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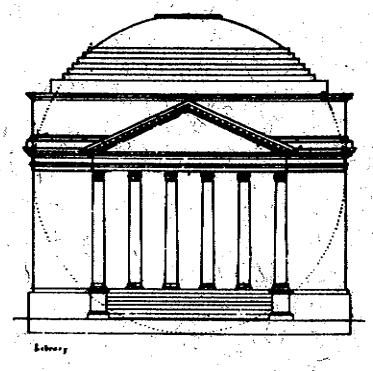

NEW WINE FOR A NEW BOTTLE: JUDICIAL REVIEW IN THE REGULATORY STATE

James V. DeLong

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*James V. DeLong**

THE relationship between courts and administrative agencies has been settled many times. It was defined in the Administrative Procedure Act in 1946,[1] explicated at length in the 1970's,[2] restated by the Supreme Court in 1978,[3] and often treated as routine during the 1980's.[4] Despite this epidemic of finality, almost every month brings a new opinion considering the proper role of the judiciary in reviewing agency decisions. These cases involve more than esoteric legal points; they raise fundamental questions about the nature of American government and the division of political power.[5]

This article discusses why the "long-continued and hard-fought contentions"[6] supposedly settled by the APA's judicial review formula refuse to remain quiescent. The theme is that the rise of the Regulatory State has created a series of conundrums amenable at this point only to preliminary exploration, not final resolution.

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[1] See 5 U.S.C. § 706 (1982). This provision was intended to "constitute a general restatement of the principles of judicial review embodied in many statutes and judicial decisions." U.S. Dep't of Justice, Attorney General's Manual on the Administrative Procedure Act 93 (1947), reprinted in Administrative Conference of the U.S., Federal Administrative Procedure Sourcebook 51, 142 (1985).

[2] See the materials cited in DeLong, Informal Rulemaking and the Integration of Law and Policy, 65 Va. L. Rev. 257, 260-61 n.22 (1979).

[3] See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978).

[4] See, e.g., Formula v. Heckler, 779 F.2d 743 (D.C. Cir. 1985); Robbins v. Reagan, 780 F.2d 37 (D.C. Cir. 1985) (per curiam).

[5] See, e.g., Clark-Cowlitz Joint Operating Agency v. Federal Energy Regulatory Comm'n, 775 F.2d 366 (D.C. Cir. 1985), involving an abrupt agency change of position on an intricate statutory question after a court of appeals had ratified the agency's initial position.

[6] Wong Yang Sung v. McGrath, 339 U.S. 33, 40 (1950), quoted with approval in Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 523 (1979).

The article discusses some of the problems underlying the ambiguous "partnership" between courts and agencies[7] and suggests possible directions for future analysis.

Part I provides a context for the discussion. It starts from three basic propositions: (1) Thinking in terms of an abstract entity called "an agency" blurs significant distinctions among the diverse functions and purposes carried out by agencies. These distinctions are crucial to understanding the ways in which the impacts of legal doctrines about judicial review hinge on the particular agency operations to which they are applied. (2) Thinking in terms of a generalized "control of agency action" blurs important distinctions that exist because the particular values promoted by this control (or refusal to impose control) vary greatly from one context to another. (3) Concentrating overmuch on review by courts obscures the importance of other control mechanisms. It also obscures some interesting features of the interaction between judicial review and these other mechanisms.

The three sections of Part I expand upon these propositions. The first section presents a brief taxonomy of agency functions. The second recapitulates the varied and not always consistent purposes society seeks to promote by placing controls on agencies. The third outlines some of the institutional mechanisms available in particular instances to implement these controls or—equally important—to determine that an agency should not be subject to outside restraint.

Part II builds on the analysis contained in Part I. All of Part II revolves around a simple question: considering the interaction of diverse agency functions, the various reasons for controlling agencies' actions, and the institutions available to exercise control, what kinds of problems are likely to arise, and how might these problems be solved?

The analysis in Part II is not comprehensive. It does not purport to develop a systematic list of issues and relate them to existing administrative law doctrine. Such an inquiry, however interesting, would take more space and patience than are available to the author here. It would also entail a review of issues that others have

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[7] Origination of the "partnership" concept is usually attributed to the late Judge Harold Leventhal, writing in Greater Boston Television Corp. v. FCC, 444 F.2d 841, 851-52 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971).

already analyzed in depth.[8] Instead, Part II simply identifies and discusses some issues that seem to the author to be of particular interest and importance and that have received less judicial or scholarly attention than they deserve.

I. The Topography of Government

A. Agencies and Their Functions

Except at a high level of abstraction, it is almost pointless to try to analyze the workings of an archetypal "agency." Agencies exist in many forms: executive departments, subunits of the Executive Office of the President, councils, single- and multi-headed regulatory agencies, foundations, commissions, institutes, and much else besides.[9] These variations in structure can have important ramifications for issues of control and discretion. To some extent, functioning will follow form, and analysis of a particular agency's operations should take this into account. A single-headed agency does not exhibit the same organizational dynamics as a multi-headed one, for example, and a gigantic cabinet department is not run like a small commission. One part of a complete theory of judicial review of agency actaion would have to be administrative morphology—the study of agency structures.

For purposes of the present analysis, though, questions of structure do not in themselves require elaborate treatment. Instead, they serve as an introduction to a more general point—administrative agencies vary greatly in the ends they pursue and the functions they perform; these differences have a great impact on the types of errors to which agencies are prone and on the scope of society's concerns about controlling them. Consequently, it is useful to begin this analysis by categorizing agency functions, not in terms of pious abstractions ("promote the public interest") or micro-detail ("regulate railroad freight rates") but in terms that might lead to interesting generalizations. The organizing theme of the following taxonomy is that agencies are essentially concerned with the control, use, and distribution of money and power. Thinking in these terms has the advantage of stripping the analysis of civics book sentimentality.

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[8] See Levin, Federal Scope-of-Review Standards: A Preliminary Restatement, 37 Ad. L. Rev. 95 (1985).

[9] See H. Seidman, Politics, Position, and Power 226-30 (2d ed. 1975).

Starting from this premise, agencies are engaged in the following activities:

Producing Public Goods. A primary function of government is to produce certain kinds of goods and services, such as defense, highways, or new basic knowledge, that provide widespread benefits but that will not be produced by private parties responding to market incentives. The essential feature of such public goods is that they cannot be provided to one person without being provided to all, so there is no way for a producer to exclude free riders and no way to recover the costs of production.[10] Some public goods, such as defense, weather reports, and criminal justice, benefit everyone. Others, such as Coast Guard patrols or air traffic control, benefit identifiable subgroups. Almost all public goods will be of greater benefit to some members of society than to others.

Transferring Wealth to Individuals. Programs such as welfare and Social Security transfer money to specific individuals. Other programs, like Medicare and veterans' hospitals, transfer wealth in kind.

Subsidizing Particular Activities. This category includes farm subsidies, housing subsidies, and the numerous other federal subsidy programs designed to encourage activities deemed worthwhile. Some programs that masquerade as providers of public goods probably belong in this category, and some expenditures that appear to be subsidies of worthy activities are actually wealth transfers to individuals.

Regulating a Sector of the Economy. A number of agencies, including those most familiar to administrative lawyers, are responsible for regulating particular areas of the economy, such as a specific mode of transportation, the banking system, the energy industry, the securities markets, or the communications field.

Administering a Public Resource. The federal government owns vast natural resources, including forests, offshore oil fields, and grazing land. Government agencies must manage these resources.

Establishing Rules for Other Decision Processes. Most of the country's business is conducted through private decision processes, most notably the free market. One of the historic functions of government is to establish rules that make these processes work. Anti-

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[10] See P. Samuelson, Economics 150-52 (11th ed. 1980).

fraud laws are a classic example of government intervention in this area.

Promoting Health, Safety, and Other Important Social Values. Agencies in this category further important social goals that the free market may undervalue. Such agencies are primarily concerned with safeguarding public health, protecting the environment, and ensuring freedom from discrimination.[11] The major agencies responsible for promoting these values are the Environmental Protection Agency, the Occupational Safety and Health Administration, the Consumer Product Safety Commission, the National Highway Traffic Safety Administration, the Food and Drug Administration, the many units enforcing civil rights statutes, and the post-1974 Federal Trade Commission. Programs that provide assistance to particular groups, such as the handicapped or the mentally retarded, fit within this category if the programs are administered through regulations rather than direct government payments.

Internal Oversight. Agencies that perform this function are responsible for overseeing the operation of other agencies. The various units of the Executive Office of the President are the major examples.

Issues presented by this taxonomy recur throughout this article, but two points deserve emphasis at the outset. First, few if any agencies fall neatly into only one of these categories. An agency may have a dominant purpose, but most agencies perform several functions. The EPA, for example, is more than a social regulatory agency; it may be the biggest pork barrel since the Pyramids.[12] The

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[11] It might be argued that this category, which essentially consists of "social regulatory" agencies, is not a separate category at all, because agencies exercising these functions operate by performing functions already covered in the taxonomy, such as producing public goods, providing subsidies, or regulating private decision processes. There is some validity to this argument, but it misses a crucial point. It is precisely the novelty of the combination of powers exercised by social regulatory agencies, and their peculiar freedom from restraints, that has created many of the current problems in the court-agency relationship. For a good summary of the nature of social regulation, see Schuck, Book Review, 90 Yale L. J. 702 (1981) (reviewing The Politics of Regulation (J. Wilson ed. 1980)). An interesting article on this topic is Lilley & Miller, The New "Social Regulation," 47 Pub. Interest 49 (1977). This article notes that the doctrines courts use to analyze traditional economic regulation may be inappropriate for an analysis of modern social regulation. The article is particularly interesting because a coauthor is James C. Miller, III, the current Director of the Office of Management and Budget.

[12] See Sibbison, Whose Agency Is It, Anyway?: How OMB Runs EPA, 17 Wash. Monthly 19 (1985).

Department of Agriculture does not simply subsidize the farming industry; it also regulates the agricultural sector of the economy.

Second, just as an agency generally has more than one function, specific agency programs often have more than one purpose, and the true purposes are not always easy to identify. For example, consider the difficulty in determining the primary function of a program that provides grants to students of foreign languages.[13] The program may be designed to produce a public good, such as an improved foreign policy or an educated citizenry. By contrast, one might characterize the program as a subsidy to professors of languages, to institutions of higher education, or to the publishers of foreign language books. The program might also be an income transfer to diletantes who prefer to study languages rather than work, or, from yet another perspective, an effort to raise wages by temporarily removing language students from the labor market. Finally, the program may be intended to promote the social good (or bad, depending on one's point of view) of multilingual education.

The difficulty of discerning a program's real function should not be surprising. To survive the legislative process a program must often have more than one dimension so it can attract support from diverse constituencies.[14] Congressional proponents of a program with a subsidy or wealth transfer aspect will always emphasize the program's effect in promoting whatever public value is currently politically appealing.[15] Furthermore, the appropriate characterization of a program's function may itself become the focus of intense political dispute or legal controversy. For instance, a housing program can be portrayed as an in-kind wealth transfer to poor people or a subsidy to the construction and lending industries. The political fate of such a program may depend on which of these perceptions eventually dominates the public mind.

The theme of multifaceted agency purposes recurs throughout

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[13] See 20 U.S.C. §§ 952(a), 956(c)(2) (1982).

[14] See Linde, Due Process of Lawmaking, 55 Neb. L. Rev. 197, 231-35 (1976).

