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Is Administrative Law Inevitable?

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If we lacked an administrative law would we and should we devise one? This is the question at the heart of our essay. While a large body of legal scholarship wrangles over questions of how and why certain doctrines are developed to control agency decisionmaking, limit bureaucratic discretion, and improve the processes of governance, the question of how administrative law *writ* large fits into the fabric of regulatory politics is, if considered at all, takes a back seat to the practical matters of, say, administrative procedure and standards of judicial review.

We argue that administrative law performs a dual function: it enables Congress and President to maintain adequate mechanisms of control over the content and process of regulatory administration; and it enables courts to implement values more directly in the wheelhouse of judicial competency and preference, including protections against unfairness, administrative arbitrariness, and threats to individual rights. The two leading approaches to understanding the role and function of administrative law, the model of administrative law as an exogenous (to politics and to statutory lawmaking) system and the PPT view of courts as honest agents have the story partially right and partially wrong. The inevitability of administrative law as part of a coherent regulatory system in the United States follows neither from a wholly normative account of agencies and the necessity of systematic supervision by courts nor from a purely positive political theory of agencies, Congress, and courts. Instead, it emerges from a more complete theory of the political foundations of regulatory administration and administrative law;

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moreover, it coherent picture of modern regulatory administration which picture takes proper account of concerns raised by both traditional legal scholars and positive political theorists.

I. Introduction

Major veins of contemporary administrative law scholarship tell two different stories about the overarching functions of administrative law in the United States. For most legal scholars, administrative law is a body of doctrine, supported by normative analysis, designed to ensure that agencies act within the structure of the rule of law and promote sound governance³ – goals both orthogonal to political strategy and, in particular, Congressional behavior.⁴ Indeed, many legal scholars view administrative law as an antidote to politics;⁵ that is, courts implement doctrines to ensure that agency decisionmaking is the product of “expert,” not “political,” judgment.⁶ Legislators seek control; courts come to the rescue.⁷ By contrast, scholars in the political economy tradition – particularly positive political theorists – usually view administrative law is a component of ordinary political influence and control.⁸ Courts develop and implement doctrines in order to safeguard the interests of political principals; and while the product of these doctrines is something we label for convenience sake “administrative law,” the reality of the matter is that Congress and the President essentially have their way with agencies.

³ See generally Daniel B. Rodriguez, “Administrative Law,” in Oxford Handbook on Law and Politics (K. Whittington eds. 2008).

⁴ Which is not to say that administrative law scholars neglect the central role that Congress plays in establishing the regulatory program and, as well, the basic procedural parameters within which they operate. See James Landis, *The Administrative State* (1938). For a skeptical (even radical?) account of the nature of legislative delegations in the modern administrative state, see Edward Rubin, “Law and Legislation in the Administrative State,” *Columbia L Rev* (1988).

⁵ [Add list of cites supporting proposition] For a good review of this strand of analysis, see Martin Shapiro, *Who Guards the Guardians?* (1988).

⁶ On expertise/politics distinction, see, e.g., Gerald Frug, *The Ideology of Bureaucracy in American Law*, *Harvard L Rev* (1984).

⁷ See, e.g., Thomas Merrill, “Capture Theory and the Courts: 1967-1983,” *72 Chicago-Kent L Rev* 1039 (1997).

⁸ See McNollgast, “Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies,” *Virginia Law Review* (1989); “Administrative Procedures as Instruments of Political Control,” *J. L. Econ. & Org.* (1987); Terry Moe, “The Politics of Bureaucratic Structure,” in *Can the Government Govern?* (J. Chubb & P. Peterson eds. 1989).

Federal judges are strategic actors to be sure but, given the vast weapons available to legislators, courts seldom have the last word.⁹ Administrative law is just politics by other means.

Another common proposition in the literature tracks these different perspectives as well: Early administrative law scholars emphasized the ways in which administrative law was essentially structured as a form of common law.¹⁰ Courts developed doctrine and an approach to judicial review that was, for all intents and purposes, judge-made; that is, it was either tangentially related to the organic statute or, in some cases, at cross purposes with the statute. Louis Jaffe and Kenneth Culp Davis, two iconic figures in the development of 20th century administrative law, embraced this notion of an administrative common law. They, and others, saw the development as a sensible reaction to the myriad incentives pulling agencies in irresponsible directions; they also (although this was less conspicuous in this early literature) saw Congress as unable or unwilling to limit agency discretion. By emphasizing the “trans-statutory” nature of administrative law, traditional legal scholars thereby reinforce the point that courts in making administrative law sit outside the political process.¹¹

This elaborate conception of administrative common law is largely absent in the positive political theory (PPT) account. The focus of PPT is on legislative strategy, both *ex ante*, through the configuration of statutes and administrative processes (such as in the APA),¹² and *ex post*, through variegated mechanisms of legislative control.¹³ From the perspective, then, of PPT there are two flaws in the grand account of administrative law: First, most of administrative law is actually the product of distinct statutory choices and, second, even what we can view as administrative common law, that is where the tether to the statutory charge is weak, this common law is forged in a political context.

Both of these stories cannot be right. Courts cannot be both a transmission belt for the political choices of Congress and also be champions of the public interest and overseers and final judges over these choices. Yet, because these perspectives yield such divergent conclusions about the origins and functions of administrative law, there persists a very wide gulf in the

⁹ See text accompanying notes – *infra*.

¹⁰ See e.g., Louis Jaffe, *Judicial Control of Administrative Action* (1965); Kenneth Culp Davis, *Administrative Law Treatise* (1958) (and subsequent editions); *Discretionary Justice: A Preliminary Inquiry* (1970). See generally Schiller; Rabin for 20th century historical analyses.

¹¹ See John Duffy, “Administrative Common Law in Judicial Review,” 77 *Texas Law Review* 113 (1998); Henry Monaghan, *Marbury and the Administrative State*, *Columbia L Rev* (1983).

¹² See McNollgast, *supra*. 1989, 2000.

¹³ See Mathew D. McCubbins & Thomas Schwartz, “Congressional Oversight Overlooked: Police Patrols versus Fire Alarms,” 28 *Am. J. Pol. Sci.* 165 (1984). McNollgast (1987).

literature of regulatory decisionmaking.¹⁴ Still, in key respects, each strand of analysis captures important truths about the nature of regulatory administration and administrative law; and each is in other respects incomplete and inaccurate. Integrating these two analytic approaches is a tall order; and, as such, is mostly beyond the scope of our article.¹⁵ But we do insist that a more theoretically nuanced and empirically dense consideration of contemporary administrative law themes suggests that there is more in common than meets the eye.

We enter into this project by addressing the question in the paper's title: Is administrative law inevitable? In other words, under what conditions would we expect to find an elaborate set of rules, standards, and doctrines that impose meaningful requirements on administrative agency behavior? Given what PPT tells us about the purposive, strategic behavior of Congress, we might be dubious about the claim that administrative law exists in any serious way exogenous to political choice.

In this paper, we develop a coherent argument for substantial administrative law within a PPT framework. At the same time, we argue that PPT models must be refined and even reconfigured to take account of the complex, institutionally embedded role of law – in this case *administrative* law – in order to give an adequate account of the relationship among Congress, agencies, and the courts in the modern administrative state.

The logic of our argument is this: Administrative law scholars of various traditions typically miss two pieces of the puzzle, one empirical and one theoretical. To begin with, legal scholars seldom consider systematically the important transformations of regulatory policymaking in the modern era. Later in this paper, we sketch the political dynamics of regulatory administration in the contemporary period, a period roughly measured by the 1960's "Great Society" and New Social Regulation era and continuing up to the present. While administrative law predated this era,¹⁶ the transformation of American politics and of regulatory conduct that reflected in the last half century has rearranged the basic structure and objectives of administrative law. The "reformation" that Richard Stewart famously described in 1975 captures cogently the shifts during the early period;¹⁷ and later scholarship as well, details the ebbs and flows of administrative law's reformation during the Reagan era and beyond. Understanding the

¹⁴ See Jerry L. Mashaw, "Explaining Administrative Process: Normative, Positive, and Critical Stories of Legal Development," 6 J.L. Econ. & Org. 267 (special issue) (1990).

¹⁵ For a recent, excellent effort at integration along similar lines as developed here, see Lisa Bressman, "Procedures as Politics in Administrative Law, 107 Colum. L. Rev. 1749 (2007).

¹⁶ See Jerry Mashaw's magisterial, and ongoing, exegesis of the history of American administrative law: Mashaw, Yale L.J., et al.

¹⁷ Richard Stewart, "The Reformation of American Administrative Law," 88 Harvard L. Rev. 1669 (1975).

political dynamics of this era helps us understand the underlying functions of administrative law. In a somewhat similar vein, PPT scholars miss key parts of the picture because they undervalue the role of the courts in establishing legal rules that limit political discretion and restrain political adventure. As others have pointed out,¹⁸ existing PPT approaches to administrative law have an incomplete picture of law and the role of law in the regulatory system. Thus, they cannot easily see how and why courts would fashion an administrative law that promotes values that differ from, and sometimes at cross purposes with, the political objectives of legislators.

On a more theoretical level, both the traditional account and the PPT reformulation have a blind spot to the critical elements of the overall strategy. In the former, this is a blind spot to the role of politics and political strategy; in the latter, it is a neglect of the complex role of judicial doctrine and legal rules in constructing a big part of the process of regulatory implementation. As a growing chorus of scholars,¹⁹ including some from within the PPT tradition, remind us, the special character of legal rules and of law generally must be understood and appreciated if a full picture of administrative governance is to emerge.

Our general thesis is that both the traditional account – what we will call here “the legal model” – and the PPT account, capture some important insights about the development of modern administrative law. They miss, to be sure, other elements, but the prospects for integration are promising. The key to this integration lies in understanding more fully the political foundations of regulatory administration; relatedly, we must understand the changing role of Congress, courts, and agencies in the modern period of administrative regulation, a period that begins in earnest in the mid-1960s with LBJ’s Great Society and the so-called “new social regulation.”²⁰

In the years following the New Deal era, courts were typically described by administrative law scholars as independent of politics and political considerations. This description was simultaneously positive and normative. Courts and administrative law were most often viewed against the backdrop of commission-form administrative agencies, created mostly in the Progressive era and the New Deal (for example, Interstate Commerce Commission, the Federal Trade Commission, the National Labor Relations Board, and the Security and Exchange Commission). These commissions developed and implemented primarily economic regulation in the context of rather broad delegations.²¹ Regulatory statutes of this era granted

¹⁸ See Bressman; *supra*; Mashaw; *supra*; Jerry Mashaw, “Normative and Critical Perspectives,” *supra*; Greed, Chaos, and Governance. Cf. Barry Friedman, “The Politics of Judicial Review,” *Texas L Rev.*

¹⁹ See sources cited *id.* See also McNollgast, *Judicial Doctrine*, *So. Cal. L. Rev.*; Stephenson, *Harv L Rev.*, et al.

²⁰ See generally Robert Rabin, “Federal Regulation in Historical Perspective,” *Stanford Law Review* (1986).

²¹ See *id.*

agencies enormous discretion; moreover, the interest groups that can be depended upon to influence agencies in the course of exercising this discretion were principally corporate interests and constituency groups focused primarily on economic matters. Administrative law was configured by and large around the circumstances of these regulatory programs and the kind of institutions that were at the center of regulatory implementation. Judicial enforcement of separation of functions requirements,²² for example, ensured that noxious interest group influence would be checked by a delineated set of restrictions on consultation and collaboration within the agency. Other doctrines reflected these concerns as well.

With the 1960's and 1970's came a rash of new types of administrative agencies.²³ These agencies were typically headed by a single administrator and were located within the executive branch; they implemented policy crafted through more detailed, specific statutory delegations; and, significantly, they reflected significant shifts in the nature and configuration of constituent groups. The new agencies also reflected the shift in emphasis from economic policy to social policy. This transformation created a new administrative state.²⁴ The courts participated in this transformation, but they were not the prime movers. Traditional administrative law scholarship tells its story of this era with courts as the principal characters, as the protagonists in a ceaseless march toward administrative rationality.²⁵ The reality, as we argue, is considerably more complex, involving interdependent, endlessly calculating political officials acting in the shadow of both legal rules (the Constitution, the APA, pertinent organic statutes and, yes, judge-made doctrine) and political strategies of competitor institutions. The typical new regulatory statute in this era contained 100s of pages of new administration procedures.

