

# CAN THE ADMINISTRATIVE STATE BE TAMED?

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## ABSTRACT

The modern American administrative state is a regime of lawmaking by ad hoc managed democracy. It is the product of modern affluence and technology—which have reduced political transactions costs, increased demands for government intervention, and enabled Congress to supply the increased demands by transferring lawmaking to executive agencies. Specialized, hierarchical agencies can employ communication and information technology much more thoroughly than a conflict-riven legislature, and thereby generate law on a much larger scale. Today's administrative state departs from traditional rule-of-law values in important respects; understanding its roots in affluence and technology points to both constraints and opportunities for legal reformers.

## 1. 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 (Hamburger 2014).

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 executives, 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 individuals, business firms, and organizations.

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This article is written in a reformist spirit. It takes the view that administrative law has become 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, economy, and society. The article 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.

## **2. ADMINISTRATIVE LAW AND THE EMERGENCE OF RULEMAKING**

### **2.1 Regulation and the Administrative Procedure Act**

Agencies of the executive branch issue and enforce many kinds of rules under authority of statutes passed by Congress. Many concern the agencies' own operations, such as rules 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 entities. The agencies operate programs for adjudicating disputes under these rules, from immigration applications to defense contracts to Social Security benefits, usually with rights of appeal to independent, Article III courts.

Another category is rules that impose obligations and confer benefits on business 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 article—the domain customarily described as “government regulation.” Regulation includes the writing of rules—“rulemaking,” our primary focus—and several related 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 rules and under statutory law; the granting of licenses and permits for regulated activities such as marketing pharmaceutical drugs and using the electromagnetic spectrum; and the issuance of agency “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: (i) the APA establishes *procedures* for agency decision-making and defines the *discretion* of agencies in making decisions and of courts in reviewing challenged decisions, (ii) the organic statutes establish *policies* and *standards* for agency decision-making, and, sometimes, *procedures* that supplant those of the APA for particular decisions under those statutes, and (iii) the courts, in deciding challenges to agency procedures and decisions, 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 seventy 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 (established in 1934), Federal Communications Commission (FCC, 1934), and Civil Aeronautics Board (CAB, 1938). 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 policies be public and their decisions subject to judicial review? These questions produced several political and institutional divisions—between congressional leaders and the Roosevelt administration 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 advocacy and findings of fact, but much looser evidentiary standards than those of judicial trials. Adjudications 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; unless otherwise specified in the organic statutes, challenged decisions had to be supported by “substantial evidence” on the “whole record”—a more lenient standard than the “preponderance of the evidence” standard employed in civil trials.

- 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 public notice of proposed rulemaking summarizing their proposals and the statutory authority for them, then give interested parties opportunity to submit written comments, and then, after considering the submitted comments, issue a final rule along with a “concise general statement of [its] basis and purpose.” Rules would be subject to judicial review and could be set aside if they were “arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law”; this was intended to be even more lenient than the “substantial evidence” standard for adjudicatory decisions, but its actual import was to vary over time.

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 article. 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 adversarial hearings and findings of fact and could make law *managerially*, subject only to the requirements of public notice, consideration of submitted comments, and a statement of the rationale for final rules. The watershed was to come in the early 1970s.

## 2.2 The Rulemaking Revolution of the 1970s

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”—entry, 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 case-by-case licensing and permitting and live evidentiary hearings and enforcement actions involving one or a few firms, as did the distinctive programs of the Federal Trade Commission (FTC, 1914), Food and Drug Administration (FDA, 1930), and National Labor Relations Board (NLRB, 1935). In the agencies and courts, administrative law consisted mainly of interpreting and applying the adjudication provisions of the APA and the organic statutes. There is essentially

no judicial case law on informal rulemaking before the late 1960s, when some agencies began to use rulemaking to settle generic issues that arose repeatedly in licensing and enforcement cases.

Then, in 1970, Congress began chartering new programs of so-called “social regulation” devoted to public health and safety, environmental quality, and consumer protection. The EPA, National Highway Traffic Safety Administration (NHTSA), and Occupational Safety and Health Administration (OSHA) were all established in that year, the Consumer Product Safety Commission (CPSC) in 1972. The Equal Employment Opportunity Commission (EEOC) and Office for Civil Rights (OCR, now a division of the Department of Education), established by the Civil Rights Act of 1964, became increasingly assertive in the 1970s—policing not only racial discrimination but also discrimination based on sex, age, and disability, and requiring “affirmative action” to promote the participation of blacks and other groups in the workplace and schools and universities, especially among federal grantees and contractors. A variety of consumer finance programs were enacted in the 1970s also, including the Fair Credit Reporting Act of 1970 (FCRA) and the Employee Retirement Income Security Act of 1974 (ERISA). The Arab oil embargo of 1973 brought energy efficiency regulations for motor vehicles, consumer products, and household appliances, administered by NHTSA, EPA, and a new Department of Energy established in 1977.

The differentiation of “economic” and “social” regulation, which began to appear in the 1970s, is imprecise. Just as utility regulation may be thought of as correcting the market failure of monopoly, so environmental regulation may be thought of as correcting the market failure of external costs; just as utility regulation standardizes prices, so health and safety regulation standardize production methods and product designs. The distinction did, however, capture a fundamental shift in the nature and purposes of federal regulation. The Progressive and New Deal agencies were mainly concerned with regimenting production in key economic sectors, often at the expense of consumers; in contrast, the new ones were mainly concerned with promoting personal consumption and, more broadly, personal welfare and dignity. The established agencies mainly mediated self-contained commercial disputes of scant interest to most citizens; in contrast, the new ones were missionary and aspirational, pursuing open-ended objectives of strong interest to large and growing numbers of citizens.

The shift to social regulation in the 1970s reflected profound changes in American politics that were to propel the growth of the administrative state for decades to come, as examined below in Section VI. Its immediate effect was to lay the groundwork for that growth by increasing not just the number of executive agencies but also their legal discretion and practical power. The

Progressive and New Deal organic statutes gave agencies broad discretion—for example, directing them to prescribe “fair and reasonable” rates and to permit market entry according to “the public convenience and necessity.” That discretion, however, was exercised largely through permitting and adjudicatory decisions involving one or a few firms, such as determining whether one or another airline would be permitted to fly a particular route. The health, safety, and environmental statutes were sometimes similarly broad (air pollution standards for stationary sources should be “requisite to protect the public health with an adequate margin of safety”) and sometimes highly precise (standards for automobile emissions were specified by statute). But the new agencies operated largely through the more expeditious and flexible methods of informal rulemaking, setting standards that covered the entire economy or major sectors such as energy, finance, education, manufacturing, motor vehicles, and consumer products. Rules were subject to judicial review on statutory and constitutional grounds, but the terms of review were lenient and became increasingly so over the years. Once established, the rules were proprietary and dynamic—continuously monitored, enforced, adjudicated, and modified by the agencies that created them and litigated by interest groups in the agencies’ “stakeholder communities.” The old-line economic regulators such as the Interstate Commerce Commission (ICC, 1887), Federal Power Commission (FPC, 1920), and FCC took notice and began to shift to informal rulemaking, not just as an adjunct but also as a substitute for adjudication—even for setting prices, which had long been assumed to require evidentiary hearings.

Thus was born the modern era of efficient, high-volume, high-impact regulation, where agencies, following public notice and comment, could issue rules with costs and benefits of scores of millions of dollars per year and more 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. For one thing, it began to grow mightily in sheer volume. The U.S. *Code of Federal Regulations* (CFR) was about 23,000 pages in length in 1950, excluding internal organizational rules and those of the Department of Defense. By this measure it grew by about 21,000 pages during 1951–1970, to 44,000 pages. The CFR then grew by 62,000 pages during 1971–1990 and another 40,000 pages during 1991–2010, for a total of 146,000 pages in 2010.<sup>1</sup> But the growth in regulatory text does not

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1 The CFR numbers are from the data set for Dawson & Seater (2013), available at [http://www4.ncsu.edu/%7Ejseater/index\\_003.htm](http://www4.ncsu.edu/%7Ejseater/index_003.htm). The problematics of measuring regulation by numbers of pages, rules, and notices are presented in Carey (2015). The RegData project of the Mercatus Center at George Mason University analyzes regulatory text and counts numbers of binding constraints or restrictions—see <http://regdata.org>.

capture the growing range, cost, and popular salience of the contents of that text.

The 1970s was not the last watershed—another would come in the years surrounding the financial collapse of 2008. Section 2 examines central developments during administrative law’s formative (1946–1970) and growth (1970–2008) periods, and Section 3 turns to the current, post-2008 period of “the executive unbound.” Following these interpretive surveys, the remainder of the article proceeds as follows: Section 4 reviews the recent “fundamentalist” literature on administrative government; Section 5 offers an explanation—which I call a “material” explanation—for the growth and nature of the new administrative state; Section 6 argues that the material explanation is superior to the conventional “progressive” explanation; Section 7 considers the implications of today’s administrative state for rule-of-law values; and Section 8 examines the dilemmas of administrative law reform and evaluates several leading reform proposals.

### 3. ADMINISTRATIVE LAW THROUGH 2008

The rise of the administrative state was accompanied by persistent controversy among judges, lawyers, legislators, presidents, executive officials, academics, business leaders, union leaders, and policy activists. The most important litigation, legislative proposals, and academic debates centered on a common question: whether the emerging phenomenon of executive policymaking should be constrained, and if so how. Three forms of constraint dominated the debates—(a) constitutional and (b) legal standards and procedures aimed at sustaining traditional “rule of law” protections for individual rights and promoting electoral accountability, and (c) economic standards and procedures, in particular cost–benefit analysis, aimed at making regulation more effective and public-interested. These will be examined in the following subsections.

It will be useful to summarize our conclusions in advance. The efforts at regulatory constraint, while not entirely without consequence, largely failed. They were not so much defeated on the merits as overwhelmed by the dynamics of government growth through legislative delegation and managerial lawmaking. In place of rule-of-law norms or economic analysis, Congress and the courts decreed policies of transparency and “reasoned decision-making.” Under the new dispensation, executive agencies possessed wide lawmaking discretion as a formal 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 actions. Administrative law became discretionary, cumbersome, servile, and litigious. It was a regime of specialized, ad hoc,

managed democracy with its own internal logic and tremendous institutional momentum.

