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Administrative Law After the Counter-Reformation: Restoring Faith in Pragmatic Government

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In an effort to realign their political parties, the President of the United States and the Prime Minister of England have proposed a "third way" for government. Although the characteristics of this middle path have yet to be defined, the idea suggests that there is a new way to define government and its role in society that differs from traditional understandings. The goal of this symposium is to explore whether a "third way" exists in terms of such important governmental functions as economic regulation, environmental policy and risk regulation, labor and employment policy, and welfare and poverty policy. My contribution is to consider whether there is a "third way" to think about the accountability of government to the public when it implements these and other public functions.

Administrative law has been dominated in the last thirty years by two viewpoints of government. The reformation, named by Richard Stewart in the 1970s, obtained a fundamental reorientation of administrative law as a pluralistic decisionmaking process, in which citizens can participate and hold government accountable to carry out its many regulatory missions. While the reformation had several facets, the impact statement, "hard look" review, and standing doctrine were three key elements. The reformation was followed by what I will call the counter-reformation which, as its name implies, seeks to undo the achievements of the reformation. The counter-reformation sought to rationalize regulation by requiring policy analysis and by reducing excessive citizen participation in the regulatory process. The counter-reformation was achieved using several procedures, but the

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same procedures used in the reformation—the impact statement, “hard
look” review and standing doctrine—have been key elements.

The reforms of the counter-reformation have prompted two reactions. The
first, the restoration, seeks to restore the reformation by blunting, if not
reversing, the impact of the counter-reformation. The other, the
reconciliation, seeks to reconcile the reformation and counter-reformation
by relying on cooperation with regulated entities and on participatory
decisionmaking involving regulated entities, citizens, and regulators. This
approach is a reconciliation because it seeks to respond to the objectives of
both the reformation and the counter-reformation.

The reconciliation might be characterized as a “third way” in
administrative law because, while it shares the objectives of both the
reformation and counter-reformation, it proposes a conception of the
administrative process that is fundamentally different than either. This
Essay argues, however, that the pragmatic tradition of governance in the
United States offers a better conception for administrative reform. This
potential and how it differs from the counter-reformation, restoration, and
reconciliation is the business of this paper.

I. FRAMING ADMINISTRATIVE LAW

The concept of “framing” helps explain why individuals construct
different interpretations of policy issues. As Rein and Schön use the term,
“framing is a way of selecting, organizing, interpreting, and making sense
of a complex reality to provide guideposts for knowing, analyzing,
persuading, and acting.” It is through frames, they explain, that
individuals integrate facts, values, theories and interests. Thus, framing
“leads to different views of the world and creates multiple social realities”
and it leads individuals to “support different courses of action concerning
what is to be done, by whom, and how to do it.” The “policy frames” that
individuals use “are revealed through the stories participants are disposed
to tell about policy situations”—stories which “link causal accounts of
policy problems to particular proposals for action and facilitate the
normative leap from ‘is’ to ‘ought.”

2. Martin Rein & Donald Schön, Reframing Policy Discourse, in THE ARGUMENTATIVE TURN
IN POLICY ANALYSIS AND PLANNING 145, 146 (Frank Fischer & John Forester eds., 1993).
3. Id. at 147.
4. Id.
5. Id. at 148.
6. Id. (footnote omitted).
Deborah Stone has elaborated on the concept of "policy stories." She describes the web of ideas and arguments that underlie reform movements as "causal stories." In politics, Stone explains, reformers "look for causes not only to understand how the world works but to assign responsibility for problems." The aim is to "tell a story in which one set of people are oppressors and another are victims." Political conflicts over causal stories," as a result, "are . . . more than empirical claims about sequences of events." Instead, "[t]hey are fights about the possibility of control and the assignment of responsibility." 

Policy stories are important because they have political salience. As Peter Schuck observes, a complete understanding of public policy requires us to acknowledge "the power of the ideas that frame our understanding of the world." Stone concludes: "Being accepted by the general public is one test of success for a causal story, but the ultimate test of political success is whether it becomes the dominant belief and guiding assumption for policymakers."

The reformation, the counter-reformation, and the responses to it are policy stories. Each story identifies a problem, aggregates citizens as the victims of the problem, and establishes who or what is the cause of the problem. The stories are useful because they capture and clarify essential elements in competing schools of thought about the administrative process. This benefit is also a disadvantage. The stories organize the administrative law world into neat and tidy packages that distort the messy reality of actual events and their relationship to each other. Nevertheless, as distillations of administrative law camps, the stories help us to organize what might otherwise appear as disparate developments. Like more conventional stories, they emphasize certain elements in order to make a point, rather than to be a completely accurate historical account of the events that transpired. The next three sections describe these stories in more detail.

8. Id.
9. Id.
10. Id. at 197.
11. Id.
13. STONE, supra note 7, at 203.
II. THE REFORMATION

In 1972, Professor Richard Stewart characterized the emerging trends in administrative law as a reformation. Stewart’s terminology referred to various developments that had the cumulative impact of empowering the beneficiaries of regulation, or more often, their representatives, public interest groups, to exercise the same participatory rights in regulatory decisionmaking as regulated entities. At the time, this transformation was revolutionary. While those whose private property was adversely affected by governmental action have always had participatory rights, the beneficiaries of regulation historically did not have the same opportunities to influence regulatory decisionmaking or to sue agencies when regulations were not to their liking.

A. The Problem

The causal story told by the environmental and consumer public interest advocates laid the groundwork for the reformation. The problem, as the reformers defined it, was the government’s inability to prevent corporations and others from despoiling the environment, injuring consumers and workers, discriminating against racial minorities, and committing other social ills. These claims were buttressed by books and news stories indicating the social harm that had occurred. In the early 1960s, for example, Rachel Carson’s book, Silent Spring, called attention to the environmental destruction caused by the widespread use of pesticides, while Barry Commoner’s book, The Closing Circle, warned that, unchecked, the use of “counter-ecological technologies” could result in environmental ruin. At about the same time, the public learned that modern medicines could injure, as well as heal, after it was revealed that Frances Kelsey, an employee of the Food and Drug Administration (FDA), almost single-handedly kept thalidomide from being sold in the United States. The issue of automobile safety came to the public’s attention after General Motors admitted in a congressional hearing that it had hired private investigators to follow Ralph Nader in order to discredit his book Unsafe at Any Speed. Frequent mining catastrophes, such as the death of eighty-

eight miners in Farmington, West Virginia, and the discovery of new occupational diseases, such as "brown lung," focused the public on occupational safety and health risks.¹⁹

B. The Cause

Reformers blamed existing political arrangements between business and government for ineffective regulation. The weak role that the federal government played in policing markets was attributable to the social and political hegemony of the business community. In 1976, Robert Dahl and Charles Lindblom observed: "[C]ommon interpretations that depict the American or any other market-oriented system as a competition among interest groups are seriously in error for the failure to take account of the distinctive privileged position of businessmen in politics."²⁰ Lindblom explained that, in light of the central role of business in a capitalistic system, corporations did not appear to government officials "simply as the representatives of a special interest, as representatives of interest groups do."²¹ Rather, they were "functionaries performing functions" that were regarded by government as "indispensable."²² Politicians "simply understand[d]," Lindblom concluded, that "government leadership must often defer to business leadership" in order "to make the system work."²³

Besides blaming existing social ills on the privileged position of business in the political system in general, reformers attributed the failure of what regulatory programs did exist to their "capture" by the business community. Numerous studies by Nader's Raiders documenting the existence of the failure to regulate corporate abuses convinced reformers that agencies routinely ignored and subverted "the rule of law itself -- whether it be antitrust law, environmental regulations, freedom-of-information procedures, or OSHA standards."²⁴ They concluded that the administrative discretion granted to agency officials in most regulatory matters only invited corporate capture.

²⁰. ROBERT DAHL & CHARLES LINDBLOM, POLITICS, ECONOMICS, AND WELFARE at xxxvii (1976).
²¹. CHARLES LINDBLOM, POLITICS AND MARKETS 175 (1977).
²². Id.
²³. Id.
²⁴. MICHAEL W. MCCANN, TAKING REFORM SERIOUSLY: PERSPECTIVES ON PUBLIC INTEREST LIBERALISM 44 (1986).
C. The Solution

The "solution" for the failure to protect the public and the environment followed from the definition of the cause. First, it was necessary to shift responsibility from the "lax authority of market mechanisms and common law to . . . federal government regulation."25 Legislators heeded this call and Congress engaged in a frenzy of legislation unmatched since the New Deal. It enacted comprehensive changes to air, water, and pesticide regulation and a web of civil rights laws, created new agencies to regulate dangerous automobiles, consumer products, and workplaces and gave existing agencies, such as the Federal Trade Commission, new authority to regulate.26 By one count, Congress passed twenty-five laws regulating business between 1967 and 1973 alone.27

Second, in light of agency capture, reformers were "acutely aware that what had been won in Congress could easily be lost in the halls of administrative agencies."28 Administrative procedure had failed to prevent "capture," the reformers contended, because the courts did not recognize that the exercise of administrative discretion is "essentially [a] legislative process of adjusting the competing [demands] of various private interests affected by agency policy."29 By focusing exclusively on legitimating the regulation of private property, the courts had provided only limited assistance to regulated beneficiaries who felt that an agency was slighting their statutory "right" to protection.30 Reformers pointed to the lack of standing of regulatory beneficiaries to sue agencies (or participate in agency adjudications), and judicial deference to policy decisions that favored regulated entities.31

The judiciary's reaction was to empower statutory beneficiaries to challenge the failure of government to act or to act sufficiently through now familiar doctrinal changes. One set of changes authorized statutory beneficiaries to participate in agency decisionmaking. The Supreme Court interpreted the protection of property under the Due Process Clause to include statutory entitlements,32 which meant that the government had to

25. Id. at 82.
29. Stewart, supra note 1, at 1683-84.
30. See id. at 1687.
31. See Shapiro, supra note 27, at 100.
provide a pretermination hearing before terminating welfare and other governmental benefits. The courts also expanded public participation in licensing hearings by interpreting statutory hearing rights to include regulatory beneficiaries. Lower court decisions extended the notice requirements of informal rulemaking to require agencies to disclose the scientific basis for a rule. The other set of changes enabled statutory beneficiaries to challenge agency decisions that did not comport with the outcomes for which they argued. The Supreme Court also established a strong presumption that agency action and inaction were subject to judicial review, and it empowered statutory beneficiaries to secure judicial review by expanding the APA’s cause of action to include regulatory beneficiaries and by interpreting constitutional standing requirements to facilitate such law suits. The courts’ adoption of the “hard look” doctrine connected the two sets of developments by requiring agencies to give adequate consideration to the evidence and arguments advanced by statutory beneficiaries and otherwise take seriously their mission to protect the public.

Congress was also convinced that the procedural playing field was uneven. It passed open government laws, such as the Freedom of Information Act (FOIA) and the Federal Advisory Committee Act (FACA), which made it more difficult for agencies to adopt industry-friendly policies behind closed doors that would then be difficult to dislodge. Congress also passed the National Environmental Policy Act of 1969 (NEPA), which required agencies to analyze and disclose to the public the potential environmental impacts of agency actions, and it

34. See Office of Communication of Church of Christ v. FCC, 359 F.2d 994, 1006 (D.C. Cir. 1966); see also Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608 (2d Cir. 1965) (granting an intervenor a license to construct a pumped storage hydroelectric plant).
35. See Portland Cement Ass’n v. Ruckelshaus, 486 F.2d 375, 394 (D.C. Cir. 1973); see also United States v. Nova Scotia Food Prod. Corp., 568 F.2d 240, 252 (2d Cir. 1977) (stating that scientific material supporting the proposed rule should be disclosed for public comments).
39. See infra notes 170-90 and accompanying text (describing the “hard look” doctrine).
42. See Matthew D. McCubbins et al., Administrative Procedures as Instruments of Political Control, 3 J.L. ECON. & ORG. 243, 259 (1987) (discussing the implications of the FOIA).
subjected agency compliance with these requirements to judicial review.\textsuperscript{44} NEPA, like the open government laws, made it easier for environmentalists and other public interest groups to monitor agencies, like the Department of Agriculture, that were perceived by them to be excessively friendly to corporate and business interests. Congress also passed legislation to permit persons who sued the government to collect legal fees, which reduced the transaction costs of collective action by statutory beneficiaries.\textsuperscript{45}

Thus, the activists who sought the reformation shared with their Progressive and New Deal predecessors the faith that the best antidote for big business was big government, but as "civic skeptics,"\textsuperscript{46} they were not prepared to trust regulators to protect citizens and the environment.\textsuperscript{47} Whereas the Progressives put their faith in "neutral" experts to choose the most appropriate decisions, the reformers had an "inherent distrust of the professional ranks of bureaucratic elites in whom earlier generations placed their greatest hopes for social improvement."\textsuperscript{48} As Michael McCann has noted, "[i]ndeed, it is against the very ideal of government by scientists, experts, and bureaucrats understood to be above politics that the new reformers have pitted themselves."\textsuperscript{49} They understood that regulatory decisions were inherently political, and they sought to create a "surrogate political process" for "consideration of all interests" by the adoption of the reforms of the reformation.\textsuperscript{50}

Professor Stewart concluded: "[W]hether a fully-articulated model of interest representation will emerge from [the reformation], or whether interest representation is simply an interim stage in the emergence of some totally new conception of the relation between administrative institutions, legal controls, private groups, and social and individual values, is as yet unclear."\textsuperscript{51} With the benefit of hindsight, we now know that the next phase constituted a rejection of the concepts of the prior one.

\textsuperscript{44} See id. \S 4332(2)(C) (subjecting agencies to judicial review by stating that the disclosures must comply with FOIA).


\textsuperscript{46} See McCANN, supra note 24, at 90 (attributing the description of the 1960s' reformers as "civic skeptics" to Andrew McFarland).

\textsuperscript{47} See id. at 91-92 (describing the reformers' skeptical attitudes toward government).

\textsuperscript{48} Id. at 99.

\textsuperscript{49} Id. at 99-100.

\textsuperscript{50} Id. at 112.

\textsuperscript{51} Stewart, supra note 1, at 1813.
III. THE COUNTER-REFORMATION

When President Reagan took office, declaring that “government is not the solution to our problem. Government is the problem,” the counter-reformation was in full bloom. Although this transformation has failed to roll back the entire results of the reformation, it has had a considerable impact on administrative procedure. Many of the recent significant presidential, legislative, and judicial developments in administrative law are related to the counter-reformation.

