Administrative Law in a Global Era: Progress Deregulatory Change and the Rise of the Administrative Presidency

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ADMINISTRATIVE LAW IN A GLOBAL ERA:
PROGRESS, DEREGRULATORY CHANGE,
AND THE RISE OF THE
ADMINISTRATIVE PRESIDENCY

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When President Reagan took office in January, 1981, one of his first official acts was to decontrol completely the price of domestic crude oil. Due to the peculiarities of the Emergency Petroleum Allocation Act, this power was fully within his authority. With a single stroke of the pen he brought to a close a complex, costly, presumably “temporary” governmental program that, in one form or another, had operated for more than eleven years. The Reagan Revolution had begun.

Though the decontrol movement began much earlier, decontrol fever swept Washington during the Reagan Administration. Washington law firms no longer appeared to be quite the growth industry they once were. Pennsylvania Avenue was awash with resumes, particularly those of government lawyers made redundant in their respective regulatory agencies. Government in the form of bureaucracy, command-control rules, and regulations, was no longer viewed as an appropriate means of solving societal problems—and neither were the lawyers, formerly necessary for promulgating, interpreting and enforcing these regulations. Government in and of itself was seen as a fundamental problem. “Less government” became the prescribed solution for problems ranging from civil rights to the price of natural gas at the wellhead. Most Reagan regulatory appointees adhered to this philosophy. Some publicly proclaimed that their primary goal was to close down the agencies they were chosen to head.

4 For a procedural and substantive case study of this regulatory program, see Aman, supra note 3.
5 Deregulatory proposals were made during Ford’s administration and deregulation also was vigorously pursued during the Carter Administration. For a history and analysis of the deregulation that occurred in the trucking, airline, and communications industries, see M. DE RTHICK & P. QUIRK, THE POLITICS OF DEREGULATION (1985).
7 See, e.g., Need for Lawyers in Capital Cut, N.Y. Times, June 1, 1981, at D1, col. 5.
10 See Workers Wait Numbly For Probable Oblivion, N.Y. Times, Nov. 26, 1981, at B8, col. 5. The head of the Department of Energy noted that he wished to “work [him]self out of a job.” Id.
But revolutions are not made in a day. The Reagan Administration's increased reliance on deregulation punctuated a long cultural, political, and legal process. This Article examines some of the continuities and discontinuities of this process by defining three distinct eras of administrative law: (1) the New-Deal APA Era; (2) the Environmental Era; and (3) the Global-Deregulatory Era. It argues that, particularly in the Global-Deregulatory Era under President Reagan, not only has the substance of regulation changed, but the processes of change themselves also have been redefined, giving rise to the doctrine of presidential deference and to new perceptions of the relationships among courts, agencies, the executive, and Congress. Moreover, these developments are increasingly at odds with a more deliberative conception of administrative law, one that emphasizes incremental change based on reasoned decisionmaking that reflects the policy goals enunciated by Congress. The conception of administrative law underlying deregulatory change often differs, at least in degree, in several important ways from a more deliberative approach. It tolerates more abrupt change, driven by the President and the executive branch rather than by Congress or the courts. The new system also more easily rationalizes change in terms of political power and accountability rather than expertise or reasoned deliberation.

Decontrol of a particular regulatory area—such as the decontrol of petroleum in 1981—rarely results from a stroke of the executive's pen or from fiery speeches by agency heads. Clear cut legislative deregulatory acts also have been relatively rare, in part because of

11 See Aman, supra note 3, at 497-544.
12 Throughout this Article I shall refer to these three regulatory eras. By "New Deal Era," I mean to include roughly the years from the Great Depression through the end of World War II. By "Post-New Deal" or "APA Era," I mean primarily the post-war years from the mid to late 1940s to the 1960s. The Administrative Procedure Act, 5 U.S.C. §§ 551-59, 701-06, 1904, 3105, 3944, 5572, 7521 (1982), was passed in 1946. In Part One, I will collapse these two eras into the "New Deal-APA Era." The "Environmental Era" begins in the late 1960s and reaches its peak during the 1970s. The Administrative Procedure Act was significantly glossed by much of the legislation passed during this time period. The Environmental Era lasts until 1981 when, in my view, the "Global-Deregulatory Era" begins. For an excellent history of the substance of the federal regulation during these times as well as a different break down of the historic eras involved, see Rabin, Federal Regulation In Historical Perspective, 38 STAN. L. REV. 1189 (1986).
13 This is not to say, however, that Congress did not initially jump on the deregulatory bandwagon when it appeared that a general consensus was emerging regarding the deregulation of the airline, communication, and transportation industries. See, e.g., Garland, Deregulation and Judicial Review, 98 HARV. L. REV. 505, 507-08 & n.4 (1985) (citing statutes). Most of these statutes, however, effectuated only partial decontrol. Only the Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (codified in scattered sections of 49 U.S.C.), led to the complete deregulation of one phase of airline industry activities and the elimination of a federal agency, the Civil Aeronautics Board.

Some of Congress's deregulatory actions arguably had a re-regulatory effect. See,
the increasingly persistent fragmentation of political views in Congress, and its well known penchant to muddle along. Deregulatory law reformers usually have had to work within the constraints of statutory frameworks created during earlier regulatory eras, whose prevailing premises regarding the role of government in general and agencies in particular were very different. As a consequence, regulatory agencies themselves have accomplished much deregulatory law reform. Paradoxically, agencies cast as villains in the political drama that preceded deregulatory policies became heroes in the actual process of deregulation.

Ironically, most decontrol at the agency level occurs within the very statutory frameworks that gave rise to the offending regulations in the first place. Agencies often must justify the market values and results of deregulation as another form of regulation. The regulatory past is thus very much a part of any agency deregulatory reform efforts. The regulatory discourse shapes the very terms under which these reforms proceed. Thus, the regulatory "past" is never over; it remains important even in decontrol contexts. For this reason, I use the term "regulatory matrix" to refer to the form and substance of the regulatory context of agency deregulatory efforts. The matrix is not self-evident, but must be interpreted by agencies and courts in relation to specific deregulatory strategies. Whoever controls the interpretation of the matrix has a great deal of influence upon the future.

This Article analyzes the role that various interpreters of the regulatory matrix have played during the deregulatory process, focusing particularly on the courts and the President. It examines not

e.g., Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 (1980) (current version in scattered sections of 49 U.S.C.). Working within the framework of existing legislation, the Interstate Commerce Commission sought to increase competition in the trucking industry by deregulating various aspects of the industry. See Dempsey, Congressional Intent and Agency Discretion—Never the Twain Shall Meet: The Motor Carrier Act of 1980, 58 CHI. KENT L. REV. 1, 14-21 (1981); Note, Teamsters, Truckers, and the ICC: A Political and Economic Analysis of Motor Carrier Deregulation, 17 HARV. J. LEGIS. 123, 145-47 (1980). Congress responded to the Commission's deregulatory attempts by passing the Motor Carrier Act of 1980. The Act included an amendment which set forth increased competition as a goal. 94 Stat. 794 § 4(3). However, it also maintained significant regulatory control. For example, Congress revised the burden of proof, but did not eliminate it. Id. at § 5. Courts, however, subsequently interpreted such provisions to justify further deregulatory action, arguably beyond that which Congress intended. See Dempsey, supra, at 31-53.


16 For an analysis of how market values, approaches, and norms often become a part of an overall regulatory scheme, see Aman, Administrative Equity: An Analysis of Exceptions to Administrative Rules, 1982 DUKE L. J. 277.
only the administrative law context within which these interpreters act, but also the relationships of constitutional law to administrative law. As this Article will demonstrate, constitutional law is a very important part of the context in which regulatory and deregulatory change occurs. The constitutional law doctrines of an era influence the administrative law doctrines of that era and affect the relative ability of the three branches of government to influence agency change. This Article begins to articulate the contextual and doctrinal links that exist between administrative and constitutional law. In so doing, it shows how our overall public law structure is related to the relative power of courts, agencies, Congress, and the executive to interpret the regulatory matrix.

The rise of the administrative Presidency has made the executive branch a most significant interpreter of the regulatory matrix in the Global-Deregulatory era. The extent of the executive's involvement, particularly in deregulatory contexts, highlights the apparent inability or unwillingness of Congress to effectuate significant legislative change on its own. The Global Era has not yet created the politics necessary to generate the kind of comprehensive legislation that typified both the New Deal and Environmental eras. This lack of comprehensive congressional involvement has meant that the pressure for, and the initiation of, regulatory change, particularly deregulatory change, has come primarily from agencies and the executive. In some deregulatory contexts, the process of change that results risks inappropriately converting the "take care" clause of Article II of the U.S. Constitution into an inappropriate source of executive legislation.

The dimensions of the Global Era's transformation of the processes of deregulatory change become more apparent when compared with the processes of change in earlier regulatory eras. This Article, therefore, begins by examining two earlier eras: the New Deal-APA Era and the Environmental Era. Part One examines the legal, regulatory, and political contexts of these eras by tracing the development of the judicial review doctrines of deference and hard look. It argues that these doctrines were products of the conceptions of progress and change that typified the two eras. More significantly, it demonstrates how these administrative law doctrines resonated with the dominant constitutional law doctrines of the times and how both Congress and the President played relatively important roles in defining the legal parameters of the two regulatory eras.18

17 U.S. Const. art. II, § 3.
18 Some commentators have suggested that the New Deal programs are best understood as examples of Presidential power, with Congress doing the bidding of a very
Against this backdrop of change and the relationship of constitutional law to administrative law, Part Two then examines the Global-Deregulatory Era, focusing particularly on judicial responses to deregulatory change. Part Two shows that courts sometimes chose to apply New Deal deference when dealing with economic deregulation and the hard look doctrine when facing health, safety or environmental deregulation. This doctrinal choice often has significant impact on the degree to which courts can effect agency decontrol. In addition, the application of the New Deal doctrine of deference to agency decisions in economic deregulatory contexts not only facilitates agency deregulation, but can also transform the meaning of the relatively producer oriented statutes of the 1930’s by adopting a consumer perspective that often typifies the environmental statutes of the 1970’s.

Part Three then examines how judicial deference to agency deregulation in environmental, health, and safety contexts can, in effect, give distinctly consumer oriented legislation a more production oriented bias. Specifically, Part Three examines the Global Era of administrative law by focusing, in particular, on the emergence of the doctrine of presidential deference set forth in Chevron v. Natural Resources Defense Council, Inc. Part Three places this doctrine within a global regulatory context and links it to the more formalistic constitutional approaches that also are a part of this era. Part Three concludes that, particularly in the context of health, safety, and environmental deregulation, courts have a duty to supervise presidential policymaking far more closely than the Supreme Court’s approach in Chevron suggests.

In short, the central arguments of this Article focus on the role various interpreters of the regulatory matrix play in effectuating change. The heart of the Article’s contextualized approach to administrative law is its argument that specific changes in our concept of progress define important thresholds in the continuous development of administrative law. The underlying premise of the Article is that changes in the form of this belief in progress are embedded in

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19 T. Lowi, The Personal President 44-66 (1985); see also Shapiro, APA: Past, Present, Future, 72 Va. L. Rev. 447, 447-52 (1986). Though this may be true to a large extent, it is important for our discussion to recognize a very fundamental point: Congress at least passed the legislation generally authorizing agencies’ regulatory activities. Some of this legislation may have been unacceptably vague to some, but Congress at least charted a general regulatory course that administrative agencies are expected to follow. To be sure, this might have been done more precisely. But contrast this level of congressional involvement with the comparative roles of Congress and the President set forth in Part Three where deregulation often occurs without any major deregulatory legislation, but rather through agency and executive power as well as budgetary constraints on agency action.
historical context and consciousness. An in-depth examination of these underlying cultural changes themselves, however, lies beyond this Article’s scope. The focus of the Article relates changes in our overall public law structure to changes in the substance of what agencies regulate. Each regulatory era is defined by the responsiveness of the regulatory matrix to its times, giving each era a certain coherence that transcends the legal system. This Article concludes that analyzing administrative and constitutional law doctrines in this manner provides the seeds for a unitary theoretical approach to public law. Such an approach can ultimately more fully account for substantive differences and parallels among agencies and eras than less contextualized approaches.

I

Judicial Review of Agency Regulation

In many ways, the best and the worst that can be said for substantive agency law is that it is disposable. Its primary advantage is that an agency need not politically mobilize the legislature every time it wants to change its rules and regulations. It can experiment and adapt to new circumstances in the industries with which it deals. This ability to change is particularly significant because the cost of invoking the processes of agency change usually is much less than the cost of mobilizing 535 representatives to amend, pass, or repeal a law. This is particularly true in the absence of any dramatic crisis or other unifying event to aid in placing an issue on the legislative agenda and mustering the necessary political support to pass it.

On the other hand, if agency law is too easily disposable, it can breed uncertainty and disrespect. Law made by administrative agencies is borne of politics and it has political effects. To be legitimate, however, agency law must be reasonably stable and not immediately reflect every change in the political winds. Major shifts in agency law or policy that appear to be at odds with an agency’s enabling act can raise statutory and, on occasion, constitutional problems as well. Our constitutional system assumes that legal

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21 This is one reason why it is important to delegate an agency’s duties and powers with some specificity. There should be reasonably clear statutory limits on an agency’s policy options that make it impossible entirely to blow with the wind. See T. Lowi, The End of Liberalism: The Second Republic of the United States 92-126 (2d ed. 1979).

22 See infra text accompanying notes 310-20. For a critique of broad delegations of power to agencies that allow changes in agency law and policy to occur in an arguably unconstitutional manner, see T. Lowi, supra note 21, at 130-34. See also Aranson, Gellhorn & Robinson, A Theory of Legislative Delegation, 68 Cornell L. Rev. 1 (1982); Freed-
change should be costly. If new legislative bargains need to be struck, Congress, rather than an agency or any other single branch of government, should strike them.

These aspects of our legal system have profound implications for the processes by which change occurs and, more importantly for our purposes, for the willingness of courts either to facilitate, frustrate, or remain neutral in the face of change. In close cases, where the lines between policy and law often blur, or where the constitutional demands of the nondelegation doctrine arguably are stretched to their limits, the spirit of an age and the sense of progress that it embodies have significant impact upon the manner in which constitutional, statutory, and agency policy issues are conceptualized and decided.

A. Judicial Deference in the New Deal-APA Era

It has often been implied that the costs of change during the New Deal-APA era were far too low. During that age, Congress was able to sidestep difficult political issues by delegating broad legislative power to administrative agencies. The agencies in turn, often were able to use and expand their legislative power with relatively little apparent scrutiny from the courts. The Administrative Procedure Act (APA), passed in 1946, provided the statutory basis for judicial review of agency action well into the 1960s. In interpreting it, particularly the provisions governing the scope of judicial review, courts generally read it in a way that resonated with the deferential judicial approaches they applied to constitutional issues involving essentially economic issues. In particular, agency interpretations of law rarely received the judicial scrutiny that the APA itself would allow. The hands-off judicial approach to constitutional delegation and statutory jurisdictional issues, coupled with

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23 See Aranson, Gellhorn & Robinson, supra note 22, at 17-21. See also T. Lowi supra note 21, at 273-74.
24 Id.
25 See infra at note 82.
the relatively deferential approach the APA required when reviewing agency fact-finding and policy decisions, facilitated agency change and the evolutionary growth of the administrative state.\(^2\)

The consequences of these judicial approaches to agency action may now appear to be much clearer in retrospect. At the time, however, the judicial hands-off approach that typified this era was part of a much larger pattern of change, very much of a piece with the Court's willingness to let Congress decide how best to deal with the essentially economic issues spawned in the wake of the Great Depression.\(^2\)

It was all part of deferring to Congress which had, in large part, passed the programs demanded by a popular and strong President. With the demise of *Lochner v. New York*\(^3\) still fresh in mind, deference was an attempt to give the New Deal agencies created by Congress at least a chance to work.

The underlying basis for this deference is best understood by examining the larger political, regulatory, and constitutional context in which the courts were operating. That context eventually included a relatively supportive political consensus for the administrative state that agencies represented. The context also included at least four additional and interrelated factors: (1) the constitutional judicial restraint doctrines that had developed during and after the Roosevelt Administrations—doctrines which emphasized the pri-

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\(^2\) This is not to argue, however, that the APA itself did not represent a significant change in the overall supervisory power of courts over administrative agencies. Most agency decisions, including policy decisions, were made in an adjudicatory context. Sections 554, 556, and 557 judicialized this process. Moreover, as to questions of fact, the Administrative Procedure Act's substantial evidence standard, though applied in a relatively deferential manner, nevertheless represented a toughening of earlier standards, particularly for those courts that believed substantial evidence need not be found in the record as a whole. See *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 489 (1951). As to questions of policy, however, the Act seemed to codify the rational basis approach taken by courts prior to passage of the Act. The "arbitrary, capricious and an abuse of discretion" standard was applied much like the reasonableness standard for legislation in the post-*Lochner* era and it appears that that is what the drafters of the Act intended. See generally *Pacific States Box & Basket Co. v. White*, 296 U.S. 176, 185 (1935); *H.R. REP. No. 1980, 79th Cong., 2d Sess. (1946)*, reprinted in *ADMINISTRATIVE PROCEDURE ACT LEGISLATIVE HISTORY* 235. But when it came to policymaking, even policymaking made in an adjudicatory context, the Court was willing, post-APA, to demand that an agency rather than a court provide reasons that justify its policy. See *SEC v. Chenery*, 332 U.S. 194 (1947). Also section 706 of the Act, which applied to questions of law, did not state what level of deference agency law-interpretation should receive from reviewing courts. Nevertheless, the courts developed elaborate deference doctrines. See, e.g., *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944). See generally DeLong, *New Wine for a New Bottle: Judicial Review in the Regulatory State*, 72 Va. L. Rev. 399 (1986).


\(^3\) 198 U.S. 45 (1905).
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macy of the legislature and the need for judicial restraint; (2) the perceived independence and expertise of the regulators involved and the relationship of that independence and expertise to the concept of representation that typified this era; (3) the development of a regulatory discourse that was particularly conducive to agency expansion and judicial approval; and (4) the essentially economic nature of the regulation involved and the implications of this for the relationship of the individual to the state.

1. The New Deal Constitution and the Relationship of Constitutional Law To Administrative Law in the New Deal-APA Era

The doctrine of judicial restraint that typified the Supreme Court's approach to legislation after the decline of *Lochner v. New York* facilitated social and economic experimentation and change. It had its intellectual beginnings in the depths of the Depression in reaction to Supreme Court substantive due process approaches that had seriously obstructed New Deal experimental legislative attempts. The context of these legislative experiments was perceived as extraordinary. As then Professor Felix Frankfurter wrote in 1933:

> in this the fourth winter of our discontent it is no longer temerarious or ignorant to believe that this depression has a significance very different from prior economic stresses in our national history. The more things change the more they remain the same is an epigram of comfortable cynicism. There are new periods in history, and we are in the midst of one of them. . . .

Frankfurter went on to comment that “[i]n our scheme of government, readjustment to great social changes means juristic readjustment.” This readjustment required, if not a sophisticated pluralistic conception of society, at least an understanding of the fact that, in Justice Holmes's words, the Constitution “is made for people of fundamentally differing views, and the accident of our

31 Id.

34 Id. at 477.
finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States." Yet Frankfurter did not see judicial restraint as a form of avoidance or as reflecting a desire to have the Supreme Court play a weaker role than the other branches of government.

The Justices of the Supreme Court are arbiters of social policy because their duties make them so. For the words of the Constitution which invoke the legal judgment are usually so unrestrained by their intrinsic meaning or by their history or by prior decisions that they leave the individual Justice free, if indeed they do not compel him, to gather meaning not from reading the Constitution but from reading life.

But in "reading life" the Court "must have a seasoned understanding of affairs, the imagination to see the organic relations of society, [and] above all, the humility not to set up its own judgement against the conscientious efforts of those whose primary duty is to govern." Indeed, Frankfurter was so convinced of the primacy of the legislature in its efforts to solve these societal problems that he went so far as to quote Ernst Freud for the proposition that "'[i]t is unlikely that a legislature will otherwise than through inadvertence violate the most obvious and cardinal dictates of justice; gross miscarriages of justice are probably less frequent in legislation than they are in the judicial determination of controversies.'" If the profound problems of the Great Depression were to be solved, "the Supreme Court's attitude towards the most inclusive of all our problems, namely, how to subdue our anarchic competitive economy to reason" and "how to correct the disharmonies between production and consumption" needed to tolerate, and indeed encourage, experimentation and change at both the federal and state levels.

Justice Stone's famous opinion in Carolene Products emphasized the primacy of legislative solutions for economic problems and a restrained role of the courts. In that case, the Court set forth guidelines defining the rational basis test for economic legislation. In a footnote, however, the Court established the basis for a two-tiered approach to judicial review. Under this approach, a more

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35 Justice Holmes, as cited in id. at 478.
36 Id. at 480.
37 Id. at 486.
38 Id.
39 Id. at 494.
41 Id. at 152.
42 Id. at 152 n.4 ("There may be a narrower scope for operation of the presumption..."
Of the constitutional law at the time, when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth.”

In retrospect, one could easily interpret this two-tiered review as requiring closer judicial scrutiny when more important individual rights were at stake and less judicial scrutiny for less important economic concerns. In the context of the Great Depression, however, severe and widespread economic concerns were the most important issues of the day. Such collective problems demanded collective solutions. The perspective of the time was that of a group, not individuals, and that of a nation, not just individual states. Judicial restraint was encouraged because no more significant issue existed than the economic well-being of a nation characterized as one-third “ill-housed, ill-clad, ill-nourished.”

Conceptually speaking, the problem of the Depression resembled Justice Holmes’s reasoning in *Bi-Metallic Investment Co. v. State Board of Equalization.* In that case, property owners complained that certain changes in their tax assessments violated their due process right to a hearing. Justice Holmes rejected their claim. The large number of people involved and the commonality of their plight made this an issue appropriate for resolution by the legislative branch. To the extent that economic rights common to many individuals were trampled by the majority, their recourse was at the ballot box rather than in the courts.

Underlying this constitutional approach was a pluralistic conception of the political market place that justified a kind of judicial laissez-faire. Though the economic market may have been failing, the political market that was reacting to the economic failure was vital. For similar conceptual reasons the courts refused to formulate issues in terms of individual economic rights. As Roosevelt’s famous “court-packing speech” emphasized, the courts’ earlier willingness to intervene to protect individual economic rights had “cast doubts on the ability of the elected Congress to protect us against catastrophe by meeting squarely our modern social and economic conditions.” The interventionist spirit of the courts had stood in the

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45 299 U.S. 441 (1915).
46 *Id.* at 445.
47 F. Roosevelt, supra note 44, at 123.
way of progress, defined as economic prosperity for all, rather than just for some individuals.

The doctrine of judicial restraint that emerged during this period was, therefore, very much a sympathetic part of a larger pattern of change—one that viewed legislative experimentation and the economic legislation that it produced as a necessary form of progress that might help extricate a substantial portion of the nation from the grips of poverty and despair. Deference to the legislature was thus a kind of judicial activism that equated legislation with progress.

Like most political movements, particularly such a strong and important national effort as the New Deal, distinctions among various kinds of legislative action and the Constitutional provisions that apply to these actions often are blurred and distorted. Courts do not compartmentalize as much as the analytical frameworks implied by certain statutory provisions or clauses of the Constitution might or should indicate. The spirit of an age has a way of working its way into all the cases with which a court deals. Thus, the liberal, expansive interpretation the New Deal Court began to give the commerce clause and the legislative power it authorized was reflected in its approach to other clauses of the Constitution as well. It is perhaps no surprise that the judicial use of the delegation doctrine as a means of checking legislative power peaked on May 27, 1935 when the Court decided *Schechter Poultry Corp. v. United States.* Similarly, neither the takings clause, the tenth amendment, nor the con-

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48 See, e.g., cases cited *supra* note 27.
50 There were, of course, exceptions to the takings clause claims. Even judges sympathetic to the New Deal's spirit of experimentation and change recognized, at least initially, that other legitimate constitutional limitations on legislative primacy existed. It was their duty to impose these limitations, no matter how serious the conditions of the times. Writing for the majority in *Louisville Joint Stock Land Bank v. Radford,* 295 U.S. 555 (1935), Justice Brandeis declared the Frazier-Lemke Act an unconstitutional taking of private property. In so doing, he emphasized that "the Fifth Amendment commands that, however great the Nation's need, private property shall not be thus taken even for a wholly public use without just compensation." Id. at 602. Similarly, the Court in *Schechter Poultry Corp. v. United States,* 295 U.S. 495 (1935), struck down important New Deal legislation on delegation grounds. Although that decision was viewed at the time as a serious setback to the Administration, the constitutional basis of the decision was reasonable. By demanding that Congress be more precise in delegating power to agencies and, perhaps even more importantly, by demanding that this power not be given to private industrial groups, the Court staked out a legitimate constitutional position. Nevertheless, though there theoretically may be a constitution for all seasons, the overwhelming political spirit of the age can ultimately shape constitutional perceptions of problems as well as constitutional interpretation. Indeed, both the delegation and the takings doctrines largely fell into disuse in the post-New Deal era. They were never repudiated in quite so definitive a way as the application of the substantive due process clause to economic legislation, yet the threat of a takings clause or delegation argument was usually not a serious obstacle to the rise and expansion of the administrative state. Economic rights were perceived, not as individual rights, but as collective rights.
tracts clause ever seriously became an impediment to most of the regulatory approaches advocated after the New Deal. The courts no longer perceived economic rights as individual constitutional rights. With an entire nation battling to free itself from the grips of the Depression, these rights were seen as collective, group rights.

The issues could be conceptualized in a way that did not pit individuals against the government so as to raise close constitutional scrutiny, but rather pitted the government against the chaos of the market.

Economic legislation occupied a central place in the New Deal. Statutes to help infant industries such as airlines and communications to correct the problems caused by natural monopolies such as interstate natural gas pipelines, and to ensure fairness in securities markets and equal bargaining power in labor markets all aimed to ensure a market economy that worked. These statutes, and the reforms they embodied, were fundamentally capitalist in their orientation and design. They did not seek to nationalize industries; nor did they take a strictly voluntary corporatist

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51 See, e.g., U.S. v. Darby, 312 U.S. 100 (1941). The use of the tenth amendment as a check on federal power was revived in National League of Cities v. Usery, 426 U.S. 833 (1976). This revival was short-lived. In Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985), the Court apparently put this doctrine to rest once again. But Justice Rehnquist dissented, noting that he is "confident" that the National League of Cities approach would "in time again command the support of a majority of the Court." Id. at 580.


54 This is not to imply, however, that the New Deal consisted only of economic regulation. A major portion of New Deal legislation dealt with social issues such as unemployment compensation and social security. See A. SCHLEsinger, THE COMING OF THE NEW DEAL 263-82, 297-315 (1988). See also Social Security Act, ch. 551, 49 Stat. 620 (1935) (codified at 42 U.S.C. §§ 301-1399 (1982)).


60 See E. Hawley, THE NEW DEAL AND THE PROBLEM OF MONOPOLY 472-94 (1966);
approach to regulation. Rather, the New Deal sought to forge a government-business partnership, staking out a middle regulatory ground. Given the fact that reviving the economy was one of the New Deal’s main goals, the importance of reviving old businesses and enabling new businesses and industries to succeed cannot be overestimated.

2. The Nature of the Agencies—Agencies as Independent Experts and the Means of Institutionalizing Reform

Many of the agencies established to address social issues were executive in nature. Most of those dealing with economic matters, however, were set up as independent commissions. In so doing, New Deal reformers looked to business and the corporate structure, rather than to government as models to implement their economic regulatory reforms. From business these reformers drew their inspiration for a constitutional approach to separation of powers issues that would facilitate their vision of governance. James Landis, an important New Deal architect, thus rejected the rigid tripartite form of government as conceived by Montesquieu because, in his view, the government machinery necessary to regulate business should mirror essential features of the businesses it regulates.

Thus, Landis formulated the constitutional separation of powers

\[\text{see also B. Karl, The Uneasy State 153-54 (1983); Thomas, Socialism, Not Roosevelt’s Pale Pink Pills, in New Deal Thought 398 (1966).} \]

61 \[\text{See A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (striking down the NRA because the act improperly delegated legislative power to private groups). See E. Hawley, supra note 60, at 398.} \]

62 \[\text{See Rabin, supra note 12, at 1248.} \]


65 \[\text{It is interesting to note that some New Deal commentators criticized independent commissions because they combined executive, prosecutorial, and judicial functions. See, e.g., President’s Comm. on Administrative Management, Report of the Committee with Studies of Administrative Management in the Federal Government 36-38 (1997). See also R. Cushman, The Independent Regulatory Commissions 701 (1944).} \]

66 \[\text{[W]hen government concerns itself with the stability of an industry it is only intelligent realism for it to follow the industrial rather than the political analogue. It vests the necessary powers with the administrative authority it creates, not too greatly concerned with the extent to which such action does violence to the traditional tripartite theory of governmental organization.} \]

\[\text{Id. at 11-12.} \]
analysis necessary for the creation of the relatively independent and efficient administrative agencies he envisioned. In Landis's view, Congress was to be the engine of change and the font of new ideas, while administrative agencies were its primary front-line agents, organized in a manner that maximized their flexibility and minimized the cost of change.

The Supreme Court assisted in creating this new, more fluid approach to constitutional separation of powers issues. Justice Sutherland's opinion in *Humphrey's Executor v. United States*, though initially seen as a setback to the Roosevelt Administration, provided the constitutional flexibility necessary to Landis's view of separation of powers. The Court in *Humphrey's Executor* refused to grant President Roosevelt the power to remove a Commissioner of the Federal Trade Commission on the basis of policy differences with the Chief Executive. In the Court's view, this case did not deal with purely executive officers because Federal Trade Commissioners occupied "no place in the executive department" and did not exercise any "part of the executive power vested by the Constitution in the President." The Court rather conveniently concluded that to the extent the Commissioner "exercises any executive function, as distinguished from executive power in the constitutional sense, [the officer] does so in the discharge and effectuation of . . . quasilegislative or quasijudicial powers, or as [an officer of] an agency of the legislative or judicial departments of the government."

Justice Sutherland based that opinion on a distinction between executive power and executive functions. That distinction enabled the Federal Trade Commission to retain a certain amount of political independence and constitutional integrity while combining executive, legislative, and judicial functions. The use of broad delegation clauses and the combination of executive, legislative, and judicial powers significantly lowered the cost of change. Agencies did not have to obtain congressional approval to continue their experiments when confronted with new situations. They could solve problems as they arose, in the process unifying their efforts to fulfill their regulatory missions. By delegating such combined powers, Congress intended to foster regulatory experimentation. The agencies were not just to carry out specific duties, but also to act as overall regulators, responding to new situations with presumably

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68 Id. at 631-32.
69 Id. at 628.
creative expert decisions. The relative independence from direct political control that the Supreme Court authorized in Humphrey's Executor, coupled with agencies' presumed expertise, ultimately became important legitimating sources of agency power, particularly as the crisis mentality of the Great Depression gave way to relative prosperity after World War II.

Just as it would be wrong to overemphasize the radical nature of New Deal regulatory approaches, it would also be wrong to underestimate the importance of the relationship of agency independence and expertise to the underlying conceptions of legislative representation and democratic theory. New Deal regulatory agencies are sometimes characterized in a way that juxtaposes their independence with political control and their expertise with political judgments. However, underlying the willingness to view employees of agencies as independent experts is the fact that they are the agents of elected representatives. According to one theory of democracy, elected representatives themselves can be viewed as experts, wiser and more knowledgeable about social and economic affairs than the average voter. Knowledgeable representation is one response to the perennial problem that voters arguably do not know enough to decide important issues. If legislative representatives themselves are seen as experts, it is logical to view their agents as similarly expert. Judicial development of the doctrine of legislative primacy was thus quite sympathetic to a view that emphasized the legislature's need to designate its own independent agents. The emphasis on expertise and independence is thus but an extension of a larger conception of representation that extended this notion from the actual legislators to their agents.

This approach was of a piece with the underlying political theory of the New Deal and the view of democracy which favored the primacy of legislative experimentation and Presidential power. It willingly delegated enormous political power to groups of experts,

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71 See, e.g., Ackerman & Hassler, Beyond the New Deal: Coal and the Clean Air Act, 89 Yale L.J. 1466 (1980). For a view that disagrees somewhat with this conception of New Deal regulatory activity, see Rabin, supra note 12, at 1263 n.296.

72 As one commentator has noted:

In the new science of politics expounded by Hamilton and Madison it was precisely this "scheme of representation" that "promise[d] the cure. . . ." [T]he founders expected elected representatives to be wiser and more virtuous than the average voter. In addition, the powerful offices created by the Constitution, with their fixed and fairly lengthy terms, would appeal to able men, those who "possess most wisdom to discern, and most virtue to pursue the common good of the society."


73 See authorities cited supra note 72.
both elected and unelected, representing what Professor Barber has labelled “thin democracy.” Thin democracy is democracy based on large delegations of power to representatives with only limited political participation in the day-to-day operations of government by the citizenry at large. Indeed, in a thin democracy, the foremost, and virtually only, kind of participation is the vote. Furthermore, in a thin democracy it is a short step from congressional representation to agency expertise. Under this approach, agencies were the agents of Congress and if Congress delegated their tasks to them, courts assumed it was for a good reason. Congress believed, in its expert judgement, that such delegation was the best way to get a very important job done.

This willingness to defer to “experts” after the Great Depression was an understandable, very American approach to complex problems. The thin democracy of expertise represented a pragmatic attempt to find workable solutions. Although New Deal legislation never represented a coherent, integrated means of achieving the era’s common goals, deference to the legislature and its agents contributed to a rational sense of effective governance. In this sense, the New Deal conception of the Constitution was, particularly as seen by reviewing courts, intensely political. It emphasized the primacy of legislative political processes. The agents of progress, at least when they were first created, were obvious extensions of this political process. It was but an incremental step from Congress making law to agencies implementing the details of Congress’s legislative vision.

The New Deal, however, did not squelch the desire for individual economic rights. The fear and dislike of government intervention in general, and agencies in particular, persisted. These different philosophical views of government colored the debates over the Administrative Procedure Act. From its inception the Act

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75 Id. at 4.
76 Independence and expertise were two by-products of setting up administrative agencies as independent commissions. They were not ends in and of themselves, but rather the result of a much broader goal—the accomplishment of the substantive tasks set by Congress. In this sense, the concept of representation subsumes expertise and independence in the same sense that a speaker’s inherent right to speak is the basis of theories of speech based on the value of the speech that results.
77 See D.W. Brogan, American Character 145-57 (1956).
78 See generally E. Hawley, supra note 60.
represented, as Justice Jackson observed, "a long period of study and strife," and ultimately, upon its passage, "a formula upon which opposing social and political forces have come to rest." The Act provided elaborate administrative procedures for formal adjudication and formal rulemaking proceedings. While its provisions for informal rulemaking were simple, direct, and straightforward, most of the important issues of the day, including policy questions, were decided in adjudicatory proceedings. Agency ratemaking and licensing functions, for example, were almost always exercised in an adjudicatory manner, and agency policy was more often than not formulated in adjudicatory contexts.

The impact of the New Deal's constitutional penchant for deference to legislative solutions, nevertheless, had an impact on the resolution of various nonconstitutional issues as well. This was apparent in the courts' approach to the scope of judicial review of agency action, and most particularly, the treatment of questions of law. Although Section 706 of the APA would allow a de novo judicial role when dealing with questions of law, the courts developed elaborate doctrines of deference not only to agency policy decisions, but also to agency law making and interpretation that they continued to apply after passage of the APA. This did not mean that courts would always defer to any and all agency interpretations of law. Courts, however, generally used the language of deference, particularly when upholding or extending agency jurisdiction.

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82 As Professor Jaffe noted in Judicial Control of Administrative Action 575 (1965):

In the 1940's the Supreme Court, particularly in Gray v. Powell and NLRB v. Hearst Publications, Inc., recognized perhaps more openly than had been customary in the recent past the law- or policy-making functions of the agencies. It was a time when the agencies were fast growing in power and were being viewed by the courts—particularly the Supreme Court—with exceptional tolerance.

For a more recent analysis and theory concerning the various contexts in which courts will or will not defer to questions of law, see Levin, Identifying Questions of Law in Administrative Law, 74 Geo. L.J. 1 (1985).
83 See, e.g., Packard Motor Car Co. v. NLRB, 330 U.S. 485 (1947) (Court does not defer to agency legal interpretations but upholds the Board's decision and thus its extension of jurisdiction). For a reconciliation of this case with Hearst and Powell, see Levin, supra note 82, at 23-27.
84 See, e.g., NLRB v. Hearst Publications, Inc., 322 U.S. 111 (1944) (Court defers to agency extension of the National Labor Relations Act to "newsboys"). After the Court essentially foreclosed most constitutional attacks on regulatory statutes, see authorities
came to carrying out the will of Congress, courts equated progress with agency experimentation, change and, ultimately, growth.\footnote{\textsuperscript{85}} The legal discourse used to justify such extensions of agency power relied upon broad notions of congressional intent.\footnote{\textsuperscript{86}} It usually adopted a legal rhetoric that was particularly familiar to the common law minded judges who wrote these opinions.\footnote{\textsuperscript{87}}

3. The Nature of the Regulatory Discourse and the Inevitability of Regulatory Growth

As New Deal agencies dealt with regulatory issues, they inevitably faced questions that legislators did not, and often could not, foresee. In many instances, agencies proposed solutions that extended their substantive jurisdictional mandates and thus, their substantive regulatory powers. When challenged in court, such cases generated a legal discourse that made it relatively easy for essentially common-law minded judges to defer to agency decisions.