At the same time, falling back on the pure form of the PPT description of courts and agencies as mere vessels into which Congress pours content and in which intra-legislative strategy is the both the key element and determining force of regulatory administration is equally misleading. Courts were not merely honest agents of purposive legislative efforts. While they often implemented legislative aims, they also interposed external standards of fair process and bureaucratic rationality into the regulatory process.²⁶ Looked at from within the dynamics of the

²² The classic judicial exegesis on separation of functions is the Supreme Court's decision in the various Morgan ratemaking cases. See *Morgan v. United States*, 298 U.S. 468 (1936); *Morgan v. United States*, 304 U.S. 1 (1938). See also *FTC v. Cement Institute*, 333 U.S. 683 (1948). See generally William F. Pedersen, Jr., "The Decline of Separation of Functions in Regulatory Agencies," 64 *Va. L. Rev.* 991 (1978).

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²⁴ Citations to general surveys of this era and its consequences. Dodd and Schott (1977), Fiorina (1977)

²⁵ See text accompanying notes – *infra*.

²⁶ See Martin Shapiro, *Who Guards the Guardians*, *supra*; Colin Diver, "Policy Paradigms in Administrative Law," *Harvard L. Rev.* (1981).

political process, courts are best viewed as both partners and as police officers. Understanding why and in what circumstances courts occupy one role rather than the other where a controversy arises, is essential in understanding the structure and functions of administrative law.

Insofar as we focus on lacuna in the two principal administrative law literatures, our paper proceeds by considering, in sequence, the basic assumptions and arguments underlying we call the “legal” and “PPT” models respectively. In the next Part, we consider the general structure of the argument that administrative law protects an ideal of governance and limited discretion in the face of political pressures (and, relatedly, of agency misconduct). In particular, we want better to understand how administrative law effaces Congressional and Presidential politics. Likewise, in Part III, we describe how PPT scholars collapse administrative law and political politics; in doing so, they miss the rich texture of administrative law in the modern law; in particular, they cannot, with this pure form theory, give an adequate account of judicial interventions that are cross purposes with Congressional and Presidential objectives. Nor can do assist us in fashioning a more nuanced normative agenda for modern administrative law.

In Part IV, we come back to the general themes forecast above, that is, that the structure of regulatory politics and policymaking in the contemporary U.S. shapes to a great extent the contours of administrative law. Different dilemmas call for different judicial strategies and a deeper understanding of how and why the federal courts did what they did requires reflecting upon these emerging dilemmas. In Part V, we return in earnest to administrative law and the underpinnings of the theory of administrative law as it is created and recreated in the shadow of these important political transformations.

II. The Traditional Legal Model and its Common Wisdom

“The law of admin procedure contributes, as does all such law, to the construction of an operationally effective and symbolically appropriate normative regime. . . [A]dministrative procedural requirements embedded in law shape administrative decisionmaking in accordance with our fundamental (but perhaps malleable) images of the legitimacy of state action. That is administrative procedure’s purpose and its explanation.”

Jerry Mashaw, “Explaining Administrative Process: Normative, Positive, and Critical Stories of Legal Development.”

“The administrative state has been transmuted . . . to something far better and nobler than politics.”

Martin Shapiro, “APA: Present, Present, and Future.”

In ascribing general themes to the legal model, we paint here with a very broad brush. Administrative law scholarship captures a range of considerations and perspectives; and the differences are essential, as one might expect, in understanding the underlying logic and the competing strands of several generations of administrative law theory. Yet, the themes we consider here – what we call the common wisdom – are widely shared. Indeed, to put the point most provocatively, characterizing judicial interventions in regulatory policymaking as an essentially apolitical or nonpolitical process, as one that attempts to protect fairness and sound governance in the face of political pathologies, is by the large part of the definition of administrative law. As reformulated by legal scholars in the post-New Deal period, administrative law was a body of law that created omnibus, ambitious legal constraints, *formed and implemented by judges*, on the exercise of administrative discretion. To these scholars, looking at administrative law as merely the product of legislative choice would miss the essential point; administrative law was critical in ensuring that neither agency discretion or legislative discretion manifest in political control would undermine the salutary objectives of bureaucratic rationality and expertise.²⁷

A. Courts in Splendid Isolation

The call for greater judicial intervention into the administrative process, a call marked by Lisa Bressman as part of the early period in modern administrative law,²⁸ rested on the assumption that courts were willing and able to intervene into regulatory disputes without risk of serious blowback. Judicial review based upon a version of administrative common law was valuable, even imperative, to overlay statutorily based sources of control over agency discretion. As Louis Jaffe wrote in the mid-1960’s:

An agency is not an island entire of itself. It is one of the many rooms in the magnificent mansion of the law. The very subordination of the agency to judicial jurisdiction is intended to proclaim the premise that each agency is to be brought into harmony with the totality of the law; the law as it is found in the statute at hand, the

²⁷ She Martin Shapiro, “APA: Past, Present, Future,” 72 Virginia L Rev 447 (1986).

²⁸ See Bressman, Procedures, at 1758-60.

statute book at large, the principles and conceptions of the ‘common law,’ and the ultimate guarantees associated with the Constitution.²⁹

From Professor Jaffe’s vantage point, looking backwards over the landscape of administrative law cases in the decades following the New Deal and preceding the new administrative state of the 1960’s and 1970’s, this account had some descriptive basis. Various doctrines of an earlier era seemed to have this quality of politically external interventionism. For example, the pre-Chevron cases dealing with agency statutory interpretation and judicial deference, including Skidmore v. Swift³⁰ and Gray v. Powell³¹ describe judicial review standards in ways unmoored from statutory considerations.³² Likewise, in the two Chenery decisions of the 1940’s,³³ the Court grappled with the question whether the agency can, in the absence of statutory guidance, choose between rulemaking and adjudication for the formulation of agency policy. That choice, implied the Court, rested on judgments about the relative merits of one or another form of policy development and not exclusively, or even primarily, on interpretations of the regulatory statute.

Viewed holistically, the traditional approach to administrative law in both the “early” and “middle” periods (to use, again, Professor Bressman’s terminology)³⁴ was viewed as trans-statutory, that is, was interpreted by leading administrative law scholars as a body of law beyond statutory rules. “Much of administrative law,” writes Cass Sunstein in 1986, “is common law.” To be clear, the emphasis on trans-statutory doctrine was more than merely a mode or a methodology; rather, it connoted, said scholars, a view of the proper responsibility of courts in safeguarding sound governance and in ensuring procedural fairness.³⁵ Writing about bureaucracy more generally, Gerald Frug sketched out the contrast the theoretical basis of the approach at the mainstream of modern administrative law:

Unlike both the formalist and expertise models, which seek to justify bureaucracy by properly organizing its subjective and objective components, the judicial review and market/pluralist models seek outside help to legitimate the bureaucratic structure. The judicial review and market/pluralist models take as their premise that no form of

²⁹ Louis L. Jaffe, *Judicial Control of Administrative Action* 590 (1965). See also Daniel B. Rodriguez, “Jaffe’s Law: An Essay on the Intellectual Underpinnings of Modern Administrative Law Theory,” 72 *Chicago-Kent L Rev* 1159, 1182-83 (1997).

³⁰ 323 U.S. 134 (1944).

³¹ 314 U.S. 402 (1941).

³² See Skidmore, 323 U.S. at 139-40; Gray, 314 U.S. at 411-12. See also Rodriguez, *Jaffe’s Law*, at 1183.

³³ 332 U.S. 194 (1947); 318 U.S. 80.

³⁴ Bressman, “Procedures,” at --.

bureaucratic organization can be self-policing. **The judicial review model assigns the role of police officer to the courts, and the model's ability to legitimate bureaucracy rests on this judicial role. Bureaucratic legitimacy is derived from the courts' own legitimacy; it is because we can trust the courts that we can trust the bureaucracy.**³⁶

The principal basis of this belief was skepticism about the political process the capacity of agencies and Congress to resist influences that would warp regulatory decisionmaking. As Stewart wrote in the mid-70's, courts fretted about the extent to which agencies were mere transmission belts for interest group influences;³⁷ Thomas Merrill likewise observes that courts in the 60's and 70's were deeply concerned with agency capture.³⁸ These concerns were manifest, he argues, in cases such as Abbott Laboratories v. Gardner³⁹ and Home Box Office v. FCC,⁴⁰ where the courts interposed judicially created doctrines of reasonable administrative procedure into palpably political controversies. As Sunstein surveyed the field upon the 40th anniversary of the APA's enactment: "Courts should be available to hear complaints of structural or systemic illegalities. To withdraw this function from the courts would be a cure worse than the disease. . ."⁴¹

To be sure, sophisticated legal scholars seldom saw the courts as completely isolated from political pressures. Indeed, some key scholars, including Christopher Edley and Peter Strauss, took pains to emphasize that administrative process sensibly takes place in a political context and, therefore, the role of the courts should be to examine administrative processes in order to improve political decisionmaking, not to unduly limit its scope.⁴² Still, the juxtaposition between judicial and political intervention, between Congress doing what it wants and courts doing the right thing, was sharply drawn in the contemporary literature. Indeed, the principal normative project was to exhort courts to craft an administrative law that reflected externally

³⁶ Gerald E. Frug, "The Ideology of Bureaucracy in American Law," 97 Harvard L. Rev. 1276, 1373-74 (1984).

³⁷ Stewart, Reformation, at --.

³⁸ Thomas Merrill, "Capture Theory and the Courts, 1967-1983, 72 Chicago-Kent L Rev 1039 (1997).

³⁹ 387 U.S. 136 (1967).

⁴⁰ 567 F.2d 9 (D.C. Cir.), cert denied, 434 U.S. 829, reh. denied, 434 U.S. 988 (1977).

⁴¹ Sunstein, 72 Virginia L Rev at 293.

⁴² See, e.g., Christopher Edley, *Administrative Law : Rethinking Judicial Control of Bureaucracy* (1990); Peter Strauss, "Revisiting Overton Park: Political and Judicial Controls over Administrative Actions Affecting the Community," 39 UCLA L Rev. (1992).

constructed values – rationality, fairness, justice – and would scrupulously safeguard these values from the siren song of partisan political pathologies. Viewing the courts as in splendid isolation of politics, therefore, was not merely a normative trope; rather, it framed major parts of the academic agenda in the modern era. And it was distinct enough for Jerry Mashaw to write at the beginning of the 1990’s that administrative law had a “normative” model to be contrasted with the “critical” model emerging at the hands of positive political theorists.⁴³

B. Congressional Impotence

One question begged in the account of regulatory failure underlying the view of the courts as police officers is this: If the problem is interest representation or failures in synoptic rationality, then presumably Congress could correct this problem. On the assumption that they want administrative decisionmaking to work, Congress should be motivated to engage in ex post structural innovations and ex post oversight to facilitate good purposes. But common wisdom in this literature is that Congress will be unable or unwilling to engage in this facilitating enterprise.⁴⁴

The claims about unwillingness and inability are distinct. Undergirding the view of Congress as impotent is the idea, elaborated in the Hart and Sacks’ “The Legal Process” materials of the 1950’s,⁴⁵ and unfurled more elaborately in the public choice critique of the early 1980’s and beyond,⁴⁶ that Congress will be pressed into the service of private-regarding interest groups; they cannot then be trusted to safeguard good regulatory administration.⁴⁷ Furthermore, Congress, in the view of legal scholars armed with a too-often thin grasp of legislative structure and politics, lacks the appropriate retinue of techniques to limit adequately agency discretion. The choice between judicial intervention and legislative control points toward judicial leadership. Comparative institutional competence, to use the vernacular of legal process, counsels active

⁴³ See Jerry L. Mashaw, “Explaining Administrative Process: Normative, Positive, and Critical Stories of Legal Development,” 6 J. L. Econ. & Org. 269 (special issue) (1990).

⁴⁴ See Elena Kagan, “Presidential Administration,” 114 Harvard L Rev 2245, 2256 (2001).

⁴⁵ See Henry Hart & Albert Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (W. Eskridge & P. Frickey eds.).