[15] In the 1950's, Congress favored a "defense" purpose. See, e.g., National Defense Education Act of 1958 § 101, 20 U.S.C. § 401 (1982); 23 U.S.C. § 101(b) (1982) (statement of purpose regarding the "National System of Interstate and Defense Highways"). In the 1960's and 1970's, the prevailing value was "anti-discrimination." See Schuck, The Graying of Civil Rights, 89 Yale L. J. 27, 85-91 (1979). Next year, each piece of legislation will probably contain a reference to "international competitiveness" or "America's infrastructure."

administrative law litigation, especially in the judicial search for the elusive "congressional intent." A court may find that the "official" objective of a program and the accompanying statutory language differ significantly from some of the purposes expressed in the legislative history.[16] The "congressional purpose" that lawyers and judges so solemnly analyze is always a tricky beast and frequently a mythical one.[17]

B. Reasons for Controlling Agencies

As an old saying goes, "Whenever someone looks me straight in the eye and says in an earnest voice, 'Trust me,' I know it's time to hold tight to my wallet." *The Federalist* expresses the same underlying principle, albeit in more elegant language.[18] American political thought is largely premised on the candidly cynical belief that no one can be trusted absolutely and that anyone (especially a powerful government official) who even *asks* to be regarded as absolutely trustworthy is almost certainly up to no good. A logical implication of this belief is the principle that every part of government, including the agencies, must be restrained by an effective

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[16] See, e.g., National Wildlife Fed'n v. Gorsuch, 693 F.2d 156, 178 (D.C. Cir. 1982) ("[A]s any student of the legislative process soon learns, it is one thing for Congress to announce a grand goal, and quite another for it to mandate full implementation of that goal.") Furthermore, few government programs, however pure their original goal, retain their innocence over time. The most obvious examples concern ostensible public goods programs, such as water projects and road construction. These programs usually take on a wealth transfer function, especially if legislators add uneconomic projects in exchange for votes or if the agency adopts allocation formulas that require a geographic distribution of projects regardless of economic merit. An amusing example from the environmental field is the requirement in the Superfund legislation that each state must, "to the extent practicable," have at least one toxic waste site in the top 100 on EPA's priority list. Comprehensive Environmental Response, Compensation, and Liability Act, § 105(8)(B), 42 U.S.C. § 9605(8)(B) (1982). When Congress is in a feeding frenzy, no pork is too tainted.

[17] See Linde, supra note 14, at 232 ("The vote is on the means, not on the ends. The means are what will happen, the ends may or may not happen . . . . The crucial thing is that the means themselves are somebody's end . . . .").

[18] In the words of James Madison:

> If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this; you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessary of auxiliary precautions.

The Federalist No. 51, at 356 (J. Madison) (B. Wright ed. 1961).

countervailing power. Of course, this does not mean that the public should never trust the government, since that attitude would lead only to the more subtle tyranny of ineffectiveness and chaos. In the administrative setting the principle simply means that the potential for control must always exist.

The simple need to "control the agencies," however, is too abstract to be analytically useful. It is necessary to develop a more detailed differentiation of the essential rationales for controlling agencies; again, a simple taxonomy is useful.

1. Fairness

An obvious reason for controlling agency action is to protect the twin fairness values of due process and equal protection. American society has strong ideas about the "just" way to do things and implements these ideas by providing individuals with the right to know the standards governing an agency decision, to hear and dispute the evidence offered against them, to have a hearing, to be judged impartially, and to receive an explanation of the final agency decision. Though individuals' constitutional or statutory rights to particular *forms* of process vary with the context, almost every kind of government decisionmaking, from contract awards to rulemaking, incorporates general due process norms.[19]

Notions of fairness also imply that agencies should make decisions in a rational way on the basis of valid information.[20] Moreover, agencies should make these decisions according to articulated principles and in a consistent manner. The equal protection concept that like cases should be treated alike is fundamental not only to American government but to American culture. The desire for rational and consistent agency action extends even to areas like policymaking in which due process principles do not formally apply. Consequently, society puts intense pressure on government agencies to develop and apply workable definitions of "like cases" and "treated alike."[21]

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[19] See, e.g., Salzer v. FCC, 778 F.2d 869, 875 (D.C. Cir. 1985) (applicants for broadcasting license entitled to explicit notice of criteria of acceptability).

[20] See, e.g., Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983); National Tire Dealers & Retreaders Ass'n v. Brinegar, 491 F.2d 31 (D.C. Cir. 1974).

[21] See, e.g., National Black Media Coalition v. FCC, 775 F.2d 342 (D.C. Cir. 1985).

2. *Competent Performance*

Society also needs to maintain control over agencies because, unlike institutions forced to survive in the free market, agencies do not depend on satisfied customers for their continued existence. Agencies tend to be monopolies, and their outputs are often of indeterminate value, which makes it difficult to determine whether they use their resources effectively or produce anything of social value. Moreover, administrative bodies are vulnerable to capture by clients or ideologues who may try to frustrate the congressional purpose.[22] Mechanisms of control must ensure, to the extent possible, that agencies remain responsive to their original mandates.

The need to promote competent agency performance often has the same practical implications as concern for fairness. Agencies collect comments on proposals not just to be fair to those affected but also because members of the public have information that will improve the quality of public policy. Society is concerned with the consistency of results across different situations not solely because of fairness considerations but also because of the obvious truth that a decision process producing inconsistent results is either irrationally designed or incompetently operated.

3. *Boundaries*

Agencies are supposed to operate within the jurisdictional bounds that Congress establishes. At the most extreme level, this means that the Weather Bureau is not allowed to build roads and the Department of Health and Human Services cannot recruit its own army. At a more realistic level, a regulatory agency is not to impose controls on activities outside the scope of its statutory authority. Questions of alleged or actual agency overreaching arise constantly, which is hardly surprising given the number of regulatory statutes in existence and the elaborate distinctions they often draw.[23]

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[22] See, e.g., AFL-CIO v. Donovan, 757 F.2d 330 (D.C. Cir. 1985), in which the crux of the debate concerned the Secretary's authority to change government policy.

[23] See, e.g., Planned Parenthood Fed. of America v. Heckler, 712 F.2d 650, 655 (D.C. Cir. 1983) ("An essential function of the reviewing court is to guard against bureaucratic excesses by ensuring that administrative agencies remain within the bounds of their delegated authority."). See generally Volkswagenwerk Aktiengesellschaft v. Federal Maritime Comm'n, 390 U.S. 261, 272 (1968) (noting that courts are "not obliged to stand aside and

4. Error Tolerance

Another reason for controlling agencies is to oversee the agency's approach to tolerance of error. All decision processes make two kinds of mistakes, false positives and false negatives, and steps designed to reduce one kind of error tend to enlarge the other. To appreciate this correlation, imagine that Congress enacts a program to provide benefits to people above a specific age who have a particular physical condition caused by a certain type of employment. In any individual case, the administering agency must determine whether the applicant has satisfied all of these conditions. When the agency establishes evidentiary criteria and standards for use in this determination, it must make a decision (albeit usually a tacit one) about the relative weight it places on the two different kinds of error. If the agency allows the claimant to prove causation easily, for example, it has decided to risk paying some invalid claims (false positives) to reduce the number of erroneous claim denials (false negatives). Conversely, if the agency establishes high standards of proof, it shows a preference for false negatives over false positives. Society wants to guarantee that the agency balances the two types of error at a reasonable point or at least at the point ordained by Congress.

5. Coordination

The tremendous growth in the number, size, budgets, staffs and authority of government agencies has obviously created problems of integration and coordination.[24] The "policy space" is getting crowded, and the most important issue in assessing new programs may be their potential conflict with other programs rather than their impact on private decisionmaking.[25] Coordination problems come in many shapes and sizes. In some cases, two agencies may operate at complete cross-purposes, as when the Department of Energy wants to grind up mountains for shale oil while the EPA adopts nondegradation policies. Moreover, jurisdiction over a particular area or problem may be so badly divided that no one knows

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rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate") (quoting NLRB v. Brown, 380 U.S. 278, 291 (1965)).

[24] See A. Wildavsky, Speaking Truth To Power: The Art and Craft of Policy Analysis 64-67 (1979).

[25] See Sierra Club v. Costle, 657 F.2d 298, 322-40 (D.C. Cir. 1981).

if the various agency programs are in accord. During the 1970's, the proposed comprehensive regulation of exposure to vinyl chloride[26] would have required action by five different agencies under fifteen different statutes.[27] Such examples of overlapping jurisdiction are common.

The conflict among agencies and policies may also exist at a more abstract level. Environmental protection statutes may inhibit the economic growth fostered by other policies. Provisions favoring one disadvantaged group might work to the detriment of another disadvantaged group protected by different statutes. Providing an in-kind resource to one group will likely reduce the availability of that resource to other groups. A government can tolerate a great deal of disorder, and there is no need to be fanatical about programmatic consistency, but sometimes conflicts must be reconciled.[28]

6. *Resources*

The final reason underlying the need to control agencies is money. Most government action involves expenditures of one sort or another, and a large part of human history (including the history of the American Revolution) has consisted of struggles over exactions and expenditures. In the United States Constitution control over finances is one of the most carefully guarded congressional prerogatives,[29] and the modern Congress has increasingly asserted its authority over federal finances. Given the importance of federal fiscal policy, it is useful to examine the ways—both direct and indirect—in which agencies allocate financial resources.

An agency obviously allocates resources by spending the money that Congress appropriates for it. An agency cannot exceed this appropriation; if it runs out of money, it must shut down. More-

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[26] See 39 Fed. Reg. 35,890 (1974).

[27] See D. Doniger, The Law and Policy of Toxic Substances Control: A Case Study of Vinyl Chloride 1 (1978).

[28] Coordination is usually a function of Congress or the Executive Office of the President. Nonetheless, the courts cannot escape performing some coordination of agency policies, as in the long series of cases on the extent to which regulatory agencies must take account of the antitrust laws or the frequent cases that require courts to reconcile the language of conflicting statutes. As with many other issues of public policy, when a conflict is direct enough to make a decision unavoidable, it winds up in court.

[29] See U.S. Const. art. I, §§ 7-8.

over, an agency cannot supplement its budget by separately taxing the private sector or even by accepting volunteer labor or private contributions without express congressional authorization. Agencies also allocate resources through special funds or user fees, and Congress occasionally allows agencies to levy reasonable fees on particular individuals in return for special benefits provided.[30] Beyond these straightforward examples, the concepts of "taxing and spending" begin to fade into more indirect means of allocating resources. Agencies allocate resources through at least four indirect methods.

The first method is for an agency to assume contingent liabilities by guaranteeing loans, deposits, or particular performances. These programs affect the current allocation of resources and investment, and they also create a possibility that the government will have to pay large sums in the future.

Second, an agency influences the allocation of funds when it determines eligibility for entitlements. Some entitlement programs confer benefits on any qualified individual. These programs do not have an overall budget cap; the government will satisfy every valid claim, regardless of the program's total cost. The agency administering an entitlement program has some control over the amount expended on the program because the agency develops the rules governing eligibility criteria and establishes the level of error tolerance.

Third, to the extent that economic regulation affects the national economy, a regulatory agency can force some reallocation of the nation's resources. For example, before the deregulation efforts of recent years, economists estimated that the regulation of trucking by the Interstate Commerce Commission cost the United States about $1.5 billion per year in dead weight loss.[31] Although the extent of the transfer payments resulting from regulation was indeterminable, it was probably much larger.[32]

Finally, social regulation has become a significant method of allocating national wealth. Social regulatory agencies act primarily by issuing regulations that require individuals, businesses, or other

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[30] See, e.g., Central & S. Motor Freight Tariff Ass'n v. United States, 777 F.2d 722 (D.C. Cir. 1985).

[31] See Moore, The Beneficiaries of Trucking Regulation, 21 J. L. & Econ. 327, 330 (1978).

