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# ARTICLE

## CONSTITUTIONALISM AFTER THE NEW DEAL

Cass R. Sunstein\*

*In recent years, the failure of administrative agencies to implement congressional programs faithfully and effectively has called into question the wisdom of the central institutional innovations of the New Deal: the expansion of the regulatory state and the shift in power from the states to the federal government. In this Article, Professor Sunstein challenges the New Deal more fundamentally, examining not only the institutional changes themselves, but also the shift in constitutional commitments that underlay those reforms. Professor Sunstein identifies three aspects of New Deal constitutionalism: the rejection of the original constitutional commitment to checks and balances in favor of independent and insulated regulatory administration, the recognition of substantive entitlements beyond those protected at common law, and the abandonment of principles of federalism that vested regulatory authority in both the federal government and the states. Professor Sunstein argues that many of the present failures of regulatory administration — particularly the problems of agency capture and factionalism — can be traced to the New Deal's failure to incorporate the original constitutional commitment to checks and balances into regulatory administration. The remedy, he suggests, is to reinvoke the commitment to checks and balances through a system of coordinated review of agency action that includes a strong supervisory role for each of the three branches of government — the executive, the judiciary, and Congress. In addition, Professor Sunstein maintains that the protection of new entitlements during the New Deal was a natural and justified outgrowth of the recognition by New Deal reformers that the common law itself favors some social interests over others. He suggests that this substantive aspect of the New Deal should be incorporated into modern public law, in which common law categories persist despite the insights of New Deal reformers. Finally, Professor Sunstein argues that the third aspect of New Deal constitutionalism — the emphasis on national rather than local control of regulatory issues — has been carried too far, depriving citizens of the opportunity to participate meaningfully in the debate over the terms of their social life.*

### I. INTRODUCTION

We are in the midst of a period of considerable dissatisfaction with the performance of the federal government. The post-New Deal in-

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crease in presidential power, and the creation of a massive bureaucracy concentrated in the executive branch, have augmented factional power and self-interested representation, often leading to regulation that fails to serve the interests of the public at large. In significant ways, the federal government both overregulates and underregulates. The failure of national institutions to intervene or to exercise restraint is not simply the product of the poor judgment of key government officials or the triumph of a particular political agenda. Much of the failure of public regulation over the past half-century reflects the inadequacy of important aspects of the constitutional vision embraced by the New Deal. Institutional reform is thus a major part of the agenda of modern public law.

#### A. *New Deal Constitutionalism*

The regulatory system established during the New Deal<sup>1</sup> has failed to fulfill its original promise. In the New Deal period, reformers believed that administrative officials would serve as independent, self-starting, technically expert, and apolitical agents of change. This basic understanding wedded the original constitutional belief in the need for an energetic national government<sup>2</sup> to the desire, associated with the Progressive movement,<sup>3</sup> to insulate public officials from par-

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<sup>1</sup> The initial period of growth for the regulatory agency came before the New Deal, during the latter part of the 19th century and the first two decades of this century. See generally S. SKOWRONEK, BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877-1920 (1982) (surveying the early development of the modern administrative state). It is important to emphasize as well that the New Deal was far from monolithic. There were competing strands and several different periods of experimentation, with different emphases. For all its novelty, the New Deal was not an altogether sudden break; it should instead be understood as the culmination of a set of ideas with much earlier foundations. See generally *id.*; W. WILSON, CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS 22-23 (1981) [hereinafter W. WILSON, CONGRESSIONAL GOVERNMENT] (describing "the new leadership of the Executive"); W. WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 57-81 (1921) [hereinafter W. WILSON, CONSTITUTIONAL GOVERNMENT]; *id.* at 60 (chronicling the rise of the President "as the unifying force in our complex system, the leader both of his party and of the nation"); W. WILSON, THE NEW FREEDOM: A CALL FOR THE EMANCIPATION OF THE GENEROUS ENERGIES OF THE PEOPLE 5-8 (1961) (detailing Wilson's campaign to regulate the trusts). The discussion in this Article is therefore stylized, emphasizing dominant features. For discussion of the period, see generally P. CONKIN, THE NEW DEAL (2d ed. 1975); K. DAVIS, FDR: THE NEW DEAL YEARS, 1933-1937 (1986); O. GRAHAM, JR., TOWARD A PLANNED SOCIETY (1976); E. HAWLEY, THE NEW DEAL AND THE PROBLEM OF MONOPOLY (1966); R. HOFSTADTER, THE AGE OF REFORM (1955); B. KARL, THE UNEASY STATE (1983); J. PATTERSON, CONGRESSIONAL CONSERVATISM AND THE NEW DEAL (1967); J. PATTERSON, THE NEW DEAL AND THE STATES: FEDERALISM IN TRANSITION (1969).

<sup>2</sup> See *infra* pp. 432-33.

<sup>3</sup> See, e.g., M. BERNSTEIN, REGULATING BUSINESS BY INDEPENDENT COMMISSIONS 35-39 (1955). See generally R. HOFSTADTER, *supra* note 1, at 232-36 (describing Theodore Roosevelt's efforts to achieve a nonpartisan administration); S. SKOWRONEK, *supra* note 1, at 177-211 (discussing the Progressive movement's goal of reformulating civil administration).

tisan pressures in the service of a long-term public interest. The concept of autonomous administration, now under sharp attack, was originally the source of enormous optimism about possible reformation of the system of checks and balances. The New Dealers believed that institutional changes were necessary to allow the federal government to deal with the multiple social and economic issues that arose in the wake of the Depression.

The institutional program of the New Deal was one element of a three-part critique of the traditional constitutional framework. The first criticism, substantive in character, was the culmination of a long period of rethinking both of that framework and of the system of common law ordering. For the New Deal reformers, the common law was neither natural nor prepolitical. Instead, it embodied a particular social theory, serving some interests at the expense of others.<sup>4</sup> In particular, the New Dealers viewed the common law as a mechanism for insulating the existing distribution of wealth and entitlements from collective control. The common law catalog of rights included both too much and too little — excessive protection of established property interests and insufficient protection of the interests of the poor, the elderly, and the unemployed. Hence the New Deal reformers called for substantial changes that would recognize new interests as entitlements and redistribute resources.<sup>5</sup> Most dramatically, President Franklin Roosevelt urged a "second Bill of Rights," available to all "regardless of station, race, or creed," and including:

The right to a useful and remunerative job in the industries or shops or farms or mines of the Nation;

The right to earn enough to provide adequate food and clothing and recreation;

The right of every farmer to raise and sell his products at a return which will give him and his family a decent living;

The right of every businessman, large and small, to trade in an atmosphere of freedom from unfair competition and domination by monopolies at home or abroad;

The right of every family to a decent home;

The right to adequate medical care and the opportunity to achieve and enjoy good health;

The right to adequate protection from the economic fears of old age, sickness, accident, and unemployment;

The right to a good education.<sup>6</sup>

<sup>4</sup> See *infra* pp. 437-38.

<sup>5</sup> See *infra* pp. 437-40.

<sup>6</sup> F.D. Roosevelt, Message to the Congress on the State of the Union (Jan. 11, 1944), reprinted in 13 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT, VICTORY AND THE THRESHOLD OF PEACE, 1944-45, at 41 (1950). President Roosevelt described the

The second element of the New Deal critique focused on the institutional system of tripartite government and checks and balances. The New Deal reformers believed that the original constitutional structure, like the common law, was closely associated with protection of the existing distribution of wealth and entitlements. In their view, the system of separated functions prevented the government from reacting flexibly and rapidly to stabilize the economy and to protect the disadvantaged from fluctuations in the unmanaged market.<sup>7</sup> In addition, the New Deal reformers believed that the distribution of powers among the three branches of government created political struggles that disabled officials in the executive branch from making regulatory policies free of partisan pressure.

Although the most radical attacks on tripartite government failed, some of the impulses behind those attacks paved the way for both enhanced presidential authority and the rise of regulatory administration.<sup>8</sup> The newly created agencies, largely a creature of the New Deal,<sup>9</sup> combined traditionally separated functions and remained free of direct control from Congress, the federal judiciary, and sometimes

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origin of the term "New Deal" in this way:

The word "Deal" implied that the government itself was going to use affirmative action to bring about its avowed objectives rather than stand by and hope that general economic laws alone would attain them. The word "New" implied that a new order of things designed to benefit the great mass of our farmers, workers and business men would replace the old order of special privilege in a Nation which was completely and thoroughly disgusted with the existing dispensation.

F.D. Roosevelt, 2 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT, THE YEAR OF CRISIS, 1933, at 5 (1938).

<sup>7</sup> See Dunn, *Regulation by Commission*, 199 N. AM. REV. 205, 205-06 (1914) (discussing the inability of the courts, legislature, and executive branch to regulate properly); see also J. LANDIS, THE ADMINISTRATIVE PROCESS 10-46 (1938) (arguing in favor of agencies rather than courts); Eastman, *The Place of the Independent Commission*, 12 CONST. REV. 95 (1928) (discussing the function and place of the independent commission within government).

<sup>8</sup> See *infra* pp. 440-41.

<sup>9</sup> Although administrative agencies have been a part of government since the founding of the republic, the modern regulatory agency is a recent phenomenon. The Interstate Commerce Commission was created in 1887, and the Federal Trade Commission in 1914, but it was not until the New Deal that the modern agency became a pervasive feature of American government. Eleven agencies were created between the framing of the Constitution and the close of the Civil War; six were created from 1865 to the turn of the century; nine agencies date from 1900 to the end of World War I; nine more were created between 1918 and the Depression in 1929; and no fewer than 17 were created in the decade between 1930 and 1940. See ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, FINAL REPORT 7-11 (1941) [hereinafter ATTORNEY GENERAL'S COMMITTEE]. These New Deal agencies included the Federal Home Loan Bank Board, the Federal Deposit Insurance Corporation, the Securities and Exchange Commission, the Social Security Board, the National Labor Relations Board, the Commodity Exchange Commission, the Railroad Retirement Board, the Wage and Hour Division of the Department of Labor, and the Selective Service Administration. See *id.* at 10-11. In addition, of course, new duties were conferred on established entities during this period.

even the President.<sup>10</sup> The institutional critique of the period, pointing to the need for entities not burdened by tripartite government, naturally accompanied the New Deal's substantive program.<sup>11</sup>

The third element in the New Deal critique, also institutional, produced a massive shift in the relationship between the federal government and the states. Interdependencies in the economy, a central revelation of the Depression, made it increasingly difficult for reformers to believe that states could solve social and economic problems on their own. Competition among the states sometimes produced paralysis; many problems called for a uniform national remedy. States often seemed to be arenas for factional strife and parochialism.<sup>12</sup> Moreover, the size of state government and the dominance of well-organized private groups within the states made it difficult to credit the traditional belief that local self-determination could genuinely be achieved by state autonomy. In these circumstances, the call for a dramatic increase in the exercise of federal regulatory power seemed quite natural.

In the New Deal period, the original constitutional framework was thus reformulated in three fundamental ways. The New Deal set out a different conception of legal rights, rejecting common law and status quo baselines for deciding what constituted governmental "action" and "inaction"; it proposed a dramatically different conception of the presidency and a novel set of administrative actors; and it rejected traditional notions of federalism. The term "New Deal constitutionalism" describes the resulting structure.

### B. Current Controversies

Although the reformers of the 1930's were largely successful in changing both legal entitlements and institutional forms, American public law has not entirely come to terms with New Deal constitutionalism, and many current controversies reflect ambivalence about its legacy. Some of modern public law, for example, is built directly on common law or status quo baselines. For example, rights to a hearing,<sup>13</sup> to an article III tribunal,<sup>14</sup> and to judicial review of agency action<sup>15</sup> are powerfully influenced by common law categories; the

<sup>10</sup> See *infra* pp. 444-45. The degree to which agencies were intended to be or have in fact been immune from presidential control is subject to dispute. See *id.*; *infra* note 352.

<sup>11</sup> See J. LANDIS, *supra* note 7, at 30-40 (describing institutional limits on the ability of courts to regulate economic activity); Hale, *Coercion and Distribution in a Supposedly Non-coercive State*, 38 POL. SCI. Q. 470, 478-81 (1923) (discussing coercion in markets).

<sup>12</sup> See *infra* note 391 and accompanying text.

<sup>13</sup> See *infra* pp. 502-03.

<sup>14</sup> See *Northern Pipeline Constr. Co. v. Marathon Pipeline Co.*, 458 U.S. 50 (1982).

<sup>15</sup> See *infra* pp. 474-78 (discussing standing and reviewability).

existence of a right protected at common law is highly relevant in all three areas. One of the greatest ironies of modern administrative law — an area whose origins lay in a substantial repudiation of the common law — is its continuing reliance on common law categories.

The institutional issues are in a similar state of flux. Over the last three decades, autonomous administration has come under pressure from a variety of directions. In a number of statutes enacted since 1960, Congress has attempted to limit administrative discretion through timetables, deadlines, and clear instructions about implementation. In the 1960's and 1970's, the courts became increasingly aggressive in reviewing administrative activity. Since 1970, the President has sought to impose greater control. There has also been a resurgence of doubt about the constitutional status of agencies that are "independent" of presidential control. In all of these areas, traditional checks and balances have been reinvigorated in an effort to police the administrative process and to restore electoral accountability. Current failures of regulatory agencies have thus undermined the institutional learning of the New Deal during a period in which the New Deal skepticism about "limited government" remains for the most part intact, at least in the context of social regulation.<sup>16</sup>

Recent efforts to impose judicial and executive checks on the regulatory process have been especially controversial. In light of the ideological tension between the President and the judiciary during the Reagan Administration, it should perhaps be unsurprising that those who favor an active judicial role tend to oppose the exercise of presidential authority<sup>17</sup> and that those favorably disposed toward presi-

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<sup>16</sup> President Reagan, for example, has not fundamentally altered the regulatory state. During his first term, he spoke approvingly of the "social safety net," and his intrusions on spending and regulatory measures were not intended to eliminate minimum floors. *See generally* MAINTAINING THE SAFETY NET: INCOME REDISTRIBUTION PROGRAMS IN THE REAGAN ADMINISTRATION (J. Weicher ed. 1984) (examining changes in income security and redistribution programs during Reagan's first term).

<sup>17</sup> *See, e.g.*, Davis, *Presidential Control of Rulemaking*, 56 TUL. L. REV. 849, 853-56 (1982); Morrison, *OMB Interference with Agency Rulemaking: The Wrong Way to Write a Regulation*, 99 HARV. L. REV. 1059, 1064-71 (1986) [hereinafter Morrison, *OMB Interference with Agency Rulemaking*]; Morrison, *Presidential Intervention in Informal Rulemaking: Striking the Proper Balance*, 56 TUL. L. REV. 879, 897-902 (1982) [hereinafter Morrison, *Presidential Intervention in Informal Rulemaking*]. Courts have invalidated a number of deregulatory efforts. *See, e.g.*, Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983) (invalidating an agency's rescission of passive restraint regulation); Action for Children's Television v. FCC, 821 F.2d 741, 745-77 (D.C. Cir. 1987) (invalidating the deregulation of children's television commercialization guidelines); Independent U.S. Tanker Owners Comm'n v. Dole, 809 F.2d 847, 853-55 (D.C. Cir. 1987) (invalidating the deregulation of subsidized merchant marine vessels), *cert. denied*, 56 U.S.L.W. 3243 (U.S. Oct. 6, 1987); Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 507, 534-41 (1985) (describing deregulation cases under the Reagan administration); Sunstein, *Deregulation and the Hard-Look Doctrine*, 1983 SUP. CT. REV. 177,

dential authority are skeptical about the supervisory role of the federal courts.<sup>18</sup> But the disagreement between advocates of presidential control and advocates of judicial power is undergirded not only by divergent views about how much social and economic regulation is desirable, but also by disagreement over the respective roles of politics, law, and technical expertise in the regulatory process.<sup>19</sup> The advocates of a strong judicial role generally embrace a technocratic conception of regulation — also associated with the New Deal — in which immersion in the law and facts leads to uniquely correct solutions, or at least to a sharply restricted range of acceptable outcomes.<sup>20</sup> In a curious reversal of the New Deal understanding that technocratic rationality precludes judicial control, some observers maintain that the courts should play an important role in regulation — to ensure “legality” and to prevent factionalism — and that the role of the President is secondary.<sup>21</sup>

The advocates of presidential control are deeply skeptical of this conclusion. For them, regulatory issues are above all “political.” Here, as elsewhere, the precise meaning of the term “political” is not always clear, but the central ideas are that regulation poses issues of values and not of facts, and that the relevant values should be implemented by those accountable to the public. In addition, presidential control is said to promote technocratic rationality.<sup>22</sup> It follows

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190–91. Courts have also reviewed administrative inaction and sometimes compelled administrative action. See, e.g., *Doyle v. Brock*, 821 F.2d 778, 783–87 (D.C. Cir. 1987) (invalidating a decision by the Secretary of Labor not to challenge a union election procedure); *NAACP v. Secretary of Hous. & Urban Dev.*, 817 F.2d 149, 157–61 (1st Cir. 1987) (requiring HUD affirmatively to further the antidiscriminatory policies of the Fair Housing Act); *Public Citizen Health Research Group v. Auchter*, 702 F.2d 1150 (D.C. Cir. 1983) (requiring OSHA to expedite rulemaking regarding industrial exposure to ethylene oxide); *Carpet, Linoleum & Resilient Tile Layers Local 419 v. Brown*, 656 F.2d 564 (10th Cir. 1981) (reviewing agencies’ failure to enforce the Davis-Bacon Act). *But see Heckler v. Chaney*, 470 U.S. 821 (1985) (creating a presumption against review of agency decisions not to take enforcement action).

<sup>18</sup> See, e.g., Gray, *Presidential Involvement in Informal Rulemaking*, 56 TUL. L. REV. 863, 869–78 (1982); Pierce, *The Role of Constitutional and Political Theory in Administrative Law*, 64 TEX. L. REV. 469, 520–24 (1985); Scalia, *Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345.

<sup>19</sup> Cf. C. Edley, *Judging Governance: The Structure of Administrative Law* (temp. ed. June 26, 1986) (unpublished manuscript on file at Harvard Law School Library) (arguing that the trichotomy of politics, adjudicatory fairness, and scientific expertise pervades judicial understanding of administrative decisions and provides misleading and unworkable distinctions).

<sup>20</sup> Cf. Morrison, *OMB Interference with Agency Rulemaking*, *supra* note 17, at 1066–67 (criticizing OMB for second-guessing the technical decisions of experts and politicizing the rulemaking process).

<sup>21</sup> See Davis, *supra* note 17 (criticizing the President’s recent efforts to wield control through the Office of Management and Budget); Morrison, *OMB Interference with Agency Rulemaking*, *supra* note 17, at 1066–67 (same).

<sup>22</sup> See *infra* pp. 453–56.

that the President should play a critical role in regulation, and that the courts should do very little.

Controversies over clear congressional instructions to agencies often turn on similar disputes about the relationship between the political and technocratic features of regulation. Advocates of congressional specificity point to the risk of regulatory failure and the advantages of the legislative process in terms of visibility and accountability.<sup>23</sup> Critics contend that Congress is itself beset by factionalism<sup>24</sup> and that a measure of agency autonomy is necessary to ensure flexibility and specialization in the matter at hand. In all of these areas, the debate over the regulatory process has refocused attention on the nature of tripartite government in an era of positive regulation.

Finally, efforts have been made to achieve some of the goals associated with the original federal structure. Proposals for increasing state autonomy, promoting local self-determination, and achieving economic democracy recall the roots of the Constitution in principles of civic republicanism.<sup>25</sup> At least for some, the goals of such proposals are to find a realm for active citizen participation in deciding the terms of social life, to promote flexibility and diversity, and to ensure that political outcomes result from civic virtue and deliberation rather than from self-interest and bargaining.

The principal purpose of this Article is to describe the relationship between the original constitutional structure and the New Deal reformation and to outline some of the lessons of the last half-century for dilemmas in modern public law. The Article suggests that the New Deal's substantive critique was largely correct; indeed, in some ways it did not go far enough.<sup>26</sup> An important task for the future is therefore to generate a new set of entitlements to accompany the development of public law. On the other hand, the institutional framework of the New Deal was largely a mistake — an unnecessary and in some ways counterproductive means of achieving its own substantive program. Even if the institutional goal of insulating officials from constituents is grounded in established features of Amer-

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<sup>23</sup> See, e.g., T. LOWI, *THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES* 298–301 (2d ed. 1979).

<sup>24</sup> See *infra* note 286 and accompanying text.

<sup>25</sup> See Stewart, *Federalism and Rights*, 19 GA. L. REV. 917, 918 (1985) (“[D]ecentralized self-government promotes republican values by providing citizens greater opportunities to participate in public and political life and collectively to deliberate and define the character of their community.”). See generally B. BARBER, *STRONG DEMOCRACY* (1984) (advocating decentralization in the interest of participatory democracy).

<sup>26</sup> In the area of economic regulation, however, and in economic premises generally, New Deal understandings were misguided, resulting in regulatory schemes based on faulty assumptions. See generally S. BREYER, *REGULATION AND ITS REFORM* (1982) (discussing regulatory failures that often result from “mismatching” the diagnosis of the market problems and the administrative remedy applied).

ican constitutionalism,<sup>27</sup> this goal has not been served by the institutional innovations of the New Deal. Administrative agencies have failed to serve as vehicles for democratic aspirations, and the regulatory regimes they have designed have often been unsuccessful.

In these circumstances, it is necessary both to counter the pathologies of the current institutions and to consider new initiatives. Such strategies must of course recognize the need for regulatory agencies that can provide both flexibility over time and specialization in the subject at hand. But in the wake of the abandonment of the New Deal vision of independent administration, the best alternative is to develop a system of aggressive legislative, judicial, and executive control — a system in which the three institutions bring about something close to the safeguards of the original constitutional framework without retreating to anachronistic understandings of "limited government." Such a system, accompanied by a reformulated network of rights and strengthened federalism, will promote those aspects of New Deal constitutionalism that have the strongest claim to contemporary support.

I propose a number of reforms to accomplish these goals. These include (1) increased presidential supervision of the executive agencies, accompanied by various safeguards; (2) reformulation of executive control to include the power and responsibility to encourage the undertaking of regulatory initiatives — to some degree on the ombudsman model<sup>28</sup> — as well as the authority to discourage unnecessary or counterproductive proposals; (3) continuation of a moderately aggressive role for the federal judiciary; (4) development of a greater role for Congress in agency administration, through specifications of regulatory ends, deadlines, and various sorts of oversight; (5) reduction of statutes that identify the means by which agencies are to accomplish statutory goals; (6) inclusion of independent agencies within the supervisory authority of the President; (7) revision of the system of rights to extend the New Deal abandonment of common law and status quo baselines; (8) reformulation of administrative law doctrines to place regulatory beneficiaries on the same plane as regulated entities; and (9) a departure from the national focus of the New Deal to a system that increases opportunities for local self-determination and democratic participation.

This Article is organized as follows. Part II describes the relationship between limited government and the traditional distribution of national powers; it also explores the ways in which New Deal constitutionalism departed from the original framework, both in its institutional critique and in its opposition to limited government. Part III

<sup>27</sup> See *infra* pp. 431-32.

<sup>28</sup> See *infra* pp. 488-89.

describes and evaluates changing attitudes of the President, the courts, and Congress toward the administrative process, suggesting that because of the various intrusions on agency autonomy, traditional conceptions of administration have become anachronistic. Part III also addresses the relationships among the various forms of control and discusses the constitutional attack on independent agencies, relating that attack to the declining faith in New Deal administration. Part III argues in favor of a revised system of checks and balances, adapted for a period of active governmental regulation of the economy. Part IV discusses the reformulation of rights during the New Deal period, substantive regulatory reform, and the question of local self-determination.

## II. THE NEW DEAL REFORMATION

### *A. The Distribution of National Powers: Underlying Functions*

The New Deal was a self-conscious revision of the original constitutional arrangement of checks and balances, and some of the problems of modern regulation are a product of the myopic reaction of the New Deal reformers to the system of separated and divided powers. New Deal constitutionalism must therefore be understood against the backdrop of the traditional framework. It is necessary at the outset to note that the notion of separation of powers is in important respects a mischaracterization of the constitutional system, which should instead be understood in terms of checks and balances.<sup>29</sup> The three branches of course have overlapping functions; each is involved to some degree in the activities of the other.<sup>30</sup> The term "separation" tends to disguise this fact.

The distribution of national powers was powerfully influenced by the Madisonian revision of classical republican thought and in particular by the Madisonian conception of representation.<sup>31</sup> In Madison's framework, the central danger for a political system lay in factionalism — the usurpation of governmental power by well-organized private

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<sup>29</sup> See F. McDONALD, *NOVUS ORDO SECLORUM* 258 (1985) ("The doctrine of the separation of powers had clearly been abandoned in the framing of the Constitution; as Madison explained in *Federalist* numbers 47–51, mixing powers was necessary to ensure a system of checks and balances.").

<sup>30</sup> Examples of overlapping control include the President's role in lawmaking, most prominently the presentment clause; the power of Congress to advise and consent to presidential appointments; the power of Congress to vest the appointment authority in the President alone, department heads, or courts; judicial review; and the mixed roles of Congress and the President in the area of foreign affairs.

<sup>31</sup> See D. EPSTEIN, *THE POLITICAL THEORY OF THE FEDERALIST* 93–99 (1984) (discussing Madison's view of the duty of representatives to promote the public good).

groups with interests adverse to those of the public as a whole.<sup>32</sup> Madison believed that politics should not consist of a series of unprincipled trade-offs among self-interested factions. The process should instead have a significant component of deliberation and dialogue about the public good. As Madison saw it, however, experience had shown that the classical republican belief in small-scale democracy, calling for active citizen participation<sup>33</sup> in government, was unrealistic and counterproductive.<sup>34</sup> In view of the self-interested character of citizen behavior, efforts to promote decisions by the citizenry at large would produce factional warfare.<sup>35</sup> Widespread citizen participation therefore would not serve the traditional republican belief in deliberative government.

Madison's solution dramatically revised traditional republican thought.<sup>36</sup> For classical republicans, only a small republic with direct self-rule could produce and benefit from a virtuous citizenry.<sup>37</sup> Madison turned this understanding on its head. In his view, it was a large republic, with comparatively insulated representatives, that would be uniquely able to produce a well-functioning deliberative democracy. A small republic would be torn by factional warfare; in a large one, by contrast, representatives would be able to escape the pressures of powerful groups and engage in the deliberative tasks of politics. It was therefore necessary to place decisions in the hands of representatives chosen from a large territory, "whose wisdom may best discern the true interest of their country and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations."<sup>38</sup> In this respect, there is a Burkean strand in Madison's

<sup>32</sup> See *THE FEDERALIST* No. 10 (J. Madison).

<sup>33</sup> See Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 35-48 (1985) (discussing the relationship between Madisonian theory and classical republican thought).

<sup>34</sup> See *THE FEDERALIST* No. 10 (J. Madison).

<sup>35</sup> See *id.* (criticizing small republics as arenas for factionalism).

<sup>36</sup> The role of republican thought in the constitutional design is disputed. See, e.g., R. DAHL, A PREFACE TO DEMOCRATIC THEORY 4-33 (1956) (offering a pluralist approach); Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1016-23 (1984) (suggesting the prevalence of "normal politics" in the original system); Diamond, *Ethics and Politics: The American Way*, in *THE MORAL FOUNDATIONS OF THE AMERICAN REPUBLIC* 39, 46-49 (R. Horwitz ed. 1977) (emphasizing the framers' beliefs in self-interest and political bargaining). See also sources cited below in note 37.

<sup>37</sup> See Sunstein, *supra* note 33, at 31-32, 35-38. For various views on republicanism and the founding, see J. DIGGINS, *THE LOST SOUL OF AMERICAN POLITICS* (1984); J.G.A. POCOCK, *THE MACHIAVELLIAN MOMENT* 333-552 (1975); G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787*, at 46-90, 430-67 (1969); Banning, *Republican Ideology and the Triumph of the Constitution, 1789 to 1793*, 31 WM. & MARY Q. 167 (1974); Kramnick, *Republican Revisionism Revisited*, 87 AM. HIST. REV. 629 (1982); and Shalhope, *Republicanism and Early American Historiography*, 39 WM. & MARY Q. 334 (1982).

<sup>38</sup> *THE FEDERALIST* No. 10, at 60 (J. Madison) (C. Van Doren ed. 1945).

theory of representation.<sup>39</sup> Madison abandoned the classical republican belief in direct self-rule by the citizenry<sup>40</sup> without rejecting the underlying republican faith in deliberative democracy. Of course, the framers set out other safeguards as well, including federalism and a measure of political accountability, achieved through direct election of the House of Representatives and through electoral control of other institutions.

The distribution of national powers served two principal purposes.<sup>41</sup> The first was efficiency, brought about by a sensible division of labor. Often the separation of powers is thought to confine authority, but in some respects it increases and liberates it. For example, a central defect of the Articles of Confederation was its failure to provide for a strong executive. The framers, responding to this failure, created an executive branch designed to promote energetic and consistent governance.<sup>42</sup>

The goal of governmental efficiency was also promoted by the coordination of executive action, which was to be achieved through the creation of a unitary executive branch.<sup>43</sup> The framers rejected a "plural executive" on the ground that the fragmentation of power would make expeditious action impossible, attenuate accountability, and prevent coordination and centralization of policy.<sup>44</sup> Hence exec-

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<sup>39</sup> See Barber, *The Compromised Republic: Public Purposelessness in America*, in THE MORAL FOUNDATIONS OF THE AMERICAN REPUBLIC 19, 25–26 (R. Horwitz ed. 1977).

<sup>40</sup> Important exceptions to the Madisonian rejection of direct democracy were the rare but crucial moments of constitutional creation, in which the citizenry actually participated. See Ackerman, *supra* note 36, at 1022–24. The New Deal might itself be understood as such a "constitutional moment." *See id.* at 1051–57.

<sup>41</sup> The discussion that follows draws on that in G. STONE, L. SEIDMAN, C. SUNSTEIN & M. TUSHNET, CONSTITUTIONAL LAW 343–45 (1986).

<sup>42</sup> James Wilson described the necessity for a unitary executive in these terms:

[I]n the active scenes of government, there are emergencies, in which the man [who] deliberates, is lost. But, can either secrecy or dispatch be expected, when, to every enterprise, mutual communication, mutual consultation, and mutual agreement among men, perhaps of discordant views of discordant tempers and of discordant interests, are indispensably necessary? . . . If, on the other hand, the executive power of government is placed in the hands of one person, is there not reason to expect, in his plans and conduct, promptitude, activity, firmness, consistency and energy?