Agencies typically argued that Congress has authorized us to regulate X and Y, but it is impossible to do that effectively unless we also regulate Z. Given the broad statutory language of most New

cited \textit{supra} notes 50-52, statutory challenges to the jurisdictional basis of agency regulation were often the only realistic substantive legal arguments available. The broad delegation clauses upheld by the courts gave the agency and ultimately the reviewing court broad discretion in determining how an agency could or should extend its reach to new situations not explicitly covered by their enabling acts. In most New Deal and post-New Deal cases, the courts almost invariably upheld the agency's power to regulate. \textit{See, e.g.}, Federal Power Comm'n v. Louisiana Power and Light Co., 406 U.S. 621 (1972) (Court extended power to control price to the power to control curtailments and allocation of scarce natural gas supplies); Red Lion Broadcasting Co. v. Federal Communications Comm'n, 395 U.S. 367 (1969) (Court rejected attempts to narrow the scope of the FCC's regulatory powers by equating a first amendment right to broadcast with an individual's first amendment right to speak, write or publish); Phillips Petroleum v. Wisconsin, 347 U.S. 672 (1954) (Court applied the price controls of the Natural Gas Act to natural gas produced and sold at the well head); National Broadcasting Co. v. United States, 319 U.S. 190 (1943) (Court upheld the FCC's power to issue regulations that extended its jurisdiction from the regulation of technical and engineering matters to more direct control of licensee behavior).

\footnote{\textsuperscript{85}} This was often true even if the agency resisted an extension of its own jurisdiction. \textit{See, e.g.}, Phillips Petroleum Co., 347 U.S. at 676. \textit{See infra} notes 94-102. It is interesting to note that this extension of jurisdiction to cover natural gas purchases was not necessarily what Congress had in mind. Congress, however, was never politically able to master the votes to roll back these controls. \textit{See S. Breyer & P. MacAvoy, Energy Regulation by the Federal Power Commission 56-58 (1974).} Similarly, it is interesting to note that the Court's extension of jurisdiction under the National Labor Relations Act to cover foremen as supervisory employees in \textit{Packard Motor Co.}, 390 U.S. at 491, was corrected by Congress the next year. Congress amended the Taft Hartley Act to specifically exclude foremen as "supervisory employees." For a discussion of this amendment, see NLRB v. Bell Aerospace Co., 416 U.S. 267, 279-80 (1974).

\footnote{\textsuperscript{86}} \textit{See supra} note 84.

\footnote{\textsuperscript{87}} For an example and discussion of common law rhetoric, see E. Levi, \textit{An Introduction to Legal Reasoning} 1-6 (1958).
Deal statutes, the statutory phrase in question in a case often was not decisive. Legislative histories were similarly inconclusive. Courts tended to resolve all doubts in favor of extended agency jurisdiction.

The traditional judicial discourse, with its penchant for precedent, reasoning by analogy, and reliance upon the past, is essentially a conservative one. It proceeds "backwards from a receding past into an unknown future." The most successful arguments, therefore, refer to the past and advocate the kind of gradualism that common law judges understand best. Such arguments result in incremental, rather than radical, change and adapt easily to the pre-existing regulatory scheme. As applied during the New Deal-APA Era, this reasoning not only reinforced a sense of regulatory progress, but also encouraged an essentially monolithic regulatory approach to the resolution of new problems. For example, if the competition that trucks provided for railroads undermined the Interstate Commerce Commission rates for railroads, the solution was to extend the Commission's power to set rates for trucks, rather than to consider seriously what role, if any, competition should

88 See, e.g., Communications Act of 1934, Ch. 652, § 309(a), 48 Stat. 1085 (codified in scattered sections of 47 U.S.C.) (FCC can grant licenses if they serve the "public interest, convenience, and necessity").
89 See, e.g., Phillips Petroleum Co. v. Wisconsin, 347 U.S. 672, 682-83 (1954). See also Chevron v. NRDC, 467 U.S. 837, 851 (1984). Of course, even when the legislative history seems clear, it may speak very differently to those with different theories of the case. See, e.g., Wald, Some Observations on the Use of Legislative History in the 1981 Supreme Court Term, 58 Iowa L. Rev. 195, 214 (1983) ("It sometimes seems that citing legislative history is still, as my late colleague Harold Leventhal once observed, akin to 'looking over a crowd and picking out your friends.'").

Given that the market often undercuts the explicit and implicit regulatory goals of the statutes involved, courts, not surprisingly, concluded that congressional intent required solutions involving regulatory expansion.

Perhaps the best example of this logic, the regulatory discourse that it generated, and the agency power that the court ultimately created and extended to the Federal Power Commission is *Phillips Petroleum Co. v. Wisconsin.*

Phillips Petroleum Company was a large, integrated oil company which produced, gathered, and sold natural gas. It did not sell gas in interstate commerce nor was it was affiliated with any interstate natural gas pipeline company. Rather, Phillips sold natural gas to interstate pipeline companies which resold the gas to consumers and local distributing companies. The Federal Power Commission investigated Phillips to determine whether Phillips was a “natural gas company” within the Commission’s jurisdiction under the Natural Gas Act, and if so, whether its rates were reasonable and just. The Commission itself concluded that Phillips was not such a company and ceased its inquiry at that point. The United States Court of Appeals for the District of Columbia Circuit, however, reversed the Commission’s decision, and the Supreme Court affirmed.

The specific provisions of the Natural Gas Act which concerned the Court were a jurisdictional provision and a provision defining a natural gas company. The jurisdictional provision contained an exemption clause excluding from the Federal Power Commission’s authority the production and gathering of natural gas. The definitional provision limited the FPC’s authority to those companies transporting gas in interstate commerce or selling gas in interstate commerce for resale.

The majority of the Supreme Court disagreed with the Commission’s conclusion that it had no jurisdiction. The Court would not defer to the agency’s interpretation of its own statute. It would, however, defer to the proposition that the agency should have the power necessary to carry out the tasks that Congress had delegated. Thus the Court reasoned that because production and gathering

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97 205 F.2d 706 (D.C. Cir. 1953).
98 347 U.S. at 685.
100 Id. at § 2(b) (current version at 15 U.S.C. § 717a(b) (1982)).
end before sales begin and because the congressional intent behind the Natural Gas Act was to give the Commission jurisdiction over all wholesale sales of natural gas in interstate commerce, Phillips was a natural gas company as defined by the Act. Thus, the Commission had jurisdiction to regulate its rates. As the Court pointed out, "[p]rotection of consumers against exploitation at the hands of natural-gas companies was the primary aim of the Natural Gas Act." The Court believed an extension of Commission power was necessary to help ensure that ultimate goal:

Regulation of the sales in interstate commerce for resale made by a so-called independent natural-gas producer is not essentially different from regulation of such sales when made by an affiliate of an interstate pipeline company. In both cases, the rates charged may have a direct and substantial effect on the price paid by the ultimate consumers.

By this reasoning, the Court refused to weaken this protection for consumers by engaging in what it felt would be "a strained interpretation of the existing statutory language." The Court’s opinion in *Phillips* is indicative not only of the impact of a deferential, pro-regulatory substantive approach, but also of the regulatory momentum that occurs when one aspect of an industry is regulated and another is not. The Natural Gas Act clearly authorized regulation of the monopolistic and monopsonistic practices of interstate natural gas pipeline owners. This, however, did not necessarily solve all natural gas pricing problems. It became increasingly difficult to regulate those pipelines which also produced

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102 347 U.S. at 682 & n.10.
103 Id. at 678, 682. An example of the extreme extent to which the Court went to grant the Commission jurisdiction is the Court’s dismissal of the Solicitor’s testimony as irrelevant. The Court argued that the testimony concerned a version of the Act far different from the one finally passed. In so doing, the Court ignored a second version, which was nearly identical to the final bill, and the hearings connected with it. The Court also apparently forgot that seven years earlier it had used the very testimony it now discounted, to construe the meaning of “production and gathering.”

Justices Douglas, *id.* at 687, and Clark, *id.* at 690, dissented. Justice Douglas questioned the value of the legislative history because it contained no discussion of independent producers. *Id.* at 688. He also noted that the Commission’s construction of the Act was inconsistent with the Court’s past decisions. *Id.* at 689-90. More importantly, he argued that the Court was imposing upon the Commission power which Congress had refused to grant. *Id.* at 690. Justice Clark added that the Court was tampering with the balance of power between the federal government and the states by giving the federal government absolute control where previously it could exercise control only if the states failed to do so. *Id.* at 691.

104 Id. at 685.
105 Id.
106 Id.
their own natural gas because such owners could simply charge themselves a higher price and then pass that price on to consumers.

In *Interstate Natural Gas Co. v. FPC*,108 decided seven years before *Phillips*, the Supreme Court had authorized the Federal Power Commission to regulate the production price of such producers, holding that the Commission's ratemaking jurisdiction extended to natural gas producers affiliated with interstate pipelines. The Court then carefully distinguished this case from one involving wholly independent producers. Yet the Court in *Phillips* took that next step and extended jurisdiction to independent producers.109 In so doing, it read the Natural Gas Act broadly:

> [W]e believe that the legislative history indicates a congressional intent to give the Commission jurisdiction over the rates of all wholesales of natural gas in interstate commerce, whether by a pipeline company or not and whether occurring before, during, or after transmission by an interstate pipeline company.110

The Court thus resolved ambiguous legislative language in favor of increased agency power, reaching a result that Congress probably could not have reached. In fact, nearly forty years passed before Congress could even partially undo it.111

This is not to imply that the courts' deferential pro-regulatory approach resulted in affirmance when there was, in fact, no legal basis for the agency decision under review. Rather in close cases, more often than not, courts were very receptive to arguments that extended agency power and jurisdiction, particularly when such extension was clearly necessary to carry out the will of Congress, broadly construed.112 Courts usually read agency enabling statutes broadly, as if they were remedial in nature. The jurisdictional cases allowed the evolutionary process at the regulatory level to continue without frequent resort to Congress. The enabling statutes implied that Congress intended to give the agencies whatever authority they needed to do the job. As long as the steps the agencies sought to take were gradual and incremental in nature, reasonably tied to the fundamental goals prescribed in the statutes, and thus falling within a common-law form of discourse, courts were willing to approve specific agency actions or extensions of agency authority.

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109 347 U.S. at 689-90.
110 Id. at 682.
112 See, e.g., cases cited *supra* notes 84 and 90.
4. **The Nature of the Regulation—A Producer Perspective**

The extension of substantive agency power benefitted not only from the common-law discourse to which it was amenable, but also from the economic substance of the problems with which many New Deal enabling statutes dealt. New Deal regulatory programs dealt primarily with what were perceived to be economic problems.\(^{113}\) They were affirmative, comprehensive regulatory attempts to correct the flaws of a chaotic market.\(^{114}\) In its attempt to lift the country out of the Great Depression, Congress established independent agencies and bureaus designed to deal with real or imagined market failures.\(^{115}\)

Although consumers were expected to benefit from New Deal legislation,\(^{116}\) New Deal statutes and the regulatory regimes they established were, on balance, highly sensitive to producer- or production-oriented points of view. The National Industrial Recovery Act\(^{117}\) ambitiously sought to achieve comprehensive industrial planning. The Agricultural Adjustment Act\(^{118}\) provided substantial subsidies to farmers. Similarly, some independent agencies, such as the Federal Power Commission,\(^{119}\) the Federal Communications Commission,\(^{120}\) and the Civil Aeronautics Board,\(^{121}\) were designed, in large part, to regulate conflicts between producers, broadcasters, and members of the industry in general as well as their inherent tendencies to compete destructively. The Federal Power Commission, for example, dealt with conflicts among producers, transport-

\(^{113}\) Of course, as noted supra note 54, the New Deal also dealt extensively with more direct forms of wealth redistribution such as social security and unemployment compensation. But an important and relatively long-lasting contribution of the New Deal was the establishment of five of the so-called "big seven" independent agencies: The Civil Aeronautics Board (1938); the Federal Communications Commission (1934); the Federal Power Commission (1930); the National Labor Relations Board (1935); and the Securities and Exchange Commission (1934). Along with the Interstate Commerce Commission and the Federal Trade Commission, these agencies directly affected "the national economy and the quality, service, and prices paid by consumers in well-nigh every category of trade and commerce . . . ." B. SCHWARTZ & H. WADE, LEGAL CONTROL OF GOVERNMENT: ADMINISTRATIVE LAW IN BRITAIN AND THE UNITED STATES 28 (1972).

\(^{114}\) ATTORNEY GENERAL'S COMM. REPORT, supra note 79, at 13.

\(^{115}\) See generally A. SCHLESINGER, supra note 54. By 1941 there were nineteen separate lawmaking bureaus within executive departments and 22 independent agencies. See ATTORNEY GENERAL'S COMM. REPORT, supra note 79, at 3-4.


\(^{117}\) Ch. 90, 48 Stat. 195 (1933) (held unconstitutional in Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935)).

\(^{118}\) Ch. 25, §§ 1-19, 48 Stat. 31 (1933) (current version at 7 U.S.C. §§ 601-19 (1982)).


\(^{121}\) Civil Aeronautics Act of 1938, ch. 601, 52 Stat. 973 (1938).
ers, and consumers of natural gas. Such legislation did not focus on consumers, *per se*. Rather, it sought to create and maintain an orderly market, from which producers and consumers would all benefit.

Such regulatory regimes generated issues which usually resulted from economic conflicts among the various regulated entities involved. In resolving the reasonableness of rates for natural gas sold in interstate commerce or the appropriate routes and fares for a particular airline, agencies usually applied an economic perspective common to all of the regulated entities involved. The wealth distribution issues at stake could be accommodated within that common regulatory perspective. A primary statutory goal, in many instances, was the mitigation of the conflict among various segments of the business community. It is little wonder that a common perspective would arise between agencies and the regulated.

Agencies themselves were thought to represent the public interest and, thus, the general citizenry as well as the regulated. More importantly, the overall thrust of the legislation and regulation involved was not consumer oriented as we understand that concept today. It did not treat the regulated industries involved as simply potential perpetrators of harm. These industries and the firms within them were potential victims of the chaotic market forces that the legislation sought to control. Helping to ensure the continued existence and viability of the industries involved was also an important goal of much of the New Deal's economic regulatory legislation. If the market could be made to work, if unnecessary labor strife could be eliminated, if rates truly approximated what they would be in a smoothly functioning market, producers, consumers and, indeed, society itself would be better off. This societal view generated a group perspective on economic problems that encouraged tradi-

122 See generally M.E. Sanders, supra note 101, at 17-45.

123 See, e.g., Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945) (dealing with competing applicants for a single license); see also cases discussed in Stewart, *The Reformation of American Administrative Law*, supra note 22. These cases show the diverse economic interests among regulated entities as well as among potential beneficiaries of agency action, thus justifying their participation in these proceedings.

124 See generally M. Bernstein, supra note 64. Of course, just where the emphasis should be between the regulated entities and other intended beneficiaries of the statutes has never been clear. A pro-industry set of rulings is often said to indicate agency capture, but the statutes involved never themselves fully resolved how the balance between the regulated and the beneficiary should be struck. See generally E. Hawley, supra note 60.

125 This is not to argue that protecting consumers from monopolistic pricing was not important, but rather that the overall tone and orientation of New Deal regulatory statutes had a distinct producer orientation along with some consumer-oriented goals. This is perhaps highlighted best by comparing this legislation with the much more consumer-oriented legislation of the 1970's. See infra notes 179-83 and accompanying text.
tional conceptions of both individualism and the role of administrative law. The individual continued to be conceptualized atomistically and agencies were to protect that individual from the market.

Individualism and administrative law were thus related in the broad regulatory New Deal goals. By contrast, in the pre-New Deal, laissez-faire era, the primary function of administrative law was to protect the individual from the government.\textsuperscript{126} Administrative law thus developed what some commentators have called “red light” theories designed to limit the role of government.\textsuperscript{127} The New Deal, however, sought to protect individuals and firms from the faltering markets of the Great Depression and from market failures such as natural monopolies that prevented individuals from acting freely. Since governmental correction of these market failures would enable individuals to act more freely in their own self-interest, the role of administrative law shifted from protection of the individual from the government, to protection of the individual from the market. This role required “green-light” theories of administrative law or theories designed to enable government to carry out its statutory tasks.\textsuperscript{128} The shift in the role of administrative law generated a corresponding shift in the judiciary. Judicial deference to agency decision-making in economic areas reflected a green light approach to the New Deal.

Conceptually, this shift in judicial roles from the protection of individuals from the government to the protection of individuals from the market was not all that great. The focus was still the atomistic individual and the overall governmental goal remained essentially the same: ensuring individual economic freedom in an otherwise chaotic world.

The clear need and overall consensus for governmental action in the face of the devastating market failures characteristic of the Great Depression did not, however, result in clear-cut, direct statutes. There were no known “solutions” to such enormous economic problems. Experimentation by Congress and agencies offered the most promising approach to the issues spawned by the economic disaster of the Great Depression. Legislative experimentation resulted in open-ended, discretionary grants of legislative power to agencies who were expected to develop new approaches to


\textsuperscript{128} Id. at 35.
new issues on a day to day basis. Despite the experimental nature of the New Deal, or perhaps because of it, those doing this day to day administrative work were regarded as experts who were, for the most part, above the political fray.

One of the basic linchpins of the New Deal was the independent regulatory commission, with its ability to legitimize congressional agents of reform with the imprimatur of independence. Because of this independence, courts viewed the results of agency efforts not just as the political output of political appointees, but as the considered opinion of experts. Indeed, they were Congress's experts and what they produced was the product of a regulatory process whose rationality was assumed. Inherent in the very breadth and scope of the statutes passed by Congress was the belief that wide discretion was necessary and justified. Thus, courts viewed deference to the agencies as, in effect, deference to Congress.

The judicial review provisions of the Administrative Procedure Act do not necessarily mandate such a deferential approach. Yet judicial interpretation of these provisions resembled the deference doctrines then developing in constitutional law. As to matters of policy, courts in effect equated administrators with legislators. As to matters of law application, courts often allowed administrators the kind of interpretive discretion that made them judges as well.

Such broad delegations were necessary not only because of the unforeseeability of many issues and the need to build in legislative flexibility, but also as noted supra note 40, because there was never any complete reconciliation of views as to how best to accommodate the competing interests of consumers and industry. At best, these statutes were guaranteed to trigger a regulatory dialogue with no clear guide as to how the issues should ultimately be resolved. See E. Hawley, supra note 60, at 35-36.

See J. Landis, supra note 65, at 14-16.


See supra text accompanying notes 65-87.


See, e.g., Pacific States Box & Basket Co. v. White, 296 U.S. 176, 185-86 (1935) ("Every exertion of the police power, either by the legislature or by an administrative body, is an exercise of delegated power . . . .[W]here the regulation is within the scope of authority legally delegated, the presumption of the existence of facts justifying its specific exercise attaches alike to statutes, to municipal ordinances, and to orders of administrative bodies."). The APA did, however, seem to require that Administrators themselves articulate their policies. See, e.g., SEC v. Chenery Corp., 332 U.S. 194 (1947).

Hand in hand with the deferential approach to most administrative decision-making was an equally judicially deferential attitude to legislation typified by *Railway Express*,supra note 82, at 23.;*Day Brite*supra note 138, and *Williamson v. Lee Optical*supra note 140 in the constitutional realm. These cases applied a rational basis approach to judicial review of legislation which made judicial approval virtually automatic, much like the relatively deferential view courts took when reviewing the end product of Congress's agents. As Edward Shils has argued, persons are accorded deference corresponding to the degree to which they serve the central value systems of the society. The same can be said of agencies. Therefore, at least while the effects of the Depression were vividly apparent in the collective political consciousness of the country, courts were willing to defer to agency attempts to deal with those effects.

The creativity of an era, however, and the political winners it produces inevitably result in an attempt to institutionalize, if not constitutionalize, that era's view of progress. But as the New Deal agency approach to economic problems became institutionalized and the relative prosperity of the post-war years became a reality, agencies dealt less and less directly with the burning issues of the day. As agencies became less visible, they became their own centers of power rather than the agents of elected representatives. The longer they functioned, the less flexible and responsive to change they were. Agencies increasingly became the captives of their past, and thus much more susceptible to capture. The legal discourse itself can limit the ability of agencies to change. To the extent that a

in those cases were, in fact, theoretically preserved for court review, see Levin, supra note 82, at 23.

141 E. SHILS, CENTER AND PERIPHERY: ESSAYS IN MACROSOCIOLOGY 3-16 (1975).
142 See T. Lowi, supra note 18, at 273-74.
143 This is particularly true if by capture one means a neutralization of effective agency regulatory authority and an undermining of agency innovative ability. There is, however, no good theory of capture. Economically-based capture theories emphasize the laws of supply and demand. They imply that agencies inevitably supply the regulatory goods demanded by the regulated. See, e.g., Posner, *Theories of Economic Regulation*, 5 BELL J. OF ECON. 335 (1974); Stigler, *The Theory of Economic Regulation*, 2 BELL J. OF ECON. 3 (1971). Such capture theories, however, often imply a kind of consistency of results that the data does not support. For an excellent critique of capture theories to date, see Riker & Barke, *A Political Theory of Regulation with Some Observations on Railway Abandonment*, 39 PUB. CHOICE 73 (1982). Moreover, such theories fail to consider seriously the effects of legal processes and doctrines of precedent or the effects of *stare decisis*. Legal reasoning, itself, is limiting. Once an agency makes certain choices, it is often precluded from advancing other goals. The regulated can manipulate the agencies by forcing them to adhere to the logic of their previous positions. Without a clean slate to write on, agency change can, at times, be prevented. The agency may then appear to be captured, but the real problem may be stasis, not capture.
particular discourse relies on precedent, its penchant for incremental change and its need to adhere to legal logic make significant changes more difficult to effectuate the longer an agency operates.

New Deal agencies became more judicialized and less capable of significant change. Agencies and their law tended to become the ends rather than the means of solving pressing societal problems. Congress's inability or unwillingness to assert itself in the face of anything less than a total crisis greatly expanded the ability of agencies to pursue their increasingly limited goals independently. This approach to law may have made change difficult, but it also insulated agencies as well. Their respective regulatory matrices became increasingly entrenched.

Agencies thus institutionalized the New Deal and its regulatory approaches to problems. They did not, however, constitutionalize this approach. Theoretically agencies could still be removed overnight by legislation. Their regulatory mandates could be changed drastically. They were the creatures of the legislature and the by-products of the courts' deferential constitutional approach. Judicial review of agency decisions including agency fact-finding, policymaking and even law-making functions reflected this type of constitutional deference. The judicial deference doctrines that developed in the aftermath of the Great Depression and World War II, along with the legal and political theories that justified them, provided a particularly influential constitutional backdrop for judicial interpretations of the Administrative Procedure Act\textsuperscript{144} for the next fifteen to twenty years.

B. The Hard Look Approach—Judicial Activism in an Interdependent Era

Just as judicial deference to agency decisions was the hallmark of the New Deal-APA Era, more overt judicial activism characterized the Environmental Era that followed. Indeed, if Congress's legislative powers were stretched to the breaking point by the broad delegation clauses that characterized New Deal legislation, the power used by federal courts to ensure that various agencies properly considered environmental values raised new institutional concerns. In reviewing various agency environmental decisions, judicial decisions highlighted the differences between the legal requirements of absolutist, environmental legislative requirements and the costs of economic growth. The environmental dimension of economic growth moved to the center of the legislative and judicial stage during the

\textsuperscript{144} Ch. 324, 60 Stat. 237 (1946) (current version codified in scattered sections of 5 U.S.C.).
Environmental Era. Progress no longer meant unrestrained economic and technological growth. Rather, growth had to accord with an emerging set of environmental values and a more collective approach to risk and risk assessment. As one court put it, "[s]everal recently enacted statutes attest to the commitment of the Government to control, at long last, the destructive engine of material 'progress.'" \(^{145}\)

The new environmental statutes often took an absolutist approach to such problems as air and water pollution. They also applied across industry lines and dealt with issues that often involved great scientific complexity and uncertainty. \(^{146}\) Moreover, these issues had an interdependent quality—they raised a variety of related legal, social, economic, ethical and scientific issues, and questions. Proposed solutions to such questions, more often than not, demanded interdisciplinary and often intergovernmental approaches. The substantive problems that characterized the environmental era spilled over national and international boundaries. More importantly, the common pool aspects of the market failure that underlie the need for environmental regulation spawned a new conceptual relationship of the individual to society, one which can be called interdependent individualism. An interdependent concept of individuals recognized more fully that society's overall interest in clean air or clean water could not necessarily be equated with the aggregate interests of individuals atomistically pursuing their own self interest. Indeed, it was an atomistic conception of individual freedom that created many environmental problems in the first place. An interdependent concept of individualism resonated with and was reinforced by the interdependent and interdisciplinary conceptions of both the problems and the solutions that characterize the Environmental Era. Accordingly, a more complex form of this era's emerging belief in a new conception of progress was necessary to deal with such new levels of interconnectedness.

The new environmental legislation also reflected a distinct consumer perspective. \(^{147}\) The statutes interjected environmental values into the relationships between the regulated and the regulators, casting the various parties before agencies in a new light. More often than not producers of goods were now seen as producers of


\(^{146}\) See, e.g., Clean Air Act of 1970; Clean Water Act of 1977. See generally M. Shapiro, supra note 29, at 79-87; Ackerman & Hassler, supra note 71, at 1468-70, 1475.

harm. 148 Those who sought to benefit from these environmental statutes had an even more compelling interest in the outcome than in the economic effects of a properly functioning market. They were likely to be the personal victims of pollution or toxic substances. Economic conflicts of interest among the regulated gave way to more fundamental conflicts of value between producers and the beneficiaries of these statutes. For the purported beneficiaries, the issues involved did not as easily translate into a common economic discourse. It was not at all obvious how one could calculate the cost of a human life or of irrevocable damage to the environment. The administrative process thus became more complex as it sought to accommodate a number of new, broadly-defined, and often conflicting environmental interests, values, and groups. 149

Given the interdependent perspectives involved in the nature of the regulatory problems and in the congressional and administrative solutions suggested, agency rationalizations for change inevitably became more complicated. 150 Because environmental, health, and safety questions now cut across industry lines, single-mission and single-industry commissions were not appropriate; nor did the regulatory issues involved lend themselves to reasonably specific economic answers. Setting rates was relatively easy compared to assessing the overall health, safety, and environmental effects of various manufacturing processes. The scientific uncertainty that accompanied these assessments triggered a more holistic judicial conception of the regulatory problems involved. The life-and-death nature of the issues at stake encouraged courts to supervise agency policymaking much more closely than the economic questions involved in the New Deal Era. Judicial scrutiny of agency explanations became more exacting. Judicial control of agencies grew. Initially, at least, some courts willingly played this role: "it remains to be seen whether the promise of this legislation will become a reality. Therein lies the judicial role." 151

148 Id. at 27. Contrast this consumer view with that represented by the New Deal statutes, supra notes 116-21.

149 A superb example of this kind of regulatory complexity and the diversity of views that had to be reconciled was the Alaskan pipeline proceeding. The issues involved were both economic and environmental. 58 F.P.C. 810 (1977); 58 F.P.C. 1127 (1977) (Commission decision). See also Natural Gas Pipeline Co. v. F.E.R.C., 765 F.2d 1155 (1985).

150 See, e.g., Tanners’ Council of America v. Train, 540 F.2d 1188, 1193 (4th Cir. 1976).

151 Calvert Cliffs’ Coordinating Comm. v. Atomic Energy Comm’n, 449 F.2d 1109, 1111 (D.C. Cir. 1971). See also Ethyl Corp. v. EPA, 541 F.2d 1 (D.C. Cir.), cert. denied, 426 U.S. 941 (1976). The opinions in this Clean Air Act case highlight some important differences in the judicial role through the debate between Chief Judge Bazelon and Judge Leventhal. In separate concurring opinions, the Chief Judge argued for more procedural control of agency decisionmaking and New Deal-style deference when it came to
The courts had much new legislative and agency material with which to work. Between 1966 and 1981, "Congress enacted 182 regulatory statutes and created 24 new regulatory agencies . . . as compared with 58 statutes and 8 new agencies between 1946 and 1965." This vast new bureaucracy produced much new law, creating yet another level of interdependence and overlap. Coinciding with this growth in new agencies and statutes was an approach to regulatory lawmaking that emphasized rulemaking rather than the relatively slow, cumbersome, and usually limited adjudicatory proceedings that had dominated the New Deal Era. Indeed, "the number of pages in the Code of Federal Regulations . . . increased from 22,876 in 1960 to 35,281 in 1965 to 54,482 in 1970 to 71,307 in 1975 to 104,938 in 1982." This growth created a need for greater supervision of the bureaucracy. The constitutional context in which this regulation occurred, the nature of the regulation, the kinds of market failures with which it dealt, the value issues it raised, and a more interdependent conceptualization of the individual's relationship to the state and to other individuals combined to create a new value-laden regulatory discourse. Within this context the courts developed and applied more activist administrative law doctrines to their review of substantive agency action. Once again, however, these new administrative law doctrines reflected the dominant constitutional law doctrine of the time.

1. The Relationship of Constitutional to Administrative Law in the Environmental Era

The primacy of the legislature and the rational basis test of the New Deal Era helped shape the constitutional context within which the pro-regulatory administrative law deference doctrines developed. Similarly, the civil rights cases following Brown v. Board of Education contributed to the climate of judicial activism that led courts to scrutinize agency decisions closely in the Environmental

agency expertise involving substantive matters, id. at 66, while Judge Leventhal argued for more direct, substantive judicial review. Id. at 68. Judge Leventhal's view eventually prevailed during the Environmental Era. For an example of the increased complexity of judicial review under the hard look doctrine, see Sierra Club v. Costle, 657 F.2d 298 (D.C. Cir. 1981).


Era. When courts reviewed governmental action that arguably conflicted with fundamental constitutional rights of individuals or that adversely affected a discrete and insular minority, not just any reason would justify that governmental action. The courts required a compelling justification for the action taken. Similarly, when governmental action was taken that significantly and adversely affected a discrete and insular minority, such as a racial minority, courts also required compelling reasons to justify such action. In short, whether there is a specific, textually based (or inferred) constitutional right or whether the process by which certain laws are made jeopardizes the rights of minorities, the law that developed and flourished during the civil rights era had courts playing a major role as the guardians of individual rights. Rather than economic legislation, the preferred rights referred to in Justice Stone's footnote four of *United States v. Carolene Products Co.* became the focus of constitutional law.

Both the substantive fundamental rights and the process-oriented insular minority strands of this constitutional hard look doctrine were reflected in the administrative law doctrines of this period. It is ironic that, in a regulatory era characterized largely by its interdependence and complexity, a constitutional approach focusing on individual rights would emerge in administrative law. Yet, the most significant aspect of the relationship between constitutional and administrative law during this period is administrative law's adoption of certain aspects of constitutional law's strict scrutiny techniques. This adoption was due, in large part, to the many similarities between constitutional rights and the legislature's and courts' conceptualization of environmental, health, and safety issues.

2. *The Nature of the Issues—Absolutism*

The new administrative statutes and agencies that came into being in the 1970's often treated health, safety, and environmental issues in absolutist terms. There was clean air or dirty air; clean water or polluted water. Questions of degrees of pollution were not

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155 For examples of suspect class analysis being applied where fundamental rights were at stake, see Shapiro v. Thompson, 394 U.S. 618 (1969) (fundamental right to travel); Hunter v. Erickson, 393 U.S. 385 (1969) (fair housing law).
156 *Shapiro*, 394 U.S. at 634 (“[I]n moving from State to State... appellees were exercising a constitutional right, and any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a compelling governmental interest, is unconstitutional.”).
157 *Hunter*, 393 U.S. at 392.
158 304 U.S. 144, 152 n.4 (1938); see also notes 40-43 and accompanying text.
159 See, e.g., Currie, *Relaxation of Implementation Plans Under the 1977 Clean Air Act Amendments*, 78 Mich. L. Rev. 155 (1979) (the "most striking feature of this scheme is its
seriously entertained. Congress identified an evil and quickly passed statutes to eradicate it. This approach may have been necessary to generate the political support required to mobilize Congress to pass the new set of statutes. The absolutist approach resulted in legislation that minimized the importance of economics in general and the cost of regulation in particular. As in cases in which constitutional rights were at stake, cost was not viewed as a serious factor mitigating polluters' duty to achieve the environmental goals outlined in the statutes. Nor was cost seen as a serious factor in the promulgation of agency rules designed to carry out Congress's goals.

This absolutism translated into a demand for quick solutions to the complicated social and economic problems spawned by an industrialized society. Statutes such as the Clean Water Act, for example, were designed to eliminate pollution quickly. Unlike the Supreme Court's approach to eliminating racial discrimination with all "deliberate speed," this statute set definite, often unrealistic, dates for the complete elimination of pollution.

The absolutist nature of the statutes also reduced agency discretion, and transformed the regulatory discourse so as to place upon the agency the burden of proving that certain environmental values had, in fact, been adequately considered. Courts would not presume environmental rationality.

The courts similarly adopted absolutist approaches. The expansionary regulatory discourse that typified the Court's approach

absoluteness'); see also 1 W. Rodgers, ENVIRONMENTAL LAW, AIR AND WATER § 1.2 (1986).
161 See 1 W. Rodgers, supra note 159, at § 1.3(c).
165 See 1 W. Rodgers, supra note 159, § 1.3, at 19 ("Among the more salient examples of absolutism in environmental law are the goals in the Clean Water Act calling for fishable/swimming water everywhere by 1983 and no discharges anywhere by January 1, 1985. These two missions impossible . . . are among the most thoroughly denounced actions taken by any twentieth century Congress.").
in *Phillips Petroleum* was replaced with a cost-benefit logic, but one that emphasized environmental, rather than economic, benefits and costs. *Citizens to Preserve Overton Park, Inc. v. Volpe* set the judicial tone for the emerging administrative law era. In that case the Court turned an otherwise discretionary environmental statute into an absolutist one. The Court demanded that the Secretary of Transportation show that he had, in fact, engaged in a serious environmental discourse, such that he could truly justify his decision to build a highway through a park in Memphis, Tennessee. As the Court put it:

> Congress clearly did not intend that cost and disruption of the community were to be ignored by the Secretary. But the very existence of the statutes indicates that protection of parkland was to be given paramount importance. The few green havens that are public parks were not to be lost unless there were truly unusual factors present in a particular case or the cost or community disruption resulting from alternative routes reached extraordinary magnitudes. If the statutes are to have any meaning, the Secretary cannot approve the destruction of parkland unless he finds that alternative routes present unique problems.

This kind of discourse, common in environmental litigation, dealt with burden of proof questions in a manner not unlike constitutional litigation. It put the burden on the party seeking to disrupt

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168 401 U.S. 402 (1971). For further discussion of *Overton Park*, see infra notes 250-31 and accompanying text.
169 The statutory provision at issue was the Federal-Aid Highway Act of 1968, 23 U.S.C. § 138 (1982). It stated that the Secretary of Transportation should make a “special effort... to preserve... public park and recreation lands... [by] not approv[ing] any program or project which requires the use of any publicly owned land from a public park... unless... there is no feasible and prudent alternative....” *Id.* The Court interpreted this statute to mean that the Transportation Department was not merely to evaluate all prudent routes in terms of the cost to the public, but to give the protection of the parks “paramount importance.” 401 U.S. at 412-13. Only if alternative routes presented problems reaching “extraordinary magnitudes” could parks be sacrificed. *Id.* at 13.
the environment, whether that party was the government or a private firm.\textsuperscript{178} When constitutional rights such as the First Amendment were at stake, for example, speech could be curtailed or prohibited only if there were a compelling reason for taking such action and no realistic alternative to the action proposed. This heavy burden of proof rested on the person seeking to prohibit or curtail speech.\textsuperscript{174} In a variety of environmental cases, courts similarly put a heavy burden on the party seeking to disrupt the environment.\textsuperscript{175}

Yet another similarity to constitutional law followed from conceptualizing environmental issues in absolutist terms. A decision to curtail or prohibit speech is likely to be irrevocable. Similarly, environmental damage is likely to be irreversible. Once a road is built through parklands or a dam is placed on a scenic river, the environmental damage is not easily repaired.\textsuperscript{176} Damage to the health and safety of individuals is likewise conceived as irrevocable, especially if the damage is in the form of a life-threatening disease. In sum, the irrevocability of the damage in question raised the stakes considerably, creating pressure to find the right answers. It lessened judicial tolerance for reasonable guesses and discourses involving probabilities rather than certainties.\textsuperscript{177}

Statutory environmental rights thus took on a constitutional quality. The judicial review techniques that courts used when reviewing constitutional issues were applied to environmental policy issues as well. In short, the absolutist nature of the statutes and the perceived irrevocability of the harm generated a legal discourse that often sounded more constitutional than statutory or regulatory.\textsuperscript{178}


\textsuperscript{176} But see N.Y. Times, Aug. 12, 1987, at 14, col. 3 (discussing former Energy Secretary Hodel’s proposal to complete construction of the Auburn Dam near Sacramento, California.).


\textsuperscript{178} See, e.g., Environmental Defense Fund, Inc. v. Ruckelshaus, 439 F.2d 584, 597-98 (D.C. Cir. 1971). A regulatory perspective usually takes a broad perspective and is concerned largely with group rights. It tolerates a certain number of mistakes that result from good faith estimates and best guess probabilities. It is tailor-made for a rational basis approach to judicial review. A constitutional perspective, however, is based on the individual’s perspective. It demands more precision in reasoning, particularly if individual fundamental rights are at stake. In absolutist contexts, rational basis reasoning and
3. The Nature of the Regulation—A Consumer Perspective

Combined with the absolutism of many environmental statutes was an essentially consumer-oriented perspective. The acts reflected new desires associated with the advanced consumer economy that came into being after World War II. Some of these services pertain[ed] to outdoor recreation and the allocation of air, land, and water to natural environment management and use; others pertain[ed] to new objectives concerning health and well being and to the adverse effects of pollution on both biological life and human beings; still others dealt[ed] with matters such as 'least cost' technologies in energy, smaller-scale production, and population—resource balance.\(^7\)

These quality-of-life concerns generated some environmental values that Congress sought to impose on decision-making processes. These values were those of individual consumers. Indeed, the statutes themselves sought to eliminate specific harms by preventing specific producers from inflicting these harms on the environment in general and individuals in particular. Unlike the New Deal’s more abstract concern with ensuring an adequately functioning market from which all individuals might benefit, the Environmental Era sought to remedy specific harms caused by specific producers for the direct benefit of individual consumers. Though an interdependent conception of individualism can underlie the basic need for environmental regulation, an individual rights conception of the benefits bestowed by these statutes energized their enforcement.

