" jurisdiction, as opposed to "original" jurisdiction, over both "Law *and Fact*" to prevent it from re-finding facts.[190]

These few examples begin to show that the concern for arbitrariness is not only a ubiquitous feature of the administrative state but of the constitutional structure.[191] Furthermore, they begin to show that the concern for arbitrariness is not a secondary consideration or the subject of a subordinate body of law.[192] It is a foremost consideration, no matter where in law (administrative or constitutional) it is addressed. If addressed in administrative law, it serves to elevate such

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187 See Akhil Reed Amar, The Constitution and Criminal Procedure 120 (1997) ("At root, jury trials were, in Thomas Jefferson's words, 'trials by the people themselves.'" (quoting Letter from Thomas Jefferson to David Humphreys (Mar. 18, 1789), in 15 The Papers of Thomas Jefferson, 1788-1789, at 676, 678 (Julian P. Boyd ed., 1958)).

188 Id. at 121 (noting that, for Framers, jury trial functioned as check on "a corrupt or partial set of judges," much as legislative bicameralism functioned as check on partiality or corruption in either House of Congress).

189 See Letter from Thomas Jefferson to L'Abbe Arnoux (July 19, 1789), in 15 The Papers of Thomas Jefferson, 1788-1789, at 282, 282-83 (Julian P. Boyd ed., 1958) ("[W]e all know that permanent judges acquire an Esprit de corps, that being known that are liable to be tempted by bribery, that they are misled by favor, by relationship, by a spirit of party, by a devotion to the Executive or Legislative.").

190 U.S. Const. art. III, § 2, cl. 2 (emphasis added).

191 The examples I provide here are by no means exclusive. Other structural provisions that, perhaps more obviously, inhibit arbitrary governmental action include the Bills of Attainder and Ex Post Facto Clauses. See U.S. Const. art. I, § 9; Rogers v. Tennessee, 532 U.S. 451, 460 (2001) (noting with approval contention that Ex Post Facto Clause prevents "the arbitrary and vindictive use of the laws"); Harold J. Krent, Judging Judging: The Problem of Second-Guessing State Judges' Interpretation of State Law in *Bush v. Gore*, 29 Fla. St. U. L. Rev. 493, 520 (2001) (summarizing "traditional analysis" under which "the Ex Post Facto Clause protects against arbitrary governance as well as safeguarding the offender's reliance interest"); Todd David Peterson, Congressional Oversight of Open Criminal Investigations, 77 Notre Dame L. Rev. 1373, 1436 (2002) (arguing that Framers' "deep suspicion of legislative involvement in individual guilt or innocence was incorporated into the Constitution in the form of the clause that expressly prohibits bills of attainder").

192 Cf. Bruce Ackerman, The New Separation of Powers, 113 Harv. L. Rev. 633, 691-92 (2000) (noting that administrative law scholars have consigned themselves to second-class status by declining to focus on large theoretical issues).

law to quasi-constitutional status. Yet it is not out of place if addressed in constitutional law. The critical point is that it must be addressed alongside accountability—not simply for the sake of good regulatory government, but for the sake of *legitimate* regulatory government. Until we do so, we cannot hope to offer an adequate model of the administrative state.

B. The Effort to Straddle Accountability and Arbitrariness

Perhaps this realization has not been lost entirely on advocates of the presidential control model. Many worry about arbitrary administrative decisionmaking, despite their focus on majoritarian accountability. And one has attempted actually to address it. Fresh from a stint in the Clinton White House, Professor Elena Kagan devised a plan to make the presidential control model more responsive not only to majority will but also to the need for preventing arbitrary administrative decisionmaking.[193]

Importantly, Kagan's impulse to expand the inquiry—her very concern for arbitrariness—signals that the most sophisticated adherents of the majoritarian paradigm recognize, at least implicitly, deficiencies in that paradigm. In a loose sense, Kagan can be seen as a new administrative law analogue to John Hart Ely. Ely saw that simple majoritarianism was inconsistent with the Constitution's commitment to protecting individual rights from arbitrary legislative intrusion, so he tried to square the circle by explaining how majoritarianism in fact entailed some rights protection.[194] Likewise, Kagan appears to appreciate that simple majoritarianism is inconsistent with the Constitution's concern for protecting rights from arbitrary administrative intrusion. Rather than using the courts as "representation reinforcement" of the legislative or administrative process, she uses the President. She seeks to ensure that agencies make acceptable judgments by ensuring that the President does.

This Section shows that Kagan's plan cannot work. Her commitment to majority rule, like Ely's, prevents her from resolving fully the concern for arbitrariness. In the end, her only weapon against arbitrary administrative decisionmaking is a call for the President to exercise control of agency decisions "transparen[tly]."[195] As this Section demonstrates, transparency alone is not enough to combat arbitrary administrative decisionmaking; it is really just a handmaiden of major-

193 See Kagan, supra note 25, at 2319-83.

194 See Ely, supra note 12, at 87-88.

195 See Kagan, supra note 25, at 2331-39.

itarianism. Moreover, the type of control that might adequately inhibit arbitrariness would cripple the presidency.

1. Presidential Control as a Solution

Before describing Kagan's approach and its failings, I must address a threshold question: Why is presidential control, without any special revisions or reinforcements, insufficient to prevent arbitrary administrative decisionmaking? The question is why the President cannot be trusted to resist the corrupting forces of good regulatory decisionmaking. Advocates of the presidential control model, some steeped in public choice theory and others not, contend that the President is more responsive to the people than Congress is (and, obviously, than agencies are) and therefore should be trusted to control administrative discretion and control it well.[196] This argument essentially asserts presidential control as protection against private interest and agency self-interest.

But the mere presence of presidential control is not sufficient. Asserting that the President is more immune to factional pressure than Congress because of his national constituency only asserts that the President is immune in a relative sense. That is not immune enough. Furthermore, serious questions exist as to whether the President is immune at all. The President, no different from Congress, may use unfettered discretion to instruct the agencies under his control to select the policies that favor his most generous supporters.[197] Even if the President operates from purer motives, he may leave room for Congress to facilitate faction and for agencies to develop tunnel vision. The President may fail to ensure that the agencies under his control fill up the details of regulatory statutes in a manner comprehensive enough to block Congress from diverting administrative pol-

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[196] See supra Part I.D.

[197] See William D. Araiza, Judicial and Legislative Checks on Ex Parte OMB Influence Over Rulemaking, 54 Admin. L. Rev. 611, 613-15 (2002) (noting that OMB review has raised concern about "the executive acting as a confidential partner of and conduit for regulated parties seeking to influence agency action" and arguing that self-imposed White House controls have not fixed problem); Farina, supra note 148, at 125-30 (expressing skepticism that, even under public choice theory, presidential involvement reduces faction); Shane, supra note 3, at 202-04 (voicing doubt that presidential control is proof against faction); Sidney A. Shapiro, Two Cheers for *HBO*: The Problem of the Nonpublic Record, 54 Admin. L. Rev. 853, 854 (2002) (arguing that potential for secret White House contacts has taken on new significance with advent of what Professor Kagan describes as "presidential administration"); Strauss, supra note 3, at 971-73 (providing examples from Clinton Administration that "political controls still embody the potential for corruption"); Richard A. Nagareda, Comment, Ex Parte Contacts and Institutional Roles: Lessons from the OMB Experience, 55 U. Chi. L. Rev. 591, 623-24 (1988) (criticizing ex parte contacts with OMB as facilitating faction).

icy to *its* most generous supporters, or to block agencies from diverting administrative policy to *their* pet projects. The President, even when not operating from any insidious motives of his own, may exercise control too sporadically to combat effectively the insidious motives of others.[198]

2. *Transparency as a Solution*

Perhaps no one realizes this more than Kagan. She constructs a type of presidential control that might be understood simultaneously to achieve majority rule and afford safeguards against factionalism, thus bridging the divide between simply majoritarian government and truly legitimate government. She starts with President Clinton's practice of assuming authority to make choices of regulatory policy delegated to agencies and exercising that authority through official directives to agency heads.[199] She then proposes to formalize that practice. She suggests that courts interpret all statutory delegations to agencies as implicit delegations to the President to fill the statutory gaps.[200] In addition, she suggests that courts ought to refuse to accord *Chevron* deference to any administrative interpretation that does not reflect a presidential directive (or some other comparable indicia of presidential involvement), including most interpretations by independent agencies.[201] She further recommends that courts adopt a similar approach to freestanding administrative policy decisions under the hard look doctrine.[202] According to Kagan, courts should relax the scrutiny of the hard look doctrine when an agency can demonstrate that the President took an official role in formulating regulatory standards and policy.[203] Finally, she would subject all official presidential involvement to judicial review.[204]

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198 See Friendly, supra note 19, at 155-57 (expressing doubt that President could set all standards missing from broad delegations).

199 Kagan, supra note 25, at 2290-99.

200 Id. at 2372-79.

201 Id. at 2376-77. Kagan appears to retreat from this position in a more recent article. She suggests that the application of *Chevron* should turn not on whether the President has taken responsibility for the relevant policy choice by issuing a directive, but on whether a sufficiently high-level official within an agency has taken responsibility for it by reviewing the interpretation and adopting it in her name. See David J. Barron & Elena Kagan, *Chevron*'s Nondelegation Doctrine, 2001 Sup. Ct. Rev. 201, 234-57. This, she claims, will adequately "place[ ] decision making in the hands of politically accountable actors and . . . discipline administrative behavior." Id. at 241 (internal citations omitted). More specifically, it will sufficiently connect the decisionmaker to public preferences, id. at 241-44, and "promote[ ] the disciplined consideration of policy throughout the agency." Id. at 244.

202 See Kagan, supra note 25, at 2380-83.

203 Id. at 2380.

204 Id. at 2350-51.

The approach that Kagan puts forth might be understood to reduce the risk of factionalism or tunnel vision inherent in broad delegations. It does so, however, not by identifying or proposing additional means of presidential control over agency decisions, but by rendering *transparent* such controls as there are.[205] Thus, her approach requires the President to assert whatever control he exercises through visible means, such as executive orders and directives. Transparency allows concerned parties—both public and political—to understand governmental decisions, to detect improper motives, and to assign blame. In this way, transparency promotes accountability (in the majoritarian sense) and prevents arbitrary administrative action. And the President is uniquely capable of generating transparency because his actions are uniquely apparent and understandable. As Kagan argues:

> [T]he President has natural and growing advantages over any institution in competition with him to control the bureaucracy. The Presidency's unitary power structure, its visibility, and its "personality" all render the office peculiarly apt to exercise power in ways that the public can identify and evaluate. The new strategies of presidential leadership, focused as they are on intensifying the direct connection between the President and the public, enhance these aspects of the office and the transparency they generate; so too does the increased media coverage of the President, which is at once a cause and a result of these strategies.[206]

But Kagan's strategy, taken seriously as an effort to make presidential control effective against arbitrariness, is difficult to implement because, despite the general visibility of his office, the President has the incentive and ability to hide control. The President depends on numerous confidential contacts for information and has executive privilege. Kagan acknowledges that President Reagan used his office to veil efforts at administrative control.[207] Yet he often failed, she counters, partly because his overall efforts to involve OMB in rulemaking attracted attention.[208] Still, she concedes, "[t]he focus on confidentiality in the Reagan years nonetheless may have interfered in certain cases with the ability of the public, Congress, and interested parties to identify the true wielders of administrative authority."[209] One might imagine another President who insists on keeping a large

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[205] Id. at 2337 ("To the extent that presidential supervision of agencies remains hidden from public scrutiny, the President will have greater freedom to play to parochial interests. . . . It is when presidential control of administrative action is most visible that it most will reflect presidential reliance on and responsiveness to broad public sentiment.").

[206] Id. at 2332.

[207] Id. at 2333.

[208] Id.

[209] Id.

range of documents and decisions private—including, for example, decisions involving critical energy policy.[210] One might imagine a President interpreting executive privilege broadly and asserting it repeatedly, even for documents of a prior president who himself had waived the privilege.[211]

A related point is that different presidents may eschew transparent methods of control for more obfuscating methods. Rather than assuming responsibility for the enforcement of Clean Air Act regulations on coal-fired power plants as his father and President Clinton had done, President George W. Bush went another route.[212] He solicited a proposal from the EPA on how to amend the Clean Air Act itself. The EPA submitted a proposal that would have significantly reduced air pollution, adverse health effects, and associated costs. But President Bush rejected the proposal for one of his own that would impose fewer costs on industry.[213] The difficulty was that the "Clear Skies" proposal contained no analysis comparable to the EPA analysis of expected pollution reduction or health increases—that is, no analysis of potential benefits. When asked for the analysis, the Bush Administration disclaimed responsibility for producing it.[214] The Administration said that the proposal was not a regulatory proposal but a legislative proposal and "the legislative language is still being written."[215] When chastised by the chair of the Senate Environment and Public Works Committee and pressed for details by state environmental officials, the Administration released some maps showing nationwide air pollution reductions. The maps carried disclaimers saying that they reflected only preliminary analyses and were subject to change. Meanwhile, the proposal was already taking its toll. It was precluding the EPA from settling lawsuits against major violators of the Clean Air Act who expected to escape liability should the Clear

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[210] See Shapiro, supra note 197, at 853-54 (describing controversy surrounding George W. Bush Administration energy task force, which refused to disclose names of those with whom it met amid charges that it had extensive secret contacts with lobbyists and industry executives but not with environmental or public interest groups).

[211] See Joshua Micah Marshall, Bush's Executive-Privilege Two-Step, Salon.com (Feb. 7, 2002), at http://www.salon.com/politics/feature/2002/02/07/bush_records (observing that President Bush has asserted executive privilege strategically, including for documents of President Clinton as to which President Clinton himself had waived privilege).

[212] See Katharine Q. Seelye, White House Rejected a Stricter E.P.A. Alternative to the President's Clear Skies Plan, N.Y. Times, Apr. 28, 2002, at A26.

[213] Id.

[214] Id.

[215] Id.

Skies proposal become law.[216] This is not the work of a reliably "transparent" presidential administration.

Note, however, that this example is not meant to suggest that legislative recommendations always are less transparent than regulatory proposals. Nor is it meant to suggest that the Bush Administration always will be less likely than the Clinton Administration to use transparent methods of controlling regulatory policy, or that Republican administrations always will be less likely than Democratic administrations to do so. Indeed, President Bush's "regulatory czar" at OMB, John D. Graham, has elevated visibility to an art form. The White House website provides a log of his meetings, memoranda to agency heads, and general guidance on rulemaking.[217]

Rather, the Clear Skies example is intended to illustrate the ability of *any* president, Republican or Democrat, to use passive-aggressive strategies of controlling regulatory policy that are less likely to achieve their purported public purpose than to please private interests. The Bush Administration failed to furnish critical data and provide a basis for evaluation of its proposal. It hid behind the legislative label. It quietly defeated EPA settlement plans in lawsuits to enforce current law. The result was policy control, and it did not require passage or even completion of the proposed legislation.[218]

The President also is able to distance himself from agency proposals or findings that generate disapproval. In 2001, the Internal Revenue Service proposed a regulation requiring domestic banks to reveal the identity of all depositors, even if those depositors were for-

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[216] Months after President George W. Bush announced the Clear Skies initiatives, the EPA produced new data showing "dramatic" air quality improvements from the initiative. See Press Release, Envtl. Prot. Agency, New EPA Data Shows Dramatic Air Quality Improvements from Clean Skies Initiative (July 1, 2002), available at http://www.epa.gov/air/clearskies/presrels.html.

[217] See Power & Schlesinger, supra note 134, at A1; http://www.whitehouse.gov/omb/inforeg/regpol.html (last visited April 10, 2003).

[218] The Bush Administration also prompted the resignation of some frustrated, high-level EPA officials—notable mainly because the Administration did not even have to take the heat for firing them. See Elizabeth Shogren, A Natural Split with Bush, and Many Quit, L.A. Times, June 3, 2002, at A1 (noting unusually high number of resignations by senior career executives and political appointees, and linking at least some of resignations to frustration with "Bush team's strident pro-development policy" and unwillingness to listen to their perspectives). One of the officials who resigned—Eric D. Shaeffer, Director of the Office of Regulatory Enforcement, which is responsible for civil enforcement of most environmental laws—tried to force President Bush to take some heat nonetheless. He sent a letter to his boss, EPA Administrator Christine Todd Whitman, citing the President's undermining actions as cause for his departure. Id. He also testified on Capitol Hill about the circumstances precipitating his resignation. See id.

eign.[219] Banks were up in arms at the expected administrative burden and loss of foreign depositors fearing privacy invasions.[220] The Bush White House responded by opposing the proposed rule—but not publicly because that would have angered members of the European Union who supported it.[221] Rather, the White House leaked its opposition to the economic community and exercised behind the scenes pressure on the IRS.[222] The IRS issued a revised proposal, more solicitous of bank interests, without mentioning administration policy.[223]

In 2002, the EPA delivered its report on global warming to the United Nations, concluding for the first time that human activities are causing the problem.[224] Industry, hearing news that they had feared and that the Bush Administration had assured them was not forthcoming, accused the Administration of an about face.[225] The Administration reacted by disclaiming responsibility for the report.[226] When

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219 Guidance on Reporting of Deposit Interest Paid to Nonresident Aliens, 66 Fed. Reg. 3925 (proposed Jan. 17, 2001) (to be codified at 26 C.F.R. pts. 1, 31). I am grateful to Jeffrey Schoenblum for this example.