### 3.1 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 and Lockean political theory. 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 in statutes. But not more: policy choices are the responsibility of elected representatives and may not be handed off 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 acquiescence in New Deal economic interventionism, along with other constitutional doctrines that had previously limited Congress’s ability to regulate interstate commerce and restrict economic liberties. By this account, limits on congressional delegation had been recognized in Court opinions going back to Chief Justice John Marshall, and had been summarized in *J.W. Hampton v. United States* (276 U.S. 394 (1927)) 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 during the New Deal. In the event, nondelegation was a one-year, two-case wonder, applied to invalidate provisions of the National Recovery Act in *Panama Refining v. Ryan* (293 U.S. 388 (1935)) and *Schechter Poultry v. United States* (295 U.S. 495 (1935)).<sup>2</sup> But those decisions provoked angry political reactions and their rationales were soon abandoned. Forever after (the standard account goes), the Court unfailingly approved congressional delegations, even under vague, open-ended statutory standards such as that agencies 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.”

2 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).

This account is misleading. It glosses over the slower moving dynamics of the nondelegation doctrine's decline, which reached 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 Benjamin 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. *NBC v. United States* (319 U.S. 190 (1943)), 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. All of the Court's nondelegation cases before the 1970s were of this sort.

The radical departure was from constitutionally sanctioned judging and licensing to constitutionally sanctioned legislating by executive officials. This 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 and evidentiary constraints of courts and of the decision-making constraints of legislatures. The Progressive and New Deal regulatory commissions were like courts or mini-legislatures—they consisted of five members, including representatives of both major political parties, who served fixed terms, decided matters by majority vote, and were nominally independent of presidential supervision. In contrast, most of the new agencies, such as the EPA and OSHA, were hierarchies reporting to a single administrator who served at the president's pleasure. Yet they made policy decisions with broader effect than those of court judgments, and they used notice-and-comment procedures in legislative fashion to build constituency coalitions and public support for their initiatives. And they often did so under highly elastic congressional standards with little more in the way of "intelligible principles" than 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.* (410 U.S. 224 (1973)), but over the vigorous dissent of another famous progressive, Justice William O. Douglas, who had been a New Dealer and SEC chairman. *Florida East Coast* was not formally a nondelegation case—the question was whether the Interstate Commerce Act's requirement of a "hearing" precluded use of the APA's rulemaking provisions—but Justice Douglas insisted that, for something as inherently discretionary as setting prices, agencies must conduct live evidentiary hearings rather than canvas for memos. A year later, in the companion cases *National Cable Television Assn. v. United States* (414 U.S. 336 (1974)) and *FPC v. New England Power Company* (414 U.S. 345 (1974)), he spoke for the Court in rejecting an even bolder form of agency policymaking—FCC and FPC taxes on broad categories of firms based on a statutory "public policy or interest served" standard. Citing *Schechter* for the proposition that such a broad delegation would be constitutionally problematic, 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 (414 U.S. at 340–342). The distinction did not last: Congress continued to encourage agencies to set broad-based, politically contrived taxes, and in 1989 the Court unanimously approved in *Skinner v. Mid-American Pipeline Co.* (490 U.S. 212 (1989)).

When the new programs of social regulation got into gear in the late 1970s, matters became more complicated but with the same result. The Supreme Court's *Benzene* decision, *Industrial Union Dep't., AFL-CIO v. American Petroleum Inst.* (448 U.S. 607 (1980)), 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 more than 40,000 words, whose net effect was to invalidate the benzene standard and send it back to OSHA with a recipe for avoiding nondelegation problems in the future.

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 evidence of health risks at exposures greater than 10 ppm, but a mere assumption that reducing exposure from 10 to 1 ppm would reduce risks further. That, said the government, was sufficient: the statute gave OSHA discretion to tighten

exposure limits without demonstrating incremental health benefits, and without bothering with incremental compliance costs beyond their “feasibility” (which meant only that the regulated firms would find the costs “bearable”).

Justice William Rehnquist’s concurring opinion agreed that the statute gave OSHA the discretion the government claimed—and concluded that it was therefore an unconstitutional delegation of legislative authority. The deciding (four-justice) opinion agreed that statute might be unconstitutional under the government’s interpretation (citing *Schechter* and *Panama Refining*), but had a different interpretation. The “reasonably necessary or appropriate” language, it said, meant that OSHA must find that there is a “significant risk” under an existing standard before tightening the standard. OSHA had not done that, so had to start over. The plurality approach was similar to Justice Douglas’s approach in the 1974 tax cases: reading a statute in a highly imaginative way to sidestep the delegation problem. (Four dissenting justices would have upheld the benzene standard and OSHA’s rationale for it.)

The “significant risk” hurdle was not difficult 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, *American Textile Manuf. Inst. v. Donovan* (452 U.S. 490 (1981)) (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 joined by Chief Justice Warren E. Burger, 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 the Court had rejected, but this time with some updated health evidence and a mathematical model that extrapolated the risks of high levels of exposure down into the 10–1 ppm range.<sup>3</sup> There was substantial evidence in the record both for and against significant health risks at 10 ppm; 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

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

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 the decisive four of them were content with a boundary that was, as a practical matter, admonitory. The result was to give OSHA the discretion the dissenters wanted but at the price of more elaborate rationalization than the agency wanted; this fit a larger pattern to be explored in the next subsection.

What was most impressive about the *Benzene* and *Cotton Dust* opinions was not their formal reasoning but rather their length, complexity, and exasperation in the search for a useful judicial role in a field dominated by technical and administrative considerations. Judicial 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 (448 U.S. at 676–682). 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 the 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 Antonin Scalia, dissenting in *Mistretta v. United States* (488 U.S. 361, 413–427 (1989)), 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.* (531 U.S. 457 (2001)), 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 not until 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 in Section 4.

### 3.2 Law versus Democracy in the Administrative State

The debates over administrative procedure and judicial review were similar in purpose and result to those over constitutional legitimacy, but were more dynamic and revealing of the political forces at work. These debates proceeded in Congress as well as in the courts, and moved in the same direction despite the two branches' different sources of authority and methods of decision-making.

#### 3.2.1 Congressional Developments

From the earliest years of the APA down to the present, Congress has considered frequent proposals for legislative reform from academic and practicing lawyers, business associations, the American Bar Association and other professional bodies, and good-government groups beginning with the 1955 Hoover Commission.<sup>4</sup> The proposals have aimed to make administrative law more like traditional lawmaking and law enforcement and less like modern administration and management. In the 1950s and 1960s, they aimed to make then-dominant APA adjudication more court-like, with higher evidentiary standards and greater functional separation between agency proponents on the one hand and 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 reform proposals has aimed to make rulemaking more formal and adversarial, to move major regulatory decisions from

4 Indeed the proposals for greater procedural formality and higher evidentiary standards predate the APA, and passed Congress in the form of the Walter-Logan bill of 1940, vetoed by President Roosevelt. Six years later, the APA enacted less constraining provisions for adjudication and, for rulemaking, much less constraining standards that opted for "transparency and openness" rather than evidentiary hearings and strong judicial review. See McNollgast (1999, pp. 197–200). That choice presaged the more elaborate statutory requirements for agency transparency to come, related in the text immediately following. However, while McNollgast interprets the APA's original public notice requirements as facilitating congressional oversight, the later transparency statutes and judicial requirements were directed at facilitating public oversight and participation, as emphasized in the text later in Section 3.2.1 and in Section 3.2.2.

rulemaking to adjudication, and to narrow agency discretion through more specific criteria for standard-setting or an overarching cost–benefit standard.

None of these proposals has been enacted, with the exception of a 1976 APA amendment barring *ex parte* communications in then-receding formal evidentiary proceedings.<sup>5</sup> Instead, Congress preserved the Act’s informal rulemaking provisions and established scores of new agencies and programs that combine rulemaking with broad standard-setting discretion. As it fostered the growth of executive authority, Congress mediated that authority not with legal procedure and judicial review 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 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).

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5 Allan (1986); Pierce (1996). Pierce, an ardent proponent of unfettered agency discretion, gives a thorough account of the failed formalizing initiatives and the accompanying professional literature. He notes, and laments, that Congress has enacted tighter evidentiary and judicial-review standards in the organic statutes of some rulemaking agencies (pp. 193–194). But his list is a short one in the face of Congress’s enactment of numerous new programs employing APA informal rulemaking and rejection of proposals to tighten its requirements. An example not on his list is the Occupational Safety and Health Act of 1970, which required OSHA rules such as the one at issue in the *Benzene* case (discussed in the text) to be supported by “substantial evidence,” the APA’s general standard for adjudication decisions, rather than merely not being arbitrary or capricious. That is why the result of the *Benzene* decision was that OSHA must offer “substantial evidence” of a “significant risk.” The higher standard of review helped the Court’s deciding plurality avoid the nondelegation problem, while still leaving OSHA with wide rulemaking discretion—the agency had to provide more elaborate rationalizations for its decisions than it would have preferred, but that, as we shall see in the text, would have been the case under the arbitrary or capricious standard as well.

- 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 require the agencies to be less cloistered, more transparent, and more permeable to publicity and organized influence. Congress insisted that its creation of delegated executive lawmaking be a mirror of itself: participatory, responsive, wordy, and, in a loose and unstructured way, publically accountable.

### 3.2.2 *Judicial Developments*

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 quintessential judicial task of statutory interpretation. The judiciary as well as the legislature accommodated 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, in the 1940s and 1950s, Congress had seemed open to a more formal and legalistic administrative law). Beginning in the early 1970s, the Court of Appeals for the District of Columbia Circuit, which hears most challenges to administrative actions, 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 and 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 lawyer’s toolkit—formal adversarial procedures. But the judges spoke in terms that were not so much lawyerly as responsive to the deficiencies they apprehended in informal rulemaking as a means of 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 the public at large, could understand to be other than arbitrary.

In *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council* (435 U.S. 519 (1978)), the Supreme Court stuck down the D.C. Circuit's project in a blistering opinion.<sup>6</sup> 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 judges were free to supplement according to their own, Monday-morning quarterbacking of whether those procedures had turned out to be fair and thorough in the case at hand. If additional procedures were appropriate in particular circumstances, that was for the agencies to decide. The courts' role was to judge whether the agencies' decisions met Congress's standards of judicial review—in *Vermont Yankee*, whether the rulemaking decision (of the Nuclear Regulatory Commission (NRC)) was or was not arbitrary or 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 trial 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, including its extension to judicial deference to agency interpretations of their own regulations and jurisdiction, and its optionality when courts wish to decide big cases with their own choices among arguable statutory interpretations. What deserves more attention is the institutional circumstances of the case itself, *Chevron U.S.A. v. National Resources Defense Council* (467 U.S. 837 (1984)). The question before the 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 for facilities in regions with air quality falling short of EPA standards. But this was only incidentally a question of statutory interpretation, for the statute and legislative history had nothing to say on the

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6 The classic study of the case and its antecedents is Scalia (1978).

