The problems that vex democracy seem to be unmanageable by democratic methods."

Walter Lippman

"All the ills of democracy can be cured only by more democracy."

Al Smith

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I. Introduction

Administrative agencies recently have been subjected to widespread criticism, much of it focusing on the failings of the administrative process. Health, safety, and consumer protection regulations, for example, have been attacked as both under- and overregulation. Older agencies stand accused of being captured by the very interests they were established to regulate.\(^3\) Newer agencies have been charged with imposing regulations whose costs to society outweigh their benefits.\(^4\)

This dissatisfaction with the effects of governmental regulation has generated a number of proposals to increase the accountability of agency decisionmaking.\(^2\) Each proposal gives one of the three branches of government more authority over the regulatory process. Some critics of agency performance recommend expanded judicial review as a solution to excessive discretion.\(^6\) Senator Bumpers has called for heightened judicial scrutiny of agencies,\(^7\) and thus has endorsed a

\(^3\) M. Bernstein, *Regulating Business by Independent Commission* 86-91 (1955). Bernstein argues that regulatory agencies pass through a four-stage life cycle in which they gradually lose their sense of purpose and begin to rely on established procedures, moving from an initial stage of youthful aggressiveness to one characterized by debility and decline. *Id.* at 74-95.


\(^7\) The original Bumpers bill, S. 111, 96th Cong., 1st Sess. (1979), would have subjected all
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line of decisions by activist courts reviewing agency action. Other critics have directed their interest toward enhanced “political” review. Some urge expansion of the legislative veto authority, which Congress has used to assert its control over many administrative actions, to cover all regulatory agencies. Others would give the President, who has already established a “court of last resort” in his Office of Management and Budget to determine whether proposed executive agency rules should be promulgated, even greater authority over executive and in-

agency conclusions of law, including interpretations of the agency’s organic act, to de novo review, with no deference accorded the agency’s legal conclusions. The bill also would have replaced the traditional presumption of validity of an agency rule with a presumption of invalidity; the rule could be sustained by the reviewing court only if its validity was “clearly and convincingly shown.” Woodward & Levin, In Defense of Deference: Judicial Review of Agency Action, 31 AD. L. REV. 329, 329-30 (1979).

The Regulatory Reform Act, by comparison, specifies that a court “shall require that action by the agency is within the scope of agency jurisdiction or authority on the basis of the language of the statute or, in the event of ambiguity, other evidence of ascertainable legislative intent.” Regulatory Reform Act, S. 1080, 97th Cong., 2d Sess. § 5, 128 CONG. REC. S2718 (daily ed. Mar. 24, 1982) (passed by the Senate to amend 5 USC § 706(e) (1976)). For “questions of law” other than determinations concerning statutory jurisdiction or authority, “a court shall not accord any presumption in favor or against agency action, but in reaching its independent judgment concerning an agency’s interpretation of a statutory provision, the court shall give the agency interpretation such weights as it warrants, taking into account the discretionary authority provided to the agency by law.” Id. Unlike the earlier version, the bill applies only to “questions of law” and not to agency conclusions of “fact” or “policy.” 128 CONG. REC. S2406 (daily ed. Mar. 18, 1982) (statement of Sen. Bumpers). Moreover, while “determinations concerning statutory jurisdiction or authority” receive no deference, “other questions of law” can receive deference.

The Senate, however, failed to define clearly the differences between the terms it used to explain when deference may be granted. “Jurisdiction or authority” may be limited to questions concerning the agency’s power over subjects, things, and persons, or it may extend to questions concerning the inclusion of certain factors in implementing a statutory standard. Compare Senate Comm. on Governmental Affairs, Regulatory Reform Act, S. REP. No. 305, 97th Cong., 1st Sess. 89-90 (1981) (subject, thing, and person definitions), and 128 CONG. REC. S2406 (daily ed. Mar. 18, 1982) (choice of factors is a “policy” question), with Senate Comm. on the Judiciary, The Regulatory Reform Act, S. REP. No. 287, 97th Cong., 1st Sess. 168 (1981) (choice of factors can be question of “authority”). If no deference will be paid to agency interpretations of how it should regulate, the Bumpers amendment will “portend pervasive and, from the standpoint of the government, disruptive changes in litigation about agency action . . . [that] will likely increase the risk that such action will not be sustained by a reviewing court.” Ossola, Two Versions of Bumpers Differ on Judicial Review, Legal Times of Wash., Mar. 29, 1982, at 29, col. 1. The present treatment of questions of statutory construction is described at notes 31-39 infra & accompanying text.

8. See text accompanying notes 61-81 infra. These courts have also acted to limit discretion by fostering greater public participation in agency decisionmaking. See B. Schwartz, Administrative Law 266-68 (1978).


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dependent agencies.\textsuperscript{11}

Although judicial and political solutions to agency problems appear diametrically opposed,\textsuperscript{12} each assumes that a major cause of poor regulatory performance is excessive agency discretion.\textsuperscript{13} This Article analyzes the validity of this perception by considering the current scope of agency discretion and the extent to which the proposed reforms would limit it without incurring other, unanticipated costs. Part II argues that a certain amount of discretion is necessary if agencies are to function effectively in a complex society. Parts III, IV, and V survey the effectiveness of current judicial, congressional, and executive oversight, concluding that existing oversight mechanisms already constrain agencies within tolerable limits. Since allowing the flexibility necessary for decisionmaking invariably entails a risk that agencies will administer programs capriciously, discretion should be treated as an unavoidable cost of regulation. Agencies should be scrutinized only to determine whether the benefit of the administrative program outweighs whatever costs—including those of capricious action—may be imposed by the inevitable play in the regulatory process.

This method of addressing the problem of discretion has the advantage of focusing attention on the merits of regulation. The debate over procedural reforms should not disguise the extent to which most criticism of administrative behavior is really an attack on agency goals.\textsuperscript{14} While augmented review probably will not increase the efficiency of bureaucratic regulation, it is likely to transfer authority to persons even less accountable to normal democratic pressures than the agencies themselves.\textsuperscript{15} Most people support these proposals only because they expect their political goals to be furthered by the decisionmakers who receive the power to decide regulatory matters.\textsuperscript{16} We

\textsuperscript{11} See subpart V(C) infra.

\textsuperscript{12} The Bumpers proposal is consistent with an earlier conception of the administrative process as a quasi-judicial, depoliticized advocacy system designed to produce the expertise necessary to decide regulatory issues dispassionately. See text accompanying notes 17-19 infra. Advocates of expanded political controls, on the other hand, assume that agencies will not produce policies in the public interest unless popularly elected officials closely supervise agency decisionmaking. See text accompanying note 180 infra.

\textsuperscript{13} An agency can be said to possess discretion in at least two senses. First, the decisionmaker has substantive discretion when it is not completely bound by any standard or standards, but remains relatively free to exercise its own judgment in deciding an issue. Second, the decisionmaker has discretion in a procedural sense when its application of a relevant standard or standards is not reviewable by some other institution. R. Dworkin, Taking Rights Seriously 31-32 (1978). While discretion may thus be either substantive or procedural, this Article is concerned only with substantive discretion.

\textsuperscript{14} See text accompanying notes 204-08 infra.

\textsuperscript{15} See text accompanying notes 89-101, 189-203, 240-53 infra.

\textsuperscript{16} See text accompanying notes 204-08 infra.
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take no position on the desirability of specific regulatory programs, but we do argue that the continued effectiveness of our political process requires that substantive political debates not be disguised as arguments over "neutral" procedural issues.

II. The Administrative Function in Democratic Society

The regulatory process was originally viewed as fully compatible with democratic government. Regulators were seen as public servants, impartial experts implementing well-defined legislative policies with technical precision.\(^{17}\) Regulation was a neutral, scientific process, constrained by the narrow judicial mandate of the agency, the professionalism of the administrators, the incremental nature of a case-by-case process, and the nature of adjudication itself. Affected parties were to participate in full-scale hearings, which would produce a closed record from which decisions would be reached.\(^{18}\) The courts could rectify occasional errors by ensuring that decisions were made in compliance with the dictates of due process, based on the record, and consistent with the specific mandate of the agency.\(^{19}\)

Almost five decades of heavy reliance on administrative government have resulted in a more sophisticated view of the regulatory process. Congress has found that it can solve many of our social problems only by relying on delegations of authority that are broad and vague, rather than clear and specific.\(^{20}\) The complexity of these problems requires regulators to make political as well as technical decisions.\(^{21}\) Since many social concerns, like pollution, discrimination, and product or workplace safety, cut across industry lines, the jurisdiction of modern agencies must extend to the entire economy.\(^{22}\) Furthermore, in order to make the complex determinations upon which modern regulations are based, we have found it necessary to replace adjudicatory decisionmaking with informal rulemaking procedures, which limit formal participation by those affected to the filing of written com-


\(^{19}\) See R. Pound, Administrative Law 34 (1942).

\(^{20}\) See text accompanying notes 117-31 infra.

\(^{21}\) See notes 129-31 infra & accompanying text.


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Regulators today are often free to establish their own agendas for action, instead of serving as neutral decisionmakers.\textsuperscript{24}

The new awareness of regulatory discretion highlights the tension between agency government and democratic values. Although an effective regulatory process requires that agencies be given considerable freedom, the presence of wide administrative discretion increases the importance of democratic controls over the entire process. These controls will be effective only if the agent of restraint is also accountable to the electorate. Otherwise we will merely have substituted one unaccountable entity for another. The following survey of judicial and political oversight indicates that agencies are already subject to a tolerable degree of supervision. It also demonstrates that reforms that might increase the effectiveness of review would also damage our democratic society by transferring decisionmaking power to reviewers who would be less politically accountable than the agencies.

III. Judicial Control over the Regulatory Process

This part analyzes the effectiveness of judicial review in constraining agency action. Our inquiry indicates that judicial review of administrative determinations of questions of law and questions of fact is already adequate to bind agencies to their original mandates. Congress could increase the judiciary's authority to review the broader agency reasoning process, but only by allowing judges to incorporate their personal views into regulatory decisions.

A. Scope of Current Judicial Review

The courts are not authorized to review every agency action. With few exceptions, the Constitution does not provide a right to court review of agency decisions.\textsuperscript{25} Every decision to institute review can be traced to the Administrative Procedure Act (APA),\textsuperscript{26} agency organic
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acts, or judicial precedent. Some statutes expressly preclude review of agency action, although the courts often strain to circumvent statutory limitations. In the last decade, some judges have suggested that the courts can contribute so little to the analysis of highly technical substantive issues that they should deemphasize substantive review and concentrate instead on the more manageable task of creating a procedural framework that enables legislators, scientists, and the public to review substantive decisions in areas of technological complexity. Al-

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—
(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
(B) contrary to constitutional right, power, privilege, or immunity;
(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
(D) without observance of procedure required by law;
(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.


Finally, courts often decline to review an agency action because the area in which the action is taken involves important functions uniquely within the responsibilities of another branch of government, Curran v. Laird, 420 F.2d 122 (D.C. Cir. 1969), as in the case of sensitive matters of international relations, Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103 (1948).

28. See, e.g., Tracy v. Gleason, 379 F.2d 469 (D.C. Cir. 1967). Where congressional intent to eliminate court participation in the administrative process is clear, however, the courts respect that intent and refuse to review the action. See, e.g., Schilling v. Rogers, 363 U.S. 666 (1960).

29. Judge Bazelon’s concurring opinion in Ethyl Corp. v. EPA, 541 F.2d 1 (D.C. Cir.), cert. denied, 426 U.S. 941 (1976), states this argument most clearly: “Because substantive review of mathematical and scientific evidence by technically illiterate judges is dangerously unreliable, I continue to believe we will do more to improve administrative decision-making by concentrating our efforts on strengthening administrative procedures.” Id. at 67. This basis for declining substantive review appears similar to the lack of judicial aptitude branch of the APA’s exemption for actions committed to agency discretion. It differs, however, at least in the way in which courts apply it. Numerous terse, conclusory appellate court opinions affirming complicated agency actions may be found in which the court simply fails to discuss any of the arguments made by the petitioners. Compare Hercules Inc. v. FPC, 559 F.2d 1208 (3d Cir. 1977) (per curiam) (petition for review denied), with North Carolina v. FERC, 584 F.2d 1003 (D.C. Cir. 1978). These two proceedings were tried by the same counsel using the same expert witnesses to raise the same issues. In the first case, the Third Circuit declined to review an FPC order and affirmed the agency action in a brief unpublished per curiam opinion that contained little discussion of the issues. In the
though the plausibility of this argument has been partly undermined by the severe constraints on judicially imposed procedures announced in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.* the view that courts should abstain from substantive review of technically complex administrative decisions may retain some vitality.

When the courts do review agency actions, the applicable standard is only vaguely dictated by statute; as a rule, the choice is guided instead by general principles established in prior court decisions. The effectiveness of judicial review depends upon whether the court is considering a question of fact, a question of law, or the overall agency reasoning process.

1. Questions of Law.—An agency’s organic act usually defines the primary constraints under which it must operate. Judicial oversight of an agency’s interpretation of its organic act thus functions as a critical check on administrative power. Courts typically review an agency’s resolution of these questions of law by applying either the rational basis test or a standard of de novo review.