Like the reformation, the counter-reformation tells a story of a problem, a cause, and a solution that follows from the definition of the cause. The reformation identified pollution, dangerous products, discrimination and other social ills as the problem, the “capture” of government by the business community as the cause, and a pluralistic interest group system as the solution. The counter-reformation sees irrational and counterproductive regulation as the problem, the “capture” of government by regulatory beneficiaries as the cause, and the reduction of the influence of such groups as the solution.

A. The Problem

In 1979, Charles Wolf proposed a “theory of non-market failure,” which specified ways in which government programs, intended to redress market failures themselves, were subject to similar types of failures. The idea of “government failure” is at the heart of the counter-reformation story. This story recognizes that government has a role in addressing market “failures” which can, among other problems, reduce society’s wealth, endanger people and the environment, and fail to provide a sufficient level of public goods. In the counter-reformation story, however, efforts to clean up the environment, help the poor, or engage in any of the other myriad functions of modern government lead to ineffective and inefficient policies that harm the very persons that they are intended to protect.

53. See supra Part II for a discussion of the reformation.
55. See SHAPIRO & TOMAIN, supra note 25, at 31-39 (describing market failures and their consequences).
1. Inefficient and Ineffective Regulation

The idea of “government failure” received an early and prominent endorsement in Regulation and Its Reform, written by Justice Stephen Breyer while he was an academic. Breyer proposed that regulatory failure occurs because of “mismatches” or the failure “to correctly match the [regulatory method or] tool [used] to the problem at hand.”56 A mismatch can occur because government can misdiagnose the problem that it is attempting to solve and apply the wrong regulatory approach as a result, or even if a problem is correctly identified, government chooses a regulatory tool that is less effective and more expensive than other options.57 While the first mistake justifies deregulation, the more usual problem is the second mistake. The government fails not because government regulation is unnecessary, but because it does not take advantage of the most rational way to implement regulation.

Today, the idea that government programs fail because of poor design and the failure to rationalize policy has many proponents. Cass Sunstein’s explanation of “how regulation fails” is typical:

The regulatory state has not been a failure. On the contrary, regulatory statutes have brought about significant improvements in a variety of areas, including the environment, energy conservation, automobile safety, endangered species, and discrimination on the basis of race and sex. At the same time, however, some statutes have produced benefits that are dwarfed by the costs, had unanticipated side effects, or have in any case been far less successful than their advocates had hoped. Moreover, the entire area is pervaded by what we might call paradoxes of regulation: regulatory strategies that are self-defeating in the sense that they bring about results precisely the opposite to those that are intended.58

Thus, “even when it is possible to identify a good reason for statutory intervention, governmental regulation may not be successful.”59 Rather, the “statutory solution might be poorly designed, producing a ‘government failure’ parallel to or more costly than the market failure that gave rise to regulation in the first instance.”60 And, “[e]ven when well designed by the legislature, statutes can be subverted in the implementation process” by factors such as “[i]gnorance, misdiagnosis, poor incentives for administrators, misunderstanding of the market, and pressures from

56. STEPHEN BREYER, REGULATION AND ITS REFORM 191 (1982).
57. See id. at chs. 11-14.
59. Id. at 83.
60. Id.
powerful private groups incline enforcement of the law in unproductive or perverse directions." 61

In a best-selling book, Phillip Howard popularized and exaggerated these themes as a "death of common sense" that "suffocates" America. 62 As Howard summarized the issue, "[t]he more important question is not why government is so big—we know in our hearts that any reduction would only occur at the edges—but why, with a few exceptions, it fails in even its simplest tasks." 63

Howard's book is composed of anecdotes of what appear to be silly governmental policies and decisions, but there is a large body of academic literature that identifies governmental failure with the problems identified by Justice Breyer and Professor Sunstein. A brief listing would include critiques of automobile safety, 64 consumer and product safety, 65 employment law, 66 environmental policy, 67 occupational safety and health policy, 68 and social welfare policy. 69

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61. Id.
63. Id. at 8.
2. Harm to the Public

The problem posed by “government failure” is that it harms the public in both direct and indirect ways. The direct harm is that regulation ends up hurting the very persons that it is supposed to help or protect. The indirect harm is that regulation produces macro-economic effects that adversely affect citizens in general and the poor in particular.

a. Direct Harms

The critique of social welfare policies is an obvious example of how government regulation can be counter-productive. Government’s efforts, far from helping the poor, create a cycle of dependency that robs welfare recipients of the independence and drive that they need to succeed in our market economy. Those who pay for such programs are victimized by the waste of tax dollars to support unproductive, indeed counterproductive, programs.

The counter-reformation story concerning risk regulation likewise identifies citizens as the victims of regulation. Professor John Mendeloff first expressed this idea under the banner “overregulation causes underregulation.”70 A substance is “overregulated” to the extent that its costs exceed its benefits, and it is “underregulated” to the extent that the costs of regulation are less than the benefits. Mendeloff argued that many health hazards in the workplace are underregulated because the Occupational Safety and Health Administration (OSHA) promulgates standards that are not justified under a cost-benefit test.71 If OSHA would only promulgate standards for which costs more nearly approximated benefits, Mendeloff contended, it could promulgate more standards.72 If the standards were less stringent, industry would be less likely to challenge them in court, and, if they were challenged, the courts would be more likely to approve them. Thus, although each standard would be less protective of workers, Mendeloff concluded the sum total of protection for workers would be greater because there would be many more standards overall.73 Other analysts have generalized Mendeloff’s story. Cass Sunstein, for example, asserts the “threat of draconian regulatory requirements gives industries powerful incentives to fight regulation where ever they can, and

70. MENDELOFF, THE DILEMMA OF TOXIC SUBSTANCE REGULATION, supra note 68, at 8.
71. See id. at 5-6.
72. See id. at 6.
73. See id. at 9-11.
gives agencies a powerful incentive not to promulgate or enforce them.” Sunstein therefore blames the stringency of the relevant laws for EPA’s record of regulating “only seven toxic air pollutants (out of hundreds)” and “fewer than a dozen toxic water pollutants (again, out of hundreds).”

Overregulation causes underregulation for another reason. Because society spends too much for some regulations, that is, those whose costs greatly exceed their benefits, citizens miss out on the opportunity to direct regulation to areas that would generate benefits that exceed costs. According to Justice Breyer: “Does it matter if we spend too much over-insuring our safety? The money is not, or will not be, there to spend, at least not if we want to address more serious environmental or social problems—the need for better prenatal care, vaccinations, and cancer diagnosis, let alone day care, housing and education.” Breyer concludes that “overregulation” offers a “powerful argument . . . not necessarily for deregulation, but for a serious effort to prioritize, and perhaps to reallocate, our regulatory resources.”

b. Indirect Harm

The counter-reformation has identified “government failure” as producing two levels of indirect harm. In the 1980s, critics blamed “government failure” for the economic recession then in effect. In the 1990s, after the economy recovered, critics shifted their focus and argued that “government failure” harmed the poor and unemployed by making domestic companies less competitive in international markets and by increasing their health risks by reducing the wealth of the country.

The counter-reformation originally blamed regulation for the poor performance of the economy. Since the advent of social regulation occurred at about the same time as a decline in economic productivity, the critics pointed to regulation as a culprit. When he was a candidate for president, for example, Ronald Reagan repeatedly cited a controversial estimate by Professor Murray Weidenbaum that federal regulation had a cost of $120 billion in 1980 to suggest that regulation imposed

75. Id.
77. Id.
unreasonable and unwarranted costs on the economy.\textsuperscript{79} After he took office, “regulatory reform” became one of the “pillars of policy” to rescue the country from its “economic abyss.”\textsuperscript{80}

By publicizing the counter-reformation story, the critics were able to shift the agenda from the undesirable conduct of business (market failure) to the undesirable conduct of government (“government failure”). “As long as the political agenda was dominated by a concern about ‘micro’ market failure,” David Vogel has observed, “the public-interest movement was in a position to offer a politically coherent and economically plausible alternative, namely, increased regulation.”\textsuperscript{81} Once, however,

the public became concerned about long-term economic growth, public interest advocates found that they had become largely irrelevant: having based their political program on policies designed to ameliorate the effect of economic growth, they had no practical solutions to offer when that growth appeared to have become problematic. They did, of course, vigorously challenge the contention of business that social regulation was a cause of the nation’s economic difficulties. But the burden of proof had shifted: now it was government, not business, that was forced to justify itself.\textsuperscript{82}

Vogel adds, “[t]he increased public support for business criticisms of regulation . . . was also a response to increased public awareness of its shortcomings.”\textsuperscript{83} Thus, “[b]y the late 1970s, government regulation was no longer seen simply as a solution to the problems created by business: it had become a problem in its own right as well.”\textsuperscript{84}

As the economy recovered, however, it became “clear that changes in regulatory policy were not very important in rescuing the economy from the depths into which it had plunged after the inflation of the 1970s.”\textsuperscript{85} In response, economic critics found new ways that regulation harmed economic performance. Regulation threatens the poor and unemployed, for example, because the excessive cost of regulation makes domestic companies less competitive in international markets and leads to the flight of jobs overseas.\textsuperscript{86} Another claim, known as “richer is safer,” is regulation

\textsuperscript{80.} Robert W. Crandall, Forward to REGULATION AND THE REAGAN ERA: POLITICS, BUREAUCRACY AND THE PUBLIC INTEREST at x (Robert E. Meinder & Bruce Yandle eds., 1989).
\textsuperscript{81.} Vogel, supra note 78, at 231.
\textsuperscript{82.} Id.
\textsuperscript{83.} Id. at 233.
\textsuperscript{84.} Id.
\textsuperscript{85.} Crandall, supra note 80, at x.
\textsuperscript{86.} See JOHN FRANCIS, THE POLITICS OF REGULATION: A COMPARATIVE PERSPECTIVE 29 (1993) (“Firms searching for a less restrictive environment seemed to be leaving Western nations and seeking Third World countries that either offered far fewer regulations or failed to enforce the regulations that
creates a health-health trade-off. Since people who are poor and unemployed tend to be in worse health and live shorter lives than wealthier and employed persons, costly regulation increases health risks for citizens simply because it reduces the wealth of the country.\textsuperscript{87} Consider this claim by Kip Viscusi: "[T]he studies suggest that with an expenditure of a bit more [than $5.0 million to prevent the loss of a life] or perhaps double that amount, there will be the loss of [another life]. In effect, saving lives becomes a break-even proposition where every time we are willing to spend money to save a life, we lose a life because we become poorer in doing so.\textsuperscript{88}

Many claims about "government failure" and the harm it causes are controversial, and there is a counter-literature defending the performance of the government in most every area attacked by regulatory critics.\textsuperscript{89} One does not have to agree with the conclusions of studies critical of regulation, however, to recognize that they have been skillfully used by the adherents of the counter-reformation, particularly trade associations and conservative think-tanks, to bolster the counter-reformation story.\textsuperscript{90}

\textbf{B. The Cause}

The counter-reformation argues "government failure" has produced regulatory policies that have harmed both the intended beneficiaries of regulation and citizens in general. It attributes this failure to its own version of government "capture." The reformation story blamed "capture" of government by the business community for the failure to protect the public and the environment adequately. Similarly, the counter-reformation story blames "capture" by regulated entities for the failure of agencies to produce rational and productive regulatory policies.

The origins of the counter-reformation "capture" story date back to the late 1970s when neo-conservative commentators identified a "New Class" of social activists who had a strong animus against capitalism and economic growth.\textsuperscript{91} Since the New Class were graduates of the upheavals they did possess."

\textsuperscript{87} \textit{See Cass R. Sunstein}, \textit{Free Markets and Social Justice} ch. 12 (1997) (discussing "health-health tradeoffs").


\textsuperscript{89} \textit{See infra} notes 216-28 & accompanying text (discussing the counter-literature).


\textsuperscript{91} \textit{See Barbara Ehrenreich}, \textit{Fear of Falling: The Inner Life of the Middle Class} 146-60 (1989) (describing the origins of the "New Class" theory).
of the 1960s, it was not surprising to their critics that they "[did] not, on balance, like a free, commercial society." 92 The New Class activists did not seek "to correct the deficiencies of markets, but to transcend markets altogether." 93 Thus, reformers showed "little or no concern for the cost and consequences of [their] pursuit" 94 and had a "positive distaste" for the subject of economics. 95 "[G]overnment regulation [was] not economic policy, but social policy." 96

Moreover, given their strong social orientation, the New Class was prepared to bend scientific analysis to fit their preconception that American industry constituted a social menace either because they were intellectually dishonest or culturally biased. Edith Efron's muck-raking critique of "regulatory science" is an example of the first claim. In her introduction, Efron states: "I bumped into evidence of such hostility to the objective disciplines of science, evidence of so aggressive a rejection of facts and logic, that I could scarcely credit my senses." 97 Mary Douglas and Aaron Wildavsky supported the second, more sophisticated claim in their book, Risk and Culture, which identified as culturally biased the way in which social activists treated technological risks. 98 According to Douglas and Wildavsky, environmentalism was popular because it supported a certain kind of "social criticism"—for example, asbestos poisoning received more attention than skin cancer because it "justifie[d] a particular anti-industrial criticism," whereas "there [was] no obvious way in which the incidence of skin cancer caused by leisure-time sunburn [could] be mobilized for criticism of industry." 99

The New Class activists, who formed the core of the public interest movement, were aided and abetted by those with similar viewpoints found in the press, agencies, and judiciary. Together they constituted an "iron triangle" that was in the "driver's seat" concerning regulatory decisionmaking. 100 In light of this "capture," "government easily [became] an exercise in gratuitous excess." 101 Moreover, such policies did not represent the will of the people, but only the narrow, parochial interests of

93. Weaver, supra note 92, at 56.
94. Weaver, supra note 92, at 52.
95. See Kristol, supra note 92, at 13.
96. Weaver, supra note 92, at 56.
99. Id.
100. See Weaver, supra note 92, at 52.
101. Id. at 57.
the New Class. Indeed, the New Class—the environmentalists and consumer movements—were a threat to the rest of society. As Irving Kristol warned, the New Class

combines a morbid economic ignorance with a driving power lust, and it combines hostility to democracy with the illusion that it speaks for the People. . . If the political ambition of this class is not checked and if it does not acquire the necessary economic education [about the virtues of free enterprise], the dangerous result will be the destruction of freedom.102

Once the Republicans gained control of the White House in the 1980s, New Class rhetoric quickly faded. The story that regulatory beneficiaries had “captured” regulatory policy, however, continued. For some, the capture resulted from old-fashioned interest group politics. In Clean Coal, Dirty Air,103 for example, Bruce Ackerman and William Hassler claim certain provisions of the Clean Air Act were far more costly and far less effective than they might have been as a result of an alliance between environmental groups and Eastern high-sulfur coal producers.104 At the behest of these groups, Congress required coal producers to install expensive scrubbing equipment to remove sulfur from the coal they sold. The requirement put Western low-sulfur coal producers at a competitive disadvantage because it forced Western coal producers to scrub sulfur from their coal although it had a lower sulfur content. The result also prevented the use of low sulfur coal as an anti-pollution strategy, which was a lower cost solution. Similarly, Cass Sunstein attributes the “draconian” provision for regulating toxic substances in OSHA’s mandate “in part” to the “lobbying efforts of [labor] unions.”105

Justice Breyer offers another version of the “capture” story. He attributes “over-regulation” of cancer and other health and safety risks to three mutually reinforcing factors.106 First, there is a pervasive public misconception of risks resulting from the inevitable limits of public attention and selective media coverage. Because of these factors, the public evaluation of “risk problems differs radically from any consensus of experts in the field.”107 Second, Congress passes legislation concerning safety and health risks one statute at a time, which means it “does not look at risk, or safety. . . as a set of related problems that might benefit from a

102. EHRENREICH, supra note 91, at 159 (quoting Irving Kristol) (alteration in original).
104. See id. at 2.
105. SUNSTEIN, supra note 58, at 86.
106. See BREYER, supra note 76, at 10.
107. Id. at 33 (citing Leslie Roberts, Counting on Science at EPA, 249 SCIENCE 616 (1990)).
unified approach.” Moreover, because of public demands to be protected from risk, Congress goes the “last mile” and orders agencies to eliminate all vestiges of risk, even when experts agree that they are not particularly dangerous. Finally, risk regulation is implemented by a “regulatory system in which the inevitable problems of scientific uncertainty are aggravated by distorting and inconsistent assumptions, political pressures, failures of communication and procedural rigidities.” Yet, the public and Congress are “unlikely to disentangle the complex combination of science, fact, value, and administration underlying the agency’s risk conclusion.” As a result, they “overemphasize a risk analysis’s oversimplified ‘bottom line’ while nonetheless suspecting that something about it is arbitrary.” To gain public confidence, an agency is forced to “prove that it has erred on the side of safety” and to adopt “the public’s risk agenda of the moment.” In the end, these factors “tend to create a vicious circle, diminishing public trust in regulatory institutions and thereby inhibiting more rational regulation.”