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 Democratic leadership of the 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 leadership). 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 in more productive abatement investments—not only lower abatement costs but also 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 trying to undermine the Clean Air Act's purposes or short-circuit the agency's regulatory apparatus for the selfish benefit of industry.

The conventional approach of appellate review, and the one commanded by the APA and followed by the D.C. Circuit in the case, would have been for a court to conduct its own assessment of the statutory question and determine whether "source" did or did not embrace an entire factory. But that, in the circumstances of the case, would hardly have 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 leadership. Given that the legal question was a coin toss, the Court would have been acting, willy-nilly, as an über executive. It might have ruled that both interpretations of "source" were not only reasonable but lawful, and EPA was free to choose between them; but that would have left unresolved whether EPA might adopt still other interpretations as the nonattainment program evolved. Better, the Court must have thought, to hold generally that courts should defer to reasonable agency choices when statutes are silent or ambiguous.

The *Chevron* doctrine has been debated at length in traditional legal terms. But what stands out in the *Chevron* line of environmental, health, and safety rulemaking cases—in parallel with the *Benzene* and other nondelegation cases—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, 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 issues of management, policy, 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, appropriations riders, and informal pressures. Mostly it is deference to the reality of executive government and the amalgam of lawmaking and management.

But that deference, along with deference regarding agency procedures and policy choices, has come 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 are not 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, who have come to exercise legislative authority as agents and on grounds of specialization and expertise (the opposite of representation). So not only must they act non-arbitrarily, they also must provide detailed documentation and explanation 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 rulemaking 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 law-making 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). This much lives on from the D.C. Circuit's pre-*Vermont Yankee* concern with fairness, dialogue, and forthright explanation. 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 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, White House officials have justified the cost-benefit requirement not only as a means of facilitating presidential oversight but also of promoting regulatory transparency and participation and countering agency parochialism.<sup>7</sup>

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 goals set forth in the preambles to their organic statutes—conscientiously. This is a plausible explanation of some 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 judge-made

<sup>7</sup> As emphasized by early and recent administrators of the Office of Information and Regulatory Affairs, which oversees the regulatory review programs. See DeMuth & Ginsburg (1986) and Sunstein (2014).

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 in *Baltimore Gas & Electric Co. v. National Resources Defense Council* (462 U.S. 87 (1983)). Then, just a few months later, the justices took a strikingly different tack in *Motor Vehicle Manufacturers Ass'n. v. State Farm Mutual Automobile Ins. Co.* (463 U.S. 29 (1983)). *State Farm* concerned the National Highway Traffic Safety Administration's rescission of a rule requiring automobile manufacturers to equip vehicles with "passive restraints" for protecting occupants in crashes—either airbags or automatic seatbelts. The 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 explained that it had concluded that manufacturers would largely opt for the less costly and more familiar seatbelts but that many drivers would detach them, 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 instead chosen an airbags-only rule.

NHTSA's explanation had been even thinner than the NRC's, but not by much. The decisive difference seems to have been 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 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" (435 U.S. at 557). 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 (463 U.S. at 33). 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 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" (463 U.S. at 59), 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 deference. 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 or capricious. Taken together, the foundational decisions of judicial review of safety and environmental rulemaking—*Vermont 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 assigned to it.

Mission-contingent deference was dramatically on display in the Supreme Court's recent plunge into the thicket of regulatory politics in its two greenhouse gas decisions, *Massachusetts v. EPA* (549 U.S.497 (2007)), and *Utility Air Regulatory Group v. EPA* (134 S.Ct. 2427 (2014)). In the first case, the Court held that EPA must seriously consider the petitions of several states that it regulate carbon dioxide and other greenhouse gas emissions under the Clean Air Act, despite the agency's protestations that the statute, designed for the control of conventional air pollutants such as sulfur dioxide and particulate matter, provided no practicable means for doing so. In the second, the Court confronted the statutory conundrums the agency had warned of in the first case. Through a complex series of rulemaking maneuvers, EPA had invoked one set of Clean Air Act authorities for regulating stationary pollution sources. Those authorities, however, applied to sources emitting more than 100 tons of pollution per year (250 tons in some cases)—which covers a few hundred power plants and industrial facilities for the conventional air pollutants, but would cover millions of sources of ubiquitous carbon dioxide, down to small apartment buildings. Recognizing that this expansion of its regulatory controls would be absurd and unworkable, EPA revised the statutory thresholds upwards 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 of agency rewriting of explicit statutory requirements. But it found a different route for EPA to proceed with its greenhouse gas program—noting that other provisions of the Act permitted the agency to add ancillary requirements, which reasonably could restrict greenhouse gas emissions, in issuing permits for facilities already subject to its controls for conventional pollutants.

As a matter of dry law and precedent, these should have easy cases—in *Massachusetts*, for deferring to EPA’s abstention on highly plausible statutory grounds; in *UARG*, for rejecting EPA’s statutory extemporizing and abstaining from its own extemporizing. Instead they were very hard cases for the Court, each one generating sharply disagreeing opinions and contorted reasoning on all sides. The best explanation is that they followed the implicit doctrine of mission-contingent deference. The cases concerned the most politically salient environmental issue of the day, one that had already mobilized the governments of several sovereign states although it was inherently a national (and international) rather than state issue. If our national environmental agency could not bother itself over global warming and greenhouse gas emissions, what was the agency for? The Court first insisted that EPA simply could not sit out the debates by wrapping itself in legal technicalities, and then cleared away the technicalities more artfully than the agency itself had done. In this view, the Court would have permitted EPA to decide against regulating greenhouse gasses provided only that it articulate a plausible rationale for that choice in terms of its positive statutory missions—as EPA had done in *Chevron* but NHTSA had not done in *State Farm*.

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, *Business Roundtable v. SEC* (647 F.3d 370 (D.C. Cir. 2011)), and antecedent decisions cited therein, and FCC efforts to regulate the Internet in the name of “net neutrality,” *Verizon Communications Inc. v. FCC* (740 F.3d 623 (D.C. Cir. 2014)) and *Comcast Corp. v. FCC* (600 F.3d 642 (D.C. Cir. 2010)). 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 interests 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 to the advantage of powerful interest groups, which was neither democratic nor public-spirited.

### 3.3 Administrative Law and Economics

The deregulation and regulatory reform movement of the 1970s and 1980s attempted to constrain administrative government through economic norms

rather than legal norms. The movement was concerned not with whether agencies were constitutionally legitimate or legally punctilious, but rather with whether their policies were economically efficient and socially productive. 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 professor who became a key architect of airline deregulation (Nelson 1987, pp. 60–63); an influential proponent of regulatory reform (Breyer 1982), of wide agency discretion tied to economic and scientific principles (Breyer 1995) and of democratic participation (Breyer 2005); and a 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.<sup>8</sup> 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 J. Stigler, used economic reasoning to explain the political causes of seemingly perverse policies (Stigler 1971), while a school of reformers, led by Alfred E. Kahn and Breyer, used economic reasoning to formulate better policies (Kahn 1970, Breyer 1982).

The positive economic theory of regulation developed at a time when public utility and common carrier regulation still dominated. It asserted that those 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 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 policymaking and administrative law—much of it applied equally well to the sugar import quota, minimum

8 On the rise and fall of the Landis consensus, see McCraw (1984). Landis himself lost faith in it—see Ritchie (1980).

wage, and other forms of direct legislative regulation.<sup>9</sup> 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 (i) economically rational pricing and the elimination of entry controls where markets were natural monopolies and (ii) 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 (Posner 1999). New technology provided the means of unregulated entry into communications and financial markets, much of it beyond the jurisdiction of the FCC and bank regulators—leading the 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

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9 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 Spence & Cross (2000) and Spence (2002).

dominance (Wilson 1980).<sup>10</sup> That view will be elaborated and extended later in this article. For now it is sufficient to note that, despite many demonstrations of perverse effects, big-business favoritism, and interest-group “capture” in the new social regulation, that regulation was not unpopular. As social regulation grew and economic regulation receded in the 1980s and 1990s, the idea that administrative agencies were a conspiracy against the public lost much of its political salience.

Economists did, however, advance a normative critique and reform agenda for social regulation, focused much more heavily on the particulars of agency policymaking than they had for economic 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, because 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 (Newell & Rogers 2006) (both agency reforms in the 1980s), and a statutory emissions trading program for controlling sulfur dioxide and nitrogen oxides pollution added to the Clean Air Act in the 1990s. White House review of major rules, requiring cost–benefit analysis under a “maximum net benefits” standard, begun in the Reagan administration, 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

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10 Stigler responded with a scathing review of Wilson’s book (Stigler 1980), but later came close to acknowledging the essential points of Wilson’s essay (Stigler 1982). Croley (2007) is a much later critique of the economic theory of regulation, with several case studies of what the author regards as public-interested regulations, which were strongly opposed by industry groups.

low benefits, and worked many improvements to rules that were issued (*Administrative Law Review* 2011).

Yet these actions had no more than marginal and transitory effects on the pre-2008 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 adherence to the maximum net benefits standard (Hahn & Tetlock 2008; Hahn & Dudley 2007; Finkel 2014). 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 stalled or defeated by agency sabotage, political opposition, and court reversals, while Congress expanded 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 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) (DeMuth 2011). The reformers had little influence on regulatory forms that did not fit the economic template—such as the transformation of anti-discrimination law into race-and-gender quotas (by the Department of Education’s OCR and other agencies), and programs that operated primarily through case management rather than rulemaking (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). And the rulemaking agencies became increasingly adept at the use of “guidance documents,” litigation settlements, and other methods that elided White House oversight, APA requirements, and (often) judicial review (Epstein 2015). The efforts to constrain the administrative state with economics were more consequential than those to constrain it with law, but over time they too were overpowered by the political ballistics propelling its growth (Noll 1999; Peltzman 2004).

#### 4. 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 budget appropriations. It also became more “fusionist”—combining regulation of private firms with government operations that competed or collaborated with those firms. These changes moved American government further from traditional legal and constitutional norms, and further from the APA’s requirements as originally conceived, than even the 1970s rulemaking

revolution had done. And they were accompanied by other changes: executive actions became increasingly opaque and nonpublic, and public pronouncements increasingly abrupt and conclusory. These changes violated the implicit compact described in the previous section, whereby Congress and the courts conditioned executive discretion on transparency, openness, and detailed explication.