The APA appears to instruct the courts to decide questions of law de novo—as if the agency’s prior decision did not exist. The courts sometimes adopt this standard on their own because they view statutory construction as an area in which they possess superior expertise. De novo review of questions of law, however, can be described more accurately as review in which an extremely low level of deference is accorded an agency’s interpretation of the law; courts adopting this approach are almost always influenced by an agency’s prior construction of the statutory provision at issue.
Courts may choose to apply the rational basis test in lieu of de novo review. The most definitive enunciation of this test appears in *NLRB v. Hearst Publications, Inc.*, in which the Supreme Court, reviewing the NLRB's determination that certain newsboys are "employees" as that term is used in the National Labor Relations Act, held that the agency's construction of a statutory provision must be accepted "if it has warrant in the record and a reasonable basis in law." Both the rational basis test and de novo review enable the courts to constrain an agency's legal interpretations within tolerable bounds. No matter how much a court defers, it never accepts the agency's interpretation without some independent analysis. If the interpretation is inconsistent with the purpose of the statute, its legislative history, or plain logic, it is likely to be rejected by a reviewing court even under the most deferential version of the rational basis test.

### 2. Questions of Fact

Agencies are supposed to be particularly skilled in deciding questions of fact, which often demand special scientific knowledge uniquely within their areas of expertise. Because professional standards should govern decisionmaking in these areas, the courts accord greater deference to agency findings of fact. Although the formal standard of review depends upon whether the process is one of formal adjudication or informal rulemaking, the resulting levels of scrutiny are barely distinguishable under either standard.

Formal adjudication can be affirmed only if an agency makes findings on every material, contested fact that is supported by "substantial evidence." Even when qualified by the requirement that the

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35. This deference may be supported on several grounds. First, the APA arguably does not compel de novo review of all questions of law. See note 31 *supra*. Second, agency interpretations of statutory provisions are often so inextricably bound to factual and policy issues that de novo review would constitute undue interference in the agency's factfinding or policymaking process. Third, the agency is often best suited to understand how it is supposed to pursue the congressional purposes underlying a statute. Fourth, uniformity should be enhanced by deferring to reasonable agency interpretations of regulatory statutes. Fifth, in some circumstances, deference to agency statutory interpretations may help protect the reliance interests of parties affected by the statute at issue. See generally Woodward & Levin, *supra* note 7, at 331-36.


38. 322 U.S. at 131.


40. 4 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 29.01 (1958).

41. Florida v. United States, 282 U.S. 194, 212 (1931) (rate establishment requires findings on existing traffic and revenue and on the effect of the prescribed rates on carrier's income); cf. United States v. Pierce Auto Freight Lines, Inc., 327 U.S. 515, 533 (1946) (failure to make explicit finding not fatal where finding exists but is "inartistically drawn").

42. "Substantial evidence is more than a scintilla. It means such relevant evidence as a rea-
evidence be "substantial" after the court takes into account "whatever
in the record fairly detracts from its weight,"43 this test accords consid-
erable deference to administrative findings. If, as is usually the case,
the evidence before the agency would permit a reasonable person to
reach more than one conclusion, the agency's finding will be affirmed
as long as it reaches any of those conclusions.44 Some courts differ over
interpretations of the substantial evidence test,45 but most courts seem
to have little difficulty understanding and applying the test in a uni-
form, effective manner.46

The APA generally does not require findings of fact to accompany
an agency action taken through informal rulemaking. In practice,
however, the agency must at least implicitly disclose its findings of fact
in its final rule and provide a "concise general statement of . . . basis
and purpose"47 in order to avoid reversal or the equally unpalatable
prospect of cross-examination in court.48 A more difficult question is
which of three tests a court should use to review these findings of fact:
de novo review, the substantial evidence test, or the arbitrary and cap-
pricious test. Although regulatory statutes49 require de novo review
sousible mind might accept as adequate to support a conclusion." Consolidated Edison Co. v.

44. For example, in Celebrezze v. Bolas, 316 F.2d 498, 506 (8th Cir. 1963), a determination of
the extent of a person's disability was upheld when there was substantial evidence supporting a
number of contradictory results.

evidence" can be found not to exist even though the finding is not "clearly erroneous"), with
NLRB v. James Thompson & Co., 208 F.2d 743, 746 (2d Cir. 1953) (agency finding should be
accepted unless there is no way certain evidence could have satisfied doubts raised by testimony).

46. A survey of cases carried out by Professor Cooper reached the opposite conclusion, but
we interpret his data to show a high degree of uniformity in the application of the substantial
evidence test. See Cooper, Administrative Law: The Substantial Evidence Rule, 44 A.B.A. J. 945
(1958). Professor Cooper was able to identify seven relatively easy rules of thumb that courts used
in applying the test. These rules were that: (1) hearsay is not substantial evidence, at least if it is
opposed by competent evidence; (2) a finding contrary to uncontradicted testimony is not sup-
ported by substantial evidence; (3) evidence that is slight or sketchy in an absolute sense is not
substantial evidence; (4) evidence that is slight in relation to much stronger contrary evidence is
not substantial evidence; (5) an administrative law judge's finding contrary to agency findings
may be a significant factor leading a court to conclude that the agency finding is not supported
by substantial evidence; (6) dissenting opinions by members of the agency with respect to agency
findings of fact have an effect on a reviewing court comparable to a contrary finding by an admin-
istrative law judge; (7) a court is more likely to reverse an agency finding if the agency has en-
gaged in a consistent pattern of crediting the agency's witnesses and discrediting opposing
witnesses. Id. at 1002-03. There is no indication that modern courts deviate from these rules.

47. 5 U.S.C. § 553 (1976). The Regulatory Reform Act would expressly require "an explana-
tion of how the factual conclusions upon which the rule is based are substantially supported in the
rulemaking file maintained pursuant to . . . this section." S. 1080, 97th Cong., 2d Sess. § 3, 128

only in narrow, specific circumstances, something closely resembling de novo review of agency findings of fact is beginning to emerge in a much broader class of cases in which regulations are reviewed by a district court. The district court's natural tendency is to conduct something that looks very much like a trial, complete with lengthy discovery and evidentiary phases. This practice may decline as rules adopted under the expanded notice concept of Portland Cement Association v. Ruckelshaus and United States v. Nova Scotia Food Products Corp. begin to reach district courts accompanied by records containing studies and counterstudies of contested factual issues. It is premature, however, to predict such a change at this time. The APA requires use of the substantial evidence test only for findings of fact adopted in formal adjudication or rulemaking, but many organic acts that authorize informal rulemaking also require substantial evidence review of findings of fact. Some judges tend automatically to apply the substantial evidence test to contested findings of fact adopted through the use of informal procedures even in the absence of an authorizing statute. The lack of statutory guidance has caused other courts to use the arbi-


50. Absent a statutory provision mandating de novo review, it is authorized only when an agency uses inadequate procedures in an adjudicatory proceeding or when new factual issues are raised in an enforcement proceeding. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415 (1971).

51. Institute on Federal Agencies and the Public Interest, ABA Section of Administrative Law, Panel IV: Judicial Review of Agency Action, 26 AD. L. REV. 545, 564 (1974) (remarks of Mr. Allen) [hereinafter cited as ABA Institute].


55. 5 U.S.C. § 706 (1976). For the text of this provision, see note 26 supra.


57. See, e.g., Leventhal, Environmental Decisionmaking and the Role of the Courts, 122 U. PA. L. REV. 509, 540 (1974). While other judges have suggested that the combination of informal procedures and substantial evidence review is an irrational compromise, Industrial Union Dep't v. Hodgson, 499 F.2d 467, 469 (D.C. Cir. 1974), most courts have little difficulty applying the test where findings of fact are adopted using procedures that produce written presentations of contested issues of fact. See, e.g., American Pub. Gas Ass'n v. FPC, 567 F.2d 1016 (D.C. Cir.), cert. denied, 435 U.S. 907 (1977).

58. The Regulatory Reform Act would remedy this oversight by requiring that a court find agency factual conclusions to be arbitrary and capricious if they are "without substantial support in the rule making file." S. 1080, 97th Cong., 2d Sess. § 5, 128 CONG. REC. S2718 (daily ed. Mar. 24, 1982) (passed by the Senate). "Substantial support" is defined in a statement of legislative intent to require application of the "hard look" doctrine. Id. at S2406 (statement of Sen. Bumpers). The doctrine is described at notes 70-76 infra & accompanying text.
Arbitrary and capricious test to review agency findings of fact. Many of these courts apply the arbitrary and capricious standard in a manner yielding essentially the same results as application of the substantial evidence test.

Agencies possess considerable freedom to reach factual findings. Except for instances of district court de novo review, courts are not as free to overrule agency findings of fact as they are to reverse agency conclusions of law. The substantial evidence test review of adjudication grants great deference to the agencies, and the arbitrary and capricious test calls for no less deference than the substantial evidence test. Thus, judicial discretion to invade findings of fact is correspondingly slight.

3. Agency Reasoning Process.—The major area of judicial activism involves review of the reasoning process that links an agency’s basic findings of fact and conclusions of law to the ultimate conclusions reflected in the action it takes. While all modern approaches to review of the reasoning process seem to be outgrowths of the arbitrary and capricious test, there are many different formulations of the proper approach.

Under the adequate consideration test, an action can be remanded for further consideration if the agency initially failed to pay adequate attention to something it was required by statute to consider. This test requires consideration of each goal or decisional factor contained in the organic act. To appreciate the scope of this provision, it must

61. In its original form, the arbitrary and capricious test was extremely limited, giving great deference to an agency’s reasoning process. In 1935, the Supreme Court applied the test as no more than a theoretical and abstract method of screening out patently irrational actions. Pacific States Box & Basket Co. v. White, 296 U.S. 176 (1935). An agency action could withstand review under the test as long as there was a theoretically plausible relationship between the action taken and any permissible goal or purpose of the agency. The modern version of the arbitrary and capricious test requires that the agency state its reasons when it acts, Camp v. Pitts, 411 U.S. 138, 142-43 (1973), that the agency explain the reasons for its action, Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 413-16 (1971), and that the agency’s choice of action not be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” Id. at 414 (quoting 5 U.S.C. § 706(2)(A) (1964 & Supp. IV 1970)).
62. See, e.g., Palisades Citizens Ass’n v. CAB, 420 F.2d 188 (D.C. Cir. 1969).
63. The recent decision of the Temporary Emergency Court of Appeals in Mobil Oil Corp. v. DOE, 610 F.2d 796 (Temp. Emer. Ct. App. 1979), cert. denied, 446 U.S. 937 (1980), provides an apt illustration of this requirement. DOE’s organic act required it to further nine broad goals “‘to the maximum extent practicable.'” Id. at 801 (quoting 15 U.S.C. § 753(b)(1) (1976)). In Mobil, the court reversed and remanded a DOE rule concerning allocation of crude oil costs because the agency did not explain its action with reference to each of those factors. The court described its duty in reviewing DOE’s action as including a determination “whether the decision was based on a consideration of relevant factors, whether there has been a clear error of judgment and whether
be noted that statutory provisions usually prescribe only very broad limits. An agency is often told to further the public interest, which may be refined to encompass several specific but conflicting goals, or it may be instructed in its organic act to consider and attempt to further a separate list of goals. It is rarely told which goals are paramount. Rather, it is usually instructed that it must balance all goals in every case. Whenever an agency fails to give adequate consideration to goals or factors that it has a duty to consider, its action is subject to judicial remand. Courts may apply the same standard whenever any other statute imposes a duty to consider goals or factors in addition to those incorporated in the organic act.

Courts have pursued more rigorous review under the "hard look" doctrine, which was first clearly articulated in Greater Boston Television Co. v. FCC:

The function of the court is to assure that the agency has given reasoned consideration to all the material facts and issues. This calls for insistence that the agency articulate with reasonable clarity its reasons for decision, and identify the significance of the crucial facts, a course that tends to assure that the agency's policies effectuate general standards, applied without unreasonable discrimination.

The District of Columbia Circuit interpreted this standard to require

there is a rational basis for the conclusions approved by the administrative body." Id. (quoting Texaco, Inc. v. FEA, 531 F.2d 1071, 1076-77 (1976)). It emphasized that "all nine factors are to be balanced objectively." Id.


68. See note 26 supra. In this respect, the adequate consideration doctrine differs from the traditional arbitrary and capricious standard from which it evolved. If an agency fails the adequate consideration test, its action is remanded for further proceedings; if it fails the arbitrary and capricious test, the action is reversed.

69. One of the most common of these is the duty to consider environmental impact imposed on many agencies by the National Environmental Policy Act of 1969, § 102(c), 24 U.S.C. § 4332(2)(c) (1976). See McGarity, The Courts, the Agencies, and NEPA Threshold Issues, 55 Texas L. Rev. 801 (1977). Failure to consider arguments and data contained in public comments, a duty implicit in § 553 of the APA, 15 U.S.C. § 553 (1976), may also result in judicial remand. When an agency acts through informal rulemaking, the APA requires it to publish a notice of its proposed actions in the Federal Register and to provide an opportunity for comments on the proposed action by affected members of the public. 5 U.S.C. § 553(c) (1976). These requirements form the basis for an agency's duty to explicitly consider arguments against its proposed action raised in comments.


71. Id. at 851.
remand of the agency action whenever it appears "that the agency has not taken a 'hard look' at the salient problems, and has not genuinely engaged in reasoned decision-making."

So defined, a "hard look" means more than subjective good faith consideration of these problems; the Greater Boston court described it as review "with vigilance." The Greater Boston court's recognition of the need for a standard of review stricter than that offered by the adequate consideration test was apparently triggered by the fact that the agency's decision-making process "was at one time blemished by ex parte contacts with agency heads." Since Greater Boston, reviewing courts have applied the "hard look" doctrine under a variety of circumstances.

