CAN THE ADMINISTRATIVE STATE BE TAMED?

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Introduction

American administrative law, according to Philip Hamburger, is not law at all, but rather an elaborate evasion of law—of our foundation law, the Constitution, which specifies that laws are to be written by Congress and which intended thereby to prevent lawmaking by executive prerogative.[1]

But administrative law is nonetheless positive law, with highly developed procedures, precedents, doctrines, and institutions for crafting and enforcing its commands. Indeed it has come to operate as a sort of shadow constitution, channeling the actions of Article I legislators, Article II executive officials, and Article III judges and calibrating the balance of power among the three branches. And it is a central field of federal law and policy that powerfully affects the actions and expectations of millions of citizens, businesses, and organizations.

This paper is written in a reformist spirit. It takes the view that administrative law is problematic not just as a constitutional matter but also as a practical matter—that it is seriously imposing on private rights and freedoms and impeding the vitality of our government and political, legal, and economic systems. The paper does not, however, promulgate a program for reform. Rather, it aims to clarify the nature of administrative law and the causes of its growth at the expense of other forms of law and policy, and to apply that understanding to evaluating the strengths and shortcomings of reform ideas that are already on the table.

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[1] *Is Administrative Law Unlawful?* (2014).

Background

Agencies of the executive branch write, issue, and enforce many kinds of rules under authority of statutes passed by Congress. Many rules concern the agencies' own operations, such as those governing civilian and military personnel, the procurement of goods and services, the management of parks and prisons, and the administration of border controls and immigration policies. Others set forth the terms of grants and other payments to state and local governments and to private business corporations, organizations, and individuals. The agencies operate their own programs for adjudicating disputes under these rules, from immigration to Social Security disability benefits, usually with rights of appeal to independent, Article III courts.

Another category is rules that impose obligations and confer benefits on firms, organizations, and individuals in their private capacities, independently of any contractual, employment, or beneficiary relationship they may have with the government. It is rules of this sort that constitute the administrative law examined in this paper—the domain customarily described as "government regulation." Regulation includes the writing of rules—"rulemaking," our primary focus here—and several ancillary and additional activities: the policing and enforcement of rules by the agencies that wrote them, by courts, and sometimes by private parties; agency adjudication of disputes under their own rules and under statutory law; the granting of licenses and permits for regulated activities such as operating radio stations and marketing pharmaceutical drugs; and the issuance of "guidance documents" and "interpretative rules" that do not have the legal authority of formal rules but nevertheless affect the actions of private parties subject to the issuing agency's authority.

Administrative law is governed by the Administrative Procedure Act of 1946 (APA), by numerous "organic" statutes establishing individual regulatory programs (such as the Clean Air Act for the Environmental Protection Agency (EPA) and the Securities and Exchange Act for the Securities and Exchange Commission (SEC)), and by court decisions interpreting these statutes. In general: (a) the APA establishes *procedures* for agency decision-making and defines the *discretion* of agencies in making decisions and of courts in reviewing challenged decisions; (b) the

organic statutes establish *policies* and *standards* for agency decision-making, and, often, *procedures* that supplant those of the APA for particular decisions under those statutes; and (c) the courts, in reviewing challenges to agency procedures and decisions in discrete cases, create precedents with lives of their own. But the APA is the foundation stone of the administrative state. It set the terms for executive agencies to legitimately combine Article II management and law-enforcement functions with Article I legislative functions and Article III dispute-resolution functions, and it has governed the evolution of that combination for sixty-nine years.

The APA resolved debates that had flared during the 1930s and been interrupted by World War II. The New Deal had established many new regulatory agencies such as the SEC, Federal Power Commission (FPC), Federal Communications Commission (FCC), and Civil Aeronautics Board (CAB). Beginning in 1937, the Supreme Court had relaxed or abandoned constitutional doctrines that previously restrained the scope of federal economic intervention—making it clear that New Deal activism was here to stay. But much of the action was in the agencies and was highly informal and extemporaneous. What procedures should agencies follow in issuing and enforcing policies and deciding individual disputes? How much discretion should they possess, and how much "due process" should they afford regulated parties? To what extent should agency decisions be subject to judicial review? These questions produced several political and institutional divisions—between congressional leaders and the Roosevelt and Truman administrations over legislative versus executive prerogatives, between lawyers (often represented by the American Bar Association) and the agencies over the need for trial-like procedures, and between advocates and opponents of greater federal regulation of the economy over questions of agency discretion and judicial review.

After the war, the APA resolved the questions essentially as follows:

- In making decisions affecting the interests of specific parties (e.g., granting or denying licenses or permits, imposing price or service controls, and settling disputes among parties), agencies would generally follow trial-like "formal adjudication" procedures featuring live testimony, cross-examination, and advoca-

cy and findings of fact, but much looser evidentiary standards than those of judicial trials. Hearings would be conducted by hearing officers (later renamed "administrative law judges") who were employees of the agencies, with appeal to agency heads or commissions. Final decisions would be subject to judicial review for fidelity to the APA procedures and the terms of the pertinent organic statutes—challenged decisions had to be supported by "substantial evidence" on the "whole record."

- In issuing rules that applied broadly to many parties, agencies would follow legislation-like "informal rulemaking" procedures, also called "notice-and-comment rulemaking." Agencies would first issue a notice of proposed rulemaking summarizing their proposals and the statutory authority for them, then allow time for the submission of written comments and consideration of those comments, and then issue a final rule along with a "concise general statement of [its] basis and purpose." Rules would be subject to judicial review under a more capacious standard than adjudications—challenged rules could be set aside if they were "arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law."

The APA also countenanced intermediate procedures such as "informal adjudication" and "formal rulemaking"; and over the years many organic statutes would lay down program-specific hybrids of their own. But these are details for purposes of this paper. The great innovation was informal rulemaking, which was unrecognized at the time but came to dominate administrative law and propel the growth of the regulatory state. Here the agencies were free of the costs and constraints of evidentiary hearings and findings of fact and could make law *administratively*, subject only to the requirements of public notice, consideration of submitted comments, and a statement of the rationale for final rules.

The great watershed came in 1970. When the APA was enacted in 1946 and for the next quarter century, federal regulation consisted mainly of the New Deal and Progressive inheritance of "economic regulation": licensing, permitting, and price and service controls in public utility and common carrier industries (transportation, communications, and power) and in banking and finance. These programs proceeded almost entirely

through live evidentiary hearings and enforcement actions involving one or a few firms[2]; in the agencies and courts, administrative law consisted mainly of interpreting and applying the adjudication provisions of the APA and the organic statutes, and there was little regulatory growth. There is essentially no judicial case law on informal rulemaking before the late 1960s, when some of the agencies began to use rulemaking to settle generic issues that arose repeatedly in licensing cases.

Then, beginning in 1970, Congress began chartering new programs of "social regulation" that set health, safety, environmental, and anti-discrimination standards for the entire economy or broad sectors such as power generation, heavy industry, motor vehicles and other consumer products, and higher education. The EPA, National Highway Traffic Safety Administration (NHTSA), and Occupational Safety and Health Administration (OSHA) relied primarily on APA informal rulemaking to establish their standards, and demonstrated its potency. Soon, old-line economic regulators such as the Interstate Commerce Commission (ICC), FPC, and FCC began to shift to informal rulemaking, not just as an adjunct to but as a substitute for adjudicating individual disputes—even for setting prices, which had long been assumed to require evidentiary hearings and findings of fact. And the courts acquiesced.

Thus was born the modern era of efficient, high-volume, high-impact regulation, where agencies, following notice and comment, could issue rules with compliance costs of scores or hundreds of millions of dollars per year and did so in profusion. Administrative law was transformed beyond anything that the architects of the New Deal and APA had or could have foreseen. And it began to grow mightily in sheer volume, by the crude measure of pages of regulatory notices and final regulations. As illustrated on the chart appended to this paper, pages of rules and notices spiked dramatically upward in the early 1970s. In the decade following 1970, the *Code of Federal Regulations* (containing final rules) doubled in length and the average annual length of the *Federal Register* (containing regulatory notices and decisions) tripled over that of the previous decade.

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[2] As did the distinctive programs of the Federal Trade Commission (FTC), Food and Drug Administration (FDA), and National Labor Relations Board (NLRB).

That was not the last watershed—another would come in the years surrounding the financial collapse of 2008. We will first consider the major debates and developments during administrative law's formative period (1946–1970) and growth period (1970–2008), then turn to the current, post-2008 period of "the executive unbound."

The Administrative Law Debates through 2008

The rise of the administrative state was accompanied by persistent, wide-ranging debates over its legitimacy, procedures, and consequences. The debates engaged judges, lawyers, executive officials, legislators, academics, business interests, and policy activists on various discrete questions. But they had two big things in common. First, they were instigated by efforts to reconcile administrative law to "rule of law" values as traditionally understood—that is, to make it politically accountable, observant of constitutional and legal norms, and devoted to the public welfare rather than to parochial causes and interests. Second, the rule-of-law efforts, while not entirely without consequence, largely failed. They were not defeated on the merits but rather were overwhelmed by the dynamics of government growth through legislative delegation and managerial lawmaking. In place of traditional rule-of-law norms, Congress and the courts decreed policies of transparency and "reasoned decision-making." Under the new dispensation, executive agencies possessed wide policy discretion as a legal matter—but as the price of that discretion were obliged to be open, democratic, porous to outside influence, and rational or at least rationalistic in explaining their intentions and decisions. Administrative law became discretionary, cumbersome, servile, and litigious; the amalgam had its own internal logic and demonstrated tremendous institutional momentum.

Delegation and the Constitution. The debates over the constitutional legitimacy of administrative law centered on the "nondelegation doctrine," derived from the Constitution's basic structure of separated federal powers. The doctrine holds that, because the Constitution assigns "all legislative powers" to Congress, Congress may not delegate legislative power to the executive branch. Congress may, actually must, afford executive officials such discretion as is reasonably necessary to execute

and enforce the policies it has enacted by statute. But not more: policy choices are the responsibility of elected representatives, and may not be assigned to others (not even to the president himself, who is also elected but as an executive and head of state rather than as a lawmaker).

There is a standard synopsis of the nondelegation doctrine that portrays it as one of the casualties of the Supreme Court's 1937 capitulation to New Deal economic interventionism, along with other constitutional doctrines that had restricted Congress's ability to regulate interstate commerce and restrict economic liberties. By this account, nondelegation was articulated in Court opinions going back to Justice John Marshall, and was summarized in the 1927 case of *J.W. Hampton v. United States*[3] as requiring that Congress must provide "intelligible principles" to guide the decisions of executive officials. The doctrine had never overturned a law or executive action on constitutional grounds—but Congress had never before delegated policymaking so expansively as it did under the New Deal. In the event, nondelegation was a one-year, two-case phenomenon, applied to invalidate provisions of the National Recovery Act in *Panama Refining v. Ryan*[4] and *Schechter Poultry v. United States*[5] in 1935.[6] But those decisions prompted angry political reactions and their rationales were soon abandoned. Foreverafter (the standard account goes), the Court unfailingly approved congressional delegations, even under vague, open-ended statutory standards such as that agency decisions promote "the public interest" and "fair and equitable" commercial arrangements, and that agency rules be "reasonably necessary to provide safe or healthful places of employment," or "requisite to protect the public health with an adequate margin of safety."

But this account is misleading. It glosses over the slower moving political dynamics of the nondelegation doctrine's decline, which reached

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[3] 276 U.S. 394 (1927).

[4] 293 U.S. 388 (1935).

[5] 295 U.S. 495 (1935).

[6] The following year, the Supreme Court also found that provisions of the Bituminous Coal Conservation Act of 1935 amounted to an unconstitutional delegation of legislative power, but that finding was subsumed in the Court's holding, under the commerce clause, that Congress itself lacked the power asserted in the statute. *Carter v. Carter Coal Company*, 298 U.S. 238 (1936).

their denouement only with the emergence of informal rulemaking. *Schechter* was not a last gasp of the judicial old guard before progressive justices rescued the New Deal. It was a unanimous decision, underscored by progressive Justice Cardozo's famous "delegation run riot" concurrence. The case involved commercial codes adopted under procedures that did not come close to those later required by the APA. The Court noted the lack of any familiar administrative procedure in establishing the codes, which regulated prices, wages, and sales practices in the poultry business; it might have gone on to note that the codes had been drawn up at the government's request by an industry group that emphatically did not include small kosher poultry merchants such as the Schechters.) And the decision was not even implicitly overruled by the pre-APA cases that followed. The 1943 *NBC v. United States*[7] decision, often cited for nondelegation's speedy demise, was a *licensing* case—and regulatory commissions had by then been granting and denying licenses and permits to specific firms under a "public interest, convenience, and necessity" standard for more than a half-century without constitutional difficulty. Later pre-APA Supreme Court cases involved either wartime price controls, which the Court would not have dared interfere with, or adjudicatory proceedings involving one or a few parties, not unlike Article III civil trials under general statutory or common law standards; and indeed all of the Court's nondelegation cases before the 1970s were of this sort.

The radical departure, from constitutionally approved judging and licensing to constitutionally approved legislating, came not from the 1937 switch-in-time but rather from the appearance of large-scale informal rulemaking in the 1970s. Here the agencies were free of the procedural constraints of courts and, increasingly, even of legislatures—the Progressive and New Deal regulatory commissions were mini-legislatures with proportional representation, but most of the new agencies, such as the EPA, were hierarchies reporting to a single head. Yet they made decisions with broader effect than those of courts, and they used notice-and-comment procedures to build public and interest-group support in the manner of legislative politics. And they often did so under congressional

[7] 319 U.S. 190 (1943).

standards hardly more specific that the old "public interest" licensing statutes.

The nondelegation doctrine shadowed the early years of the rulemaking revolution. In 1970, the ICC tried its hand at informal rulemaking to set rates charged among railroads for use of each others' freight cars; the Supreme Court went along in *United States v. Florida East Coast Ry.*,[8] but over the vigorous dissent of another famous progressive, Justice Douglas, who had been a New Dealer and SEC chairman. *Florida East Coast* was not formally a nondelegation case, but Douglas clearly believed that, for something as inherently discretionary as setting prices, agencies must conduct live evidentiary hearings rather than canvas for memos. A year later, he spoke for the Court in rejecting an even more problematic form of agency price setting—FCC and FPC *taxes* on broad categories of firms based on a statutory "public policy or interest served" standard.[9] Citing *Schechter* for the proposition that such a broad delegation would raise constitutional difficulties, the Court held that the agencies must confine themselves to targeted user fees under a narrower "value to the recipient" standard in the same statute. Taxation, Justice Douglas wrote, is inherently arbitrary and political—and the difference between legislation and regulation is that Congress may act in this manner but agencies may not. The distinction did not last: Congress continued to encourage agencies to set broad-based, politically contrived taxes, and in 1989 the Court unanimously approved.[10]

When the big new programs of social regulation got into gear, matters became more complicated but with the same result. The Supreme Court's 1980 *Benzene* decision[11] concerned one of a burgeoning number—then scores, now hundreds—of OSHA standards for occupational exposure to various hazardous substances. The case generated five opinions running to a total of more than 40,000 words, whose net effect was to invalidate the

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[8] 410 U.S. 224 (1973).

[9] In the companion cases *National Cable Television Assn. v. United States,* 414 U.S. 336, and *FPC v. New England Power Company* 414 U.S. 345 (1974).

[10] In *Skinner v. Mid-American Pipeline Co.,* 490 U.S. 212 (1989).

[11] *Industrial Union Dep't., AFL-CIO v. American Petroleum Inst.,* 448 U.S. 607 (1980).

benzene standard and send it back to OSHA with a recipe for avoiding nondelegation problems.

The justices were construing a statute whose criteria for OSHA standards included "reasonably necessary or appropriate to provide safe or healthful employment" and "most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity." The challenged rule had reduced permitted ambient benzene levels from 10 parts per million down to 1 ppm—based on strong evidence of health risks at exposures greater than 10 ppm, but a mere assumption that reducing exposure from 10 to 1 ppm would be healthier. That, said the government, was good enough: the statute gave OSHA discretion to tighten exposure limits without demonstrating incremental health benefits or bothering with incremental compliance costs beyond their "feasibility."

Justice Rehnquist's concurring opinion agreed that the statute gave OSHA such discretion—and concluded that it was therefore an unconstitutional delegation of legislative authority. The deciding, four-justice opinion saw the problem and employed Justice Douglas's approach in the 1974 tax cases: to save the statute from possible unconstitutionality under *Schechter* and *Panama Refining*, it devised an imaginative interpretation that required OSHA to make a finding of "significant risk" supported by "substantial evidence" before tightening an exposure standard.

