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ARTICLES

PROCEDURES AS POLITICS IN ADMINISTRATIVE LAW

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Legal scholars view administrative law as alternately shaped by concerns for procedural formality and issues of political control, and therefore as consisting of largely conflicting rules. But they have overlooked that the Court may be elaborating administrative law, and more particularly, administrative procedures, for a particular political purpose—to ensure that agency action roughly tracks legislative preferences. Thus, rather than vacillating between procedures and politics, the Court may be striving to negotiate two sorts of politics: congressional control, exercised through administrative procedures, and presidential control, vindicated by presumptive judicial deference. Positive political theorists, meanwhile, have appreciated that administrative procedures can assist Congress in monitoring agencies. But they have not applied their theory to actual administrative law, and their assumptions about judicial behavior cannot predict such law. This Article combines the insights of legal scholars and positive political theorists to offer a better descriptive account and normative defense of the seminal administrative law cases. It shows that the Court has recognized a distinctive political use for administrative procedures, as positive political theorists might expect. It contends, however, that to truly understand administrative law, we must see the Court in a way more familiar to legal academics, as sincerely interested in producing acceptable rules for agency decisionmaking. The Court has claimed a role in mediating the strategic needs of both political branches for control of agency action. In so doing, the Court has matched the practical way that agencies operate with a normative theory about how they should operate in the democratic structure.

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INTRODUCTION

Administrative law seems to be essentially schizophrenic, alternately shaped by concerns for procedural formality and issues of political control.[1] After decades of vacillation between due process and rule-of-law values on the one hand and accountability on the other, administrative law appears to contain a mass of conflicting and inconsistent rules. For example, administrative law tells agencies that they must choose procedures that "carry the force of law,"[2] but that they have a choice among procedures.[3] It tells agencies that they must submit to judicial scrutiny of their policy choices,[4] but that they are entitled to judicial deference for their policy choices.[5] It tells agencies that they must answer for their failures to enforce the law,[6] but that they have discretion to enforce the law.[7]

1. For the classic account, see Richard B. Stewart, The Reformation of American Administrative Law, 88 Harv. L. Rev. 1669 (1975).

2. See United States v. Mead Corp., 533 U.S. 218, 221 (2001).

3. See SEC v. Chenery Corp. (Chenery II), 332 U.S. 194, 203 (1947).

4. See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 41–42 (1983).

5. See Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865–66 (1984).

6. See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 186 (2000).

7. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 573 (1992).

In the face of this morass, legal scholars and political scientists have taken diametrically opposed approaches. Neither approach is entirely satisfying to account for administrative law. If we combine insights from both, we can produce a more coherent description of—and a better normative justification for—the doctrine.

Legal scholars are largely united in a general obsession with the Supreme Court's role in enhancing the legitimacy of agency action, for example, by announcing rules that promote due process or political accountability.[8] As a result of this obsession, legal scholars have overlooked the possibility that administrative law doctrine may serve a political function by setting rules for how agencies operate.[9] Specifically, the Court may enforce administrative procedures in order to help ensure that agency decisions track dominant legislative preferences.[10] On this view, the Court may be understood as mediating between two different sorts of politics, congressional and presidential, rather than as vacillating between politics and procedures.[11] It has recognized that the White House has presumptive responsibility to manage the executive branch and may shift policies with presidential philosophies. At the same time, it has enabled Congress to prevent over- or under-regulation in specific instances. Administrative procedures are the mechanism that, together with judicial review, facilitates such congressional involvement.

Positive political theorists, meanwhile, have appreciated this political use of administrative procedures—namely, that administrative procedures may help to ensure that agencies stay more or less in line with legislative preferences.[12] By using constituents to monitor the administrative

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8. See Richard J. Pierce, Jr., Democratizing the Administrative State, 48 Wm. & Mary L. Rev. 559, 562 (2006) (noting that "[s]cholars have long questioned the political and constitutional legitimacy of the administrative state" and discussing Court's role in addressing this concern).

9. I do not claim that legal scholars have entirely ignored the strategic political function of administrative procedures. Many, including myself, have cited the political science literature concerning the strategic use of administrative procedures to evaluate the legitimacy of agency action. See Lisa Schultz Bressman, Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State, 78 N.Y.U. L. Rev. 461, 491 n.146 (2003) [hereinafter Bressman, Beyond Accountability]. My claim is that legal scholars have not examined how their understanding of administrative law might change if administrative procedures are viewed as some political scientists have viewed them.

10. See infra Part III.

11. See infra Part IV.

12. See Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, Administrative Procedures as Instruments of Political Control, 3 J.L. Econ. & Org. 243, 254 (1987) [hereinafter McNollgast, Administrative Procedures]; Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies, 75 Va. L. Rev. 431, 468–81 (1989) [hereinafter McNollgast, Administrative Arrangements]; Mathew D. McCubbins & Thomas Schwartz, Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms, 28 Am. J. Pol. Sci. 165, 166 (1984). Positive political theorists generally do not view the bureaucracy as arising out of concerns for accountability or efficiency. Rather, they view the bureaucracy as "aris[ing] out of politics, and its design reflect[ing] the interests,

process, Congress can take advantage of what positive political theory (PPT) scholars call "fire-alarm" oversight: When Congress relies on constituents to alert it to threatened agency errors, it can intervene most efficiently.[13] PPT scholars have been hindered, however, by a simplistic understanding of the role of the Court in defining and enforcing such procedures. They have not explored the administrative law cases elaborating administrative procedures, and thus they cannot match their theories to actual administrative law. Furthermore, their methodological commitments do not permit them to develop satisfactory accounts of why the Court has enforced administrative procedures as it has.[14]

This Article bridges the gap between legal academics and positive political theorists by showing that administrative law may be understood to reflect the contributions of both. It argues that to best understand the seminal administrative law cases, we must take seriously the PPT notion that agencies are answerable to Congress. Indeed, viewing the cases through this lens helps to resolve some puzzles of administrative law better than the standard legal account of administrative procedures alone. The rules are better explained, from a purely descriptive standpoint, as assisting Congress (through its constituents) in monitoring agency action.

This Article also contends that, even if we use PPT to gather a better understanding of *how* the Court has enforced administrative procedures, we should not be so quick to accept its assumptions about *why* the Court has done so. PPT scholars might assume that the Court has adopted rules that facilitate congressional control to avoid legislative reprisal. But the Court has little reason to fear legislative reprisal in this context because the rules are not susceptible to precise codification. Nor is it plausible to believe that the Court issues the rules simply to impose its own substantive policy preferences or grow its own power. Judges are more nuanced in their decisionmaking.

This Article argues that we would benefit from seeing the Court more in the way that lawyers do, as genuinely interested in developing appropriate rules for agency action (i.e., rules that can be said to improve the legitimacy of agency action). Yet we should not assume that the Court is interested merely in advancing traditional rule-of-law values, such as fairness or rationality, or abstract political values, such as accountability or transparency. Rather, we should see the Court as striving to

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strategies, and compromises of those who exercise political power." Terry M. Moe, The Politics of Bureaucratic Structure, *in* Can the Government Govern? 267, 267 (John E. Chubb & Paul E. Peterson eds., 1989).

13. See McNollgast, Administrative Procedures, supra note 12, at 246.

14. See, e.g., McNollgast, Conditions for Judicial Independence, 15 J. Contemp. Legal Issues 105, 124 (2006) [hereinafter McNollgast, Judicial Independence] (arguing that courts seek to make determinations that cannot be overturned by legislation or undermined through noncompliance); McNollgast, Politics and the Courts: A Positive Theory of Judicial Doctrine and the Rule of Law, 68 S. Cal. L. Rev. 1631, 1633 (1995) [hereinafter McNollgast, Politics and the Courts] (same).

match political reality with normative theory. In making this claim, I do not purport to know the Court's actual motivation in any particular case. Rather, I credit the Court with an awareness of certain political facts in developing administrative law: Congress creates agencies with few constraints on their power and then seeks to control their decisionmaking, just as the President does. In essence, agencies are subject to *two* political principals. Furthermore, these principals may have divergent policy preferences and may seek agency decisions that move in different, even conflicting, directions. Under these circumstances, the Court might see its role as mediating the needs of both political branches for control of agency decisionmaking, consistent with separation of powers. In sincerely attending to procedural issues in connection with agency decisionmaking, the Court has attended to the needs of the legislative branch. It has rendered agency action more susceptible to ongoing congressional oversight, which—together with ongoing presidential involvement—enhances the legitimacy of such action.

This picture of administrative law connects what legal scholars have been seeking with what positive political theorists have been saying. Legal scholars have sought an understanding of administrative law that has predictive value and captures core democratic values.[15] Positive political theorists have viewed administrative procedures as assisting Congress in ensuring that agencies stay roughly in line with legislative preferences.[16] This Article argues that both have something to offer, although neither has gotten it quite right: The Court has produced rules that bring agencies in line with the constitutional structure by negotiating the political forces in the administrative process.

With this understanding of administrative law in mind, we might consider the debate among legal scholars over the relative value of procedural formality and political control in disciplining agency decisionmaking. Those who believe that the primary purpose of administrative procedures, as interpreted, is to promote due process and rule-of-law values do not have to abandon their view, but they should expand it.[17] Their view looks naïve in light of the practical political description of administrative procedures.[18] Moreover, it is insufficient to fully understand the relevant principles of administrative law.

Those who believe that accountability is sufficient to legitimate agency action face a more significant task.[19] If they mean that Congress

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15. See infra Part I.

16. See infra Part II.

17. I am one such scholar. See Bressman, Beyond Accountability, supra note 9, at 527–52 (arguing that administrative law promotes rule-of-law values).

18. See Jerry L. Mashaw, Explaining Administrative Process: Normative, Positive, and Critical Stories of Legal Development, 6 J.L. Econ. & Org. (Special Issue) 267, 270 (1990) [hereinafter Mashaw, Explaining Administrative Process] (arguing that political purpose of administrative procedures is "obscured, if not misrepresented, by lawyers' talk").

19. For examples of authors who make this accountability argument, see Steven G. Calabresi, Some Normative Arguments for the Unitary Executive, 48 Ark. L. Rev. 23, 58–70

has less of a claim to control agency action than the President, they must offer further justification for this position.[20] Congressional control is no less perfect than presidential control as a means for legitimating the administrative state.[21] If neither form of political control is without weaknesses, then as a normative matter, we might think that they are better together than apart.

This Article proceeds in six parts. Part I provides some brief background on the sources of administrative procedures. For our purposes, administrative procedures are basically statutory in origin, though elaborated substantially by the Court.

Part II then addresses how legal scholars have thought about administrative procedures. Essentially (though not exclusively), they have viewed procedural formality as antithetical to political control. But their perspective is limited; it does not consider the possibility that the Court has allowed—or even encouraged—Congress to use administrative procedures for strategic political purposes.

Part III sets forth the competing positive political theory account of administrative procedures. According to PPT scholars, such procedures can ensure that such decisionmaking roughly tracks legislative preferences. But their perspective also is limited; it does not attend to the role of the Court in elaborating administrative procedures through administrative law, and their behavioral assumptions about the Court cannot predict such law.

Part IV shows that administrative law can be understood as facilitating the political purpose of administrative procedures, just as positive political theorists might expect. Indeed, it argues that this understanding helps to explain the more puzzling aspects of the cases better than the standard legal account alone. Thus, it demonstrates that PPT makes a valuable contribution to administrative law.

Part V considers why the Court would have chosen to elaborate administrative procedures this way. Without laying claim to actual judicial motivation, it argues that we would benefit from seeing the Court more

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(1995); Elena Kagan, Presidential Administration, 114 Harv. L. Rev. 2245, 2331–37 (2001); Lawrence Lessig & Cass R. Sunstein, The President and the Administration, 94 Colum. L. Rev. 1, 102–03 (1994); Jerry L. Mashaw, Prodelegation: Why Administrators Should Make Political Decisions, 1 J.L. Econ. & Org. 81, 95–96 (1985) [hereinafter Mashaw, Prodelegation]; Richard J. Pierce, Jr., The Role of the Judiciary in Implementing an Agency Theory of Government, 64 N.Y.U. L. Rev. 1239, 1280–85 (1989) [hereinafter Pierce, Role of the Judiciary].

20. For examples of authors who view congressional control as less desirable or important than presidential control of agency action, see Calabresi, supra note 19, at 50 (arguing that President is normatively preferable to either congressional committees or courts as "logical candidate for the role of executor of the laws"); Kagan, supra note 19, at 2346–63 (arguing that President has proper role in influencing regulatory policy, even when that role largely displaces comparable roles of Congress, agency officials, and interest groups).

21. See infra Part IV.

in the way that lawyers do, as committed to developing appropriate rules for agency action. But we might acknowledge that the Court seeks to achieve more than the legality or accountability of agency decisionmaking. It also seeks to match practical reality with democratic theory.

Finally, Part VI considers normative objections to this understanding of administrative law. It focuses on arguments for presidential control and judicial deference. It concludes that, though not free from doubt, a system that incorporates congressional control has more advantages than drawbacks.

I. THE SOURCES OF ADMINISTRATIVE PROCEDURES

Because I will focus on statutory administrative procedures and the Court's role in elaborating them, it is helpful to provide some general background concerning this interplay. For as long as agencies have existed, administrative procedures (and judicial review) have controlled their decisionmaking. Few of these procedures find their source in the Constitution itself. Indeed, the Supreme Court held early on that the Due Process Clause provides only limited procedural constraints on agency decisionmaking.[22] But Congress has provided more procedures than the Constitution requires. An early example is the Interstate Commerce Act of 1910, which established the Interstate Commerce Commission to regulate the railroads.[23] The Act not only provides notice and hearing rights to a wide range of parties, it provides basic requirements for the Commission to follow in handling complaints against carriers and other regulatory matters.[24] These provisions are broad, leaving the Commission ample room to craft its own procedures.[25] (The Commission is now defunct.) The generality of the statutory provisions raises an important point about administrative procedures: Agencies often are left to establish procedures themselves.

Nevertheless, statute-based procedures often are the starting point for agencies as well as the focal point for courts and commentators. Central among statute-based procedures is the Administrative Procedure Act (APA), which Congress enacted in 1946.[26] The APA applies to all federal

22. In 1908, for example, the Court famously held that due process required a local agency to afford particular landowners an individualized, trial-type hearing when applying a tax assessment for the costs of paving a street fronting their property. See Londoner v. Denver, 210 U.S. 373, 385–86 (1908). But, shortly thereafter, the Court made clear that this principle did not extend to landowners contesting the increase in the valuation of all taxable property in a city. See Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441, 444–46 (1915). Such landowners had no right to be heard other than in the political process. See id. at 445.

23. See 4 I.L. Sharfman, The Interstate Commerce Commission: A Study in Administrative Law and Procedure 151–52 (1937) (describing purposes and processes of Interstate Commerce Commission).

24. See id. at 154–60 (detailing statutory notice and hearing procedures).

25. See id. at 150–51.

26. 5 U.S.C. §§ 551–559, 701–706 (2000).

agencies and acts as a default rule, supplying procedures when organic statutes do not. It contains many provisions, but a small number form its core. The APA divides agency action into two major categories, adjudication and rulemaking.[27] So-called "formal" adjudication contains more stringent procedures, akin to a judicial hearing, than so-called "informal" rulemaking, which is akin to a legislative hearing.[28] This arrangement reflects a political compromise among the members of the enacting Congress. New Deal Democrats fought to unleash agencies from rigid procedural control, while Republicans pushed in the opposite direction, particularly in the context of adjudication, which was a prevalent form of agency decisionmaking at the time.[29] The APA split the baby. The most restrictive and detailed provisions apply to formal adjudications, the cause of concern to the Republicans.[30] The most minimal and vague provisions apply to informal or notice-and-comment rulemaking, the wellspring of hope for the Democrats.[31] Other forms of agency action have few or no applicable procedures.[32]

Congress has since provided other procedures. For example, it has amended the APA to contain two acts that enable parties to obtain information about agency action outside the context of a particular proceeding. The Freedom of Information Act (FOIA), enacted in 1966,[33] directs agencies to make available records to "any person" upon request that "reasonably describes such records."[34] The Government in the Sunshine Act (GITSA), enacted in 1976, applies to any agency subject to FOIA and run by a collegial body whose members are appointed by the President

27. See 5 U.S.C. § 553 (rulemaking); id. §§ 554, 556–557 (adjudication).

28. See Peter L. Strauss, Changing Times: The APA at Fifty, 63 U. Chi. L. Rev. 1389, 1405 (1996) (describing notice-and-comment process as "little more than a consultative process for public presentation of information and views, loosely comparable to what might be employed by a congressional committee").

29. See Martin Shapiro, APA: Past, Present, and Future, 72 Va. L. Rev. 447, 453 (1986) [hereinafter Shapiro, APA] ("For matters requiring adjudication, in which government action was directly detrimental to the specific legal interests of particular parties, the compromise was heavily weighted in favor of the conservatives."). For excellent accounts of the politics surrounding the enactment of the APA, see McNollgast, The Political Origins of the Administrative Procedure Act, 15 J.L. Econ. & Org. 180, 189–213 (1999); Alan Schwartz, Comment on "The Political Origins of the Administrative Procedure Act," by McNollgast, 15 J.L. Econ. & Org. 218, 219–21 (1999); George B. Shepherd, Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics, 90 Nw. U. L. Rev. 1557 (1996).

30. See Shapiro, APA, supra note 29, at 453.

31. See id. ("The second part, rulemaking, constituted an almost total victory for the liberal New Deal forces.").

32. See id. at 454 ("On this point, the liberal New Dealers won almost complete victory, labeling agency action in this area as 'committed to agency discretion.'").

33. Pub. L. No. 89-487, 80 Stat. 250 (1966) (codified as amended at 5 U.S.C. § 552 (2000)). Although enacted in 1966, FOIA was strengthened in 1974. See Pub. L. No. 93-502, 88 Stat. 1561 (1974) (codified as amended at 5 U.S.C. § 552).

34. 5 U.S.C. § 552(a)(3)(A).

with the consent of the Senate (i.e., independent agencies).[35] An agency subject to GITSA must give reasonable notice of its meetings and make every portion of its meetings open to public observation, subject to enumerated exceptions.[36] Congress also has enacted other statutory provisions that, like the APA, cover all agencies, including the National Environmental Policy Act of 1969,[37] which requires agencies to assess the environmental impact of proposed rulemakings, the Regulatory Flexibility Act of 1980,[38] and its successor, the Small Business Regulatory Enforcement Fairness Act,[39] which requires agencies to assess the effect of significant proposed rulemakings on small businesses. Congress has continued to provide more specific procedures in organic statutes.[40]

When administrative law users—agencies, politicians, courts, parties, scholars, students—consider statute-based procedures such as the APA, they consider not only the provisions themselves but also the judiciary's construction of those provisions. The judicial construction fundamentally shapes procedural law. Most of the metaprinciples have come from the Supreme Court, while the lower federal courts have played an important role in applying those principles.[41] When discussing the law of administrative procedures, articles such as this one place the Court's cases on center stage. The Court has issued extensive interpretations of various procedural provisions.[42] Although the APA reflects a political compromise, the Court has not understood it as restricted to the original bargain—that is, as providing serious constraints only for formal adjudication and not for other forms of agency action. Rather, the Court has supplied an elaborate judicial gloss on the APA, and that gloss has become an obsession of legal scholars.

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35. Pub. L. No. 94-409, § 3(a), 90 Stat. 1241, 1241–46 (1976) (codified as amended at 5 U.S.C. § 552b).

36. See § 552b(c) (listing exceptions to open meeting requirement).

37. 42 U.S.C. § 4321–4347 (2000).

38. 5 U.S.C. §§ 601–612.

39. Pub. L. No. 104-121, 110 Stat. 857 (1996) (codified in scattered sections of 5, 15, 28 U.S.C.).

40. See, e.g., Clean Air Act Amendments of 1970, 42 U.S.C. § 7409 (containing specific deadlines and other procedures for setting air quality standards).

41. For example, Judges David Bazelon and Harold Leventhal of the D.C. Circuit might be seen as the principal architects of the reasoned decisionmaking requirement in the notice-and-comment rulemaking context. See Ethyl Corp. v. EPA, 541 F.2d 1, 33–37 (D.C. Cir. 1976) (en banc); id. at 68–69 (Leventhal, J., concurring); Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 394 (D.C. Cir. 1973) (Leventhal, J.). But the Supreme Court eventually adopted that requirement. See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 41 (1983).

42. See, e.g., *State Farm*, 463 U.S. at 41 (requiring reasoned explanation for notice-and-comment rulemaking); Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 415–17 (1971) (requiring reasoned explanation for informal adjudication).

II. The Legal Account of Administrative Procedures

Legal scholars who consider the APA in the context of administrative law often assume a dichotomy between procedures and politics. As this Part shows, the dichotomy is evident in how many legal scholars describe the very evolution of administrative law. Professor Richard Stewart's work is the classic.[43] Others have picked up the story where he leaves off.[44] On the collective telling, administrative law has vacillated between concerns for procedural formality and issues of political control and, as a result, today contains conflicting rules. That is not to say that procedural formality and political control are completely exclusive means for enhancing the legitimacy of agency action (the normative goal of administrative law). There is a modest argument that attention to procedures promotes accountability by promoting the transparency and political oversight of agency action.[45] But, as we shall see, this theme does not play as large a role in the defense of administrative procedures as due process and rule-of-law values, and it is countered on the other side by a superior form of accountability—presidential control of agency decisionmaking—which entails judicial deference, not procedural rigor.