The conception of the problems involved and the focus on the particular causes of harm made it easier for courts to view environmental, health, and safety issues in individual rights terms. The beneficiaries of the statutes were already distinct from the regulated. Producers were the producers of harm and environmental consumers were, in fact, victims. The courts’ role in protecting individuals from harm was a familiar one and the judicial techniques developed in civil rights contexts were easily transferred to this new arena.\(^8\)

The nature of the market failure that environmental statutes sought to correct was also distinctive. The common pool or tragedy of the commons form of market failure that typified the Environmental Era, came about because individuals sought to maximize deference to good faith guesses and probability inevitably give way to least restrictive alternative approaches and a higher demand for rationality and precision.\(^179\) See also Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (1982).

Judge Leventhal notes the similarity between administrative hard look doctrines and constitutional strict scrutiny in Ethyl Corp. v. EPA, 541 F.2d 1, 68 (D.C. Cir.) (Leventhal, J., concurring), cert. denied, 426 U.S. 941 (1976).
Because there were no enforceable property rights in the environment, such "rational" behavior could lead to disaster. Unlike regulation of natural monopolies, which sought to protect the individual from monopolistic enterprises, regulation of common pools sought to protect individuals from themselves. This conception of market failure not only generated statutes that sought to resolve fundamental conflicts of value, but often gave rise to a values discourse and value conflicts, not unlike those courts regularly confronted in constitutional litigation.

Environmental, health, and safety problems were also marked by their complexity and the collective nature of many of the risks they presented. In an increasingly complex and technocratic society, the information needed to act rationally was difficult not only to acquire, but also to understand. Therefore, sensible risk assessment of potential environmental harms required collective information-gathering. Actual risk assessment decisions inevitably involved others. Such questions as whether to utilize nuclear power or where and how to build a safe nuclear plant did not lend themselves to individual risk calculations limited solely to the safety of those who made them. Nuclear accidents could have ramifications and effects reaching far beyond those living near the plant.

In short, (1) the complexity of these issues, (2) the common pool nature of the market failure to which environmental regulation was a response, (3) the sense of interdependent individualism that this conception of the problem spawned, and, most importantly, (4) the judicial individual rights discourse that the consumer perspective inherent in many environmental health and safety stat-

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181 See generally Hardin, The Tragedy of the Commons, 162 Sc. 1243 (1968). As one article of the era noted:

[the fundamental cause of any common-pool problem is the difficulty of identifying, keeping track of, and asserting property rights over some part of the resource in question. As a consequence, each person with access to the resource has an incentive to exploit currently as much as he profitably can, thus neglecting the effects of his actions on recourse availability in the future, since he cannot hope to reap the future benefits that would result if he were to forgo some current profit.


182 See supra note 181.

183 Of course, the common pool problem could also be conceptualized in primarily market terms. It could be corrected by creating property rights in air or water so that individuals would maximize their individual interests in a way that internalized the external costs of their individual activities. This is not the approach that characterized the absolutist approaches of Congress in the early 1970's. See M. Shapiro, supra note 29, at 80-87. See also R.S. Melnick, Regulation and the Courts: The Congress and the Clean Air Act 369 (1983) for a discussion of how the courts inevitably read economics into the Clean Air Act. But see infra notes 200-29 and accompanying text.
utes encourages are all important aspects of the nature of the regulation of this era.

C. The Nature of the Agencies—Conflicts of Interest

Not only did the nature of the issues and the nature of the regulation involved affect the way courts in the Environmental Era conceptualized the issues before them, but the nature of the agencies themselves also influenced the courts’ approach to judicial review. Generic statutes, such as the National Environmental Policy Act,\(^\text{184}\) applied to all governmental agencies.\(^\text{185}\) Many of these agencies, however, had interests at odds with the public interest goals of the statutes. Many earlier environmental agencies were very development oriented.\(^\text{186}\) The Army Corps of Engineers, the Bureau of Reclamation, and the Federal Power Commission, for example, often found environmental values antithetical to their own basic missions.\(^\text{187}\) Thus, the governmental entity charged with applying environmental values was often completely self-interested in applying its own statutory duties and goals. It was, therefore, just as likely to disregard broader public values as any private entity.\(^\text{188}\) In such cases, courts tended to act as if they were in effect super-agencies, the ultimate guardians of the true public interest. Thus, courts often took a hard look and found agencies’ reasons for their actions inadequate.\(^\text{189}\)


\(^{186}\) See Hays, supra note 147, at 25-27.

\(^{187}\) Id.

\(^{188}\) See, e.g., Environmental Defense Fund, Inc. v. Corps of Engr’r of the United States Army, 470 F.2d 289 (8th Cir. 1972); Calvert Cliffs Coordinating Comm. v. Atomic Energy Comm’n, 449 F.2d 1109 (D.C. Cir. 1971). See also supra note 172.

\(^{189}\) See supra note 188. See also Jackson County v. Jones, 571 F.2d 1004, 1015 (8th Cir. 1978); County of Suffolk v. Secretary of the Interior, 562 F.2d 1368, 1384 (2d Cir. 1977); Environmental Defense Fund, Inc. v. Corps of Engr’r of the United States Army, 492 F.2d 1123, 1139-40 (5th Cir. 1974); Sierra Club v. Froehlke, 486 F.2d 946, 953 (7th Cir. 1973); Silva v. Lynn, 482 F.2d 1282, 1284 (1st Cir. 1973); Conservation Council of N. Carolina v. Froehlke, 473 F.2d 664, 665 (4th Cir. 1973).


In Calvert Cliffs' Coordinating Committee, Inc. v. Atomic Energy Commission, for example, the United States Court of Appeals for the District of Columbia reviewed, for the first time, the application of the National Environmental Policy Act to the Atomic Energy Commission. At that time, the Commission had a built-in conflict of interest. It not only regulated the safety aspects of nuclear power, but it was also responsible for promoting the use of nuclear power. As in many other cases involving development-oriented agencies, the court knew that the agency's own goals undercut its ability to take environmental values seriously into consideration. Protecting the environment, and Congress's desires regarding the environment, therefore, became the province of the courts. In dramatic fashion, Judge Skelly Wright threw down the gauntlet:

These cases are only the beginning of what promises to become a flood of new litigation—litigation seeking judicial assistance in protecting our natural environment. In these cases, we must for the first time interpret the broadest and perhaps most important of the recent statutes: the National Environmental Policy Act of 1969 (NEPA). We must assess claims that one of the agencies charged with its administration has failed to live up to the congressional mandate. Our duty, in short, is to see that important legislative purposes, heralded in the halls of Congress, are not lost or misdirected in the vast hallways of the federal bureaucracy.

This approach struck a different judicial tone and stance toward agencies than the deference doctrine of the New Deal Era. The courts recognized that agencies could be just as self-interested and non-public regarding as private industry. This was particularly the case when the primary mission or goal of the agency conflicted with the environmental values mandated by Congress.

The courts sought to ensure that the government itself lived up to the mandates of the National Environmental Policy Act. They chose to play the role of protector of the values and goals expressed by Congress, a role akin to the Executive's duty "to take care that the laws be faithfully executed." Carried too far, such a judicial

190 449 F.2d 1109 (D.C. Cir. 1971).
192 The Nuclear Regulatory Commission was created in large part, to correct this conflict of interest situation. See S. REP. No. 980, 93d Cong., 2d Sess. 14 (1974) ("The Commission will have solely regulatory responsibilities, in keeping with a basic purpose of this act to separate the regulatory functions of the Atomic Energy Commission from its developmental and promotional functions ... "). See also Quirk & Terosawa, Nuclear Regulation: An Historical Perspective, 21 NAT. RESOURCES J. 833, 849 (1981).
193 See supra note 172. See generally Hays, supra note 147.
194 449 F.2d at 1111 (emphasis added).
195 U.S. CONST. art. II, § 3.
stance arguably could raise constitutional concerns regarding the limits of the judicial supervisory role. Courts clearly had the power and the duty to ensure that congressional mandates were not violated. But scrutinizing how agencies carried out their duties too intensely could blur the theoretical differences among judicial review, legislative amendments and executive administration and coordination.

Active judicial involvement during the Environmental Era nevertheless became an important means by which progress in this new era was defined and advanced. Courts now became much more explicit interpreters of the new regulatory matrices established by Congress in the 1970's. The judicial tools and techniques they used, however, were not fashioned out of whole cloth. The hard look doctrine and approaches that emerged had distinct continuities with the past. New Deal deference was not completely discarded, but it was often enhanced by a blend of common law logic that courts knew so well and the constitutional law doctrines and approaches that dominated the 1960's and 1970's.


Though the hard look doctrine came into its own during the Environmental Era, it began much earlier when the New Deal minimal rationality approach was very much in vogue. Expressing his disagreement with the Second Circuit's penchant for almost always deferring to agency decisions, Judge Jerome Frank perhaps inadvertently set forth an important purpose of the judicial application of the hard look doctrine—the use of reason to secure and enhance an agency's legitimacy. Commenting on the Interstate Commerce Commission's use of discretion in determining the accuracy of a railroad's property valuations, he noted:

If, however, the Commission is sustained in this case, and, accordingly, behaves similarly in future cases, then its conduct will indeed be a mystery. Its so-called "valuations" will then be acceptable, no matter how contrived. In that event, it would be desirable to abandon the word "valuation"—since that word misleadingly connotes some moderately rational judgment—and to substitute some neutral term, devoid of misleading associations, such as "aluation," or, perhaps better still, "woosh-woosh." The pertinent doctrine would then be this: "When the I.C.C. has cere-

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196 For a critical assessment of the courts' role in environmental litigation, see Sax, The (Unhappy) Truth About NEPA, 26 OKLA. L. REV. 239 (1973).
197 Id.
monially woosh-wooshed, judicial scrutiny is barred."

Judge Frank, however, was quick to observe that his desire to overturn this administrative decision was not based on any anti-agency bias. Indeed, he was a friend of administrative agencies, but:

[to condone the Commission's conduct here is to give aid and comfort to the enemies of the administrative process, by sanctioning administrative irresponsibility; the friends of that process should be the first to denounce its abuses. If the courts declare themselves powerless to remedy those abuses, judicial review will become a sham.]

It was similarly a desire to protect the administrative process and to emphasize the distinctive role of agencies that resulted in the Supreme Court's decision in *SEC v. Chenery Corp.* In that case the Court refused to give its reasons for a particular result until the agency first set forth its views. Indeed, the Court noted that: "a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency."

Because notions of expertise were founded upon the reasoning of agency decisions, the ability of an agency to express its reasoning process was an important source of agency legitimacy. It proved that they were responsible agents of Congress. This procedural aspect of the role of reason was at the center of the hard look doctrine set forth in *Greater Boston Television Corp. v. FCC.*

The underlying premise of this purely procedural version of the hard look doctrine was that the process of agency reasoning produced good results which not only enhanced the legitimacy of the agency itself, but also increased the likelihood of producing wise policies that furthered statutory goals. This emphasis on the agency's need to display a reasoned approach to its tasks, particularly when significant changes in policy were contemplated, had strong overtones of an evolutionary common law methodology.

Like changes in common law, changes in agency law were expected to occur gradually, to fit into pre-existing legal frameworks, and to represent a form of regulatory progress. Change was more likely to occur in this way if it was in fact the product of rea-

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199 Id. at 451.
201 Id. at 196.
203 See Sax, supra, note 196, at 247.
204 This approach is not unlike traditional approaches to evolution. See Provine, Pro-
soned analysis and not merely the result of a new set of political forces. The hard look doctrine thus assumed a high degree of rationality and, along with it, a highly developed doctrine of administrative stare decisis. In its most procedural form, it did not seek to have courts substitute their own substantive views for the agencies', but rather to ensure that the agencies had engaged in the process of reasoning. That process ensured that a reasonable approach, if not necessarily the best, would, in fact, be taken. Thus, courts could ensure substantive rationality by requiring that agencies explain the links between the congressionally expressed belief in progress and the reasonableness of the regulation being reviewed. The courts required that reasonableness be articulated, not assumed. The more substantive the courts' demands for articulation became, however, the more power courts had to alter or stop completely the changes proposed by agencies. This kind of exacting review is the essence of the judicial approach and it is a court's primary tool for organizing and ordering reality.


The common law-flavor of this doctrine is fully evident in Greater Boston Television Corp. v. FCC. In that case, the Federal Communications Commission, during proceedings regarding renewal of a television station's operating license, had conducted complete comparative licensing proceedings contrary to its usual policy of renewing licenses without such comparative proceedings. The television industry protested that this change in Congress in Evolution and Meaning in Life (unpublished manuscript on file at Cornell Law Review).

205 444 F.2d at 841.

206 Initially, the Commission had awarded the license to the station. However, "[w]hile the decision was on appeal in this court, it came to the court's attention that the Commission's award might be subject to an infirmity by virtue of improper ex parte contacts with the Chairman of the Commission." 444 F.2d. at 844. This possibility triggered another round of evidentiary hearings, at the end of which the Commission again awarded the license to WHDH, but for only four months, instead of the customary three year period. The Commission was unsure about the extent of the ex parte contacts and whether and about how they should affect the Commission's decision. When WHDH later filed for a renewal of its license, the Commission began another round of comparative license hearings. Meanwhile, both WHDH and Greater Boston appealed the grant of the four-month license. During this appeal, Mr. Robert Choate of WHDH, who had initiated the improper ex parte contacts, died. The Court then remanded the case to determine what effect, if any, his death should have on the licensing proceedings. The Court also authorized the Commission to combine the renewal proceedings with the remanded proceedings. The consolidated comparative proceeding began in May, 1964. After further comparative hearings, the hearing examiner placed primary emphasis on the actual operating record of WHDH under its temporary authorizations of the preceding nine years and granted it a three-year license. The Commission, however, reversed this decision in what turned out to be a very controversial opinion.
mission policy would place current license holders on equal footing with new applicants every time their licenses came up for renewal. The industry began organizing to seek legislative reversal of the Commission decision. In response, the Commission added a paragraph to its opinion to clarify that this was an unusual case.

On appeal, the court elaborated the need for the agency to take a "'hard look' at the salient problems." In so doing, the court set forth the circumstances under which a hard look would be required and explained just what the hard look approach required. The court then concluded that the Commission in this case had taken the necessary hard look at the issues and had adequately explained its reasoning to the court.

The court would apply the hard look approach when certain danger signals became apparent. Foremost among these danger signals was what the court perceived as a 180-degree turnabout in agency policy. Specifically, Judge Leventhal noted:

Judicial vigilance to enforce the Rule of Law in the administrative process is particularly called upon where . . . the area under consideration is one wherein the Commission's policies are in flux. An agency's view of what is in the public interest may change, either with or without a change in circumstances. But an agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored, and if an agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute.

The hard look doctrine thus reflected the common law by putting a premium on the past and by demanding continuity of agency policy.

The call for a "reasoned analysis" inevitably implied a substantive component to the doctrine. While it was not entirely clear from this case just how good a reason an agency must give if it does decide to change course, the opinion strongly implied that not just any reason would do. Indeed, the Court apparently anticipated reasoning which promotes results in the public interest by requiring the agency to focus on the values served by its decision, and hence releasing the

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207 Id. at 848-49.
208 The Commission explained that this case was unusual because WHDH's license had been granted only temporarily, because WHDH did not receive a license until 1962 and then only received a license for four months, and because of the Commission's concern about "'inroads made by WHDH upon the rules governing fair and orderly adjudication.'" Id. at 849.
209 Id. at 851.
210 Id. at 851-52.
211 Id. at 852-53.
212 Id.
clutch of unconscious preference and irrelevant prejudice. It fur-
tthers the broad public interest of enabling the public to repose confidence in the process as well as the judgments of its decision-
makers.\(^{213}\)

It was expected that the process of reasoned decision-making would yield substantive reasons which the public (through the courts) would recognize as good reasons, though not necessarily reasons with which all might agree. By requiring agencies to publicly articulate their rationales, courts encouraged results worthy of judicial deference and public approval. The reasoning process was thus a means to a more acceptable end. The reasoning process could not, however, be divorced completely from its products.\(^{214}\)

How good an agency's reason had to be and how much defer-
ence a court would give to that reason were matters of degree. If the court had a primarily procedural cast of mind, it would, in the face of a reason it might not agree with, reluctantly conclude that Congress ultimately wanted the agency to make the substantive decision involved. Such a court would require only that the decision be made in a manner capable of explanation to a court. An extreme process-oriented approach would allow virtually any reason as long as the agency's action was within its statutory powers. At the other end of the spectrum, an extreme substantive approach would mandate that the agency choose not just a good reason, but the best reason. Of necessity, “best” would be defined according to what the Court concluded that Congress intended when it passed the legislation.\(^{215}\)

The more demanding a court became in assessing agency rea-
soning, the more substantive its review would become. Indeed, a court's analysis of the reasonableness of an agency policy decision could resemble a determination of whether the agency action was *ultra vires*. If the action were outside the agency's legal powers, no one would object when courts intervened. However, when the policy advocated by an agency was technically within its powers, but philosophically beyond what Congress presumably intended, problems could arise. A substantive hard look approach would make the courts the ultimate arbiters of wise policy choices, with wise being defined as what a court thought Congress would have wanted

\(^{213}\) *Id.* at 852 (emphasis added).

\(^{214}\) A more direct substantive approach is explored *infra* at notes 220-40 and accompanying text.

\(^{215}\) Depending upon the complexity of the legislative history involved, however, the opportunities for the courts to decide what was a better as opposed to just a good reason were considerable. *See, e.g.*, Judge Mikva's approach in *State Farm Mut. Auto. Ins. Co. v. Department of Transp.*, 680 F.2d 206 (D.C. Cir. 1982), discussed *infra* at notes 364-91 and accompanying text.
at the time it passed the legislation involved. This approach could easily slip into a decision about what Congress might do today if it were willing to expend the political capital necessary to change the law.

Recognizing that there are degrees of judicial deference to agency reasoning processes and judgments does not negate the fact that the net result of the hard look approach was an increase in judicial power. This was true of even its most “procedural” decisions. This increase in power gave courts a greater role in determining the direction and pace of agency change. The common law basis of this doctrine puts a premium on the past, demanding continuity before agency change is likely to be accepted. To the extent that the invocation and/or the vigor with which this doctrine is applied are unpredictable, the ultimate shift of power from the agency to the court is correspondingly greater.

Judge Leventhal, in *Greater Boston Television Corp. v. FCC*, 216 however, did not see this doctrine solely in terms of power. Nor did he see the courts as totally separate from the administrative process. Like Judge Frank and other New Deal judges who believed in the regulatory experiment, Judge Leventhal believed judicial involvement was necessary for the good of the administrative process in general and agencies in particular. 217

Process and substance were inextricably intertwined, even when courts reviewed only the reasoning process in which an agency may or may not have engaged. The implicit or explicit requirement that not just good reasons but best reasons be provided usually arose in cases involving health, safety, and environmental issues which triggered absolutist approaches. 218 Even within the procedural approach, the degree of judicial scrutiny afforded often corresponded to the substance of the case. 219 There are, however, even more di-

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216 444 F.2d 841 (D.C. Cir. 1970).
217 Judge Leventhal argued that:
   Agencies and courts together constitute a “partnership” in furtherance of
   the public interest, and are “collaborative instrumentalities of justice.”
   The court is in a real sense part of the total administrative process, and
   not a hostile stranger to the office of first instance. This collaborative
   spirit does not undercut, it rather underlines the court’s rigorous insis-
   tence on the need for conjunction of articulated standards and reflective
   findings . . . .
444 F.2d at 851-52. *See also* Leventhal, *Environmental Decisionmaking and the Role of the
218 *See infra* notes 219, 222.
219 *See*, e.g., *Environmental Defense Fund, Inc. v. Ruckelshaus*, 439 F.2d 584 (D.C.
   Cir. 1971).

As a result of expanding doctrines of standing and reviewability, and new statutory causes of action, courts are increasingly asked to review admin-
istrative action that touches on fundamental personal interests in life,
rect substantive approaches to judicial review that coincide directly with the change in substantive regulation that occurred largely in the 1970's. The more substantive approaches precipitated a discourse that sounded more like constitutional than common law. The end result, however, was the same: judicial power was substantially increased.


Constitutional-like judicial review of agency action usually arose when the substantive regulation involved value questions in the context of health, safety, and environmental regulation. As we have seen, the type of market failure involved usually differed from the traditional New Deal concerns with natural monopoly or cutthroat competition.\(^2\) It was more likely to be based on a lack of the information necessary for informed individual and collective choice (about worker safety or the placement of a nuclear plant) or on a common-pool type of market failure where the blind pursuit of individual self-interest only worsens the problem.\(^2\)\(^1\) Because such questions involved life-and-death trade-offs, irrevocable damage,\(^2\)\(^2\) and calculation of the value of human life,\(^2\)\(^3\) compounded by scientific uncertainty, the judgments being made seemed less the result of expertise and more the result of essentially political value judgments. This sense of the substance involved suggests what Chief Judge Bazelon had in mind when he noted, in a case dealing with pesticide safety, that:

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health, and liberty. These interests have always had a special claim to judicial protection, in comparison with the economic interests at stake in a ratemaking or licensing proceeding. To protect these interests from administrative arbitrariness, it is necessary, but not sufficient, to insist on strict judicial scrutiny of administrative action.

Id. at 597-98. See also Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608 (2d Cir. 1965) (the more important the rights involved, the sharper the scrutiny of the relevant facts and the broader the scope of court review). See generally Frankfurter, The Task of Administrative Law, 75 U. Pa. L. Rev. 614, 619-20 (1927) ("Judicial review . . . derives significance from the nature of the subject matter under review as well as from the agency which is reviewed."); cf. Jaffe, Administrative Law: Burden of Proof and Scope of Review, 79 Harv. L. Rev. 914 (1966) (important rights asserted in deportation cases justify the imposition upon administrative agencies of greater burden of proof and the imposition on courts of the duty of more thorough judicial review.).

\(^2\)\(^2\) See supra notes 31-62 and accompanying text.

\(^2\)\(^1\) See supra note 219.

\(^2\)\(^3\) See F. Grad, 2 ENVIRONMENTAL LAW § 8.02[2], at 8-127 (2d ed. 1978) ("There is a special aspect of environmental rights which renders them more basic and more fundamental than most traditional civil rights. . . . That feature is the irrevocability of their breach."); M. Sagoff, THE ECONOMY OF THE EARTH 24-49 (1988).

Courts are increasingly asked to review administrative action that touches on fundamental personal interests in life, health and liberty. These interests have always had a special claim to judicial protection, in comparison with the economic interests at stake in a ratemaking or licensing proceeding.\textsuperscript{224}

This basis for close judicial scrutiny of agency decisions encouraged a judicial methodology that was directly analogous to the substantive constitutional approaches taken when fundamental constitutional rights or suspect classifications were involved. Thus, the initiator of action affecting "fundamental personal interests in life, health and liberty"\textsuperscript{225} had to carry a heavier burden than an actor who affected only economic interests.\textsuperscript{226} Under Judge Leventhal's process rationale, the economic issues and the apparent change in agency policy involved in \textit{Greater Boston Television Corp. v. FCC}\textsuperscript{227} demonstrated a combination of danger signals which justified close judicial scrutiny. The more substantive version of the hard look doctrine, however, does not necessarily require such danger signals and may authorize judicial intervention in the absence of any clear change in policy direction and, presumably, even when reasons are given.\textsuperscript{228} Moreover, in cases involving health, safety, and environmental issues, complex issues of law and policy were more likely to be seen as issues of law, rather than policy, thus facilitating more extensive judicial review.\textsuperscript{229}

The Court in \textit{Citizens to Preserve Overton Park, Inc. v. Volpe},\textsuperscript{230} for example, was deciding whether the Secretary of the Interior had adequately considered environmental values before making his decision to build a highway through Memphis parklands. The Court, in effect, treated this as an issue of law because it interpreted the relevant statutes to require the Secretary to give great weight to such environmental values. The characterization of the issue as a question of law, rather than policy, allowed the Court to apply a higher standard of review than the deferential "arbitrary and capricious" standard.\textsuperscript{231} The Court could thus use its explicit process demands

\textsuperscript{224} Environmental Defense Fund, Inc. v. Ruckelshaus, 439 F.2d 584, 597-98 (D.C. Cir. 1971).
\textsuperscript{225} Id.
\textsuperscript{226} This approach was similar to that outlined in footnote four of United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938), which stated that courts would closely examine official actions that affect civil liberties, but would take, essentially, a hands-off approach in cases involving economic interests.
\textsuperscript{228} See, \textit{e.g.}, \textit{Citizens to Preserve Overton Park, Inc. v. Volpe}, 401 U.S. 402 (1971).
\textsuperscript{230} 401 U.S. 402 (1971).
to implicitly insist that the Secretary pursue substantive environmental goals.

When all of these reasons for a hard look coincided—namely, a change in agency policy, life-and-death issues, and what were perceived as flimsy or incomplete agency reasons—in the context of an issue that could be characterized as a violation of substantive law as well, the courts were likely to take a hard look. By demanding, in effect, that better reasons be given than those offered by the agency, or that alternatives be considered for which further reasons would be required, or that the agency explain what appeared to the court to be an *ultra vires* act, courts, in effect, were taking a hard look at much more than the process of agency decisions.

The more substantive hard look approach to issues of policy was tied to the "arbitrary and capricious" clause of the Administrative Procedure Act. The substantive approach, however, was usually buttressed by provisions in the agency enabling acts that gave courts an opportunity to act as if Congress implicitly intended to insert a sliding scale approach into the Administrative Procedure Act. Hybrid rulemaking statutes calling for the application of a substantial evidence test to policy making determinations could be used to authorize a closer look. Reliance on such enabling act provisions avoided the problems which arose when appellate courts explicitly glossed the Administrative Procedure Act in ways that Congress arguably did not intend when it passed the Act in 1946. The result, however, was the same: the "arbitrary and capricious" clause of the Administrative Procedure Act could take on various meanings depending on the circumstances of the case, much like the

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232 See, e.g., State Farm Mut. Auto. Ins. Co. v. Department of Transp., 608 F.2d 206 (D.C. Cir. 1982). This clearly was a case where a variety of danger signals converged.


equal protection or due process clauses of the Constitution. More importantly, the hard look discourse demanded right answers, not just examples of on-going processes of agency reasoning, and it allowed the courts to decide what answers were right.

In short, the hard look discourse opened the judicial door for more intense discussions of the rationality of agency decisions. During the Environmental Era, unlike the New Deal Era, rationality was not presumed and often could not be established by a minimal adherence to the Administrative Procedure Act's requirement of a "concise general statement of . . . basis and purpose." The questions raised, the value conflicts inherent in those questions, the human stakes involved, and the agencies' inability, often because of conflicts of regulatory interests, to inspire confidence in their expertise, all led to an era of greater judicial involvement and a much more judicially defined view of what constituted progress. Interdependence and the relationships among individuals, agencies, and the law spawned a much more complex sense of progress that often raised philosophical issues similar to those that courts frequently confronted in the constitutional realm.

As the 1980's and deregulation took hold, courts had their choice of at least three different approaches to agency deregulatory action: New Deal deference, a procedural hard look, or a more overt substantive hard look approach. As we shall see in Part II, the approach a court takes when reviewing agency deregulatory action often has a substantial effect on the action's likelihood of success. More importantly, this doctrinal choice can also have a transforming effect on the deference doctrine itself as well as the statute involved. As we shall also see, a new form of Presidential deference has emerged in the deregulatory context, one based neither on agency expertise nor on perceived congressional will, but more on the Article II supervisory powers of a President willing to assert direct control over a large, unwieldy, and powerful bureaucracy. It is, in particular, in a deregulatory context that the application of presidential deference may not only have transforming effects on the

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239 If, for example, an economic policy decision were under review and no "danger signals" were present, "arbitrary and capricious" could be interpreted to resemble the rational basis test commonly used by courts when reviewing the reasonableness of economic legislation under the due process clause. If, however, "fundamental interests" were involved and/or "danger signals" were present, the strict scrutiny or hard look approach could be employed. As we shall see, just as in constitutional litigation, there were often more than two tiers of review available. The hard look doctrine could apply with varying degrees of intensity causing great doctrinal uncertainty, more litigation, and substantially greater control and power for reviewing courts.

240 See Administrative Procedure Act, 5 U.S.C. § 553(c).
statutes involved, but can also risk stretching the President’s supervisory powers to their constitutional breaking point.

II
JUDICIAL REVIEW OF AGENCY DEREGULATION

Part One contextualized New Deal deference and the hard look approach of the Environmental Era by concentrating on key legal and non-legal factors. These factors informed the regulatory matrix in terms of which the cases in these two eras were understood. Part One thus placed these administrative law doctrines within the very different constitutional contexts that dominated these two eras. It also suggested that judicial review of agency action is shaped by the nature of the agency, the agency’s enabling act, the substantive matters with which the agency deals, the kind of market failure it is attempting to correct, and the explicit and implicit values underlying the conflicts at hand. Moreover, the further we get in time from the words and history of the statutes involved, the more we deal with contextual variables which we may call “X factors.” X factors are those aspects of the context of a case that have no necessary legal basis, but can very much affect the way a court views the merits of a case. X factors include: Does the agency involved have a good reputation? How carefully does it do its work? Has it been unduly influenced by the politics of the moment? Are serious conflicts of interest at work?

But even broader and more subtle contextual factors often come into play. Different historic eras—be they the laissez-faire era of the 1920s, the New Deal era of the 1930s and beyond, the Environmental Era of the 1960s and 70s or the Deregulatory Era of the 1980s—generate different attitudes toward regulation. Why and how societal attitudes change from era to era defies easy explanation, yet it is clear that the prevailing attitudes of the day deeply affect the regulatory matrices with which we work. History does not necessarily justify agency actions, but it can help to explain them.

The deregulation movement coincides with what may be another significant threshold of change in administrative law. Our belief in progress is now related more to broad notions of efficiency and less to environmental values. This belief no longer encourages regulatory growth. Production and the ability to compete in global markets drives much of the deregulatory reform of the present era. Unlike the New Deal Era and the Environmental Era, however, the production values and efficiency concerns of this era have not gen-

241 For a discussion of how such factors affect judicial jurisdiction over tribunal decisions in England, see P. CRAIG, ADMINISTRATIVE LAW 75 (1983).
erated many new comprehensive legislative programs. Deregulation in the 1980s has been largely a presidential initiative, carried out by agencies operating pursuant to enabling acts passed in previous regulatory eras. Much deregulation has been achieved pursuant to the same statutes that created the regulatory regime that agencies now seek to replace; however, there surely are limits to the extent to which efficiency alone can justify agency change without congressional action. The Constitution requires that the cost of fundamental change be high; some change must be accomplished through new legislation rather than through the substitution of market rules. Though agencies, working within their old enabling acts, have been the primary agents of deregulatory change, some of the legal limits within which deregulatory-minded agencies must work have attracted judicial attention. In order to understand both the limits and the flexibility that agencies have regarding deregulation, we begin Part Two by examining the discourse of deregulation, particularly of deregulation at the agency level. We then examine how the doctrines of deference and hard look have been applied in deregulatory contexts. Finally, we examine the emergence of a new form of deference, presidential deference. Part Three then analyzes that doctrine in some detail, particularly as applied in *Chevron v. NRDC*.

A. The Discourse of Deregulation

The political rhetoric that surrounds deregulation often implies that deregulation is clearly defined. Taken on its own terms, deregulation is the antithesis of regulation. Among those favoring deregulation, regulation stands for the heavy, inefficient, all-too-visible hand of the federal government, while deregulation represents individual liberty and a free marketplace. Those advocating deregulation often approach reform as if regulation and deregulation were opposites and as if the debate were truly dialectical.

This, however, is an oversimplified view, particularly for deregulation that occurs at the agency level. Deregulation is not simply the antithesis of regulation. Rather, deregulation can and does implement a variety of policy goals and aspirations. It is not a monolithic concept. Deregulation may be advocated for theoretical, 

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242 See authorities cited *supra* note 13.
244 See, e.g., N.Y. Times, Aug. 19, 1984, § 1, at col. 6 (weekly Presidential radio address); *id.*, Aug. 22, 1984, § 1, at 18, col. 1 (1984 Republican party platform); *id.*, July 18, 1980, § 1, at 8, col. 1 (Reagan's 1980 Presidential nomination acceptance speech before the Republican Convention).
Micro-economic theory forms the underlying theoretical basis for deregulation. This kind of deregulatory logic typically argues as follows: Government intervention is unnecessary where markets can or do exist and where they can function reasonably freely. Markets can best allocate society’s scarce resources to their highest and best use. Law is only necessary to bolster or help create a market. From an economic, theoretical point of view, law should not try to undo, substantially change, or modify the results a freely functioning market would otherwise produce. Thus, according to this view, there is no need to control the price of natural gas or oil because competition exists at the production level and the law of supply and demand will reach an equilibrium by means of the pricing mechanism. Those who cannot afford to pay will simply fall off the demand curve.

Closely related to the theoretical aspects of micro-economics which argue in favor of deregulation are the normative or philosophical reasons favoring deregulation. A market approach not only furthers efficiency, but arguably furthers such values as liberty, creativity, decentralized government, and the excellence that comes with maximum individual freedom of choice. Thus, for example, Milton Friedman writes: “The preservation of freedom is the protective reason for limiting and decentralizing governmental power. But there is also a constructive reason. The great advances of civilization, whether in architecture or painting, in science or literature, in industry or agriculture have never come from centralized government.” Friedman goes on to note that, while some governmental regulation might improve the standard of living of many individuals, “in the process, government would replace progress with stagnation . . . [and] . . . substitute uniform mediocrity for the variety essential for that experimentation which can bring tomorrow's laggards above today’s mean.” In short, the market is

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247 If welfare help is then necessary, a regulatory regime more consistent with market principles would provide that help directly by, for example, using energy stamps, rather than a pricing structure that distorts the market and creates unnecessary demand for underpriced, regulated natural gas. For a discussion of various perspectives on energy and natural resources issues, in general, including a deregulatory, economic approach, see A. AMAN, supra note 111, §§ 1-1 to 1-50.

248 M. FRIEDMAN, CAPITALISM AND FREEDOM 3 (1962).

249 Id. at 4.
intrinsically good. The market leads to efficiency, and this, in turn, enables other positive values and individual economic rights to flourish.\footnote{250}

Viewed in these theoretical and normative ways, the regulation-deregulation debate is a dialectical one. Government intervention stands as the antithesis of the free market. The process of deregulation, however, is political and the political reasons for advocating a market regime as opposed to a regulatory approach usually are based on pragmatic, often short-run, policy goals. The market, like the law, is viewed and used instrumentally; that is to say, advocating and adopting market approaches to problems is not a return to nature, but the use of an impersonal regulatory tool, particularly appropriate, for example, for allocating shortages of energy supplies for which no politician particularly wants to take responsibility. Therefore, when the market reaches or promises politically popular results it is embraced.\footnote{251} When the market's results are not politically popular, the market is rejected, regardless of the underlying theoretical or normative views of regulation.\footnote{252} In short, behind the pragmatic use of the market is the same view of theory that underlies Keynes' famous dictum: "In the long run, we are all dead."\footnote{253}

At the congressional level, for example, deregulation is often

\footnote{250} Closely related to the goals of economic liberty and political freedom is the idea that "government power must be dispersed. If government is to exercise power, better in the county than in the state, better in the state than in Washington." Id. at 3. As we shall see below, after the Department of Transportation's attempts to rescind the airbags rule failed, Secretary Dole took an alternative regulatory approach that sought to avoid federal regulation if a requisite number of states themselves initiated the use of airbags. That approach was an attempt to substitute local regulation for federal regulation and, as such, may or may not be viewed as ideologically, rather than pragmatically, motivated. See infra notes 322-63 and accompanying text. For a case in which the United States Court of Appeals for the District of Columbia found an agency's use of federalism to be unauthorized by the statute involved and, in effect, motivated more by ideology rather than by the pragmatic use of discretion, see Farmworker Justice Fund, Inc. v. Brock, 811 F.2d 613 (D.C. Cir.), vacated as moot, 817 F.2d 890 (D.C. Cir. 1987).

President Reagan also sought to encourage federalism at the agency level. For federalism principles raised when executive agencies engage in regulation, see Exec. Order No. 12,612, 52 Fed. Reg. 41,685 (1987), reprinted in 5 U.S.C. § 601, at 298-300 (1987) (seeking "to restore the division of governmental responsibilities between the national government and the States . . . and to ensure that the principles of federalism . . . guide the Executive departments . . . ").

\footnote{251} Airline deregulation certainly can be seen in this way. See generally S. Breyer, supra note 245, at 817-40.

\footnote{252} When the Carter Administration first proposed deregulating the price of crude oil, it attempted to "sell" this approach by also advocating a politically popular windfall profits tax on oil companies, lest they reap the benefits of the higher de-controlled prices. See A. Aman, supra note 111, §§ 5.04, 5-81 to 5-85. See also Windfall Profits Tax and Energy Trust Fund: Hearings Before the House Comm. on Ways and Means, 96th Cong., 1st Sess. 6, 19 (1979) (statement of W. Michael Blumenthal); Drapkin & Verleger, The Windfall Profit Tax: Origins, Development, Implications, 22 B.C.L. REV. 631, 665-66 (1981).

\footnote{253} J. Keynes, A TRACT ON MONETARY REFORM 80 (1924).
presented in a manner that resembles consumer legislation. Airline deregulation, for example, was aimed at lowering air fares and increasing services for consumers. Advocates of oil decontrol pitched it as a conservation measure and coupled the initiative with a stiff windfall profits tax to redistribute wealth in a politically acceptable manner. Such goals are similar to the policy aspirations and goals of traditional New Deal statutes. Though the means for achieving these ends is the market, the process of implementing this approach is the same as implementing any other government program. Laws must be passed, speeches given, positions established, and votes taken. In the process, legislators' identities are sharpened. Deregulation is, in short, a political process and what it promises has much to do with whether or not it will succeed legislatively.