220 See Daniel Mitchell, Commentary, America: Europe's Tax Collector?, Wash. Times, June 27, 2002, at A20.

221 See Richard Rahn, Commentary, Pursuit of Economic Literacy, Wash. Times, Aug. 6, 2002, at A13 (

> Even when the [Bush] Administration makes the correct decision, it is reluctant to explain it to the public. For instance, there is a proposal from the Europeans (the European Savings Directive) that would greatly undermine our personal privacy and drive hundreds of billions of dollars of needed capital out of the U.S. The economists in the administration wisely decided that the U.S. government would not support the proposal, and then quietly let the economic policy community know of the decision. When asked why members of the administration did not make a public announcement, some of us were told they did not want to offend certain Europeans).

222 See id.

223 See Guidance on Reporting of Deposit Interest Paid to Nonresident Aliens, 67 Fed. Reg. 50,386, 50,387 (proposed Aug. 2, 2002) (to be codified at 26 C.F.R. pts. 1 and 31) (

> After consideration of the comments received, the IRS and Treasury have concluded that the 2001 proposed regulations were overly broad in requiring annual information reporting with respect to U.S. bank deposit interest paid to any nonresident alien. The IRS and Treasury have decided instead that reporting should be required only for nonresident alien individuals that are residents of certain designated countries. The IRS and Treasury believe that limiting reporting to residents of these countries will facilitate the goals of improving compliance with U.S. tax laws and permitting appropriate information exchange without imposing an undue administrative burden on U.S. banks).

224 See U.S. Dep't of State, U.S. Climate Action Report 2002, at 6, available at http://www.epa.gov/globalwarming/publications/car/index.html.

225 See Andrew C. Revkin, U.S. Sees Problems in Climate Change, N.Y. Times, June 3, 2002, at A1 (describing "stark shift" in Bush Administration view on whether human actions are responsible for recent global warming).

226 See Katharine Q. Seelye, President Distances Himself from Global Warming Report, N.Y. Times, June 5, 2002, at A23; Press Release, The White House, Remarks by the President to the Travel Pool, NSA Operations Center, National Security Agency, Fort Meade,

that did not work, it attempted to recharacterize the EPA's findings to indicate uncertainty on whether people contribute to the production of greenhouse gases.[227]

Under Kagan's approach, this type of conduct is not without constraint. She notes that the President cannot escape media coverage of his actions.[228] And these examples indicate that President George W. Bush has not. President Bush would find it difficult to foist responsibility for the Clear Skies proposal on Congress (or the EPA) now that he has attracted media attention for his involvement. Sunshine might make a difference in cases where the President himself seeks to complicate the lines of authority. But sunshine might not make a difference if the public, once exposed to the story, continues to applaud the President and fault the agency. And who would forego an opportunity to fault the IRS?

Kagan suggests a backup plan that might catch cases of public misperception (whether or not the IRS example is such a case). Her plan is to rely on the courts, not the media, to ensure that the President exercises control through transparent means by directing them to withhold *Chevron* deference from administrative regulations unless traceable to presidential policy.[229] This proposal is designed to make it difficult for the President to dictate policy through informal means rather than announced, binding policy.

But Kagan's *Chevron* revision is meaningful only if it demands a reliable indication of presidential involvement. She tells courts to look for presidential involvement that "rises to a certain level of substantiality, as manifested in executive orders and directives, rulemaking records, and other objective indicia of decisionmaking processes."[230] The truth is that executive orders and directives provide the only dependable evidence of presidential involvement. Any other means allows agencies or the President to fake involvement with each other. Kagan acknowledges that her approach might encourage "a new kind of boilerplate in administrative action—a presidential seal of approval disconnected from real participation in the action by

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MD (June 4, 2002), available at http://www.whitehouse.gov/news/releases/2002/06/20020604-16.html (stating, in response to media question about whether he plans any new initiatives to combat global warming, that "I read the report put out by a—put out by the bureaucracy. I do not support the Kyoto Treaty.").

227 See George Archibald, White House Defends U-Turn on Global Warming, Wash. Times, June 4, 2002, at A9 (remarking also that "[s]cientists and others normally friendly to Bush administration policies" emerged to attack EPA's scientific data).

228 Kagan, supra note 25, at 2332-33.

229 Id. at 2376-77.

230 Id. at 2377.

the President or his close White House aides."[231] Such boilerplate seems particularly likely if an administrative record suffices to verify presidential involvement rather than a freestanding, authoritative document emanating from the President himself. Although Kagan is quick to reject such boilerplate, she shies away from preventing it.[232] The reason, as discussed below, must be her concern for the effect on the President. What Kagan carefully avoids is obligating the President to exercise truly formal control of administrative decisionmaking as a precondition of *Chevron* deference, because doing so would make the cure for presidential secrecy worse than the disease.[233]

3. *Presidential Leeway as an Objection*

Imposing on the President an obligation to discipline administrative discretion through official, independent means would divert his energy from "the things that only [he] can legitimately undertake in a modern democracy: . . . making (a very few) particular decisions of high visibility that genuinely require the exercise of statesmanship and practical wisdom."[234] Kagan concedes that "no President (or his executive office staff) could, and presumably none would wish to, supervise [all, or even all important] regulatory activity."[235] But even her purportedly limited proposal to take presidential control up a notch demands too much. If the President declines to take a formal role, he does so on penalty of public disapprobation as a result of the very visibility he has cultivated,[236] as well as judicial disrespect for his administration's actions. Yet if the President agrees to assume responsibility in ways that bespeak "ownership" of administration,[237] he would

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231 Id. at 2377 n.507.

232 Id. (

> I doubt that this result would follow, given the substantial risks that the President would incur from essentially signing a blank check made out to the agencies; I also doubt that courts would prove unable to distinguish between these boilerplate statements and indicia of concrete policy guidance. And to the extent I am wrong, the worst that would happen is that the *Chevron* deference regime would operate largely as it does now, with a few sentences (concerning White House involvement) appended to each regulation and corresponding judicial opinion).

233 Id. at 2377 ("Conditioning deference in this way at once would induce disclosure of any presidential role in administration and encourage expansion of this role to so far neglected areas of regulation.").

234 Ackerman, supra note 192, at 692; cf. Thomas W. Merrill, Judicial Deference to Executive Precedent, 101 Yale L.J. 969, 996 (1992) (arguing that "Presidential oversight has inherent limitations").

235 Kagan, supra note 25, at 2250.

236 See Fitts, supra note 3, at 835-36 (arguing that President's visibility is vice as well as virtue in terms of legitimating his actions in public eye).

237 Kagan, supra note 25, at 2250.

find himself consumed by the process or simply rubber-stamping directives drafted by an ever-expanding staff (or perhaps another layer of bureaucracy).[238] The reality is that the President needs leeway to run modern government that precludes the imposition of a formal control obligation—even the form that Kagan advocates.

This observation is a matter of common sense with respect to the other potential source of political control: Congress. Congress needs leeway to write broad regulatory statutes. It may possess the will to enact broadly responsive regulatory programs but lack the technical judgment or factual information to micromanage regulatory policy. It may lack the votes to support specific provisions. It simply may lack the time, given the vast demands of modern government. Of course, it also may have more suspect reasons—for example, to preserve room for private interests to dominate the administrative process. But we have come to recognize through a combination of respect and resignation that it is impossible to distinguish the permissible motives from the impermissible ones. Most delegations reflect both. Members of Congress may lack the competence or the votes or the time to decide a complex regulatory matter *as well as* the discipline to follow the public interest rather than the selfish interests of its members. If we are to have effective modern government or any modern government at all, we cannot permit the degree of delegation to turn on the issue of legislative motive.[239]

The same sorts of arguments apply to the President and undercut Kagan's strategy to make presidential control effective against arbitrariness. The President needs leeway to issue broad directives or none at all. He also may lack the technical judgment and factual information to micromanage regulatory policy. In any event, he cannot possibly attend to every problem that every regulatory statute addresses or even the subset for which an agency might seek to claim *Chevron* deference—at least not without losing the government for the regulation. Although the President has the responsibility for coordinating specific regulatory policy with broader governmental priorities, he should not have the responsibility for dictating the details of such regulatory policy.

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238 See Farina, supra note 113, at 185 ("It seems to me that it is unrealistic to think that the President can supervise the entire regulatory enterprise in any comprehensive and meaningful way.").

239 This does not mean that we have to tolerate all broad delegations. In some cases, the nature of the delegation might increase the potential for abuse of discretion to such an intolerable level that it merits invalidation—for example, delegation directly to the President. See infra text accompanying notes 290-298 (discussing invalidation of delegations to President under nondelegation doctrine). But the reason for invalidation does not necessarily concern congressional motives.

Releasing the President from such responsibility avoids a contentious issue that Kagan necessarily enjoins: whether the President possesses the authority to dictate specific regulatory policy as he chooses. There is disagreement among scholars whether the President may issue official directives even to executive branch agency heads, and no court has resolved the precise issue.[240] The Supreme Court has indicated, however, that reviewing courts might consider presidential approval of executive branch agency policies in their *Chevron* analyses of those policies.[241] The Court stated that courts should defer to reasonable administrative statutory interpretations that "rely upon the incumbent administration's views of wise policy."[242] It may be that reliance on the President's view—especially when that view is expressed in a transparent and authoritative format—is an additional reason to accord deference to a well-considered administrative decision. Direction from the people, in the person of the President, is a positive factor when it contributes to a rational administrative decision.[243] At the same time, it may be that reliance on a presidential directive is neither necessary nor sufficient.[244]

Furthermore, it may be that reliance on a presidential directive is not beneficial with respect to all agency decisions. Consider, in particular, independent agency decisions. One reason that Congress creates independent agencies is to insulate their decisions from unfettered presidential politics. Congress has done this with less and less frequency, suggesting that it does so only when necessary.[245] One might think that administrative law ought to respect such congressional determinations rather than trying to defeat them—for example, by denying *Chevron* deference to independent agency regulations as Kagan suggests.[246] Perhaps administrative law would be justified in attempting to neutralize the authority of independent agencies if the Constitu-

240 See Kagan, supra note 25, at 2250 & n.8 (noting scholarly debate and lack of court resolution).

241 Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837, 865-66 (1984).

242 Id. at 865.

243 See Sierra Club v. Costle, 657 F.2d 298, 404-08 (D.C. Cir. 1981) (observing that presidential involvement in choosing policy supported by rulemaking record is permissible and beneficial).

244 Cf. Jerry L. Mashaw, Small Things Like Reasons Are Put in a Jar: Reason and Legitimacy in the Administrative State, 70 Fordham L. Rev. 17, 22 (2001) (noting that presidential direction alone is insufficient to authorize administrative action unless that action is "rationalized in terms of relevant statutory criteria and social, economic, or scientific facts spread upon the rulemaking record").

245 See Morrison v. Olson, 487 U.S. 654, 685-93 (1988) (insulating independent counsel from plenary presidential removal authority to preserve counsel's impartiality and integrity).

246 Kagan, supra note 25, at 2376-77.

tion requires such a result—that is, if the Constitution forbids the creation of independent agencies. But Kagan herself denies that it does.[247]

These criticisms show that Kagan's strategy asks too much of the President—perhaps more than he legitimately possesses. But her strategy also asks too little. Her modified *Chevron* approach prods the President to supply official control when an agency acts to fill a statutory gap, but it does not require the President to supply such control when an agency declines to do so. That is, it does not instruct the President to assume comprehensive control of the administrative state by directing agencies to regulate in ways that prevent them or Congress from diverting administrative policy away from the public interest. As a mechanism for controlling administrative discretion, it is sporadic at best. Of course, it must be spotty to avoid obliterating presidential prerogatives entirely. That observation only confirms its inadequacy as well as its impracticality for addressing, in full, the administrative legitimacy problem. If the presidential control model cannot offer comprehensiveness, it must rely on the existence of other control mechanisms to legitimate the administrative state. Professor Kagan does not assert otherwise.[248] But then the presidential control model is only as good as the other models that serve alongside of it. The presidential control model, even where feasible, does not dampen the quest for other legitimating models.

To summarize, we might have serious concerns about a model of the administrative state that obligates the President to issue official directives for controlling agency discretion. Such a model might solve some instances of faction and government self-interest that broad delegations to administrative agencies facilitate, but it does so at a great price to democracy. In any event, the model simply is not enough. Even if presidential control, exercised responsibly, offered some protection from the forces that corrupt agency decisionmaking, this amount falls short of what legitimacy demands. Thus, efforts to

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[247] Id. at 2250. Kagan does maintain that presidential control is necessary to improve the accountability rather than the constitutionality of independent agency decisionmaking. Id. at 2331-39. This argument misses the point. In creating independent agencies, Congress implicitly has determined that presidential control would increase the risk of arbitrary administrative decisionmaking. Cf. Strauss, supra note 120, at 650-53 (arguing that Constitution requires preservation of rough parity between Congress and President to control administrative action, and thus forbids Congress from retaining control of agencies while preventing President from doing same). Kagan has failed to demonstrate why courts applying *Chevron* should disregard this congressional determination.

[248] See Kagan, supra note 25, at 2250 ("And of course, presidential control [has] coexisted and competed with other forms of influence and control over administration, exerted by other actors within and outside the government.").

straddle accountability and arbitrariness from within the presidential control model cannot entirely succeed. A model fixated on accountability cannot adequately address the concerns for arbitrariness necessary for a truly legitimate administrative state.

III
BACK TO THE FUTURE: REFOCUSING ON ARBITRARINESS TO RESOLVE THE PERENNIAL PUZZLES AND POINT THE WAY AHEAD

The question is where to go from here. We could take refuge in accountability, as we have done for the last thirty-plus years. If Kagan's intuition is right, that approach no longer suffices. We already have come some distance beyond the view that majoritarianism alone can legitimate the administrative state. We now recognize, at least implicitly, that we must address the concern for arbitrary administrative decisionmaking at the level of high theory, not just workaday doctrine. Moreover, we cannot address that concern exclusively through political control—not through presidential control, any more than through congressional control. We have no choice but to seek a better balance.

This turns out to be quite a good thing. When we look for a more balanced approach, something interesting happens, as we might expect if we are in fact making progress toward reconciling the constitutional structure and the administrative state. Sure enough, we see that some of the conventional puzzles in administrative law (both constitutional and ordinary) start to dissolve.

For example, we can begin to understand the constitutional doctrine concerning delegation. We can perceive why the Supreme Court both takes pains to maintain the nondelegation doctrine and refuses to enforce it. We also can appreciate why the Court strikes down certain legislative efforts to control administrative action, seeing the invalidation of such devices as the legislative veto as more than silly formalism. A majoritarian model does not explain this kind of judicial activism.

Moreover, we can begin to make sense of the whole idea of agency-supplied standards as integral to the legitimacy of the administrative state. Davis, Friendly, and Leventhal began talking about it in the 1960s.[249] Now sitting judges on the "administrative law circuit" have begun to talk about it, too, and even to reincorporate it in the law. Yet, more than ever, scholars have trouble comprehending the notion of administrative standards because such standards do not fit

[249] See supra note 19.

nicely within the majoritarian model. And the Supreme Court, as already noted, has rejected the idea that constitutional law mandates administrative standards—although it left open the possibility that administrative law does.[250] Once we step outside the majoritarian paradigm, we can grasp the importance of administrative standards, and begin to integrate ordinary and constitutional administrative law.