That was not a difficult hurdle for OSHA to surmount, especially considering where it led: to a path of administrative lawmaking that was at once highly discretionary and constitutionally secure. The path was further cleared a year later, in the *Cotton Dust* decision[12] (20,000 words), where the Court held that "to the extent feasible" did not require OSHA to balance the health benefits and economic costs of a tightened exposure standard, but simply to determine that the tighter standard was capable of being achieved. (Justice Rehnquist, now jointed by Chief Justice Berger, dissented, reiterating his nondelegation argument.) And OSHA easily vaulted the "significant risk" requirement for benzene, although it took several years to complete the job: in 1987 it reissued essentially the same standard that had been rejected in the *Benzene* case, but this time with

[12] *American Textile Manuf. Inst. v. Donovan,* 452 U.S. 490 (1981).

some updated health evidence and a mathematical model that extrapolated high levels of exposure down into the 10–1 ppm range.[13] There was substantial evidence in the record both for and against significant health risks at these levels; that was enough.

It seems strange that a "significant risk" test should govern the constitutionality of Congress's delegating lawmaking power with a confusing, Janus-faced statute. Health, safety, and environmental rulemakings feature mounds of often-incommensurable public health data and statistical analyses and sharply conflicting expert interpretations. Large uncertainties invariably remain, especially when one is considering the risks of extremely low exposure (often approaching background levels) where little direct experience exists. In these circumstances, agencies have wide latitude to selectively emphasize data, analyses, and uncertainties that justify their decisions. Judicial review of whether OSHA has found substantial evidence of a significant risk is not an effective means of policing the boundary between the legislative and executive powers.

But what was the alternative? By 1980, a decade into the rulemaking revolution, health, safety, and environmental regulation had become a major component of Washington policymaking, operating under statutes that had passed Congress by large majorities. Its rules were already deeply embedded in the operations of many critical industries. Holding key provisions of the OSHA statute unconstitutional would have also undone the Clean Air Act and many other organic statutes that were the foundations of the EPA, NHTSA, the Department of Energy, and other agencies. This would have been more politically disruptive and institutionally risky than the Court's pre-1937 New Deal decisions. Four dissenters in *Benzene* were happy with unbounded legislative delegation; the other five were not, but four of them were content with a boundary that was, as a practical matter, admonitory.

What was most impressive about the *Benzene* and *Cotton Dust* opinions was not their formal reasoning but rather their sheer length, complexity, and exasperation in the search for a useful judicial role in a field dominated by technical and administrative considerations. Judicial

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[13] U.S. Department of Labor, Occupational Safety and Health Administration, Occupational Exposure to Benzene: Final Rule. 53 *Fed. Reg.* 34460 (Sept. 11, 1987).

acquiescence in broad congressional delegation and agency lawmaking-by-rulemaking was surely animated in considerable degree by this sense of judicial incapacity. And a vivid portrait of the source of the problem came in Justice Rehnquist's *Benzene* concurrence, with its detailed account of the legislative history of the OSHA statute. Congress was clearly going to establish a new agency to promote occupational health and safety through rules and standards, but key legislators were at odds over criteria for agency standard-setting. Rather than compromising among preferences for more- and less-stringent criteria, they threw all of them in—combining an absolute-sounding, no-employee-left-behind goal with several prudential qualifications, to indeterminate effect. That gave every member something to crow about and left the actual policymaking to the new agency.

After *Benzene* and *Cotton Dust*, the nondelegation doctrine was effectively dead for thirty-four years, forcefully rejected every time it arose in the Supreme Court and not even invoked as a reason to read a broad statute narrowly. Only a single justice in a single case would have held a delegation unconstitutional—Justice Scalia, dissenting in *Mistretta v. United States*,[14] which approved Congress's creation of an independent commission to write sentencing guidelines for federal crimes that judges would ordinarily be required to follow. But then, twelve years later, Justice Scalia wrote for a unanimous Court, in *Whitman v. American Trucking Ass'ns.*,[15] rejecting a nondelegation challenge to EPA's setting national air quality standards "the attainment and maintenance of which in the judgment of the Administrator, … allowing an adequate margin of safety, are requisite to protect the public health." It was only in 2014, when the next and more aggressive round of executive aggrandizement was in full flush, that intimations of a living nondelegation doctrine reappeared, as we will see.

Legal requisites. The debates over administrative procedure were similar in purpose and result to those over constitutional legitimacy, but were more dynamic and revealing of the political forces at work. From the earliest years of the APA down to the present, the statute has been the

[14] 488 U.S.361 (1989).

[15] 531 U.S. 457 (2001).

subject of numerous reform proposals from academic and practicing lawyers, American Bar Association and other professional bodies, and good-government groups (beginning with the 1955 Hoover Commission). The consistent theme has been to make administrative law more like traditional law and less like modern administration. In the 1950s and 1960s, the proposals were to make then-dominant APA (and organic statute) adjudication more court-like, with higher evidentiary standards and greater functional separation between agency proponents on the one hand and decision-makers (hearing officers and administrative law judges) on the other; these proposals have continued down to the present. Since the rise of informal rulemaking in the 1970s, a second wave of proposed reforms aimed to make rulemaking more formal and adversarial, to move major regulatory decisions from rulemaking to adjudication, and to narrow agency discretion through more specific criteria for standard-setting in the organic statutes or an overarching cost-benefit standard in the APA.

None of these legal formalizing proposals has been enacted, with the exception of a 1976 APA amendment barring *ex parte* communications in then-receding formal evidentiary proceedings.[16] Instead, Congress has moved in the opposite direction, preserving the Act's informal rulemaking provisions and expanding their reach, consistently and powerfully, through highly discretionary laws such as the OSHA and EPA organic statutes and many others. As it fostered the growth of executive authority, Congress mediated that authority not with legal procedure but rather with political and media exposure. Here are the major amendments to the original APA:

- The Freedom of Information Act, generally requiring disclosure of government documents or information on request (first enacted in 1966 and since expanded several times by statute and executive order, but also limited in some cases involving foreign intelligence and criminal investigations).
- The Federal Advisory Committee Act, requiring that advisory groups be "fairly balanced" in their membership and that their

[16] William H. Allen, "The Durability of the Administrative Procedure Act," 72 *Virginia Law Review* 235 (1986).

meetings ordinarily be open to the public with advance notice (1972—not technically an APA amendment but codified as an appendix to it).

- The Privacy Act, governing the collection and use of personally identifiable information about individuals and requiring the disclosure of data bases containing such information (1974)
- The Government in the Sunshine Act, requiring (with exceptions) that "every portion of every meeting of an agency shall be open to public observation" (1976).
- The elimination of sovereign immunity in cases against the government seeking other than money damages (1976, anticipated by several court decisions).
- The Regulatory Flexibility Act, requiring that agencies analyze the impact of their rules on small businesses and non-profit associations and seek "less burdensome alternatives" for them (1980, since expanded several times).
- The Negotiated Rulemaking Act, establishing procedures for agencies to convene committees of interested parties (e.g., labor and management representatives for OSHA rules, industry and environmental groups for EPA rules) to negotiate the terms of rules on particular subjects (1996).

The immediate political motivations of these statutes varied, but their import was the same: to make administrative lawmaking less cloistered, more transparent, and more porous to publicity and organized influence. Executive lawmaking was to be discretionary but democratic and, in a loose and unstructured way, politically accountable. It was to be a regime of ad hoc, non-electoral administrative democracy.

The judiciary's response was strikingly similar to Congress's: courts afforded wide policy discretion to regulators conditioned on their being transparent and responsive. Indeed the parallel went further: just as Congress had delegated essential legislative tasks to executive agencies, so the courts delegated their essential judicial task of statutory interpretation. The judiciary as well as the legislature adapted to the management needs and political momentum of executive lawmaking.

At first it looked as if the courts might move in the opposite direction—just as when, in the 1950s, the ABA and other influential groups began importuning Congress to impose greater legal formality on the agencies. Beginning in the early 1970s, the Court of Appeals for the District of Columbia Circuit (which hears most and the most important administrative law appeals) issued a series of extraordinary decisions opining or deciding that agencies sometimes needed to provide opportunities for live oral testimony and cross-examination, even in proceedings under the APA's informal rulemaking provisions or similar ones in organic statutes. The D.C. Circuit judges were not legal formalists, as their own extemporizing made clear. They were rather liberal progressives, concerned that the agencies were promoting corporate interests at the expense of consumer interests, and especially (as the EPA rulemaking machinery geared up) at the expense of environmental values; they wanted to break up agency-business alliances by opening proceedings to representatives of more diffuse environmental and consumer interests. The means they used were those at hand in their legal toolkit—formal adversarial procedures. And they spoke in terms that were not only apolitical but perfectly apt to the deficiencies of informal rulemaking in deciding contentious policy questions: in terms of fairness to all parties, of genuine dialogue rather than bureaucratic artifice, of plumbing technically complex issues to produce a decision and record that a reviewing court (and others) could understand to be other than arbitrary.

In its 1978 *Vermont Yankee* decision,[17] the Supreme Court stuck down the D.C. Circuit's project in a blistering opinion. Congress, the Court declared, had determined in the APA and organic statutes which legal procedures were appropriate to which kinds of agency action. Congress's procedures were not minimums that courts were free to supplement from case to case according to their own, Monday-morning estimates of whether those procedures had turned out to be fair and thorough. If additional procedures were appropriate in particular circumstances, that was for the agencies to decide. The courts' role was to judge whether the

[17] *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519 (1978). The classic study of the case and its antecedents is Antonin Scalia, "Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court," 1978 *Supreme Court Review* 345.

agencies' decisions met Congress's standards of judicial review—in the case at hand, whether the rulemaking decision (of the Nuclear Regulatory Commission (NRC)) was or was not arbitrary and capricious.

In subsequent decisions, the Supreme Court, and eventually the D.C. Circuit, afforded progressively greater deference to agency decisions on matters not only of procedure but also of fact, policy, and, most strikingly, law. That deference was not unconditional, as we have noted and will examine further. But first we will look at the famous *Chevron* doctrine that requires courts to defer to reasonable agency interpretations of indeterminate statutory provisions. Appellate courts emphatically do not defer to the statutory interpretations of trail courts or prosecutors; that they should do so for regulatory agencies is a dramatic instance of rule-of-law traditions giving way to the dynamics of the administrative state.

Much has been made of *Chevron*'s apparently off-hand genesis and subsequent evolution into today's complex, iconic doctrine. What deserves more attention is the institutional circumstances of the case itself, *Chevron U.S.A. v. National Resources Defense Council*.[18] The question before EPA—and, until the Supreme Court spoke, before appellate courts—was whether an entire factory, rather than its individual components, could be considered a pollution "source" under the Clean Air Act's strict "nonattainment" provisions. But this was only incidentally a question of statutory interpretation (the statute and legislative history had nothing to say on the matter). Nor, despite the case's caption, was it a struggle between industry and environmentalists over strict versus lenient pollution control. It was instead an earnest policy question pitting the proponents of "command and control" regulation (which had included the leadership of the Democratic EPA that had been retired in the 1980 presidential election) against the proponents of "regulatory reform" and "economic incentives" (including the newly installed Republican EPA). EPA's economic reformers argued that permitting a factory to be refurbished and modernized within a total emissions cap for the entire factory would result not only in lower abatement costs but also in greater and more rapid pollution reduction. They might have been right or wrong (we have since learned that they were right), but they were certainly not

[18] 467 U.S. 837 (1984).

trying to undermine the Clean Air Act's purposes or short-circuit the agency's regulatory apparatus for the selfish benefit of industry.

The traditional approach of appellate review, and the one clearly prescribed by the text of the APA (and followed by the D.C. Circuit in the case), would have been for a court to conduct a de novo assessment of the statutory question and render its own decision whether "source" did or did not embraced an entire factory. But that, in the circumstances of the case, would hardly been a triumph for the rule of law. It would have meant deciding a policy and political question in the guise of a legal question, and thereby enshrining one policy choice in law so as to restrict future developments based on accumulated experience or changing EPA political leadership and executive branch dynamics. Given that the legal question was a coin toss, the Court would have been acting, willy-nilly, as an über executive.

The *Chevron* doctrine has been debated at length in traditional legal terms. But what stands out in the text of the *Chevron* line of environmental, health, and safety rulemaking cases—in parallel with the *Benzene* and other nondelegation cases in this area of regulation—is the paucity of law that a court could effectively act on. The sprawling records combine suggestive data with discursive discussion, typically adding up to qualified judgments and rhetorical assertions rather than findings of fact. The final rules were obviously written with an eye on the statutes and judicial precedents (in the idiom of agency lawyers, to be "appeal proof"), yet just as obviously were the product of internal, off-record agency and executive branch deliberations and efforts to navigate the positions of politically influential interest groups. In such cases, issues of law, such as they are, are entwined with and dominated by unarticulated issues of management, judgment, and politics; moreover the final rules, in whatever shape the courts leave them in, will have their effects only as one component of management, enforcement, and political decisions.

Chevron is best understood as a special form of the political questions doctrine—as a doctrine not of law but of political deference and institutional prudence. Some of that deference is to Congress, which could overrule a court's statutory interpretation only with another statute but may overrule an agency's interpretation more easily, with hearings and

informal pressures. Mostly it is deference to the reality of executive government and the fusion of lawmaking and administration.

But that deference, along with deference regarding legal procedures and policy substance, comes with a critical qualification. As the price of broad discretion, agencies must observe democratic norms. First, they must explain their intentions, attend carefully to the arguments pressed on them, and justify their decisions (including their evaluations of submitted comments and evidence) with great particularity. Under every formulation of standards of judicial review since the early 1970s, in hundreds of decisions and in the face of many shifts and inconsistencies on other questions, courts have required agencies to go far beyond the APA's "concise general statement of [a final rule's] basis and purpose." In part this is simply because rules based on abstract, technically complex information place greater demands on judicial review of any sort. The choice of an environmental standard of 1 versus 10 ppm requires, and permits, more detailed rationalization than the award of a television license.

There is, however, a broader, more political reason for the necessity for greater explanation. Regulation has become not only more technical but also more consequential, and of greater interest to more variegated constituencies and to the public at large. A concise general statement is fine for a relatively narrow and uncontroversial rule of interest to only a few knowledgeable insiders. But many of today's rules are legislative in their sweep and public importance. They are political acts in a way that adjudicatory decisions and narrow rules are not.

The essence of representative legislation is unprincipled compromise among conflicting interests and values—elected legislators may and indeed must act arbitrarily, and with as much or as little explanation as they please, as emphasized by Justice Douglas in *National Cable Television*. Those prerogatives do not extend to regulatory officials. They have come to exercise legislative authority as agents and on grounds of specialization (the opposite of representation) and putative expertise. So they may not act arbitrarily (which is a higher duty than the APA's duty not to be "arbitrary *and* capricious"), and they must provide detailed explanations of what they are doing for the inspection of Congress, participating parties, reviewing courts, and the general public.

By this account, the increasing length and deliberativeness of rule-making proceedings and decisions has been not only a matter of satisfying courts that APA and other statutory requirements have been met, but also a matter of maintaining political legitimacy. Highly discretionary executive branch lawmaking is a departure from America's constitutional traditions and norms of democratic accountability, and has arisen at a time when our politics has become more populist, participatory, and distrustful of government authority. In this environment, notice-and-comment procedures and elaborate explanations of decisions serve political as well as legal functions: the former to build public support and assemble effective coalitions (just as legislators use hearings and negotiations for these purposes), the later to demonstrate that decisions have been knowledgeable, responsible, and public spirited (in substitute for the legislator's electoral sanction). Woodrow Wilson's government administrator was presumed to be expert and disinterested; today's government administrator must demonstrate that he is.

A related cause of highly rationalized explanation is the institution of regular White House review of proposed and final rules, which has included an explicit cost-benefit test for major regulations since 1981. Here the agencies are reporting to the executive branch's sole elected official. From the beginning and down to the present, the cost-benefit requirement has been justified not only as a means of facilitating presidential oversight but also of promoting regulatory transparency and participation and countering agency parochialism.[19]

Now the courts, unlike the president, are not responsible for the democratic bona fides of regulatory agencies. They have, however, presided over and accommodated the growth of executive government, and thereby acquired an interest in its good reputation. Not infrequently, courts seem to care not only whether agencies have provided minimally coherent, legally sufficient explanations of their decisions, but also whether they are pursuing their statutory missions—the aspirations set

[19] As emphasized by early and recent administrators of the Office of Information and Regulatory Affairs which oversees the regulatory review program: Christopher DeMuth and Douglas H. Ginsburg, "White House Review of Agency Rulemaking," 99 *Harvard Law Review* 1075 (March 1986); Cass R. Sunstein, *Valuing Life: Humanizing the Regulatory State* (2014).

forth in the preambles to their organic statutes—conscientiously. This is a plausible explanation of some (not all) otherwise anomalous cases where the Supreme Court and D.C. Circuit have asserted themselves vigorously against agencies' statutory interpretations and policy decisions.