Viewed in this manner, it is impossible to see the regulation-deregulation issue simply in either/or terms. Nor does decontrol represent a single regime. Control and decontrol, and regulation and deregulation are the same side of the same coin. To decontrol, one must first control. To deregulate, one must first regulate. Both actions require affirmative governmental proceedings and much of the decontrol that has occurred to date continues to focus attention on the federal government. In some cases, decontrol may actually increase federal power particularly if the area decontrolled cannot constitutionally be regulated by the states. In short, even if one thinks of decontrol in normative and theoretical terms, it is nonetheless, ironically, another kind of government program as

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254 See S. Breyer, supra note 245, at 317-40.
255 See, e.g., authorities cited supra note 252.
256 For an analysis of how market and regulatory values inevitably combine in various ways in the implementation of a regulatory program, see Aman, supra note 16. On whatever end of the regulatory spectrum we begin—the free market or a complete regulation of the market—an examination of administrative equity suggests that an ongoing interplay of various market and regulatory values will occur and temper the dominant tendencies of whatever regulatory scheme is in effect. A regulatory regime based primarily on market principles will not be a static one. The regulatory dialogue will continue, and, given the basic values that pervade any regulatory scheme, the underlying structure of these new approaches will remain very much the same.

Id. at 330-31.

For a case study examining how the fear of market regulatory approaches affected the legislative choices of the procedures and the ultimate structure of the Department of Energy, see Aman, supra note 3.

257 See Foote, Administrative Preemption: An Experiment In Regulatory Federalism, 70 Va. L. Rev. 1429, 1431 (1984) (noting that some federal agencies are exercising their preemptive powers to preclude state health and safety laws that would impose greater restrictions on industry. In this regard, some agencies have declared "that state laws on a given issue are preempted by the agency's decision not to regulate."). See also examples cited supra note 8.
well, albeit one that does not necessarily require any expenditure of federal funds. Decontrol, therefore, need not be, and seldom is, the antithesis of control. It is, rather, a continuation of the same kind of political, regulatory processes as before. This is particularly the case in deregulation that occurs at the agency level.

B. Deregulation at the Agency Level

The President can advocate deregulatory change for philosophical and theoretical reasons. Similarly, Congress can pass new deregulatory laws and repeal old laws for theoretical or normative reasons alone. Agencies, however, cannot usually deregulate if these are its only reasons. Authorized to achieve certain statutory goals, agencies must justify market oriented rules and approaches in pragmatic terms that satisfy those goals. For deregulation to occur at the agency level, it must be characterized as a form of progress within a regulatory scheme whose past history may be hostile to deregulatory change. Nevertheless, in the absence of congressional action, agencies play the most significant role in the deregulatory process. Agency deregulatory action can take a variety of forms.

1. The Forms of Deregulation

An agency may seek to repeal or rescind existing rules or postpone indefinitely the effective date of rules already promulgated but not yet controlling. Such actions are retrospective in nature and usually are supported on the grounds of changing circumstances and/or the ineffectiveness of the prior regime. Similarly, an agency may refuse to take action concerning problems that it has the power to regulate. The agency may be unsure what to do or it may feel that the market achieves results that are as good or better than regulatory approaches would achieve. Such prospective market action is not necessarily decontrol, but it has obvious deregulatory effects. This type of regulatory forbearance relies on the market as its primary regulatory tool. It assumes the market will do at least as good a regulatory job as agency rules.


Most regulatory forbearance is essentially unreviewable and, thus, capable of normative or ideological reasoning even by agencies.\(^{261}\) Similarly, decisions to enforce or not to enforce existing agency rules can also have significant deregulatory effects, and, though rationalized in terms of prosecutorial discretion and the allocation of resources, may nonetheless be quite consistent with certain ideological views as well. These decisions, too, are practically speaking, immune from effective judicial review.\(^{262}\)

Most agency deregulation that has given rise to litigation, however, has been the retroactive kind—that which seeks to rescind old rules and replace them either with new, market oriented rules or with nothing at all.\(^ {263}\) Because retroactive change requires that the agency explain itself, this process has given rise to a number of legal issues, most of which have involved the legal power of the agency either to formulate new market oriented rules against an essentially New Deal legislative backdrop or to, in effect, appear to “refuse to regulate.” Before examining some of these cases in detail, it is useful to consider whether one can or should think of agency processes of deregulatory change from a theoretical or normative point of view, rather than a pragmatic one. Can the repeal or rescission of rules legally be justified by theoretical or normative reasons alone? Specifically, what assumptions should underlie judicial review of this kind of action? As we shall see, the narrower the scope of judicial review of such questions, the greater the discretion of the agency and, presumably, the opportunity to act solely or primarily for ideological reasons.

2. Agency Deregulation from a Normative Perspective

Significantly, the Administrative Procedure Act does not distinguish between the promulgation and the repeal of a rule.\(^ {264}\) The same procedures and, presumably, the same standards of judicial review apply to both.\(^ {265}\) But does it follow that the scope of judicial

\(^{261}\) See, e.g., Heckler v. Chaney, 470 U.S. 821, 832 (1985) (FDA decision not to take investigatory and enforcement action regarding drugs used for lethal injections immune from judicial review). One can also petition an agency to make rules and then seek review of the agency’s refusal to do so. The scope of this review is very narrow. For all practical purposes, an agency’s refusal to promulgate new rules is virtually immune from judicial review. See WWHT v. FCC, 656 F.2d 807, 809 (D.C. Cir. 1981). Writs of mandamus might also be possible along with private causes of action. See generally Stewart & Sunstein, Public Programs and Private Rights, 95 Harv. L. Rev. 1193 (1982).

\(^{262}\) See WWHT v. FCC, 656 F.2d 807, 819-20 (D.C. Cir. 1981) (under narrow scope of judicial review, FCC’s refusal to apply mandatory carriage requirements to scrambled signals of local subscription television seen as within agency’s discretion).


\(^ {264}\) See 5 U.S.C. § 551(5).

review for deregulatory action should be the same as it is for regulation? One way to narrow the scope of review for deregulatory action is to, in effect, differentiate sharply between substance and procedure.

Professor, now Justice, Scalia argued some time ago that “parity of process does not necessarily entail parity of substance.” As a result, courts should not necessarily equate the scope of review of regulatory action with that of deregulation. They should give deregulation greater deference than is given to agency decisions to regulate because “the substantive inertia of our laws . . . favors not the status quo but private autonomy, whether or not [private autonomy] is what the status quo prescribes.” The burden of proof should thus always be on the party seeking to retain regulation, not on the party seeking the freedom of the marketplace by the rescission of a present rule. Moreover, “an agency’s elimination of burdens upon private parties—like an agency’s failure to impose burdens in the first place—must fall within that portion of the [sliding scale of review] giving the administrator the broadest leeway, and the courts the narrowest scope of review.” Though the courts ultimately rejected this argument, it is worth exploring for its implications concerning change in general and the administrative process in particular. More importantly, it shows how an ideological point of view can improperly color what should be a purely regulatory approach.

To view deregulation philosophically as “the elimination of burdens on private parties” is to see this process solely in terms of the regulated, to the exclusion of the purported beneficiaries of the regulations the agency seeks to rescind. The statutes passed by Congress and the agency rules promulgated pursuant to those statutes are presumed to be in the public interest. They impose costs on some for the benefit of the public at large. While one may quarrel with the efficacy or wisdom of such statutes and rules, it is difficult to equate the purported beneficiaries of these laws with the regulated and to argue that deregulation is better for everyone.

Nor is it correct to contend that the removal of regulatory bur-
dens can be equated with failing to regulate in the first place. From the point of view of at least some beneficiaries of the rescinded rules, there is likely to have been a loss—be it an economic benefit of some kind or a modicum of environmental, health, or safety protection. A decision to remove a benefit once conferred by an agency cannot be treated as if the rule in question had never existed. Such a perspective would be an appropriate way to view a congressional decision to repeal legislation, but it is not appropriate when an agency repeals a rule in the context of the same statute that generated the rule as part of the agency's attempt to carry out its regulatory obligations. Repeal requires the agency at least to consider its significance in terms of its obligation to act on behalf of a certain class of regulatory beneficiaries. Under these circumstances, change is not impossible, but it should be explained.

In addition, it is not possible to separate substance and procedure and analyze agency rescissions of rules without considering what substantive action the agency proposes to take after the rescission. An agency may decide to promulgate a new, arguably better, rule or, for a variety of reasons, it may choose not to regulate further for the time being. In assessing the validity of an agency rescission, one cannot fully separate these two decisions. A philosophical preference for private autonomy rather than the regulatory status quo cannot be the legal basis of a rescission unless it is reflected in the agency's enabling act or susceptible to a public interest discourse triggered by the statute itself. Given the fact that the regulatory framework within which agency decontrol must take place usually seeks to replace or substantially alter the market, a preference for private autonomy is not likely to be stated in regulatory terms. A rescission followed, for example, by a decision not to regulate to allow the market to work more freely, would thus have to be justified in terms of the goals of the regulatory statute involved. If the market is likely to yield results that advance the public interest goals of the statute involved, courts, as we shall see, are usually willing to defer to such an agency decision. Though the end result may be an increase in private autonomy, that fact alone can constitute neither the statutory justification for an agency rescission nor a judicial basis for deferring to that action.

Similarly, certain premises inherent in a philosophical approach to agency decontrol that place a premium on private autonomy arguably are fundamentally at odds with what administrative law is, or should be, particularly given the substantive goals of most statutes.

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272 Id. at 279-80.
A preference for private autonomy implies a view of administrative law that has, as its primary purpose, the protection of the individual from governmental intrusion. The New Deal statutes were, of course, a legislative response to precisely that kind of thinking. Though they often reflected a distinct producer perspective, their goal was market correction, not private autonomy. To achieve that goal, the autonomy of many firms and industries was necessarily compromised. Administrative law seeks to implement the goals of the statutes involved. Justifications for agency action or inaction or deregulatory action that focus solely on private autonomy are necessarily incomplete. It is impossible to view a return to the market (especially at the agency level) as anything but a regulatory act, requiring affirmative governmental action. Thus, the question is not whether a rescission will further private autonomy, but whether it will further the public interest goals of the statutes involved. The market cannot be equated with a state of nature. In the context of an existing regulatory statute, resort to the market is the substitution of just another kind of complex, regulatory approach.

Health, safety and environmental regulatory cases tend to involve complex, irrevocable, and often life-and-death questions; therefore, it is not surprising that agency deregulation might more easily be accomplished within the matrix of traditional New Deal economic regulation. It is easier, in economic contexts, to justify resort to the market as a regulatory tool since the essential goals of the statutes themselves are fundamentally economic in nature. If competition between natural monopolies offers the prospect of fairer rates for consumers, or if the market may produce reasonable diversity in radio programming to comport with the broad “public interest” goals of the statute involved, the use of the market need not necessarily be explained as ideologically based, but rather as an essentially pragmatic response to new circumstances. Theoretical, philosophical, and pragmatic reasons for decontrol thus can converge in a decision whose main justification is expressed in regulatory, public interest terms.

The decontrol that results can satisfy all three levels of analysis. It may be both theoretically and normatively pure and, most important of all, capable of explanation in pragmatic, regulatory terms. Such explanations enable courts to view deregulation as a kind of regulation and to defer to the new deregulatory bargains negotiated

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among the agency, the regulated, and the beneficiaries. 277 This
class kind of discourse is more likely when the regulation involved is eco-

cnic in nature and the conflicts that arise are more in the nature of
conflicts of economic interest, rather than fundamental conflicts of
value. 278

Judicial deference to market approaches applied in the context
of health, safety, or environmental issues is much more problematic.
As we have seen, the statutes involved usually provide less flexibility
than the broad public interest statutes of the New Deal. 279 More
importantly, decisions to rescind rules in this context are not easily
based either on the use of the market as a regulatory tool or on
notions of individual, private autonomy. This is particularly true
when to grant an individual complete autonomy in nineteenth cen-
tury or classical economic terms may jeopardize the health, safety,
and economic interests of the community at large. The stakes are
different in such cases. First, these cases often deal with trade-offs
difficult to express in monetary terms. Second, administrative law's
traditional function of protecting the individual from unfair govern-
mental intrusion or from unfair market effects must be viewed in
relation to the paramount interest of protecting a community of indi-
viduals from the excesses of individualism. Cases such as these
raise more fundamental conflicts of value, the resolution of which is
more likely to be viewed as fundamentally political and less amena-
tle to resolution by agency experts. 280

These tensions and shifts of emphasis from an individualist ap-
proach to a more collective approach are evident in some judicial
responses to agency attempts to deregulate. As we shall see, if the
issues of a case can be viewed solely in terms of conflicts of eco-
nomic interest, courts are willing to tolerate agency resort to an eco-
nomic regulatory discourse and to apply what looks like the
traditional deferential model of judicial review. If, however, courts
perceive the issues as raising fundamental conflicts of value, eco-
nomic discourse alone is unlikely to withstand judicial scrutiny and
the courts will likely apply, in both substance and effect, one of the
hard look approaches examined above.

The judicial review doctrines devised for regulation are thus
fully applicable to deregulation as well, but their application in der-
regulatory contexts can nevertheless have transforming statutory effects. Judicial deference to deregulatory action in the context of economic regulation facilitates the use of a market perspective on issues that arise within statutory frameworks designed to combat market failure. This occurs, in large part, because of the courts' willingness to adopt an essentially consumer-oriented perspective when interpreting statutes that usually did not directly consider the needs of consumers per se. Perhaps an even more significant statutory transformation occurs when courts choose to defer to rather than examine closely, the deregulatory actions of environmental, health, and safety agencies. As we shall see in Part Three, deference in the context of deregulatory agency action involving health, safety, and the environment often transforms a distinctly consumer-oriented statute into a much more producer-oriented piece of legislation.

C. Judicial Approval of Agency Deregulation—The Application of Traditional Deference

The reasons for traditional judicial deference to the economic regulatory decisions of New Deal agencies set forth above\(^2\) are equally applicable to economic deregulation.\(^2\) When deregulation is presented as a form of public interest regulation which uses the market as a regulatory tool to achieve goals the agency has set, the likelihood of judicial deference to agency deregulation is greatly increased. The common law discourse of incremental change with its reliance on fitting new approaches into a pre-existing regulatory structure coupled with an expression of a belief in regulatory progress becomes the very means by which agencies dismantle the regulatory regime previously created through the same means. An agency's ability to explain its decision in pragmatic economic terms is crucial to its deregulatory success. Essentially this depends on three key factors: (1) the nature of the regulation involved; (2) the

\(^{281}\) See supra notes 23-62 and accompanying text.

\(^{282}\) This, of course, assumes that both agencies and reviewing courts are substantially correct when they interpret the broad delegation clauses of New Deal statutes to allow the use of market means to achieve the various statutory ends. The statutory transformation that this economic discourse facilitates is ironic, particularly given the fact that Congress had concluded that regulation was necessary because unregulated markets did not work. Not all courts, of course, are willing to assume that the use of market means does not necessarily significantly change the statutory ends of a program that essentially has rejected the market. See, e.g., International Ladies' Garment Workers' Union v. Donovan, 722 F.2d 795, 827 (D.C. Cir. 1983), cert. denied, 469 U.S. 820 (1984); Farmers Union Cent. Exch. v. FERC, 734 F.2d 1486, 1518-20 (D.C. Cir.), cert. denied, 469 U.S. 1034 (1984). On balance, however, the open-ended nature of the delegation clauses, the economic conflicts of interest involved, and the implicit attempts to further the public interest make courts less suspicious of substantive interpretations of the statutes that allow the market to be used in this way.
statute under which the agency operates; and (3) the reasons an agency gives to explain its deregulatory approach.

Economic regulation pursuant to open-ended New Deal statutes facilitates agency rationalizations for deregulation. In this context the agency, the regulated, the beneficiaries and, most importantly, the court can frame and resolve conflicts by resort to a common economic discourse that arguably satisfies the relevant statute involved. The ability of economic rhetoric to fit within the regulatory framework means that agencies can explain market approaches as just another regulatory tool. They are not simply rescinding old rules for ideological, philosophical, or political reasons such as the desire to “do nothing” or “to get government off of the backs of the people;” they are rescinding old rules and replacing them with newer, more effective regulatory approaches. Courts often assume the effectiveness of these newer, more market oriented approaches when choosing to defer. In any event, courts usually analyze these market approaches from the point of view of the public interest, emphasizing the consumer’s or the beneficiary’s perspective.

Perhaps the most successful agency decontrol to take place over a sustained period of time has occurred at the Federal Communications Commission. The open-ended nature of the Federal Communications Act (like most New Deal statutes), the economic nature of the regulation involved, and the technological changes that have occurred in this industry have made it relatively easy for courts to view agency resort to the market as being within “the public interest.” Courts willingly presumed that a market approach will serve the beneficiaries’ interest.

FCC v. WNCN Listeners’ Guild is a prime example of the Court reviewing the agency’s deregulation with a consumer perspective in mind and the agency explaining its use of the market in pragmatic, as opposed to ideological or theoretical, terms. In so doing, the agency was able to engage in a deregulatory discourse that sounded essentially the same as regulation. The FCC was not shirking its duty to regulate; it was pursuing a new kind of regulatory progress and all that had changed, presumably, was the form of the regulation involved. The agency was thus asking the Court to evaluate this change in public interest terms and to take note of the fact that, in the agency’s view at least, the beneficiaries of the regulation would be better off if the market were allowed to work.

WNCN involved FCC renewal of broadcast licenses. The FCC renews or transfers broadcast licenses if the “public interest, con-
venience and necessity [is] served thereby.\textsuperscript{284} Pursuant to this broad, discretionary mandate, the FCC issued a policy statement which said that it would no longer examine changes in entertainment programming (called format changes) when ruling on applications for license renewal or transfer.\textsuperscript{285} The FCC concluded that by letting market forces dictate what format each station took, the public interest, as measured in terms of public satisfaction and diversity of programming, would be better served than in the past.\textsuperscript{286} According to the FCC, relying on market forces would and, indeed, at the time of this litigation, already had led to significant inter-station diversity in large markets, as well as intra-station diversity.\textsuperscript{287} Moreover, the agency maintained that such an approach was more flexible and more responsive to public desires than traditional command-control regulations.\textsuperscript{288} In short, the agency presented its deregulatory action as an alternative kind of regulation. It concluded that reliance on the market would, in fact, more fully satisfy its duty to regulate in the public interest than its previous approach.

Various groups of citizens supporting certain kinds of radio formats not common in modern commercialized markets challenged this change in regulatory approach.\textsuperscript{289} These groups included those in favor of classical music formats, educational radio, and bilingual education. They all considered themselves to be legitimate, direct beneficiaries of the FCC's previous format regulatory authority. Without format regulation, they feared that the kind of programming they favored might not survive in a fully competitive market place. This was a chance they did not wish to take. They were, in effect, winners under the former regulatory approach and were not eager to change the rules of the game. They argued that resort to the market could not be equated with a form of regulation and that the FCC was failing to carry out its statutory duties by leaving format decisions wholly to the market.\textsuperscript{290}

The Supreme Court disagreed, holding, in effect, that a decision to use the market as a regulatory tool was fully within the agency's expertise and powers. As the Court noted, the Commission had argued that:

\begin{quote}
[I]n large markets, competition among broadcasters had already produced "an almost bewildering array of diversity" in entertainment formats. Second, format allocation by market forces accom-
\end{quote}

\begin{footnotes}
\textsuperscript{284} Id. at 584.
\textsuperscript{285} Id. at 585.
\textsuperscript{286} Id.
\textsuperscript{287} Id. at 590.
\textsuperscript{288} Id.
\textsuperscript{289} Id. at 585.
\textsuperscript{290} Id. at 600.
\end{footnotes}
modulates listeners' desires for diversity within a given format and also produces a variety of formats. Third, the market is far more flexible than governmental regulation and responds more quickly to changing public tastes. Therefore, the Commission concluded that "the market is the allocation mechanism of preference for entertainment formats, and . . . Commission supervision in this area will not be conducive either to producing program diversity [or] satisfied radio listeners."\textsuperscript{291}

Justice White therefore concluded that "[t]he Commission has provided a rational explanation for its conclusion that reliance on the market is the best method of promoting diversity in entertainment formats."\textsuperscript{292}

The majority went on to note that the Commission had concluded that the benefits of such an approach appeared to outweigh the harm and that the new policy need not achieve perfection to be upheld:

In making these judgments, the Commission has not forsaken its obligation to pursue the public interest. On the contrary, it has assessed the benefits and the harm likely to flow from Government review of entertainment programming, and on balance has concluded that its statutory duties are best fulfilled by not attempting to oversee format changes. . . . It did not assert that reliance on the market place would achieve a perfect correlation between listener preference and available entertainment programming. Rather, it recognized that a perfect correlation would never be achieved, and it concluded that the marketplace alone could best accommodate the varied and changing tastes of the listening public. These predictions are within the institutional competence of the Commission.\textsuperscript{293}

Several aspects of this case merit special emphasis. First, Justice White found the agency's explanation of its decision to deregulate to be a rational one,\textsuperscript{294} though presumably not just any explanation would be accepted as rational. Here the language of the market easily fit within the regulatory framework. The market regulatory approach was at least as effective as the command control rules that preceded it. Secondly, the Court found no reason to disagree with the agency's conclusion that the benefits of this new regulatory approach outweighed the costs of regulation.\textsuperscript{295} The Court was quite willing to defer to the agency's conclusion on this largely untested question. Finally, and perhaps most importantly, the stat-

\textsuperscript{291} Id. at 590.
\textsuperscript{292} Id. at 595 (emphasis added).
\textsuperscript{293} Id. at 595-96 (emphasis added).
\textsuperscript{294} Id. at 595.
\textsuperscript{295} Id. at 595.
ute's public interest language easily accommodated the agency's market discourse and allowed the agency to rationalize its deregulatory goals in public interest terms.

It is, of course, difficult to argue that this case involves only economic conflicts of interest among the agency, the regulated, and the regulatory beneficiaries. The petitioner-beneficiaries probably had strong value interests in the kinds of programming they favored that transcended dollar and cents issues. Nevertheless, the basic issues in this case and the values they implied were capable of expression and resolution within an economic framework. The outcome may not have been consistent with the petitioners' goals, but both the conflict and its resolution were capable of being expressed in an economic rhetoric that satisfied the statute and the court. The agency could show that the market was simply another way to deal with the problems with which Congress was concerned. Under these circumstances, the court could, and did, defer to the agency's institutional competence.

The United States Court of Appeals for the District of Columbia took an even more deferential view of the FCC's decontrolling actions in *NAACP v. FCC.* In that case, the Commission had decided to repeal its “Top-Fifty Policy” on television ownership. This policy required that, absent a compelling showing that a proposed acquisition would be in the public interest, applications on behalf of those seeking to acquire a third television station or more than two VHF stations in one of the fifty largest television markets would not be granted. The FCC concluded that no problem of concentration of ownership had, in fact, developed and that this rule was no longer necessary. The court, noting that it had under view “a reversal of a prior position,” nevertheless easily upheld the agency's judgment.

The FCC had a duty to promote, on behalf of “all the people of the United States, a rapid, efficient, Nation-

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297 682 F.2d 993 (D.C. Cir. 1982). See also Telocator Network of America v. FCC, 691 F.2d 525 (D.C. Cir. 1982).

298 682 F.2d at 996-97.

299 Id.

300 Id. at 998.
wide, and world-wide wire and radio communication service” and a duty to regulate as the “public interest, convenience and necessity” requires.\textsuperscript{301} The court commented on the flexibility this standard gives the FCC, and deferred to the FCC's judgment concerning the ineffectiveness of the rescinded rule and to its predictions for the future.\textsuperscript{302}

The petitioners in this case, arguably the beneficiaries of the regulation, were really only secondary beneficiaries. One effect of the ownership rule was that it increased the chances for minority black ownership of radio and television stations.\textsuperscript{303} Once again, the petitioners fared better under the prior regime and were not at all sanguine as to their choices under a market approach. Unlike WNCN, however, these beneficiaries presented a less sympathetic case. Ensuring a certain racial diversity in ownership, while arguably an excellent side effect of the rule, was not the rule's primary, or even secondary, goal. Though the petitioners in this case raised more wide ranging objections, they appeared to have a vested interest in maintaining the present regime because of the unintended consequences of the rule.\textsuperscript{304} Their economic interests were adversely affected by the agency decision, but they could not raise a true conflict of value within the existing statutory framework. An economic discourse fully in tune with the main goals of the rule and the Federal Communications Act itself could easily resolve the conflict that did exist. Neither the Act nor the rule was intended to increase minority black ownership of stations.\textsuperscript{305}

Petitioners, however, also raised more pertinent and persuasive legal arguments for maintaining the status quo. They argued that no concentration of ownership problem had arisen because the rules now being rescinded had, in fact, worked. They contended that the agency had the burden of proving that this was not the case. The Commission, on the other hand, argued that since waivers to this rule were granted quite liberally, it had not, in reality, ever been in existence at all. Whether or not this was true, the court was unwilling to shift such a heavy burden of proof to the agency: “We conclude that . . . [a]n agency need not seek out all available information on the subject before it but must attempt to have all viewpoints represented. Petitioner's views were directly represented. . . . They could have submitted testimony of experts on the impact of

\begin{itemize}
\item \textsuperscript{301} Id. at 999 (quoting 47 U.S.C. §§ 151, 309(a), 310(b) (1976)).
\item \textsuperscript{302} Id.
\item \textsuperscript{303} Id. at 1003.
\item \textsuperscript{304} Id. ("The Top-Fifty Policy was not intended directly to promote these minority interests . . . ").
\item \textsuperscript{305} Id.
\end{itemize}
The Court substituted procedure and the chance to participate for any substantive requirement that the agency submit evidence of a certain kind. According to the Court, the agency had supplied a reason for its action, and it was not necessary for the agency to meet all conceivable objections by all conceivable beneficiaries.307

The court was thus quite willing to trust the Commission’s judgment in this matter, noting that the agency had been quite aware of its change in policy, that the agency was not required by statute to have a Top-Fifty policy, and that “[w]hile it may be that the Commission would have defined more precisely what level of concentration it considers harmful, we have to agree that it was certainly within its discretion and area of expertise to find these potential levels not so threatening that the Top-Fifty Policy should be retained.”308

The Court’s willingness in these cases to entertain a market discourse in the context of a New Deal statute is understandable. The agency’s action can be perceived in “public interest” rather than solely ideological terms. In rescinding its rules, it was not just dismantling what had gone before. It had a positive, regulatory replacement for its actions and its broad delegation clause language proved to be a two-way street: it could facilitate both regulation and deregulation.309 The deregulatory discourse was not one of pure ideological efficiency, but of efficiency in the “public interest.” Progress remains synonymous with the public interest, albeit a public interest that embodies contraction rather than growth and market values rather than regulatory values. These market values, however, are converted into a regulatory, public interest discourse that retains the same regulatory form justifying the same judicial deference that facilitated regulatory growth in the first place. The deregulatory

306 Id. at 1001.
307 Id.
308 Id. at 1002-03. Similarly, courts have looked with favor on the FCC’s reversal of its regulatory policy regarding cable television. The Second Circuit, in upholding an FCC decision to rescind certain rules relating to syndicated program exclusivity and distant signal carriage noted, in Malrite T.V. of New York v. FCC, 652 F.2d 1140, 1147 (1981), cert. denied, 454 U.S. 1145 (1982), “While the deregulation of the cable television industry raises serious policy questions, evidenced by the sharp division within the Commission . . ., these questions are best left to the agencies that were created, in large part, to resolve them.”

For a similar judicial approach to deregulation, see also Western Coal Traffic League v. United States, 719 F.2d 772 (5th Cir. 1983) (court deferred to an ICC decision not to set rates), cert. denied, 466 U.S. 953 (1984). But see Global Van Lines v. ICC, 714 F.2d 1290 (5th Cir. 1983) (court rejected the ICC’s extension of restriction removal rules to freight forwarders).
309 682 F.2d at 1003.
discourse of change thus sounds very much like the discourse of regulation.

Judicial deference to an agency’s ability to express its deregulatory preferences in pragmatic, regulatory terms can, however, often imperceptibly blend with and be reinforced by a reviewing court’s own ideological preferences for deregulatory change. In *NAACP v. FCC*,\(^3\) it is not at all clear that the arguments made by the direct beneficiaries of the ownership rules being rescinded should not have been accorded more weight than the public interest, beneficiary oriented perspective provided by the agency. To the extent that ideological forces were driving the agency to rescind these rules, a court’s ideologically based willingness to defer to the agency’s pragmatic deregulatory rationalizations may risk seriously undermining the regulatory goals of the statutes involved. The flexible public interest language of the statutes thus can become a source of new, deregulatory legislation that bears little relationship to Congress’ original goals.

This is precisely what the court resisted in *International Ladies’ Garment Workers’ Union v. Donovan*,\(^3\) when it refused to sanction the Labor Department’s attempt to rescind long-standing restrictions on the employment of homeworkers in the knitted outerwear industry. Though the Labor Department saw this simply as a market oriented regulatory approach that would produce widespread benefits for workers in the home,\(^3\) the court was struck with the statutory conflicts this approach would necessitate. The agency’s creative new manner of statutory implementation looked, to the court, like an executive attempt to amend the legislation involved:

> We recognize that a new administration may try to effectuate new philosophies that have been implicitly endorsed by the democratic process. Nonetheless, it is axiomatic that the leaders of every administration are required to adhere to the dictates of statutes that are also products of democratic decisionmaking. Unless officials of the Executive Branch can convince Congress to change the statutes they find objectionable, their duty is to implement the statutory mandates in a rational manner.\(^3\)

In closer cases, where the agency’s deregulatory discourse can fit within the applicable regulatory framework, judicial deference to agency deregulatory results is by no means the same as the deference to New Deal statutes and goals we examined in Part One. Not only does deregulatory deference result in a very different kind of

\(^{310}\) *Id.* at 993.

\(^{311}\) *722 F.2d 795 (D.C. Cir.), cert. denied, 469 U.S. 820 (1983).*

\(^{312}\) *Id.* at 816.

\(^{313}\) *Id.* at 828.
regulation, but also it is usually accompanied by an agency explanation that takes a consumer or beneficiary perspective on the deregulation. This may have a number of salutary effects. It often undercuts considerably the cartel-like aspects of some New Deal regulation and is very responsive to both the perspective and policy demands of some agency capture theories. But Congress designed the cartel-like aspects of New Deal regulation of airlines and communications, in large part, with industry in mind. Congress was trying to mitigate the destructive effects of competition on the industry itself, thereby making it possible for such infant industries to survive in a most uncertain world. Indeed, much New Deal legislation sought to police relationships among producers to the point that "a common perspective seemed to arise between the regulation and the regulated." Consumers were, of course, expected to benefit indirectly from a smoothly functioning market, but this was not the primary purpose of these statutes. Rather, these statutes were necessary to make the existence of consumers possible. Consumers had relatively little influence when it came to affecting the regulatory compromises reached by agencies in the New Deal regulatory era. Judicial deference to agency decisions usually meant deference to an extension of agency power and expertise in its attempt to service the diverse interests of various segments of the industry. Consumers of the products these industries produced were benefitted, but the overall regulatory perspective was a diverse one, compared to the more focused consumer perspective taken in the deregulatory cases.

The end results of deregulatory deference, however, are not always clear. Deregulatory deference usually results in giving an agency's articulation of a consumer perspective significant, if not determinative, weight. Sometimes this results in genuine benefits for consumers; sometimes it arguably is more of a boon to the regulated. What is clear, however, is that deregulatory deference is very sympathetic to and resonates with the intersection of the views of agencies and regulation reflected in the work of such economic theorists as George Stigler and Richard Posner, and consumer oriented regulators such as Mark Green and Ralph Nader. These theorists argue that agencies implementing economic regulation generally do so in a manner that aids the regulated, usually at the

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314 See, e.g., R. Noll, Reforming Regulation 33-46 (1971); Green, Uncle Sam the Monopoly Man, in The Monopoly Makers 15-17 (M. Green ed. 1973).
315 Hays, supra note 147, at 24.
316 See, e.g., Stigler, supra note 143, at 3-21; Posner, supra note 143, at 335-39. See also Peltzman, Toward a More General Theory of Regulation, 19 J. Law & Econ. 211 (1976).
expense of consumers. Such agencies are captured by the very groups they regulate. Their substantive output is thus often at odds with consumers' interests and it can result in a net loss for society as a whole. That these very agencies accomplish deregulation cuts somewhat against such capture theories, but arguably the appointment of commissioners who have approached their work primarily with the analytical tools of micro-economic theory and a preference for market results has led to much agency deregulation. The interest of the regulated in a stable, relatively competition-free industry has given way to a new era emphasizing competition whenever possible. Cartel-like statutes are thus glossed with an economic point of view and the perspective emphasized is that of the consumer, not the industry. Deregulatory deference does more than simply allow the dismantling of the regulatory framework that New Deal deference facilitated. It transforms the statutes from a cartel-like form of producer oriented regulatory legislation to consumer oriented market legislation. The broad public interest language of many of the economic statutes involved is, indeed, a two-way street. But the return trip does not, and cannot, simply take us back to where we started fifty years ago.

The more modern, specifically consumer oriented statutes of

318 In fact, there does not appear to be a true theory of capture that can explain this level of behavior. For a critique of the economist's approach to this issue, see Riker & Barke, supra note 145.

319 A prime example of the combination of a court's pro-market leanings with an agency's attempt to instill competition into the interstate pipeline regulatory framework is Associated Gas Distrib. v. FERC, 824 F.2d 981 (D.C. Cir. 1987), cert. denied, 108 S. Ct. 1468 (1988) where the court upheld FERC Order No. 436. This order began to transform the natural gas pipeline industry from individually regulated interstate pipelines into a competitive transportation system where pipelines play essentially the role of middlemen. Throughout the opinion the court emphasized the consumer perspective—one which stands to gain considerably at the expense of some interstate pipelines. Order No. 436 facilitates the sale of market-priced gas to a wide range of consumers. The linchpin of the opinion is the court's decision to treat interstate pipelines as if they were something akin to common carriers. On that issue the court simply deferred, citing, among other authorities, Chevron v. NRDC, 467 U.S. 837 (1984), though noting that *Chevron* is "not a wand by which the court can turn an unlawful frog into a legitimate prince." *Id.* at 1001.

However, Judge Mikva, in a partial dissent, disagreed with the majority's extensions of these market-like approaches, particularly if they threatened the welfare of consumers. Specifically, he focused on the bypass problem, noting that the Commission's decision will make it easier for "pipelines to 'bypass' ... the local utilities with whom most consumers deal directly ... Thus, ... the Commission has prevented the state commissions from protecting affordable rates for local customers. ..." *Id.* at 1045.

320 There are, of course, limits to the deregulation that is possible under the economically oriented New Deal statutes. See, e.g., International Ladies' Garment Workers' Union v. Donovan, 722 F.2d 795 (D.C. Cir. 1983) (preventing what the court believed to be the undermining of the minimum wage law), cert. denied, 469 U.S. 820 (1984). See also Farmers Union Cent. Exch., Inc. v. FERC, 734 F.2d 1486 (D.C. Cir.), cert. denied, 469 U.S. 1034 (1984).
the 1970s are much more resistant to these deregulatory transformations than their New Deal counterparts. The environmental, health, and safety statutes of the 1970s created a new regulatory discourse that focused on the needs of consumers and often triggered more careful judicial scrutiny. Deregulating these statutes can evoke similar judicial scrutiny and thus make deregulatory change much more difficult to achieve. Such statutes involve entirely different perspectives or frameworks than do economic statutes. Market approaches to social regulation often introduce a view of regulatory problems that raises serious value conflicts and statutory concerns. It is difficult for pragmatic economic reasons to fit within these intensely consumer oriented statutes. When deregulation is attempted in this context, it often appears much more ideological, transforming the very clear consumer perspective of the statute itself into the kind of producer or economic perspective that many of these statutes reject.321

D. Judicial Rejection of Agency Deregulation—The Application of the Hard Look Doctrine

In Motor Vehicles Manufacturers Association v. State Farm Mutual,322 the Department of Transportation sought to rescind a rule mandating airbags or passive restraints in various model cars by 1982. An economic discourse could not capture the complexity and philosophical depth of the substantive issues involved in this case, nor could one argue that regulatory progress could be achieved by greater emphasis on productive efficiency. Agency attempts to argue in efficiency terms were not only unsuccessful but, to some judges, at least, suggested both a conflict of interest on the part of the agency and a course of action that seemed openly to elevate ideology above the congressionally mandated goal of safety.323 Indeed, the confluence of factors in this case militating in favor of close judicial scrutiny makes an alternative result almost impossible. The nature of the social regulation involved raised conflicts of value not at all susceptible to an economic discourse.324 The statute itself arguably required more than the usual judicial scrutiny in that it

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321 See supra text accompanying notes 179-83.
323 Id. at 49 (Justice White implied that the agency was too solicitous of industry’s views on these issues.). See also Graham & Gorman, NHTSA and Passive Restraints: A Case of Arbitrary and Capricious Deregulation, 35 ADMIN. L. REV. 193, 197 n.35 (1983).
324 Congress perceived the problem of increasing highway deaths as having less to do with the conduct of individual drivers and more to do with the design of the car. Indeed, it treated these issues as public health issues. The Motor Vehicle Act, in effect, adopts an epidemiological perspective. See Mashaw & Harfst, supra note 91, at 258.
called for hybrid rulemaking and the agency's weak reasons for its rescission strongly suggested an ideological basis for its decision rather than a good faith attempt to propose new regulatory solutions to congressionally recognized problems. Though the judicial result in this case may have been preordained, the importance of the case lies in the range of judicial approaches it elicited to deregulatory actions taken by agencies pursuant to statutes like the National Traffic and Motor Vehicle Safety Act of 1966.

This Act was one of the first technology-forcing statutes passed by Congress. Its primary goal was to reduce the carnage on our highways by forcing manufacturers to design and build safer cars. Its premise was that the market would not create enough demand to justify construction of safer automobiles for all consumers. Indeed, all consumers were not necessarily free to choose safe or safer cars, nor were they adequately informed to make a correct choice. Congress thus rejected arguments that the market alone would provide the level of automobile safety that Congress now sought to ensure.

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325 463 U.S. at 43-44. Justice White's opinion noted that Congress required substantial evidence review of cases like this and specifically required a record of the rulemaking proceedings to be compiled.

326 Presumably, the agency could have made a much stronger case than it did, but the rescission in this case may have been as symbolic as substantive, reflecting the Reagan Administration's general policy of deregulation and Executive Order No. 12,291 in particular. See Holmes, supra note 259, at 647.