In addition, we can start to see a transition to a future, prescriptive model of the administrative state. Although its precise contours are uncertain, one element is clear. It will require a significant change to the (ordinary) administrative law principle concerning the choice of procedures. Since the watershed decision of *SEC v. Chenery Corp. (Chenery II)*[251] in 1947, the Court has allowed agencies virtually unlimited discretion to choose their procedures for making general policy. This "choice of procedures" rule has met little objection. Who could be against affording agencies the flexibility to avoid burdensome procedures when they determine that others might serve more effectively? We now can see such unlimited administrative flexibility, like other forms of unlimited administrative discretion, as an impediment to administrative legitimacy. We can also begin to understand the Court's recent decision in *United States v. Mead Corp.*,[252] which restricted choice of procedures in an important way. But we can see that *Mead* ultimately falls short of what legitimacy demands.

Section A discusses "constitutional" administrative law principles, first those that pertain to congressional control of administrative action and then those that pertain to presidential control of agency action. Section B considers "ordinary" administrative law principles, first those involving administrative standards and then those involving choice of procedures.

A. "Constitutional" Administrative Law Principles

From a majoritarian perspective, the constitutional law principles concerning delegation seem exactly backwards. Those principles do not maximize majority rule but thwart it. This Section shows that these principles are just right if the concern is not increasing accountability but decreasing arbitrariness.

1. The Nondelegation Doctrine I

The nondelegation doctrine prohibits Congress from delegating authority to administrative agencies in the absence of an "intelligible

250 See Whitman v. Am. Trucking Ass'ns, 531 U.S. 457 (2001).
251 332 U.S. 194 (1947).
252 533 U.S. 218 (2001).

principle" guiding and limiting the exercise of that authority and facilitating judicial review.[253] It demands, in theory, congressional control of administrative decisionmaking. Furthermore, the Court recently has said that administrative self-control will not suffice. In *Whitman v. American Trucking Ass'ns*,[254] the Court rejected an effort of the D.C. Circuit Court of Appeals to obtain agency-supplied standards for delegation of power in the absence of congressional standards.[255] The Court stated that agencies lack the power to furnish the intelligible principle that would render their delegated lawmaking authority constitutional.[256] Without a congressional intelligible principle to render valid their delegated authority, agencies simply possess no power whatsoever.[257]

But the nondelegation doctrine, as applied, has never lived up to its potential. The Court consistently has approved as "intelligible principles" legislative provisions that do not adequately confine administrative authority by making the basic choices of policy.[258] In many cases, the supposed congressional principles make virtually no choices at all. Nor did the Court require more in *American Trucking*. Even though it went out of its way in that case to reaffirm the intelligible principle requirement, the Court bent over backwards to find an intelligible principle in the most anemic statutory language.[259] With the exception of two cases decided in 1935, the Court has not enforced the nondelegation doctrine to require congressional intelligible principles that meaningfully guide and limit administrative discretion.[260] As others too numerous to mention have noted, the "nondelegation" doctrine is a misnomer. The doctrine validates rather than prohibits or polices broad delegations to agencies.

The question is how to make sense of a doctrine that the Court takes pains to maintain in pristine form[261] and yet makes no effort to

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253 See J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928) (articulating "intelligible principle" requirement).

254 531 U.S. 457 (2001).

255 Id. at 473.

256 Id.

257 See id.

258 See Bressman, supra note 99, at 455.

259 See *Am. Trucking*, 531 U.S. at 473 (approving as intelligible principle phrase "requisite to protect the public health").

260 See A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935); Lisa Schultz Bressman, *Schechter Poultry* at the Millennium: A Delegation Doctrine for the Administrative State, 109 Yale L.J. 1399, 1403-06 (2000).

261 At least what has been pristine form since 1928, when the Supreme Court first announced that the nondelegation doctrine does not ban delegation, as its name suggests, but merely requires an "intelligible principle" guiding administrative discretion. See J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928).

apply in any form. One answer is that the Court has found itself caught between the practical necessity of delegation and the strict logic of constitutional analysis. The Court feels bound to acknowledge that Congress needs leeway to enact broad statutes in order to establish modern government. Yet it is unwilling to admit that agencies have power to self-validate their own authority under those statutes, for to do so would defy reason. This explanation, while close to the one the Court gives, is not flattering. It depicts the Court as waffling uncomfortably between pragmatic and formal analysis. Moreover, it suggests that the Court lacks any theory of why delegation presents a constitutional problem or how to address that problem.

Be that as it may, the focus on arbitrariness suggests another explanation. The Court honors the nondelegation doctrine in the breach for a purpose: to excuse Congress from any obligation to provide meaningful standards while continuing to emphasize the need for such constraints on administrative discretion. Although the Court, on this understanding, intends to grant Congress the necessary leeway to enact broad delegations, it still aspires to record a concern for such delegations. Of course, that would seem to leave agencies as the best candidates to address the concern. Why, on this view, would the Court refuse to ask agencies for meaningful standards? It would not. It might, however, refuse to ask agencies for the requisite standards under "constitutional" administrative law. It might do so because reviewing courts could ask agencies for such standards under "ordinary" administrative law—for example, as part of the reasoned explanation agencies must provide in support of their decisions.[262]

The Court's approach to the nondelegation doctrine can be made comprehensible when viewed in terms of arbitrariness rather than just accountability, and as continuous with "ordinary" administrative law rather than confined to "constitutional" administrative law: A case like *American Trucking* recognizes the importance of meaningful standards to legitimate administrative action and the limits of congressional control and "constitutional" administrative law toward that end. It maintains the concern for standardless delegation as part of congressional consideration and "constitutional" administrative law, but redirects the solution to agency consideration and "ordinary" administrative law. It indicates how ordinary administrative law might

[262] See Bressman, supra note 99, at 479-81 (reading *American Trucking* to shift from constitutional law to administrative law requirement that agencies supply standards that meaningfully constrain their discretion).

serve to improve the legitimacy, as well as the quality, of administrative decisionmaking.[263]

2. *The Legislative Veto and the Comptroller General*

In *INS v. Chadha*,[264] the Court invalidated a statute authorizing one House of Congress, by resolution, to veto executive branch decisions ordering the deportation of particular individuals from the country.[265] The Court held that the "legislative veto" violated the constitutional lawmaking requirements of bicameralism and presentment:[266] When Congress makes "law," it must do so through the constitutionally prescribed channels of bicameralism and presentment rather than through a single house resolution.

Scholars have come to describe the Court's holding in *Chadha* as constitutionally prohibiting Congress from reclaiming power once it has delegated that power to an executive branch agency. Opponents of the decision applaud the legislative veto as allowing Congress to correct the excessive concentration of power in the executive branch created by broad delegation.[267] Proponents condemn the legislative veto as allowing Congress to replace presidential control with its own brand of control.[268] Once Congress relinquishes power, the President assumes it. Congressional repossession amounts to congressional

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263 For reasons why the Court sensibly might have made this shift from constitutional administrative law to ordinary administrative law, see Bressman, supra note 99, at 455-69. Unlike constitutional law, administrative law contains a well-established framework for obtaining administrative standards. See id. at 466-69. In addition, it does not require revision of constitutional doctrine or impugn the validity of congressional acts, but only affects the validity of administrative action. See id. at 459-66.

264 462 U.S. 919 (1983).

265 Id. at 925, 928.

266 Id. at 956-58.

267 See E. Donald Elliott, *INS v. Chadha*: The Administrative Constitution, the Constitution, and the Legislative Veto, 1983 Sup. Ct. Rev. 125, 134-38 (arguing that legislative veto did not constitute forbidden grant of legislative power); Eskridge & Ferejohn, supra note 179, at 540-43 (arguing that legislative veto restores balance of power between Congress and President implicit in requirements of bicameralism and presentment); Greene, supra note 3, at 187-95 (contending that legislative veto is necessary to restore checks and balances given overall increase in presidential power); Peter B. McCutchen, Mistakes, Precedent, and the Rise of the Administrative State: Toward a Constitutional Theory of the Second Best, 80 Cornell L. Rev. 1, 30-40 (1994) (defending legislative veto); Strauss, supra note 120, at 651 (noting that legislative veto is most legitimate when exercised "in those cases in which the initiative subject to the possibility of veto is actually the President's" because "[t]he President's involvement assures parity" with Congress); see also *Chadha*, 462 U.S. at 1002 (White, J., dissenting) (arguing that legislative veto "is a necessary check on the unavoidably expanding power of the agencies, both Executive and independent, as they engage in exercising authority delegated by Congress").

268 See Calabresi, supra note 146, at 73-74.

usurpation of executive authority—simply put, congressional aggrandizement.

There is another way to understand the result in the case that better identifies the crux of the problem. The concern raised by the legislative veto is not *who* should exercise control but *how* such control should be exercised. The legislative veto allows Congress to assert a passive-aggressive form of control. A legislative veto may be exercised without public hearing, report, or statement of reasons, and may be passed without recorded vote.[269] Thus, it clearly does not have the qualities of the administrative action it reverses—such as participation, transparency, and rationality. Furthermore, it does not even have the benefits of concerted action that the Constitution typically demands for legislative action, which mutes the influence of private groups,[270] moderates the production of improvident law,[271] and ensures that whatever law is produced at least receives the assent of both accountable branches, or a supermajority of one.[272] In *Chadha* itself, the veto had the additional vice of determining individual rights without procedural safeguards and without binding more than the party to the ruling.[273] Thus, it furnished no basis on which to assess fair application in a particular case or promote predictable and consistent application in future cases—that is, to prevent arbitrariness.

Evaluating the legislative veto in terms of arbitrariness accounts for the Court's reliance on the lawmaking requirements of bicameralism and presentment to invalidate it. It may be that the Court invoked those requirements not to engage in a formal analysis but to demonstrate a practical problem with the process that Congress had chosen to control administrative discretion. The Court effectively told Congress that when it wants to control administrative discretion, it must do so through channels that require concerted effort in order to promote deliberation and moderation, and that produce decisions accessible to public view. Such a requirement was particularly impor-

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269 *Chadha*, 462 U.S. at 926-27.

270 Cf. Bruff & Gellhorn, supra note 178, at 1372-81 (suggesting various problems with legislative veto, including diminishing procedural checks on Congress); Pierce & Shapiro, supra note 178, at 1207-09 (describing potential for legislative veto to facilitate private interests); Pierce, supra note 146, at 1248-50 (arguing that legislative veto makes more likely potential for factionalism at congressional level by removing safeguards of bicameralism and presentment).

271 See Eskridge & Ferejohn, supra note 179, at 528-33 (arguing that requirements of bicameralism and presentment reduces production of hasty or unwise law).

272 See Farina, The Consent of the Governed, supra note 3, at 10-18 (arguing that requirements of bicameralism and presentment ensures high degree of political support for any law enacted).

273 See *Chadha*, 462 U.S. at 964-66 (Powell, J., concurring); Farber & Frickey, supra note 150, at 130; Brown, supra note 163, at 1546-47.

tant in the context of *Chadha* itself—involving a legislative veto of an administrative adjudication—because of individual fairness concerns. But formal procedural requirements also are apt in cases involving legislative vetoes of administrative rules. A legislative veto of an administrative rule neither provides the accountability of a statute repealing the rule nor the participation, transparency, and rationality of a new rule rescinding the old one.

A similar concern for the manner in which Congress asserts control of executive functions can be understood to account for the Court's holding in *Bowsher v. Synar*.[274] In that case, the Court invalidated a provision in the Gramm-Rudman-Hollings Act[275] that permitted Congress to exercise another form of potentially arbitrary control. The Gramm-Rudman-Hollings Act vested the Comptroller General with responsibility for reporting to the President the specific programs to receive "automatic" spending reductions, based on an independent analysis of a report jointly prepared by OMB and the Congressional Budget Office.[276] The Act also authorized Congress, by joint resolution, to remove the Comptroller General for certain specified causes.[277] The Court held that "[b]y placing the responsibility for execution of the [Gramm-Rudman-Hollings Act] in the hands of an officer who is subject to removal only by itself, Congress in effect has retained control over the execution of the Act and has intruded into the executive function."[278]

Unlike *Chadha*, *Bowsher* addressed directly the question whether the assertion of power over the Comptroller General constitutes congressional aggrandizement and executive invasion. The problem was not repossession of executive authority (through a one-house veto) but original assertion of executive authority (through a congressional agent). The difference was of no consequence because the result was precisely the same (congressional, rather than presidential, control of executive discretion).[279]

While this characterization describes the technical constitutional issue, it does not explain the actual constitutional danger. The problem with the removal provision was not so much that it increased congressional power at presidential expense, but that it increased

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274 478 U.S. 714 (1986).

275 Pub. L. No. 104-130, 110 Stat. 1200 (1996).

276 *Bowsher*, 478 U.S. at 718.

277 Id. at 720.

278 Id. at 734.

279 Id. at 726 ("To permit an officer controlled by Congress to execute the laws would be, in essence, to permit a congressional veto.").

congressional power over the official with "ultimate authority"[280] to make spending cuts—*at public expense*. The removal provision enhanced the ability of Congress to pressure the Comptroller General, its own agent, from cutting spending programs important to its most prized constituents. That the removal provision worked in this way is not obvious. It required a joint resolution, which in turn requires presidential signature or passage, by two-thirds majority, over a presidential veto—the same amount of political capital required for ordinary legislation, such as a statute cutting the Comptroller General's budget or abolishing its office.[281] Thus, the removal provision did not seem to give Congress any power to influence the Comptroller General that it did not already have through the legislative process.

But this analysis cannot explain why Congress wanted the removal power. Congress sought the removal power because it believed that threat of removal was particularly effective in influencing the Comptroller General.[282] Perhaps it presumed that the Comptroller General would take the threat of removal more personally than the threat of other forms of action, which might be attributed to any number of generic causes. Perhaps it thought that the Comptroller General would take the threat of removal more seriously than the threat of ordinary legislation—such as the threat of a statute restoring aid to a particular program or a statute cutting its budget. To be sure, Congress could not easily enact such statutes. Restoring aid to a particular program might be seen as blatant interest group favoring legislation, which might cause the coalition supporting it to break down. Cutting the Comptroller General's budget or authority might be seen as endorsement of deficit spending and therefore equally unlikely to maintain the necessary political backing. But Congress *could* fire the Comptroller General because it could blame the termination on poor job performance—that is, failure properly to cut pork spending.[283] Thus, the problem with the Act was that it offered Congress a particularly credible tool for pressuring the Comptroller General to keep certain programs off the list.

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280 Id. at 733.

281 Id. at 767-68 (White, J., dissenting).

282 See id. at 728-29 (noting importance to various members of enacting Congress that through removal, it could control Comptroller's "destiny in office").

283 Historically, Congress had never even tried to fire a Comptroller General. See id. at 773 (White, J., dissenting). This historical fact was irrelevant to the Court on the issue of whether the removal provision interfered with executive functions as a constitutional matter. Id. at 730. It might reinforce my analysis. The fact that Congress never tried to fire the Comptroller General might show that the mere threat of removal was sufficient to achieve desired results.

Chadha and *Bowsher* can be understood either to depict a congressional struggle for executive power or a congressional grab for ad hoc power. The advantage of the latter construction is that it rationalizes the Court's invocation of the lawmaking requirements of bicameralism plus presentment. The manner in which Congress exerted itself—through a one-house veto and through its own agent—can be seen as increasing the potential for private lawmaking of the type that the constitutional structure seeks to avoid.

3. *The Nondelegation Doctrine II*

Several cases involving limits on presidential control of administrative discretion also are consistent with the goal of preventing arbitrary administrative decisionmaking. In fact, they are difficult to explain otherwise. The cases fall into two groups. *A.L.A. Schechter Poultry Corp. v. United States*[284] and *Panama Refining Co. v. Ryan*[285] concern restrictions on the President's ability to exercise administrative authority. *Clinton v. City of New York*[286] concerns a restriction on the President's ability to control the authority exercised by agencies.

Each of these cases is different from the case concerning limitations on presidential control that comes most readily to mind—*Humphrey's Executor v. United States*[287]—which concerned the limitation on presidential removal authority that created independent agencies. *Humphrey's Executor* did not involve limits that the Court *itself* imposed. Rather, it involved restrictions that Congress imposed and the Court merely upheld—namely, a "for cause" statutory restriction on presidential removal of the agency head. In the cases at issue here, the Court itself imposed the restrictions on presidential control. In *Schechter Poultry* and *Panama Refining*, the Court prevented the President from assuming lawmaking authority himself under the nondelegation doctrine.[288] In *Clinton*, it blocked the President from asserting line-item veto power over agency decisions under the requirements of bicameralism and presentment.[289] These were cases in which Congress wanted to hand the President certain authority, and the Court disapproved.

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284 295 U.S. 495 (1935).

285 293 U.S. 388 (1935).

286 524 U.S. 417 (1998).

287 295 U.S. 602 (1935).