Address by James Wilson, quoted in Miller, *An Inquiry into the Relevance of the Intentions of the Founding Fathers, with Special Emphasis upon the Doctrine of Separation of Powers*, 27 ARK. L. REV. 583, 589 (1973). See generally Flaumenhaft, *Hamilton's Administrative Republic and the American Presidency*, in THE PRESIDENCY IN THE CONSTITUTIONAL ORDER 65, 65–112 (J. Bessette & J. Tulis eds. 1981) (discussing Hamilton's position).

<sup>43</sup> See generally E. CORWIN, THE PRESIDENT: OFFICE AND POWERS 1787–1957, at 3–30 (1957) (discussing the unitary executive); Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 599–602 (1984) (same). This goal does not, however, eliminate Congress' authority to structure the executive branch. *See infra* p. 498.

<sup>44</sup> See 3 THE FOUNDERS' CONSTITUTION 491–99 (P. Kurland & R. Lerner eds. 1987) (discussing drafting history).

utive power was vested in the President alone.<sup>45</sup> The division of power between the executive and the judiciary also served to free the executive from responsibility for decisions that all or parts of the citizenry might disapprove. By conferring adjudicative functions on a separate institution, the framers ensured that the executive would not be held responsible for decisions unfavorable to particular factions.<sup>46</sup>

Even though the distribution of national powers can be understood as an efficient division of labor, the best-known justification for the distribution is the need to diminish the risk of tyranny. Even as Madison extolled the value of a large republic in promoting public-spirited representation, he recognized that "enlightened statesmen will not always be at the helm."<sup>47</sup> The distribution of national powers was designed to check unenlightened or self-interested representatives. Above all, it diffused governmental power, reducing the likelihood that any branch would be able to use its power against all or parts of the citizenry. The system of checks and balances allowed each branch — armed with its own ambitions — to attempt to counter the other.<sup>48</sup> In these respects, checks and balances fit comfortably into a system in which dangers were thought to lie principally in governmental action rather than failure to act.

In view of this history, it should not be surprising that the New Deal reformers associated the system of checks and balances with governmental inaction. This association prompted advocates of governmental intervention to seek a substantial reformation of the original distribution of national powers. The reformation has been only partly successful, however, and many of its failings recall the purposes underlying the original system of checks and balances. It is therefore

<sup>45</sup> See Flaumenhaft, *supra* note 42, at 70-71, 74; *id.* at 70 (arguing that in the Hamiltonian system of energetic national government, "[o]nly replacing the vestiges of democratic participation by an efficacious administrative system could supply the energy to protect [Americans] against turmoil and invasion and the energy to manage their prosperity," and stating that "[t]he rejection of classical politics culminates in the politics of administration"). This understanding fits comfortably with Madison's theory of representation; it also presages the New Deal. See *infra* pp. 441-42.

<sup>46</sup> See Holmes, *Precommitment and the Paradox of Democracy*, in CONSTITUTIONALISM AND DEMOCRACY (J. Elster & A. Slagstad eds. forthcoming 1988).

<sup>47</sup> THE FEDERALIST No. 10, at 58 (J. Madison) (C. Van Doren ed. 1945).

<sup>48</sup> This justification appears in THE FEDERALIST No. 47 (J. Madison) (C. Van Doren ed. 1945): "The accumulation of all powers, legislative, executive, and judiciary in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." *Id.* at 322. This basic theme can also be found in Justice Brandeis' celebrated suggestion that the "doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy." *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting).

necessary to explore the ways in which the distribution of national powers operates as a safeguard against tyranny. The framers emphasized several considerations; most are highly relevant to current institutional dilemmas.

1. *The Rule of Law.* — The distinction between the legislature and the executive ensures that the power to execute the law is not in the hands of those who make it. Because legislators are unable to exempt themselves from law execution, they must, in enacting laws, take the perspective of ordinary citizens subject to the force of the law. Thus “[i]f a separate executive will enforce the law even against the lawmakers, the lawmakers will not have a ‘distinct interest from the rest of the Community.’”<sup>49</sup> In this way, the distribution of national powers promotes generality in lawmaking — a fundamental constitutional value.

2. *Rulers Versus Ruled.* — A related but more general justification stresses the desire to ensure that government officials will not act in their own interests, but in the interest of the public as a whole. The concern that rulers might have independent interests, and use them to oppress the public, played an important role in the framing of the Constitution.<sup>50</sup> The term “self-interested representation” describes the phenomenon of representatives seeking to promote their own interests.<sup>51</sup> If authority were concentrated in one branch, that branch would be more likely and able to increase its own power at the expense of the governed. By allowing each branch to check the others, the distribution of national powers was intended to act as a partial solution to this problem, increasing democratic control over representatives and safeguarding both liberty and private property against governmental action.<sup>52</sup>

3. *Limited Government.* — A different rationale for the constitutional distribution of powers stresses the goal of limited government. The executive and judiciary must concur with the legislature in order for a law to be enforced. No law can be brought to bear against the citizenry without a broad consensus. Each branch has the power to prevent legal impositions. This system tends to make it difficult for government to act unless there is something close to general agreement that it ought to do so. This rationale echoes Montesquieu’s observation that a system with three branches “should naturally form a state of repose or inaction.”<sup>53</sup>

<sup>49</sup> D. EPSTEIN, *supra* note 31, at 130 (quoting J. LOCKE, TWO TREATISES OF GOVERNMENT 410 (P. Laslett ed. 1965) (3d ed. 1698)). In this respect, the system of checks and balances has an implicit but powerful equal protection theme.

<sup>50</sup> See THE FEDERALIST No. 51 (J. Madison).

<sup>51</sup> The economic term is “agency costs.” See Jensen & Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure*, 3 J. FIN. ECON. 305 (1976).

<sup>52</sup> See Levi, *Some Aspects of Separation of Powers*, 76 COLUM. L. REV. 371, 374 (1976).

<sup>53</sup> C. MONTESQUIEU, THE SPIRIT OF THE LAWS 211 (D. Carrithers ed. 1977) (T. Nugent trans. 2d ed. 1748).

For the framers, the legislature posed the primary threat of unjustified intrusion into the private sphere. The period immediately before the Constitutional Convention of 1787 was characterized, in the view of many of the framers, by dangerous interventions by the legislature into the realm of liberty and private property.<sup>54</sup> The distribution of national powers was therefore intended to ensure the protection of individual rights — most prominently rights of property — against the legislature.<sup>55</sup>

There is in this respect an intimate connection between the distribution of national powers, the protection of private ordering, and the framers' emphasis on the need for "deliberation" before governmental action.<sup>56</sup> Deliberation was designed in part as a check against popular passions for redistribution of wealth.

4. *The Problem of Faction.* — The distribution of powers at the national level also helped resolve a central problem of government: factionalism, which poses the risk that private groups might usurp public power in order to redistribute wealth or opportunities in their favor.<sup>57</sup> Such private groups, whether minorities or (more likely) majorities, might use governmental authority to oppress others. The separation of powers and the system of checks and balances were intended to reduce that risk. A faction might come to dominate one branch, but it was unlikely to acquire power over all three. The distribution of national powers thus operated to protect minorities from the tyranny of powerful private groups. It is important to emphasize that the framers' concerns about factionalism, self-interested representation, and limited government were closely linked, and indeed ultimately merged in the general effort to use constitutionalism to limit the thrust of democracy.<sup>58</sup>

<sup>54</sup> See J. RAKOVE, *THE BEGINNINGS OF NATIONAL POLITICS* 392–96 (1979); Riesman, *Money, Credit, and Federalist Political Economy*, in *BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY* 128, 150–51 (R. Beeman, S. Botein & E. Carter eds. 1987).

<sup>55</sup> See G. WOOD, *supra* note 37, at 609; see also J. MAIN, *THE ANTIFEDERALISTS: CRITICS OF THE CONSTITUTION* 49–50, 162–64, 168–74, 269–81 (1961) (describing conflicts between federalists and antifederalists on such issues as debtor relief, paper money, and democracy); Hofstadter, *The Founding Fathers: An Age of Realism*, in *THE MORAL FOUNDATIONS OF THE AMERICAN REPUBLIC* 73, 79 (R. Horwitz ed. 1977) (stressing and deplored the antidemocratic character of the traditional constitutional framework).

<sup>56</sup> On the theme of deliberation, see *THE FEDERALIST* Nos. 10 and 63 (J. Madison) and *THE FEDERALIST* Nos. 27, 71, and 73 (A. Hamilton).

<sup>57</sup> See *THE FEDERALIST* No. 10 (J. Madison).

<sup>58</sup> Madison argued for large election districts and length of service in the event that suffrage was made universal and not limited to those with property, on the theory that long service in large districts would attract "persons of general respectability, and of probable attachment to the rights of property," who would be able "to render the Body more stable in its policy, and more capable of stemming popular currents taking a wrong direction, till reason & justice could regain their ascendancy." *Madison, Property and Suffrage: Second Thoughts on the Constitutional Convention*, in *THE MIND OF THE FOUNDER* 394, 399–400 (M. Meyers rev. ed. 1981);

5. *Stability.* — The distribution of national powers does not only limit government; it also promotes stability by insulating the status quo from rapid change. In many cases, two or more branches must concur in order to alter current law; the system is structured to provide each branch with the means and the will to resist the others. The desire to promote stability was closely related to the framers' belief in private property and economic development in a commercial republic.

Significantly, the system of checks and balances ensured that the terms of regulation often would be set by the common law courts, which had a vital place in the system. The importance of this point cannot be overstated.<sup>59</sup> Courts creating and implementing the common law could play a major role in social ordering, promoting private markets and resisting the various dangers associated with a government that combined the power to make, interpret, and execute the law. A politically insulated judiciary was permitted to assume this function because the common law was supposed to embody a system of natural or prepolitical rights;<sup>60</sup> in acting according to the dictates of "reason," courts were not subject to the risks posed by a combination of powers in the legislative or executive branch of the national government. As we will see, all of these understandings came under sharp attack during the New Deal period.

At the same time, the federal nature of the system generated another series of constraints on government,<sup>61</sup> promoted flexibility, accountability, and diversity, and permitted a measure of self-determination through classically republican participation in government. The result was a complex system. Madisonian representation at the national level would allow for deliberation in government; the creation of a unitary executive and the division of labor would permit national action to meet national needs; the distribution of national powers would furnish checks diminishing the risks associated with factionalism, self-interested representation, and incursions into private property

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accord F. McDONALD, *supra* note 29, at 176–83 (discussing the view that the period before the framing was characterized by excessive democracy); 1 THE FOUNDERS' CONSTITUTION, *supra* note 44, at 544 (quoting a reference by Rep. Gerry to "the excess of democracy"). But see Diamond, *supra* note 36, at 68–72 (suggesting the democratic character of the original safeguards).

<sup>59</sup> See generally S. SKOWRONEK, *supra* note 1, at 39–46, 285–92 (stressing that the original system was a "state of courts and parties").

<sup>60</sup> See F. McDONALD, *supra* note 29, at 11–40, 111–14 (tracing the relevance of common law to the framers' system). A recent commentator has illustrated this view in a manner characteristic of the nineteenth century. See R. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985); Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973). The framers' understanding of the common law differed from the nineteenth-century formulation; McDonald's historical account of the relevance of property and the common law is thus substantially different from that offered by Epstein.

<sup>61</sup> See THE FEDERALIST No. 51 (J. Madison) (describing the federal system as a method of distributing power and therefore a means of protecting against abuse).

and liberty; and the federal system would create supplemental safeguards and allow a measure of citizen self-determination as well.

### B. *The Second Bill of Rights, the New Deal Agency, and Limited Government*

1. *Substantive and institutional reform.* — The modern regulatory agency emerged largely from deep dissatisfaction with both the common law system of private ordering and the original distribution of national powers.<sup>62</sup> The Progressives criticized the common law on a number of grounds.<sup>63</sup> A prominent part of their critique focused on the antidemocratic character of judicial lawmaking — a problem particularly severe in the constitutional context, but also troubling with regard to the common law. The problem was posed most sharply during the *Lochner* era,<sup>64</sup> when constitutional constraints owed their origin and shape to common law categories.

An additional concern was the anachronistic, or at least incomplete, character of common law rights. The Depression and the failures of unregulated businesses made it harder to argue that governmental intervention beyond common law rules<sup>65</sup> was antithetical to economic productivity. The collapse of the common law market system during the Depression made the utopian premises of laissez-faire thought seem fanciful. Indeed, economic recovery seemed to call for greater coordination and planning. A final concern was the perceived need for redistribution of wealth and entitlements,<sup>66</sup> which could not be brought about through the common law. Most fundamentally, many New Deal reformers regarded the common law itself as a regulatory scheme, not as prepolitical, and asserted that the common law had proved wholly inadequate in this regulatory role.<sup>67</sup> The very term "New Deal" is highly suggestive. It connotes a reshuffling of the

<sup>62</sup> See J. LANDIS, *supra* note 7, at 6–46.

<sup>63</sup> See Stewart & Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1238–39 (1982); J. LANDIS, *supra* note 7, at 30–46; M. BERNSTEIN, *supra* note 3, at 27–28 ("The courts were accused of . . . lack of sympathy with regulatory objectives . . . . Distrust of the judiciary played an important role in strengthening the case for transferring regulatory responsibilities to an administrative agency.").

<sup>64</sup> The term "the *Lochner* era" refers roughly to the years between 1905 and 1937 following the Supreme Court's decision in *Lochner v. New York*, 198 U.S. 45 (1905).

<sup>65</sup> The fact that the common law is a regulatory system embodying a form of governmental intervention was of course an important lesson of the legal realist movement. See Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927); Hale, *supra* note 11.

<sup>66</sup> See F.D. Roosevelt, Acceptance of the Renomination for the Presidency (June 27, 1936), reprinted in 5 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT, THE PEOPLE APPROVE, 1936, at 230, 234 (1938) (asserting that government must guard against the tyranny of "economic royalists"); *supra* note 6.

<sup>67</sup> See J. LANDIS, *supra* note 7, at 30–46; Hale, *supra* note 11, at 493.

cards, from which a different distribution of benefits and burdens would result.

Reformers in the New Deal period thus called for the recognition of a new category of legal rights. Traditional rights of market ordering no longer captured the category of fundamental interests; they were both over- and under-inclusive. Rights to governmental assistance in the employment market, for example, were insufficiently protected by the common law, as were the interests of the poor, consumers of dangerous food and drugs, the elderly, traders on securities markets, and victims of unfair trade practices. At the same time, the common law system gave undue protection to rights of private property. In some settings the common law itself seemed a product of factional power in its protection of some interests and its unwillingness to recognize others.<sup>68</sup>

This basic theme, a central ingredient of New Deal constitutionalism, was prominent throughout Roosevelt's presidency. In his speech accepting the Democratic nomination for the presidency in 1936, for example, Roosevelt argued that although the constitutional framers were concerned only with political rights, new circumstances required the recognition of economic rights as well, because "freedom is no half-and-half affair."<sup>69</sup> The most dramatic statement of this revised notion of entitlement came in President Roosevelt's State of the Union address of 1944, which set forth the "Second Bill of Rights" quoted above.<sup>70</sup> These rights were to apply to all citizens, "regardless of station, race, or creed."<sup>71</sup> The substantive program of the New Deal thus constituted a rejection of the common law system in favor of a new conception of rights, albeit of uncertain dimensions.<sup>72</sup> The

<sup>68</sup> See *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 399 (1937) (describing the failure of the common law to provide a minimum wage as "a subsidy for unconscionable unemployers"); see also J. LANDIS, *supra* note 7 (tracing the growth and forms of the administrative process to economic forces and industrial development). The understanding that the common law system institutionalized political choices emerged before the New Deal. See, e.g., *Miller v. Schoene*, 276 U.S. 272, 279 (1928) (recognizing that failure to combat an injury is "none the less a choice"); H. CROLY, THE PROMISE OF AMERICAN LIFE 134, 136 (1909) ("The tendency of the legally trained mind is inevitably and extremely conservative. . . . The existing political order has been created by lawyers; and they naturally believe somewhat obsequiously in a system for which they are responsible, and from which they benefit."); see also F.D. Roosevelt, The Constitution of the United States Was a Layman's Document, Not a Lawyer's Contract (Sept. 17, 1937), reprinted in 6 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT, THE CONSTITUTION PREVAILS, 1937, at 359 (1941) (arguing that the Constitution should be interpreted so as to promote the common good).

<sup>69</sup> See 5 F.D. Roosevelt, *supra* note 66, at 232-34.

<sup>70</sup> See *supra* p. 423.

<sup>71</sup> 13 F.D. Roosevelt, *supra* note 6, at 41.

<sup>72</sup> President Johnson's Great Society greatly expanded New Deal entitlements, adding to them the right to be free of discrimination, the interest in environmental protection, and rights to basic material entitlements in such areas as housing, food, medical services, and welfare. In these extensions, the Great Society remained faithful to New Deal understandings as expressed in President Roosevelt's "Second Bill of Rights." See generally Vogel, *The "New" Social Regu-*

program dramatically altered the baselines from which governmental action or inaction and partisanship or neutrality would be measured. Although the new conception of rights revised the original understandings, it maintained a measure of continuity. President Roosevelt placed the new spirit of entitlement squarely within the framework of rights; his nomenclature both recalled the original Bill of Rights and added to it.

The case for departure from common law ordering took various forms. Sometimes New Deal reformers emphasized the need for centralized planning under the authority of the national government.<sup>73</sup> On occasion they stressed the benefits of cartelization in promoting economic productivity.<sup>74</sup> There is, in this regard, a close connection between public interest justifications for regulation and explanations that see regulation as a product of interest-group deals;<sup>75</sup> such deals, in the form of cartelization, were designed to improve the operation of a depressed economy. Sometimes regulation was justified on more conventional economic grounds, such as "market failure" in the form of externalities ignored by the common law or a lack of information on the part of consumers and workers.<sup>76</sup>

Alternative and potentially more radical grounds for expanding substantive rights stressed the essentially undemocratic character of market ordering. In this view, collective control was necessary in order to achieve democracy.<sup>77</sup> Some regulation was thought to be

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*lation in Historical and Comparative Perspective*, in REGULATION IN PERSPECTIVE 155 (T. McCraw ed. 1981) (comparing regulation during the New Deal with environmental, consumer, and civil rights regulation between the years 1964 and 1977).

<sup>73</sup> For a detailed discussion, see O. GRAHAM, JR., cited in note 1 above. The National Industrial Recovery Act, ch. 90, 48 Stat. 195 (1933), exemplifies the movement toward centralization.

<sup>74</sup> See The National Industrial Recovery Act, ch. 90, 48 Stat. 195 (1933). The NIRA, of course, was invalidated in part in Schechter Poultry Corp. v. United States, 295 U.S. 495, 542 (1935), as an unconstitutional delegation of public power to private groups. Cf. K. DAVIS, *supra* note 1, at 260-75 (arguing that large business interests dominated the NIRA); E. HAWLEY, *supra* note 1, at 270 (same).

<sup>75</sup> See generally Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. ECON. 371 (1983) (discussing the conflict among interest groups for political favors); Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & ECON. 211 (1976) (developing a model to explain small group dominance in the regulatory process); Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971) (arguing that regulation is designed and operated primarily for the benefit of industry).

<sup>76</sup> Regulations justified on such grounds include the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301-392 (1982 & Supp. III 1985), and the National Labor Relations Act, 29 U.S.C. §§ 151-168 (1982 & Supp. III 1985).

<sup>77</sup> The National Labor Relations Act, 29 U.S.C. §§ 151-168 (1982 & Supp. III 1985), and the National Industrial Recovery Act, ch. 90, 48 Stat. 195 (1933), can be understood as efforts to assert collective control. As an earlier commentator argued:

For better or worse the American people have proclaimed themselves to be a democracy, and they have proclaimed that democracy means popular economic, social, and moral emancipation . . . . The economic and social changes of the past generation have brought out a serious and a glaring contradiction between the demands of a constructive demo-

redistributive in character — maximum hour and minimum wage laws are examples.<sup>78</sup> Different grounds for regulation have been invoked more recently, including the presence of noncommodity or public values distinct from private consumption choices<sup>79</sup> and the difficulties people face in making decisions about low-probability events, such as highway and occupational accidents.<sup>80</sup> In the area of discrimination on the basis of race and gender, advocates of regulation have asserted that some preferences are distorted or objectionable and operate to perpetuate undesirable social hierarchies.<sup>81</sup>

During the New Deal period, reformers believed that these revised conceptions of substantive rights required significant institutional reform. The separation of powers and checks and balances appeared to prevent government from taking necessary steps to intervene in the economy. A system of more unified powers was necessary in order to allow for dramatic and frequent governmental action.<sup>82</sup> Moreover, the complicated character of modern regulation vastly increased the need for technical expertise and specialization in making governmental decisions. None of the original institutions seemed to have those qualities.

These perceptions of the inadequacy of inherited institutional frameworks led to two developments. The first was a dramatic increase in the power of the President, who assumed powers formerly associated with common law courts.<sup>83</sup> The second was the grant of authority to regulatory agencies. The New Deal conception of administration regarded agencies as politically insulated, self-starting, and technically sophisticated. The expectation was that neutral ex-

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cruistic ideal and the machinery of methods and institutions, which have been considered sufficient for its realization. This is the fundamental discrepancy which must be at least partially eradicated before American national integrity can be triumphantly re-affirmed.

*See H. CROLY, supra* note 68, at 270.

<sup>78</sup> See K. DAVIS, *supra* note 1, at 516-17 (suggesting that Roosevelt may have been relieved by the invalidation of NIRA but noting his desire to retain minimum hour and maximum wage regulations as redistributive measures).

<sup>79</sup> See Stewart, *Regulation in a Liberal State: The Role of Non-Commodity Values*, 92 YALE L.J. 1537, 1566-87 (1983); Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129, 1132-36, 1140-45 (1986).

<sup>80</sup> See generally JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (D. Kahneman, P. Slovic & A. Tversky eds. 1982) (discussing various cognitive difficulties people confront in making decisions based on probabilities). Various rationales supporting regulation are outlined in Sunstein, cited in note 79 above, at 1166-69. Cf. S. HADDEN, READ THE LABEL: REDUCING RISK BY PROVIDING INFORMATION 211-27 (1986) (discussing cognitive difficulties in processing warnings about risks).

<sup>81</sup> See, e.g., Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 350-51 (1987).

<sup>82</sup> For a particularly extreme example, see L. DENNIS, THE COMING AMERICAN FASCISM (1936), which views the existing American economic and political system as unworkable and calls for fascism.

<sup>83</sup> See T. LOWI, THE PERSONAL PRESIDENT 45-48 (1985).

perts, operating above the fray, would be able to discern the public interest.<sup>84</sup> President Roosevelt proclaimed that "[t]he day of enlightened administration has come."<sup>85</sup>

It would be a mistake to overstate the association between the New Deal and the belief in neutral expertise. Independent regulatory agencies, including the Interstate Commerce Commission, the Federal Trade Commission, and the Federal Radio Commission, were created well before the New Deal. Moreover, the numerous agencies created in the New Deal period differed substantially. Some of these agencies, for example, faced relatively clear legislative instructions.<sup>86</sup> It would therefore be misleading to suggest that a unitary model of administration covers all regulatory entities associated with the New Deal period, but none that were created before that time. Nonetheless, the enduring legacy of the period is the insulated administrator, immersed in a particular area of expertise, equipped with broad discretion, and expected to carry out a set of traditionally separated functions. Despite the risk of oversimplification, one may therefore point to a New Deal conception of administration.

There was a powerful Madisonian dimension to the New Deal enthusiasm for insulated and technically expert agencies. Just as the framers designed the original constitutional system in part to insulate national representatives in order to increase the likelihood of deliberative government, so the New Deal conception of administration sought to insulate public officials in order to protect governmental processes against the distortions produced by factionalism.<sup>87</sup> In both the original system and the New Deal reformulation, reformers believed that protection from factionalism, through a measure of insulation, was highly desirable.

<sup>84</sup> See F. GOODNOW, POLITICS AND ADMINISTRATION 85 (1900) (suggesting that administration is "unconnected with politics because it embraces fields of semi-scientific, quasi-judicial and quasi-business or commercial activity"); Long, *Bureaucracy and Constitutionalism*, 46 AM. POL. SCI. REV. 808, 816 (1952) (arguing that bureaucracy should serve as a "representative organ," a "source of rationality," and an additional branch of government).

<sup>85</sup> F.D. Roosevelt, Campaign Address on Progressive Government (Sept. 13, 1932), reprinted in 1 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT, THE GENESIS OF THE NEW DEAL, 1928-32, at 752 (1938).

<sup>86</sup> See, e.g., Agricultural Adjustment Act, 7 U.S.C. §§ 601-624 (1982 & Supp. 1985).

<sup>87</sup> See U.S. COMM'N ON ORG. OF THE EXECUTIVE BRANCH OF THE GOV'T, THE INDEPENDENT REGULATORY COMMISSION, H.R. DOC. NO. 116, 81st Cong., 1st Sess. app. N at viii (1949) (Task Force Report) (suggesting that the independent commission "provides a means for insulating regulation from partisan influence or favoritism, for obtaining deliberation, expertness and continuity of attention, and for combining adaptability of regulation with consistency of policy so far as practical"); Eastman, *supra* note 7, at 101 ("[T]he cold neutrality of the commission . . . ought rather to be safeguarded jealously against [political] influences. They are as out of place in the case of a commission as they would be in the case of a court."). On the relationship between republicanism and the Progressive movement, see Diggins, *Republicanism and Progressivism*, 37 AM. Q. 572 (1985).

The institutional framework of the New Deal, however, differed in important respects from the original constitutional system. First, the institutional mechanism of insulation as a safeguard against factionalism served radically different purposes in the two periods. In the Madisonian framework, insulation was intended to operate as a brake on change. Deliberative democracy was designed in part to protect the status quo from, among other things, the redistribution of wealth. By contrast, the New Dealers saw changes in the status quo, including a measure of redistribution, as highly desirable,<sup>88</sup> and insulation and deliberation as a means of accomplishing such changes.<sup>89</sup>

Second, the New Deal belief in the importance of technical expertise and immersion in the facts was foreign to the original framework. Although the importance of energetic administration was a central theme in the founding period, there was no emphasis on technical sophistication in governmental processes. This difference was a natural product of the different understandings of the scope of national regulation.

Third, in the Madisonian system, states played a large role as a check against the federal government and as an arena for collective self-determination. During the New Deal period, by contrast, states appeared weak and ineffectual, unable to deal with serious social problems; they seemed too large to provide a forum for genuine self-determination. The idea that the states would check the federal government, if true, appeared perverse in light of the need for national action. For this reason, New Deal reformers showed little sympathy for state autonomy.<sup>90</sup>

This shift in the conception of the role of state government was dramatic. Previous efforts at reform had relied on state and local institutions, in part because of the tenacity of the Jeffersonian belief in an engaged citizenry operating through face-to-face democracy.<sup>91</sup>

<sup>88</sup> Herbert Croly offered an early expression of this sentiment, stating that “[w]hat a democratic nation must do is not to accept human nature as it is, but to move in the direction of its improvement.” See H. CROLY, *supra* note 68, at 413. In this respect the New Deal agency served purposes akin to those of aggressive federal courts in the 1960’s and 1970’s; insulation was justified in similar terms in the two periods. See, e.g., O. FISS, THE CIVIL RIGHTS INJUNCTION 4–5 (1982) (arguing that from 1954 to 1974, the injunction was “used to restructure educational systems throughout the nation” and in general to provide remedies in civil rights cases).

<sup>89</sup> But see J. CHAMBERLAIN, FAREWELL TO REFORM 314–15 (1932) (suggesting that those who believe in boards and commissions “fail explicitly to realize that such a board, once set up, would merely amount to the definition of the boundaries of the battlefield. The fight for control of the Board would still go on, between the various ‘interests’ in contemporary society . . . .”).

<sup>90</sup> See *infra* pp. 504–05.

<sup>91</sup> See S. Milkis, New Deal Party Politics, Administrative Reform and the Transformation of the American Constitution 9–10 (unpublished manuscript available in Harvard Law School Library) (prepared for “The Legacy of the New Deal: Our Inheritance,” a seminar sponsored

By making the presidency, rather than states and localities, the focal point for self-government, the New Deal reformers in a single stroke linked the Hamiltonian belief in an energetic national government with the Jeffersonian endorsement of citizen self-determination.<sup>92</sup>

The New Deal reformers thus democratized Hamiltonian notions of energetic government through novel conceptions of the presidency and regulatory administration. The progressive belief in insulation of public officials, the collapse of common law ordering, and the critique of tripartite government legitimated a new set of institutional understandings. It was for this reason that James Landis could see no conflict between insulation of administrators and responsiveness to the public will, describing national administrators as the mechanism by which "our democratic institutions" might "exercise some control over the varying phases of our economic life."<sup>93</sup> Administrators not subject to traditional pressures would be able to promote the public interest in economic productivity and at the same time redistribute resources and protect new entitlements.

Finally, the Madisonian system of deliberative democracy included the system of checks and balances as a necessary safeguard of private property and liberty against factionalism and self-interested representation. In contrast, the New Deal conception of autonomous administration rejected checks and balances, considering them an obstacle to social change.<sup>94</sup> One of the advantages of autonomous administration was its capacity for prompt action, a quality that the three branches of the national government lacked. A major consequence of this high valuation of prompt action was substantial hostility toward the judiciary.

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by the Center for Constructive Alternatives, Hillsdale College, Hillsdale, Mich., Mar. 8-12, 1987); *cf.* B. KARL, *supra* note 1, at 233-34 (describing the replacement of "local autonomy" with New Deal nationalism). The result in the courts, of course, was a dramatic increase in federal power, especially under the commerce clause. *See, e.g.*, *Wickard v. Filburn*, 317 U.S. 111 (1942); *United States v. Darby*, 312 U.S. 100 (1941).

<sup>92</sup> See S. Milkis, *supra* note 91, at 17.

<sup>93</sup> J. LANDIS, *supra* note 7, at 16.

<sup>94</sup> See W. ELLIOT, THE NEED FOR CONSTITUTIONAL REFORM: A PROGRAM FOR NATIONAL SECURITY 31-34, 200-02 (1935) (describing the system of checks and balances as unworkable and arguing for an increase in presidential power); T. FINLETTER, CAN REPRESENTATIVE GOVERNMENT DO THE JOB? 5-6 (1945) (criticizing the original system as "designed to achieve political negatives and the *laissez-faire* state"); H. HAZLITT, A NEW CONSTITUTION Now 9-10, 102-06, 180 (1942) (arguing for a parliamentary system on similar grounds); W. MACDONALD, A NEW CONSTITUTION FOR A NEW AMERICA 37 (1921) (describing the American system as "rigid and irresponsible" and urging movement toward the development of a parliamentary system). Woodrow Wilson earlier had made an argument to this effect. *See* W. WILSON, CONGRESSIONAL GOVERNMENT, *supra* note 1, at 206 ("[T]he federal government lacks strength because its powers are divided."); W. WILSON, CONSTITUTIONAL GOVERNMENT, *supra* note 1, at 221 ("[W]e must think less of checks and balances and more of coordinated power, less of separation of functions and more of the synthesis of action.").