A. *The Early Years*

Initially, administrative procedures figured prominently in administrative law. They were an important part of what Professor Stewart famously labeled the "transmission belt" model of administrative law.[46] The transmission belt model saw agencies as merely implementing legislative directives. Administrative procedures, including the scope and availability of judicial review, were integral to that project.[47] By confining agencies to legislative directives, administrative procedures, as enforced by the Court, served to promote fairness and rationality.[48] The difficulty

43. Stewart, supra note 1.

44. See, e.g., Bressman, Beyond Accountability, supra note 9, at 469–91 (describing various models of the administrative state); Robert L. Rabin, Federal Regulation in Historical Perspective, 38 Stan. L. Rev. 1189, 1191 (1986) (examining waves of federal regulatory reform and judicial response to each successive wave); Martin Shapiro, Administrative Discretion: The Next Stage, 92 Yale L.J. 1487, 1488 (1983) [hereinafter Shapiro, Discretion] (reviewing discretionary action and judicial response to it); Peter L. Strauss, From Expertise to Politics: The Transformation of American Rulemaking, 31 Wake Forest L. Rev. 745, 755–60 (1996) (examining agency rulemaking from 1961–1977); see also Thomas W. Merrill, Judicial Deference to Executive Precedent, 101 Yale L.J. 969, 978–79 (1992) (noting that political accountability has replaced judicial review of administrative decisions); Robert B. Reich, Public Administration and Public Deliberation: An Interpretive Essay, 94 Yale L.J. 1617, 1618–19 (1985) (describing administrative law as initially protecting due process interests and later promoting deliberation).

45. See, e.g., Bressman, Beyond Accountability, supra note 9, at 529 (noting that reasoned decisionmaking requirement, by promoting transparency of agency decisionmaking, facilitates political oversight); Kagan, supra note 19, at 2382–83 (same).

46. See Stewart, supra note 1, at 1675–76.

47. See id.

48. See id. at 1673.

with this picture, however, was that few regulatory statutes contained legislative directives for agencies to obey.[49] The transmission belt model, together with its vision of administrative procedures, could not work given the broad delegating statutes that Congress was inclined to enact.

Another conception of administrative law soon arose to suit those statutes, and it did not emphasize procedures. The "expertise model" understood agencies as relying on "the knowledge that comes from specialized experience."[50] Such professionalism would sufficiently discipline agency behavior and allow them to deploy science and economics to produce sound policy.[51] Administrative procedures were largely unnecessary because "[t]he policy to be set [was] simply a function of the goal to be achieved and the state of the world."[52] Agencies could be trusted to apply their skills to fix the nation's ills, much as a doctor would treat her patient's illness.[53] Indeed, procedures might prevent agencies from doing their jobs. The New Dealers sought broad discretion for the agencies that they created and staffed, and thus broad discretion itself was an important political interest.[54] By reducing discretion, more elaborate procedures would diminish room for expert judgment of the sort that the New Dealers preferred.[55]

When the Court was confronted with procedural issues during this period, it refused to resolve them in a way that restricted agency discretion.[56] It gave agencies a choice of procedures.[57] It reduced the scope and availability of judicial review.[58] There were exceptions in which the

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49. Id. at 1676–77.

50. Id. at 1678.

51. See id.

52. Id.

53. Id.

54. See id.

55. See id.

56. See Rabin, supra note 44, at 1268–71 (collecting cases).

57. See SEC v. Chenery Corp. (Chenery II), 332 U.S. 194, 202–03 (1947) (describing how unique role of agencies necessitates choice of procedures).

58. See NLRB v. Hearst Publ'ns, Inc., 322 U.S. 111, 130–31 (1944), overruled in part by Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318 (1992) (deferring to agency interpretive judgments); Switchmen's Union v. Nat'l Mediation Bd., 320 U.S. 297, 300–01 (1943) (holding that agency action was not reviewable by judiciary); Ala. Power Co. v. Ickes, 302 U.S. 464, 475 (1938) (holding that petitioner lacked standing to challenge agency action because action did not violate recognized legal rights); see also Lee A. Albert, Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief, 83 Yale L.J. 425, 480 (1974) (noting development of standing to insulate administrative expertise from judicial interference); Louis L. Jaffe, Standing to Secure Judicial Review: Private Actions, 75 Harv. L. Rev. 255, 261–88 (1961) (recounting development of federal standing law through 1950s); Steven L. Winter, The Metaphor of Standing and the Problem of Self-Governance, 40 Stan. L. Rev. 1371, 1452–57 (1988) (identifying five factors that contributed to emergence of modern constitutional standing doctrine). But see Henry P. Monaghan, Constitutional Adjudication: The Who and When, 82 Yale L.J. 1363, 1379–80 (1973) (arguing that doctrines like standing, mootness, and ripeness had been "recast in recent decades" and barred judical review "only infrequently and erratically").

Court seemed to limit agency freedom.[59] But for the most part, this period reflected the ascendance of expertise over procedures. And expertise was the choice of New Deal politicians, even if it entailed a removal of administrative decisions from direct electoral politics.

The expertise model attracted critics precisely for its inattention to administrative procedures.[60] The APA was partly a response to these concerns.[61] But even this major innovation failed to satisfy critics' demands for procedural rigor on two fronts. With respect to adjudication, the concern was basic fairness. Agencies were still acting with too little regard for procedural protections.[62] As for rulemaking, the concern was not fairness so much as planning and consistency. Agencies were not using rulemaking as often as they might to set generally applicable regulatory standards.[63]

At this time, courts began to concentrate their attention on administrative procedures.[64] In the adjudicatory setting, they performed "more searching scrutiny of the substantiality of the evidence supporting agency factfinding" and required more hearings prior to the deprivation of property.[65] Most significantly, they stepped up the requirement that agencies provide reasoned explanations for generally applicable policy decisions, even though rendered outside the rulemaking context.[66] The reasoned decisionmaking requirement forced agencies to substantiate their policy decisions.[67] In addition, it forced agencies to render consistent decisions or at least explain departures from past practice.[68] In these ways, courts addressed some of the procedural issues that critics had identified.

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59. See, e.g., SEC v. Chenery Corp. (Chenery I), 318 U.S. 80, 94–95 (1943) (refusing to supply grounds for upholding agency action); FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 476–77 (1940) (granting standing to nontraditional plaintiff harmed indirectly as result of agency action benefiting its competition).

60. See Rabin, supra note 44, at 1264 (describing criticisms of Roscoe Pound, chairman of special committee of ABA on administrative law, who argued that agencies often decided issues in way that raised concerns for due process and fundamental fairness).

61. See id. at 1265 (describing origins of APA).

62. See id. at 1286 (noting criticism concerning "oppressive tendencies of the regulatory system"); Charles A. Reich, The New Property, 73 Yale L.J. 733, 751–56 (1964) (discussing procedural shortcomings of administrative tribunals).

63. See, e.g., Kenneth Culp Davis, Discretionary Justice 55–57 (1969) (arguing that agencies should develop standards through rulemaking to confine their own discretion as soon as feasible and as often as possible); Henry J. Friendly, The Federal Administrative Agencies: The Need for Better Definition of Standards 5–6 (1962) (same).

64. See Stewart, supra note 1, at 1679 (arguing that courts began using alternative techniques to control administrative discretion).

65. Id.

66. Id. at 1679–80.

67. Id.; see also Greater Boston Television Corp. v. FCC, 444 F.2d 841, 850–51 (D.C. Cir. 1970) (Leventhal, J.) (coining phrase "reasoned decision-making").

68. See Stewart, supra note 1, at 1680.

B. *The Middle Period*

By the 1970s, a new era of administrative law had emerged, and with it, a new conception of administrative procedures. Experience had bred a certain amount of skepticism about the expertise model. Agencies were no longer viewed as clinicians, and social policies were no longer viewed as amenable to correct solutions.[69] Meanwhile, Congress enacted bold new regulatory statutes, addressing health, safety, and environmental concerns in addition to economic ones.[70] And agencies began to implement these statutes primarily through notice-and-comment rulemaking rather than through formal adjudication. Yet the APA, taken literally, seemed to impose few procedural constraints on such rulemaking. Administrative law responded and acquired a new focus: the "interest group representation" model.[71] Under this model, the process would be open to affected interests and thereby enhance the legitimacy of agency action "based on the same principle as legislation."[72] Thus, the goal was no longer simply to promote fairness and rationality in line with traditional due process or rule-of-law values. It was to promote participation so that decisionmaking would reflect the preferences of all involved.

Administrative law reflected the interest group representation model by building up the reasoned decisionmaking requirement, also known as the "hard look doctrine."[73] It instructed agencies to articulate the factual and analytical basis for their decisions and to demonstrate consideration of relevant policy alternatives and party comments.[74] In addition to promoting rationality, the hard look doctrine promoted participation by encouraging agencies to respond to criticisms and show why they had rejected alternative solutions.[75]

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69. See id. at 1683.

70. For example, in 1970, Congress enacted the Clean Air Act Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (codified at 42 U.S.C. § 7401–7671q (2000)), which directs the Environmental Protection Agency to set air quality standards. At this time, Congress also enacted the National Environmental Policy Act, Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified at 42 U.S.C. § 4331), which requires federal agencies to "give focused consideration to the impact of their decisions on the environment." Rabin, supra note 44, at 1287.

71. See Stewart, supra note 1, at 1760–61.

72. Id. at 1712.

73. See Harold Leventhal, Environmental Decisionmaking and the Role of the Courts, 122 U. Pa. L. Rev. 509, 514 (1974) (arguing that courts must ensure that agencies have taken "'hard look' at all relevant factors").

74. See Ethyl Corp. v. EPA, 541 F.2d 1, 33–37 (D.C. Cir. 1976) (en banc); Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 394 (D.C. Cir. 1973) (Leventhal, J.); Leventhal, supra note 73, at 511. Judge Leventhal proposed a stronger version that the Court refused to adopt. Under that version, courts also would assess whether the agency's policy decision is substantively irrational. See *Ethyl Corp.*, 541 F.2d at 68–69 (Leventhal, J., concurring) (arguing that it is better to have "no judicial review at all than a charade that gives the imprimatur without the substance of judicial confirmation that the agency is not acting unreasonably").

75. See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 41 (1983) (requiring reasoned decisionmaking for notice-and-comment rulemaking under

Administrative law also fortified other procedures in ways that accommodated broad public participation. Parties acquired a right to formal adjudicatory hearings prior to deprivation of "new," statutorily-created property rights.[76] Parties acquired greater access to judicial review of agency action as liberalized standing, ripeness, and exhaustion doctrines emerged.[77] For example, in *Sierra Club v. Morton* and *Association of Data Processing Service Organizations v. Camp*, the Court stated that harm to nontraditional interests, such as aesthetic, recreational, or conservational interests, could confer standing.[78] These decisions "empowered statutory beneficiaries to be included in the decisionmaking process and to hold agencies accountable for responding to beneficiary arguments concerning the scope of regulation."[79] Some lower courts went even further, requiring procedures beyond those that the APA required for record-generating purposes.[80] These courts converted notice-and-comment rulemaking into a "hybrid" process somewhere between informal rulemaking and formal adjudication. The Supreme Court foreclosed this effort in 1978, permitting extra procedures only when Congress required them or agencies supplied them, and not where lower courts demanded them.[81]

But the interest group representation model attracted criticism because of its focus on procedures. In particular, the benefits of enhanced procedures did not clearly outweigh the costs. On the benefits side, some groups appeared to have more say in the administrative process than others.[82] Thus, the model did not necessarily produce broad participation. On the costs side, the process resulted in more paper for agencies to consider and compile.[83] These vulnerabilities opened the door for a new model of administrative law.

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arbitrary and capricious test of APA); Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 415–16 (1971) (requiring reasoned decisionmaking for informal adjudication under arbitrary and capricious test of APA).

76. See, e.g., Goldberg v. Kelly, 397 U.S. 254, 264 (1970) (holding that Due Process Clause requires hearings before termination of welfare benefits).

77. See, e.g., Ass'n of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 153–55 (1970) (standing); McKart v. United States, 395 U.S. 185, 197–99 (1969) (exhaustion); Abbott Labs. v. Gardner, 387 U.S. 136, 148–51 (1967) (ripeness).

78. See Sierra Club v. Morton, 405 U.S. 727, 738 (1972); *Data Processing*, 397 U.S. at 153–55.

79. Sidney A. Shapiro, A Delegation Theory of the APA, 10 Admin. L.J. Am. U. 89, 101 (1996) [hereinafter Shapiro, Delegation Theory].

80. See, e.g., Appalachian Power Co. v. EPA, 477 F.2d 495, 503–04 (4th Cir. 1973) (requiring limited trial-type hearing in notice-and-comment rulemaking); Int'l Harvester Co. v. Ruckelshaus, 478 F.2d 615, 630 (D.C. Cir. 1973) (requiring public hearing in notice-and-comment rulemaking).

81. See Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, 435 U.S. 519, 523–25 (1978).

82. See Shapiro, Discretion, supra note 44, at 1498.

83. See Cass R. Sunstein, Factions, Self-Interest, and the APA: Four Lessons Since 1946, 72 Va. L. Rev. 271, 283–84 (1986) (describing reasons why interest group model failed).

C. *The Current Period*

By the 1980s, administrative law theory and doctrine had transitioned to presidential control of agency decisionmaking as a principal mechanism for legitimating such decisionmaking.[84] The "presidential control" model displays a strikingly similar disregard for administrative procedures as the expertise model, but for a different reason. The model comes with its own procedures—presidentially-generated procedures—set forth in executive orders rather than statutes.[85] Those procedures, together with other tools, enable the White House to monitor and influence agency action as it unfolds.

The centerpiece is Executive Order 12,291 and its successors.[86] Executive Order 12,291 required agencies to consider cost-benefit analysis "to the extent permitted by law"[87] and to submit their proposed major rules, along with a "Regulatory Impact Analysis" of the rule, for centralized White House review by the Office of Management and Budget (OMB).[88] Within OMB, the Office of Information and Regulatory Activities (OIRA) now performs the review function.[89] President Reagan issued this executive order to improve the efficiency and coordination of agency rulemaking.[90] All subsequent Presidents have maintained it, and two have expanded it. President Clinton issued Executive Order 12,866, which enlarged the focus of White House regulatory review by instructing agencies to consider not only the cost-effectiveness of their proposals but their distributional effects as well.[91] President George W. Bush instituted a more dramatic change.[92] He issued Executive Order 13,422, amending Executive Order 12,866 and enlarging the scope of regulatory review to include not only rulemaking proposals but also guidance documents.[93] In addition, Executive Order 13,422 requires a presidential political ap-

84. For a description of this model, see Bressman, Beyond Accountability, supra note 9, at 485–91; Michael A. Fitts, The Paradox of Power in the Modern State: Why a Unitary, Centralized Presidency May Not Exhibit Effective or Legitimate Leadership, 144 U. Pa. L. Rev. 827, 841–57 (1996); Kagan, supra note 19, at 2277–2319.

85. See Kagan, supra note 19, at 2285–90 (discussing role of centralized White House review in implementing vision of "presidential administration").

86. Exec. Order No. 12,291, 3 C.F.R. 127 (1982), reprinted in 5 U.S.C. § 601 (1988), revoked by Exec. Order No. 12,866, 3 C.F.R. 638 (1993), reprinted as amended in 5 U.S.C. § 601 (2000).

87. 3 C.F.R. 128 (1982).

88. 3 C.F.R. 128–30 (1982).

89. See Exec. Order No. 12,866, 3 C.F.R. 638 (1993), reprinted as amended in 5 U.S.C. § 601 (2000).

90. See 3 C.F.R. 127 (1982) (listing purposes of Executive Order 12,291, including reducing "the burdens of existing and future regulations," providing "for presidential oversight of the regulatory process," and minimizing "duplication and conflict of regulations").

91. 3 C.F.R. 638, 640, 645 (1993), reprinted as amended in 5 U.S.C. § 601 (2000).

92. Initially, President Bush made only minor changes to Executive Order 12,866 with Executive Order 13,258. See Exec. Order No. 13,258, 3 C.F.R. 204 (2002).

93. See Exec. Order No. 13,422, 72 Fed. Reg. 2763 (Jan. 23, 2007).

pointee in each agency to oversee the development of regulatory policy, including guidance documents.[94]

The presidential control model has enjoyed widespread support. In addition to bipartisan political appeal, it has broad scholarly appeal. Formalists or originalists contend that it brings agencies within the four corners—or rather the three Articles—of the Constitution.[95] Because agency decisionmaking occurs under the direction of the Chief Executive, it is no longer constitutionally suspect. More instrumentalist scholars argue that the strong president model subjects agencies to the direction of an elected official who may best ensure their accountability and efficacy. The President is elected by the entire nation and therefore best represents popular preferences.[96] The President is uniquely visible and therefore can be held responsible for his actions.[97] The President, a single actor, has the capacity to coordinate and manage the executive branch through tools such as centralized review of agency proposals under principles of cost-benefit analysis.[98]

Administrative law reflects the presidential control model by increasing judicial deference to agency decisions. The most prominent example is *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*[99] In that case, the Court held that agencies are entitled to judicial deference for interpretations of ambiguous statutory provisions in large part because they are subject to presidential control:

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94. See id. at § 5 (amending Exec. Order No. 12,866 § 6(b)).

95. See Steven G. Calabresi & Saikrishna B. Prakash, The President's Power to Execute the Laws, 104 Yale L.J. 541, 570–99 (1994).

96. See Jerry L. Mashaw, Greed, Chaos, and Governance: Using Public Choice to Improve Public Law 152 (1997) [hereinafter Mashaw, Greed] (arguing that President is particularly responsive to public preferences because he deals with national issues and has no particular constituency demanding benefits in exchange for votes); Kagan, supra note 19, at 2331–37 (arguing that presidential control of administration serves two goals of accountability and effectiveness); Lessig & Sunstein, supra note 19, at 105–06 (arguing that President, in part because of his "national constituency," should ultimately control administrative decisionmaking); cf. Pierce, Role of the Judiciary, supra note 19, at 1251–54 (arguing that Constitution is premised on belief that government should act as agent of people, and that President is second best to Congress as agent of people for controlling administrative policymaking).

97. See Kagan, supra note 19, at 2331–37 (arguing that visibility of President's office subjects him to increased public attention); Lessig & Sunstein, supra note 19, at 105–06 ("[B]ecause the President has a national constituency—unlike relevant members of Congress, who oversee independent agencies with often parochial agendas—[he] appears to operate as an important counterweight to factional influence over administration.").

98. See Christopher C. DeMuth & Douglas H. Ginsburg, White House Review of Agency Rulemaking, 99 Harv. L. Rev. 1075, 1076–82 (1986) (arguing that centralized cost-benefit review "encourages policy coordination, greater political accountability, and more balanced regulatory decisions"); Mashaw, Prodelegation, supra note 19, at 93 (noting that "executive branch . . . cost-benefit analyses of agency regulations . . . press agencies in the direction of . . . welfare-enhancing action").

99. 467 U.S. 837 (1984).

> [A]n agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.[100]

Chevron, more than any other case, is responsible for anchoring the presidential control model. It recognized that politics is a permissible basis for agency policymaking.[101]

Despite the strength of the presidential control model, the Court has departed from it in significant ways, again shifting its focus back to traditional administrative procedures.[102] The classic example is *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*, in which the Court refused to uphold a rule rescission that the Reagan administra-

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100. Id. at 865–66.

101. Other cases mirror that sentiment. See, e.g., Lujan v. Defenders of Wildlife, 504 U.S. 555, 577 (1992) (refusing to grant standing to plaintiffs challenging nonenforcement decision because to do so would interfere with presidential prerogatives); Heckler v. Chaney, 470 U.S. 821, 831–35, 837–38 (1985) (denying review of claim challenging nonenforcement decision because Congress had not indicated that such decision would be reviewable).