[32] See id. at 342.

levels of government to take or refrain from taking specific actions. Complying with these regulations often costs money. Although commentators debate the precise economic impact of the expenditures required by social regulation,[33] the *potential* for major impact clearly exists.[34]

C. *Institutions of Control*

The principal control mechanisms in our system of government are words in law books. This elementary truth makes courts the primary institutions for agency control, because courts are the official interpreters of the sacred constitutional and statutory texts.[35] Even Congress cannot authoritatively establish the meaning of previously enacted legislation, except by passing a new law. The recurring arguments over the amount of deference due an agency determination do not affect this basic division of power because courts ultimately determine the deference due.[36]

In addition to interpreting the statutes that govern administrative agencies, the courts have the authority to conduct substantive review of agency actions, authority derived either from the APA and statutes modeled on it, or from specific congressional injunctions requiring courts to review agency actions for the substantiality of the evidence and for arbitrariness.[37] Moreover, the courts and Congress have diluted the standing doctrine[38] to the point that

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[33] See G. Eads & M. Fix, Relief or Reform?: Reagan's Regulatory Dilemma 17-44 (1984).

[34] In commenting on the suggestion that the Clean Air Act might be interpreted to require the shutting down of all radionuclide-emitting facilities, the EPA dryly pointed out that this interpretation would require society to forgo the benefits of such industries as electrical power, aluminum, steel, chemicals, and paper products. EPA Proposed Standard for Stationary Emitting Sources of Radionuclides, 40 C.F.R. §§ 61.90-61.108 (1985). For further discussion see infra text accompanying notes 112-113.

[35] This degree of reliance on courts is not constitutionally compelled, and nothing in the basic jurisprudence of judicial review requires courts to interpret legislative directives to agencies. The Constitution and the logic of Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), require only that the Supreme Court determine the constitutionality of legislative or executive action. The interpretation of the laws, as opposed to a determination of their constitutionality, could be assigned solely to the agency involved, to some internal administrative body, or to the discretion of the President.

[36] See, e.g., AFL-CIO v. Donovan, 757 F.2d 330, 340-41 (D.C. Cir. 1985).

[37] For an interesting analysis of these congressional delegations, particularly of the relationship between the substantial evidence standard and the arbitrary and capricious standard, see Association of Data Processing Serv. Orgs., Inc. v. Board of Governors of the Fed. Reserve Sys., 745 F.2d 677, 681-86 (D.C. Cir. 1984).

[38] See, e.g., Association of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150 (1970).

anyone with some ingenuity and a strong interest in an agency decision can find a way to challenge the decision in court.

The prominence of judicial review in this structure makes the court system the logical focal point for anyone concerned with control of agency action, especially for people who write for and read law journals. It also creates an intellectual trap. Lawyers and judges may concentrate on the role of courts while ignoring the reviewing functions of other institutions, and they may emphasize the power of legal language while neglecting the importance of institutional dynamics and internal incentive structures. Such legal ethnocentrism distorts analysis, because mechanisms other than judicial review play important roles in controlling agency behavior.

The most important alternative form of control is an agency's internal gyroscope. That officials and agencies cannot be completely trusted does not mean that they can never be trusted, and to a large extent the administrative system rests on the assumption that officials act in good faith and that external control mechanisms are backup rather than primary systems. Another major source of control—though historically more potential than actual—is the Executive Office of the President and particularly the Office of Management and Budget. The OMB's influence over the agencies' budgets is an important limitation on agency power. Moreover, the OMB clears the agencies' statements and legislative proposals, and in recent years it has assumed responsibility for reviewing and coordinating agency regulations.[39]

The President's power to fire top agency officials can be another instrument of control, but this authority barely scratches the working levels of an agency and remains largely a negative power. The President can fire top officials for letting their subordinates do things the President does not want done, but it is difficult for the President to force the agency to respect his policy preferences if the permanent staff does not willingly cooperate.

Other nonjudicial institutions also exercise some control over agencies. The General Accounting Office (formally a congressional institution) polices the actual flow of dollars to agencies and engages in some policy analysis of administrative regulations. The Office of Personnel Management controls personnel matters, often

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[39] See Exec. Order No. 12,498, 50 Fed. Reg. 1036 (1985); Exec. Order No. 12,291, 3 C.F.R. 127 (1981), reprinted in 5 U.S.C. § 601 app. at 431-34 (1982).

enforcing the laws that protect the public from the dangers of undue governmental efficiency and productivity. The Department of Justice coordinates agencies' legal positions. Congress also exercises much informal control over the agencies, in addition to its formal oversight hearings and budget reviews.

No examination of the role of courts is complete without consideration of the effects of the gravitational pulls exercised by these other institutions. More subtly, thorough analysis of judicial review requires an examination of the interactions between the courts and these other controlling institutions. The central issues are how the courts can help or inhibit the other institutions (and vice versa) and how courts can use the other institutions to improve their own methods of agency review.

II. The Exercise of Control

A. Problems of Control

A coherent analysis of the problems of agency control requires the integration of the three topics addressed in Part I—the functions of agencies, the reasons for controlling them, and the institutional mechanisms of control. The simplest way to start this process is with three parallel lists.

Function	*Reason for Control*	*Institution*
Public Goods	Fairness	Internal Agency Gyroscope
Wealth Transfer	Competent Performance	Executive Office of the President
Economic Regulation	Boundaries	Other Oversight Agencies
Public Resource Administration	Error Tolerance	Courts
Rules for Other Decision Processes	Coordination	Congress
Social Regulation	Public Resources	
Internal Oversight	Private Resources	

A comprehensive approach to integrating these columns would create a three-dimensional matrix. Each axis would represent one of the columns, and each cell would contain a single entry from each of the three columns. For example, one cell would be judicial control for fairness considerations in reviewing the production of public goods; another would be the functioning of the internal agency gyroscope in reviewing allocations of resources effected by social regulatory agencies, and so on. It seems intuitively probable

that each cell would raise its own unique set of issues. However, the hypothetical matrix would have 245 cells, and a cell-by-cell explication might grow tedious. Consequently, the balance of this article will develop only a few generalizations about the interactions of the items on the three lists.

The most important generalization is rather obvious—problems involving the control of agency action can be aggravated or ameliorated but never really solved. Judging the appropriate level of control of any single function for any given reason by any specified institution would be difficult enough even if the question at hand could be isolated from all other considerations. In fact, of course, control of any agency function automatically affects the agency's performance of other functions; control for one value affects other values; and the types of controls that can be applied effectively by any institution will depend heavily on the actions of other institutions.

Consider the way control for any of the values set forth in the second column affects agency performance in other dimensions. Control for fairness is a good example because it is so familiar. Society fears that agencies, out of eagerness to get on with their primary mission or from simple sloth or ignorance, will pay insufficient attention to fairness. Thus, the law regards controls for fairness as important, and these have become the special concern of courts. Once a court begins to control for fairness, though, it may not easily find intellectually and emotionally satisfactory stopping points, since one can always imagine another procedural requirement that might prevent potential injustice. Consequently, a court may keep adding restrictions to ensure "fair" agency actions, at a cost in efficiency and effectiveness. Excessive interference with an agency's capacity to perform its primary mission will injure the people that Congress intended to benefit. The problem is the familiar one of diminishing marginal returns—a court's basic task is to find the point at which additional inputs of procedural protection cease to produce enough additional justice to offset the resultant losses.[40]

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[40] See Mathews v. Eldridge, 424 U.S. 319, 335 (1976). See generally Cooper, Conflict or Constructive Tension: The Changing Relationship of Judges and Administrators, 45 Pub. Ad. Rev. 643, 644-45 (1985) (discussing judicial recognition of administrative cost constraints). The analysis of procedural issues has been immensely complicated by the rhetoric

Judicial oversight of an agency's treatment of error tolerance presents similar problems.[41] Concerns about interacting and potentially conflicting values play a large part in the error tolerance issue—in a wealth transfer program how should an agency balance the risk of denying a valid claim against the risk of accepting a spurious one?[42] Denying legitimate claims undermines fairness values, but so does accepting unworthy ones, albeit over a longer term. Furthermore, accepting invalid claims will have undesired distributional effects and can distort private decision processes.

The courts frequently review an agency's relative error tolerance, although the decisions seldom come up clothed in these words. The more familiar terms are "burden of proof," "substantial evidence," or "deference." Indeed, much of the history of judicial review most familiar to administrative lawyers revolves around the question of when agencies can adopt error tolerances that differ markedly from those prevailing in common law courts.[43]

Other techniques for controlling agency behavior trigger other sorts of tradeoffs. If the OMB limits an agency's budget or other resources, it may undermine the organization's capacity to accomplish its tasks. By forcing an agency to act on one problem, a court can prevent the agency from responding to other equally important problems. Compelling an agency to subsidize one applicant may preclude payment to others or may impair the agency's ability to perform competently. Examples of these kinds of problems could be multiplied almost without limit.

By themselves, the difficulties inherent in balancing among the different dimensions of control are enough to insure that analysts of the relationship between agencies and their reviewers never lack

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of the past decade that couches arguments for income transfers in the language of due process and constitutional entitlements. See Schuck, supra note 11.

[41] Error tolerance issues have broad implications. For example, a social regulatory agency can assert a virtually limitless claim on resources by adopting health or safety standards designed to eliminate all risk that an undesirable effect will occur. See the discussion of social regulatory agencies at infra text accompanying notes 101-136.

[42] See Association of Data Processing Serv. Orgs., Inc. v. Board of Governors of the Fed. Reserve Sys., 745 F.2d 677, 689 (D.C. Cir. 1984) ("[T]he whole point of rulemaking as opposed to adjudication (or of statutory law as opposed to case-by-case common law development) is to incur a small possibility of inaccuracy in exchange for a large increase in efficiency and predictability."); see also Heckler v. Campbell, 461 U.S. 458 (1983) (upholding the use of medical-vocational guidelines in determining eligibility for Social Security disability benefits).

[43] See DeLong, supra note 2, at 346-47.

for work. Two additional institutional factors complicate matters even further.

The first factor has to do with the biases of the reviewing institutions. The term "agency discretion" means, at its core, the power and duty of the agency to balance all the competing considerations discussed above. Society does not want reviewing institutions to substitute their judgment for that of the agency, because any specific reviewing institution is usually established to protect a particular subset of values, not to analyze the tradeoffs among the full range of values. Courts tend to focus on fairness and procedure, the Department of Justice is usually concerned with statutory interpretation, and the OMB will always grab for the money. Reviewing processes are not intended to replicate the agency's internal decisionmaking but to compensate for potential weaknesses in it. This automatically raises the question of who watches the watchman—how does the system establish procedures to compensate for the weaknesses in the decisionmaking processes of the reviewing institutions themselves?

The second factor involves the somewhat disorderly way in which both agencies and the mechanisms for reviewing them have developed. Some governmental processes, such as personnel practices, budget requests, expenditures, contract awards, and hearing procedures, are very tightly controlled. Others, such as the accountability for actual output or the level of burdens imposed on the private sector, are reviewed quite loosely. As a general rule, it is safe to assume that agencies have an incentive to maximize their discretion and that increasing controls over one activity or area will tend to push an agency to pursue other activities. The most obvious example, one that figures prominently in the analysis of social regulatory agencies, is that tight control over budgets will push agencies to allocate resources through regulation rather than direct expenditure.

This variety of problems surrounding control of agency action is reminiscent of a quip made in other contexts: there are only two kinds of control, too much and too little, and every agency suffers from both. The question is how to lessen the too much and increase the too little.