The role of courts was thus limited, and agencies were granted broad discretion to determine the public interest. The New Dealers were of course reformers who believed that the purpose of agencies was to achieve economic productivity and distributive justice. They recognized that agency officials would not be entirely neutral.<sup>95</sup> As Herbert Croly wrote, “[i]mpartiality is the duty of the judge rather than the statesman, of the courts rather than the government.”<sup>96</sup> But at least some New Deal critics believed that the notion of the public interest was relatively unproblematic — indeed, it was sometimes codified as the statutory standard<sup>97</sup> — and that agencies, because of their expertise and insulation, should have a large measure of autonomy in determining what the public interest requires.

Moreover, the power of the President to control regulatory agencies was frequently limited by law or in practice. To be sure, the power of the President also increased enormously during the New Deal period<sup>98</sup> — a product of faith in the democratic character of the office of the presidency and an associated belief in the need for vigorous executive action. Nonetheless, some regulatory agencies were immunized from direct presidential control by statute — the legacy of Progressive faith in technocracy — and sometimes the enthusiasm for technocratic administration translated into a large degree of autonomy for agency officials in practice. In the now-familiar understanding of the legislative role of the period, Congress often restricted itself to identifying a problem and requesting that an agency develop a solution.<sup>99</sup>

There was some tension in the New Deal vision of the executive branch. The increase in presidential power was based on a belief in a direct relationship between the will of the people and the will of the President; hence the presidency, rather than the states or the common law courts, was regarded as the primary regulator. In contrast, the faith in bureaucratic administration was based on the ability of regulators to discern the public interest and to promote, though indirectly and through their very insulation, democratic goals. The tension between the belief in presidential lawmaking and the faith in

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<sup>95</sup> See Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1677–78 (1975).

<sup>96</sup> H. CROLY, *supra* note 68, at 192.

<sup>97</sup> See, e.g., 47 U.S.C. § 151 (1982) (describing the purposes of the Federal Communications Commission); 49 U.S.C. § 10101 (1982) (listing the standards governing the Interstate Commerce Commission).

<sup>98</sup> See generally T. LOWI, *supra* note 83, at 48–66 (describing the four part “Roosevelt Revolution”); S. Milkis, *supra* note 91 (describing President Roosevelt’s transformation of the role of the Chief Executive from head of a governing political party to executive administrator of a nation).

<sup>99</sup> The vague delegations of Congress are caricatured in T. LOWI, cited in note 23 above, at xi–xii.

administrative autonomy continues in contemporary debates over the roles of the President, Congress, and courts in the regulatory process.

During the New Deal period, three kinds of issues were submitted for agency resolution: legalistic, technocratic, and political.<sup>100</sup> Legalistic decisions involve the application of law to fact. They rarely call for broad judgments of policy or technical specialization. An example of a legalistic decision is the choice of an administrative law judge to award or to withhold disability benefits under the standards set out by the Social Security Act.<sup>101</sup> In cases of this sort, Congress might as well have placed the decision in the hands of state or federal judges. The decision to delegate authority to an administrator is partly a matter of convenience and partly a product of a desire to limit the number of and burdens on article III judges.

By contrast, technocratic decisions involve the application of expertise to policy goals that Congress has clearly identified. An example of a technocratic decision is an administrative determination of the proper method for attaining a specified level of pollution. The decision to delegate authority to an administrative agency in this context is based on the need for specialization and perhaps the desire to avoid the distorting effects of partisanship.

Finally, political decisions call for a large measure of value judgment; they involve basic issues of the distribution and allocation of resources. A decision concerning regulation of carcinogens in the workplace is essentially political, for the decision cannot depend solely or even primarily on application of technical expertise. The reason for the delegation of power to an administrative actor might be the absence of political consensus, the desire to avoid political responsibility for the decision, or a belief that insulation promotes sound decisions.

Most regulatory decisions involve a mixture of legalistic, technocratic, and political features. Decisions about whether to award disability benefits, for example, call not only for an assessment of facts, but also for specialization and even value judgment. The choice of means for achieving agreed-upon ends may itself raise serious distributional issues. Even the most political decisions should be informed by detailed knowledge of the subject at hand. It is therefore anachronistic to understand administration solely by reference to one or another of these three conceptions. Nevertheless, agency decisions should not be approached as an undifferentiated unit. One can distinguish general tendencies in different fields — tendencies that have considerable practical importance. The Administrative Procedure Act

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<sup>100</sup> Cf. C. Edley, *supra* note 19, at 3-5, 15.

<sup>101</sup> But cf. J. MASHAW, BUREAUCRATIC JUSTICE 49-61 (1985) (discussing the difficulties of purely legalistic administration of the Social Security Act).

(APA)<sup>102</sup> incorporates such distinctions only slightly,<sup>103</sup> though administrative practice, in the courts and elsewhere, does so to a greater degree.<sup>104</sup>

The nature of a decision bears significantly on both the need for delegation to the agency and the appropriate kind and extent of supervision by the three constitutionally specified branches. In the New Deal period, however, distinctions of this sort were rarely made. Two consequences followed. First, all kinds of primary decisions were submitted to agencies for resolution. Second, oversight functions on the part of Congress, the courts, and sometimes even the President were sharply limited.

*2. The Modern Institutional Critique.* — At least since the 1940's, many observers have invoked the traditional concerns underlying the distribution of national powers to challenge the role and performance of administrative agencies. The critics include those who accept and those who reject the Progressive critique of the common law.<sup>105</sup> In the period shortly following the New Deal, conservatives advocating a return to the common law ordering of the late nineteenth century sought legal checks on administrative agencies.<sup>106</sup> But the attack on autonomous administration need not be coupled with a plea for deregulation. More recently, for example, those concerned about agency failure to implement statutes have also urged legal controls.<sup>107</sup>

The first problem is that the New Deal agency combines executive, judicial, and legislative functions. To some degree, organic statutes and the APA attempt to separate these activities,<sup>108</sup> but these measures have not produced a system that even remotely resembles the constitutional system of checks and balances. There is little competition

<sup>102</sup> 5 U.S.C. §§ 551–559, 701–706 (1982) (codifying and amending ch. 324, 60 Stat. 237 (1946)).

<sup>103</sup> It does not, for example, make such distinctions in the section discussing the scope of review, *see id.* § 706, except that notice-and-comment rulemaking is reviewed for arbitrariness, *see id.* § 706(2)(A), whereas formal proceedings are reviewed for substantial evidence, *see id.* § 706(2)(E).

<sup>104</sup> Compare INS v. Cardoza-Fonseca, 107 S. Ct. 1207, 1221 (1987) (holding that the judiciary is the final authority on issues of statutory construction) with FCC v. WNCN Listeners Guild, 450 U.S. 582, 596 (1981) (deferring to the agency's policy choice).

<sup>105</sup> See, e.g., M. BERNSTEIN, *supra* note 3, at 291–97 (attacking agency independence without calling for deregulation); T. LOWI, *supra* note 23, at 295–313 (same).

<sup>106</sup> See M. BERNSTEIN, *supra* note 3, at 96–97; Gellhorn, *The Administrative Procedure Act: The Beginnings*, 72 VA. L. REV. 219 (1986) (describing the passage of the APA).

<sup>107</sup> See, e.g., Morrison, *The Administrative Procedure Act: A Living and Responsive Law*, 72 VA. L. REV. 253, 264–68 (1986) (describing and endorsing judicial checks on agencies).

<sup>108</sup> See Administrative Procedure Act, 5 U.S.C. § 554 (1982). The institutional position of administrative law judges often has been criticized, with some advocating greater independence for such judges. See Scalia, *The ALJ Fiasco: A Reprise*, 47 U. CHI. L. REV. 57 (1979) (arguing for changes in the selection and promotion of judges).

among different administrative functionaries within agencies, with "ambition" operating to "check ambition." More often, the administrators are expected and believed to act in concert; indeed, that expectation was one of the reasons for the creation of the agency. What the New Deal administrators celebrated as a virtue — the combination of functions — is now often regarded as a vice, precisely because it causes some of the problems that gave rise to the original distribution of national powers.

The second problem is that agency actors lack electoral accountability and often are not responsive to the public as a whole. Because of the absence of the usual electoral safeguards, agencies are peculiarly susceptible to factional pressure and often likely to act in their own interests.<sup>109</sup> The New Deal conception of administration celebrated the rejection of these traditional concerns. Indeed, the repudiation of the system of separation and of checks and balances was a central feature of the New Deal reformation. By creating a new set of autonomous administrative actors, the New Deal critics sought to bypass the common law courts and, occasionally, the legislative process, both of which seemed to have fallen prey to factional control.<sup>110</sup> But by evading the traditional safeguards, the New Deal reformers heightened the potential for abuses that the traditional system was designed to check.

The initial reaction of the courts to these sorts of attack was predictable: they invalidated statutes creating agencies on constitutional grounds, invoking articles I, II, and III as well as the due process clause. The most familiar example is *Schechter Poultry Corp. v. United States*,<sup>111</sup> in which the Supreme Court invalidated the National Industrial Recovery Act as an unconstitutional delegation of lawmaking power to private groups.<sup>112</sup> The constitutional assault eventually disintegrated<sup>113</sup> in the face of prolonged and persistent popular support of regulatory administration. Taken as a whole, the

<sup>109</sup> See *infra* pp. 448-50.

<sup>110</sup> See M. BERNSTEIN, *supra* note 3, at 26-28, 43-46, 55-57; S. SKOWRONEK, *supra* note 1, at 165-66, 253-54 (outlining the motivations behind early twentieth-century administrative expansion).

<sup>111</sup> 295 U.S. 495 (1935).

<sup>112</sup> See *id.* at 539-42; see also *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936) (holding that the Bituminous Coal Conservation Act was an arbitrary grant of power to private persons and a "clear[] . . . denial of rights safeguarded by the due process clause"); *Crowell v. Benson*, 285 U.S. 22, 54-65 (1932) (interpreting a congressional delegation of judicial power to an agency narrowly to avoid conflict with article III); *Myers v. United States*, 272 U.S. 52, 63-64 (1926) (holding that executive officials must be subject to plenary control of President).

<sup>113</sup> See *Yakus v. United States*, 321 U.S. 414 (1944) (upholding the delegation to the Price Administrator of the power to set prices during wartime); *supra* note 91 (citing cases upholding broad congressional power under the commerce clause).

process altered the constitutional system in ways so fundamental as to suggest that something akin to a constitutional amendment had taken place.<sup>114</sup>

After the constitutional challenge was rebuffed, the struggle between the advocates and the critics of New Deal administration resurfaced in the debate over the APA. During that debate, the Progressive critics of the common law sought administrative autonomy, while their opponents invoked pre-New Deal understandings of private liberty and of checks and balances in arguing for severe legal constraints on administrative agencies.<sup>115</sup>

The conflict resulted in a working compromise in which broad delegations of power were tolerated as long as they were accompanied by extensive procedural safeguards. Those safeguards surrounded the administrative process with some of the trappings of adjudication,<sup>116</sup> provided for an internal separation of agency functions,<sup>117</sup> and allowed regulated industries a variety of ways to challenge administrative decisions.<sup>118</sup> In its focus on the rights of regulated industries, the APA was anachronistic in light of the New Deal attack on the common law system of private ordering.<sup>119</sup> More recently, the APA seems increasingly inadequate in light of changes in administrative processes and new understandings of agency "failure."

The problem of factio, for example, has played a central role in administrative law in the last two decades.<sup>120</sup> The absence of either true insulation or electoral safeguards has made administrators susceptible to the influence of well-organized private groups. Findings of agency "capture" are common in the literature, although the phenomenon is complex.<sup>121</sup> The ultimate concern is one of lawmaking

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<sup>114</sup> See Ackerman, *supra* note 36, at 1051-57 (arguing that "the great judicial retreat of 1937" was "the final point in the process of structural amendment").

<sup>115</sup> See M. BERNSTEIN, *supra* note 3, at 192-95; Gellhorn, *supra* note 106; see also Dodd, Garfield, McGuire, Maguire & Pound, *Report of the Special Committee on Administrative Law*, 63 A.B.A. REP. 331, 339-40 (1938) (criticizing autonomous administration as a "Marxian idea"); Verkuil, *The Emerging Concept of Administrative Procedure*, 78 COLUM. L. REV. 258, 268-74 (1978) (chronicling the events surrounding the passage of the APA and the arguments of "procedural conservatives").

<sup>116</sup> See Administrative Procedure Act, 5 U.S.C. §§ 554, 556-557 (1982) (providing for, among other things, timely notice, the submission and consideration of facts, arguments, and offers of settlement, and the performance of quasi-judicial functions by administrators).

<sup>117</sup> See *id.* § 554(d) (forbidding investigative or prosecuting administrators to participate in agency decisions).

<sup>118</sup> See *id.* § 706 (setting out the scope of judicial review of agency decisions).

<sup>119</sup> The APA, however, does permit courts to "compel agency action unlawfully withheld or unreasonably delayed," *id.* § 706(1), and its definition of agency action includes "failure to act." *Id.* § 551 (1982).

<sup>120</sup> It would, however, be a mistake to suggest that factional tyranny is omnipresent in administration. See S. KELMAN, *MAKING PUBLIC POLICY* 88-113 (1987); K. SCHLOZMAN & J. TIERNEY, *ORGANIZED INTERESTS AND AMERICAN DEMOCRACY* 341-46 (1986).

<sup>121</sup> See P. QUIRK, *INDUSTRY INFLUENCE IN FEDERAL REGULATORY AGENCIES* 4-21 (1981);

by private groups — the functional analogue to the National Recovery Act as construed and invalidated in *Schechter Poultry*.<sup>122</sup>

Although the power of well-organized groups is often attributable to the absence of the ordinary constitutional safeguards — including checks by the three branches of government — the precise sources and nature of the “capture” phenomenon are sharply contested. Some observers claim that whereas the energy of groups seeking regulation dissipates during the implementation process, the well-organized regulated class members are able to exercise sustained influence.<sup>123</sup> Under this view, there is a predictable series of phases in which agencies become progressively less devoted to their original mission.<sup>124</sup> Others contend that Congress intends regulation to result in “capture”<sup>125</sup> and that, for this reason, the problem is not as significant as might be thought.<sup>126</sup> Some commentators suggest that independent agencies are particularly subject to industry influence because they are immune from plenary presidential control.<sup>127</sup> Still others contend that capture occurs because agencies receive most of their information from regulated industries.<sup>128</sup>

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K. SCHLOZMAN & J. TIERNEY, *supra* note 120, at 341–46; Stewart, *supra* note 95, at 1684–87 (offering four explanations of agencies’ “industry orientation” that are “more subtle” than the “capture scenario”).

Because it aggravated the problem of factional power by allowing private groups an additional opportunity to fend off regulation, the legislative veto was an inadequate method for Congress to use to reassert its lawmaking role. See Bruff & Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 HARV. L. REV. 1369, 1372–81 (1977).

<sup>122</sup> See *supra* p. 447.

<sup>123</sup> The often diffuse and poorly organized beneficiaries of regulation may be plagued with free-rider problems, while the well-organized regulated class members may be better able to mobilize as a unit. See M. BERNSTEIN, *supra* note 3, at 74–95.

<sup>124</sup> See *id.* (asserting that agencies typically experience the life pattern of gestation, youth, maturity, and old age).

<sup>125</sup> See generally Stigler, *supra* note 75, at 3 (arguing that regulation is designed to benefit the regulated industry rather than the public at large).

<sup>126</sup> See generally Jaffe, *The Illusion of the Ideal Administration*, 86 HARV. L. REV. 1187–88 (1973).

<sup>127</sup> See *infra* note 352 and accompanying text.

<sup>128</sup> See Stewart, *supra* note 95, at 1686. Other theories suggest that industries are able to influence the selection of administrators, that agency budgets depend on pro-industry action, and that administrators are influenced by the fact that they must eventually seek employment in regulated industries. See P. QUIRK, *supra* note 121, at 17–19. These theories are difficult to evaluate in the abstract. One useful approach attempts to distinguish among regulatory programs in terms of the distribution of benefits and burdens to regulated industries and regulatory beneficiaries. When the regulated class is well-organized or unitary and the regulatory beneficiaries numerous and diffuse, disproportionate power on the part of the former may be expected. When the reverse is true, the opposite conclusion follows: regulatory beneficiaries are likely to have considerable influence. When the regulated class and regulatory beneficiaries have parallel structures, they should be able to offset one another. This theory of the capacity of industries to influence agency decisions has some explanatory power. See generally Wilson, *The Politics*

However widespread the problem of factionalism, and however it is defined,<sup>129</sup> it may manifest itself in too much or too little regulation. A central goal of administrative law has been to restrict the power of well-organized private groups over agencies, and much of the desire to limit agency autonomy is a product of that concern. Agency autonomy, in short, has often served not as a guarantor of neutral administration, but as a source of vulnerability to the pressures of well-organized groups. Oversight by the three constitutionally specified branches is a promising corrective.

The problem of self-interested representation is also a frequent source of concern about autonomous administration.<sup>130</sup> The fear is that administrators will attempt to promote their own interests at the expense of the interests of the public. Some observers have argued that administrators seek above all to enlarge their own powers, often producing excessive or misdirected regulation.<sup>131</sup> Because agencies are not subject to the discipline of the market or the electoral process, this concern looms especially large. The absence of the system of checks and balances, moreover, aggravates the problem.

The administrative process also suffers from problems of inefficiency, a concern addressed by the original constitutional effort to create a unitary executive. Frequently, the bureaucracy is unable to act expeditiously.<sup>132</sup> Many agencies have overlapping or inconsistent missions. Without unitary control, it is difficult to coordinate agency

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of Regulation, in THE POLITICS OF REGULATION 385 (J. Wilson ed. 1980) (describing the effects of organized interest groups on regulated industries). But see M. DERTHICK & P. QUIRK, THE POLITICS OF DEREGULATION 8-27, 237-58 (1985) (explaining processes through which administrators have escaped concentrated pressures and promoted interests of unorganized groups in the course of eliminating economic regulation).

<sup>129</sup> One problem in evaluating the various theories of capture is the difficulty of generating an uncontroversial baseline from which to define factionalism. One might define the phenomenon of capture in terms either of procedure or of substance. If one defined capture procedurally, one would ask whether the relevant officials respond mechanically to the pressures imposed on them, or whether they deliberate about the subject at hand. This definition raises the difficulty, however, of revisiting subjective processes of decision. For this reason, a more substantive definition, incorporating some evaluation whether the decision in question is good, might be preferable. Such an approach is consistent with Madison's own, which asked whether the group seeks goals consistent with the welfare of the society. See THE FEDERALIST No. 10 (J. Madison). But the difficulties may be even more formidable if capture is defined in terms of outcomes. Some substantive baseline about the proper degree of regulation must be selected, and any baseline will inevitably be controversial — a lesson of the New Deal itself.

<sup>130</sup> See, e.g., G. BENVENISTE, BUREAUCRACY 71-111 (1977).

<sup>131</sup> See D. MUELLER, PUBLIC CHOICE 156-70 (1978); W. NISKANEN, BUREAUCRACY AND REPRESENTATIVE GOVERNMENT 36-42 (1971).

<sup>132</sup> See Stewart, *The Discontents of Legalism: Interest Group Relations in Administrative Regulation*, 1985 WIS. L. REV. 655, 680-82; *id.* at 682 ("the current system of regulation and administrative law wastes resources, penalizes new investment, and discourages entry by new competitors"); cf. R. UNGER, FALSE NECESSITY 454-57 (1987) (challenging the constitutional system of checks and balances on the ground that it prevents experimentation).

decisions or to redirect national policy. Attacks on the ad hoc character of national regulatory policy<sup>133</sup> and recent challenges to the notion of "independent" agencies have invoked this concern.<sup>134</sup>

The goals of limited government and stability, originally of considerable importance to the distribution of national powers, provide the least compelling justification for a return to the original constitutional framework. The reasons are both practical and conceptual. The practical problem is that, since the New Deal, neither limited government nor stability can be regarded as an unambiguous good. In many areas, substantial governmental intervention is necessary. If severe structural limits make governmental action more difficult, significant social problems may remain unresolved. In addition, rapid changes are sometimes necessary to solve social problems, particularly in areas such as environmental regulation and telecommunications, in which technology is in a state of rapid flux. For these reasons, some observers have criticized checks and balances for making governmental action harder to undertake. These criticisms are overstated, however, because, as we shall see, checks and balances need not produce inaction.

The more significant difficulty with the argument for a return to the original goal of limited government is conceptual. That goal, as traditionally understood, is harder to justify in the wake of the decline of the *Lochner*-era understanding of the relationship between the citizen and the state.<sup>135</sup> It is now clear that the common law is itself a regulatory system, embodying a series of controversial social choices.<sup>136</sup> The system of common law ordering appears "limited" only because the regulatory regime seems natural and indeed invisible to those accustomed to it. More generally, traditional conceptions of governmental action and inaction rest on controversial premises; they depend on baselines about the ordinary and desirable functions of government that should themselves be subject to critical scrutiny.<sup>137</sup>

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<sup>133</sup> That there is no centralized discretion is reflected in the great diversity in the expenditures of federal agencies per statistical life saved, which range from \$70,000 (for CPSC regulation of unvented space heaters) to \$132 million (for FDA rule banning DES in cattlefeed). See EXECUTIVE OFFICE OF THE PRESIDENT, OFFICE OF MANAGEMENT AND BUDGET, REGULATORY PROGRAM OF THE U.S. GOV'T xxi (Apr. 1, 1986-Mar. 1, 1987) [hereinafter OMB REGULATORY PROGRAM, 1986]. See generally Stewart, *supra* note 132, at 678-82 (discussing the benefits and drawbacks of "centralized regulation"). Professor Stewart's criticism of legalism as a solution to regulatory problems tracks the original New Deal hostility to juridical solutions. See *supra* p. 437.

<sup>134</sup> See *infra* pp. 496-500.

<sup>135</sup> See B. ACKERMAN, RECONSTRUCTING AMERICAN LAW 1-5, 28-37 (1984); Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873 (1987).

<sup>136</sup> Cf. Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J.L. REF. 835 (1985) (arguing that any regime of family law necessarily constitutes state intervention).

<sup>137</sup> See Hale, *supra* note 11, at 470-71, 493-94.

Moreover, governmental inaction, even if it is understood as such, may itself be a product of factional power.<sup>138</sup> The claims of agency capture by regulated industries reflect the point; statutes may be undone by inaction and deregulation as well as by overzealous enforcement. In short, although modern administration is sometimes dysfunctional, it should not be understood as the imposition of government onto a system of purely private ordering. "Limited government" as reflected in the common law was itself a system of regulation and control.

In any event, many of the concerns that underlay the original distribution of national powers have played a prominent role in modern evaluations of administrative performance. These concerns have led to a sharply declining faith in the New Deal agency, insulated from legislative, executive, and judicial supervision.

This decline in faith in the institutional program of the New Deal is entirely justified.<sup>139</sup> The New Deal attack on checks and balances was not a necessary part of its institutional framework and was largely a mistake. An aggressive role for each of the constitutionally specified branches — even a form of checks and balances — can promote those substantive goals of the New Deal that have a claim to contemporary support. The current task is to devise institutional structures and arrangements that will accomplish some of the original constitutional purposes in an administrative era; this is no small ambition in light of the continuing rejection of the traditional notion of "limited government" with which the original distribution of powers was closely allied.

### III. CHECKS AND BALANCES AFTER THE NEW DEAL

#### A. *Presidential Supervision*

*1. The Theoretical Case for Executive Control.* — The arguments for presidential control of the bureaucracy draw heavily both on traditional constitutional concerns and on recent problems in the regu-

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<sup>138</sup> See P. BACHRACH & M. BARATZ, POWER AND POVERTY 47-51 (1970); S. LUKES, POWER: A RADICAL VIEW 18-20 (1974).

<sup>139</sup> Systematic attention to the actual impact of regulation is relatively rare, in part because of the severe methodological difficulties in measuring both benefits and costs. The available studies suggest that social gains and social losses have often been substantial, and that there are disparities across various programs. Illuminating efforts include CENTER FOR POLICY ALTERNATIVES AT THE MASSACHUSETTS INSTITUTE OF TECHNOLOGY, BENEFITS OF ENVIRONMENTAL, HEALTH, AND SAFETY REGULATION, prepared for the Committee on Governmental Affairs, United States Senate, 96th Cong., 2d Sess. (Comm. Print 1980); R. LITAN & W. NORDHAUS, REFORMING FEDERAL REGULATION (1982); K. MEIER, REGULATION: POLITICS, BUREAUCRACY, AND ECONOMICS (1985).

latory process. In particular, three factors are of special importance to the case for a unitary executive.

First, the President is accountable to the electorate. The visibility of the President assures a degree of responsiveness; presidential decisions are uniquely subject to public scrutiny. The President also has a national constituency, which guards against the more parochial pressures imposed on agencies and makes the President more likely to avoid the dangers of self-interested representation and factional tyranny. The President's supervisory role should thus increase the likelihood that discretionary decisions by administrative agencies will respond to the needs of the public.

Second, the President is in an unusual position to centralize and coordinate the regulatory process. The President is the only national official charged with the implementation of a mass of legislation. This capacity is especially important in light of the proliferation of agencies with overlapping responsibilities. The President's institutional position is useful for coordinating the wide range of sometimes inconsistent legislation of the modern regulatory state.<sup>140</sup> For example, over a dozen agencies have responsibility for federal energy policy.

Finally, the President is able not only to coordinate, but also to energize and to direct regulatory policy in a way that would be difficult or impossible if that policy were set individually by agency officials. This ability is especially important at the beginning of a presidential term and when there is a national consensus that regulatory policy should be moved in particular directions. Presidential control tends to work against the harmful effects of intra-executive checks and balances, allowing the government to respond to shifts in public opinion and decreasing the likelihood that politics will become routinized and heavily bureaucratized. The fact that the President appoints agency officials might itself alleviate some of the risks associated with decentralized bureaucracy. But agency heads are subject to distinctive pressures from their staffs and regulated industries, and presidential supervision can provide a useful check against those pressures.<sup>141</sup>

Responding to such concerns, recent Presidents have steadily increased their control of the bureaucracy, in measures that have been highly controversial.<sup>142</sup> In the New Deal period, the Brownlow Com-

<sup>140</sup> See M. BERNSTEIN, *supra* note 3, at 54–55 (discussing the need for executive coordination); Huber, *Electricity and the Environment: In Search of Regulatory Authority*, 100 HARV. L. REV. 1002 (1987) (discussing the need for federal coordination in the regulation of electrical power); cf. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 667–72 (1952) (Vinson, C.J., dissenting) (describing the President as the only national official entrusted with coordinating a mass of legislation).

<sup>141</sup> See, e.g., AMERICAN BAR ASSOCIATION, COMMISSION ON LAW AND THE ECONOMY, FEDERAL REGULATION: ROADS TO REFORM (1979); Bruff, *Presidential Power and Administrative Rulemaking*, 88 YALE L.J. 451 (1979); Strauss, *supra* note 43.

<sup>142</sup> Members of Congress have expressed considerable concern about these initiatives, and

mittee, appointed by President Roosevelt, invoked original constitutional purposes to support presidential centralization.<sup>143</sup> The Committee recommended a series of institutional changes to increase presidential power. Commissions organized by Presidents Truman and Johnson reached similar conclusions.<sup>144</sup>

More recently, Presidents Nixon, Ford, and Carter issued orders designed to ensure centralized direction of regulation.<sup>145</sup> President Reagan has taken the most dramatic steps in Executive Orders 12291<sup>146</sup> and 12498,<sup>147</sup> which substantially increase presidential supervision of the bureaucracy. The Reagan initiatives concentrate the relevant authority in the Office of Management and Budget (OMB).<sup>148</sup> Executive Order 12291 permits OMB to review and comment on regulations proposed by executive agencies, testing the regulations for adherence to principles of cost-benefit analysis and cost-effectiveness.<sup>149</sup> Executive Order 12498 goes a step further, requiring agencies to submit for OMB approval an "annual regulatory plan" outlining proposed actions for the next year.<sup>150</sup>

These measures build into the regulatory process a system of review akin to that used in developing the national budget. In both

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Congress frequently has held hearings to investigate the process. *See Role of OMB in Regulation: Hearings Before the Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce*, 97th Cong., 1st Sess. (1981).

<sup>143</sup> The Committee stated that "[i]t was . . . not by accident but by deliberate design that the founding fathers set the American Executive in the Constitution on a solid foundation. . . . [T]he American Executive occupies an enviable position among the executives of the states of the world, combining as it does the elements of popular control and the means for vigorous action and leadership — uniting stability and flexibility." REPORT OF THE PRESIDENT'S COMMITTEE ON ADMINISTRATION MANAGEMENT IN THE GOVERNMENT OF THE UNITED STATES 1 (Jan. 1937). President Roosevelt echoed these themes in a letter to Congress, complaining that "the present organization and equipment of the executive branch of the Government defeats the constitutional intent that there be a single responsible Chief Executive to coordinate and manage the departments." *Id.* at ii.

<sup>144</sup> *See R. NATHAN, THE ADMINISTRATIVE PRESIDENCY* 4-5 (1983).

<sup>145</sup> *See generally NATIONAL ACADEMY OF PUBLIC ADMINISTRATION, PRESIDENTIAL MANAGEMENT OF RULEMAKING IN REGULATORY AGENCIES* 9-10 (1987) (describing the regulatory management programs of Presidents Nixon, Ford, and Carter).

<sup>146</sup> Exec. Order No. 12,291, 3 C.F.R. 127 (1981), reprinted in 5 U.S.C. § 601 note (1982).

<sup>147</sup> Exec. Order No. 12,498, 3 C.F.R. 323 (1985), reprinted in 5 U.S.C. § 601 note (1982 & Supp. III 1985).

<sup>148</sup> The fact that OMB rather than the President makes the decisions causes some complications. For discussion, see Strauss & Sunstein, *The Role of the President and OMB in Informal Rulemaking*, 38 ADMIN. L. REV. 181, 190-91 (1986). See also pp. 483-91 below, suggesting reformations in the current system, including transfer of supervisory authority from OMB. The advantages of review relate to executive branch supervision in general, rather than specifically to OMB.

<sup>149</sup> Exec. Order No. 12,291, 3 C.F.R. 127, 128-130, 131 (1981), reprinted in 5 U.S.C. § 601 note (1982). The exercise of presidential control need not be accomplished by such substantive principles, though the placement of authority in OMB may incline in that direction.