If a court characterizes a regulatory standard as "experimental," it may "apply a standard of review requiring heightened deference to the agency's expertise in such experimental regulations." This standard of review, which is sometimes referred to as "kid glove review," is illustrated by the District of Columbia Circuit's two opinions in Public Service Commission v. Federal Power Commission. New York's Public Service Commission sought reversal of an FPC order permitting interstate gas pipelines to include in their rate bases certain advance payments made to producers on the ground that the agency had failed to consider several factors or to give adequate reasons for its action. Although the court rejected New York's challenge, it emphasized its

72. Id.
73. Leventhal, supra note 57, at 528.
74. 444 F.2d at 850. For example, under an application of the "hard look" doctrine to environmental impact statements, a court must scrutinize the statement "to see that it fully discloses and analyzes the environmental impacts of a proposed action; that it lays bare alternatives to the proposed action in such a way as they may be understood and appreciated by the decision-maker, and more generally, in the vernacular, that it all hangs together and makes elementary good sense." Leventhal, supra note 57, at 525.
75. 444 F.2d at 850.
76. E.g., International Harvester Co. v. Ruckelshaus, 478 F.2d 615 (D.C. Cir. 1973); Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375 (D.C. Cir. 1973), cert. denied, 417 U.S. 921 (1974). Some argue that the "hard look" doctrine should be invoked both when the action is very important, and when there is reason to suspect the agency's bona fides or relevant expertise. Leventhal, supra note 57, at 515, 531-33. Moreover, courts often hold an agency to a special duty whenever it departs from its prior policy or precedents. This is best exemplified by the holding in Atchison, T. & S.F. Ry. v. Wichita Bd. of Trade, 412 U.S. 800 (1973). In that case, the court recognized a "presumption" that an agency can best carry out the policies committed to it by Congress by adhering to a "settled rule" established by agency precedents. Id. at 808. The agency can overcome this presumption of duty, however, by clearly setting forth the grounds for its departure, assuming that these grounds are supported and are consistent with the agency's statutory mandate. Id.
77. Shell Oil Co. v. FPC, 520 F.2d 1061, 1072 (5th Cir. 1975), cert. denied sub nom. California Co. v. FPC, 426 U.S. 941 (1976).
78. Id.
79. 467 F.2d 361 (D.C. Cir. 1972); 511 F.2d 338 (D.C. Cir. 1975).
intention to review the experiment in the future under a very different test:

One of the important factors in reaching our decision was the temporary character of the FPC order under review . . . and our belief that it represented a justifiable experiment in the continuing search for solutions to our nation’s critical shortage of natural gas . . . . Fundamental to the concept of any experiment is the assumption that the data developed from the experience thereunder will be subjected to meaningful review, analysis, and evaluation before the experimental practice is allowed to continue or to become institutionalized as a more permanent procedure.

After the agency had twice extended the original program for one-year periods and had attempted to gather data to determine its effectiveness, the court reduced its level of deference in a second review proceeding, replacing the "heightened deference" of the "kid glove" test with the "increased vigilance" of the "hard look" doctrine.

These standards of review allow the courts considerable latitude in evaluating the agency reasoning process. The factors used in selecting an appropriate standard of review are sufficiently vague to permit considerable judicial intervention in the administrative process.

B. Evaluation of Judicial Review of Agency Action

1. The Adequacy of Review of Questions of Law and Fact.—No alternative approach to review of agency interpretations of specific statutory provisions offers any advantage over the approach now taken. The original version of the Bumpers proposal, which would allow no deference for an agency's construction of its statute, would create a lack of uniformity in interpretation of related regulatory provisions that would wreak havoc in light of many agencies' broad mandates and frequently bewildering maze of separate statutory provisions. The no-deference proposal would also transfer discretion from agencies, which are politically accountable, to the courts, which are not. Given the typical ambiguity of statutory provisions governing agency action, this change in the allocation of power would only decrease political ac-

80. 467 F.2d at 371.
81. The court sought to determine whether the agency had engaged in “meaningful review, analysis, and evaluation of the advance payments program.” 511 F.2d at 342. The orders extending the program were reversed and remanded because the agency failed “to indicate ‘fully and carefully the methods by which, and the purposes for which, it has chosen to act, as well as the consequences of its orders for the character and future development of the industry.’ ” Id. at 346 (quoting Permian Basin Area Rate Cases, 390 U.S. 747, 792 (1968)).
82. See text accompanying notes 31-39 supra.
83. See note 7 supra & accompanying text.
84. See Woodward & Levin, supra note 7, at 336-44.
countability. Conversely, proposals to accord total deference to administrative interpretations of statutory provisions must also be rejected. The courts need to maintain current levels of review to ensure that statutory mandates are not ignored. When Congress has imposed a specific constraint or decisional standard on an agency, courts should continue to carry out their obligation to enforce congressional intent.

Current review of agency factual determinations is also satisfactory. Congress has consistently expressed the intention to require agencies to take delegated actions based on factual premises that are as well supported as they can be under the circumstances.85 The substantial evidence test is sufficiently pragmatic and malleable to realize this goal.86 The test should be applied to all agency resolutions of contested material facts regardless of whether these resolutions are reflected in specific findings adopted in a formal adjudication, or are implicit in action taken in informal rulemaking.

2. The Danger of Reformulating Controls over Agency Reasoning.—Active judicial review of the agency reasoning process is thought to be beneficial because in the absence of this review, agencies can adopt policies that are counterproductive, poorly reasoned, or biased. Isolated decisions remind the agencies of the ever-present possibility of active review, forcing them to consider proper decisional factors more carefully in matters before them.87 The courts have already increased their review of the reasoning process, but some argue that an acceleration of this trend would yield a substantial improvement in accountability.88 This subpart describes the process of active review and then considers the likely costs of increased judicial scrutiny.

(a) The process of active review.—The courts are certainly too busy to be able to give detailed consideration in every instance of contested agency action. Rather than attempt that impossible task, appellate courts follow a model of selective review similar to the Supreme Court’s certiorari system.89 Assuming a court chooses to review an

85. See notes 55-56 supra & accompanying text.
86. See text accompanying notes 41-48, 55-57 supra.
87. ABA Institute, supra note 51, at 575 (remarks of Judge Oakes); Friendly, Chenery Revised: Reflections on Reversal and Remand of Administrative Orders, 1969 Duke L.J. 200, 215; Leventhal, supra note 57, at 526.
89. The court identifies a relatively small portion of the total agency actions appealed to it as deserving detailed review. Some of these actions are reversed and remanded with lengthy opinions detailing the ways in which the agency did not adequately consider various statutory decisional factors or arguments raised in comments. The bulk of the agency actions are affirmed with
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agency's stated reasons for taking an action, it typically applies some form of the "adequate consideration" version of the arbitrary and capricious test. The case is remanded for further proceedings if the agency failed to "give full consideration" to a factor,90 made a "clear error of judgment,"91 failed to balance factors "objectively,"92 "ignored . . . relevant factors,"93 or dismissed an argument with an "unconvincing assertion."94

This verbal imprecision makes it easy for a court to defend its opinion, whether affirming or remanding, simply by varying sub rosa the content given this vague language. Since an agency must in its comments "adequately" consider at least scores and sometimes hundreds of statutory factors and arguments, it is unlikely to consider explicitly every factor that a court may later include in the duty of adequate consideration.95 Even if an agency takes particular care to address every issue in a controversial case, a court can almost always subsequently identify factors or arguments that were not discussed.96

The opinions provide little guidance for identifying the criteria that the courts use to accord greater or lesser deference to an agency's stated reasons for taking an action. The only opinions that even admit to varying the degree of deference accorded by the adequate consideration test refer to the "hard look" or "kid glove" standards of review.97 Yet variations in the degree of deference given the reasoning process are clearly critical in many more cases than these.98 According to judges' extrajudicial statements, judicial deference is likely to depend

short opinions stating, somewhat disingenuously, that the court has reviewed the agency's reasoning process under its normal standards and found the agency to have adequately considered everything it was required to consider.

95. Leventhal, supra note 57, at 536-37. For instance, over 400 different issues were raised in one EPA ruling. Costle, Brave New Chemical: The Future Regulatory History of Phlogiston, 33 Ad. L. Rev. 195, 199 (1981).
97. See text accompanying notes 70-81 supra.
98. A few judges have attempted in their extrajudicial writings to identify the factors responsible for these different degrees of deference. Judge Oakes provides several particularly helpful insights:

Any realist would have to concede that a judge's views as to the extent of judicial review vary from agency to agency, from time to time, with the character of the administrative agency, the nature of the problems with which it deals, the confidence the agency has won, the degree to which the review would interfere with the agency's functions, or bur-
upon the court's perception of the importance of the function performed by the agency, its views on the general competence and integrity of both the agency and the parties, and its belief about whether agency action is right or wrong.\textsuperscript{99} Judges are bound to be influenced by their own political or ideological beliefs when applying these highly subjective factors.\textsuperscript{100} Some judges will be more confident than others of their ability to understand the area in which the agency is acting. Although this factor is less likely to correlate with each judge's political leanings, it will affect the level of judicial deference accorded.

Judges are also likely to intervene if they perceive that an agency's procedures are inadequate. This factor has no functional significance when an agency fails to follow the minimum procedures required by regulations, statutes, or the Constitution, since in these circumstances the action should be remanded for its procedural defects alone. In other circumstances, judges may well reverse agency actions on grounds of inadequate consideration when their only real reason for so doing is belief that the minimum procedures required by law are inadequate. This approach should be more tempting now that the Supreme Court has severely constrained the reviewing court's discretion to require procedures greater than those mandated by statute or by the Constitution.\textsuperscript{101}

\textbf{(b) The costs of active review.—}The review process gives judges the freedom to make decisions based at least in part on their view of the role of the judiciary in the administrative process and the propriety of a particular administrative decision. If this freedom is actively exercised, it will create significant costs for the agency system. Judges assume a role inconsistent with their position in our governmental structure when they rely on their own political beliefs to second-guess agencies.\textsuperscript{102} Furthermore, generalists lacking technical den the courts, and the nature of the proceedings before the agency as well as other factors.

ABA Institute, \textit{supra} note 51, at 575 (remarks of Judge Oakes).

Judge Kaufman recognizes that reviewing courts are often influenced by their gut feelings about the parties' "bona fides," or their sense that "justice" is not being done, acknowledging that an enterprising judge "can usually find error upon which to base a reversal." Kaufman, \textit{supra} note 96, at 209. Judge Friendly characterizes judicial review of the agency reasoning process as "more an art than a science." Friendly, \textit{supra} note 87, at 200. He states candidly that "a reviewing court is more likely to take a charitable view toward error in subsidiary findings when it sympathizes with the agency's end result than when it does not." \textit{Id.} at 224.

\textsuperscript{99} See note 98 \textit{supra} & accompanying text.

\textsuperscript{100} See Stewart, \textit{supra} note 17, at 1781-84.


\textsuperscript{102} See, \textit{e.g.}, North Carolina v. FERC, 584 F.2d 1003 (D.C. Cir. 1978). Courts breed cyni-
training are ill-equipped to decide issues whose resolution demands technical expertise. Judicial activism also imposes procedural costs on the administrative process; courts willing to increase the scope of review would attract many more petitions for review than are currently submitted. Although most of these would eventually be dismissed or disposed of in brief, conclusory opinions, the increased caseload would greatly extend the length of time affected parties have to wait for final resolution.

Reversal for failure to give adequate consideration to factors identified by a reviewing court only adds to the uncertainty surrounding key unresolved issues, causing the deferral of major investment decisions and preventing agencies from erecting large portions of their regulatory programs. Other costs of active judicial review include the costs of the rethinking and rewriting required to comply with the court's mandate. Since courts rarely identify all the steps an agency must take to achieve judicial affirmation, a cautious administrator might feel compelled to "play it safe" by adding elaborate, costly procedures, including full evidentiary hearings in some cases. Increasing active review would also cause an increase in the level of forum shopping. Consideration of all these costs reveals that a single instance of active review under the adequate consideration test can cause criticism and lack of respect for their traditional role when they engage in political decisionmaking thinly disguised as "judicial review" limited to screening out "arbitrary and capricious" agency action.

103. The agency must attempt to read between the lines and make an educated guess whether the court will accept a rewritten agency order reaffirming its prior action or giving increased "consideration" to the factors identified by the court, or whether the court is actually telling the agency that judicial affirmation can be obtained only by adopting a different resolution of the issue. Moreover, if the agency believes that the court is telling it to resolve the issue in a different manner, it must attempt to determine what resolution of the issue the court will ultimately find acceptable. This is often no mean feat, for courts often hint strongly that the agency's resolution of an issue is unacceptable without providing any real clue to enable the agency to divine the resolution of the issue that the court prefers. This process of agency action, court remand on an ambiguous ground, agency reconsideration on remand, often followed by a second or third iteration of the process, can easily last a decade. See, e.g., Tucker, Environmentalism and the Leisure Class, HARPER'S, Dec. 1977, at 49. See generally Pierce, supra note 53, at 5-30. Faced with this possibility, the agency may simply abandon its attempts to regulate. McGarity, Substantive and Procedural Discretion in Administrative Resolution of Science Policy Questions: Regulating Carcinogens in EPA and OSHA, 67 GEO. L.J. 729 (1979).

104. See Pierce, supra note 53, at 25.

105. If the holding in Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978), is to have the effect the Court expects of it, it may have to be followed by decisions reducing judicial discretion to disguise active procedural review as review of the agency reasoning process. McGowan, Reflections on Rulemaking Review, 53 TUL. L. REV. 681, 695 (1979); Verkuil, Judicial Review of Informal Rulemaking: Waiting For Vermont Yankee II, 55 TUL. L. REV. 418, 419 (1981).