To illustrate: *Vermont Yankee* had concerned a Nuclear Regulatory Commission rule grading the environmental risks of nuclear fuel disposal for use in licensing power plants; the commission had judged the risks minuscule but offered only cursory explanation (it essentially said that the problem of containing radioactive waste was solvable). That case was about procedures, but when the NRC subsequently adopted a nearly identical rule with scarcely more explanation, the D.C. Circuit held the rule arbitrary and capricious in its own terms—and the Supreme Court reversed again, upholding the NRC unanimously.[20] Then, just a few months later, the justices took a strikingly different tack in *State Farm*,[21] concerned with the National Highway Traffic Safety Administration's rescission of a rule requiring automobiles to be equipped with "passive restraints" for protecting occupants in crashes—either airbags or automatic seatbelts. The required seatbelts fastened automatically but were detachable for reasons of safety and convenience; the airbags were not detachable, and appeared from the record to be highly effective, but they were much more costly. NHTSA's explained that it had concluded that manufacturers would largely opt for the less costly and more familiar seatbelts, but that many drivers would detach the devices, so that the rule's safety benefits would be much less than it had previously supposed and not worth the bother. Four justices thought NHTSA's seatbelt explanation was adequate—but all nine agreed that it had been arbitrary and capricious to jettison the airbag mandate at the same time, without explaining why it hadn't chosen an airbags-only rule.

NHTSA's explanation had been even thinner than the NRC's, but not by much. The decisive difference, I maintain, was that the NRC's statutory mission was to advance nuclear power, while NHTSA's mission was to advance automobile safety. In *Vermont Yankee* the Court had gone out of

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[20] *Baltimore Gas & Electric Co. v. National Resources Defense Council*, 462 U.S.87 (1983).

[21] *Motor Vehicle Manufacturers Ass'n. v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29 (1983).

its way to note that "[n]uclear energy may some day be a cheap, safe source of power or it may not. But Congress has made a choice to at least try nuclear energy, establishing a reasonable review process in which courts are to play only a limited role."[22] In contrast, the Court began its *State Farm* opinion by noting that Congress had found that highway deaths and injuries were unacceptably high and that a large part of the solution lay in improving vehicle design and safety features—and had created NHTSA to pursue such improvements. In the rulemaking decisions before the Court, the NRC had been pursuing its mission but NHTSA had not—it appeared to be backing off. Perhaps reversing course on airbags was a sensible decision under the statutory requirements that safety standards be "reasonable, practicable, and appropriate" and based on "relevant available motor vehicle safety data." But, if so, NHTSA needed to explain why in terms of the evidence in the record. It had withdrawn the most important safety requirement in its history, and one that had been a central, hotly contested issue in auto safety debate for more than a decade, without a word of explanation.

This account of differential judicial deference has a political cast, but it does not assert or assume that judges are partisan, biased, or "results oriented." NHTSA's passive restraint rule had been issued during the Jimmy Carter administration and rescinded early in the administration of Ronald Reagan—who had been an outspoken opponent of mandatory airbags as an egregious example of nanny-state overregulation. But the concurring opinion in *State Farm* emphasized that a change in administrations was a "perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations," and nothing in the Court's decision suggested otherwise. As if to underscore the point, *Chevron*, decided the following year, approved another Reagan regulatory initiative (candidate Reagan had also been a firm critic of the EPA) in terms that set a new standard for judicial difference. But in that case EPA had explained what it was up to in terms of effective pursuit of its pollution-control mission; the explanation was debatable but certainly not arbitrary and capricious. Taken together, the foundational decisions of judicial review of safety and environmental rulemaking—*Vermont*

[22] *Supra*, note 17, at 557.

Yankee/Baltimore Gas, *State Farm*, and *Chevron*—say that an agency's lawmaking latitude is a function of its demonstrating fidelity to the purposes Congress has assigned to it.

Mission-contingent deference was dramatically on display in the Supreme Court's plunge into the thicket of regulatory politics in its two recent greenhouse gas decisions, *Massachusetts v. EPA*[23] and *Utility Air Regulatory Group v. EPA*.[24] In the first case, the Court ran roughshod over *Chevron* and other administrative law doctrines (foremost including standing and reviewability) to compel EPA to seriously consider the importunings of several states that it regulate greenhouse gas emissions under the Clean Air Act. In the second, it was faced with the agency's practical inability to do so (as EPA had warned in the first case) without radically revising unambiguous statutory provisions. For instance, the Act defines "major sources" as those emitting more than 100/250 tons of pollution per year—which covers a few hundred industrial facilities for the conventional air pollutants the Act was designed for but would cover millions of sources of carbon dioxide, down to small apartment buildings. So EPA had revised the statutory thresholds by orders of magnitude, to 75,000/100,000 tons per year, while noting it might revise them further over time. The Court could not countenance that degree (and others) of statutory rewriting, but nevertheless contrived its own clever rationale to permit EPA to proceed.

As a matter of law and precedent, these should have easy cases—for deference to EPA's abstention on (highly) plausible statutory grounds in *Massachusetts*, and for rejection of its statutory extemporizing in *UARG*. Instead they were very hard cases for the Court, each one generating sharply disagreeing opinions and contorted reasoning. The best explanation is that the cases concerned the most politically salient environmental issue of the day, one that had already mobilized several sovereign states although it was inherently a national (and international) rather than state issue. If our national environmental agency could not concern itself with climate change and greenhouse gas emissions, what was the agency for? The Court first insisted that EPA simply could not sit out the debates by

[23] 549 U.S.497 (2007).

[24] 134 S.Ct. 2427 (2014).

wrapping itself in legal technicalities, and then cleared away the technicalities more artfully than the agency itself had done.

The courts seem to be more assertive in reviewing economic regulation than social regulation, a tendency that may also be ascribed to enforcing transparency and conscientiousness. Prominent recent examples are the D.C. Circuit's rejections of SEC efforts to regulate proxy contests and other elements of corporate governance[25] and FCC efforts to regulate the Internet in the name of "net neutrality."[26] The decisions were arguably *Chevron* compliant in that they turned on relatively clear statutory provisions and categories that the commissions were either ignoring or using opportunistically to achieve preconceived results (the SEC had played loose with a statutory requirement that it consider its rules' "economic consequences" and effects on "efficiency, competition, and capital formation," while the FCC had tried to regulate Internet management under ill-suited provisions of the 1934 Communications Act). But they also involved two of the most powerful remaining New Deal agencies, which were intervening in economic markets for the benefit of some commercial groups at the expense of others, and which as nominally "independent" agencies were free of presidential supervision and White House cost-benefit review. The commissions were bending their statutes on behalf of powerful interest groups, which was neither democratic nor public-spirited.

Economic merits. The deregulation and regulatory reform movement of the 1970s and 1980s attempted to cabin administrative government with economic norms rather than legal norms. The movement was concerned not with whether agencies were constitutionally legitimate or punctilious about legislative authorization or legal formality, but rather with whether their policies were efficient, productive, and "sensible." Its origins were intellectual rather than institutional, but it came to influence institutional design and legislative, regulatory, and judicial decisions. One of its leading exponent-practitioners, for example, was Stephen Breyer, a law

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[25] *Business Roundtable v. SEC*, 647 F.3d 370 (D.C. Cir. 2011), and antecedent decisions cited therein.

[26] *Verizon Communications Inc. v. FCC*, 740 F.3d 623 (D.C. Cir. 2014); *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010).

professor who became a key architect of airline deregulation, an influential proponent regulatory reform[27] and of wide agency discretion tied to economic and scientific principles[28] and democratic participation,[29] and distinguished appellate judge and Supreme Court justice.

The APA was born in the era of the James Landis–led consensus that exalted agency expertise and assumed that regulatory elites would disinterestedly correct market failures and pursue the public interest. Beginning in the late 1950s, that consensus gave way to a more realistic, skeptical view, animated by the growing interest of economists (and, eventually, of the doyens of the law and economics and public choice movements) in the operations and policies of the regulatory agencies.[30] Their investigations found that agencies were prone to pursue policies that were wasteful, harmful, counterproductive, or simply ineffective. A school of positive theorists (led by George Stigler[31] and James Buchanan[32]) used economic reasoning to explain the political causes of seemingly perverse policies, while a school of reformers (led by Alfred E. Kahn[33] and Breyer) used economic reasoning to formulate better policies.

The positive economic theory of regulation developed at a time when public utility and common carrier regulation still dominated. It asserted that these programs systematically benefited incumbent producers (or subsets of them) at the expense of new entrants and consumers and to the detriment of economic efficiency and social welfare. The explanation, briefly, was that concentrated producer interests had low costs of political organizing and high individual benefits from regulatory restrictions on market entry and price competition, while dispersed consumer interests

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[27] *Regulation and Its Reform* (1984).

[28] *Breaking the Vicious Circle: Toward Effective Risk Regulation* (1995).

[29] *Active Liberty: Interpreting our Democratic Constitution* (2005).

[30] On the rise and fall of the Landis consensus, see Thomas K. McCraw, *Prophets of Regulation: Charles Frances Adams, Louis D. Brandeis, James M. Landis, and Alfred E. Kahn* (1984), chs. 5–7.

[31] "The Theory of Economic Regulation," *Bell Journal of Economics and Management Science*, Vol. 2, No. 1 (Spring 1971).

[32] *The Calculus of Consent: Logical Foundations of Constitutional Democracy* (with Gordon Tullock) (1962).

[33] *The Economics of Regulation: Principles and Institutions* (1970).

had high organizing costs and low individual benefits from defeating the cartels. This critique, while formally positive, had obvious normative implications, and it undermined the public repute of economic regulation (including among the pre-*Vermont Yankee* D.C. Circuit judges who took it upon themselves to ameliorate the problem). The critique was not particularly focused on delegated policy-making and administrative law—much of it applied equally well to the sugar import quota, minimum wage, and other forms of direct legislative regulation.[34] But it was popularized in the term "agency capture"—a term suggesting that legislative intentions had been perverted by regulated firms at the agency level—and much of it made sport of the hypocrisy of agencies' desultory proceedings and protectionist decisions in light of the high-minded "public interest" language of their organic statutes.

The normative critique of traditional regulation prescribed (a) economically rational pricing and the elimination of entry controls where regulation was justified by natural monopoly and (b) outright abolition where markets were naturally competitive. These arguments played a prominent role in the deregulation wave of the 1970s and 1980s, which abolished many forms of transportation regulation, partially relaxed many communications and energy controls, and thoroughly relaxed state and federal banking regulation. But these were only qualified examples of economic reasoning restraining the growth of administrative law. The economic "stagflation" of the 1970s undermined the industry cartels that had supported the transportation agencies such as the CAB and ICC, leaving them vulnerable to reformers from within their coalitions and from Congress.[35] New technology provided the means of unregulated entry into communications and financial services markets, much of it beyond the jurisdiction of the FCC and bank regulators, leading the

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[34] Some public choice theorists would eventually argue that administrative regulation was no worse than, and in some circumstances might be better than, legislative regulation. See David B. Spence and Frank Cross, "A Public Choice Case for the Administrative State," 89 *Georgetown Law Review* 97 (2000) and David B. Spence, "A Public Choice Progressivism, Continued," 87 *Cornell Law Review* 398 (2002).

[35] See Richard A. Posner, "Natural Monopoly and Its Regulation" (1999) (author's preface to Cato Institute reprint of 1969 article).

agencies to relax or abandon price and market controls that were preventing "their" firms from responding to the new competition.

Moreover, the decline of traditional economic regulation coincided with the rise of social regulation—health, safety, environmental, anti-discrimination—and, with it, of the much more discretionary and far-reaching administrative rulemaking described earlier. Social regulation posed a fundamental challenge to the positive, Stiglerite theory of economic regulation: The new agencies' policies were frequently very costly to the concentrated industry groups that attended closely to their proceedings and objected strongly and often unsuccessfully to their proposed rules, and those rules were generally intended to benefit, and sometimes did benefit, dispersed populations where individual benefits were relatively small. The best explanation, first propounded by the political scientist James Q. Wilson in a frontal attack on the economic theory, was that American politics was undergoing fundamental changes that enabled and encouraged a new form of media-based, entrepreneurial, Ralph Naderite policy activism capable of overcoming the economic logic of industry dominance.[36] That view will be elaborated and extended later in this paper. For now it is sufficient to note that, despite many demonstrations of perverse effects and interest-group "capture" in the new social regulation, that regulation was not unpopular. As social regulation grew and economic regulation declined in the 1980s and 1990s, the idea that administrative agencies were a conspiracy against the public interest lost much of its political salience.

Economists did, however, advance a normative critique and reform agenda for social regulation—and these focused much more heavily on the particulars of agency policymaking than they had for economic

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[36] James Q. Wilson, "The Politics of Regulation," in *The Politics of Regulation* (J.Q. Wilson, ed., 1980). Stigler responded with a scathing review of Wilson's book, but later came close to acknowledging the essential points of Wilson's essay. See George J. Stigler, "Trying to Understanding the Regulatory Leviathan," *The Wall Street Journal*, Aug. 1, 1980, and "The Process and Progress of Economics," Nobel Memorial Prize Lecture, Dec. 8, 1982. A much later critique of the economic theory of regulation, with several case studies of what the author regards as public-interested regulation, and which certainly involved regulations strongly opposed by industry groups, is Steven P. Croley, *Regulation and Public Interests: The Possibility of Good Regulatory Government* (2008).

regulation. The critique was that agencies such as EPA, NHTSA, and OSHA were prone to "overregulation" that forced excessive or unproductive investments. They did so, first, because they were missionary agencies operating largely without a budget constraint—most of the costs of their policies were realized entirely within the private sector, free of the institutions of public finance (taxation, appropriation, budget control) that force tradeoffs among competing missions. And, second, the agencies were staffed mainly by lawyers and engineers who were preoccupied with controlling observable features of production methods and product designs, oblivious to market and behavioral responses that reduced or eliminated the expected benefits. The economic reformers favored market incentives over "command and control" (i.e., taxes and property rights rather than engineering and design mandates); regulation of outputs rather than inputs; and centralized review of agency rules under a cost-benefit standard as the regulatory equivalent to centralized budget control over spending agencies.

The reformers achieved some notable improvements in environmental policy, including the factory-source ("bubble") policy at issue in the *Chevron* case and the use of marketable permits in phasing out lead additives in gasoline (both agency reforms in the 1980s), and a statutory emissions trading program for controlling sulfur dioxide and nitrogen oxides pollution in the 1990s. White House review of major rules, requiring cost-benefit analysis under a "maximum net benefits" standard, begun in the Reagan administration, was continued in every subsequent administration. In every one, the White House and Office of Management and Budget (OMB, which administered the program through its Office of Information and Regulatory Affairs (OIRA)) rejected some agency rules with very high costs and low benefits, and worked many improvements to rules that were issued.

Yet these actions had no more than marginal and transitory effects on the growth of the administrative state and the substance of its policies. OIRA cleared many economically dubious rules in every administration, because of political pressures or White House priorities, and the agencies were highly inconsistent in their use of cost-benefit analysis and adher-

ence to the maximum net benefits standard.[37] After 2000, the regulatory reformers were in eclipse. During the administration of George W. Bush, efforts to extend the "bubble" and emission trading programs were defeated by agency sabotage, political opposition, and court reversals. In the same years, Congress enacted, with President Bush's energetic support, major expansions of federal regulation of primary and secondary schooling (the No Child Left Behind Act of 2001), election finance (the McCain-Feingold Campaign Reform Act of 2002), corporate governance (the Sarbanes-Oxley Act of 2002), and energy conservation (the unabashedly paternalistic Energy Independence and Security Act of 2007, which among other things tightened motor vehicle fuel efficiency standards and gasoline biofuel requirements and banned the incandescent light bulb).[38] The reformers had little to say about regulatory forms that did not fit the economic template—such as the transformation of anti-discrimination law into administrative race-and-gender quotas, and programs (such as those of the FDA in approving new drugs and medical devices and the Department of the Interior in administering the Endangered Species Act) that operated primarily through case management rather than rulemaking. And the rulemaking agencies became increasingly adept at the use of "guidance documents," litigation settlements, and other tactics that elided White House oversight, APA requirements, and (often) judicial review. In sum, the efforts to guide executive government with economics, like the efforts to guide it with law, proved inadequate to the political ballistics propelling its growth.