<sup>150</sup> Exec. Order No. 12,498, § 1(a), 3 C.F.R. 323, 323 (1985), reprinted in 5 U.S.C. § 601 note (1982 & Supp. III 1985).

settings, the President grants to OMB power to coordinate and centralize executive branch authority. Such centralization and coordination ensure that an institution with a view of the entire regulatory process will manage policy. In both cases, however, Congress retains the ultimate power to make law. Just as the executive branch has no authority to refuse to spend appropriated funds,<sup>151</sup> so the President has no authority to decline to execute laws of which he disapproves, or to execute laws only as he wishes.<sup>152</sup> Both agencies and OMB are thus subject to limitations set out by statute.

To some degree, OMB has attempted to accomplish the tasks the courts perform under the "hard look" standard of review.<sup>153</sup> OMB has some potential advantages over the courts, however, in its ability to centralize and coordinate the administrative process, its greater power of initiation, its political accountability, and its capacity to assemble a body of officials who specialize in the subject at hand. One goal of the reviewing process is to ensure that the agency has considered all relevant factors and has weighed the factors in a rational manner. Another goal is to diminish the risks of factional power and self-interested representation — risks to which administrators in single agencies tend to be vulnerable.<sup>154</sup> OMB's position as a general coordinator of regulatory policy puts it at a comparative advantage in resisting pressures imposed by well-organized groups seeking too much or too little regulation. In addition, the very prospect of review has probably had an important effect on agency decisions. It may well be that OMB review effectively deters careless or otherwise improper proposals.

In these respects, OMB review might well serve both technocratic and democratic goals. The emphasis on cost-benefit analysis is designed to discipline agency decisions — to bring "policy analysis" to bear and to ensure consideration of the advantages and disadvantages of proposed courses of action.<sup>155</sup> In light of the New Deal expectations

<sup>151</sup> See generally G. STONE, L. SEIDMAN, C. SUNSTEIN & M. TUSHNET, *supra* note 41, at 362–63 (noting that most courts and commentators have rejected presidential assertions of constitutional power to withhold congressionally appropriated funds).

<sup>152</sup> See *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29 (1983) (invalidating the National Highway Traffic and Safety Administration's (NHTSA) rescission of its own passive restraint requirement on the ground that presidential deregulation violated the law); *id.* at 59 (Rehnquist, J., dissenting) (stating that the President must adhere to the statute). The President can resist some legislation through the exercise of prosecutorial discretion, and the line between unlawful failure to enforce and a lawful exercise of discretion will sometimes be thin. See Sunstein, *Reviewing Agency Inaction After Heckler v. Chaney*, 52 U. CHI. L. REV. 653, 665–75 (1985).

<sup>153</sup> See Sunstein, *Actions, Self-Interest, and the APA: Four Lessons Since 1946*, 72 VA. L. REV. 271, 294 (1986); *infra* pp. 469–73.

<sup>154</sup> See *supra* pp. 449–50.

<sup>155</sup> See G. EADS & M. FIX, *RELIEF OR REFORM: REAGAN'S REGULATORY DILEMMA* 54–67 (1984); see also OMB REGULATORY PROGRAM, 1986, *supra* note 133, at xi–xvi, xix–xxxi (outlining

about the relative expertise of agencies, it is ironic that presidential control of bureaucracy through OMB review may vindicate, rather than threaten, the New Deal goal of technocratic government. Moreover, the underlying notion of the recent executive orders, at least in part, is that parochial administration compromises the long-term public interest in productivity and a competitive economy, and that the technical skills associated with OMB might promote that public interest. The OMB process also serves some of the framers' original purposes in creating a unitary executive branch.

At the same time, OMB control ensures that the views of those close to the President inform value judgments and that the President's positions about regulation thus remain in the forefront of the regulatory process. In this respect, the initiatives attempt to vindicate a political model of administration that is quite contrary to New Deal understandings. The rise of presidential control thus creates a puzzle in its simultaneous endorsement and rejection of technocratic approaches to administration. OMB review should be understood as an attempt to unite two fundamental, though seemingly antagonistic, aspirations of the New Deal — technical expertise and political accountability.

The institutional and substantive concerns of the recent executive orders should be sharply distinguished. The substantive position consists largely of skepticism about social and economic regulation.<sup>156</sup> There can be no doubt that a principal purpose and effect of OMB review under the Reagan administration is to reduce regulatory intervention.<sup>157</sup> In this respect, OMB has undertaken some of the tasks associated with the antiregulatory judges of the 1930's and 1940's — a remarkable irony in light of the quite different alignments of the presidency and the judiciary during that earlier period. The institutional position embodies a preference for political control of the bureaucracy, a position that could coexist with a more hospitable attitude toward regulation.

2. *Executive control in practice.* — The considerations set out above make a strong theoretical case for presidential control of the bureaucracy. Nevertheless, critics have attacked OMB's role on a

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President Reagan's regulatory policy and calling for more efficient allocation of regulatory resources, especially in the area of risk regulation). President Carter also attempted technocratic control. See G. EADS & M. FIX, *supra*, at 54-65 (discussing President Carter's efforts to bring economic analysis to bear on regulatory proposals).

<sup>156</sup> See generally EXECUTIVE OFFICE OF THE PRESIDENT, OFFICE OF MANAGEMENT AND BUDGET, REGULATORY PROGRAM OF THE UNITED STATES GOVERNMENT xi-xiii (Apr. 1, 1985-Mar. 31, 1986) [hereinafter OMB REGULATORY PROGRAM, 1985] (strongly criticizing excessive regulation in virtually every area of the United States government); Olson, *The Quiet Shift of Power: Office of Management & Budget Supervision of Environmental Protection Agency Rule-making Under Executive Order 12,291*, 4 VA. J. NAT. RESOURCES L. 1, 64-73, 80 (1984) (describing the hostility OMB demonstrated in its oversight of EPA rules).

<sup>157</sup> See *infra* pp. 458-59.

variety of theoretical and practical grounds. Some claim that OMB will dismantle regulatory schemes enacted by Congress<sup>158</sup> and that OMB personnel are incompetent to make regulatory decisions — a major threat to the basic justifications for autonomous administration.<sup>159</sup> The secrecy and insulation of OMB review may exacerbate the problem, impairing both accountability and expertise. Another concern is that in light of the current President's hostility toward regulation, an increased role for OMB may signify a rollback of social programs. In addition, OMB may be unduly susceptible to the influence of well-organized private groups. More fundamentally, critics urge — in a partial return to the New Deal conception of administration — that OMB control politicizes a system that should primarily involve the application of technical expertise and law.<sup>160</sup> These crit-

<sup>158</sup> See Morrison, *supra* note 107, at 266–67.

<sup>159</sup> See Morrison, *OMB Interference with Agency Rulemaking*, *supra* note 17, at 1066–67.

<sup>160</sup> See Morrison, *supra* note 107, at 265–68; Olson, *supra* note 156, at 60–64, 69–73. In a development of considerable importance, OMB has published an official regulatory program of the United States government, using the documents generated by Executive Orders 12291 and 12498. The regulatory program is divided into three basic parts. The first part offers OMB's basic description of its regulatory program, an outline of especially important regulatory initiatives for the coming year, a general discussion of risk reduction (heavily influenced by welfare economics), and an outline of various ways to take advantage of markets, including trading of the right to pollute. The second and by far the longest section of the program describes the regulatory agenda of each agency. The third part deals with the implementation of Executive Order 12291 and offers information about OMB interference with the discretion of various agencies to make rules.

Several aspects of the regulatory report are especially striking. The report gives a sense of coherence and coordination among the executive departments. The general principles announced by the various agencies are applied consistently throughout; it is almost as if the report were written by a single person. The process thus has been a significant success in bringing about a unitary executive branch. The regulatory program is also useful in informing the public of the nature and purposes of national regulation in the recent past and in the near future.

Another distinctive feature of the program is the omnipresence of laissez-faire ideology. Laissez-faire principles appear in the policy statements of almost all federal departments and agencies, and those principles have had significant impact in concrete cases. See OMB REGULATORY PROGRAM, 1986, *supra* note 133. The Department of Agriculture, for example, begins its statement of policies with the suggestion that “[e]xcept where otherwise required by statutes, competitive markets should be allowed to allocate private-sector resources and solve economic and social problems with minimal, if any, intervention by the government.” *Id.* at 5. The Department of Education describes the first of its “key regulatory objectives” as “deregulation, including . . . elimination of overly prescriptive requirements.” *Id.* at 49; see also *id.* at 147 (Department of Housing and Urban Development); *id.* at 175 (Department of the Interior). The list could easily be expanded.

The general statement of OMB objectives and the requirement of a rule-by-rule demonstration that federal action is necessary reveals the regulatory program's orientation toward traditional market ordering. Thus, the Executive Order process has fused pre-New Deal conceptions of the role of government with post-New Deal ideas about government's proper institutional structure. Cf. *infra* pp. 472–73, 480–82 (showing how judicial and congressional controls on agency autonomy have sometimes increased regulation).

Significantly, legislative specificity and judicial review have proved especially important for the regulatory program. In numerous cases, agencies propose rules because Congress has

icisms recall Madisonian conceptions of politics, also associated with the New Deal, that view insulation as a possible safeguard against factional power. According to this view, OMB control threatens to undermine the traditional republican belief in deliberative democracy.

In addition to these concerns about the theoretical case for presidential control, many observers have criticized OMB's actual performance. There is some evidence that OMB's interaction with politically powerful private groups has affected its review.<sup>161</sup> OMB also may have been unduly affected by antiregulatory zeal.<sup>162</sup> OMB review has caused considerable delay in the rulemaking process.<sup>163</sup> Another risk is that OMB will terminate rulemaking proceedings at an early stage to avoid public scrutiny of OMB intervention. Furthermore, OMB's position as guardian of costs and its employees' lack of technical expertise suggest that OMB may not implement statutory programs fully or effectively.

The regulatory program also reveals that OMB has substantially controlled the regulatory process, sometimes effectively displacing agency authority over the ultimate decision. Numerous rules have been changed, withdrawn, or returned for reconsideration by OMB. In 1985, OMB found only 70.7% of the agency rules it reviewed to be consistent with Executive Order 12291.<sup>164</sup> It required changes in 23.1% of the cases.<sup>165</sup> The agencies themselves withdrew more than 3% of the rules.<sup>166</sup> The fact that rules are often developed during a process of negotiation and discussion with OMB suggests that OMB has sometimes assumed the final power of decision — a role that is in many cases unlawful.<sup>167</sup>

The criticisms of the reviewing process as unduly antiregulatory and perhaps even unlawful suggest that the President should consider

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required them to do so. When there is a statutory silence or ambiguity, doubts generally have been resolved in favor of inaction. Judicial rulings requiring agency action within a certain period of time have prodded proposed rulemaking. *See infra* pp. 472-73. The regulatory program thus attests to the importance of judicial review in ensuring implementation of statutes.

<sup>161</sup> See G. EADS & M. FIX, *supra* note 155, at 118, 124-38; J. LASH, A SEASON OF SPOILS 25, 62-73 (1984); Houck, *President X and the New (Approved) Decisionmaking*, 36 AM. U.L.REV. 535, 542 & n.42 (1986); Olson, *supra* note 156, at 60-64, 69-73, 80.

<sup>162</sup> See Olson, *supra* note 156, at 14, 42-43, 80.

<sup>163</sup> See generally NATIONAL ACADEMY OF PUBLIC ADMINISTRATION, *supra* note 145, at 5-6, 37-38 (describing some of the regulations that OMB has delayed); Olson, *supra* note 156, at 48-49 (asserting that OMB has significantly delayed EPA regulations with which it disagreed).

<sup>164</sup> See OMB REGULATORY PROGRAM, 1985, *supra* note 156, at 553.

<sup>165</sup> *See id.*

<sup>166</sup> *See id.*

<sup>167</sup> See NATIONAL ACADEMY OF PUBLIC ADMINISTRATION, *supra* note 145, at 25-32 (discussing the charges that OMB has acted unlawfully in usurping decisionmaking authority); OMB WATCH, OMB CONTROL OF RULEMAKING 28 (1985) (criticizing OMB's rule as undermining agency authority).

placing the power of oversight in an institution other than OMB, though still under direct presidential control. Such a system might both reduce possible biases — deriving from OMB's special position as guardian of costs — and secure some of the advantages associated with centralized executive direction. Moreover, such a system would fit comfortably with the recommendation, set out below, that the institution charged with oversight should understand its mission to include not simply the reduction or veto of regulation, but also its initiation and sponsorship.<sup>168</sup>

In any case, none of the problems of OMB review is sufficient reason to reject the general idea of presidential supervision of the bureaucracy.<sup>169</sup> A system of executive control strikes the proper balance between two goals of administration — insulation from partisan pressure and responsiveness to electoral preferences. Executive oversight does not sacrifice the Madisonian goal of deliberative democracy. Too much as well as too little insulation threatens to undermine the Madisonian framework. Because a coordinating office like OMB is not subject to the concentrated pressures that private groups impose on single agencies, OMB oversight probably reduces rather than increases the possibility of factionalism.

Such supervision, moreover, is no more likely to increase than to decrease the incidence of statutory violations. OMB control may well counteract arbitrariness or statutory violations by the relevant agency. To the extent that regulations emerging from the OMB process do not comply with statutory mandates, such noncompliance is subject to control through judicial review.<sup>170</sup> And although OMB's implementation problems are revealing, no major scandals have emerged. Those problems that have occurred should be susceptible to control

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<sup>168</sup> See *infra* pp. 488-89.

<sup>169</sup> There are now several studies of executive control in practice. Although it is far too early for a final assessment, the preliminary results appear mixed. A case study of the EPA has suggested that OMB control through Executive Order 12291 has resulted in the displacement of EPA authority, given disproportionate power to well-organized private groups, and produced statutory violations. See Olson, *supra* note 156, at 64-73. A more general overview of the system suggested a somewhat brighter picture, but offered reasons for caution. See G. EADS & M. FIX, *supra* note 155, at 117-38. Other studies have suggested that the process has fulfilled some or many of its intended purposes. See NATIONAL ACADEMY OF PUBLIC ADMINISTRATION, *supra* note 145, at 48, 58-59 (endorsing the concept of regulatory management by OMB, but presenting a mixed picture of current results); DeMuth & Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075, 1080-88 (1986). In any case, the fact that there have been problems in implementing OMB review is no more reason to reject this development than an objectionable budget is reason to abandon the budgetary process in favor of the more decentralized system that preceded it.

<sup>170</sup> See *supra* note 17 (citing decisions invalidating deregulatory efforts). For a discussion of the recent cases in which agency deregulation has been overturned by the courts, see Garland, *supra* note 17, at 534-41.

by ensuring, through internal<sup>171</sup> and external<sup>172</sup> checks, that OMB officials are aware of the limitations of their role. Some checks are already in place.<sup>173</sup> As for the charge of secrecy, OMB has taken steps to ensure disclosure of regulatory impact analyses and has also publicized the results of its own reviews. In any event, deliberative processes within a particular agency, or among agencies, generally need not be made public. A degree of secrecy in the reviewing process is supported by legitimate concerns, most prominently the need to ensure openness and candor during the deliberative process.<sup>174</sup>

This is not to argue that more disclosure would be undesirable. In particular, OMB should make available to Congress and the public most of the details of its reviewing process after rulemaking is completed.<sup>175</sup> It should also impose more stringent controls on ex parte contacts with private groups, including disclosure of all substantive communications that occur outside the rulemaking process.<sup>176</sup> Such requirements would significantly improve the current system.

Whether the goal is to improve technocratic decisionmaking or to promote accountability, much is to be gained by some variation on the centralized process introduced by the recent executive orders. Regulatory decisions necessarily involve value judgments, and those decisions should be overseen by officials close to the President. Executive oversight should have the salutary effect of increasing the authority of agency heads over lower-level employees by bringing issues to light early, thereby allowing agency heads to participate before positions have congealed through staff decisions. With appropriate safeguards, discussed below, executive oversight should diminish the risk of factional politics and promote decisions that tend to accord with the will of the public.<sup>177</sup>

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<sup>171</sup> OMB itself has imposed safeguards, including the limitation of ex parte contacts. For a general discussion of the new safeguards, see W. Gramm, Memorandum for the Heads of Departments and Agencies Subject to Executive Order Nos. 12291 and 12498 (Aug. 8, 1986) (unpublished memorandum on file at Harvard Law School Library).

<sup>172</sup> Congressional and judicial review are particularly important external checks.

<sup>173</sup> See *supra* notes 171-72.

<sup>174</sup> Cf. *United States v. Nixon*, 418 U.S. 683, 708 (1974) (recognizing executive privilege); *Sierra Club v. Costle*, 657 F.2d 298, 404-08 (D.C. Cir. 1981) (recognizing the need to protect intraexecutive communications from disclosure).

<sup>175</sup> See Strauss & Sunstein, *supra* note 148, app. at 207 (reprint of recommendation by the ABA) [hereinafter ABA Recommendation]; see also NATIONAL ACADEMY OF PUBLIC ADMINISTRATION, *supra* note 145, at vii, 4-5, 34-35.

<sup>176</sup> See ABA Recommendation, *supra* note 175 (arguing for disclosure of "all substantive communications with persons outside of the executive branch"). OMB has failed to go this far, disclosing some ex parte contacts only to the agency involved, and not to the public at large. See W. Gramm, *supra* note 171 (discussing ex parte contracts).<sup>1</sup>

<sup>177</sup> See Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L., ECON. & ORG. 81, 95-99 (1985).

Some potential advantages of executive coordination of agencies are suggested by the benefits that have accompanied executive coordination of the budget. Few would advocate return to a system in which each agency submitted its budget to Congress without presidential coordination. Similar considerations support endorsement of the current initiatives and suggest that they should be applied to the "independent" agencies as well.<sup>178</sup>

Limitations on the role of OMB follow from the affirmative case for executive supervision. The purpose of control is to establish the basic framework within which decisions are made. Such supervision is least appropriate when the decision is predominantly legalistic. By contrast, broad policy decisions — for example, those implicated by the carcinogen policy of the Occupational Safety and Health Administration (OSHA)<sup>179</sup> — call for a significant measure of OMB participation. A technocratic decision is an intermediate case. Determination of the appropriate means for achieving agreed-upon ends should include OMB participation so as to promote technocratic values and diminish the risk of factionalism.

Most importantly, OMB should avoid ad hoc or one-shot interventions. It is in such cases that political considerations in the form of factional politics are most likely to infect the regulatory process.<sup>180</sup> It is also in such cases that OMB's lack of technical sophistication is most troubling.<sup>181</sup> Moreover, OMB control must not displace the role of the agency as the ultimate authority entrusted with the decision — a limitation expressly recognized (if not followed in practice) in both executive orders.<sup>182</sup> Congress has the constitutional authority to re-

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<sup>178</sup> See *infra* pp. 496–500. Such application is recommended by the American Bar Association. See ABA Recommendation, *supra* note 175, at 206.

There are, however, two differences between the budgetary and regulatory contexts. First, in the regulatory context, Congress has conferred authority on agency officials by statute; such officials, rather than OMB, are therefore the ultimate decisionmakers. Second, in the regulatory context, Congress has supplied a statutory standard with which the agency must comply; there is no such standard in the budgetary context.

<sup>179</sup> See Occupational Safety and Health Act, 29 U.S.C. § 651 (1982) (creating OSHA).

<sup>180</sup> Various studies of the OMB process confirm the point, suggesting that isolated intervention sometimes occurs in response to exercises of influence by well-organized groups. See *supra* note 161 and accompanying text.

<sup>181</sup> See M. REAGAN, REGULATION: THE POLITICS OF POLICY 176 (1987).

<sup>182</sup> See Exec. Order No. 12,291, 3 C.F.R. 127, 130 § 3(f)(3) (1981), reprinted in 5 U.S.C. § 601 (1982) ("Nothing in this subsection shall be construed as displacing the agencies' responsibilities delegated by law."); Exec. Order 12,498, 3 C.F.R. 323 § 1(b), reprinted in 5 U.S.C. § 601 (Supp. III 1985) ("The head of each Executive agency subject to this Order shall ensure that all regulatory actions are consistent with the goals of the Administration and will be appropriately implemented."); cf. Myers v. United States, 272 U.S. 52, 135 (1926) (recognizing that "there may be duties so peculiarly and specifically committed to the discretion of a particular officer as to raise a question whether the President may overrule or revise the officer's interpre-

quire that the agency make the decision;<sup>183</sup> moreover, the need for some specialization and insulation supports the decision to entrust the individual agencies with ultimate authority.

In addition, the focus on economic productivity and cost-benefit analysis must be tempered by a recognition that some regulatory schemes aim to redistribute resources or to recognize and foster public or noncommodity values.<sup>184</sup> Regulatory systems having objectives other than economic efficiency include regulation of communications, social security, antidiscrimination statutes, and some environmental measures.

Finally, a serious concern about regulatory review is that it has in some contexts led to an unduly aggressive and broad movement toward deregulation through executive abdication.<sup>185</sup> In this respect, the reviewing process has offered regulated entities an extra opportunity to fend off regulation<sup>186</sup> — neither a desirable nor an inevitable result. Nevertheless, the institutional structure of presidential control is desirable — for reasons of accountability — quite apart from the substantive results it reaches.

The rise of presidential control has fundamentally transformed the New Deal agency. Administrative autonomy has been substantially restricted because of the risks of decentralization, uncoordinated enforcement, and unaccountability. Under the Reagan Administration, presidential supervision has also been associated with skepticism about aspects of the substantive program of the New Deal. Although supervision undoubtedly was sought by interests opposed to regulation and fearful that agency autonomy would help bring it about,<sup>187</sup> there is no necessary connection between antiregulatory politics and executive control. In a different administration, executive centralization

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tation of his statutory duty in a particular instance"); *Kendall v. United States*, 37 U.S. (12 Pet.) 524, 610 (1838) ("There are certain political duties imposed upon many officers in the executive department, the discharge of which is under the direction of the President. But it would be an alarming doctrine that Congress cannot impose upon any executive officer any duty they may think proper . . . .").

<sup>183</sup> Cf. *Myers*, 272 U.S. at 135 (suggesting that certain congressional delegations of power to agency officers may be beyond the presidential power to dictate results); *Kendall*, 37 U.S. (12 Pet.) at 609–14 (indicating that Congress has such power). In the early years of the nation, the Attorney General issued vacillating opinions on the power of the President to dictate outcomes. See W. GELLHORN, C. BYSE, P. STRAUSS, T. RAKOFF, & R. SCHOTLAND, ADMINISTRATIVE LAW 159 n.8 (8th ed. 1987).

<sup>184</sup> See sources cited *supra* note 79.

<sup>185</sup> See NATIONAL ACADEMY OF PUBLIC ADMINISTRATION, *supra* note 145, at 4–6, 35; Olson, *supra* note 156, at 48–49.

<sup>186</sup> See S. BREYER & R. STEWART, ADMINISTRATIVE LAW AND REGULATORY POLICY 661 (2d ed. 1985) (quoting C. Boyden Gray, Counsel to the Presidential Task Force on Regulatory Relief, inviting regulated industries to seek presidential help if they find agencies uncooperative).

<sup>187</sup> Many career administrators who had been appointed in a different administration undoubtedly did not share the political agenda of the Reagan Administration.

might have the opposite result. Whether more or less regulation is desirable in different settings, greater presidential control of the bureaucracy is a promising response to some of the risks created by the New Deal agency.

### B. Judicial Control

Thus far, I have argued that presidential control of the bureaucracy can operate as a partial remedy for some of the problems introduced into the system of tripartite government by the rise of administrative agencies. An increased role for the executive does not, however, remove the need for other controls on the regulatory process. For the last quarter-century, the federal courts have also acted as an important check on administrative agencies. The judicial role has manifested itself most prominently in the development of the "hard-look doctrine."<sup>188</sup> As the doctrine evolved, courts first required agencies to undertake, and then themselves undertook, a close look at the advantages and disadvantages of challenged regulatory strategies.

The hard-look doctrine has taken two primary forms. First, courts have limited regulatory initiatives,<sup>189</sup> sometimes by requiring agencies to show that the advantages of regulation justify the disadvantages.<sup>190</sup> In such cases, technocratic reasoning on the part of the judiciary operates as a check on regulatory intervention<sup>191</sup> similar to that provided by the recent executive orders. In some respects, this judicial role bears out the New Deal fear of limitations on regulation from courts interested in preserving traditional market ordering. From another angle, however, the role might be seen as a peculiar reversal of New Deal understandings, because aggressive judicial review has sometimes been necessary to vindicate technocratic goals associated with the New Deal itself.

<sup>188</sup> The term "hard look" first appeared in *Pikes Peak Broadcasting Co. v. FCC*, 422 F.2d 671, 682 (D.C. Cir. 1969), *cert. denied*, 395 U.S. 979 (1969), and *Wait Radio v. FCC*, 418 F.2d 1153, 1156 n.8, 1160 (D.C. Cir. 1969), *aff'd*, 459 F.2d 1203 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 1027 (1972). The doctrine was devised by the United States Court of Appeals for the District of Columbia Circuit and has been endorsed, at least on occasion, by the Supreme Court. See, e.g., *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).

<sup>189</sup> See, e.g., *Industrial Union Dep't, AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 659 (1980) (plurality opinion) (finding that the Secretary of Labor, in setting a new standard for permissible levels of benzene in the workplace, had exceeded the authority granted OSHA under the Occupational Safety and Health Act).

<sup>190</sup> See, e.g., *Asbestos Information Ass'n v. OSHA*, 727 F.2d 415, 423 (5th Cir. 1984) (finding that the proposed safety measure "must, on balance, produce a benefit the costs of which are not unreasonable"); *Aqua Slide 'N' Dive Corp. v. Consumer Prod. Safety Comm'n*, 569 F.2d 831, 835 (5th Cir. 1978) (setting aside CPSC standards because the Commission did not examine the effectiveness of the standards or their impact on the availability and utility of the product).

<sup>191</sup> See, e.g., *Aqua Slide*, 569 F.2d at 840-44 (evaluating technological data and invalidating the agency's decision on that basis).

Second, courts have relied on the hard-look doctrine to invalidate or remand for reconsideration regulatory measures that did not fulfill the goals of the governing substantive statute.<sup>192</sup> Courts have intervened in part because of their fear that statutes were being inadequately implemented. In such instances, the need to vindicate legislative goals against a reluctant or interest-driven executive branch justifies a judicial role. It is ironic that careful judicial supervision of agency action, opposed by the original advocates of regulation and sought almost exclusively by its opponents, is now invoked by those seeking regulatory action to further New Deal goals.

The APA, which governs judicial review of agency action, sets out two primary functions for reviewing courts. First, courts must ensure fidelity to positive law.<sup>193</sup> Second, courts must invalidate decisions that are "arbitrary" or "capricious."<sup>194</sup> The hard-look doctrine has been an effort to implement these basic requirements of the APA.

*i. Reviewing Conformity to Law.* — The basic requirement that agencies adhere to statute, and the judicial enforcement of that requirement are uncontroversial. The central question is whether, and when, deference to an administrative interpretation of a governing statute is consistent with the basic tenet that it is for courts to "say what the law is."<sup>195</sup> The cases have produced confusion on this issue. Sometimes courts purport to defer to an administrative interpretation unless it is plainly wrong or inconsistent with a congressional judgment squarely on point.<sup>196</sup> This position is a direct outgrowth of the New Deal approach to administration, which favored agency autonomy and regarded courts as an obstacle to statutory implementation.<sup>197</sup>

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<sup>192</sup> See, e.g., *State Farm*, 463 U.S. 29; *Action for Children's Television v. FCC*, 821 F.2d 741, 745-77 (D.C. Cir. 1987); *Independent U.S. Tanker Owners Comm'n v. Dole*, 809 F.2d 847, 853-55 (D.C. Cir. 1987); see also R.S. MELNICK, REGULATION AND THE COURTS: THE CASE OF THE CLEAN AIR ACT 351 (1983) (discussing several circuit courts' prohibition of the EPA's practice of granting variances to polluters, on the ground that such deadline extensions would undermine Congress' intent in enacting the Clean Air Act); Garland, *supra* note 17, at 534-41 (discussing the new "reasonableness" test used in deregulation cases).

<sup>193</sup> See Administrative Procedure Act, 5 U.S.C. § 706 (1966).

<sup>194</sup> See *id.* The APA also charges the courts with ensuring adherence to applicable procedural requirements, *see id.*, a point not treated here.

<sup>195</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

<sup>196</sup> See, e.g., *Gray v. Powell*, 314 U.S. 402, 412 (1941) (stating that a congressional delegation of authority to an agency "will be respected and the administrative conclusion left untouched").

<sup>197</sup> See *id.* at 412 ("It is not the province of a court to absorb the administrative functions to such an extent that the executive or legislative agencies become mere fact-finding bodies deprived of the advantages of prompt and definite action."). This principle departs from the canon of interpretation that statutes in derogation of the common law should be narrowly construed; that canon served as an obstacle to both the institutional and the substantive goals of the New Deal program. The notion of deference to administrative interpretations, like the principle that remedial statutes should be broadly construed, might be understood as a corrective to that canon, embodying respect for the New Deal reformation.

At the same time, courts often approach issues of law without deference to agency interpretations,<sup>198</sup> pointing to the absence of administrative expertise on legal questions.<sup>199</sup> This approach has sometimes been associated with hostility to regulation.<sup>200</sup> More recently, however, courts have undertaken an independent judicial inquiry into legal questions in order to ensure implementation of regulatory programs, a development paralleling the rise of hard-look review of agency decisions. Underlying each of these developments is a view that agency autonomy threatens to undermine statutory purposes.

In an important recent departure from this approach to legal questions, however, the Supreme Court endorsed a rule of deference to agency interpretations of law. In *Chevron USA, Inc. v. National Resources Defense Council, Inc.*,<sup>201</sup> the Court held that unless Congress has "directly spoken to the precise question at issue," reviewing courts must give considerable deference to the "executive department's construction of a statutory scheme it is entrusted to administer."<sup>202</sup> The Court justified its decision in part by pointing to presidential supervision over agencies and to the fact that the President, unlike courts, is accountable to the electorate.<sup>203</sup> This view is a partial return to New Deal conceptions of the relationship between agencies and reviewing courts.

Often Congress delegates discretionary power to an administrative agency because Congress has been unable to resolve the issue itself; even when Congress has addressed the issue, the statute may be ambiguous. If, as *Chevron* seems to suggest, courts must give administrative interpretations extreme deference, there will be little or no judicial check on the executive's exercise of discretion in statutory interpretation. Combined with the recent rise of presidential control, *Chevron* appears to confer considerable law-interpreting powers on the President.<sup>204</sup>

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<sup>198</sup> See, e.g., *Industrial Union Dep't, AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 658-59 (1980) (plurality opinion) (emphasizing that the lower court did not make any factual determinations, but merely interpreted the statutory authority of the Secretary of Labor under the Occupational Safety and Health Act).