106. The organic acts under which most agencies function permit adversely affected parties a choice of reviewing courts. The potential for active review makes the choice of reviewing court outcome-determinative in some cases.
general regulatory confusion, frustration, and stagnation.107

C. The Inadvisability of Expanding Review

The courts appropriately accord the greatest deference to an agency's factual findings, since these are largely the product of technical expertise. Agencies are well equipped to make factual determinations, and litigants should be able to uncover technical errors through currently available procedures. Courts do not appear to have much difficulty deciding whether an agency has abused the rather considerable discretion it is granted under any of the tests used. The substantial evidence test is best suited to this task and should be applied in cases of both formal adjudication and informal rulemaking. The courts also possess adequate tools to review an agency's legal conclusions without exercising their own values.

Changes in the scope of review of factual or legal questions would upset the present equilibrium in the distribution of discretion between the judiciary and the agencies. The judiciary undertakes the necessary task of ensuring that an agency acts on the basis of supportable factual premises. Any other system would ignore the advantages that administrative bodies have in developing those facts, and the difficulties the judiciary encounters in second-guessing that process. If no deference were paid to legal conclusions, power would be reallocated from the agencies to the judiciary, and the political accountability of this system would decrease. Since many statutes governing agency actions are ambiguous, judges permitted to ignore agency interpretations of their statutory mandates would enjoy additional freedom to rely upon their political and social views in carrying out their review function.

The primary arena for judicial activism has been review of the agency reasoning process. The articulated tests for such review are so vague that selection of the level of judicial deference depends on unarticulated standards. Because judges differ greatly in their basic political and ideological beliefs, they will vary substantially in their perception of these standards. An increase in the current level of judicial review of the agency reasoning process will tend to increase the number of erroneous decisions and decrease overall accountability. The ambiguity of directives issued by a remanding court may require the utilization of unnecessarily elaborate procedures by the agency entrusted with carrying them out. Augmented review will be accompanied perforce by an increase in the level of forum shopping. Most

important, as the least accountable branch of government, the judiciary represents the least desirable institution to vest with increased oversight of administrative decisions.\textsuperscript{108} The scope of judicial review should not be expanded, although review of agency findings and conclusions should be maintained at its current level to ensure that congressional intent is enforced.

IV. Congressional Control

Part III demonstrated that any expansion in the role of the judiciary raises new problems of political accountability. These problems are less likely to affect action by Congress, whose members are more accountable to the electorate than federal judges. This part analyzes existing congressional controls on administrative action in order to consider the effectiveness within this framework of two proposed reforms, a revitalized delegation doctrine and an expanded congressional veto.

A. The Limited Democratic Role of Congress

The notion that Congress is a representative institution that guarantees popular sovereignty through general elections is a gross oversimplification of a complex phenomenon.\textsuperscript{109} Voting is not always an accurate reflection of public sentiment: many people do not vote,\textsuperscript{110} and those who do frequently fail to study a candidate's voting record. As a result, many of an incumbent's unpublicized decisions will not affect his chances for reelection.\textsuperscript{111} Although many citizens receive

\textsuperscript{108} Any attempt to weigh all the costs and benefits of the present level of judicial review of the agency reasoning process is likely to dissolve into a sifting of anecdotal evidence defying evaluation. Some will defend active review, claiming that it causes agencies to exercise greater care in their reasoning, but others will deny this and argue that the price we pay in errors and delay precludes augmented review. Compare notes 87-88 supra & accompanying text with notes 103-07 supra & accompanying text. The Regulatory Reform Act would keep the present level of active review by requiring the “hard look” doctrine for all informal rulemaking. S. 1080, 97th Cong., 2d Sess., 128 CONG. REC. S2713-21 (daily ed. Mar. 24, 1982); see note 58 supra.

\textsuperscript{109} Since the electorate must make undifferentiated judgments, any voter will have to overlook at least some of the hundreds of decisions made by a candidate, or be prepared to vote against that candidate despite a high degree of agreement overall. J. Choper, Judicial Review and the National Political Process 13 (1980) (electorate must buy representation in “bulk form”).

\textsuperscript{110} Id. at 31. Often more than one-half of the eligible voters do not vote on election day. Id.

\textsuperscript{111} T. Mann, Unsafe at Any Margin: Interpreting Congressional Elections 46 (1978); M. Margolis, Viable Democracy 79 (1979). Mann reports that “even on controversial issues such as abortion and gun control, 70% to 80% of the voters surveyed in 1976 did not know the position of the candidates for Congress.” T. Mann, supra, at 46. This lack of information is in part caused by the fact that Congressmen vote anonymously on many issues. J. Choper, supra note 109, at 15. As a result, the voter often reaches decisions based on the candidate’s responsiveness to the district, measured in terms of benefits obtained and services rendered as an ombudsman. Id.
some representation through interest groups, this selectively representative form of government cannot replace a fully democratic process. Since interest groups primarily represent business groups and the well-to-do, many citizens go unrepresented. Moreover, even assuming that currently unrepresented individuals understood their need to organize, many would still lack the economic incentive of business groups. Interest groups limit Congress' ability to control agency behavior, but they fail to adequately represent a broad range of sentiment on issues affecting us all.

Congress establishes an agency's legal authority to regulate, and it could conceivably exercise strict control by narrowing the range of agency discretion in the enabling legislation under which it operates.

112. Interest groups generally seek to further the economic interests of their members in a manner that requires elected officials to take account of those concerns. M. Margolis, supra note 111, at 99-100. Some of these organizations—the public interest groups—seek collective or widely shared benefits, while others—the private interest groups—seek exclusive benefits. M. Nadel, The Politics of Consumer Protection 157 (1971). In either case, elected officials in a pluralistic system will attempt to facilitate a compromise that will attract the agreement of as many groups as possible. R. Dahl & C. Lindblom, Politics, Economics, and Welfare 304 (1976); L. Rieselbach, Congressional Politics 196-97 (1973). By serving as an ombudsman the official maximizes support for his reelection. R. Dahl & C. Lindblom, supra, at 285. Such support is often monetary. M. Green, Who Runs Congress? 5-17 (1979). Theoretically, as long as the interests of a representative section of voters are advocated in this manner, there will be a reasonably just and stable division of the benefits and burdens of social and economic life. R. Dahl & C. Lindblom, supra, at 314.

113. M. Margolis, supra note 111, at 117. See also R. Dahl & C. Lindblom, supra note 112, at 341.

114. Decisions will normally discriminate against those not effectively represented, R. Dahl & C. Lindblom, supra note 112, at xxxvi; M. Green, supra note 112, at 27; J. Wilson, Political Organizations 345 (1973), but factors like altruism, the efficiency of direct-mail fund drives, foundation support, friendly media coverage, and sympathetic members of Congress can lower the costs and increase the effectiveness of public group organizing. J. Wilson, supra, at 385-86. But considering the political strength of the private forces often arrayed against such groups, political success often demands the presence of a skilled entrepreneur who can mobilize "latent public sentiment (by revealing a scandal or capitalizing on a crisis), put the opponents on the defensive (by accusing them of deforming babies or killing motorists), and associate the legislation with widely shared values (clean air, pure water, health and safety)." Id. at 370.

115. For a significant number of Americans, this assumption may not be true. Cf. R. Dahl, Democracy in the United States 431 (1972).

116. If voters act as rational economic agents and calculate the profits expected from political activity, an interest group will be assembled only when the costs of forming the group are less than the benefits to be gained. Peltzman, Toward A More General Theory of Regulation, 19 J.L. & Econ. 211, 213 (1976). Political activity is costly and is often discouraged because the costs of organizing, which increase disproportionately with the size of the group, usually outweigh the benefits to be obtained. Policies usually confer benefits on many persons at a cost borne by a very few, or impose substantial costs on many persons for the benefit of a few. Since in either instance most individuals will be only marginally affected by the policy, only those few members of the public who are substantially affected will organize to influence the policy. Wilson, The Politics of Regulation, in The Politics of Regulation 357, 369-70 (J. Wilson ed. 1980). Both costs and benefits can be widely distributed, but there will be little motivation for interest group activity because no group can expect to capture a disproportionate share of the benefits or avoid a significant share of the burdens. Id.

117. See Stewart, supra note 17, at 1672.
Efforts to enact this type of legislation, however, have met with little success.\textsuperscript{118} Political pressures force Congress to resort to extremely general enabling legislation; some legislative grants of authority to regulatory bodies are so broad and vague as to be practically limitless.\textsuperscript{119} The pressures of interest group competition often lead Congress to try to foster a compromise acceptable to the greatest possible number of groups.\textsuperscript{120} This tendency is particularly noticeable in the area of regulation because there has never been any lasting social consensus on a philosophy of governmental activism.\textsuperscript{121} Another reason is that while interest groups may be only generally affected by a decision to regulate, the means chosen to implement the decision can have a far greater impact on them. This has often meant that while agreement could be reached about the need to regulate, no corresponding agreement was possible about the details of regulation.\textsuperscript{122} Under these circumstances, the broad delegation of legislative authority may present itself as the only means of preventing a general consensus from being frustrated by continuing disagreement over particular applications.\textsuperscript{123} Congress has steadfastly refused to make vague enabling acts more specific, even at the behest of an agency.\textsuperscript{124}

By avoiding any determination of the specific details of a regulatory program, members of Congress serve their own interests.\textsuperscript{125} They receive credit for establishing a federal program to solve a social problem that most people may agree requires decisive action,\textsuperscript{126} while offering themselves as ombudsmen to represent interests before the agency responsible for deciding the specific issues left unresolved by Congress.\textsuperscript{127} This noncontroversial role is vastly preferable to having to

\textsuperscript{118} J. Freedman, \textit{supra} note 17, at 78; Davis, \textit{A New Approach To Delegation}, 36 U. Chi. L. Rev. 713 (1969).


\textsuperscript{120} See note 112 \textit{supra} & accompanying text.

\textsuperscript{121} The only philosophy on which people agree lies somewhere between "the polarities defined by Adam Smith and Karl Marx [or] between the polemic positions . . . of Milton Friedman and John Kenneth Galbraith." J. Freedman, \textit{supra} note 17, at 33.


\textsuperscript{123} Robinson, \textit{supra} note 9, at 177; Stone, \textit{The Twentieth Century Administrative Explosion and After}, 52 Calif. L. Rev. 513, 520 (1964).


\textsuperscript{126} Id. at 48; Fleishman & Aufses, \textit{supra} note 122, at 33-34. See also M. Edelman, \textit{The Symbolic Uses of Politics} 37-38 (1964) (regulatory statutes are reassuring symbols to the public of protection against powerful economic forces, even though they may indirectly aid organized groups in making greater claims upon tangible resources).

\textsuperscript{127} M. Fiorina, \textit{supra} note 125, at 48; J. Freedman, \textit{supra} note 17, at 68.
decide a controversial regulatory issue outright.\textsuperscript{128}

Even if Congress found it politically feasible to delegate authority more specifically, its own institutional limitations would usually prevent it from doing so. Many members of Congress and their staffs lack the expertise necessary to understand the policy choices involved in complex regulations.\textsuperscript{129} Furthermore, a regulatory agency typically must decide many important questions that could not have been anticipated at the time its enabling legislation was enacted.\textsuperscript{130} Although Congress could conceivably legislate on each question as it arose, it almost certainly does not have the time to do so.\textsuperscript{131}

Political pressures also influence the choice of ongoing legislative controls over established agencies. Congress has a wide assortment of controls at its disposal.\textsuperscript{132} Since Congress creates the authority under which an agency operates, it can always narrow an operating mandate by amending the enabling legislation.\textsuperscript{133} Appropriations can be wielded to punish or reward agencies, and specific restrictions can be placed on the use of appropriated funds.\textsuperscript{134} Specific decisions can be overruled,\textsuperscript{135} vetoed,\textsuperscript{136} or rendered moot by the simple expedient of

\textsuperscript{128} See M. Fiorina, supra note 125, at 41-49.

\textsuperscript{129} Wright, Book Review, 81 YALE L.J. 575, 580 (1972) (reviewing K. Davis, Discretionary Justice (1971)); see, e.g., Ackerman & Hassler, supra note 17, at 1567 (dirty-coal lobby exploited "technical incompetence of Congress to further ends peripheral to the main goals of environmental law").

\textsuperscript{130} Davis, supra note 118, at 720; Redford, Regulation Revisited, 28 AD. L. REV. 543, 563-64 (1976). Professor Robinson has questioned this argument by noting that the failure of the FCC to adjust its regulatory program for recent technological changes in telecommunications had prompted congressional consideration of action. Robinson, supra note 9, at 198. But Robinson admits that Congress may be even less responsive than the FCC. Id. at 199.

\textsuperscript{131} Stewart, supra note 17, at 1695; Stone, supra note 123, at 519. Although several examples of more specific delegations may be found, they do not establish that Congress generally has the political will and institutional expertise to pass specific regulatory legislation. In such cases, institutional factors, such as the makeup of a committee or the identity of a chairperson, are uniquely present. Stewart, Foreword: Lawyers and the Legislative Process, 10 HARV. J. ON LEGIS. 151, 170 (1973).

\textsuperscript{132} Redford, supra note 130, at 560-61.

\textsuperscript{133} Stewart, supra note 17, at 1672.

\textsuperscript{134} See J. Freedman, supra note 17, at 67; Krasnow & Shooshan, Congressional Oversight: The Ninety-Second Congress and the Federal Communications Commission, 10 HARV. J. ON LEGIS. 297, 307 (1973). Appropriation legislation specifies the purpose for which funds are to be used, the amount that can be spent, and sometimes purposes for which the funds may not be spent. 2 SENATE COMM. ON GOVERNMENT OPERATIONS, STUDY ON FEDERAL REGULATION: CONGRESSIONAL OVERSIGHT OF REGULATORY AGENCIES, S. Doc. No. 26, 95th Cong., 1st Sess. 30-31 (1977) [hereinafter cited as SENATE STUDY]; M. Kirst, Government Without Passing Laws 3-6 (1969).