102. Scholars also have criticized the model. See, e.g., Bressman, Beyond Accountability, supra note 9, at 492–515 (arguing that the model does not adequately prevent arbitrary agency action); Cynthia R. Farina, Undoing the New Deal Through New Presidentialism, 22 Harv. J.L. & Pub. Pol'y 227, 227 (1998) [hereinafter Farina, Undoing the New Deal] (arguing that "new presidentialism" is "a profoundly anti-regulatory phenomenon"); Fitts, supra note 84, at 841–57 (arguing that singularity and visibility of presidency may exaggerate its flaws); Martin S. Flaherty, The Most Dangerous Branch, 105 Yale L.J. 1725, 1755–1810 (1996) (arguing that unitary executive is incorrect as matter of original understanding); Abner S. Greene, Checks and Balances in an Era of Presidential Lawmaking, 61 U. Chi. L. Rev. 123, 187–95 (1994) (arguing that unitary executive is incorrect as matter of constitutional interpretation); Thomas O. McGarity, Presidential Control of Regulatory Agency Decisionmaking, 36 Am. U. L. Rev. 443, 462–63 (1987) (arguing that presidential control interferes with agency independence); Peter M. Shane, Political Accountability in a System of Checks and Balances: The Case of Presidential Review of Rulemaking, 48 Ark. L. Rev. 161, 212–14 (1995) (arguing that presidential review of rulemaking disrupts "dialogue, openness, and responsiveness" important to system of checks and balances); Sidney A. Shapiro, Political Oversight and the Deterioration of Regulatory Policy, 46 Admin. L. Rev. 1, 24 (1994) (arguing that presidential control interferes with agency expertise); Peter L. Strauss, Presidential Rulemaking, 72 Chi.-Kent L. Rev. 965, 968 (1997) [hereinafter Strauss, Presidential Rulemaking] (arguing that presidential involvement in rulemaking "insufficiently respects the tension inherent in the Constitution between Congress's power to create the instruments of government and allocate authority among them and the fact of a single chief executive at the head of the agencies thus created, with intended and inevitable political relationships with all").

tion supported absent a more reasoned explanation for the action.[103] Another is *United States v. Mead Corp.*[104] There the Court held that an agency is entitled to *Chevron* deference for reasonable interpretations of ambiguities in the statutes that they administer only if they select a procedural format that Congress anticipates will "carry[ ] the force of law."[105]

In sum, the evolution of administrative law has been generally characterized by vacillation between procedures, which serve due process or rule-of-law values, and politics, which appeal to the values of accountability and efficiency (and, previously, expertise). This vacillation, according to legal scholars, has produced rules that reflect contradictory procedural and political impulses. Administrative law therefore sends conflicting signals to agencies regarding choice of administrative procedures, intensity of judicial review, and availability of judicial review.

To resolve the apparent tension, legal scholars more or less divide into two camps—those who favor procedures and those who favor politics.[106] Neither entirely discounts the other, of course.[107] No scholar says

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103. 463 U.S. 29, 51–52 (1983).

104. 533 U.S. 218 (2001).

105. Id. at 226–27. The Court has departed from strict presidential control in other cases. See Gonzales v. Oregon, 546 U.S. 243, 268–69 (2006) (invalidating regulation of physician-assisted suicide despite support of George W. Bush administration); FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000) (invalidating regulation of tobacco products despite support of Clinton administration).

106. Compare David J. Barron & Elena Kagan, Chevron's Nondelegation Doctrine, 2001 Sup. Ct. Rev. 201, 234 ("The Court's approach, when measured against the values of accountability and discipline, denies deference to actions that have earned it and gives deference to actions that do not deserve it."), and Cass R. Sunstein, Beyond *Marbury*: The Executive's Power to Say What the Law Is, 115 Yale L.J. 2580, 2588 (2006) [hereinafter Sunstein, Beyond *Marbury*] (arguing that executive branch should be permitted broad discretion to choose either technocratic policy or political policy, and that either is consistent with *Chevron*), with Lisa Schultz Bressman, How *Mead* Has Muddled Judicial Review of Agency Action, 58 Vand. L. Rev. 1443, 1486–91 (2005) [hereinafter Bressman, *Mead*] (defending *Mead* and its emphasis on procedural regularity as condition for *Chevron* deference). Many scholars view administrative procedures as serving important normative values, such as fairness, rationality, participation, and accountability. For a sampling, see generally articles in Symposium on the 50th Anniversary of the APA, 10 Admin. L.J. Am. U. 1 (1996) (discussing values, interpretations, and future of APA); Administrative Law Symposium, 72 Va. L. Rev. 215 (1986) (discussing development and future of APA). For those scholars who generally favor political accountability, particularly through the President, see, e.g., Mashaw, Greed, supra note 96, at 152 (suggesting that delegation and accountability in executive administration "improv[es] the responsiveness of government to the desires of the general electorate"); Calabresi, supra note 19, at 58–70 (arguing unitary President is most accountable and best situated to make fair decisions); Kagan, supra note 19, at 2331–37 (claiming that presidential administration encourages accountability by increasing transparency and making government more responsive to general public); Lessig & Sunstein, supra note 19, at 102–03 (suggesting that strong unitary President is necessary to achieve goals of country's founders); Pierce, Role of the Judiciary, supra note 19, at 1280–85 (arguing that politically accountable President prevents factions).

107. See Barron & Kagan, supra note 106, at 244–45 (restricting *Chevron* deference to interpretation rendered by high level officials in part because such interpretations

that the APA should not apply, even if they oppose the Court's efforts to expand its provisions in certain contexts. Similarly, no scholar says that political accountability is irrelevant, even if they oppose particular efforts to provide Presidents running room. Rather, legal scholars roughly divide on which normative values and which judicial decisions they believe make a greater contribution to the legitimacy of agency action.

III. THE POSITIVE POLITICAL THEORY ACCOUNT OF ADMINISTRATIVE PROCEDURES

Legal scholars have not adequately considered what positive political theory (PPT) scholars have been saying about administrative procedures for at least the last two decades. This Part sets forth the PPT account of administrative procedures and highlights its critical contributions. Coincident with the arrival of the presidential control model and largely independent from that model, PPT scholars began asserting that Congress can use administrative procedures to influence agency action before it is final. Thus, procedures *are*, or can be, about politics and not simply about law.

But, this Part shows, PPT scholars have not told a complete story about administrative procedures any more than legal scholars have. They have not addressed whether the Court has elaborated the APA in a manner that would enable Congress to influence agency action. That is, they have failed to connect their theory to actual administrative law. Furthermore, their assumptions about judicial behavior cannot predict such law, leaving open both descriptive and theoretical work.

A. *The APA as a Tool for Legislative Oversight*

Positive political theorists relate the study of administrative procedures to their analysis of congressional delegation. They start from the premise that delegation creates a principal-agent problem.[108] In particular, Congress knows that agencies may implement their own policy preferences rather than legislative preferences.[109] Political scientists identify

promote rule-of-law values, including "disciplined consideration of policy throughout the agency, even (or especially) at the lower levels" and "coherence of administrative action, both by preventing deviations from agency policy and establishing a mechanism to implement that policy in a coordinated manner"); Bressman, Beyond Accountability, supra note 9, at 514 (acknowledging need for political accountability in agency decisionmaking).

108. See John D. Huber & Charles R. Shipan, Deliberate Discretion? The Institutional Foundations of Bureaucratic Autonomy 26 (2002) (noting that "principal-agent framework from economics has played an extremely prominent and powerful role in [the] institutional approach to relations between politicians and bureaucrats"). For the classic political science accounts describing why Congress creates agencies, see generally Morris P. Fiorina, Congress: Keystone of the Washington Establishment (1977); William A. Niskansen, Jr., Bureaucracy and Representative Government (1971).

109. See McNollgast, Administrative Procedures, supra note 12, at 246–48.

two sorts of difficulties: "coalitional drift" and "bureaucratic drift."[110] Bureaucratic drift arises when agency officials act in ways inconsistent with the original deal or coalitional arrangement struck between interest groups and politicians. Coalitional drift occurs when agency officials, even if reflecting the preferences of the enacting Congress, depart from the preferences of future Congresses. For both sorts of problems, legislative monitoring is the antidote.

At first, political scientists examined the most obvious forms of legislative monitoring, such as committee hearings.[111] But they noticed that Congress has trouble monitoring its agents directly. Such oversight is costly, requiring both time and resources.[112] Moreover, Congress frequently lacks the information necessary to assess whether agencies have selected policies that diverge from the ones that it would have chosen.[113] Congress may have no expertise on the relevant issues and no sense for the best alternatives. As Professor Terry Moe has explained:

> Th[e] primordial act of organization comes with a built-in control problem: for the agent has expertise and other information—about his own diligence and aptitude, for example, or his actual behavior on the job—that are largely unavailable to the principal, and this asymmetry makes it difficult for the principal to ensure that his own interests are being faithfully pursued by the agent.[114]

In 1987, Mathew McCubbins, Roger Noll, and Barry Weingast, the political scientists known collectively as "McNollgast," introduced a path-breaking way to explain how Congress overcomes the principal-agent problem that broad delegation inevitably creates.[115] They did not focus on direct legislative oversight or ex post controls, as prior political scientists had. Rather, they observed that Congress can overcome the princi-

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110. See Kenneth A. Shepsle, Bureaucratic Drift, Coalitional Drift, and Time Consistency: A Comment on Macey, 8 J.L. Econ. & Org. 111, 113–15 (1992) (developing notions of political "drift"); see also Murray J. Horn & Kenneth A. Shepsle, Commentary on "Administrative Arrangements and the Political Control of Agencies": Administrative Process and Organizational Form as Legislative Responses to Agency Costs, 75 Va. L. Rev. 499, 501–04 (1989) (discussing problem of bureaucratic drift and its underlying tradeoffs).

111. See McNollgast, Administrative Procedures, supra note 12, at 249–51 (analyzing two forms of policy monitoring: evaluation by congressional committees and "fire-alarm monitoring"); McNollgast, Administrative Arrangements, supra note 12, at 440–44 (discussing structural and procedural solutions to issue of agency deviation).

112. See McNollgast, Administrative Arrangements, supra note 12, at 443 (noting that, although costly, structural and procedural solutions prevent agency deviations).

113. See McNollgast, Administrative Procedures, supra note 12, at 247 ("A consequence of delegating authority . . . is that [the agency] may become more expert about their policy responsibilities than [Congress].").

114. Terry M. Moe, Political Control and the Power of the Agent, 22 J.L. Econ. & Org. 1, 3 (2006).

115. McNollgast, Administrative Procedures, supra note 12, at 244. Professor McCubbins and Thomas Schwartz identified the possibility of fire-alarm oversight in 1984. See McCubbins & Schwartz, supra note 12, at 168.

pal-agent problem through the very structure and design of agencies.[116] Specifically, they contended that Congress can subject agencies to administrative procedures, like those in the APA.[117]

According to McNollgast, administrative procedures serve two purposes. First, Congress can use them to address informational asymmetries that prevent effective oversight. Professors John Huber and Charles Shipan helpfully describe these asymmetries, as follows:

> One category is general uncertainty about what events might happen tomorrow. A politician, for example, may want to devise pollution standards, but no one may know how technology will develop in this area. Private information is also important. A bureaucrat, for example, may know more than the politician about the state of pollution abatement technology or about the feasibility of setting particular standards. The bureaucrat might also have private information about his or her skills or objectives, which leads to the problem of adverse selection. A third type of informational problem is unobservable behavior. If bureaucratic behavior is difficult to observe, there will often be incentives for post-contractual opportunism, called moral hazard.[118]

Congress may overcome these problems by including its constituents in the process, allowing them to learn what the agency knows before it presents a fait accompli.[119] Once those constituents gain access to information about agency proposals, they may alert Congress when intervention is necessary.[120] Such "fire-alarm" oversight is efficient because it shifts to third parties the cost of gathering and processing information.[121] Furthermore, the sequential nature of the administrative process ensures that Congress will have multiple opportunities to influence a policy before it is final.[122] Judicial review is necessary for the mechanism to

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116. McNollgast, Administrative Procedures, supra note 12, at 244.

117. Id.

118. Huber & Shipan, supra note 108, at 27.

119. See McNollgast, Administrative Procedures, supra note 12, at 257–58; McNollgast, Administrative Arrangements, supra note 12, at 442.

120. See McNollgast, Administrative Procedures, supra note 12, at 254. Rui J.P. de Figueiredo, Jr., Pablo Spiller, and Santiago Urbiztondo have modeled the informational function of administrative procedures, concluding that political principals will prefer information from multiple monitors. Rui J.P. de Figueiredo, Jr., Pablo T. Spiller & Santiago Urbiztondo, An Informational Perspective on Administrative Procedures, 15 J.L. Econ. & Org. 283, 301 (1999).

121. McNollgast, Administrative Procedures, supra note 12, at 254.

122. See William N. Eskridge, Jr. & Philip P. Frickey, Law as Equilibrium, 108 Harv. L. Rev. 26, 30–33 (1994) (noting sequential nature of decisionmaking among legislature, President, agencies, and courts); McNollgast, Administrative Procedures, supra note 12, at 258; McNollgast, Administrative Arrangements, supra note 12, at 442; cf. John Ferejohn & Charles Shipan, Congressional Influence on Bureaucracy, 6 J.L. Econ. & Org. (Special Issue) 1, 3–5 (1990) (noting sequential structure that allows Congress to influence policy before it is final, but claiming that these efforts are often futile and lead to little substantive impact on agency action).

work because courts force agencies to comply with the procedures that facilitate fire-alarm oversight.[123]

The second way that Congress may use administrative procedures is to tilt agency decisionmaking toward the preferences of important constituents.[124] Congress can ensure that the same constituents who supported a regulatory statute have access to agency decisions before they are final. Thus, Congress can "stack the deck," increasing the likelihood that agencies will reflect the preferences of its constituents without any further intervention, solving the problem of bureaucratic drift.[125] In addition, Congress can ensure that agency policies change as the preferences of its constituents change, simultaneously addressing the problem of coalitional drift.[126]

Although many have challenged the deck-stacking hypothesis,[127] few have questioned the informational-asymmetry hypothesis.[128] Administra-

123. Congress also must be able to learn from agency action and detect false alarms. See Arthur Lupia & Mathew D. McCubbins, Learning from Oversight: Fire Alarms and Police Patrols Reconstructed, 10 J.L. Econ. & Org. 96, 106–07 (1994).

124. See McNollgast, Administrative Arrangements, supra note 12, at 444.

125. Id.

126. Id.

127. Political scientists have found little empirical evidence to support the deck-stacking hypothesis. See, e.g., Steven J. Balla, Administrative Procedures and Political Control of the Bureaucracy, 92 Am. Pol. Sci. Rev. 663, 669–71 (1998) (finding that operation of notice-and-comment process in Medicare physician payment reform did not support deck-stacking hypothesis); de Figueiredo et. al., supra note 120, at 286 (arguing that administrative procedures are not properly viewed as form of deck-stacking because informational gains induce political actors to prefer multiple interest groups, even when one or more groups is in opposition to politician); David B. Spence, Managing Delegation Ex Ante: Using Law to Steer Administrative Agencies, 28 J. Legal Stud. 413, 415 (1999) (analyzing two sets of decisions made by Federal Energy Regulatory Commission and finding only "limited, qualified support" for view that political actors can influence agency decisionmaking through design of administrative procedures); cf. Matthew Potoski & Neal D. Woods, Designing State Clean Air Agencies: Administrative Procedures and Bureaucratic Autonomy, 11 J. Pub. Admin. Res. & Theory 203, 218 (2001) (finding support in empirical study of state clean air policies for thesis that administrative procedures can hardwire agency decisions to reflect preferences of enacting legislative coalition). Political scientists and legal scholars have also raised theoretical questions about fire-alarm oversight. See, e.g., Michael Asimow, On Pressing McNollgast to the Limits: The Problem of Regulatory Costs, 57 Law & Contemp. Probs., 127, 131 (1994) ("[W]hen groups that oppose agency action trip legislative fire alarms, the fire will be doused (or fed or ignored) by the existing power balance in the legislature rather than by the coalition that existed at the time the legislation was enacted."); Glen O. Robinson, Commentary on "Administrative Arrangements and the Political Control of Agencies": Political Uses of Structure and Process, 75 Va. L. Rev. 483, 484 (1989) ("[McNollgast's] model is too general in its description of processes and structure to permit useful generalizations about how they can be used to 'stack the deck' in favor of specific political interests."); Shapiro, Delegation Theory, supra note 79, at 96 ("The idea that Congress will 'hot-wire' its substantive preference by its choice of procedures ignores the political difficulty of accomplishing that result.").

128. But cf. Huber & Shipan, supra note 108, at 36 (noting that critics have argued that the McNollgast theory "is too general and, as a result, too hard to test or refute," and

tive procedures allow Congress (which is to say the current Congress) to obtain more information than it would have otherwise, without incurring the costs of direct oversight. Thus, PPT offers a valuable insight about the possible use of administrative procedures.

B. *The Missing Piece*

Yet PPT scholars have not offered a full understanding of the case law around these procedures. Specifically, they have not considered whether the Court has interpreted the APA and other procedures to provide Congress (through its constituents) with access to information about agency action.[129] In other words, they have been unable to determine whether the Court has implemented Congress's theoretical controls.

The Court's role in elaborating administrative procedures cannot be overlooked. The APA itself is likely too sparse to facilitate congressional monitoring, requiring agencies to provide little information about their actions. For rulemaking, it merely requires agencies to provide notice of "either the terms or substance of the proposed rule or a description of the subjects and issues involved" and a "concise general statement" of basis and purpose for the final rule.[130] It demands even less for informal adjudication. In any event, the Court has not left procedural law at the APA alone. If the McNollgast theory is correct, the Court's jurisprudence should demonstrate a fortification or amplification of information-providing procedures.[131]

McNollgast have described some principles of administrative law as providing Congress (through its constituents) with access to information about agency action.[132] For example, McNollgast have noted the impor-

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that the theory suffers from "the need for clearer distinctions between structures and procedures," as well as the need "to specify the conditions under which the structure and process hypothesis will operate" (citations omitted)); Mashaw, Explaining Administrative Process, supra note 18, at 281–84 (questioning whether simply yielding information is sufficient to make administrative procedures useful in way that McNollgast claims).

129. See Mathew D. McCubbins & Daniel B. Rodriguez, The Judiciary and the Role of Law: A Positive Political Theory Perspective, *in* The Oxford Handbook of Political Economy 273, 280 n.7 (Barry R. Weingast & Donald A. Wittman eds., 2006) (noting that McNollgast have focused on role of "procedural rules and structures" rather than role of courts).

130. 5 U.S.C. § 553 (2000).

131. A question for the McNollgast theory, as well as the argument here, is why Congress, if interested in the monitoring function of the APA, left so much to judicial elaboration. Although it is beyond the scope of this Article to explore the exact legislative motivations behind the APA, the answer, we might speculate, is at least twofold. First, as mentioned previously, the APA was the product of intense political negotiation and compromise. See supra text accompanying notes 29–32. Thus, the political climate was not conducive to consensus on more precise concepts. Second, as explained below, many of the concepts are not susceptible to more precise codification even under the best political conditions. See infra text accompanying notes 138–139. Judicial elaboration, at some level, was unavoidable.

132. See McNollgast, Administrative Procedures, supra note 12, at 257–59.

tance of the reasoned decisionmaking requirement in this regard.[133] The reasoned decisionmaking requirement ensures that agencies must "solicit valuable political information" and make such information public.[134] It prevents agencies from secretly conspiring against political officials by presenting a fait accompli and from secretly colluding with particular constituent groups.[135] It also ensures that the most politically contentious issues are those with the biggest record, generating the most complete information and performing a signaling function.[136]

Positive political theorists have not looked across the whole spectrum of administrative law, which includes many more principles that may complicate the procedures-information-oversight connection. They have not done the critical descriptive work necessary to their thesis. At most, they have assumed that the Court would produce principles to assist Congress in monitoring agencies.

The difficulty is that they cannot simply assume that the Court has chosen the right rules to assist Congress in this context. PPT scholars argue generally that the Court, in interpreting statutes, is likely to behave in a way that insulates its decisions from legislative reversal.[137] Thus, the Court can be expected to adopt rules that hew closely enough to current legislative preferences—neither so overinclusive nor so underinclusive that Congress would have the votes to reverse them, or that the executive branch would be inclined to refrain from enforcing them.[138]

But the Court is not clearly constrained in this area. It bears noting that, as a general matter, there is little empirical evidence to support this theory of judicial behavior.[139] That is not the whole problem, however. There is simply little reason to believe the theory holds here because the Court's procedural principles are not the sort of rules for which Congress might raise a credible threat of retaliation. The standards for assessing

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133. See id.

134. Id at 258.

135. Id.

136. Id. at 258–59.

137. See McNollgast, Judicial Independence, supra note 14, at 114–15 (observing that Court formulates doctrine so as to minimize possibility of legislative reversal); McNollgast, Politics and the Courts, supra note 14, at 1649–50 (same). For an excellent summary of the McNollgast theory, as well as other views from the political science literature about judicial behavior, see McCubbins & Rodriguez, supra note 129, at 281–84.

138. See Lee Epstein, Jack Knight & Andrew D. Martin, The Supreme Court as a Strategic National Policymaker, 50 Emory L.J. 583, 594 (2001) (arguing that Court chooses doctrine effectuating its own preferences only to extent it can without prompting political branches to react); William N. Eskridge, Jr., Overriding Supreme Court Statutory Interpretation Decisions, 101 Yale L.J. 331, 372–89 (1991) (modeling "interaction between the Supreme Court, Congress, and the President as a sequential game, in which a Court interested in not being overridden can achieve that objective and usually still read its preferences into federal statutes").