<sup>199</sup> See *Bowen v. American Hosp. Ass'n*, 106 S. Ct. 2101 (1986) (plurality opinion) (invalidating an agency regulation because it fell outside the agency's authority); see also J. LANDIS, *supra* note 7, at 152-54.

<sup>200</sup> See *Industrial Union Dep't*, 448 U.S. at 637-46, 652-58.

<sup>201</sup> 467 U.S. 837 (1984).

<sup>202</sup> *Id.* at 842, 844.

<sup>203</sup> See *id.* at 865-66.

<sup>204</sup> For an approving view of increased executive control and of *Chevron*, see Pierce, cited in note 18 above. For a recent discussion of comparative competence, see Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549 (1985), which argues in favor of a presumptive rule of deference to agency interpretations. A skeptical discussion of

The meaning of *Chevron*, however, is not entirely clear. *Chevron* recognizes that no deference is due when Congress has directly addressed the question at issue, and perhaps the Court will define that category broadly. If so, courts will often approach issues of law independently. If *Chevron* requires deference whenever there is ambiguity, however, the case could have a major impact.<sup>205</sup>

Such a deferential approach would be unacceptable for several reasons. First, it is too general and undifferentiated. The case for deference to agency decisions depends on congressional will, which in ambiguous cases is reconstructed on the basis of several factors, including the technical expertise of the agency, its relative accountability, and its ability to centralize and coordinate administrative policy. Because these factors have different force in different contexts, the appropriate degree of deference cannot be resolved by a general rule. The extent of deference should depend on the nature of the issue and, above all, on the applicability of distinctive administrative capacities. These capacities argue most powerfully in favor of deference when the issue involves questions of fact and policy — a “mixed” question — and when resolution thus depends on extralegal concerns. Deference is much less appropriate when the issue is solely one of law.<sup>206</sup> *Chevron* fails to make such distinctions.

Second, *Chevron* fails to distinguish between statutory ambiguities on the one hand and legislative delegations of law-interpreting power to agencies on the other. The *Chevron* Court reasoned that when the text of a statute does not resolve a question, Congress should be understood to have delegated the problem to the agency for deci-

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*Chevron*, overlapping with that offered here, is Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 372–82 (1986).

The connection between judicial deference and presidential control is not inadvertent. *Chevron* itself pointed to presidential accountability as a reason for judicial deference: “While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices . . . .” 467 U.S. at 865.

<sup>205</sup> See, e.g., *Young v. Community Nutrition Inst.*, 106 S. Ct. 2360 (1986) (deferring to FDA interpretations of an arguably ambiguous statute).

<sup>206</sup> Assume, for example, that a statute requires an agency to demonstrate a “significant risk” before regulating a substance in the workplace, and that the relevant agency concludes that a particular substance produces such a risk. The decision whether the statute permits regulation in the particular case cannot be made on the basis of the law alone. Inquiries of fact and policy are relevant as well. The case for deference is therefore substantial. A contrasting case is one in which the issue is whether a statutory standard requires the agency to undertake cost-benefit analysis or merely to show that there is a significant risk. See, e.g., *Industrial Union Dep’t, AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607 (1980) (holding that a significant risk must be shown in order to regulate carcinogens under OSHA). That question is independent of particular facts. Even if issues of policy are involved, it is hardly clear that the agency is better qualified to make the decision. The case for deference on “pure” questions of law is much weaker, because such questions do not implicate the particular institutional competence of the agency.

sion.<sup>207</sup> But ambiguities are not always delegations. The fact that a statute can be read in different ways does not mean that Congress intended the agency to resolve the question. Although the *Chevron* rule of deference is appropriate when Congress purposely has left a gap for agency resolution, a different rule should apply when there is merely ambiguity.<sup>208</sup> In such cases, an independent judicial inquiry is required to check the agency's interpretation of the law.

Third, *Chevron* suggests that administrators should decide the scope of their own authority. That notion flatly contradicts separation-of-powers principles that date back to *Marbury v. Madison*<sup>209</sup> and to *The Federalist No. 78*.<sup>210</sup> The case for judicial review depends in part on the proposition that foxes should not guard henhouses — an injunction to which *Chevron* appears deaf. It would be most peculiar to argue that congressional or state interpretations of constitutional provisions should be accepted whenever there is ambiguity in the constitutional text; such a view would wreak havoc with existing constitutional law. Those limited by a provision should not determine the nature of the limitation. The relationship of the Constitution to Congress parallels the relationship of governing statutes to agencies.<sup>211</sup> In both contexts, an independent arbiter is necessary to determine the nature of the limitation.<sup>212</sup>

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<sup>207</sup> See *Chevron*, 467 U.S. at 864–66; see also Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 32–34 (1983) (comparing deferential review of agency action to constitutional review of congressional action, and reconciling both with the principles announced in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)). Similar issues arise in the law of preemption, which requires courts to decide whether congressional silence indicates a desire to leave an issue to state government, or instead reflects the striking of a balance that forbids state regulation.

<sup>208</sup> See *Young*, 106 S. Ct. at 2367–68 (Stevens, J., dissenting) (arguing that courts should resolve any ambiguities in statutes).

<sup>209</sup> 5 U.S. (1 Cranch) 137 (1803).

<sup>210</sup> Hamilton noted that judicial review served not only to allow invalidation of unconstitutional laws, but also to deter legislatures from enacting oppressive measures. See *THE FEDERALIST NO. 78*, at 525–26 (A. Hamilton) (C. Van Doren ed. 1945). Hamilton wrote:

But it is not with a view to infractions of the Constitution only, that the independence of the judges may be an essential safeguard against the effects of occasional ill humors in the society. These sometimes extend no farther than to the injury of the private rights of particular classes of citizens, by unjust and partial laws. Here also the firmness of the judicial magistracy is of vast importance in mitigating the severity and confining the operation of such laws. It not only serves to moderate the immediate mischiefs of those which may have been passed, but it operates as a check upon the legislative body in passing them; who, perceiving that obstacles to the success of iniquitous intention are to be expected from the scruples of the courts, are in a manner compelled, by the very motives of the injustice they meditate, to qualify their attempts.

*Id.*

<sup>211</sup> See *id.* at 527; cf. Monaghan, *supra* note 207, at 32–34 (arguing that the role of judicial review is substantially the same in administrative law and constitutional law).

<sup>212</sup> If Congress specifically authorizes the agency to determine the limits of its own authority, a different conclusion is appropriate. See Monaghan, *supra* note 207, at 33 ("[T]he judicial duty

This principle assumes special importance in light of the awkward constitutional position of the administrative agency. Without the ordinary electoral safeguards or the usual checks and balances, risks of factionalism and self-interested representation increase. A firm judicial hand in the interpretation of statutes is thus desirable, especially when the agency's self-interest is obviously at stake. Consider, for example, an agency's resolution of the question whether a statute makes its own decisions reviewable, requires elaborate procedures, or allows imposition of fines ultimately redounding to the agency's benefit. In cases in which the agency's self-interest is so plainly at issue, it is doubtful that the *Chevron* rule would be applied.<sup>213</sup> But the potential for self-interested decisions extends to most cases in which an agency is deciding on its statutory authority.

Fourth, *Chevron* does not accurately reflect congressional intent, which the Court itself suggests is critical to its rule of deference.<sup>214</sup> The APA — the basic charter governing judicial review and *Chevron* itself — was born in a period of considerable distrust of agency activity.<sup>215</sup> To the extent that there are indications of congressional views in the recent past, they suggest that Congress favors a relatively aggressive judicial role.<sup>216</sup> In light of these intentions, the appropriate rule is one of largely independent judicial interpretation of statutes, with the degree of deference increasing as the issue becomes more technical or involves issues of policy.

Finally, the *Chevron* approach is based on a misconception of the process of statutory interpretation. Congress rarely addresses precise questions directly, but its failure to do so does not remove all constraints on administrators. Instead, statutes set out general principles that guide and discipline administrative discretion even in unforeseen cases.<sup>217</sup> The question is not whether Congress has directly addressed

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is to ensure that the administrative agency stays within the zone of discretion committed to it by its organic act.").

<sup>213</sup> See Breyer, *supra* note 204, at 371 (suggesting that courts are less likely to defer to an agency decision if the agency cannot "be trusted to give a properly balanced answer"); Note, *Coring the Seedless Grape: A Reinterpretation of Chevron U.S.A. v. NRDC*, 87 COLUM. L. REV. 986 (1987).

<sup>214</sup> See *Chevron*, 467 U.S. at 862–65; cf. Monaghan, *supra* note 207, at 32–34; Sunstein, *supra* note 17, at 199 (discussing the history of the APA); Sunstein, *supra* note 153, at 289 n.96 (discussing the legislative history of the APA and illustrating the congressional desire for strong judicial oversight of agency decisions).

<sup>215</sup> See *supra* p. 448.

<sup>216</sup> Members of Congress have shown enthusiasm for the Bumpers Amendment, which would expand judicial control of agency decisions. See J. MASHAW & R. MERRILL, ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM 383–85 (2d ed. 1985). In 1982, the Bumpers Amendment was passed overwhelmingly by the Senate as part of S. 1080, but the bill expired in the House. See *id.* at 385.

<sup>217</sup> See, e.g., *Motor Vehicle Mfrs. Ass'n. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 55 (1983) (justifying the invalidation of an agency's rescission of a regulation not compelled by

the precise issue, but whether the statute requires or forbids the relevant administrative action.

For these reasons, *Chevron* should be interpreted narrowly, as its context suggests: the case involved a highly complex statute in a technical area, and a reasonable initiative that attempted to reconcile a variety of policies, all of which were statutorily permissible.<sup>218</sup> A recent Supreme Court opinion discussing *Chevron* emphasized precisely these considerations, and described the case as involving an application of law to facts rather than as a general endorsement of deference to agency interpretations of law.<sup>219</sup> Viewed in this way, *Chevron* holds that deference to agency interpretations of law is appropriate when the distinctive institutional capacities of the agency are called into play.<sup>220</sup> The case should not be treated as a dramatic departure from the general recent trend toward independent review of agency interpretations of law.

2. *Arbitrariness Review*. — The APA requires courts to ask not only whether an agency action conforms to statute, but also whether it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."<sup>221</sup> This question cannot be answered by reference to the statute alone. Courts must explore the agency's decision on the merits. That task is in some tension with the self-conscious rejection of judicial lawmaking that gave rise to agencies in the New Deal period.

The inquiry into arbitrariness is best understood as a means of "flushing out" both serious errors of analysis and impermissible motivations for administrative behavior. In this context, the hard-look

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statute in part on the ground that the statute placed a premium on safety). Judges almost always extrapolate the purposes of a statute to some extent in interpreting its language. See R. DWORKIN, LAW'S EMPIRE 313-54 (1986); Fuller, *Positivism and Fidelity to Law — A Reply to Professor Hart*, 71 HARV. L. REV. 630, 661-69 (1958). This approach must be contrasted with the technique of extrapolating purposes (for example, "protecting the environment") and taking them out of context to defeat particular administrative initiatives that are not actually proscribed by the statute. It is this latter approach against which *Chevron* may be rebelling. See Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 544 (1983) (suggesting that statutory domain "be restricted to cases anticipated by [the statute's] framers and expressly resolved in the legislative process"). Easterbrook's own approach, however, depends on a belief in the primacy of common law ordering — a belief that Congress and the President rejected during and after the New Deal.

<sup>218</sup> See *Chevron*, 467 U.S. at 865-66.

<sup>219</sup> See INS v. Cardoza-Fonseca, 107 S. Ct. 1207, 1221 (1987) (stating that a "pure question of statutory construction [is] for the courts to decide" by "[e]mploying traditional tools of statutory construction," and noting that "[t]he narrow legal question . . . is, of course, quite different from the question of interpretation that arises in . . . case[s] in which the agency is required to apply . . . standards to a particular set of facts"); see also International Union, United Auto., Aerospace & Agric. Implement Workers v. Brock, 816 F.2d 761, 765 (D.C. Cir. 1987) (stating that "*Chevron* and *Cardoza-Fonseca*, together, guide our analysis").

<sup>220</sup> See *Cardoza-Fonseca*, 107 S. Ct. at 1221.

<sup>221</sup> 5 U.S.C. § 706 (1982).

doctrine requires agencies to consider all statutorily relevant factors, to justify departures from past practices, to furnish detailed explanations of their decisions, to explain the rejection of alternatives, and to show connections between statutory purposes and regulatory policies.<sup>222</sup> The hard-look doctrine sometimes entails a close look at the ultimate outcome as well.<sup>223</sup> Courts apply the doctrine to a wide range of decisions, from the most technocratic to the highly political. In all contexts, the principal justification for judicial scrutiny is a fear of agency subversion of statutory purposes.

The hard-look doctrine is associated with a belief in the power of technical expertise and of law to help generate solutions to regulatory problems. Immersion in the technical materials, it is sometimes thought, can furnish uniquely correct outcomes or at least sharply limit the range of acceptable choices. The purpose of judicial review is to ensure that illegitimate considerations, including statutorily irrelevant factors, have not influenced agency outcomes. In its ideal form, judicial control is designed to serve both technocratic and political goals.

A useful example of the hard-look approach is *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*,<sup>224</sup> which involved the Reagan administration's rescission of a passive-restraint regulation. The regulation would have required the installation of either automatic seatbelts or airbags in new automobiles. The Supreme Court's decision to invalidate the rescission rested in part on the agency's failure to consider the option of a regulation involving only airbags, as opposed to one that gave manufacturers a choice between airbags and automatic seatbelts. The rejection of a plausible alternative suggested that the conclusion was driving the analysis rather than vice versa.<sup>225</sup>

The disagreement within the Supreme Court over the repeal of the passive-restraint rule stemmed from contrasting views about the proper role of politics in the regulatory process.<sup>226</sup> The majority treated the issue as if it were simply one of the application of expertise to the problem.<sup>227</sup> Value judgments by an administration hostile to regulation were irrelevant; the facts themselves dictated a solution that any administration, applying the correct statutory criteria, would have reached. Justice Rehnquist responded that the decision was

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<sup>222</sup> See Sunstein, *supra* note 17, at 177, 181-84.

<sup>223</sup> See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).

<sup>224</sup> 463 U.S. 29 (1983).

<sup>225</sup> See *id.* at 46-51.

<sup>226</sup> Compare 463 U.S. at 32-57 with 463 U.S. at 57-59 (Rehnquist, J., concurring in part and dissenting in part).

<sup>227</sup> See 463 U.S. at 46-57.

ultimately a political one, and that the Court should respect the shift in public opinion reflected in the change in administration.<sup>228</sup>

The majority's approach, however, should be seen not as a naive disregard of the proper role of politics,<sup>229</sup> but as an effort to "flush out" illegitimate or unarticulated factors — perhaps solicitude for an ailing automobile industry or a general antiregulatory animus — and to ensure that those factors are available for discussion and comment during and after the rulemaking process. In this respect, the hard-look doctrine might be regarded as a means of limiting impermissible influences in the regulatory process. An aggressive judicial role thus furthers the New Deal conception of administration.

The hard-look doctrine, as a means of implementing the prohibition of arbitrariness, has been criticized on a number of grounds. Critics claim that the requirement of detailed explanation has little substantive effect on agency decisions;<sup>230</sup> that judicial review increases delay and the risk of nonimplementation;<sup>231</sup> that courts lack the expertise or accountability to play a constructive role in the administrative process; and that the hard-look doctrine ignores the desirable, and in any event inevitable, motivating role of "politics" in agency decisions.<sup>232</sup> The ultimate risk, occasionally realized in practice, is that outcomes will depend on the policy preferences of the judges rather than of electorally responsive officials.<sup>233</sup>

Many of these concerns have some basis, but they are insufficient to justify abandonment of the hard-look doctrine. The requirement of detailed explanation has been a powerful impediment to arbitrary or improperly motivated agency decisions.<sup>234</sup> Like OMB review, judicial scrutiny is valuable above all as a deterrent to careless or illegitimate decisions — a point emphasized by Alexander Hamilton in justifying judicial independence, quite outside of the context of

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<sup>228</sup> See *id.* at 59 (Rehnquist, J., concurring in part and dissenting in part).

<sup>229</sup> Cf. C. Edley, *supra* note 19 (arguing for recognition of a role for politics).

<sup>230</sup> See Sax, *The (Unhappy) Truth About NEPA*, 26 OKLA. L. REV. 239, 247-48 (1973).

<sup>231</sup> See, e.g., Mashaw & Harfst, *Regulation and Legal Culture: The Case of Motor Vehicle Safety*, 4 YALE J. ON REG. 257 (1987) (arguing that judicial review of agency decisions has contributed to the decrease in motor vehicle safety rulemaking).

<sup>232</sup> See Scalia, *Two Wrongs Make a Right: The Judicialization of Standardless Rulemaking*, REG., July-Aug. 1977, at 38, 40 (arguing that the politicization of agency rulemaking is not inappropriate, but in fact desirable).

<sup>233</sup> See Shapiro, *APA: Past, Present, Future*, 72 VA. L. REV. 447, 478-79 (1986). In addition, aggressive judicial review of agency policy choices is quite at odds with deferential judicial review of agency interpretations of law. See Breyer, *supra* note 204, at 363-65.

<sup>234</sup> See Pedersen, *Formal Records and Informal Rulemaking*, 85 YALE L.J. 38, 59-60 (1975) (describing the benefits of judicial review of EPA regulations); Stewart, *The Development of Administrative and Quasi-Constitutional Law in Judicial Review of Environmental Decision-making: Lessons from the Clean Air Act*, 62 IOWA L. REV. 713, 731-32 (1977).

constitutional law.<sup>235</sup> The courts' lack of technical expertise and accountability is a reason for modesty, but the hard-look doctrine, properly understood, takes those factors into account. Judges can require and evaluate detailed explanations of regulatory decisions without substituting their own political and technical judgments for those of agencies.

There have been some judicial errors in the actual implementation of the hard-look approach,<sup>236</sup> but the doctrine has not posed major problems of judicial usurpation. Because of the uneasy constitutional position of the administrative agency, a measure of judicial review is highly desirable. The insulation of the courts operates as a safeguard against factional power, which has been among the most important problems plaguing the New Deal agency.<sup>237</sup>

Judicial review can also help to initiate as well as to fend off agency action; there is hardly an inevitable association between an aggressive judicial role and an antiregulatory animus. Examples of judicial decisions spurring regulation are not difficult to find. Courts have helped bring about statutory enforcement in the areas of, for example, civil rights,<sup>238</sup> environmental law,<sup>239</sup> social security benefits,<sup>240</sup> occupational safety and health,<sup>241</sup> and automobile

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<sup>235</sup> See *supra* note 210; cf. Mashaw & Harfst, *supra* note 231, at 273-316 (demonstrating that the prospect of judicial review has a significant effect on agency decisions, but arguing that the result has been perverse in the context of automobile safety decisions).

<sup>236</sup> See R.S. MELNICK, *supra* note 192, at 357-60; Mashaw & Harfst, *supra* note 231, at 312-16 (arguing that judicial reversal of NHTSA decisions has caused the agency to abandon its standard-setting function).

<sup>237</sup> See *supra* pp. 448-50.

<sup>238</sup> See Adams v. Richardson, 480 F.2d 1159 (D.C. Cir. 1973) (requiring enforcement of title VI of the Civil Rights Act of 1964).

<sup>239</sup> See Natural Resources Defense Council, Inc. v. Train, 510 F.2d 692 (D.C. Cir. 1975) (as modified) (compelling EPA to publish effluent limitation guidelines as required by water pollution control legislation); Calvert Cliffs' Coordinating Comm., Inc. v. United States Atomic Energy Comm'n, 449 F.2d 1109 (D.C. Cir. 1971) (striking down procedural rules established by the Atomic Energy Commission as not complying with environmental legislation); Environmental Defense Fund v. Ruckelshaus, 439 F.2d 584 (D.C. Cir. 1971) (requiring hearings on DDT); R.S. MELNICK, *supra* note 192, at 345-60.

<sup>240</sup> See Pulido v. Heckler, 758 F.2d 503 (10th Cir. 1985) (directing HHS to adopt regulations regarding the travel expenses of disability claimants attending administrative hearings).

<sup>241</sup> See United Steelworkers v. Pendergrass, 819 F.2d 1263 (3d Cir. 1987) (requiring the Secretary of Labor to publish standards for providing employees with information about hazardous chemicals, resulting in 52 Fed. Reg. 31,852 (1987) (revising 29 C.F.R. § 1910.1200) (to be codified at 29 C.F.R. §§ 1910.1200, 1915.99, 1917.28, 1918.90, and 1926.59)); Farmworker Justice Fund, Inc. v. Brock, 811 F.2d 613 (ordering the Secretary of Labor to issue a federal field sanitation standard), *vacated as moot, reh'g denied as moot*, 817 F.2d 890 (D.C. Cir. 1987); Public Citizen Health Research Group v. Tyson, 796 F.2d 1479 (D.C. Cir. 1986) (issuing an opinion that led to the regulation of ethylene oxide, *see* 29 C.F.R. § 1910.1047 (1986)); Public Citizen Health Research Group v. Auchter, 702 F.2d 1150 (D.C. Cir. 1983) (same); National Congress of Hispanic Am. Citizens v. Marshall, 626 F.2d 882 (D.C. Cir. 1979) (directing the Secretary of Labor to issue a timetable for the development of a field sanitation standard for

safety.<sup>242</sup> Perhaps the most dramatic evidence to this effect is furnished by the 1985 and 1986 volumes of the *Regulatory Program of the United States Government*, which reveal that a number of proposed rules have been developed and issued under the pressure of judicial review and judicially-imposed deadlines.<sup>243</sup> Looking solely at litigated cases probably understates the matter; the prospect of judicial review also deters unlawful or arbitrary inaction. Although it is important to understand that litigation can produce significant delay and sometimes increase the risk of nonimplementation,<sup>244</sup> the recent record suggests that it has often had the opposite effect.

Moreover, agency decisions need not and should not be "political" in the gross sense of responding solely to constituent pressures. That understanding of politics was repudiated in the New Deal. The proper role of "politics" consists of judgments of value made in conformity with the statute and subject to public scrutiny and review. Often, agency decisions are and should be based in large part on technical issues, which form the foundation for value choices. One can imagine, for example, studies about the risks of a carcinogen that produce evidence persuading administrators with widely varying positions on regulation to come to the same decision on the particular subject.

This understanding of the role of technical specialists in the regulatory process forms the basis for what might be called a "deliberative" conception of administration, an approach with roots in republican theories of politics, in the Madisonian treatment of representation,<sup>245</sup> and in the New Deal itself.<sup>246</sup> The deliberative conception rejects both purely technocratic and purely political understandings. It does not understand the process as either a mechanism for imposing a unitary public good or for trading off exogenous "interests."<sup>247</sup> Instead, this conception views the regulatory process

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agricultural employees); International Union, United Auto., Aerospace, & Agric. Implement Workers v. Donovan, 590 F. Supp. 747 (D.D.C. 1984) (issuing an opinion that led to the proposed regulation of formaldehyde, *see* 50 Fed. Reg. 50,412 (1985) (to be codified at 29 C.F.R. § 1910.1000 tab. Z-2) (proposed Dec. 10, 1985)), *adhered to*, 756 F.2d 162 (D.C. Cir. 1985).

<sup>242</sup> See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983). But see *Mashaw & Harfst*, *supra* note 231, at 312-14 (suggesting that judicial hostility to regulations has impaired the performance of NHTSA).

<sup>243</sup> Judicially imposed deadlines have occurred, for example, in the development of regulations for the assessment of damages to natural resources, the protection of consumers from pollution in residential wood combustion, the protection of visibility in national parks and wilderness areas, the development of an ozone protection plan, the regulation of mining waste, and the general promulgation of rules protecting workers. See OMB REGULATORY PROGRAM, 1986, *supra* note 133, at 213-14, 432, 434, 469, 492. Judicial supervision has occurred in regulation of the protection of workers from benzene, formaldehyde, and radiation. See *id.* at 307, 311, 321.

<sup>244</sup> See *Mashaw & Harfst*, *supra* note 231, at 289-99, 312-16.

<sup>245</sup> See *supra* pp. 430-32.

<sup>246</sup> See *supra* pp. 440-43.

<sup>247</sup> Cf. Reich, *Public Administration and Public Deliberation: An Interpretive Essay*, 94

as an amalgam of value choices and technical expertise. The relevant value choices must be consistent with the governing statute rather than a mask for the exercise of political power, and must reasonably accord with available technical data. In this conception, the role of politics is limited to influencing value judgments within the constraints of a statute. The hard-look doctrine, like the recent executive orders, is best understood as an effort to further this conception of administration.

3. *Standing and Reviewability.* — A lurking issue for judicial review, usually raised under the rubrics of standing and reviewability, is whether courts should treat regulatory beneficiaries and regulated industries in the same way. For a long period, the role of the courts was to allow regulated entities to fend off unauthorized intrusions; the intended beneficiaries of regulation were unable to seek judicial relief.<sup>248</sup> This practice was based largely on an understanding that beneficiaries should seek redress in the legislature rather than in court. In this view, interests in regulatory protection should not be treated as legal "rights."

In the 1970's, this principle came under sharp attack from two directions. First, evidence of the power of regulated industries over agencies suggested that if fidelity to statutes was the goal, courts must protect regulatory beneficiaries as well as regulated entities.<sup>249</sup> The fact that regulated industries could turn to the courts for vindication of their rights, while the beneficiaries of regulation could look only to politics, seemed to compound the inequality of the regulatory process, in which regulated industries at least sometimes had disproportionate power.<sup>250</sup> Second, changing understandings of the importance of property rights made it doubtful that the common law interests invoked by regulated industries deserved greater protection than the statutory interests of regulatory beneficiaries.<sup>251</sup> In this view, it was

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YALE L.J. 1617, 1631-40 (1985) (arguing that public administration should be approached as a deliberative process rather than as a means of trading off preexisting interests).

<sup>248</sup> See, e.g., *Alabama Power Co. v. Ickes*, 302 U.S. 464 (1938) (holding that only those who have suffered a "legal injury" have standing to sue); *Hahn v. Gottlieb*, 430 F.2d 1243 (1st Cir. 1970) (holding that tenants were not entitled to obtain judicial review of the Federal Housing Administration's decisions to grant rent increases); cf. *International Longshoremen's & Warehousemen's Union, Local 37 v. Boyd*, 347 U.S. 222 (1954) (refusing to allow alien workers to challenge an INS interpretation of a statute before the sanctions dictated by that interpretation had been set in motion against them).

<sup>249</sup> See Stewart & Sunstein, *supra* note 63, at 1278-82.

<sup>250</sup> The fact that diffuse beneficiaries face significant transaction costs in their efforts to exercise political power exacerbates the problem of disproportionate power. See generally R. HARDIN, *COLLECTIVE ACTION* (1982) (discussing problems of organization).

<sup>251</sup> Cf. *Reich, The New Property*, 73 YALE L.J. 733, 785-86 (1964) (arguing that statutory

quite odd to suggest that the interests of, for example, victims of unfair labor practices, of pollution, and of various types of discrimination did not deserve judicial protection. On their own initiative, courts began to place beneficiaries on the same footing as regulated class members.<sup>252</sup>

These developments are compatible with — and indeed are a natural outgrowth of — the New Deal attack on the common law. The New Deal was largely a response to a perception that the common law catalog of rights was underinclusive. It is an ironic fact that for the first generation after the New Deal, the judicial role remained rooted in the common law, as courts sought to protect traditional private rights from unauthorized regulatory interventions.<sup>253</sup> The rise of a set of doctrines protecting interests created by regulatory statutes has been surprisingly slow, though relatively steady in the 1960's and 1970's.<sup>254</sup>

In several cases in the last few terms, however, the Supreme Court

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interests should be considered "property"). Concerns about failure to protect regulatory beneficiaries can be traced to the origins of the APA. *See ATTORNEY GENERAL'S COMMITTEE, supra* note 9, at 76. The Attorney General's Committee on Administrative Procedure, which published a final report in 1941 examining the procedural practices of the administrative agencies and the methods of judicial review of their decisions, found that although judicial review serves as a check against excess of power in derogation of private right,

[f]rom the point of view of public policy and public interest, it is important not only that the administrator should not improperly encroach on private right but also that he should effectively discharge his statutory obligations. Excessive favor of private interest may be as prejudicial as excessive encroachment. . . . A Federal Trade Commission may violate the legislative policy and cause harm to private interests by failing to investigate and detect unfair methods of competition as well as by overzealously condemning fair methods.

*Id.*

On the other hand, the APA and its history are ambiguous on the legal status of regulated beneficiaries. *See Sunstein, supra* note 152, at 657; *ATTORNEY GENERAL'S COMMITTEE, supra* note 9, at 76, 86. The Attorney General's Committee noted:

Judicial review is rarely available, theoretically or practically, to compel effective enforcement of the law by the administrators. It is adapted chiefly to curbing excess of power, not toward compelling its exercise. . . . [T]he problem of whether the administrator's refusal to take action is reviewable still remains. . . . In some instances review may be unavailing because the determination of whether or not action should be taken in the circumstances may have been committed to the exclusive judgment of the administrator as to the public interest and convenience. *But if the denial is based on an erroneous interpretation of law, judicial review is available to remove at least that barrier.*

*Id.* (footnote omitted) (emphasis added).

<sup>252</sup> *See Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150 (1970) (allowing standing for competitors); *Adams v. Richardson*, 480 F.2d 1159 (D.C. Cir. 1973) (reviewing claims that an agency unlawfully had failed to implement a civil rights statute); *Environmental Defense Fund v. Ruckleshaus*, 439 F.2d 584 (D.C. Cir. 1971) (permitting an environmental organization to challenge the Agriculture Department's refusal to regulate DDT).

<sup>253</sup> *See J. VINING, LEGAL IDENTITY 20-27 (1978).*

<sup>254</sup> *See, e.g.*, cases cited *supra* note 252.

has used doctrines of standing<sup>255</sup> and reviewability<sup>256</sup> to limit the access of regulatory beneficiaries to courts. In some cases, the Court has suggested that the constitutional provision requiring the President to "take Care that the Laws be faithfully executed"<sup>257</sup> justifies restrictions on the availability of judicial review.<sup>258</sup> In other cases, the Court has indicated that the proper remedy for administrative illegality lies in the Congress or the agency itself.<sup>259</sup> Some of the recent standing decisions suggest that statutory harms that regulatory schemes seek to prevent are not judicially cognizable: for example, the probabilistic or systemic injuries created by tax deductions to segregated academies, or by reduced tax incentives to provide health care for poor people, do not provide a basis for judicial relief.<sup>260</sup> The Court also has had difficulty in concluding whether and when statutorily created benefits qualify as constitutionally protected "liberty" or "property" interests.<sup>261</sup> Finally, the Court has created a presumption that agency inaction is unreviewable.<sup>262</sup>

These developments represent a partial return to pre-New Deal understandings of the legal system, and they reflect a misguided approach to the Constitution and the judicial role. The "take Care" clause is a duty, not a license. It does not authorize the President or administrative officials to violate the law through "inaction" any more than it authorizes them to do so through "action." As for the availability of judicial relief, no sharp distinction should be drawn between regulatory beneficiaries and regulated class members.<sup>263</sup> There is no

<sup>255</sup> See *Allen v. Wright*, 468 U.S. 737 (1984); *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26 (1976); *Warth v. Seldin*, 422 U.S. 490 (1975). But cf. *Clarke v. Securities Indus. Ass'n*, 107 S. Ct. 750 (1987) (granting a trade association representing securities brokers standing to challenge the Comptroller General's approval of the application of a national bank to establish discount brokerage services).