⁴⁶ See generally Daniel A. Farber & Philip Frickey, *Law and Public Choice* (1991); Jerry L. Mashaw, “The Economics of Politics and the Understanding of Public Law,” 65 Chicago-Kent L. Rev. 123 (1989).

⁴⁷ See Merrill, “Capture Theory;” Sunstein, “Factions.”

judicial intervention. Moreover, leading cases of this so-called trans-statutory heyday are seen as reflecting the preference for judicial control over ad hoc legislative intervention.⁴⁸

Significantly, judicial doctrines occasionally made this view into somewhat of a self-fulfilling prophecy. Leading separation of powers cases of the modern era presupposed the desirability of judicially crafted limits on Congressional intervention. The invalidation of the legislative veto in INS v. Chadha,⁴⁹ for instance, relies on the slender reed of Article I lawmaking processes to prevent legislators from exercising certain techniques of oversight. Once eliminating the so-called legislative veto, legislators predictably (that is to say political scientists could sensibly predict) shifted to other strategies.⁵⁰ In the main, these other strategies escaped serious constitutional scrutiny. In any case, the limits on legislative control seemed to come out of left field. The Court in this case, and in somewhat less famous cases in which legislative oversight was curtailed,⁵¹ embedded its judgment in a sense that legislators ought not to intervene routinely and ambitiously in the regulatory process, other than through ex ante choices of how best to delegate and to structure administrative agency processes.⁵² It was in this way that the skepticism about legislative competence became a self-fulfilling prophecy.

In short, Congress's role in overseeing regulatory administration was largely absent from the close scrutiny of legal scholars. These scholars were, after all, concerned with administrative *law*. And this meant that the focus was kept squarely on the ways in which courts could carry out their functions in implementing good (reasonable, fair, etc.) agency decisionmaking. Congressional action might be a supplement to these efforts, it might be an obstacle in other instances; but it was seldom a significant influence in agency decisionmaking and seldom a substitute for judge-made administrative law.

C. A Machine that Would Go of itself: Checks and Balances

⁴⁸ See text accompanying notes supra.

⁴⁹ 462 U.S. 919 (1983).

⁵⁰ See, e.g., Martin Shapiro, *Admin Discretion*, Yale L.J.

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⁵² For influential contemporary critiques of the Chadha decision along these lines, see, e.g., E. Donald Elliott, *INS v. Chadha: The Administrative Constitution, the Constitution, and the Legislative Veto*, 1983 Sup. Ct. Rev. 125; Harold H. Bruff and Ernest Gellhorn, "Congressional Control of Administrative Regulation: A Study of Legislative Vetoes," 90 Harv. L. Rev. 1369 (1977).

In the shadow of scholarly critiques of judicial interventionism, a number of administrative law scholars have shifted the focus somewhat from a preoccupation on judicial doctrine and the preeminent role of the courts and toward political-institutional considerations. Chevron, in particular, set the stage for a studied emphasis on the President and the accountability dimensions of that office. Echoing Justice Stevens's paean in Chevron to the democratic superiority of the president relative to the Congress in regulatory administration, prominent administrative law scholars saw the president as the palliative for agency indiscretion.⁵³

Relatedly, scholars looked to Congress and legislative oversight as a mechanism for controlling agencies or, at the very least, guarding against agency excesses. In this sense, the literature had come full circle; the problem of agency misfeasance was to be solved by deliberate interventions by political principals, that is, by Congress. With this reframed attention to Congress and the President came eloquent analyses of the role of checks and balances in protecting good governance from various threats and obstacles.⁵⁴ Often, these checks and balances were viewed as supplementing judicial scrutiny; at other times, inter-institutional arrangements and incentives were seen as replacing activist administrative law.⁵⁵

Faith in checks and balances is embedded in much of the literature describing and critiquing Presidential influences in regulatory administration. While an influential body of contemporary literature – including, perhaps most notably, Dean Elena Kagan's elaborate defense of active Presidential influence – argues that Presidential interventions are necessary to combat factions and to check influences of (frequently captured) Congress,⁵⁶ an equally influential critique of these depictions is emerging, critiques which call into question the underlying empirical premises of the enterprise and express grave concern about both the efficacy and nature of Presidential management.⁵⁷ In any event, the ideal of a well-balanced regulatory structure is key to both critical and supportive analysis of Presidential management and control. Scholars from

⁵³ See, e.g., Jerry L. Mashaw, *Prodelegation*, 1 J. L. Econ. & Org.

⁵⁴ See, e.g., Strauss; Shane, et al.

⁵⁵ Strauss

⁵⁶ In addition to Kagan, "Presidential Administration," supra, see, e.g., Steven Croley, "White House Review of Agency Rulemaking: An Empirical Investigation," 70 U. Chicago L Rev 821 (2003); Steven Calabresi, "Some Normative Arguments for the Unitary Executive," 48 Arkansas L. Rev. 23 (1995); Steven Calabresi & Saikrishna Prakash, "The President's Power to Execute the Laws," 104 Yale LJ 541 (1994); Christopher DeMuth & Douglas Ginsburg, "White House Review of Agency Rulemaking," 99 Harv. L. Rev. 1075 (1986); Jerry Mashaw, "Prodelegation," supra; Harold Bruff.

⁵⁷ See e.g., Lisa Bressman & Michael Vandenbergh, "Inside the Administrative State: A Critical Look at the Practice of Presidential Control," 105 Michigan L Rev 47 (2006); Cynthia Farina, "The 'Chief Executive' and the Quiet Constitutional Revolution," 49 Admin L Rev 179 (1997); Peter Strauss, "Presidential Rulemaking," 72 Chicago Kent L Rev 965 (1997).

diverse perspectives agree that checks and balances are essential; what they disagree about it, of course, is how best to reconcile Presidential actions with the imperative of balance.

This confidence in checks and balances as a mechanism for controlling agencies is a powerful theme in contemporary administrative law scholarship.⁵⁸ Viewed abstractly, there is certainly much to the notion that political actors would best be regulated by the competing incentives and forces immanent in the political process.⁵⁹ Yet, legal scholars stress the imperative of managing these processes of competition, of enforcing through administrative law doctrine this system of checks and balances. It is not clear, however, how the President and members of Congress can remain in a workable equilibrium without the courts intervening on a regular basis in order to regulate the processes of inter-institutional competition. Thomas Sargentich describes this “oversight” model thusly: “The oversight model relies on national political authorities – principally the President and members of Congress – as the intermediaries whose job it is to impose the public’s will on administrators. The basic project of administrative reform on this view is to promote greater control by the President and Congress over agency action.”⁶⁰

D. Courts as the Last Word

The ability of the courts to intervene successfully in regulatory processes and to carry out its goals of rationality in the face of politics rests, according to mainstream administrative law scholars, on the assumption that courts could impose their will on these processes.⁶¹ Viewed sequentially, Congress move first in the statutory enactment process and agencies move next, courts are viewed as the last movers. Congress could react in a broad sense, perhaps by enacting a different statute or, albeit rarely, overturning judicial decisions. But these reactions were viewed skeptically. More likely, political actors would succumb to judicial interventions. They would manage their own interests in the shadow of administrative law doctrine. This assumption, we emphasize, is essential for the traditional administrative law view; for it is only if

⁵⁸ See, e.g., Peter Strauss, “The Place of Agencies in Government: Separation of Powers and the Fourth Branch,” 84 Columbia L Rev 573 (1984).

⁵⁹ Cf. Herbert Wechsler, “Political Safeguards of Federalism,” Jesse Choper, *Judicial Review and the National Political Process* (taking this argument to its logical extreme in the context of constitutional adjudication).

⁶⁰ Thomas Sargentich, “The Reform of the American Administrative Process: The Contemporary Debate,” 1984 Wisconsin L Rev 385, 415-16.

courts can enforce their choices, can implement the external values of rational administration, that administrative law has any important role to play in improving regulatory performance.

Underlying this view is a skepticism, only loosely based on empirical examination, that Congress can or will overturn agency decisions with which they disagree. The literature on Congressional oversight is voluminous, and we do not focus in earnest on it here.⁶² What is worth noting, however, is that the plethora of empirical studies of legislative control stand at stark odds with the idea that Congress permits courts to have the last word in regulatory decisionmaking. Rather, Congress is seen as ever active, overseeing agencies through a combination of “police patrols” and “fire alarms.”⁶³ Further, Congress, as David Epstein and Sharyn O’Halloran have emphasized,⁶⁴ shapes its regulatory strategies through careful attention to delegation. In her thorough study of the “political cycles of rulemaking,” Professor Anne Joseph O’Connell summarizes succinctly the dimensions of legislative strategy:

Congress exercises control over agency rulemaking ex ante and ex post. Ex ante, Congress designs structure and procedures to influence how agencies carry out their mandates. In addition, Congress chooses what authority to delegate and how much money to provide to agencies. The Senate also confirms most agency leaders. Ex post, Congress, typically acting through committees, exercises control over agency efforts using oversight tools, including information requests, hearings, and investigations. These mechanisms permit Congress to shape the rulemaking process in multiple ways.”⁶⁵

Connecting these insights to the supposition that courts have the final say is difficult, to say the least. PPT has a story for how courts can escape legislative overruling; the traditional legal model does not. Hence, the assumption of judicial finality, here supporting the positive description of courts as actively constructing a common law of administrative procedure without fear of reprisals, is tacitly made – and is, in the end, difficult to sustain.

[Discuss how the assumption of judicial finality figures impliedly into the analysis of Mashaw and Harfst in their work on automobile safety regulation and administrative law. A looming question in the Mashaw-Harfst account is why Congress by and large left NHTSA, and the

⁶² Oversight literature: Aberbach, et al.

⁶³ See McCubbins & Schwartz.

⁶⁴ See David Epstein & Sharyn O’Halloran, *Delegating Powers: A Transaction Cost Politics Approach to Policy Making Under Separate Powers* (1999).

⁶⁵ Anne Joseph O’Connell, “Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State,” 94 *Virginia L Rev* 889, 920 (2008).

Motor Vehicle Safety Act more generally, alone in the face of what they describe as some major dysfunctionalities]

E. The Role of Administrative Law

The preceding sections of this Part have focused on the key assumptions underlying the legal model. We turn now to the ways in which the structure of administrative law is seen to reflect these assumptions.

In the traditional account, administrative law is designed to respond to certain problems in regulatory administration. The principal problems are the following: arbitrariness, unfairness, and unreasonableness.⁶⁶ Though overlapping in key respects, these problems shape the agenda of administrative law doctrine. For example, in Lisa Bressman's influential work on regulatory arbitrariness,⁶⁷ the courts figure prominently. More specifically, she argues for a rejection of various restrictions on nonreviewability of agency actions, even where these restrictions find support in statutes. In analyzing Sections 701 and 702 of the APA, Bressman urges courts to give an interpretation of that statute that would permit the courts to review otherwise discretionary discretions. Indeed, she deems such interpretations as "enlarge[ing] the reach of the section."⁶⁸ Moreover, in a clever analysis of delegation and current legal doctrine, Cass Sunstein counsels a series of "nondelegation canons,"⁶⁹ essentially rules of statutory interpretation (fashioned, however, as administrative common law) designed to rein in legislative delegations and thereby to check political influences. A number of other prominent recent works – much of it, to no great surprise, concerning Chevron-Mead, also urges the crafting of common law doctrines to combat regulatory unreasonableness for these same or similar reasons.⁷⁰

⁶⁶ See, e.g., Mariano-Florentino Cuellar, "Rethinking Regulatory Democracy," 57 Admin. L. Rev. 411 (2005); Jerry Mashaw, "Improving the Environment of Agency Rulemaking: An Essay on Games, Management and Accountability," Law & Contemp. Problems 185 (1994); Mark Seidenfeld, "A Civic Republican Justification for the Bureaucratic State," 105 Harvard L Rev 1511 (1992).

⁶⁷ Lisa Bressman, "Judicial Review of Agency Inaction: An Arbitrariness Approach," 79 N.Y.U. L. Rev. 1657 (2004); "Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State," 78 N.Y.U. L. Rev. 461 (2003).

⁶⁸ See Bressman, "Agency Inaction," at 1667.