\textsuperscript{135} J. Freedman, supra note 17, at 67.

\textsuperscript{136} As many as five major and six minor types of veto procedures have been enacted by Congress. Hearings on Administrative Procedure Act Amendments of 1978 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary, 95th Cong., 2d Sess. 860 (1978) (Congressional Research Service report) [hereinafter cited as 1978 APA Hearings]. The five major types are procedures requiring: disapproval by either House (one-House veto); disapp...
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changing an agency’s jurisdiction. Congress can also shape administrative behavior indirectly by applying political pressure through the use of committee reports; through budgetary, oversight, or investigatory hearings and hearings on nominations of administrators; and through direct communications with administrators. Congress can further increase the efficacy of these controls by requiring that agencies report to it before taking action.

The need to reconcile conflicting interests, however, leads Congress to favor nonstatutory controls over statutory ones. When Congress has utilized statutory controls, it has favored those that avoid

approval by both Houses (two-House veto); approval by both Houses; approval by committees in both Houses; or disapproval by a committee or committees in either House. Id. at 863-72.

The constitutionality of legislative vetoes has been challenged. See Consumer Energy Council v. FERC, 673 F.2d 425 (D.C. Cir. 1982); INS v. Chadha, 634 F.2d 408 (9th Cir. 1980), cert. granted, 102 S. Ct. 87 (1981). The “necessary and proper” clause, U.S. Const. art. I, § 8, cl. 18, authorizes a legislative veto only if it is consistent with the “letter and spirit of the Constitution.” McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819). Resolution of the constitutionality of the veto therefore depends on whether a narrow or expansive reading is given to various constitutional provisions and to the separation of powers principle. For a more thorough discussion of the constitutionality of the legislative veto, see Cooper & Cooper, The Legislative Veto and the Constitution, 30 GEO. WASH. L. REV. 467 (1962); Henry, The Legislative Veto: In Search of Constitutional Limits, 16 HARV. J. ON LEGIS. 735 (1979); McGowan, supra note 6, at 1119-74; Schwartz, The Legislative Veto and the Constitution—A Reexamination, 46 GEO. WASH. L. REV. 351 (1978); Stewart, Constitutionality of the Legislative Veto, 13 HARV. J. ON LEGIS. 592 (1976).

137. Kaiser, Congressional Action to Overturn Agency Rules: Alternatives to the “Legislative Veto,” 32 AD. L. REV. 667, 673-74 (1980). Preemption may occur by: exemptions to the rulemaking authority; removal of some industries from the jurisdiction of an agency rule; establishing a moratorium on certain rules; transferring jurisdiction to another agency or to state authorities; and providing waivers for certain regulated categories or deregulating an area. Id.

138. Senate Study, supra note 134, at 37, 51. This technique is a favorite of the appropriations committees. See M. Kirst, supra note 134, at 30-39.

139. Senate Study, supra note 134, at 31-33.

140. See, e.g., Bruff & Gellhorn, Congressional Control of Administrative Regulation: A Study of Legislative Vetoes, 90 HARV. L. REV. 1369, 1420-22 (1977); Krasnow & Shooban, supra note 134, at 316-20.


142. Senate Study, supra note 134, at 58-62; J. Freedman, supra note 17, at 68. While Congress seldom rejects a nominee, it uses confirmation hearings as an opportunity to review an agency’s policies and performance, to emphasize the agency’s responsibility to Congress, and to seek to force the nominee to indicate his substantive views about the direction of the agency. Id.

143. Some of these individual contacts result from constituent complaints. Senate Study, supra note 134, at 64-65; J. Freedman, supra note 17, at 68. Some of the contacts result from negotiations concerning proposed agency rules. Only the latter would probably be regarded as a serious oversight attempt. See Senate Study, supra note 134, at 65.

144. Senate Study, supra note 134, at 57-58.

145. Thus, while there have been hundreds of regulatory hearings, Senate Study, supra note 134, at 80-81; see Robinson, supra note 9, at 180 n.51, and thousands of individual contacts over the last decade, see J. Freedman, supra note 17, at 67-68, this period saw only a few instances of legislation to directly overturn agency decisions or preempt them by changing an agency’s jurisdiction. Kaiser, supra note 137, at 669-87 (study covering 1973-1978). Over the past decade regulatory appropriations have also changed proportionately with the budgets of nonregulatory agencies, suggesting that regulatory agencies have not been singled out for reward or punishment. See B. Owen & R. Braeutigam, The Regulation Game 2-9 (1978) (study covering 1957-
policy decisions and are easiest to pass, notably the legislative veto. Proponents of the legislative veto emphasize that it is easier to rely on the veto than to make substantial changes in an agency's enabling legislation. Not only does this approach not require Presidential approval, but it may require the approval of only one House. Furthermore, by using the veto Congress can avoid having to propose regulatory alternatives to rejected agency solutions. Similarly, Congress has sought to preempt agency action more frequently by changing an agency's jurisdiction than by legislating a substantive solution. Like the veto, these actions often fail to add specificity to an agency's mandate; rather, they aim to protect some interest group from the effect of an agency decision, often by postponing implementation of the decision on the ground that the matter requires further study.

B. Agency Reaction to Congressional Controls

Administrative agencies possess considerable freedom to influence congressional attempts to control their actions. They will generally succumb to congressional pressure only if unable to develop countervailing political pressure to resist congressional control. Ironically, the oversight committee is itself a source of agency support within Congress. It is difficult for members to threaten or discipline personnel who know that their performance is central to the continued existence,


147. See Bruff & Gellhorn, supra note 140, at 1423.

148. See Kaiser, supra note 137, at 710.


151. M. Kirst, supra note 134, at 79-82; Bruff & Gellhorn, supra note 140, at 1411. The fear of undesirable statutory restrictions will also lead an agency to yield to congressional pressure. See generally R. Arnold, Congress and Bureaucracy: A Theory of Influence 21 (1979).
jurisdictional integrity, and funding of the member’s subcommittee. Interest groups that support an agency will lobby Congress to do likewise. The interest groups, members of Congress, the agency, and sometimes the President will meet in an “interior process of policymaking” to bargain over the regulatory problem at issue. The result chosen by Congress will depend upon which of the supplicants bids the most. The medium of exchange is the repayment of past favors or the creation of a stock of credits useful for obtaining future favors.

Agencies also escape the effects of nonstatutory constraints because the congressional review process overlooks many regulatory actions and often fails to subject the remainder to more than the most superficial scrutiny. Unfortunately, the institutional characteristics of Congress make systematic appropriations review cursory and other allegedly more thorough oversight unsystematic. While the appropriations committees review each agency budget annually, their workload and the comparatively small size of regulatory budgets preclude inquiries of any depth. Any oversight that does take place treats only regulations with budgetary manifestations, allowing the “vast sweep of regulatory policies [to be] passed over without any review.” Because it normally yields few political advantages to committee members, other oversight has occurred only as an ad hoc response to crises that will yield useful publicity. Since Congress increasingly has required regulatory agencies to seek yearly or periodic reauthorizations, this response could be changed. But the workload of supervising most regulatory agencies would probably result in the same superficial review that has occurred in the systematic appropriations process. Moreover, to make such oversight truly effective, Congress would still have

154. *T. Lowi, The End of Liberalism* 106 (2d ed. 1979); see Verkuil, *Jawboning the Agencies: Ex Parte Contacts by the White House*, 80 *COLUM. L. REV.* 943, 947 (1980). This process has also been described as a “political subsystem” or “subgovernment.” Redford, *supra* note 130, at 562 & n.52.
157. *Id.* at 41.
158. *Id.* at 107-08; M. Green, *supra* note 112, at 141.
159. *Cf.* *L. Dodd & R. Schott, supra* note 152, at 239 (annual authorization not only may fail to provide effective oversight but also may be advantageous to the agency). At one time the vast majority of regulatory programs were endowed with permanent authorizations. *Senate Study, supra* note 134, at 45. About one-half of the independent agencies are still permanently authorized. *Id.*
to do away with the overlap of committee jurisdiction that makes coordination so difficult. Such a reform is unlikely because it would disrupt many congressmen's close ties to key interest groups and bureaucrats, which allow them to press their claims for financial and political support.

Recent developments concerning the Federal Trade Commission (FTC) illustrate the limits on effective oversight. In 1969 an American Bar Association report strongly recommended that the FTC be reformed to carry out its legislative mandate. Stung by this and similar criticism, the FTC performed in such a credible way that by 1975 Congress agreed to extend its powers. But by 1980 the FTC was once again in congressional disfavor. Congress statutorily prohibited it from continuing several pending rulemaking proceedings, forced it to reconsider many others, and placed all future FTC rules under the


161. L. Dodd & R. Schott, supra note 152, at 125.


shadow of its legislative veto authority.\textsuperscript{167} The change in congressional attitude occurred because FTC opponents, aroused by the Commission's active investigation of such areas as the funeral industry, television advertising, and the legal profession, mounted a full-scale attack against it.\textsuperscript{168} Because public support for regulation had substantially decreased, the FTC found that even its former supporters, including some members of Congress, could not successfully counter the legislative onslaught.\textsuperscript{169}

The FTC experience demonstrates the unevenness of congressional oversight of administrative agencies. While the FTC has been singled out for intensive scrutiny, other controversial agencies have been ignored.\textsuperscript{170} Further, although the FTC had a very broad and vague mandate, Congress resisted pressures to narrow this mandate. When the FTC succeeded in finding political support, as in its antitrust efforts, Congress abandoned legislative attempts to restrict the FTC's power to regulate.\textsuperscript{171}

\textbf{C. Proposed Reforms}

Several proposals have been advanced for altering Congress' preference for nonstatutory, or the least effective statutory, controls. The two most important proposals are for revitalization of the delegation doctrine and adoption of a legislative veto for all regulatory agencies. Both of these proposals raise problems of effectiveness and democratic accountability.

\textit{1. Revitalizing the Delegation Doctrine.}—For years the federal
courts have recognized and sanctioned Congress’ inability to pass more specific legislation by declining to enforce the delegation doctrine.\(^{172}\)

This doctrine, predicated upon the constitutional prohibition against delegating legislative authority,\(^{173}\) is currently satisfied as long as Congress retains a modicum of statutory control over an agency.\(^{174}\) Recently, several influential jurists and commentators have recommended revival of the delegation doctrine.\(^{175}\)

In *Industrial Union Department v. American Petroleum Institute (Benzene)*,\(^{176}\) some members of the

173. U.S. Const. art. 1, § 1; Field v. Clark, 143 U.S. 649, 692, 697 (1892) (majority opinion).
176. 448 U.S. 607 (1980). In *Benzene*, the Court considered a provision of the Occupational Safety and Health Administration Act (OSHA) that required the Secretary of Labor to set exposure limits for toxic materials in the workplace that would “most adequately assure, to the extent feasible, . . . that no employee will suffer material impairment” of his or her health. Occupational Safety and Health Act of 1970, § 6, 29 U.S.C. § 655(b)(5) (1976). Although the litigants differed over the interpretation of the words “to the extent feasible,” a majority of the Court found it unnecessary to reach that issue. Four members of the Court held that because OSHA had failed to make a necessary threshold determination that benzene posed a significant health hazard at the prohibited level of exposure, the regulation would be returned to the agency. A fifth Justice found that the statutory provision violated the delegation doctrine. 448 U.S. at 672 (Rehnquist, J., concurring in the judgment).

In *American Textile Mfrs. Inst., Inc. v. Donovan (Cotton Dust)*, 101 S. Ct. 2478 (1981), the Court decided that the statutory reference to “feasibility” did not require a cost-benefit analysis to justify imposition of an exposure standard for cotton dust. *Id.* at 2490. Two Justices dissented on the ground that the statutory provision was a violation of the delegation doctrine. *Id.* at 2508 (Rehnquist, J., dissenting, joined by Burger, C.J.). They followed the *Benzene* concurring opinion to argue that the constraint of “feasibility” that qualified the authority to promulgate regulations aimed at cleaning up the work environment was not sufficiently defined by Congress, and was therefore only precatory. According to this view, the legislative history of the Act showed only that Congress failed to agree on a definition of feasibility, and impermissibly delegated that task to OSHA. *Benzene*, 448 U.S. at 672 (Rehnquist, J., concurring in the judgment). Justice Rehnquist distinguished instances where Congress would be unable to delegate more specifically because of a lack of technical expertise, which he would permit, from cases like *Benzene*, which he characterized as demonstrating a lack of political will. *Cotton Dust*, 101 S. Ct. at 2881-82, 2885-87. This distinction was suggested earlier by Judge McGowan, see McGowan, *supra* note 6, at 1128, and was criticized by Professor Stewart as requiring predictions about inherently subjective factors and therefore presenting the appearance, if not the actuality, of partisanship. Stewart, *supra* note 17, at 1696-97. These positions assume that Congress’ lack of will justifies use of the doctrine, but the assumption is incorrect. *See* text accompanying notes 180-81 *infra*.

The majority in *Cotton Dust* rejected this position. They found that the language of the OSHA statute, supported by a legislative history that “concededly” was not “crystal clear,” indicated that Congress intended “feasible” to mean “capable of economic and technological accomplishment.” 101 S. Ct. at 2493-97.