The “vicious cycle” inhibits more rational regulation because it ties regulators’ hands with detailed legislation based on unreasonable health fears, rather than trusting agency experts to choose appropriate levels of risk regulation. In other words, it is the reformation that is at the heart of the problem. The reformation sought to make regulatory government responsive to citizens and their preferences. For Justice Breyer, the problem is that the regulatory system is too responsive.

C. The Solution

According to the counter-reformation, policymakers listen too much to regulated beneficiaries in determining the nature and scope of regulatory policies. The counter-reformation proposed a twofold answer. First, demands for regulation should be filtered through decisionmaking processes that “rationalize” regulation. This “rationality project,” as Debra Stone has described it, “is the nexus of rational choice theory, microeconomic efficiency models, and cost-benefit analysis.” In Tom

108. Id. at 42.
110. BREYER, supra note 76, at 49-50.
111. Id. at 50.
112. Id.
113. Id. at 33.
114. Deborah A. Stone, Clinical Authority in the Construction of Citizenship, in PUBLIC POLICY FOR DEMOCRACY 45, 46 (Helen Ingram & Stephen Rathgeb Smith eds., 1993).
McGarity's terms, the reformers favor "comprehensive analytical rationality,"\textsuperscript{115} which requires technical analysis—cost-benefit, risk-benefit or decision analysis—of all potential regulatory options. Second, the administrative process should be protected against the excessive demands of regulatory beneficiaries by making the regulatory system less responsive to these demands. At the heart of this objection is an effort to redefine standing doctrine in a manner that reverses some of the access to the courts gained by regulated beneficiaries during the reformation.

The counter-reformation seeks to combat "government failure" by employing for its own purposes three techniques of the reformation—impact statements, "hard look" review and standing. The White House, Congress, and the judiciary have expanded on the concept of "impact statements" to require agencies to use rational decisionmaking tools. The courts use "hard look" review to remand regulatory decisions back to agencies for analytical failures. Finally, the Supreme Court has narrowed the expansive standing doctrine adopted in the reformation to reduce the influence of regulatory beneficiaries on agency decisionmaking.

1. Impact Statements

The counter-reformation seeks to combat "government failure" by requiring regulators to use rational decisionmaking tools. All three branches have contributed to this goal. The President and Congress have imposed numerous obligations on agencies to study the impacts of regulation before rules are promulgated, and legislation is pending in Congress to expand these requirements. For their part, the courts have used aggressive statutory interpretation to require agencies to use risk assessment and other techniques of policy analysis before they act.

a. The White House

Reformers initially chose presidential oversight as the principal procedural vehicle for reform,\textsuperscript{116} and the Reagan and Bush Administrations put these plans into effect. Oversight during the Reagan and Bush Administrations occurred under a series of executive orders that established reporting requirements monitored by the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget.

\textsuperscript{116} See, e.g., AMERICAN BAR ASSOCIATION, COMMISSION ON LAW AND THE ECONOMY, FEDERAL REGULATION: ROADS TO REFORM 2 (1979).
(OMB). Beginning with Executive Order 12,291,117 which required executive agencies to assess the benefits and costs of proposed rules, President Reagan started requiring assessment of family, federalism, and property impacts.118 The Administration also required executive agencies to submit an annual regulatory agenda, and they were prohibited from working on regulations not approved by OIRA.119 The Bush Administration required executive agencies to perform a preliminary cost-benefit analysis to justify placement of a proposed regulation on an agency's regulatory agenda,120 extended Executive Order 12,291 to almost every form of agency action except adjudication,121 and ordered agencies to assess the impact of regulations on civil litigation.122 President Bush also instituted a ninety-day regulatory moratorium in January 1992 and renewed it for another ninety days in April 1992,123 during which time agencies were ordered to reassess previous regulations and report the results to the White House.124 Finally, both administrations established highly visible task forces to reform particular regulations: the Task Force on Regulatory Relief, headed by Vice-President Bush, in the Reagan Administration and the Competitiveness Council, headed by Vice-President Quayle, in the Bush Administration.125

President Clinton has continued executive oversight and to some extent extended it. Executive Order 12,866 requires agencies to assess the costs and benefits of proposed and final rules, establishes a review process similar to that of his predecessors, and extends coverage of the annual regulatory agenda to independent agencies.126 In addition, the President has required agencies to assess, regarding proposed and final rules, the impacts of federalism, civil justice reform, intergovernmental impacts, property

120. See Sidney A. Shapiro, Political Oversight and the Deterioration of Regulatory Policy, 46 ADMIN. L. REV. 1, 8 (1994).
121. See id.
125. See Shapiro, supra note 120, at 11-12.
rights, and environmental justice. Like its predecessors, the Administration also established a highly visible White House regulatory reform effort, although it was oriented towards process changes, rather than specific regulatory relief. Under the guidance of Vice-President Gore, the National Performance Review set out to create a “government that works better and costs less,” including, as one of the key steps, “eliminating regulatory overkill.”

b. Congress

Congress has also been an enthusiastic supporter of the rationality project. The Regulatory Flexibility Act, originally passed in 1980, requires agencies to prepare a regulatory flexibility analysis whenever they propose a rule that may have a significant economic impact on a substantial number of small businesses, organizations, or governments. The Act was significantly amended in 1996, adding, as discussed below, judicial review provisions. The Paperwork Reduction Act, also passed in 1980 and reauthorized in 1995, requires agencies to analyze the necessity of imposing paperwork requirements and gain the approval of OMB to do so. Title II of the Unfunded Mandate Reform Act, entitled “Regulatory Accountability and Reform,” requires federal agencies, before promulgating either a proposed or final regulation that would include a “mandate” resulting in costs over $100 million annually on state, local, or tribal governments or the private sector, to prepare a statement assessing the effect of the regulation.


128. NATIONAL PERFORMANCE REVIEW, CREATING A GOVERNMENT THAT WORKS BETTER AND COSTS LESS: FROM RED TAPE TO RESULTS at i (1993).

129. Id. at 32.


135. 2 U.S.C. § 1532(a) (Supp. IV 1998). Whenever the agency is required to prepare such a statement, the agency must “identify and consider a reasonable number of regulatory alternatives.” Id. § 1535(a).
Since 1994, Congress has attempted to enact a comprehensive set of amendments to the Administrative Procedure Act (APA) that would codify and extend the regulatory analysis requirements imposed by executive order. In March, 1995, the House of Representatives passed the Job Creation and Wage Enhancement Act, which contained extensive and detailed analytical and substantive requirements for agency rulemaking. This legislation was part of the effort to implement the “Contract with America” proposed by House Republicans elected in 1994. The Senate took up its own version of general regulatory reform in the Comprehensive Regulatory Reform Act of 1995, which was also known as the “Dole bill,” after its primary sponsor, then majority leader Senator Robert Dole. This effort was blocked by a filibuster which the Republicans failed to end by two votes. In May 1999, the Senate Governmental Affairs Committee voted to send regulatory reform legislation, sponsored by Senators Fred Thompson (Republican senator from Tennessee) and Carl Levin (Democratic senator from Michigan), to the floor of the Senate. The bill, titled the Regulatory Improvement Act of 1999, requires an analysis of the costs and benefits of proposed and final rules similar to those required by the executive orders. To these requirements, it adds procedures for the conduct of risk assessment and a requirement of “independent” peer review for both cost-benefit and risk assessments of major rules.

In establishing these many obligations to study the impact of regulations before they are adopted, the counter-reformation builds on a key concept from the reformation. As mentioned earlier, the National Environmental Policy Act (NEPA), enacted in 1970, originated the concept of requiring an agency to analyze the impact of regulation before it is adopted. The executive orders, legislation, and proposed legislation all copy NEPA’s concept of an impact statement.

The subsequent analytical requirements differ in one significant way, however, from NEPA. Environmental and other citizen groups have been able to police agency compliance with NEPA by invoking its judicial review provisions, which empower a court to enjoin agency action until

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140. Agencies are required to make Environmental Impact Statements (EIS) before engaging in activities (including rulemaking) that may have a significant effect on the human environment. See 42 U.S.C. § 4332(2)(c) (1994). These EISs describe in some detail the effect the proposed action will have on the environment and the effects that alternatives to the proposed action would have.
there has been compliance with NEPA procedures.\textsuperscript{141} With one exception, the courts lack similar authority to enforce the other analytical requirements. The Executive Orders have precluded judicial review,\textsuperscript{142} and the courts have respected this intent. Title IV of the Unfunded Mandates Act provides for judicial review of the compliance or non-compliance by agencies with some of the regulatory reform requirements, but a court can only order the agency to comply with those requirements after a rule is promulgated.\textsuperscript{143} The original Regulatory Flexibility Act precluded review entirely, but Congress authorized review in 1996 in response to complaints about the ineffective nature of the Act. If an agency fails to comply with required procedures, a court may remand a rule back to an agency and stay enforcement of the rule against small entities.\textsuperscript{144}

Earlier versions of the regulatory reform legislation now pending in the Senate authorized courts to enjoin agency action until there was compliance with the procedures enumerated in the bill, but the latest version has a weaker judicial review provision. According to current legislation, the adequacy of an agency's compliance with the various cost-benefit, risk assessment, and peer review procedures dictated by the legislation would not be subject to judicial review, except that a court would be authorized to remand or invalidate a rule if an agency "failed to provide" for these steps.\textsuperscript{145}

The analytical requirements still serve the rationality project even without judicial enforcement of analysis procedures. First, the existence of the analytical requirements has forced agencies to give economists, risk assessors, and other analysts a central role in agency decisionmaking.\textsuperscript{146} As a result, there is now a constituency within agencies for rational choice theory, cost-benefit analysis, risk analysis and the other analytical techniques favored by adherents to the counter-reformation. Second, OMB oversees agency compliance with the analytical requirements imposed by the executive orders, and the Small Business Administration performs the same function for the Regulatory Flexibility Act. Although the vigor of such review may ebb and flow depending on which party holds the White

\textsuperscript{141} See, e.g., Calvert Cliffs Coordinating Comm., Inc. v. USAEC, 449 F.2d 1109 (D.C. Cir. 1971).
\textsuperscript{142} See, e.g., Exec. Order No. 12,866, sec. 10, 58 Fed. Reg. 51,735 (1993) (Regulatory Planning and Review) (stating that the order is intended "only to improve the internal management of the Federal Government and does not create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States").
\textsuperscript{145} S. 746, 106th Cong. § 627(d)-(e) (1999).
\textsuperscript{146} See McGARITY, supra note 115, at ch. 10.
House, it is still an important element in the rationality project. Finally, the results of the various analyses are placed in the rulemaking record. Thus, when a litigant challenges a rule as "arbitrary and capricious" under the APA, a court will consider the results of analytical studies in resolving this claim. This may lead to a remand or reversal because, as discussed below, judges often employ a heightened level of scrutiny in reviewing agency regulations.

c. The Judiciary

The Supreme Court's decision in *Industrial Union Department v. American Petroleum Institute,* known as the Benzene case, is the fountainhead of efforts to read analytical obligations into agency statutes. OSHA's mandate requires employers to reduce the exposure of employees to toxic substances to the extent that is technologically and economically feasible. Under this mandate, OSHA took the position that it would seek the minimum possible exposure of employees to toxic substances. Another section of OSHA's mandate requires it to adopt regulations that "provide safe or healthful employment and places of employment." A plurality of the Court held that it was implicit in the word safe that OSHA must make a threshold determination that the workers' current level of exposure presented a "significant risk of harm." They remanded OSHA's attempt to reduce employee exposure to benzene because it had skipped this "analytical step," and they suggested that OSHA use mathematical risk assessment models to meet this burden. Thus, the Court "found the words 'significant risk' in a statute that did not use those words in order to

147. OMB review of agency rulemaking was particularly rigorous, and notorious, in the Reagan and Bush Administrations. See Shapiro, supra note 120, at 21-23.
150. See infra notes 170-90 & accompanying text.
153. Id. § 652(8) (emphasis added).
154. See *Industrial Union Dep't*, 448 U.S. at 640-45.
156. See *Industrial Union Dep't*, 448 U.S. at 655.
require the agency to engage in a particular analytical methodology (risk assessment) the statute did not explicitly require.\textsuperscript{157}

The plurality justified its interpretation, in part, by noting that unless it adopted the "significant risk" limitation on OSHA's power, the statute would lack a sufficiently concrete standard for regulation that it "might" violate the nondelegation doctrine.\textsuperscript{158} This doctrine is based on the constitutional requirement that the legislative powers of the government are vested in Congress,\textsuperscript{159} and, although it permits Congress to empower agencies to make rules, it requires that a statute contain limitations that clearly indicate the extent of the agency's power to regulate.\textsuperscript{160} Thus, the plurality suggested that Congress could not constitutionally empower an agency to regulate toxic substances without first using risk assessment to determine whether such substances posed a "significant" risk to the public.