288 See *Schechter Poultry*, 295 U.S. at 551 (invalidating under nondelegation doctrine statutory provision that delegated to President authority to promulgate regulations stabilizing economy); *Panama Ref.*, 293 U.S. at 433 (same).

289 *Clinton*, 524 U.S. at 438-39.

It is this countermajoritarian aspect of the cases that is difficult to explain. The question is why the Court should forbid the President, an elected official, from receiving as much authority as Congress intends to grant. Similarly, the question is why the Court should bar the President from exercising control of agencies when Congress encourages such control. An understanding based on arbitrariness provides an answer. It explains these cases as preventing the President from asserting control over administrative discretion under circumstances or in ways that create a particularly intolerable risk of arbitrariness.

Consider first *Schechter Poultry* and *Panama Refining*. These cases are the only ones in which the Court ever has invalidated statutes under the nondelegation doctrine.[290] In *Schechter Poultry* and *Panama Refining*, Congress delegated authority directly to the President rather than to an administrative agency.[291] These were not the first or last cases in which Congress delegated authority to the President, however. But in each of those other cases—from *The Cargo of the Brig Aurora v. United States*,[292] decided in 1813, to *Loving v. United States*,[293] decided in 1996—Congress had delegated a narrower slice of authority to the President.[294] None of the cases involved, as *Schechter Poultry* and *Panama Refining* did, the sweeping power to regulate virtually the entire economy.[295]

Under the presidential control model, the breadth of the delegated power in *Schechter Poultry* and *Panama Refining*—however extraordinary—would not impugn the legitimacy of that power.[296] The President routinely deals with matters national in scope. There is no

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290 See Bressman, supra note 260, at 1404-05 (noting that Supreme Court, while entertaining nondelegation challenges since it decided *Schechter Poultry* and *Panama Refining*, has never applied nondelegation doctrine to invalidate piece of legislation).

291 See *Schechter Poultry*, 295 U.S. at 521-23; *Panama Ref.*, 293 U.S. at 433.

292 11 U.S. (7 Cranch) 382, 383-84, 388 (1813) (upholding delegation to President to suspend embargo on trade with France and Britain if he determined that those nations "cease[d] to violate the neutral commerce of the United States").

293 517 U.S. 748, 751 (1996) (upholding delegation to President to define "aggravating factors" that permit imposition of death penalty in court martial).

294 See also J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 401, 410-11 (1928) (upholding delegation to President to adjust tariffs when they failed to "equalize . . . differences in costs of production"); Field v. Clark, 143 U.S. 649, 692 (1892) (upholding delegation to President to suspend favorable tariff treatment for nations that imposed on American products any "exactions and duties . . . which he found to be . . . unequal and unreasonable").

295 See Todd D. Rakoff, The Shape of the Law in the American Administrative State, 11 Tel Aviv U. Stud. L. 9, 22-23 (1992) (arguing that problem in *Schechter*, unlike other cases, was that delegation was both directly to President and so sweeping, because such delegation concentrates dangerous amount of power in President); Strauss, supra note 3, 981-82 (noting that early delegations to President were narrow in scope and involved matters, such as foreign relations, particularly appropriate to executive discretion).

296 See Kagan, supra note 25, at 2365-67.

fear that he, unlike specialized agencies, will be out of his area of competence in regulating the national economy. Furthermore, there is a hope that he will be particularly well suited to regulate the national economy because he, unlike Congress, is responsive to a national constituency.

But the Court regarded the President as part of the problem, not the solution, in *Schechter Poultry* and *Panama Refining*. Consider as a reason that the President's involvement created particularly intolerable opportunities for arbitrariness, given the extraordinary breadth of the delegations. Perhaps the grant of authority directly to the President made the opportunities for regulatory policy to favor private interest groups particularly easy, and the scope of that authority made the impact of those opportunities particularly menacing. No agency or administrative process stood between the President and private groups, as some sort of mediating influence.[297] Indeed, the President used his authority as a direct pipeline to industry groups, simply rubber-stamping agricultural codes that those groups proposed.[298]

Schechter Poultry and *Panama Refining* thus can be understood to invalidate delegations that increase the possibility of arbitrary action to unacceptable levels. Unless understood in this fashion, the cases seem exactly backwards. They single out for invalidation delegations that are more—not less—appropriate than other delegations that the Court has upheld. They are more appropriate because they are aimed directly at the President, who is more responsive to the people than Congress or the agencies.

4. The Line-Item Veto

The other case in which the Court imposed its own limits on presidential control is *Clinton v. City of New York*.[299] In that case, the Court invalidated the Line Item Veto Act,[300] which authorized the

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[297] Cf. Farina, The Consent of the Governed, supra note 3, at 999-1002 (viewing executive branch as multifarious, rather than unitary, and thus less likely to provide system of constraints over lawmaking); Strauss, supra note 295, at 984 (arguing that presidential ownership of rulemaking eliminates "multi-voiced framework" of government that includes agency itself).

[298] Cf. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 537-38 (1935) (predicting this result). Professor Kagan suggests that the problem in *Schechter Poultry* and *Panama Refining* was lack of judicial review, which the statutes did not authorize. See Kagan, supra note 25, at 2368-69. This diagnosis does not undermine my reading of the cases but rather confirms it. If lack of judicial review was the problem, it was because judicial review is a means to prevent the President from discharging his delegated authority in an arbitrary fashion. It is beyond the scope of this Article to consider the effects (either good or bad) of judicial review on such presidential authority.

[299] 524 U.S. 417 (1998).

[300] Pub. L. No. 104-130, 110 Stat. 1200 (1996).

President to "cancel" certain items of spending in certain bills.[301] The Court reasoned that the line-item veto, like the legislative veto, violated the requirements of bicameralism and presentment.[302]

Clinton has supporters and detractors. Some embrace the decision as a backdoor nondelegation doctrine. The line-item veto, they say, enables Congress to claim credit with its backers for funding their programs while deflecting responsibility and blame for all uncorrected excessive spending to the President.[303] The decision invalidating the line-item veto prevents Congress from engaging in this conduct.

Critics of the decision view it as diminishing presidential control of spending decisions.[304] Regardless of what the line-item veto allows Congress to do, it grants the President a specific tool for counteracting improvident funding. The decision invalidating the line-item veto is not only as formalistic as the decision in *Chadha*, which invalidated the legislative veto, but less defensible because it struck down a provision that directed increased power to the President rather than back to Congress.[305] *Clinton* did not rectify a case of congressional usurpation of an executive function. Rather, it struck down a provision that, by affording the President a mechanism to control federal spending, enhanced presidential control of an executive function.[306]

Again, however, the case is better explained from an arbitrariness perspective. In important respects, the line-item veto can be under-

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301 *Clinton*, 524 U.S. at 436-38.

302 Id. at 438-39.

303 See Neal E. Devins, In Search of the Lost Chord: Reflections on the 1996 Item Veto Act, 47 Case W. Res. L. Rev. 1605, 1629-31 (1997) (arguing that line-item veto enables Congress to authorize spending that benefits powerful constituents, while blaming President for failure to cut such spending); Lawrence Lessig, Lessons from a Line Item Veto Law, 47 Case W. Res. L. Rev. 1659, 1660-65 (1997) (assuming that line-item veto permits Congress to avoid responsibility for pork spending and to shift either responsibility or blame for such spending to President, and arguing that it thereby violates nondelegation doctrine); see also Michael B. Rappaport, The Selective Nondelegation Doctrine and the Line Item Veto: A New Approach to the Nondelegation Doctrine and Its Implications for *Clinton v. City of New York*, 76 Tul. L. Rev. 265, 366-67 (2001) (arguing line-item veto violates "formalist nondelegation doctrine" because it permits President to make basic policy decisions about which programs receive funding); Maxwell L. Stearns, The Public Choice Case Against the Item Veto, 49 Wash. & Lee L. Rev. 385 (1992) (describing public choice arguments in favor of line-item veto and ultimately rejecting them).

304 Cf. Aranson et al., supra note 157, at 41 (questioning view that line-item veto inhibits private benefits); Glen O. Robinson, Public Choice Speculations on the Item Veto, 74 Va. L. Rev. 403, 410-12 (1988) (same).

305 See Devins, supra note 303, at 1623-25; Elizabeth Garrett, Accountability and Restraint: The Federal Budget Process and the Line Item Veto Act, 20 Cardozo L. Rev. 871, 882-84 (1999).

306 Nor did the line-item veto create an excessive concentration of presidential power because Congress retained the power to specify that particular projects cannot be cancelled. See Garrett, supra note 305, at 884-85.

stood as combining features of both the legislative veto invalidated in *Chadha* and the removal provision invalidated in *Bowsher*. Like the legislative veto, it permitted the President to act without a process designed to produce deliberative policymaking and prevent arbitrary policymaking, or at least to ensure the consent of the two accountable branches or a supermajority of one. Like the removal provision, it allowed the President to influence spending decisions in ways that tended to please private interests at public expense. Moreover, it allowed the President to do so even more directly than the removal provision in *Bowsher* allowed Congress to do. The President did not have to pressure an agency head through threat of removal but instead could exercise his line-item veto to cut funding for programs supported by politically powerless groups or disfavored by politically powerful ones. By so doing, he could claim credit with voters for reducing pork without making cuts that affect his base of private support.

Once the line-item veto is understood as conferring on the President the type of policymaking authority that invites arbitrary determinations, the decision is consistent with *Chadha* and *Bowsher*. The Court again relies on bicameralism and presentment to identify a problem with the process by which political officials seek to control administrative decisionmaking. It shows that the President is just as capable as Congress of possessing and exercising an improper method of control. Thus, it suggests, the fact that the line-item veto enhanced presidential control rather than diminished such control is not as determinative as it might have seemed in *Chadha* or *Bowsher*. In all three cases, the potential for arbitrariness determined the result.

B. "Ordinary" Administrative Law Principles

If constitutional law doctrine can be explained as prohibiting majoritarian control over administrative action when such control creates an undue risk of arbitrariness, we might expect administrative law doctrine to do no less. After all, the test for "arbitrary and capricious" administrative action comes from the APA itself.[307] Yet even a cursory glance at administrative law doctrine over the last thirty years reveals much the opposite. Recent administrative law developments tend to reinforce majoritarian control rather than restrict it. Indeed, many such developments have been the building blocks of the majoritarian models. The first wave of changes opened the administrative process to all affected interests, consistent with the develop-

[307] See Administrative Procedure Act, 5 U.S.C. § 706 (2000) (prescribing arbitrary and capricious standard of judicial review).

ment of the interest group representation model.[308] The second wave of changes strengthened presidential control over administrative decisionmaking, consistent with the advent of the presidential control model. Most significantly, *Chevron U.S.A., Inc. v. Natural Resources Defense Council*[309] held that agencies are entitled to judicial deference when interpreting ambiguous statutory terms in part because they are subject to the President, who is accountable to the people.[310]

But there is one glaring exception to the evidently majoritarian bent of contemporary administrative law doctrine: *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Corp.*[311] In that case, decided in 1983, the Court held that agencies must articulate the basis for their policy decisions.[312] Thus, the Court endorsed the "reasoned decisionmaking" requirement or "hard look" doctrine that had been percolating in the law since the 1940s.[313] Moreover, it applied the doctrine to remand a regulation containing a policy that the President himself had directed.[314] Simple majoritarianism, particularly of the presidential variety, cannot make sense of this result. Scholars, not surprisingly, have accused *State Farm* of granting courts the power to micromanage agency decisions and ossify the notice-and-comment rulemaking process.[315] But the case is not without an alternative explanation—one that should be familiar by now. *State Farm*, or more precisely the reasoned-decisionmaking requirement,

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308 See supra notes 48-54 and accompanying text (describing doctrinal changes that facilitated development of interest group representation model).

309 467 U.S. 837 (1984).

310 See id. at 864-66; Farina, supra note 54, at 499.

311 463 U.S. 29 (1983).

312 See id. at 43 (asking agency to "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made'" (quoting Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962))). If an agency fails to articulate such a basis for its policy decision, the requirement directs the reviewing court to remand that policy decision to the agency for further deliberation or explanation rather than upholding it. See id.

313 The reasoned-decisionmaking requirement calls on agencies, as a condition of judicial validation of their policy decisions, to engage in the type of decisionmaking that tends to produce rational decisions. By promoting rational decisions, the requirement inhibits decisions that are poorly considered—for example, those that rest on a faulty chain of logic or an incomplete assessment of the relevant considerations. See id. Moreover, the requirement tends to inhibit decisions that are precisely calculated to advance private interests or agency objectives at public expense. Put differently, the requirement tends to inhibit decisions that evince an impermissibly narrow purpose or fail to evince a properly public purpose. An agency, confronting judicial scrutiny of its decisionmaking process and judicial remand of its decisionmaking product, will hesitate to rely on a purpose that does not demonstrably advance the broad public goals of the statute it implements. Thus, the requirement involves agencies (with court assistance) in ensuring the deliberative and public-regarding quality of their own decisionmaking.

314 Id. at 59 (Rehnquist, J., concurring in part and dissenting in part).

315 See supra note 109.

can be understood as preventing arbitrariness. That does not mean the reasoned-decisionmaking requirement must be understood as subverting accountability. To the contrary, the requirement may promote accountability by ensuring public participation in or oversight of the administrative process. It may even coincide with political control of the administrative process. Of course, as applied in *State Farm*, it did not. The case thus contains an important lesson about the relationship between administrative arbitrariness and political accountability. The former may prevail over the latter when the two conflict.

This Section discusses two other principles, in some sense related to *State Farm*, that reflect a similar lesson about the relationship between administrative arbitrariness and political accountability. Yet these principles, unlike *State Farm*, are not a part of mainstream administrative law. Indeed, one has garnered thin recognition and the other flat rejection. This Section first addresses the requirement that agencies supply the standards that guide and limit their discretion. It then turns to the corollary requirement that agencies generally choose certain procedures to supply such standards—in particular, notice-and-comment rulemaking.

1. Administrative Standards

In the 1960s, Davis and Friendly described the problem of arbitrary administrative decisionmaking as the lack of standards controlling the exercise of administrative authority.[316] At one level, the problem coincided with a lack of political control; it occurred when Congress failed to include meaningful standards in delegating stat-

[316] See Davis, supra note 19, at 55 ("When legislative bodies delegate discretionary power without meaningful standards, administrators should develop standards at the earliest feasible time, and then, as circumstances permit, should further confine their own discretion through principles and rules."); Friendly, supra note 19, at 5-6 ("A prime source of justified dissatisfaction with the type of federal administrative action . . . is the failure to develop standards sufficiently definite to permit decisions to be fairly predictable and the reasons for them to be understood."). For other significant articles from this period discussing the failure of agencies to articulate standards through rulemaking, see generally Merton C. Bernstein, The NLRB's Adjudication-Rule Making Dilemma Under the Administrative Procedure Act, 79 Yale L.J. 571 (1970); Cornelius J. Peck, The Atrophied Rule-Making Powers of the National Labor Relations Board, 70 Yale L.J. 729 (1961); David L. Shapiro, The Choice of Rulemaking or Adjudication in the Development of Administrative Policy, 78 Harv. L. Rev. 921 (1965); J. Skelly Wright, The Courts and the Rulemaking Process: The Limits of Judicial Review, 59 Cornell L. Rev. 375 (1974). Jaffe is notably missing from this list. Although Jaffe toiled alongside Davis and Friendly on issues of administrative arbitrariness, he focused primarily on strengthening the role of judicial review in policing agency decisionmaking. See Jaffe, supra note 19; see generally Daniel B. Rodriguez, Jaffe's Law: An Essay on the Intellectual Underpinnings of Modern Administrative Law Theory, 72 Chi.-Kent L. Rev. 1159 (1997) (describing Professor Jaffe's efforts to organize administrative law).

utes.[317] But agencies perpetuated the problem at the administrative level by failing to develop subsidiary standards in the course of regulating. Failure to develop such standards created room for agencies to succumb to private interests or their own ideological interests at public expense.[318] It also decreased the predictability and consistency of their decisions.[319]

Critically, the Davis/Friendly solution to the problem they identified was not increased political control of administrative discretion. It was not to restore congressional control by, for example, asking Congress to include standards in delegating statutes.[320] Nor was it to invite presidential control by, for example, asking the President to dictate standards through policy directives.[321] Indeed, much of the failure to set standards occurred in adjudication—the prevailing mode of administrative decisionmaking at the time—and was off limits to presidential intervention.[322] The solution was to implement administrative control. It was to require agencies to supply the standards guiding and limiting their own discretion.[323]

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317 See Davis, supra note 19, at 48 ("What Congress says in some such statutes is, in effect: 'We the Congress don't know what the problems are: find them and deal with them.'"); Friendly, supra note 19, at 12 ("'Sometimes telling the agency to do what is in the public interest is the practical equivalent of instructing it: "Here is the problem. Deal with it."'" (quoting 1 Kenneth Culp Davis, Administrative Law Treatise § 2.03, at 82 (1958))).