These departures became conspicuous in the government's response to the financial collapse 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 those 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 protocols at airports and shipping terminals and capacious new forms of surveillance of private communications and financial transactions. The arrangements melded regulation with operational collaboration with private firms and were, with the exception of airport security, largely insensible to the public, often explained only vaguely, and sometimes entirely secret. Many were undertaken without statutory authorization; others under capacious new statutes, such as the Homeland Security Act of 2002, which President Bush had insisted on in an atmosphere of crisis.

Yet other, similar steps in the years before 2008 were strictly domestic. In response to the Enron accounting scandals of late 2001, Congress passed at the president's urging the Sarbanes-Oxley Act of 2002, which intruded deeply into corporate decision-making and 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 its own fees and taxes which made it entirely free of congressional appropriations.<sup>11</sup> The Department of Justice, in responding to the accounting

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11 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 in the text in Section 3.1—although PCAOB's taxes are much broader than those in *Skinner* and its financial independence from Congress is much greater (DeMuth 2015b).

fraud under established laws, employed criminal prosecution in unprecedented fashion, liquidating a leading accounting firm, Arthur Anderson, for document-retention violations, with little public explanation. The Supreme Court eventually reversed the conviction (unanimously) in *Arthur Anderson LLP v. United States* (544 U.S. 696 (2005)), but by then the firm was gone and its 26,000 U.S. employees dispersed.

Another departure, also in financial regulation, was the combined 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.<sup>12</sup> The regulators encouraged banks and other financial institutions to relax traditional mortgage underwriting standards (eliminating down-payment and income-documentation requirements and the like) and to extend these mortgages to borrowers in lower-income and minority communities. Fannie and Freddie subsidized the mortgages (through implicit federal guarantees on their own borrowing) by purchasing them in large numbers, packaging and marketing them as derivative securities (“mortgage-backed securities” or MBSs), and purchasing large quantities of MBSs created by private banks.

These efforts began in the 1990s and flowered in the 2000s, when very 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 set the table for the financial collapse of 2008, which was 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 this article is that the efforts were an innovation in the fusion of government regulation with government–industry financial collaboration. Although the programs were encouraged by some congressional leaders and undergirded by 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

12 My account of the antecedents of the financial crisis and of the government’s rescue efforts draws on, among other works, Wallison (2013); Friedman (2010); and Taylor (2009). For a meticulous study of the lawfulness and legitimacy of the administration’s rescue measures, see Wallach (2015).

the procedures of administrative law, and that few people (including bank regulators) even comprehended at the time.

When the financial crisis arrived in 2008, it revealed the full power of the 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. 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—Treasury Secretary Henry Paulson and FRB Chairman Ben Bernanke and their subordinates were reticent about the nature and purposes of their decisions and the extent of the government’s financial participation, and instructed the executives of the affected firms to keep mum as well. The fusion of government regulation with government financial participation increased rather than reduced market uncertainty, suppressed private remediation, and almost certainly added to the severity of the collapse (Taylor 2009).

The Treasury-FRB partnership also produced *de facto* appropriations of hundreds of billions of dollars without any legislative involvement. When Congress finally did get into the act, with a \$700 billion “Troubled Asset Relief Program” (TARP) in October 2008, the administration promptly 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 bank finances 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 one 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 the fusion of regulation with joint operations. Although political leaders, 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 spectacular 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), and the

emergence of national and international financial markets and firms. Among the consumers who benefited from those innovations was the government itself—which came to depend on them for off-budget, debt-financed promotion of homeownership and other politically favored activities such as college attendance, as well as for financing its own fiscal deficits. Far from returning the financial sector to the localized structure and conservative practices of the past, Dodd-Frank sought to harness its new scope and dynamism more thoroughly to the government’s purposes.

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,” which singled them out for closer supervision and also for certain rescue in the event of insolvency. That lowered the firms’ borrowing costs to near-Treasury levels and increased their profitability over smaller rivals, extending the methods that had fueled the rise of Fannie and Freddie. The selection of systematically important firms (other than those with \$50 billion or more in assets, which were designated systemically important in the Act) was to be made under vague standards 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 a 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, like the PCAOB, independent of congressional appropriations) 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 liquidation 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 similar to Dodd-Frank in its executive architecture. It, too, provided sweeping policy discretion and commissioned internal executive-branch committees to make critical decisions. 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. An Independent

Payment Advisory Board (IPAB) was to make nigh-mandatory decisions on Medicare program spending that were exempt from presidential supervision, exempt from judicial review, and subject only to very limited congressional review—the Act even purported to limit the authority of subsequent Congresses to amend IPAB’s extraordinary statutory powers! ObamaCare was also fusionist, blending regulation of private health insurers with government management of vital components of their businesses—the state and federal “health insurance exchanges” marketing subsidized policies for some purchasers.

Yet the most dramatic departure in executive government in the years following 2008 was sheer unilateralism—executive agencies, and frequently President Obama personally, effecting major policy changes in defiance of reasonably clear statutory requirements, often on grounds that Congress had failed to enact them or would require concessions on other matters to proceed (Lowande & Milkis 2014). Governing “with the pen and the phone” was President Obama’s bold characterization of his “We Can’t Wait” initiative. In implementing ObamaCare, 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 “settlements” of investigations into bank mortgage practices and other matters, described cursorily in agency press releases and lightly reviewed court filings; establishing a targeted taxing-and-spending program without any statutory authorization at all (the \$20 billion BP Horizon oil-spill compensation program, promulgated by a White House 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. Finally, the OCR announced several policy innovations in school finance, sexual harassment and assault procedures, English language instruction, and school discipline through “guidance documents” and “Dear Regulated Colleague” letters (Melnick 2016).

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 offered 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 acquiescence, enthusiastic or reluctant, 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 *UARG*, 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* (725 F.3d 255 (2013)), 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-mission—the case was more like *State Farm* than *Vermont Yankee/Baltimore Gas*). In *King v. Burwell* (576 U.S.—(June 15, 2015)), the Court permitted the administration to extend tax subsidies to purchasers of health insurance on the federal insurance exchanges, mainly on grounds that this would facilitate effective pursuit of ObamaCare's broad statutory purposes (mission-contingent deference again). Legal and constitutional challenges to the administration's immigration actions, Clean Power Plan, and other initiatives are proceeding toward the Supreme Court.

## 5. THE ADMINISTRATIVE LAW DEBATES TRANSFORMED

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

That they are indeed trends seems to be implicit in a new 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 particulars of agency procedure and judicial review, the utility of regulatory cost-benefit analysis, and the merits of particular policies. The new literature is instead fundamentalist—devoted to basic questions of government structure and legitimacy, and looking to political history and political philosophy for answers.

Foremost among the attacks on the administrative state is Hamburger (2014), invoked in the opening of this article. Hamburger argues that the administrative state is unconstitutional tout court, because the Constitution's assignment of "all legislative powers" to Congress meant that citizen's liberties could be constrained only by representative legislation (or by courts settling

specific disputes under statutory or common law). Other works in the new literature advance similarly sweeping arguments. Buckley (2014) maintains that the framers ordained a congressional government, which became a separation-of-powers regime only with the emergence of political parties and a democratic presidency in the nineteenth century, and in recent decades has evolved into “crown government” as presidential power has outstripped essentially all constitutional restraints. Cost (2014) argues that the federal government’s combination of congressional representation of local interests with increasingly expansive domestic powers has produced a comprehensively corrupt federal establishment, much of it conducted by executive agencies. An important precursor of the new criticism is Lawson (1994), by 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.” A recent installment, discussed below, is Murray (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. Posner & Vermeule (2010) contends that the separation of powers was theoretically unsound and ineffective to begin with, and that modern executive supremacy, necessitated by modern conditions, is effectively constrained by modern mass media and popular opinion. Mashaw (2012) argues that executive officials have exercised wide discretion back to the earliest days of the Republic, and that modern agency procedures and judicial review provide fair process and protection against abuse. Ernst (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. Nelson (2014) maintains that the founders understood the advantages of executive prerogative over legislative confusion and parochialism, and built that understanding into the Constitution. Most sweeping of all, Rubin (2005) argues that our notions of constitutional branches, power and discretion, legal rights and property, and political legitimacy are all “social nostalgia” and “relics of a prior era”—we need to replace them with new “metaphors” for collective action that will permit the administrative state to manage the problems of modern life and open its opportunities for all. These apologetics 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 laments the dysfunctions of contemporary American government but sees the problem as too little rather than too much executive discretion. Two outstanding examples blame our “political decay” (Fukuyama 2014) and “broken government” (Howard 2014) on—in the terminology of this article—the transparency and democratic servility that have come as the price of wide executive discretion. Fukuyama 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 tradition of rights-based individualism and a post-1960s decline in social trust, which have combined to deny public officials the leeway to act decisively on behalf of the public good. Howard decries the decline in discretion in both the private and public sectors. Business employers, plant managers, doctors, and administrators of hospitals and nursing homes are all prevented from exercising common-sense judgment by a profusion of minute rules. But public officials, from school teachers and administrators to those responsible for permitting and building bridges and highways, 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 brilliant works, but just using them to advance my own arguments.<sup>13</sup> And for that purpose what is remarkable about them is their dearth of practical solutions. The defenders of executive government of course have little to solve—they are largely content with its legitimacy and utility and are uninterested in the deficiencies that agitate its critics. 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 and Cost say as much implicitly.

Moreover the critics, when they do suggest reforms, admit to being impractical and come close to being circular. Buckley would like Congress to

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13 I review Cost (2015) and Murray (2015) in detail in DeMuth (2015a), and draw on that review in my discussion of Murray later in the text.

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* into statutory law, soldiering through its dozens of chapters and adopting, revising, and discarding individual requirements as it goes along. That would be more than herculean. The *CFR* is more than 150,000 pages—more than double the length of *United States Code* of statutory law, and growing faster. Translating it into statutory law would take many decades, and Congress might never catch up. Both proposals run squarely against the long-entrenched practices of congressional delegation and presidential–congressional partisan alliances that have caused the problem in the first place. The same difficulty afflicts the more modest 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 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 constitutional amendments—to sunset program statutes after 15 years; to give Congress authority to veto regulations; to give the president a line-item veto in budget bills and similar authority in regulatory bills, 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 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.<sup>14</sup>

Murray's solution is more populist—bottom-up rather than top-down. He regards the administrative state as constitutionally and politically illegitimate and unreformable within its self-protecting structure. But he sees 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 ill repute and to the individualistic American spirit. He proposes a program of concerted civil disobedience to regulatory commands, built on the model of public-interest litigation groups such as the Pacific Legal Foundation and Institute for Justice. But whereas these

14 Described at the website of Common Good, [www.commongood.org](http://www.commongood.org).

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 lawful but excessive, wasteful, or self-defeating. In effect, Murray proposes to engineer the regime-threatening crisis that Fukuyama says is a necessary precondition to serious reform—but on the 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 become much more demanding in applying 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 campaign would steer clear of 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 *Sackett v. EPA* (566 U.S. 154 (2012)).