Judge Williams in the D.C. Circuit Court of Appeals has demonstrated how Benzene can be extended to other regulatory situations. In American Trucking Associations, Inc. v. EPA,\textsuperscript{161} for example, he held that the nondelegation doctrine required EPA to find some analytical technique that would indicate when an "adequate margin of safety" had been achieved.\textsuperscript{162} Under the Clean Air Act, Congress required EPA to establish national ambient air quality standards (NAAQS) sufficient to protect the public with an "adequate margin of safety."\textsuperscript{163} Williams refused to affirm standards set by EPA for ozone and particulate matter because the statute did not provide a basis for picking the particular level at which a standard should be set.\textsuperscript{164} The problem, according to Judge Williams, was that the "EPA's explanations for its decisions amount to assertions that a less stringent standard would allow the relevant pollution to inflict a greater quantum of harm on public health, and that a more stringent standard would result in

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\textsuperscript{157} McGarity, supra note 155, at 1402.
\textsuperscript{158} See Industrial Union Dep't, 448 U.S. at 646.
\textsuperscript{159} See U.S. Const. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States. . .").
\textsuperscript{160} See Mistretta v. United States, 488 U.S. 361, 372-73 (1989) (stating that the nondelegation doctrine is satisfied "if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority" (quoting American Power & Light Co. v. SEC, 329 U.S. 90, 105 (1946))).
\textsuperscript{161} 175 F.3d 1027 (D.C. Cir. 1999), modified on reheg by 195 F.3d 4, (1999).
\textsuperscript{162} Id. at 1034-35; see also International Union, UAW v. OSHA, 37 F.3d 665 (D.C. Cir. 1994) (holding that OSHA's interpretation of its mandate to require it to meet several requirements, although not a cost-benefit test, was sufficient to satisfy the nondelegation doctrine); International Union, UAW v. OSHA, 938 F.2d 1310 (D.C. Cir. 1991) (inviting OSHA to adopt a cost-benefit standard to avoid having the court declare its authorization to adopt safety-standards to be a violation of the nondelegation doctrine).
\textsuperscript{164} See American Trucking Ass'ns, Inc., 175 F.3d at 1035.
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less harm.”165 This explanation, however, would justify any level between zero and just below the level “associated with London’s ‘Killer Fog’ of 1952.”166 What was missing was “any determinate criterion for drawing lines.”167 Since prior precedent ruled out requiring a cost-benefit standard to establish the level of exposure, Judge Williams observed, in light of the “power” that EPA “wield[ed] over American life,” it had to develop some “generic unit of harm” that would indicate what constitutes a safe level of exposure.168 Judge Williams remanded the standards back to EPA to give the agency an opportunity to develop analytical criteria sufficient to satisfy the nondelegation doctrine.169

2. “Hard Look” Review

Besides statutory interpretation, the courts have acted to promote rationality by using a judicial review doctrine—“hard look” review—that was invented in the reformation to promote regulation, rather than limit it. The phrase “hard look” review was originated by Judge Harold Leventhal in 1970 as a gloss on the APA’s “arbitrary and capricious” standard of review.170 He observed that a judge’s supervisory function required intervention “not merely in case of procedural inadequacies, or bypassing of the mandate in the legislative charter, but more broadly if the court becomes aware . . . that the agency has not really taken a ‘hard look’ at the salient problems, and has not generally engaged in reasoned decisionmaking.”171 In a subsequent law review article, Leventhal explained the function of “hard look” review was to ensure that agencies did not shirk their statutory responsibilities to protect the environment, particularly in cases where the agency had to balance environmental concerns with other social and economic objectives.172

In Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.,173 the Supreme Court endorsed the idea that courts should examine closely the methodology and substance of agency decisionmaking. An agency’s obligation to avoid arbitrary and capricious

165. Id.
166. Id. at 1036.
167. Id. at 1034.
168. Id. at 1039.
171. Id.
decisions requires it to "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" 174 An agency fails to meet this burden when it has "entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." 175 The Court remanded the rule under review—a decision by the National Highway Traffic Safety Administration (NHTSA) to revoke a prior regulation that required automobile manufacturers to install either air bags or passive restraints in new cars—after minutely examining the evidence in the rulemaking record. 176

In the reformation, judges used "hard look" review to address the possibility that agencies, responding to regulated entities, promulgated less stringent regulation than the rulemaking record justified. The State Farm case actually involved this type of case. In the counter-reformation, this function is reversed. Judges employ "hard look" review to address the possibility that agencies, responding to citizen groups, adopt more stringent regulation than the rulemaking record justifies. 177 To ensure the rationality of agency decisionmaking, courts consider, frequently in painstaking detail, an agency’s factual predicate, analytical methodology, and its chain of reasoning. In fact, the aggressive manner in which "hard look" review has been employed has changed the common understanding of the term. Judge Leventhal used the term "hard look" to describe the agency’s obligation to take a "hard look" at the issues before it, but the term is now commonly used "to describe the relatively rigorous review that courts appl[y] to agency decisions to ensure that these decisions [are] not arbitrary and capricious." 178

Consider, for example, the lockout/tagout standard promulgated by the Occupational Safety and Health Administration (OSHA). 179 When the rule

174. Id. at 43 (quoting Burlington Truck Lines v. United States, 371 U.S. 156, 168 (1962)).
175. Id.
176. See id. at 58.
177. See, e.g., Corrosion Proof Fittings v. EPA, 947 F.2d 1201 (5th Cir. 1991); Gulf S. Insulation v. Consumer Prod. Safety Comm’n, 701 F.2d 1137 (5th Cir. 1983); CPC Int’l, Inc. v. Train, 515 F.2d 1032 (8th Cir. 1975).
179. See 29 C.F.R. §§ 1910.147 (1996). The rule addressed the problem that, each year, 150 workers are killed and many more receive serious injuries when machines under repair are accidentally started. OSHA required employers to lock machines under repair and to provide the only key to the employee working on the machine. When installation of a lock would require that a machine be dismantled, rebuilt, or replaced, OSHA required a tagout, the posting of a sign warning that a machine
was reviewed, Judge Stephen Williams, writing for a three-judge panel, determined that OSHA had done an inadequate job of determining compliance costs. OSHA had estimated that the rule would likely save 122 lives, which meant that the standard cost $1.2 million per fatality avoided. When the economic benefit to employers of a reduction in injuries, such as fewer lost production days, was also taken into account, the cost of each fatality and injury avoided fell to $0.19 million. When OSHA included the benefits to workers from injuries that would be avoided, it found that the cost per injury was "extremely low." Based on this data, the agency concluded that the rule was highly cost-effective. Judge Williams objected, however, that OSHA had not presented industry-by-industry comparisons of costs and benefits and had failed to explain its logic for failing to undertake this calculation. He speculated that there might be some industries where the costs of compliance were relatively high and the benefits relatively low. Without "disaggregated" data, Judge Williams believed that judges had no way of knowing whether the standard was justified.

Judges have also acted to protect their prerogative to use "hard look" review. Agencies have sometimes avoided judicial review, as well as the analytical requirements imposed by Congress and the President, by using non-legislative or procedural rules as the method of adopting a new policy. The APA does not require rulemaking procedures for either non-legislative or procedural rules, and the analytical requirements do not

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180. See International Union, UAW v. OSHA, 938 F.2d 1310, 1322 (D.C. Cir. 1991). Judge Williams remanded the rule back to OSHA to give it the opportunity to clarify whether a cost-benefit standard applied to workplace safety. See id. at 1325; see supra note 163 (referring to this aspect of the case). Because he anticipated that OSHA would defend the standard under a cost-benefit test, he warned the agency that the existing record did not support the rule on that basis. See International Union, 938 F.2d at 1322. This second conclusion illustrates the application of hard look review.


182. See id.

183. See id.

184. See International Union, 938 F.2d at 1322.

185. See id.

186. See id.

187. The APA recognizes two types of non-legislative rules. See 5 U.S.C. § 553(b) (1994). Interpretive rules are "issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers." ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 30 n.3 (1947), available at Florida State University College of Law, Administrative Procedure Database (visited Apr. 19, 2000) http://www.law.fsu.edu/library/admin/1947iii.html. A policy statement is "issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power." Id. An agency can promulgate non-legislative rules without complying with the APA's rulemaking procedures because the rules are not legally binding on the public or an agency.

188. See 5 U.S.C. § 553(b).
apply to these types of rules. Recently, however, the courts have begun to cut off this avenue of escape. A recent decision in the D.C. Circuit, for example, rejected plausible arguments by OSHA that a directive to its inspectors, named the "Cooperative Compliance Program" (CCP), was a procedural or non-legislative rule. The D.C. Circuit has also recently held once an agency gives a regulation an interpretation in a non-legislative rule, it can only change that interpretation by using the APA's rulemaking procedures, even though the non-legislative rule was originally promulgated without using rulemaking procedures.

3. Standing

Judges employ "hard look" review to ensure that agencies are not overly responsive to irrational demands for regulation. With the same goal, the Supreme Court has interpreted a number of administrative law doctrines that preclude citizen groups from obtaining judicial review. The Court has adopted a less stringent test for when Congress has directly or impliedly precluded judicial review on behalf of regulatory beneficiaries, and it has prevented beneficiaries from attacking regulations before they are enforced on the grounds of ripeness. The Court's primary vehicle to cut off judicial review on behalf of regulatory beneficiaries, however, has been standing doctrine.

Using standing, the Court has limited the access of regulatory beneficiaries by increasing the level of proof that a litigant must have that

190. See Alaska Prof'l Hunters Ass'n v. FAA, 177 F.3d 1030, 1034 (D.C. Cir. 1999).
191. Compare Block v. Community Nutrition Inst., 467 U.S. 340, 351 (1984) (reasoning that § 701(a)(1) of the APA precludes judicial review when a "congressional intent to preclude judicial review is 'fairly discernible' in the detail of the legislative scheme"), with Abbott Lab. v. Gardner, 387 U.S. 136, 141 (1967) (stating that "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review" under § 701(a)(1)).
192. See Heckler v. Chaney, 470 U.S. 821, 821 (1985) ("An agency's decision not to take enforcement action is presumed immune from judicial review under § 701(a)(2) [of the APA]."); see also Webster v. Doe, 486 U.S. 592, 608 (1988) (Scalia, J., dissenting) (recognizing a "federal common law" that "mark[s] out, with more or less precision, certain issues and certain areas that [are] beyond the range of judicial review").
193. See Reno v. Catholic Servs. Inc., 509 U.S. 43, 43-44 (1993) (denying aliens the right to challenge regulations that narrowed their eligibility to remain in the country until after they applied to remain in the country and were denied); Lujan v. National Wildlife Fed'n, 497 U.S. 871, 873 (1990) (refusing to permit litigants to seek review of land policies promulgated by the Bureau of Land Management (BLM) in a "wholesale" manner and requiring instead that litigants challenge the policies one-by-one as they were applied regarding specific parcels of land).
194. Two recent standing decisions of the Supreme Court appear to reverse the trend discussed in this section. See infra notes 195-201 and accompanying text (discussing recent cases and reasons for the reversal).
it was injured by an agency's regulatory decision and that prevailing in the
law suit will redress that injury. A litigant must prove a "concrete and
particularized" injury that is "actual or imminent," rather than "conjectural
or hypothetical," that is "fairly . . . traceable to the challenged action" of
the agency being sued. 195 It also must be "likely," rather than
"speculative," that the injury will be "redressed by a favorable
decision." 196 Regarding both elements, the Court has rejected probabilistic
claims by regulatory beneficiaries, even if they are logical, unless the
linkages are straightforward and obvious. In Allen v. Wright, 197 for
example, the Court held that the parents of black children did not have
standing to challenge an Internal Revenue Service (IRS) policy permitting
racially discriminatory private schools to receive favorable tax treatment. 198
The parents argued that, if the Court struck down the IRS benefit, students
would likely move back into the public schools as tuition increased in
private schools because of the loss of the favorable tax treatment. 199 The
Court held that the chain of causation underlying this argument was too
speculative because the plaintiffs could not prove that white students might
not stay in private schools despite increased tuition. 200

The Court has heightened the proof requirements for standing in cases
like Allen and others by defining injury as whether or not someone has in
fact been injured. In cases where the litigant is challenging the failure of
the government to regulate sufficiently, the plaintiff will often have a hard
time showing that any particular regulatory intervention will help in a
particular way. The reason, as Cass Sunstein has noted, is that the

injury is not of the discrete and individual sort typical at common law. Instead,
it is regulatory in nature, and best characterized as systemic, collective, or
probabilistic. Regulatory regimes are typically designed to reduce risks of injury
that affect large numbers of people. The connection between the risk and any
actual injury to any person cannot readily be established either before or after the
fact. The consequences of greater enforcement for any particular member of the
class of beneficiaries are often unavoidably speculative, even though the
systematic impact—for classes of citizens suffering from inadequate
administrative protection against product risks, discrimination, fraud, or other
harm—is substantial. 201

196. Id. at 561 (quoting Simon v. Eastern Kent. Welfare Rights Org., 426 U.S. 26, 38, 43
(1976)).
198. See id. at 737-38.
199. See id. at 758.
200. See id. at 757-59.
201. Cass R. Sunstein, Standing and the Privatization of Public Law, 88 COLUM. L. REV. 1432,
1458 (1988).
Thus, the effect, if not the intent, is to roll back standing doctrine to its status before the reformation, when regulatory beneficiaries generally were not able to sue. The Court’s narrowing of standing doctrine is not compelled by either historical precedent or the framers’ intent.202 Indeed, the hallmark of the Court’s standing cases during the reformation was its willingness to accept “intangible and widely shared statutory injuries” as sufficient to establish standing to argue that an agency had failed to regulate sufficiently.203

The Court has not justified this shift except to attribute it to the constitutional demand that a case and controversy exist. However, Justice Scalia, the architect of this shift,204 has spoken out against courts superintending agency compliance with statutory commands to protect the public, and he has blamed the expansion of standing for this result.205 Moreover, Justice Scalia has sought to justify the Court’s standing decisions on the ground that the principles of separation of powers require a narrow standing doctrine, although these comments have operated as dicta in the opinions in which they were made.206 According to Justice Scalia:

The question . . . is whether the public interest in proper administration of the laws (specifically, in agencies’ observance of a particular, statutorily prescribed procedure) can be converted into an individual right by a statute . . . that permits all citizens (or, for that matter, a subclass of citizens who suffer no distinctive concrete harm) to sue . . . . To permit Congress to convert the undifferentiated public interest in executive officers’ compliance with the law into an “individual


[historical material demonstrates that—for the first 150 years of the Republic—the Framers, first Congresses, and the Court were oblivious to the modern conception either that standing is a component of the constitutional phrase ‘cases or controversies’ or that it is a prerequisite for seeking government compliance with the law.