318 See Friendly, supra note 19, at 22 ("Lack of definite standards creates a void into which attempts to influence are bound to rush . . . .").

319 See id. at 19-20 (arguing that lack of standards enables agencies to treat similarly situated parties differently and decreases beneficial reliance).

320 See, e.g., Davis, supra note 19, at 49 (noting that "[l]egislative clarification of objectives may sometimes be undesirable"); Friendly, supra note 19, at 163-73 (expressing doubt that Congress could—or should—specify missing standards).

321 See Friendly, supra note 19, at 150 (arguing that President should not set specific administrative standards, though he may "inform[ ] the agency of his policy when the policy is a very general one, for which he desires the cooperation not only of the particular agency but of all branches of Government").

322 See Administrative Procedure Act, 5 U.S.C. §§ 554(d), 557(d) (2000) (prohibiting ex parte contacts in adjudication); Reuel E. Schiller, Rulemaking's Promise: Administrative Law and Legal Culture in the 1960s and 1970s, 53 Admin. L. Rev. 1139, 1148-49 (2001) (noting that Davis and Friendly wrote in response to prevalence of administrative adjudication).

323 See Davis, supra note 19, at 55-57 (arguing that agencies should develop standards through rulemaking to confine their own discretion as soon as feasible and as often as possible); Friendly, supra note 19, at 19-26, 145 (arguing that agencies should develop standards in adjudication and should supplement adjudication with policy statements and rulemaking for elaborating standards); see also Jaffe, supra note 19, at 49-51 (agreeing with Friendly's basic observation that agencies should more often formulate standards than they do, but noting that in circumstances "where the opposed forces are so powerful that Congress cannot compose their quarrel, it is quixotic to expect an agency with little or no political power to resolve it" and Congress therefore must set standards).

For a brief period, this solution moved into the law. In the famous case of *Amalgamated Meat Cutters v. Connally*,[324] Judge Leventhal announced that reviewing courts should ask agencies to articulate the standards that constrain their discretion and thereby legitimate their authority under broad delegations.[325] Other cases held that due process requires agencies to supply standards governing their discretion under certain circumstances.[326]

Despite these cases, the Davis/Friendly solution never really materialized into a robust model of the administrative state.[327] Perhaps it was trumped by other developments in the law. Emerging at the same time were the components of the interest group representation model that increased hearing rights and facilitated other forms of participation in the administrative process.[328] These principles, obviously related to the new majoritarianism, left the administrative standards requirement, not so obviously related, stranded.[329] The administrative standards requirement still retained appeal particularly in connection with due process, but it had limited vitality.[330]

With the passage of time, a more basic reason for the neglect or subordination of the administrative standards requirement has emerged. The administrative standards requirement just seems incoherent. It advances neither congressional nor presidential control of administrative decisionmaking, at least not directly.[331] Thus, it does not materially improve the accountability of agencies. Agencies simply cannot improve their accountability through self-help.

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[324] 337 F. Supp. 737 (D.D.C. 1971).

[325] Id. at 758-59 (Leventhal, J., for three-judge panel).

[326] See Morton v. Ruiz, 415 U.S. 199, 232-36 (1974); Holmes v. N.Y. City Hous. Auth., 398 F.2d 262, 265 (2d Cir. 1968); Hornsby v. Allen, 326 F.2d 605, 608-09 (5th Cir. 1964).

[327] See Rodriguez, supra note 316, at 1159 (noting that era from 1940s through 1960s "is somewhat neglected by modern accounts of administrative law"); cf. Frug, supra note 25, at 1283 (counting "judicial review model" among legitimating models of administrative state, and attributing this model to Davis in part); Seidenfeld, supra note 39, at 91-94 (referring to "'traditional' model" of administrative law, in place from 1940s to 1970s, which owed its origins to legal process school).

[328] See, e.g., Goldberg v. Kelly, 397 U.S. 254 (1970) (holding that Due Process Clause requires hearings before termination of welfare benefits to allegedly ineligible recipients); see supra Part I.B.

[329] Cf. Bressman, supra note 260, at 1416-17 (noting that administrative standards requirement does not bear clear connection to separation of powers rationale that underlies traditional nondelegation doctrine).

[330] See Ernest Gellhorn & Glen O. Robinson, Perspectives on Administrative Law, 75 Colum. L. Rev. 771, 792-93 (1975) (arguing that Due Process Clause only requires agencies to issue standards when allocating scarce governmental benefits).

[331] Cf. Peter L. Strauss et al., Gellhorn & Byse's Administrative Law 434-35 (9th ed. 1995) (noting that administrative standards may reduce costs of political monitoring); Bressman, supra note 260, at 1423 (noting that administrative standards may enhance congressional oversight).

Recently, Judge Stephen Williams of the D.C. Circuit Court of Appeals tried to show why this majoritarian conception of administrative self-regulation is wrong. Relying on *Amalgamated Meat Cutters*, Judge Williams argued that "[i]f the agency develops determinate, binding standards for itself, it is less likely to exercise the delegated authority arbitrarily."[332] He argued that agency-generated standards, coupled with judicial review, are enough to make constitutional the delegated authority.[333] He applied this rule in a case involving the EPA, remanding to the agency a regulation for articulation of standards that would support it and render constitutional the statute authorizing it. He thus recognized that agency-supplied standards, while not addressed to majoritarian control, powerfully respond to administrative arbitrariness.[334]

In *Whitman v. American Trucking Ass'ns*,[335] the Supreme Court rejected this effort. The Court found illogical the notion that agencies possess the power to supply the standards that render their own statutory power constitutional.[336] In some ways, the Court reaffirmed the incoherence of administrative standards in a world that requires majoritarian control of administrative decisionmaking—in particular, a congressional "intelligible principle" to guide and limit administrative discretion. But, as suggested earlier, the Court might be understood, somewhat counterintuitively, as appreciating the relevance of administrative standards. The Court stressed the need for an "intelligible principle" and then approved one that was utterly meaningless.[337] It thus signaled a rule of law deficit that could only be made up with administrative standards. Perhaps, then, the Court merely declined to demand such standards under constitutional law, instead leaving that work to administrative law.[338]

Even if this reading of the Court's analysis is wishful thinking, it is time for administrative law to come to grips with the concept of ad-

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332 Am. Trucking Ass'ns v. EPA, 175 F.3d 1027, 1038 (D.C. Cir. 1999), modified in part and reh'g en banc denied, 195 F.3d 4 (D.C. Cir. 1999), rev'd sub nom. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457 (2001).

333 Id.; see also Amalgamated Meat Cutters v. Connally, 337 F. Supp. 737, 758 (D.D.C. 1971) (noting that administrative standards requirement "means that however broad the discretion of the Executive at the outset, the standards once developed limit the latitude of subsequent executive action").

334 *Am. Trucking*, 175 F.3d at 1038.

335 531 U.S. 457 (2001).

336 Id. at 473.

337 See id. at 472-73 (approving as intelligible principle phrase "requisite to protect public health").

338 See id. at 476 ("It will remain for the Court of Appeals—on the remand that we direct for other reasons—to dispose of any other preserved challenge to the NAAQS under the judicial-review provisions contained in 42 U.S.C. § 7607(d)(9).").

ministrative standards. As Davis, Friendly, and the current judges on the "administrative law circuit" have recognized,[339] such standards are necessary to improve the rationality, fairness, and predictability—and hence the legitimacy (although not, after *American Trucking*, the technical constitutionality)—of administrative decisionmaking. Few long for a return to the transmission belt model and the expectation that Congress will make the basic choices of regulatory policy rather than delegating those choices.[340] If that is the case, however, agencies must assume responsibility for those choices. Otherwise, there is no assurance that they will exercise their authority in a manner that reflects reasonableness rather than arbitrariness—as contemplated by a case already very much a part of (ordinary) administrative law: *State Farm*. Thus, agencies must supply the standards that discipline their discretion under delegating statutes, and it does not matter for legitimacy purposes whether they do so under "ordinary" administrative law or "constitutional" administrative law. Indeed, for a number of reasons explored elsewhere, it may make great sense for agencies to supply standards under "ordinary" administrative law.[341] The result is to elevate ordinary administrative law to quasi-constitutional status, not to denigrate administrative standards to second-class status, as some might mistakenly think.

2. *Choice of Procedures*

The idea of administrative standards as a constraint on agency discretion is contingent on another set of issues concerning choice of procedures. Put simply, agencies must choose certain procedures for issuing standards or else they deprive such standards of their intended force. First, agencies must choose procedures capable of generating binding standards. Procedures that yield nonbinding standards do not really yield any standards at all. Second, agencies must choose notice-and-comment procedures, to the extent possible, for issuing standards

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[339] See Pearson v. Shalala, 164 F.3d 650, 660 (D.C. Cir. 1999) (holding that agency violated arbitrary and capricious test of APA because it failed to articulate standards that governed its discretion); Checkosky v. SEC, 139 F.3d 221, 225-26 (D.C. Cir. 1998) (same).

[340] But see *Am. Trucking*, 531 U.S. at 487 (Thomas, J., concurring) (recommending that Court revisit issue of whether current nondelegation doctrine, as applied, is consistent with original understanding of constitutional structure); Martin H. Redish, The Constitution as Political Structure 135-61 (1995) (arguing for revitalized nondelegation doctrine); Schoenbrod, supra note 121, at 14-16 (arguing, on public choice grounds, for reinvigorated nondelegation doctrine); Hamilton, supra note 157, at 807 (understanding Constitution "to prescribe a bright-line doctrinal approach" to distinguish legislative power, which Congress may not delegate, from executive power, which Congress may delegate); Gary Lawson, Delegation and Original Meaning, 88 Va. L. Rev. 327, 333-35 (2002) (arguing on originalist grounds that Constitution compels vigorous nondelegation doctrine).

[341] See Bressman, supra note 99, at 459-69.

in advance of applying them to particular facts. Other procedures, even if capable of binding, do not best promote the values of fairness, predictability, and participation important to a genuinely nonarbitrary administrative state.

It was Davis who wrote that agencies should, to the extent possible, articulate standards through notice-and-comment type rulemaking in advance of applying those standards to particular facts.[342] But the notion that agencies should issue ex ante standards is extremely provocative. It is one thing to suggest that agencies, already engaged in notice-and-comment rulemaking, supply the standards that govern their decisions in the course of that rulemaking. This is essentially what Judge Williams asked of the EPA in *American Trucking Ass'ns v. EPA*.[343] It is quite another to suggest that agencies, regularly engaged in formal adjudication or other administrative action, first undertake notice-and-comment rulemaking to supply the standards that will govern their subsequent decisions. Few courts have ever done this.[344]

The reason is that administrative law always has permitted agencies virtually unqualified discretion to choose the procedures for issuing general policy.[345] Since the 1947 decision of *SEC v. Chenery Corp. (Chenery II)*,[346] the Supreme Court has refused to second-guess agencies on their selection of policymaking tools.[347] Within limited con-

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342 Davis, supra note 19, at 55-59.

343 See 175 F.3d 1027, 1034-38 (D.C. Cir. 1999), modified in part and reh'g en banc denied, 195 F.3d 4 (D.C. Cir. 1999), rev'd sub nom. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457 (2001).

344 Cf. NLRB v. Wyman-Gordon Co., 394 U.S. 759, 764-66 (1969) (plurality opinion) (holding that NLRB could not announce new rule in adjudication and refuse to apply that new rule to parties in case because to do so would constitute impermissible rulemaking); Ford Motor Co. v. FTC, 673 F.2d 1008, 1010 (9th Cir. 1981) (preventing agency from using adjudication to announce new policy where doing so would circumvent notice-and-comment process).

345 For an excellent discussion of the various policymaking methods among which agencies choose, see generally M. Elizabeth Magill, Agency Choice of Policymaking Form (on file with the *New York University Law Review*).

346 332 U.S. 194 (1947).

347 In *Chenery II*, the SEC had, in the course of adjudication under the Securities Act, interpreted that statute to bar corporate management from purchasing preferred stock during reorganization. Id. at 198-200. The SEC initially had found that equitable principles barred such purchases. The Supreme Court, in the first *Chenery* decision, rejected this reasoning and remanded the issue to the agency for further reflection. See SEC v. Chenery Corp. (Chenery I), 318 U.S. 80, 87-90 (1943). The agency then supplied a statutory basis for its rule, on which rationale the Court upheld the rule. *Chenery II*, 332 U.S. at 207-09. The Court rejected arguments that the agency could not announce its new rule in adjudication. Id. at 201-03. Although the Court praised the advantages of rulemaking for avoiding unfair retroactive application of new policy, it refused to establish a preference for rulemaking. Id. at 202. The Court noted that agencies frequently lack the foresight, experience, or information to formulate a general rule and often need the flexibility to use case-by-case adjudication. Id. at 202-03. Moreover, the Court states that it simply would not

straints, agencies may choose to make policy through notice-and-comment rulemaking, through adjudication, or through other administrative action.[348]

Chenery II, though decided during the reign of the expertise model, has enjoyed enduring support. Not even Davis was willing to tinker with it, suggesting instead that agencies, in the exercise of their discretion, choose to issue ex ante standards when possible.[349] The same is true of other scholars who have recognized the advantages of notice-and-comment rulemaking for issuing general policy.[350] They have merely recommended the use of notice-and-comment rulemaking, rather than required it. When push comes to shove, few scholars want to reduce agency flexibility. Advocates of the presidential control model might be particularly reluctant. *Chenery II*, like *Chevron* and unlike *State Farm*, reserves discretionary decisions (here, the choice of procedures) for those subject to political control—agencies rather than courts.

But that is exactly why *Chenery II* is troubling. It is inconsistent with subsequent cases, including *State Farm*, that demand more transparency and rationality for discretionary agency decisions. Moreover, in the context of modern agency decisionmaking procedures, it provides far more opportunities for abuse than it did in 1947. In 1947, the choice of adjudication over rulemaking was commonplace because

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second-guess an agency's reasons for relying on adjudication. Rather, it stated, "the choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency." Id. at 203. This principle has governed with few exceptions ever since. Cf. *Wyman-Gordon*, 394 U.S. at 764-66 (holding that NLRB could not announce new rule in adjudication and refuse to apply that new rule to parties in case because to do so would constitute impermissible rulemaking); *Ford Motor*, 673 F.2d at 1010 (barring agency use of adjudication to announce new policy when it would avoid notice-and-comment process); NLRB v. Bell Aerospace Co., 416 U.S. 267, 294 (1974) (reaffirming that agencies possess discretion to choose between rulemaking and adjudication, except in those rare cases where reliance on adjudication "would amount to an abuse of discretion"). For detailed discussions of *Chenery II*, see generally Magill, supra note 345; William D. Araiza, Agency Adjudication, the Importance of Facts, and the Limitation of Labels, 57 Wash. & Lee L. Rev. 351 (2000); William V. Luneburg, Retroactivity and Administrative Rulemaking, 1991 Duke L.J. 106; Russell L. Weaver, *Chenery II*: A Forty-Year Retrospective, 40 Admin. L. Rev. 161 (1988).

348 Even under *Chenery II*, there is a judicial check for arbitrariness. Reviewing courts, applying a due process-like balancing test, will preclude agencies from changing course in adjudication without sufficient notice or solicitude for reliance interests. See, e.g., Clark-Cowlitz Joint Operating Agency v. FERC, 826 F.2d 1074, 1081 (D.C. Cir. 1987) (en banc) (articulating this test); Stephen G. Breyer et al., Administrative Law and Regulatory Policy 540-42 (4th ed. 1999) (collecting cases).