Other resource constraints also may have influenced the agency's decision. For an excellent discussion of the effects that caseload, the nature of the record developed, the time an agency has to act, and other such factors have on the legal doctrine ultimately developed, see Strauss, One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action, 87 Colum. L. Rev. 1093 (1987).


328 See 15 U.S.C. § 1381 (1982) ("purpose of this chapter is to reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents"); S. Rep. No. 1301, 89th Cong., 2d Sess. 1 (1966) ("this legislation reflects the faith that the restrained and responsible exercise of Federal authority can channel the creative energies and vast technology of the automobile industry into a vigorous and competitive effort to improve the safety of vehicles"); see also Graham & Gorman, supra note 325, at 196.

329 See S. Rep. No. 1301, 89th Cong., 2d Sess. (1966);
the committee met with disturbing evidence of the automobile industry's chronic subordination of safe design to promotional styling, and of an overriding stress on power, acceleration, speed, and "ride" to the relative neglect of safe performance or collision protection. The committee cannot judge the truth of the conviction that "safety doesn't sell," but it is a conviction widely held in industry which has plainly resulted in the inadequate allocation of resources to safety engineering.

Id. at 2. The political reaction to Ralph Nader's book, Unsafe at Any Speed: The Designed-In Dangers of the American Automobile (1965), seemed to be to make automobile safety a consumer entitlement. Thus, for example, the Act was seen by some of its proponents as an attempt to "equalize" automobile safety for everyone. See, e.g., Traffic Safety: Hearings on S. 3005 Before the Senate Comm. on Commerce, 89th Cong., 2d Sess. 50 (1966) (remarks of Sen. Ribicoff) (a person driving a Plymouth, Ford, or Chevrolet is
The technology-forcing aspects of the Motor Vehicle Safety Act were relatively novel in 1966.\(^{330}\) Compared to the more traditional forms of New Deal economic regulation, it represented a much more direct assault on private corporate autonomy,\(^{331}\) threatening to interfere with automobile manufacturers in what had always been one of their most important concerns—automobile design.\(^{332}\) Though the statute sailed through Congress, its implementation has produced years of experimentation, delay, and legal dispute that continue to this day.\(^{333}\)

The airbag controversy has outlasted five Presidents, seven heads of the Department of Transportation, and at least six heads of the National Highway Traffic Safety Administration (NHTSA).\(^{334}\) Each President, Secretary of Transportation, and head of the NHTSA has had his or her own peculiar view of the Act in general

\(^{330}\) Mashaw & Harfst, supra note 91, at 257-61.

\(^{331}\) Id.

\(^{332}\) Id. at 258 n.4.

\(^{333}\) For the latest judicial episode in this case, see State Farm Mut. Auto. Ins. Co. v. Dole, 802 F.2d 474 (D.C. Cir. 1986).

NHTSA’s response to the Supreme Court’s decision in State Farm was to suspend the rule for one year for reconsideration. In 1984, NHTSA issued a new rule concerning automatic occupant restraints (49 Fed. Reg. 28,962 (1984), codified at 49 C.F.R. § 571.208 (1987)). The most important provision of the new regulation states that the entire automatic restraint requirement would be rescinded if two-thirds of the population were covered by state imposed mandatory seatbelt use laws (MULs) by April 1, 1990. The agency reasoned that: 1) MULs are favored if enforced; and 2) airbags will offer the greatest amount of protection if development continues. See generally Note, Automatic Occupant Restraints and Judicial Review: How a Federal Agency Can Violate Congressional Will and Get Away With It, 19 VAL. U.L. REV. 693 (1985).

This new provision was challenged as contrary to the applicable statute and as arbitrary and capricious. The court found that the issue concerning deference to the states was not yet ripe. New York’s challenge that the Department of Transportation should have adopted certain alternative standards was dismissed on the merits. State Farm Mut. Auto. Ins. Co. v. Dole, 802 F.2d 474 (D.C. Cir. 1985). It is interesting to note that using federalism as a fallback to a more direct market oriented approach is, to some extent, at odds with some of the legislative history on the role of the states in automobile safety concerns. See Traffic Safety: Hearings on S. 3005 Before the Senate Comm. on Commerce, 89th Cong., 2d Sess. 41-42 (remarks of Sen. Ribicoff) ("We have been sucked in with the propaganda that the Federal Government has no place in traffic safety; that we should leave this up to the States. There isn’t a state in the country that has the facilities or the qualifications to go into the complexities of the automobile... "). Of course, the seatbelt option, if chosen by the states, would result in uniformity. As of August 1988, 32 states and the District of Columbia had enacted mandatory seatbelt laws. See Chicago Tribune, Aug. 14, 1988, § 1 at 32, col. 1.

\(^{334}\) We now have our sixth president presiding over this issue. The matter is still awaiting the action of various states. See Chicago Tribune, Aug. 14, 1988, § 1, at 32, col. 1. See generally N.Y. Times, May 26, 1988, at A1, col. 1.
and of passive restraints in particular. Shortly after passage of the Act, for example, the National Highway Safety Traffic Administrator, the Secretary's delegate in these matters, promulgated a rule called Standard 208. It required all automobile manufacturers to install manual seatbelts on all vehicles. This rule, however, did little more than formalize a practice already in existence. Virtually all automobile companies provided manual seatbelts as standard equipment in the cars they manufactured. The problem was that a significant percentage of drivers did not wear them. Manual seatbelts thus did little to lower the injury and death rate due to highway accidents and further action seemed necessary to fulfill the Safety Act's objectives.

NHTSA thus began to consider more effective measures. In 1969, the Department formally proposed a standard requiring the installation of passive restraints, that is, automatic seatbelts of one kind or another. To this end, the agency revised Standard 208 to include passive protection requirements and, in 1972, the agency amended the standard to require full passive protection for all front seat occupants of vehicles manufactured after August 15, 1975. In the interim, vehicles built between August 1973 and August 1975 were to carry either passive restraints or lap and shoulder belts coupled with an ignition interlock that would prevent starting the vehicle if the belts were not connected. Most car manufacturers chose the ignition interlock option, but the public outcry over this decision led Congress to amend the Act specifically to prohibit a motor vehicle safety standard from requiring or permitting compliance by means either of an ignition interlock or a continuous buzzer system. The 1974 Amendments also provided that any safety standard that could be satisfied by a system other than seatbelts would have to be submitted to Congress where it would be subject to a veto by concurrent resolution of both houses.

The agency extended the effective date for mandatory passive restraint systems until August 31, 1976. But in June 1976, Presi-
dent Ford, the third president to deal with this Act, initiated, through Secretary of Transportation William Coleman, a new rulemaking on the issue.\textsuperscript{345} Their regulatory approach was to be less intrusive.\textsuperscript{346} Although Secretary Coleman found passive restraints technologically and economically feasible, he suspended the passive restraint requirement because he feared that, as with the ignition interlock buzzer, there might be widespread public dissatisfaction and resistance to such a new system.\textsuperscript{347} Secretary Coleman proposed, instead, a voluntary demonstration project to smooth the way for public acceptance of passive restraints at a later date.\textsuperscript{348}

This gradualist approach, however, was rejected by President Carter’s Secretary of Transportation, Brock Adams. His delegate, Joan Claybrook, took a more activist regulatory approach and issued a mandatory passive restraint standard known as Modified Standard 208.\textsuperscript{349} It required the phasing in of passive restraints beginning with large cars in model year 1982 and extending to all cars by model year 1984. The two principal systems that would satisfy Modified Standard 208 were airbags and passive belts. Auto manufacturers could choose which system to install.\textsuperscript{350} Both systems, however, were fully automatic and required no action on the part of the drivers. Congress did not veto the rule and the United States Court of Appeals for the District of Columbia subsequently upheld its legality.\textsuperscript{351}

When President Reagan took office in 1981, however, one of his objectives was to get government off the backs of the people.\textsuperscript{352} In line with a more market oriented, deregulatory approach to government, one of the first acts of President Reagan’s Secretary of Transportation Drew Lewis was to delay the effective date of the Carter passive restraint rule by one year.\textsuperscript{353} He then reopened the entire rulemaking record and, after a seven month proceeding, decided to rescind the Modified Standard 208 promulgated by the Carter Administration.\textsuperscript{354}

\textsuperscript{345} 42 Fed. Reg. 5,071 (1976).
\textsuperscript{346} See generally U.S. DEP’T TRANSP., THE SECRETARY’S DECISION CONCERNING MOTOR VEHICLE OCCUPANT CRASH PROTECTION (Dec. 6, 1976).
\textsuperscript{347} Id. at 11-12, 52-57.
\textsuperscript{348} Id.
\textsuperscript{352} See President’s Remarks to Annual Convention of United States Jaycees, 17 WEEKLY COMP. PRES. DOC. 675, 676 (June 24, 1981); President’s Remarks to Central City and California Taxpayers’ Associations, 17 WEEKLY COMP. PRES. DOC. 684, 685-86 (June 25, 1981).
In rescinding this rule, the Department of Transportation reasoned as follows: In 1977 when the rule was first issued, it had been assumed that airbags would be installed in 60% of all new cars and automatic seatbelts in 40%. However, by 1981 it became apparent that automobile manufacturers planned to install automatic seatbelts in approximately 99% of new cars. The agency, however, assumed that the overwhelming majority of such seatbelts could, and presumably would, be easily and permanently detached. If this did occur—and Drew Lewis' Department of Transportation thought this highly likely—the life-saving potential of the automatic seat belt would be completely undercut. The result would be similar to that which occurs when only manual seatbelts are installed. Thus, the Department of Transportation concluded that no basis existed for reliably predicting that a rule, which could be satisfied by installing automatic seatbelts that might be detached, could lead to any significant increase in safety. Given the great expense of implementing the passive restraint rule and the minimal benefits anticipated, the agency feared that the public would regard this rule as yet another instance of ineffective regulation—i.e., unnecessary, wasteful government on the backs of the people. The rule was rescinded and the rescission was promptly challenged in the courts.

This particular rescission was not an isolated incident. It was part of an across the board move by the Reagan Administration to put an end to what it considered unnecessary federal intrusion into the private sector. For philosophical and symbolic reasons, the Administration issued a kind of across the board regulatory freeze order. Regulations were rescinded or suspended at EPA, OSHA, NLRB, NHTSA, and other agencies. Recision of the airbags

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357 Id.
358 Id.
359 Id.
360 Id.
363 Id. One of President Reagan's first acts in office was to order executive agencies to suspend for sixty days all regulations promulgated in final form that would otherwise become effective during that sixty day period. See Presidential Memorandum of Jan. 29, 1981, 3 C.F.R. § 223 (1981). Shortly thereafter, the President issued Executive Order No. 12,291, 3 C.F.R. § 127 (1981), reprinted in 5 U.S.C. § 601 at 431-34 (1982) mandating the reassessment of existing regulations and directing the suspension of "major rules" that had not yet become effective, thereby permitting OMB reconsideration of their costs and benefits.
rule was but one part of a broader bureaucratic onslaught.

For various reasons, however, the airbags case turned out to be relatively easy to decide against the agency. Not a single judge on the United States Court of Appeals for the District of Columbia, nor a single Justice in the Supreme Court voted to uphold the agency's decision. While all found fault with its reasoning, or the lack thereof, a variety of judicial approaches and scopes of review emerged. Underlying these approaches are very different judicial conceptualizations of the administrative process and the role of courts in that process. Each approach has very different implications for the impact courts can have on agency deregulatory decisions.

1. The United States Court of Appeals for the District of Columbia—The Judge as a Literary Critic

In Judge Mikva's majority opinion for the United States Court of Appeals for the District of Columbia both the procedural and substantive strands of the hard look doctrine converged. This convergence highlighted both the common-law assumptions behind the procedural strand of the hard look doctrine and the constitutional assumptions inherent in the more substantive approach. It also indicated, implicitly, Judge Mikva's conception of the administrative process and his apparent working conception that what was at stake here was nothing less than judicial protection of Congress from an overly intrusive executive. That Judge Mikva would be particularly protective of Congress is not surprising. As a former Congressman, he was acutely aware of the impact that agency action (or inaction) could have on the substance of the legislation involved. Judge Mikva's sense of the need to protect Congress was reflected in his opinion and in his emphasis on the importance of recognizing the legal significance of the product of an agency battle.

Implicit in Judge Mikva's opinion was a view of the administrative process as an ongoing struggle towards rational solutions to significant problems. His careful and thorough recounting of the administrative and judicial skirmishes that preceded the promulgation of Modified Standard 208 demonstrated his assumption that these administrative proceedings matter. They were not random political spasms, but rational attempts to resolve complex problems.}

364 See supra text accompanying notes 198-240.
365 680 F.2d. 206, 240 (D.C. Cir. 1982) ("NHTSA may not confuse its role with that of Congress.").
366 Id. at 228-29.
As such, the results of these proceedings, especially those at the agency level, ought not to be regarded lightly. As in the common law, there is an assumption of progress here. A change in agency policy-making direction should not signify simply a new set of policy-makers with a new political outlook, but a judgment that real progress toward solving the problem with which Congress was concerned will be achieved through the change. This view of the process and this respect for its ultimate product led Mikva to apply "thorough probing, in-depth review," to the issues presented in the airbags case. This review required that the court determine "whether the agency has engaged in reasoned decisionmaking, making actual judgments concerning the significance of the evidence in the record and supporting its decision with 'reasoned analysis'."

Mikva explicitly based this decision to take this kind of a hard look on two reasons. First, he noted that the rescission meant a "sharp change in policy" and that this was, itself, a "danger signal." He went on, however, to note that, while Judge Leventhal's hard look approach was developed in the context of an adjudicatory proceeding, this case involved rulemaking. Judge Mikva noted, "[a]gency departure from precedent raises obvious problems, but why should courts have similar concerns about erratic agency policymaking or reversals in the course of rulemaking?"

To bridge the gap between the adjudicatory version of the hard look doctrine and the legislative context in which he now sought to apply it, Judge Mikva noted an important separation of powers concern:

The answer to this question lies in the fact that an agency is not a legislature. Congress delegates rulemaking power in the anticipation that agencies will perform particular tasks. . . . Even when there is no claim that the agency has exceeded its jurisdiction, as there is not in this case, sudden and profound alterations in an agency's policy constitute "danger signals" that the will of Congress is being ignored.

Thus, it was his sense of executive interference with Congress that justified application of the essentially common law hard look approach in the legislative context now presented.

Indeed, here the procedural and substantive strands of the hard look doctrine began to blend. Judge Mikva read the regulatory statute as a kind of regulatory constitution governing the agencies in-

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368 680 F.2d at 228-29.
369 Id. at 228 (quoting Pacific Legal Foundation v. Dep't of Transp., 593 F.2d 1338, 1343 (D.C. Cir. 1979)).
370 Id. at 229.
371 Id. at 220.
372 Id. at 221.
373 Id.
Deviations from that constitution justified the court's close look. The court treated the statute as a constitution because, as Judge Mikva recognized, no statutory violation had occurred here. The agency clearly was not compelled to issue a rule mandating a passive restraint system in the first place. Having done so, there was nothing in the law compelling the agency to continue that particular approach. For Judge Mikva, however, the rescission jeopardized the will of Congress, viewed as if the court were interpreting the spirit and ultimate intent of the Founding Fathers of a constitution. His reasoning proceeded as follows: Everyone knows that Congress intended the agency to do something to reduce the carnage on our highways and, after years of debate and struggle, the agency decided to mandate passive restraints. Congress has not interfered or expressed dissatisfaction with that decision. To now revoke it and put nothing in its place undermines the basic safety goals of those "Founding Fathers." In short, Judge Mikva's concern that Congress and its substantive goals were being ignored by this rescission ultimately provided the primary basis for his decision to take a hard look.

Judge Mikva did not credit his fears to intuition or speculation. The rule being rescinded had been the cause of intense congressional debate, though ultimately Congress chose to do nothing about it. Congress failed to veto the passive restraint rule under the legislative veto provision, and though it had chances to amend or repeal the rule, it chose not to do so. Though congressional inaction of this sort can speak many ways, Judge Mikva interpreted it as a kind of congressional approval for the passive restraint rule, an implicit expression of the will of Congress. With this view of the legislative process surrounding the administrative process, Judge Mikva went on to reiterate Judge Leventhal's view on the relationship of courts to agencies: "courts, administrative agencies and Congress are partners, not adversaries. Courts do not substitute judgment for that of the agency, but ensure that agencies exercise their judgment only in accordance with the will of Congress."

Although Congress had not acted affirmatively here,

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374 Id.
375 Such an approach, as we shall see, is very much at odds with the judicial approach that mandates deference to the President when policy issues are involved. See infra text accompanying note 597.
376 680 F.2d at 222-28.
377 Id.
378 See, e.g., Graham & Gorman, supra note 323, at 207-08. See also Justice White's majority opinion in State Farm interpreting these events negatively. 463 U.S. 29, 92-57 (1983).
379 680 F.2d at 242.
380 Id.
neither had it acted negatively. Against this backdrop of legislative history, Judge Mikva demanded that any proposed rescission be accompanied by “clear and convincing reasons.”

Though the weak rationale provided by the agency might have failed a lesser standard of review, Judge Mikva saw this as a case of first impression, as well, perhaps, as the first of a series of actions taken by the new executive in seeming disregard of the legislative branch. Moreover, for Judge Mikva, agency processes and the results they produced were not only entitled to respect, but also a kind of administrative stare decisis. Agency law was not written in stone, but neither was it easily disposable, especially when the agency seemed to be ignoring the underlying spirit of the statute and the will of Congress.

Judge Mikva’s approach to judicial review in this case was both procedural and substantive from an agency and legislative point of view. From an agency perspective, there had been a 180 degree change in direction. That alone justified close judicial attention. Substantively, the change not only undercut Congress’s statutory goals, but did so in a way that jeopardized the validity of the legislative process. In this regard, Judge Mikva added a novel dimension to his analysis. By focusing on congressional inaction, he not only emphasized the substantive side of what the agency was doing, but introduced a separation of powers idea as well. He feared executive legislation. Put another way, he feared an administrative presidency so powerful and effective that the natural development of congressional statutes and agency law would be not only stopped, but ultimately turned on its head. At bottom, this was a separation of powers case for Judge Mikva, even though only the reasonableness of an agency policy question was technically at issue.

The level of scrutiny he applied to this case usually was reserved for cases in which a fundamental constitutional right or discrimination against a suspect class was involved. When this approach was taken, the end result was usually preordained, but Judge Mikva’s underlying theoretical justification for this level of scrutiny was not simply the application of the statutory command that agency action not be “arbitrary and capricious.” It was judicial protection of the legislative process itself and a Vermont Yankee-like warning to the executive.

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381 Id. at 229.
382 Id. at 218.
383 Id. at 221.
384 Id. at 242.
385 In Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519 (1978), the Court instructed the appellate courts not to impose procedural requirements that were not found in the statutes themselves. Judge Mikva was, in a way, trying to instruct the
Combined with this more constitutional or substantive mode of analysis was a traditional common law methodological approach which represents perhaps the foremost judicial tool for controlling agency discretion. Inherent in this use of the hard look doctrine were several biases deeply embedded in western culture. Indeed, what particularly enabled Judge Mikva to apply constitutional-like strict scrutiny to the agency's action was not only the fact that the agency's action raised fundamental questions of value, but also the fact that the agency's proposed method of implementing its changes ran counter to three crucial assumptions about the administrative process.

First, the Mikva opinion displayed a deep belief in a sense of progress in administrative law proceedings. All of the 60 or so administrative hearings that preceded the issuance of Modified Standard 208 and the give and take that they entailed must mean something. To Judge Mikva they represented an evolutionary political approach toward a reasonable reconciliation of the conflicting desires of the participants, one that is not easily put aside simply because of a change in administrations or economic climate. Battles were fought; issues were thrashed out. But once the rule was finally agreed upon, the issues no longer remained up for grabs.

Second, any new administrative policy or approach should be adaptable. It should fit within a pre-existing decisional framework. Thus, unless a deregulatory act reversing a previous agency policy can be adapted to the decisional framework of the agency and easily explained within that agency's own regulatory framework, it is suspect. This is particularly true when a rescission is proposed and

executive on the parameters of its duty to "take care that the laws be faithfully executed," U.S. Const., art. II § 3.

386 These biases include an evolutionary notion of progress that is similar to the views held by early theorists in evolutionary biology. Normally, biological change was thought to occur gradually and incrementally and to be fully adaptable to pre-existing intellectual and biological frameworks. All of this was thought to lead, inevitably, to a form of progress. See J. HUXLEY, EVOLUTION: THE MODERN SYNTHESIS 556-79 (1942). But see Provine, supra note 24, at 2 (arguing that "Huxley's idea of progress in evolution is merely the imposition of his cultural values upon evolution . . . and that the progress of evolution gives no meaning in life." The imposition of similar cultural values, however, is very much a part of the law governing agency change.).

387 680 F.2d at 241 ("NHTSA may yet conduct the reasoned decisionmaking that can support the rescission of the passive restraint standard, but it may not reject twelve years of preparation for such a standard until it does so.").

388 Id. at 242 ("These changed factors—higher gasoline prices, smaller cars, an ailing automobile industry, and the methods of compliance being pursued by that industry—may fully justify reassessing, modifying, and even deferring date of the regulation . . . . There has been no showing, however, that these changes justify rescinding the standard outright.").

389 Id. at 229 ("Judicial scrutiny of agency action—including the rescission of a rule—depends on the extent to which the agency has deviated from congressional ex-
nothing affirmative is proposed to replace the rescinded rule.

Third, and closely related to adaptability, is the expectation that change be gradual. Change at the agency level should be incremental. A 180 degree turn in policy is the antithesis of gradualism and therefore deserves a very close judicial look. All of these judicial biases of how change should occur, particularly at the agency level, were sounded in the airbags case and Mikva responded with a very hard look indeed.

The upshot of this approach is an ironic kind of judicial activism. Courts could invoke their most conservative, change resistant doctrines to block agency deregulation that either cut against the courts’ perceptions of the substantive will of Congress or that raised concerns about executive interference with the legislative process. This approach clearly has implications for the ease with which agency change can occur and it undercuts, somewhat, the increasingly powerful administrative role played by the President. It does this not only in the name of congressional will, but also in the name of rationality, deliberation, and a view of the administrative process as a kind of civilized politics that matters. When the executive uses its administrative power to exercise not just supervisory control but legislative initiative as well, such a hard look approach may be particularly appropriate. However, the Supreme Court specifically disavowed any such explicit recognition that strict scrutiny under the arbitrary and capricious clause of the APA is either possible or necessary.

2. The Supreme Court Majority—A Hard Look Without the Rhetoric

The Supreme Court majority of five, speaking through Justice White, also found the agency’s action arbitrary and capricious. In so doing, however, it rejected the court of appeals’ approach to the scope of judicial review as well as its attempt to intensify that scope based on a reading of legislative events. If anything, the Supreme Court found that precisely the opposite conclusion regarding congressional support for airbags could be drawn from the congressional debates relied upon so heavily by Judge Mikva, and in any event, the Court decided that such non-action was irrelevant.

390 Id. at 220.
391 For an excellent treatment of the overall impact of judicial review on automobile safety, see Mashaw & Harfst, supra note 91.
393 Id. at 45-46.
394 Id. at 45
The Supreme Court, nevertheless, agreed that "an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance." But just how reasoned this analysis must be remains subject to the arbitrary and capricious test. For the majority, the arbitrary and capricious standard was, theoretically, no stronger than usual, even if this case happened to involve decontrol. In the words of the Court, "the direction in which an agency chooses to move does not alter the standard of judicial review established by law." "We will," said the Court, "... uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." The Court even went so far as to suggest that "the removal of a regulation may not entail the monetary expenditures and other costs of enacting a new standard, and accordingly, it may be easier for an agency to justify a deregulatory action . . . ." 

This was hardly the case here, however, as the majority application of its reasonableness test to the rulemaking record before it ultimately resembled in its intensity the analysis made by the court of appeals. Moreover, like Judge Mikva, Justice White saw agencies as something less than legislatures. The reasonableness test he applied was not the reasonableness test normally applied to judicial scrutiny of economic legislation. Because the agency gave no reason for its abandonment of the airbag option, the Supreme Court did not put its degree of scrutiny to the test. But the majority went on to assess the agency's reasons for concluding that detachable, automatic seatbelts would not work and went even further to conclude that the agency should have given reasons why another alternative was not mentioned at all: nondetachable seatbelts. In effect, the majority took a substantive hard look at the agency's evi-

395 Id. at 42.
396 Id. at 41. In this regard, State Farm can be viewed not only as a case that implicitly reaffirms the hard look doctrine but also one that loosened the grip of appellate courts on agencies. Indeed, the rhetoric of the opinion supports the conclusion that there is no sliding scale approach to the interpretation and application of the arbitrary and capricious standard, but the reality of Justice White's close scrutiny suggests otherwise. For an argument why such a sliding scale is appropriate, see Note, Judicial Review of Administrative Inaction, 83 Colum. L. Rev. 627, 663-64 (1983).
397 463 U.S. at 42.
398 Id. at 43 (quoting Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281, 286 (1974)).
399 Id. at 42.
400 See infra text accompanying notes 369-70.
401 463 U.S. at 43 n.9. (distinguishing between rational basis review appropriate for legislation and the standard appropriate for agency decisions.).
402 Id. at 52-57.
403 Id. at 55.
ence and found it wanting. Given the perceptual glasses through which the Court reviewed the immense record, it, unlike the agency, resolved all evidentiary doubts in favor of safety, rather than the market.

In so doing, the majority implicitly recognized the validity of cost as a factor in the agency's calculations. Rather than defer to the agency's views on this matter, however, it rejected the agency's interpretation of its own cost-benefit data as applied to the use of detachable passive seatbelts. The Reagan NHTSA had been quick to conclude that the use of detachable passive belts could not reliably predict "even a 5 percentage point increase as the minimum level of expected usage increase." Given the overwhelming cost-benefit evidence of the benefits of increased usage of seatbelts, however, the majority of the Court resolved all doubts in favor of usage, noting that "the safety benefits of wearing seatbelts are not in doubt, and it is not challenged that were those benefits to accrue, the monetary costs of implementing the Standard would be easily justified."

The Court thus also rejected the agency's view of the evidence of the likely usage of automatic belts, finding that, at best, "the agency's view of the field tests on passive restraints indicates only that there is no reliable real-world experience that usage rates will substantially increase." On the other hand, as the Court pointed out, "inertia—a factor which the agency's own studies have found significant in explaining the current low usage rates for [manual] seatbelts—works in favor of, not against, use of the [automatic] protective device." The Court did not denigrate the agency's concern over the costs of passive restraints, but directed that "NHTSA should bear in mind that Congress intended safety to be the preeminent factor under the [Motor Vehicle Safety] Act." This analysis represents an essentially substantive approach to judicial review that brings to bear the values of safety implicit in the statute.

These very different approaches to the evidence in this case resulted from the very different sets of perceptual glasses through which the agency and the majority of the Court viewed this case. The agency, at bottom, was looking at Modified Standard 208 and the record that supported it through philosophical, economic

\[\text{Id. at 52-57.}\]
\[\text{Id. at 52.}\]
\[\text{Id. at 52-53.}\]
\[\text{Id. at 51 (quoting 46 Fed. Reg. 53423 (1981)).}\]
\[\text{Id. at 52.}\]
\[\text{Id. at 53.}\]
\[\text{Id. at 54.}\]
\[\text{Id. at 55.}\]
lenses. It resolved all doubts in favor of individual private autonomy—not only the autonomy of individual consumers, but also, and more significantly, the private autonomy of the industry involved. The agency at one point had emphasized the dire straights of the auto industry and its difficulty competing with foreign competition. Indeed, the economic climate in which the agency acted seems to have been almost as important a consideration for the agency as the statute. The Court sought to uphold not just the strict letter of the statute, but also the values inherent in that statute. For good or ill, Congress had essentially rejected a market approach to these safety problems and the Court was forcing the agency to remain true to the particular political compromise reached in 1966.

In resolving all doubts in favor of increased safety, the Court appropriately took its values from the 1966 statute, not from the free market norms that characterized the political climate of the 1980’s. But in going beyond the merely procedural aspects of the hard look doctrine and disagreeing with the agency’s interpretation of its own evidence, the majority triggered Justice Rehnquist’s dissent. While the dissent focused on the majority’s willingness to base its decision on grounds other than the purely procedural lack of any reason at all, it also began to spell out a very different deferential doctrine with very different implications for the supervisory roles to be performed by courts and the executive.

3. The Dissent—Presidential Deference and A New Discourse of Change

In analyzing the Department of Transportation’s decision to rescind Modified Standard 208, then Justice, now Chief Justice, Rehnquist set forth a rationale for deference that emphasized politics and the electoral accountability of the executive. In arguing on behalf of facilitation of deregulatory change, he stated:

The agency’s changed view of the standard seems to be related to the election of a new President of a different political party. It is readily apparent that the responsible members of one administration may consider public resistance and uncertainties to be more important than do their counterparts in a previous administration. A change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency’s reappraisal of the costs and benefits of its programs and regulations. As long as the agency remains within the bounds established by Congress, it is entitled to assess adminis-

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412 Id. at 39.
413 Id. at 49.
414 680 F.2d at 213.
While such an approach may resemble the deferential model set forth in Part One, both its underlying basis and the ultimate deregulatory effects it facilitates significantly differ from New Deal deference.

The Rehnquist model mixed politics with expertise more directly. While not completely denying the validity of expertise in general, it suggested that it is no longer possible to have an expert for all seasons. The essentially political nature of the valuative tasks agency experts undertake was emphasized by a deference that explicitly recognized that experts wear the philosophical perceptual glasses of the administration in power. Thus, it followed that agencies would, and courts should expect them to, interpret the facts and figures in a record developed under different circumstances by different people in a different administration in a new way.

What lends legitimacy to agency judgments is the fact that these judgments derive directly from an electorally accountable official—the President. While Judge Mikva's approach, and to some extent the Supreme Court majority's approach, recognized a grey area where arguably "legal policy actions" could nevertheless have illegal substantive results, the Rehnquist approach would effectively put huge areas of agency discretion beyond judicial scrutiny with the admonition that there has been the "election of a new President of a different political party." But even with this heightened deference, the agency's decision in the airbags case could not pass muster. Because the agency gave no reasons for dismissing the use of mandatory airbags, even the dissenting justices had to agree that there quite literally was no rational basis for the decision. In the dissent's view, however, the majority was wrong to go further. The agency's reasons regarding detachable automatic seatbelts were fully acceptable and the fact that the agency never considered the obvious alternative of non-detachability was irrelevant. New administrators could legitimately read the record with new philosophical glasses and reach different conclusions.

Though the majority rejected much of the rhetoric of Judge Mikva's opinion, as well as his explicit recognition of a sliding scale approach to judicial review under the arbitrary and capricious standard, this case seemed to establish a precedent for courts willing to play an active role in the agency decontrol movement, even when only policy issues were involved. It applied a middle tier hard look.

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415 463 U.S. at 59.
416 Id.
417 Id.
approach. The majority recognized that there had been a reversal in agency policy, that regulation and deregulation were, for review purposes, the same thing, and that the Motor Vehicle Safety Act itself required a substantial evidence test applied to a rulemaking record. Accordingly, the Court justified an approach that enabled it to dismiss the agency's substantive reasons for rescission as inadequate.

While Judge Mikva's approach, once activated, almost ensures agency reversal and Justice Rehnquist's approach usually ensures agency affirmance, there is little certainty or predictability in the majority's approach. The Court recited standard boiler plate language and suggested that nothing new was going on, but its analysis of the agency's reasoning process was exacting. Like middle level equal protection analysis, you may win or you may lose, but since the reviewing court will engage in more than a perfunctory review of the issues, an appeal will almost always be worth pursuing.

It remains, however, not only unclear what result a court may reach if it engages in this kind of hard look, but also increasingly uncertain whether the airbags case was merely a sport. Though the presidential deference approach outlined by Justice Rehnquist's dissent was narrowly rejected in State Farm, there are strong indications that it is, indeed, the doctrine of the future. Chevron v. NRDC promises to supplant the hard look approach with a new form of deference, not unlike that suggested by Justice Rehnquist's dissent. As we shall see in Part Three, underlying this approach is yet another sense of progress, one that equates progress with efficiency. More importantly, a global perspective emphasizing competition seems to be replacing the national perspective emphasizing regula-

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418 Id. at 41.
419 Id. at 43-44.
420 Id. at 53-54.
The fragmentation of post-industrial society encourages the use of the market as the least and the most common denominator. Such changes are likely to have profound implications for the future directions of administrative law.

III

ADMINISTRATIVE LAW IN A GLOBAL ERA: THE ADMINISTRATIVE PRESIDENCY AND THE POLITICS OF EFFICIENCY

Deregulation is a by-product of the Global era in which we now live. Just as then Professor Felix Frankfurter saw the Great Depression as the beginning of a new historic era, then Judge Scalia saw a new era taking shape in the deregulation movement fifty years later: "There are vast tides in human history: the Age of the Industrial Revolution, the Age of Enlightenment. Ours will doubtless go down as the Age of Deregulation in the history books of the future..." While it is, perhaps, hyperbole to compare deregulation to either the Industrial Revolution or the Age of Enlightenment, the "Age of Deregulation" to which Scalia refers undoubtedly constitutes a definitive moment.

This section examines more fully the context of deregulation from the perspective of administrative and constitutional law doctrines that characterize this age. In Parts One and Two we examined the relationship of post-Lochner v. New York constitutional law to the doctrines of deference that characterized the New Deal-APA Era. We then examined the relationships between Brown v. Board of Education and its progeny and the hard look doctrine that gained prominence during the Environmental Era. Part Three will now examine the relationship of constitutional formalism in recent Supreme Court separation of powers cases to the administrative law doctrines of non-delegation and presidential deference as set forth in Chevron v. NRDC.

Part Three will also examine a number of basic trends that con-
verge in these constitutional and administrative law doctrines: (1) the adoption of a global regulatory perspective that encourages deregulation and fuels a politics of efficiency; (2) the rise of the administrative presidency; (3) the further decline of Congress in the wake of increasing presidential control over the administrative process; (4) the declining role of agency expertise as a fundamental source of agency legitimacy; and (5) the gradual replacement of a legal discourse focusing primarily on the relationship of agency rationality to congressional goals by a more political discourse that justifies agency action in terms of presidential power and electoral accountability. These trends provide a perspective on the larger patterns of change of which presidential deference and constitutional formalism are but a part.

A. A Global Perspective—Deregulation, Technology and the Politics of Efficiency

The deregulation movement is fueled by major changes in industrial technology and by the new demands of an increasingly global economy to which virtually all competitive corporations now must respond. Changes in technology can increase competition

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432 One can, of course, trace global trade and the comparative advantage that facilitates it far back in history. As Professor Rosecrance noted: "trading city states existed in the late medieval period of European history and . . . they flourished down to the end of the fifteenth century." R. Rosecrance, The Rise of the Trading State: Commerce and Conquest in the Modern World 72 (1986). But Professor Rosecrance also notes: what is interesting and different about the world of international relations since 1945 is that a peaceful trading strategy is enjoying much greater efficacy than ever before. Through mechanisms of industrial-technological development and international trade, nations can transform their positions in international politics, and they can do so while other states also benefit from the enhanced trade and growth that economic cooperation makes possible. International "openness," low tariffs, efficient means of transport, and abundant markets offer incentives to many nations that have only to find a niche in the structure of world commerce to win new rewards. The returns, as Japan, Korea, Taiwan, Hong Kong, the Association of Southeast Asian Nations . . . Brazil, Mexico, China, India and others have demonstrated, can be incredibly high. Small European nations, like Switzerland, Belgium, Holland, Austria, Denmark, Norway, and Sweden, have also grown dynamically as their foreign trade has risen as a fraction of the gross national product.

Id. at ixx. For discussion and analysis of various global perspectives on military and economic issues, see D. Calleo, Beyond American Hegemony: Future of the Western Alliance 3 (1987) (characterizing the NATO alliance as "essentially an American protectorate for Europe"); R.O. Keohane, After Hegemony: Cooperation and Discord in the World Political Economy (1984); C. V. Prestowitz, Trading Places: How We Allowed Japan to Take the Lead (1988) (discussing problems with American business practices and governmental trade policies, particularly in light of Japanese
in industries where competition was once limited, obviating both market failure and the need for regulation. Deregulation is thus more likely if real competition is possible. The arguments favoring deregulation become doubly powerful when a market is working and reaching politically acceptable results.

Global competition drives deregulatory forces more vigorously than regional or national markets can. It places the costs of domestic regulation in stark relief, whether or not new competition-encouraging technologies are involved or true market failure, in fact, persists. A global perspective on domestic regulation encourages a more cost conscious regulatory perspective and often reinforces the increasingly global, market oriented perspective of the regulated. Moreover, whether a regulation deals primarily with economic conflicts of interest or with more fundamental conflicts of value is of less importance when a global perspective is involved. Regulators’ inability to impose regulation on producers world-wide emphasized the domestic impact of regulatory costs. Though a variety of factors may account for the decision of some industries to shift the production phase of their operations abroad, some evidence suggests that regulatory costs are a significant component for


In addition, some industries grow, change and evolve over time to the point that competition is possible where it once was unlikely. See, e.g., Pierce, Reconsidering the Roles of Regulation and Competition in the Natural Gas Industry, 97 Harv. L. Rev. 345 (1983):

Much has happened since 1935, however, to cast doubt on the continuing viability of FTC’s recommendation [that the natural gas pipeline industry be regulated]. Three dramatic changes have taken place: (1) the pipeline industry’s structure has changed—the size of the market has increased fifteen-fold . . .; (2) our understanding of the effects of economic regulation has improved; and (3) our understanding of the operation of unregulated markets has improved. These changes warrant reconsidering the desirability of regulating gas pipelines . . .. Regulation of gas producers cannot be justified by a monopoly rationale. The industry is structurally competitive: no gas producer has significant market power, and barriers to entry are low.

See supra text accompanying notes 248-57.