139. See Jeffrey A. Segal, Separation-of-Powers Games in the Positive Theory of Congress and Courts, 91 Am. Pol. Sci. Rev. 28, 42 (1997) (finding little empirical evidence that Court will defer to congressional preferences in order to protect its decisions).

agency action—whether stringent, like the reasoned decisionmaking requirement, or lenient, like *Chevron* deference—are not susceptible to precise codification. They are too amenable to case-by-case elaboration, rather than legislative consensus. Thus, Congress is limited in its ability to "overrule" the Court and address these issues with more specificity than it has.[140] As one commentator has stated, "It remains difficult, perhaps impossible, to capture in statutory language the precise mixture of respect and skepticism with which courts should approach administrative determinations."[141] As a result, the Court remains relatively free to craft the rules governing the requirements of rulemaking or the scope of judicial review.

Similarly, the Court is not vulnerable to legislative overruling with respect to rules governing the availability of judicial review. Congress is limited in its ability to strengthen section 702 of the APA, which provides that any person "adversely affected or aggrieved" may seek judicial review.[142] It can do little more than remind the Court that "we meant what we said," by, for example, enacting a citizen suit provision in an organic statute or by providing an individualized statutory right to challenge agency action. But Congress lacks control over the interpretation of such provisions, and they do not necessarily guarantee broad access to judicial review.[143]

That is not to say that the Court is or has been insensitive to legislative preferences in elaborating administrative procedures.[144] The Court

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140. The failed Bumpers Amendment tried. See S. 2408, 94th Cong. (1975). For novel ideas on how Congress might take an active role in allocating interpretive authority between agencies and courts, see Elizabeth Garrett, Legislating *Chevron*, 101 Mich. L. Rev. 2637, 2660–70 (2003).

141. Marshall J. Breger, The APA: An Administrative Conference Perspective, 72 Va. L. Rev. 337, 355 (1986); see also Shapiro, APA, supra note 29, at 484 ("It is notoriously difficult for Congress to find statutory language to instruct courts on the precise level of review desired.").

142. 5 U.S.C. § 702 (2000).

143. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 571–74 (1992) (rejecting argument that citizen-suit provisions allow any person to bring suit).

144. Indeed, this is where legal scholars often err. Legal scholars seldom internalize the possibility that the Court might take seriously how Congress can use administrative procedures. See Barry Friedman, The Politics of Judicial Review, 84 Tex. L. Rev. 257, 259 (2005) (arguing that "normative constitutional theory about judicial review will remain impoverished until it fully embraces the positive project"); McCubbins & Rodriguez, supra note 129, at 281 (noting traditional depiction of courts "as using constitutional and administrative law to rescue apolitical agencies from the baleful influence of Congress and the President"). Instead, they see the Court as pursuing other values, like rule of law or accountability (often defined as presidential control). Or they concentrate on the instances in which the Court has invalidated congressional control mechanisms. See, e.g., William N. Eskridge, Jr. & John Ferejohn, The Article I, Section 7 Game, 80 Geo. L.J. 523, 540–43 (1992) [hereinafter Eskridge & Ferejohn, Article I, Section 7 Game] (arguing that legislative veto, by facilitating congressional control, restores constitutional balance of powers, and therefore Court improperly invalidated it). In *INS v. Chadha*, it was the legislative veto. 462 U.S. 919, 959 (1983). In *Bowsher v. Synar*, it was the congressional removal of executive officials. 478 U.S. 714, 733–34 (1986). But these cases do not show

is not operating entirely outside politics, simply offering legalistic roadblocks to politically-based decisionmaking. By the same token, the Court is not operating entirely *within* politics either—at least not in the way that PPT scholars may think.

To be sure, there are other possible explanations for the Court's motives in this area. Perhaps the Court, at least in part, is furthering its own policy preferences. We should be skeptical, however, that the Court is *only* furthering its own policy preferences when deciding the seminal administrative law cases.[145] As many have demonstrated, judges are much more nuanced in the factors that they consider in decisionmaking.[146] Beyond that, it is largely irrelevant whether the Court has a *substantive* preference for particular policies in the major administrative law cases because the rules articulated in those cases—for example, the reasoned decisionmaking requirement—transcend the holdings. It does not matter whether the Court has an ideological preference for the pollution policy in *Chevron* or against the auto safety policy in *State Farm*. The

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that the Court has disregarded congressional preferences across the board. Rather, they suggest that it is unwilling to accommodate Congress's every wish, for reasons explored in detail below. See infra text accompanying notes 359–362.

145. For an excellent summary of the various theories of judicial behavior, including the attitudinal model, see Theodore W. Ruger et al., The Supreme Court Forecasting Project: Legal and Political Science Approaches to Predicting Supreme Court Decisionmaking, 104 Colum. L. Rev. 1150, 1155–60 & nn.20–36 (2004) (describing standard attitudinal model as view that Justices "decide cases based upon their fixed policy preferences . . . and are not meaningfully constrained from voting in accord with those views by doctrine, text, or institutional setting"); see also Lee Epstein & Jack Knight, The Choices Justices Make 10–18 (1998) (suggesting strategic account of judicial decisionmaking as involving attainment of goals, strategic interaction among justices, and institutional context); Jeffry A. Segal & Harold J. Spaeth, The Supreme Court and the Attitudinal Model Revisited 86–97 (2002) (arguing that judges vote on basis of personal political preferences); Andrew F. Daughety & Jennifer F. Reinganum, Speaking Up: A Model of Judicial Dissent and Discretionary Review, 14 Sup. Ct. Econ. Rev. 1, 2–7 (2006) (developing model in which judicial dissent at appellate level communicates to Supreme Court and using model to characterize how changes in judges' jurisprudential preferences affect such information transfer).

146. See, e.g., Friedman, supra note 144, at 263, 280–329 (arguing that Court is sensitive to "strategic interaction with other judges . . . , the pressures imposed by judges on the judicial hierarchy's lower rungs who have their own views of how things should be, interbranch struggles over legal outcomes with significant policy implications, and popular opinion regarding judicial outcomes and the practice of judicial review"); Richard A. Posner, The Role of the Judge in the Twenty-First Century, 86 B.U. L. Rev. 1049, 1053 (2006) (stating that judges must decide cases expediently and that many factors, in addition to judge's political preferences, are relevant to task, including "feasibility of a particular judicial intervention . . . , the effect on the law's stability and the court's reputation if its attitude toward precedent and statutory text is seen as too cavalier, and the judge's desire for ideological consistency (which is different from, though often correlated with, political preference)"); Ruger et al, supra note 145, at 1163 (citing as influential "(1) circuit of origin; (2) issue area of the case; (3) type of petitioner (e.g., the United States, an employer, etc.); (4) type of respondent; (5) ideological direction (liberal or conservative) of the lower court ruling; and (6) whether the petitioner argued that a law or practice is unconstitutional").

proper focus is the Court's motivation in choosing a particular metarule for evaluating agency action: judicial deference or judicial scrutiny. Indeed, to the extent that the Court sees such metarules as contributing to a system of law (i.e., administrative law), we must further view any particular metarule in connection with the other metarules.

One still might think that the Court chooses these metaprinciples to maximize its own power,[147] but there is cause for skepticism that such empire building is the sole or even primary motivation. Again, most believe that judging is more complicated. Furthermore, not all administrative law principles increase judicial power; some rules increase judicial deference. If the Court is dedicated to enlarging its own domain, it has done a spotty job. The very same Court that decided *State Farm* (judicial scrutiny) decided *Chevron* (judicial deference). More seems to be at work in this pair than power maximization.

Finally, one might hypothesize that the Court facilitates congressional control when it is ideologically aligned with Congress and restricts congressional control when it is ideologically closer to the President or the agency. This Article does not preclude this—or any—explanation of judicial behavior from accounting at least in part for the Court's motives. The Article does caution, however, that in making claims about judicial behavior, we must not only consider the Court's votes on a particular substantive policy but also the metarule in the case. We must then confront certain puzzles, including why *Chevron* would follow *State Farm* when neither the members of the Court nor the political branches had changed.

The weaknesses in the existing explanations of judicial behavior create room for an alternative theory of why the Court has elaborated administrative procedures to facilitate congressional control. This Article suggests that the Court is sincerely interested in preserving the strategic choices of the political branches and a role for itself as mediator. This conception, though different from the standard PPT account, is nevertheless consistent with positive theory. Furthermore, it is similar to how

147. For example, legal scholars have made this argument about United States v. Mead Corp., 533 U.S. 218 (2001), which enlarged judicial power by circumscribing *Chevron* deference. See, e.g., Barron & Kagan, supra note 106, at 225 ("Perhaps the [*Mead*] Court attributes its policy judgments to Congress . . . to cloak judicial aggrandizement; it may be no coincidence that when ceding power in *Chevron*, the Court spoke the language of policy, whereas when reclaiming power in *Mead*, the Court abandoned this language."); Ronald J. Krotoszynski, Jr., Why Deference?: Implied Delegations, Agency Expertise, and the Misplaced Legacy of *Skidmore*, 54 Admin. L. Rev. 735, 751 (2002) ("The implied delegation prong of the *Mead* test represents a naked power grab by the federal courts."); cf. Michael P. Healy, Spurious Interpretation Redux: *Mead* and the Shrinking Domain of Statutory Ambiguity, 54 Admin. L. Rev. 673, 677–81 (2002) (arguing that *Mead* exemplifies Rehnquist Court's tendency to judicially resolve instances of statutory ambiguity, thereby shifting interpretive power to courts, because of its general unwillingness to acknowledge such ambiguity); Ronald M. Levin, *Mead* and the Prospective Exercise of Discretion, 54 Admin. L. Rev. 771, 793–94 (2002) [hereinafter Levin, Prospective Exercise] (concluding that *Mead* allocates interpretive authority to courts in too many instances).

many (though not all) legal scholars seek to understand the Court or its project—as generating the appropriate rules for agency action.

Before exploring this conception, it is first necessary to demonstrate that the Court *has* elaborated administrative procedures to facilitate congressional control, rather than relying on abstract assumptions about judicial behavior. The next Part takes up that descriptive work. It shows that seminal administrative law cases may be understood to facilitate congressional control. It further finds that describing administrative procedures as a political mechanism helps to clarify the contours of the cases better than the standard legal account alone. In assisting our understanding of administrative law, the PPT reimagination of such law is a step forward.

IV. The Law of Administrative Procedures

This Part demonstrates that the Court has developed a law of administrative procedures that is consistent with the PPT account. To be clear, this Part does not offer a political science explanation for the Court's behavior, or any other explanation for that matter. It shows that, for whatever reason, the Court has shaped administrative law in a manner that enables Congress—beyond the bare provisions of the APA and other statutes—to monitor agency action. The PPT account may be translated into a plausible vision of administrative law.

For the most part, this vision does not conflict with the standard efforts of law professors to justify administrative procedures in terms of the values they serve and the goods they deliver. Indeed, the same rules that enable parties to acquire information about agency action also promote fairness, rationality, and participation, as well as traditional oversight, through committee hearings and the like. These values, though integral to the intellectual history of administrative law, cannot illuminate the major building blocks as well as a more targeted focus on information and oversight can.[148] By tying administrative law specifically to congressional monitoring, we can better appreciate why certain principles exist, what other principles mean, and how they interact with those that seem to move in the opposite direction. Thus, seeing administrative law from a particular political vantage is not merely possible but helpful. This is important because it demonstrates that legal scholars cannot afford to ignore the PPT insights about administrative procedures in describing and analyzing administrative law.

This Part discusses the procedural principles developed in the seminal cases of administrative law with three goals in mind. First, it seeks to

148. The standard legal account is also less realistic about how politics pervade agency decisionmaking. See Mashaw, Explaining Administrative Process, supra note 18, at 269 (describing normative account as naïve because it "has failed to ask hard questions about whether its ideological pretensions are in any way connected to the realities of bureaucratic governance").

establish an information-oversight explanation for those principles—specifically, that the principles enable parties to acquire information about agency action and even agency inaction. Thus, the focus will be on congressional monitoring and not other forms of oversight or other sorts of values that these principles also might serve. Second, this Part seeks to demonstrate that, in elaborating the relevant procedural principles, the Court has taken steps to minimize the potential for reviewing courts to impose their own preferences of wise policy, which is important for PPT in a context that involves not only agencies but also courts. If reviewing courts can impose their own preferences, they may simply swap one principal-agent problem (between Congress and agency) for another (between Congress and courts). If consistent with PPT, the rules should reflect a conscious effort by the Court to constrain reviewing courts from substituting their judgment for that of the agencies. Finally, this Part aims to show that, by focusing on information and oversight, we might understand the procedural principles of administrative law better than when viewed solely in terms of the conventional legal justifications.

A. *Principle I: Reasoned Decisionmaking*

One of the central judicial innovations in administrative procedures is the reasoned decisionmaking requirement, also known as the "hard look" doctrine. This rule ensures that Congress has the information that it needs to perform fire-alarm oversight. As previously noted, the APA itself does not require agencies to provide extensive information for most actions.[149] Thus, any information that Congress receives about these forms of agency action comes largely as result of the reasoned decisionmaking requirement.

The reasoned decisionmaking requirement has deep roots. Even before Congress enacted the APA, the Court required agencies to provide certain information about their actions. In the 1943 case of *SEC v. Chenery Corp. (Chenery I)*, the Court held that reviewing courts must evaluate an agency action "solely by the grounds invoked by the agency" and that agencies therefore must set forth those grounds "with such clarity as to be understandable."[150] The Court feared that reviewing courts, in supplying their own reasons, would tread "into the domain which Congress has set aside exclusively for the administrative agency."[151] The case involved a formal adjudication.[152] The Court declined to uphold an order of the Securities and Exchange Commission on grounds other than those

149. See supra Part II.B.

150. SEC v. Chenery Corp. (Chenery II), 332 U.S. 194, 196 (1947) (describing holding in Chenery I, 318 U.S. 80 (1943)).

151. Id. at 196 (discussing *Chenery I*).

152. See *Chenery I*, 318 U.S. at 81.

upon which the agency actually relied.[153] It remanded the order to the agency for further proceedings.[154]

After Congress enacted the APA, the Court developed the reasoned decisionmaking requirement. In *Citizens to Preserve Overton Park, Inc. v. Volpe*, the Court remanded a decision to approve construction of a highway through a park because the agency had failed to state the reasons for choosing that route over the alternatives.[155] The agency had supplied litigation affidavits to support its decision (the product of informal adjudication), but the Court rejected such affidavits as "'*post hoc*' rationalizations."[156] The Court also rejected the idea that the agency may simply rest on the "bare record" of its decision, which "may not disclose the factors that were considered or the [agency's] construction of the evidence."[157] Thus, the Court stated that the agency must offer "some explanation" to facilitate determination whether "the [agency] acted within . . . [its] authority and if the [agency's] action was justifiable under the applicable standard."[158] The Court based the reasoned decisionmaking requirement on section 706 of the APA, stating that courts could not perform their review function under the arbitrary and capricious standard without a better explanation and record.[159]

In *State Farm*, the Court further elaborated the reasoned decisionmaking requirement and applied it to notice-and-comment rulemaking.[160] The Court stated that:

> [A]n agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.[161]

An agency also must consider alternatives "within the ambit of the existing Standard."[162]

The standard legal justification for the reasoned decisionmaking requirement is that it promotes rationality, deliberation, and accountability. It encourages agencies to perform a thorough and logical analysis, which includes consideration of relevant factors, important aspects, and alterna-

153. See id. at 95.

154. Id.

155. 401 U.S. 402, 408, 420 (1971).

156. Id. at 419 (quoting Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168–69 (1962)).

157. Id. at 420.

158. Id.

159. Id. at 413–16.

160. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 41 (1983).

161. Id. at 43.

162. Id. at 51.

tive solutions.[163] Furthermore, it prods agencies not only to solicit comments from affected parties, but also to consider those comments in the formulation of policy.[164] Finally, it induces agencies to be transparent about their rationales, facilitating not only judicial review but public and political oversight as well.[165] These functions are primarily procedural rather than substantive.[166]

The reasoned decisionmaking requirement has detractors, of course. Some maintain that it compels agencies to produce an excessive paper trail, which has the paradoxical effect of delaying or "ossifying" the very action that it was intended to improve.[167] Others contend that it requires agencies to produce the sort of analysis that courts understand, even though such analysis is ill-suited to the types of technical and scientific problems that agencies actually confront.[168]

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163. See Matthew C. Stephenson, A Costly Signaling Theory of "Hard Look" Judicial Review, 58 Admin. L. Rev. 753, 761–63 (2006) (recounting arguments for reasoned decisionmaking requirement and collecting sources).

164. See Richard J. Pierce, Jr., Seven Ways to Deossify Agency Rulemaking, 47 Admin. L. Rev. 59, 87–88 (1995) [hereinafter Pierce, Seven Ways] (connecting enforcement of reasoned decisionmaking requirement to agency consideration of beneficiary comments).

165. See Kenneth A. Bamberger, Regulation as Delegation: Private Firms, Decisionmaking, and Accountability in the Administrative State, 56 Duke L.J. 377, 406–07 (2006) (noting that "transparent nature of administrative record building and agency decisionmaking . . . facilitates accountability in a host of ways," including facilitation of political oversight); Kevin M. Stack, The Constitutional Foundation of *Chenery*, 116 Yale L.J. 952, 958–59 (2007) (arguing that reasoned decisionmaking requirement "provides assurance that accountable agency decision-makers, not merely courts and agency lawyers, have embraced the grounds for the agency's actions, and that the agency decision-makers have exercised their judgment on the issue in the first instance").

166. See Gary Lawson, Outcome, Procedure and Process: Agency Duties of Explanation for Legal Conclusions, 48 Rutgers L. Rev. 313, 318–19 (1996) (noting that reasoned decision requirement is related to procedure and process); Mark Seidenfeld, Cognitive Loafing, Social Conformity, and Judicial Review of Agency Rulemaking, 87 Cornell L. Rev. 486, 518 (2002) ("On its face, arbitrary and capricious review, as currently implemented under the 'hard-look' or 'relevant factors' rubric, is almost entirely a process-based evaluation." (footnotes omitted)).

167. See, e.g., Jerry L. Mashaw & David L. Harfst, Regulation and Legal Culture: The Case of Motor Vehicle Safety, 4 Yale J. on Reg. 257, 294 (1987) (arguing that procedural focus of judicial review "invites courts to invalidate reasonable judgments that are badly explained or perhaps inexplicable in straightforward logical fashion"); Thomas O. McGarity, The Courts and the Ossification of Rulemaking: A Response to Professor Seidenfeld, 75 Tex. L. Rev. 525, 549 (1997) (arguing that hard look review can be used as "license to destroy regulatory programs"); Pierce, Seven Ways, supra note 164, at 67–68 ("I am a skeptic with respect to the grand claims of social benefits made by many proponents of the judicially enforced duty to engage in reasoned decisionmaking."); see also Stephenson, supra note 163, at 763–65 (recounting arguments against reasoned decisionmaking requirement).

168. See Martin Shapiro, Who Guards the Guardians? Judicial Control of Administration 151–52 (1988) [hereinafter Shapiro, Guardians] ("[I]t is much easier to eventually win court approval by piling on more and more synopticism than by persisting in telling the truth."). The inverse criticism is that courts cannot understand the actual explanation for agency regulations. See Stephenson, supra note 163, at 763 (collecting sources).

But this debate does not reflect the complete story. We might regard the reasoned decisionmaking requirement differently, as a special form of accountability related to legislative monitoring.[169] The claim is not merely that the reasoned decisionmaking requirement promotes transparency and therefore facilitates legislative oversight (among other forms of oversight). It is more concrete. The reasoned decisionmaking requirement provides Congress (through its constituents) with access to information about agency action before such action is final. As a result of the reasoned decisionmaking requirement, an agency must reveal the factual and legal basis for its decision; it must demonstrate the alternatives considered and the reasons for selecting one over another; it must show that it has addressed the comments that run contrary to its policy choice. And it must do so in a common sense format, one that is accessible not only to judges but to members of Congress. This translation exercise, even if overly "synoptic" as some contend, serves a monitoring purpose.[170] It requires agencies to filter information for ordinary consumption, minimizing informational asymmetries between administrator and legislator.[171]

McNollgast have drawn the connection between the reasoned decisionmaking requirement and fire-alarm oversight. They note that the reasoned decisionmaking requirement ensures that agencies "solicit valuable political information" and make such information public.[172] But the political scientists' explanation is incomplete. In particular, it is helpful to be more explicit about how the reasoned decisionmaking requirement addresses informational asymmetries *during* the administrative process rather than after the fact. As a technical matter, the reasoned decisionmaking requirement does not guarantee that an agency will share information during the process. It only demands that an agency provide information with the final decision. The issue is whether, as a result of the reasoned decisionmaking requirement, agencies have an incentive to conduct an open and iterative process, or whether they merely have cause to reveal their hand at the end.

It is possible to think that agencies do have incentive to conduct an open and iterative process as a result of the reasoned decisionmaking

169. Scholars also make related arguments about the informational function of the reasoned decisionmaking requirement. See de Figueiredo et al., supra note 120, at 287–300 (modeling informational function of administrative procedures); Stephenson, supra note 163, at 766–67, 772–75 (arguing that reasoned decisionmaking requirement mitigates informational asymmetries between agency and reviewing court and that agency may signal reviewing court concerning benefits of proposed policy by providing high quality explanation).