These specifications significantly limit 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 their lot is a wetland). Experienced regulatory lawyers know that innocents are often sacrificed to bureaucratic stratagems in ways that never get to court. But such cases are marginal to the big regulatory programs. Many, perhaps most, of those who must follow safety and employment rules they know to be nonsense are engineers or personnel 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 individuals most of the time, the burdens of regulation are insensible, consisting of higher prices for private goods and lost benefits of forgone or misdirected investments or employment opportunities.

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 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 little people, akin to the Regulatory Flexibility Act's special attentions to small business in rulemaking.

## 6. THE MATERIAL FOUNDATIONS OF TODAY'S ADMINISTRATIVE STATE

The most impressive characteristic of administrative law is evolutionary fitness, 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 constraints, 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 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 must frequently 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 courts. Recently, executive 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, the standard 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 world 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 higher

political demand for government interventions and new forms of political and government organization capable of supplying the higher demand.<sup>15</sup>

The first part of the equation is affluence and its accouterments. Political action requires three basic resources: (i) discretionary time; (ii) the ability to acquire, assimilate, and communicate information; and (iii) 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. But now, in the wealthy, highly educated, predominately middle-class societies of the advanced democracies, they have become abundant and widely shared, and political activism has become widespread and highly organized as a result. Affluence, education, and leisure time have also produced more refined tastes, sensibilities, and avocations. Before the 1960s, domestic politics in the USA 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 affirmative participation among numerous minority groups; sexual mores and gender relations on the campus, in the workplace, and on the Internet; and obesity, animal rights, bank overdraft charges, household trash management, and hundreds of other concerns, complaints, and enthusiasms.

The second part of the equation is high technology in the means of human interaction—faster transportation, faster and more proficient communications, and manifold improvements in gathering, storing, and manipulating information, all at plummeting cost. 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 the costs of market transactions, 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 within 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

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15 The argument of the subsequent paragraphs builds on Wilson (1979) and Wilson (1980). See also Wilson, DiIulio, & Bose (2013), DeMuth (2013), and the works cited in note 16 *infra*. What I am calling a “material” explanation for the rise of administrative government might as well be called a “modernity” or “post-modernist” explanation; Drucker (1957) uses the latter term for some of the economic and technological developments I am concerned with. But I wish to avoid some of the connotations of those terms extraneous to my purpose, which is to contrast an explanation based on the changing material circumstances of contemporary society with the conventional “intellectual” explanation based on changing conceptions of the requisites of effective government.

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 a virtual advocacy network with a fighting chance of political success. The multitude of discrete causes that today press upon government and public opinion 24/7 would have been infeasible fifty years ago.

The economic and technological improvements that have transformed the demand side of the policy market have equally transformed the supply side. Traditionally, politics was strongly hierarchical: National and local media oligopolies and civic triumvirates of business, union, and church leaders controlled the political agenda; two political parties controlled electoral careers; autocratic committee chairmen and party elders controlled the congressional calendar. 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 build a personal support network is a good substitute). A backbench legislator can assemble a portfolio of policy causes, and advance his electoral prospects, without spending years inching up the committee hierarchies. Politics has become “atomized”<sup>16</sup> and entrepreneurial. It is organized around networked affinity groups—some of them sharply ideological, many of them narrowly issue-specific—rather than broad coalitions and elites.

Modern technology has similarly transformed the organization of government, fueling executive lawmaking at the expense of representative legislation. It was in the late 1960s and early 1970s that Congress largely abolished its seniority system and weakened its committee chairmen. The leadership was bowing to the inevitable. Members were acquiring the wherewithal to operate independently, and the authorizing and appropriating committees were standing in the way of their responding to the many new policy causes pressing in on them. (Also, many of the seniors and chairmen were Dixiecrats, in eclipse following the civil rights revolution and legislation of the mid-1960s.) But Congress faced a further and more intractable constraint: it was still a representative legislature. Its ability to scale-up in response to multiplying policy demands was limited by inherent impediments to action—representation of

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16 King (1978, pp. 391–394). King’s analysis of political “atomization” was developed further in Wilson (1979) and Hertzke & Peters (1992). To my knowledge the term was first used in Nisbet (1975), which however ascribes atomization to cultural developments rather than the economic and technological developments I emphasize.

diverse and often conflicting interests and localities, decision by nested committees, the disruptions of regular elections—and by auxiliary constitutional impediments—bicameralism, power-sharing with an independent president. The solution was to delegate policy response to issue-specific executive agencies.

The executive branch brought several innate advantages to the assignment. It is less specified than Congress in the Constitution and therefore more open to innovation. Executive agencies operate through hierarchy and authority, which enables them to make decisions more quickly and at lower cost than committees of representative legislators. Agencies can also take much greater advantage of specialization than Congress—they can master the arcana of a subject, assemble and maintain highly motivated coalitions around discrete projects, and penetrate deeply into the true (“reservation price”) positions of coalition members. They are less conflicted than legislators—rulemaking involves conflict, negotiation, and compromise, but only among those directly interested in the matter at hand, and (as mentioned earlier) it is largely free of budget constraints that force trade-offs with wider interests. 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. And they have longer time horizons and longer memories than legislators.

Modern communication and information technologies have greatly amplified these advantages. Hierarchies can collect, analyze, and use data more efficiently than committees, and there are now lots more data around for these purposes. Like specialized interest groups on the demand side of the policy market, specialized agencies are employing modern technology to establish and manage affinity networks with increasing proficiency. Combining high-tech lawmaking with high-tech surveillance and enforcement is another plus: agencies are becoming more proficient in using the threat and application of coercion to maintain coalitions, police defections, and respond quickly to outside threats, including those from congressional antagonists.

The advantages of specialized hierarchical action in expanding the scope 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. Scott (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 pervasive problem in contemporary government is excessive confidence in abstract metrics that obscure critical elements of local and practical knowledge and lead to repeated policy fiascos.

The lesson of Scott's work 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 happenings within firms. The National Security Agency's collection of transaction data 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. The EPA, in its nascent greenhouse gas program at issue in *UARG 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 variables—the most legible ones—affecting an aimed-for result (DeMuth 2009). Improvements in technology, Scott's analysis suggests, may make government more effective but not necessarily; it expands the range, penetration, and particularity of state action for better or worse.

Government agencies can be expected to lag behind the private state-of-the-art in information technology, because of cumbersome procurement rules, suffocating personnel rules (over recruitment, hiring and firing, salaries and promotion), the absence of market discipline, and other inherent inefficiencies in public organization. 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 giving pains. The exchanges are more than brokerage operations: they regulate the terms of health insurance contracts and subsidize purchasers according to their individual circumstances, and for those 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 persons, households, and firms, in partnership with private insurers, banks, and Internet service and content providers. The information will be valuable for many purposes beyond managing ObamaCare; over time, state and federal agencies and their private-sector exchange partners will become increasingly proficient at collecting and using it.<sup>17</sup>

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 the benefits of publicizing ourselves and knowing more about others. Proponents of more interventionist government understand the potential, as in the proposal of Piketty (2014, ch. 15) for global surveillance of movements of capital and individual wealth, a project already underway in data-sharing initiatives in the USA and some European nations.<sup>18</sup>

## 7. PROGRESSIVISM, SPECIALIZATION, AND POPULISM

### 7.1 The Troubles with Progressivism

The materialist explanation for the ascendancy of executive government is much superior to the standard 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 (Wilson 1887). 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 then the full blossoming of administrative government beginning in the 1970s.

There is some truth to the Progressive explanation. Material and intellectual causes may operate in tandem: certainly some delegating legislators and deferring judges have been convinced of the utility of flexible administrative law-making. But the temporal pattern of the adoption of Progressive ideas points to the decisive importance of rising affluence, falling political transactions costs, and technology-driven improvements in government capabilities. The Great

17 In addition to the ObamaCare exchanges, the U.S. Department of Education operates a website that collects financial and other personal information for purposes of making and managing various student loans (<https://studentloans.gov>), and there is an incipient movement in the states for regulating and subsidizing private retirement saving accounts, which would set the stage for ObamaCare-like state exchanges—see John & Gale (2015).

18 See <https://financialtransparency.org/issues/automatic-tax-information-exchange>.

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 clubs rather than missionary and aspirational; they regimented production in key economic sectors rather than promoting consumerism, environmentalism, social equality, and personal fulfillment.<sup>19</sup> The periods of capacious executive growth came *much* later—in 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, the landmark 1914 Progressive regulatory achievement, did not even acquire rule-making authority until 1975. The other Wilsonian triumph, the Federal Reserve System established in 1913, possessed great discretion over the money supply and interest rates, but became an activist regulatory agency with many new rulemaking powers in the 2000s. That the post-1970 growth of executive government has been fairly continuous, persisting through liberal and conservative presidents and Congresses and incessant conservative complaints about “unaccountable bureaucrats,” 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 dynamic, which has necessitated commensurately complex, specialized, dynamic government. But this argument is a non sequitur as a general matter—complexity may countenance simple, stable government rules and a wide ambit for market competition (Epstein 1995). More important, it encounters serious difficulties when one gets down to cases. A simple 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 (Nivola 2009); the regulatory reform literature is replete with similarly persuasive models and case studies of the superiority of taxes and property rights over intricate regulatory controls, especially in energy and environmental policy and

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19 The New Deal agencies did not 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 unregulated and privatized (Herman (2012)). The war brought wage and price controls, and some extraordinarily deferential judicial decisions—see, *Yakus v. United States* (321 U.S. 414 (1944)), carefully dissected in Conde & Greve (2015). But the controls themselves were rapidly dismantled after the war, and the administrative state was relatively quiescent during the two postwar decades through the late 1960s.

financial regulation.<sup>20</sup> Conversely, regulatory agencies often oversimplify complex problems out of administrative convenience or necessity—a key argument of Scott (1998) and lesson of the unintended consequences literature (DeMuth 2009). And agencies often act inexpertly to suppress new technologies and beneficial complexity—examples include the ICC and CAB (whose industries flourished after 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 (Poole 2013)), and the FDA (probably the strongest theoretical case for expert regulation, which in practice has fallen far behind advances in the biological sciences and medical research (Gottlieb 2012; Huber 2013)).