349 Davis, supra note 19, at 59 n.6.

350 See, e.g., Bernstein, supra note 316, at 587-97 (noting advantages of rulemaking); Arthur Earl Bonfield, The Federal APA and State Administrative Law, 72 Va. L. Rev. 297, 326-31 (1986) (same); Peck, supra note 316, at 754-60 (same); Shapiro, supra note 316, at 929-42 (same).

agencies hardly ever used rulemaking. Agencies now routinely use rulemaking, which makes the choice of adjudication over rulemaking for making policy significant if not suspect. Furthermore, agencies now choose other methods instead of rulemaking for making policy. They use informal adjudications or enforcement actions against private parties. They use guidance documents or settlement negotiations.[351]

It should therefore come as no surprise—at least to those who understand administrative law as concerned with arbitrariness as well as accountability—that the Supreme Court has recently begun to pare back the deference it accords to agency choice of procedures. In *United States v. Mead Corp.*,[352] the Court held that an agency is entitled to *Chevron* deference only if Congress has delegated to that agency the authority to issue interpretations that carry the force of law, and the agency has used that authority in issuing a particular interpretation.[353] And where an agency chooses a *procedure* that belies a congressional intention to give the interpretation the force of law—procedures that do not "bespeak the legislative type of activity that would naturally bind more than the parties to the ruling,"[354]—it is not entitled to *Chevron* deference.[355] The agency may be entitled to *Skidmore v. Swift & Co.*[356] deference, however, if it produces an interpretation that reflects "'a body of experience and informed judgment'" upon which courts, though not required, would be wise to rely.[357]

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351 For a description and criticism of the use of settlement negotiations for making policy, see Jim Rossi, Bargaining in the Shadow of Administrative Procedure: The Public Interest in Rulemaking Settlement, 51 Duke L.J. 1015, 1018-32 (2001) (arguing that rulemaking settlements are problematic because they create principal-agent gap in policy formulation).

352 533 U.S. 218 (2001).

353 Id. at 231-33.

354 Id. at 232. One example is the tariff classification ruling letters under consideration in *Mead*. See id. at 231-34. The Customs Service issued such ruling letters in 10,000 to 15,000 individual cases each year. Id. at 233. The ruling letters, which specify the tax classification for particular imported products under the Harmonized Tariff Schedule of the United States, also are subject to independent review and displacement by the Court of International Trade. Id. at 232. They are treated as binding between Customs and the individual party to whom a particular ruling is issued. Id. And they come from forty-six different Customs offices. Id. at 233. The Court was not persuaded by the fact that the ruling letter at issue in the case was generated by Customs Headquarters, rather than one of the myriad field offices, and that it contained a reasoned explanation for its classification. Id. at 233-34.

355 Id. at 231-34.

356 323 U.S. 134 (1944).

357 *Mead*, 533 U.S. at 227 (quoting Bragdon v. Abbott, 524 U.S. 624, 642 (1998), in turn quoting *Skidmore*, 323 U.S. at 140). Under *Skidmore*, agencies get deference only to the extent they offer interpretations with the "power to persuade." *Skidmore*, 323 U.S. at 140. As the *Skidmore* Court stated: "The weight of such a judgment in a particular case will

This Section argues that *Mead* moves in the right direction. The case begins a partial weaning from *Chenery II* and unlimited choice of procedures. As such, it shows that administrative law has begun to record a concern for arbitrariness in this area. This Section contends, however, that *Mead* does not go far enough. While recognizing that nonbinding agency interpretations are tantamount to no interpretations at all, *Mead* does not create a preference for ex ante, notice-and-comment interpretations. It does not ask agencies generally to issue interpretations in a way that best addresses the concern for arbitrariness and even the need for accountability.

a. From *Chenery II* to *Mead*.

To see *Mead* as a movement away from unlimited choice of procedures takes some effort. The case is new, and those who have commented tend to view it as nothing more than judicial overreaching. Justice Scalia, dissenting in the case, claimed that *Mead* "makes an avulsive change in judicial review of federal administrative action" because "[w]hat was previously a general presumption of authority in agencies to resolve ambiguity in the statutes they have been authorized to enforce has been changed to a presumption of no such authority, which must be overcome by affirmative legislative intent."[358] On his account, *Mead* replaces an implied delegation principle with a congressional clear statement principle. Many scholars have castigated *Mead* for a different reason. They argue that *Mead* transfers authority illegitimately from agencies to courts.[359] In their view, the case

depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." Id.

358 *Mead*, 533 U.S. at 239 (Scalia, J., dissenting); see also John O. McGinnis, Presidential Review as Constitutional Restoration, 51 Duke L.J. 901, 951 n.222 (2001) (noting that *Mead* may have restricted scope of *Chevron*).

359 See, e.g. Michael P. Healy, Spurious Interpretation Redux: *Mead* and the Shrinking Domain of Statutory Ambiguity, 54 Admin. L. Rev. 673, 677-81 (2002) (arguing that *Mead* improperly shifted interpretive authority from agencies to courts by imputing to Congress need for specific delegation of interpretive authority); William S. Jordan, III, Judicial Review of Informal Statutory Interpretations: The Answer Is *Chevron* Step Two, Not *Christensen* or *Mead*, 54 Admin. L. Rev. 719, 722-25 (2002) (arguing that *Mead* pits executive branch against judicial branch in cases to which *Chevron* does not apply because once court chooses meaning in reliance on agency informal adjudication, agency may not be able to depart even through use of congressionally specified procedures such as notice-and-comment rulemaking or formal adjudication); Ronald J. Krotoszynski, Jr., Why Deference?: Implied Delegations, Agency Expertise, and the Misplaced Legacy of *Skidmore*, 54 Admin. L. Rev. 735, 751 (2002) (arguing that *Mead* represents "a naked power grab by the federal courts" because it provides them yet another way to displace an agency interpretation); Ronald M. Levin, *Mead* and the Prospective Exercise of Discretion, 54 Admin. L. Rev. 771, 793-94 (2002) (contending that *Mead* gives courts too large role in denying agency deference due).

provides courts yet another tool for reclaiming interpretive power that *Chevron* (correctly) accords to agencies. It is necessary to make sense of *Mead* as more than inappropriate judicial interference with, first, broad congressional delegations and second, reasonable agency interpretations.

Mead, though framed in terms of congressional intent, does not have to be understood as telling Congress how to write statutes. Rather, it can be understood as telling agencies how to interpret statutes. It instructs agencies, as a condition of judicial deference, to use only those interpretive methods that Congress has contemplated. Those methods are rulemaking and adjudication, which are the customary tools for interpretive purposes, or some other means that "bespeak the legislative type of activity that would naturally bind more than the parties to the ruling."[360]

While *Mead* speaks to agencies, it does not have to be understood as unjustifiably depriving them of power. Rather, the case can be viewed as properly steering agencies toward interpretive methods that satisfy two conditions important to their own legitimacy: Agencies may possess only so much authority (1) as Congress may grant them, and (2) as they may exercise consistent with the values of fairness, rationality, and predictability. *Mead*'s requirement of congressional authorization can be seen to satisfy the first condition. It ensures that agencies stay within the scope of their delegated authority. But the congressional authorization requirement—like its constitutional counterpart, the nondelegation doctrine—is only a nominal requirement. It is inferred from and satisfied by the same considerations as the second, administrative exercise condition.

Those considerations are the nature of the interpretive method and the administrative practice in using that method.[361] More specifi-

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[360] *Mead*, 533 U.S. at 232; see Robert A. Anthony, Which Agency Interpretations Should Bind Citizens and Courts?, 7 Yale J. on Reg. 1, 2-6, 36-40 (1990) (arguing, long before *Mead*, that agencies should not have power to bind unless they use procedures Congress has provided for that purpose).

[361] In a subsequent case, the Court confirmed this understanding in dicta. In Barnhart v. Walton, 535 U.S. 212 (2002), the Court addressed the issue of whether *Chevron* deference applied to certain Social Security Administration interpretations of a definition in the Social Security Act. The agency originally issued the interpretations in a 1982 Social Security Ruling, a 1965 Disability Insurance State Manual, and a 1957 OASI Disability Insurance Letter. See id. at 219-20. In 2001, it promulgated them in notice-and-comment regulations. Id. at 217. Justice Breyer, writing for the Court, rejected the argument that the agency's regulations were not entitled to *Chevron* deference because they were recently promulgated, perhaps in response to litigation. See id. at 221. He said that the agency's interpretation was "long standing." Id. "And," he continued, "the fact that the Agency previously reached its interpretation through means less formal than 'notice and comment' rulemaking does not automatically deprive that interpretation of the judicial deference otherwise its due." Id. (internal citation omitted). Under *Mead*, he noted,

cally, the considerations are whether the method is capable of producing generally applicable, binding law (i.e., policy that "bespeak[s] the legislative type of activity that would naturally bind more than the parties to the ruling"[362]) and whether the agency treats it as producing generally applicable, binding law.[363] These considerations form a sort of "law-like decisionmaking" requirement, akin to the well-recognized reasoned-decisionmaking requirement. The law-like decisionmaking requirement ensures that when agencies claim the force of law, they actually have made law.

But the law-like decisionmaking requirement serves a more important purpose than ensuring that agencies put their money where their mouths are (though it frequently does this, in the literal as well as figurative sense). It also makes certain that agencies given policymaking authority exercise that authority in ways that generally promote consistency and specifically prevent ad hoc departures at the behest of narrow interests. By announcing a rule that binds all similarly situated parties, agencies may stem requests for deviations except through official channels—for example, a petition for reconsideration or an argument for overruling based on changed circumstances. In any event, agencies provide themselves a tool for resisting requests that continue undeterred. In so doing, agencies further the very purpose that an administrative standards requirement

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"whether a court should give such deference depends in significant part upon the interpretive method used and the nature of the question at issue." Id. at 222. Justice Breyer never reached these questions because he determined that routine *Chevron* deference applied to the interpretation, which was issued through the notice-and-comment rulemaking process and "ma[de] considerable sense in terms of the statute's basic objectives," in addition to validating long-held policy. Id. at 219.

362 *Mead*, 533 U.S. at 232.

363 These considerations are different from whether an interpretation is "authoritative," as Justice Scalia uses the word. See id. at 257 (Scalia, J., dissenting). The test is not merely whether the interpretation reflects the "official position of the agency," id., which, as the majority observed, depends not on "breadth of delegation or the agency's procedure in implementing it . . . and may ultimately be a function of administrative persistence alone." Id. at 237. The test is analogous to the one courts have employed, in reverse, to determine whether an interpretation constitutes a valid interpretative rule for purposes of APA exemption from notice-and-comment rulemaking procedures. See, e.g., Cmty. Nutrition Inst. v. Young, 818 F.2d 943, 946-50 (D.C. Cir. 1987) (holding that "action level" below which agency would not institute enforcement proceedings constituted invalid legislative rule because it was capable of binding parties and agency followed it consistently). For a different view of what the Court meant by an agency action with the force of law, see Thomas W. Merrill, The *Mead* Doctrine: Rules and Standards, Meta-Rules and Meta-Standards, 54 Admin. L. Rev. 807, 827 (2002) (arguing that agency acts with force of law for purposes of *Mead* when it adopts rule or order that once final, is no longer open to challenge and subjects those who violate it to legal consequences).

is intended to serve. Only then do agencies deserve judicial deference for their policymaking.[364]

Even on this reading, *Mead* only makes a difference if the case induces agencies to use law-like procedures, which in turn depends on the risk agencies perceive in foregoing such procedures. Agencies may not perceive a significant risk. Indeed, agencies may not think about the issue at all. Those who do may know that the failure to use law-like procedures puts them in a *Skidmore* regime rather than a *Chevron* regime. Under *Skidmore,* they must take their chances of persuading a court that their interpretations are entitled to deference rather than commanding near automatic deference.[365] But they also may know that courts typically have awarded *Skidmore* deference as often as they have awarded *Chevron* deference.[366]

This risk assessment overlooks the consequences of *Skidmore* deference for future administrative action. Agencies that forego law-like procedures and settle for *Skidmore* deference run the risk of losing the ability to change their interpretations in the future. This risk arises because the Court has not clarified whether *Skidmore* grants the agency or the court the final power to interpret the relevant statutory provision.[367] In other words, the Court has not clarified whether *Skidmore* directs courts to uphold persuasive agency interpretations or to consider agency interpretations, to the extent persuasive, in their own independent statutory analysis. If courts are the final arbiters under *Skidmore*, agencies will have limited flexibility to change their interpretations in the future, even through methods that Congress contemplates for issuing interpretations with the force of law. Once a

364 Cf. Thomas W. Merrill & Kristin E. Hickman, *Chevron*'s Domain, 89 Geo. L.J. 833, 884-85 (2001) (noting procedural advantages of restricting scope of *Chevron* to legislative rules and binding adjudications).

365 See Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

366 Interestingly, the lower court, on remand in *Mead* itself, did not follow this tradition. See Mead Corp. v. United States, 283 F.3d 1342, 1345-50 (Fed. Cir. 2002) (refusing to accord *Skidmore* deference to tariff classification ruling letter).

367 See Cooley R. Howarth, Jr., *United States v. Mead Corp.*: More Pieces for the *Chevron*/*Skidmore* Deference Puzzle, 54 Admin. L. Rev. 699, 714-15 (2002) (noting confusion on issue whether court or agency is final decisionmaker under *Skidmore*). Compare Jordan, supra note 359, at 722 (asserting that court is final decisionmaker under *Skidmore*), with Merrill & Hickman, supra note 364, at 861-63 (arguing that under *Skidmore*, agency resolves meaning of statutory ambiguity at issue rather than reviewing court). There appears to be some disagreement or confusion among members of the Court about the effect of *Skidmore* deference (or non-*Chevron* deference) on the ability of agencies to adopt other permissible interpretations in the future. Compare Edelman v. Lynchburg Coll., 535 U.S. 106, 114 n.8, 118 (2002) (finding agency's interpretation "unassailable" but suggesting that it was not only one that agency could adopt), with id. at 122 (O'Connor, J., concurring) (arguing that only finding of *Chevron* deference to existing interpretation permits agency freely to change that interpretation in future).

court locks in the meaning of a statutory ambiguity, agencies have little ability to adjust that interpretation for changing circumstances in the exercise of their expert judgment—an ability that *Chevron* expressly affords them.[368] Even if agencies retain the final interpretive power under *Skidmore*, they are not home free. Once an agency has succeeded in persuading a court that it has arrived at an acceptable interpretation, it may be reluctant to take a chance again. Such risk aversion increases in cases where courts, applying *Skidmore*, go beyond suggesting that an administrative interpretation is persuasive and intimate that it is correct.

b. A Preference for Notice-and-Comment Rulemaking

Assuming *Mead* can succeed in prodding agencies to issue law-like interpretations, it still falls short for purposes of preventing administrative arbitrariness. *Mead* fails to establish a preference for notice-and-comment rulemaking.[369] *Mead* either assumes congressional indifference among congressionally authorized interpretive tools or it perpetuates its own indifference—or rather, its own *Chenery II*-based preference for unlimited administrative flexibility to choose among congressionally authorized procedures. This preference is a mistake when viewed through the lens of arbitrariness. And here is where I begin to sketch how the concern for arbitrariness might bridge the gap between the positive account of the law we do have and the prescriptive account of the law we should have.

The place to start is with the advantages of notice-and-comment rulemaking for making general policy. Many scholars have articulated these advantages,[370] and I will only summarize them here. In so doing, I necessarily will make some overgeneralizations, as others have done before. But, because I do not intend to defend the use of notice-and-comment rulemaking in all cases (but merely a preference for notice-and-comment rulemaking, as described below), I permit room for departures where the advantages are overstated or the disadvantages are understated.

Notice-and-comment rulemaking, by its nature, facilitates the participation of affected parties, the submission of relevant informa-

368 See Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 845 (1984) (upholding as reasonable agency interpretation that reflected change in policy).

369 *Mead* also only addresses a limited context. While it imposes a law-like decision-making requirement under *Chevron*, it does not address the issue of whether such a requirement also applies under *State Farm*. The claim is not that *Mead* should have addressed the broader context, simply that the broader context must be addressed.

370 See generally Davis, supra note 19, at 65-67; Pierce, supra note 146, at 59-60; Shapiro, supra note 316, at 929-42; Strauss, supra note 26, at 755-56; Paul R. Verkuil, Judicial Review of Informal Rulemaking, 60 Va. L. Rev. 185, 188-93 (1974).

tion, and the prospective application of resulting policy. As a result of the reasoned-decisionmaking requirement that accompanies it, notice-and-comment rulemaking fosters logical and thorough consideration of policy. To the extent notice-and-comment rulemaking issues general rules that rely for their enforcement on further proceedings, it also promotes predictability. At a minimum, it allows affected parties, who participate in the formulation of the rule, to anticipate the rule and plan accordingly.