203. Nichol, supra note 202, at 1147 (stating that, during the reformation, the Supreme Court “had consistently accepted intangible and widely shared statutory injuries as the basis for jurisdiction”).

204. See id. at 1142.


right” vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive’s most important constitutional duty, to “take Care that the Laws be faithfully executed.”

Thus, for Justice Scalia, the Constitution itself recognizes the potential for “capture” of policy by regulatory beneficiaries, aided by friendly judges, and it protects the President against shifts in power.

If one accepts the logic of the reformation, the move to restrict access to judicial review reduces the influence of regulatory beneficiaries. The reformation expanded standing to ensure that agencies paid attention to the arguments and data submitted by citizen groups. If an agency ignored this input, a judge could determine the agency had failed to take a “hard look” at the problem before it. When citizen groups can sue, they can use the threat of seeking review as leverage in bargaining with the agency (and with regulated entities) concerning a regulatory outcome. To the extent that the courts now prevent such groups from suing, their influence is thereby diminished.

IV. RESPONSES TO THE COUNTER-REFORMATION.

The counter-reformation has utilized three key concepts of the reformation—the impact statement, “hard look” review, and standing—to reduce the influence of regulatory beneficiaries in the regulatory process. Impact statements are used to expose the excessive and irrational demands for regulation made by citizen groups. “Hard look” review is used to prevent agencies from promulgating more stringent regulation than is rationally justified by the rulemaking record. Restrictions on standing weaken the influence of regulatory beneficiaries by denying them the bargaining leverage that the threat of a law suit establishes.

The counter-reformation has provoked two new stories by those who favor greater government regulation to protect citizens and the environment. One story, the restoration, seeks to restore the reformation by blaming the counter-reformation for denying citizens and the environment appropriate regulatory protection. If the restoration cannot reverse these developments, it at least seeks to blunt their impact. The other story, the reconciliation, favors the activist government of the reformation, but it also accepts many of the criticisms of the counter-reformation. To reconcile these positions, it rejects the solutions of the counter-reformation. Instead, it seeks regulatory methods that rely on

207. Id. at 576-77.
cooperation and participatory decisionmaking processes that include regulators, regulated entities, and citizens.

A. The Restoration

The restoration story blames the counter-reformation for government's failure to protect the public and the environment in the manner envisioned in the reformation. This story denies that most government decisions are ill-founded and irrational and that regulatory issues are susceptible to the types of rationalistic decisionmaking tools favored by the counter-reformation. These tools fail because, at bottom, regulatory decisions require the resolution of political and value issues that cannot be quantified or be resolved by objective analysis. In light of these claims, the "rationality" project is a "Trojan Horse" designed to slow regulatory decisionmaking and hinder the government's efforts to protect the public and the environment.

1. The Problem

The restoration has identified two problems with the counter-reformation. During the 1980s, White House oversight invited "capture" of the administrative process by regulated entities. In addition, the impact of "hard look" review and impact statements has been to slow regulatory decisionmaking to the point where regulators are unable to protect the public and the environment. In the words of the critics, there is "paralysis by analysis."\textsuperscript{208}

Opponents of the Reagan Administration's effort to impose executive oversight attacked the legitimacy of the process arguing that it unreasonably delayed beneficial public and environmental protection, placed decisionmaking authority in the hands of OMB bureaucrats who lacked regulatory expertise and experience, and operated in complete secrecy, which hid the Administration's efforts to make behind-the-scenes deals with regulated entities to weaken regulation.\textsuperscript{209} The fact that the Administration established a high level project named the "Task Force for Regulatory Relief" added to the credibility of the last claim. Congressional

\textsuperscript{208} See Thomas O. McGarity & Sidney A. Shapiro, OSHA's Critics and Regulatory Reform, 31 Wake Forest L. Rev. 587, 623-32 (1996) (discussing extensive list of regulatory dysfunctions associated with a cost-benefit approach to setting occupational and health safety standards, including paralysis by analysis and overreliance on unverified industry data).

Democrats responded by attempting to mandate open-government procedures for executive oversight, but these were successfully opposed for the most part by the Reagan and Bush Administrations. The criticisms of White House oversight carried the message that executive oversight was not an attempt to establish more rational policy, but an effort to "capture" government decisionmaking for the benefit of regulated entities.

More broadly, the restoration has focused on what has come to be known as the "ossification" of rulemaking. This term, coined by E. Donald Elliott, a former General Counsel of EPA, refers to the burdensome and rigid nature of the rulemaking process as compared to rulemaking in the 1970s. The restoration attributes the ossification to the "assortment of analytical requirements [that] have been imposed on the simple rulemaking model, and evolving judicial doctrines [that] have obliged agencies to take greater pains to ensure that the technical bases for rules are capable of withstanding judicial scrutiny." The presidential and congressional requirements to analyze potential and final rules slow rulemaking because of the cumulative burden they impose. Mark Seidenfeld has counted 111 potential steps that an agency might have to complete in order to promulgate a rule. "Hard look" review contributes to ossification because it raises the potential that any analytical error may cause a court to remand a rule. Tom McGarity explains, "[f]ully aware of the consequences of a judicial remand, the agencies are constantly 'looking over their shoulders' at reviewing courts in preparing supporting documents, in writing preambles, in responding to public comments, and in assembling the rulemaking 'record.'" In the end, as one critic concludes, "[w]hile many of the [solutions proposed in response to the counter-reformation] will no doubt ease the burden of regulation on private entities, they will invariably reduce the protections that the existing statutes currently afford to citizens and environment."

210. See Shapiro, supra note 120, at 22-23.
211. See McGarity, supra note 155, at 1385 (attributing the term ossification to E. Donald Elliott).
212. Id. at 1385; see also Richard J. Pierce, Jr., Seven Ways to Deossify Agency Rulemaking, 47 ADMIN. L. REV. 59, 65-66 (1995).
2. The Cause

The restoration attributes the failure of the regulatory process to the widespread, but undeserved, credence given to the argument of "government failure." To counter the studies and articles that claim to have found overregulation and other forms of irrational policy, the restoration story cites a counter-literature that concludes such claims are often overstated, if not unproven. This counter-literature emphasizes that most regulatory decisions cannot be resolved on the basis of rational decisionmaking methods, such as risk assessment or cost-benefit analysis, because decision-makers lack reliable data to employ such techniques. To overcome this gap, analysts employ their own value judgments, which are at odds with the goals and purposes of the reformation.

Lisa Heinzerling's recent article, *Regulatory Costs of Mythic Proportions*, is a good example of this restoration literature. She challenges the accuracy of statistics used by authors, such as Professor Sunstein and Justice Breyer, to establish their claim of overregulation. These authors (and most other critics of risk regulation) rely on a study done by John Morrall, an OMB economist. Using different key assumptions, Heinzerling recalculates the cost of regulations studied by Morrall and finds that there is very little evidence of overregulation. She then establishes that the choice of assumptions used in calculating regulatory costs involves difficult and controversial value choices. She concludes that a "normatively plausible perspective" on these value choices "would lead one to a sympathetic, rather than unsympathetic, account of current regulation."

An article by Tom McGarity and myself also illustrates the nature of the restoration literature. We challenge John Mendeloff's "overregulation" causes "underregulation" thesis. After examining the "questionable methods of calculation" used by Mendeloff, we conclude that

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217. See id. at 1984.
218. See id. at 1983.
219. See id. at 1985.
220. See id. at 2070 ("In order to choose between [Morrall's values choices or mine], one must instead grapple with a range of fundamental issues, such as the relative worth of lives saved today and lives saved tomorrow, the proper response to scientific uncertainty, and the purposes of environmental law.").
221. Id.
"[g]iven the vast technical uncertainties and anchorless moral judgements reflected in the cost-benefit calculations for health and safety standards, basing important public policy decisions on these quantitative cost-benefit comparisons is patently unreasonable."224 Further, we disagree with Mendeloff's claim that weaker OSHA regulations will lead to more protection of workers. Mendeloff's claim is premised on the assumption that industry will not fight (or fight as vigorously) against more reasonable regulations, but OSHA's actual experience suggests "[i]ndustry will oppose both weak and strong regulations with equal vigor as long as it is in its financial interest to do so."225 Therefore, we conclude "the solution to industry opposition is to make it easier for OSHA to regulate, rather than yielding to industry opposition by abandoning the goals of occupational safety and health regulation."226

Thus, the restoration literature disputes claims of overregulation because such claims depend on value choices that do not reflect the premises of the reformation. Claims of overregulation depend on, in Wendy Wagner's felicitous phrase, a "science charade."227 This insight has two important ramifications. First, it discredits the counter-reformation by denying the possibility that regulatory decisions can be resolved by rationalistic decisionmaking methods. This theme relates back to the reformation. As noted earlier, the 1960s reformers were Progressive in seeking active government intervention, but they had rejected the Progressives' faith in neutral expertise. By comparison, the counter-reformation seeks to reestablish this discredited approach to government by imposing risk assessment, cost-benefit analysis, and other forms of expert decisionmaking.

Second, the importance of value assumptions in rationalistic decisionmaking means regulatory decisions are inherently political. As Tom McGarity warns:

Although society should reexamine the goals that it has set for itself in some regulatory contexts, that is at bottom an intensely political inquiry about which there is very little consensus in either the community of scholars or the public at large. To implement [the reforms of the counter-reformation] is to impose the values of one fairly small, albeit influential, segment of society on the rest of us."228


225. Id. at 751.

226. Id.


228. McGarity, supra note 215, at 11.
The political nature of regulatory decisions also relates back to the reformation. Given the inherently political nature of such decisions, they should be the subject of the procedures adopted in the reformation to ensure the participation of regulatory beneficiaries and the public accountability of agency decisionmaking.

3. The Solution

Since regulatory decisionmaking is not nearly as imperfect as the counter-reformation maintains, the restoration would roll back the reforms implemented in response to the counter-reformation. The restoration has had some success concerning impact statements and standing, but it is a long way from reestablishing the reformation.

a. Impact Statements

The restoration, as noted, attacked executive oversight because it was conducted in an unaccountable manner. When President Clinton took office, he ended much of the secrecy that had marked earlier White House oversight.229 This achievement, however, was only a partial victory for the restoration. As discussed earlier,230 the President continued executive oversight and its reliance on the analytical decisionmaking approach favored by the counter-reformation.

The restoration has opposed legislation pending in the Senate (described earlier)231 that would institutionalize and extend the analytical requirements now imposed by executive orders. The current bill, however, is less ambitious than an earlier version, which was nearly one-hundred pages in length and sought nothing less than a "comprehensive" regulatory reform.232 The current legislation, which more modestly seeks "regulatory improvement," is narrower in its aspiration and scope.233 While the pending bill is still objectionable to the restoration, it is a compromise that reflects the objections raised by opponents of the "rationality project."

In particular, Congress has eliminated (for now anyway) an earlier provision in the bill that would have authorized the courts to enjoin agency action until there has been compliance with legislation's analysis.

230. See supra notes 126-27 and accompanying text.
231. See supra notes 136-40 and accompanying text.
requirements. Representatives of regulatory beneficiaries fear that once the courts have this authority, the opponents of regulation will be able to block the enforcement of rules by challenging agency compliance with analysis procedures. They argue that this is a likely possibility because of the difficulty of measuring the types of impacts that the agencies are required to study. Since cost-benefit studies and risk assessments are notoriously difficult to undertake, opponents predict continuous litigation over whether an agency has done an adequate job of preparing such an analysis. Environmental groups, in particular, have good reason to forecast this result. They have often been successful in using NEPA litigation to slow, and even stop, governmental projects that they opposed.

More generally, the fervor for regulatory reform evident in the House of Representatives in the heyday of the “Contract for America” has abated along with talk of a “revolution” in American government. Still, regulatory reform legislation may eventually be passed, particularly if a Republican president is elected in the 2000 elections.

b. Standing

Two recent Supreme Court standing cases may be the restoration’s most conspicuous success to date. In Federal Election Commission v. Akins, the Court allowed opponents of the American Israel Public Affairs Committee (AIPAC) to challenge a ruling by the Federal Election Commission that AIPAC did not have to comply with recordkeeping requirements imposed by the Federal Election Committee Act. The plaintiffs argued they were injured by the decision because it deprived them of information concerning AIPAC’s activities that would have been revealed if AIPAC had to comply with the recordkeeping requirements. In his dissent, Justice Scalia argued the plaintiffs’ injury—the unavailability of information—was abstract and indefinite because it was “precisely the same as the harm caused to everyone else.” Because the injury was shared by every voter, Justice Scalia decided that the plaintiffs had not established a “particularized” and specific injury that created a case and controversy. The majority, by comparison, held that, although the injury was widespread, that fact did not make it abstract and indefinite.

235. See id. at 26.
236. See id. at 21.
237. Id. at 35 (Scalia, J., dissenting).
238. See id. (Scalia, J., dissenting).
239. See id. at 24.
The injury was "concrete" because the plaintiffs were interested in particular information that would be helpful to them as voters.\textsuperscript{240} In \textit{Friends of the Earth, Inc. v. Laidlaw Environmental Services},\textsuperscript{241} the Court permitted an environmental group to sue Laidlaw and obtain a civil penalty for the firm's failure to limit its water pollution.\textsuperscript{242} Justice Scalia dissented because the plaintiffs had failed to prove that pollution actually caused any harm to the water that might have adversely impacted the plaintiffs.\textsuperscript{243} The majority noted, however, that the "relevant showing for purposes of Article III standing . . . is not injury to the environment but injury to the plaintiff."\textsuperscript{244} The plaintiffs had filed affidavits from their members indicating that the water near the pollution looked and smelled polluted and that they were afraid to engage in recreational activities, such as boating and swimming, near the pollution.\textsuperscript{245} The majority held that these averments were sufficient proof that the plaintiffs had suffered an aesthetic and recreational injury.\textsuperscript{246} The majority also held that, "[t]o the extent that [civil penalties] encourage defendants to discontinue current violations and deter them from committing future ones, they afford redress to citizen plaintiffs who are injured or threatened with injury as a consequence on ongoing unlawful conduct."\textsuperscript{247}

These decisions reverse the anti-standing trend in the Court's counter-reformation cases. \textit{Akins} was an expansion of standing doctrine because the Court had not previously recognized an "informational" injury as sufficient to obtain standing. The \textit{Laidlow} majority assigned a burden of proof concerning "injury" that was considerably easier to meet than the one favored by Justice Scalia. Justice Scalia had sought a burden of proof—prove harm to the water that harmed the plaintiffs—that may have entirely prevented lawsuits of the type filed in \textit{Laidlow}. The difficulty with Justice Scalia's approach is that proof that one source of pollution is responsible for harming a body of water is not easily obtained. Just as importantly, the Court's ruling on redressibility may have saved citizen suits from becoming extinct. In an earlier case, the Court had held that an environmental group lacked standing to seek injunctive relief if a company had ceased violating the law by the time the lawsuit was brought.\textsuperscript{248} This

\textsuperscript{240} See id.
\textsuperscript{241} 120 S. Ct. 693 (2000).
\textsuperscript{242} See id. at 700.
\textsuperscript{243} See id. at 713 (Scalia, J., dissenting).
\textsuperscript{244} Id. at 704.
\textsuperscript{245} See id. at 704-05.
\textsuperscript{246} See id. at 705.
\textsuperscript{247} Id. at 706-07.
meant that the only basis to bring a citizen suit concerning wholly past violations was to seek civil damages. Had the majority held that this remedy was not sufficient to support standing, it would have been the end of citizen suit enforcement actions in any case involving wholly past violations.