170. See Shapiro, Guardians, supra note 168, at 151–53.

171. Eric Posner has made a similar argument about the effect of cost-benefit analysis. See Eric A. Posner, Controlling Agencies with Cost-Benefit Analysis: A Positive Political Theory Perspective, 68 U. Chi. L. Rev. 1137, 1143 (2001) (arguing that cost-benefit analysis improves political monitoring by revealing information about agency action).

172. See McNollgast, Administrative Procedures, supra note 12, at 257–58.

requirement. Agencies must produce an explanation that is likely to survive judicial review. To do so, they must anticipate potential weaknesses in the record. Perhaps the best way to anticipate such weaknesses is to consult the likely challengers, sharing information with them in order to gain information from them.[173] Those challengers, once armed with information, may alert members of Congress to intervene before the agency issues a final decision.

Even if agencies do not share information until they issue a final decision, the reasoned decisionmaking requirement may still facilitate fire-alarm oversight in a certain sense. Congress may still have time to influence the decision before the agency changes the regulatory landscape. For example, a rule may not have taken effect. Under the APA, rules generally may not take effect until thirty days after publication.[174] Armed with information, Congress may pressure the agency to extend the effective date of a rule or reopen the rulemaking for reconsideration. Such oversight is close to "police-patrol" oversight, which occurs after the agency has rendered a final decision, rather than before.[175] The difference is that, unlike committee hearings and the like, the intervention

173. Some might argue that agencies have just the opposite incentive. In particular, agencies will hide weaknesses to evade later judicial challenge. Although equally logical, this argument may not track reality. Major policy decisions of the sort subject to the reasoned decisionmaking requirement rarely evade judicial challenge in many areas. See Kay Lehman Schlozman & John T. Tierney, Organized Interests and American Democracy 367 (1986) (noting that "virtually every regulation issued by such agencies as the Environmental Protection Agency and the Occupational Safety and Health Administration is challenged in court either by environmental and consumer groups or by industry"); Frank B. Cross, Shattering the Fragile Case for Judicial Review of Rulemaking, 85 Va. L. Rev. 1243, 1254–55 (1999) (noting that "in several areas of law, virtually every significant regulation is challenged in court"); Richard J. Lazarus, The Tragedy of Distrust in the Implementation of Federal Environmental Law, 54 Law & Contemp. Probs. 311, 334 (1991) (reporting that "[b]oth environmental organizations and industry took advantage of the increased judicial access and together challenged between 80 and 85 percent of EPA's major decisions"); Mark Seidenfeld, Playing Games with the Timing of Judicial Review: An Evaluation of Proposals to Restrict Pre-Enforcement Review of Agency Rules, 58 Ohio St. L.J. 85, 95 (1997) [hereinafter Seidenfeld, Playing Games] (noting that agencies are "[f]aced with a prospect of almost certain judicial review" of rules). Thus, agencies may not expect to hide. At the same time, they may attempt to insulate themselves against particular claims by obtaining the information necessary to remedy particular deficiencies. In addition, they may use the information to produce the kind of explanation that is likely to persuade a court to uphold the underlying policy. See Seidenfeld, Playing Games, supra, at 95 (noting that, in light of reasoned decisionmaking requirement, agency will refrain from issuing rule unless it has "collected data showing that every aspect of the rule is justified"); Stephenson, supra note 163, at 766–67, 772–75 (arguing that high quality, and therefore costly, explanations by agency signal courts that agency expects to receive substantial benefits from regulation). There is risk in this strategy. The information that contributes to a thorough explanation also may trigger a legislative fire-alarm. But that is precisely why and how the reasoned decisionmaking requirement works to signal Congress.

174. 5 U.S.C. § 553(d) (2000).

175. Cf. Ferejohn & Shipan, supra note 122, at 11–12 (arguing that ability of judiciary to review agency action grants Congress better chance to impact agency policies).

may occur a bit earlier and a bit easier. Congress may have time to influence agency policy while it is still in flux.

If it is possible to view the reasoned decisionmaking requirement as assisting Congress in monitoring agency action, it is also possible to see the reasoned decisionmaking requirement as addressing a related political problem, namely that courts may impose their own views of wise policy. The Court has stated that a reviewing court must scrutinize the basis for a regulatory decision but not "substitute its judgment for that of the agency."[176] The standard legal explanation for the prohibition on invasive judicial review, whether under the arbitrary and capricious test or otherwise, is that agencies are more accountable than courts for their policy choices. Such accountability often runs to the President. But the prohibition on invasive judicial review also may assist Congress. Reviewing courts may not substitute their judgment for that of the agency because the agency judgment may better reflect legislative preferences, especially given the possibility of fire-alarm oversight. In interpreting administrative procedures, the Court has taken steps to prevent the mechanism for addressing the principal-agent problem that broad delegation creates—agencies departing from legislative preferences—from introducing a new principal-agent problem of reviewing courts departing from legislative preferences. We would expect no less if, in the Court's view, the reasoned decisionmaking requirement functions to ensure that regulatory policy roughly tracks legislative preferences.

Understanding the reasoned decisionmaking requirement as connected to congressional monitoring is not only plausible but helpful because it can explain the more mystifying applications of the requirement. For example, the account can explain why, in *State Farm*, the Court would remand a policy to an agency despite political considerations that counseled affirmance.[177] The Department of Transportation issued a rule rescinding the passive restraints standard for motor vehicles.[178] The rescission, though justified on technical grounds, was important to the Reagan administration.[179] It was part of an effort to assist the ailing domestic auto industry, as well as a broader effort to shrink government and centralize agency rulemaking.[180] These circumstances favored judicial deference rather than heightened scrutiny.

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176. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

177. See id. at 59 (Rehnquist, J., concurring in part and dissenting in part).

178. Id. at 38 (majority opinion).

179. See Marianne Koral Smythe, Judicial Review of Rule Recissions, 84 Colum. L. Rev. 1928, 1933 n.32 (1984) ("One major tenet of President Reagan's 'regulatory relief' program was to ease regulatory 'burdens' on the domestic automobile industry.").

180. See *State Farm*, 463 U.S. at 59 (Rehnquist, J., concurring in part and dissenting in part).

At the same time, Congress, which had been active in the area, seemed to have different interests or ideas.[181] Thus, legislative preferences likely moved in a different direction from presidential ones. Without specifically mentioning *these* circumstances, the Court found that the agency had failed to offer an adequate explanation for the rescission.[182] One message to the agency was to better cloak its politically based decisions in technical dress. Another was to reveal the political as well as the technical basis for its decisions. On this view, the Court was saying that the agency had not provided the full story. The political basis for the rescission was one-sided, and in any event, not disclosed in the record. Forcing an agency to reveal the political basis for its decisions will force it to consider the opposing political position, unless it is prepared to blatantly disregard Congress. This agency was not. One year after *State Farm*, the agency reinstated the passive restraints rule.[183]

In sum, we may understand the reasoned decisionmaking requirement in connection with information and oversight. We may see the Court as spurring agencies to provide information that constituents might use to invoke legislative intervention before such action is final. We may see the Court as admonishing reviewing courts to refrain from imposing their own policy preferences. Finally, we might appreciate why the Court would insist on a better record for an agency policy even though that policy exhibited the hallmarks of presidential accountability. The Court was not insensitive to the role of politics in the decision. Rather, it was ensuring that the decision reflected the politics of both branches, not just one. This is not the only way to understand or defend the reasoned decisionmaking requirement, but it is a particularly useful way. The Court was accommodating the strategic needs of politicians within a legal frame rather than simply imposing that legal frame on a political issue.

B. *Principle II: Hybrid and Formal Rulemaking Procedures*

We might focus on the connection between information and oversight to address another principle and puzzle of administrative law. Though permitting reviewing courts to ask agencies for better explanations, the Court has prohibited reviewing courts from asking agencies for better procedures. In *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, the Court held that reviewing courts could not order agencies to provide supplemental trial-type procedures in no-

181. See State Farm Mut. Auto. Ins. Co. v. Dep't of Transp., 680 F.2d 206, 228 (D.C. Cir. 1982) (noting that Congress had acted in response to early version of passive restraints standard by enacting prohibition on ignition interlock seatbelts, and had considered, on several occasions, but did not pass, modifications to passive restraints standard).

182. See *State Farm*, 463 U.S. at 57 ("[I]t is the agency's responsibility, not this Court's, to explain its decision.").

183. See Federal Motor Vehicle Safety Standard; Occupant Crash Protection, 49 Fed. Reg. 28,962 (July 17, 1984) (codified at 49 C.F.R. pt. 571).

tice-and-comment rulemaking.[184] Unless Congress mandated a trial-type hearing or select features thereof, courts were not free to require additional cross-examination, for example, on the theory that it would enhance the fairness or accuracy of the proceeding.[185] The Court stated that the APA set a ceiling on procedural requirements.[186] It distinguished the reasoned decisionmaking requirement from the procedural hybrid, arguing that the former does not impose additional procedural requirements upon an agency.[187]

Here arises the puzzle. The reasoned decisionmaking requirement certainly imposes additional procedural requirements upon the agency. The Court's response seems silly, creating an unresolved tension between *State Farm*, on the one hand, and *Vermont Yankee*, on the other.[188] It is possible to embrace both or reject both, but distinguishing between them seems unprincipled.

At first blush, the information-oversight thesis would seem to confirm the tension between the cases rather than resolving it. In particular, the information-oversight thesis would seem to suggest that *Vermont Yankee* is wrong for the same reason that *State Farm* is right. Additional trial-type procedures are a potential source of information about agency action. What information Congress (through its constituents) might acquire as a result of the reasoned decisionmaking requirement it could augment through cross-examination and similar information-soliciting practices.

On closer examination, the information-oversight thesis actually provides a way to resolve the tension. From a PPT perspective, two requirements are not necessarily better than one. Although Congress needs a certain level of information to monitor agency action, we have already seen that procedures for that purpose carry a risk of judicial overreaching. Just as reviewing courts may use the reasoned decisionmaking requirement to impose their own policy preferences in particular instances, they may use the procedural hybrid. Put in the simplest terms, a reviewing court may remand for better reasons or additional procedures simply to signal an alternative policy preference. We know that the Court entrenched the reasoned decisionmaking requirement notwithstanding its risk. But, against this backdrop, we might understand the Court as drawing the line at the procedural hybrid. Congress, the Court effectively reasoned, has sufficient information as a result of the reasoned decisionmaking requirement and therefore might be held to that amount unless it

184. 435 U.S. 519, 548 (1978).

185. See id. at 544–45.

186. See id. at 545–48.

187. See id.

188. See Jack M. Beerman & Gary Lawson, Reprocessing *Vermont Yankee*, 75 Geo. Wash. L. Rev. 856, 881–82 (2007) (noting tension between *Vermont Yankee* and hard look doctrine and suggesting that courts refrain from using hard look doctrine to impose particular procedures).

indicated otherwise by specifying additional procedures in an organic statute. This line, though not inevitable, is rational when evaluated in terms of Congress's need to monitor both agencies and courts.

With the reasoned decisionmaking requirement as a backdrop, the procedural hybrid carries another downside that is relevant to PPT. Additional procedures consume additional resources. As long as Congress has the basic information that it needs to perform fire-alarm oversight, the Court has no reason to impose further costs. Such costs may produce normative gains, improving fairness or accuracy, but not sufficient political gains to justify the costs.

This reading aligns *Vermont Yankee* with *United States v. Florida East Coast Railway Co.*[189] There, the Court said that it would not require agencies to use formal procedures unless Congress has made that intent unmistakably clear by using in the organic statute the same magic words that trigger formal procedures in the APA: "[O]n the record after opportunity for an agency hearing."[190] The rule is sensible. The Court should hesitate before asking agencies to undertake formal procedures because those procedures are quite onerous and expensive. Informal rulemaking ordinarily should be sufficient.

The reasoning, however, was bewildering. The organic statute was enacted before the APA, and therefore the Court was out of bounds in expecting Congress to use the magic words from the APA.[191] Moreover, the Court was not in the business of requiring a clear statement, such as the magic words, before demanding more procedures—witness, the reasoned decisionmaking requirement.

Like *Vermont Yankee, Florida East Coast* can be understood as an example where more information is unnecessary to the political purpose of the APA. Formal procedures may have extra value in protecting the due process interests of those affected. But any extra informational value that they provide *to Congress* does not justify the costs. Informal rulemaking is sufficient to provide Congress with the minimum information that it needs to perform fire-alarm oversight. *Florida East Coast* reflects an implicit distinction between an informational floor and an informational ceiling.

In short, these procedural cases can be explained in terms of information and oversight. They balance the need for legislative monitoring against the concern for judicial overreaching. Again, that explanation is not the sole or exclusive one. But it is a revealing one, which suggests that it has a certain force. It tends to square the cases with those that surround them better than the standard legal justification alone.

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189. United States v. Fla. E. Coast Ry. Co., 410 U.S. 224 (1973).

190. Id. at 236–38; 5 U.S.C. § 553(c) (2000).

191. But see *Fla. E. Coast Ry. Co.*, 410 U.S. at 239–41 (referring to APA to define term in statute enacted after APA).

C. *Principle III: Ex Parte Contacts*

The next principle to consider in light of information and oversight concerns ex parte communications, which are off-the-record contacts between the agency decisionmaker and an outside party. The APA clearly prohibits such contacts in formal adjudication because they may impugn the integrity of the trial-type hearing process.[192] The APA does not forbid them with respect to notice-and-comment rulemaking or informal adjudication.[193] This is an area in which the Supreme Court has not taken a firm stand.

Lower courts have been reluctant to prohibit ex parte contacts in informal proceedings, even if eager to expand other provisions of the APA. The D.C. Circuit, in cases from the middle period of administrative law, expressed a familiar concern for due process interests even in notice-and-comment rulemaking.[194] The concern was that certain industry or interest groups gained undue influence over the agency process, and that "the final shaping of the rules . . . may have been by compromise among the contending industry forces, rather than by exercise of the independent discretion [of the agency]."[195] Thus, ex parte contacts interfered with the "reasoned judgment" that agencies were expected to demonstrate and reviewing courts were expected to confirm under the arbitrary and capricious test, after cases like *Overton Park*.[196] They reduced notice-and-comment rulemaking to a "sham."[197]

But the D.C. Circuit expressed a countervailing concern for the free flow of information. It acknowledged that ex parte contacts are the "'bread and butter' of the process of administration and are completely appropriate so long as they do not frustrate judicial review or raise serious questions of fairness."[198] It therefore created a compromise rule, prohibiting ex parte communications only after an agency has officially begun the process by issuing a notice of proposed rulemaking.[199]

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192. See 5 U.S.C. § 557(d) (providing that "no interested person outside the agency shall make . . . to . . . the agency, administrative law judge, or other employee who is . . . involved in the decisional process of the proceeding, an ex parte communication relevant to the merits of the proceeding," and providing remedy if such communication nonetheless occurs).

193. GITSA, which permits parties to request disclosure of certain ex parte communications, does not apply to notice-and-comment rulemaking or informal adjudication. See 5 U.S.C. § 552(b).

194. See, e.g., Home Box Office, Inc. v. FCC, 567 F.2d 9, 56 (D.C. Cir. 1977) ("Equally important is the inconsistency of secrecy with fundamental notions of fairness implicit in due process and with the ideal of reasoned decisionmaking on the merits which undergirds all of our administrative law.").

195. Id. at 53.

196. Id. at 54.

197. Id.

198. Id. at 57.

199. Id.

Within the same time frame and as applied to the same agency, the D.C. Circuit refused to apply this rule.[200] It found that ex parte contacts in notice-and-comment rulemaking were perhaps "impolitic" but not unlawful.[201] It worried in particular that there was no stopping point for what an agency might be expected to reveal or explain on the record in informal proceedings. The court implied that there might be circumstances where "the potential for unfair advantage" would outweigh the "practical burdens" on agencies."[202] Still, in light of *Vermont Yankee* and the concern for judicially imposed procedures, the D.C. Circuit ultimately limited the compromise rule to the facts of the case in which it was announced.[203]

We might have cause to revisit this issue in consideration of the PPT account of administrative procedures. Ex parte communications in informal proceedings are problematic, but not so much because they imperil basic fairness or allow political compromise to guide agency decisions. Rather, they are problematic because they deprive outsiders of access to information about agency action.[204] Parties may engage in secretive contacts with the agency. Of course, under cases like *Overton Park* and *State Farm*, agencies must reveal any contact that forms the actual basis of their decisions.[205] But the message to agencies and parties is as important as the formal rule: Absent a ban on ex parte contacts, the message is that off-the-record information is expected and permissible and revealed only as necessary to support the final decision. The inverse message would better promote the flow of information to all parties during the policy development process, allowing any party to alert Congress about impending departures from their preferences. Put differently, a ban on ex parte contacts after the commencement of the proceeding would ensure that all constituents have access to information about agency action and that no party has secret influence on such action.

Legal scholars have enabled us to put a finer point on the issue in this era of intensified presidential control. A ban on ex parte contacts would ensure that groups important to the President do not have disproportionate influence on agency decisionmaking.[206] Scholars have noted

200. See Action for Children's Television v. FCC, 564 F.2d 458, 475 (D.C. Cir. 1977).

201. Id. at 473.

202. Id. at 477.

203. See Iowa State Commerce Comm'n v. Office of Fed. Inspector, 730 F.2d 1566, 1577 (D.C. Cir. 1984) (finding that relevant APA section only applies to "on the record" adjudications and rulemaking according to *Florida East Coast*).

204. See McNollgast, Administrative Procedures, supra note 12, at 262–63.

205. See Home Box Office, Inc. v. FCC, 567 F.2d 9, 54 (D.C. Cir. 1977).

206. See William D. Araiza, Judicial and Legislative Checks on Ex Parte OMB Influence over Rulemaking, 54 Admin. L. Rev. 611, 613–15 (2002) (noting that OMB review has raised concern about "the executive acting as a confidential partner of and conduit for regulated parties seeking to influence agency action"); Sidney A. Shapiro, Two Cheers for HBO: The Problem of the Nonpublic Record, 54 Admin. L. Rev. 853, 854 (2002) (emphasizing potential for secret White House contacts).

that off-the-record contacts between parties and OMB during the White House rulemaking review process may result in secret deals. Forbidding such contacts from occurring at least without disclosure into the record would invite others, including Congress, into the administrative process.[207] OIRA has taken voluntary steps in this direction under the George W. Bush Administration.[208] A tighter judicial reign on ex parte contacts in notice-and-comment rulemaking might prompt more vigilance and more congressional oversight.

Although the D.C. Circuit has vacillated as to whether a ban on ex parte communications in informal proceedings is consistent with *Overton Park* or at odds with *Vermont Yankee*, the answer is clearer when the ban is viewed in terms of information and oversight. Because a ban reinforces the informational floor, it is in essence part of the reasoned decisionmaking requirement in *Overton Park*. Furthermore, it is distinguishable from the procedural hybrid in *Vermont Yankee* because it does not provide Congress with more information than might be necessary for monitoring purposes in the service of other interests. It is also confined (to ex parte contacts) in a way that the procedural hybrid is not, which addresses the concerns for judicial overreaching and administrative resources.

D. *Principle IV: Procedures for Statutory Interpretation*

The information-oversight perspective is also relevant to assessing *United States v. Mead Corp.*, one of the most important cases involving administrative procedures.[209] In that case, the Court held that an agency is entitled to *Chevron* deference for reasonable interpretations of ambiguities in the statutes that it administers only if the agency renders such interpretations through certain procedures.[210] *Mead* concerns the application of another judicial decision, which is to say *Chevron*, rather than the APA.[211] Nevertheless, the case deals with the general scope of judicial review, as well as a subset of policy judgments—interpretations of statutory provisions—to which the arbitrary and capricious test ultimately may apply.[212]

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207. See Araiza, supra note 206, at 613 (noting that ex parte OMB contacts impair the "procedural regularity and fairness of the notice-and-comment process" and that banning or regulating such contacts would counteract this effect).

208. See Memorandum from John D. Graham, Adm'r, Office of Info. & Regulatory Affairs, to OIRA Staff (Oct. 18, 2001), available at http://www.whitehouse.gov/omb/inforeg/oira_disclosure_memo-b.html (on file with the *Columbia Law Review*) (describing steps to make available draft regulations, agency analyses, other material submitted by agency, change pages, correspondence between OIRA and agency, and correspondence between OIRA and outside parties).

209. 533 U.S. 218 (2001).

210. See id. at 226–27.

211. Id. at 226.

212. Id. at 227. See Lisa Schultz Bressman, Disciplining Delegation After *Whitman v. American Trucking Ass'ns*, 87 Cornell L. Rev. 452, 457–58 (2002) (discussing relationship between APA and *Chevron*); Ronald M. Levin, The Anatomy of *Chevron*: Step Two

In *Mead*, the Court held that agencies are entitled to *Chevron* deference "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."[213] Notice-and-comment rulemaking and formal adjudication presumptively suffice.[214] But other formats also might qualify.[215] The Court did not clarify which procedures fall into this residual category, although it held that the letter ruling in the case did not.[216] That ruling was one of 10,000 to 15,000 issued per year by forty-six different offices of the agency, without any participatory process or reasoned explanation, binding only on the parties to which it was addressed.[217] As a result, letter rulings do not "foster the fairness and deliberation" or "bespeak the legislative type of activity that would naturally bind more than the parties to the ruling."[218]

Mead has supporters, who make arguments similar to those in support of the reasoned decisionmaking requirement. They contend that to command the force of law, agencies should use procedures that promote the rule of law.[219] In particular, they argue that agencies should use procedures that result in transparent and well-reasoned policy, facilitating judicial review, political oversight, and administrative rationality. Agencies should use procedures that also result in binding policy, treating like parties alike and preventing unjustified departures.