B. Institutional Processes and Incentive Structures

1. The Scope of Judicial Inquiry

The traditional approach to judicial review consists of three steps, in ascending order of intensity and difficulty. First, the court determines if the proceeding was procedurally correct in that interested parties received the opportunities to participate guaranteed by the Constitution and relevant statutes. Second, the court decides whether the agency properly interpreted its statutory mandate. Third, the court ascertains whether the agency action was substantively within the zone of reasonableness. Depending on the applicable legal doctrine, this final step is essentially a determination of whether the agency evidence was sufficient or the agency action arbitrary.[44]

The courts are most comfortable when assessing the procedural regularity of agency action. They are less eager to interpret the agency's statutory authority, given the extraordinary complexity of some regulatory schemes, but interpretation is a familiar judicial task covered by known rules of decision. The judiciary typically prefers not to reverse an agency on the last of the three tests, largely because the standards are so amorphous and because the chances of illegitimate encroachment on agency expertise and discretion loom so large.[45] If necessary, courts will undertake a substantive review, but judges will try to focus on the strength of the logical link between the agency's data and conclusions rather than on the abstract wisdom of the agency's policy.[46]

Although this is a reasonable approach to review, the courts might profitably consider expanding their purview to include an evaluation of the roles and functioning of other mechanisms of control. A court's role under this conception would be to ensure that somebody somewhere in the system performed adequate qual-

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[44] See, e.g., Weyerhaeuser Co. v. Costle, 590 F.2d 1011, 1024-25 (D.C. Cir. 1978), which sets forth this three-part inquiry.

[45] Cf. Ethyl Corp. v. EPA, 541 F.2d 1, 67 (D.C. Cir.) (Bazelon, C.J., concurring) ("Because substantive review of mathematical and scientific evidence by technically illiterate judges is dangerously unreliable, I continue to believe we will do more to improve administrative decisionmaking by concentrating our efforts on strengthening administrative procedures."), cert. denied, 426 U.S. 941 (1976).

[46] See, e.g., Motor Vehicle Mfrs. Ass'n of United States, Inc. v. EPA, 768 F.2d 385 (D.C. Cir. 1985), cert. denied, 106 S. Ct. 852 (1986).

ity control and to recognize that the somebody need not necessarily be a court. This alternative orientation suggests three possible areas of judicial inquiry—control exercised by the agency's internal processes, by other organs of the executive branch, and by Congress.

The first inquiry involves an examination of the agency's internal decision process—what was earlier referred to as the "internal gyroscope." Here it is necessary to note the distinction between *procedures*, the devices through which the agency interacts with the outside world and ensures that outsiders have adequate opportunity to participate, and *processes*, which include not only procedures but also the internal steps an agency takes in making a decision.[47] It would be possible for a court to consider its review obligation fulfilled if the court assured itself that the decision processes the agency used were reasonably calculated to produce a reasonable result. This approach, which would use a review of the process as a substitute for a review of the substantive result, was implicit in many of the cases of the 1970's dealing with judicial review of agency rulemaking.[48] However, in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*[49] the Supreme Court vehemently rejected judicial imposition of procedures that would give outside parties additional rights of participation in the agency proceedings.[50] In doing this the Court blurred the important distinction between judicial imposition of procedures and judicial review of processes.[51] Consequently, while courts

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[47] For example, an EPA public hearing is a procedural step, whereas referral of a scientific issue to a science advisory board is part of the agency decisionmaking process.

[48] See, e.g., Dunlop v. Bachowski, 421 U.S. 560 (1975); United States Lines, Inc. v. Federal Maritime Comm'n, 584 F.2d 519 (D.C. Cir. 1978); Home Box Office, Inc. v. FCC, 567 F.2d 9 (D.C. Cir.), cert. denied, 434 U.S. 829 (1977); DeLong, supra note 2, at 301-19; Wald, Making "Informed" Decisions on the District of Columbia Circuit, 50 Geo. Wash. L. Rev. 135, 138-40 (1982).

[49] 435 U.S. 519 (1978).

[50] See id. at 547-48.

[51] Admittedly, the distinction between procedure and process can be a fine one. For example, the APA gives an interested party the right to file comments on a proposed rulemaking, 5 U.S.C. § 553(c) (1982), and courts have held that the opportunity for comment must occur before the agency makes a decision. While a court could base this holding on the rights of the party seeking to comment—the "right to comment" has to be more than a sham—it can also base it on the idea that a rational decision process requires the agency to consider comments before making a decision. See Simmons v. ICC, No. 84-1034, slip op., (D.C. Cir. Nov. 12, 1985); cf. Sierra Club v. Peterson, 717 F.2d. 1409 (D.C. Cir. 1983) (fed-

continue to review the appropriateness of agency decision processes, they have no doctrinal label to apply to the exercise.[52]

The second area of inquiry would be an analysis of the control exercised by the executive branch. Depending on the issue, a court might be content to assure itself that some nonagency body, such as the Department of Justice or the General Accounting Office, had reviewed the agency's decision under appropriate ground rules. The courts might also regard the protections offered by the Executive Office review process as an alternative to judicial review, or—under a slightly different conception—the courts might conduct a full-scale inquiry into agency action only if the Executive Office review were inadequate.[53]

The third area of inquiry is perhaps the most difficult—how a court can take the role of Congress into account. This is a complex problem because Congress interacts with agencies at many different levels to promote many different purposes. A comprehensive

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eral agencies have procedural obligation to prepare environmental impact statement before taking any action that might have significant environmental consequences).

[52] Among the many cases that could be cited as "decision process" cases are Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983); American Fin. Servs. Ass'n v. FTC, 767 F.2d. 957 (D.C. Cir. 1985); Small Refiner Lead Phase-Down Task Force v. EPA, 705 F.2d 506, 535 (D.C. Cir. 1983). The D.C. Circuit's "hard look" doctrine reflects this type of analysis. As originally formulated in Greater Boston Television Corp. v. FCC, 444 F.2d 841, 851 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971), the doctrine meant that the reviewing court should assure itself that the agency had taken a hard look at the problems. Moreover, the ubiquitous doctrine of SEC v. Chenery Corp., 318 U.S. 80 (1943), which holds that a court must judge an agency decision solely on the validity of its stated rationale, seems partially designed to promote the rationality of an agency's internal processes. The concept of negotiated regulations suggests an interesting analogy. In a regulatory negotiation, the ultimate result might not be supported by detailed evidence or explained by a single rationale. Nonetheless, a court might uphold the result if the process adequately protected the interests usually protected through judicial review. See Harter, The Political Legitimacy and Judicial Review of Consensual Rules, 32 Am. U.L. Rev. 471 (1983).

[53] As of the time of this writing, this discussion of the possibility of fruitful interaction between OMB review and judicial review has absolutely no relation to reality. The two are viewed by all involved as distinct processes governed by different criteria, almost as if the government is to be run by two entirely different systems of logic—judicial and management/budgetary—that are never allowed to touch. The chief concern of those interested in OMB review, including the courts themselves, seems to be whether the OMB is somehow usurping the functions of the agencies, not how the courts and the Executive Office can function as complementary reviewers, and the battle lines tend to be court and agency versus the OMB. The primary reason for this strange turn of events is the confusion over the social regulatory agencies. This problem is discussed at infra text accompanying notes 101-136.

analysis would have to consider: (1) Congress' original action in giving statutory direction to the agency, (2) the interaction of substantive legislation with budgetary authority, (3) the role of conventional oversight hearings and other forms of congressional review, (4) the efforts of individual members of Congress to promote particular statutory interpretations through manipulation of the legislative history, and (5) the use of explicit or implicit intimidation by members of Congress.

Naturally a court must eschew any attempt to dictate to Congress, since the courts lack the authority to run the affairs of a coequal branch of government. It would be possible, though, for a court to examine how the various kinds of congressional interactions with the agency influence agency behavior; the court would then determine how it should carry on its own review in light of the congressional action. For example, a court may lack authority to make the *Congressional Record* a real record of the proceedings on the floors of the House and Senate, but the court can determine how much weight to give the *Record* in construing congressional intent.[54] A court cannot insist that Congress issue a conference report before it passes a bill, but in ascertaining congressional intent the court can discount the authoritativeness of a report issued long after the bill's enactment.[55]

2. *The Importance of Agency Incentive Structure*

The preceding section suggested that courts look at agency decision processes to determine if they are "reasonable" or "appropriate." This formulation is a bit abstract for everyday use, especially considering the broad range of agency decisions to which it must be applied. If judicial review along these lines is to be effective without being overintrusive, courts will have to develop more explicit analytical constructs than now exist. These constructs must delineate what kinds of agency processes are appropriate for what kinds of decisions.

An obvious starting point for developing criteria of appropriateness is an analysis, in terms of the taxonomy set forth in Part I, of

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[54] See Gregg v. Barrett, 771 F.2d 539 (D.C. Cir. 1985).

[55] See Melnick, The Politics of Partnership, 45 Pub. Ad. Rev. 653, 655-56 (1985), for an analysis of the courts' function in interpreting and applying legislative intent concerning administrative programs.

the functions the agency performs. It is important to recognize that problems with an agency's decisionmaking process will vary with the nature of the agency and its functions. Providing a public good like a highway system or national defense is a different enterprise from allocating subsidy funds or regulating a sector of the economy, and the inherent vulnerabilities of the agency process will vary from one sort of enterprise to another. The nature of the enterprise will also determine the pressures on an agency to exercise certain forms of authority and the strength of the agency's internal incentives to resist or succumb to the pressures.[56] Since the notion of adverting to agency incentive structure is not a familiar one in the legal literature, some further explanation is necessary.

To start with an elementary example, an agency's budget must be carefully controlled by an outside body, because no agency can be trusted to determine its own proper share of available resources. No agency charged with producing a public good or with subsidizing a particular constituency knows the meaning of the word "enough" or the possibility of restraint. On the other hand, if the outside body maintains control of the agency's budget and the agency observes elementary standards of fairness and honesty, there is little cause for concern over how the agency produces public goods or allocates subsidy funds. The agency has no incentive to operate in a manner that undermines the overall purposes of the program.

Just as an agency is subject to strong internal incentives to attempt to expand its budget, it also has incentives to try to extend its legal power as far as possible. It is hardly surprising, therefore, that the courts have always retained the last word on the scope of agency authority.[57]

The interplay of agency functions, pressures, and incentive structures has a more subtle dimension as well, as seen in the contrasts between two different types of agencies. The first type consists of such regulatory agencies as the Interstate Commerce Commission, the Federal Communications Commission, the Securities

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[56] This discussion necessarily glosses over many features of the individual agencies' decision processes. An article of this brevity has no other choice, but a more sophisticated analysis would try to factor in a detailed consideration of each agency's incentive structures. See, e.g., The Politics of Regulation (J. Wilson ed. 1980).

[57] See Levin, supra note 8, at 104-07.

and Exchange Commission, and the other great Progressive Era and New Deal agencies that have furnished the context for most legal thinking about judicial review. Historically, these agencies were responsible for overseeing discrete sectors of the economy. Their basic incentives were to keep the sector functioning with reasonable efficiency, to pacify the major players in the political game, and to allow industry clients to earn modest monopoly profits, provided the clients shared those profits with organized labor and did not unduly burden the public.[58] As long as these basic incentives prevail, judicial review of these agencies' activities is only marginally important. The courts can concentrate on preserving fairness values because the closed loop of the agency decision process adequately protects other interests.

Contrast this judicial review of a traditional agency with the problems presented by review of a social regulatory agency such as OSHA. The regulatory goal of OSHA is amorphous because the agency cannot determine when "enough" worker health and safety has been achieved.[59] OSHA does not bear responsibility for the continuing health, or even the continuing existence, of any particular sector of the economy, and it has been seriously argued that the agency *must* shut down whole industries if they cannot be made absolutely safe.[60] OSHA is a subagency of the Department of Labor, and involved parties, such as labor, management, and Congress, regard the agency as representing the interests not simply of labor, but of unionized labor in particular.[61] The agency's authority extends across the entire economy, making it virtually impossible for OSHA to tailor rules to individual circumstances or to know the individual circumstances of the regulated firms. The agency has the potential to make an enormous impact on expenditures of national wealth; its authorizing statute contains few obvious regulatory stopping points, and the restrictions that do exist are phrased in obscure terms.[62] Consequently, the agency has little in-

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[58] See Lilley & Miller, supra note 11, at 52-54. The deregulation movement has changed this, of course.