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[37] See Adam M. Finkel, "The Cost of Nothing Trumps the Value of Everything: The Failure of Regulatory Economics to Keep Pace with Improvements in Quantitative Risk Analysis," 4:1 *Michigan Journal of Environmental & Administrative Law* 91 (Fall 2014); articles collected in the OIRA thirtieth anniversary issue of the *Administrative Law Review*, 63 *Administrative Law Review* (2011); Robert W. Hahn and Paul C. Tetlock, "How Economic Analysis Improved Regulatory Decisions," 22:1 *Journal of Economic Perspectives* 67 (Winter 2008); and Robert W. Hahn and Patrick M. Dudley, "How Well Does the U.S. Government Do Cost-Benefit Analysis?" 1:1 *Review of Environmental Economics and Policy* 1 (Winter 2008).

[38] See Christopher DeMuth, "Contemporary Conservatism and Government Regulation," in *Crisis of Conservatism?* (J.D. Aberbach and G. Peele, ed., 2011); and Christopher C. DeMuth and Douglas H. Ginsburg, "Rationalism in Regulation," 108 *Michigan Law Review* 877 (April 2010).

2008—The Executive Unbound

Executive government began to change in fundamental respects in the early 2000s. It became more "unilateralist"—acting independently of Congress's laws and even financial appropriations—and also more "fusionist"—combining regulation of private firms with government operations that competed or collaborated with the regulated firms. These changes moved American government further away from traditional rule-of-law and constitutional norms, and further from the APA's requirements as originally conceived, than even the 1970s rulemaking revolution had done. And they prompted another change: executive actions became increasingly opaque, nonpublic, abrupt in occurrence, and conclusory in explanation. Such actions violated the implicit compact described in the previous section, in which Congress and the courts conditioned wide executive discretion on transparency and detailed explication.

These departures became conspicuous in the government's response to the financial crisis of 2008. In retrospect, we can see them underway in earlier years in measures that laid the groundwork for what was to come. Some were shrouded in the traumatic aftermath of the terrorist attacks of September 11, 2001. Crisis and war are reliable inducements to the expansion of executive prerogatives at the expense of Congress: fast and decisive action is imperative and, whether or not these actions are eventually codified in statute, they set practical precedents for more normal times. The "war on terrorism" and other responses to 9/11 were distinctive in that they involved, in addition to foreign military actions, extensive domestic ("homeland") security operations and regulations in a nation otherwise at peace. These included new security arrangements at airports and shipping terminals and capacious new forms of surveillance of private communications and financial transactions—all of them melding regulation with direct operations in collaboration with private firms in ways that were insensible to the public, often explained only vaguely, and sometimes entirely secret. Many were undertaken without any statutory authorization; others were authorized by statutes, such as the Homeland Security Act of 2002, which President Bush had insisted on in an atmosphere of crisis. All of them seem likely to continue for the indefinite future.

Yet there were similar, strictly domestic steps in the same direction in the years before 2008. In response to a much smaller crisis, the Enron accounting scandals of late 2001, Congress rushed through at the president's urging the Sarbanes-Oxley Act of 2002, which substantially expanded the SEC's authority over matters of corporate governance that had previously been the province of state law, and intruded into internal corporate decision-making further than any previous measures. Sarbanes-Oxley also created a new regulatory agency, the Public Company Accounting Oversight Board (PCAOB), with unprecedented autonomy: its members were not appointed by the president nor confirmed by Congress and could not be removed by the president, and its budget was funded by fees and its own corporation tax which made it entirely free of congressional appropriations.[39] The Department of Justice, in its own response to the accounting frauds under established laws, employed criminal prosecution in unprecedented fashion to liquidate an entire firm, the leading accounting firm Arthur Anderson, for document-retention violations, with little explanation for such a momentous step. The Supreme Court eventually reversed the conviction unanimously,[40] but by then the firm was gone and its 26,000 U.S. employees dispersed. The Justice official responsible for the liquidation, Michael Chertoff, went on to become Secretary of Homeland Security.

Another departure, also in financial regulation, were the joint-and-several actions of the Department of Housing and Urban Development, several bank regulatory agencies, and the government-sponsored corporations Fannie Mae and Freddie Mac that produced a vast expansion of "nonprime" mortgages to promote homeownership among persons of modest means and members of minority groups.[41] To briefly summarize a

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[39] In *Free Enterprise Fund v. PCAOB*, 561 U.S. 477 (2010), a constitutional challenge, the Supreme Court upheld the PCAOB appointment provisions but slightly strengthened the president's removal power. The Board's independent taxing power has not been effectively challenged, perhaps because of the *Skinner* precedent mentioned earlier—although PCAOB's taxes are much broader than those in *Skinner* and in greater conflict with the Constitution's blunt assignment of taxing responsibility to Congress.

[40] In *Arthur Anderson LLP v. United States*, 544 U.S. 696 (2005).

[41] My accounts of the antecedents of the financial crisis and of the government's rescue efforts draw on, among other works, the essays of Peter J. Wallison collected in *Bad History, Worse Policy: How a False Narrative about the Financial Crisis Led to the Dodd-Frank*

complicated story, the regulators encouraged banks and other financial institutions to substantially relax traditional mortgage underwriting standards (eliminating down-payment and income-documentation requirements and the like) and obliged them to extend mortgages in lower-income and minority communities, while Fannie Mae and Freddie Mac aggressively subsidized nonprime mortgages by purchasing them in large numbers, packaging and marketing them as derivative securities ("mortgage-backed securities" or MBSs), and purchasing MBSs created by private banks for their own investment portfolios.

These efforts began in the 1990s and flowered in the 2000s, when artificially low interest rates engineered by the Federal Reserve Board (FRB) were creating strong incentives for mortgage borrowing of all kinds. By 2008, the efforts had generated 26.7 million nonprime mortgages with outstanding principal of $4.6 trillion (half of the entire U.S. mortgage market), sliced and diced into MBSs held by banks and other financial institutions across the nation. That was a key antecedent of the financial collapse of 2008, precipitated by a steep fall in housing prices that left many nonprime mortgages "nonperforming," many MBSs unmarketable, and many MBS-holding institutions insolvent. The important point for the argument of this paper is that the programs were an innovation in the fusion of regulation and government-industry financial collaboration. Although the programs were encouraged by some congressional leaders and statutes specifying "affordable housing" goals, they were major advances in executive unilateralism and policy opacity: They enlisted private financial markets in the provision of hundreds of billions of dollars of housing subsidies that Congress could never, as a political matter, have appropriated in the light of day; that for the most part operated outside of the procedural constraints of administrative law; and that few people (including most bank regulators) even comprehended at the time.

Act (2013); *What Caused the Financial Crisis* (J. Friedman, ed., 2011); and John B. Taylor, *Getting Off Track: How Government Actions and Interventions Caused, Prolonged, and Worsened the Financial Crisis* (2009). For a meticulous study of the administration's rescue measures, see Philip A. Wallach, *To the Edge: Legality, Legitimacy, and the Responses to the 2008 Financial Crisis* (2015).

When the financial crisis arrived in 2008, it revealed the full power of the new executive innovations. The Bush administration and nominally independent FRB acted in tight partnership, taking extraordinary liberties with statutory authorities to force mergers and structure "bailouts" for some failing financial institutions but not for others. Treasury Secretary Henry Paulson and FRB chairman Ben Bernanke acted more as tight-lipped dealmakers than market-bolstering policymakers. Throughout the crisis—and at critical junctures such as the Bear Sterns-J.P. Morgan rescue-merger in March 2008, the Lehman Brothers non-rescue in September, and the immediately following Merrill Lynch-Bank of America merger and AIG loan-rescue—Paulson and Bernanke and their subordinates were reticent about the nature and public purposes of their decisions and the extent of government's financial participation, and instructed the executives of the firms they were dealing with to keep mum as well. They did some things right, such as providing financial markets with ample liquidity, but their investment-banker-like circumspection violated the first rule of government action in a financial panic—which is to provide private markets with continuous, unvarnished information and clear principles of government action. In practice, the fusion of regulation with financial participation increased rather than reduced market uncertainty, suppressed private remediation, and almost certainly added to the severity of the collapse.

The Treasury-FRB partnership also made possible de facto executive appropriations of hundreds of billions of dollars without any legislative involvement. When Congress finally did get into the act, with its $700 billion "Troubled Asset Relief Program" (TARP) in October 2008, the administration promptly (within a few weeks) announced that it was revising the legislation's essential terms, using the appropriations not to purchase troubled assets ("toxic" mortgages and MBSs) but rather to shore up banks and other financial institutions themselves with equity investments. The investments were indiscriminate, forced upon banks that had prudently avoided excessive MBS exposure, and by year's end were also being extended to the automobile manufacturers General Motors and Chrysler to keep them out of conventional bankruptcy proceedings.

Members of Congress of both parties responded angrily to the usurpations, but Congress itself soon acceded to them with supporting

appropriations and other measures. The most important came a year later, in the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, which set new records for standardless legislative delegation and executive discretion and the fusion of regulation with joint operations. Although political leaders of both parties, including Dodd-Frank's authors and advocates, had blamed the financial collapse on banking deregulation, Dodd-Frank did nothing to reinstitute the New Deal-era controls over banks' prices, geographical scope, and organizational structure that had been progressively relaxed or abolished beginning in the late 1970s. Those liberalizing steps had facilitated the explosive growth of the financial sector through the deployment of new information technologies, the development of new financial products and services (mortgage-backed securities being just one), the emergence of national and international financial markets and firms, and many other innovations. Among the consumers who benefited from those innovations none was more avid than the government itself—which came to depend on them heavily for off-budget promotion of homeownership, college attendance, and other politically favored activities, as well as for financing its own spending deficits and capital-intensive projects from highways to schools to solar energy. A fair characterization of Dodd-Frank is that it sought not to return finance to the conservative, competition-averse practices of the past but rather to harness its new scope and energy more thoroughly to the government's interests.

The Act did so primarily by deepening the penetration of bank regulators into the daily management and governance of financial firms. Its central provisions established a process for selecting certain firms as "systemically important"—so as to single them out for even closer supervision and also for certain rescue in the event of insolvency, thereby lowering their borrowing costs to near-government levels and increasing their profitability over smaller rivals. Selections were to be made firm-by-firm under highly elastic standards (for all institutions other than banks with $50 billion or more in combined, which were designated systemically important in the Act itself) by a Financial Stability Oversight Council (FSOB). The FSOB is a committee of ten, chaired by the Treasury Secretary and consisting mostly of chairmen of various regulatory commissions; it makes legislature-like decisions by vote but lacks the political balance of

previous regulatory commissions—all are appointees of the president and conventionally of his party (although a few, such as the FRB chairman, have terms that may extend beyond the president's term).

Dodd-Frank's other innovations in executive government included the Consumer Financial Protection Bureau (CFPB), funded by a share of Federal Reserve Bank profits and thereby independent of congressional appropriations like the PCAOP (an extension of the subsequent discovery of FRB appropriating power during 2008), and enjoying special statutory deference on judicial review. Another was the Orderly Liquidation Authority, a procedure for Treasury Department liquidation of certain financial institutions. The statute limits judicial review of Treasury actions to a nonpublic, ex parte exercise, where a court may review only whether the institution meets the statutory definition of financial institution and is in danger of default (and not the terms of the liquidation plan, which is the essential judicial function in bankruptcy law) and is given twenty-four hours to render its decision.

The Affordable Care Act (ObamaCare), also enacted in 2010, was remarkably similar to Dodd-Frank in its executive architecture. It, too, provided sweeping policy discretion (the Secretary of Health and Human Services was authorized to regulate health insurance prices with none of the standards and procedures that had attended previous programs of price regulation) and commissioned of internal committees to make critical policy decisions (one of them, the Independent Payment Advisory Board (IPAB), was to make nigh-mandatory decisions on Medicare program spending that were exempt from presidential supervision or modification, exempt from judicial review, and subject only to very limited congressional review—the Act even purported to limit the ability of subsequent Congresses to amend IPAB's statutory authority!). It was also fusionist, blending of regulation of private health insurers with government management and control of vital components of their businesses (the state and federal "health insurance exchanges").

Yet the most dramatic departure in executive government during the first six years of the Obama administration was sheer unilateralism—actions taken in defiance of reasonably clear statutory requirements to effect consequential new policies, often on grounds that Congress had failed to enact them. Governing "with the pen and the phone" was

President Obama's characterization of this approach. In implementing its signature ObamaCare program, the administration continuously revised the statutory timing and terms for mandatory purchase of health insurance by individuals and provision of health insurance by employers, and announced and paid extra-statutory tax subsidies for insurance purchased on the federal exchange (after many states declined to sponsor their own exchanges, which were authorized to provide tax subsidies). The administration made similar declarative revisions to immigration, welfare, education, energy, and environmental statutes. It also coupled regulatory and criminal enforcement with public finance in novel ways—raising more than $100 billion through press release "settlements" of investigations into mortgage practices and other matters, some of which had never reached the formality of legal complaints and public proceedings; establishing a targeted taxing-and-spending program without any statutory authorization at all (the $20 billion BP Horizon oil-spill compensation program, also promulgated by a press release); ordering the firing of General Motors CEO Rick Wagoner and jiggering the "managed bankruptcies" of General Motors and Chrysler on behalf of political allies; and scuttling perfectly legal "tax inversion" mergers with foreign firms by dint of private conversations with directors of the U.S. firms.

Many (not all) of these actions were taken independently of APA or other legal procedures—no notice, no comment, just a press release, website posting, or conference call. The explanations for the actions often consisted of little more than management convenience or congressional intransigence. Some of them were effectively immune from judicial review because of standing requirements or the agreement or acquiescence of the immediately affected parties. Where statutory rewrites did get into court, the judicial response was mixed and remains a work in progress as of this writing. In *Utility Air Regulatory Group v. EPA*, the 2014 greenhouse-gas case discussed earlier, the Supreme Court rejected EPA's revisions but found a subtler means of permitting the agency to proceed. In *In re Aiken County*,[42] the D.C. Circuit rejected with an extraordinary writ of mandamus the Nuclear Regulatory Commission's persistent defiance of statutory requirements regarding nuclear waste siting (the NRC was now off-

[42] 725 F.3d 255 (2013).

mission—the case was more like *State Farm* than *Vermont Yankee/Baltimore Gas*). The circuit courts are divided on the ObamaCare tax subsidies, and the Supreme Court will decide the matter by mid-2015;[43] the case, like the EPA greenhouse-gas cases, is reasonably clear-cut against the government as a matter of statutory interpretation and judicial precedent, but its political importance puts the Court under pressure for similar jurisprudential improvisation.

The Administrative Law Debates Transformed

The immediate debates over the Dodd-Frank and ObamaCare statutes and the Obama administration's policy unilateralism were highly partisan. As we have seen, however, both the legislative and executive actions were natural (albeit often bold) extensions of earlier actions, including those of Republican, avowedly conservative administrations and Congresses. So there is at least a serious possibility that the recent developments constitute trends rather than diversions in the evolution of modern government.

That the developments are indeed trends seems to be implicit in a new academic literature on regulation and executive government. The previous, pre-2008 literature was incrementalist—devoted to such questions as the contours of the nondelegation doctrine, the appropriate standards of agency procedure and judicial review, the utility of regulatory cost-benefit analysis, and the merits of agency policies. The new literature is instead fundamentalist—devoted to questions of government structure and legitimacy, and looking to political history and political philosophy for answers.

Foremost is Philip Hamburger's 2014 *Is Administrative Law Unlawful?* cited at the beginning of this paper, arguing that the administrative state is unconstitutional tout court—because the Constitution's assignment of "all legislative powers" to Congress was meant to be exclusive, reflecting the Framers' essential purpose to ensure that citizen's liberties could be constrained only by representative legislation or by courts settling specific disputes. But there are other notable works in the new tradition, written by similarly distinguished scholars and advancing similarly sweeping

[43] On review of *King v. Burwell*, 759 F.3d 358 (4th Cir. 2014).

arguments. F.H. Buckley's *The Once and Future King: The Rise of Crown Government in America*, also published in 2014, argues that the Framers thought they had ordained a congressional government, with power centered in a Senate and House of Representatives, and that it was only the emergence of political parties and a popularly elected president that produced a true separation-of-powers regime in the first half of the nineteenth century, which then evolved into a regime of "crown government" in the early twenty-first as presidential power outstripped essentially all constitutional restraints. An early example of the genre (actually a precursor, published in 1994 before the recent deluge) is "The Rise and Rise of the Administrative State" by Gary Lawson,[44] now the author of a leading administrative law case book, which begins, "The post-New Deal administrative state is unconstitutional, and its validation by the legal system amounts to nothing less than a bloodless constitutional revolution." The most recent is Charles Murray's *By the People: Rebuilding Liberty Without Permission* (2015), which begins, "The twin propositions of this book are that we are at the end of the American project as the founders intended it, but that opportunities are opening for preserving the best qualities of the American project in a new incarnation."