⁶⁹ Sunstein, "Nondelegation Canons," 67 U. Chi. L. Rev. 315 (2000).

⁷⁰ See, e.g., Mark Seidenfeld, "A Syncopated Chevron: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes," 73 Texas L Rev 83 (1994); other cites.

A caveat: We should not leave the reader with the impression that the lion's share of modern administrative law scholarship, swept into the large net of what we call the "legal model," is hopelessly naïve about the role and functions of politics in the administrative process. In fact, a great deal of the current literature considers, sometimes empirically and other times more speculatively, the impact of certain doctrines on the configuration of American politics. More often than not, certain prescriptions are proffered for the very reason that they jibe more effectively with political factors, including factors over which courts have limited control. Moreover, some the leading work that emerges from a concern with enforcing salutary values in agency decisionmaking in a world of raging politics is avowedly empirical and therefore necessarily takes account of serious political considerations.⁷¹

However, the nesting of prescriptive analysis in a nuanced understanding of politics is not the same as a consideration of how administrative law in fact reflects and refracts politics. We maintain that the gist of the administrative law literature is concerned with ways of counteracting bad influences upon agencies and also the dysfunctional behavior of agencies from within their respective bureaucratic structures. Although writing very early on in the development of the new administrative state, James Landis, in many ways the key architect of the New Deal agency, fretted about what he saw as the growing politicization of modern administrative government. Though understand that administrative regulation was unavoidably a "political" process, he counseled a greater increase in external (read: courts) scrutiny of agency decisions and political conduct. [Insert quote from Landis 1960's report to President Kennedy]

⁷¹ See O'Connell, "Political Cycles," *supra*; Bressman & Vandenberg, "Inside the Administrative State," *supra*; Kristin Hickman, "Coloring Outside the Lines: Examining Treasury's (Lack of) Compliance with Administrative Procedure Act Rulemaking Requirements," 82 *Notre Dame L Rev* 1727 (2007); Jacob Gerson and Anne Joseph O'Connell, "Deadlines in Administrative Law"; Jide Nzelibe, "The Fable of the Nationalist President and the Parochial Congress," 53 *UCLA L Rev* 1217 (2006); M. Elizabeth Magill, "Agency Choice of Policymaking Form," 71 *U. Chicago L Rev* 1383 (2004); Nina Mendelson, "Agency Burrowing: Entrenching Policies and Personnel Before a New President Arrives," 78 *NYU L Rev* 557 (2003)

III. Positive Political Theory, puzzle pieces and pieces missing

A. Policy Influence by Relentless, Resourceful Legislators

Key to the PPT story of regulatory policymaking is that legislators act purposively and strategically in order to implement their policy objectives.⁷² The creation of, and influence over, administrative agencies is no substitute. In this realm, they create administrative procedures and oversee regulatory decisions, all in the service of discernible political aims and ends.

Among these procedural devices are procedural structures that signal to legislators (and also to the President) proposed policies. Legislators “hard wire” agencies to their preferred outcomes through carefully constructed statutory rules; moreover, the vast web of administrative procedures ensure to a large degree that agencies will not stray too substantially from the domain of legislative objectives.

Legislators worry about two different sorts of drift. “Bureaucratic” drift reflects the risks that agencies will tilt away from the preferences of their legislative commanders.⁷³ Certain administrative procedures are fashioned to protect against this drift. And, as we will describe more fully below, courts aid legislators in their agenda of controlling, or at least managing, this sort of drift. Further, legislator preferences are somewhat unstable. The institution changes, after all, with subsequent elections; and, in addition, legislative objectives are revisited in light of new pressures and new information. Thus there is a “coalitional” drift which legislators worry about.⁷⁴ The prospects of this sort of drift likewise requires procedures that tether agencies to the preferences of enacting coalitions; it also requires attention by institutions *ex post* – agencies and courts – to the risks that the bargain will become unraveled later by purposive legislators.⁷⁵

In a nutshell, the PPT account of administrative procedure insists, first, that legislators have strong interests in managing public policy and therefore in controlling regulatory outcomes;

⁷² For general summaries of the literature, see Rodriguez & Weingast, “Legislative History,” at 1431-37; essays in Oxford Handbook on Political Economy et seq.

⁷³ See Kenneth Shepsle, “Bureaucratic Drift, Coalitional Drift, and Time Consistency: A Comment on Macey,” 6 J. Law, Econ. & Org. 111 (1992); Murray Horn & Kenneth Shepsle, “Commentary on ‘Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies’: Administrative Process and Organizational Form as Legislative Responses to Agency Costs,” 75 Virginia L. Rev. 499 (1989).

⁷⁴ See *id.*

⁷⁵ Cf. William Landes & Richard Posner, “The Independent Judiciary in an Interest Group Perspective,” 18 J. Law & Econ. 875 (1975).

second, it insists that legislators have ample mechanisms for carrying out their control objectives. While much of the standard PPT literature emphasized the ubiquitous collection of legislative oversight techniques, McNollgast's work in the late 1980's on the political economy of administrative procedures emphasized in novel ways the dimensions of Congressional control over agency performance through the design of various procedural instruments.⁷⁶

Among the procedural instruments that function to serve legislator interests are public disclosure requirements (not importantly, under the Freedom of Information Act), evidentiary standards including standards for allocating burdens of proof, and various assortments of action-forcing requirements that incentivize agencies to do their work on behalf of political principals. The legislators' objective is to stack the deck, that is, to make it more likely than not that agency decisions will reflect legislator, not administrator, interests. The basic logic of these strategies is as follows:

“If procedures do affect outcomes, political officials have available to them [tools] for inducing bureaucratic compliance. Specifically, alterations in procedures will change the expected policy outcomes of administrative agencies by affecting the relative influence of people who are affected by the policy. Moreover, because policy is controlled by participants in administrative processes, political officials can use procedures to control policy without bearing costs themselves, or even having to know what policy is likely to emerge.”⁷⁷

In the PPT account, then, legislators are strategic, resourceful, and broadly effective at controlling agency policymaking through careful attention to administrative procedures.

B. Dynamic Competition across and between Branches

While PPT often collapses legislators and the president into one general category, emphasizing the political objectives of both institutions within roughly the same framework, an emerging literature has concentrated on the dynamics of legislative-executive competition. The rationale for such competition is readily apparent: Presidents have an interest in controlling regulatory processes for their own purposes; and Congress writ large has an institutional interest in limiting the scope of Presidential influence. While these institutions will often be seen to

⁷⁶ See McCubbins, et al, Structure and Process; Politics and Policy: Administrative Arrangements and the Political Control of Agencies,” 75 Virginia L. Rev. 431 (1989); “Administrative Procedures as Instruments of Political Control,” 3 J. L. Econ. & Org. 243 (1987).

⁷⁷ McNollgast, “Administrative Procedures,” supra, at 254.

collaborate, especially in an era of unified government, they are wary of the interests and incentives of one another. Regulatory influence can, in some instances, be a zero sum game; legislators, therefore, are seldom agnostic or unaware about the conduct of the President in this regulatory struggle.

Terry Moe,⁷⁸ among others,⁷⁹ has noted the ways in which the bureaucracy reflects this dynamic competition. Bureaucratic structure is a function of this competition in key ways. So, too, is the design of intra-Congressional institutions. Finally, the structure of administrative procedure and the rules governing such procedure, track in important respects the imperative on the part of legislators to maintain an adequate offense and defense in the regulatory struggles with the President.

As a consequence of this ubiquitous competition, legislators, presidents, and judges design instruments to enable them to compete more effectively in this competitive process. Courts, for instance, jealously guard their prerogatives to interpret statutes – indeed, even within the broad rubric of Chevron-Mead deference, the courts reserve the right, under the first step in the analysis, to apply their interpretation of the statute.⁸⁰ Furthermore, these branches of government function in various ways while the game unfolds; that is, they deploy their various resources and institutional power to protect their prerogatives and to promote their policy objectives. The essential insight of PPT is that this process is a dynamic game, with political actors acting and reacting in the shadow of the expectations and incentives of other participants. While taking no global position on the underlying “motivations” of these actors, PPT stresses – and frequently models – the ways in which this competitive game explains well the processes of legislation, administration, and legal interpretation.

C. Judges as Pawns in the Legislature’s Game

The structure of the PPT argument supposes that agencies will make decisions in the shadow of legislative preferences and strategies. Courts will have limited latitude to change these decisions, facing the possibility of legislative overruling. Moreover, Congress can affect judicial strategy *ex ante*, by organizing the court’s review authority or by framing the regulatory choice set in a way that constrains the courts; or it can use some combination of these or other techniques. In all, then, judicial discretion is limited in significant ways. For example, Congress can curtail so-called pre-enforcement review of regulations thereby depriving the court of any important weapon its competition with legislators and the president for bureaucratic control. By

⁷⁸ See Terry Moe, “The Politics of Structural Choice: Toward a Theory of Public Bureaucracy,” in *Organization Theory: From Chester Barnard to the Present* (Oliver Williamson ed. 1990).

⁷⁹

⁸⁰ This is the important of Sunstein’s analysis of what he calls “Chevron step zero.”

circumscribing review thusly and therefore making courts wait until an issue arises in the course of an adjudicative process, certain techniques are taken away from courts. More generally, the timing of the courts' intervention is significantly impacted, impacted in ways that curtail judicial strategies. Other examples of a similar quality are standing restrictions and the absence of a private right of action. Both of these are procedural choices Congress makes that has, unavoidably, consequences for judicial intervention.

The assumption undergirding these analyses of legislative action is that courts are steered distinctly by Congress toward one or another outcome preferred by the legislature. Courts may have their own institutional interests to be sure, but the idea is that Congress is well-armed with mechanisms to restrain the courts in the implementation of their interests. In a word, courts are viewed as just another agency in government. This is so for one of two reasons: Either courts have no independent interests and are truly honest agents of the legislature; or, more plausibly, courts are determined policymakers, but without any serious cluster of resources to compete with Congress and the President in the exercise of this power and influence. Either way, judges are little more than pawns in the political branch's game.

The notion that courts behave as mere agencies rests on a view that law and legal doctrine is in no serious way distinct from ordinary public policy. Courts implement their strategies through sometime called a legal rule, but this is essentially tautological with the "legal" aspect nothing more nor less than a reflection of the fact that the institution responsible for creating "law" is the one performing this function. It is, needless to say, an extraordinarily thin conception of law and judging, and one that gives precious little insight into the institutional dynamics of legal decisionmaking by courts. Further, it takes the standard attitudinalist insight about the motivations of judicial behavior to its logical extreme, explaining judicial doctrine as a mere policy output of courts. Yet, and in contrast to the attitudinalist insight, courts are seen as mainly reactive to the actions and agendas of other institutions in government.

D. Administrative Law as Just Politics by Other Means

A positive political evaluation of administrative procedures show that, wholly apart from their effects on procedural due process rights and other fairness-related considerations, these procedures have remarkable, discernible political implications – implications desired by political overseers within the legislative and executive branches. For example, the last thing that political overseers in Congress want is to see agencies making political judgments and providing benefits to constituencies different from those sought by Congress. In this setting, open proceedings, expansion of standing, the rights of all interest parties to provide evidence in agency adjudications, the importance of following official procedures, and other common procedural requirements in administrative law, are all valuable to Congress that wants to ensure that they

know in advance when an agency might deviate from its wishes. This is the central lesson from the McNollgast work on administrative procedure and legislative design.