The plurality opinion in the *Benzene* case invoked the delegation doctrine to justify the Court’s gloss on a statutory section defining occupational safety “standards” as conditions “reasonably necessary or appropriate to provide safe or healthful employment.” 29 U.S.C. § 652(8) (1976). Rejecting the government’s contention that the section required regulations to be only rationally related to the purpose of achieving a healthier work environment, the plurality warned that unless the definition was read to include a requirement that OSHA act only to eliminate significant risks, the agency would be limited solely by the remaining statutory constraint of feasi-
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Supreme Court indicated a similar willingness to consider its more active use. This reconsideration is difficult to reconcile with the realities of congressional practices. The Court's reluctance to enforce the delegation doctrine has certainly facilitated passage of the many regulatory programs now in effect. A change in judicial willingness to uphold broad statutory delegation\textsuperscript{177} will affect the fate of similar legislation, significantly reducing Congress' ability to set national policy. If the past is any indication,\textsuperscript{178} unless Congress can compromise by using generalities to accommodate opposition, it will pass much less regulatory legislation. Thus, reinvigoration of the delegation doctrine would represent a political choice in favor of less government intervention. The doctrine would give the judiciary power to determine those areas in which government intervention is possible.\textsuperscript{179}

Serious application of the delegation doctrine would restrict Congress' necessary flexibility to legislate in the national interest. Advocates of vigorous enforcement of the doctrine claim that it promotes democracy by forcing elected officials to make choices for which they will be politically responsible, rather than delegating such choices to unelected administrators.\textsuperscript{180} But many regulatory mandates are necessarily broad because of the complexity of the technical questions that condition their implementation, while others accurately reflect a view that once a general consensus is reached, it is more efficient to resolve details in administrative proceedings. Presumably, the Supreme

\textsuperscript{177} See note 176 supra.

\textsuperscript{178} As Justice Rehnquist recognized in his Benzene concurrence, "[i]f Congress wishes to legislate in an area which it has not previously sought to enter, it will in today's political world undoubtedly run into opposition no matter how the legislation is formulated." 448 U.S. at 687. Contra T. Lowi, supra note 154, at 293; Jaffe, The Illusion of the Ideal Administration, 86 Harv. L. Rev. 1183, 1189-90 (1973); Wright, supra note 129, at 584. Judge Wright asserts that "[t]here is every reason to believe that, with a slight nudge from the courts, Congress would eagerly reassert its rightful role as the author of meaningful organic charters for administrative agencies." Id. He explains, "Congress . . . seems to be in a mood to reassert some of its long-dormant prerogatives." Id. While Congress may be in a mood to reassert itself, it will choose mechanisms, such as the legislative veto, that are easy to implement, rather than substantive statutes, which are more difficult to pass. See text accompanying notes 145-50 supra.

\textsuperscript{179} The plurality in the Benzene case could have chosen through its interpretation of the legislative history to "withdraw" from use of the delegation doctrine by finding some standard in the legislative history to fill in an otherwise unacceptably vague statute or to "assert" the doctrine more actively, in the manner of the concurring opinion in Benzene, by finding the legislative history unhelpful. See note 176 supra. While either choice would be open to the subsequent criticism that the legislative history had been misread, the finality of the Court's interpretation confirms the latitude of the Court's discretion in applying the doctrine.

\textsuperscript{180} J. Ely, supra note 175, at 133-34; J. Freedman, supra note 17, at 94; Wright, supra note 129, at 585.
Court's past reluctance to enforce the delegation doctrine reflects its belief that it should not prevent Congress from legislating in the only manner that political reality will allow.\textsuperscript{181}

More specific congressional legislation can be achieved only at the cost of transferring power from Congress to the courts. The decision to enforce the delegation doctrine strictly and reject congressional decisions to adopt regulatory schemes without spelling out all details beforehand would effectuate a judicial deregulation of the economy. Strict enforcement would also force Congress to be specific even when it would be wiser to defer to technical experts for specific decisions.\textsuperscript{182}

This does not mean that the delegation doctrine should be abandoned. Professor Davis argues that we should respect congressional decisions to make broad delegations of authority, and proposes that agencies themselves fill in the details. But forcing the agencies to decide the necessary details places no pressure on Congress to shoulder its responsibilities.\textsuperscript{183} The Court might reserve the doctrine for only the most egregious cases of standardless delegations. However, if those instances are similar to the few cases that have invalidated legislation, all modern statutes would pass muster. No modern statute lacks the procedural protections absent in the statutes at issue in those cases, nor do modern statutes delegate authority to private parties as those cases prohibit.\textsuperscript{184} If past cases could not be used as a guide, the Court would

\textsuperscript{181}. Justice Rehnquist in the \textit{Benzene} case sought to avoid the usual result of the delegation doctrine—invalidating the legislative scheme—by rewriting the OSHA statute to satisfy his objections. He judicially deleted the statutory requirement that the Secretary of Labor consider feasibility in promulgating regulations, so that a standard could be issued if necessary to achieve a safe environment even though the cost of its implementation would be beyond the means of the businesses affected. 448 U.S. at 687-88. By writing his own version, Justice Rehnquist further arrogated congressional power to the Court.

\textsuperscript{182}. Judge McGowan recognizes this difficulty and suggests that the delegation doctrine should be enforced in those instances where the reason for lack of congressional specificity is due to lack of political will instead of lack of expertise. McGowan, \textit{supra} note 6, at 1128-30. This proposal runs counter to the previous argument that the Court should respect Congress' political predicament unless alternative methods of policing discretion are unavailable. Moreover, this technique would require predictions about inherently subjective factors, inviting partisan rulings. Stewart, \textit{supra} note 17, at 1696-97.

\textsuperscript{183}. Professor Davis has proposed that agencies use their rulemaking powers to articulate standards that fill in broad or vague delegations. \textit{See} Davis, \textit{supra} note 118, at 725, 728-29. If agencies did not comply, they could be forced to do so by the courts as a matter of due process. Wright, \textit{supra} note 129, at 587-93. Since this proposal would stall agency actions until acceptable rules were drawn up, some commentators worry that the same political forces that stymied Congress would block the agencies, resulting in a stalemate. \textit{See id.} at 585-86. Even if this did not occur, the Davis proposal still invites the judiciary to take a more active role in deciding whether administrative programs can go forward, again shifting power to the judiciary. This shift is less marked than that resulting from strict enforcement of the delegation doctrine itself.

probably disagree over the limits of permissible delegation. And even if it agreed upon some standards for legislative delegation, its intervention would raise the independent problem of an accretion of judicial power.

In the end, Professor Stewart's recommendation that the Court use legislative history to fill in the details of vague delegations, but construe the delegation as narrowly as a reading of the legislative history will permit, seems most appropriate. It creates an incentive for Congress to act decisively, offers a predictable basis for application of the delegation doctrine, and respects the political predicament of Congress.

2. Expanding the Legislative Veto.—Congress is likely to remain reasonably free to reject the use of specificity in enabling acts as a means of controlling agency discretion. Instead, as now, Congress will look first to nonstatutory options for influencing the content of regulations. For this reason, this section examines the legislative veto. The popularity of the legislative veto is hardly surprising, given the institutional difficulties attending both statutory and nonstatutory review. Because it is easier to veto an action than make a statutory change, members are prone to believe that the veto offers the most systematic and efficient form of oversight. These advantages, however, are eclipsed by one significant disadvantage: the veto will augment the disproportionate power of some members of Congress and, worse yet, of their staffs. Congress usually follows the recommendations of its

§ 9(c) of the National Industrial Recovery Act, Pub. L. No. 73-67, 48 Stat. 195, 200 (1933), on which the orders were based, was an improper delegation of legislative power to the President).

185. See text accompanying notes 176-77 supra.

186. Stewart, supra note 17, at 1697 n.6. This was essentially the position adopted by the Benzene plurality, which ruled that OSHA could not act until it established that a significant risk existed. This approach preserves both the regulatory program and the congressional decision to establish it, but requires Congress to reconsider the agency's mandate.

187. See note 9 supra.

188. Bruff & Gellhorn, supra note 140, at 1420-23. But from five case studies of legislative vetoes, Professors Bruff and Gellhorn concluded that because interest group pressure on members to intervene in agency rulemaking contravened the purposes of public comment, because the vetoes caused serious delays and even impasses in the implementation of rules, and because the veto system lessened the pressure in Congress for specificity in delegating power and did not otherwise provide such specificity, the veto actually reduced congressional control. See id. at 1412-20, 1423-28. Some or all of these observations are endorsed by other prominent critics of the veto process. See, e.g., Administrative Conference of the United States, Recommendation 77-1: Legislative Veto of Administrative Regulations, reprinted in Hearings on Congressional Procedures Before the Subcomm. on the Rules and Organization of the House Comm. on Rules, 95th Cong., 2d Sess. 169-70 (1979); McGowan, supra note 6, at 1146-49.

189. W. Cary, Politics and the Regulatory Agencies 57 (1967) (A "committee chairman or even a powerful member of a committee . . . can create far more havoc with a commission . . . than his constituent's role in the economy would justify."); M. Kirst, supra note 134, at 130 ("[T]he easiest way to insure that nonstatutory language gets in the report is to persuade the chairman . . . .")

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committees, especially when committee actions do not significantly affect the interests of many other members' constituents. Because the decision to use the easily exercised legislative veto effectively rests with congressional committees, key committee members will come to enjoy additional leverage over the agencies they supervise. Unfortunately, most of this additional power is likely to be delegated still further to the committees' staffs. Critics already complain that policy is made not by elected officials with broad experience but by "staff technocrats whose knowledge of the world is limited to what they learned in school or from other participants in the specialized Washington issue networks." A recent study of the operation of existing vetoes found a similar situation, in which "much settlement of policy occurred in behind-the-scenes negotiation between the staffs of the committees and the agencies." Both committee members and their staffs will operate in an environment where private interests exert more influence than public groups. Since members often seek committee assignments that will enable them to help their constituents, few committees contain members whose political careers are independent of pressures from the groups affected by their committees' decisions. The fragmentation resulting from the committee system only accentuates this dependency: the dispersion of power among a large number of subcommittees ties members who look to interest groups for electoral support to the relatively small number of lobbies interested in the narrow subject matter dealt with by their subcommittees. More often

190. M. Green, supra note 112, at 63.
192. See Senate Study, supra note 134, at 51. The committees usually fall under the control of the chairperson and a few other members, Bruff & Gellhorn, supra note 140, at 1417; Krasnow & Shooshan, supra note 134, at 301-04, so that power is ultimately wielded "by a faction which may be a faction," MacMahon, Congressional Oversight of Administration: The Power of the Purse II, 58 Pol. Sci. Q. 380, 414 (1943). Because it is easier to execute than the passage of positive legislation, the veto will further enhance this distortion of power.
194. Id. at 247.
196. M. Green, supra note 112, at 135-36; see R. Fenno, Jr., Congressmen in Committees 271-72 (1973). Western conservationists have had special difficulty dealing with Congress when private commercial interests were lobbying in opposition. Id.; L. Kieselbach, supra note 112, at 203-04.
197. J. Harris, Congress and the Legislative Process 95 (1972). Members also seek committee assignments for fame and prestige, but those relatively few prestigious positions go to persons of long congressional experience. Id.; S. Horn, Unused Power 11-12 (1970).
199. L. Dodd & R. Schott, supra note 152, at 182.
than not, private interests, with their greater financial incentive to lobby, constitute the core of this support.\textsuperscript{200}

The consequences of these disparities are magnified because Congress does not operate under the same procedural constraints as the agencies.\textsuperscript{201} There is no congressional equivalent of the administrative requirement of notice and comment rulemaking, or the concomitant requirement that the final version of a rule be accompanied by a written justification that takes into account all opposing viewpoints.\textsuperscript{202} There is also no limitation on ex parte contacts of the sort that constrain agencies.\textsuperscript{203} The most likely effect of an expanded legislative veto will be to enhance the ability of private lobbies to rely upon powerful, solicitous committee members and their minimally accountable staffs to reach otherwise unattainable objectives.

\section*{D. The Inadequacy of Proposed Reforms}

Congress has the power, but not the will, to eliminate administrative discretion. Because Congress tries to avoid the political difficulties that attend specific decisions, more detailed delegations and other forms of statutory control simply are not used.\textsuperscript{204} Because members of Congress emphasize politically productive activities, they are able to avoid systematic oversight and exercise their authority only superficially when some action is unavoidable.\textsuperscript{205} Strict enforcement of the delegation doctrine would produce less legislation, not more specific legislation. Consequently, arguments favoring this reform are likely to be based on their proponents' general opposition to regulation, rather than on any nonpartisan desire to increase the efficiency of regulatory performance. The legislative veto holds some promise of avoiding these problems,\textsuperscript{206} but only at the cost of making the exercise of congressional power less representative.\textsuperscript{207}

200. Professor Robinson, however, finds that effective participation in complex administrative proceedings is too costly for some public interest groups and that access to legislative committees provides a cheaper, more effective method by which they can influence public policy. Robinson, \textit{supra} note 9, at 201. Prominent public interest groups dispute this contention, arguing that participation before both the agency and Congress is necessary to the groups' effectiveness. McGowan, \textit{supra} note 6, at 1149. Professors Bruff and Gellhorn agree, finding in their study that public groups will have a better chance to influence Congress if they help produce a favorable record before an agency. Bruff \& Gellhorn, \textit{supra} note 140, at 1412-13. They also find that the situation necessarily discriminates against interested parties with fewer financial resources. \textit{Id.} at 1414.

201. Robinson, \textit{supra} note 9, at 176.

202. \textit{See} notes 47, 70-81 \textit{supra} \& accompanying text.

203. \textit{See} notes 75-76 \textit{supra} \& accompanying text.

204. \textit{See} notes 117-124, 132-37 \textit{supra} \& accompanying text.

205. \textit{See} notes 156-61 \textit{supra} \& accompanying text.

206. \textit{But see} note 188 \textit{supra}.