See infra text accompanying notes 439-56. In addition, the rise of new, innovative, flexible reconstitutive approaches to regulation is part of the new global era of administrative law. For a discussion of these more flexible efficient regulatory approaches see Stewart, Reconstitutive Law, 46 Mo. L. Rev. 86 (1986). See also Sunstein, supra note 421:

Some reconstitutive approaches include protecting and encouraging collective bargaining . . . providing for tradable emissions permits . . . allowing diverse forms of broadcasting regulations . . . grant[ing] some powers currently reserved to the federal government . . . mov[ing] toward economic and workplace democracy . . . [and granting] state and local officials . . . [the] authority to establish procedures and to impose different sorts of controls.

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Id. at 506-07.
many of these industries. Environmental and worker safety costs, for example, have had a significant effect on the copper, silver and automobile industries. Such regulatory costs increase when the statutes involved provide little economic flexibility and the agencies that implement them resist market approaches.

Global competition creates pressure for a least common denominator regulatory approach. Such pressure is similar to the political forces that affected state and local regulation before the regulatory nationalism of the New Deal. National regulation came about, in part, because certain problems were beyond the jurisdiction of individual states. In addition, states often had significant incentives to avoid regulation that would increase manufacturing costs and put local industry at a competitive disadvantage. Moreover, it was perhaps easier for opponents to block regulatory attempts at the state or local level than at the national level. Global pressures favoring a more economic, cost-conscious form of regulation need not necessarily translate into a return to laissez faire, but they do encourage an equation of such regulation with "the public interest."

While James Landis and the New Dealers may have looked to industry for inspiration concerning the regulatory structure they were creating, globally conscious regulators increasingly look to

436 See Chapman, Environmental Standards and International Trade in Automobiles and Copper: The Case for a Social Tariff, presented at the December 1988 meeting of the Allied Social Science Foundation, Cornell Agricultural Economics Working Paper No. 89-3 (on file with Cornell Law Review) (arguing that regulatory costs are a key factor and that labor costs are, in fact, less of a factor in industries such as copper, silverware manufacturing and automobile manufacturing).

437 Id.

438 For a general discussion of the unrealistic nature of these absolutist goals and the role courts have played in enforcing them, see R.S. Melnick, supra note 183.

439 State agencies could not regulate rates for natural gas and electricity sold in interstate commerce. The Supreme Court has held that these matters involved interstate commerce and can only be regulated at the federal level. The 1938 Natural Gas Act and the Federal Power Act were passed in reaction to the Supreme Court's rulings in Public Utilities Comm'n v. Atleboro Steam & Elec. Co., 273 U.S. 83 (1927) and Missouri v. Kansas Natural Gas Co., 265 U.S. 298 (1924). See A. Amann, supra note 111, at §§ 4-1 to 4-179.

440 See Sunstein, supra note 421, at 505 ("Competition among the states would generate a 'race to the bottom' that would both harm the disadvantaged and prevent coordinated action.").

441 Id.

442 Of course, globalism can be considered in a much broader, interdependent way. Rather than decreasing domestic regulation, one can argue for more global regulatory approaches like that taken to the global environmental problem of ozone depletion. See, e.g., United Nations: Protocol on Substances That Deplete the Ozone Layer, 26 I.L.M. 1541 (Sept. 16, 1987). The point here, however, is that, in the absence of international uniformity, the economic effects of global competition reinforce the pro-market deregulatory domestic regulatory actions taken by various administrative agencies.

443 See supra notes 65-66 and accompanying text.
industry for the actual substance of the regulation they propose. Global realities reinforce regulators' deregulatory incentives, making an economic deregulatory perspective appear very attractive.

A global perspective underscores the complexity of regulatory tasks which involve international issues. No agency can be truly effective when dealing with such concerns, no matter what domestic regulatory powers it possesses. The problems caused by acid rain, for example, require that the United States and Canada develop a coordinated, international regulatory scheme.\textsuperscript{444} Similarly, oil price controls imposed by Congress on domestic crude oil in the wake of the 1973 OPEC embargo may have mitigated, somewhat, the inflationary impact of OPEC's price increases. However, without the power to regulate the entire oil market, because nearly fifty percent of the oil used domestically came from abroad, these controls were both inefficient and ineffective in their long term effects on domestic prices. In stark contrast to the relatively complete regulatory control exercised by the Federal Power Commission over natural gas prices in the wake of the Supreme Court's decision in \textit{Phillips Petroleum Co. v. Wisconsin},\textsuperscript{445} regulators of the price of oil could not reliably deliver a regulated price to any of their constituents. The reality of \textit{global} prices undercut considerably their ability to provide politically acceptable \textit{national} prices.

While such shifts in focus might seem to be a natural function of a global perspective, they can, nonetheless, meet with resistance among domestic agency constituencies. An agency's inability to deliver regulatory benefits to these constituents can adversely affect constituents' perceptions of the usefulness of the agency. The price of oil, for example, may not have been high relative to what it might have been without regulation; nevertheless, consumer constituents saw absolutely higher average domestic prices as the unpleasant bottom line of the agency action. Such results provided an additional incentive for energy regulators to turn higher market prices into a regulatory, pro-conservation policy. Rather than appear to be ineffective or unable to control a situation for which they had been given regulatory responsibility, domestic regulators tried to use the market and claim success by explaining their approach in terms of pragmatic conservation-oriented policy goals.\textsuperscript{446}


\textsuperscript{446} Of course, higher prices and a market approach would also encourage greater domestic production, lessen national security concerns and encourage conservation.
Agencies also worry about the industries they regulate. The usual political debate over whether an agency is being too easy or too hard on a particular industry or whether it is "captured" takes a very different tone when the industry being regulated is truly in danger of going under.\textsuperscript{447} Administrative equity is built into most regulatory schemes, either implicitly or explicitly.\textsuperscript{448} A global perspective that emphasizes the cost of regulation, the intensity of competition within the industry, and the likelihood that the accusing political finger may be pointed at a particular agency if jobs are lost and plants are closed often militates in favor of regulatory moderation and increased reliance on market forces.\textsuperscript{449}

The cumulative effects of a global regulatory perspective have fostered a new brand of regulatory politics—a politics of efficiency. In the canon of the politics of efficiency, regulatory ends often celebrate cost-efficiency as a central value.\textsuperscript{450} Indeed, cost conscious-

Thus, President Carter began the process of price decontrol as a part of his pro-conservation energy program. This approach not only moved toward deregulation, but it also helped extricate the government from a situation it really could not control.

In regulatory contexts with no international overtones, agencies nevertheless often have incentives to opt for the market rather than direct forms of regulation. For example, price controls often eventually contribute to shortages of the controlled good, necessitating agency allocation of the good. A political body may find it difficult to maintain its reputation if it must regularly deprive some groups of a good that others can have. When shortages arise, regulators may prefer to say that the market, rather than the regulators, requires these results. This approach makes such allocation decisions seem impersonal. On the other hand, in some instances, market prices are lower than regulated prices and deregulation will, in fact, deliver a lower price to important constituent beneficiaries of the agency involved. In such cases, regulators want to achieve these results and take credit for them. \textit{See, e.g.}, Associated Gas Distrib. v. FERC, 824 F.2d 981 (D.C. Cir. 1987).

\textsuperscript{447} For an interesting comparison of the adversariness of the American as compared to the British regulatory system, see D. Vogel, \textit{National Styles of Regulation} 146-92 (1986).

\textsuperscript{448} See Aman, supra note 16, at 323 (noting how exceptions processes provide a means of tempering regulatory regimes with market values and vice versa); Schuck, \textit{When the Exception Becomes the Rule: Regulatory Equity and the Formulation of Energy Policy through an Exceptions Process}, 1984 DUKE L.J. 163, 169. \textit{See also} R. S. Melnick, supra note 183, at 64-70 ("[T]he courts have sought to moderate the zeal of agencies single-mindedly pursuing limited objectives and to bring greater balance to public policies."); Stukane, \textit{EPA’s Bubble Concept After Chevron v. NRDC: Who is to Guard the Guards Themselves?}, 17 NAT. RESOURCES LAW. 647, 669-73 (1984) (arguing that courts have a tendency to read economic reality into statutes even where the statutes do not explicitly allow it).

\textsuperscript{449} See, \textit{e.g.}, infra notes 571-643 (discussing of \textit{Chevron v. NRDC}).

\textsuperscript{450} See Sagoff, \textit{At the Shrine of Our Lady of Fatima or Why Political Questions Are Not All Economic}, 23 ARIZ. L. REV. 1285, 1285 (1981) ("This essay concerns the economic decisions we make about the environment. It also concerns our political decisions about the environment. Some people have suggested that ideally these should be the same, that all environmental problems are problems in distribution. According to this view, there is an environmental problem only when some resource is not allocated in equitable and efficient ways."); Morrison, \textit{OMB Interference with Agency Rulemaking: The Wrong Way to Write a Regulation}, 99 HARV. L. REV. 1059, 1062 (1986) ("[Executive Order 12,291] requires that agencies promulgate only those regulations that are the product of cost-
ness pervades the implementation of most current regulatory programs, particularly those administered by the President and subject to review by the Office of Management and Budget (OMB). While cost-consciousness is not an entirely new policy, the intensity and cost-consciousness of OMB review has increased steadily in recent years. Cost conscious executive review began in earnest during President Nixon’s term, continued with more persistence during President Ford’s and President Carter’s administrations, and was extended and considerably intensified by President Reagan’s Executive Order 12,291. The imposition of cost-benefit analysis can, of


The extensive use of executive orders as a means of controlling administrative discretion has been a part of executive politics for some time. President Nixon’s OMB instituted “Quality of Life” reviews. The EPA circulated proposed regulations among other agencies and responded to their comments. See Office of Management and Budget Plays Critical Part in Environmental Policymaking, Faces Little External Review, 7 Envr. Rep. (BNA) 693 (1976); Bruff, Presidential Power and Administrative Rulemaking, 88 Yale L.J. 451, 464-65 (1979) (“The history of Quality of Life review reveals a tendency for ‘procedural’ techniques such as interagency review to pressure the subject agency toward substantive change, or to provide an opportunity for those opposed to statutory programs to delay their implementation . . . . Because agency comments were not made part of the public record and often occurred before notice of proposed rulemaking, Quality of Life review had low visibility.”). In 1974, President Ford issued Executive Order No. 11,821, 3 C.F.R. 926, reprinted in 12 U.S.C. § 1904 (1976), amended by Executive Order No. 11,949, 3 C.F.R. 161 (1977). These orders required agencies to prepare “inflation-impact statements” for all major regulations. Major regulations were defined as those having an impact in excess of $100 million. Similarly, President Carter’s attempts to control the bureaucracy led to the issuance of Executive Order No. 12,044, 3 C.F.R. 152 (1978), reprinted in 5 U.S.C. § 535 (1976 & Supp. II 1978). Among other things, this order required that agencies set forth their rulemaking agenda in semianual regulatory calendars, that they re-evaluate old rules and that they conduct regulatory analyses of proposed rules having an economic impact of $100 million or more per year. Carter also created a Regulatory Council to screen proposed rules and guard against duplication. He also established the Regulatory Analysis Review Group (RARG), composed of representatives of 36 executive and independent agencies. Its primary responsibility was to analyze carefully the regulatory analysis of fifteen to twenty of the most important rules proposed by certain agencies.

course, be a healthy development for the administrative process, but it also creates significant risks. This is particularly true in deregulatory contexts where the executive attempts to "take care" that the laws are not only "faithfully," but also efficiently, executed.

Deregulation is closely related to regulatory cost-cutting and is an end product of the politics of efficiency. Abolishing existing regulation in specific areas and avoiding the introduction of regulation to new areas constitute the ultimate cost-cutting or cost-avoiding devices. Of course, attempting to achieve regulatory goals as efficiently as possible differs from the wholesale substitution of a set of market goals and market values arguably at odds with the regulatory regime already in place. But the momentum generated by deregulatory change can blur these differences. Given a politics of efficiency focusing on global competition with foreign corporations and foreign states who play by very different rules, deregulation's success as a cost-cutting device increases the likelihood that deregulation will be extended and risks the possibility that it will be illegally overextended.

Thus, particularly in a deregulatory context, a significant conflict is built into the administration of an executive controlled agency. The executive agency's desire to transform noneconomic domestic statutes into cost-efficient global legislation may risk con-


The attempts by Nixon, Ford and Carter to gain control, supra notes 452-53, were, by no means, insignificant. They pale, however, in comparison to the extensive control that President Reagan sought, and largely achieved, in Executive Order No. 12,291. Like the orders that preceded it, Executive Order No. 12,291 requires agencies to justify so-called major rules with a regulatory impact analysis (RIA). This RIA must describe the potential costs and benefits of the rule, their probability, and any alternative approaches that might achieve the same goals at a lower cost. Section 2 of the Order imposes certain substantive requirements on agencies as they go about their tasks. Specifically, all agencies, except "independent agencies" are required to include a cost-benefit analysis showing that "the potential benefits to society for the regulation outweigh the potential costs to society" and a cost-effectiveness analysis showing that the regulatory alternative "involving the least net cost to society [has been] chosen." These cost benefit analyses are not simply suggested as a guide. They are required. "Regulatory action shall not be undertaken" unless these cost-benefit requirements are met.

In addition to these substantive requirements, the Order gives OMB an active enforcement role. The Order does not define just what costs and benefits are. OMB thus rides herd on agency attempts to do this and prepares standards for the development of RIA's. More importantly, Executive Order No. 12,291 requires agencies to submit both proposed rules and final rules to OMB before publication. OMB can thus veto rules before they ever see the light of day. This makes OMB's action essentially unreviewable.


See infra notes 605-15 and accompanying text. See also McGarity, Regulatory Analysis and Regulatory Reform, 65 TEX. L. REV. 1243, 1273-1308 (1987); Morrison, supra note 450, at 1064-68.
verting the “take care” clause of Article II into an independent and unconstitutional source of executive legislation. This possibility militates in favor of keeping the President’s supervisory role over the administrative process in perspective. As we shall see in our discussion of *Chevron v. NRDC*, it is particularly in a deregulatory context that we need to ask: who is the appropriate and ultimate interpreter of the regulatory matrix, and by what criteria should this question be answered?

Before exploring those questions directly, however, it is important to recognize related converging trends in administrative and constitutional law. If the New Deal-APA Era was marked by judicial deference to congressional judgments and the Environmental Era was marked by a more vigorous form of judicial activism, the deregulatory era seems increasingly to be marked by judicial deference to the executive. This deference is reflected most clearly in the Supreme Court’s approach to administrative decision making in *Chevron v. NRDC*. As will be argued below, deference to the executive in a deregulatory context such as this can be excessive, depriv-

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457 U.S. Const. art. II, § 3.
458 See infra text accompanying notes 571-643.
459 This is particularly true if one includes, along with *Chevron*, recent developments in constitutional law taking a formalistic approach to separation of power issues and an expansive and protective view of executive power. See supra and infra notes 444-89 and accompanying text. There are, of course, exceptions to these trends. See, e.g., Morrison v. Olson, 108 S. Ct. 2597 (1988) (appointment of independent counsel by federal court not violative of Appointments Clause or separation of powers concerns). Moreover, the Court’s approach in *Chevron*, has not necessarily taken hold completely. In other contexts, the Court has shown some reluctance to defer to presidential power in quite the way *Chevron* would suggest. See, e.g., Mississippi Power & Light Co. v. Mississippi, 108 S. Ct. 2428 (1988); INS v. Cardozo-Fonseca, 480 U.S. 421 (1987); Board of Governors of the Federal Reserve Sys. v. Dimension Fin. Corp., 474 U.S. 361 (1986). But see Young v. Community Nutrition Inst., 476 U.S. 974 (1986).

Nevertheless, the long-term trend seems very much in the direction of increasing executive power over the administrative process. This is very much of a piece with the general trend of increased Presidential power. Indeed, Justice Jackson noted some of the reasons for this increase in his concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 653-54 (1952):

> Executive power has the advantage of concentration in a single head in whose choice the whole Nation has a part, making him the focus of public hopes and expectations. In drama, magnitude and finality his decisions so far overshadow any others that almost alone he fills the public eye and ear. No other personality in public life can begin to compete with him in access to the public mind through modern methods of communications. By his prestige as head of state and his influence upon public opinion he exerts a leverage upon those who are supposed to check and balance his power which often cancels their effectiveness.

See also Kurland, *The Rise and Fall of the “Doctrine” of Separation of Powers*, 85 Mich. L. Rev. 592, 607-10 (1986). As far as the administrative process is concerned, the need for executive coordination has been increasing along with the increase in the bureaucracy’s policy making power. See infra notes 616-43 and accompanying text.
ing both the courts and Congress of important decision making roles. But the growth of presidential control is not confined to discretionary administrative law doctrines. It is also apparent in some of the constitutional law decisions that define this era.

Indeed, the rise of the administrative presidency coincides with the re-emergence of constitutional issues that have been largely moribund since the early days of the New Deal.461 Once again, the constitutionality of independent agencies has been in contention,462 the non-delegation doctrine shows new signs of life,463 and even the ghost of Crowell v. Benson464 has appeared.465 As administrative and constitutional law doctrines have evolved from a regulatory era dominated by a national perspective to a deregulatory era typified by a more global point of view, some judicial attempts to resolve separation of powers issues have been not only more protective of expanded executive power and discretion, but also increasingly formalistic in their overall constitutional approach and tone.

This formalistic discourse is a constitutional analogue of the hard look doctrine. It invariably makes the court the ultimate arbiter of how much executive, legislative, or judicial power can be combined in new ways. But formalism is not the only doctrinal choice available for resolving separation of powers. Just as a reviewing court may invoke either the deference of Chevron v. NRDC466 or the hard look approach of State Farm Mut. Auto. Ins. Co. v. DOT467 in certain kinds of cases, the more pragmatic functional approach to separation of powers questions used in Morrison v. Olson468 is an

462 See Bowsher v. Synar, 478 U.S. 714 (1986). Though footnote four of Bowsher expressly states that this issue was not decided, the implications of this opinion were tested again in Morrison v. Olson, 108 S. Ct. 2597 (1988). Once again, the Court refused to rule in a manner that made the "headless fourth branch" unconstitutional. In fact, it seems to have put the issue to rest once again. But see 108 S. Ct. at 2622 (Scalia, J., dissenting). See also infra note 522 and accompanying text.

For recent commentary criticizing the role of administrative agencies in our constitutional system, see Miller, Independent Agencies, supra note 70; Currie, The Distribution of Powers After Bowsher, supra note 70. For an overview of these important constitutional issues, see Strauss, The Place of Agencies in Government: Separation of Power and the Fourth Branch, 84 COLUM. L. REV. 573 (1984) [hereinafter Strauss, The Place of Agencies in Government]. For an application of this analysis to Bowsher v. Synar and other recent cases, see Strauss, Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?, 72 CORNELL L. REV. 488 (1987) [hereinafter Strauss, Formal and Functional Approaches].
463 See infra notes 550-70 and accompanying text.
available alternative to formalism. Our primary purpose in the fol-
lowing section will be to examine the underlying bases of the more 
formalist constitutional approaches to separation of powers ques-
tions and their relationship to two important administrative law doc-
tines: non-delegation and presidential deference. In so doing, we 
shall also highlight the significance of the very different constitu-
tional approach taken by the Court in Morrison.

1. Regulation, Deregulation, and a Constitutional Hard Look 
Approach to the Doctrine of Separation of Powers

Inherent in the New Deal approach to the Constitution was 
great tolerance for the substantive results reached by legislative 
processes. As we have seen, Congress could delegate legislative re-
sponsibilities relatively freely to administrative agencies.\(^{469}\) It also 
treated the regulatory tasks of a modern, activist government 
pragmatically, and thus, as essentially overlapping in nature. The 
lines between legislative and executive and legislative and judicial 
functions were not distinct.\(^{470}\) Courts similarly tended to view such 
issues pragmatically. Courts’ practical constitutional approach to 
such questions\(^{471}\) was less concerned with possible contamination of 
legislative with executive powers, or vice versa, than with the overall 
effect that certain legislation was likely to have on the balance of 
powers between and among the three branches of government.\(^{472}\) 
Inherent in a functional approach is a concept of “checks and bal-
ances”: though the balance may, at times, require separation, a 
combination of the different perspectives and different voices repre-
sented by the various branches of government best achieves the 
overall balance of powers established in the Constitution.\(^{473}\)

\(^{469}\) See supra notes 23-62 and accompanying text.

\(^{470}\) See supra text accompanying notes 65-73.

\(^{471}\) See Strauss, The Place of Agencies in Government, supra note 462. Professor Strauss 
has identified three distinct approaches to separation of powers issues—a separation of powers 
approach that “supposes that what government does can be characterized in 
terms of the kind of act performed,” id. at 577, a separation of functions approach that is 
“grounded more in considerations of individual fairness in particular proceedings than 
in the need for structural protection against tyrannical government generally,” id., and a 
more practically oriented checks and balances approach whose “focus is on relationships 
and interconnections” among governmental officials rather than “a radical division of 
government into three parts, with particular functions neatly parcelled out among 
them.” Id. at 578. See also Sunstein, supra note 455, at 495-96.

\(^{472}\) For example, Buckley v. Valeo, 424 U.S. 1 (1976), an Appointments Clause case, 
represents the Court’s more functional approach to separation of powers issues. See 
Burkoff, Appointment and Removal Under the Federal Constitution: The Impact of 
Buckley v. Valeo, 22 WAYNE L. REV. 1335, 1358 n.108 (1976) (citing cases prior to Buckley which 
reflect courts’ functional approach). See also Strauss, Formal and Functional Approaches, 
supra note 462, at 616-22.

\(^{473}\) See generally Kurland, supra note 459, at 599 (discussing Madison’s perception of
This relatively deferential judicial approach to the structure and location of agencies within our constitutional structure contributed to the growth of the administrative state. The national government's extensive new role differed significantly from the more minimalist form of national government the Founding Fathers took for granted when they built the separation of powers into the Constitution. To the extent that separation of powers principles are viewed procedurally, rather than substantively, they are consistent with a more flexible and legislatively defined concept of individual liberty. They are not themselves a source of substantive constitutional protection. As Professor Kurland has noted "the doctrine of separation of powers was not a rule of decision." Protection of individual liberty ultimately had to be found in other more specific provisions of the Constitution particularly in the Bill of Rights. As far as the economic legislation of the New Deal was concerned, these protections were largely procedural, not substantive. The legislative process was allowed to work its will.

The Court's more tolerant approach to separation of powers issues, however, did no more than make legislation possible. Congress itself affirmatively had to institute its vision of progress. Once this was done, the New Deal Constitution offered relatively little resistance to such legislative efforts. This approach constitutionalized broad congressional discretion, but in so doing, also underscored the theoretical ability for legislative and political change to occur. The New Deal's emphasis on the legislature and its agents enabled the New Deal vision of progress to be statutorily institutionalized, but not necessarily constitutionalized. Congress had wide powers to pass and, theoretically at least, to amend or repeal its own laws. The formalistic approach to the Constitution, at its most extreme, emphasizes a categorical approach to separation of powers issues. Is a specific governmental action legislative, executive, or judicial? Is it being performed by someone in an appropriate branch

"checks and balances" as a result, in part, of the indeterminacy of governmental functions).

474 See supra text accompanying notes 23-28. Increasing national power, whether through administrative agencies or congressional pronouncements, has been a continuing trend. As Professor Kurland has noted, "limited government, or minimalist government, in Lockean or Harringtonian terms, is a matter of ancient history; its demise is probably coincident with the growth of the idea of implied powers." Kurland, supra note 459, at 604.

475 Kurland, supra note 459, at 604.

476 Id. at 603.

477 Id. at 604.

478 For an illuminating discussion of the difficulties involved in repealing statutes, see G. Calabresi, A Common Law for the Age of Statutes (1982).
of government and, therefore, in accord with the Constitution? Separation of powers concepts certainly point to fundamental differences in governmental functions, but attempts to capture these complexities under the terms "legislative," "executive," or "judicial" are inevitably arbitrary. Since it is virtually impossible to describe fully and accurately the complexity of modern governmental functions with these three labels, most exercises of governmental power are easily susceptible to descriptions that include some combination of these functions. As a consequence, when a formalistic approach is rigorously applied, regulatory legislation becomes constitutionally vulnerable to a new judicial activism. Indeed, formalism is a kind of constitutional hard look doctrine that resonates with the minimalist role for the federal government envisioned by the Founding Fathers and the deregulatory, cost-conscious times of which it is now a part.

As applied in some recent Supreme Court cases, this approach and its rhetoric suggest a strong anti-regulatory bias that can have deregulatory side effects. Indeed, just as there is a substantive side to the administrative law hard look doctrine, so too is there a substantive side to this constitutional hard look approach. The more formalistic the Court is, the more substantive separation of powers principles become. Carried to their logical extreme, they can easily serve as an independent constitutional basis for protecting individual rights, including the individual economic rights generally disregard by New Deal statutes. A vigorous application of formalism would, for example, render regulatory statutes such as the Federal Trade Commission Act constitutionally suspect.

The Framers intended separation of powers principles to help preserve liberty, but not necessarily to constitutionalize a specific, negative concept of individual liberty, one in which freedom is defined primarily as an absence of federal governmental action. Freedom could, instead, be defined positively as the passage of federal legislation furthering the freedom of a majority of citizens.

Formalistic approaches to separation of powers issues reinstate a set of constitutional limitations on the exercise of federal

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479 See, e.g., Bowsher v. Synar, 478 U.S. 714, 749 (1986) ("One reason that the exercise of legislative, executive, and judicial powers cannot be categorically distributed among three mutually exclusive branches of government is that governmental power cannot always be readily characterized with only one of those three labels.") (Stevens, J., concurring in part and dissenting in part).


481 See generally Sunstein, supra note 421, at 488-91 (arguing for incorporation of a constitutional commitment to checks and balances into regulatory administration). For a discussion of positive and negative concepts of liberty, see I. BERLIN, FOUR ESSAYS ON LIBERTY 118-72 (1969).
power, particularly on federal legislative power of a kind exercised prior to the regulatory eras we have been examining. These formalistic limitations on how power can be shared among the branches are akin, at least in result, to the federalism constraints that predated the seventeenth amendment and that appeared in the Supreme Court's narrow interpretation of the Commerce Clause prior to 1937. A more functional checks and balances approach to separation of powers issues, however, would place individual rights protections primarily in the Bill of Rights and other specific constitutional clauses. It would also underscore the existence of a freely functioning legislature, constrained primarily by the Bill of Rights, that could legislate in a timely way on the basis of new or varying conceptions of liberty.

Quite apart from the deregulatory side effects that may result from the rigorous application of a formalistic approach to regulatory statutes, the use of this approach, coupled with an expansive view of executive power, can have actual structural effects. Formalism can further considerably a broad executive role in the supervision and control of the administrative process.

2. Formalism as a Means of Constitutionalizing Executive Control Over Administrative Discretion

INS v. Chadha and Bowsher v. Synar exemplify a formalistic constitutional approach applied to issues arising out of the administrative process. Both these cases protect, if not expand, the executive's role in controlling the administrative process; however, they do so with a rhetoric which, carried to its logical extreme, places the constitutional status of administrative agencies in jeopardy. Moreover, a true formalistic approach can be a two-edged sword when applied to executive power over the administrative process. For example, a narrow view of what constitutes a truly executive function could be turned on the executive branch itself, rendering executive orders that have broad legislative effects constitutionally suspect. Indeed, as the executive seeks to maximize its influence over admin-

482 See supra text accompanying note 32.
484 478 U.S. 714 (1986).
485 For example, Executive Order No. 12,291, 3 C.F.R. 127 (1981), reprinted in 5 U.S.C. § 601 app. (1982), was promulgated shortly after the Reagan Administration took office, but also after Congress had failed in its attempts to amend the APA to provide for similar regulatory analyses of proposed rules. See, e.g., Joint Report of the Senate Comm. on Governmental Affairs and the Comm. on the Judiciary on S. 262, S. Rep. No. 1018, 96th Cong., 2d Sess. pt. 1 (1980). For an argument that that order was, in fact, unconstitutional, see Rosenberg, Beyond the Limits of Executive Power: Presidential Control of Agency Rulemaking under Executive Order 12,291, 80 Mich. L. Rev. 193 (1981). A formalistic approach makes the constitutional argument even stronger: if the legisla-
istrative discretion, it easily can push its constitutional authority under the "take care" clause to its outer limits. The logic of formalism can encourage a narrow view of executive power as well as legislative power. Whatever the substantive result, however, and its ultimate impact on legislative or executive power, a formalistic constitutional approach clearly increases the power of the court. It makes governmental action, both executive and legislative, constitutionally vulnerable.

In *INS v. Chadha*, the Supreme Court struck down a legislative veto provision as unconstitutional and violative of fundamental separation of powers principles. The Court's sweeping opinion made very clear that the Court was not at all interested in reviewing the various forms of legislative vetoes already in place. This is consistent with the all-or-nothing rhetoric that typifies the formalistic constitutional approach. The rhetoric itself does not countenance ambiguity or gradations in the legislative, judicial, or executive effects of governmental action. Thus, despite the Court's recognition that governmental functions are not hermetically sealed, the Court's analysis treated all legislative vetoes as legislative in nature and, by implication, strongly suggested that meaningful lines existed between various governmental functions. Writing for the majority, Chief Justice Burger thus assumed that all legislative vetoes, in effect, constituted amendments to the agency enabling statutes involved and were essentially new pieces of legisla-

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487 *See generally* Strauss, *Was There a Baby In the Bathwater? A Comment on the Supreme Court's Legislative Veto Decision*, 1983 Duke L.J. 789 (addressing the Court's inability in *Chadha* to distinguish the use of the veto in political and regulatory contexts). For a study of legislative vetoes in general and their effect on the administrative process, see Bruff & Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 Harv. L. Rev. 1369 (1977).

488 *But see* 462 U.S. at 968-74 (White, J., dissenting), noting the various kinds of legislative vetoes that have developed over time. *See also* Strauss, *supra* note 487, at 804-12 (analyzing Justice White's "intellectual" approach to the legislative veto question).

489 *Compare* Chevron v. NRDC, 467 U.S. 837 (1984) discussed *infra* text accompanying notes 571-815, demonstrating the rhetorical, all-or-nothing aspect of the formalistic approach. In that case, Justice Stevens set forth, as a condition of judicial intervention, the requirement that Congress speak precisely to the issue then before the Court. According to Stevens, courts should resolve all doubts in favor of agency discretion in the face of statutory silence or ambiguity.

490 462 U.S. at 951 ("Although not 'hermetically' sealed from one another, . . . the powers delegated to the three Branches are functionally identifiable.").
tion. As such, they could not short circuit the full legislative process. For these vetoes to have legal effect, they not only had to pass both houses of Congress, but they had to be presented to the President for his approval or veto. Failure to provide for presentment would require even two-house vetoes to be struck down as unconstitutional.

The formalistic rhetoric the Court used in reaching this result conflicts with the New Deal’s overall tolerance for separation of powers pragmatism or, as Landis called it, "intelligent realism." The Court in *Chadha* focused not on the democratic nature of the overall structure of government, but on the application of a rather crude litmus test to the complicated and delicate power relationships Congress sought to balance. By choosing such a test, the Court substituted a hard look approach for the more deferential approach inherent in functionalism. While the New Deal’s James Landis looked to industry for his model of government, Chief Justice Burger looked to the Founding Fathers: "In purely practical terms, it is obviously easier for action to be taken by one House without submission to the President; but it is crystal clear from the records of the Convention, contemporaneous writings and debates, that the Framers ranked other values higher than efficiency." In *Bowsher v. Synar*, the Court took a similarly formalistic approach to the Balanced Budget and Emergency Deficit Control Act

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491 See [*Strauss*, supra note 487, at 794-801.]

492 The Constitution requires presentment to the President for all new legislation. See U.S. Const. art. I, § 7, cl. 2.

493 *Chadha*, 462 U.S. at 945-46.

494 J. LANDIS, supra note 65, at 11.

495 This is not to say that the veto provision in *Chadha* was not, in fact, unconstitutional, but rather to emphasize that if unconstitutional, it was so for reasons more subtle and complicated than those articulated by the sweeping opinion of the majority. See, e.g., 462 U.S. at 959 (Powell, J., concurring). See also [*Strauss*, supra note 487, at 817; Sunstein, supra note 421, at 496 (concluding that a functional approach to *Chadha* would yield the same result).

It is also important to note that, despite the impression of clear-cut lines and the almost formulaic approach, formalism is also capable of flexibility and ambiguity. Judges have discretion when characterizing the nature or function of the official under review. The discretion involved in the labeling gives courts a great deal of power, not only because it makes legislation more constitutionally vulnerable, but because of confusion regarding the definitions of legislative, executive, and judicial functions. Once the court defines and applies these labels, the analysis appears very simple. But the judicial definitional process behind this approach is by no means clear cut. See, e.g., *Bowsher v. Synar*, 478 U.S. 714, 748-49 (1986) (Stevens, J., concurring). See [*Strauss*, supra note 487, at 797-98 (discussing what is legislative); Kurland, supra note 459, at 603 (commenting on “the inefficacy of resorting to a general notion of separation of powers to resolve contests between two branches of government”).

496 See [*supra* text accompanying note 66.]

497 *Chadha*, 462 U.S. at 958-59.

of 1985.\textsuperscript{499} In the process, the Court also attempted to ensure an appropriate executive role in the supervision of the budgetary process. Enabling the executive branch to infuse current political sentiments into our regulatory processes may be an important goal, but doing so in a way that risks constitutionalizing a substantive, deregulatory approach to the legislative issues dealt with by Congress is quite another matter. The logic of formalism and the radical separation of powers model implicit in formalistic logic very much leans in this direction. Whether the Court sees separation of powers principles as substantive rules for decisions in individual cases or as a procedural guide to the manner in which power should be allocated among the branches will greatly influence the extent to which the logic of this doctrine is applied. The more the Court chooses to use the separation of powers doctrine as a means of protecting individual rights in individual cases, the more it risks judicial activism bordering on substantive due process.\textsuperscript{500} Given the complexity of modern government, formalistic analyses that ignore the wider perspective of the overall power relationships among the branches of government inevitably render much regulatory legislation constitutionally suspect. But short of this possible substantive result, the formalistic perspective implies a very different conception of the administrative process. This conception appears particularly clearly in the lower court’s opinion in \textit{Bowsher}.

The purpose of the Gramm-Rudman-Hollings Act\textsuperscript{501} was to eliminate the federal budget deficit by requiring, under certain circumstances, “automatic” across-the-board cuts in federal spending. Each year, the Directors of the Office of Management and Budget (OMB) and the Congressional Budget Office (CBO) independently were to estimate the federal budget deficit for the coming year. If that estimate exceeded the maximum targeted deficit amount for that fiscal year by a particular amount, the OMB and CBO Directors were to calculate, independently, on a program-by-program basis, the budget reductions necessary to meet the maximum deficit amount. They then were to report jointly their deficit and budget calculation estimates to the Comptroller General. The Comptroller General was to review these reports, which theoretically might differ both in their approaches to the calculations made and in the actual numbers produced. The Comptroller General, presumably, was to

\textsuperscript{500} For a similar problem that arises when the First Amendment is arguably overextended to certain kinds of commercial or regulatory speech, see Jackson & Jeffries, \textit{Commercial Speech: Economic Due Process and the First Amendment}, 65 Va. L. Rev. 1 (1979); see also, Aman, \textit{supra} note 177.
resolve these conflicts and report his conclusions to the President.502 The President would then issue a sequestration order mandating the spending reductions specified by the Comptroller General.503 Congress then had an opportunity to act and obviate the need for this order. If Congress failed to act, the sequestration order would become effective.

This statute was challenged almost immediately after passage before a three-judge district court. In striking down the Act in a *per curiam* opinion widely reported to have been authored by then-Judge Scalia, the lower court focused on *Humphrey's Executor v. United States*,504 taking aim at what it called "the political science preconceptions characteristic of its era and not of the present day...."505 The court noted that:

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502 Section 251(b), 2 U.S.C. § 901(b) (Supp. IV 1986), states:

1. **Report to be Based on OMB-CBO Report**—The Comptroller General shall review and consider the report issued by the Directors... and, with due regard for the data, assumptions, and methodologies used in reaching the conclusions set forth therein, shall issue a report to the President and the Congress... estimating the budget base levels of total revenues and total budget outlays..., identifying the amount of any deficit excess..., stating whether such deficit excess... will be greater than $10,000,000,000..., specifying the estimated rate of real economic growth..., and specifying... the base from which reductions are taken and the amounts and percentages by which such accounts must be reduced... in order to eliminate such deficit excess... Such report shall be based on the estimates, determinations, and specifications of the Directors...

2. **Contents of Report**—The report of the Comptroller General under this subsection shall—

   (A) provide for the determination of reductions...; and

   (B) contain estimates, determinations, and specifications for all of the items contained in the report submitted by the Directors...

   Such report shall explain fully any differences between the contents of such report and the report of the Directors.

503 Section 252(a), 2 U.S.C. § 902(a) (Supp. IV 1986), states:

(a) **Issuance of Initial Order**—

   (1) **In General**—On September 1 following the submission of a report by the Comptroller General... the President... shall eliminate the full amount of the deficit excess... by issuing an order that...

   (A) modifies or suspends the operation of each provision of Federal law that would (but for such order) require an automatic spending increase to take effect during such fiscal year, in such a manner as to prevent such increase from taking effect, or reduce such increase, in accordance with such report; and

   (B) eliminates the remainder of such deficit excess... by sequestering new budget authority, unobligated balances, new loan guarantee commitments, new direct loan obligations, and spending authority..., and reducing obligation limitations, in accordance with such report—

504 295 U.S. 602 (1935).

It is not as obvious today as it seemed in the 1930s that there can be such things as genuinely "independent" regulatory agencies, bodies of impartial experts whose independence from the President does not entail correspondingly greater dependence upon the committees of Congress to which they are then immediately accountable; or, indeed, that the decisions of such agencies so clearly involve scientific judgment rather than political choice that it is even theoretically desirable to insulate them from the democratic process.\textsuperscript{506}

Along with its substantial doubts about the policy justifications for independent agencies, the district court also expressed serious concern about the overall constitutionality of the so-called headless fourth branch.