The notion described at length by McNollgast that Congress will create mechanisms whereby agency decisions are on “auto pilot” illustrates the logic of how Congress uses administrative procedures to create a politically relevant balance among constituencies and interest parties. Likewise, the various mechanisms by which agency decisions are delayed, delayed because of the imperative of complying with certain administrative procedures, including public comment, hearing requirements and, significantly, a reasoned elaboration requirement, are best seen as serving Congressional interests. Courts, in this account, stand at the ready to implement these wishes. The penalty for not doing so is legislative reversal; moreover, Congress can guard against judicial drift from legislative objectives by myriad *ex ante* and *ex post* control mechanisms.⁸¹

IV. Regulatory Politics Revisited

The focus of the discussion thus far has been on how the contemporary literature views the role of courts in developing and implementing administrative law. We turn now to the paper’s principal question: whether and to what extent these competing stories of administrative law are more or less plausible. In our view, both accounts lack a coherent, updated picture of regulatory decisionmaking in the modern administrative state. Somewhat curiously, big picture efforts to describe major shifts in the paradigms of administrative law emphasize changes in normative understandings and sympathies, rather than changes in the structure of regulatory and regulatory administration. As a result, these accounts miss both the forest and the trees. Only by taking account of the dynamics of regulatory administration and American politics can we grasp what role courts do and ought to play in the administrative process. To a large extent, this has been the mantra of PPT. On the other hand, PPT is blind to the special role of courts and legal doctrine in the operation of this process. Integrating the legal model and PPT model, therefore, requires bringing these two pictures more closely together. In this part, we focus on some of the key political and administrative dynamics; in the next part, we bring back in the central questions of administrative law.

⁸¹ The McNollgast literature gives extensive examples of *ex post* controls. See sources cited in text accompanying notes – *supra*. On *ex ante* controls, in the specific context of statutory interpretation, see Daniel B. Rodriguez, “Statutory Interpretation and Political Advantage,” *Int’l Review of Law & Econ.* (2002).

A. The Across-the-Board Transformation in American Politics, 1963-1975

Legal scholars' court-centric view leads them to ignore the huge transformation of the 1960s and early 1970s – in politics, in federalism, and in the regulation of the government to the economy. This era ushered in a huge increase in the federal regulation of the economy, regulation in which the federal government assumed jurisdiction over and prerogatives in a great many regulatory tasks that had previously been the purview of the states.

Importantly, the political system dramatically changed how it reacted to interest groups and constituencies. Historically, the older regulatory agencies existed in something of a splendid political isolation, with one main interest group or set of closely aligned interest groups against an undifferentiated mass public. This political structure allowed the interest groups to dominate (and gave rise, in turn, to the “Chicago School” interest group theory of regulation). During the 1960's and 70's, however, a huge new set of interest groups and constituencies arose; and the mass public changed their attention to, and demands upon, government. Congress and the president responded to this change with legislation creating a great many new programs that looked very little like that of capture, including civil and voting rights, the Great Society, Medicare and Medicaid, and a wide range of environmental, health, consumer, and safety regulation.

The strength of the political pressure for these new laws can be seen by observing President Richard M. Nixon who was a pro-business official by nature. And yet he was an activist president, creating more regulatory agencies than his liberal predecessor, President Lyndon Johnson. In the environmental area, for example, he and Senator Edmund Muskie (D, VT) engaged in a stiff competition to see who could be more pro-environmental.⁸²

This across-the-board political transformation cannot be understood as a transmission belt in any sense. Moreover, we cannot think of this transformation – even restricting attention to regulation – as court-driven. Not only did the courts respond to the rise of new interests and constituencies, so too did Congress and the President. This transformation affected voters/consumers, parties, interest groups, Congress, the president, and the courts. All parts of the American political system participated in and were affected by this transformation.

The rise of the environmentalists and the environmental movement exhibits this. administrative law scholars frequently see the response of the federal courts to the environmentalists as part of a heroic judiciary-centric transformation of the administrative

⁸² Ackerman and Elliot, JLEO.

process, the reality is more complex. Indeed, courts in key cases forced agencies to open access to new interests and constituencies, allowing environments – once cut out of the system, to participate. This can be seen in such diverse settings as the Army Corps of Engineers programs as nuclear power.

Yet the court-centric view ignores the across-the-board transformation, notably, the fact that Congress was engaged in exactly the same process of responding to new constituencies, granting them access, new agencies, and policy benefits.

Consider the specific example of atomic energy.⁸³ The status quo ante involved a promotional agency, the Atomic Energy Commission (AEC), pursuing assiduously the commercialization of nuclear power in close coordination with their Congressional overseers, the Joint Committee on Atomic Energy, and with the principal interest groups, the nuclear power industry and public utilities. The legal model holds that through a series of critical court cases,⁸⁴ judges transformed the structure of nuclear power regulation, forcing the AEC and its successor agency, the Nuclear Regulatory Commission (NRC), to allow new constituencies to participate and thereby to influence regulatory decisions. The new groups included the environmentalists and local communities affected by location decisions of proposed plants.

This status quo and its transformation appear to support the traditional legal model of politics, regulation, and the role and impact of administrative law. However, there is more to the story than meets the eye. The traditionalist account fails to understand what actually happened in nuclear power policy. Importantly, environmentalists had their political sponsors as well, including Senator Edmund Muskie and President Nixon.⁸⁵

Paralleling the logic of capture, the AEC and its political overseers in Congress, the JCAE, collaborated with the nuclear power industry to promote nuclear power. Environmentalists were a thorn in their side, and the agency sought to limit their influence. And yet the logic of capture cannot explain what happened in nuclear power regulation.

Although the pro-environmental members of Congress could not break the direct hold of the JCAE over nuclear power, they were able to do so indirectly. Passing the National Environmental Policy Act (NEPA) was critical, forcing all agencies to take into account the effects of their proposed policies on the environment. In particular, NEPA required all agencies to undertake an environmental impact statement (EIS). True, the courts played a critical role in

⁸³ See generally McNollgast, “Positive and Normative Models of Procedural Rights: An Integrative Approach to Administrative Procedures,” 6 *J. L. Econ. & Org.* 307 -330 (and sources cited therein).

⁸⁴ Cite cases.

⁸⁵ See Ackerman; Mashaw, “Prodelegation,” on the competition between Muskie and Nixon to carry out the mantle of being the most pro-environmental.

this process.⁸⁶ The AEC announced that it had already took the environment into account and therefore did not need to do the NEPA-required EIS. It did take the D.C. Circuit in Calvert Cliffs to force the AEC's hand.⁸⁷

Acting alone, however, the judiciary could not have forced the AEC to conduct a serious EIS. It required a law mandating all agencies to pursue this mechanism, that is, NEPA. In this view, Congress and the courts act far more in parallel and along similar lines, both responding to and furthering the interests of new constituencies.⁸⁸ This is not the picture of the courts acting independently against a narrow, interest group-focused political system, but the courts working in tandem with parts of the political system against other parts. Congress and the courts collaborated in the new outcome, playing complementary roles, both necessary to the change in regulatory outcomes.

Another major decision largely ignored by the legal literature is the demise of the AEC. Because the AEC had both regulatory and promotion goals, many environmentalists felt that the agency's promotion role compromised its ability to make prudent regulatory decisions with respect to nuclear power's safety and environmental impact.

In 1974, Congress passed the Energy Reorganization Act, which broke away the promotion aspects of the AEC from the regulatory aspects by dividing the AEC into two separate parts. The NRC assumed the regulatory functions and a new Energy Research and Development Administration, later incorporated into the new Department of Energy, assumed the rest. By separating the promotional aspects of nuclear power from the regulatory aspects, this act made it more difficult for the AEC's promotion goals to influence their regulatory decisions, including ignoring new constituencies who opposed the promotion of nuclear power.⁸⁹

B. Political Action and Judicial Results

A second flaw of the traditional legal model is that, beyond ignoring the across-the-board political transformation, the model fails to account for the indirect effects of the political system

⁸⁶ See Calvert Cliffs (DC Circuit). See generally Daniel B. Rodriguez & Barry Weingast, "The Paradox of Expansionist Statutory Interpretations," *Northwestern U. L. Rev.* (2007).

⁸⁷ See generally Linda Cohen, "Innovation and Atomic Energy: Nuclear Power Regulation, 1966-Present," 43 *Law & Contemp. Probs.* 67 (1979).

⁸⁸ See *id.* and notes – *infra*.

⁸⁹ See generally McNollgast, "Positive and Normative Models of Procedural Rights: An Integrative Approach to Administrative Procedures," 6 *J. L. Econ. & Org.* 307, 318-28 (special issue) (1990).

on judicial choices and decisions. As the new separation of powers literature suggests,⁹⁰ no part of the political system exists in isolation. Each of the branches affects the others.⁹¹ The PPT and law literature makes this point explicitly.⁹² The main PPT lesson is that the courts do not exist in a vacuum. Because the political branches are heavily involved in regulation and administration, judges must consider their actions in a larger context. In particular, because Congress and the President can override any judicial decisions based on statutes, judicial statutory interpretations and administrative law decisions must take into account the possibility of overrides.⁹³ Moreover, as William Eskridge has suggested,⁹⁴ Congressional overrides are far more frequent than is generally supposed.

Even so, the absence of overrides can be taken, as it appears to be in the traditional administrative law literature, as a sign that Congress routinely defers to judicial judgments. An alternative interpretation, however, is that judicial decisions are sufficiently close to those sought by political officials that the need to override seldom arises. In this view, judges strategically tailor their decisions so as to conform sufficiently to those sought by Congress.

In short, the PPT account acknowledges that judges have a good deal of discretion, but this discretion is bounded in important respects by the preferences of legislators. These preferences are actualized through the creation of various veto gates and other obstacles to policy change. Moreover, institutions emerge to protect Congressional interests. This notion is captured in the idea of a “structure-induced equilibrium,”⁹⁵ that is, a set of interlocking institutional arrangements and rules that maintain a broad fidelity to legislative interests notwithstanding judicial initiatives.

[Bring back to example of atomic energy and also the struggle over Clean Air Act implementation in the Judge Pratt/Sierra Club controversy, described at length in McNollgast, JLEO '89 and elsewhere]

⁹⁰ See generally Rui de Figuerido, Tonja Jacobi, and Barry Weingast, “The New Separation of Powers,” in *Oxford Handbook on Political Economy* (2007).

⁹¹ See text accompanying notes – supra.

⁹² See Mathew McCubbins and Daniel Rodriguez, “The Role of Law in Positive Political Theory,” in *Oxford Handbook on Political Economy* (2007); Brian Marks.

⁹³ See Marks, Ferejohn & Shipan, et al.

⁹⁴ See William Eskridge, “Overriding Statutory Decisions,” *Yale L.J.*

⁹⁵ See generally Kenneth Shepsle & Barry Weingast, “Structure Induced Equilibrium and Legislative Choice,” 37 *Public Choice* 509 (1981); Gordon Tullock, “Why So Much Stability?,” 37 *Public Choice* 189 (1981).

C. Regulatory Objectives of Congress and the Courts

Regulation, and public administration more broadly, is sufficiently important for all members of Congress that they have a compelling joint interest in ensuring that administrative law serves their interests.⁹⁶ Because of this, if the courts failed to articulate an administrative law at least broadly consistent with the objectives of Congress, Congress would have every incentive to rewrite the law. As McNollgast explains, the structure of administrative law serves both due process purposes, and political ones as well.⁹⁷ Indeed, the political implications of administrative procedures are remarkably consistent with the needs and requirements of Congress.⁹⁸ Courts, therefore, exist in a direct and strategic partnership with the political branches.

Judges are not mere pawns, however. This partnership serves the interests of both parties. The PPT view shows that, within important limits, courts have considerable freedom to tailor the details of administrative to, for example, ensure that procedural due process-related interests are upheld. They must exercise this freedom, however, in a way that serves Congressional interests and that allows regulation to respond to politically relevant constituencies. The fact that administrative procedures serve political purposes does not deny that they also serve the purposes of procedural fairness. Rather, it suggests that judges formulating procedural rights must do so in a way that is consistent with the political needs of Congress.

Here is where both PPT and the traditional legal model add important elements to the mix. PPT enriches the understanding of the proper role of the courts in this partnership by focusing attention on the strategies courts use to implement so-called “rights” interests – particularly concerns with individual fairness and non-arbitrariness – while leaving to Congress and the President the principal prerogatives over the content of social and economic policy. As the PPT framework reveals, this relationship is also born of a purposive desire of legislators to implement their preferred policies through, inter alia, the careful design of administrative procedures and regulatory instruments and a parallel desire of courts to assist legislators with these objectives. And yet it is born, as well, of an interest in judicial concerns with their own institutional prerogatives and preferences.

⁹⁶ See McNollgast, 1989, 1987.

⁹⁷ See McNollgast, “Political Origins of the APA,” *J. L. Econ. & Org.* (2000).

⁹⁸ In addition to McNollgast cites *supra*, see Bressman, “Procedures,” at --.