Not surprisingly, *Mead* has many critics. Justice Scalia, who dissented in the case, contended that *Mead* establishes an ad hoc balancing test largely reminiscent of the one that *Chevron* consciously replaced.[220] As a result, it will confuse the lower courts.[221] Indeed, Justice Scalia's prediction has come to pass. Scholars have demonstrated that the lower courts have divided not only on the formats that are entitled to *Chevron* defer-

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Reconsidered, 72 Chi.-Kent L. Rev. 1253, 1263–66 (1997) (offering examples of lower courts' application of *Chevron* step two).

213. 533 U.S. at 226–27. See generally Cass R. Sunstein, *Chevron* Step Zero, 92 Va. L. Rev. 187, 191 (2006) (describing "initial inquiry into whether the *Chevron* framework applies at all" as "Step Zero").

214. *Mead*, 533 U.S. at 227, 230.

215. Id. at 229–31.

216. Id. at 231.

217. Id. at 233.

218. Id. at 230, 232.

219. See, e.g., Bressman, *Mead*, supra note 106, at 1486–91.

220. 533 U.S. at 241 (Scalia, J., dissenting) ("The Court has largely replaced *Chevron* . . . with that test most beloved by a court unwilling to be held to rules (and most feared by litigants who want to know what to expect): th' ol' 'totality of the circumstances' test."). Scholars have also made this argument. See Barron & Kagan, supra note 106, at 226 ("*Mead* naturally lends itself to interpretation as a classic ad hoc balancing decision, and so a partial reversion to the doctrine of judicial review that prevailed before *Chevron*.").

221. 533 U.S. at 245 (Scalia, J., dissenting) (arguing that "utter flabbiness of the Court's criterion" would create confusion among lower courts).

ence after *Mead*, but on the relevant analysis.[222] In particular, they have alternated between two seemingly inconsistent analyses, one from *Mead* itself and one from *Barnhart v. Walton*, which the Court decided just one year later.[223] In *Barnhart*, the Court did not consider whether the interpretation "foster[s] . . . fairness and deliberation" and "bespeak[s] the type of legislative activity that would naturally bind more than the parties to the ruling."[224] Rather, it considered a host of other factors, including "the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time."[225]

Scholars have castigated *Mead* for additional reasons. Some have argued that *Mead* transfers authority illegitimately from agencies to courts.[226] In their view, the case provides courts yet another tool for reclaiming interpretive power that *Chevron* (correctly) accords to agencies. Others have maintained that *Mead* insists on procedural formality at the expense of more important values. They note that the APA permits procedural informality to conserve administrative resources and facilitate public guidance, but *Mead* does not.[227] Moreover, they contend that *Mead* ignores the importance of political accountability to agency decisionmaking.[228] *Chevron* accorded broad judicial deference to agency interpretations in large part because agencies, through the President, are more accountable than courts for their policy choices.[229] Courts should ensure that an interpretation reflects the official position of the agency, rather than the work of an underling, so that the interpretation can be

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222. See Bressman, *Mead*, supra note 106, at 1458–74 (examining efforts of lower courts to apply *Mead*); Adrian Vermeule, Introduction: *Mead* in the Trenches, 71 Geo. Wash. L. Rev. 347, 349–55 (2003) (examining efforts of D.C. Circuit to apply *Mead*).

223. Barnhart v. Walton, 535 U.S. 212 (2002).

224. *Mead*, 533 U.S. at 230, 232.

225. *Barnhart*, 535 U.S. at 222.

226. See, e.g., Barron & Kagan, supra note 106, at 234 (arguing that *Mead* "makes the judiciary the principal decision maker when the agency should be, and vice versa"); Healy, supra note 147, at 677–81 (arguing that *Mead* shifts interpretive authority to courts); Krotoszynski, supra note 147, at 751 (arguing that *Mead* represents "naked power grab by the federal courts"); Levin, Prospective Exercise, supra note 147, at 793–94 (contending that *Mead* gives courts too large a role).

227. See *Mead*, 533 U.S. at 243–45 (Scalia, J., dissenting) ("There is no necessary connection between the formality of procedure and the power of the entity administering the procedure to resolve authoritatively questions of law."); Barron & Kagan, supra note 106, at 230 (arguing that *Mead* ignores "common need of agencies to interpret a statute without the delays involved in notice and comment, along with the strong interest of regulated parties in learning of these interpretations in advance of an enforcement action").

228. Barron & Kagan, supra note 106, at 234 ("The Court's approach, when measured against the values of accountability and discipline, denies deference to actions that have earned it and gives deference to actions that do not deserve it.").

229. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865–66 (1984).

said to promote accountability.[230] Then they should step out and allow accountability to take over.

While commentators have largely reprised the procedures versus politics debate when discussing *Mead*, we might understand the case differently, as concerned with access to information about agency action. Again, such an understanding is not merely possible but productive. It explains why the Court favored procedural formality over presidential accountability. In addition, it shows how *Mead* might apply in difficult cases.

1. *As Qualifying* Chevron *and* Chenery II. — *Mead*'s first puzzle is why the Court would favor procedural formality over presidential accountability, working a significant modification of *Chevron*. One answer is that *Mead* serves to facilitate fire-alarm oversight. An interpretation may be authoritative yet lack the process that provides constituents with access to what the agency knows. This is particularly acute with post hoc justifications, such as litigating positions, which appear after the agency action is final.[231] Although Congress may respond to litigating positions through committee hearings and other forms of police-patrol oversight, it has no means of ex ante oversight.

Understanding *Mead* in this light also helps to explain its relationship to *SEC v. Chenery Corp.* (*Chenery II*).[232] In that case, the Court held that an agency is entitled to choose between adjudication and rulemaking for formulating generally applicable policy. The Court reasoned that agencies cannot always foresee how their statutes will unfold and therefore need flexibility to make judgments in the course of resolving specific disputes.[233] *Mead* seems to conflict with this broad principle of agency choice because it demands a degree of formality before an agency may command the force of law. But *Chenery II* is not necessarily inconsistent with this proposition. The decision speaks only to the choice between formal adjudication and informal rulemaking, both of which are sufficiently formal to command deference under *Mead*.[234] Formal adjudication is sufficient because, like judicial decisionmaking, it produces what we recognize as law even if it does not permit political intervention for

230. See *Mead*, 533 U.S. at 257 (Scalia, J., dissenting) (arguing that judicial deference should turn on whether interpretation is "authoritative"); Barron & Kagan, supra note 106, at 242–43 (arguing that judicial deference should turn on whether sufficiently high-level agency official is responsible for interpretation at issue because "it is only the involvement of these officials in decision making that makes possible the kind of political accountability that *Chevron* viewed as compelling deference").

231. Cf. *Mead*, 533 U.S. at 258 (Scalia, J., dissenting) (approving of deference to litigating positions as long as they are authoritative).

232. SEC v. Chenery Corp. (Chenery II), 332 U.S. 194 (1947).

233. Id. at 202–03.

234. Of course, there is a long tradition of understanding *Chenery II* to stand for a broad proposition of agency choice. For an excellent discussion, see M. Elizabeth Magill, Agency Choice of Policymaking Form, 71 U. Chi. L. Rev. 1383, 1402–43 (2004).

independent, due process reasons.[235] Notice-and-comment rulemaking promotes political supervision, among its other law-like attributes.[236] These are easy cases, both for choice of procedures and judicial deference. *Mead* is significant—and *Chenery II* is not to the contrary—for the vast range of *other* formats, which must promote political supervision before they can command the force of law. Even if *Chenery II* tells agencies that they have broad choice among informal procedures, it does not promise them judicial deference regardless of compliance with the informational floor.

2. *As Applied to Nontraditional Formats.* — By focusing on the information-oversight purpose of procedural formality, we might also elucidate which procedures fall in the residual category of formats carrying the force of law—the second puzzle. The Court still has not clarified the relationship between *Mead* and *Barnhart*. Scholars have sought to reconcile these cases on standard legal grounds, identifying functional commonalities in the tests.[237] But they have not been able to provide concrete guidance, leaving lower courts uncertain about whether particular interpretations satisfy.

To gain traction, we might consider the procedural issue in terms of informational asymmetries. The procedures in *Mead* seem to create a textbook principal-agent problem, inhibiting any form of oversight let alone fire-alarm oversight. Consider the facts in detail. The case involved a U.S. Customs Service ruling letter that specified the tariff classification for a particular imported product under the Harmonized Tariff Schedule of the United States.[238] The Customs ruling letter classified imported day planners, three-ring binders with a small space for daily entries, as "diaries" that are "bound" for tariff purposes.[239] This classification reflected a change in prior practice and increased the tax liability for the importer.[240] It was exactly the sort of policy that constituents might bring to the attention of Congress.

Yet the ruling letters did not allow constituents to do so before the letters were a fait accompli. Such letters simply arrived on the doorstep of the importer. Furthermore, they arrived with little or no explanation, from one of forty-six different Customs offices, at a rate of 10,000 to 15,000 per year, binding no other importer.[241] Thus, importers received little information to effectively challenge the tax. In addition, they had little incentive to collectivize with those similarly situated—the letters

235. See Bressman, Beyond Accountability, supra note 9, at 542–43 (describing general attributes of formal adjudication).

236. See id. at 541–42 (describing general attributes of notice-and-comment rulemaking).

237. See, e.g., Bressman, *Mead*, supra note 106, at 1488–90 (reading both *Mead* and *Barnhart* to "require comparable, minimum lawmaking values").

238. United States v. Mead Corp., 533 U.S. 218, 221 (2001).

239. Id. at 224–25.

240. Id. at 225.

241. Id. at 233.

warned others against reliance. Thus, the process contained too many agents and generated too many interpretations. Congress might think that oversight of any variety was futile and that its constituents would fare better by convincing a reviewing court to protect their interests. And this is just what the Court set in motion by holding that Congress did not intend Customs letters to carry the force of law.

From this example, we may begin to understand in general which interpretations do not qualify for *Chevron* deference. If an interpretation—or more particularly, a class of interpretations—emanates fully formed, from too many offices, with too little explanation, and too much possible variation, it does not receive *Chevron* deference. Rather, a court may review any such interpretation de novo, giving some respect to the agency position if appropriate. In this way, judicial review may serve to protect constituent interests in lieu of legislative oversight. Judicial review may also produce a longer-term gain to the extent that it encourages agencies to use oversight-worthy procedures in the future. Customs possessed authority to issue the tax classifications through notice-and-comment rulemaking and chose not to do so.

Although *Mead* did not provide guidance on which nontraditional formats might qualify for *Chevron* deference, we might now sketch the basic criteria. To merit *Chevron* deference, an interpretation must provide enough information for Congress to engage in fire-alarm oversight. Thus, an interpretation must emanate from an official source, as Justice Scalia contends.[242] Unless the position is authoritative, constituents do not know what to monitor. Importantly, the agency must also provide access to information before the decision is final. Thus, disclosure at an informal town meeting, as in *Overton Park*, might qualify, as long as it is accompanied by a reasoned explanation.

Barnhart contains an example of a procedure that qualifies on the information-oversight account for a slightly different reason.[243] The case involved a Social Security Administration interpretation of the Social Security Act. The agency issued the interpretation through informal means but repeatedly and over a long period of time: in a 1957 letter, a 1965 manual, and a 1982 ruling.[244] In 2001, it issued the same interpretation through notice-and-comment rulemaking.[245] The Court offered a list of factors that were relevant in analyzing the interpretation for deference purposes, different from the ones that it had identified in *Mead*.[246]

Looking at the case with the information-oversight idea in mind, we might isolate one factor—namely, the longstanding interpretation of the agency. The Court noted that the interpretation, even in its pre-notice-and-comment forms, was evidently acceptable to Congress, which repeat-

242. See id. at 260 (Scalia, J., dissenting).
243. Barnhart v. Walton, 535 U.S. 212, 217 (2002).
244. Id. at 219–20.
245. Id.
246. Id. at 222.

edly reenacted the relevant statutory provisions without change.[247] Even if the early forms did not afford constituents enough information to facilitate fire-alarm oversight, the "longstanding duration" of the interpretation cured that defect.[248] Congress was aware of the interpretation and had multiple opportunities to correct it. Police-patrol oversight had occurred even if fire-alarm oversight had not. Under the circumstances, there was no reason to withhold deference.

What we discover then is that *Barnhart* is a special case for judicial deference. It validates particular interpretations in the face of congressional acquiescence. The procedural problem was harmless error in a sense. Thus, *Barnhart* does not provide a mode of analysis that is generally applicable to entire classes of procedures, such as Customs letter rulings, although lower courts have understood it this way.[249] *Barnhart* only applies to particular interpretations under particular circumstances evidencing obvious legislative awareness.

The Court eventually will be asked to decide cases involving other procedures, and the information-oversight analysis may provide a helpful framework. Consider a particularly difficult case, involving interpretative or interpretive rules. Interpretive rules merely clarify existing substantive law, such as prior regulations, rather than creating new law.[250] They are exempt from notice-and-comment procedures.[251] If viewing interpretive rules as a category, we might expect the Court to engage in a *Mead* analysis rather than a *Barnhart* analysis. The question then is whether interpretive rules create a principal-agent problem. On the one hand, such rules evade oversight because they are exempt from notice-and-comment procedures. On the other hand, Congress has expressly provided for this feature. Perhaps Congress has determined that the potential for legislative oversight of the underlying substantive law (whether fire-alarm or police-patrol) is sufficient, and interpretive rules may become binding gloss on such law without difficulty.

But there is a concern that affects this prediction. It is notoriously difficult to separate mere clarifications from amendments.[252] Agencies

247. Id. at 218–220.

248. Id.

249. See, e.g., Krzalic v. Republic Title Co., 314 F.3d 875, 879 (7th Cir. 2002) (applying *Barnhart* analysis to Housing and Urban Development Statements of Policy); Schuetz v. Banc One Mortgage Corp., 292 F.3d 1004, 1012–14 (9th Cir. 2002) (same).

250. See, e.g., Warder v. Shalala, 149 F.3d 73, 80 (1st Cir. 1998); First Nat'l Bank v. Sanders, 946 F.2d 1185, 1188 (6th Cir. 1991); S. Cal. Edison Co. v. FERC, 770 F.2d 779, 783 (9th Cir. 1985).

251. 5 U.S.C. § 553(b)(3)(A) (2000).

252. Justices and commentators have expressed similar concern about interpretive rules that interpret prior regulations rather than statutory provisions. See Gonzales v. Oregon, 546 U.S. 243, 257 (2006) (holding that regulations that merely parrot statutory language are not entitled to deference under the lenient standard of Auer v. Robbins, 519 U.S. 452, 461–63 (1997)); Shalala v. Guernsey Mem'l Hosp., 514 U.S. 87, 108–09 (1995) (O'Connor, J., dissenting) (arguing that agency's interpretation of its own regulations undermined regulatory and statutory scheme); Thomas Jefferson Univ. v. Shalala, 512 U.S.

may use interpretive rules to change the law in substantive ways, even though they should not. If interpretive rules *do* change the law, then the potential for congressional oversight of the initial rule is insufficient. The Court might decide that the risk of substantive change is too great to permit deference. Accordingly, it might deny deference across the board or resort to a *Barnhart*-style analysis, evaluating interpretive rules on a case-by-case basis, depending on whether Congress was actually aware of a particular rule, or where on the spectrum between clarification and amendment that rule lies.

What this example shows is that, in the hardest cases, the information-oversight account may not eliminate the need for judgment about which interpretive formats merit *Chevron* deference. Yet it is still a plausible reading of *Mead*. Furthermore, it is still a helpful reading. The information-oversight framework yields a more comprehensible and consistent set of factors for lower courts and others to consider than previous analyses have provided.

3. *In Relation to* Brand X. — Before leaving *Mead*, we might touch on a puzzle at the periphery of the case. That puzzle concerns the Court's subsequent decision in *National Cable & Telecommunications Ass'n v. Brand X Internet Services*.[253] The Court held that an agency is entitled to "overrule" a judicial interpretation of an ambiguous statutory provision in favor of its own interpretation under certain circumstances.[254] Scholars have defended and rejected *Brand X*. Proponents have embraced *Brand X* as promoting administrative flexibility.[255] On the other side, Justice Scalia, dissenting in the case, expressed the concern that affording agencies such power is inconsistent with notions of judicial authority and stare decisis.[256]

504, 525 (1994) (Thomas, J., dissenting) (stating that "Secretary has merely replaced statutory ambiguity with regulatory ambiguity"); Robert A. Anthony, The Supreme Court and the APA: Sometimes They Just Don't Get It, 10 Admin. L.J. Am. U. 1, 11–12 (1996) (discussing agency interpretations of vague regulations "that do not interpret but instead create new law"); John F. Manning, Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules, 96 Colum. L. Rev. 612, 616 (1996) (discussing *Thomas Jefferson* and *Guernsey Hospital*).

253. 545 U.S. 967 (2005).

254. Id. at 984–85.

255. See Jacob E. Gersen, Overlapping and Underlapping Jurisdiction in Administrative Law, 2006 Sup. Ct. Rev. 201, 229 (noting that "[l]ike *Chevron* itself, *Brand X* is flexibility preserving"); Kathryn A. Watts, Adapting to Administrative Law's *Erie* Doctrine, 101 Nw. U. L. Rev. 997, 1015 (2007) (stating that *Brand X* "rests on a desire to avoid the concerns Justice Scalia raised in *Mead* about 'the ossification of large parts of our statutory law'" (citation omitted)). For a discussion, pre-*Brand X*, of the need for flexibility in the face of prior precedent, see generally Kenneth A. Bamberger, Provisional Precedent: Protecting Flexibility in Administrative Policymaking, 77 N.Y.U. L. Rev. 1272 (2002) [hereinafter Bamberger, Provisional Precedent].

256. See *Brand X*, 545 U.S. at 1017 (Scalia, J., dissenting) ("Article III courts do not sit to render decisions that . . . Executive officers" can reverse or ignore. "That is what today's decision effectively allows. Even when the agency itself is party to the case in which the Court construes a statute, the agency [can] disregard that construction and seek *Chevron*

If the standard legal accounts point in opposite directions, we might think that the information-oversight understanding points solidly to the holding in the case. The *Brand X* issue arises in two circumstances: (1) when a court has interpreted an ambiguous statutory provision in the absence of any agency interpretation; or (2) when a court has interpreted an ambiguous statutory provision in the face of a *Chevron*-ineligible interpretation.[257] Under these conditions, courts are justified in filling the gaps. Once the agency interprets or reinterprets the statutory ambiguity through procedures that facilitate fire-alarm oversight, the analysis shifts. The agency interpretation should be entitled to *Chevron* deference because it is more likely to reflect legislative preferences than the court's prior interpretation.

To conclude this discussion, *Mead* can be explained in terms of an information-oversight account of administrative law. Moreover, it can be better understood in such terms. Few would dispute that *Mead*, whatever its purported value, cannot live up to its promise absent clarification on several fronts. The information-oversight account makes important advances.

E. *Principle V: Standing*

A final principle for consideration is standing. From a distance, standing does not look like a principle of administrative procedure because it affects which parties will have access to the judicial process. But, relevant for present purposes, it may also affect which parties will have access to the administrative process. The reason is a matter of common sense rather than legal compulsion. Agencies are more inclined to involve and accommodate those who have the power to challenge their decisions later. Fear of reversal is a strong motivator. Thus, agencies are more likely to seek information from or share information with parties who posses standing—and less likely to seek out those who lack standing. The question is whether the cases grant standing reliably enough to facilitate the information-oversight connection.

Many standing cases involve situations in which plaintiffs seemed to have a right to be in court but found themselves outside, with *Lujan v. Defenders of Wildlife* as the leading case.[258] *Lujan* involved the Endangered Species Act (ESA), which contained a special provision authorizing "any person" to file suit.[259] This so-called citizen suit provision might have

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deference for its contrary construction the next time around."). For a discussion, pre-*Brand X*, of the tension between *Chevron* deference and stare decisis, see Bamberger, Provisional Precedent, supra note 255, at 1294–1301.

257. For a discussion, pre-*Brand X*, of these circumstances, see Bamberger, Provisional Precedent, supra note 255, at 1300–01.

258. 504 U.S. 555, 562–64 (1992).