207. \textit{See} notes 189-203 \textit{supra} \& accompanying text.
The congressional lack of will is created by the very nature of our political system. It is therefore unlikely that reforms will be mounted to put Congress in a posture of more effective surveillance. Most recommendations for reform consist of minor alterations in congressional structure or procedure and fail to reduce the political pressures that have made it difficult for Congress to conduct systematic and detailed oversight in the past.\textsuperscript{208}

If the ties between interest groups and members of Congress cannot be weakened by changes in congressional structure, effective reform would require other changes that would decrease the disproportionate influence wielded by these groups. The most effective reform would be to revitalize the role played by our political parties in the nomination process. Recent reforms have had the opposite effect, however, and the extent to which the performance of political parties can be improved is in considerable doubt.\textsuperscript{209} Even if Congress could be

\textsuperscript{208} See generally L. DODD & R. SCHOTT, supra note 152, at 184-214, 348-57; M. OGU, CONGRESS OVERSEES THE BUREAUCRACY 181-202 (1976); L. RIESELBACH, supra note 112, at 359-95. One exception is the recommendation that regulatory oversight be transferred to the Government Operations Committee of each House to avoid the cozy relationships that have developed between members of subcommittees and the lobbies that support them. L. DODD & R. SCHOTT, supra note 152, at 192-94, 223-74, 351. But it is unlikely that either the members or the lobbies would agree to a plan that would dilute the influence of both. Even if agreement could be reached, the committees would require large and expert staffs to begin to have the breadth needed to review the many types of regulations now in effect. Congress would be unlikely to allow those committees to create such an important and influential empire.

\textsuperscript{209} At one time, local and state political parties, open to all citizens, served as a “countervailing collective power on behalf of the many individually powerless against the relatively few who are individually—or organizationally—powerful.” D. IPPOLITO & T. WALKER, POLITICAL PARTIES, INTEREST GROUPS, AND PUBLIC POLICY 263 (1980) [hereinafter cited as POLITICAL PARTIES] (quoting W. BURNHAM, CRITICAL ELECTIONS AND THE MAINSPRINGS OF AMERICAN POLITICS 133 (1970)). Recent reforms, however, have been a primary cause of a “dramatic decline” in party strength. Godwin & Ingram, Single Issues: Their Impact On Politics, in Why Policies Succeed or Fail 287 (H. Ingram & D. Mann eds. 1980); POLITICAL PARTIES, supra, at 257-58. Nominations are now run through electoral primaries, not by party selection, and candidates with support from single-issue or narrowly based groups bypass party participation to appeal directly to their particular constituencies, or other voters. Godwin & Ingram, supra, at 289. In most primaries, where few citizens vote, this support is often sufficient to win the nomination. Winter, "The New Age of Political Reform": Looking Back, 15 GA. L. REV. 1, 15-16 (1980). One reason this support is so effective is that these groups effectively do not operate under spending limitations as restrictive as those imposed on the parties. The net effect of these reforms has been to render members of Congress more vulnerable to the demands of these interest groups. Successful reforms would have to focus on changes in the financing laws and on creating an endorsement mechanism for the parties. One such reform would be to raise the spending limitation that now constrains political parties. Another would be to publicly finance congressional candidates’ campaigns, channeling public financing to the political parties. POLITICAL PARTIES, supra, at 258. If states allowed preprimary conventions and endorsements of congressional candidates, they would place the parties on an equal footing with other organized groups that seek to influence party nominations. Id.

Unfortunately, these changes would require the acquiescence of influential interest groups that stand to lose some of their influence. “The new politics gives encouragement to all kinds of oddities and demagogues to seek national power . . . .” Winter, supra, at 17. These types of politicians have gained real power and influence as a result of recent changes in our political
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made more accountable to the electorate, it still would not be able to exercise systematic oversight because of its lack of technical expertise and time for investigation. By contrast, the President is often thought to be uniquely capable of efficiently managing regulatory programs.210 This Article next considers the effectiveness of present and proposed mechanisms of Presidential control.

V. Presidential Control

A. Accountability and Available Controls

As the only elected official with a national constituency, the President is often described as the most politically accountable of our officials.211 This claim may be somewhat overstated: the members of the House stand for election more frequently than the President, and they generally spend more time in office subject to the pressures of reelection. The President’s accountability may be more symbolic than real since his reelection, or even the election of a favored successor, can represent only an undifferentiated judgment upon a political performance consisting of thousands of discrete actions.212 Finally, many Presidential decisions may be made by unsupervised staff members.

Although the President may not be as accountable as proponents of expanded Presidential oversight claim, he can exercise greater control over agencies than either Congress or the courts. Presidential control can be asserted either directly, if the President has the authority to modify or reverse a final agency decision, or indirectly, when Presidential pressure on an agency’s management is sufficient to convince it to adopt a White House viewpoint. Congress has only rarely authorized direct Presidential review of final adjudicatory decisions,213 and at-
tempts to assert indirect control generally violate legislative and constitutional prohibitions against ex parte contacts.214 Similarly, Congress has explicitly authorized the President to review promulgated rules only in a limited number of instances,215 although in some cases congressional authorization may not be necessary.216 Congress has endowed the executive branch with a variety of indirect management tools, including the authority to appoint administrators,217 remove administrators,218 change the designated chairmen of independent commissions,219 withhold support from agency budgetary and legislative

214. The Administrative Procedure Act, § 4(a), 5 U.S.C. § 557(d) (1976), forbids ex parte interference in agency proceedings. Before this section was adopted, the same result was achieved by relying on a due process argument. Pillsbury Co. v. FTC, 354 F.2d 952, 963 (5th Cir. 1966).


216. Presidential authority to control government policymaking can be derived either from a congressional authorization or from the President's constitutional duty to "take Care that the Laws be faithfully executed . . . ." U.S. CONST. art. II, § 3. Many scholars have adopted the analysis of Justice Jackson in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring), for the purpose of determining the extent of authority granted to the President by article II. See, e.g., Bruff, supra note 210, at 472-74. Bruff feels that Presidential directives would be particularly appropriate in the areas of military and foreign affairs, and during economic emergencies. Id. at 495-96. He argues that "Presidential justifications for exercising such authority over rulemaking are legitimized by the factual foundation for the initiative and also the relation between the issue at hand and the President's role in the constitutional scheme." Id. at 495. The availability of judicial review and "the capacity of Congress to restrain the President," id. at 507, are checks sufficient to counter potential Presidential abuse of this authority. Id. at 507-08.

Some authors, however, feel that broad Presidential authority over rulemaking would threaten the constitutional allocation of power between the executive and legislative branches of government. See Rosenberg, Beyond the Limits of Executive Power: Presidential Control of Agency Rulemaking Under Executive Order 12,291, 80 MICH. L. REV. 193, 220 (1981); Note, Delegation and Regulatory Reform: Letting the President Change the Rules, 89 YALE L.J. 561, 577-78 (1980) [hereinafter cited as Delegation and Regulatory Reform]. Both authors argue that it is the special task of Congress to represent and balance conflicting interests, and that too much Presidential authority over executive agencies would usurp that role.

217. J. FREEDMAN, supra note 17, at 63. This opportunity to influence policy through appointments extends to the independent agencies despite the agency commissioners' fixed terms in office. Appointments are, however, subject to Senate confirmation. Because of high turnover in agency management, Presidents almost invariably have been able to appoint a majority of most commission administrators. Id.; Goodsell & Gayo, Appointive Control of Federal Regulatory Commissions, 23 AD. L. REV. 291, 302-03 (1971). The opportunity to use the appointment power to influence policy is considered to be potentially the most important of the President's indirect powers. See É. KRASNOW & L. LONGLEY, THE POLITICS OF BROADCAST REGULATION 56 (2d ed. 1978).

218. The President has the inherent power to remove executive officials without cause. Buckley v. Valco, 424 U.S. 1, 135-37 (1975); Myers v. United States, 272 U.S. 52 (1926). However, Myers allows the removal only of "executive officer[s] restricted to the performance of executive functions." Humphrey's Executor v. United States, 295 U.S. 602, 627 (1935). See also Wiener v. United States, 357 U.S. 349, 352-56 (1958). The President does not possess unlimited power to remove officers of administrative agencies that are created by Congress to effectuate legislative policies. 295 U.S. at 628-30. Congress can prescribe an exclusive list of causes for removal of such officers and limit executive power of removal accordingly. Id.

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requests, and transfer programs between agencies or abolish some rulemaking functions. The most potent of these measures, removal without cause, is effectively available for both executive and independent agencies. The effect of these prerogatives can be further enhanced by highly visible Presidential attention to regulatory policies, particularly if accompanied by the systematic review of proposed agency rules by various executive office or interagency bodies.


Under the Congressional Budget and Impoundment Control Act of 1974, 31 U.S.C. §§ 1301-1407 (1976 & Supp. III 1979), the President cannot completely rescind appropriated funds without the approval of both Houses of Congress, but funds may be deferred subject to a one-House veto. Id. § 1403.

Under the Reorganization Act of 1977, 5 U.S.C. §§ 901-912 (Supp. III 1979), the President is authorized, within specified limits, to transfer, consolidate, or abolish agency functions. This authority includes the power to transfer or abolish some rulemaking functions. Id. § 903(a)(2).

Many independent commissioners will accede to a White House request to resign, whether or not it is based on cause. J. FREEDMAN, supra note 17, at 63. But even the power to remove for cause gives the President some management control. Verkuil, supra note 154, at 954.

B. Efficacy of Control

The exercise of indirect controls will involve the President, or more likely his staff, in negotiations with interested members of Congress and affected interest groups. The President will prevail in these negotiations unless an agency can develop sufficient political support from the other participants in the negotiations. If this support is forthcoming, Presidential efforts to prevail or retaliate will divert the President from more pressing matters and cost him negotiating capital on other policy issues as the price of his action here. If a President prefers to avoid confrontation, Presidential control will be limited correspondingly. The risk of confrontation is greater for the independent agencies, which operate under a protective congressional umbrella. This tradition of autonomy is so strong that Presidents Carter and Reagan both exempted the independent agencies from the requirement that “important” proposed regulations be screened by an interagency task force or the Office of Management and Budget (OMB).

Although Presidents Carter and Reagan created similar mechanisms for reviewing proposed executive rules, recent changes in the political environment are likely to make the Reagan controls much more successful than those utilized during the Carter years. In order to repay the liberal wing of his party for its electoral support, President Carter began his administration by filling several powerful administrative positions with regulatory activists. Later in his term, when the President responded to the pressures of moderate inflation by attempting to limit the scope of federal regulation, his initiatives in many instances were successfully countered by his appointees. President Reagan, on the other hand, has used the backing of a conservative Senate to install

226. See text accompanying notes 240-53 infra.
227. See text accompanying notes 154-55 supra.
228. W. CARY, supra note 189, at 136; Tolchin, supra note 225, at 49.
229. Verkuil, supra note 154, at 957. Professor Verkuil describes removal as a “doomsday machine” that is “both an overwhelming and an inadequate device for controlling or formulating policy.” Id.
230. Congress has traditionally believed that these agencies were to be free of White House influence, and should remain so. Id. at 947; Delegation and Regulatory Reform, supra note 216, at 562-63.

Executive agencies, such as the Food and Drug Administration, often are also thought of as independent agencies because of loose Presidential supervision. This may be attributed to the fact that the President can expect only limited, if any, political gain from close involvement in their regulatory affairs. Robinson, On Reorganizing The Independent Regulatory Agencies, 57 VA. L. Rev. 947, 953 n.18 (1971).
233. See, e.g., Verkuil, supra note 154, at 944-47.

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regulators who actively share his belief that his election represented a mandate to cut federal regulation.\textsuperscript{234} As long as the President, the Congress, and the agencies continue to believe that the country wishes to reduce regulation, Presidential control will remain effective. But as the political situation changes, Presidential control again will become subject to political limitations.\textsuperscript{235}

C. Proposed Reforms

Fearing the return of events that might weaken Presidential control, many reformers would give the President additional oversight mechanisms, particularly over the independent agencies. Some reformers argue that the President should be given express authority by use of notice and comment rulemaking to order executive or independent agencies to modify or reverse a rule.\textsuperscript{236} Since such a decision could be unpopular with both Congress and some interest groups, this reform would suffer from many of the same disadvantages as the use of indirect controls. The President, however, would be much less hampered if he exercised direct supervision. Under a system of indirect controls, opponents could block Presidential efforts by exerting their political influence.\textsuperscript{237} But if the President could order a rule to be rewritten or reversed, successful countermeasures would require congressional legislation, a much more difficult prospect for opponents. Moreover, because the President could make changes in any regulatory rule, Congress might often acquiesce in one matter to avoid undesirable changes in other areas.\textsuperscript{238} Finally, once Presidential review became routine, the present atmosphere of relative agency independence would


\textsuperscript{235} See text accompanying notes 228-30 supra.

\textsuperscript{236} The idea of establishing direct control originated with Professor Redford, see E. Redford, Administration of National Economic Control 318-20 (1952); E. Redford, The President and the Regulatory Commissions 3 (1960), and was reintroduced in an influential law review article, Cutler & Johnson, supra note 210, at 1395. Direct control was endorsed by a prestigious American Bar Association Commission considering regulatory reform. ABA Comm'n on Law and the Economy, Federal Regulation: Roads to Reform (1978) [hereinafter cited as ABA Comm'n]. Cutler and Johnson's proposal would authorize the President to order an agency to modify or reverse agency rules by a published executive order following at least 30 days of public comment, subject to a one-House congressional veto. Cutler & Johnson, supra note 210, at 1414-17. The ABA proposal would give the President the same authority for "critical" regulations, subject only to congressional advice and consent. ABA Comm'n, supra, at 79-80.