In a related vein, the legal model emphasizes the ways in which courts develop doctrine that has the effect of making Congressional and Presidential influences over agencies more difficult. Indeed, the courts do so sometimes for this very reason. As Dean Kagan explains: “Although substantial, [the role of the courts] is now mostly indirect: the courts today do not so much exercise an independent check on agency action as they protect or promote (in various ways and to varying degrees) the ability of the other entities . . . to perform that function.” . . . For this reason, most administrative law today amounts to an allocation of power to and among the different parties (internal and external) interested in controlling agency product.”⁹⁹ The question for Congress and the President, however, is how much is it worth to them to proceed full-speed-ahead with their regulatory strategies. All the courts can do in the end is raise the decision costs to legislators and the President; to the extent that political officials are determined to implement their regulatory objectives, the courts will seldom be in a position to resist these efforts. To recall the struggle over passive restraints at issue in the State Farm litigation,¹⁰⁰ President Reagan and his administration was able to proceed apace with deregulatory initiatives notwithstanding the Court’s reasonableness requirements.¹⁰¹ Moreover, in the many of the examples Dean Kagan raises in her thorough analysis of presidential administration in the Clinton administration,¹⁰² a skeptical court is seldom any match for a determined, resourceful president.

D. The Structure of the New Administrative State

Lastly, the administrative law literature ignores the immense attention to administrative procedure in the organic acts that have created new regulatory agencies and new regulatory laws. Most new acts are hundreds of pages of long prose, and most of these pages prescribe procedures that agencies must follow. Since the mid-1960s, the basis for most procedures associated with new agencies and new regulatory laws arise in the statute, not from the agency acting in partnership with the courts in isolation from the general political system.

Perhaps the best example of this is the architecture of federal environmental laws. These laws include an array of procedural requirements and statutory guidelines, including various action-forcing requirements (deadlines and the like) and templates for a fairly elaborate series of procedures the EPA and other cognate agencies must follow in order to promulgate regulations. Overlaid onto specific environmental statutes are various “framework” statutes, laws that

⁹⁹See Kagan, “Presidential Administration,” at 2254, 2269.

¹⁰⁰ See text accompanying notes – supra.

¹⁰¹ Cites.

¹⁰² See Kagan, supra, at --.

essentially guide environmental agencies in the process of regulatory action of different sorts. NEPA, the Regulatory Flexibility Act, laws requiring regulatory negotiation, and other similarly omnibus statutes, all impose a variety of procedural requirements upon agencies. By any measure, these laws go well beyond (although at times overlapping) procedural requirements in the APA.

Moreover, modern regulatory statutes fill in the lacuna left by the APA's neglect of so-called informal adjudication.¹⁰³ Contrary to the view frequently expressed in the literature, informal adjudication is not unregulated in American regulatory administration. In addition to the procedural due process provisions that derive from the Constitution,¹⁰⁴ there exist an admixture of detailed procedural guidelines for agencies to follow in establishing and enforcing orders.¹⁰⁵ Indeed, even the processes of statutory interpretation – regarded by some as a black hole of sorts – are increasingly guided by statutory requirements.¹⁰⁶ So, for example, when the Supreme Court decided Mead several years ago,¹⁰⁷ they did so against the backdrop by a myriad of federal statutes that in fact mandated more or less formal processes to be followed in order for an agency to implement its preferred statutory interpretation. Consequently, scholars of an earlier era – who decried the fact that the decision was largely left to the agencies to proceed with policymaking through rulemaking rather than through adjudication (or vice versa) -- missed that new regulatory statutes frequently prescribed these choices for the agencies. And where the statutes did not mandate this procedural pathway directly, they created incentives for agencies to do so. The result was that agencies had before them a rash of detailed procedural requirements and implementation guidelines.¹⁰⁸

We can debate, of course, whether this proceduralization through statutory structure was a good or bad development. But, for now, the principal point is that the expansion of procedural checks on agency performance, an expansion that has, to critics, contributed mightily to the “ossification” of regulatory decisionmaking, has been caused principally by Congress through the statutory enactment process. Where courts have spelled out rules of procedure, they have done so as supplements, and even complements, to statutory laws.

¹⁰³ See Gellhorn, Byse, and Strauss, *Administrative Law* (9th edition).

¹⁰⁴ Due process cites.

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¹⁰⁷ See United States v. Mead Corp., 533 U.S. 218 (2001).

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Having framed (admittedly in this draft, merely sketched!) the transformation in regulatory design and structure in the modern era, we can turn now to the “big” idea underlying this paper, that is, how courts have proceeded in partnership with Congress. This partnership belies the notion that courts behave either as mere supplicants of Congress (as PPT frequently supposes) or as totally free agents (as is characterized in the legal model).

V. Enter the New Administrative Law

“Administrative law has been profoundly conserving. Through a process of evolutionary adaptation to changing societal circumstances, the older forms continue, but their function has been changed in the process.”

Richard Stewart, “Administrative Law in the 21st Century”¹⁰⁹

Administrative law has adjusted in significant ways to the transformations in regulatory administration and public policy over the last quarter century or so. These shifts are consistent with the general thesis that courts have carved out legal doctrine that affects political choices and imposes generally external values onto processes of administrative decisionmaking – that is, it is broadly consistent with the traditional legal model of administrative law. At the same time, these shifts illustrate, often in subtle ways, the connection of administrative law to political choice and strategy, in ways broadly consistent with the PPT explanation of administration law and regulatory politics.

A. A Hard Look at “Hard Look”

In the abstract to his seminal 1975 “Reformation” article, Richard Stewart describes the traditional model of American administrative law as “centrally concerned with restricting administrative actions to those authorized by legislative directives.”¹¹⁰ As of the 1970’s, this model has given way, he argues to an interest representation model, one that seeks to more effectively “reconcile the discretionary power enjoyed by agencies with the basic premise of the

¹⁰⁹ 2003 NYU Law Review.

¹¹⁰ Stewart, “Reformation,” *supra*, at 1669.

liberal state that the only legitimate intrusions into private liberty and property interests are those consented to through legislative processes.”¹¹¹ While the central insights of Stewart’s analysis are parts of explanations for why and how courts have moved toward a different model of administrative law, the underlying assumption at work in this and scholarship by Stewart’s leading contemporaries is that the courts did fill out the agency control project with trans-statutory common law rules.

Certainly the beginnings of the hard look era reinforced this strategy. A number of the lodestar cases, found at the both the court of appeals level and at the U.S. Supreme Court, evinced this effort at judicial intervention largely exogenous to politics. Think first of Citizens to Preserve Overton Park v. Volpe.¹¹² In that case, the Supreme Court considered an administrative decision of officials within the executive branch, a decision to improve the permit for a section of a highway to be built through a public park. The salient administrative law questions before the Court were overlapping: First, the Court considered whether this decision was reviewable by a federal court or, instead, was “committed to agency discretion by law.”¹¹³ Second, and having answered the first question in the affirmative, the Court examined the decisionmaking processes of the agency to ensure that discretion was properly exercised. In language that would help shape hard look review in subsequent years, the Court described the basis of judicial scrutiny as involving an inquiry into whether there was adequate “law to apply.”¹¹⁴ And, significantly, this “law” could be administrative common law; that is, it needn’t follow directly from the language of the agency’s organic statute or from the APA.¹¹⁵ Similarly, the injunction to the agencies and the courts to engage in searching review was, too, derived from the interests in rational agency decisionmaking, and in a fundamentally fair process. Themes of both procedural fairness and sound governance are at work in Overton Park. And this case fits squarely in the shifting movement toward interest representation that Stewart and others described.

Overton Park may well have represented the high water mark of judicial intervention (alongside, perhaps Abbott Laboratories v. Gardner,¹¹⁶ a case that established the presumption of reviewability of administrative agency action). Key hard look cases in the 1970’s advanced the hard look review agenda, while also reflecting some intra-court handwringing over what exactly agencies were expected to do in carrying out their responsibilities for reasonable agency

¹¹¹ Id.

¹¹² 401 U.S. 402 (1971).

¹¹³ APA, Section 701(2).

¹¹⁴ See Overton, at --.

¹¹⁵ See id at --.

¹¹⁶ 387 U.S. 136 (1967).

decisionmaking. In the Ethyl Corp. litigation,¹¹⁷ for example, Judges Bazelon, Leventhal, and Wright argue over whether and to what extent courts should act as amateur scientists – as *surrogate experts* – or should confine hard look review to an essentially proceduralist excavation into the agency’s reasoning processes. Even as Stewart wrote in 1975, the consensus that courts would do well to enforce a version of interest representation through aggressive review was starting to fray. To be sure, the D.C. Circuit maintained a certain level of vigilance; and agency decisionmaking received strict scrutiny at the hands of this liberal court.¹¹⁸ Yet, other circuit courts were more ambivalent.¹¹⁹ And the Supreme Court, when they (rarely) ventured into the waters of substantive administrative law, struck a more cautionary tone. In Vermont Yankee v. NRDC,¹²⁰ the Supreme Court overturned the D.C. Circuit’s elaborate requirements that the agency in question develop and implement non-statutorily based procedures in order to safeguard public interests. It would not do, declared the Vermont Yankee Court, to look outside the scope of the APA, the agency’s organic statute, or the Constitution, to find procedural limits on the exercise of administrative discretion.

Vermont Yankee, as has been pointed out frequently,¹²¹ did not undermine in a decisive way the federal courts’ interventions into regulatory decisionmaking through hard look review. What it did do, however, is rein in efforts to create a trans-statutory common law of fair administrative procedure.¹²² Courts would thereafter have to look to constitutional principles of due process in agency adjudicatory contexts and would need to rest their decisions reviewing agency regulations on substantive scope of review grounds or on the agency’s organic statute or some admixture of both.

The apotheosis of the Court’s efforts to reconcile hard look review with statutory requirements happened in the two cases that are often juxtaposed against one another as the twin pillars of modern administrative law: Motor Vehicles Manufacturers Ass’n v. State Farm¹²³ and Chevron v. NRDC.¹²⁴ In State Farm, the Court articulated more fully a reasonableness standard

¹¹⁷ Ethyl Corp. v. EPA, 541 F.2d 1 (D.C. Cir. 1976) (en banc). See also Internat’l Harvester Co. v. Ruckelshaus, 478 F.2d 615 (D.C. Cir. 1973).

¹¹⁸ Cites.

¹¹⁹ See the discussion in Edley, “Administrative Law,” supra.

¹²⁰ 435 U.S. 519 (1978).

¹²¹ Strauss; Sunstein; other cites.

¹²² See Duffy, “Administrative Common Law,” supra.

¹²³ 463 U.S. 29 (1983).

¹²⁴ 467 U.S. 837 (1984).

for agency decisions; yet they did so yoked to the statutory framework of the Motor Vehicle Act.¹²⁵ In that respect, *State Farm* and other hard look cases of the early 1980's reflected a turn away from interest representation and back some ways to what Stewart labeled the interest representation model. As Merrick Garland explains this retrenchment:

“[T]he decline of the interest representation model is not reflected only in the loss of its descriptive power. Rather, the deregulation cases represent a significantly different conception of the role of administrative agencies. These cases largely reject the notion that agencies should do no more than reflect shifting political balances; they insist instead that administrative action be animated by the legislative purposes underlying each agency's organic statute. By so doing, these cases have reestablished agency fidelity to congressional intent as the central concern of admin law.”¹²⁶

In *Chevron*, the Court considered squarely the question of judicial deference to agency statutory interpretations. In the second step of their famous formulation, the Court instructed lower courts to ask whether the agency decision was a reasonable one. This standard has been notoriously hard to apply.¹²⁷ Although no one supposes that what has emerged from the vast body of post-*Chevron* caselaw is a coherent approach to Step Two questions, the principal criterion for evaluating whether and to what extent an agency decision passes muster is whether it reflects sound judgment and not merely arbitrariness or political considerations or a combination of both.¹²⁸ In short, the considerations reframe the issue as one of administrative common law – or at least that is the conventional wisdom from the perspective of administrative law scholars.¹²⁹

A quarter century has passed since these *State Farm* and *Chevron* have been decided and, especially with respect to the latter case, there have been significant modifications to the doctrine as the Supreme Court has decided cases involving the contours of these doctrinal rules.¹³⁰ The

¹²⁵ See *id.* at --.