Now compare formal adjudication. Agencies, like the NLRB, have shown that adjudication may serve as a policymaking tool.[371] And, adjudication certainly affords important procedural protections to individual litigants. Yet, adjudication, as a general matter, has serious shortcomings for formulating policy. It applies new rules retroactively to the parties in the case. It also excludes other affected parties in the development of policy applicable to them, unless included through the venues of intervention or amicus curiae filings. To the extent it excludes such parties, it also excludes the information and arguments necessary to define the stakes and educate the agency.[372] It tends to approach broad policy questions from a narrow perspective—only as necessary to decide a case—which decreases the comprehensiveness of the resulting rule and increases the risk that bad facts will make bad law. Similarly, it elaborates policy in a narrow manner—on a case-by-case basis—which decreases predictability and opportunities for planning. It also announces policy in the form of an order rather than codifying it in the Federal Register, thus decreasing accessibility. And, it depends for all of this on the existence of circumstances that lead to the initiation of a proceeding or succession of proceedings.[373]

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[371] See Mark H. Grunewald, The NLRB's First Rulemaking: An Exercise in Pragmatism, 41 Duke L.J. 274, 281-82 (1991).

[372] Richard A. Posner, The Rise and Fall of Administrative Law, 72 Chi.-Kent L. Rev. 953, 962 (1997) ("When the fixing of a rule requires either the kind of scientific or technical data obtainable only in a rulemaking proceeding, or simply an arbitrary judgment, the adjudicative process is unusable. Notice and comment rulemaking must be employed . . . .").

[373] All of this might be said of judicial adjudication, and indeed, it forms the basis for a significant body of scholarly work critiquing "activist" judging. See Farber & Sherry, supra note 90, at 17-18 (criticizing Robert Bork). While beyond the scope of this Article to discuss fully the differences between judicial adjudication and administrative adjudication for formulating general policy, it suffices for now to point out one critical distinction: Courts have no choice but to elaborate policy on a case-by-case basis. It is for this reason that courts face all sorts of judicial restraint rules, both constitutional and prudential—for example, the ban on advisory opinions, the limits on standing, the rule of stare decisis, and the rule against prospectivity. That is not to debate the necessity or sufficiency of those rules, or even my selection among them. It is simply to note that rules exist to prevent courts from freely legislating. Unlike courts, agencies are expected to legislate freely—

Other methods for formulating general policy, whatever those might look like after *Mead*, fare even worse. Consider the administrative action at issue in *Pearson v. Shalala*.[374] The FDA had failed altogether to define the statutory phrase "significant scientific agreement," although it repeatedly had applied that phrase to approve and reject requests from manufacturers to make certain claims on dietary supplement labels.[375] The D.C. Circuit held, in reviewing a claim rejection, that the FDA had violated the reasoned-decisionmaking requirement by failing to define the criteria it used in applying the statutory phrase.[376] The court remanded the claim rejection to the agency.[377] Suppose the FDA decides in the course of its next claim decision to define the criteria.[378] Such action would be less fair and deliberative than formal adjudication, which at least provides procedural protections for individual litigants and the possibility of intervention and amicus curiae filings for other parties. It would be equally retroactive and narrowly focused. And it would be less visible, decreasing notice and planning.

If notice-and-comment rulemaking typically is the best method for making general policy, then a refusal to use it might be arbitrary. It might lack any justification whatsoever. Or it might indicate improper motives, such as a desire to avoid committing broadly or visibly, or to retain room for departures that serve narrow interests. Of course, it might be neither. The refusal to use notice-and-comment rulemaking might reflect a perfectly understandable desire to avoid the costs and complexities that the process imposes. This justification really is an objection to the entire idea of rulemaking, notwithstanding its potential advantages. I address this objection below.[379]

Cost considerations aside, there are legitimate justifications for the refusal to use notice-and-comment rulemaking. In *Chenery II*, the Court itself envisioned some such instances.[380] One might imagine circumstances in which an agency genuinely fails to appreciate the

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indeed, that is the whole idea of broad delegation. Furthermore, they have available "legislative-like" procedures for this purpose, which should be utilized as important constraints on the power they possess.

374 164 F.3d 650 (D.C. Cir. 1999).

375 Id. at 653-54 (quoting 21 U.S.C. § 343(r)(3)(B)(i) (2000)).

376 Id. at 660.

377 Id. at 661.

378 Assume also that such action constitutes a permissible interpretive method under *Mead*; if it does not, then *Mead* itself might require the use of notice-and-comment rulemaking to define ambiguous statutory terms more often than the Court seems willing to admit.

379 See infra Part III.B.2.c.

380 See SEC v. Chenery Corp. (Chenery II), 332 U.S. 194, 202-03 (1947) (describing circumstances when use of adjudication rather than rulemaking might be appropriate).

need for a general standard until the need presents itself in the course of adjudication or other administrative action. Agencies cannot possibly anticipate every ambiguity that their organic statutes contain. In such circumstances, an agency might issue general policy as necessary to resolve its case or execute its action. One might imagine other circumstances in which notice-and-comment rulemaking is not feasible. Sometimes an agency lacks the experience with a problem or the information relevant to a problem to formulate a general standard governing it. In such circumstances, agencies might elaborate standards incrementally through formal adjudication or other means. If they were to engage in rulemaking, they likely would produce a rule that is too general or indeterminate to achieve any advantage.

But the concern for circumventing notice-and-comment rulemaking is sufficiently grave that agencies should be required to take affirmative steps to justify a departure from rulemaking. At a minimum, they should articulate the reasons for using other procedures. This brings choice of procedure into compliance with the reasoned-decisionmaking requirement. Agencies also might go further. They might project a timeline for revisiting their policy decisions through notice-and-comment rulemaking, on penalty of losing judicial deference to future orders or actions that deviate without good reason from that plan.

What I have just described might be considered a preference for notice-and-comment rulemaking. Such a preference would require agencies to use notice-and-comment rulemaking for implementing broad statutory requirements and interpreting ambiguous statutory provisions unless they offer an explanation for their choice of adjudication or other administrative action. A reviewing court would defer to this explanation if reasonable, much as it defers to an agency's explanation of the substantive basis for its policy decision under the reasoned-decisionmaking requirement. And, as with the reasoned-decisionmaking requirement, a court should not supply its own explanation if the agency fails to provide one. Rather, it should remand the issue to the agency for further consideration.[381]

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[381] *Mead* introduces certain complications in the application of a preference for notice-and-comment rulemaking. Applying a preference for rulemaking would be straightforward only in cases involving a choice between rulemaking and formal adjudication where Congress authorizes both. An agency that selects adjudication simply would have to articulate an explanation for so doing. A reviewing court would defer to that explanation if reasonable.

When an agency chooses a method other than adjudication, the issue would be more complex. An agency still would have to articulate an explanation for using that method. But a reviewing court first would have to determine whether Congress had authorized the use of that method before it could consider whether the agency had offered an adequate

c. Practical Objections

It is worthwhile to step aside for a moment and address some possible objections to a preference for notice-and-comment rulemaking. This Subsection and the following Subsection take up that task. By their nature, these subsections at times digress from the central point about the role of a preference for notice-and-comment rulemaking in preventing arbitrary administrative decisionmaking.

Some may argue that a preference for notice-and-comment rulemaking would only increase the ossification that plagues agencies saddled with rulemaking. Agencies, facing the prospect of countless iterations of rulemaking and review or conflicting commands about what factors to consider on remand, decline to issue regulations or to revise existing ones.[382] On this view, the move to informal interpretive methods is an understandable, even welcomed, reaction to a torpid administrative process.

A further point is that the move to informal interpretive methods is an appropriate response to today's regulatory problems, particularly those involving scientific or technological uncertainty. Not only is rulemaking stultifying because of agencies' inability to compile a record sufficiently precise to survive unrealistic judicial expectations, it is simply wrong-headed. It requires agencies to set achievable levels of compliance based on speculation when they more fruitfully might experiment with proposed levels. It invites agencies to produce rules that, by the time they are final, already have outlived their usefulness

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justification for using it. The agency explanation might prove helpful on the congressional authorization issue. An agency might assert that it was making generally applicable, binding policy, and that it did so through an individualized enforcement action because it lacked the information to make policy through notice-and-comment rulemaking or belatedly discovered the need to make such policy. The court would have to make an independent determination as to the first half of the agency's explanation (concerning congressional authorization), and, if satisfied, defer to the second half of the agency's explanation (concerning choice of procedures).

Another complication would arise when an agency lacks express notice-and-comment rulemaking authority but nonetheless claims *Chevron* deference for another policymaking method. *Mead* itself was one such case. Such cases would not involve a choice-of-procedures question, whose answer depends on the reasoned judgment of the agency, but merely a congressional authorization question, whose answer depends on the independent judgment of the court. A court would have to ascertain whether the method is capable of binding and whether the agency treats it as binding. If so, the court could infer a congressional justification for its use. But, with *Mead* as an indication, these cases might be rare. Courts might decline more often than not to find congressional authorization for agencies to make general policy with the force of law when they lack notice-and-comment rulemaking power. Indeed, the *Mead* Court could find only one example of congressional authorization outside the rulemaking and adjudication context. See United States v. Mead Corp., 533 U.S. 218, 231 & n.13 (2001) (citing case involving Comptroller of Currency, who possessed congressional authorization to make binding policy without specified procedures).

382 The ossification literature is legion. See supra note 109.

because technological or scientific advances have superseded them. And it prohibits agencies from negotiating policy directly with affected parties, as they might through settlement negotiations in an enforcement action. The Court, if anything, should applaud agencies that elaborate policy in areas of uncertainty on an informal basis. The response to these objections proceeds in five parts.

First, a preference for rulemaking would be just that—a preference or, perhaps more accurately, a presumption. It would shift the burden to agencies to justify their use of other methods for formulating general terms and standards. It would not deny them the flexibility to choose particular procedures when circumstances warrant. Rather, it would encourage agencies to deliberate on a question of importance to producing the type of policy decisions that will narrow broad delegations consistent with the constitutional structure—that is, the choice-of-procedures question.

But perhaps this initial response avoids the hard issue of whether we want a rule that discourages agencies from using informal methods for developing general policy, *even where efficient*. Why not allow agencies to use interpretive rules or guidance documents, for example, to push the law along when notice-and-comment rulemaking would produce rules that, by the time they are final, not only have consumed an inordinate amount of resources (both public and private) but have outlived their usefulness?[383] The reason is that allowing agencies to use interpretive rules and guidance documents in this fashion, while improving efficiency in particular instances, comes at too high a price overall. It jeopardizes administrative legitimacy. If we are to succeed in legitimizing the administrative state, we cannot prioritize efficiency above all else. That is not to minimize the importance of efficiency, because an inefficient administrative state is, as Justice Breyer might

[383] The APA prohibits the use of interpretive rules and policy statement to formulate general policy. See 5 U.S.C. § 553 (2000) (excluding interpretive rules and policy statements from notice-and-comment requirements applicable to rules that generate binding policy). But there is much confusion among courts as to when interpretive rules and policy statements transgress that line. A court might utilize this confusion to permit an agency to formulate general policy through an interpretive rule or policy statement by determining that the interpretive rule or policy statement merely clarifies existing law rather than makes new law. For excellent discussions of the use of "nonlegislative" rules, see generally 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 (1992); Robert A. Anthony, Three Settings in Which Nonlegislative Rules Should Not Bind, 53 Admin. L. Rev. 1313 (2001); Anthony, supra note 360; Peter L. Strauss, Publication Rules in the Rulemaking Spectrum: Assuring Proper Respect for an Essential Element, 53 Admin. L. Rev. 803 (2001).

say, a "game not worth the candle."[384] We must seek efficiency at every level of the administrative process: by improving agency consideration and public participation and judicial review and political oversight. But we cannot, in the alternative, dispense with agency procedures.

Second, any preference for rulemaking would not entail the more burdensome requirement that agencies issue superstatutory regulations constraining their discretion. While agencies would be wise to issue such regulations if they could,[385] they often cannot. The stakes and information relevant to most policy decisions only emerge in the course of concrete administrative action. Moreover, the volume of statutory ambiguities and required judgments realistically may preclude an agency from engaging in an initial, roving rulemaking. Because we might expect this to be the norm rather than the exception given the nature of modern delegation, we should not call agencies to account for failure to issue a governing regulation defining all terms and standards. Rather, we should expect agencies to define terms and standards in the course of focused rulemakings. Agencies engaged in particular rulemakings ought to define all relevant terms and standards in the course of such rulemakings. Moreover, agencies anticipating adjudication or other administrative action on particular issues should aim to undertake rulemaking ex ante on those issues to the extent possible, or as soon as the issues sufficiently crystallize.

Third, a preference for rulemaking would not prevent agencies from issuing different definitions or standards to fit different aspects of a regulatory problem. Nothing in a preference for rulemaking requires agencies to issue definitions or standards in a one-size-fits-all manner. To the contrary, uniform rules might produce arbitrariness when a regulatory problem demands individualized attention.[386]

Fourth, a preference for rulemaking would not prevent agencies from changing their positions if circumstances so warrant. If a statutory term allows more than one permissible meaning, agencies should have the freedom to choose a different meaning as long as they observe the same requirements that applied to their initial choice. Thus, agencies must change their positions through notice-and-comment

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384 AT&T v. Iowa Utils. Bd., 525 U.S. 366, 430 (1999) (Breyer, J., concurring in part and dissenting in part).

385 See Davis, supra note 19, at 42-44.

386 See, e.g., U.S. Telecom Ass'n v. FCC, 290 F.3d 415, 422-26 (D.C. Cir. 2002) (remanding to FCC uniform national carrier access rule on theory that absence of access would "impair" competition within meaning of Telecommunications Act of 1996, 47 U.S.C. § 251(d)(2) (2000), because it would provide access "in circumstances where there is little or no reason to think that its absence will genuinely impair competition that might otherwise occur").

rulemaking. Current principles of administrative law already facilitate this result, requiring agencies to amend notice-and-comment rules with notice-and-comment rules.[387]

Finally, courts play a role in reducing ossification. Many have characterized the use of the hard look doctrine as an excuse for courts to substitute their generalist judgment for the specialized judgment of agencies. To be sure, a preference for notice-and-comment rulemaking would afford courts even more opportunities for overly aggressive judicial review. More than ever, courts would have to employ a rule of restraint.[388] Courts would have to restrict themselves to ensuring that agencies do their homework, not that agencies arrive at the correct answer.

d. Analytical Objections

A separate objection to establishing a presumption of rulemaking is that it would complicate *Chevron* analysis with yet another consideration. Justice Scalia has already raised a vociferous objection to *Mead*'s force-of-law requirement as demanding "affirmative legislative intent" for *Chevron* deference.[389] A preference for rulemaking would not require any more from Congress, however. It would seek from *agencies* an assurance that they have exercised their interpretive power in ways both congressionally authorized and demonstrably lawlike. This approach, while undoubtedly more complex than an "agency wins" rule, would ensure that agencies win only when they should.

A stronger objection is that a preference for notice-and-comment rulemaking would draw *Chevron* ever closer to *Skidmore*, and negate the reason for maintaining two separate tests. After *Mead*, further overlap (and confusion) between *Chevron* and *Skidmore* unquestionably exists. *Chevron* step two includes a reasoned-decisionmaking requirement that tracks many of the *Skidmore* factors.[390] *Chevron* deference and *Skidmore* deference occur with similar frequency, suggesting that courts approach the two analyses with equal agency solicitude. And *Skidmore* sometimes applies in cases where *Chevron* might instead.

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387 See Ariz. Grocery Co. v. Atchison, Topeka & Santa Fe Ry., 284 U.S. 370 (1932) (holding that agency must follow its own rules until officially changed).

388 See Leventhal, supra note 62, at 511-12 (conceiving of hard look doctrine as "'judicial supervision with a salutary principle of judicial restraint'" (quoting Greater Boston Television Corp. v. FCC, 444 F.2d 841, 851 (D.C. Cir. 1970))).

389 United States v. Mead Corp., 533 U.S. 218, 239 (2001) (Scalia, J., dissenting).

390 See Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

Consider a case that followed closely after *Mead*. In *Edelman v. Lynchburg College*,[391] Justice Souter, writing for the Court, entertained the question of whether *Chevron* deference might apply to an Equal Employment Opportunity Commission (EEOC) regulation issued without notice-and-comment rulemaking, but ultimately declined to resolve the question.[392] In a most remarkable footnote, Justice Souter explained: "[N]ot all deference is deference under *Chevron*, and there is no need to resolve deference issues when there is no need for deference."[393] The Court upheld the interpretation as "not only a reasonable one, but the position we would adopt even if there were no formal rule and we were interpreting the statute from scratch."[394] Thus, it apparently upheld the EEOC regulation under *Skidmore*.[395]

Regardless of whether a preference for notice-and-comment rulemaking or a choice-of-procedures analysis would further narrow the space between *Chevron* and *Skidmore*, it would not negate the reason for maintaining two tests.[396] *Chevron* deference, unlike *Skidmore* deference, rests on a theory of congressional delegation. As long as an agency acts within the scope of its delegated authority, interpreting statutory ambiguity through a law-like method, it merits deference. That basis will make a difference in cases of ambiguity where the court finds the interpretation unpersuasive.[397] It is in precisely such cases that *Chevron* directs the court to set aside its own

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391 535 U.S. 106 (2002).