The new literature includes commensurately sweeping defenses of the constitutional groundings of the administrative state and the political legitimacy of its evolution into its current form. Indeed the fundamentalist defenses are even more voluminous than the fundamentalist critiques. Eric A. Posner and Adrian Vermeule, *The Executive Unbound: After the Madisonian Republic* (2010), argues that the separation of powers was theoretically unsound and ineffective to begin with, and that modern executive supremacy, necessitated by modern problems, is effectively constrained by modern mass media and popular opinion. Jerry L. Mashaw, *Creating the Administrative Constitution: The Lost One Hundred Years of American Administrative Law* (2012), argues that executive officials possessed wide discretion with congressional approval back to the earliest days of the Republic, and that the evolution of agency procedures and judicial review have provided fair process and protection against abuse.

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[44] 107:6 *Harvard Law Review* 1231 (April 1994).

Daniel Ernst, *Tocqueville's Nightmare: The Administrative State Emerges in America, 1900–1940* (2012), argues that the architects of the administrative state well understood both its tensions with ancient legal and constitutional norms and its necessity to address modern problems, and successfully reconciled the two. Eric Nelson, *The Royalist Revolution: Monarchy and the American Founding* (2014), argues that the founders understood the advantages of executive prerogative over legislative confusion and parochialism, and built that understanding into the Constitution. Finally and most sweeping of all, Edward L. Rubin, *Beyond Camelot: Rethinking Law and Politics for the Modern State* (2005), argues that notions of constitutional branches, power and discretion, legal rights and property, and political legitimacy are all "social nostalgia" and "relics of a prior era" that we need to replace with new "metaphors" for collective action that will permit the administrative state to manage the problems and opportunities of modern life.

These works are obviously in sharp conflict with the root-and-branch (as well as many milder) critiques. The remarkable thing is that scholars of all dispositions should be returning to first principles, and that proponents as well as opponents of contemporary executive dominance should be resting their cases on foundational demonstrations from history and philosophy.

A third strain in the new literature is concerned with the dysfunctions of contemporary American government. Two outstanding examples blame our "political decay" and "broken government" on (in the terminology of this paper) the transparency and democratic servility that have come as the price of wide executive discretion. Francis Fukuyama, in *Political Order and Political Decay: From the Industrial Revolution to the Globalization of Democracy* (2014), celebrates the executive state and would like ours to be not only highly discretionary but also genuinely autonomous, as ours was in the early twentieth century and many European states are today. He ascribes our subsequent decay to our post-1960s decline in political trust plus our tradition of rights-based individualism, which have combined to paralyze government, denying officials the leeway to act decisively on behalf of the public good. Philip K. Howard, in *The Rule of Nobody: Saving America from Dead Laws and Broken Government* (2014), laments the decline in discretion in both the private and public

sectors. Business employers, teachers, doctors, and administrators of schools, hospitals, and nursing homes are all prevented from exercising common-sense judgment by a profusion of minute rules. But public officials, from schoolteachers to those responsible for permitting and building bridges and highways and other development projects, are similarly hobbled by bureaucratic rules and the ability of outside groups to effectively veto their decisions. The "Credo of modern American government," Howard says, is:

> *Public choices must be preset by specific legal dictates wherever possible. Officials are not allowed to make practical choices, and must act in ways that are nonsensical and often counterproductive to public goals. Legal rigidity should in all cases trump efficiency, innovation, accommodation, and free choice. Individual responsibility should be avoided and replaced with legal dictates and processes.*

I am not doing justice to these works, which are brilliant and nuanced, but just using them to advance my own arguments. And for that purpose what is remarkable about them is a dearth of practical solutions. The apologists of course have little to solve—they are largely content with the legitimacy and utility of the administrative state, and uninterested in the deficiencies that agitate its critics and to the Fukuyaman decay that is all around. The critics are indeed agitated but largely bereft. Hamburger is a legal historian and exegete, not a reformer. Fukuyama says flatly that nothing can be done until a regime-threatening crisis arrives, and Buckley comes close to saying the same thing.

Moreover the critics, when they do suggest improvements, admit to being impractical and come close to being circular. Buckley would like Congress to reinstitute its earlier semi-parliamentary prerogatives through such steps as frequent impeachment of the president for policy disagreements. Hamburger has said (in book talks, not in his book itself) that Congress should enact the *Code of Federal Regulations* (*CFR*) into statutory law, soldiering its way through its dozens of chapters and adopting, revising, and discarding individual requirements as it goes along. This task would be more than herculean. The *CFR* is 150,000 pages by the measure used on chart appended to this paper—more than double the

length of *United States Code* of statutory law. Translating it into statutory law would take many decades; at the current rate of *CFR* growth, Congress might never catch up. Both proposals run squarely against the long-entrenched practice of congressional delegation that has caused the problem in the first place—to the opponent of today's broad and breezy delegation, the Buckley and Hamburger solutions are like prescribing, as a cure for drunkenness, greater temperance in the consumption of alcohol. The same problem afflicts the more modest law-review proposals to revive the nondelegation doctrine, abolish the *Chevron* doctrine, and formalize administrative procedures: they propose to reverse decades of judicial precedent, established and followed by judges and justices of all persuasions, which must be assumed to reflect powerful institutional imperatives.

Murray and Howard see the problem, and avoid circularity by stepping outside the Congress-Executive-Judiciary triangle. Howard advances a flurry of ambitious constitutional amendments—to sunset program statutes after 15 years; to give Congress authority to veto regulations; to give the president a line-item veto over budget statutes and similar authority over regulatory statutes, plus the authority to reorganize executive agencies and fire public employees; to limit lawsuits that would impede the conduct of government or diminish general freedoms; and to establish a Council of Citizens to advise Congress on the rewriting of laws. There are some excellent ideas in the bunch, but even for a state-convened constitutional convention (which has never happened before) they would be a very heavy lift; they are less a practical reform program than a thought experiment in aid of Howard's bleak analysis and rousing exhortations and the more incremental reforms he pursues as a political activist.[45]

Murray's solution is more populist, bottom-up rather than top-down. He regards the administrative state as constitutionally and politically illegitimate and irredeemable within its self-protecting structure. But he spies an outside-the-beltway solution in the very circumstance that Fukuyama decries. The administrative state, he says, pretends to be strong but is in fact weak, vulnerable to its democratic illegitimacy and popular

[45] Described at the website of Common Good, www.commongood.org.

ill repute and to the individualistic American spirit. He proposes a program of concerted civil disobedience to regulatory commands, funded by private foundations and built on the example of litigation groups such as the Pacific Legal Foundation, Institute for Justice, and Center for Individual Rights. But whereas these groups have exploited legal lacunae in regulatory programs, the new efforts would aim to overwhelm the agencies' enforcement resources with widespread noncompliance with technical requirements that are pointless or self-defeating. In effect, Murray proposes to engineer the regime-threatening crisis that Fukuyama says is necessary—but on the contrary hunch that the crisis will sunder rather than fortify autonomous executive government. He is particularly keen on using enforcement proceedings to publicize imbecilic rules and agency high-handedness in order to pressure courts to adopt more demanding, less deferential applications of the arbitrary and capricious standard and the nondelegation doctrine. His goal is to overlay the administrative state with a common-law regime of "No Harm No Foul."

Murray's plan is less incendiary than it sounds. He would exclude rules that forbid acts wrong in themselves (*malum in se*), tax regulations, and rules that "foster public goods classically defined"—which would excuse much of the work of the EPA. His main focus would be rules that impose on land ownership, personal risk-taking, and especially employment—regulation of hiring, promotion, and firing, workplace conditions, and occupational licensure. Implicitly, his citizen deregulators would be individuals and small businessmen rather than large corporations. They would be people like Michael and Chantell Sackett, who were faced with an EPA order to stop building a home on their small residential lot on grounds that it was a protected wetland, and denied any hearing on the matter unless they first incurred crushing fines. Represented by the Pacific Legal Foundation, they fought the agency to a 9-0 victory in the Supreme Court.[46]

These specifications suggest significant limits on the range and potential of Murray's revolution. There are plenty of Sacketts around, especially if we include conceded violations of trivial infractions carrying hefty fines (the Sacketts do not concede that their lot is a wetland). Experienced

[46] *Sackett v. EPA*, 566 U.S. 154 (2012).

regulatory lawyers can tick off many similarly infuriating examples of innocents sacrificed to bureaucratic stratagems. But they are marginal to the big regulatory programs, and Murray's scheme depends on mass. Many, perhaps most, of those who must follow safety and employment rules they know to be nonsense are engineers or personal officers of large corporations with continuous dealings with multiple government agencies and powerful incentives to be cooperative. Programs that impose product safety standards (NHTSA) and marketing controls (FDA) confront most citizens as consumers rather than producers. For most persons most of the time, the burden of regulation consists of higher prices for private goods and the lost benefits of forgone or misdirected investments or employment opportunities, not jackbooted bureaucrats with bullhorns on the front lawn. Moreover the most important recent trend in administrative statecraft, described earlier, is the fusion of regulation with management collaboration in the key sectors of finance and health care (and, increasingly, communications), which aligns the interests of government and business even further. Civil disobedience may appeal to marginal firms in these industries, but not remotely to the leading firms with an interest, reluctant or enthusiastic, in maintaining the status quo of mutual capture.

If the Murray plan were a scorching success, Washington would probably respond with a ballyhooed program of special enforcement leniency for small businesses and other sympathetic categories of "everyday people," akin to the Regulatory Flexibility Act's special attentions to small business in rulemaking. Beyond the tax code, regulatory burdens are largely insensible in the daily lives of most citizens-as-citizens, and are therefore politically insalient. This is a serious limit on Tea Party reform strategies.

The Material Foundations of Today's Administrative State

The most impressive characteristic of administrative law is momentum, its seeming organic capacity for growth and adaptation. For over a century, going back to its origins in the Progressive Era, it has overcome repeated efforts to bridle it with constitutional, legal, and economic norms and persistent complaints about overregulation, abuses of individual rights,

and systematically harmful policies. More recently it has flowered into outright executive government over large swaths of American society and industry, leaving even its strongest critics at a loss for practicable reform strategies. Its one major concession to American politics and democratic traditions has been transparency—openness to the importunings, and sometimes outright vetoes, of well organized interest groups, and obligations to reveal a portion of its inner workings and to explain its decisions in detail. These accommodations have weakened administrative government in certain respects: Its big decisions take time and expense (although not so much as big legislative decisions); it must negotiate the demands of multiple conflicting interests and sometimes accede to them; it must keep a wary eye on Congress; it frequently must dissimulate. But these costs are manageable. They are not existential threats—as would be, for example, a requirement to make and enforce rules and adjudicate disputes before independent Article III tribunals. Recently, administrative government has been probing the possibilities of avoiding transparency, permeability, explanation, and judicial reviewability as well—a work-in-progress that may or may not succeed.

A phenomenon so powerful and protean must have powerful and protean causes. Among the intellectuals who debate the origins of the administration state, a favorite explanation is intellectual: the triumph of Woodrow Wilson progressivism among political leaders and activists and judges, who came to understand that the problems of the complex modern economy required flexible, dynamic, expert supervision of a kind that only executive government can provide. I believe instead that the essential causes are material—economic growth and technological advance, which in tandem have generated (a) higher political demand for government interventions and (b) new forms of political and government organization capable of supplying the higher demand.[47]

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[47] The argument of the subsequent paragraphs builds on James Q. Wilson, "The Politics of Regulation," *supra* note 36, and "American Politics, Then & Now," *Commentary*, February 1979, reprinted in James Q. Wilson, *American Politics, Then & Now and Other Essays* (2010). See also, James Q. Wilson, John J. DiIulio, Jr., and Meena Bose, *American Government: Institutions and Politics* (13th ed., 2013), Chapter 22, "Who Governs? To What Ends?"; Christopher DeMuth, "The Bucks Start Here," *Claremont Review of Books*, Summer 2013; and the works cited in note 48 below.

The first part of the equation is affluence and its accouterments. Political action requires three basic resources: (1) discretionary time; (2) the ability to acquire, assimilate, and communication information; and (3) the skills of argument, persuasion, and mobilization. For most of human history these resources have been scarce and confined to elites, and so therefore has been politics. In the wealthy, highly educated, predominately middle-class societies of the advanced democracies, political resources have become abundant and widely shared, and political activism has become widespread and highly organized as a result. Affluence and leisure time have also produced more refined tastes, sensibilities, and avocations. Before the 1960s, domestic politics in the United States was largely about a few broad economic issues—growth, recession, and employment; income security; the prerogatives of management versus unions. Since then it has come to embrace innumerable environmental, health, safety, and lifestyle issues; discrimination and preference among numerous minority groups; sexual mores and gender relations on the campus and on the Internet; women's sports, animal rights, bank overdraft charges, household trash management, and hundreds of other concerns, complaints, and enthusiasms.

The second part of the equation is technology—in the form of faster transportation, faster and more proficient communications, and manifold improvements in gathering, storing, and manipulating information. These developments have been underway for more than a century but, in communications and information technology, have advanced exponentially in recent decades. In private markets, they have radically lowered transactions costs, eased market entry, and facilitated specialization and the division of labor. They have had the same growth-propelling effects on "policy markets." On the demand side, it has become possible to communicate among far-flung individuals and groups cheaply and instantaneously, both en masse and through specialized, reticulated networks that have supercharged the human proclivity for forming "affinity groups." The now-abundant human resources of time and intellectual skill have been complimented by the technological capacity to deploy them on a national scale—to share experiences and information,

assemble coalitions, raise funds, design and execute publicity and lobbying strategies, negotiate with allies and opponents, and monitor and respond to the actions of legislators and executive officials. Adherents of the slightest cause can now easily achieve self-awareness and organize an advocacy group with a fighting chance of success. The profusion of discrete causes that today press upon government and public opinion 24/7 would have been simply infeasible fifty years ago.

And the same economic and technological improvements that have transformed the demand side of the policy market have equally transformed the supply side. Traditionally, politics was highly hierarchical: political debate was mediated by a media oligopoly and a civic triumvirate of commerce, unions, and church; electoral careers were mediated by two political parties; and legislation was mediated by powerful congressional committee chairman and party leaders. These hierarchies disciplined the actions and ambitions of candidates and officeholders and the range of issues they could champion. But today it has become relatively easy to mount a political career without party approval (it helps to have your own fortune, but there are lots of those, and the ability to galvanize even a narrow cause is an excellent substitute). A backbench legislator can advance a portfolio of policy causes, and his electoral and career prospects, without first spending years inching up the committee hierarchies. Politics has become, in the Anthony King's term, "atomized."[48]

Modern technology has had a second and more profound effect on the supply of government policy: empowering executive lawmaking. It was in the late 1960s and early 1970s that Congress largely abolished its seniority system and greatly weakened the powers of its committee chairmen. The leadership was bowing to the inevitable: Members were acquiring the wherewithal to operate independently, and the authorizing and appropri-

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[48] Anthony King, "The American Polity in the Late 1970s: Building Coalitions in the Sand," in *The New American Political System* (Anthony King, ed., 1978), pp. 391–394. King's term was used and developed by Wilson in "American Politics, Then & Now," *supra* note 46, and then in *The Atomistic Congress: An Interpretation of Congressional Change*, Allen D. Hertzke and Ronald M. Peters, Jr., eds. (1992) (see especially the editors' introductory essay and the previous studies of Congress it discusses). A prescient study of the atomization of contemporary politics, which however ascribes the transformation to cultural rather than economic and technological developments, is Robert Nisbet, *Twilight of Authority* (1975).

ating committees were standing in the way of their responding to the many new policy causes pressing in on them. (Also, many of the elders and chairmen were Dixiecrats, in eclipse following the civil rights revolution and legislation of the mid-1960s.) But as Congress became more atomized, entrepreneurial, and activist, it faced a further and more intractable constraint—it was still a representative legislature. Its ability to scale-up in response to escalating policy demands was limited by inherent barriers to action (decision by layered committees, representation of diverse and conflicting interests and localities) and by auxiliary constitutional barriers (bicameralism, power-sharing with a politically independent president). The solution was to delegate policy to executive agencies, many of them newly created for the assignment.