¹²⁶ Merrick B. Garland, “Deregulation and Judicial Review,” 98 Harv. L. Rev. 505 (1985).

¹²⁷ See generally Ronald Levin, “The Anatomy of Chevron: Step Two Reconsidered,” 72 Chicago-Kent L. Rev. 1253 (1997).

¹²⁸ See, e.g., *Arent v. Shalala*, 70 F.3d 610 (D.C. Cir. 1995); *National Ass'n of Regulated Util. Comm'rs v. ICC*, 41 F.3d 721 (D.C. 1994); *Hazardous Waste Treatment Council v. EPA*, 886 F.2d 355 (D.C. Cir. 1989).

¹²⁹ See, e.g., Levin, *supra*; Clark Byse, “Judicial Review of Administrative Interpretation of Statutes: An Analysis of Chevron's Step Two,” 2 Admin. L.J. 255 (1988).

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underlying structure of administrative law, however, has remained more or less intact. And it is to this underlying structure that we now turn.

B. Whither an Administrative Common Law?

The notion that there is a trans-statutory administrative common law has proved unworkable, perhaps even nonsensical.¹³¹ Even where neither the regulatory statute or the APA gives clear guidance to the courts in reviewing an agency decision, the court's review is carried out in the shadow of discernible political choices. In the case of Chevron, with respect to steps one, two, and (especially), step "zero,"¹³² the court inquires into the words and structure of the statute in order to measure whether the agency's resolution passes muster. In the case of ordinary hard look review under APA Section 706 or an applicable provision of the pertinent regulatory statute, courts are measuring the agency decision in light of political considerations. Whether the court is behaving "politically" is a different matter; a fair amount of empirical analysis in recent years has suggested that the answer ranges somewhere "almost always," "mostly yes," and "occasionally yes."¹³³ But here we mean to say something different, some more moderate, that is that the agency decisions and the processes that have generated these decisions are the byproduct of distinct Congressional (and Presidential) choice. When, for example, courts look to modern environmental statutes to measure agency decisionmaking, they are considering agency decisions in light of important legislative choices. And we would thus be hard pressed to view the courts as acting "outside" politics.

There is another way, however, to understand the function of trans-statutory administrative law in our regulatory system. We can see courts as filling in the gaps left by Congress in creating administrative delegations. These gaps, as has been noted by Joseph Grundfest and Adam Pritchard,¹³⁴ among others,¹³⁵ may well be deliberate. Courts, in this

¹³¹ See the discussion in Duffy, "Administrative Common Law," supra. See also John Manning on "Nondelegation."

¹³² See Cass Sunstein, "Chevron Step Zero," 92 Virginia L Rev 187 (2006).

¹³³ Miles & Sunstein; Cross & Tiller; Wald.

¹³⁴ See Joseph Grundfest & Adam Pritchard, "Statutory Ambiguity," Stanford L Rev (200-).

¹³⁵ See, e.g., the discussion in Einer Elhauge, Statutory Default Rules: How to Interpret Unclear Legislation.

account, contribute to the political objectives of legislators by assessing the current political landscape and making appropriate adjustments through their legal doctrines.

Neither of these accounts capture adequately, in our view, the ways in which administrative law operates in modern regulatory administration. The notion that courts simply make up rules of fairness and reasonable governance is strangely dislodged from the political processes that we have described above. Not only would legislators and presidents look askance at judicial efforts to craft independent norms that constrain and channel regulatory behavior, but there would seem to be push back by the agencies themselves. Courts, after all, are limited in various ways in their ability to implement their prescriptive agendas. To overlap purely normative, trans-statutory doctrine onto a complex political process puts agencies in a real bind. And these agencies are not without resource to complicate the efforts of the reviewing courts.

An example of this phenomenon in action is the courts' imposition of a reasoned elaboration requirement on administrative agencies in rulemaking. This requirement, in many ways the centerpiece of modern hard look review, rests on the courts' confidence (or we might say the "hope") that agencies will go back to the drawing board and come up with a suitable explanation for why they decided as they did. What can happen in the real world, however, is a combination of the sort of "ossification" that Thomas McGarity and other critics have noted is the result of this back-and-forthing between the courts and agencies; moreover, such strategies risk empowering influential legislators to intervene in the middle of the regulatory process, using the delay and the court's hard look as an opportunity to pursuing their own interventions. To some extent, this is what Mashaw and Harfst described in the context of motor vehicle safety regulation in the 1970's and 80's; it is clearly part of the story Shep Melnick describes with the EPA and Clean Air legislation and John Mendeloff describes in the context of OSHA. Although none of these scholars rest their analyses on PPT accounts of regulatory administration, the basic insight that emerges from their empirical work is that judicial doctrines yield some truly unexpected consequences.

So we come back to the question of whether these judicial strategies are best framed as common law. It is hard to see how this free-floating mechanism for making and implementing law can be reconciled with how and why courts intervene in regulatory disputes. Whether modern administrative law doctrine is tethered in a taut way to the language and legislative history of particular regulatory statutes is another matter;¹³⁶ but we best see administrative law as part of a political process that includes, at its core, legislative strategies manifest in statutes and the statutory process. Seeing courts as doing something altogether exogenous, as trans-statutory in the sense we describe it above, is misleading.

¹³⁶ See Daniel B. Rodriguez & Barry R. Weingast, "Paradox," *supra*; "The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and its Interpretation," 151 U. Penn. L. Rev. 1417 (2003).

C. Political Administrative Law

The vision of the courts as preserving broad values dislodged from politics, for example, bureaucratic deliberation, civic republicanism, or palliatives for interest group influence is increasingly hard to square with the reality of modern administrative law. Moreover, it is difficult to square with a compelling normative narrative about regulatory decisionmaking in the modern administrative state. “We might regard,” suggests Lisa Bressman, “the reasoned decisionmaking requirement differently, as a special form of accountability related to legislative monitoring.”¹³⁷ Various other doctrines, including *ex parte* contacts prohibitions, hybrid procedures, and standing can be reconfigured as doctrines that serve discernible political interests. These efforts to ground contemporary administrative law doctrine in PPT is a useful antidote to the traditional legal model that supposes courts are looking objectively, and through an external lens, at agency processes. However, we need not draw the pure conclusion that all administrative law doctrines serve legislators’ strategic aims. The reality is more complex and a comprehensive answer to the question “what function does administrative law serve?” must be more nuanced.

The impact of judicial doctrine on legislative strategy is usually indirect.¹³⁸ Courts can impact the structure and parameters of legislative and executive influence through the development and application of judicial doctrine aimed at restricting the options available to members of Congress and the President. In her discussion of administrative law doctrine and PPT, Lisa Bressman suggests that judges will do so in order to help ‘reconcile the administrative state with the constitutional structure [thereby] helping to promote the legitimacy of agency action.’ This proposed function, while capturing a key insight about the incentive structure of courts, supposes that courts are in fact preoccupied with fidelity to the Constitution and, likewise, to the legitimacy of the administrative state. Yet, courts have a substantial say in what the Constitution requires and, further, the administrative state’s legitimacy is not a separate question, but is bound up with judicial pronouncements of proper agency action.¹³⁹

So, why would courts use administrative law doctrine to maintain constitutional balance and ensure administrative legitimacy when courts are so concerned with implementing legislative strategies? The answer comes in discrete pieces developed by scholars working

¹³⁷ Bressman, “Procedures,” at 1780.

¹³⁸ Much of the material in the following two paragraphs is drawn from Rodriguez & McNollgast, “Administrative Law Agonistes,” 108 Colum. L. Rev. Sidebar (4/29/08).

¹³⁹ See Kevin Stack, *Constitutional Foundations*; Bressman, “Accountability.”

squarely in the PPT tradition. One piece flows directly from the general architecture of the PPT framework. First, as Brian Marks observed two decades ago, legislators face a series of intrainstitutional hurdles to overturning judicial decisions that are within the ‘gridlock region.’¹⁴⁰ Because of the gridlock region, courts (and, for that matters, agencies)¹⁴¹ can implement their most preferred policy within the gridlock region without fearing congressional reversals.

An especially formidable ways in which courts can act to protect their prerogatives in the face of legislative and executive influence is to use legal rules to prevent legislative overturning of their rulings. They do so strategically; for example, by splitting the original legislative coalition that formed to pass the legislation. This action lessens the risk of legislative reversal of judicial decisions that fall within the policy region where the coalition has been split. Therefore, within this region, courts can maximize their own interests and, where necessary, implement their own regulatory strategies.

The success of the courts in pursuing their agendas through strategic attention to doctrine depends upon a combination of factors. More often than not, implementation of judicial interventions requires compliance, compliance by agencies and, at least at a general level, by other institutions in the political system. The clearest example of where this is the case is when a certain rule requires the expenditure of money (thus implicating legislative appropriations) or forces action by an agency (requiring some degree of executive action beyond merely acceding to the judiciary’s power). “Judicial review,” observes Anne Joseph O’Connell, “seems somewhat unstable at present, with courts cascading between political accountability and expertise theories of deference.”¹⁴² A plausible reason for this instability is that courts are imperfect in implementing strategies through doctrinal devices.¹⁴³

¹⁴⁰ Judicial policies can become a “structure based equilibrium” and be “invulnerable to change” where a court’s policy falls irreconcilably between preferred policy choices of the two legislative houses. See Brian A. Marks, “A Model of Judicial Influence of Congressional Policymaking: *Grove City College v. Bell* 18-19 (Hoover Inst., Working Papers in Political Science No. P-88-7, 1988). Gridlock also occurs in areas where those policies preferred by Congress make the president worse off and will be vetoed, while policies preferred by the president make Congress worse off and will not be passed. Therefore, subject to qualifications related to the veto-override, any judicial decision within these regions is stable because it cannot be legislatively overturned.

¹⁴¹ Ferejohn and Shipan show how the gridlock argument grants agencies a degree of discretion. See John A. Ferejohn & Charles R. Shipan, “Congressional Influence on Administrative Agencies: A Case Study of Telecommunications Policy, in *Congress Reconsidered* 393 (Lawrence C. Dodd & Bruce I. Oppenheimer, eds., 4th ed. 1989).

¹⁴² O’Connell, “Political Cycles,” *supra*, at 980.

¹⁴³ Cf. Daniel B. Rodriguez, “Of Gift Horses and Great Expectations,” 36 *Arizona State L.J.* 599 (2004) (describing unintended consequences of particular judicial doctrine).

A much more optimistic, and deeply sophisticated rendering, of judicial strategy in administrative law is found in the work of Professor Matthew Stephenson. In a series of articles, Stephenson describes the origin and functions of specific judicial doctrines from the perspective of PPT models of courts, agencies, and Congress. In his study of hard look review, for example, he uses a signaling model, the technology of which is familiar to PPT, to explain why courts can use hard look review to overcome their comparative informational disadvantages vis-à-vis other governmental decisionmakers.¹⁴⁴ Hard look review, in this logic, becomes a strategy judges use to implement their objectives. And the model, bolstered by a rich empirical examination of specific cases, suggests that courts will be reasonably effective at pursuing their strategies. Likewise, Stephenson revisits the Chevron issue and considers how courts will implement strategies favoring the President's mandate for leadership, even where this mandate is distant from the preferences of the Court.¹⁴⁵ To Stephenson, this strategy is quite purposive; the objective is to facilitate Presidential control, and, in doing so, expand the political influence of the President, perhaps at the expense of Congress. As Stephenson models this process, courts will eschew mere implementation of their ideological preferences, a choice that other scholars also working with the PPT tradition (Linda Cohen and Matt Spitzer, to be more precise)¹⁴⁶ insist courts would make. While there is more to say about the plausibility of Stephenson's ambitious effort to reinterpret Chevron, it is exactly the sort of analysis that integrates insights from both PPT and (to the extent that it focuses squarely on legal doctrine and technique) the traditional legal model.