[59] See Industrial Union Dep't v. American Petroleum Inst., 448 U.S. 607, 662-664 (1980) (Burger, C.J., concurring).

[60] See AFL-CIO v. Brennan, 530 F.2d 109, 122-23 (3d Cir. 1975).

[61] See Kelman, The Occupational Safety and Health Administration, *in* The Politics of Regulation, supra note 56, at 236.

[62] See Industrial Union Dep't v. American Petroleum Inst., 448 U.S. 607, 671-88 (1980) (Rehnquist, J., concurring).

centive at any point to refrain from forcing further expenditures of private resources. The agency's power to levy on private resources is virtually unlimited, and its decisions are not reviewed as either taxes or expenditures.

When the two types of agencies are characterized in this fashion, it becomes clear that reviewing institutions cannot logically use the same set of assumptions and techniques to control a social regulatory agency as they use to control a traditional agency.[63] Because of their different incentive structures and basic goals, the two types of agencies present incommensurable problems. It is not accidental that generations of American Presidents saw little need to exert control over the classic regulatory agencies, while the rise of the social regulatory agencies has produced a series of presidential initiatives designed to increase control over agency actions.[64]

The familiar case *Citizens to Preserve Overton Park v. Volpe*[65] illustrates another dimension of institutional incentive structures. The case involved a decision by the Secretary of Transportation (i.e., a decision by roadbuilders) to take parkland for a highway. The applicable statute provided that parkland could be used only if no feasible alternative route existed.[66] Whatever legal doctrine might say about deference, presumptions of regularity, and so forth, no veteran of the government would reasonably expect roadbuilders to be adequate guardians of the nation's parks. Since roadbuilders pay less for parkland than for developed property, they have an incentive not to protect the nation's parks. Consequently, the Supreme Court's application of a "searching and careful" standard of review to the Secretary's decision in *Overton Park* seems sensible.[67] The same standard might be unnecessarily intrusive when applied to situations in which the roadbuilders' incentives were more congruent (or at least less in conflict) with the values to be protected.

To summarize, because of their internal incentives agencies will

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[63] See Lilley & Miller, supra note 11; Schuck, supra note 11.

[64] See Exec. Order No. 12,498, 50 Fed. Reg. 1063 (1985); Exec. Order No. 12,291, 3 C.F.R. 127 (1981), reprinted in 5 U.S.C. § 601 app. at 431-34 (1982); Exec. Order No. 12,044, 3 C.F.R. 152 (1978).

[65] 401 U.S. 402 (1971).

[66] Id. at 405.

[67] See id. at 415-17.

naturally do some things well and others badly, favoring some interests and disfavoring others. Courts understand this reality and should seriously consider it in developing standards for review. At present, courts discuss agency incentives occasionally[68] but do not seem to engage in systematic analysis. Most importantly, courts should combine analysis of incentive structures with attention to agency decision processes. Common sense would indicate that an agency demonstrating an awareness of its own potential institutional biases, and compensating for them, deserves more deference than an agency that accentuates its biases.[69]

3. *Competencies and Biases of Reviewing Institutions*

In addition to recognizing the different incentives and structural biases of agencies, courts should realize that reviewing institutions themselves will tend to have characteristic strengths and shortcomings when they examine agency decisions. Courts have difficulty dealing effectively with control problems that require the coordination of different programs, the resolution of interagency policy conflicts, or the resolution of a conflict between specific congressional directives and broader but more inchoate national policies. The nature of the judicial process, which relies on a record developed by a particular set of litigants and decides conflicts on the narrowest available grounds, limits a court's ability to perform an effective coordinating function. In particular, courts are ill-equipped to protect the polity against "death of a thousand cuts" problems arising from the steady accretion of minor difficulties. Moreover, like any other institution, a court may tend to place too much weight on the values with which it is most familiar—a court may overemphasize formalized procedures[70] or may force an

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[68] See, e.g., Maggard v. O'Connell, 671 F.2d 568, 571-72 (D.C. Cir. 1982).

[69] In at least two cases the D.C. Circuit did not look at an agency's incentive structure when such an examination might have been useful. See United Steelworkers v. Marshall, 647 F.2d 1189, (D.C. Cir. 1980) (involving agency use of consultants), cert. denied, 453 U.S. 913 (1981); Association of Nat'l Advertisers, Inc. v. FTC, 627 F.2d 1151 (D.C. Cir. 1979) (involving agency prejudgment of issues under consideration in rulemaking proceeding), cert. denied, 447 U.S. 921 (1980) . For an examination of the latter case, see DeLong, Book Review, 80 Mich. L. Rev. 885 (1980) (reviewing The Politics of Regulation (J. Wilson ed. 1980)).

[70] See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 543-49 (1978).

agency to treat error tolerance the way a court does.[71] Despite these important limitations, courts perform some functions particularly well, such as protecting due process values and restricting agencies to their proper jurisdiction. Courts are also potentially effective at reviewing agency error tolerance decisions and at assessing whether an agency applied the appropriate decision process to the right kind of information.[72]

The executive branch also has certain strengths and weaknesses in controlling agency behavior. For example, the Executive Office has a better chance of achieving the broad interagency policy coordination that courts cannot.[73] By contrast, one would be reluctant to entrust the OMB with the protection of due process values.

4. The Problem of Legislative Intent

The most difficult issue of contemporary institutional performance concerns the Congress. As noted earlier, the most important instruments of control over agency action are the words in law books establishing the parameters within which all the actors in the system operate. It is obvious that serious systemic problems in writing these words will have effects on all parts of the administrative system.[74]

In our democratic society Congress, acting as a whole, enacts the laws. Sometimes, of course, the statutory language is not entirely clear or its application to a particular situation is in doubt, resulting in a need for courts to interpret the statutes. The rules of statutory construction essentially require the courts to look behind a statute to discover the intent of those who enacted it.[75] In the

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[71] See Wald, Judicial Review of Economic Analyses, 1 Yale J. Reg. 43 (1983); supra text accompanying notes 40-43.

[72] See Wald, supra note 71.

[73] See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984); Sierra Club v. Costle, 657 F.2d 298, 406 (D.C. Cir. 1981).

[74] For example, a vague or overly grandiose statutory mandate makes it almost impossible for agency officials to instruct staffs on their duties, to resist constituent pressures, or to evaluate internal performance. Since the staff will have no common conception of the agency's function, disorganization and conflict will set in. Reviewing institutions will be equally puzzled and may have a particularly difficult time resisting the impulse to promote values they hold dear at the expense of other dimensions of agency performance.

[75] The interpretation of legislative intent is the subject of a large literature. See, e.g., J. Hurst, Dealing with Statutes 31-65 (1982); Linde, supra note 14, at 223-35; Wald, Some Observations on the Use of Legislative History in the 1981 Supreme Court Term, 68 Iowa L. Rev. 195 (1983).

modern Regulatory State, however, finding "congressional intent" has become increasingly troublesome. Legislators and their staffs have become skilled at gaming the system. Legislation appears to be made deliberately ambiguous, contradictory, or meaningless,[76] and the legislative "history" often seems unrelated to the actual thoughts of the legislators.[77] The congressional intent that courts strive to find may be nonexistent and its ultimate pronouncement an exercise in legal fiction.[78]

This general situation has several consequences. As the number of laws and programs increases, the level of attention that an individual legislator can devote to any one area declines. Legislators must rely on specialists, creating opportunities for these specialists to manipulate statutory ambiguity and legislative history.[79] As legislative history becomes lengthier and more convoluted, power over programs becomes more concentrated in the "experts." The number of people who can truly claim to understand the ins and outs of the interplay between the Clean Air Act or the Resource Conservation and Recovery Act and their respective legislative histories is very small. The sacrifice of time, energy, and mental health required to join their ranks is enormous. The only real players are the members of the agency staff who administer a program, some of the congressional staff, and a few industry and public interest

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[76] See Industrial Union Dep't v. American Petroleum Inst., 448 U.S. 607, 680-82 (1980) (Rehnquist, J., concurring).

[77] Several congressmen, upset that the *Congressional Record* did not print the actual words of the legislators, unsuccessfully sued for a verbatim record. The court refused to interfere with Congress' decision on how to compile its record. See Gregg v. Barrett, 771 F.2d 539 (D.C. Cir. 1985).

[78] It is difficult to read any extensive analysis of legislative intent and not emerge with the feeling that the legislative record is the legal equivalent of a television "docudrama." Although the observer finds an occasional glimpse of reality, its appearance is usually random. See, e.g., TVA v. Hill, 437 U.S. 153, 172-93 (1978); see also supra text accompanying notes 14-17 (multiple purposes of statutes make unitary congressional intent difficult to discern). A remark attributed to the late Judge Leventhal of the D.C. Circuit sums it up: citing legislative history is like "looking over a crowd and picking out your friends." Wald, supra note 75, at 214.

[79] Specialists within the agencies engage in similar manipulation. For instance, conventional wisdom says that an agency likes to be given discretion. This may be true of the agency's top officials, but program advocates within the agency may well not desire discretion because they can best achieve their goals if Congress makes certain types of action compulsory rather than discretionary. If the statute does not contain compulsory language, the program advocates may find such compulsion by "interpreting" the legislative history.

lobbyists.[80] No one can review their work in a genuinely competent way—not the agency head, not a court, not the press, not the OMB, not the members of Congress. If reviewing institutions do not wish to acquiesce in this system, they must either make an inordinate investment in mastering a lot of esoterica or act essentially at random.

This increasing balkanization of congressional intent causes Congress to ignore problems of program interaction and impact. Although Congress may declare that one particular value, such as protection of snail darters,[81] has absolute priority over other social interests, Congress cannot possibly maintain that every value has priority over every other value. A rational person evaluating a program would obviously want to know how the program interacts with a program enacted last year or how it may affect a new one scheduled for next year. This person would also want to know which programs are to be preferred. Congress, however, has no mechanism for addressing these issues, and partisans of particular programs have little interest in changing the system. Legislators can maximize the well-being of their favorite programs by creating legislative history that asserts the priority of these programs and by relying on the likelihood that a reviewing court will ignore coordination issues and will not consider any legislative history beyond that dealing with the particular programs at issue.

Despite the serious problems presented by the increased specialization of Congress and the decreased accuracy of legislative history, few legal doctrines address these issues. Obviously, courts have no constitutional power to control the internal workings of the legislature, but they could try to explore congressional intent more accurately by developing doctrines that reflect some of the realities of the modern Congress as an institution.

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[80] As the quantity of this specialized information increases, the administration of specific agency programs becomes more insular because no individual can be an expert on, or even conversant with, more than a few of the complex regulatory statutes at a time. This lack of broad vision may cause an agency to produce several different approaches to virtually identical statutory language or to produce contradictory approaches to the same problem.

[81] See TVA v. Hill, 437 U.S. 153 (1978).

C. The Special Problem of Boundaries

One of the dimensions of control of agency action discussed in Part I was the need to keep agencies within the boundaries established by Congress. The most obvious boundary problems arise when an agency attempts to stretch its authority too far. These problems can present intricate issues for a reviewer, but current legal doctrine deals with them fairly well, and these issues do not raise novel problems of control. More subtle boundary problems, though, present greater challenges to the prevailing framework of administrative law.

There is an aphorism "it is hard for the government to do just one thing," meaning that any action taken for one purpose is almost certain to have ancillary effects, for good or ill. An agency can take advantage of this truism and use its authority to take an action precisely because it wants to achieve the ancillary effects, even though straightforward efforts to achieve these effects would be beyond the agency's statutory mandate. An example of such leveraging of authority from one area into another would be for a local fire marshal to prohibit smoking in a public place, ostensibly for fire protection reasons but actually in response to concerns about the health consequences of smoking. The result may be desirable, but the process is disturbing.