The executive possessed substantial comparative advantages. It is less specified than Congress in the Constitution and therefore more open to innovation. Executive agencies operate through hierarchy and authority, and can make decisions more quickly and at less cost than committees of representative legislators. Agencies can also take much greater advantage of specialization than Congress—they can master the arcania of a subject, assemble and maintain highly motivated coalitions around individual subjects, and penetrate deeply into the true ("reservation price") positions of coalition members. They are mission-driven, less conflicted than legislators, and as mentioned earlier are relatively free of the financial constraints of taxing and spending programs—all of which further reduces decision-making costs. Best of all, mission-specific agencies can be proliferated essentially without limit: they do not encounter the diseconomies of scale that set in early in any legislature regardless of its internal structure.

Modern communications and information technologies have greatly amplified these advantages. Hierarchies can collect, analyze, and use data more efficiently than committees, and there is lots more data around for these purposes. Like specialized interest groups on the demand side, specialized agencies can employ modern technology to identify and communicate and negotiate with these groups with increasing proficiency. Combining high-tech lawmaking with high-tech law enforcement, agencies can better use the threat and application of coercion to maintain

coalitions, police defections, and respond quickly to outside threats, including from Congress.

The advantages of specialized, hierarchical lawmaking in expanding the scope and penetration of government are almost certain to grow. The range and resolution of commercial products such as Google Maps and Zillow, and their rapidly improving capacities for continuous, microscopic surveillance, hold potential for government as profound as those we are already experiencing in private life. James C. Scott, in *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed* (1998), shows that a central problem of statecraft is to make the population and society within its jurisdiction "legible." Governments first seek to "map" inhabitants and their activities (along with terrain and natural resources) for the classic state functions of taxation, conscription, and maintenance of order and prevention of rebellion. At later, more advanced stages of development, higher degrees of legibility are necessary for more ambitious efforts at social engineering and provision of public goods. These exertions may be worthy (roads and sanitation) or monstrous (Soviet and Chinese agricultural collectivization), but a consistent problem in contemporary government is excessive confidence in abstract metrics, which obliterate critical elements of local and practical knowledge and lead to repeated policy fiascos.

The lesson of Scott's work for the analysis here is that improved social legibility leads to increased government authority and self-confidence and increased centralization in the executive. National government can now assemble information on millions of citizens and firms, direct and coordinate their activities, and monitor and sanction their behavior to a degree inconceivable in the past. In time, it will be possible to assemble comprehensive information on the identities, characteristics, and activities of almost everyone, and on transactions among them and activities within firms. The National Security Agency's collection of details on billions of telephone and email transactions, and analysis of patterns in those data to uncover potential terrorist threats, is an example of what could be undertaken in domestic regulation. EPA, in its nascent greenhouse gas program at issue in *Utility Air Regulatory Group v. EPA*, proposes to regulate only hundreds, not millions, of sources of carbon dioxide emissions. But the agency's forbearance is more political than technical: in

time a fully developed program of carbon dioxide controls could easily extend to apartment and office buildings and individual dwellings.

Modern technology will not solve the Hayek knowledge problem, because much pertinent information is subjective, implicit, and transient (and too much so to be penetrated more than superficially by "big data" behavioral analyses). Nor will it abolish the law of unintended consequences, which arises from often-subtle compensations to government rules that control only a few (the most legible) variables affecting an aimed-for result.[49] High technology may make policies more effective but not necessarily; it expands their range, penetration, and particularity for better or worse.

Government can be expected to lag behind the private state of the art in information technology, because of cumbersome procurement rules and other inefficiencies. But even the lagging art is becoming Promethean, and the new fusion of regulation with public-private collaboration is one means of keeping pace. The troubled debuts of the ObamaCare website exchanges were growing pains. The exchanges are more than brokerage operations: they regulate the terms of health insurance contracts and subsidize purchasers under various circumstances, and for these purposes track personal health, medical care, employment, and income information, tax payments and government benefits, and some private payments and receipts. They do this for millions of individuals, households, and firms in partnership with insurers, banks, and Internet service and content providers. The information will be valuable for many purposes beyond policing ObamaCare requirements; over time, state and federal agencies and their private-sector exchange partners will become increasingly proficient at collecting and using it.

Political resistance to big-data government is low and falling. We are being introduced to it as a means of averting palpable security threats, and in private life we are accepting less personal privacy in exchange for knowing more about others and other benefits. Proponents of more interventionist government understand the potential, as in Thomas

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[49] Christopher DeMuth, "Unintended Consequences and Intended Non-Consequences," AEI Center for Regulatory and Market Studies, June 2009, pp. 14–21; http://ccdemuth.com/regulation/#toggle-id-12.

Piketty's proposal for global surveillance of movements of capital and individual wealth,[50] a project already underway in new data-collection initiatives in the United States and some European nations.

Of Progressivism, Populism, and Magicians' Rabbits

The materialistic explanation just offered for the ascendency of executive government is more plausible than the rival, intellectual explanation. Woodrow Wilson progressivism was a forthright attack on parochial, uninformed legislative process and outmoded constitutional strictures, and a program to replace them with scientific expertise and politically neutral administrative discretion.[51] But Wilson's teachings were more theory than practice during the Progressive Era itself. The intellectual argument must be that it took time for such radical ideas to win over a sufficient number of thought leaders, political leaders, and judges, preparing the way for the New Deal in the 1930s and the further expansion of administrative government beginning in the 1970s.

There is certainly some truth to the progressivism explanation; material and intellectual causes may coincide and operate in tandem. But the temporal pattern of deployment of Progressive ideas points to the decisive importance of rising affluence, falling political transactions costs, and technology-driven improvements in government's capacities. The Great Depression was a national crisis conducive to executive expansion, but came when few people were inclined toward or capable of particularized political activism. The New Deal agencies were revolutionary for their time but dowdy and industrial-age by today's standards: they were protectionist and clubby rather than missionary and expansionist, regimenting production in key economic sectors rather than promoting consumerism, environmentalism, social equality, and personal fulfillment.[52] The periods of capacious executive growth came *much* later—in

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[50] In *Capital in the Twenty-First Century* (2014), chapter 15.

[51] Woodrow Wilson, "The Study of Administration," 2 *Political Science Quarterly* 197 (June 1887).

[52] The New Deal agencies did not even grow in power, and in fact receded, as a result of the next crisis to come—World War II and the need for rapid industrial mobilization, which was notably extemporaneous and private-sector-led, as documented in Arthur Herman, *Freedom's Forge: How American Business Produced Victory in World War II* (2012). World War II wage and price controls were rapidly dismantled after the war; they left

the early 1970s, following two post-war decades of unprecedented prosperity that had brought a "revolution in rising expectations," and the 2000s, on the crest of unprecedented advances in communications and information technologies. The Federal Trade Commission, established in 1914 and an iconic Progressive achievement, did not even acquire rulemaking authority until 1975. The Federal Reserve System, established in 1913, possessed highly discretionary authority over monetary policy and bank supervision, but gained vastly more power beginning in the 1970s with the emergence of high-tech financial markets discussed earlier. That the post-1970 growth of executive government has been fairly continuous, persisting through liberal and conservative presidents and Congresses and through times of normalcy as well as times of crisis, also favors the material over the intellectual explanation.

A counterargument might be that the material explanation confuses supply for demand. Affluence and technology, the story would go, has made economic markets and social relations more complex, specialized, and far-ranging, which in turn has summoned commensurately complex and specialized administrative government. But this argument encounters serious difficulties when it gets down to cases. For one thing, complex problems do not always, or even often, require complex government regulation. A simple legislated gasoline tax would be highly effective in promoting motor vehicle fuel economy, while the complex CAFE (Corporate Average Fuel Economy) regulatory program has been largely ineffective;[53] the economic regulatory reform literature contains numerous, similarly persuasive descriptions and case studies of the superiority of broad taxes and property rights over intricate regulatory mandates. Conversely, regulatory agencies often oversimplify complex problems out of administrative necessity—a key argument of James C. Scott and of the unintended consequences literature. And they often act in decidedly inexpert ways to suppress new technologies and beneficial complexity—examples include the ICC and CAB (whose industries flourished after

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some lasting policy residues—most profoundly, the tax exclusion of employer-provided health insurance—but no permanent augmentation of the administrative state.

[53] Pietro S. Nivola, "The Long and Winding Road: Automotive Fuel Economy and American Politics," Brookings Institution Governance Studies, Feb. 25, 2009.

they were abolished), the FCC (which delayed the introduction of mobile telephony by at least a decade), the Federal Aviation Administration (which is strongly resistant to using modern communications and information technologies in air traffic control[54]), and the FDA (probably the strongest case for scientific regulation, which however has fallen far behind advances in biotechnology and medical research[55]).

The Federal Reserve System—prototype and still leading archetype of autonomous, Congress-free expertise—may be the weakest case of all for the progressive-response-to-modernity argument. The Federal Reserve is widely blamed for deepening the Great Depression with unduly restrictive monetary policies, for inciting the eventually calamitous housing bubble in the 2000s with unduly loose policies, for creating the stagflation of the 1970s with vacillating policies, and for many other errors of misapplied expertise.[56] In the years leading up to the financial collapse of 2008, the FRB, along with other bank regulators and the SEC, not only failed to see the crisis coming but also, by relaxing capital standards and promoting loose mortgage standards, encouraged regulated firms to take actions that greatly magnified the crisis.

There is a further difficulty with the idea that modernity has demanded rather than supplied executive government. It cannot easily explain the procedural requirements that I have called conditions of executive government and that Francis Fukuyama sees as its fatal weakness. One could say, as Fukuyama does, that executive lawmaking was a German import that had to be adapted to American-style democratic individualism. But the natural adaptation would have been to combine administrative law with our constitutional and legal traditions. Instead those traditions were abandoned and new ones established—for Freedom of Information, Government in the Sunshine, and Regulatory Flexibility

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[54] Robert W. Poole, Jr., "Organization and Innovation in Air Traffic Control," Hudson Institute, Nov. 2013.

[55] Scott Gottlieb, "Changing the FDA's Culture," 12 *National Affairs* 108 (Summer 2012); Christopher DeMuth Sr. and Christopher DeMuth Jr., "The FDA Nixes a Pathbreaking Drug for MS," *The Wall Street Journal,* Jan. 17, 2014.

[56] Allan H. Meltzer, *A History of the Federal Reserve* (Vol. 1, 2003; Vol. 2:1 and 2:2, 2009); Ben S. Bernanke, *Essays on the Great Depression* (2000); *The Great Inflation* (M.D. Bordo and A. Orphanides, ed., 2013).

required by statute, and for open participation, agency responsiveness, and elaborate rationalization required by courts. These were not policies to empower administrative discretion within boundaries of democratic legislation, independent tribunals, and legal protections of individual rights. Rather they empowered cause-based political activism and representation and collectivist conceptions of rights. They did not limit the range of executive discretion but instead politicized it across an unlimited domain—thereby compromising its ability to act expertly, scientifically, or disinterestedly, much less expeditiously. They weakened the ability of agencies of manage modern complexity by subjecting them to a profusion of dictates that accommodated modern political methods.

An eloquent example of ad hoc administrative democracy in action is the requirement of the Department of Agriculture's Animal and Plant Health Inspection Service (USDA–APHIS) that magicians prepare and submit disaster-response contingency plans for the rabbits they use in their shows.[57] In 1965, Congress responded to a heartbreaking news report of animal abuse with a law requiring licenses for medical laboratories using dogs and cats in their research; in 1970, it amended the statute to cover other animals and "exhibitors" (circuses, animal shows, etc.) as well as research labs. Thirty-five years later, in 2005, a USDA official was attending a children's magic show in Monett, Missouri, in which the magician, Marty Hahne, pulled a rabbit, Casey, out of his hat. She asked to see Hahne's license, which he had not known about but immediately obtained. He began paying USDA's annual license fee and following the agency's requirements—which included furnishing USDA with itineraries for Casey's out-of-town travel and agreeing to surprise inspections of his (Hahne's) home. USDA began contacting other children's magicians, and their association, KIDabra, began playing an intermediary role.

Then, in the wake of Hurricane Katrina later in 2005 (in which some New Orleans exhibition animals were lost), USDA–APHIS initiated rulemaking proceedings for animal disaster-response planning that

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[57] This account draws on David A. Fahrenthold, "Watch Him Pull a USDA-mandated Rabbit Disaster Plan Out of His Hat," *The Washington Post*, July 16, 2013, and "USDA Holds Off on Disaster Plan Requirement for Animal 'Exhibitors'," July 29, 2013, as well as various USDA postings.

dragged on for many years and produced a final rule in December 2012.[58] Soon thereafter, Hahne received a "Dear Members of Our Regulated Community" letter informing him of the new requirements. With the pro bono assistance of a professional disaster-plan consultant, he prepared a 34-page plan analyzing the risks facing a bunny in Christian County, Missouri, including chemical leaks, floods, tornadoes, heat waves, and other emergencies, and specifying evacuation procedures for Casey, including continued exercise opportunities and continued care if Hahne and his wife Brenda were incapacitated in the disaster, and other matters.[59]

Finally, when the *Washington Post* ran a fun-poking story about Hahne and Casey's travails, USDA immediately announced that it was suspending the disaster-plan rule for further analysis. But that in turn prompted objections from People for the Ethical Treatment of Animals (PETA), who pointed out that the rule was already based on years of analysis. A year and a half later, there has been no further notice or proceedings concerning the rule. It will almost certainly be reinstated at some point. PETA is an influential organization with millions of members and many famous celebrity spokespersons, well known at USDA-APHIS and in the media, and it knows that it must take instances of ridicule seriously. It can point out that the USDA rule had been providing vital protection to innocent animals in a range of institutional settings. If an instance of abuse to a magician's rabbit or other covered animal should arise anywhere in the United States while the rule is in limbo, PETA will notify the *Washington Post* and USDA officials will be flayed at congressional hearings. Moreover the rule suspension was conclusory, with nothing of the sort of detailed explanation required by the Supreme Court in *State Farm,* and permanently amending it to exempt magicians would require a new assessment of the exempted activities. Hahne and presumably other rabbit-licensed magicians have already prepared and submitted their plans, so the pressures on the agency are one-sided.

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[58] U.S. Department of Agriculture, Animal and Plant Health Inspection Service, "Handling of Animals; Contingency Planning; Final Rule," 77 *Fed. Reg.* 76815 (Dec. 31, 2012).

[59] The plan is posted at http://apps.washingtonpost.com/g/page/politics/marty-the-magicians-disaster-plan-for-bunny/320.

The saga of Marty Hahne and Casey illustrates two imperatives of our ad hoc administrative democracy. The first is *Comprehensive Concern*—once a domain of attention has been established, we will insist that the principle of equal treatment be extended to every individual, man or mouse. Recall the OSHA statute directing (among other things) that "no employee … suffer material impairment of health or functional capacity"; another example is the utopian aspiration of the No Child Left Behind school reform statute. Every Washington lobbyist knows that a single heart-rending story is worth a thousand words of analysis.

The second imperative is *Do Something*—and applies even if there is nothing a government agency could do that would be effective or sensible. It is inconceivable that the requirement of a disaster contingency plan will reduce the incidence of harm to magicians' rabbits. What is to be done with rabbits in emergencies large or small is almost entirely a matter of practical knowledge of local circumstances and care of domestic animals acquired in the course of everyday life, and of empathy for one's pets; individuals who possess these things do not need a disaster plan, and those who do not possess them will not be helped by a plan. Hahne's plan did include some historical data about floods and tornadoes in Christian County, and some information, from Hahne himself, on how to properly pick up, put down, and feed a rabbit. But mainly it was written to satisfy remote government reviewers—with a prominent notice that it had been prepared by a "woman-owned small business that specializes in emergency management" and that had prepared plans for numerous federal agencies, and boilerplate recitations of many statutes and agency rules. Its contingency plan consisted of this: (a) in minor emergencies, Casey will be placed in his USDA-compliant cage and taken to the basement if necessary; (b) in major emergencies requiring evacuation, Marty and Brenda Hahne will take Casey with them in their car to a nearby town; and (c) if Marty and Brenda should become incapacitated, Brenda's mother will take care of Casey.