D. Policy Tradeoffs and Judicial Strategy

Sustained judicial interventions through administrative law is just one view of the cathedral – or, as Jaffe memorably puts it, one room “in the magnificent mansion of the law.” As we discussed above, the judiciary will often trade off active scrutiny of regulatory decisionmaking in order to preserve a space for judicial inquiries into matters involving rights. Courts face tradeoffs; activism in the area of regulatory policymaking may sap its capital and thereby make it more difficult to invest in areas of law where it believes it can do the most good. It is no accident that courts fret more substantially about matters of procedural fairness and that

¹⁴⁴ Matthew C. Stephenson, “A Costly Signalling Theory of ‘Hard Look’ Judicial Review,” 58 Admin. L. Rev. 753 (2007).

¹⁴⁵ See Matthew Stephenson, “Mixed Signals: Reconsidering the Political Economy of Judicial Deference to Administrative Agencies,” 56 Admin. L. Rev. 657 (2004). See also M. Stephenson, “The Strategic Substitution Effect: Textual Plausibility, Procedural Formality, and Judicial Review of Agency Statutory Interpretations,” 120 Harv. L. Rev. 528 (2006).

¹⁴⁶ See Linda Cohen & Matthew Spitzer, “Solving the Chevron Puzzle,” 57 Law & Contemp. Problems 65 (1994).

Congress frets more about the contours of regulatory policy. Constituencies of both institutions have expectations in this regard. Congress will want to limit judicial adventures in matters of regulatory policy – and, as we discussed in the previous part, they have taken steps to so limit these adventures. Likewise, courts will want to preserve discretion and power in the area of constitutional adjudication.

[There are two separate reasons to expect that courts will care more about these issues than will Congress. First, courts traditionally create and implement doctrines concerning individual justice and therefore are more often engaged with rights and specific justice in adjudication than is the legislature or executive branch. Second, and in a more political vein, courts can and do use rights analysis to negotiate the demands of outside interest groups. If this is correct, then the judiciary will maintain, for sensible reasons, influence and even authority in the realm of extrastatutory administrative law, for this will give them leverage in and over domains that most substantially implicate the institutional interests of courts. In the end, rights-creating and rights-implementing adjudication is in the wheelhouse of courts; that is, they indeed do care about the ways in which agency decisionmaking is more or less fair. This interest is symmetrical with congressional strategies, as legislators will also protect their important prerogatives to control the processes of regulation and will keep judicial interventions more directly focused on policy at greater arms length.]

Administrative law, in important respects, mirrors this distribution of function and of role. Most conspicuously in the work of Matt Stephenson¹⁴⁷ and in earlier work by Emerson Tiller and other PPT scholars,¹⁴⁸ the strategic decisionmaking of courts is emphasized. To be sure, these scholars do not insist that courts merely implement their preferred policies. Rather -- and this the more nuanced point that illustrates well the efforts at integrating PPT models with approaches more copasetic to legal scholars -- courts pursue strategies regardless of their overarching motivations. All that is supposed in these accounts is that courts want to have an impact.

¹⁴⁷ See Stephenson sources cited therein.

¹⁴⁸ See e.g., Emerson Tiller, “Controlling Policy by Controlling Process: Judicial Influence on Regulatory Decision Making,” 14 *J. L. Econ. & Org.* 114 (1997); Joseph L. Smith & Emerson Tiller, “The Strategy of Judging: Evidence from Administrative Law,” 31 *J. Legal Stud.* 61 (2002); Pablo Spiller & Emerson Tiller, “Decision Costs and the Strategic Design of Administrative Process and Judicial Review,” 26 *J. Legal Studies* 347 (1997); David B. Spence, “Managing Delegation Ex Ante: Using Law to Steer Administrative Agencies,” 28 *J. Legal Studies* 413 (1999); “Administrative Law and Agency Policymaking: Rethinking the Positive Theory of Political Control,” 14 *Yale J. on Regulation* 408 (1997);

E. Administrative Law: Contingent? Inevitable?

Administrative law serves a dual function. Some of these functions are external to direct legislative strategies – although not, as we have stressed, external to politics. This proposition is often missed in PPT accounts; administrative law scholars, particularly scholars who take seriously the political dimensions of regulatory decisionmaking, understand this well as a theoretical matter. Moreover, the emerging empirical literature on administrative law (Anne Josephs O’Connell, Cary Coglianese, Jody Freeman, others) reinforces the point in a variety of ways and from the vantage point of a variety of different normative perspectives. Some of these functions are distinctly grounded in political choice and in purposive political activity. Administrative law tracks legislative objectives in ways that PPT explains and explores. To see administrative law as a component part of American political strategy is to understand more fully an otherwise rather curious set of doctrines.

These observations about administrative law’s dual functions reflect a somewhat weak thesis about the structure of administrative law. We have argued at length that the field should be more fully integrated and that the legal model and PPT model of regulatory decisionmaking and administrative law ought to be better integrated. Yet, the analysis above provides at the rudiments of a bolder thesis, the elements of which we sketch out here.

To return to the principal question of this paper, the transformation of administrative law in the late 1960s and early 1970s would have happened even if passive judges had not created it. To begin with, our normative commitments to fair process and to sound governance necessitate some constraints – some regulation – on the performance of administrative agencies. Commitments to representative democracy require that we give the choices of Congress and the President pride of place; but our commitments to the rule of law and our embrace of administrative government as a mechanism for reconciling liberty with efficiency, and political judgment with expertise requires that there be some elaborated rules and standards of administrative fairness and sound governance. PPT insists on the inevitability of political decisionmaking and seeks to connect the dots among various spheres of government behavior and political strategy; yet, insofar as it is entirely a positive project, it leaves open the essentially normative question of whether we should stop worrying and learn to live with persistent strategizing and inter-institutional competition for influence and control. The place for administrative law is squarely within the *sturm und drang* of regulatory competition; so long as we have firmly in mind the idea that courts do not and cannot behave independently of political considerations and the consequences of their decisions for political outcomes, we will be able to protect and nurture that appropriate place for legal doctrine that regulates administrative discretion.

A second and more direct lesson to draw from the analysis above is that administrative law is inevitable because political constituencies of various stripes demand an implementer of their objectives. The demand is not merely for (to recall Chief Justice Roberts’s phrase) an

“umpire” of sorts; rather, legislators and the President require institutions that function to facilitate their strategic objectives. For example, insofar as courts insist that agencies comply with the procedural rules and structural devices imposed upon them by statutes (as the McNollgast theory of administrative procedures suggests), then the judiciary acts as a reliable agent of the legislature. Some aspects of contemporary administrative law doctrine, as Lisa Bressman shrewdly suggests in her recent *Columbia Law Review* article, serve this function; other aspects of doctrine, however, are harder to interpret in this light. But the general point that emerges from the PPT account is that administrative law is a necessary, if not sufficient, condition for the implementation of legislative strategy. If it did not exist, Congress would have to create it in some way. Indeed, that it did so in the early days of the administrative state when attention, after all, was focused on the virtues of agency independence and judicial scrutiny was looked on with skepticism by leading scholars, is a testament to the imperative of administrative law in a system in which the legislature looks creatively for resources to carry out their policy objectives.

That administrative law is bounded, however, by statutory limits and by the vicissitudes of political actions and reactions – that is, that it is not, contrary to the traditional wisdom, a form of common law – is also critical to our picture. What is inevitable is administrative law as a system of law constructed by legislation and fashioned in the shadow of Congressional limits and forms of Presidential control. To see it as essentially judge-made law is to miss our basic point that administrative law is forged in a political context. As such, administrative law deals with matters for which the stakes are high in the minds of legislators. Regulatory policy matters to these legislators greatly, more greatly than it matters for courts typically. To suppose that courts are given the freedom and flexibility to develop trans-statutory, largely exogenous mechanisms of agency control is to imagine that Congress is interested in a very limited way in regulatory output and outcomes. This is truly hard to believe.

What is much easier to believe is the idea that courts pursue their own agendas most assiduously where the stakes are high for them. One area in which this is so is in the area of individual rights and constitutional adjudication. Courts have a vested interest in ensuring that rights are safeguarded and that the expanding administrative state does not seriously imperil the rights and liberties of citizens and groups subject to administrative policymaking. The literature on administrative adjudication and rulemaking has, unfortunately, been bifurcated; administrative scholars look at issues of retail administrative justice – think of Kenneth Davis’s work on discretionary justice, Jerry Mashaw on social security administration, Paul Verkuil, etc. – as those these issues involve different considerations and strategies than do issues involving rulemaking. But the forms of agency decisionmaking raise a common, persistent concern: How is individual liberty and the rule of law best protected in a world in which the most substantial decisions involving one’s economic well-being, health, and human dignity are made not by legislatures, but by administrative agencies. Courts have a role to play – an *inevitable* role to play – in assessing and grappling with these questions. In the final analysis, they understand this

role as superior to any role they may have in imposing external standards on agencies for reasons growing out of preferences about social and economic policies and judgments about whether an administrative decision is “too political.” Negotiating this tradeoff, then, between these two distinct functions of judicial intervention is part of the shape of administrative law. To a large degree, sustained attention by scholars of various stripes and from different disciplines to the ways in which the legal model and the PPT model address this tradeoff will help best illuminate the structure of contemporary administrative law.

VI. Summary

We have argued that both the traditional legal model and PPT provide an incomplete understanding of the evolution of administrative law over the past five decades. The traditional view of heroic courts forcing agencies to adhere to norms of fairness and reasonableness in the face of interest group politics and legislatures hopelessly captured by their constituency groups ignores the wholesale transformation of the political process from the mid-1960s onward. As new groups and constituencies arose that opposed existing regulatory agencies focused on benefits to regulated interests, Congress wrote new statutes forcing new goals and outcomes.

We illustrated this transformation with nuclear power, demonstrating the importance of the courts in forcing the NRC to follow environmental concerns, but also the central importance of new laws. Indeed, the courts could not have acted as strongly in nuclear power without these new laws, such as NEPA. NEPA created environmental impact statements and led to hundreds of legal disputes across a spectrum of agencies. As another example, Congress, not the courts, fashioned deregulation of many of the traditional regulatory agencies once captured by narrow regulated interests (e.g., the Airline Deregulation Act of 1978 and the laws deregulating railroads and trucks). Similarly, the Freedom of Information Act (1966) and the Government in the Sunshine Act (1976) dramatically changed the openness of agency proceedings. These acts had obvious implications for rights of due process, and, as well, had profound political implications.¹⁴⁹ The acts greatly improved the ability of interest groups to monitor agencies; and it lowered the likelihood that these groups would be caught by surprise policy change in an agency *fait accompli*. In particular, the acts’ new openness allowed interest groups to monitor agencies and to inform members of Congress when their interests were in jeopardy.¹⁵⁰ These new regulatory laws demonstrate the necessity of thinking of the evolution of the administrative state with both judicial and political components.

Similarly, PPT points us toward the political logic of administrative procedures but fails to see that courts nonetheless force these procedures to be consistent with the rights of due

¹⁴⁹ See McNollgast, 1989, *supra*.

¹⁵⁰ See McCubbins & Schwartz, *supra*, on “fire alarm” oversight.

process. Although this gives political officials considerable latitude to design complex regulatory procedures that create the politically relevant balance of interests, they are constrained by standard considerations of due process. We are only beginning to understand the real ways in which courts constrain political officials, and both PPT and the traditional perspectives for this project.

Finally, we return to our opening question, is administrative law inevitable? In particular, was the transformation of administrative law from the mid-1960s through the 1970s inevitable? We answer yes. Even without judges, this transformation would have taken place. The across-the-board transformation in American politics forced political officials to respond, and they did so aggressively. As new groups and constituencies arose across the spectrum of issues, Congress and the president furthered their interests and created new balances among various groups attending each issue, especially within the regulatory process. In practice, the courts and Congress worked together in this program; in short, they were partners responding to the same underlying changes in American politics. Both Congress and the courts created new rights of participation, new openness requirements, and new procedures to assure that various groups interested in a policy issue could participate adequately. At this same time, Congress changed the way it wrote regulatory laws, no longer charging agencies with the duty to regulate “in the public interest” and delegating authority to the agency to determine both how to find such interests, as well as determining “substance.” Regulatory acts became dozens of pages long, often in the hundreds, much of which represented new procedures that existing agencies had to follow under the act or charging new agencies with following. These procedures helped fashion a balance among interest groups sought by political officials, lowering the possibility that agencies would create their own balance.