A number of recent cases arguably involve agency efforts to leverage authority from one area into another. The FCC, in the view of the D.C. Circuit, exceeded its authority over broadcast licenses when it promulgated a policy that it perceived to be "a Good Idea [that] would lead to a Better World."[82] The Department of the Navy tried to use its authority to make an economic determination as a backdoor way of promoting particular foreign policy objectives.[83] As Professors Bruce Ackerman and William Hassler have discussed at length, authority granted to promote clean air can easily be perverted to promote an inefficient program of economic

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[82] Steele v. FCC, 770 F.2d 1192, 1199 (D.C. Cir. 1985). The court ruled that an extension of preference to women in broadcast licensing could not be justified as a way of promoting program diversity. The dissent agreed with the majority's premise that "the FCC's public interest mandate does not give [it] roving discretion to do good deeds," id. at 1200 (Wald, J., dissenting), but disagreed strongly with the application of this premise to the facts of the case. See id. at 1200-12.

[83] See Rainbow Navigation, Inc. v. Department of the Navy, No. 85-6104 (D.C. Cir. Jan. 27, 1986).

protection.[84] Such efforts to leverage authority are likely to be both more prominent and more troublesome in the future, for at least four reasons.

The first is that the steady growth of the Regulatory State has greatly increased the number of grants of authority that agencies may exploit. Also, the very fact that there has been an explosion of regulatory authorities means that any specific statute, and any specific exercise of authority, is less visible than it would have been two or three decades ago. In a crowded forest, no tree stands out. Furthermore, even when an exercise of authority becomes visible, legal doctrines that might limit the use of leveraging are not well-developed. For all of these reasons, almost any grant of regulatory or program authority has the potential to become a valuable franchise for an interest group or policy entrepenuer to acquire, even if the acquirer's interests have little to do with the ostensible purposes of the authority.

The second reason to worry about leveraging concerns the interactions of Congress with the agencies. A program gains legislative backing by appealing to diverse groups, and the motives behind individual votes for a bill, or behind an individual legislator's continuing support for a program, may have little to do with its formally stated purposes.[85] If a member of Congress is primarily concerned with the ancillary benefits of a program, he has many opportunities to pressure the agency to emphasize these benefits, even at the risk of contravening the "official" congressional intent. The growth in the number of programs in the Regulatory State, combined with the growth in congressional staffs, has increased the system's susceptibility to such program distortion.[86]

The Supreme Court's disapproval of the legislative veto[87] may have removed one powerful source of congressional pressure on agencies to engage in leveraging. The basic incentives remain, however, and the stakes are high enough to guarantee that the problem will persist.[88]

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[84] See B. Ackerman & W. Hassler, Clean Coal/Dirty Air (1981).

[85] See supra text accompanying notes 14-15.

[86] See, e.g., Malbin, Congressional Committee Staffs: Who's in Charge Here?, 47 Pub. Interest 16 (1977).

[87] See Immigration and Naturalization Serv. v. Chadha, 462 U.S. 919 (1983).

[88] Louis Fisher, a leading scholarly commentator and supporter of the legislative veto, says:

The third reason for concern about leveraging is that courts may confront the issue directly when an agency decides to repeal a regulation. Whatever an agency's original rationale for promulgating a regulation, there are likely to be ancillary beneficiaries. If the agency decides to repeal a regulation that no longer serves its original purposes, the ancillary beneficiaries may object.[89] When the D.C. Circuit recently faced this issue, the court ruled that an agency could not be compelled to continue a practice that served only the interests of ancillary beneficiaries.[90] The court left open the question of whether the agency could *voluntarily* decide to continue the practice, however. This leveraging issue will certainly put continued pressure on the courts. Individuals receiving benefits as a result of a regulation will resist losing them, however far from the agency's original contemplation the benefits are. Their resistance will raise novel questions of law, especially if the leveraging problem combines with intricate questions concerning the "zone of interests" approach to standing[91] and with the increasing tendency of the legal system to treat some regulations as entitlements of prospective beneficiaries.[92]

Fourth, the leveraging issue may arise when standards developed under one statute are transplanted to other contexts. The field of health, safety, and environmental protection offers some convenient examples of this aspect of the leveraging problem. The statutes involved are immensely complex, so the following analysis is somewhat oversimplified, but the two crucial dimensions of most of these statutes are risk and cost. In these statutes, Congress usually provides that the EPA can or must impose controls on hazardous materials. At the same time, Congress normally controls the

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> Neither agencies nor committees want the static model of government offered by the Court [in *Chadha*]. The inevitable result is a record of non-compliance, subtle evasion, and a system of lawmaking that is now more convoluted, cumbersome, and covert than before. In many cases, the Court's decision simply drives underground a set of legislative and committee vetoes that had previously operated in plain sight.

Fisher, Judicial Misjudgments About the Lawmaking Process: The Legislative Veto Case, 45 Pub. Ad. Rev. 705, 710-11 (1985).

[89] See DeLong, Repealing Rules, Regulation, May-June 1983, at 26, 30.

[90] See Simmons v. ICC, 757 F.2d 296, 299 (D.C. Cir. 1985).

[91] In 1970, the Supreme Court replaced the "legal injury" test with the expansive "zone of interest" test. See Association of Data Processing Serv. Orgs., Inc. v. Camp, 379 U.S. 150, (1970). See generally J. Vining, Legal Identity 1-10 (1978) (discussing the standing doctrine in public law).

[92] See, e.g., United Steelworkers v. Auchter, 763 F.2d 728 (3d Cir. 1985).

Agency's action by limiting the amount of private expenditures required or the level of technology that the Agency can demand from the regulated industries. To understand the scheme established by a particular statute or even by a particular subpart of a statute, it is important that each of these dimensions of the regulatory scheme be read in the context of the others.

Two statutes exemplify this congressional ambivalence.[93] The first example is the Safe Drinking Water Act (SDWA), which directs the EPA to set two standards for any given contaminant in drinking water. The initial standard is the Recommended Maximum Contaminant Level (RMCL),[94] which is a nonenforceable standard based solely on health considerations. Formulation of the RMCL is not to be tainted by considerations of cost or practicality.[95] In the EPA's view, this standard represents an ultimate social aspiration and is to be set at a level at which there is no possibility that the contaminant would have an adverse effect on humans.[96] The enforceable regulatory standard for a contaminant under the SDWA is the Maximum Contaminant Level (MCL). The EPA is required to set this standard as close to the RMCL as is "feasible," taking into account the realities of municipal water system technology and financing.[97]

The second statutory example involves the Resource Conservation and Recovery Act (RCRA), which contains a definition of "hazardous waste" that could be interpreted as allowing the EPA to list almost every substance in the world as hazardous.[98] The reg-

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[93] Principles governing truth-in-law-review-writing require the author to disclose that he has worked with interested industries on both the Safe Drinking Water Act and the Resource Conservation and Recovery Act, and on the Clean Air Act issues discussed in this article. The author has also had extensive experience as an employee of the federal government. The reader can discount as he or she sees fit for this complicated set of crosscutting biases.

[94] See 42 U.S.C. § 300g-1(b)(1)(B)(3) (1982).

[95] See H.R. Rep. No. 1185, 93d Cong., 2d Sess. 19-20, reprinted in 1974 U.S. Code Cong. & Ad. News 6454, 6472.

[96] See EPA National Primary Drinking Water Regulations; Volitile Synthetic Organic Chemicals, 50 Fed. Reg. 46,880, 46,884 (1985) (to be codified at 40 C.F.R. § 141).

[97] See 42 U.S.C. § 300g-1(b)(3) (1982).

[98] The legislation states:

> (5) The term "hazardous waste" means a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may—
>
> (A) cause, or significantly contribute to an increase in mortality or an increase in

ulations the EPA establishes to control these substances, however, must be "necessary to protect human health and the environment,"[99] a formulation that seems to contemplate that the Agency should control only those risks that exceed some reasonable level.

Obviously, when the EPA sets an RMCL or decides whether to list a substance as hazardous, the Agency officials will consider the practical limits imposed by the other sections of the statute. For example, the Agency will probably be willing to run a high risk of setting unnecessarily protective RMCLs because it believes that the process of setting MCLs will prevent undue financial burdens on municipalities. The Agency will also be indifferent to the problems inherent in classifying an everyday substance as hazardous waste as long as the Agency thinks it will have the opportunity to reconsider the real risks of the substance in determining whether regulation of the substance is "necessary to protect human health." Phrased in more general terms, the Agency will make decisions on the tolerable risk of classification errors in light of other statutory mechanisms limiting the consequences of errors that do occur.

The leveraging problem in this area arises because the EPA makes these preliminary decisions on RMCLs and hazardous wastes in freestanding administrative proceedings that are not *formally* dependent on the Agency's later decisions to impose the actual regulatory requirements. These preliminary decisions, moreover, may be used in extraneous contexts that are not subject to the checks and balances created by the second stage of the original statutory scheme. For example, because of provisions in the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) the Agency's decision to list a substance as hazardous under the RCRA has an important impact on the civil liability and insurability of firms handling the substance.[100] The impact of the RCRA extends beyond the scope of the Act itself and into ar-

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serious irreversible, or incapacitating reversible, illness; or

(B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.

42 U.S.C. § 6903(5) (1982).

[99] 42 U.S.C. § 6922 (1982).

[100] See 42 U.S.C. § 9607 (1982) (discussing the civil liability consequences of such a listing); 42 U.S.C. § 9608 (1982) (discussing the insurance ramifications).

eas in which the built-in limitations on the Act do not operate. Similarly, an RMCL, set through a process specifically designed to avoid hard judgments about health requirements and to provide a statement of zero-risk aspirations, could conceivably become a "federal health standard" for purposes of cleanup requirements, state liability decisions, and the evening news.

This aspect of the leveraging phenomenon raises immensely complex issues of agency discretion and external review. Courts may have to determine whether an agency acts arbitrarily if it fails to consider the extraneous contexts in which an agency classification might be used. The courts may also have to determine whether those affected by a decision have a right to an agency statement that cautions against the use of the decision outside the original context or at least specifies the nature of the original context. Finally, courts may face difficult issues of statutory interpretation if Congress incorporates part of a statute in a subsequent law without adverting to the original statutory context.

D. The Current Battleground: Social Regulatory Agencies and Compulsory Agency Action

It is appropriate here to confront two overlapping topics that are generating intense current controversy—the functions of the social regulatory agencies and the extent to which Congress has removed their discretion to impose or not impose regulations. A major theme of this article is that no analysis of the issues presented by social regulatory agencies can make sense unless it is informed by a broad vision of administrative behavior; to try to understand isolated statutory provisions one at a time leads to misunderstanding. Thus, it is important to begin an analysis of the problem at hand by defining the context.