Whether these decisions indicate that the tide has turned in the Supreme Court against restricting standing remains to be seen. In both Akins and Laidlow, Justice Scalia renewed his claim, described earlier, that restrictive standing is necessary to protect separation of power principles. In Laidlow, Justice Kennedy, who concurred in the result, indicated that he was reserving judgment on the impact of Article II on standing because it was not raised or briefed in the case.

B. Reconciliation

The restoration seeks to restore the reformation by blaming the counter-reformation for denying citizens and the environment appropriate regulatory protection. It seeks to reestablish the capacity of regulatory beneficiaries to influence regulatory policy through the procedural innovations adopted in the reformation.

Other regulatory reformers tell a different story. On the one hand, they oppose a restoration because they accept many of the criticisms of regulation posed by the counter-reformation. On the other hand, they oppose the counter-reformation’s procedural solutions because they recognize, along with the restoration, that these solutions can impede activist government favored by a majority of citizens. Having a foot in both camps, favoring active government, but seeking more rational policies, these reformers propose a reconciliation of the two positions. In the reconciliation, deliberative, democratic methods of decisionmaking replace adversarial approaches and flexible methods of regulation replace traditional command-oriented approaches.

1. The Problem

In the reconciliation, the problem is the reformation and the counter-reformation. The reformation led to excessive and irrational regulation, but

249. See supra note 206 and accompanying text.
251. 120 S. Ct. at 719 (Kennedy, J., concurring).
the counter-reformation has stymied regulation and prevented the government from protecting the public.

These themes are evident in two prominent proposals for a reconciliation. In their book, Responsive Regulation,252 Ian Ayres and John Braithwaite claim there is a “crisis in confidence” brought about by attacks on government from the right and the left ends of the political spectrum.253 While critics on the right claim that regulation is an “inefficient and stifling force,” critics on the left find it is “inefffectual or coopted.”254 Reform is stymied because these different perspectives lead to “strongly divergent proposals for reform.”255 What is necessary, Ayres and Braithwaite conclude, is a regulatory process that “transcend[s]” the existing approaches.256 In her article, Collaborative Governance in the Administrative State,257 Jody Freeman also finds the administrative state in a “state of crisis.” Her diagnosis of the problem is also similar. The public is harmed by burdensome “rule-bounded” regulation, but it is also harmed by rulemaking ossification.

2. The Cause

The reconciliation believes that the public is harmed by the lack of regulation as well as regulation that is irrational and poorly designed. The adversarial procedures favored by the reformation and the counter-reformation are the cause of this unsatisfactory result. In their respective efforts to prevent capture by the other side, regulated entities and beneficiaries have missed the opportunity to deliberate together to find rational, mutually acceptable policy outcomes. Instead of seeing regulatory issues as mutual problems that the country must solve, people in the two camps advocate for their own preferred policy outcome. Thus, the mutual distrust of regulated entities and beneficiaries have produced the classic prisoner’s dilemma. Each side, seeking to prevent capture by the other side, insists on procedures and regulatory policies that are less optimal than what could be obtained if the two sides engaged in cooperative decisionmaking.

253. Id. at 158.
254. Id.
255. Id.
256. Id.
The reconciliation's opposition to the pluralistic interest group system favored by the reformation can be traced to the interest of Jane Mansbridge, among others, in moving "beyond adversarial democracy." Mansbridge contrasts a participatory democracy, which she calls "unitary," based on agreed consensus, with a representative, competitive model, which she calls "adversary," based on a "majority rules" principle. She favors creating unitary democracy, where possible, as a remedy to the participatory lack of interest of citizens in politics and public decisionmaking. "As a people," she observes, "we in America are starved for unitary democracy." She understands, but disputes, the argument that it is not possible to obtain consensus, which she distinguishes from unanimity, about policy issues. Mansbridge proposes, however, that there are circumstances in a democracy where members of the polity can have common interests, and that to "maintain its legitimacy, a democracy must . . . embrac[e] both unitary and adversary forms, becoming neither and absorbing neither, but holding them together so that when circumstances warrant, the constituent forms continue to appear." Ultimately, the goal is to increase reliance on non-adversarial approaches to public decisionmaking. "[P]reserving unitary virtues," Mansbridge concludes, "requires a mixed polity—part adversary, part unitary—in which citizens understand their interests well enough to participate effectively in both forms at once."

Those who favor participatory democracy also disfavor the "rationality project." As Peter DeLeon explains, a utilitarian perspective "will, in practice, quickly distance itself from direct citizen participation . . . . This . . . orientation . . . would find that the parochial, individual citizen (especially in larger, unmonitored numbers) cannot themselves be trusted to reach an equitable estimation of the utilitarian catchword, 'the greatest good for the greatest number.'" The vast majority of policy analysts, DeLeon continues, have left the "participatory branch of American democratic theory relatively untouched as they migrate toward the utilitarian tent, seeking the convenience and prestige that defends and

258. JANE J. MANSBRIDGE, BEYOND ADVERSARY DEMOCRACY (1980); see also AMY GUTMANN & DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT 1 (1996) (proposing "deliberative democracy").
259. MANSBRIDGE, supra note 258, at 3-5.
260. Id. at 301.
261. Id. at 300.
262. Id. at 302.
264. Id. at 49.
utilizes their technical expertise over lay opinion."265 The opposition of DeLeon and many others to the rationality project is not surprising. As noted earlier, the counter-reformation supports the "rationality project" precisely because it filters the demands of citizens and makes it less likely that policy decisions will reflect these preferences.266

3. The Solution

The "solution" proposed by the reconciliation follows directly from its diagnosis of "adversarial procedures" as the cause of both overregulation and underregulation. Following Mansbridge, the restoration attempts to move beyond adversarial procedures in those circumstances where it is likely that the participants have common interests and where face-to-face negotiations are feasible. Thus, the restoration favors more cooperative forms of regulation and more reliance on participatory forms of decisionmaking. This section considers three blueprints for the restoration and discusses how they have influenced recent developments in the administrative process.

a. Reconciliation Proposals

Three recent proposals for a new approach to the administrative process indicate how the reconciliation might proceed. There is "responsive regulation," "collaborative regulation," and "civic environmentalism."

Ayres and Braithwaite propose to transcend the debate between the reformation and the counter-reformation by adopting "responsive regulation." This requires that government seek, in the first instance, to cooperate with regulatory entities in finding and implementing regulatory solutions, and that government reserve commanding regulatory solution for situations when regulated entities demonstrate that they will not cooperate.267 Although regulatory cooperation, backed if need be by government enforcement, can make regulation more rational, Ayres and Braithwaite worry that regulatory cooperation will instead encourage the "evolution of capture and corruption."268 They therefore propose that

265. Id. at 57.
266. See supra notes 114-15 and accompanying text.
268. Id. at 54.
government must foster the participation of regulatory beneficiaries, a form of decisionmaking that they called "tripartism."\textsuperscript{269}

According to Ayres and Braithwaite, government should adopt a "pyramid" of regulatory approaches that make cooperation the first choice in regulation.\textsuperscript{270} The government's first option at the bottom of the pyramid is "self-regulation." Making this option the first choice recognizes that corporations operate under certain market and public pressures that often lead them to protect citizens and the environment. When self-regulation is not adequate, the second step is "enforced self-regulation" in which the government compels companies to write a set of rules "tailored to the unique set of contingencies facing that firm."\textsuperscript{271} The government would then audit firms to ensure that they lived up to their commitments and punish firms if they failed to meet those commitments. By localizing regulation in this manner, Ayres and Braithwaite address criticisms that government regulation is inflexible and unreasonable, while maintaining activist government. Since "enforced self-regulation" would not work in every regulatory context, the government should move up the pyramid to more traditional forms of regulation, such as "command regulation with discretionary punishment"\textsuperscript{272} if need be. By placing traditional regulation at the top of the pyramid, however, Ayres and Braithwaite indicate it should be used in fewer situations than self-regulation or enforced-self-regulation.

Having responded to the counter-reformation's criticisms of regulation as irrational and inflexible, Ayres and Braithwaite then propose "tripartism" to address the danger of "capture" that was the focus of the reformation. This solution is necessary because the methods of preventing regulatory capture favored by the reformation can lead to the very regulatory inflexibility that Ayres and Braithwaite seek to prevent. They explain:

Wide discretion "presents a real danger of corruption and capture." But narrow discretion results in rulebook-oriented regulation that thwarts the search for the most efficient solutions to problems like pollution control. When the reward payoff for cooperation is low as a result of such confining discretion, then the evolution of cooperation is unlikely.\textsuperscript{273}

\textsuperscript{269} Id.
\textsuperscript{270} Id. at 39.
\textsuperscript{271} Id. at 106.
\textsuperscript{272} Id. at 39.
\textsuperscript{273} Id. at 56 (citations omitted).
Thus, the challenge is "to allow discretion to be wide, but to replace narrow rule-writing to control capture with control by innovative accountability for the exercise of wide discretion."\textsuperscript{274} The answer, they conclude, is in a "republican" form of tripartism, a process "in which the relevant public interest groups (PIGs) become the fully fledged third party in the game."\textsuperscript{275}

Jody Freeman has proposed a model of "collaborative governance" that adds more texture to the reconciliation skeleton sketched by Ayres and Braithwaite.\textsuperscript{276} Like Ayres and Braithwaite, she proposes cooperation between regulators, regulated entities, and regulatory beneficiaries. She explicitly rejects the adversarial, interest group pluralism established by the reformation and favored by the restoration.\textsuperscript{277} Instead, collaborative governance serves the goals of "efficacy and legitimacy" by reformulating the administrative process to be "a problem-solving exercise in which parties share responsibility for all stages of the rule-making process, in which solutions are provisional, and in which the state plays an active, if varied, role."\textsuperscript{278} At the same time, collaborative governance is the "activist" government favored by the reformation. This approach "should not be mistaken for a system in which the agency withdraws from active duty."\textsuperscript{279} It "is not merely an umpire, nor need it be a pushover in the face of obstructionist tactics or recalcitrant noncompliance."\textsuperscript{280}

Collaborative governance leads to more "efficient" regulation—that is, more rational regulation—for two reasons. First, multi-stakeholder processes are more likely than the traditional rule-making processes "to be sites at which regulatory problems are redefined, innovative solutions [are] devised, and institutional relationships [are] rethought."\textsuperscript{281} This claim rests on the republican principle that "unanticipated or novel solutions are likely to emerge from face-to-face deliberative engagement among knowledgeable parties who would never otherwise share information or devise solutions together."\textsuperscript{282} Second, the "business" of agencies is "regulatory research and development," rather than regulatory decisionmaking, which requires "an ethic of experimentalism in which

\textsuperscript{274} Id.
\textsuperscript{275} Id.
\textsuperscript{276} See generally Freeman, supra note 257.
\textsuperscript{278} Freeman, supra note 257, at 6.
\textsuperscript{279} Id. at 33.
\textsuperscript{280} Id.
\textsuperscript{281} Id. at 7 (emphasis omitted).
\textsuperscript{282} Id. at 22-23.
errors are not viewed as failures.” 283 An agency may serve this function in various ways, including “(1) a minimum standard setter; (2) a convener-facilitator of multi-party negotiations that are designed to produce goals, standards, and the measures necessary to judge whether they have been obtained; and (3) a capacity-builder of institutions capable of partnership in coregulation.” 284 Regulation is improved because regulatory solutions are provisional and can be adjusted in light of technological and scientific developments. 285

The idea of “responsive” or “collaborative” governance has also been picked up by the “new environmentalism” which seeks a community-based approach to environmental protection. While in basic agreement with the prior perspectives, these reformers object to making environmental policy at the national level, which was the object of the reformation. In a recent manifesto, three supporters of this approach offer the following description of how it would be organized and what it would accomplish:

Within broad limits the local units set their own environmental performance targets and devise the means to achieve them. In return, they provide detailed reports on actual performance and possible improvements to public authorities. The resulting framework replaces regulation based on central commands with a combination of local experimentation and centralized pooling of experience. . . . Thus the new framework forces continuous improvements in both regulatory rules and environmental performance while heightening the accountability of the actors to each other and the larger public. 286

b. Reconciliation Procedures

Since the public is harmed by the procedures of the reformation and the counter-reformation, the solution is to adopt processes that utilize cooperative regulation and deliberative decisionmaking. Two administrative law developments are direct responses to the call for a reconciliation. There is increasing use of negotiated rulemaking (“neg-neg”), which emerged in the 1980s as an alternative to traditional rulemaking procedures for drafting proposed regulations. 287 Administrative agencies, particularly EPA, are experimenting with a number of techniques of self-regulation and enforced self-regulation.

283. Id. at 31.
284. Id.
285. See id. at 28.
The essence of reg-neg is that it is possible in some situations to bring together representatives of the agency and the various affected interest groups to negotiate the text of a proposed rule. Congress endorsed regulatory negotiation when it passed the Negotiated Rulemaking Act of 1990, which established a statutory framework for reg-neg. In Executive Order 12,866, President Clinton directed agencies to "where appropriate use consensual rulemaking mechanisms for developing rules, including negotiated rulemaking," and in a subsequent memorandum exhorted agencies to "negotiate, don't dictate" and "to expand substantially efforts to promote consensual rulemaking." EPA appears to be the agency that has most often used reg-neg, but most regulatory agencies have undertaken one or more reg-neg initiatives. Reg-neg, besides reducing the threat of litigation when a rule is promulgated, promises to address regulatory irrationality without the threat of capture. While the agreement of industry participants promotes the rationality of the rule, the agreement of representatives of regulated beneficiaries tends to ensure that it adequately protects people or the environment.