259. The citizen suit provision provided, in relevant part, that "any person may commence a civil suit on his own behalf . . . to enjoin any person, including the United States and any other governmental instrumentality or agency . . . who is alleged to be in

authorized standing without limit.[260] Yet the Court saw the matter differently. Despite the citizen suit provision, the Court held that plaintiffs lacked standing to challenge the agency's failure to follow its own procedures or apply the statute abroad because their complaints were generalized grievances.[261] The Court reasoned that Congress may not "transfer from the President to the courts the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed.'"[262] To recognize standing "would enable the courts, with the permission of Congress, to assume a position of authority over the governmental acts of another and co-equal department, and to become virtually continuing monitors of the wisdom and soundness of Executive action."[263]

Legal scholars have argued that *Lujan* deprives Congress of the ability to enlist private citizens in challenging agency action.[264] Some go further, contending that *Lujan* skews the administrative process against regulatory beneficiaries.[265] Because regulatory beneficiaries often lack a traditional injury, they must premise standing on citizen-suit provisions. By denying plaintiffs use of such provisions, *Lujan* has the effect of depriving regulatory beneficiaries of access to judicial review, which may affect their access to the administrative process.

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violation of any provision of this chapter." Id. at 571–72 (quoting 16 U.S.C. § 1540(g)). Citizen suit provisions, which confer standing on "any person," are broader than provisions, either in the APA or an organic statute, that confer standing on any "person aggrieved." Compare Fed. Election Comm'n v. Akins, 524 U.S. 11, 19 (1998) (noting that "[h]istory associates the word 'aggrieved' with a congressional intent to cast the standing net broadly—beyond the common-law interests and substantive statutory rights upon which 'prudential' standing traditionally rested"), with *Lujan*, 504 U.S. at 571–74 (holding that language "any person" reflects congressional intent to grant standing without qualification, and exceeds limits of Article III case and controversy requirement).

260. See *Lujan*, 504 U.S. at 571–72.

261. See id. at 573.

262. Id. at 577.

263. Id. (citations and internal quotation marks omitted).

264. See, e.g., Richard J. Pierce, Jr., *Lujan v. Defenders of Wildlife*: Standing as a Judicially Imposed Limit on Legislative Power, 42 Duke L.J. 1170, 1170–71, 1198–1200 (1993) [hereinafter Pierce, *Lujan*] (arguing that *Lujan* denies Congress ability to enforce its policy decisions against agencies); Peter L. Strauss, Revisiting *Overton Park*: Political and Judicial Controls over Administrative Actions Affecting the Community, 39 UCLA L. Rev. 1251, 1324–25 (1992) ("Congress may choose widely to distribute the right to challenge agency behavior in court both as a means of assuring agency fidelity to its aims and as a reliable device for signaling to it when administration is going astray—as a substitute . . . for its own political oversight."); Cass R. Sunstein, What's Standing After *Lujan*? Of Citizen Suits, "Injuries," and Article III, 91 Mich. L. Rev. 163, 211 (1992) [hereinafter Sunstein, What's Standing] (arguing that Congress should have plenary authority to control class of plaintiffs entitled to bring suit).

265. See Pierce, *Lujan*, supra note 264, at 1170–71, 1194–95 (noting that *Lujan* may lead to reduction in participation in administrative process by groups other than regulated firms); Sunstein, What's Standing, supra note 264, at 186–88, 195–97, 218–19 (describing trend toward decreased judicial role in enforcing beneficiary rights and inadequacy of political process to protect majority interests).

But whatever its legal downsides (or advantages in terms of presidential control), if *Lujan* were the final word on standing, then it would be appropriate to conclude that the Court has not done well to facilitate the purpose of the APA that PPT scholars identify. It has restricted standing, disabling regulatory beneficiaries from possessing the sort of power that affords them entrée to the administrative process and, ultimately, the sort of information that facilitates fire-alarm oversight. Worse, it has precluded standing where most necessary for monitoring purposes—to enforce the procedures that generate information about agency action.

We see instead, after a high point in *Lujan* of denying access to the courts, that the standing cases fall more in line with PPT. Put simply, the Court will grant plaintiffs access to the courts when necessary to promote legislative oversight of agency decisionmaking before such decisionmaking is final. To illustrate the point, some extended discussion of the post-*Lujan* cases is in order. As demonstrated below, the Court has eliminated the traditional barriers to standing and has expanded the range of instances in which parties can expect to gain access to the administrative process, even beyond those at issue in the cases themselves.

In *FEC v. Akins*, the Court granted standing to a group of voters seeking access to information under the Federal Election Campaign Act of 1971 (FECA).[266] FECA addresses corruption of federal elections by limiting the campaign contributions that "political committees," among others, may make and by requiring political committees to disclose their membership, contributions, and expenditures to the Federal Election Commission (FEC).[267] The plaintiffs argued that the American Israel Public Affairs Committee (AIPAC) was such a political committee, and that the FEC had failed to require AIPAC to make the requisite disclosure under the statute.[268] The plaintiffs premised standing on the same sort of citizen-suit provision at issue in *Lujan*.[269]

The Court held that the plaintiffs' injury, though widely shared by all voters, was not a generalized grievance.[270] It was based on a concrete right to obtain the information under the statute, not an abstract interest in "seeing that the law is obeyed."[271] Thus, the Court held that the plaintiffs could challenge the agency's failure to compel the information. Justice Scalia dissented, reiterating his argument from *Lujan* that Article II prevents citizens from challenging enforcement discretion of the executive branch, notwithstanding the approval of the legislative branch.[272]

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266. 524 U.S. 11, 19–26 (1998).

267. 2 U.S.C. § 434(b) (2000).

268. *Akins*, 524 U.S. at 16–18.

269. See 2 U.S.C. § 437g(a)(8)(A) (providing that "[a]ny party aggrieved by an order of the Commission dismissing a complaint filed by such party . . . may file a petition with the United States District Court for the District of Columbia").

270. *Akins*, 524 U.S. at 23–25.

271. Id. at 24–25.

272. Id. at 36–37 (Scalia, J., dissenting).

After *Akins*, it is reasonable to expect that the Court will grant standing under other informational statutes. For example, plaintiffs may gain standing to obtain information under FOIA and GITSA.[273] More broadly, plaintiffs may gain standing to obtain access not only to documents but to meetings concerning agency action, for example under the Federal Advisory Committee Act.[274] This strategy might hold for statutes that compel agencies to provide information in the course of making particular decisions, including consultations and assessments.[275] What if an agency declined to prepare an environment impact statement under the National Environmental Policy Act, for example?[276] What if it declined to hold a public hearing as required by many organic statutes or failed to provide adequate notice under section 553 of the APA?[277] Perhaps these provisions give plaintiffs a statutory right to obtain a certain degree of information about agency action.

Another case expanding standing and therefore access both to the judicial process and the administrative process is *Bennett v. Spear*, which also involved a citizen-suit provision.[278] But the case involved plaintiffs with clear injuries, not generalized grievances—they wanted water from an irrigation project that raised concerns under the Endangered Species Act—and thus was not significant on this point.[279] Rather, it was significant because of the action that the plaintiffs sought to challenge. Plaintiffs sought to challenge a Biological Opinion issued by the Fish and Wildlife Service (FWS) under the ESA to advise another agency, the Bureau of Reclamation, on the operation of the irrigation project at issue.[280] Because the Biological Opinion was merely advisory, the Court paused to

273. Another statute is the National Environmental Policy Act of 1969, which establishes an agency duty to release information to the public. 42 U.S.C. § 4332 (2000). For a discussion of informational statutes, see generally Cass R. Sunstein, Informational Regulation and Informational Standing: *Akins* and Beyond, 147 U. Pa. L. Rev. 613 (1999) [hereinafter Sunstein, Informational Regulation].

274. 5 U.S.C. app. §§ 1–5 (2000).

275. See, e.g., Regulatory Flexibility Act, 5 U.S.C. § 604 (requiring that agency prepare a final regulatory flexibility analysis after it issues a final rule); Federal Employees' Compensation Act, 5 U.S.C. § 8193(d) (requiring agencies to cooperate with Secretary of Labor when Secretary requests information); Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C § 136w(a)(2) (2000) (requiring that EPA submit its proposed rules to Department of Agriculture for comment); National Trails System Act of 1968, 16 U.S.C. § 1246(a) (2000) (requiring consultation with all affected agencies); Endangered Species Act of 1973, 16 U.S.C. § 1536(a) (requiring consultation with other agencies); Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. § 1320d-1(c)(3) (requiring consultation with particular organizations before adopting standards).

276. See 42 U.S.C. § 4332(C)(i).

277. See Section of Admin. Law & Regulatory Practice of the Am. Bar Ass'n, A Blackletter Statement of Federal Administrative Law, 54 Admin. L. Rev. 1, 54–55 (2002) (discussing ambiguity surrounding standing to enforce procedural requirements of certain statutes).

278. See 520 U.S. 154, 166 (1997).

279. See id. at 168.

280. Id. at 157.

consider whether ruling on it would redress the plaintiffs' injuries.[281] The Court found that the Biological Opinion, though not the final policy or decision itself, had "coercive effect" on the Bureau's action.[282] Put differently, the Biological Opinion "alter[ed] the legal regime to which the action agency is subject" because it, in essence, contained the actual basis for the policy.[283] The Court therefore determined that ruling on this advisory action would redress the plaintiffs' injuries.[284]

Bennett is interesting to the extent that it supports standing to challenge advisory actions not typically subject to challenge, and it may have application to other such actions, including guidance documents. Guidance documents are exempt from the notice-and-comment procedures of section 553 and may fail to constitute "final agency action" subject to judicial review because they are merely advisory.[285] Thus, they may present a version of the redressability problem or at least a close cousin: they are not compulsory and therefore are not remediable. After *Bennett*, the Court might find guidance documents subject to challenge if they contain the actual basis for agency policy. In essence, the Court might treat particular guidance documents as "coercive" or as "alter[ing] the legal regime" because the agency would have to explain its failure to comply with them.[286] This move would reflect a change in the law, resulting in the formalization of guidance documents with an oversight effect. Anticipating litigation, agencies would provide parties with access to information about guidance documents, facilitating congressional oversight, consistent with the PPT account of administrative procedures.[287] If *Bennett*

281. Id. at 168–71.

282. Id.

283. Id. at 169.

284. Id. at 171.

285. See, e.g., Am. Paper Inst., Inc. v. EPA, 882 F.2d 287, 289 (7th Cir. 1989) (holding that EPA policy statement did not represent "final agency action" and as such, was not reviewable (citations and internal quotation marks omitted)); Pa. Mun. Auths. Ass'n v. Horinko, 292 F. Supp. 2d 95, 105 (D.D.C. 2003) (finding that EPA guidance documents did not constitute "final agency action").

286. But see William W. Buzbee, Expanding the Zone, Tilting the Field: Zone of Interests and Article III Standing Analysis After *Bennett v. Spear*, 49 Admin. L. Rev. 763, 804–07 (1997) (arguing that procedure is "coercive" enough to convey standing under *Bennett* only if it results in affirmative agency action).

287. This raises a question whether the standing determination would influence an argument on the merits that a guidance document was a "legislative" rule, subject to full notice-and-comment procedures. For excellent discussions of the distinction between "legislative" and "nonlegislative" rules, see Robert A. Anthony, Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?, 41 Duke L.J. 1311, 1321–23 (1992) (listing identifying characteristics of legislative rules); Robert A. Anthony, Three Settings in Which Nonlegislative Rules Should Not Bind, 53 Admin. L. Rev. 1313, 1313 (2001) (discussing situations in which nonlegislative guidances are practically binding); Peter L. Strauss, Publication Rules in the Rulemaking Spectrum: Assuring Proper Respect for an Essential Element, 53 Admin. L. Rev. 803, 803–05 (2001) (reviewing "variety of written texts American government uses to communicate its powers and its citizens' rights and obligations").

foreshadows this effect, it is significant indeed, particularly in the wake of increased White House attention to guidance documents.[288] It would ensure that congressional involvement keeps pace with White House involvement.

In *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, the Court granted standing to environmental groups even though they had no ongoing injury.[289] The plaintiffs sought to challenge noncompliance with a permit under the Clean Water Act, but after the lawsuit was filed, the defendant substantially complied with the limit.[290] The Court, per Justice Ginsburg, held that plaintiffs nonetheless could maintain a suit for civil penalties. The Court reasoned that the possibility of civil penalties might deter future violations.[291] *Laidlaw* is significant because the Court expanded the availability of standing to plaintiffs without continuous or imminent injuries.[292] In *Lujan*, the Court denied standing to plaintiffs under similar circumstances.[293] Furthermore, *Laidlaw* is significant because the Court distinguished it from another case, *Steel Co. v. Citizens for a Better Environment*, in which the Court denied standing to environmental groups seeking to obtain information from a private company under an informational statute, the Emergency Planning and Community Right-to-Know Act.[294] The company supplied the withheld information before the start of the litigation, and the Court held that the plaintiffs could not maintain their suit for civil penalties.[295] By distinguishing *Steel Co.*, the Court narrowed the case to its facts, creating the possibility of broad standing for plaintiffs seeking to deter future violations, perhaps even for withheld information.[296]

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288. See Exec. Order No. 13,422, 72 Fed. Reg. 2,763 (Jan. 23, 2007) (amending Exec. Order No. 12,866, 3 C.F.R. 638 (1993)) (including guidance documents within coverage of Executive Order).

289. 528 U.S. 167, 180–88 (2000).

290. Id. at 178–79.

291. Id. at 185–87.

292. Some scholars have expressed uncertainty as to what *Laidlaw* accomplishes. See John D. Echeverria, Critiquing *Laidlaw*: Congressional Power to Confer Standing and the Irrelevance of Mootness Doctrine to Civil Penalties, 11 Duke Envtl. L. & Pol'y F. 287, 296–301 (2001) (noting that *Laidlaw* "provides few definitive answers" about Court's standing doctrine); Richard J. Pierce, Jr., Issues Raised by *Friends of the Earth v. Laidlaw Environmental Services*: Access to the Courts for Environmental Plaintiffs, 11 Duke Envtl. L. & Pol'y F. 207, 243 (2001) (noting that "[t]he Court has failed to be consistent in this area of decision-making" and that "[i]t could retract, recharacterize, or amend significantly almost any of the important statements in the majority opinion in *Laidlaw*").

293. Lujan v. Defenders of Wildlife, 504 U.S. 555, 578 (1992).

294. 523 U.S. 83, 109–10 (1998).

295. See id. at 102–09.

296. See *Laidlaw*, 528 U.S. at 188 ("[O]ur decision in [*Steel Co.*] did not reach the issue of standing to seek penalties for violations that are ongoing at the time of the complaint and that could continue into the future if undeterred."); Echeverria, supra note 292, at 310 (arguing that *Steel Co.* may not survive *Laidlaw* or may be limited to cases in which compliance occurs prior to initiation of litigation); Harold J. Krent, *Laidlaw*:

A final case is *Massachusetts v. EPA*, which involved the question whether the EPA has authority under the Clean Air Act to regulate greenhouse gas emissions from new motor vehicles.[297] After notice-and-comment rulemaking, the EPA concluded that it lacked such authority and would, in any event, decline to regulate greenhouse gas emissions for policy reasons important to the George W. Bush administration.[298] Predictably, the environment groups that brought suit confronted barriers to standing. But among the plaintiffs were several states claiming that climate change was eroding their coastlines.[299] The Court acknowledged that states were nontraditional plaintiffs.[300] Moreover, it acknowledged that the harm from climate change was widespread, and that EPA regulation of greenhouse gas emissions would by no means solve the problem.[301] Nevertheless, it found that Massachusetts had standing to challenge the EPA's refusal to act.[302] It reasoned that a state has a quasi-sovereign interest in "'the earth and air within its domain,'"[303] and, with respect to Massachusetts, the harm to this interest was concrete.[304] Furthermore, it stated that any EPA action regulating motor vehicle emissions would be an important incremental step in remedying the harm.[305] The Court could hear the case.

Massachusetts v. EPA is a unique case because it involved a state plaintiff and an extraordinary issue, but it still contains important messages for legislative monitoring. Most obviously, the Court is willing to recognize standing even for nontraditional plaintiffs. *Lujan* is on the decline. As agencies realize this fact, they may regard more parties as potential litigants and share information more readily during the administrative process. Equally significant, the Court is willing to extend standing even when (or especially when) the White House is visibly involved in a decision not to regulate.[306] The Court effectively held that presidential accountability was insufficient to remit the matter to agency discretion.

Redressing the Law of Redressability, 12 Duke Envtl. L. & Pol'y F. 85, 101–02 (arguing that *Steel Co.* was limited by facts showing weak statutory link between civil penalties and injury).

297. 127 S. Ct. 1438, 1446 (2007); see also 42 U.S.C. § 7521(a)(1) (2000) (requiring that EPA "by regulation prescribe . . . standards applicable to the emissions of any air pollutant from any class . . . of new motor vehicles . . . which [in the EPA Administrator's] judgment cause[s], or contribute[s] to, air pollution . . . reasonably . . . anticipated to endanger public health or welfare").

298. See 127 S. Ct. at 1451.

299. See id. at 1456.

300. Id. at 1454.

301. Id. at 1456, 1457–58.

302. Id. at 1457.

303. Id. at 1454 (quoting Georgia v. Tenn. Copper Co., 206 U.S. 230, 237 (1907)).

304. Id. at 1455–56.

305. Id. at 1457–58.

306. See id. at 1449 ("Before the close of the comment periods, the White House sought 'assistance in identifying the areas in the science of climate change where there are the greatest certainties and uncertainties' . . . ." (quoting Appendix at 213, *Massachusetts*, 127 S. Ct. at 1438 (No. 05-1120))).

Rather, states and other parties are entitled to involvement in future proceedings—which means that they will have the opportunity to gather information and alert Congress.

It is difficult to leave *Massachusetts v. EPA* without commenting briefly on the merits, particularly because the case is significant in a way that closes the loop on the PPT account of administrative law. The Court was unwilling to accept White House policy reasons as the sole basis for decision. More specifically, the Court held that the EPA had not offered a reasoned explanation for declining to regulate greenhouse gases from new motor vehicles.[307] It rejected the "laundry list" of factors that the EPA supplied, all of which concerned President Bush's desire to manage climate issues as he saw fit.[308] In this regard, the case was much like *State Farm*, with the presidential priorities evident in the administrative record rather than the broader context. Yet this difference, which increased the transparency of the agency's policy, did not save that policy. If the reason is unclear, consider an explanation relevant to congressional control. The Court noted that, since enacting the Clean Air Act, Congress had taken concrete steps consistent with EPA authority to regulate greenhouse gases.[309] In essence, the Court said that agencies must consider current congressional preferences, particularly those reflected in subsequent statutes. Congress not only had a right to monitor agency action over time, but also to influence it.

Returning to standing, *Lujan* has not been overruled, but its scope has been restricted in a manner compatible with PPT and the information-oversight thesis.[310] Environmental plaintiffs and other regulatory

307. Id. at 1462–63.

308. Id. at 1463.

309. Id. at 1460–61 ("[W]e have no difficulty reconciling Congress' various efforts to promote interagency collaboration and research to better understand climate change with the agency's pre-existing mandate to regulate 'any air pollutant' that may endanger the public welfare. Collaboration and research do not conflict with any thoughtful regulatory effort; they complement it." (footnote and citation omitted) (quoting 42 U.S.C. § 7601(a)(1) (2000))).

310. See Suzanna Sherry, Logic Without Experience: The Problem of Federal Appellate Courts, 82 Notre Dame L. Rev. 97, 122 (2006) (noting that substantive injuries in *Lujan*, *Bennett*, and *Laidlaw* are too similar to support meaningful doctrinal distinction); Maxwell L. Stearns, From *Lujan* to *Laidlaw*: A Preliminary Model of Environmental Standing, 11 Duke Envtl. L. & Pol'y F. 321, 327 (2001) (arguing that "Court appears to have issued a major retrenchment upon *Lujan*'s logic, if not its holding"). What remains of *Lujan* is uncertain. One scholar has contended that the Court has converted the generalized grievance worry to a prudential concern rather than a constitutional one, increasing judicial flexibility to grant standing. Sunstein, Informational Regulation, supra note 273, at 645. The Administrative Law section of the American Bar Association has stated that *Lujan* precludes standing only when a plaintiff seeks compliance with procedures that relate to agency activities in which Congress has given no individual an enforceable personal stake—for example, the consultation requirement. See Section of Admin. Law & Regulatory Practice of the Am. Bar Ass'n, supra note 277, at 54–55 (describing *Lujan* this way); see also Sunstein, Informational Regulation, supra note 273, at 654 (noting that standing is less clear "when an individual or institution seeking

beneficiaries will surely have greater access to the judicial process.[311] And citizen suit provisions will have broader application.[312] More specifically, plaintiffs will have a greater argument for standing in a variety of contexts: (1) to sue under informational statutes for access to information wrongfully withheld; (2) to challenge the basis for agency inaction even if their injury is widely shared; (3) to challenge agency action even in the absence of an ongoing injury; (4) to challenge the basis of agency action even when provided in traditionally advisory formats. By expanding standing in these ways, the Court will increase the likelihood that parties will have access to information about agency action and inaction in the future.