The commentators also suggest that direct control is the best way to eliminate fragmented, overlapping, and conflicting regulations. Bruff, supra note 210, at 455; Cutler & Johnson, supra note 210, at 1406-07.

\textsuperscript{237} Cf. text accompanying notes 151-61 supra (describing administrative resistance to congressional controls).

\textsuperscript{238} See Delegation and Regulatory Reform, supra note 216, at 566 & n.35.
change to the point that Presidential involvement would be much less controversial politically.239

While proposals to give the President direct control probably would significantly increase agency responsiveness to his wishes, they present the possibility that the President will fail to supervise his staff effectively, or become overly involved in rule review.240 The President is unlikely to attend to more than a fraction of the matters under review, leaving his staff members, who, unlike agency administrators, are not accountable to Congress through traditional oversight mechanisms,241 discretion to act in his behalf. In order to provide adequate supervision, the President will be forced to divert his attention from foreign and domestic policy issues that only he can decide. If he opts to spend his time on more important problems, he will be able to give only superficial consideration to agency matters.242 In the latter case, subordinates will enjoy considerable discretion,243 especially if they manage the presentation of information to the President. The problem would be minimized if direct control were exercised as seldom as several times a year, but it is unlikely for several reasons that this would be the case.244 First, following in the footsteps of its three most recent predecessors, the Reagan Administration has set up a system to have the OMB comment on all important executive agency regulations, evidence of more executive interest in intervention than the proposals predict.245 Second, statements by Reagan administration spokesmen indicate a desire to centralize control of rulemaking in the White House.246 Finally, the prediction of limited use is naive, since once an appeals mechanism is created, it will be politically difficult not to consider a reasonable number of the many appeals submitted.247

Supporters of the reform proposal defend it on the ground that

239. See Auerbach, Some Thoughts on the Hector Memorandum, 1960 Wis. L. Rev. 183, 194.
240. ABA Comm'n, supra note 236, at 156, 156-58 (dissenting statement of William T. Coleman) [hereinafter cited as Coleman Dissent].
241. Id. at 157.
243. Coleman Dissent, supra note 240, at 156.
244. ABA Comm'n, supra note 236, at 84 (estimating controls would be exercised three or four times a year); Cutler & Johnson, supra note 210, at 1415 n.64 (estimating ten times a year).
245. See note 225 supra.
246. See note 10 supra.
express Presidential approval will be required for any action. They argue that subjecting all such decisions to the glare of publicity will produce the necessary accountability. But these proponents seem to concede implicitly that even this safeguard might not be sufficient; they also propose a congressional veto or veto-like authority over Presidential decisions. Even with a veto, however, there will still be a problem of accountability because the White House will often be able to achieve its aims without any formal action as agencies concede informally to avoid conflict. Unless an agency has enough political clout to leak the details of the affair, the entire matter may ultimately go unnoticed.

While direct Presidential control could bring agencies more securely under the management of the White House, the net benefits of this reform are doubtful at best. If this authority is used as infrequently as its proponents predict, it probably will not have a significant impact on agency discretion. If it is used widely, the resulting increase in Presidential power probably will be left unchecked by Congress and the public and exercised primarily by Presidential aides. While even unsupervised White House aides would probably act to

249. The ABA Commission, fearing the unconstitutionality of the congressional veto, recommended that Congress give itself the authority to comment upon any proposed Presidential action concerning a rule, by resolution, after which the President could withdraw or modify his proposal in light of the resolution. ABA Comm'n, supra note 236, at 88. These proposals for congressional involvement were justified by proponents as necessary to win congressional support for direct Presidential control. Id. at 89; Cutler & Johnson, supra note 210, at 1415-16. The proponents therefore recognize that Congress would not accede to a plan that in its view would give the President important new powers unchecked by Congress. The previous analysis supports that congressional viewpoint. See text accompanying notes 236-39 supra.
250. It is unlikely that an agency will fight every time, or even often. See McGowan, supra note 6, at 1172; text accompanying notes 227-31 supra.
251. This conclusion, which has support, see W. Cary, supra note 189, at 136-37; Robinson, supra note 9, at 210-11, confronts considerable authority to the contrary, see note 236 supra, not the least of which is that of Judge Henry Friendly, who has done a remarkable about-face on this issue. In his influential Holmes lectures, Judge Friendly's initial reaction to proposals for direct control was an emphatic "[q]uite simply, I find it hard to think of anything worse." H. Friendly, The Federal Administrative Agencies 153 (1962). But Judge Friendly has now endorsed the concept, explaining that with today's increase in regulation by rulemaking instead of adjudication, coordination is now more important than previously and, if narrowly drawn, the President's power can be sufficiently restricted. ABA Comm'n, supra note 236, at 163-64 (separate statement of Hon. Henry J. Friendly). But even the proposal endorsed by Judge Friendly allows the President considerable power, undefined by any standards. Delegation and Regulatory Reform, supra note 216, at 574-75. White House power will be informally exerted, regardless of the existence of formal controls, and Judge Friendly probably underestimates the frequency with which Presidential power will be exercised, formally or informally, see text accompanying notes 245-47 supra.
252. McGowan, supra note 6, at 1171. One of the plan's supporters describes it as only a "modest, incremental step." Byse, supra note 248, at 164.
253. See notes 237-50 supra.
further the President's regulatory philosophy, the risk that they might not is not worth taking. In any event, the President already possesses sufficient power. In the absence of effective political opposition, the President has successfully used indirect controls to further his views and coordinate interagency policy in dealings with executive agencies. If there is effective opposition, then the forces recognized in our system of checks and balances will have worked their will. The situation for independent agencies is quite similar. The President can exercise many of the same indirect controls here, including the effective ability to replace commissioners. Nevertheless, because the independent agencies were created to be free of political involvement, and because Congress takes a proprietary interest in maintaining that freedom, indirect Presidential oversight over independent agencies can be more easily stymied.

In order to increase this indirect oversight of independent agencies, Congress might place administrators under the President's authority to dismiss officials without cause. At a time when agencies acted only by adjudication and there was greater faith in the objective application of their expertise, independence made more sense. Today, however, independent agencies are hardly free from indirect Presidential controls, and the proposed step is consistent with congressional approval of these mechanisms. Nevertheless, because of the symbolism involved—Congress has traditionally thought of the agencies as an extension of itself—Congress has always rejected this proposal. Fur-

254. Bruff, supra note 210, at 466 (delay in automobile passive restraint and ignition interlock systems ordered by Nixon administration); Verkuil, supra note 154, at 944-47 (cotton dust, ozone air quality, and strip mining rules influenced by Carter administration). See generally J. Freedman, supra note 17, at 65-66.


256. See notes 214-35 supra.

257. See notes 227-31 supra.


259. J. Freedman, supra note 17, at 44-51.

260. See notes 217-25 supra.

261. It is impossible to distinguish independent agencies from executive agencies by their functions. Rulemaking decisions by either type of agency can affect national policies and problems in the same way and to the same degree.

262. W. Cary, supra note 189, at 20. The traditional congressional view of independent agencies has not changed significantly in recent years. President Carter's reorganization of several agencies into a Department of Energy was unacceptable to Congress unless the former Federal
thermore, the proposal itself might pose constitutional problems, since the Supreme Court has protected independent administrators from Presidential removal without cause.\footnote{Humphrey’s Executor v. United States, 295 U.S. 602, 632 (1935), which broadly declared independent administrators to be beyond the reach of Presidential removal without cause, probably on the theory that because they engage in adjudication, these officials are not executive officers. Since independent agencies now also establish policy by rulemaking, the continued validity of this language has been questioned. Bruff, supra note 210, at 499; Verkuil, supra note 154, at 954.} Under these circumstances, narrower changes might be more acceptable to both Congress and the courts. For example, congressional approval could be sought to require that independent agencies report new regulations to the OMB, just as executive agencies do.\footnote{See note 10 supra & accompanying text.} This step would give the President some additional leverage without seriously undermining the tradition of agency independence.

\subsection*{D. The Redundancy of Increased Control}

Reforms that would in effect authorize the President to write agency rules as part of the executive review process are unnecessary. Like Congress, the President already has significant authority to constrain administrative discretion. Unlike Congress, the President normally is not prevented from exercising that power by the political environment. As a result, except where there is considerable political opposition, effective Presidential oversight requires only executive attention.

A grant of additional power to the President would exacerbate existing shortcomings in Presidential accountability. The political accountability of the President is derived from his election to represent a national constituency. It is weakened by the inability of voters to make a differentiated judgment concerning specific Presidential actions, by the President’s lame duck status during a four-year second term, and by the not infrequent use of essentially unsupervised Presidential aides to carry out executive responsibilities. Giving the President additional power in these circumstances would have two undesirable consequences. The President would be able to avoid some of the checks and balances to which he is now subject. Moreover, were such power used comprehensively, decisions probably would be made by unsupervised staff.
VI. Unavoidable Discretion

The modern administrative law system has created discretion in agencies by modifying their mandates, jurisdictions, and procedures. Assuming that this expansion in their power is a cause of present dissatisfaction with federal health, safety, and consumer protection legislation, reformers have urged that the judiciary, the Congress, or the President be given additional authority to review agency action. We find these reforms unnecessary because administrative decisionmaking is already subject to a reasonable degree of control, and because the reforms would result in the allocation of power to individuals or institutions that are not necessarily more accountable to the public and are certainly less qualified to make technical decisions than the regulators themselves.

Agency discretion is already reasonably constrained by the interplay of the three branches of government. The judiciary measures whether an agency has a factual basis for its legal conclusions, whether its conclusions are correctly interpreted, and whether it has used reasonable procedures to analyze the consequences of its decisions. Although the courts will defer somewhat in each of these review functions, judicial review sets outer limits beyond which agency discretion may not be exercised. Presidential and congressional review operates within those limits. Presidential control is exercised through a wide variety of mechanisms whose effects are weakened only by executive inattention or the ability of an agency to exploit political support to its benefit. Congress, which controls both the legal charter and the budget of an agency, potentially has even greater power. Although congressional review tends to be sporadic or superficial even when systematic, it is unlikely that any agency entirely escapes review. Those taking politically controversial actions receive considerably more attention.

Proposed reforms would narrow the range of agency discretion that survives present review efforts, but only at the cost of increasing the power of existing nondemocratic elements in our three branches of government. Changes in the scope of judicial review would shift residual discretion from agencies to the least politically accountable branch of government. Congressional reliance on the legislative veto would emphasize the policies of well-placed legislators generally beholden to special interests, while strict enforcement of the delegation doctrine would produce less legislation, not more specific legislation. And increased Presidential authority, if effectively utilized, would be exercised by unsupervised Presidential aides. Even if Presidential su-
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pervision were adequate, the additional review authority would allow the Executive to avoid some of the checks and balances to which he is now subject.

Proponents of reductions in agency discretion must face the consequences of increasing the power of unaccountable individuals and institutions. Because supporters of the proposed reforms fail to address this problem, we suspect that their support is result-oriented; they raise their proposals not because these reforms would produce greater accountability in the regulatory system as a whole, but because they would place additional power to make decisions in the hands of decisionmakers who are presumed to share their basic political views.

In order to alleviate this dilemma, we propose that efforts at reforming agency policymaking should focus on substantive mandates rather than the review mechanisms available to eliminate agency policymaking discretion. This solution treats agency discretion as a cost of regulation, since it poses a risk that a program will be administered in ways insensitive to the democratic will. If a program is otherwise of substantial net benefit, it should be continued. Since existing mechanisms offer tolerable control, the benefits of most programs outweigh the cost posed by discretion. In cases in which the net benefits are more marginal, unless the cost can be lowered by special attention to existing oversight techniques, the risk that the program could be administered in a discretionary manner would require its elimination.

Although this solution condones the residual discretion that remains in agencies after review, it has three advantages over reforms that would increase the authority of reviewers. First, the proposal is consistent with the modern conception of regulation, which recognizes that regulatory effectiveness requires discretion. Second, by focusing on the merits of a program, this proposal avoids a result-oriented decision to reallocate discretion from agencies to reviewers in the hope of stimulating or impeding specific policies without prior consideration of the worth of a regulatory program. Finally, the proposal avoids difficult problems that also lead to result-oriented debates concerning the relative accountability of agencies and their reviewers.

Some of the proposed reforms, such as increased Presidential review authority, might be considered improvements on the ground that the President and his aides generally are more accountable than agency administrators. This proposition, however, is not easy to document. Presidential aides, unlike agency administrators, are not subject to congressional oversight. Their accountability depends, therefore, on Presidential supervision, which would not necessarily be forthcoming.
Thus, these aides may be no more closely supervised by the President than are agency regulators by Congress. Moreover, the degree of supervision by the President or by Congress would vary from situation to situation. Under these circumstances, judgments about relative accountability may become shaded by the political views of the person doing the weighing.

Further alleviation of the dilemma created by the unaccountability of both agencies and their reviewers requires reform of the political process. The potentially most accountable of the three reviewing institutions is Congress. Its membership is closer to the electorate and its processes are subject to intense interest lobbying. Unfortunately, reforms of the electoral process have enhanced the influence of interest groups to the detriment of the many citizens who are not members of such groups. Reinvigorating the political parties by reversing some of the previous reforms could lessen the effectiveness of presently influential interest groups. Under those circumstances, Congress might become more accountable, and its review efforts more acceptable.

Even with a more stringent congressional review process, agencies would still be imperfectly accountable. Perfection in the democratic system is a politician's myth. Agencies, like their reviewers, can be made only partially accountable to the public. Past that point, the problem of accountability is beyond democratic means to resolve.