Besides its reliance on reg-neg, EPA has experimented with a series of programs of the type that Ayres and Braithwaite have at the bottom two layers of their regulatory pyramid. In Project XL, EPA has tried to implement the type of collaborative governance described by Freeman. In other programs, it has promoted "voluntary regulation" through positive and negative publicity concerning pollution reduction by industry. EPA established Project XL (eXcellence and Leadership) in 1995 to provide regulated entities "the opportunity to develop and implement alternative strategies that produce superior environmental performance." Proposals may be developed by regulated entities, state environmental agencies, nonregulated parties, or EPA itself. For regulated entities, EPA will waive regulatory requirements in exchange for the achievement of "superior" environmental results, which companies achieve through better pollution

291. Memorandum on Regulatory Reform, 1 PUB. PAPERS 304, 305 (Mar. 4, 1995), quoted in Lubbers, supra note 289, at 131 n.120.
292. A summary of the use of reg-neg at the EPA and other agencies can be found in Cary Coglianese, Assessing Consensus: The Promise and Performance of Negotiated Rulemaking, 46 DUKE L.J. 1255 (1997), especially appendices A and B.
control and prevention than is required by existing regulations. Companies can obtain cost savings by adopting new approaches to reducing pollution and by reducing the paperwork costs associated with traditional forms of regulation, such as permitting. Project proponents must also seek stakeholder approval for their projects. Stakeholders, such as state and local government agencies, environmental and public interest organizations, members of the local community, and other concerned groups, must have an opportunity to participate in project development. The participation of these groups is intended to make projects more responsive to the specific environmental concerns of communities and local regulatory agencies.

EPA’s 33/50 program illustrates how the agency has relied on positive publicity to encourage pollution reduction. EPA invited companies to volunteer to participate in reducing emissions from seventeen toxic chemicals. The name refers to the goal of reducing emissions by thirty-three percent by the end of 1992 and by fifty percent by the end of 1995. EPA has also introduced “Green Lights,” “which encourages businesses to install energy-efficient lighting,” and “Energy-Star,” which encourages the development of energy-saving computers. Cooperation with EPA gains a firm favorable publicity. Another EPA program generates negative publicity for polluters. The Emergency Planning and Community Right-To-Know Act, passed by Congress in 1986, requires companies to provide EPA with estimates of the amounts of toxic chemicals that they are releasing into the environment, and these data in turn are published by EPA as a Toxic Release Inventory (TRI).

V. A “THIRD WAY” FOR ADMINISTRATIVE LAW

Administrative law theory involves a contest over different visions of democracy. Each vision tells a story about cause and effect which implies a necessary solution. The reformation blamed the lack of effective federal regulation for the social and environmental problems identified during the 1960s and 1970s, and it sought effective federal regulation as the solution. To ensure the effectiveness of federal regulation, the reformation used administrative procedures—particularly the impact statement, “hard look”

296. Id. at 1285.
297. See id. (describing these programs).
review, and standing—\textsuperscript{299} which enabled regulatory beneficiaries to challenge the failure of agencies to regulate sufficiently. The counter-reformation blamed the reformation for producing “government failure,” and it used the same administrative procedures to seek rational, efficient, and effective regulatory policy. Once the results of the counter-reformation slowed the regulatory process and reduced regulatory output, the restoration and the reconciliation blamed it for the failure to address outstanding social and environmental problems. The restoration, which disputes “government failure,” seeks to reestablish the procedures favored by the reformation, while the reconciliation, which acknowledges “government failure,” seeks more flexible regulation and more participatory governance.

The reconciliation might qualify as a “third way” for administrative law. The reformation and counter-reformation imply that there are two choices facing the American public: avoid government regulation or subject it to adversarial procedures before a decision is reached to assure appropriate outcomes. The reconciliation goes down a different pathway. Like the reformation and counter-reformation, it recognizes the necessity of government regulation. But unlike the reformation and counter-reformation, it utilizes cooperative regulation and deliberative decisionmaking. If cooperative regulation and deliberative decisionmaking are as beneficial as their proponents suggest, the reconciliation may become the next phase of administrative law after the counter-reformation. Studies of the impact of the restoration are mixed, and it is difficult to determine how far the reconciliation will go at this point in time.

The reconciliation may be a “third way,” but I see it as part of a broader program to restore pragmatic government. A pragmatic conception of government would embrace elements of each of the other approaches but for a different reason. The guiding principle of pragmatism is problem-solving or the adoption of procedures and processes that are best suited to solve social problems under the actual conditions in which government functions. Thus, pragmatism shifts the focus from what process is used to make a decision to whether the regulatory outcome is successful or not.

At the end of this section, I switch from a positive to normative perspective. I suggest that there is a story that supports pragmatism as an attractive alternative to the other stories of administrative law. I suggest the general contours of this approach but leave for another day further development of this idea.

\textsuperscript{299} See supra Parts III.C.1-3 (discussing impact statements, “hard look” review, and standing).
A. Assessing the Reconciliation

The reconciliation claims that it can produce more rational regulatory policy than the reformation with fewer delays that are the hallmark of the counter-reformation. While the reconciliation has had some success, the evidence is inconclusive whether cooperative regulation and deliberative decisionmaking can accomplish these goals.

EPA’s experimentation with self-regulation and enforced self-regulation is illustrative of the types of reforms favored by the reconciliation. These reforms have provoked a debate over the efficacy of “responsive” regulation. This debate involves three issues. First, are the incentives for self-regulation strong enough that they will produce the same level of regulatory protection as traditional regulation? Second, do consensual methods of decisionmaking, particularly reg-neg, produce decisions that are superior to the decisionmaking methods favored by the reformation (particularly rulemaking)? Finally, what is the risk that cooperative and responsive regulation will be subject to “capture” by regulated entities?

The reconciliation relies on regulatory cooperation, rather than regulatory analysis, to foster more rational regulation. Protection of individuals and the environment is left to market forces and public pressure in some cases. In other cases, agencies set goals and cooperate with regulatory entities to achieve those goals. Supporters of the reconciliation argue that these forces are strong enough to compel corporations to engage in significant levels of protection. Eric Orts, for example, claims that “[t]aken as a whole [EPA’s] . . . voluntary programs are probably more beneficial than the defensive compliance programs encouraged by sentencing standards and federal enforcement policies because they have the virtue of encouraging business to ‘do good’ proactively.”300 Orts believes that the “positive approach of voluntary programs also contrasts sharply with the punitive nature of most command-and-control regulations.”301 The argument here is that, given human nature, agencies can obtain more compliance with carrots than with sticks. Similarly, Donald Elliott believes “the recent reductions in the release of toxic chemicals to the environment, accomplished ‘voluntarily’ under public pressure stimulated by the TRI inventory, are probably many times larger

300. Orts, supra note 295, at 1286.
301. Id.
than the reductions achieved over twenty years of traditional standard-setting regulation of air toxics.\footnote{302}

Other analysts are more skeptical that voluntary regulation can produce sufficient protection, let alone the same level of protection as regulation. For example, my own review of the evidence indicates that caution is due concerning regulatory cooperation. After comparing the efficacy of punishment versus cooperation in regulatory enforcement, Randy Rabinowitz and I conclude that, "[w]hile cooperation holds promise as an effective enforcement technique, the policy literature suggests that caution is due. Although a mix of cooperation and punishment is likely to be an optimal enforcement policy, the literature provides no clear guidance concerning what policy is optimal."\footnote{303} Regarding programs like TRI, Rabinowitz and I conclude that "[v]oluntary compliance has the potential to induce greater regulatory protection of the environment, workers, or consumers, but only in narrowly circumscribed circumstances," and "[e]ven when voluntary compliance is effective, it is likely that it provides less protection than does regulation."\footnote{304}

A similar debate exists concerning the impact of regulatory negotiation. According to the reconciliation, the advantage of consensus, deliberative processes like reg-neg is that they are more likely to produce flexible, sensible solutions to regulatory issues because they can be oriented towards problem-solving. In addition, because reg-neg reduces the chances of litigation over a rule, an agency can implement the regulation more quickly and reduce the regulatory problem more expeditiously. Although reg-neg has not yet become the dominant method of decisionmaking, and some reg-negs have failed to produce a consensus, its supporters believe that reg-neg produces better rules with less chance of litigation.\footnote{305} Critics acknowledge some success, but doubt, as compared to conventional rulemaking, that reg-neg has produced better, more widely accepted rules or helped to reduce the threat of litigation.\footnote{306} Critics also worry that reg-neg cedes policymaking initiative, if not authority, to private groups—a form of


\footnote{306} See, e.g., Coglianese, supra note 292, at 1321.
capture. 307 Freeman acknowledges this danger, but believes that it can be remedied, although it will require nontraditional forms of accountability. 308 Reg-neg is emblematic of "collaborative" governance because it invites deliberation between affected parties over the nature and scope of regulation. Those favoring the restoration are skeptical about creating "deliberative democracy," particularly outside of the scope of reg-neg. The new environmentalism would involve citizens by moving decisions to the local level. This works, of course, only for environmental problems that are local in their effects. Even when problems are local, collaborative governance will have to overcome citizen apathy and the capture of local units of government by developers and other regulated entities.

Adherents of the reconciliation are confident that government can act to overcome these problems and create participatory structures of decisionmaking, 309 but others are less certain. They recall that it was the failure of state and local government to protect individuals and the environment that created the need for the reformation in the first place. 310 At the federal level, the skeptics worry that regulatory beneficiaries cannot serve as effective participants in enforcement programs if they are unorganized or weak. Thus, "[t]he lack of a unionized workforce in an industry . . . could inhibit, if not prevent, the use of tripartism by OSHA." 311 Supporters of the reconciliation reply that new thinking is required about traditional regulatory procedures. For example, analysts favoring "participatory policy analysis" have suggested that agencies form "panels composed of citizens at large [that] are empowered to participate in deliberations over public policy issues over an extended period of time (say, a year)." 312

Theodore Lowi has aptly summed up the state of the literature on the impact of the reconciliation. The "trouble," as he has observed, is that "for every supporting case study there is almost inevitably an unsupportive case

308. See Freeman, supra note 257, at 82-97 (discussing the development of a collaborative structure); Jody Freeman, The Private Role in Public Governance, 75 N.Y.U. L. Rev. (forthcoming).
309. See, e.g., John DeWitt, Good Cops, Bad Cops, BOSTON REV., Oct.-Nov. 1999, at 16, 16 (recognizing apathy and capture problems but expressing confidence that the "trend toward civic environmentalism is unstoppable").
310. See, e.g., Shapiro & Rabinowitz, supra note 303, at 723 (observing that "[t]he ineffective nature of the largely cooperative state enforcement programs was one reason that Congress created OSHA").
311. Id. at 728.
312. DELEON, supra note 263, at 111.
study.”313 This opens the door, at least until more definitive evidence arrives, for the reconciliation camp to tell a story of success and for others to tell a story of “skepticism” and “caution.”

B. A Pragmatic Administrative Process

The reconciliation might be conceived of as a “third way” for administrative law because it accepts the need for regulation, but it rejects the adversarial procedures favored by the reformation and counter-reformation. If there is to be a “third way,” however, I believe it should arise out of a different story—the pragmatic tradition of American governance. I am currently working on a book-length treatment on what constitutes a pragmatic approach to administrative law in the context of risk regulation.314 Others, notably Daniel Farber,315 are plowing the same ground. For present purposes, I describe in general how this approach differs from the other perspectives.

The New Dealers sought to justify their governmental activism not only in terms of Progressive principles, but also in terms of pragmatism. In a time of crisis, they asked the public to judge the acceptability of new government programs in terms of how well they worked to restore the economy and serve other social purposes. President Roosevelt successfully “hid the departure from Locke,” Louis Hartz observes, by submerging classic Lockean liberalism in pragmatic problem-solving.316 Judging results permitted experimentation, and the New Deal was “chaotic with experimentation.”317 As long as the threat of the Depression loomed, critics of the aggrandizement of power made little progress.318 When the crisis abated, public patience with the lack of government accountability increased, and passage of the APA soon followed.319

While no one wishes a return to pre-APA government, the American tradition of “pragmatism” offers a basis for a “third way” in government. As compared to other administrative law stories, pragmatism is a shift in emphasis in how government policy should be made. More specifically,

315. See, e.g., DANIEL A. FARBER, ECO-PRAGMATISM: MAKING SENSIBLE ENVIRONMENTAL DECISIONS IN AN UNCERTAIN WORLD 9 (1999) (writing about a “pragmatic approach to environmental problems, in which economic analysis is useful, but not controlling”).
318. See Shapiro, supra note 27, at 97.
319. See id. at 97-98.
pragmatism has the following five characteristics that distinguish it from the previous approaches.

1. Bounded Rationality

A pragmatic administrative process attempts to address the world as it really exists. Thus, unlike the counter-reformation, a pragmatic approach does not believe the "rationality project" is possible. As Charles Lindblom observed many years ago:

For complex problems, [the effort to formalize rational policy formation] is of course impossible. Although such an approach can be described, it cannot be practiced except for relatively simple problems and even then only in some modified form. It assumes intellectual capacities and sources of information that men simply do not possess, and it is even more absurd as an approach to policy when the time and money that can be allocated to a policy problem is limited, as is always the case.\(^{320}\)

Lindblom was acknowledging that institutional decisionmaking is a function of "bounded rationality" or limitations concerning knowledge and understanding. Under these circumstances, the best that organizations can do is to rely on habits, practices, and tests, such as "rules of thumb" or "heuristics," that take into account real world limitations.\(^ {321}\) His reliance on incremental decisionmaking reflects this reality.

This is not to say that pragmatic administration would ignore what risk analysis, cost-benefit analysis, or other analytical techniques might teach us in a particular situation. As Gene Shreve notes, pragmatism’s mission is "to test, clarify, and mediate impulses generated elsewhere within a larger community of ideas."\(^ {322}\) A pragmatic approach would, however, limit the time and effort devoted to these techniques in recognition of their limitations to inform public policy analysis. And, in recognition of these limitations, it would not elevate these techniques into the decisionmaking standards that determine regulatory policy.


\(^{321}\) See JAMES MARCH & HERBERT A. SIMON, ORGANIZATIONS 140-41 (1958); HERBERT A. SIMON, ADMINISTRATIVE BEHAVIOR: A STUDY OF DECISIONMAKING PROCESSES IN ADMINISTRATIVE ORGANIZATION (1945); HERBERT A. SIMON, MODELS OF MAN (1957); see also RICHARD CYERT & JAMES MARCH, A BEHAVIORAL THEORY OF THE FIRM (1963).