It has . . . always been difficult to reconcile \textit{Humphrey's Executor}'s "headless fourth branch" with a constitutional text and tradition establishing three branches of government. . . .\textsuperscript{507}

The lower court emphasized that changes had occurred since \textit{Humphrey's Executor} had been decided. Specifically, the court focused on \textit{INS v. Chadha},\textsuperscript{508} and noted that, at a minimum,

some of the language of the majority opinion in \textit{Chadha} does not lie comfortably beside the central revelation of \textit{Humphrey's Executor} that an officer such as a Federal Trade Commissioner "occupies no place in the executive department," and that an agency which exercises only "quasi-legislative or quasi-judicial powers" is "an agency of the legislative or judicial departments of the government."\textsuperscript{509}

The district court, however, ultimately chose a narrower ground for its decision, noting that "[t]he Supreme Court's signals are not sufficiently clear . . . to justify our disregarding the rationale of \textit{Humphrey's Executor} . . . ."\textsuperscript{510} Relying on \textit{Humphrey's Executor}, rather than overruling it, the court found the Balanced Budget Act unconstitutional. According to the court, the Comptroller General was neither a "purely executive officer" nor an officer like the one involved in \textit{Humphrey's Executor}. Though he or she exercised some powers that were unquestionably legislative, the official's powers under the automatic deficit reduction provisions of the Act were neither exclusively legislative nor exclusively judicial.\textsuperscript{511} The lower

\textsuperscript{506} Id.
\textsuperscript{507} Id.
\textsuperscript{508} 462 U.S. 919 (1983).
\textsuperscript{509} Synar, 626 F. Supp. at 1399.
\textsuperscript{510} Id.
\textsuperscript{511} The lower court noted that:
Under subsection 251(b)(1), the Comptroller General must specify levels of anticipated revenue and expenditure that determine the gross amount
court thus found the Comptroller General to be "in the no-man's land described by Humphrey's Executor..."512

The lower court also suggested that this case could be decided on broader grounds:

We think it at least questionable whether the power would be approved even with respect to officers of the United States who exercise only "quasi-legislative" powers in the Humphrey's Executor sense—since it would dramatically reduce the value of the right to appoint such officers which the Constitution has assured to the Executive or to the Courts of Law, a right that the Supreme Court has regarded as an important element of the balance of powers, prompted by the founders' often expressed fear "that the Legislative Branch of the National Government will aggrandize itself at the expense of the other two branches."513

The Supreme Court majority did not take this bait, rather affirming on narrower grounds.514 Writing for the majority once again, Chief Justice Burger had little trouble reaching the merits of the case.515 The majority used this case as an opportunity to reiterate the separation of powers rhetoric set forth in INS v. Chadha.516 Quoting from Buckley v. Valeo517 and Chadha, the Court set forth its major separation of powers premise:

The dangers of congressional usurpation of Executive Branch functions have long been recognized. "[T]he debates of the Constitutional Convention, and the Federalist Papers, are replete with expressions of fear that the Legislative Branch of the National

which must be sequestered; and he must specify which particular budget items are required to be reduced by the various provisions of the Act... and in what particular amounts. The first of these specifications requires the exercise of substantial judgment concerning present and future facts that affect the application of the law—the sort of power normally conferred upon the executive officer charged with implementing a statute. The second specification requires an interpretation of the law enacted by Congress, similarly a power normally committed initially to the Executive under the Constitution's prescription that he "take Care that the Laws be faithfully executed." Art. II, § 3. And both of these specifications by the Comptroller General are, by the present law, made binding upon the President in the latter's application of the law. Act § 252(a)(3)... In our view, these cannot be regarded as anything but executive powers in the constitutional sense.

Id. at 1400.
512 Id.
513 Id. at 1401 (quoting Buckley v. Valeo, 424 U.S. 1, 129 (1976)).
515 The Court gave short shrift to the various standing arguments that were advanced and, given its disposition of the separation of powers arguments, the majority did not have to reach the delegation questions raised by the Act. See 478 U.S. at 736 n.10.
Government will aggrandize itself at the expense of the other two branches". Indeed, we also have observed only recently that "[t]he hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted."

In light of these pressures, the Court reasoned that if the Comptroller General exercised executive powers and only Congress could remove him, it would be tantamount to a congressional veto and thus violative of the principles set forth in Chadha. Equating congressional removal with a legislative veto, the Court reasoned further that "Congress could simply remove, or threaten to remove, an officer for executing the laws in any fashion found to be unsatisfactory to Congress." This, the Court said, was precisely what Chadha disallowed.

In so holding, the Court took a formalistic

\[518\] 478 U.S. at 727 (quoting Buckley, 424 U.S. at 129 and Chadha, 462 U.S. at 951).

\[519\] Id. at 726.

\[520\] Justice Stevens rejected this approach, which, in his view, was too dependent on "a labeling of the functions assigned to the Comptroller General as 'executive powers.'" Id. at 737 (Stevens, J., concurring). Indeed, "[o]ne reason that the exercise of legislative, executive, and judicial powers cannot be categorically distributed among three mutually exclusive branches of government is that governmental power cannot always be readily characterized with only one of those three labels." Id. at 749. Justice White, in his dissent, also rejected the majority's "distressingly formalistic view of separation of powers...." Id. at 759 (White, J., dissenting). He saw this case as one that was decided on a triviality. There was no evidence whatsoever that the Comptroller General was, in fact, subservient to Congress. Moreover, the official could not be removed at will, but only for certain stated causes. As White pointed out, the majority did not take the position that the Comptroller General must be removable at the will of President. Rather, the majority objected to the fact that the President seemingly played no role. But this too, according to Justice White, was inaccurate. Not only must Congress remove the Comptroller General for cause, but by a joint resolution. A joint resolution requires passage by both houses of Congress and presentment to the President. This not only satisfies the Chadha case upon which the majority relies so heavily, but ensures that the President does have a role to play in the removal process.

Justice White's alternative approach to separation of powers issues forms the most important aspect of his dissent, however. He takes a pragmatic, power-balancing approach, recognizing the complexity of modern government and the fact that Congress and the President can, for the most part, sort out allocation of power problems for themselves. His dissent advocates a practical, deferential approach.

The wisdom of vesting "executive" powers in an officer removable by joint resolution may indeed be debatable—as may be the wisdom of the entire scheme of permitting an unelected official to revise the budget enacted by Congress—but such matters are for the most part to be worked out between the Congress and the President through the legislative process, which affords each branch ample opportunity to defend its interests.

Id. at 776.

Justice White was thus willing to defer to political realities. Indeed, "[u]nder such circumstances, the role of this Court should be limited to determining whether the Act so alters the balance of authority among the branches of government as to pose a genuine threat to the basic division between the lawmaking power and the power to execute the law." Id. Justice White saw no such threat in this case and viewed the majority's
separation of powers approach.\textsuperscript{521} It examined the activities of the Comptroller General, determined whether they could be labeled executive, legislative, or judicial, and then examined the place of the Comptroller General in the administrative structure to determine whether that official was properly under the control of the appropriate branch of government. The majority found the Act to be unconstitutional on those grounds, but sidestepped the more fundamental issue raised by then-Judge Scalia: the constitutionality of the "headless fourth branch."\textsuperscript{522}

With Judge Scalia now sitting as Justice of the Supreme Court, this issue was implicitly very much alive once again in \textit{Morrison v. Olson}.\textsuperscript{523} Yet in that case the Court not only resisted the opportunity to, in effect, declare a degree of independence unconstitutional, but it also rejected the formalistic rhetoric used by the Burger Court. The Rehnquist Court opted for the rhetoric of functional, balancing and chose to defer to the political bargains struck by Congress and the executive. In so doing, the Court refused to constitutionalize its conception of the administrative process, but its overall approach was not necessarily inconsistent with the more political conception typified by \textit{Chevron v. NRDC},\textsuperscript{524} and some of the underlying assumptions of constitutional formalism.

The Ethics in Government Act of 1978\textsuperscript{525} created the office of "independent counsel." Congress sought to make the prosecutor as independent from executive control as possible, since his or her primary function was to investigate and possibly prosecute high-ranking executive officials suspected of criminal conduct. Congress

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\textsuperscript{521} See Strauss, Formal and Functional Approaches, supra note 462, at 489.

\textsuperscript{522} As the majority noted:

The statutes establishing independent agencies typically specify either that the agency members are removable by the President for specified causes, . . . or else do not specify a removal procedure . . . . This case involves nothing like these statutes, but rather a statute that provides for direct congressional involvement over the decision to remove the Comptroller General.

\textsuperscript{523} 108 S. Ct. 2597 (1988).

\textsuperscript{524} 467 U.S. 837 (1984).

assumed that a conflict of interest would be built into any such investigation if it were carried out by Department of Justice prosecutors in the usual manner. To assure a high degree of independence, Congress required the Attorney General to request the appointment of an independent counsel, to be named by a Special Court. The Attorney General could demand removal of this person only for cause. Both the appointment and removal aspects of the Act were constitutionally attacked. The question regarding the ability of Congress to restrict the President’s discretion to remove the independent counsel to a “for cause” standard raised the issue of how much Congress could interfere with a core executive function. Petitioners’ primary argument was that prosecutorial power of this sort was completely executive in nature and could not, constitutionally, be shared. As Justice Scalia argued in dissent, Article II vests all executive power in the President.

The majority in Morrison rejected this argument and upheld the Act. It distinguished Bowsher v. Synar by noting that in that case the Comptroller General performed executive functions and was removable essentially only by Congress. In this case, however, Congress could exercise no such monopoly. The executive clearly had an important role to play, and the Court implied that Congress’s role in passing the statute with the good cause removal provision did not really affect its analysis: “[u]nlike both Bowsher and Myers, this case does not involve an attempt by Congress itself to gain a role in the removal of executive officials other than its established powers of impeachment and conviction.” Presumably this was one reason why the constitutional hard look approach of Bowsher was not employed. Indeed, the Court further reasoned that the “[a]ct instead puts the removal power squarely in the hands of the

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526 The Act directs the Chief Justice to assign three judges to a special division of the United States Court of Appeals for the District of Columbia (“Special Court”) created for the purpose of appointing an independent counsel. 28 U.S.C. § 49. When the Attorney General receives information that persons subject to the Act have violated a federal criminal law other than a petty offense, he or she must investigate the matter within ninety days. 28 U.S.C. § 592(a)(1). If the Attorney General finds that reasonable grounds exist for further investigation or prosecution, he or she must then apply to the Special Court for the appointment of an independent counsel and must provide sufficient information to assist in selecting the independent counsel and in defining the independent counsel’s prosecutorial jurisdiction. 28 U.S.C. §§ 592(c)(1), 592(d). The Special Court must then appoint the independent counsel and define his or her jurisdiction.

527 Upon removal, the Attorney General must report the reasons for the decision to the Special Court and to Congress, 28 U.S.C. § 596(a)(1), (2). The independent counsel may seek judicial review of this decision. 28 U.S.C. § 596(a)(3).

528 108 S. Ct. at 2626 (Scalia, J., dissenting).


530 108 S. Ct. at 2616.
Executive Branch; an independent counsel may be removed from office, only by the personal action of the Attorney General, and ‘only for a good cause.’ While emphasizing the executive's role in initiating removal of an independent counsel, the Court seemed to ignore the fact that Congress was nevertheless involved when it conditioned that removal on “good cause.” As Justice Scalia argued in his fiery dissent, “limiting removal power to ‘good cause’ is an impediment to, not an effective grant of, presidential control.” This of course, was precisely the issue that Scalia had felt too constrained to reach as a lower court judge in Bowsher. It was one of the key issues he was now eager to reach, hopefully with a majority of his colleagues.

As in Bowsher, the majority reaffirmed the vitality of Humphrey's Executor as precedent, but, in so doing, it applied a different approach to the resolution of separation of powers issues: “the real question is whether the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty, and the functions of the officials in question must be analyzed in that light.” This approach triggers a separation of powers analysis that the dissent disparagingly characterized as a “balancing test.” The majority's approach was, at best, very vague as to what factors should or should not go into future judicial balancing. Moreover, since the majority concluded that “this case does not involve an attempt by Congress to increase its own powers at the expense of the Executive Branch,” the fact that purely executive power may have been involved was not determinative. The Court rejected the all-or-nothing discourse of formalism and the micro-analysis of governmental functions that it encouraged. In its place

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531 Id. (quoting 28 U.S.C. § 596(a)(3)).
532 Id. at 2627 (Scalia, J., dissenting).
533 Id. at 2619.
534 Id. at 2629 (Scalia, J., dissenting).
535 As Justice Scalia vigorously argued in dissent: "What are the standards to determine how the balance is to be struck, that is, how much removal of presidential power is too much? . . . The most amazing feature of the Court's opinion is that it does not even purport to give an answer. It simply announces, with no analysis, that the ability to control the decision whether to investigate and prosecute the President's closest advisors, and indeed the President himself, is not "so central to the functioning of the Executive Branch" as to be constitutionally required to be within the President's control. Apparently this is so because we say it is so. Having abandoned as the basis for our decision-making the text of Article II that "the executive Power" must be vested in the President, the Court does not even attempt to craft a substitute criterion . . . . Evidently the governing standard is to be what might be called the unfettered wisdom of a majority of this Court, revealed to an obedient people on a case-by-case basis."
536 Id. at 2629-30 (Scalia, J., dissenting).
537 Id. at 2620.
the Court substituted a more functional constitutional discourse and a macro perspective of the overall balance of power between the governmental branches that the Supreme Court majority thought this Act actually mandated.537

It is, perhaps, difficult to account for the fact that seven Justices supported not only the result in this case, but also the approach by which it was achieved.538 One could, somewhat cynically, contend that the new Rehnquist Court was unwilling to go down in history in so politically charged a case as this, as a predictable supporter of executive power in general, and executive power wielded by the Reagan Administration in particular.539 One could also argue, however, that, on a doctrinal level, the facts of this case simply did not trigger the hard look rhetoric of constitutional formalism. Morrison did not as easily lend itself to the all-or-nothing constitutional discourse that typified Chadha and Bowsher. In Chadha, the executive was completely bypassed by vetoes the Court viewed as legislative in nature.540 In Bowsher the power to remove an official exercising important executive functions was effectively monopolized by Congress.541 In both cases the executive was essentially cut out of an important executive decision.

Morrison also involved an important exercise of executive power, but in this case the executive was not excluded from either the appointment or the removal process. For appointment purposes, the executive initiated the proceedings which culminated in the naming of an inferior officer. Since the Court saw the independent counsel as "inferior," the appointment role played by the special court set up by the Ethics Act fit easily within the textual authority of the Constitution.542 More importantly, the executive had a distinct and, in the Court's view, dominant role in the removal of independent counsel. The Attorney General could remove this official, albeit only "for good cause."543 Congress would not be involved in the actual application of these good cause provisions. Congress would not make the decision that a particular independent counsel should

537 See id. at 2620-21. For a more recent case in which the Court took a similar approach to the separation of powers issues presented, see Mistretta v. United States, 109 S. Ct. 647 (1989).
538 Only Justice Scalia dissented. Justice Kennedy did not sit. Justice Scalia also dissented in Mistretta, 109 S. Ct. at 675.
539 See Kahn, N.Y. Times, May 9, 1988, at 19, col. 1. See also N.Y. Times, Sept. 11, 1988, § 6 (magazine), at 36.
540 See supra text accompanying notes 489-93.
541 But see Bowsher v. Synar, 478 U.S. 714, 771 (1986) (White, J., dissenting) (noting that the executive had a role to play).
542 U.S. Const. art. II, § 2, cl. 2 specifically provides for the appointment of inferior officers by "Courts of law."
be removed from office. Congress's only involvement was abstract and legislative, specifying the criteria of "good cause." The executive branch was thus not excluded from the decision-making process that might ultimately result in removal; indeed, when it came to the removal of a particular individual, the executive branch was largely on its own. The issue in this case was thus whether this minimal sharing of power between the executive and legislative branches so undercut the executive prosecutorial role that it presented a violation of constitutional dimension. The fact that Congress was not directly involved with the removal of a particular individual arguably triggered the majority's functional balancing approach to separation of powers questions.

As the dissent forcefully argued, however, this case could have been conceptualized in all-or-nothing terms if one began with the premise that all executive power—or at least every core executive function—was vested exclusively by Article II in the executive branch. Any intrusion by Congress into an area controlled solely by the executive branch would necessarily trigger the hard look approach of constitutional formalism. The majority of the Court was unwilling to see this case in such all-or-nothing terms because Congress was not involved at all in the removal of particular individuals. The Court's approach, however, suggests yet another way of understanding Morrison and, more importantly for our purposes, of fitting this case into the emerging administrative-constitutional framework of the Global Era.

At bottom, the majority in Morrison, like Justice Scalia, believed this case was about power, but it focused on the power of the political process to pass legislation and resolve political problems. The majority thus took a more procedural approach to separation of powers issues. These principles were designed to allocate power properly and to ensure the overall functioning of the political process, not necessarily the vindication of individual rights in individual cases. Implicitly, at least, individual rights questions were matters best left to the interpretation and application of more specific constitutional provisions. For the majority, only a dramatic shift in power among the branches of government would trigger the judicial activism typified by the hard look approach of formalism. Anything

544 Of course, an executive removal decision could be appealed in court, but the executive made the primary decision to propose removal of an individual.
546 As Justice Scalia noted: "That is what this suit is about. Power. The allocation of power among Congress, the President and the courts in such fashion as to preserve the equilibrium the Constitution sought to establish—so that 'a gradual concentration of the several powers in the same department,' can effectively be resisted." Id. at 2623 (Scalia, J., dissenting) (citation omitted).
short of such a dramatic shift would involve the Court in political value choices for which there were no judicially principled bases of decision.

The *Morrison* balancing approach is, thus, consistent with courts’ increasingly political view of the administrative process and with the overall trend of increasing executive influence over the administrative process. As noted above, the flexibility of functionalism can favor executive power as well as legislative power, while the logic of formalism is potentially very restrictive of executive and legislative power. In a practical sense, *Morrison* may, in the long run, provide for even greater executive flexibility in supervising administrative discretion because it will presumably be very tolerant of the executive use of legislative power. It also seems to put to rest some persistent attempts to repeal parts of the New Deal through the courts rather than through Congress. The majority implied that if certain administrative agencies had outlived their usefulness, Congress, not the courts, would have to act. The courts could not make such decisions because they were not judicial or constitutional decisions.

More significantly, though the rhetoric of functionalism does not necessarily resonate with deregulatory or anti-regulatory substance, it does underscore two other important points: (1) the political nature of the decisions made by Congress and, by implication, administrative agencies and (2) the generally limited role of the judiciary in fundamentally political decisions. Judicial deference, inherent in *Morrison*, to the political bargains struck by Congress and the executive provides a very supportive constitutional framework for the value skepticism and increasing judicial reliance on political rationality that underlie the administrative law doctrine of presidential deference. We shall now pursue these constitutional themes in a more explicit administrative law context by examining, first, the non-delegation doctrine opinions of then Justice Rehnquist and, second, the doctrine of presidential deference as conceived and applied in *Chevron v. NRDC*.

While there is much to be said for active executive supervision of administrative agencies, judicial deference to agency change in the face of congressional inaction and aggressive executive control, particularly in global deregulatory contexts, raises serious issues. Indeed, an analysis of *Chevron* sug-

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547 See supra note 485.
gests that the Court should have assumed a much more active role in that case.

3. The Non-Delegation Doctrine Cases and the Rise of Political Rationality

The Supreme Court has not struck down an act of Congress as violative of the non-delegation doctrine since *A.L.A. Schechter Poultry Corp. v. United States*[^550]. Yet Chief Justice Rehnquist's special concurrence in *Industrial Union Department, AFL-CIO v. American Petroleum Institute*[^551] and his dissent in *American Textile Manufacturers Institute v. Donovan*,[^552] represent serious attempts to resurrect this doctrine. His arguments are intellectually plausible and encourage Congress to play a more responsible lawmaking role, but they are also serious for contextual reasons.

Chief Justice Rehnquist's application of the non-delegation doctrine to the Occupational Safety and Health Act[^553] under review in *American Petroleum* and *Donovan* focused principally on the value choices Congress was asking the Secretary of Labor to make. How much safety had Congress mandated? Should the working environment be essentially risk-free? Underlying these questions was an even more fundamental issue: what is the value of a human life?[^554] Chief Justice Rehnquist found no legislative answer to that question in the text or history of the Act. He concluded that this failure of legislative will was fatal to the overall legitimacy of Congress's attempt to delegate rulemaking authority to the Secretary.[^555]

The Chief Justice emphasized the fundamentally political nature of the value choices involved relying on the Lockean notion that these kinds of value choices can only be made with the consent of the governed and thus are properly decided by legislatures, not courts. Consistent with this approach was values skepticism which assumes that value choices are fundamentally political because they are incapable of any truly principled resolution. The non-delegation doctrine invoked by Chief Justice Rehnquist required clear textual and historical guidance before a court could engage in a legitimate interpretive role.[^556] If the legislature did not decide the

[^554]: 452 U.S. at 547.
[^555]: Id. at 548.

Tracking this originalist theme and approach the *Cheveron* Court also, in effect, con-
fundamental political issues, a court had no basis upon which to construct a principled opinion. Thus, Chief Justice Rehnquist looked first to the Founding Fathers for his basic premises, then to the legislative fathers of the Occupational Safety and Health Act.\textsuperscript{557} Finding no legislative basis for any of the possible judicial interpretations of this statute,\textsuperscript{558} he concluded that the legislature had not done its job. It was not just silent on an unforeseeable issue. Rather, the legislature was silent on the very issue upon which this statute should have been based. These were legislative issues precisely because they involved fundamental political value choices.

The nature of the health and safety regulation involved in these cases underscored the political nature of these value choices. Application of the non-delegation doctrine in this context thus differed from invocations of the doctrine in the context of statutes raising primarily conflicts of economic interest.\textsuperscript{559} The fundamental conflicts of value involved in these cases did not readily translate into a purely economic discourse. They invoked at least two world views that were not easily, if at all, reconcilable. One world view, economic in nature, would require an agency to consider explicitly the economic consequences of its regulatory actions and weigh these costs against the potential benefits of its actions. Another view, absolutist in nature, emphasized the preciousness of life and the need to preserve it, whatever the cost. The nature of the issues involved made Justice Rehnquist's institutional preference for the legislature more compelling. Indeed, his basic argument was that the choice of the appropriate perceptual glasses for dealing with such issues was neither the province of agency experts nor of generalist judges. Such issues were clearly legislative.

The application of the non-delegation doctrine in these cases also resonates with a minimalist conception of the role of the federal government. Like the application of formalism in the separation of powers cases discussed above,\textsuperscript{560} the vigorous application of the non-delegation doctrine will likely result in a strong deregulatory or


\textsuperscript{558} The statutory language "to the extent feasible" could, for example, mean economic feasibility, technological feasibility, or administrative or political feasibility. As Justice Rehnquist notes: "We are presented with a remarkable range of interpretations of that language." 452 U.S. at 544.

antiregulatory bias. It will be very difficult to re-enact health and safety statutes which have been declared unconstitutional for failing to resolve more definitively the conflicts of value involved. Such life-and-death questions call out for “right” answers, but the variety of answers suggested by the different world views these questions invoke engenders a conflict which is not easily susceptible to the give and take of the legislative process. This is undoubtedly one reason why such statutes usually reflect political compromises in a procedural, rather than substantive, manner. Thus, they often reject the Administrative Procedure Act's informal rulemaking and incorporate more procedurally complex statutory hybrid-rulemaking. The non-delegation doctrine, by invalidating procedural substitutes for substantive legislative bargaining, clearly expressed in terms of definitive legislative choices, may make it more difficult to propose and pass new statutes which involve fundamental conflicts of value.

These possible deregulatory results are, of course, neither a sufficient nor a necessary condition to the rigorous application of the non-delegation doctrine. Nor do these by-products necessarily confirm or invalidate the political and constitutional foundations of the doctrine. Nevertheless, the non-delegation doctrine gains a new freshness and force precisely because of the overall context in which the doctrine now applies. It no longer seems quaint. It resonates with the times. Chief Justice Rehnquist's non-delegation opinions are even more forceful because their formalistic aspects represent more than the voice of a single Justice. They resonate with the implications of the formalistic approach taken in \textit{Bowsher v. Synar} and \textit{INS v. Chadha}. The deregulatory overtones of the non-delegation doctrine also highlight the fact that the doctrine is consistent with the negative concept of liberty that suggests that freedom is best preserved when the federal government acts infrequently or not at all. If, however, the federal government must act, it can do so only with the explicit consent of the governed. As former Chief Justice Burger noted in \textit{INS v Chadha}: “With all the obvious flaws of delay, untidiness, and potential for abuse, we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the

\begin{footnotes}
\item562 But see \textit{Bunn, Irvin & Sido, No Regulation Without Representation: Would Judicial Enforcement of a Stricter Non-delegation Doctrine Limit Administrative Lawmaking?}, 1983 Wis. L. Rev. 341, 368 (arguing that in Illinois and Wisconsin a strong judicial approach to delegation issues has little or no effect on legislators).
\end{footnotes}
Finally, Chief Justice Rehnquist's attempt to resurrect the non-delegation doctrine and its resonance with the cost-conscious, global regulatory age comports with the view of the administrative process expressed in Rehnquist's dissent in *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*\(^5\) and, to a large extent, adopted in the majority opinion in *Chevron v. NRDC.*\(^6\) The non-delegation doctrine's emphasis on the political nature of the value choices involved, some of which must be made by Congress and most of which usually are made by agencies, challenges the idea that agency legitimacy flows from agency expertise. Agencies may be experts at analyzing the possible health and safety effects of certain toxic substances, but the choice among the alternative remedial approaches is usually viewed as political in nature. The emphasis on the political nature of these decisions encourages a more uniformly political perspective on the administrative process as a whole. There seldom is a clear line between expert analysis and political choice. A perception of agencies that emphasizes politics tends to resolve all doubts in favor of politics, rather than expertise and deliberation. Judicial deference to political rationality may thus make it easier for various kinds of agency decisions to withstand substantive judicial scrutiny.\(^7\)

Political questions involve values and there are no real values experts. The value skepticism implicit in Chief Justice Rehnquist's non-delegation doctrine opinions thus reinforces his argument that

\(^5\) 462 U.S. at 959 (emphasis added).
\(^7\) 467 U.S. 837 (1984).

\(566\) *But see* Sierra Club v. Costle, 657 F.2d 298 (D.C. Cir. 1981). Judge Wald's opinion in that case skillfully separates that which is appropriate for agency expertise and, presumably, reasoned analysis, from that which is more political in nature. This analytic perspective is important to maintain. It can keep in focus the proper roles of the agency and the court. Nevertheless, given the political momentum of a new regulatory age, the line between expert judgments and political choices can easily blur. The underlying substantive basis for an agency's action may thus elude review altogether. The technocratic rationality a court might come to expect and demand from an agency can easily give way to an acceptance of more political rationalizations of an agency's position, premised largely on the agency's power. This deference to agency power may be particularly appropriate when Congress has staked out a new area or new approach and an agency is doing its best to carry out its mandates. See Mashaw, *Conflict and Compromise Among Models of Administrative Justice,* 1981 DUKE L.J. 181 (arguing that judicial rationality is very different from agency or bureaucratic rationality and may, in fact, focus on the wrong issues). Such deference to agency power can create particularly difficult problems in a deregulatory context. See infra text accompanying notes 598-615. The blurring of this line in a deregulatory context may allow an agency to equate market means with ends in a manner arguably at odds with congressional intent. In such cases, a judicial requirement that agencies articulate their rationales clearly can protect Congress from a form of executive legislation that goes far beyond the executive's duty to take care that the laws are faithfully executed. See infra text accompanying notes 616-43.
a legislature must make such fundamental political choices. It also emphasizes the political nature of the administrative process. Assuming Congress has properly delegated its powers, agencies engaged in policy making are also making statutorily constrained value choices. These choices are political and are best supervised, not by judicial reasoning with its incrementalism and judicial rationality, but by political control and accountability. With that control in place, political rationality can legitimately replace judicial rationality because principled decisions are not, in any event, really possible.569

Political rationality is more likely to be steeped in some new vision of the future than in the past. By more easily allowing for discontinuities with the past, the use of political rationality to uphold agency decisions tends to maximize agency flexibility. Such an approach more easily disregards judicially reasoned, incremental change constrained by precedent and leaves open the possibility of more dramatic changes in agency policy.

Fundamentally, political rationality is premised on power, not reason. Political value choices need not be principled, but simply authorized by the legislature. Such an approach thus sees the administrative process as the means for implementing political value choices. The courts’ primary role is to be certain agencies’ value choices are statutorily authorized. But agency discretion in making these choices is best controlled by the political branches of the government, particularly by the President. It is, therefore, no surprise that along with the more political view of agency decisions comes a greater executive role, one which the Court has, to some extent, constitutionalized in the formalistic ways described above.570

An examination of presidential deference in the context of deregulation, however, will show why political rationality alone is generally not enough to justify agency deregulatory actions, particularly when we are in the midst of a new age, an age that should, and ultimately must, be defined by both the President and the Congress.

B. Deferring to Executive Deregulation—Chevron v. NRDC

The administrative law doctrine of presidential deference very much complements the constitutional trends discussed above, both the formalistic separation of powers approach and the generally pro-executive results it has yielded as well as the value skepticism

569 For a discussion of some of the very different perspectives that come into play in a regulatory setting, particularly agency rationality as contrasted with judicial rationality, see Mashaw, supra note 568, at 185. See also Bruff, Legislative Formality, Administrative Rationality, 63 Tex. L. Rev. 207 (1984).

570 See supra text accompanying notes 483-522; see also Bruff, supra note 569, at 233-35 (arguing that the executive branch is well suited for this supervisory role).
inherent in both the functionalism of *Morrison v. Olson* and the non-delegation doctrine opinions of Chief Justice Rehnquist. Justice Stevens in *Chevron v. NRDC*\(^{571}\) applies an originalist interpretive approach to statutes. The Court concluded that an agency value choice was at issue. It implicitly assumed that such value choices were fundamentally political in nature and, as such, not capable of principled resolution. Though the Court recognized that this value choice involved the implementation of Congress's program and thus, had presumably been delegated to the EPA, Congress's silence as to the precise meaning of "statutory source" did not authorize judicial intervention. On the contrary, if Congress did not make this value implementation choice, neither would the Court. Indeed, it would assume that these political choices were within the bailiwick of the agency and responsive to the political control of the executive.

The Court accomplished this result by opting for an all-or-nothing discourse, similar to the discourse of constitutional formalism. If Congress did not address "the precise question at issue,"\(^{572}\) it was appropriate for the Court to defer to the agency's interpretation of the statute. But the end result of this deference was not simply an incremental change in agency policy. The Court's formalistic approach enabled it to treat an environmental statute as if it were a New Deal, economic, public interest piece of legislation. This approach transformed essentially consumer-oriented legislation into legislation with a much more distinct producer-oriented bias than Congress arguably ever intended. With transformation in mind, we shall closely examine the Court's reasoning in *Chevron* and suggest a contextual reading and critique of the case.

1. *Chevron—An Overview*

_*Chevron v. NRDC* began as a challenge to the EPA's repeal of rules promulgated during the Carter Administration pursuant to the mandates of the 1970 *Clean Air Act*,\(^{573}\) as amended in 1977.\(^{574}\) These statutes directed the EPA to establish primary and secondary national ambient air quality standards for various pollutants. Each state was to devise an implementation plan for each pollutant, setting forth its program for achieving the required air quality standards by a certain date.

\(^{571}\) *Id.* at 843.


\(^{573}\) *Id.* at 843.

In 1977, Congress amended the Act to impose even more stringent requirements on states that had not yet reduced pollution to levels below the ambient standards in what were called non-attainment areas. These provisions required permits "for the construction and operation of new or modified stationary sources" of air pollution. A state could issue a permit for the construction of a new or modified major source in a non-attainment area only if the proposed source met these stringent requirements. The primary goal of these amendments was to reduce pollution in non-attainment areas. The legislative history suggests that cost was to be a factor in attempts to achieve this goal, but arguably not to the extent argued by the government in Chevron.

Consistent with the apparent stringency of the 1977 amendments, the Carter EPA viewed all individual pieces of plant equipment as "stationary sources" of pollution within the meaning of the Act. The relevant statutory provisions required all new sources of pollution, or modifications to major stationary sources, that increased the amount of pollution by more than one hundred tons per year to comply with the "lowest achievable emission rate." The Carter EPA's rules applied this stringent standard to each piece of equipment sought to be replaced. In this way, the Carter EPA hoped that pollution in non-attainment areas would, in fact, begin to improve.

In response to President Reagan's directive that agencies conduct a "Government-wide reexamination of regulatory burdens and complexities," the Reagan EPA conducted an informal rulemaking proceeding, which resulted in the repeal of the Carter EPA's rules and the implementation of the so-called "bubble concept."
Under the "bubble" approach, the EPA defined a major stationary source as the entire plant, rather than the individual facilities within the plant.\footnote{582} It was thus possible to replace individual pieces of equipment within a plant without any pollution controls whatsoever, if the owner could show that the net increase in total pollution would not exceed one hundred tons per year. The entire plant was, in effect, encased in an imaginary bubble for purposes of determining whether the requirements of the 1977 Act should apply.

The net effect of the bubble concept was to lessen considerably the stringency of the repealed Carter rules. It allowed plants in non-attainment areas essentially to maintain the status quo when they replaced individual pieces of equipment rather than actually to lower their overall level of pollution. The bubble concept thus helped replace the less cost-conscious regulatory approach to pollution control espoused by the Carter EPA and affirmed by the courts with a new regulatory approach designed to mitigate the costs borne by those creating the pollution. In so doing, it allowed the essentially consumer-oriented Clean Air Act to take on a distinct producer orientation.\footnote{583}

Achieving statutory goals in a more cost-efficient manner is always a plus, but the bubble approach arguably did more than lower the costs of regulation. It was likely to have a substantial impact on the curtailment of pollution in non-attainment areas as well. It enabled polluters to upgrade their equipment without necessarily lowering their total pollution rate. Putting the costs of regulation in the forefront and, in effect, maintaining the status quo in non-attainment areas was arguably not what Congress intended.\footnote{584} This was, however, precisely the way the government argued the matter in court.

In its brief to the Supreme Court, the EPA "spoke" economics. It asked the Court to: "[s]uppose that it is economically desirable to modernize and expand the capacity of machine A, leading to an increase in its emissions to 700 units, and that at the same time emissions from machine B could be correspondingly reduced from 500 to 300 units."\footnote{585} The EPA went on to argue that, under these cir-

\footnote{583} See Hays, supra note 147, at 32-33; Stukane, supra note 448, at 648.
\footnote{584} See Stukane, supra note 448, at 653-68; see also The Supreme Court, 1984 Term—Leading Cases, 98 HARV. L. REV. 87, 247 (1984). But see Landau, supra note 578.
\footnote{585} See Stukane, supra note 448, at 666 (quoting from the government briefs in Chevron v. NRDC, 467 U.S. 837 (1984)).
cumstances, preconstruction permit review would be useless because the project would not adversely affect air quality. Though this argument disregarded completely the fact that Congress might not have wanted to maintain the status quo in non-attainment areas, the EPA continued its cost-based argument by assuming that the cost of the two hundred unit reduction from machine B was $1 million. If machine A had to have the "lowest achievable emission rate," the unit would emit 600 units, but this would cost $2 million. To affect a 100-unit increase in emissions from machine A, machine B would have to be cut back by 100 and this would cost $.5 million. Thus, the EPA argued that, without the bubble, the total cost would be $2.5 million, but with it, the cost would only be $1 million and the effect on air pollution would be the same. Thus, the EPA concluded:

[The bubble approach] ensures that emissions from new or modified sources do not prejudice attainment; it requires review of those projects that could interfere with achievement of national air quality standards. It also facilitates the statutory policies of industrial growth and modernization by eliminating the costs necessary to comply with new source review for projects that do not adversely affect air quality. And it gives a plant owner the flexibility to control emissions in the most efficient manner.\(^{586}\)

This is, essentially, an argument for accepting the environmental status quo at the least possible regulatory cost, but it gives little weight to the fact that the 1977 Act, as applied to non-attainment areas, was intended to achieve more than the status quo. The EPA’s approach is seemingly at odds with the overall structure of the Clean Air Act, its legislative history, and at least one previous judicial interpretation of the Act by the United States Court of Appeals for the District of Columbia.\(^{587}\)

More importantly, using a market oriented approach as the primary means of assuring environmental quality arguably changed significantly the very ends of the program mandated by Congress. This command-control regulation did not easily lend itself to the use of the market as a means for achieving the same regulatory ends. The use of the market transformed the statute from a consumer oriented statute to one with a much more distinct producer bias.\(^{588}\)

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\(^{586}\) Id. at 666-67.


\(^{588}\) Reasonable people can and do disagree about this substantive point. The Supreme Court and some commentators believe that the legislative history of the Act easily accommodates the new reading the EPA has given the Act. The significant point for purposes of this Article, however, is whether there was enough ambiguity to justify
The Clean Air Act Amendments of 1977 were premised on a common-pool conception of market failure. They contemplated that a technology-based standard would be designed to reduce pollution in non-attainment areas. As one commentator noted, "the 1970 Amendments imposed Draconian mandates for the abatement of pollution, regardless of cost." The 1977 Amendments built on that approach. The Act and its amendments highlighted the value judgments in play, emphasizing that the environmental goals involved were not easily susceptible to a mere dollars-and-cents discourse. The Reagan Era approach was not necessarily unwise, but in the context of the Clean Air Act it should have raised some serious judicial questions. In short, the nature of the issues at stake, the nature of the statute, the market failure involved, and the change in policy direction represented by the bubble concept all pointed to close judicial scrutiny. On its face, this case would appear to have had much more in common with State Farm Mutual than FCC v. WNCN Listeners' Guild.

The Court in Chevron nevertheless took an approach to the appropriateness of the EPA's new definition of stationary sources that not only maximized agency discretion, but also avoided any real examination of the agency's dramatic change in philosophic perspective. The Court's approach is particularly disturbing because the EPA's philosophic changes had the effect of changing not only the regulatory means by which Congress could achieve its ends but, arguably, the regulatory ends as well. Even if one resolves the complicated questions of legislative history and intent to support the bubble approach, the Court's analysis in Chevron is problematic.

The Chevron Court was unwilling to take a hard look at the questions of law in this case, much less the questions of policy. It reasoned that if the Court had a duty to examine these issues more fully, regardless of the wisdom of the agency's approach. See infra text accompanying notes 604-05.