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 pumping up a calamitous housing bubble in the 2000s with unduly loose interest-rate policies, for creating the stagflation of the 1970s with vacillating policies, and for many other errors of misapplied expertise (Bernanke 2000; Meltzer 2003 and 2009; Bordo & Orphanides 2013). 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 (Taylor 2009).

The point here is not to disparage administrative government by comparing it to an abstract ideal or legislative ideal. The tax code, almost entirely a legislative achievement, is at least as needlessly complex and infuriatingly wasteful as anything an administrative agency could have conceived; the “cap and trade” greenhouse gas program that Congress came close to enacting in 2010 was replete with political favors that would have greatly compromised, and perhaps altogether defeated, the program’s purposes. Some regulatory policies, such as motor vehicle CAFE and emissions rules, and even food safety regulation during the 1958–1996 reign of the “Delaney Clause,” have been legislative–executive joint ventures. The point, rather, is that the actual operations of the administrative state frequently contradict rather than vindicate the Progressive conception of neutral expertise

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20 Assiduously curated over the years in *Regulation* magazine (<http://www.cato.org/regulation/archives>) and in publications of the Mercatus Center of George Mason University (<http://mercatus.org>), the Property and Environment Research Center (<http://www.perc.org>), and the Regulatory Studies Center of the George Washington University (<http://regulatorystudies.columbian.gwu.edu>).

responding to complex problems. The next section considers whether those operations vindicate the material conception.

## 7.2 Expertise, Specialization, and Politicization

Kwak (2014) uses the regulatory antecedents of the financial collapse to advance an important general proposition about administrative law, one with strong implications for the choice between the Progressive and material explanations. The policy changes in the decades preceding the 2008 collapse do not, Kwak explains, fit comfortably with the conventional notion of agency capture. Many of those changes quite plausibly furthered efficient capital markets and public welfare—so, right or wrong, they were not industry-athwart-the public-interest—and many of them involved conflicting interests and policy positions among different segments of the financial industry. A better explanation, he suggests, is “cultural capture”—that everyone involved, notwithstanding differing interests and goals from case to case, was part of a common, inbred culture.<sup>21</sup> Officials from various regulatory agencies with distinctive missions, executives and lawyers from various firms and industry segments, and representatives of consumer groups all shared a common view of the nature of financial markets and ultimate purposes of financial regulation. They spoke the same specialized language, employed the same techniques of analysis and argument, and interacted in the same rulemaking proceedings and professional conferences; many had attended the same colleges and law schools; many moved comfortably through the revolving door between regulatory agencies and regulated firms. Despite their disagreements on discrete issues, they were all part of an insular, self-reinforcing, self-satisfied subculture. This led them to be uniformly oblivious to the cumulating economic risks of a sequence of regulatory decisions, each one seeming to be sensible in its own terms or at least a workable compromise among respectable viewpoints within their world.

We may generalize further from Kwak’s argument to say that the administrative state is characterized by *specialized* lawmaking—which is different from, and to a degree opposed to, *expert* lawmaking. To be sure, many regulatory fields involve a high degree of technical expertise—in the biological sciences at the FDA, in public finance at the FRB, in corporate finance at the SEC. But

21 Kwak emphasizes the deregulation of banking structure and pricing rather than the promotion of nonprime mortgages emphasized by Taylor (2009) and Wallison (2013) and in Section 4 of this article (all concerned point to regulatory acquiescence in lax capital and leverage standards for commercial and investment banks). But adding nonprime mortgages and Fannie/Freddie to Kwak’s litany would only strengthen his “cultural capture” argument: striking features of those programs were a common enthusiasm among regulators and regulated firms for expanding mortgage lending to low-income households, a common incomprehension of the risks involved, and a common (vast) overestimate of risk-reducing properties of MBS diversification.

many others do not—women’s sports and other areas of antidiscrimination and affirmative action regulation, many forms of consumer protection and disclosure regulation, and licensing and permitting regimes that award one or another firm (or none) permission to build a pipeline on a given route or use radio spectrum for a specified purpose. In every field of regulation, practical on-the-job knowledge—of the institutional details of the markets and organizations being regulated, and of the agency’s own structure, procedures, and personalities—are at least as important as abstract technical knowledge, and in many fields the practical knowledge is all there is. Typically, the regulatory apparatus is dominated by lawyers, key decisions are made by political appointees and other generalists, and the agency is a consumer rather than producer of whatever scientific knowledge bears on its activities. Moreover, true expertise of the scientific kind includes awareness of the limits and uncertainties of science, and this is often in tension with the regulatory enterprise. EPA, for example, does not acknowledge the uncertainties concerning the relationship between greenhouse gas concentrations and global warming that are well known to actual climate scientists; to the contrary, it employs faux expertise—the unscientific mantra of “settled science”—to disparage critics of its greenhouse gas program.

If the administrative state were strongly characterized by the application of neutral technical expertise, albeit with a modicum of agency and interest-group politics in the mix, that would be strong evidence of the adoption of Progressive ideas. But mere specialization points strongly to the material explanation. Specialization is the essential method of efficiency and growth. The organization of lawmaking into an array of insular policy silos is not the realization of a normative theory of government; it reflects the emergence of effective political demand for a multiplicity of tailored policy interventions, and the supply of those demands through delegation from a general legislature to specialized agencies.

Three other features of modern administrative law further undermine the Progressive explanation and fortify the material one. The first is excessive centralization and standardization. One need not go so far as Epstein (1995) to notice that economic complexity and social diversity are often best accommodated by decentralization and diversification. In the private sector, modern complexity and diversity, and the spread of knowledge and education, have induced decentralized management structures in both traditional and high-tech industries and empowered a dizzying array of “disruptive” virtual enterprises that have splintered previously concentrated markets.<sup>22</sup>

22 Koch (2007) is a best-selling account of “market-based management” in a traditional manufacturing, petroleum, and minerals enterprise. Murray (2015, chs. 12 and 13) argues explicitly that America’s increased social diversity and technological proficiency have rendered many inherited regulatory programs “systemically incompetent” and anti-progressive.

(The technological dismantlement of commercial hierarchies is similar to the technological dismantlement of political hierarchies.) But the administrative state features innumerable examples of national regimentation of products, services, and management and production methods better left to the variegated, more down-to-earth approaches of state and local governments, private markets, and social institutions. Complexity-sensitive regulation would not standardize the energy efficiency characteristics of home appliances from Duluth to Tucson, nor control industrial air pollution through engineering (rather than emission) requirements. Friedman & Kraus (2011) show that regulatory micro-management of bank capital in the years before the 2008 collapse produced similar asset structures throughout the financial system—thus creating *artificial* “systemic risk” in place of risk diversification. And consider the Office for Civil Rights’ aggressive campaign to nationalize standards and procedures for responding to allegations of sexual assault at colleges and universities (Gertner 2015). The initiative is an effort to standardize the management of a problem that involves a matrix of social, psychological, and educational issues, which had previously been addressed in the contexts of widely varying college traditions, cultures, purposes, and student characteristics. These and other regulatory projects are often decried as “one size fits all” bureaucratic ineptitude—but they are usually the result of organized political pressures from groups seeking uniformity for commercial or ideological purposes.

The second feature is partisanship. Lowande & Milkis (2014) (and earlier work by Milkis and others cited in that article) argue that the administrative state has powered the growth of an “executive centered party-system.” Presidents, of course (emphatically including Wilson and FDR), have always administered domestic programs with an eye toward their and their parties’ electoral fortunes. But since the 1980s the practice has become much more systematic and politically consequential. Beginning with Ronald Reagan, presidents have become the central figures in their parties, merging presidential leadership with the articulation of party doctrine and mobilization of candidates, funding, and grass-roots enthusiasm. Since 2008, Barak Obama has taken the practice to a new level. His “celebration of unilateralism” has been pre-emptive, not just sidestepping congressional gridlock but also exploiting it. He has used direct executive action to galvanize key party constituencies such as women’s-rights groups, environmentalists, immigrant minorities, and even veterans’-benefits activists. Through personal, highly publicized, often defiant decisions, he has sought to demonstrate to these groups the advantages of a Democratic presidency and to dramatize the

opposition of Republicans (personified by their outraged congressional leaders) to their causes.<sup>23</sup>

These innovations, Lowande & Milkis emphasize, have turned Progressivism on its head. They have deployed the authority and “bipartisan legitimacy” of administrative government for partisan purposes, and for “creating the illusion of an executive-centered democracy.” Centralizing policy and democracy in the person of the president may not always advance his party’s interests, but in any event it can “undermine the rule of law, the foundation of representative constitutional government.” It need only be added that the evolution of an executive centered party-system could not have happened but for the delegation of wide-ranging lawmaking power to the executive beginning in the 1970s.

Third and finally, Progressivism cannot easily explain, and the material explanation easily does, the procedural impositions that I have called conditions of executive government and that 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 weakened and new ones were established in their place—for Freedom of Information, Government in the Sunshine, and Regulatory Flexibility 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 set by representative legislation and constitutional rights. Rather they empowered cause-based activism, ad hoc representation, and collectivist conceptions of rights. They did not limit the domain 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 to manage modern complexity by suffusing them with modern politics.

### 7.3 Ad Hoc Administrative Democracy—A Case Study

An eloquent testament of the modern administrative state is the requirement of the Department of Agriculture’s Animal and Plant Health Inspection Service (USDA–APHIS) that magicians prepare and submit disaster-response

23 Lowande & Milkis detail many of the executive actions mentioned in Section 4 of this article, and note further that the president and his political aides orchestrated many of them through White House events and direct negotiations with outside groups.

contingency plans for the rabbits they use in their shows.<sup>24</sup> 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, in addition to research labs, “exhibitors” such as circuses and animal shows. 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 exhibitors 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 to require animal disaster-response planning. The proceedings dragged on for many years and produced a final rule in December 2012.<sup>25</sup> 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.<sup>26</sup>

A few months later, in mid-2013, the *Washington Post* ran a fun-poking story about Hahne’s regulatory odyssey. The next day, USDA announced that it was suspending its new 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. At this writing, two and a half years later, there have been no further notices or public 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

24 This account draws on Fahrenthold (2013a,b), and various USDA postings.

25 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).