<sup>256</sup> See *Heckler v. Chaney*, 470 U.S. 821 (1985) (holding that agency inaction is presumed immune from judicial review); *Block v. Community Nutrition Inst.*, 467 U.S. 340 (1984) (holding that ultimate consumers may not obtain judicial review of milk market orders).

<sup>257</sup> U.S. CONST. art. II, § 3.

<sup>258</sup> See *Chaney*, 470 U.S. at 832; *Allen*, 468 U.S. at 761.

<sup>259</sup> See *Allen*, 468 U.S. at 759–60.

<sup>260</sup> See *id.* (denying standing to the parents of black children to challenge the granting of tax exemptions to segregated private schools); *Simon*, 426 U.S. 26 (denying standing to poor people to challenge the favorable tax treatment of hospitals that did not provide emergency services to poor people to the extent of the hospitals' financial ability); cf. *Mashaw & Harfst*, *supra* note 231, at 302–09 (arguing that judicial review of motor safety regulations has suffered from judicial unwillingness to accept probabilistic showings of harm).

<sup>261</sup> See, e.g., *Arnett v. Kennedy*, 416 U.S. 134 (1974) (plurality opinion of Rehnquist, J.) (arguing that statutorily created rights are not constitutionally protected).

<sup>262</sup> See *Chaney*, 470 U.S. 821.

<sup>263</sup> Some distinctions between regulatory beneficiaries and members of the regulated class, however, are appropriate, because agencies cannot accommodate all beneficiaries with plausible claims. One important function of agencies is to allocate resources among competing claimants. See *Sunstein*, *supra* note 152, at 672–75.

reason to restrict the former group to political remedies. The usual complaint of beneficiaries is that agencies have violated statutes and thus have prevented implementation of a victory already won through the legislature. In such cases, it seems odd to suggest that regulatory beneficiaries must return to the political process to remedy administrative illegality.<sup>264</sup>

Both the presumption that agency inaction is unreviewable and the general skepticism that statutory benefits fall within the category of liberty or property fit awkwardly with the premises of the New Deal. In particular, the notion that agency inaction should be presumed unreviewable, if taken to its logical extreme, is inconsistent with the creation of the regulatory scheme in the first instance; the creation of the administrative program reveals a congressional desire to correct a problem, and agency abdication frustrates that desire. Moreover, the presumption of unreviewability for inaction but not for action creates an incentive against implementation of statutes. A judicial regime that restricts the courts to the review of regulatory intervention would impose an indefensible one-way ratchet on the judicial role of requiring agency adherence to law.<sup>265</sup>

Thus far, the discussion has dealt primarily with doctrines of standing. There is a separate question, however, whether agency action is reviewable at all. Congress has created a strong presumption of reviewability,<sup>266</sup> for reasons relating to the traditional concern for the rule of law. Judicial review is valuable in bringing about both conformity to statute and procedural regularity. But the APA immunizes agency action from judicial control when there is statutory preclusion of review or when the decision is "committed to agency discretion by law."<sup>267</sup> The considerations presented in the previous discussion suggest that the "committed to agency discretion" exception to reviewability should be repealed.

The Supreme Court has said, in the standard formulation, that the exception applies when a statute is "drawn in such broad terms that . . . there is no law to apply."<sup>268</sup> Under this formulation, to say

<sup>264</sup> Limitations on standing are often generated as a means of restricting judicial intrusions into the political process. See A. BICKEL, THE LEAST DANGEROUS BRANCH (1962). This rationale has some plausibility when the plaintiff seeks to invalidate political decisions on constitutional grounds. It is quite implausible, however, when the plaintiff seeks to require an administrative agency to adhere to the will of Congress. In such cases, considerations of democracy argue in favor of rather than against a judicial role.

<sup>265</sup> There are, of course, distinctive remedial questions in suits brought to compel agency action. See Garland, *supra* note 17, at 562-68; Sunstein, *supra* note 152, at 656-61.

<sup>266</sup> See *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 & n.2 (1967).

<sup>267</sup> 5 U.S.C. § 701(a)(2) (1982).

<sup>268</sup> *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971) (quoting the legislative history of the APA); *accord Heckler v. Chaney*, 470 U.S. 821 (1985) (using the same test).

that an agency decision is "committed to agency discretion" is to say that it is lawful on the merits. If there is "no law to apply" to the decision at hand, there is by hypothesis no legal constraint on the administrator; the decision cannot be unlawful. Instead of making a threshold determination that a decision is "committed to agency discretion" and therefore unreviewable, courts might more simply decide the case on the merits.

The "committed to agency discretion" exception creates a needlessly confusing threshold inquiry into whether there is "law to apply" — a multifactor balancing test that sometimes produces incorrect results.<sup>269</sup> It would be better to do away with the inquiry entirely. Such a step would not mean that all decisions are reviewable in court. It would still be possible for Congress to immunize decisions from review — subject of course to constitutional constraints — with statutory provisions barring judicial intrusions.

The development of moderately aggressive judicial review under the hard-look doctrine reflects a rejection of the New Deal's misplaced faith in autonomous administration, and generally has had quite salutary effects. A firm judicial hand has disciplined administrative outcomes by correcting parochial or ill-reasoned decisions and serving as a significant deterrent.<sup>270</sup> Efforts to return to the deferential posture associated with the New Deal should be resisted. At the same time, and perhaps even more importantly, doctrines that distinguish between regulatory beneficiaries and regulated industries should be rejected as anachronistic revivals of pre-New Deal understandings of the legal system.

### C. The Changing Role of Congress

It is a commonplace that in creating agencies during the New Deal period, Congress often established minimal guidelines to limit administrative discretion. The characteristic statute required agencies to promote the public interest, to ensure against "unreasonable" practices, or to prevent "unfairness."<sup>271</sup> In recent years, however, Congress has sought to impose greater control. This control has taken several

<sup>269</sup> The enormously complex test for reviewability is set forth in *Hahn v. Gottlieb*, 430 F.2d 1243 (1st Cir. 1970), in which the court concluded that reviewability depends on "first, the appropriateness of the issues raised for review by the courts; second, the need for judicial supervision to safeguard the interests of the plaintiffs; and third, the impact of review on the effectiveness of the agency in carrying out its assigned role." *Id.* at 1249. One court of appeals used this complicated inquiry to determine that the FBI's refusal to hire a homosexual is committed to agency discretion by law. *See Padula v. Webster*, 822 F.2d 97 (D.C. Cir. 1987).

<sup>270</sup> See *supra* note 234 and accompanying text.

<sup>271</sup> See, e.g., 15 U.S.C. § 45(a) (1982) (governing the FTC); *id.* § 2051 (1982) (governing the Consumer Product Safety Commission); 47 U.S.C. § 151 (1982) (governing the FCC); 49 U.S.C. § 10101 (1982) (governing the ICC).

forms: increasing specificity in statutes; "agency-forcing" in the form of timetables for agency action;<sup>272</sup> various mechanisms of congressional oversight,<sup>273</sup> including frequent hearings and the now-defunct legislative veto; statutes that set goals to be achieved instead of offering values to be balanced; "sunset provisions" providing for the expiration of agencies after a specific date;<sup>274</sup> generous provisions for judicial review, including authorization of suits by beneficiaries of regulation against regulated class members and against the agencies themselves;<sup>275</sup> and abolition of agencies that Congress deems no longer useful.<sup>276</sup> Each of these initiatives appears to conflict with important elements of the New Deal conception of administration, because each intrudes on the autonomy of administrative actors. These efforts attempt to ensure implementation of statutory directives and to counter agency "capture"<sup>277</sup>—the same goals that underlie the hardlook doctrine. The governing conception of regulation is political, and the understanding is that Congress should make the basic political choices.

The 1977 Clean Air Act amendments, enacted largely from frustration with perceived failures in implementation,<sup>278</sup> are an example of the trend toward congressional control. The statute now requires the EPA Administrator to decide within one year whether certain pollutants are hazardous within the meaning of the Act. Other provisions of the Act include similar deadlines.<sup>279</sup> The EPA is subject

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<sup>272</sup> See B. ACKERMAN & W. HASSLER, CLEAN COAL/DIRTY AIR 26-27, 122-28 (1981).

<sup>273</sup> See H. SEIDMAN & R. GILMOUR, POLITICS, POSITION, AND POWER 37-66 (1986).

<sup>274</sup> See, e.g., 15 U.S.C. § 761 note (1982) (establishing a four-year lifespan for the Federal Energy Administration).

<sup>275</sup> See, e.g., Clean Air Act, 42 U.S.C. §§ 7604-7605 (1982) (establishing procedures for citizen suits against the United States, its agencies, and persons violating the Act); Energy Policy and Conservation Act, *id.* § 6305(a) (permitting citizen suits against federal agencies and companies violating the Act); Surface Mining Control and Reclamation Act, 30 U.S.C. § 1270 (1982) (permitting persons with adversely affected interests to sue the United States, its agencies, and persons violating the Act).

<sup>276</sup> See, e.g., Airline Deregulation Act of 1978, 49 U.S.C. app. § 1551 (1982) (abolishing the Civil Aeronautics Board).

<sup>277</sup> See M. REAGAN, *supra* note 181, at 95-96.

<sup>278</sup> The House Interstate and Foreign Commerce Committee stated that one of its purposes in passing the Act was to provide "greater legislative guidance and clearer legislative intent" as to how certain aspects of the Act should be administered. See H.R. REP. NO. 294, 95th Cong., 1st Sess. 2 (1977). In requiring EPA regulation of four specific pollutants, the Committee emphasized that the EPA had failed to institute regulations for the pollutants despite evidence of the "serious health hazards" associated with them. See *id.* at 36.

<sup>279</sup> See, e.g., 42 U.S.C. § 7408(c) (1982) (requesting the administrator to revise and review nitrogen dioxide concentration criteria "[n]ot later than six months after August 7, 1977"); *id.* § 7409(a) (requiring the administrator to "publish proposed regulations prescribing . . . [an] ambient air quality standard" for individual air pollutants); *id.* § 7410(a)(2) (requiring the administrator to approve or disapprove state air quality plans within four months after the date they are submitted).

to more than 300 separate legislative deadlines,<sup>280</sup> of which only about fourteen percent have been met.<sup>281</sup>

Congress has not only set timetables for regulatory action, it has also told agencies exactly what to regulate and to what degree. For example, Congress set specific fuel-economy standards for automobiles in measures designed to promote energy conservation and environmental protection.<sup>282</sup> The Delaney Amendment and a number of other statutes dealing with carcinogens impose clear requirements on administrators.<sup>283</sup> The Safe Drinking Water Act, renewed in 1986, specifies eighty-three contaminants for which EPA must set standards in the next three years.<sup>284</sup>

Although congressional specificity amounts to a rejection of the institutional wisdom of the New Deal, it is generally motivated by a desire to ensure enforcement of regulatory statutes. In this context, unlike in that of presidential supervision, the institutional actor seeking limits on agency autonomy is favorably disposed to regulation. But this connection is not necessary. Opponents of overzealous regulation could also urge specific statutory directives.

The movement toward increased congressional control is not without risks of its own. Studies have shown that undue specificity may

<sup>280</sup> See OMB REGULATORY PROGRAM, 1985, *supra* note 156, at xiii.

<sup>281</sup> See ENVIRONMENTAL AND ENERGY STUDY INSTITUTE & ENVIRONMENTAL LAW INSTITUTE, STATUTORY DEADLINES IN ENVIRONMENTAL LEGISLATION: NECESSARY BUT NEEDED IMPROVEMENT ii (1985).

<sup>282</sup> See 15 U.S.C. § 2002(a)(1) (1982).

<sup>283</sup> See 21 U.S.C. § 348 (1982 & Supp. III 1985) (specifying in detail the only circumstances under which food additives shall be deemed safe); 15 U.S.C. § 2080 (1982) (detailing the procedures the CPSC must follow prior to issuing notices of rulemaking regarding possibly carcinogenic consumer products); 42 U.S.C. § 7545 (1982 & Supp. III 1985) (requiring the administrator to impose registration requirements on the manufacturers of fuel additives).

<sup>284</sup> See 42 U.S.C.A. § 300g-1 (West Supp. 1987). Congressional oversight has been increasing in other areas as well. The statute governing automobile pollution, for example, enacted in 1970, specifies a ninety-percent reduction in hydrocarbon and carbon monoxide emissions by 1983. See 42 U.S.C. § 7521(a)(3)(A)(ii)(I) (1982). The Federal Water Pollution Control Act Amendments of 1972 also set particular goals requiring, among other things, that all discharge of pollutants into navigable waters be eliminated by 1985. See 33 U.S.C. § 1251(a) (1982). The Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6987 (1982 & Supp. III 1985), bans land disposal of bulk liquids and spells out new toxicity testing procedures. See 42 U.S.C. §§ 6921, 6924(c)(1) (Supp. III 1985). The disability provisions of Social Security and SSI are relatively precise, and recent amendments have increased clarity. See 42 U.S.C. §§ 405, 408, 416, 421 (1982 & Supp. III). The trend of increasing statutory specificity is described in M. REAGAN, cited in note 181 above, at 95-98.

Recent history thus furnishes support for the suggestion, in J. ELY, DEMOCRACY AND DISTRUST 131-34 (1980), and T. LOWI, cited in note 23 above, at 305-09, that it is feasible for Congress to develop relatively clear guidelines in some cases. It is doubtful, however, that the evidence would support reinvigoration of the nondelegation doctrine, which requires clear standards from Congress. See Stewart, *Beyond Delegation Doctrine*, 36 AM. U.L. REV. 323 (1987) (arguing that the nondelegation doctrine is indeterminate in application, even when Congress has attempted to provide clear standards); *infra* p. 494.

produce regulation riddled by factional trade-offs.<sup>285</sup> To some, such evidence supports the view that administrators are better equipped than Congress to make political decisions. In this view, agency bureaucrats, subject to presidential control, are more likely to serve the public will than are legislators, who are subject to a range of parochial pressures.<sup>286</sup> A recent study of the Clean Air Act suggests that Congress has set unrealistic goals and that judicial enforcement of those goals has been counterproductive.<sup>287</sup> In addition, statutory deadlines have sometimes proved unrealistically rigid.<sup>288</sup>

More generally, public choice theory reveals that legislative outcomes will be, to a large degree, random. For example, the order in which issues are raised significantly affects outcomes, though logically the order should play no role; political actors often strategically manipulate the agenda to further their own interests; and majoritarian processes tend to have difficulty in aggregating preferences. Legislative outcomes are thus unlikely to reflect majority desires with accuracy.<sup>289</sup> Studies of congressional behavior, moreover, suggest that legislators may fail to achieve appropriate national solutions because they spend so much of their time and interest on constituency service.<sup>290</sup> More conventional arguments against precise statutory guidelines and clear delegations stress the need for flexibility in responding to changed circumstances and the lack of technical expertise among

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<sup>285</sup> See B. ACKERMAN & W. HASSLER, *supra* note 272, at 121-28; Graham, *The Failure of Agency-Forcing: The Regulation of Airborne Carcinogens Under Section 112 of the Clean Air Act*, 1985 DUKE L.J. 100.

<sup>286</sup> See Mashaw, *supra* note 177, at 95-99.

<sup>287</sup> See R.S. MELNICK, *supra* note 192, at 343-55.

<sup>288</sup> For critical discussions of time limits, see Abbott, *The Case Against Federal Statutory and Judicial Deadlines: A Cost-Benefit Appraisal*, 39 ADMIN. L. REV. 171 (1987), and Tomlinson, *Report on the Experience of Various Agencies with Statutory Time Limits Applicable to Licensing or Clearance Functions and to Rulemaking*, in ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, RECOMMENDATIONS AND REPORTS at 119, 122-23 (1978) [hereinafter ADMINISTRATIVE CONFERENCE]. These studies suggest that strict time limits may fail to increase rulemaking outputs and interfere with the agency's ability to set priorities, sometimes to the detriment of sound regulation. They suggest as an alternative that Congress require agencies themselves to establish and to adhere to deadlines unless the agencies have good cause for failing to do so. See *Recommendation 78-3: Time Limits on Agency Actions*, in ADMINISTRATIVE CONFERENCE, *supra*, at 9-11 (recommending more flexibility with deadlines). On the other hand, such studies also suggest that deadlines spur rulemaking in cases in which "outside interest groups are sufficiently concerned about the effects of delay to monitor the agency's performance and to bring the agency to court if necessary." Tomlinson, *supra*, at 122.

<sup>289</sup> See generally K. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (1963); W. RIKER, *LIBERALISM AGAINST POPULISM* (1982); Plott, *Axiomatic Social Choice Theory: An Overview and Interpretation*, in *RATIONAL MAN AND IRRATIONAL SOCIETY?* 229 (B. Barry & R. Hardin eds. 1982) (arguing that the aggregation of individual voting decisions leads to social preferences that are either indifferent or dictatorial).

<sup>290</sup> See generally B. CAIN, J. FEREJOHN & M. FIORINA, *THE PERSONAL VOTE* (1987) (emphasizing the time representatives spend on constituent service).

legislators<sup>291</sup> — the familiar concerns underlying the downfall of the nondelegation doctrine.<sup>292</sup> All of these factors undermine the view that the remedy for administrative misconduct lies in clear delegations of authority.<sup>293</sup>

There are, however, important countervailing considerations. Legislative control has been an important safeguard against implementation failure.<sup>294</sup> Clear statutory requirements and deadlines, especially when combined with judicial review, often are responsible for bringing about desirable regulation.<sup>295</sup> Congress' occasional lack of expertise or flexibility does not justify the degree of open-endedness characteristic of its New Deal delegations.<sup>296</sup> Congress can allow room for both agency expertise and changes over time, while simultaneously limiting administrative discretion.

The risks of factionalism and irrationality in legislative control are genuine, however, and they suggest that some forms of legislative oversight are better than others. In particular, statutes that specify ends to be achieved are generally preferable to those that set out particular regulatory methods or merely identify the values to be balanced. Such "ends-forcing" legislation, unlike statutes that specify means, allows for flexibility and for the application of technical expertise. Statutes that identify means, by contrast, increase the risk of factionalism; because methods of promoting goals are often not a visible part of the legislative process, well-organized groups might have disproportionate power in choosing them.<sup>297</sup>

Furthermore, the need for statutory specificity varies with familiar factors: the need for flexibility over time, the extent to which decisions depend on technical sophistication, and the risk that specificity will prevent enactment in the first instance.<sup>298</sup> The likely composition of

<sup>291</sup> Cf. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65 (1983) (discussing tradeoffs between rule transparency, accessibility, and congruence in administrative rulemaking).

<sup>292</sup> See Stewart, *supra* note 95, at 1693–97.

<sup>293</sup> For an argument promoting clearer delineation of authority, see, for example, T. LOWI, *supra* note 23, at 298–301.

<sup>294</sup> The rulemaking proposals set out in the *Regulatory Program of the United States*, discussed above, confirm the point. See, e.g., OMB *Regulatory Program*, 1986, *supra* note 133, at III, 213–14.

<sup>295</sup> Cf. *supra* pp. 472–73 (giving examples of judicial prodding, often as a result of congressional specificity).

<sup>296</sup> See J. ELY, *supra* note 284, at 131–34.

<sup>297</sup> This was in fact the experience with the Clean Air Act. See B. ACKERMAN & W. HASSLER, *supra* note 272, at 121–28.

<sup>298</sup> The demise of the nondelegation doctrine has been described as a "death by association," see J. ELY, *supra* note 284, at 133, but the description is misleading. By requiring a degree of consensus before regulation could be undertaken, the nondelegation doctrine was not merely a neutral requirement of specificity, but an obstacle to government intervention. There is thus a connection between the era of substantive due process represented by *Lochner* and the nondelegation doctrine. In the early twentieth century, the nondelegation doctrine and substantive due process served similar antiregulatory functions.

the beneficiary class and the class of regulated industries is also relevant. For example, statutory vagueness is more likely to put at risk a diffuse set of beneficiaries than a well-organized one.<sup>299</sup>

Two general conclusions follow from recent efforts to increase legislative supervision. First, the various mechanisms of congressional control have rendered the traditional picture of autonomous administration anachronistic. Second, these mechanisms hold considerable promise for promoting political accountability and for diminishing the risk of failure in the implementation process, especially when legislative control takes the form of specification of statutory ends, rather than choice of means.

#### *D. The Connections Among the Various Forms of Control*

*i. The Case for Simultaneous Control.* — As described above, all three branches of government have rejected important aspects of the institutional learning of the New Deal. The idea of autonomous administration is outdated.<sup>300</sup> Moreover, some forms of active presidential, legislative, and judicial roles are desirable. The call for increased controls rests on a set of beliefs about the appropriate purposes of national institutions. Those purposes include protection against factionalism and self-interested representation, assurance of a measure of deliberation in government, responsiveness to popular opinion, and development of new legal entitlements following the New Deal recognition of the socially constructed character of legal rules.

In particular, the structure I propose recognizes the continuing need for regulatory institutions that retain a large measure of discretion. But those institutions should not be autonomous. Indeed, supervision of regulatory agencies by the three branches of government can coexist quite comfortably with aggressive administrative programs. For example, a congressional role in the specification of regulatory ends, and judicial control designed to ensure executive adherence to those ends, can work to promote rather than to undermine federal intervention. A system of simultaneous control should also increase accountability, sound decisions, and legality. To this extent, the New Deal critique of tripartite government as inevitably tied to inaction was far too crude. Checks and balances, suitably revised, will promote electoral control and sometimes bring about regulatory intervention. This proposition holds even if the New Deal critics were

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<sup>299</sup> See M. BERNSTEIN, *supra* note 3, at 263–64 (arguing that vague statutes allow disciplined and strategically positioned groups to influence the regulatory process).

<sup>300</sup> For an anachronistic description of contemporary delegation, see T. LOWI, cited in note 23 above, at xii, 97–107; see also Lowi, *Two Roads to Serfdom: Liberalism, Conservatism and Administrative Power*, 36 AM. U.L. REV. 295 (1987) (arguing that autonomous administration undermines important constitutional values).

correct in suggesting that institutions unburdened by checks and balances are particularly capable of prompt action.

The case for these efforts to curb agency autonomy draws from the functions of the original distribution of national powers. Presidential control provides some of the benefits associated with a division of labor; in this respect, a tripartite system remains a means of facilitating rather than impeding government action. At least in some forms, presidential control diminishes the risks of factional tyranny and self-interested representation arising from the exercise of discretion by bureaucracy. The courts have furnished a significant supplemental check. In particular, the insulation of the judiciary makes it less susceptible to the pressures imposed by well-organized private groups. Legislative specificity serves as an important safeguard against failure of implementation and ensures a large measure of visibility for basic regulatory choices.

The link between any one of these goals and any particular set of institutional arrangements cannot be established with certainty. Both theory and experience, however, suggest that the institutional recommendations made here will increase the likelihood of promoting all of these goals, in a way that links important aspects of the New Deal reformation with central features of the original constitutional framework. For this reason, it is possible to reject significant elements of the New Deal conception of administration without accepting pre-New Deal understandings of "limited government."

The value of efforts to curb agency autonomy will of course vary with the regulatory context. When a decision is predominantly political, presidential and legislative supervision are most desirable. Legalistic decisions present a much weaker case for legislative or presidential supervision. Technocratic issues call for a measure of presidential control, but less supervision from Congress. In all three contexts, judicial control is desirable, but its nature and scope will vary.

As described above, these initiatives pose risks. Although presidential control diminishes some threats of factionalism associated with agency discretion, such control also threatens the appropriate role of specialization. Judges may have their own agendas, and their accountability and technical abilities are limited. Congressional specificity has sometimes led to unrealistic goals, produced irrational prescriptions, and reflected the power of well-organized groups. In the forms described here, however, the likely benefits of control outweigh the potential dangers in all three cases.

This critique of the institutional innovations of the New Deal responds to a more general phenomenon that is common to institutional reform. After an initial period of enthusiasm for novel institutions, original expectations are frequently disappointed, and new

mechanisms of control must be adopted. The rise of checks on regulatory agencies provides an example of this common cycle.<sup>301</sup>

*2. Relationships Among the Branches.* — What is the relationship among these various initiatives? Some of them appear to fit together quite comfortably. Congressional specificity facilitates judicial control, and vice versa. The principal purpose of judicial review is to ensure adherence to statutes, and that function is most easily carried out when the statute is clear and specific. Presidential oversight and congressional specificity pose a somewhat more difficult case. Among the goals of the former is to ensure a measure of coordination and centralized direction and at the same time to promote technocratic virtues. Congressional specificity may make coordination impossible, because of divergences among statutes, and may also minimize the role of specialists. The need for presidential oversight is greatest when congressional guidance is absent; it is least pressing when Congress has been clear. Presidential oversight and congressional specificity can thus be seen as alternatives,<sup>302</sup> serving similar functions of promoting accountability and ensuring implementation, but having different potential benefits and risks. The experience under the recent executive orders suggests that the two can work together. At least some ambiguity is inevitable in statutes, and even when Congress has been relatively clear, a presidential role may be desirable to ensure a coordinated enforcement system.

Simultaneous judicial and executive control, however, appears paradoxical. The case for a judicial role stems above all from a fear of "bad politics" — decisions based on statutorily irrelevant factors or on the power wielded by well-organized private groups. The argument for judicial control thus tends to emphasize the rules of technical expertise and legality in disciplining agency decisions. The case for presidential control, on the other hand, stresses the political dimensions of agency decisions and the need to ensure that outcomes conform to public desires. It should be unsurprising that recent advocates of presidential control are hostile to the courts and that the defenders of the hard-look doctrine are suspicious of the increased role of OMB.<sup>303</sup> The two forms of control seem deeply incompatible.

The incompatibility, however, is only superficial. Presidential and judicial controls each act to guard against the risks posed by the other. Presidential control promotes coordination and centralization, making it easier for government to act with dispatch. It also allows redirection

<sup>301</sup> See, e.g., Clark, *The Four Stages of Capitalism: Reflections on Investment Management Treatises*, 94 HARV. L. REV. 561, 569-73 (1981).

<sup>302</sup> See Mashaw, *supra* note 177, at 95-99 (arguing that political accountability of administrators, through the President, may be preferable to accountability through Congress).

<sup>303</sup> See *supra* notes 17-18 and accompanying text.

of national policy in accordance with changed circumstances or public will, thus countering the inertia of bureaucracy. In addition, presidential supervision should increase political control and application of technical expertise — by bringing uniform policy analysis to bear — thus tending to insulate agency decisions from judicial reversal. Moreover, the devices for presidential coordination and oversight, such as the preparation of a regulatory impact analysis, may be helpful to courts conducting hard-look review.

At the same time, a firm judicial role minimizes the problem — especially severe in an era of active presidential supervision — of one branch determining the breadth of its own legal authority. This concern assumes special importance in an administrative era. The rise of administrative agencies posed a crisis for the original distribution of national powers. Perhaps surprisingly, the growth of presidential and judicial supervision replicate some of the most distinctive features of the original constitutional scheme without impairing the regulatory functions of administrative agencies. Consider, for example, the allegation that OMB supervision has resulted in unlawful agency inaction — a kind of illegality of which there is no public scrutiny.<sup>304</sup> Judicial review of inadequate regulatory protection, vindicating claims of failure to act in violation of statute, deters illegal conduct of that sort.<sup>305</sup> The institutional position of the judiciary generally promotes this result, and will sometimes do so regardless of the ideology of the President who appointed the judges.<sup>306</sup>

The results of two decades of hard-look review suggest, however, that judicial control is at best a partial safeguard against administrative malfeasance, and that it carries risks of its own. Courts are unlikely to be able to grasp the full breadth of an agency's enforcement program;<sup>307</sup> they lack technical sophistication; they can respond only when suits are filed; they produce delay; their decisions are ad hoc; they are not politically accountable; and they sometimes seek to implement their own preferences about policy, which may be either for or against regulation. In light of the recent appointment of many federal judges who are likely to be skeptical about regulation, it would not be surprising if in the next decade the courts invalidate many

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<sup>304</sup> See, e.g., Morrison, *OMB Interference with Agency Rulemaking*, *supra* note 17, at 1069–71.

<sup>305</sup> For this reason, the Court's decision in *Heckler v. Chaney*, 470 U.S. 821 (1985), creating a presumption against judicial review of agency inaction, should be read in its context, which involved an agency's refusal, in the absence of statutory constraints, to prosecute in an individual case — a choice traditionally left to agency discretion.

<sup>306</sup> See, e.g., *Independent U.S. Tanker Owners Comm'n v. Dole*, 809 F.2d 847, 853–55 (D.C. Cir. 1987) (opinion by Bork, J., invalidating deregulation).

<sup>307</sup> Cf. J. MASHAW, *supra* note 101, at 185–90 (noting the difficulties of effective judicial review of Social Security Administration's actions).

interventions by regulatory agencies; some of those decisions will be highly questionable.<sup>308</sup>

Moreover, control of systemic failures is extremely difficult to achieve through the courts, which act on a case-by-case basis. In this respect, legislative and executive action is far more promising. At the very least, presidential supervision is likely to be an important supplement to judicial review, serving some of the functions of the hardlook doctrine without being subject to its risks.

Finally, it is a mistake to treat agency decisions as if they were wholly "political" or based entirely on the application of expertise. Technical expertise rightly plays an important role in regulatory decisions. Immersion in the facts sometimes leads to agreement on a proposed course of action, even among people with widely varying views on regulation. Similarly, statutory constraints are sometimes sufficiently sharp to require administrations with vastly different political agendas to come to the same result on a particular question. Significant continuity among different administrations should thus be the norm, and sudden reversals of course might therefore reflect an illegitimate exercise of political pressure, justifying a presumption of illegality under the APA.<sup>309</sup> In other instances, however, administrations may lawfully reach different results on regulatory issues. Political judgments may become critical; but the term "political" should not permit arbitrariness or whim. Instead, the term calls for judgments of value on which reasonable people may differ. In such cases, the role of the courts is to ensure that the agency has articulated the actual value judgments and that they are subject to public scrutiny and review.