A browse through the United States Code indicates that Congress often exhibits a great generosity—perhaps even a grandiosity—of spirit. The preamble to a Department of Housing and Urban Development statute does not express a simple desire to help poor people, or even to subsidize homebuilders or lending institutions. It says, "The Congress hereby declares that the general welfare and security of the Nation and the health and living standards of its people require . . . the realization as soon as feasible of the

goal of a decent home and a suitable living environment for every American family . . . ."[101]

The preamble to a highway bill does not say, "Roads are useful," or even, "The contractors kicked in a bundle to the last campaign," but, "It is hereby declared that the prompt and early completion of the . . . Interstate System is essential to the national interest . . . ."[102]

Education is supported because "[T]he Congress . . . declares it to be the policy of the United States of America that every citizen is entitled to an education to meet his or her full potential without financial barriers."[103]

Nor is the economy neglected:

> The Congress hereby declares that it is the continuing policy and responsibility of the Federal Government to use all practicable means . . . to . . . promote full employment and production, increased real income balanced growth, a balanced Federal budget, adequate productivity growth, proper attention to national priorities, achievement of an improved trade balance . . . and reasonable price stability.[104]

The mentally retarded have been remembered: "Persons with developmental disabilities have a right to appropriate treatment, services, and habilitation for such disabilities."[105]

Workers are protected: "The Congress declares it to be its purpose and policy . . . to assure as far as possible every working man and woman in the Nation safe and healthful working conditions . . . ."[106] "The Secretary, in promulgating standards dealing with toxic materials . . . shall set the standard which most adequately assures, to the extent feasible, . . . that no employee will suffer material impairment . . . ."[107]

Environmental protection, of course, is also taken into account: "[T]he Administrator shall prescribe an emission standard for [hazardous air] pollutant[s] . . . . The Administrator shall establish any such standard at the level which in his judgment provides

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[101] 42 U.S.C. § 1441 (1982).
[102] 23 U.S.C. § 101(b) (1982).
[103] 20 U.S.C. § 1221-1 (1982).
[104] 15 U.S.C. § 1021(a) (1982).
[105] 42 U.S.C. § 6010(1) (1982)
[106] 29 U.S.C. § 651(b) (1982).
[107] 29 U.S.C. § 655(b)(5) (1982).

an ample margin of safety to protect the public health . . . ."[108]

That Congress expresses such hopes is not surprising. They are part of motherhood-and-apple-pie politics, and everyone knows that the statements represent ideals, not plans. Congress can enact high sentiments into law precisely because they do not normally create enforceable rights. Before these sentiments are translated into real claims on government or society, Congress must go through the additional process of establishing the administrative machinery and appropriating the money to carry them out. The final choices and hard tradeoffs are made in the budget process, and it is the existence of this backup control mechanism that gives Congress the freedom to enact grandiose organic legislation. Without appropriations the high purpose expressed in the HUD statute does not give a citizen the right to sue anybody for a decent home, nor does it allow HUD to commandeer resources from the private sector for homebuilding.

A statute's statement of purposes or goals—whether contained in a preamble or embodied in a later operational section—can conveniently be viewed as the program's "accelerator." It provides the impetus for movement. The more mundane processes of government, such as budget and staffing decisions, are the "brakes," limiting the speed at which the program can move. The supporters of any given program, both inside and outside the government, would be greatly pleased if the budget brakes disappeared and the purposes accelerator remained. This would free them from the need to show that their program deserved priority over competing claims on resources and would give them a preemptive claim on the nation's resources based only on the abstract highmindedness of their cause viewed in isolation.

During the 1970's, various developments gave supporters of many programs colorable claims that Congress *had* removed the budgetary brakes. Detailed analysis of these developments would range far beyond the scope of this article, but it is possible to sketch some of them in outline. Centrifugal forces in Congress tended to place the formulation of statutes in the hands of subcommittee activists, who became skilled at manipulating the legislative history so statutes, interpreted by conventional rules, bore

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[108] 42 U.S.C. § 7412 (b)(1)(B) (1982).

meanings that Congress as a whole might never have adopted.[109] Another crucial factor was the vast increase in the number and size of federal programs granting financial aid to the states for specific purposes. In a time of budget stringency, Congress found it easier to make statements about desirable values by giving money to the states and attaching conditions instead of appropriating federal money.[110]

The most important development was the increasing reliance on the social regulatory agency, an institution fundamentally different from other sorts of governmental bodies.[111] Unlike a classic economic regulatory agency, which has the fundamental goal of ensuring that a particular sector of the economy functions at a satisfactory level, a social regulatory agency tends to have limitless goals. It is difficult to determine when society has sufficiently protected public health or safety, removed environmental contamination, or eliminated discrimination and unfairness. In a fundamental sense, it is impossible to complete such tasks. One can always imagine another turn of the ratchet that will make things even safer or purer or fairer, however marginal the improvement might be.

A specific example will illustrate the problem. Section 112 of the Clean Air Act requires the EPA to establish emission standards for certain pollutants at a level that will "protect the public health."[112] What does this standard mean—that no instances of disease may occur, that the EPA is to act only if people begin dying in the streets, or something in between? If the answer is "in between," then *where* in between, and by what principles does the Agency decide? Must the administrator take account of public health in a broad sense—should he look at the health effects that would be caused by limiting emissions of a substance as well as those that would result from allowing the emissions?[113] Is the administrator even allowed to look at these issues? Or at correlations between national wealth and health? Must he compare the health benefits of expenditures mandated by EPA regulations with those that

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[109] See Malbin, supra note 87, at 30-31.

[110] See, e.g., Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1, 18-27 (1981) (holding that conditions attached to federal grant do not create enforceable rights).

[111] See supra notes 59-62 and accompanying text.

[112] 42 U.S.C. § 7412(b)(1)(B) (1982).

[113] See, e.g., Huber, Safety and the Second Best: The Hazards of Public Risk Management in the Courts, 85 Colum. L. Rev. 277, 314-18 (1985).

might result from direct expenditures in the health care system? Can he do so?

For a traditional agency such questions about the logical limits of its basic goals are difficult but not paralyzing. The organic legislation points the agency in the desired direction, while the budget process puts a brake on the agency's pursuit of never-to-be-attained perfection. "National defense" is a theoretically limitless goal, but limits are nevertheless established.[114]

A social regulatory agency is different. It acts largely by issuing commands to the private sector or to other levels of government, so the checks imposed by the budget and appropriations processes have little practical effect. The only limits on the agency's ability to compel regulated parties to make expenditures are those inherent in the language of the original statutory authorization. This means that the administrators of a social regulatory program have the option of using statutory interpretation to eliminate resource constraints on their programs. Given conventional legal doctrines of deference,[115] which were forged in the quite different context of Progressive Era and New Deal regulatory agencies, these agency interpretations are likely to stand. If the statute says the EPA administrator shall impose such regulations as are "necessary," then why should he not decide that it is necessary to spend as much as he pleases, or as much as would please an important constituency?

It would never occur to anyone to give the Secretary of Housing and Urban Development or the Secretary of Defense discretion to decide how large his department's budget should be, with no limitation other than a congressional directive that his expenditures be "reasonable" or "necessary in his judgment" to carry out the mission set forth in the organic legislation. It therefore seems odd to accept as axiomatic that the EPA administrator should have this same degree of authority over social resources simply because his decisions are not reviewed in the budget process.

The growth of social regulatory agencies would have created great problems for the government if agency heads had all made preemptive claims on social resources. The agencies, though, can

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[114] See, e.g., L. Aspin & J. Kemp, How Much Defense Spending is Enough? (1976). It is interesting to remember that in the 1960's program budgeting and cost-benefit analysis were the liberal's attempts to keep defense spending under control.

[115] See Levin, supra note 8, at 120-21.

exploit the remove-the-brakes philosophy only sparingly. It might be possible for a few programs to attain the status of blank-check entitlements, but it is not possible for all programs to be treated this way, especially when their goals have no inherent limits.[116] Consequently, it was almost inevitable that success in expanding agency authority[117] would eventually generate countervailing political pressures to bring administrative decisions under the control of the President. To continue with the example of the Clean Air Act, the EPA, responding at least in part to White House pressure, is trying to avoid the more extreme interpretations of section 112.[118]

This is not the end of the story, however. A program advocate seeking unlimited authority over social resources has two further arguments to make. The first is that the President cannot control regulations, that his only recourse against an irresponsible agency is to fire the agency head.[119] This narrow view of presidential

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[116] This discussion addresses the competing claims that agencies make on national resources. Richard Cooper, the former chief counsel of the FDA, has captured the essence of this problem in his comments on an analogous issue—the allocation of internal agency resources:

> Generally, the complaining party's real problem is that there have been *too many* winners or that he and people like him have themselves won too many times or won victories that are too sweeping. Politicians love to make winners, so they pass statutes, just as governments like to make people feel well-off, so they print money. Your dollar today doesn't buy as much as a dollar ten years ago because there are too many other dollars in circulation today. The complaining party is both the beneficiary and the victim of a political inflation that operates very much like monetary inflation: he is a beneficiary because he is, indeed, a winner; but he is a victim because his victory doesn't mean what it once might have—it doesn't mean that his statutory mandate will be effectively implemented. To achieve that kind of victory, he must win again and again, in appropriations processes, and in the other political and public processes that influence the implementation of federal programs. Enactment of a modern programmatic statute is not the end of the political process, with the rest left for the courts: it is merely the end of the introductory phase. A long course in political decisionmaking remains.

R. Cooper, Judicial Control of Agency Priorities 20-21 (unpublished paper delivered at the Food and Drug Law Institute Seminar on "Legal Issues of the Over-the-Counter Review: Present and Future," March 10, 1983) (copy on file with the Virginia Law Review Association).

[117] See L. White, Reforming Regulation: Process and Problems 47-70 (1981) (discussing EPA efforts to regulate emissions of photochemical oxidant).

[118] See EPA Proposed Standard for Stationary Emitting Sources of Radionuclides, 40 C.F.R. §§ 61.90-61.108 (1985).

[119] See Sierra Club v. Costle, 657 F.2d 298, 405 (D.C. Cir. 1981). For an "independent" agency, even the power to fire may not exist. See Humphrey's Ex'r v. United States, 295 U.S. 602 (1935).

power over agencies raises complex issues. Suppose, for example, that the President issued an Executive order making the Attorney General or the Director of the OMB the official interpreter of all statutes on behalf of the executive branch. Could or should a court or Congress reverse this decision, or is it inherently part of the President's constitutional power to see that the laws are faithfully executed?[120] Such questions are interesting but probably not crucial, since the power to fire the agency head, without more, is probably enough to allow a President to impose his will on the agency.

The program advocate's second argument is that by the terms of its statutory mandate the agency itself *cannot* stop regulating until it reaches the amorphous goal of "health" or "safety" or "fairness." This argument is equivalent to the contention that Congress not only removed the budget brakes but put a rock on the purposes accelerator. The courts have rejected such arguments on a number of occassions,[121] but in other cases courts have ruled that an agency must promulgate rules or provide services—in other words, that Congress meant to create an entitlement to regulation.[122] Given the amorphous language of most of the relevant statutes, of course, the limits of such entitlements are hard to delineate.

This nascent tendency to treat regulations as entitlements is ominous. The problem is that it is simply not possible to run a society in which one interest after another is decreed to have absolute priority over all other interests, each of which is itself also solemnly depicted as having absolute priority.

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[120] See U.S. Const. art II, § 3.

[121] See, e.g., Heckler v. Chaney, 105 S.Ct. 1649 (1985); ITT World Communications, Inc. v. FCC, 699 F.2d 1219, 1245-46 (D.C. Cir. 1983); Rockford League of Women Voters v. Nuclear Regulatory Comm'n, 679 F.2d 1218, 1222 (7th Cir. 1982); WWHT, Inc. v. FCC, 656 F.2d 807, 809 (D.C. Cir. 1981). "[C]ourts typically review agency inaction under a far narrower standard than that employed in reviewing ordinary rulemaking . . . ." Garland, Deregulation and Judicial Review, 98 Harv. L. Rev. 507, 515 (1985).

[122] Some of these cases base the courts' authority to compel regulation on the mandamus power. See, e.g., Carpet, Linoleum and Resilient Tile Layers, Local 419 v. Brown, 656 F.2d 564, 566, 568 (10th Cir. 1981); Pennsylvania v. National Ass'n of Flood Insurers, 520 F.2d 11, 25-27 (3d Cir. 1978). Other courts have based their authority on the APA's scope of review provision, 5 U.S.C. § 706(1) (1982), which permits courts to "compel agency action unlawfully withheld." See, e.g., Health Sys. Agency v. Norman, 589 F.2d 486, 492 (10th Cir. 1978); Caswell v. Califano, 583 F.2d 9, 15 (1st Cir. 1978). Further, some courts have found that the APA permits courts to compel agencies to act in discretionary situations. See, e.g., Hondros v. United States Civil Serv. Comm'n, 720 F.2d 278, 297-98 (3d Cir. 1983).