26 The plan is posted at <http://apps.washingtonpost.com/g/page/politics/marty-the-magicians-disaster-plan-for-bunny/320>.

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 research or exhibition animals should be killed in a tornado or flood anywhere in the USA 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*. Amending the rule to exempt magicians or “small exhibitors” would require a new assessment of the exempted activities, which may be why reissuance has taken so long.

The saga of Marty Hahne and Casey illustrates two imperatives of 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 title of the No Child Left Behind school reform statute. Every Washington lobbyist knows that a heart-rending story about a single individual 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 had prepared plans for numerous federal agencies, and boilerplate recitations of many statutes and agency rules. Its contingency plan consisted of this: (i) in minor emergencies, Casey will be placed in his USDA-compliant cage and taken down to the basement if necessary; (ii) in major emergencies requiring evacuation, Marty and Brenda Hahne will take Casey with them in their car to a nearby town; and (iii) if Marty and Brenda should become incapacitated, Brenda’s mother will take care of Casey.

## 8. THE RULE OF LAW REVISITED

American administrative law long ago discarded two previously canonical features of the rule of law—that the laws citizens live by are legislated by their elected representatives, and that disputes between citizens and government are judged by independent courts. Mashaw (2012) teaches that executive officials in the Constitution’s 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-the-scene governments unto themselves. And, 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 lawmaking is not a matter of necessity but rather of the political logic of delegation and government growth. Federal officials in branch offices throughout the country are intimately connected with the policies and strategies of colleagues back at headquarters, and are generally immune from personal liability for abuse and error. Individual rights have been supplanted by collective rights specified case to case according to the interests of agencies and rulemaking participants. And within-agency adjudication of those rights is legally and practically entrenched.<sup>27</sup> It has now been nearly six years since EPA designated Michael and Chantell Sackett’s building lot a “wetland” under the Clean Water Act because of its proximity to an underground aquifer, and nearly four years since the Supreme Court held that they are 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. When and if the Sacketts get their EPA hearing, the agency’s administrative law judge 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 the EPA under prevailing standards of review.<sup>28</sup> They will never build their house.

27 Zaring (2015) is an excellent legal and empirical analysis to this effect, focused on the SEC’s use of its discretion (expanded by Dodd-Frank) to bring enforcement actions before its in-house administrative law judges rather than Article III courts where its record is markedly poorer.

28 In the meantime, EPA has vastly expanded its definition of “waters of the United States,” see U.S. Department of the Army, Corps of Engineers, and Environmental Protection Agency, “Definition of ‘Waters of the United States’ Under the Clean Water Act; Final Rule,” 80 *Fed. Reg.* 37054 (June 29, 2015); Copeland 2015. The rule will be tied up in court for years (Cushman 2015), but if upheld will settle the Sackett’s case once and for all.

The more recent developments in executive government raise further problems for the rule of law. The one most frequently asserted—that regulation by “unelected bureaucrats” defeats “political accountability”—is the weakest. The complaint is that agency lawmaking, by departing from the law-as-legislation paradigm, 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 consumer protection and against discrimination against the handicapped, leaving the real choices to agencies. Members then decry or support agency policies as individual advocates (lobbyists with a badge, so to speak) rather than deciding matters for themselves through collective negotiation and compromise. Presidents are elected, and in the “executive centered party-system” take active personal responsibility for many agency rules, but they are highly selective among the profusion of executive branch decisions and focus on those of importance to key party constituencies. All of which, says the critique, leaves political accountability in a hopeless muddle.

But this assumes, unrealistically, that citizens on the whole are highly attentive and comprehending of government decisions, and that elections are determined by the sum of their assessments of those decisions. Under more realistic theories (Schumpeter 1942, chs. 21–23; Schattschneider 1960), electoral accountability is attenuated and punctuated. For citizens, it consists of acquiescing in one or another governing elite for the time being; for public officials, it consists of the risk of being fired for occasional policy failures or scandals sufficiently catastrophic to impress the usually passive electorate. Between through-the-rascals-out electoral conniptions, much and probably most legislation is accountability-free. At the same time, much bureaucratic regulation is accountable in the sense that it accords with the interests and preferences of many citizens, often more thoroughly than the positions of their own congressional representatives. Political representation by geographic locality is losing importance, because of the globalization of commerce and culture, increased personal mobility, and the rise of lifestyle and identity politics; political scientists are piling on with theories of “discursive representation” that contrast the engaged, knowledgeable, continuous participation in administrative proceedings with the passive, ill-informed, intermittent participation in legislative elections (Dryzek & Niemeyer 2008; Fung 2008).

The accountability complaint does, however, point to separate, serious rule-of-law problems. Executive government disconnects law from the deliberations, compromises, and parochial concerns of the representative legislature. It is more likely than legislation to go to extremes, because, as we noted in Section 6.1, it is specialized and the product of insular subcultures of agencies and their “stakeholders.” Specialization has many benefits of course, in law as elsewhere, but specialized lawmaking 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 political accountability, properly understood, is a problem of policy immoderation.

Specialization in government produces another kind of excess, excessive quantity. The inherent conflicts and cumbersomeness of legislative decision-making are a bulwark of limited government. Unconstrained lawmaking—the removal of limits on Congress’s legislative powers and on its ability to delegate those powers to specialized agencies—produces too much law. This is not to say that Congress is more inclined than agencies to adhere to the teachings of classical liberalism; rather, the sheer pertinacity of the modern administrative state inevitably penetrates and politicizes many areas of life better left to economic markets, social norms, private institutions, and personal judgments. Excessive law, litigation, and regulation is “the American illness.”<sup>29</sup> The objective performance of the federal government in domestic policy, especially regulatory policy, is consistently poor.<sup>30</sup> Government failure results in part from the problems of public monopoly and political decision making, and in part from the government’s simply doing many more things than can be done well. The tendency of specialized lawmaking to expand the range and detail of legal obligations weakens the rule of law in two ways: first, by subjecting citizens to excessive coercion, which weakens allegiance to law in circumstances where coercion is necessary, and, second, by producing ineffective and counterproductive law, which leads to justified popular disillusionment. Public trust in the federal government and its institutions (other than the military) has fallen dramatically during the past several decades of all-pervading government (Pew Research Center 2014).

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

29 See the essays collected in Buckley (2013).

30 See the examples offered in Section 7.1 of this article and, on the consistency of policy failure, Winston (2006) and Schuck (2014).

that may take years to complete, is more dynamic, expansionist, and unpredictable than statutory law. 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.<sup>31</sup> And extra-statutory executive improvisation makes the problems worse by adding the element of surprise—of shifting legal obligations that cannot be anticipated even probabilistically from statutes, judicial precedents, speeches, agency notices, 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.

There is also a dynamic element to administrative law and uncertainty. The prolificacy of administrative law means that agencies have a large stock of old rules to draw upon as new contingencies arise over time. Health and environmental regulation is replete with discoveries of surprising new applications of old rules and statutes; the use of EPA stationary source permits to jerry-rig a program of greenhouse-gas controls, endorsed by the Supreme Court in its *UARG* decision, is one example. During the 2008 financial collapse, Treasury and FRB lawyers ransacked the *Code of Federal Regulations* and *United States Code* for plausible authorities for novel actions political officials were determined to pursue (Wallach 2013; 2015, ch. 3). In general, extemporaneous law-making 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 modern administrative state is a regime of concentrated power. The combination of lawmaking, interpretation, surveillance, and enforcement, buttressed by opportunities for public-private partnering, 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 competition among the three branches is a key mechanism for policing abuse. The consolidation of executive power and weakening of judicial and legislative checks 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—Internal Revenue Service harassment of conservative political groups, abuse of patients at Veterans hospitals, political favoritism in the “managed bankruptcies” of General Motors and Chrysler.

31 See Baker, Bloom, & Davis (2015); <http://www.policyuncertainty.com>.

Beyond the headlines, highly discretionary regulation of valuable, time-sensitive corporate transactions features routine political preferment and abuse of elementary rights. Examples include the FDA's threatened and actual criminal prosecution of pharmaceutical firms for providing doctors with truthful information about effective off-label uses of their products,<sup>32</sup> and the FCC's use of its merger authority to force parties to accept "voluntary" non-germane obligations that the commission could not obtain through regular process (Barkow & Huber 2000, pp. 51–54; Koutsky & Spiwak 2010, pp. 341–347; Yoo 2014). A particularly unsettling recent instance is the CFPB's forcing Ally Financial to accept a \$98 million settlement of flimsy charges of racial discrimination in making auto loans—the federal government was at the time a majority owner Ally as a result of TARP investments in its corporate predecessor GMAC, and the settlement was a tacit condition of Ally's receiving urgent, unrelated regulatory approvals from the FRB and FDIC.<sup>33</sup>

## 9. NOTES ON REFORM

### 9.1 Adaptive Reform

If today's administrative state is the product of an intellectual wrong turn, then the task of reform is primarily intellectual. It is a matter of persuading thought leaders, politicians, and citizens that Progressive nostrums have turned out to be mistaken in important respects, and that many of the complexities of modern society can be addressed in ways that preserve constitutional structure, private liberties, and individual rights. But if the administrative state is a byproduct of high affluence and technology, then it cannot be reformed by persuasion alone. One also needs to accommodate its causes with reforms that could protect rule-of-law virtues and improve government performance in an age of technological mastery and atomized democracy.

That is more difficult but not impossible. In private life, affluence and technology—the automobile, television, birth-control pill, mobile smartphone, and Internet—have created many problems and upset many worthy traditions, along with solving many problems and providing cornucopian benefits. Over

32 Courts have recently begun to resist this longstanding abuse on First Amendment grounds—see *Amarin Pharma, Inc. v. FDA*, No. 15-3588 (S.D.N.Y. May 7, 2015); *United States v. Caronia*, 703 F.3d 149 (2d Cir. 2012). So far, however, only smaller firms have been willing to challenge the FDA's policy; large firms with multiple drug applications and other regulatory matters pending before the agency are likely to continue cooperating with it. Gottlieb (2015) analyzes other, subtler FDA controls over the dissemination of accurate, valuable health information.