3. *Checks and Balances, Revived and Reformulated.* — (a) *The risks of multiple controls.* — These suggestions — especially the call for simultaneous executive and judicial controls — present risks. First, the existence of two sets of checks on the regulatory process may produce an antiregulatory bias. OMB thus far has blocked rather than initiated regulation. The same is often true of the courts. Although judges in recent years have invalidated deregulation and re-

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<sup>308</sup> The courts recently have invalidated some agency interventions on controversial grounds. See, e.g., Jersey Cent. Power & Light v. Federal Energy Regulation Comm'n, 810 F.2d 1168 (D.C. Cir. 1987) (requiring the FERC to give a utility an evidentiary hearing to determine whether modifying the rate schedule to exclude the utility's investment in a canceled nuclear plant was just and reasonable); Restaurant Corp. v. NLRB, 801 F.2d 1390 (D.C. Cir. 1986) (overturning an NLRB finding that union solicitation and nonunion solicitation involving instances of intra-employee generosity were substantially equivalent and that disparate treatment of the two constituted discrimination within the meaning of the Act); National Soft Drink Ass'n v. Block, 721 F.2d 1348 (D.C. Cir. 1983) (limiting the Secretary of Agriculture's authority to regulate soft drink sales in schools).

<sup>309</sup> Cf. M. BERNSTEIN, *supra* note 3, at 107-09, 128-29 (discussing the need for stability over time).

quired agency action, the continuing validity of at least the latter decisions is in some doubt;<sup>310</sup> in any event, courts have difficulty ensuring regulatory intervention.<sup>311</sup> The existence of two institutions confining regulation may undermine the purposes that led to regulatory statutes in the first instance. An agency subject to various controls could find it much harder to accomplish its mission.

A more general concern relates to the value of procedural and legalistic solutions. Both OMB supervision and judicial review have been criticized on the ground that they generate boilerplate from agencies, producing costly delays without salutary effect on outcomes, and perhaps without effects at all. The creation of an additional layer of review will be costly and time-consuming, and it may not serve its intended purposes.

A related concern is that sometimes Congress has good reasons for delegating discretionary power to regulatory agencies, and intensified review from OMB and the courts tends to remove the advantages associated with the original delegation. The demise of the New Deal agency, in other words, is not an unambiguous good, and new institutional arrangements should not disregard the goals that brought about the allocation of authority to technocratically inclined and relatively autonomous administrators.

Simultaneous OMB and judicial control would therefore pose risks. In particular, those who exercise such control should not attempt to duplicate the agency's work; as noted above, the supervisory role is a limited one. Moreover — and this is a critical point — the entity entrusted with supervision of regulation should serve as an initiator of as well as a brake on regulation. Part of its mission should be to guard against failure to implement regulatory statutes. In this way, a system akin to the present scheme of OMB review might be adapted to promote aspects of the substantive agenda of the New Deal and the Great Society. Such a system would involve redirecting and energizing regulatory policy and diminishing the risks of inaction associated with a multitiered system of review. A partial analogue is the ombudsman device;<sup>312</sup> an oversight agency might serve as a similar clearinghouse for requests for regulatory initiatives. Under this system, information provided by the citizenry and by the agencies themselves would be the basis for supervision. The final decision, however,

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<sup>310</sup> See *Heckler v. Chaney*, 470 U.S. 821 (1985) (creating a presumption against reviewing agency refusals to act).

<sup>311</sup> See generally Garland, *supra* note 17 (discussing courts' historic resistance to issuing orders directing agencies to take action); Sunstein, *supra* note 152 (explaining how the concept of prosecutorial discretion traditionally has limited courts' review of administrative inaction).

<sup>312</sup> See generally W. GELLHORN, OMBUDSMEN AND OTHERS: CITIZENS' PROTECTORS IN NINE COUNTRIES (1986) (comparing the use in nine countries of the ombudsman device as a clearinghouse for citizens' grievances against official actions).

should remain with the agency. A promising development in this regard is the recent effort to require agencies to generate timetables and deadlines within which to respond to petitions to engage in rule-making.<sup>313</sup>

Under such a system, neither presidential nor judicial control would be accepted on its own; each would balance the other. In such a system, political choices would be made by those most accountable; the paralysis associated with intra-executive checks and balances would be avoided; collective choices would be permitted; and there would be a safeguard against decisions that do not accord with the law or that stem from factional power or self-interested representation.

(b) *The Continuing Value of Checks and Balances.* — The discussion thus far suggests that the New Deal critique of the original distribution of national powers and its checks and balances was contingent on a status quo of laissez-faire and a judiciary hostile to regulation. That critique was badly overdrawn, even (or perhaps especially) if one believes, as the New Deal reformers did, that substantial regulatory intervention is highly desirable in some settings. Four basic factors underlie this conclusion.

First, a concentration of powers in the presidency or in administrators insulated from congressional or judicial control does not necessarily lead to vigorous enforcement of regulatory programs. Such concentration may instead produce inaction or decisions inconsistent with the commitments underlying the creation of the regulatory scheme. If administrators are fully committed to regulatory goals, checks and balances may seem to be an obstacle to reform; but in a period of executive ambivalence, checks may be an important instrument of statutory implementation.

Second, the distribution of national powers is far from a guarantor of regulatory inaction. The New Deal critique has its greatest force when a laissez-faire system prevails; it is possible that checks and balances may help to perpetuate that system. For this reason, the critique was more powerful in the 1930's than it is today. If the status quo favors regulatory intervention, however, checks and balances may increase the likelihood that regulation will remain in place.

Third, a system of distributed powers may in fact help those who seek change, including relatively powerless groups. An important function of the division of powers is to assure that different branches pursue different agendas. The existence of three branches of government thus multiplies the points of access to government, allowing for

<sup>313</sup> See Luneberg, *Petitions for Rulemaking: Federal Agency Practice and Recommendations for Improvement*, in ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, RECOMMENDATIONS AND REPORTS 493. The Administrative Law Section of the American Bar Association adopted a recommendation to this effect on October 10, 1987 (available in Harvard Law School Library).

expression of diverse political views. Such a system increases the likelihood that at least one branch will be responsive to the interests of politically weak groups and thus will become an advocate for reform. A single branch often has initiated forms of social change.<sup>314</sup> For example, the New Deal itself was largely a product of the leadership of one branch of government — the presidency. In a system of centralized and undivided power, by contrast, the likelihood that powerful majorities will remain entrenched is enlarged; no alternative institution exists to pursue interests adverse to the majority. In this sense, a government of separated powers has considerable advantages over more unitary systems.

Vigorous advocacy by one branch — an option under a system of distributed powers — may thus serve to create momentum for change. Such momentum can be especially strong if one branch has the power to produce reform largely on its own — if, in short, government does not merely check and balance itself but is truly divided. The current constitutional structure to a large degree meets this condition because all three branches are able to generate change independently. In these circumstances, the New Deal belief that the original distribution of national powers would inevitably produce inaction, or inevitably frustrate governmental intervention, is unfounded.

Fourth, and finally, even if a system of checks and balances may sometimes decrease the rate and amount of change, rapid change is hardly always desirable. In any case, the risks of too little change may be worth incurring in order to decrease factionalism and increase deliberation in government. The concentration of power in regulatory agencies may increase responsiveness to swings in popular opinion, but such responsiveness is far from an inevitable good. A balanced system of oversight of the sort recommended here is thus preferable both to the New Deal conception of administrative autonomy and to partial systems of control as represented, for example, in recommendations for increased presidential control and decreased judicial review.<sup>315</sup>

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<sup>314</sup> Judicial oversight of executive agencies, when the President has been skeptical of regulatory enforcement in many areas, is the most recent example. The judiciary has also initiated substantial changes in the criminal justice system. *See, e.g.*, *Miranda v. Arizona*, 384 U.S. 436 (1966); *Batson v. Kentucky*, 106 S. Ct. 1712 (1986) (holding that the equal protection clause forbids a prosecutor from challenging potential jurors solely on account of their race). Congress likewise has brought about significant reform in environmental protection. *See Clean Air Act*, 42 U.S.C. §§ 7401–7642 (1982); Ackerman, Elliot & Millian, *Toward a Theory of Statutory Evolution: The Federalization of Environmental Law*, 1 J.L., ECON. & ORG. 313, 317–18, 335–38 (1985) (describing the circumstances surrounding passage of the Clean Air Act).

<sup>315</sup> To be sure, some difficulties accompany the present system of checks and balances, quite outside the area of administrative law. In particular, the current regime makes it especially difficult for the President to implement his program, with the occasional exception of vigorous action at the beginning of the presidential term. More generally, the split between the executive

At the same time, it is important to be realistic about the value of institutional changes of the kind proposed here. Indeed, a focus on institutional checks tends to perpetuate the possibly anachronistic preoccupation of administrative law with control of discretion.<sup>316</sup> Regulatory performance, for example, depends on a wide range of factors other than institutional arrangements. Appropriations, quality of personnel, distributions of social power, ideological commitment, public attitudes, and substantive regulatory controls all play critical roles.<sup>317</sup> The various changes suggested here by themselves will not cure excessive regulation and implementation failure. Improvement of the regulatory process must be accompanied by a variety of other reforms,<sup>318</sup> some of which are discussed below. Nonetheless, institutional changes should make a substantial difference. The increase in presidential, judicial, and congressional control is likely to serve the institutional purposes of the original constitutional structure without at the same time returning to anachronistic conceptions of limited government.

### E. Constitutional Constraints

The simultaneous rise of executive, judicial, and legislative control has been accompanied by growing doubts about the constitutional status of regulatory agencies. Administration has of course been an important part of the national government since the founding.<sup>319</sup> The recent constitutional doubts, reminiscent of pre-New Deal challenges to the regulatory process, do not challenge administration in general, but only particular aspects that are perceived as threats to basic constitutional principles. Some of those doubts manifest themselves in renewed efforts to use the nondelegation doctrine to limit agency discretion.<sup>320</sup> Others form the impetus to urge courts to interpret

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and legislative branches often has produced paralysis and stagnation, precluding political resolution of fundamental issues. See J. SUNDQUIST, CONSTITUTIONAL REFORM 206-38 (1986). Problems of this sort are beyond the scope of this Article.

<sup>316</sup> See C. Edley, *supra* note 19.

<sup>317</sup> Cf. Moe, *Control and Feedback in Economic Regulation: The Case of the NLRB*, 79 AM. POLIT. SCI. REV. 1094, 1095 (1985) (arguing that NLRB's performance is influenced by presidential and congressional input, court-imposed constraints, economic conditions, agency/staff interaction, and constituent behavior).

<sup>318</sup> See generally S. BREYER, *supra* note 26, at 341-68 (surveying various generic approaches to regulatory reform) (1980); Stewart, *Reconstitutive Law*, 46 MD. L. REV. 86 (1986) (advocating expanded use of a diverse array of reconstitutive strategies, including changes in jurisdiction, endowments, and decisionmaking procedures).

<sup>319</sup> For a brief overview and citations, see R. CASS & C. DIVER, ADMINISTRATIVE LAW: CASES AND MATERIALS 3-6 (1987).

<sup>320</sup> See, e.g., Aranson, Gellhorn & Robinson, *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 63-67 (1982); Gewirtz, *The Courts, Congress, and Executive Policy-Making: Notes on Three Doctrines*, LAW & CONTEMP. PROBS., Summer 1976, at 46, 49-65; Schoenbrod,

article III literally and thus to remove adjudicative functions from regulatory agencies.<sup>321</sup> The most important set of challenges question congressional power to create agencies independent of the President.

In all these cases, the basic concern is that regulatory agencies combining traditionally separated functions and immunized from presidential control are subject to the risk of factionalism and self-interested representation. The question of congressional authority to create "independent" agencies is closely associated with the issues explored thus far; it too calls for an analysis of the relationship between the system of checks and balances on the one hand and New Deal constitutionalism on the other.

The independent agency, defined as an agency whose members are not subject to the plenary removal power of the President, is the model of the New Deal institution. It received constitutional sanction largely on the ground that the Constitution could not be read to bar expert and insulated officials from designing regulatory policy at the request of Congress, even though these officials do not fall within any of the constitutionally specified branches.<sup>322</sup> This understanding has met sharp criticism in the last decade,<sup>323</sup> however, and it would not be surprising to see a fundamental attack on the concept of independent administration in the near future. Such an attack would be the constitutional analogue of the increasing distrust of New Deal administration, manifested in the growth of legislative, presidential, and judicial control.

These attacks on various aspects of modern administration, however, are flawed. They rest on methods of constitutional interpretation that are inadequate, especially in the context of administrative law. Literal interpretation of the constitutional text and the intent of its drafters is unhelpful in light of vast changes in the national government since the founding era. These changes call for an approach that takes changed circumstances into account, but at the same time reintroduces into the regulatory process some of the safeguards of the original constitutional system.

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*The Delegation Doctrine: Could the Court Give It Substance?*, 83 MICH. L. REV. 1223, 1249-74 (1985).

<sup>321</sup> Cf. Currie, *Bankruptcy Judges and the Independent Judiciary*, 16 CREIGHTON L. REV. 441 (1982-83) (arguing that article III's provisions for tenure and salary should be construed literally to invalidate congressionally created bankruptcy courts).

<sup>322</sup> See *Humphrey's Executor v. United States*, 295 U.S. 602, 628-32 (1935).

<sup>323</sup> See generally *Synar v. United States*, 626 F. Supp. 1374, 1398 (D.D.C. 1986) (asserting the difficulty of reconciling the holding in *Humphrey's Executor* with the separation of powers doctrine), *aff'd sub nom. Bowsher v. Synar*, 106 S. Ct. 3181 (1986); Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41, 96-97 (arguing that the independent agency violates the principle of the separation of powers); Scalia, *Historical Anomalies in Administrative Law*, 1985 SUP. CT. HIST. SOC'Y Y.B. 103, 106-110 (questioning the distinction between executive agencies and independent agencies and contending that the holding in *Humphrey's Executor* should be limited to its factual and historical context).

1. *Formalism, Holmesianism, and Functionalism.* — The last few years have seen a sharp rise of constitutional "formalism" in cases involving the separation of powers. Formalist decisions are premised on the beliefs that the text of the Constitution and the intent of its drafters are controlling and sometimes dispositive, that changed circumstances are irrelevant to constitutional outcomes, and that broader "policy" concerns should not play a role in legal decisions. Although this type of analysis was most prominent during the early growth of the modern regulatory state,<sup>324</sup> recent decisions also reflect some of these ideas. For example, in *Buckley v. Valeo*,<sup>325</sup> the Supreme Court struck down provisions of the Federal Election Act on the ground that members of the Federal Election Commission were not appointed by the President. Similarly, in *INS v. Chadha*,<sup>326</sup> the Court invalidated the legislative veto on the grounds that it violated the presentation clause and evaded the constitutional requirement of bicameralism. And in *Bowsher v. Synar*,<sup>327</sup> the Court invalidated the Gramm-Rudman-Hollings Act on the ground that article II prohibits Congress from granting to itself the exclusive power to remove an officer charged with the execution of the law. All of these decisions treated the text of the Constitution and the intent of its drafters as if they supplied clear, self-evident answers to the problem at hand. Changed circumstances and even underlying considerations of constitutional structure were largely ignored.

Constitutional formalism of this sort rests on weak foundations. The formalist approach is vulnerable to a wide range of objections relating to the appropriate characterization of the framers' intent,<sup>328</sup> the problem of interpretive intent, and the question how intent should be treated in unforeseen circumstances.<sup>329</sup> In the context of administrative law, the critical problem for formalism lies in the massive alterations in the executive branch since the New Deal. Formalist approaches assert, for example, that the notion of a "unitary executive" is sufficient to resolve many questions involving federal administrative agencies. But the federal government and the executive branch in particular have changed so dramatically since the founding that "framers' intent" cannot be mechanically applied as if it settles the matter.

<sup>324</sup> See, e.g., *Hampton & Co. v. United States*, 276 U.S. 394, 404–11 (1928); *Field v. Clark*, 143 U.S. 649 (1892). For a modern example, see Currie, *The Distribution of Powers After Bowsher*, 1986 SUP. CT. REV. 19.

<sup>325</sup> 424 U.S. 1, 135–37, 140 (1976).

<sup>326</sup> 462 U.S. 919, 958 (1983).

<sup>327</sup> 106 S. Ct. 3181, 3192 (1986).

<sup>328</sup> See Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204, 214–15 (1980).

<sup>329</sup> See R. DWORKIN, A MATTER OF PRINCIPLE 138–55 (1985); Brest, *supra* note 328, at 215–17.

The modern presidency is so different from the entity contemplated by the framers that it is unrealistic simply to "apply" their choices to the present situation. At its inception, the American presidency was by modern standards weak, especially in domestic affairs.<sup>330</sup> Its regulatory role was minimal. Police powers were exercised principally by the states. Federal lawmaking was the province of Congress. General questions of regulation were decided by the state legislatures and common law courts. Since the New Deal, however, the executive branch has become a major national policymaker; it often takes the initiative in lawmaking, exercising powers originally thought to lie within the domain of Congress and the states.<sup>331</sup>

For this reason, the Supreme Court's reasoning in *Chadha* and *Bowsher* was far too mechanical. The constitutionality of the legislative veto cannot be resolved solely by reference to the constitutional text.<sup>332</sup> For similar reasons, efforts to reinvigorate a literal approach to article III in order to remove adjudication from the executive branch should be resisted.<sup>333</sup> A general revival of the nondelegation doctrine would also be a mistake in light of a range of considerations: good reasons support the delegation of discretion,<sup>334</sup> standards can be extrapolated from seemingly vague statutes, judicial administration of a nondelegation principle would be both difficult and intrusive, and surrogate safeguards are available.<sup>335</sup> Of course, extreme measures, like that in *Schechter Poultry*, should be invalidated.

At the opposite pole from constitutional formalism is a position that one might associate with Justice Holmes: courts should presume that whatever Congress does in the area of separation of powers is constitutional, unless no plausible argument can be made in its favor.<sup>336</sup> Under the "Holmesian" view, separation of powers questions are essentially nonjusticiable, because the relevant institutions are able to protect themselves.<sup>337</sup> Some observers have argued in favor of a Holmesian approach on the ground that changed circumstances make the original constitutional commitments less relevant or more obscure.<sup>338</sup> Others have adopted the position because of the alleged

<sup>330</sup> See T. LOWI, *supra* note 83, at 22-41.

<sup>331</sup> See *id.* at 44-48. See generally S. Milkis, *supra* note 91 (describing the emergence of the "New Deal Constitution" as reflected by the rise in power of the executive and the decreased importance of party politics).

<sup>332</sup> See Elliot, INS v. Chadha: *The Administrative Constitution, the Constitution, and the Legislative Veto*, 1983 SUP. CT. REV. 125, 144-45; Strauss, *supra* note 43, at 597-99.

<sup>333</sup> See Fallon, *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. (forthcoming 1988) (cataloging arguments against article III literalism).

<sup>334</sup> See *supra* p. 445.

<sup>335</sup> See Stewart, *supra* note 284, at 335-43.

<sup>336</sup> See Myers v. United States, 272 U.S. 52, 177 (1926) (Holmes, J., dissenting); J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 263 (1980).

<sup>337</sup> See J. CHOPER, *supra* note 336, at 273-314.

<sup>338</sup> See INS v. Chadha, 462 U.S. 919, 967-74, 978 (1983) (White, J., dissenting); cf. Bowsher

indeterminacy of the constitutional text.<sup>339</sup> In the 1930's, the Supreme Court used a Holmesian approach to decide several cases involving separation of powers issues and administrative agencies,<sup>340</sup> but it has not done so recently.

The Holmesian approach, however, is little better than formalism. In its usual form, it amounts to a wholesale abandonment of the separation of powers, and its belief in a self-calibrating institutional equilibrium, based on the supposedly equal power of the opposing forces, is without historical or theoretical support. There is good reason to suppose that without adequate controls one branch will sometimes exercise too much power over the others.<sup>341</sup> One of the purposes of the Constitution was to prevent that outcome and to check imbalances when they occur.<sup>342</sup> Acquiescence by one branch to a redistribution of national powers may not prevent — indeed it may increase — the danger that the new arrangement will jeopardize some of the purposes that underlie the constitutional structure. The Holmesian position, effectively immunizing political outcomes from constitutional checks, is therefore inadequate.

The alternative to formalism and Holmesianism might be described as functionalism.<sup>343</sup> In general terms, functional approaches examine whether present practices undermine constitutional commitments that should be regarded as central. The text of the Constitution and the intent of its drafters are relevant, but they are not sufficiently helpful in hard cases to be determinative; it is the basic structural principles that play the critical role.<sup>344</sup> As suggested above, those principles include the unitary execution of the laws, avoidance of factionalism, protection against self-interested or unaccountable representation, and

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v. Synar, 106 S. Ct. 3181, 3205 (1986) (White, J., dissenting) (noting the importance of the Gramm-Rudman-Hollings Act as a response to the budget crisis).

<sup>339</sup> See *Chadha*, 462 U.S. at 974-84 (White, J., dissenting).

<sup>340</sup> See, e.g., *Humphrey's Executor v. United States*, 295 U.S. 602 (1935) (allowing Congress to develop new institutional forms); cf. *Crowell v. Benson*, 285 U.S. 22, 53-54 (1932) (arguing that a congressional grant of limited adjudicative powers to a non-article III tribunal can be justified to the extent it relieves the judiciary of an excessive workload).

<sup>341</sup> See, e.g., *United States v. Nixon*, 418 U.S. 683 (1974); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

<sup>342</sup> Moreover, the fact that the legislative and executive branches are in agreement is an insufficient reason to foreclose a constitutional attack; the relevant provisions are designed not only to ensure the integrity of the branches but also to protect the citizenry. See *Chadha*, 462 U.S. at 947-51, 957-59.

<sup>343</sup> See Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions — A Foolish Inconsistency?*, 72 CORNELL L. REV. 482, 488-89 (1987) (contrasting formalist and functionalist approaches to separation of powers issues).

<sup>344</sup> This method can be traced to *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). See generally C. BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1970) (arguing that the method of reasoning from structure and relation should play an important role in federal constitutional law).

promotion of deliberation in government.<sup>345</sup> A functional approach maintains, for example, that the constitutionality of the legislative veto should not have been resolved solely by reference to the text.<sup>346</sup> Nonetheless, a functional approach would yield the same result as in *Chadha*. Practice had shown that the legislative veto aggravated the problem of factionalism<sup>347</sup> — the very problem it was designed to solve. In practice, the device provided well-organized private groups an additional opportunity to fend off regulation. In this way, it undermined the central constitutional effort to diminish the power of well-organized private groups over governmental processes.

Although *Bowsher* is a harder case, it can be analyzed similarly. The congressional vesting of power in the Comptroller General removed the power of execution of the laws from the direct control of executive officials because, in practice, the Comptroller General operated independently of the President.<sup>348</sup> Execution of the laws was thus placed in the hands of someone who was, in practice, accountable to no one. An alternative defense of *Bowsher* would point to the dangers of combining legislative and executive functions, because the Comptroller General is subject to congressional removal and has traditionally viewed himself as a congressional agent.

Of course, there are problems with the functional approach as well. In particular, it allows for a large degree of discretion (and therefore uncertainty) both in characterizing the appropriate constitutional commitment and in deciding whether it has been violated. By contrast, the formalist and Holmesian approaches are highly predictable. The vices of functionalism in this regard can also be regarded as virtues, however, because they permit functionalism to avoid the defects in formal and Holmesian approaches.

2. *The Constitutional Status of Independent Agencies.* — Constitutional formalism has been of special importance in recent attacks on "independent" agencies. Although the first independent agency, the Interstate Commerce Commission, was created in the late nineteenth century, the notion of agency independence did not become popular until several decades later, as a result of fears about an unduly powerful presidency and an accompanying belief in the salutary effects of impartial expertise.<sup>349</sup> In part, the rise of independent agencies can also be viewed as an indication of the power of private industries, which believed that commissions would treat them more favorably.<sup>350</sup>

<sup>345</sup> See *supra* pp. 430-36.

<sup>346</sup> See Elliott, *supra* note 332, at 132-47; Strauss, *Was There a Baby in the Bathwater? A Comment on the Supreme Court's Legislative Veto Decision*, 1983 DUKE L.J. 789, 800-01.

<sup>347</sup> See Bruff & Gellhorn, *supra* note 121, at 1413-14, 1425-26, 1438-39.

<sup>348</sup> See Strauss, *supra* note 343, at 519-21.

<sup>349</sup> See M. BERNSTEIN, *supra* note 3, at 128-29, 137-39; Miller, *supra* note 323, at 79-83.

<sup>350</sup> See M. BERNSTEIN, *supra* note 3, at 5; *id.* at 146 (arguing that "maintenance of the

The New Deal saw the creation of a number of independent agencies, although, as with the Interstate Commerce Commission, limitations on presidential removal power predated the New Deal.<sup>351</sup> The form has been much less popular in the last twenty years, partly because of a perception that independent agencies have been, in practice, subject to the influence of well-organized private groups.<sup>352</sup>

The notion of independent administration is congruent with the Madisonian conception of representation in its desire to insulate public officials from political pressures.<sup>353</sup> But the New Deal conception of administration coupled the belief in insulation with optimism about the power of immersion in the facts and of technical expertise to resolve regulatory problems. Moreover, the advocates of the New Deal saw insulation as a mechanism for disrupting rather than preserving the status quo — a reversal of the view of the constitutional framers. The independent agency was a natural outgrowth of the New Deal plan.

Despite some continuity with Madisonian theory, the independent agency is in considerable tension with principles traceable to the orig-

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myth of commission independence represents a conscious effort by regulated groups to confine regulatory authority to an agency that is somewhat more susceptible than an executive department to influence, persuasion, and eventually, capture and control"); *see also* D. TRUMAN, THE GOVERNMENTAL PROCESS 417-19 (2d ed. 1971) (asserting that regulated groups have preferred regulation by independent agencies to supervision by an executive commission).

<sup>351</sup> See *infra* notes 358-61.

<sup>352</sup> An influential critique of agency independence written thirty years ago can be found in M. BERNSTEIN, cited in note 3 above. For a contrary view, see Jaffe, cited in note 126 above, at 1187, 1193, 1198-99. The decline of agency independence apparently reflects the belief that presidential supervision will operate as a buffer against factionalism. The EPA and OSHA are within the executive branch. Only a few of the modern safety and health statutes are administered by independent agencies. *See, e.g.*, 42 U.S.C. § 7171(a) (1982) (the Federal Energy Regulatory Commission); 15 U.S.C. § 2053(a) (1982) (the Consumer Product Safety Commission). Recent history thus suggests considerable congressional ambivalence about the independent agency.

In practice, there is little difference between independent and executive agencies in terms of their functions. Many departments within the executive branch engage in activities that are indistinguishable from those of the independent agencies. Both types of entities undertake the basic tasks of adjudication, rulemaking, and prosecution. Moreover, independent agencies are by no means genuinely liberated from political control. Such agencies perceive themselves as subject to the control of Congress, whose committees exercise a powerful supervisory function. The President, furthermore, has a range of formal and informal mechanisms for controlling agencies nominally outside of his jurisdiction. *See* Strauss, *supra* note 43, at 589-91; *see also* M. BERNSTEIN, *supra* note 3, at 109-13 (describing such mechanisms). Indeed, a recent study suggests that the behavior of independent agencies varies systematically with presidential partisanship. *See* Moe, *Regulatory Performance and Presidential Administration*, 26 AM. J. POL. SCI. 197, 221 (1982). In some cases, however, Congress has decided that immunity from plenary presidential control is desirable. There can be no doubt that independence allows agencies some measure of insulation from presidential authority and increases the supervisory power of legislative committees, which need not contend with the insulating effect of presidential support.

<sup>353</sup> See Sunstein, *supra* note 33, at 41-43; *supra* pp. 430-32.

inal constitutional framework. The first section of article II vests executive power in "a President."<sup>354</sup> The "take Care" clause makes it the duty of the President, and no one else, to "take Care that the Laws be faithfully executed."<sup>355</sup> These provisions reflect the framers' self-conscious decision to create a unitary executive who would be both accountable to the electorate and capable of energetic execution of the laws.

This basic understanding of the executive branch found powerful vindication in *Myers v. United States*,<sup>356</sup> in which the Supreme Court held that Congress could not involve itself in the decision whether to remove a postmaster.<sup>357</sup> In *Humphrey's Executor v. United States*,<sup>358</sup> however, the Supreme Court ruled in favor of the constitutionality of the independent agencies. Referring to the need for expertise and impartiality, the Court stated that the members of the FTC were to be independent in all things but their appointment, and that the FTC was not "in any proper sense . . . an arm or an eye of the executive."<sup>359</sup> For the Court, the Commission "acts in part quasi-legislatively and in part quasi-judicially" and is "an agency of the legislative and judicial departments."<sup>360</sup> At least until recently, *Humphrey's Executor* has been interpreted as establishing congressional discretion to create independent agencies as long as the relevant officials have adjudicative or rulemaking functions.<sup>361</sup>

Skepticism about the constitutional status of the independent agency has been renewed in the last decade, however,<sup>362</sup> and there are signs that the legal meaning of independence will change in the near future. Such developments should not be surprising in light of

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<sup>354</sup> U.S. CONST. art. II, § 1, cl. 1.

<sup>355</sup> *Id.* § 3.

<sup>356</sup> 272 U.S. 52 (1926).

<sup>357</sup> See *id.* at 163–64 ("Article II grants to the President . . . the power of appointment and removal of executive officers — a conclusion confirmed by his obligation to take care that the laws be faithfully executed.").

<sup>358</sup> 295 U.S. 602 (1935).

<sup>359</sup> *Id.* at 628.

<sup>360</sup> *Id.* at 628, 630.

<sup>361</sup> The claim that *Humphrey's Executor* held that rulemaking is quasi-legislative is, however, a misunderstanding. At the time of *Humphrey's Executor*, it had not been established that the FTC had rulemaking power. By "quasi-legislative" functions, the Court was referring to investigatory and reportorial actions. See Scalia, *supra* note 323, at 109.

Strictly speaking, *Humphrey's Executor* is an exceedingly narrow holding. The Court held only that a discharged member of the FTC has a right to back pay. The case did not involve a suit for reinstatement, and thus the Court did not conclude that Congress may ensure job tenure — only that compensation is due to those whom the President discharges. Moreover, the case did not involve a discharge on the ground of a refusal to implement presidential policy.

<sup>362</sup> See generally Miller, *supra* note 323, at 83 (noting the questionable constitutional grounds on which independent agencies are based); Note, *Incorporation of Independent Agencies into the Executive Branch*, 94 YALE L.J. 1766 (1985) (arguing that *Humphrey's Executor* should be overruled and that independent agencies should be incorporated into the executive branch).

the declining faith in the New Deal model of administration, which put a high premium on insulation. This skepticism has been boosted by the formalist approach of recent Supreme Court decisions — an approach that is in severe tension with the analysis in *Humphrey's Executor*, which in any event has little to be said in its behalf. The notion of quasi-legislative and quasi-adjudicative functions, pivotal to the decision, is unhelpful.<sup>363</sup> The simple point for the formalist critics is that the Constitution makes no room for a governmental entity existing "outside" the three enumerated branches, and constitutional silence suggests that no such entity may exist. Constitutional formalism provides at least as powerful an argument against the existence of independent agencies as it offers against the Gramm-Rudman-Hollings Act and the legislative veto. The President, not independent administrators, is the constitutionally specified agent of Congress in the execution of federal law.