392 Id. at 1150.

393 Id. at 1150 n.8 (internal citation omitted).

394 Id. at 1150.

395 The Court never expressly stated that it was upholding the interpretation under *Skidmore*, however. Justice O'Connor, joined by Justice Scalia, took issue with the Court's analysis in a concurring opinion. See id. at 1153-55 (O'Connor, J., concurring). She would have deferred to the EEOC regulations under *Chevron*. See id. at 1154-55. She determined that *Chevron* could apply to the EEOC regulation through a tortuous route: Although Title VII does not give the EEOC authority to promulgate substantive regulations, these were procedural regulations. Id. at 1153-55. And although Title VII does not require notice-and-comment procedures for procedural regulations, and although the agency originally promulgated the regulations at issue without such procedures, the agency later repromulgated them with those procedures. Id. Furthermore, it published them in the Code of Federal Regulations and made them binding on all the parties before the EEOC. See id. at 1155.

396 For a general discussion of the reasons for maintaining two distinct tests, see Merrill & Hickman, supra note 364, at 858-63.

397 Commentators and Justices have observed the ability of reviewing courts to displace agency interpretations at *Chevron* step one by refusing to find statutory ambiguity. See Bressman, supra note 260, at 1411-12.

judgment and defer to the agency's judgment. Under *Skidmore*, however, the court may reject the agency's judgment as unpersuasive.[398]

In addition, maintaining two distinct tests may make a difference in cases like *Edelman* where the court agrees with the agency interpretation. A finding of *Chevron* deference does not preclude the agency from changing its position, while a finding of *Skidmore* deference effectively might. Once an agency receives a congressional delegation of power under *Chevron*, it retains the power to select a different interpretation as long as reasonable. Such flexibility, endorsed in *Chevron* itself, allows the agency reasonably to adapt open-ended statutory terms to changing circumstances. *Skidmore* complicates the issue. It may allocate final interpretive say to courts rather than agencies, precluding changes even through congressionally approved methods. Even if it accords final interpretive say to agencies, it may make changes more difficult and less likely. An agency that earns deference under *Skidmore* may be more reluctant to change its position if the analysis in which the court engages tends to suggest not only that the agency selected a permissible interpretation but the correct one. When a court refuses to decide whether an agency is entitled to deference under *Chevron* or has earned deference under *Skidmore,* it further complicates the issue.[399] It asks the agency to bet on which analysis the court applied before that agency decides to change its interpretation.[400]

Of course, retaining *Chevron* as a distinct test does not prevent a court from using *Skidmore* to give agencies such a bittersweet victory. And, if Justice Souter's opinion in *Edelman* is any indication, courts may use *Skidmore* more often than they probably should.[401] In many cases, applying the *Skidmore* framework simply is easier for courts than determining whether Congress intended the interpretive method to carry the force of law, and it achieves the same result from their perspective. But the inclination of courts to take the easy route, perhaps exacerbated by *Mead* (as well as a preference for notice-and-

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[398] As the lower court, on remand, did in *Mead* itself. See Mead Corp. v. United States, 283 F.3d 1342, 1345-50 (Fed. Cir. 2002) (refusing to accord *Skidmore* deference to tariff classification ruling letter).

[399] See, e.g., Springfield, Inc. v. Buckles, 292 F.3d 813, 817-18 (D.C. Cir. 2002) (refusing to determine whether *Chevron* or *Skidmore* applies to agency study because either line of authority would support statutory interpretation contained therein).

[400] A similar argument might be made about the relationship between *Chevron* step one and step two. When courts refuse to decide whether a statute requires an agency interpretation (step one) or merely permits it (step two), they ask agencies inclined to change their position to bet. See, e.g., Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 703-04 (1995) (upholding agency interpretation without deciding whether statute compels it under *Chevron* step one, or it is merely permissible under *Chevron* step two).

[401] See supra note 393 and accompanying text.

comment rulemaking), does not argue for an abandonment of *Chevron* or *Skidmore*. It simply suggests that courts should be sensitive to the differences of the two in both theoretical justification and practical effect.

3. *Choice of Procedures Reprised*

As a brief postscript to the preceding choice-of-procedures discussion, it is worth considering a principle in administrative law that accords agencies unqualified discretion to choose the method for interpreting ambiguities in their own regulations (as opposed to ambiguities in congressional statutes). In the 1945 case of *Bowles v. Seminole Rock & Sand Co.*,[402] the Court held that an agency's interpretation of its own regulation is "of controlling weight unless [that interpretation] is plainly erroneous or inconsistent with the regulation."[403] In a sense, *Seminole Rock* does for agencies' interpretations of their own regulations what *Chevron* does for agencies' interpretations of their authorizing statutes: it accords judicial deference to them. In *Christensen v. Harris County*[404] and *Auer v. Robbins*,[405] the Court confirmed that *Seminole Rock* accords deference to administrative interpretations of ambiguous regulations.[406]

Commentators and Justices have criticized *Seminole Rock* as encouraging agencies to write ambiguous regulations and interpret them later.[407] *Skidmore* enables agencies to avoid "the relative rigors of notice-and-comment rulemaking" by issuing the bare minimum through that process and reserving the hard policy decisions "until the relatively less demanding implementation stage."[408] In so doing, *Seminole Rock* defeats the purpose of delegation—which is to have agencies resolve ambiguous statutes, not replace them with equally

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[402] 325 U.S. 410 (1945).

[403] Id. at 414.

[404] 529 U.S. 576 (2000).

[405] 519 U.S. 452 (1997).

[406] *Christensen*, 529 U.S. at 588; *Auer*, 519 U.S. at 461. The Court never has explicitly incorporated the *Chevron* two-step test for deference into *Seminole Rock*.

[407] See Shalala v. Guernsey Mem'l Hosp., 514 U.S. 87, 108-09 (1995) (O'Connor, J., dissenting); Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 525 (1994) (Thomas, J., dissenting); Anthony, supra note 44, at 11-12; John F. Manning, Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules, 96 Colum. L. Rev. 612, 616 (1996). For another view, see Jonathan T. Molot, The Judicial Perspective in the Administrative State: Reconciling Modern Doctrines of Deference with the Judiciary's Structural Role, 53 Stan. L. Rev. 1, 103 (2000) (arguing that *Seminole Rock* allows agencies to make law, whether through rulemaking or adjudication, without significant structural check of "impending judicial interpretation").

[408] Manning, supra note 407, at 616.

ambiguous regulations.[409] Moreover, *Seminole Rock* undermines the rule of law by depriving parties of regulations containing concrete guidance.[410] Unless agencies face a penalty for issuing ambiguous regulations, they will not seek to avoid them.

In the main, these objections to *Seminole Rock* are not rooted in majoritarianism. Indeed, majoritarianism would seem to support *Seminole Rock*, as it supports *Chevron*. It is better to vest interpretive authority in the actors subject to presidential control (the agencies) than in the actors who are not (the courts).[411] Majoritarianism is consistent with the notion that agencies are in the best position to resolve ambiguities in statutes, and the ambiguities that inevitably arise in their own regulations.

The problem with *Seminole Rock*, as its critics acknowledge, lies in the arbitrariness that unfettered choice of procedures creates. *Seminole Rock* permits agencies to act opportunistically, issuing shell or sham regulations. It allows agencies to issue vague regulations only to make the actual policy at the implementation stage through other means, such as case-by-case adjudication.[412] Worse, it allows agencies effectively to make the actual policy through nonbinding means, such as guidance documents, interpretative rules, and other creatures—even though such means are exempt from notice-and-comment rulemaking under the APA precisely because they do not purport to make policy.[413] Thus, the problem might be understood as an end-run around rulemaking in the extreme.

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409 See *Thomas Jefferson Univ.*, 512 U.S. at 525 (Thomas, J., dissenting); Manning, supra note 407, at 616.

410 See Manning, supra note 407, at 616.

411 Unless, of course, it is better still to vest such authority in Congress, through a revitalized nondelegation doctrine or some other strategy that would require Congress to define significant statutory ambiguities. See Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 486-87 (2001) (Thomas, J., concurring) (arguing that nondelegation doctrine should require more than meager intelligible principle).

412 See Manning, supra note 407, at 660-80 (arguing that problem with *Seminole Rock* is that it allows agencies to subvert notice-and-comment rulemaking, making policy largely through adjudication, which contradicts purpose of delegation and requirements of APA, "disserves the due process objectives of giving notice of the law to those who must comply with it and of constraining those who enforce it," and makes agency policymaking more susceptible to influence of narrow interest groups). It bears noting that resolving ambiguities in regulations is different from applying regulations to specific circumstances. See, e.g., Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 358-59 (1989) (deferring to Forest Service determination that its regulations do not extend to certain actions that might be taken by Okanogan County or State of Washington to ameliorate off-site effects of Early Winters project on air quality and mule deer herd).

413 See Anthony, supra note 44, at 6-12 (arguing that problem with *Seminole Rock* is that it accords *Chevron*-style deference to interpretative rules, which are exempt from notice-and-comment rulemaking procedures of APA, and often contain positions that are "institutionally self-interested and are intended to impose adverse consequences on private

By linking this problem to *Chenery II* and *Mead,* a solution emerges. It is possible here, as there, to introduce a preference for notice-and-comment rulemaking to the choice of procedures. This solution would demand that an agency fill any residual or subsidiary gaps in their regulations the same way it issued the regulation—through rulemaking—unless it justifies the use of other interpretive means. As there are good reasons to use adjudication rather than rulemaking in the *Mead* context, there are good reasons to use adjudication here as well. Note, however, that as in the *Mead* context, there would be no good reason to use nonbinding methods for interpreting rules. Such methods would only qualify for *Skidmore*-style deference, if anything.[414]

In a sense, the solution would be to read a preference for rulemaking to qualify *Seminole Rock* deference as it qualifies *Chevron* deference. This qualification would not change the result in *Seminole Rock*, which accorded deference to a regulation adopted through notice-and-comment rulemaking interpreting a prior regulation (albeit supported by interpretations contained in various agency bulletins, reports, and statements).[415] Nor would it change the result in *Christensen*, which refused to accord deference to an agency opinion letter purporting to interpret a regulation that was not ambiguous but merely permissive.[416] However, it would contradict *Auer*, which extended *Seminole Rock* deference to an agency interpretation issued through another means—in particular, an agency litigating position.[417] As *Auer* stands, it does not adequately ensure that agencies make and interpret policy in fair, deliberative, law-like ways.

CONCLUSION

What is old is new. Beyond the current model of the administrative state is the promise of an account with extraordinary explanatory power for constitutional and administrative law. This account seeks to address the concern for arbitrary administrative decisionmaking. That this account has the power to erase some of the confusion in constitutional and administrative law is hardly surprising. It has never really gone away.

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persons," including "favoring the agency over its private adversaries in litigation, strengthening the agency's regulatory hand, or limiting its distribution of largesse").

414 See id. at 11 (suggesting, long before *Mead*, that agencies should not receive *Chevron*-style deference for interpretative rules).

415 See Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 413, 417 (1945).

416 See Christensen v. Harris County, 529 U.S. 576, 588 (2000).

417 See Auer v. Robbins, 519 U.S. 452, 461-62 (1997).

This account initially built and justified the administrative state in the 1930s. It made some missteps along the way, characterizing agencies and their mandates in an unrealistic, inadequate fashion. But rather than correct those missteps, we replaced the account with (or subordinated it to) one that might solve a feature of agency decisionmaking never before given such prominence—the "countermajoritarian" quality of agency decisionmaking. We reacted, implicitly, to Alexander Bickel's challenge in the 1960s to defend judicial review. After Bickel's famous "countermajoritarian difficulty," all unelected and therefore unaccountable institutions were subject to question as never before. Constitutional theorists confirmed the dominance of the majoritarian paradigm in their analyses of the Supreme Court. We followed suit in our assessments of the administrative state, though we never talked about the paradigm the way those evaluating the Court did.

At first, we responded by looking to remake the administrative state in the legislature's image. In the 1970s, we opened the administrative process to all affected parties with the aim of creating an idealized legislative process. But we were not able to succeed well enough to justify the ample costs and complexities that we introduced. We soon realized that agencies were not as responsive to relevant interests as we might have hoped. And, they *still* were not accountable for that result.

While foundering over how to proceed, we discovered the presidency—or rather, the presidency discovered us. In the 1980s, Ronald Reagan assumed control of the bureaucracy and thereby fit it into the constitutional structure. President Reagan issued executive orders requiring agencies to engage in cost-benefit analysis and advance planning. He positioned the Office of Management and Budget to review regulations for consistency with administration priorities. Subsequent presidents preserved these practices. Bill Clinton, by maintaining them, demonstrated that they were not tied to conservative ideology. But he did more than that. President Clinton strengthened executive control by asserting a kind of direct and official "ownership" of particular administrative policies. In so doing, he perfected the model that made agencies responsive to public preferences through the one person accountable to the entire nation—and, not insignificantly, mentioned in the constitutional document. That model continues today.

The difficulty is that the presidential control model, for all its elegance, fails to address a concern that we always have worried about in the administrative state. The concern is for arbitrary administrative decisionmaking—precisely where we began. That we started there shows good judgment. The constitutional structure can be understood

in a variety of respects to address an analogous concern for arbitrary legislative, executive, and judicial decisionmaking. But somewhere in the 1960s and 1970s, we lost track of the concern for arbitrary administrative decisionmaking. As a result, the models that have recently emerged, including the presidential control model, can make sense of the administrative state only by ignoring, or at least leaving unresolved, a concern arguably at the heart of the constitutional structure. In addition, they must leave unresolved many of the conventional puzzles of constitutional and administrative law.

Some advocates of the presidential control model have recognized that they can no longer avoid the concern for administrative arbitrariness and must justify their model as consistent with the dictates of good government, as well as majoritarian government. One such advocate, Elena Kagan, has even taken steps to ensure this result. In the end, those steps cannot work. The presidential control model, even in its most sophisticated form, must fall back on majoritarianism. It cannot adequately account for the concern for arbitrariness. At the same time, the universally shared impulse to address the concern for arbitrariness—the very worry over it—shows that we cannot go back.

I have suggested that we move forward by examining more directly the concern for arbitrariness. Once we do, we can begin to resolve the conventional puzzles of constitutional and administrative law that the majoritarian models cannot explain. Furthermore, we position ourselves to see the outlines of a new theory of the administrative state. The absence of precise contours prevents the theory from assuming, for now, the status of a full-fledged model. Nor is it certain how exactly this model will blend the prevention of administrative arbitrariness with the promotion of political accountability.

Two general lessons are certain, however. First, the new theory will require some new administrative law principles—such as a requirement that agencies supply the standards that guide and limit their discretion, and a requirement that they do so generally through notice-and-comment rulemaking in advance of applying those standards to particular facts. Since the ascendancy of the majoritarian paradigm in administrative law, these requirements have seemed illogical or ill-advised. But they are neither when viewed through the alternative paradigm of arbitrariness. That is not to claim that these requirements are without costs, for example to agency flexibility. Rather, it is to contend that they are worth the price if the return is agency legitimacy.

Second, the new theory will rely more than ever on "ordinary" administrative law principles. For some time, reliance on "ordinary"

administrative law to *legitimate* (as opposed to proceduralize or rationalize) administrative power has seemed incomprehensible. Many have viewed administrative law principles either as authorizing court intervention or agency self-help, neither of which seemed justified or useful. It is now possible to see this perception as just the type of majoritarian thinking that we must move beyond. Others have viewed administrative law as inferior to constitutional law, as addressing none of the "big" questions of agency legitimacy. It is now possible to see this perception as simply wrong. It rests on a false dichotomy between the quantity and quality of administrative policymaking authority. More specifically, it considers separately the delegation question (i.e., how much authority Congress may grant to agencies), which is a question for "constitutional" administrative law, and the exercise question (i.e., how may agencies exercise the power they receive from Congress), which is a question for "ordinary" administrative law. For purposes of legitimating the administrative state, the questions are intertwined. Agencies legitimately possess only so much authority as Congress grants them *and* as they exercise consistent with principles of fairness, rationality, and predictability. "Ordinary" administrative law, whatever else it accomplishes, tends to ensure that agencies act consistently with the broad public purposes of the statutes they implement and in other ways that promote good government.