The nature of the difficulty is neatly illustrated by *Open America v. Watergate Special Prosecution Force*.[123] Under the Freedom of Information Act (FOIA) an agency must decide whether to grant an FOIA request within ten days of receiving it and decide any appeal from its decision within twenty days. Open America filed an FOIA request with the FBI seeking some Watergate documents. The FBI informed Open America—twenty-six days after the filing—that it was number 5,138 in line and that its request would not be dealt with until previous ones had been taken care of. Open America sued to enforce the ten-day decision rule.

The D.C. Circuit ultimately decided that it would not give Open America preferential treatment based upon the bare words of the statute or order the FBI to suspend other activities to devote more resources to processing FOIA requests.[124] If the court had given priority to Open America's FOIA request, the courts would have soon become the arbiters of all agency priorities. This would eventually have led to a never-ending reordering of priorities, as each of the 5,138 applicants in the queue successfully sued for its place in the sun, only to be overshadowed by the next batch of successful plaintiffs.[125]

Compulsory social regulation raises the same problems as *Open America*, only the scale is much larger and the problems harder to discern. The difficulty with the judicial trend of treating regulatory statutes as creating individual entitlements lies not in granting any particular claim to affirmative regulatory action. The real problem lies in granting *all* of them, or in determining whether granting the specific claim before the court will in fact make it impossible to grant other equally pressing claims.[126] In economic terms, the

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[123] 547 F.2d 605 (D.C. Cir. 1976). The author is indebted to the paper by Richard Cooper, supra note 116, at 28-30, for identifying the parallel between *Open America* and broader regulatory issues.

[124] Open America v. Watergate Special Prosecution Force, 547 F.2d 605, 615-16 (D.C. Cir. 1976).

[125] The FBI claimed that it was exercising due diligence in the processing of FOIA requests. One-hundred-ninety-one FBI employees were involved solely with the processing of FOIA requests. Ironically, a prior court order had caused the FBI to assign 65 full-time and 21 part-time employees to processing an FOIA request from the sons of Julius and Ethel Rosenberg. Moreover, the FBI's cost of implementing FOIA had jumped from $160,000 to an estimated $2,675,000 after the 1974 FOIA amendments. The House committee that drafted these amendments had estimated that their implementation would cost the entire government only $100,000 per year. Cooper, supra note 116, at 29-30.

[126] See the example at note 130 infra.

question is whether mandating low productivity expenditures today will preclude more productive expenditures tomorrow.

At the present time, the legal system lacks the doctrinal tools to deal effectively with these issues. The root problem seems to be that the courts, perhaps out of a desire to avoid undermining the primacy of congressional authority, have not developed a sufficiently sophisticated approach to congressional intent. The raw material for improvement, however, seems to be at hand, and exploration of the following four propositions might help the development of such an approach.

The first proposition is that Congress often has no intent on a particular point. In such a case, the agency's interpretation of the statute should govern, as the Supreme Court recently held in *Chevron, U.S.A, Inc. v. Natural Resources Defense Council, Inc.*.[127] The impact of this development depends on how broadly the courts read *Chevron*. They might determine that Congress had no intent on an issue only if nobody said anything about the matter. Conversely, the courts might reach the same conclusion in situations where everybody said everything about the matter. A broad interpretation of the *Chevron* doctrine would best reflect the realities of the congressional process. Trying to fish a genuine intent out of an amorphous collection of unread materials is an exercise in legal fiction, and courts should recognize this reality. Ambiguity of legislative language is often accidental or unavoidable, but courts should realize that Congress often uses vague terms to intentionally bridge political chasms.

There is a caveat, though. When Congress has no intent, it would be disingenuous, or perhaps ingenuous, to say that the agency is "interpreting" the statute. Congress has actually given the agency the power to resolve statutory ambiguity. Consequently, courts should review this agency decision by applying standards of review applicable to substantive rules, not those standards associated with review of interpretive rules.[128]

The second proposition is that the courts should recognize that the policy space is getting crowded. The implicit model that seems to underlie much administrative law doctrine is that American so-

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[127] 467 U.S. 837 (1984).

[128] See 5 U.S.C. § 553 (1982) for the consequences of the distinction between a substantive and an interpretive ruling.

ciety consists of a large sphere of private decisionmaking moderated by self-contained, mutually exclusive spheres of government intervention. In this model regulatory statutes rarely overlap, and any overlap that does occur is readily identifiable when a new statute is passed. This model simply does not describe the Regulatory State as it has evolved. The complexity of regulatory schemes has created multiple layers of overlapping statutes, with the overlap sometimes recognized early and sometimes not. Whether or not Congress acknowledges this, conscientious agency heads should do so. The legal system should accord agency heads wide latitude in harmonizing the relationships among laws enacted at different times.[129] In particular, the system must allow agency heads to consider how today's decisions narrow tomorrow's options and how to optimize the overall achievement of agency goals.[130]

The third proposition is that courts should recognize that budgetary and administrative follow-through is an important test of Congress' dedication to a particular purpose. When a program must go through the budget process for implementation, any lack of follow-through by Congress, and thus any lack of serious intent, becomes obvious. The problem is more difficult with regulatory programs because no subsequent decision point forces Congress to

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[129] Cf. Wald, supra note 75, at 213-14 (arguing that Congress has often been unsuccessful in harmonizing statutes).

[130] The Occupational Safety and Health Act provides an elementary example. See 29 U.S.C. §§ 651-678 (1982). According to the Act, once OSHA starts to regulate a hazardous substance, it must reduce the risk to the point where it ceases to be "significant." In reaching this goal of insignificant risks, the agency can impose only "feasible" costs on industry, a term loosely defined to mean that the imposition of the costs will not bankrupt the industry. Suppose the widget industry exposes equivalent numbers of workers to two substances, A and B, that present equivalent hazards at the current exposure level of 100 parts per million (ppm). For each substance, industry must spend $25 million to reduce worker exposure from 100 ppm to 50 ppm, $25 million to reduce the levels from 50 to 25 ppm, and $25 million to reduce exposure from 25 to 12.5 ppm. The industry could "feasibly" spend $100 million on control devices. Assuming that these response relationships are linear, the agency should obviously allocate $50 million to each substance, resulting in exposure levels of 25 ppm for both substances. Under existing case law, the agency's power to compel this reasonable result is uncertain. A serious argument can be made that once the agency starts to regulate either A or B, it cannot stop until the whole "feasible" amount has been spent on that particular substance. Cf. American Textile Mfrs. Inst., Inc. v. Donovan, 452 U.S. 490, 508-509 (1981) ("feasibility" involves possibility, not cost-benefit relationships). In addition to creating an inefficient and inequitable allocation of the resources available for worker protection, this argument makes the agency reluctant to start the regulatory process because of the potential that it may lose control over its own regulations.

reexamine its intent, and the expenditure of social resources in response to the regulation can continue indefinitely without further congressional review. There is no a priori reason to assume that Congress is more dedicated to the purposes served by social regulation than it is to the purposes served by direct expenditure. The courts should not conclude that, while statements of goals involving direct government expenditure require annual reaffirmation through the budget process, statements of regulatory goals deserve full credit until further notice.

The fourth proposition follows closely from the third. A court should never adopt the view that Congress intended to pursue a particular goal "regardless of costs."[131] As a matter of common sense, a Congress that is constantly trying to juggle the relationships among a huge number of competing and complementary values does not embrace any single value or goal—except possibly the very survival of the nation—regardless of its costs or consequences.

An apparent congressional mandate that costs be ignored is more reasonably interpreted to mean one of four things: (1) An agency can ignore costs because there is an adequate check on expenditures elsewhere in the system;[132] (2) Congress has looked at the costs and found them to be reasonable; (3) Congress regards the costs as de minimis and not worth the delays that would be occasioned by detailed analysis;[133] or (4) Congress will reexamine the costs at a later time.

A court trying to discern the true will of Congress under a regulatory program should not waste its time debating whether Congress cared about the costs. Congress always cares about costs. In-

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[131] In TVA v. Hill, 437 U.S. 153 (1978), the Supreme Court, after extensive consideration of the legislative history, concluded that Congress intended to halt the eradication of endangered species "regardless of costs." Congress promptly responded by establishing a mechanism to consider costs, the Endangered Species Committee. See 16 U.S.C. § 1536(e), (h) (1982).

[132] See Union Electric Co. v. EPA, 427 U.S. 246, 260 (1976).

[133] This approach raises the question: what is an agency's statutory duty when it appears that the premises upon which Congress based its decision were inadequate or that the premises have been invalidated by scientific advances? With regard to the latter situation, consider the problem created by the steadily improving ability to detect harmful substances. In 1958 Congress enacted the Delaney Clause, which defines a food or drug to be impure if it contains any trace of certain carcinogenic substances. 21 U.S.C. § 348(c)(3)(A) (1982). At that time, trace elements were measured in parts per million. Today's technology, however, allows scientists to discover traces in parts per billion. Thus, the Delaney Clause has far greater consequences than those anticipated by its drafters.

stead, the court should look at which of these four interpretations is the correct one and at what consequences flow from this interpretation. Suppose, for example, that the conference report for legislation delegating substantial power to an agency indicates Congress thought that a particular program would cost $1 billion and believed that this was a reasonable price in light of the benefits. Suppose further that the program, as proposed by the agency, will cost $10 billion. What is the real congressional intent here—that the program go forward even if it costs ten times the anticipated amount? That the agency return for further instructions? That the ultimate decision is up to the agency, subject to the usual review for rationality?

From the viewpoint of legal doctrine, the more difficult issue arises when Congress does not explicitly advert to costs at all. A court should be reluctant to rule that Congress did indeed intend to impose substantial costs on the society when there is no indication that Congress gave explicit consideration to the point. This seems to be the view taken by the Supreme Court in *Pennhurst State School & Hospital v. Halderman.*[134]

The broader development of the four propositions discussed above would foster a more orderly development of doctrine concerning control of social regulatory agencies. It might be thought that such development would also increase the power, perhaps even the unchecked power, of the regulatory agencies. On balance, though, this is not necessarily true. An agency exercising the kinds of discretion suggested by these propositions would still be subject to review and to requirements that it explain its actions satisfactorily.[135] To say that an agency has discretion to decline to act does not imply that it can follow its whim. The agency must still explain how its action is part of a coherent overall policy.[136] If an agency is given the necessary latitude to hedge against uncertainty and to make (and correct) mistakes, such requirements need be neither too loose nor too stringent.

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[134] See Pennhurst State School & Hosp. v. Halderman, 481 U.S. 1, 17-19 (1981). In this case, the Court refused to interpret an ambiguous congressional intent as requiring the states to assume the costs of maintaining minimum standards in their mental health facilities. The Court looked to the legislative history and, finding no indication that Congress explicitly expressed this view, refused to infer it.

[135] See SEC v. Chenery Corp., 318 U.S. 80, 94 (1943).

[136] See Levin, supra note 8, at 118-20.

Conclusion

The preceding discussion has devoted relatively little attention to the Administrative Procedure Act itself and deliberately so. The APA's judicial review formula has served admirably for forty years, but it provides no more than a skeletal framework for control of agency action. Because it sets forth principles of general applicability, the APA fails to address the respects in which variations in agency form and function require variations in techniques of control. The courts are and will remain the primary institutions for controlling agency behavior, but they are not the only ones. Congress, the President, and the agencies themselves all play important roles in guaranteeing that agency performance conforms to society's expectations. Courts, scholars, and administrative lawyers must take account of this insight as they develop a jurisprudence of judicial review for the modern Regulatory State.