The Rule of Law Revisited

American administrative law long ago discarded two important features of the rule of law—first, that the laws that citizens live by be legislated, through deliberation, compromise, and political judgment among elected representatives; and second, that citizens aggrieved by the application of laws be afforded the opportunity to be judged by tribunals that are independent of the state's executive apparatus. Jerry L. Mashaw, in his *Creating the Administrative Constitution* mentioned earlier, emphasizes that executive officials in our earliest days possessed enormous discretion. But those were days when transportation and communications were primitive by today's standards, so that (for example) customs inspectors and tax collectors were perforce on-site governments unto themselves. Moreover, as Mashaw relates in detail, those officials were personally liable for abuse and error, often in state courts that were not only independent of federal authority but also, then as now, highly sympathetic to local plaintiffs.

Today, executive discretion is not a matter of necessity but rather of the political logic of delegation and government expansion. Officials in federal branch offices throughout the country are intimately connected with the policies and strategies of colleagues back at headquarters, and all are generally immune from personal liability for abuse and error. And individual rights have been supplanted by collective rights that vary case-to-case according to the interests of agencies and rulemaking participants. It has now been five years since the EPA designated Michael and Chantell Sackett's two-thirds acre lot a "wetland" under the Clean Water Act because of its proximity to an underground aquifer, and three years since the Supreme Court held that they were entitled to a hearing on the matter before an EPA tribunal. On remand, their case is still tied up in district court, where EPA has raised several intermediate issues now being briefed, with no hearing in prospect. Meanwhile EPA is separately engaged in rulemaking to hugely expand its formal definition of "wetland," where representatives of environmental interests enjoy abundant opportunities to he heard. When and if the Sacketts get their EPA hearing, the agency will almost certainly back the initial position of its enforcement officers; if so, the Sacketts will then be left to challenge that decision before

an actual court, which will almost certainly defer to EPA under prevailing standards of review. Their house will never be built.

The more recent developments in executive government raise further and potentially more profound problems for the rule of law. The one most frequently asserted, that regulation by "unelected bureaucrats" reduces "political accountability," is the weakest. Executive lawmaking, the complaint goes, not only departs from the law-as-legislation paradigm but also leaves the public in the dark regarding whom to reward or punish for good or bad laws. Elected representatives vote nigh unanimously for clean air and responsible finance and against discrimination against the handicapped, leaving the real choices to agencies. Members then attack or support agency decisions as individual advocates of policy causes—as courtiers to crown government—rather than as elected lawmakers engaged in collective legislative choice. All of which leaves political accountability in a hopeless muddle.

But this critique assumes, unrealistically, that voters are highly attentive and comprehending regarding the decisions of government, and that elections are determined by the sum of their assessments of those decisions. Under the more realistic theories of Joseph A. Schumpeter[60] and E.E. Schattschneider,[61] electoral democracy consists simply of choosing one or another governing elite for the time being, and incumbent accountability consists of the risk of being dismissed from power for real or perceived failures that are sufficiently conspicuously to impress the usually passive electorate. In the meantime (to apply this account to the question at hand), much and probably most legislation is unaccounted for, and much bureaucratic regulation is accounted for in the sense that it accords with the interests and preferences of many and sometimes most citizens.

The accountability complaint does, however, point to separate, serious rule-of-law problems. Executive government unhinges law from the deliberations, compromises, and inherent conservatism of the representative legislature. It is more likely than legislation to go to extremes, because it is specialized, missionary, and the product of insular subcultures of

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[60] *Capitalism, Socialism and Democracy* (1942), chs. XXI–XXIII.

[61] *The Semisovereign People: A Realists View of Democracy in America* (1960).

agencies and their "stakeholders."[62] Specialization has many benefits of course, in law as elsewhere, but specialized law lacks the flywheel of the general perspective. Over time, it is more likely to evolve in directions that are harmful or unpopular, oblivious to what it is doing until a legislative reaction sets in or even a Schumpeterian sweep—convulsions that will be costly themselves and may produce further harms. The problem of accountability, properly understood, is a problem of immoderation.

Specialization in government produces a separate kind of excess, excessive quantity. The inherent cumbersomeness of legislative decision-making is a bulwark of limited government. Efficient executive government, in tandem with the removal of constitutional limits on Congress's legislative powers and its ability to delegate them, produces too much law, propelling government into too many areas better left to economic markets, social norms, and personal judgment. The Tocqueville theory—that minute, meliorating regulation of routine aspects of life enervates the human spirit and suppresses social problem-solving[63]—is unproven but plausible; even if the nanny state does not suppress human ingenuity, it certainly redirects that ingenuity into comprehending and working around its directives.[64] In any event, government has many grave, well-documented deficiencies relative to other modes of economic organization and social mediation, and the objective performance of the federal government in domestic policy, especially regulatory policy, is consistently poor.[65] Government failure is in part intrinsic to public monopoly and political decision-making of every kind. But another part is that unencumbered government simply does many more things than can be done well. The capacity of executive government to expand the range and detail of legal obligations weakens the rule of law by subjecting citizens to

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[62] For a vivid instance see James Kwak, "Cultural Capture and the Financial Crisis," in *Preventing Regulatory Capture: Special Interest Influence and How to Limit It* (D. Carpenter and D.A. Moss, eds., 2013).

[63] Alexis de Tocqueville, *Democracy in America* (Harvey C. Mansfield and Delba Winthrop, transls. and eds., 2000), Part 4, Chapter 6, pp. 661–665.

[64] See Christopher DeMuth, "The Regulatory State," 12 *National Affairs* 70 (Summer 2012), pp. 76–77.

[65] Documented in such works as Peter Schuck, *Why Government Fails to Often: And How It Can Do Better* (2014) and Clifford Winston, *Government Failure versus Market Failure: Microeconomic Policy Research and Government Performance* (2006).

excessive coercion, which weakens allegiance to law in circumstances where coercion is necessary, and by producing ineffective and counter-productive law, which leads to justified popular disillusionment. Public trust in government and its institutions (other than the military) has fallen dramatically during the past several decades of growing government responsibilities and intrusions.[66]

Executive government, especially in its current freewheeling unilateralism, also undermines the stability and predictability that are essential virtues of the rule of law. Legislation, because it is costly to produce, tends to be durable and slow to change. That permits business firms and individuals to organize their affairs, from legal compliance to business and personal plans, with relative confidence, and to economize on keeping up-to-date with the law's commands. Over time, even bad laws become less harmful as citizens learn how to live with and work around them, and the costs of doing so fade into "sunk costs." Administrative law, even when it follows notice-and-comment rulemaking that may take years to complete, is much more changing, expansionist, and unpredictable than statutory law (a prominent judge once said that the function of courts in regulatory appeals is to shoot the survivors). It requires greater expenditures on information gathering and lobbying and more frequent adjustments to private activities in response to new rules. Policy uncertainty and ever-looming change are enemies of private investment, causing firms to hoard cash and postpone hiring and capital projects.[67] And extra-statutory policy improvisation of the sort we have witnessed in recent years makes the problems worse by adding the element of surprise—of shifting legal obligations that cannot be anticipated even probabilistically by inference from statutes, judicial precedents, speeches, and other public information ("unknown unknowns"). Beyond discouraging saving and investment, legal instability encourages short-term thinking and action and compromises liberty by introducing additional contingencies into formal rights and practical expectations.

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[66] See Pew Research Center, "Public Trust in Government 1958–2014," Nov. 13, 2014, www.people-press.org/2014/11/13/public-trust-in-government.

[67] See Scott R. Baker, Nicholas Bloom, and Steven J. Davis, "Measuring Economic Policy Uncertainty," Chicago Booth Research Paper No. 13-02, Jan. 2013, ssrn.com/abstract=2198490.

There is also a dynamic element to administrative law and uncertainty. The prolificacy of administrative law means that, as new contingencies arise over time, agencies have a large and growing stock of rules to draw upon for unanticipated purposes. Environmental policy is replete with discoveries of surprising new authorities in old rules and statutes; during the 2008 financial collapse, Treasury and Federal Reserve lawyers ransacked the Code of Federal Regulations and United States Code for plausible authorities for novel actions officials were determined to pursue.[68] At the same time, extemporaneous lawmaking creates incentives for business firms to become compliant insiders in programs that fuse regulation with collaboration, such as the ObamaCare insurance exchanges and the Dodd-Frank club of systemically important financial firms.

Finally, the administrative state is a regime of concentrated power. It combines lawmaking, interpretation, surveillance, and enforcement in a unified apparatus, now buttressed by a form of democratic representation and, in come cases, opportunities for public-private partnering. This creates abundant opportunities for the abuse of power, from personal corruption to policy favoritism to suppression of political and program opponents. In the American scheme, the separation of powers and hard competition among the three branches is a key mechanism for policing abuse. The consolidation of executive power and weakening of judicial and legislative checks on that power will, to a certainty—as prescribed by Acton's Axiom—lead to greater political and financial corruption. There are many plausible examples in recent years, from Internal Revenue Service harassment of conservative political groups to abuse of patients at Veterans hospitals to political favoritism in the "managed bankruptcies" of General Motors and Chrysler. Beyond the headlines, highly discretionary program—such as the FDA's prohibition of pharmaceutical firms publicizing effective off-label uses of their products, and the FCC's veto authority over corporate mergers that require transfers of spectrum licenses—feature routine administrative preferment, differential enforcement among similarly situated firms, and denial of elementary rights, and sometimes outright shakedowns.

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[68] See, Philip Wallach, "When Can You Teach an Old Law New Tricks?" 16 *New York University Journal of Legislation & Public Policy* 689 (2013).

Notes on Reform

If the administrative state is not a necessity for managing the complexities of modern society, then there are many opportunities for replacing it with taxes, legislation, common law, and private codes and social norms that are at once more productive and more congruent with the rule of law—Richard A. Epstein's *Simple Rules for a Complex World* (1997). If it is the product of high affluence and technology applied to politics, then the task of reform is highly constrained. An administrative state that reflected an intellectual wrong turn a century ago would not be easy to reform at this late date, but in principle could be reformed by persuading leaders and citizens that Progressivism has turned out to be mistaken and harmful in important respects, and by winning elections. But an administrative state with strong, persisting material causes cannot be reformed by persuasion alone. One needs to accommodate its causes with reforms that could resurrect and protect rule-of-law virtues and improve government performance in an age of technological mastery and atomized, populist politics.

That is more difficult but not impossible. In private life, affluence and technology—the automobile, television, birth-control pill, mobile smartphone, and Internet, and abundant discretionary time—have created many problems and upset many worthy traditions, along of course with solving many problems and furnishing cornucopian improvements. Over time, we have adapted. True progressivism consists of realizing the benefits while controlling the harms of the new powers that wealth and technology place in the hands of fallible humanity. In government and politics, progressive adaptation is complicated by the problematics of electoral and legislative decision-making, by the seductions of "the monopoly of the legitimate use of physical force,"[69] and, in the case at hand, by the administrative state's demonstrated capacities for resistance and cooptation.

The task of adaptive reform does not require that we abandon traditional legal and constitutional mechanisms. In politics as in society (and indeed in biological evolution), vestigial forms may find new uses in new

[69] Max Weber, *Politics as a Vocation* (1919).

circumstances. The administrative state, resilient as it is, is ultimately answerable to politics—and politics, although necessarily reflecting broad social trends such as those I have adduced, is contingent and unpredictable in the immediate moment, liable to taking action in response to current events that set new forces in motion.

To illustrate this point let me review the traditionalist proposals for reforming administrative law. Courts would prescribe workable restrictions on legislative delegation that obliged Congress to make more decisions itself, and Congress, when it did delegate, would prescribe agency procedures that were more formal and court-like and less managerial and discretionary. Many important matters now decided through informal rulemaking would graduate to some form of formal rulemaking, with live testimony, cross-examination, direct confrontation of competing positions, and high standards of evidence. For adjudications, administrative law judges would be independent generalists rather than agency specialists—employed outside the regulatory agencies and rotating among them. The *Chevron* doctrine would be narrowed or abandoned. Agencies would be restricted in their ability to make policy by sub-regulatory means such as guidance documents, interim final rules, and sweetheart litigation settlements.

Now these as we have seen are precisely the reform proposals that Congress, the courts, and the agencies have repeatedly brushed aside for more than sixty years, while moving instead toward greater informality and administrative democracy. Yet at least some of them might be resurrected, precisely in response to the unbounded executive's recent overreaching. During the period of regulatory growth that began in the 1970s, agencies had to give up a portion of their new prerogatives in response to political demands, communicated to them by Congress and courts, for transparency, public participation, and rational explanation. But now, during the latest growth period that began in 2008, agencies have repeatedly violated those earlier covenants, as we have noted. Moreover the Obama administration's legal extemporizing in ObamaCare implementation, greenhouse gas regulation, immigration policy, and other cases has violated another, implicit covenant—that the executive may violate statutory law at times of crisis (when justified by urgent necessity, such as the 2008 financial crisis) but not at times of normalcy

(when justified by mere political calculus or administrative convenience).[70] These actions have fired the new fundamentalist critiques of the regulatory state and attracted wide media coverage and debate, making regulatory excess politically salient for the first time in many years. This may provide an opening for reforms that not merely restore the status quo ante (more transparency, participation, explanation) but revive at least some of the dormant rule-of-law protections.

Certainly Congress and the Supreme Court have noticed the new developments. The Court has heard several challenges to extravagant claims of executive autonomy in recent years, deciding many of them, like the *Sackett* case, 9–0 against the government.[71] Recently, three justices, in dissents and concurrences in split decisions, have issued invitations to relitigate the nondelegation doctrine, one of them (Justice Thomas) including a detailed brief for specifying "intelligible principles" of delegation.[72] One senses in these opinions a dawning realization that the Court may have been mistaken in assuming that Congress would jealously guard its constitutional powers, so that judicial restrictions are superfluous in all but extreme, essentially accidental cases. If the Court should come to the view that, in modern politics, Congress is content to hand lawmaking powers to the executive, trading the troubles of legislative choice for the rewards of single-member activism, the effects could be profound not only for the nondelegation doctrine but also for *Chevron* and other doctrines of administrative law. Conceivably the Court could be presented with a nondelegation case that was clear enough to attract a majority—such as a challenge to the CFPB or PCAOB, both of which involve abdication of taxing and appropriating responsibilities

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[70] That emergencies legitimate extra-statutory executive action is emphasized in Posner and Vermeule, *The Executive Unbound*, *supra* page 37, and Wallach, *To the Edge*, *supra* note 41.

[71] Most recently in *Mach Mining LLC v. Equal Employment Opportunity Commission*, Docket No. 13-1019, April 29, 2015, holding that the EEOC's statutory duty to attempt to conciliate discrimination claims before suing over them is subject to judicial review.

[72] *City of Arlington v. Federal Communications Commission*, 133 S. Ct. 1863, 1879 (Roberts, C.J., dissenting); *Department of Transportation v. Association of American Railroads*, Docket No. 13-1080, Mar. 9, 2015 (Alito, J., concurring, and Thomas, J., concurring in the judgment).

along with lawmaking. In the meantime, the Court might invalidate the extra-statutory tax subsidies at issue in *King v. Burwell*. The Court might discover that its reputation did not suffer for its insisting on constitutional limits, and even that Congress and the administration responded in some productive fashion.

Similarly, Congress has in recent years actively considered several bills to add traditional rule-of-law protections to the APA. The Republican House passed a few of them in 2010–2014 in circumstances where there was little chance that they would be passed by the Democratic Senate or signed by President Obama. But Congress is now, since the November 2014 elections, a one-party branch in opposition to the executive: It might pass regulatory reforms to provoke a presidential veto that Republicans could make an issue of, or it might pass a bipartisan bill that the President could sign, perhaps in the wake of a major scandal or failure. President Obama would never sign a bill reversing his major initiatives on green-house gas regulation, immigration policy, Internet regulation, or ObamaCare implementation. But tightening up APA procedures and standards of review might stand a chance, precisely because they did not directly challenge controversial administration actions.

The contingency of politics means that would-be reformers should maintain stockpiles of ideas for solving problems as they rise to public prominence. But adaptive reform means going beyond stockpiling and patience to identifying reforms that are in step with background political trends. I have explained my reasons for thinking that Philip Hamburger's legislative incorporation and revision of established rules, Charles Murray's civil defiance of obnoxious and counterproductive rules, and Philip Howard's constitutional amendments are inadequate to the dynamics of today's administrative state. I hope that they will be debated, refined, publicized, and deployed where possible on probing missions, but I am skeptical of their practical prospects.