33 U.S. House, Republican Staff of the Committee on Financial Services (2015), passim and pp. 48–53, tells the story in riveting detail, and is an exceptionally instructive account of behind-the-scenes regulatory decision-making. See also Abrams (2013); Andriotis & Ensign (2015).

time, we adapt. 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, the seductions of power, and, in the case at hand, the administrative state's demonstrated capacities for resistance and cooptation. Yet American political history has been, over long periods, a story of successful adaptation.<sup>34</sup>

Adaptive reform does not mean abandoning traditional legal and constitutional mechanisms. In politics as in society (and indeed in biological evolution), vestigial forms may find new uses in new circumstances. The administrative state, resilient as it is, is ultimately answerable to politics. And politics, although necessarily reflecting broad social movements such as those adduced in this article, is contingent and unpredictable in the immediate moment. It is always reactionary in the sense of responding opportunistically to current events and crises. It can also be reactionary in the sense of grasping for old forms to solve new problems. The reactions themselves may set new forces in motion

To see this, consider the traditionalist proposals for reforming administrative law. Courts would prescribe judicially workable restrictions on legislative delegation that obliged Congress to make more decisions itself. Congress, when it did delegate, would prescribe agency procedures that were more formal and court-like and less managerial and discretionary. Some 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 insider specialists—employed outside the regulatory agencies and riding circuit among them. *Chevron* and cognate doctrines of judicial deference would be narrowed or abandoned. Agencies would be forbidden to make law through such sub-regulatory means as guidance documents, investigation settlements, and sheer declaration. These reforms would cabin and moderate the administrative state, not abolish it; the EPA would still regulate pollution, the FDA new pharmaceutical drugs, the SEC securities fraud.<sup>35</sup>

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

34 Part of the story is told in Stein (1989).

35 Some of the reforms would impose higher resource costs on administrative decision-making—but not all of them (independent administrative law judges would not), and in a least some cases the costs would plainly be justified (prohibiting use of guidance documents to effect sweeping and controversial policy changes).

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 beginning in the 1970s, agencies had to surrender a portion of their prerogatives in response to political demands, communicated to them by Congress and courts, for transparency, public participation, and elaborate explanation. But during the latest growth period beginning in the 2000s, agencies have repeatedly violated those covenants. Moreover, the Obama administration’s statutory extemporizing in ObamaCare implementation, greenhouse gas regulation, immigration policy, and other fields has violated another, implicit covenant—that the executive may extemporize 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) (Posner & Vermeule 2010, ch. 1; Wallach 2015, ch. 1). These actions have fired the new fundamentalist critiques of the regulatory state and attracted wide media coverage and debate, making regulatory excess more politically salient than at any time since the 1970s. This may provide an opening for reforms that not only restore the status quo ante of transparency, participation, and explanation, but also, in the heat of reaction, embrace some of the heretofore spurned rule-of-law reforms.

Certainly Congress and the Supreme Court have noticed the new developments. The Court has heard several challenges to aggressive claims of executive autonomy in recent years, deciding many of them, like the *Sackett* case, 9–0 against the government.<sup>36</sup> 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 impressive brief for specifying “intelligible principles” of delegation.<sup>37</sup> These are minority views, but one senses in them a dawning realization that the Court has been mistaken in assuming that Congress jealously guards its constitutional powers, so that judicial restrictions are superfluous in all but cases of legislative panic or accident. If the Court should realize that, in modern politics, Congress is content, or eager, to hand lawmaking powers to the executive, 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 the

36 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.

37 *City of Arlington v. Federal Communications Commission*, 133 S. Ct. 1863, 1879 (2013) (Roberts, C.J., dissenting); *Department of Transportation v. Association of American Railroads*, Docket No. 13-1080, March 9, 2015 (Alito, J., concurring, and Thomas, J., concurring in the judgment).

combined delegation of regulatory, taxing, and spending powers (as at PCAOB), which the Court has never before considered (DeMuth 2015b). The Court might discover that its reputation did not suffer for its insisting on constitutional limits and resurrecting APA limits, and even that Congress and the agencies responded productively.

Similarly, Congress has in recent years 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 no chance that they would be passed by the Democratic Senate or signed by President Obama. Congress is now, since the November 2014 elections, under unified Republican management; it still has no prospect of enacting substantial reforms over the President Obama’s veto, but may be emboldened to develop them further with future possibilities in mind.

The contingency of politics means that the task of would-be reformers is more than abstract analysis and persuasion. It is also to maintain a diversified stockpile of ideas to be drawn upon in response to problems as they adventitiously arise in practical politics. Adaptive reform means, further, that reformers outfit the stockpile with ideas that seem congruent with background political trends. The traditional administrative law reforms have a long history of failure working against them on this score. And I have explained my reasons for thinking that Philip Hamburger’s legislative adaption 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 may be wrong; the ideas are in the stockpile and should continue to be debated, refined, publicized, and deployed on probing missions when opportunities appear. At the same time, however, reformers should tailor their ideas to the circumstances of contemporary democratic politics that have frustrated their efforts in the past.

## 9.2 Three Reforms

In that 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 (i) the so-called REINS Act (“Regulations from the Executive In Need of Scrutiny”) requiring congressional approval of major agency rules, (ii) the adoption of a cost–benefit standard as the APA’s basic criterion of judicial review of agency rules, and (iii) the imposition of a fifteen-year sunset on new rules.<sup>38</sup>

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38 An earlier evaluation of REINS and the cost–benefit standard is DeMuth (2012, pp. 78–89).

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-and-realignment programs) before the rules could take effect.<sup>39</sup> 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 consider the positions of legislators of varying views and interests in order to secure approval. REINS procedures might be extended to the Obama administration's innovations of revising, suspending, or waiving enforcement of important statutory requirements based on policy considerations rather than resource limitations or constitutional objections.

REINS passed the Republican House three times in recent years—but as symbolic, anti-Obama gestures. The proposal's conflicts with administrative-state dynamics are so pronounced that one wonders if even a strongly conservative Congress would pursue it as a live possibility. 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 excruciatingly detailed rules rather than cheering or booing from the sidelines. Worse, the procedure could weaken Congress by displaying its inherent inadequacies in the world of high-volume executive lawmaking. The congressional calendar would be repeatedly commandeered with 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 APA judicial review (the proposal has so far been drafted to preserve APA review, but no court would reject on other than constitutional grounds a rule enacted by Congress and president). As the agencies became adept at crafting REINS-worthy rules, they could use them to secure de facto statutory revisions that expanded their jurisdiction. Possibly, the press of other business would lead Congress to pass many of the REINS rules that came its way, or to adopt a posture of deference as the courts have done.

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39 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.

Executive government, now enshrined in statute, might then become even more dominant.

Despite these shortcomings, the basic idea underlying REINS—to combine executive initiative with legislative sanction—is at least potentially consistent with modern politics. It has been employed with notable success in a succession of trade liberalization and military base realignment exercises. Those precedents, however, involved discrete, nonrecurring problems, and each one consumed a great deal of legislative time. To adapt them to the ongoing process of major agency rulemaking would require, at a minimum, an antecedent sea change in congressional culture and capacities.

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 more precise and demanding: when challenged in court, 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’ missionary 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 viewed through the prism of adaptive reform, the cost–benefit standard is radically different than REINS. Rather than standing athwart the political dynamics of the administrative 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 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 prefer more or less aggressive implementation of different regulatory programs, but many are content with an overarching rule that all programs be pursued in a cost-effective manner. And the standard would be a further step in congressional delegation, turning over the task of regulatory constraint to the branch that is designed for case-by-case review.

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 public health experts, engineers, lawyers, and other administrative 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 workings of the whole. They are practiced 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 quantity demanded goes down.

Third, the cost–benefit standard would aim to professionalize rulemaking—in the manner that, in antitrust policy, the emergence of economics-based judicial doctrines professionalized administrative 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 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; that would have more than a fair chance of correcting the weakness and inconsistency of politically incestuous cost–benefit review noted in Section 3.3. As at the Antitrust Division and FTC since the 1980s, and at the SEC following the D.C. Circuit’s 2011 decision in *Business Roundtable v. SEC* mentioned in Section 2.2, the agencies would need to beef up their economics staffs, and their generalist administrators and commissioners would need to 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. Regulatory cost–benefit analysis has become robust sub-discipline, with its own society, several journals, and a substantial empirical and theoretical literature.<sup>40</sup> But it is mainly an academic literature: unlike the law review literature, it is not part of an ongoing professional conversation involving judges and their clerks and practicing lawyers. With a judicial cost–benefit standard, a string of judicial precedents and accompanying critical literature would develop on the application of the cost–benefit test to various types of

40 A small sampling: The Society for Benefit-Cost Analysis, <http://benefitcostanalysis.org>; Adler & Posner (2001); Hahn (2005).

rules (environmental, product safety, financial), and the precedents would guide and constrain regulatory agencies.

A statutory cost–benefit standard might 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 give shape to the desultory rationalizations now 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.

All of this would place new burdens on courts and agencies, but they 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 great shortcoming of the cost–benefit standard is its open-endedness and malleability. Cost–benefit analysis is not, strictly speaking, economic analysis: it is “decision analysis,” and can degrade into 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 attracted strong academic criticism (Fraas & Lutter 2013, Gayer & Viscusi 2013, Gayer 2015)—and, under a statutory cost–benefit standard, such critiques would make their way into court. The standard might be combined with a requirement that agencies identify a specific market failure to be rectified, as some but not all of the OIRA executive orders have done. Still, cost–benefit analysis is no panacea, but just a structure for debate. It leaves many important matters to subjective judgment, which would be vouchsafed to professional and political debate, empirical demonstration, and judicial and agency 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 problematic history (Mooney 2004; Easterbrook et al. 2012; Baugus & Bose 2015). 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 the legislatures that pass them

can then extend the day of reckoning later on. At the same time, preordained statutory revision can be an excellent device for legislative fund raising from affected interest groups.

An across-the-board sunset for rules issued by the executive branch would be less vulnerable to these problems, however, 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 recent Congresses contain sunset provisions that would do the same thing with 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 has the advantage of political plausibility—albeit at the cost of some additional legal uncertainty.

Second, a sunset provision might 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 the rules and compliance costs have diminished. But the benefits of aged rules 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 requirement, automobile manufacturers would continue to feature airbags and improve them, because customers now demand them and because the technology has become thoroughly integrated into automobile design.) The purpose of a sunset requirement, in league with a cost–benefit standard, would be to 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 suppositions become matters of practical experience. The shift in perspective is critical: it becomes possible not only to validate or invalidate the initial suppositions but also to determine when a rule has in fact become obsolete (overtaken by events), and withal to illuminate broader questions of regulatory effectiveness. All organizations resist evaluation, but government organizations, which lack 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 less inbred and more professional and self-critical in its daily routines.

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