589 Stukane, supra note 448, at 669. See generally R.S. Melnick, supra note 183 (discussing the absolutist qualities of the Clean Air Act).


court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.\textsuperscript{594}

To be permissible, the agency’s construction need not be “the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question had arisen in a judicial proceeding.”\textsuperscript{595} Underlying this deferential approach was a view of expertise and, more particularly, of politics that placed great weight on the policy judgments of an electorally accountable executive branch. If Congress had not decided the precise issue, neither would a court, even though that issue had important legal and policy implications. Not unlike Justice Rehnquist’s dissent in \textit{State Farm Mutual},\textsuperscript{596} Justice Stevens spoke in terms of presidential deference:

> Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges’ personal policy preferences. In contrast, an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration’s views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.\textsuperscript{597}

\textbf{2. A Critique}

The Court thus adopted a two-step approach that has wide applicability in other judicial review contexts and that pulls back considerably from the implications, if not the holding, of \textit{State Farm Mutual}. This approach asked first whether Congress spoke “precisely” to the statutory issue in question and, second, whether or not Congress’s intent was “clear.”\textsuperscript{598} The unanimous Court thus

\textsuperscript{594} Id. at 843 (emphasis added) (footnotes omitted).

\textsuperscript{595} Id. at 843 n.11.


\textsuperscript{597} 467 U.S. at 865-66.

\textsuperscript{598} The Court so noted, Chevron v. NRDC:
maximized agency discretion by narrowing significantly what it would view as a question of law and broadening considerably the category of policy or discretionary decisions. It then applied its doctrine of presidential deference to the policy judgments.

The Court's approach to the relevant questions of law conforms with the formalism of the Court's constitutional approaches described above. Along with Justice Rehnquist's recent revival of the non-delegation doctrine, *Chevron*'s approach is reminiscent of the debate between Justice Cardozo and Justice Hughes in the early delegation cases. In *Panama Refining Co. v. Ryan*, for example, Justice Hughes focused on specific statutory language and sought a "precise" indication that the power to be exercised by the President over the transport of "hot oil" was, in fact, specifically delegated by Congress. Finding no such decision in the delegation clause of the statute, he voted to strike it down. Justice Cardozo, on the other hand, was willing to examine the overall purpose of the statute, its preamble, its legislative history, and to infer Congress's basic intent and the apparent limits of an agency's power. Like Justice Hughes' approach in *Panama Refining*, the majority's approach in *Chevron* provides a very narrow, formalistic reading of statutory language and congressional intent. Only questions involving *ultra vires* matters are considered fair game for the Court, but to be *ultra vires* the actions must be violations of *precise* statutory terms. The Court is not about to examine the overall substance of the subject involved, nor the nature of the regulation and the value conflicts that underlie it; rather the Court will formalistically defer to agency decisions in the name of presidential deference whenever Congress has failed to resolve the *precise* issue. The policy making area left to the President is thus significantly expanded.

Such an approach ultimately assumes a bright line between questions of law and questions of discretion or judicially reviewable *ultra vires* action on the one hand and the unfettered discretion advo-

When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

467 U.S. at 842-43 (footnotes omitted).

599 293 U.S. 388 (1935).
600 Id. at 433-48 (Cardozo, J., dissenting).
icated for changes in agency policy on the other. Thus, this approach is similar to the bright-line, formalistic separation of powers approach used by the Court in INS v. Chadha\(^{601}\) and Bowsher v. Synar.\(^{602}\) It draws bright lines between law and discretion similar to the formal lines between legislative, executive, and judicial functions. It also, implicitly at least, emphasizes that value choices are political in nature and that both the choice and the implementation of these choices cannot be made by the judiciary in a principled manner. Such decisions are inappropriate for courts because their political nature requires that they be supervised by an electorally accountable branch of the government—the executive.

Like formalism in the separation of powers analyses, this statutory approach is overly rigid and overstated. No such bright line between law and discretion really exists. Moreover, courts can and should determine whether congressional value choices are being implemented in a principled manner by the agency involved. This is particularly true in the context of deregulation and environmental statutes based on conceptions of health and safety that differ profoundly from market perspectives.\(^{603}\) Attempting to draw bright lines between law and discretion in this context seriously risks giving too little respect to Congress and the legislative bargains of times past. The evolutionary approach to change that accompanied the expansion of the New Deal is not necessarily the same as the process of change typified by Chevron. This is particularly true when one takes into account the deregulatory context in which this action occurred.

Most ultra vires questions involve affirmative regulatory actions that arguably exceed the authority of the agency that undertakes them. The primary question is one of power: did the agency have the power to take this step? In the New Deal context, these cases usually raised purely jurisdictional questions and came about due to agency attempts to extend their regulatory reach. In resolving these questions, courts, sometimes explicitly, but often implicitly, examined the relevant congressional history and statutory language and resolved all doubts in favor of agency power. Similarly, courts deferred to policy decisions, which were fully within agency discretion, but the context was always that of affirmative regulatory action. In a deregulatory context, ultra vires questions of this sort do not usually arise as such. If an agency has had the power to take certain

\(^{602}\) 478 U.S. 714 (1986).
\(^{603}\) See generally Sagoff, Economic Theory and Environmental Law, supra note 590, at 1397 (noting that "[t]hese laws attempt to correct perceived environmental, rather than economic problems. Congress did not limit itself to providing economically optimal solutions.").
affirmative actions, courts usually assume that it has the legal authority to pull back. The only real questions are why an agency would choose to exercise its power in this way and what, in fact, it offers to put in place of the rules it seeks to withdraw.

As the Chevron case shows, some statutes seem to require affirmative regulatory action to ensure that the legislative goals will be attained. This would particularly seem to be the case when it comes to lowering pollution levels in non-attainment areas. Deregulation or the substitution of a market based regulatory approach may very well undercut the substantive goals of the statute involved. Using market means to achieve regulatory ends can transform those ends into something arguably at odds with what Congress intended. It can, for example, result in a cost-conscious regulatory regime that encourages the maintenance of the environmental status quo, rather than its improvement. These are issues about which reasonable people may differ and they are, by no means, easy issues to decide. But they also raise ultra-vires concerns, even in the context of a contraction, rather than an extension of regulatory power. It may seem that the legal power to do less at a cheaper cost would automatically be within the power of an agency which had previously tried to accomplish more at a higher cost, but the substitution of market means can result in a shift of statutory goals. Such policy, law, or mixed policy and law questions need close scrutiny because the very values Congress sought to promote may be at stake. The Chevron Court too quickly retreated to the discourse of deference and the use of all-too-affirming political rationality.

Even if we see these issues as pure policy or discretionary questions, the deregulatory context in which they arise requires the same judicial soul searching applicable to ultra vires cases. The agency, in effect, re-interpreting its legal mandate. In a deregulatory context, this usually is because it intends to further market values that may or may not be part of the agency's enabling act or, more broadly, its regulatory constitution. The focus in such cases cannot simply be on the fact that policy issues are involved. The courts must take the deregulatory context of these policy decisions into account. Characterizing deregulatory decisions simply as an exercise of policy discretion blurs the usual pro-regulatory policy approaches

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604 For another critique of the reasoning in Chevron and its separation of powers implications, see Farina, supra note 421. See also 42 U.S.C. §§ 7502-7508 (1982) (provisions dealing with non-attainment areas); W. Rodgers, Handbook on Environmental Law 273 n.37 (1977) ("Surely section 111 does not mean to tolerate a horrendously controlled new facility because of a fortuity that has led to the coincidental shutdown of 90 per cent of the other capacity at a given source."); Stukane, supra note 448, at 650 (explaining that Congress envisioned that "every time new sources of pollution were constructed, pollution controls would be installed.").
of agencies with deregulatory and (quite possibly) anti-regulatory policy goals. Decisions such as these should be based on the substantive legislative bargains that were struck in Congress when the original regulatory language was passed. In addition, the nature of the regulation, the market failure involved, and the values inherent in the regulatory regime should be closely examined. An agency attempting to mesh market values with a statute that sought to resolve conflicts of value in an absolutist way should trigger serious ultra vires judicial review, even if the agency's legal power to deregulate is ultimately assumed. Courts should not defer to presidential policy preferences unless those policy preferences further the value choices made by Congress. In *Chevron*, the Court too quickly assumed that this was the case. It used a formalistic approach to convert this environmental statute into a New Deal piece of legislation.

Many other contextual factors may have colored the Court's perception of the *Chevron* case, however, enabling it to convert these policy issues into matters that could be resolved by an economic discourse. The Court was undoubtedly aware of the economic impact of the EPA's policies, particularly on the economically hard-hit northeast. The case involved important political tradeoffs: jobs in the northeast rust belt, where old smoke-stack industries were dying a slow death, versus acid rain in New York, dead lakes in the Adiron-

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605 Of course, one can argue persuasively that *Chevron* still requires the agency to set forth the various policy alternatives and that the Court only defers to the executive's choice among these alternatives. See, e.g., Note, *The Chevron Legacy: Young v. Community Nutrition Institute Compounds the Confusion*, 73 CORNELL L. REV. 113 (1987). Indeed, one could also argue that *Chevron* is, in a sense, no different from *Sierra Club v. Costle*, 657 F.2d 298 (D.C. Cir. 1981). In that case, Judge Wald of the United States Court of Appeals for the District of Columbia came down on the side of agency rationality, deferring to the agency's judgments only after the agency demonstrated that it had considered the appropriate regulatory alternatives. The court also distinguished between political choices among expert alternatives. See *Strauss & Sunstein*, supra note 451.

Though this reading of *Chevron* is plausible, it is very generous, particularly given the deregulatory context of the case. In fact, the fundamental question in the case was whether the statute, its past history, its goals in non-attainment areas, its basic structure, and the kind of market failure with which it dealt allowed the agency to adopt an almost exclusively economic perspective. The Court gave that issue little attention, even though the agency's world view seemed very much at odds with that of the statute. At the very least, closer judicial examination of these issues would have been appropriate.

dacks, and similar negative effects on our neighbors in Canada. These tradeoffs do not necessarily lend themselves to agency expertise. They are political questions, and if, as in this case, Congress's intent concerning the statutory term "source" was opaque, so be it. The Court was not about to make the value choices Congress either could not or would not make. Such issues are indeed best left to the "other political branch." This approach could have resulted in a delegation decision, one that remanded the statute back to Congress for further consideration. Instead, the Court chose to convert this into a kind of New Deal statute.

Congress's silence and the opaqueness of the statutory term "stationary source" enabled the Court to act as if this Act were a typical New Deal "public interest" statute. Since Congress was not "precise" in what it authorized the agency to do, the Court read the agency's powers broadly. It assumed that power was delegated to the agency to act in the public interest, leaving to the agency discretion how best to exercise that power.

But not just any exercise of power could qualify for the hands-off treatment in *Chevron*. The case does have some definable limits. One could limit the breadth of this case by emphasizing that it was necessary, first, for the agency to show that the statute allowed it to speak economics regarding the regulatory means it would employ and the regulatory ends it sought to accomplish. Though one could persuasively argue that the court was not sufficiently rigorous in its analysis of this claim, the agency did, at least, address these points. As to the regulatory ends of the program, the Court focused on the House Committee Report accompanying the 1977 Amendments. Specifically, it noted that

Section 117 of the bill . . . had two main purposes: (1) to allow reasonable economic growth to continue in an area while making reasonable further progress to assure attainment of the standards by a fixed date; and (2) to allow States greater flexibility for the former purpose than EPA's present interpretative regulations afford.

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606 See Note, *supra* note 605, at 121 (arguing that the Court carefully considered but failed to resolve the competing policy goals, one environmental and the other economic).


608 Id. at 851-52. The Court's discussion of the Senate Committee report was inconclusive. Noting that the Senate intended a case-by-case approach to plant additions and that its emphasis on "the net consequences of the construction or modification of a new source, as well as its impact on the overall achievement of the national standards, was not . . . addressed to the precise issue raised by these cases." Id. at 853. This seems to be an unduly narrow reading of the Senate's intent, aimed at authorizing the EPA's action in this case. See Stukane, *supra* note 448, at 673 (discussing the Court's methods for narrowing its scope of review). See generally W. Rodgers, *supra* note 604, at 273 (ques-
Having rather easily satisfied itself that economics could, in fact, be utilized, the Court then focused on the market oriented means that the agency proposed to use. As in the New Deal cases, the EPA proposed its market approaches in public interest terms. As the Court noted:

[The EPA] pointed out that the dual definition “can act as a disincentive to new investment and modernization by discouraging modifications to existing facilities,” and “can actually retard progress in air pollution control by discouraging replacement of older, dirtier processes or pieces of equipment with new, cleaner ones.” Moreover, the new definition “would simplify EPA’s rules by using the same definition of ‘source’ for PSD, nonattainment new source review and the construction moratorium. This reduces confusion and inconsistency.” Finally, the agency explained that additional requirements that remained in place would accomplish the fundamental purposes of achieving attainment with NAAQs’s as expeditiously as possible.

Thus, unlike State Farm Mutual, the Court could point to some legislative history that authorized economic ends. In addition, the Court could now entertain and address what sounded like public interest reasons for pursuing more market oriented means to these ends. The Chevron Court, like the Court in FCC v. WNCN Listeners Guild, was then able to conclude:

[The plantwide definition is fully consistent with one of those concerns—the allowance of reasonable economic growth—and, whether or not we believe it most effectively implements the other, we must recognize that the EPA has advanced a reasonable explanation for its conclusion that the regulations serve the environmental objectives as well.]

The Court emphasized the need for agency flexibility in this area. That the EPA’s interpretation represented a major change in policy was not a “danger signal.” Indeed, quite the contrary. “The fact that the agency has from time to time changed its interpretation of the term source does not . . . lead us to conclude that no deference should be accorded to the agency’s interpretation of the statute. An
initial agency interpretation is not instantly carved in stone."

This approach obviously allows agencies much more flexibility to change with the times and circumstances. Yet the Court's willingness to embrace the economic ends of the regulation in this case, simply because one House of Congress mentioned them in a committee report, overlooked the more serious value conflicts raised by the incorporation of market approaches into this regulatory regime. The Court's formalistic approach to the statute and its legislative history converted a case involving potentially serious conflicts of value into an economic discourse more appropriate for the economic regulatory concerns of the New Deal.

*Chevron* deals with a form of market failure that should not immediately lend itself to an economic discourse without careful consideration of the differing philosophic perspectives that underlie the common pool and natural monopoly forms of market failure. This is not to argue that it is impossible to approach common pool failures as the EPA did in 1981. Rather, it is to argue that the EPA's approach amounts to the adoption of new regulatory ends. When this occurs, something more than a cursory discussion of the legislation and its history is required. Such a case should turn on substance, not on the invocation of a seemingly neutral deference doctrine that bows to the electoral accountability and legitimacy of the executive. Presidential deference is substantively tied to market values that are much more questionable in the deregulatory environment context of this case than the Court's analysis implies.

Just as judicial deference during the New Deal was not neutral in its vision of progress, deference in a deregulatory context also has very definite substantive results: It means opting for a discourse of efficiency. Before that discourse becomes the norm, however, a court has a duty to determine whether Congress ever intended efficiency discourse to apply to the statute. Article II requires that the executive take care that the laws are "faithfully," not necessarily "efficiently," executed. There should be a difference between these two standards. The overall trends of the new global era, however, threaten to blur that distinction by too easily deferring to executive power. For this reason, the Court should have played a more active role in *Chevron*. Its failure to do so emphasizes new power relationships among courts, agencies, Congress, and the executive that can ultimately represent not only a change in substantive regulatory policy, but also a change in the very processes of change itself.

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614 Id.
C. The Rise of the Administrative Presidency and the Relative Decline of Congress and Expertise

Perhaps the most significant trend in administrative law, particularly since the Environmental Era, is the steady increase in presidential power over the administrative process. Gone are the days when an effective President merely managed legislative policy making and carried out traditional executive functions such as foreign affairs. As the bureaucracy has grown, particularly with the addition of the legislative programs and new bureaucracies established in the 1970s, it has become unwieldy and has produced a great quantity of new law. Effective executive coordination of these various law making centers, many of which are executive in character, requires greater executive influence over policy initiation and implementation as well as greater executive control over the legal

615 See generally T. Lowi, supra note 18, at 52-58 (discussing both the demise of the theory that politics should be separate from administration and the growth of presidential power); R. Nathan, supra note 152, at 7-10 (discussing Nixon's plans to concentrate on administrative, rather than legislative, approaches to domestic policy change); Anderson, Presidential Management of Wage-Price Policies: The Johnson and Carter Experiences, in The Presidency and Public Policy Making 173-91 (G. Edwards, S. Shull & N. Thomas eds. 1985) (noting that the President has more responsibility than authority to manage the economy) [hereinafter Edwards, Shull & Thomas]. Cf. American Bar Association, Commission on Law and the Economy, Federal Regulation: Roads to Reform 79-84 (1979) (recommending greater executive involvement) [hereinafter The Roads to Reform].

616 See Lowi, The Constitution and the Regulation of Society (paper on file with Cornell Law Review), in which Lowi notes that: In 1960 there were twenty-eight major federal regulatory agencies; in 1980 there were fifty-six, and all but one of those were created after 1969. . . . Between 1970 and 1980, the budgets for the federal regulatory agencies increased by 300 percent measured in real dollars . . . . [T]he number of pages in the Federal Register increased from 14,479 in 1960 to just 20,000 in the whole decade of the 1960's, and then jumped 300 percent to 60,000 pages in 1975. By the end of 1979, the number of pages had increased to 86,000.

Id. at 19-20.

617 During the Environmental Era Congress created some new independent commissions such as the Occupational Safety and Health Commission within the Department of Labor and the reconstituted Federal Energy Regulatory Commission within the Department of Energy, but many of its new creations were more executive in character than the New Deal model of an independent commission. For example, the Environmental Protection Agency, established by the Reorg. Plan No. 3 of 1970, 3 C.F.R. 1072 (1966-70), reprinted in 5 U.S.C. app. at 1192 (1982), and in 84 Stat. 2086 (1970), is headed by a single Administrator appointed by the President with the advice and counsel of the Senate, but who is not protected by any formal removal provisions. Similarly, the Council on Environmental Quality (CEQ), a significant source of rules and regulations, functions largely as an arm of the executive. See National Environmental Policy Act of 1969, 42 U.S.C. § 4342 (1982) (creating the CEQ). Moreover, much health and safety regulation is administered by the Secretary of Labor, a cabinet-level executive office. See, e.g., The Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-78 (1982). The Department of Energy was created in 1977 to pull together a variety of energy-related regulatory activities scattered throughout the bureaucracy. It too was
output of the bureaucracy. This is particularly true for strong Presidents who seek to effectuate sweeping policy changes through comprehensive reforms.

This increase in the scope of executive management of the law making processes of agencies, both executive and independent, coincides with the apparent failure of Congress to act authoritatively or consistently regarding comprehensive regulatory reforms, particularly when those reforms involve global consequences. By nature, Congress's outlook is more domestic and regional, if not parochial, than that of the President. From an institutional point of view, the President's office is where one can expect not only a national, but also an international, perspective. That office's responsibility for foreign affairs and for our nation's role in the interdependent global economy, at least hypothetically, gives it freedom to take a more global outlook. It is at least more difficult to capture a decision maker with a broad and varied constituency. To the extent comprehensive regulatory reforms that recognize global realities are possible, they are more likely to be generated more consistently at the presidential level.

Nevertheless, Congress is theoretically the body that can create new regulatory histories and new beginnings by passing new laws or repealing old ones. It can, if it chooses, radically alter the status quo

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619 Some commentators argue that independent agencies should not be exempt from greater executive control. See, e.g., Miller, supra note 70, at 65-67.

620 For a discussion of the theoretical breadth of the Presidential perspective, see Bruff, supra note 569.

621 See generally Sunstein, supra note 421, at 453 (arguing that “[t]he President’s institutional position is useful for coordinating the wide range of sometimes inconsistent legislation of the modern regulatory state” because “the President is able not only to coordinate, but also to energize and to direct regulatory policy in a way that would be difficult or impossible if that policy were set individually by agency officials.”).
and wipe clean the statutory slate, leaving only the market in its place. It can substitute a relatively new regulatory regime for an old one or it can signal the demise of a regulatory structure.\textsuperscript{622} The fact that Congress rarely takes such radical action is due, in part, to what political scientists have described as the science of "muddling through."\textsuperscript{623} Congress has a predominantly common-law cast of mind and usually effectuates change incrementally. But some institutional changes in Congress arguably have exacerbated these gradualist tendencies, transforming Congress's penchant for moderation into a vice, and making Congress too easily manipulated by groups desiring to maintain the status quo.

The increased emphasis on re-election in Congress, and the excessive careerism and parochialism that this preoccupation can spawn, coupled with the breakdown of party hierarchy and discipline, make decisive, innovative congressional action increasingly rare.\textsuperscript{624} Institutional changes in Congress's own in-house structure and procedures can also mitigate against decisive change. As one commentator has noted, "the organization of Congress meets remarkably well the electoral needs of its members."\textsuperscript{625} Interest group politics accord a disproportionate amount of power to those seeking to preserve the status quo and enable elected officials to pursue an increasingly narrow conception of their job.\textsuperscript{626}

Perhaps even more importantly, the rise of political action com-


\textsuperscript{623} See Lindblom, \textit{supra} note 15.

\textsuperscript{624} See generally D.R. Mayhew, \textit{supra} note 14, at 17 (treating Members of Congress as "single-minded reelection seekers"); Davidson, \textit{Subcommittee Government: New Channels for Policy Making}, in \textit{The New Congress} 105 (T. Mann & N. Ornstein eds. 1981) (asserting that careerism in both houses, marked by low turnover, had a "tendency that accentuated certain committees' membership biases and perpetuated their decision-making premises and norms"); M.P. Fiorina, \textit{supra} note 14, at 15 ("the only reliable way to achieve policy change in Congress is to change congressmen."). As Senator Saxbe has noted:

\begin{quote}
Congress has declined into a battle for individual survival. Each of the Congressmen and each of the Senators has the attitude: "I've got to look out for myself." If you remember the old best advice you ever had in the army, it wound up with: "Never volunteer." This applies to Congress, and so we have very few volunteers. Most of them are willing only to follow those things that will protect them and give them the coloration which allows them to blend into their respective districts or their respective states. If you don't stick your neck out, you don't get it chopped off.
\end{quote}

\textsuperscript{625} D.R. Mayhew, \textit{supra} at 11.

\textsuperscript{626} For an interesting, journalistic account of the life of a congressman, see Barnes, \textit{The Unbearable Lightness of Being a Congressman}, \textit{The New Republic}, Feb. 15, 1988, at 18. It highlights the difficulty of being substantive and surviving in Congress. Of course, given the time constraints of legislators, their ability to take a broader, more public interest view of issues is a far more complex problem. For a classic and rich study, see R.
mittess (PACs) and the role that money plays on Capitol Hill make Congress too responsive to short-term political demands. This does not necessarily result in rapid or radical change. Rather, it increases the ability of one interest group to stymie the goals of another, particularly when comprehensive change is demanded. Change that requires some clear commitment to an overriding vision is likely to provoke a variety of powerful, wealthy groups, both for and against the change.627

Along with the application of market approaches to regulation comes an increase in the use of market approaches to explain congressional behavior.628 Public choice theories tend to see individual congressmen as subject to various political vectors capable of moving them in directions directly proportional to the strength of the political force represented. These theories almost assume passive venality on the part of legislators.629 Whatever their empirical mer-

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629 See, e.g., Farber & Frickey, supra note 629, at 925-27 (criticizing public choice proponents as cynics who greatly exaggerate the decline of the public interest. The authors assert "[a]lthough beleaguered, the public interest remains a significant factor in politics" and they argue that courts can foster the legislature's ability to make policy and thereby strengthen the democratic process); Kelman, supra note 628, at 270 (criticiz-
its, these theories illustrate quite clearly a perspective of legislative politics as removed from, if not antithetical to, principled deliberation in the public interest. Congress is increasingly a collection of local enterprises in which legislators act as independent contractors, rather than as representatives of an organic body with a definitive national purpose. In the absence of an almost overwhelmingly strong political force for change, Congress seems increasingly content to live with a stalemate rather than risk comprehensive change, especially before the politics of new situations are fully sorted out. Stasis is often a far more significant problem than inappropriate reforms.

Increased executive control over agency policy making in the 1970s and 1980s has occurred largely at the expense of congressional control. To some extent, however, Congress has apparently approved of this shift, both affirmatively and passively. Congress has affirmatively created many agencies that are more executive in nature than the independent agencies of the New Deal. One would expect the President to exercise control over these entities. But the executive control that has resulted is not limited to increased coordination and clarity of purpose. The executive has introduced substantive changes as well, particularly in the context of deregulation. Many of the substantive, deregulatory policies of the executive have been implemented by agencies, and Congress has neither affirmed these new directions nor disapproved of them.

The New Deal and Environmental Eras we have examined have been marked by the passage of specific congressional programs, inspired or at least backed by the President. Congress passed the laws that courts ultimately interpreted and extended in the New Deal Era and in the Environmental Era that followed. While agency deregul-

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633 See supra note 617.

634 The one-house legislative veto, a means by which this could have occurred, was struck down in INS v. Chadha, 462 U.S. 919 (1983). See supra text accompanying notes 486-97.
lation under these acts can be interpreted as similar to the regulatory extensions that agencies adopted in previous eras, it is important to emphasize that the most distinctive feature of the politics of efficiency is that no specific legislative program marks this new era. With the exception of congressional deregulation of the Civil Aeronautics Board and a few other deregulatory statutes,\footnote{See supra note 622.} deregulation is essentially a program carried out by the executive branch through executive orders,\footnote{See, e.g., Exec. Order No. 12,291, 3 C.F.R. 127 (1981), \emph{reprinted in} 5 U.S.C. § 601 (1982) (imposing cost benefit analysis); Exec. Order No. 12,248 (mandating regulatory planning). For a more current example, see Exec. Order No. 12,630, 53 Fed. Reg. 8589 (1988). Entitled Governmental Actions and Interference with Constitutionally Protected Rights, this order suggests a constitutional approach to regulatory takings that arguably is more stringent than what current case law would allow. It is another means of encouraging agencies to be very wary of extending their regulatory authority. Indeed, it is interesting to note that before this order was issued, Congress tried but failed to pass a reformed Administrative Procedures Act that would have added similar cost-benefit analysis provisions. Though Congress failed to pass these reforms, they nevertheless became the centerpiece of the Reagan Administration through the issuance of Executive Order No. 12,291.} appointments of efficiency-minded individuals,\footnote{See, e.g., supra note 10.} vigorous executive control over decisions not to enforce certain existing rules and regulations,\footnote{See, e.g., \textit{Chevron} v. NRDC, 467 U.S. 837 (1984) (bubble approach).} and agency attempts to rescind some rules and replace them with more cost-effective or market oriented approaches.\footnote{See, e.g., \textit{Heckler} v. \textit{Chaney}, 470 U.S. 821 (1985); \textit{UAW} v. \textit{Brock}, 783 F.2d 237 (D.C. Cir. 1986). See generally Sunstein, \textit{Reviewing Agency Inaction After Heckler v. Chaney}, 52 U. Chi. L. Rev. 653 (1985) (advocating judicial review of agency inaction); \textit{Contribution of the D.C. Circuit}, supra note 421, at 522 (describing recent years as an era of "nonregulation" in which agencies have failed to enforce existing rules or to promulgate rules where the statute appears to contemplate rules).} With few exceptions, Congress has neither repealed nor amended the statutes now used to effectuate these changes. Its primary contribution to deregulation has been indirect, in the form of budgetary legislation\footnote{See, e.g., Budget Reconciliation Act, Pub. L. No. 99-272, 100 Stat. 82 (1986) (codified as amended in scattered sections of 7 U.S.C.).} and tax reductions.\footnote{See, e.g., Tax Reform Act of 1986, 26 U.S.C. § 1 (Supp. IV 1986).} These statutes have pressured agencies to scale down their programs, goals, and statutory mandates. But such statutes differ markedly from those of the New Deal and Environmental Eras. Their impact on substantive law is indirect. They do not provide the legal guidance to courts that statutory interpretation usually requires. They are more like presidential speeches, hortatory rather than prescriptive. They are all part of the atmosphere or mood of the times—a mood that agencies have tried to read, and, occasionally force, into their own statutory
The rise of the administrative presidency is, in short, spurred by the management needs of an unwieldly bureaucracy. But management evolves into legislation when market means become ends in and of themselves. If the same processes of change used in the Environmental and New Deal Eras are to be used to define the contours of the Global Era, Congress should play a much more active and substantive role. Congress and the President must define the global scope of our regulatory structure. Both branches must shape the contours of the new global body of administrative law yet to be fully developed.

CONCLUSION

Every regulatory era institutionalizes its own vision of progress, and some eras also see their vision of progress constitutionalized. The New Deal institutionalized its reforms by establishing a variety of executive and independent administrative agencies. The constitutional law that developed in the post-Lochner era allowed Congress the flexibility necessary for these legislative innovations. Deference to Congress's statutes and to the decisions of its agents typified the courts' approach. One can argue that the courts' non-delegation approach gave Congress and the agencies it established more power than the Constitution allowed, resulting in a constitutionalized deference to Congress that left the major political decisions of the times to the discretion of that body. What Congress legislatively gave, it could also, theoretically, take away or change. Congress, agencies, and the body politic, rather than courts, were expected to be the primary agents of change.

The Environmental Era institutionalized a new, much more extensive and arguably more intrusive form of regulation and bureaucracy. New agencies proliferated, many more directly linked to their New Deal predecessors. These new agencies primarily dealt with conflicts of value and quality-of-life concerns. Many of the new statutes clearly reflected a consumer, or victim perspective. In attempting to solve problems of pollution, safety or health, Congress initially took an absolutist approach.

The constitutional framework established by the New Deal continued to provide Congress with room to experiment. But the constitutional law being forged in the civil rights context created—if not a constitutional structure for the newer, more participant-oriented


administrative law then developing—at least a context of judicial activism for the closer judicial supervision that the new environmental, health, and safety regulations would trigger. The hard look doctrine and a new, more explicit judicial supervisory role came into being. The change was not complete. It was not dramatic. In many, indeed most, run-of-the-mill cases, the New Deal framework of deference continued to work quite well. But where environmental values appeared to be given short shift, especially by old line agencies whose production-oriented missions conflicted with the new consumer perspective deeply embedded in these new statutes, courts followed in the administrative law realm the model they had developed in the civil rights context: strict scrutiny.

The Environmental Era had one foot in the traditional regulatory camp of the New Deal and one foot in the future. It continued to rely on law and traditional command-control regulatory techniques to accomplish its goals. But the regulation being developed and implemented was future oriented, too. It was global in its vision, outlook, and approach. It saw the wealth and resources of the United States as finite. Clean air and water, as well as safety and health, were seen as scarce, precious commodities. Access to these commodities was treated as a right—statutory, to be sure—but often with constitutional overtones as well. Their absolute quality, the difficulty of putting a price tag on such amenities, and the material well-being that made such progress appear possible encouraged a new, non-materialistic dialogue. This dialogue was based on the interdependence and interconnectedness of regulatory problems and solutions as well as a more interdependent conceptualization of individualism. In its most idealistic form, the environmental regulatory discourse emphasized the need to appreciate nature, not just to control it.

This more interdependent perspective on regulatory issues was transformed in the Deregulatory Era that followed. As global competition increased, the short-term economic costs of some environmental approaches became increasingly apparent. The need for truly global regulatory solutions also became apparent, as did the simultaneous need for new approaches to encourage national productivity, competitiveness, economic growth and regulatory change. In that quest, New Deal agencies and economic regulation seemed increasingly obsolete. Environmental and health and safety regulation remained important, but the price tag for attaining these goals now appeared to be very high indeed.

The new era of global competition among corporate entities and nation-states initially highlights a rather crude, realpolitik global perspective. In the words of the musical, Chess, “nobody's on no-
body's side. Everybody's playing the game, but nobody's rules are the same. . . .”

Much of our domestic regulation seemed to exacerbate the risk of adverse competitive effects on our domestic industries internationally. As we have seen, the deregulatory perspective incorporated a rather ultimate form of the global perspective. An economic perspective dominated the search for solutions to problems of global interdependence and interconnectedness. The public law system began to transform itself, and it can be argued that in so doing, nothing very fundamental changed. Thus, in place of the myth of agency expertise, we have substituted the myth of executive accountability. Agencies continued to further their (and presumably Congress's) visions of progress, and the courts, by deferring, made these new visions possible.

So, the defenders of this view would hold, the flexibility of our public law system has allowed the stiff wind of global economic reality to blow through our institutions. Agencies, once again, have become the primary agents of change and some important modifications to our administrative and constitutional law doctrines have begun to take shape. Expertise, independence, and other myths designed to insulate New Deal agencies from day to day control by the political branches have given way to a greater emphasis on the political nature of agency tasks. Agencies make and implement value choices that are political and, as such, are arbitrary. No one is an expert when it comes to making difficult value choices. Value skepticism goes hand in hand with global market realities. Perhaps it is appropriate for Congress to leave the supervision of regulatory, political decision-making to the President. Article II, after all, gives the executive the duty to take care that the laws are faithfully executed and the increase in presidential supervisory power need not necessarily undermine agency expertise. Moreover, because agencies have multiplied and because their mandates have crossed over industry lines, there is an enormous need to coordinate and control their vast policy making powers. Agencies can still set forth the appropriate range of alternatives from which administrators must choose and courts can continue to be sure that agencies choose only those alternatives within their statutory powers, but policy preferences are best controlled by an elected branch of government—the President.

644 From the song in the musical Chess, entitled “The American and Florence/Nobody's Side,” written by Benny Andersson, Tim Rice, and Bjorn Ulvaeus. See also Roberts, Re-Regulation, The Global Environment and Ignorance Equals Pessimism: A Tory Perspective, 45 Wash. & Lee L. Rev. 1345, 1354 (1988) (“With luck, this being an [sic] universe governed by chance, a new faith compatible with the global environment and consonant with democratic values will emerge. More likely, somewhere in the sands of the desert, the rough beast will have found its hour come round at last.”).
A stronger case, however, can be made for the proposition that something fundamental is transpiring. This is particularly clear when one begins with the proposition that the processes of change themselves are as significant as the substantive results that they achieve. In the Global Era, a number of factors suggest that the processes of change themselves are changing in fundamental and constitutionally dangerous ways that warrant careful monitoring. The executive has used the “take care” clause to transform statutes into efficiency-minded pieces of legislation. This change has not resulted in a process by which the implications of congressional statutes have been fleshed out and taken to their logical conclusion. Discontinuities with the past are more typical of the processes of change in the global era. Moreover, the executive frequently replaces Congress's goals with its own. In many instances, market means to regulatory ends have become new regulatory ends in themselves. These economic policies and approaches to regulatory issues may or may not be wise, but Congress has been relatively silent and passive regarding their development and implementation. Making the executive the ultimate interpreter of the regulatory matrix in a deregulatory context has created a new source of law and policy, one that creates the possibility for rapid and often dramatic change. Accordingly, greater judicial supervision, not less, is demanded.

A line distinguishing expertise and politics makes sense in a regulatory setting, but in a deregulatory setting it is not that easy to separate law from policy and politics from technical alternatives. The perceptions and the politics of an era, not to mention the economic stakes involved, can blur these distinctions. More significantly, emphasizing political rationality rather than judicial analysis of regulatory reasoning can also mask Congress's relatively non-existent role in defining the modern era, thus under-emphasizing the need for true political involvement and reform at the legislative level.

An emphasis on political rationality also has another effect on change. It encourages the blurring of categories such as law and policy by too easily resolving all doubts in favor of power, rather than power constrained or expressed in a reasoned analysis. When power is not firmly anchored in a statutory regime passed by Congress, political rationality not only provides flexibility, but perhaps too great an opportunity for executive officials to respond to the moment, to the relatively new and fickle demands of the media, and to the increasingly short-term political view of what is needed. The rationality and change explored in earlier regulatory eras emphasized gradualism, precedent, history, and a link with the past. Polit-
Rationality lends itself to more abrupt change and to greater flexibility. Yet, what legitimates such change is a sense of democracy that, ironically, may be undercut by the new administrative and constitutional law structure now taking shape. Deferring to the President when he implements a Global Regulatory Reform Act passed by Congress is one scenario. But deferring to change that our interest-group-bound political system is not really able to accomplish on its own is quite another. Change that occurs in this manner does not further democratic principles, though it may further some new economic reforms.

Indeed, the theory of democracy that underlies the current executive-oriented administrative state does not differ substantially from the “thin democracy” of the New Deal. Rather than independent, expert agencies connected to Congress, we have more politically-oriented agencies directly connected to the executive. Today policy and power do not come from the people; we do not have a “strong” form of democracy. Power and policy continue to come from technocratic decision-makers who gain legitimacy because, theoretically, they are controlled directly by an official that is subject to all of our votes. This, of course, is a myth. Executive accountability has its own limitations. More importantly, it is constitutionally limited when it becomes a source of legislative change. Without a more active congressional role, placing more and more supervisory control in the executive’s hands risks moving the processes of change in very undemocratic directions. “Thin democracy” can only become thinner in such contexts.

The change in the deregulatory context reviewed in this Article places a great deal of legislative power in the executive. Congressional programs defined the New Deal and Environmental Eras. The President and Congress were more integrated. Much of the deregulatory reform that has occurred to date has taken place through the executive’s aggressive reading of the take care clause. Thus an intense contradiction exists between the democratic nature of the constitutional and administrative rhetoric of the Deregulatory Era, and the non-legislative reality of the change that has occurred. After more than two hundred years of our country’s existence, it is not at all clear that the revolution that produced it is all but over. In the bureaucratic, interest-group world in which we live, we may now need to combat stasis with the flexibility that a more executive-oriented bureaucracy provides. But the resort to this kind of change and the political rationality that arguably justifies it involves a seri-

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For a thorough analysis of “thin” and “strong” democracy in modern politics, see B. Barber, supra note 74, for a thorough analysis of “thin” and “strong” democracy in modern politics.
ous and very different risk than that confronted in previous regulatory eras. We may be evolving toward a modified parliamentary system where the President resembles a prime minister and courts too frequently treat him like a king.