In the same spirit, I will conclude by evaluating, from the standpoint of adaptive reform, three proposals that have already passed an initial pragmatic test—they been advanced by practicing politicians as well as intellectuals and have, at one time or another, passed at least one house of Congress. These are (1) the so-called REINS Act ("Regulations from the Executive In Need of Scrutiny") requiring legislative approval of major

agency rules, (2) the addition of a cost-benefit standard to the APA's criteria of judicial review, and (3) the imposition of a fifteen-year sunset on new rules.[73] The first two would strengthen inter-branch competition, subjecting executive rulemaking to stricter review by Congress on the one hand and the courts on the other, while the third would change the dynamics of rulemaking within the executive branch.

The REINS Act would require that major agency rules be approved by both houses of Congress by up-or-down votes under expedited procedures (similar to those employed in trade-liberalization and military base-closing programs) before the rules could take effect.[74] In effect, major rules would become legislative proposals with fast-track privileges—aiming to balance agencies' mission-driven incentives with the need to attract two concurrent legislative majorities. Congress could not amend the rules (at least not under the automatic REINS procedure), but agencies would need to negotiate and compromise with members of both Houses of varying views and interests in order to avoid legislative defeat, just as is done in crafting legislation and in negotiating trade agreements. REINS procedures might be extended to the Obama administration's innovations of revising, suspending, or refusing to enforce important statutory requirements based on policy considerations rather than resource limitations or constitutional objections.

REINS passed the House twice in recent years, but as symbolic, anti-Obama gestures. As a practical matter, it is hopelessly abrupt in attempting to deconstruct the administrative state. By undelegated lawmaking for major rules, it runs directly against Congress's primary means of coping with atomized modern politics. A dozen or more times every year (depending on the definition of "major" rules), members would be obliged to vote for or against costly, often controversial, sometimes

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[73] An earlier evaluation of REINS and the cost-benefit standard is Christopher DeMuth, "The Regulatory State," *supra* note 64, pp. 78–89.

[74] Approvals would need to be signed by the president as statutory law to comply with *INS v. Chadha,* 462 U.S.919 (1983), but that would ordinarily be a forgone conclusion—REINS is a cumbersome but constitutional (under *Chadha*) one-house legislative veto. The definition of a "major rule," for the REINS procedure and for the cost-benefit requirement discussed in the text, is complicated and somewhat problematic; the complications are passed over here.

excruciatingly detailed rules rather than cheering or booing from the sidelines. Worse, the procedure could weaken Congress by vivifying its inherent inadequacies in the world of high-volume executive lawmaking. The congressional calendar would be repeatedly commandeered with complex, procedurally privileged bills that arrived at moments of the president's choosing—offering the executive new opportunities for outflanking and subjugating Congress. REINS-approved rules would be statutory law, and therefore immune to judicial review on other than constitutional grounds. As the agencies became adept at crafting REINS-worthy rules, they could use them to secure de facto statutory revisions that expanded their jurisdiction. If the press of other business led Congress to pass most of the REINS rules that came its way, or if it adopted a posture of deference similar to that of the courts, administrative law—now enshrined in statute—might grow faster than ever, and executive government—now formally countenanced by legislative procedure—might become more dominant than ever.

The second reform proposal would make the cost-benefit standard, applied within the executive branch to major agency rules through OMB-OIRA review since 1981, a statutory standard subject to judicial review. In effect, the APA's "arbitrary and capricious" standard would be made much more specific and demanding: agencies would be obliged to demonstrate that they had made a reasonable determination that the benefits of a challenged rule exceeded its costs, and that they had chosen among alternative approaches the rule with the greatest net benefits.

Like REINS, the cost-benefit standard would subject the executive to enhanced oversight by one of the other two branches. Rather than passing a political test under REINS, rules would have to pass an economic test. The aim would be to balance agencies' mission-driven incentives with a regulatory analogue to the budget constraint on spending programs—the costs of an initiative would be weighed not against a spending budget but rather against the benefits of the initiative itself. But as an institutional matter, the cost-benefit standard is radically different than REINS. Rather than standing athwart the regulatory state, it goes with the flow of delegated lawmaking, specialization, and transparency, and attempts to use them to establish a new mechanism of constraint. It does so in three ways.

First, the cost-benefit standard is politically and administratively feasible. It would be a further step in congressional delegation, turning over the task of regulatory constraint to the branch that is better equipped for case-by-case review. The proposal has been around much longer than REINS—it has passed one house several times (by a 92–0 vote in the Senate in 1982). This record, along with the standard's bipartisan durability within the executive branch, tells us that the standard is politically serviceable: different legislators and presidents will prefer more or less aggressive implementation of different regulatory programs, but many will be content with an overarching rule that all programs be pursued in a cost-effective manner.

Second, the cost-benefit standard adds a new, countervailing dimension to the principles of expertise, transparency, and rationalization that are the foundations of administrative lawmaking. Economics is an established, successful field of expertise, fully confident of its ability to work alongside other expert lawmakers. Economists, however, are specialists in generalization. Transparency and rational explication are their calling. They attempt to think rigorously about, and insofar as possible to quantify, how one change in a complex system affects the welfare of the whole. They are skilled at things that many legislators and mission-oriented regulators find difficult—such as discounting varying patterns of future benefits and costs to present values for comparison, estimating the value of nonmarket goods and forgone opportunities, and facing up to the politically inconvenient fact that when the price of something goes up the amount employed goes down.

Third, the cost-benefit standard would aim professionalize rulemaking, in the manner that economics-based antitrust doctrines professionalized antitrust review and enforcement beginning in the early 1980s. With judicial review, the cost-benefit standard would transform the dynamics of rulemaking within agencies and between agencies and OIRA. Agencies could not as easily summon political allies (outside or inside an administration) to roll over OIRA, because OIRA would not have the last word and indeed could help the agencies fashion economically attractive rules for judicial inspection. As happened at the Antitrust Division and FTC in the 1980s, and at the SEC following the D.C. Circuit's 2011 decision in *Business Roundtable v. SEC* mentioned earlier, the agencies would need to

beef up their economics staffs and pay as much attention to economists as to lawyers. Economists, like lawyers, are members of a strong profession, subject to peer-enforced professional norms that are independent of the political pressures of the moment. A string of judicial precedents, and an academic and professional literature, would develop on the application of the cost-benefit test to various types (environmental, product safety, financial) of rules.

A statutory cost-benefit standard could have additional advantages. It could ameliorate the problems that have led courts to be excessively deferential to agency determinations. Voluminous rulemaking evidence would be consolidated with economic methods and metrics, which would tend to discipline the rhetoric of rationalization employed in final decisions. Judges would be presented with findings and evidence in forms that are familiar to them in other areas such as contract and negligence law and damage calculation. To be sure, all of this would place new burdens on both courts and agencies, but these would be the burdens of applying new constraints to an administrative state whose central defect is lack of constraint. When we are dealing not with the government's own operations but rather with its rules for the operations of others, a slower moving, more costly, more deliberate government could—it should aim to—produce a faster moving, less costly, more dynamic private economy and society.

The greatest shortcoming of the cost-benefit standard is its open-endedness. Cost-benefit analysis is not, strictly speaking, economic analysis: it is "decision analysis," and often little more than decision-justification. It does not by its terms confine regulation to correcting market failures. A regulatory agency can argue that almost anything it wishes to do will have benefits exceeding its costs—based on properly crafted assumptions about consumer irrationality, producer oligopoly, dysfunctional social norms, or the social benefits of redistribution. Thus the Obama administration has used cost-benefit analysis to justify and promote several highly paternalistic energy efficiency standards and several EPA pollution standards based on dubious scientific assumptions. These rules have been strongly criticized by neutral professionals and academics—and, under a statutory cost-benefit standard, such critiques would no longer be merely academic, but would make there way into

court. The libertarian-minded reformer would like to see the cost-benefit standard combined with a requirement that agencies first identify a specific market failure to be rectified. Otherwise the matter must be vouchsafed to professional debate, empirical demonstration, and judicial precedent.

The third front-burner reform idea is a fifteen-year sunset for major agency rules. Legislative sunset provisions, specifying that statutes will remain in force only for a certain period of time, have a long and problematic history.[75] Part of the problem is that the provisions are resorted to selectively, to gain support for laws that otherwise would not be passed in the first place, and that legislatures that pass them can then extend the day of reckoning later on. An across-the-board sunset for rules issued by the executive branch would be less vulnerable to these problems, and has two attractive features from the standpoint of adaptive, feasible reform.

The first is that the idea of repealing "obsolete" rules is broadly popular and exploits an important weakness of the administrative state—public disenchantment with bureaucracy. Both the Clinton and Obama administrations pursued much publicized efforts to require agencies to review and revise outmoded rules, and several regulatory reform bills in the current Congress contain sunset provisions that would do the same thing with much less executive discretion. Regulatory obsolescence is a standard complaint of business firms, and one that meets relatively little resistance from politicians. Like the cost-benefit standard, a regulatory sunset provision seems politically plausible.

Second, a sunset provision could make a productive combination with a statutory cost-benefit standard. The costs of aged rules are almost certainly exaggerated by the proponents of sunsets and retrospective reviews—because businesses and individuals have adapted to them and face diminishing compliance costs. But the benefits are probably exaggerated too—many rules simply vindicate changing market and social preferences and technological possibilities, which thereafter become entrenched. (If NHTSA were to abolish its airbags rule, automobile

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[75] An excellent discussion is Frank H. Easterbrook, William N. Eskridge, Jr., Philip K. Howard, & Thomas W. Merrill, "Showcase Panel IV: A Federal Sunset Law," 16 *Texas Review of Law & Politics* 339 (2012).

manufacturers would not stop including airbags and continuing to improve them, because customers now demand them along with a multitude of other safety features, and because the technology has become thoroughly integrated in automobile design.) The advantage of a sunset requirement is that, in league with a cost-benefit standard, it would make regulatory debate more empirical. At the time a new regulation is issued, its benefits and costs inevitably involve a good deal of abstract supposition. Over time, the consequences become matters of practical experience. The shift in perspective is critical: it becomes possible not only to validate or invalidate the initial suppositions on which a rule was enacted, but also to determine when a rule has in fact become obsolete (overtaken by events), and most of all to plum many broad issues of regulatory effectiveness. All organizations resist evaluation, but government organizations, which lack strong market tests of their effectiveness, are in special need of it. A sunset provision, by making periodic evaluation mandatory and subject to review by an independent authority, would fortify the central ambition of the cost-benefit standard, which is to make the administrative state more professional and self-critical in its daily routines.

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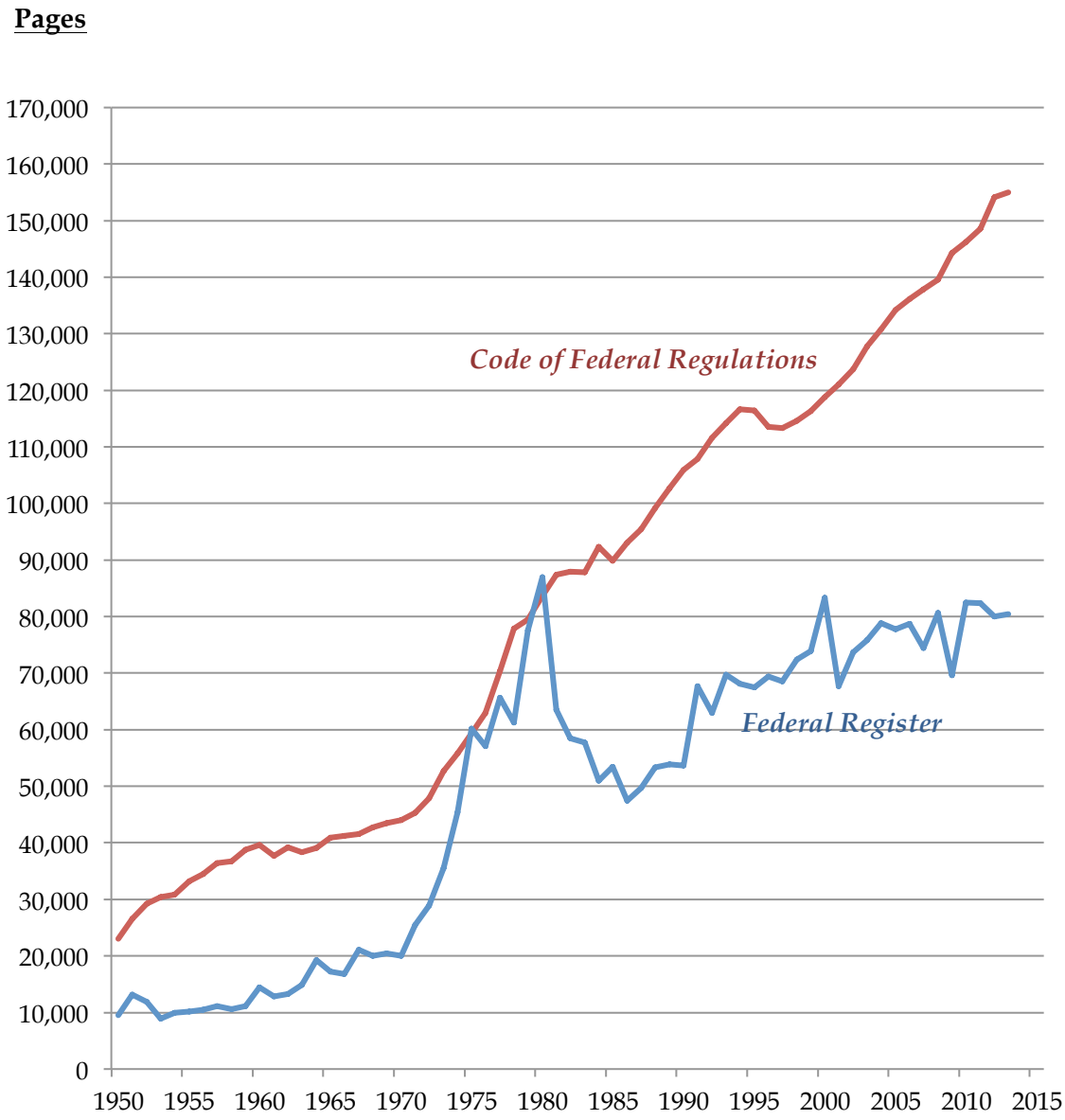
APPENDIX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Code of Federal Regulations
Federal Register

Note on the graph and numerical measures of regulation

The *Federal Register (FR)*, published since 1936, is a daily journal of the activities and decisions of the executive branch of the federal government. It contains notices of proposed rulemaking, final rules with evaluations of comments and evidence and explanations of decisions, notices of adjudicatory proceedings and decisions and of various other meetings and actions, instructions and deadlines for grant applications, and presidential documents such as executive orders and proclamations.

The *Code of Federal Regulations (CFR)*, published since 1938, is a compilation of final rules currently in force, organized by subject area and agency. The *CFR* was updated irregularly before 1969; since then it has been fully updated every year.

The Office of the Federal Register (OFR—www.ofr.gov) maintains historical statistics on the *FR* and *CFR* and occasionally updates and improves them. The current compilation is at www.federalregister.gov/uploads/2014/04/OFR-STATISTICS-CHARTS-ALL1-1-1-2013.pdf.

The OFR compilation includes total annual *FR* pages going back to 1936, and also—but only going back to 1976—more refined annual page and document counts for proposed rules, final rules, notices, and presidential documents. I am aware of no compilation of similarly refined data for years earlier than 1976. **The *Federal Register* line on the graph is the OFR's total-pages series.**

The OFR compilation includes annual pages of *CFR* publications going back to 1938, but does not attempt to standardize for various partial supplements published at irregular intervals before 1969. John W. Dawson and John J. Seater have standardized the OFR's series, and also excluded *CFR* chapters for general government organization and the Department of Defense, for the years 1949–2005,for their study, "Federal Regulation and Aggregate Economic Growth," 18 *J. Econ. Growth* 137 (2013) (www4.ncsu.edu/~jjseater/regulationandgrowth.pdf). **The *Code of Federal Regulations* line on the cover graph is the Dawson-Seater series** for those years, posted at www4.ncsu.edu/%7Ejjseater/index_003.htm. For the years 2006–2013, I extrapolated their 2005 number using annual percentage growth figures for the entire *CFR* included in the OFR series.

For useful discussions of the advantages and limitations of using numbers and pages of rules and other measures for studying levels and trends in regulation, see the Appendix to the Dawson-Seater study cited above and Maeve P. Carey, "Counting Regulations: An Overview of Rulemaking, Types of Federal Regulations, and Pages in the *Federal Register*," Congressional Research Service, November 26, 2014 (www.fas.org/sgp/crs/misc/R43056.pdf).