There are, however, several counterarguments to the formalist position. The text of the Constitution and its history<sup>364</sup> do not provide unambiguous support for the attack on independent administration; and the changing character of the modern presidency makes it unrealistic to rely on founders' intent or to pretend that it can be mechanically applied to current problems. In light of the massive changes in the nature of the presidency, the decision to create a unitary executive cannot be treated as if it resolved the matter. Indeed, the decision to permit the creation of "independent" agencies might be understood as a necessary quid pro quo for the downfall of the non-delegation doctrine. The independent agency device allows Congress to limit presidential power in lawmaking, which has assumed unprecedented dimensions since the New Deal. In this sense, it might be thought to bring the national government closer to the original system of checks and balances.

Moreover, the term "independent" is in practice a misnomer. There are lines of control from both Congress and the President to the independent agencies.<sup>365</sup> Even if the Constitution might bar Congress from creating regulatory agencies entirely immune from presidential control, congressional creation of independent agencies need not be understood in such terms.

Although the formalist attack against independent agencies was at least implicitly at issue in *Bowsher*, the Court attempted to evade the problem. The Court indicated that its decision had no bearing on the constitutionality of the concept of independent administration.<sup>366</sup> The

<sup>363</sup> See Miller, *supra* note 323, at 93.

<sup>364</sup> See Grundstein, *Presidential Power, Administration and Administrative Law*, 18 GEO. WASH. L. REV. 285, 289-326 (1950).

<sup>365</sup> See Strauss, *supra* note 43, at 587-96; *supra* note 352.

<sup>366</sup> See *Bowsher v. Synar*, 106 S. Ct. 3181, 3188 n.4 (1986).

Court's language in *Bowsher*, however, may have an impact on the issue, in ways that fit comfortably with a functional approach to the question. The Court held that the enumerated bases for removal of the Comptroller General by Congress — inefficiency, neglect of duty, abuse of office — were "very broad" and permitted discharge "for any number of actual or perceived transgressions of the legislative will."<sup>367</sup> Yet the statutes creating independent agencies use almost precisely the same language. If this language creates "very broad" removal authority, the so-called independent agencies are not in practice independent of presidential control.<sup>368</sup>

Whatever the ultimate meaning of agency independence, and whether or not it is found constitutional, it should not be surprising if the recent attacks on independence and the related decline in the New Deal conception of administration eventually lead to increased presidential control of all regulatory agencies. Such a development would be highly desirable. Understood functionally, total independence threatens central principles of electoral accountability. There is evidence that the lack of accountability of independent regulatory agencies has led to abuses.<sup>369</sup> The constitutional commitments to the avoidance of factionalism and to limitations on the disjunction between rulers and ruled tend to support presidential supervision. The various policies underlying the notion of a unitary presidency are also relevant.<sup>370</sup>

In any event, there is no reason to believe that the independent agency form — if independence is understood literally — is needed to carry out the principal substantive purposes of New Deal administration.<sup>371</sup> Moreover, such control increases the likelihood of achieving an important institutional goal of the New Deal — to provide for agency officials who serve public law. At the same time, presidential supervision of independent agencies would be an additional step in the reintroduction of checks and balances into the current administrative process, supplementing the various measures described and advocated above.

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<sup>367</sup> *Id.* at 3190.

<sup>368</sup> This conclusion is buttressed by clear-statement principles of statutory construction, which counsel courts to avoid interpretations of statutes that pose constitutional issues. *See, e.g., Kent v. Dulles*, 357 U.S. 116, 127–30 (1958) (construing statute so as to avoid constitutional questions). Under this approach, statutes with ambiguous language should be read to allow considerable presidential supervisory power.

<sup>369</sup> *See M. BERNSTEIN*, *supra* note 3.

<sup>370</sup> *See id.* at 163, 286–87; NATIONAL ACADEMY OF PUBLIC ADMINISTRATION, *supra* note 145, at 15–20.

<sup>371</sup> Some independence, however, is necessary if the agency is to serve any role at all. For example, although the President may not make the ultimate decision, a point recognized in *Myers* itself, he may remove an officer after the decision is made. *See supra* p. 498. Moreover, agencies require some independence when acting in an adjudicatory mode. *See Myers v. United States*, 272 U.S. 52, 135 (1926).

#### IV. REGULATION, RIGHTS, AND LOCAL SELF-DETERMINATION

The discussion thus far has dealt primarily with the challenge of the New Deal to the system of checks and balances and with the reaction to those innovations in the last quarter-century. As discussed above, however, the New Deal significantly altered two other aspects of the constitutional structure: individual rights and federalism. The New Deal reformers rejected common law and status quo baselines for defining substantive entitlements, and believed that the presidency and regulatory agencies provided better opportunities than state and local government for democratic self-determination. A complete discussion of constitutionalism after the New Deal must thus address not only the questions of national institutions, but also those involving individual rights and federalism. Such a discussion must also deal with substantive, as opposed to institutional, reform of administrative law.<sup>372</sup> For present purposes, a few brief remarks should suffice.

##### A. Rights

The New Deal reformers asserted that the catalog of rights protected by the common law was not natural or prepolitical, but a conscious social choice.<sup>373</sup> This understanding dramatically shifted the baseline for distinguishing between governmental "action" and "inaction," or neutrality and impermissible partisanship — a point that modern public law has insufficiently recognized. In the pre-New Deal era, courts sometimes viewed deviations from the common law and the status quo as interference with the natural order, and as impermissible violations of principles of neutrality and nonpartisanship. This was the understanding that prevailed in the *Lochner* era, during which an aggressive Supreme Court identified the requirements of the due process clause with those of the common law.<sup>374</sup>

When the Court rejected *Lochner*, it did so largely on the ground that the common law baseline from which the Court had been operating could no longer be justified.<sup>375</sup> The Court recognized that re-

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<sup>372</sup> See generally S. BREYER, *supra* note 26 (presenting a general analysis of regulatory reform); Stewart, *supra* note 318 (advocating the adoption of "reconstitutive" regulatory strategies as an alternative to both reliance on current regulatory systems and deregulation).

<sup>373</sup> See *supra* p. 423.

<sup>374</sup> See *New York Cent. R.R. v. White*, 243 U.S. 188, 201 (1917) (suggesting that if government abrogates common law rights it must provide a "reasonably just substitute"). See generally Sunstein, *supra* note 135 (describing the influence of common law baselines).

<sup>375</sup> It should be unsurprising that the same Court that rejected the *Lochner* era understanding decided *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), in which the common law was similarly found to be constructed rather than natural or prepolitical. See *West Coast Hotel v. Parrish*, 300 U.S. 379, 399 (1937) (finding that failure to have a minimum wage law is a "subsidy" to employers); *Miller v. Schoene*, 276 U.S. 272, 279 (1928) (stating that failure to regulate is "nonetheless a choice").

spect for the common law baseline and for the existing distribution of wealth and entitlements could itself be governmental "action" or the product of faction; the common law was itself a creation of the legal system.<sup>376</sup> The lesson of the demise of *Lochner* was that common law or status quo baselines should no longer be used reflexively in public law.

Notwithstanding this understanding, pre-New Deal conceptions of legal rights permeate modern public law. For example, doctrines of judicial review of administrative action depend importantly on the common law. The interests of regulatory beneficiaries are not always judicially cognizable, most significantly in the areas of standing and judicial review of agency inaction.<sup>377</sup> State action doctrine turns not on whether the state has "acted," but on whether it has departed from governmental functions that are seen as normal or natural,<sup>378</sup> largely from a common law point of view. The partial abrogation of a trespass law is thus uncontroversially state action, and possibly unconstitutional,<sup>379</sup> whereas the enforcement of the law of trespass, and the repeal of a law prohibiting private racial discrimination, are treated as constitutionally legitimate and perhaps do not represent

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<sup>376</sup> Cf. F.D. Roosevelt, Speech Accepting the Nomination for the Presidency (July 2, 1932), 1 THE PUBLIC PAPERS OF FRANKLIN D. ROOSEVELT, THE GENESIS OF THE NEW DEAL, 1928-1932, at 657 (1938) (suggesting that the laws of economics "are made by human beings" rather than "nature"); F.D. Roosevelt, Annual Message to Congress (Jan. 3, 1936), 5 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT, THE PEOPLE APPROVE, 1936, at 13 (1938) ("In these latter years we have witnessed the domination of government by financial and industrial groups . . . . [Under the New Deal there has been] an appeal from the clamor of many private and selfish interests . . . to the ideal of the public interest. Government became the representative and the trustee of the public interest. Our aim . . . was to build upon essentially democratic institutions, seeking . . . the adjustment of burdens, the help of the needy, the protection of the weak, the liberation of the exploited, and the genuine protection of the people's property."); F.D. Roosevelt, Message to Congress, H.R. Doc. No. 397, 73d Cong., 2d Sess. (1934), reprinted in STATUTORY HISTORY OF THE UNITED STATES: INCOME SECURITY 61 (R. Stevens ed. 1970) (defending social security as necessary protection in "this man-made world of ours" (emphasis added)); *infra* note 386 (citing sources discussing the contextual nature of social thought).

This view of law as a social construct was an outgrowth of legal realism. See Hale, *supra* note 11, at 493-94. The Coase theorem, see Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960), was a natural product of New Deal understandings. It, too, upset ordinary understandings of action and inaction by revealing that judgments about causation, or about who injured whom, were conventional rather than natural. See B. ACKERMAN, *supra* note 135, at 46-71 (1985). The Coase theorem was thus the private law analogue to the constitutional overruling of *Lochner*.

<sup>377</sup> See Heckler v. Chaney, 470 U.S. 821 (1985); Allen v. Wright, 468 U.S. 737 (1984); *supra* pp. 474-78.

<sup>378</sup> See Sunstein, *supra* note 135, at 214.

<sup>379</sup> See PruneYard Shopping Center v. Robins, 447 U.S. 74, 83-84 (1980) (upholding a partial abrogation of state trespass law, but implying that a more extensive abrogation would constitute a taking); Kaiser Aetna v. United States, 444 U.S. 164, 179-80 (1979) (holding that the right to exclude is an incident of ownership).

state action at all.<sup>380</sup> Similarly, the right to a hearing depends in part on whether a common law interest or instead an interest thought to be "created by the government" is at stake. The law of procedural due process thus reflects a distinction, based on common law categories, between natural and positive rights<sup>381</sup> — a distinction that was repudiated during the New Deal.

The debate over "positive" and "negative" rights also depends on the choice of baselines. Whether a right is "positive" or "negative" turns out to depend largely on whether it calls for alterations in existing practices. The selection of such baselines has been particularly critical in cases involving the imposition of "affirmative" duties on government: The protection of the trespass laws is thus generally perceived as a negative guarantee, whereas protection of welfare rights is viewed as a positive one.<sup>382</sup> Distinctions of this sort turn not on a genuine inquiry into the negative or positive character of the rights, but on whether they require government to depart from common law categories.

Cases involving discrimination on the basis of race and gender raise similar issues. Thus, for example, the constitutional attack on "affirmative action" — indeed the very term — depends on acceptance, as a baseline, of the existing distribution of benefits and burdens as between blacks and whites and women and men. If the existing distribution were seen as a product of public and private decisions, it would be harder to argue that indifference to race, as reflected in market outcomes, was the course of "neutrality" or "inaction." Similarly, gender-discrimination law is marked by a debate whether some differences are "real" rather than socially constructed.<sup>383</sup> An approach consistent with New Deal understandings would recognize that even "real" differences are given their meaning by legal and social practices.<sup>384</sup> Such an approach would recognize, for example, that the

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<sup>380</sup> See *Crawford v. Board of Educ.*, 458 U.S. 527, 538-39 (1982) (suggesting that "mere repeal" of state antidiscrimination law is constitutional); *Reitman v. Mulkey*, 387 U.S. 369 (1967) (invalidating a state constitutional provision overturning antidiscrimination statutes, but indicating that repeal of those statutes is by itself permissible).

<sup>381</sup> See *Cleveland v. Loudermill*, 470 U.S. 532 (1985); *Board of Regents v. Roth*, 408 U.S. 564 (1972).

<sup>382</sup> See, e.g., *Harris v. McRae*, 448 U.S. 297 (1980) (distinguishing limitations on the government's power to regulate abortion from an affirmative obligation to finance such operations).

<sup>383</sup> See *Craig v. Boren*, 429 U.S. 190, 204 (1976) (stating that statistical demonstration of broad sociological propositions "is in tension with the normative philosophy underlying the equal protection clause"). See generally C. MACKINNON, FEMINISM UNMODIFIED 32-45 (1987) (suggesting an approach to gender discrimination that focuses on the ways in which differences are turned into disadvantages, rather than on the ways in which differences arise).

<sup>384</sup> See C. MACKINNON, *supra* note 383, at 32-40; Minow, *The Supreme Court, 1986 Term — Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 34-36 (1987) (describing the connection between legal analysis and categorization).

legal treatment of reproductive rights and of abortion raises questions not only of privacy, but also of sex discrimination.<sup>385</sup>

A major task for the future is to bring the basic understanding of the New Deal — the socially constructed character of legal rights — to bear on current doctrine.<sup>386</sup> Such a step would produce significant shifts in the baselines from which decisions are made.<sup>387</sup> The eventual goal would be to produce a theory of legal rights that is sometimes critical of existing practice, that is not merely positivist, and that does not rely on the status quo or the common law as the foundation from which to evaluate legal outcomes. That task is a large one, and it is doubtful that the courts can perform it on their own. The legislative and executive branches must play an important role. The effort, discussed above,<sup>388</sup> to place the interests of regulatory beneficiaries on the same footing as those of regulated industries would be an important step in this direction, and it might serve as a model for future development.

### B. Republican Self-Government and Substantive Reform

In the original constitutional system, federalism provided an avenue for local self-determination. Self-government by the citizenry could be achieved through state and local government.<sup>389</sup> At the same time, the states and the national government would control each other,<sup>390</sup> generating a vertical check on government oppression. Competition among the states for residents would act as an additional safeguard, encouraging humane and efficient policies.

In the New Deal period, however, the belief in localism seemed unrealistic or perverse. State government seemed to be a forum for parochial pressures rather than for republican self-government.<sup>391</sup> The states were far too large to allow for face-to-face democracy. The notion of vertical checks and balances among competing local and federal spheres seemed inconsistent with the need for active govern-

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<sup>385</sup> See C. MACKINNON, *supra* note 383, at 32–45.

<sup>386</sup> Such a task connects legal theory to prominent themes in contemporary social thought, involving the inevitably situated character of observation. See generally G. LAKOFF, WOMEN, FIRE, AND DANGEROUS THINGS: WHAT CATEGORIES REVEAL ABOUT THE MIND (1987) (showing that normative commitments are built into language itself); T. NAGEL, THE VIEW FROM NOWHERE (1986) (discussing difficulties in making normative and descriptive statements in light of the situated character of the speaker).

<sup>387</sup> Cf. Minow, *supra* note 384, at 16 (urging the judiciary to “approach questions of difference by seeking out unstated assumptions about difference”); *id.* at 70–95.

<sup>388</sup> See *supra* pp. 474–77.

<sup>389</sup> See THE FEDERALIST No. 46 (J. Madison).

<sup>390</sup> See THE FEDERALIST No. 51 (J. Madison).

<sup>391</sup> See B. KARL, *supra* note 1, at 233–34 (discussing state autonomy as “democracy for some”); see also S. Milkis, *supra* note 91, at 72–73 (criticizing the New Deal shift in power from local to federal government for undermining traditional American government).

mental intervention to counteract the Depression. Competition among the states would generate a "race to the bottom" that would both harm the disadvantaged and prevent coordinated action. New Deal reformers willingly abandoned the belief in self-determination through local government and looked instead to national institutions, and in particular to regulatory agencies and to the presidency, to fulfill democratic aspirations.<sup>392</sup>

In the 1930's, there was good reason for this basic position. Economic conditions, in particular, made local measures appear hopelessly inadequate. In retrospect, however, the New Deal's wholesale abandonment of the original goals of federalism was myopic. The New Deal actors were far too cavalier in their treatment of the problem. National institutions are at best an imperfect arena for obtaining self-determination by the citizenry, and federal controls are often excessively rigid and inefficient. The presidency itself, although visible, is hardly a forum for republican self-government. More importantly, experience has shown that the New Deal faith that autonomous administration would serve democratic goals was unjustified. The modern administrative agency has attenuated the links between citizens and governmental processes. Although reinvigoration of checks and balances should increase the democratic character of federal administration, it is no longer credible to believe that federal agencies can serve as an outlet for democratic aspirations. In this respect, the original framework of dual sovereignty was far superior to the New Deal understanding.

In the last quarter-century, there have been numerous efforts to provide mechanisms to ensure citizen participation in the public and private spheres.<sup>393</sup> The task for the future is to incorporate New Deal understandings about the potentially destructive consequences of interstate competition,<sup>394</sup> and more recent perceptions of the frequently negative effect of state autonomy on disadvantaged groups,<sup>395</sup> into a

<sup>392</sup> See sources cited *supra* note 391.

<sup>393</sup> See B. BARBER, *supra* note 25; D. ELAZAR, *EXPLORING FEDERALISM* (1987); S. ELKIN, *CITY AND REGIME IN THE AMERICAN REPUBLIC* (1987); R. STEWART, *FEDERALISM AND POLITICAL ECONOMY IN THE GREAT REPUBLIC* (forthcoming 1987); Brest, *Constitutional Citizenship*, 34 CLEV. ST. L. REV. 175 (1986); Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059 (1980); Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, 1985 SUP. CT. REV. 341; Stewart, *supra* note 25; Walker, *A Critique of the Elitist Theory of Democracy*, 60 AM. POL. SCI. REV. 285 (1966).

<sup>394</sup> See G. McCONNELL, *THE DECLINE OF AGRARIAN DEMOCRACY* 166-72 (1953); G. McCONNELL, *PRIVATE POWER AND AMERICAN DEMOCRACY* 101-18 (1966).

<sup>395</sup> See generally J.D. GREENSTONE & P. PETERSON, *RACE AND AUTHORITY IN URBAN POLITICS* (1973) (discussing the need for community participation by blacks in their struggle for equality); G. McCONNELL, *PRIVATE POWER AND AMERICAN DEMOCRACY*, *supra* note 394, at 101-11 (emphasizing the ways in which state and local autonomy harms disadvantaged groups and rejecting the claims that informality of government produces justice and that the surrender of public authority to private groups leads to democracy); Michelman, *The Supreme Court, 1985*

system that seeks to promote geographical diversity, local self-determination, and citizen participation in government.

That task is also a large one, but it is possible to identify some promising reforms. One strategy would be to reformulate national regulatory schemes, taking the form of prescriptive rules, through a sort of "reconstitutive law" that allows increased state, local, and private flexibility.<sup>396</sup> Reconstitutive approaches do not attempt to mandate particular results; they are thus distinguished from, for example, national occupational or health standards and "command and control" regulation requiring companies or states to reduce pollution to a certain level by specified means at a specified time. Reconstitutive approaches attempt to promote regulatory purposes through such flexible methods as reallocating entitlements, altering procedures, or shifting jurisdictional boundaries. Such methods encourage but do not compel particular outcomes; instead, they create incentives or pressures that nonetheless allow for private and local flexibility in a restructured marketplace.

Some reconstitutive approaches include protecting and encouraging collective bargaining in labor law instead of imposing uniform national standards,<sup>397</sup> providing for tradable emissions permits instead of mandating national pollution controls,<sup>398</sup> allowing diverse forms of broadcasting regulations in different communities, and relaxing conditions in federal grant programs.<sup>399</sup> In the area of welfare and social services, states might also be granted some powers currently reserved to the federal government. Such an effort might have as its purpose the encouragement of experimentation and diversity in job training for the unemployed. Another approach to promoting self-determination is the movement toward economic and workplace democracy,<sup>400</sup> which has the advantage of seeking participation and self-determination in areas in which citizens are already actively engaged.<sup>401</sup> In all of these

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Term — Foreword: *Traces of Self-Government*, 100 HARV. L. REV. 4, 73 (1986) (arguing that strict majoritarianism has not entailed active engagement by the citizenry); see also THE FEDERALIST No. 51 (J. Madison) (discussing the danger of factious majorities in a small republic).

<sup>396</sup> See Stewart, *supra* note 318.

<sup>397</sup> See P. Weiler, The Future of Labor and Employment Law: Reflections on Wrongful Dismissal Within the Market, the Law, and Collective Bargaining (temp. ed. Oct. 1987) (unpublished manuscript on file with the author).

<sup>398</sup> See Ackerman & Stewart, *Reforming Environmental Law*, 37 STAN. L. REV. 1333 (1985).

<sup>399</sup> See Stewart, *supra* note 318, at 106–07.

<sup>400</sup> See, e.g., M. CARNOTY & D. SHEARER, ECONOMIC DEMOCRACY (1980); R. DAHL, A PREFACE TO ECONOMIC DEMOCRACY (1985); C. PATEMAN, PARTICIPATION AND DEMOCRATIC THEORY (1977); Elster, *The Possibility of Rational Politics*, 28 ARCH. EUR. SOC. 67 (1987).

<sup>401</sup> See C. GUNN, WORKERS' SELF-MANAGEMENT IN THE UNITED STATES (1984); R. MASSON, PARTICIPATORY AND WORKPLACE DEMOCRACY 136 (1982) (arguing that "[p]articipation in the workplace is an efficient means to generate greater participation within government"). For a more cautious but nonetheless sanguine view, see E. GREENBERG, WORKPLACE DEMOCRACY:

contexts, state and local officials might be given authority to establish procedures and to impose different sorts of controls. The national government could create ceilings and floors that permit local discretion.

Strategies of this sort, however, should be undertaken only in certain areas. As the New Deal reformers were aware, competition among the states has a dark side. States often try to outbid each other in an effort to attract job- and revenue-producing industries by eliminating desirable regulation,<sup>402</sup> such as occupational health and safety measures. In addition, competitive pressures make minimal guarantees of income and social services extremely difficult to furnish at the state level.<sup>403</sup> In some contexts, moreover, a national moral commitment, often having constitutional foundations, calls for uniform federal standards — a point that is buttressed by the frequently negative effects of state and local autonomy on traditionally disadvantaged groups.<sup>404</sup> Discrimination on the basis of race and gender is a particularly inapt area for devolution of regulatory control to the states. The case for national requirements is thus strongest when interstate competition reduces regulation and income redistribution below the optimal level, when there are interstate spillovers or free-rider effects, and when powerful moral commitments call for uniformity.

The case for deregulation and devolution to state and local authorities often depends on the purpose of a regulatory scheme. Some regulatory schemes are designed to promote economic goals;<sup>405</sup> some are redistributive;<sup>406</sup> others are designed to protect rights.<sup>407</sup> Some regulatory programs are also intended to shape preferences,<sup>408</sup> to reflect the outcome of deliberative processes among the citizenry or representatives, or to promote noncommodity or public values.<sup>409</sup> Such measures include regulation of broadcasting, protection of the environment,<sup>410</sup> and prohibition of discrimination on the basis of race

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THE POLITICAL EFFECTS OF PARTICIPATION (1986), which analyzes the effects of workplace democracy in Pacific Northwest plywood cooperatives.

<sup>402</sup> See Rose-Ackerman, *Does Federalism Matter?*, 89 J. POL. ECON. 152, 154–58 (1981).

<sup>403</sup> See P. PETERSON, CITY LIMITS 46–50 (1981).

<sup>404</sup> See sources cited *supra* note 395.

<sup>405</sup> See, e.g., 15 U.S.C. § 1 (1982) (federal antitrust laws); *id.* § 2 (1982) (establishing and defining the powers of the Federal Trade Commission).

<sup>406</sup> See, e.g., 42 U.S.C. § 7 (1982) (providing for Social Security).

<sup>407</sup> See, e.g., 42 U.S.C. § 2000(e) (1982) (prohibiting the consideration of race, color, religion, sex, or national origin in employment decisions).

<sup>408</sup> See *id.*

<sup>409</sup> See, e.g., Endangered Species Act, 16 U.S.C. §§ 1531–1543 (1982).

<sup>410</sup> See SAX, *The Legitimacy of Collective Values: The Case of the Public Lands*, 56 U. COLO. L. REV. 537 (1985) (discussing public land ownership as a means of promoting collective values); Stewart, *supra* note 79, at 1566–87 (outlining a theory of noncommodity values).

and gender.<sup>411</sup> Efforts to sort out and specify the various purposes of regulation often reveal that deregulation or devolution to states and localities will be beneficial.

The basic goal of deregulation, devolution, and reconstitutive strategies is to promote economic productivity, diversity, and flexibility, while recognizing the need, on both economic and noneconomic grounds, for substantial national intervention into private markets. By relaxing national controls, these strategies would also promote self-determination at the local level. Such strategies should be seen above all as an effort to integrate the New Deal reformation of rights with the existence, in the original constitutional regime, of opportunities for local self-determination. Movements toward local control are thus the analogue, at the vertical level, to the revival of the system of checks and balances at the horizontal level. In concert, such reforms will promote the purposes of the original constitutional plan without relying on common law or status quo baselines or retreating to anachronistic understandings of private rights.

## V. CONCLUSION

The distribution of national powers was designed to ensure a sensible division of labor, to promote deliberation in government, and to provide a series of checks against factional power and self-interested representation. The original constitutional framework was also associated with the system of common law ordering, because the scheme of checks and balances made national action more difficult, thus allowing states and the common law courts to set the basic terms of regulation.

In its substantive dimension, New Deal constitutionalism self-consciously rejected the common law. It held that a new conception of legal rights was necessary to protect workers, the poor, the elderly, consumers, and others disadvantaged by the marketplace. Above all, New Deal constitutionalism recognized that baselines derived from the common law or the status quo no longer provided neutral or natural standpoints from which to make legal decisions.

The institutional position of the New Deal followed naturally from this critique. In the view of the 1930's reformers, the original distribution of national powers obstructed necessary governmental action. The New Deal alternative was both to increase the power of the presidency and to create the modern administrative agency, comprised of technically sophisticated officials promoting the public interest. New Deal agencies were expected to energize government and to

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<sup>411</sup> See, e.g., Lawrence, *supra* note 81, at 350-51.

escape the paralysis associated with the judiciary and the system of checks and balances.

The New Deal period thus saw a simultaneous attack on the substantive and the institutional legacy of the original constitutional regime. New Deal constitutionalism maintained a measure of continuity with the Madisonian belief in deliberative government, but the reformers of the 1930's intended deliberation to result in reconstruction rather than preservation of the existing distribution of wealth and entitlements.

The last three decades have seen a growing rejection of the New Deal conception of administration, although the substantive critique of the common law has remained largely intact. Because they lack internal checks and balances, administrative agencies pose special risks from the standpoint of the traditional distribution of national powers. Dangers of factionalism and self-interested representation have been the foremost concern of modern administrative law. Most proposals for regulatory reform, whether judicial, executive, or legislative, stem from that preoccupation.

The demise of the New Deal institutional structure first manifested itself in the courts, as judge-made doctrines were developed to "flush out" impermissible bases for regulatory decisions. The consequence is the modern hard-look doctrine, which rests on a deliberative conception of administration. Properly understood, the doctrine protects beneficiaries of regulation on the same terms as regulated class members. American presidents, too, have increasingly exerted control over the bureaucracy, most recently by delegating supervisory power to OMB. In addition, Congress has enacted judicially enforceable deadlines, "goals" statutes, and precise regulatory guidelines to ensure that agencies do not subvert regulatory statutes in the implementation process. The three branches of government have thus intruded on agency autonomy in ways that have restored some of the features of the original constitutional framework.

The recent exercises of power by each branch of government reject the New Deal conception of administration. All have been highly controversial. Judicial control is said to substitute uninformed, unaccountable judges for technically expert and politically responsible administrators. Presidential power has generated sharp attack by critics who favor a New Deal model of autonomous administration. Congressional specificity is said to give rise to risks associated with factionalism and lack of technical competence.

Simultaneous presidential, legislative, and judicial control can, however, be tied tightly both to the underlying goal of deliberative government and to the purposes of the original distribution of national powers. These controls can ensure that agency decisions take account of governing statutes, technical facts, and "politics," properly understood. It is a mistake to adopt a wholly technocratic or wholly polit-

ical conception of administration. The deliberative approach outlined here maintains continuity with both the original framework and the New Deal, and accommodates political choice and technical specialization. A system of oversight by the constitutionally specified branches does not produce blind adherence to the status quo. By proliferating points of access to government, it may, on the contrary, increase the opportunities for groups to seek and obtain reform.

The task for the future is to achieve some of the purposes underlying the distribution of powers without abandoning the understanding that the common law system of regulation is insufficient. This task has three components. At the national level, the goal is to promote Madisonian representation while furnishing safeguards against factionalism and self-interested representation. At the local level, the task is to promote diversity, participation, and self-government in such a way as to accomplish traditional republican goals, which are inadequately served either by modern state government or by the presidency.<sup>412</sup> In terms of legal rights, the goal is to develop a set of entitlements that does not take the common law or the status quo as the baseline for decision. In this context, New Deal insights have been insufficiently incorporated into modern public law, which continues to rely on questionable understandings of "neutrality" and "inaction."

All of these tasks are formidable ones. In particular, the notion of Madisonian representation has to some degree broken down in practice,<sup>413</sup> and the system of checks and balances is closely associated with fear of governmental "action" and acceptance of governmental "inaction." Devolution to the states must be selective, and must guard against elimination of regulatory safeguards that national institutions are uniquely able to furnish. Development of a system of legal rights that rejects status quo baselines is enormously difficult.

Reforms of the sorts suggested here must be part of a far broader strategy for reconstruction of the constitutional system in light of developments occurring during and after the New Deal. It may not be too optimistic however, to suggest that we have put in place some of the structures with which to begin the task of integrating the growth of bureaucracy and the rejection of the common law into a system that seeks to diminish the risks of factional tyranny and self-interested representation.

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<sup>412</sup> See Barber, *supra* note 39, at 30–38.

<sup>413</sup> See Peltzman, *supra* note 75, at 212–13; Stigler, *supra* note 75, at 10–13. But see M. DERTHICK & P. QUIRK, *supra* note 128, at 237–52 (describing the role of ideology in the deregulation movement); S. KELMAN, *supra* note 120, at 44–113, 231–85 (describing the public-spirited character of representative behavior); A. MAASS, *CONGRESS AND THE COMMON GOOD* (1983) (same).