2. Incremental Decisionmaking

The "characteristic idea" of the pragmatic tradition is "that efficacy in practical application—the issue of 'which works out most effectively'—somehow provides a standard for the determination of truth in the case of statements, certainty in the case of actions, and value in the case of appraisals." As John Dewey observed, "[i]f ideas... are instrumental to an active reorganization of [a] given environment, to a removal of some specific trouble and perplexity. . . . they are reliable. . . . good [and] true." By comparison, "[i]f they fail to clear up confusion... they [are] false." Building on this orientation, Charles Lindblom recommended government rely on incremental steps that permit administrators to adjust decisions over time. Lindblom argued that, in light of the difficulty of determining what is appropriate policy, this form of "muddling through" is the most rational way to proceed. Lindblom's endorsement of incrementalism echoes Dewey's recommendation that government should try different policies in the spirit of establishing a hypothesis for approaching solutions to problems.

Following Lindblom, pragmatism does not attempt to obtain regulatory perfection in its initial decisions, but it does adjust those decisions in light of new information and new developments. The incremental nature of decisionmaking flows directly from the limits imposed by bounded rationality on initial decisionmaking. Decisionmaking is experimental in the sense that regulators adjust decisions in light of experience and knowledge that was unavailable to them when the initial decision was made.

As compared to the Progressives' defense of discretion, which depends on trusting experts to adopt appropriate solutions, pragmatism offers the advantage that the government's actions are subject to scrutiny and review. The key to "muddling through" is making incremental decisions, considering the outcome and making adjustments when policies do not turn out as planned. This is precisely the aspect of regulatory government that is the weakest. The regulatory system does little to adjust decisionmaking, correct mistakes, and take into account new scientific and technological developments.

324. JOHN DEWEY, RECONSTRUCTION IN PHILOSOPHY 156 (1920), quoted in MICHAEL W. MCCANN, TAKING REFORM SERIOUSLY: PERSPECTIVES ON PUBLIC INTEREST LIBERALISM 77 (1986).
325. Lindblom, supra note 320, at 79.
In 1981, Colin Diver foresaw the movement "from an 'incrementalist' model of policymaking to one of 'comprehensive rationality'" driven, in part, by the replacement of adjudication by rulemaking as the dominant mode of decisionmaking. For Diver, incrementalism was not a "flawed form of analysis, but a sensible response to technical uncertainty and political ferment." Pragmatically, he called for a "dispassionate assessment" of the "strengths and weaknesses" of incrementalism and comprehensive rationality. He predicted, however, that there was a "large reservoir of public issues better suited to the incrementalist model."

The administrative law system is unlikely to return to adjudication as the primary vehicle to make policy. Thus, the issue is how to make the rulemaking process more incremental. Rulemaking would be more incremental if agencies relied to a greater extent than present on adjusting the impact of regulations through time extensions, waivers, rule amendments, and other forms of ex post adjustments. OSHA is a good example. Its mandate requires that any health regulation that it promulgates must be economically and technologically "feasible." The determination of whether a regulation is feasible can be time-consuming when an OSHA regulation covers multiple industries and a variety of workplace situations. In this situation, OSHA could, but seldom does, rely on its authority to vary the requirements of standards so long as employee protections are not reduced. OSHA could use its variance authority to modify specific compliance obligations to better suit particular industry categories. Similarly, it could use its authority to grant variances to groups, not individual firms, meeting specified criteria.

328. Id. at 434.
329. Id.
330. Id. at 433.
331. See Alfred C. Aran, Jr., Administrative Equity: An Analysis of Exceptions to Administrative Rules, 1982 DUKE L.J. 277, 278-79 ("General rules cannot account for all possible situations. . . . Usually, enabling acts or an agency's own rules explicitly establish processes and criteria under which administrators can do justice in individual cases. Some courts have suggested that the authority to grant exceptions to rules may be implied as well."). Id. at 281 ("administrative equity is concerned with 'a rectification of law where law falls short by reason of its universality'—however equitable the overall purpose of the universal or general rules involved." (footnote omitted)); Marshall J. Breger, Regulatory Flexibility and the Administrative State, 32 TULSA L.J. 325, 331 (1996) ("The waiver option can also be viewed as a recognition that formal rules are unlikely to capture the infinite varieties of empirical reality and that increased flexibility in the rulemaking process is necessary.").
333. See id. § 655(d).
334. See Shapiro & Rabinowitz, supra note 304, at 147-49.
Reliance on an exceptions process requires accountability. Neither the public nor groups representing regulatory beneficiaries will accept an adjustment process that invites "capture" by regulated entities. Nevertheless, even after procedures are observed, an adjustment process can make the regulatory process less protracted because disputes over particular applications of a rule are less likely to stymie or delay promulgation of the original rule.

Rulemaking would also be more incremental if agencies developed better procedures for review of rules. While most agencies make some effort to engage in such review, these efforts vary widely both in terms of how they are conducted and the extent to which they occur. One reason why agencies are not very good at reviewing policies once they are adopted is that regulators spend so much time and money trying to adopt appropriate regulations on the front end. This dedication is driven, to a considerable extent, by existing administrative procedures, particularly the procedures favored by the counter-reformation.

3. Least Imperfect Alternative

Neil Komesar reminds us that, in choosing institutions in law, economics, and public policy, the "missing link is institutional choice," and the choice is "always a choice among highly imperfect alternatives." A pragmatic administrative process takes this injunction seriously. It therefore overlaps with other approaches because it is willing to examine whether they will function better. In the end, however, flaws in existing institutions are irrelevant unless a superior alternative exists.

The enthusiasm by some reformers for alternative procedures and regulatory tools is based on the perceived deficiencies of current approaches. They have succeeded in exposing the maladies of regulatory government for all to see, and from a distance their alternative approaches look better by comparison. The enthusiasm for reform is augmented in some cases by an ideological attachment to the underlying theory of the reform. Economists endorse the "rationality" project because it is consistent with their utilitarian outlook. Other analysts endorse


337. See Howard Latin, Ideal Versus Real Regulatory Efficiency: Implementation of Uniform Standards and "Fine-Tuning" Regulatory Reforms, 37 STAN. L. REV. 1267, 1270 ("academic literature on 'regulatory reform' reflects excessive preoccupation with theoretical efficiency, while it places
collaborative governance because of the appealing concept of civic republicanism. A pragmatic approach recognizes, however, that the proof is in the pudding, and, while it is prepared to experiment, it requires evidence that new procedures and regulatory techniques actually outperform the status quo.

Thus, a pragmatic approach embraces the substantive and procedural innovations of the reconciliation, but it is skeptical of these efforts for two reasons. The policy literature, as discussed earlier, has failed to date to show the clear superiority of these methods.\footnote{38 This does not mean that continued experimentation is inappropriate, but it does mean that the time has not yet come for a reconciliation along the lines proposed by its supporters. A pragmatic approach is skeptical about a reconciliation for more general reasons. The administrative process is extraordinarily diverse and complex. What works in one situation may be totally inappropriate in another. The techniques of the reconciliation may therefore hold great promise in one situation, but not another. For example, my research suggests that, while some forms of voluntary and cooperative regulation may be reasonably successful in the context of environmental protection, they are unlikely to work as well in the context of workplace health and safety regulation.\footnote{39}

4. Judicial Review

Pragmatism doubts the benefits of "hard look" review and recognizes the ossification of rulemaking that results. As noted earlier, pragmatism is skeptical about the rationality project because decision-makers operate under conditions of bounded rationality. Under these conditions, judicial efforts to promote greater accuracy can slow the decisionmaking process without producing corresponding benefits in terms of better, more rational policies. The judicial effort to produce more rational decisions has slowed the disposition of agency business but without accomplishing its goal, which is unrealistic based on what agencies actually know and understand.

Pragmatism therefore seeks greater judicial deference to agency policy decisions. Greater deference, however, may make the administrative process less acceptable to the public and regulated entities. The challenge for pragmatism is to establish a system of judicial review that performs its checking function and still permits the efficient disposition of agency

\footnote{38 See supra notes 300-13 and accompanying text (describing the literature assessing the innovations of the reconciliation).}

\footnote{39 See Shapiro & Rabinowitz, supra note 304, at 100.}
business. This is no easy task in light of judicial incentives and the
difficulty of developing determinate substantive review doctrines.\(^{340}\) Although the solution may not be easily achieved, pragmatism would reject
the heavy reliance by the reformation and counter-reformation on “hard
look” review.

Pragmatism, however, joins with the reformation (and restoration) in
supporting a liberal standing doctrine. In light of its instrumental
orientation, pragmatism recognizes the practical effects on representatives
of regulatory beneficiaries when they cannot secure judicial review of
agency policy decisions. As discussed earlier, the impact of restricting
access to judicial review is to weaken the influence of regulatory
beneficiaries and strengthen the influence of regulated entities, whose
access to the courts is not similarly restricted.

5. Legitimation

Finally, a pragmatic approach puts more faith in bureaucracy.
Bureaucracy, of course, is not left unchecked, either at the front or back
end, but since agencies are given more discretion and flexibility to devise
appropriate results, there is a stronger belief that discretion will be used
more appropriately than under the other stories of administrative law.
Although this is only a change in emphasis, it is of considerable symbolic
importance. The negative symbol of bureaucracy has been an important
force in American politics, and few politicians can resist the urge to run
against government. These claims, however, ignore the positive
contribution that government has made to American society and the
dedication and talent of many of the people who are career civil servants.
This is not to say, of course, that government has always performed
 admirably or produced appropriate results. I am saying that a more
balanced view of government justifies a system of administrative law that
is less suspicious of the agents of government.

In his 1983 study of the Social Security Administration (SSA),\(^{341}\) Jerry
Mashaw argues for an overdue recognition of the contribution of
bureaucracy to governmental success. He observes that, where the
established branches—judicial, legislative, and executive—speak with
institutionally competitive voices, the bureaucracy must assimilate and

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implement these various messages. Thus, to the conventional system of checks and balances, he adds a fourth participant: "The only change in the conventional model—and it is one that this essay insists upon—is that Bureaucracy has been admitted to the pantheon of institutional heroes."\(^{342}\)

While he recognizes the pitfalls of bureaucracy, Mashaw insists that the accomplishments of the Social Security Administration demonstrate the competence of bureaucracy to provide administrative justice. Mashaw asks: "Where, then, is the political symbol of bureaucratic competence that can inspire, direct, and defend reform that is also instrumentally significant?"\(^{343}\)

The aim of pragmatism is to fill this gap. It does not dispense with external controls, nor could it, but it gives more importance to the role of bureaucracy in government, which, as Mashaw notes, comports with the "underlying reality" that the country depends on bureaucracy to implement public policy. It envisions, in Paul Verkuil's phrase, a "self-legitimating" bureaucracy,\(^{344}\) which does the best it can on the front end and attempts to address its mistakes on the back end.

VI. CONCLUSION

Administrative law events in the last three decades can be described as competing policy stories. Each story identifies a problem, claims that citizens are victimized by the problem, and proposes a solution based on whom or what is perceived to be the cause of the problem. The function of these policy stories is to identify and clarify essential elements in competing schools of thought about the administrative process. While the stories inevitably distort actual events to some extent, by separating administrative law developments into neat and tidy packages, they are useful in defining fundamental differences concerning the goals and methods of administrative law.

The reformation and counter-reformation constitute the two basic stories of administrative law. Reformers in the 1960s and 1970s convinced the country of the need to enact vast new schemes of regulation and to establish procedures to prevent the capture of new and existing regulation by regulated entities. These procedures included environmental impact statements required by NEPA, an expanded concept of standing, and "hard look" review. Reformers in the 1980s supported a counter-reformation to

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342. Id. at 58.
343. Id. at 225.
rationalize regulatory policy and reduce regulatory excesses. The counter-
reformation turned to the very same procedures employed in the
reformation to accomplish these goals. Congress and the President
required numerous impact statements, the Supreme Court narrowed the
concept of standing, and the circuit courts employed "hard look" review in
a manner skeptical of the value of regulation. The goal was to reduce the
excessive influence of regulatory beneficiaries over regulatory policy.

In the 1990s, there have been two reactions to the counter-reformation.
One approach, the restoration, seeks to restore the reformation by blaming
the counter-reformation for denying citizens and the environment
appropriate regulatory protection. The solution is to blunt, if not reverse,
the procedural developments fostered by the counter-reformation. The
restoration has had some modest success. Opponents have blocked some
procedures for impact statements favored by adherents of the counter-
reformation, and the Supreme Court recently issued two standing decisions
consistent with the reformation. The other approach, the reconciliation,
favors the activist government of the reformation, but it also accepts many
of the criticisms of the counter-reformation. To reconcile these positions,
it relies on regulatory cooperation and participatory decisionmaking
processes. The reconciliation has also had some modest success.
Agencies, particularly EPA, have experimented with various forms of
regulatory cooperation and have used regulatory negotiation and other
forms of deliberative decisionmaking.

In all likelihood, the counter-reformation, the restoration, and the
reconciliation will all continue to influence regulators and legislators. If
the proponents of the reconciliation are correct about its merits, it would
become a more dominant influence. The jury is out, however, on whether
these processes can obtain the objectives of the reformation and counter-
reformation without the undesirable side effects of each.

The reconciliation might be considered a "third" way in administrative
law. Like the other theories, it does not favor a return to unregulated
markets. Unlike the other theories, it offers new and innovative ways of
reaching policy decisions.

If we are to rethink administrative process, however, I would offer the
pragmatic tradition of government as a superior alternative. With its
instrumental orientation, pragmatic governance adopts procedures on the
basis of actual outcomes. Thus, it would utilize procedures of the
reformation and the counter-reformation but based on a dispassionate
assessment of their strengths and weaknesses, rather than on a fear of
capture. With its interest in experimentation, pragmatic governance would
try the procedures favored by the reconciliation but subject them to the
same demanding test.
Besides its willingness to adopt what works, pragmatic governance would shift some of the front-end checking that occurs under the other approaches to the back end of rulemaking. Agencies would employ waivers and similar procedures to iron out problems that were not perceived at the time a rule was adopted. Agencies would also do a better job of reviewing existing regulations to determine if changes are overdue. With this shift, pragmatic governance would seek to ensure accountability and still reduce the regulatory delays that the counter-reformations has introduced.

Last, but hardly least, pragmatic government recognizes the problem-solving capacity of bureaucracy. It is willing to give regulators discretion because, as a general matter, agencies have produced important and lasting benefits for society. Government is hardly perfect, but its record does not justify the level of distrust that is implied in the other approaches considered in this paper.