To summarize this Part: It is possible to view the Court's procedural cases as sensitive to the needs of Congress for monitoring agency action, while minimizing the potential for reviewing courts to impose their own views of wise policy. What this means is the Court's cases are consistent with the PPT account of administrative procedures. Furthermore, seeing those cases in connection with the PPT account provides clarity that the standard legal account lacks. We may better understand the contours of the cases and the relationship among them. The next Part addresses how to understand the Court's procedural principles in broader context.

V. A Role for the Court in Politics

The Court has built into administrative law a strategic political use for administrative procedures. This Part asks why it has done so. As mentioned earlier, conventional PPT assumptions about judicial behavior do not offer a useful way to think about the question. The Court is not beholden to Congress in this context. Without entirely abandoning a positive focus, this Part contends that we might view the Court's project in a

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information invokes no interest expressly related to the political process and when that individual or institution cannot show that the information would relate to relevant activities on his or its part").

311. See Sam Kalen, Standing on Its Last Legs: *Bennett v. Spear* and the Past and Future of Standing in Environmental Cases, 13 J. Land Use & Envtl. L. 1, 2, 66 (1997) (suggesting that "*Bennett* decision . . . [might] mark[ ] a turning point in the treatment of standing in environmental cases"); Sherry, supra note 310, at 121 (noting shift in Court's attitude in environmental cases).

312. See William W. Buzbee, Standing and the Statutory Universe, 11 Duke Envtl. L. & Pol'y F. 247, 249–50 (2001) (arguing that law reflects "competing strains" but that *Laidlaw* helps to reconcile them by placing emphasis on the statutory interests that Congress sought to protect); Echeverria, supra note 292, at 296–98 (arguing that Article III should not "stand as a legitimate barrier to Congress' authority"); Krent, supra note 296, at 88 ("The Supreme Court has recognized a wide ambit within which Congress can determine which interests can be vindicated in court."); Gene R. Nichol, The Impossibility of *Lujan*'s Project, 11 Duke Envtl. L. & Pol'y F. 193, 197–98 (2001) (describing *Akins* and *Laidlaw* as vindication of congressionally-recognized interests); Sunstein, Informational Regulation, supra note 273, at 637 ("The unifying theme is that with respect to information, and perhaps more generally, the Court has rooted the standing question firmly in Congress's instructions.").

way that is more familiar to legal scholars. The Court is sincerely interested in facilitating congressional control to produce the right rules for agency action. Thus, the Court is working with the political forces in the administrative process to ensure that agency decisionmaking comports with democratic fundamentals. This understanding of administrative law forges a bridge between law and politics.

A. *General Considerations*

Why would the Court select rules that facilitate congressional control? We might consider that the Court is genuinely interested in finding the appropriate rules for agency action. Put differently, we might think that the Court sees administrative law as helping to reconcile the administrative state with the constitutional structure, and in this sense, as helping to promote the legitimacy of agency action. This conception of administrative law is not just a law professor's fanciful creation or obsession. It is a sensible hypothesis.

At the same time, we might recognize that the Court seeks not only to enhance the sorts of values that appeal to high-minded academics and jurists, but those that satisfy nitty-gritty politicians in Congress. Rule-of-law values matter because they secure individual rights and promote democratic aspirations. But politics also matter. In elaborating administrative procedures, the Court is attempting to match the practical way that agencies operate with a normative theory of how they should operate. In a sense, it is developing rules that simultaneously please the Baptists and the bootleggers.[313]

By claiming that the Court is "genuinely" or "sincerely" interested in choosing rules that facilitate congressional control, I do not mean to suggest that I know the actual judicial motivation behind those rules. Rather, I claim that the Court is responding, if only implicitly, to certain basic political facts about the administrative state. First, Congress often enacts broad regulatory statutes, expressing few policy preferences about and imposing few legal constraints on agency action. Second, both Congress and the President seek to maximize their control of agency action thereafter. In essence, agencies are subject to *two* political principles at any given moment in time. Third, Congress and the President often have divergent policy preferences. Under these circumstances, the Court might see a role for the current Congress (and not only the current President) in setting regulatory policy, consistent with separation of powers. Furthermore, it might see a role for *itself* in ensuring that the current Congress, as well as the current President, has an opportunity to influence agency action.

This is a general picture of the political backdrop against which the Court has elaborated administrative procedures. A more specific account

313. I am grateful to Cary Coglianese for suggesting that this characterization applies to administrative law.

requires sensitivity to context. How administrative procedures work to enhance the democratic character of agency action actually varies depending on whether we are considering independent commissions or executive branch agencies because the political forces differ accordingly. The Court has allowed Congress to make this initial design choice,[314] and it has applied the same rules of administrative law to both sorts of agencies.[315] But this initial design choice affects how administrative procedures operate as a practical and theoretical matter, as the remainder of this Part shows.

B. *Independent Agencies*

Independent agencies have features that affect political control, including limits on plenary presidential removal, bipartisan membership requirements, and fixed and staggered terms.[316] Each prevents agency policy from shifting dramatically with new administrations, although the President still may influence policy by, for example, choosing a new commission chair.[317] Nevertheless, independent agencies do not fold neatly into presidential administrations, and they are often born when Congress has relative strength over the President.[318] If Presidents have diminished control over independent agencies, the question is how we may understand such agencies as consonant with the constitutional structure.

The answer in part may be administrative procedures. Specifically, the Court may ensure that Congress can use administrative procedures to control independent agencies. Such agencies are subject to the APA, as well as other specialized procedural provisions. Thus, independent agencies follow notice-and-comment rulemaking or other procedures when they take action and are amenable to judicial review for their asserted transgressions. Of course, independent agencies are also subject to other means of legislative oversight. For example, commissioners can be called

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314. See Humphrey's Ex'r v. United States, 295 U.S. 602, 625–26 (1935) (upholding independent agencies against constitutional challenge).

315. See, e.g., Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865–66 (1984) (articulating test for judicial deference to all agency statutory interpretations, although emphasizing agency link to executive branch).

316. See David E. Lewis, Presidents and the Politics of Agency Design: Political Insulation in the United States Government Bureaucracy 1946–1967, at 3–4 (2003) ("Agencies like the independent regulatory commissions, for example, are insulated from political control by commission structures that dilute political accountability, party-balancing requirements that diminish the impact of changing administrations, and fixed terms for commissioners that limit the influence of any one administration on commission policy.").

317. See Peter L. Strauss, The Place of Agencies in Government: Separation of Powers and the Fourth Branch, 84 Colum. L. Rev. 573, 589–91 (1984) [hereinafter Strauss, Place of Agencies] (noting that independent agencies are less subject to presidential control but that "special ties" exist between President and chairs of "almost all of the independent regulatory commissions").

318. See David Epstein & Sharyn O'Halloran, Delegating Powers 131–38, 142–50 (1999); Lewis, supra note 316, at 121–36.

to testify before congressional committees. And independent agencies are immune from all political interference to the extent that they engage in formal adjudication.[319] But for informal rulemaking especially, administrative procedures increase the possibility of legislative oversight, which eases both political and democratic concerns about independent agencies.[320]

By viewing administrative procedures as having this control effect, we may begin to resolve another puzzle about *Chevron*: why judicial deference applies with equal force to independent agencies and executive branch agencies (assuming, after *Mead*, proper procedural formats). In *Chevron*, the Court expressly stated that agencies were entitled to judicial deference in part because they are accountable through the President.[321] As the call for presidential control of agency decisionmaking increases, scholars have begun to argue that independent agencies should not be entitled to *Chevron* deference.[322] Rather, such agencies should be restricted to *Skidmore* deference, which requires them to convince a reviewing court of the persuasiveness of their position.[323] But if administrative procedures provide Congress with an effective means of control, we might accept that independent agencies are accountable, albeit not through the President. And we might read *Chevron* in this light. *Chevron* stated, in the context of a case involving an executive branch agency, that it is appropriate for the executive branch—the relevant political branch—to fill the gaps. With respect to independent agencies, perhaps it is no less appropriate for the legislative branch to fill the gaps.

In adopting this reading, it is important not to understate the extent to which the President is involved in the decisionmaking of independent agencies. Independent agencies are responsive to presidential priorities in part because the President has authority to select the chair of the commission.[324] Furthermore, independent agencies often share responsibil-

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319. See 5 U.S.C. § 557(d) (2000) (prohibiting ex parte contacts in formal adjudication).

320. Indeed, independent agencies often regard themselves as responsible to Congress. See FCC, About the FCC, at http://www.fcc.gov/aboutus.html (last updated Apr. 12, 2007) (on file with the *Columbia Law Review*) (describing itself as "an independent United States government agency, directly responsible to Congress").

321. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865–66 (1984).

322. Cf. Kagan, supra note 19, at 2376–77 (arguing that *Chevron* should be "conditional deference" granted only when "presidential involvement rises to a certain level of substantiality," which would lead to more deference for executive agencies than for independent agencies); Randolph J. May, Defining Deference Down: Independent Agencies and *Chevron* Deference, 58 Admin. L. Rev. 429, 432 (2006) (arguing that independent agencies should not be entitled to *Chevron* deference because not subject to presidential direction).

323. See Kagan, supra note 19, at 2376–77.

324. See Strauss, Place of Agencies, supra note 317, at 589–91 (discussing special relationship created by President's discretionary authority, in nearly all independent

ity with executive branch agencies.[325] For example, the Securities and Exchange Commission (SEC) works with the Department of the Treasury concerning implementation of the Sarbanes-Oxley Act. Recently, the Secretary of the Treasury recommended new rules for the SEC to adopt on issues at the heart of the Act.[326] The Federal Communications Commission (FCC) and the Department of Justice have overlapping authority. Both must approve a merger of communications companies, which may require them to agree on key policy issues, including how to define the relevant market.[327] The interaction does not prove that independent agencies respond to the preferences of the executive branch. The SEC may reject a proposal, imposing deeper restrictions on private firms than the executive branch would. Similarly, the FCC may extract further concessions from private firms than the executive branch would.[328] But it does show that independent agencies are susceptible to a degree of presidential control, even if removal authority is restricted by the initial design choice. Thus, independent agencies are subject to a measure of presidential and congressional control.

In sum, the practical control that administrative procedures furnish Congress helps to explain why independent agencies are constitutionally acceptable and deserving of judicial deference. Even if they are not subject to plenary presidential control, they are not renegade governments. This insight melds the PPT observation about administrative procedures and the legal vision about the Court's contribution in elaborating them.

C. *Executive Branch Agencies*

Independent agencies do not furnish the starkest example of how administrative procedures work to democratize regulatory policy; for that, we must consider executive branch agencies. Through its elaboration of administrative procedures, the Court has not merely enabled Congress to monitor executive branch agencies more efficiently. It has allowed Con-

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regulatory commissions, to remove chairman from his special post and revert him back to commissioner).

325. See generally Neal Devins, Unitariness and Independence: Solicitor General Control over Independent Agency Litigation, 82 Cal. L. Rev. 255 (1994) (analyzing interactions between Solicitor General and independent agencies).

326. See Henry M. Paulson, U.S. Treasury Sec'y, Remarks on the Competitiveness of U.S. Capital Markets (Nov. 20, 2006), available at http://www.ustreas.gov/press/releases/hp174.htm (on file with the *Columbia Law Review*).

327. See Taylor Gandossy, Proposed Satellite Radio Merger: Boon for Consumers or Monopoly?, CNN.com, Sept. 4, 2007, at www.cnn.com/2007/TECH/09/03/satellite.radio/ (on file with the *Columbia Law Review*) (noting that proposed merger of two satellite radio companies requires agencies to agree on how radio market is defined).

328. See, e.g., FCC Seals $86B AT&T-BellSouth Merger, CNNMoney.com, Dec. 29, 2006, available at http://money.cnn.com/2006/12/29/news/companies/att_bellsouth/index.htm?eref=rss_topstories (on file with the *Columbia Law Review*) (reporting that FCC, which initially voted to block merger between AT&T and BellSouth despite Department of Justice clearance, later cleared it with certain conditions).

gress to compete more effectively with the White House for control of such agencies.

The President has practical tools for influencing the decisions of executive branch agencies. The President has the authority to remove agency heads at will. Of course, the President needs information about agency action in order to control agency action. But the President possesses access to information beyond what administrative procedures provide. The President has routine contacts with agency heads, many of whom are cabinet-level officials.[329] Moreover, the executive today has its own procedures for obtaining information. The Office of Management and Budget, and within it, the Office of Information and Regulatory Affairs, maintain a formal process for reviewing agency rulemaking proposals and now guidance documents, and they require agencies to submit extensive analyses of their actions.[330] Many other offices in the White House also gather information about agency decisionmaking.[331]

The President's practical advantages in controlling agency action are important to administrative law. The Court has recognized that the President may render agency action accountable—that is what cases like *Chevron* and *Lujan* say.[332] Thus, the Court has granted the President presumptive authority to manage regulatory policy within the executive branch.

Administrative law has also recognized that Congress seeks an ongoing role in the modern presidential era, and that it can use administrative procedures for this purpose. The Court has accommodated this role, in general, by providing Congress (through its constituents) with access to information about agency action, enabling it to get involved when its interests are not well protected.[333] Furthermore, the Court has accommodated this role, in particular, by augmenting administrative procedures in light of increased White House involvement in agency decisionmaking to ensure that Congress has access to information, not simply about what the agency knows but what the White House intends.[334] *State Farm* raises a question whether an agency can rely solely on a technical explanation for its rules when those rules reflect in large measure an undisclosed po-

329. See James P. Pfiffner, Can the President Manage the Government?, *in* The Managerial Presidency 3, 12–18 (James P. Pfiffner ed., 2d ed. 1999) (discussing ways in which Presidents have managed cabinet).

330. See supra text accompanying notes 86–94.

331. See Lisa Schultz Bressman & Michael P. Vandenbergh, Inside the Administrative State: A Critical Look at the Practice of Presidential Control, 105 Mich. L. Rev. 47, 65–70 (2006) (describing involvement of other White House offices in rulemaking of Environmental Protection Agency).

332. See Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865–66 (1984); Lujan v. Defenders of Wildlife, 504 U.S. 555, 577 (1992).

333. See supra notes 258–272 and accompanying text.

334. See supra notes 258–272 and accompanying text.

litical explanation.[335] *Akins* and *Laidlaw* indicate that agencies cannot shield information about their refusals to act, outside the context of particular administrative proceedings.[336] *Massachusetts v. EPA* goes one further, demonstrating that an agency cannot rely on White House preferences, even if disclosed in the record, without considering congressional preferences.[337]

Stepping back, we can see the real significance of the political account of administrative law. The Court has developed administrative law in a way that facilitates an ongoing series of conflicts and compromises between the political branches, so as to produce politically reasonable policy outcomes rather than nominally accountable ones. It has allowed the White House running room, but demanded that the White House give reasons for its actions, both to keep it honest and to inform others about its intentions. Moreover, the Court has afforded Congress the ability to dampen the instances of over-regulation or under-regulation that draw the greatest objections from excluded groups. Even if, generally speaking, policy ought to shift to reflect presidential philosophies—as *Chevron* suggests—administrative procedures and their case law provide the mechanism for constituents to invoke a congressional check on executive-branch action in particular contexts.[338]

Administrative law, by fortifying administrative procedures, works to ensure that that the White House will consider congressional preferences in a number of practical ways. Consider the possible consequences if the White House decides to proceed alone. First, Congress may alert the press that the White House is acting in a way that disserves legislative or public preferences. The media serves an important disciplining function in keeping the White House in line. Second, a reviewing court might be disinclined to uphold an agency policy in the face of congressional opposition. This is the ultimate role of the courts in mediating disputes between the political branches. Finally, Congress may have sufficient votes to cut the agency's budget or amend the agency's statutory mandate in response to an objectionable White House interpretation. This is the ultimate congressional tool. The administration might be willing to run these risks, winning some battles and losing others.[339] The point is that,

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335. See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 57 (1983).

336. See Fed. Election Comm'n v. Akins, 524 U.S. 11, 23–26 (1998); Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 185–88 (2000).

337. See 127 S. Ct. 1438, 1462–63 (2007).

338. This interaction is reminiscent of the interest group model of administrative law, which affords a wide range of interests the opportunity to compete for policy in the administrative process and to work toward consensus. See supra Part II.B. But it is more modern because it does not simply envision a horde of interest groups battling it out.

339. See, e.g., FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 155–56 (2000) (invalidating notice-and-comment rule that did not comport with current congressional preferences).

as result of administrative law, the White House must calculate the cost of unilateral action.

Administrative law, viewed in this manner, is rooted in the political reality that Congress and the President often compete for control of agency action. Especially in times of divided government, Congress and the President are expected to be adversaries or at least wary partners.[340] Indeed, such competition is evident in the very design of regulatory statutes. Political scientists have shown that Congress is more likely to delegate authority when the President is from the same party.[341] During periods of divided government, Congress is less likely to delegate, and when it does delegate, it imposes more constraints on agency discretion and more limits on presidential control, passing power to independent commissions.[342] Administrative law operates on the assumption that political alignments may shift over time and that congressional preferences may diverge from presidential ones.

By attending to the political dynamic between the branches, however, the Court is addressing core democratic concerns about administrative agencies—the sorts of concerns that legal scholars routinely identify and strive to address. For example, the Court's cases enforcing administrative procedures might be understood as tying in with the nondelegation doctrine, which requires Congress to supply an "intelligible principle" guiding and constraining agency action.[343] Although Congress rarely provides a meaningful intelligible principle, administrative procedures enable Congress to engage in ongoing monitoring of agency action. Constituents may alert Congress when agencies have departed from current congressional preferences. Furthermore, Congress may succeed in dissuading an agency (or the White House) from exercising authority in contested ways. Granted, the nondelegation doctrine or intelligible principle requirement, as originally articulated, seeks to hold agencies to the original legislative bargain rather than to later congressional preferences.[344] But to the extent the nondelegation doctrine seeks more generally to involve Congress in policy, it is served by a mechanism that brings in current congressional preferences.

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340. See Daryl J. Levinson & Richard H. Pildes, Separation of Parties, Not Powers, 119 Harv. L. Rev. 2312, 2356–64 (2006) (arguing that in modern government, division of parties has greater influence on regulatory policy than division of powers).

341. See Epstein & O'Halloran, supra note 318, at 131–38, 142–50; Lewis, supra note 316, at 121–36.

342. Epstein & O'Halloran, supra note 318, at 154–60.

343. See A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 529–31, 541–42 (1935) (invalidating under nondelegation doctrine statutory provision that delegated to President authority to promulgate regulations stabilizing economy); Pan. Ref. Co. v. Ryan, 293 U.S. 388, 428–30 (1935) (same); J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 401, 410–11 (1928) (articulating "intelligible principle" requirement).

344. See *J.W. Hampton*, 276 U.S. at 409–11 (providing original understanding).

The Court's cases may be understood in a broader sense as establishing a system of mutual political checks on agency action.[345] Although the Constitution envisions that Congress and the President will collaborate in setting policy,[346] they do so only superficially in the administrative state. Congress and the President act jointly to enact regulatory statutes, but those statutes rarely contain the critical details of regulatory policy.[347] The Court, through administrative law, ensures that when agencies determine those details, they consider the views of both branches, not just the executive branch. Such action is consistent with the general structure of the Constitution as well as specific provisions, including the requirements for lawmaking.[348] That is not to say that the Constitution mandates administrative procedures. Rather, it is to say that administrative procedures, at the hands of the Court, further the Framers' vision of competition and collaboration between the branches as a means of producing sound policy.[349]

A dual branch focus also provides a window into why the Court has viewed certain procedures as unconstitutional. The Court has invalidated the legislative veto, the congressional removal of executive officials, and the line item veto.[350] The veto provisions, whether benefiting Congress or the President, give one branch (or a subset of one branch) final authority to reverse a decision that is the product of a process susceptible to oversight by both branches, which make them inconsistent with separa-

345. See The Federalist No. 51, at 320 (James Madison) (Clinton Rossiter ed., 1961) (describing "interior structure of the government" as one in which "its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places"); see also Lisa Schultz Bressman, Deference and Democracy, 75 Geo. Wash. L. Rev. 761, 764–66 (2007) (arguing that President is not entitled to disregard congressional or broader popular preferences on regulatory issues, and contending that Supreme Court has recognized as much); Jide Nzelibe, The Fable of the Nationalist President and the Parochial Congress, 53 UCLA L. Rev. 1217, 1263–64 (2006) (arguing that unitary executive thesis fails to recognize that "shared accountability" is necessary to legitimate democratic governance and reflects the empirical reality of the administrative state).

346. See U.S. Const. art. I, § 7 (requiring bicameralism and presentment for lawmaking).

347. See Mistretta v. United States, 488 U.S. 361, 415–16 (1989) (Scalia, J., dissenting) (noting that Court is unlikely to invalidate a delegating statute despite vague statutory standards).

348. See Nzelibe, supra note 345, at 1263 (noting that "American constitutional structure seems to encourage multiple claims of legitimacy and political accountability across a wide range of political actors").

349. See Eskridge & Ferejohn, Article I, Section 7 Game, supra note 144, at 528–33 (arguing that requirements of bicameralism and presentment reduce production of hasty or unwise laws); see also The Federalist No. 9 (Alexander Hamilton), supra note 345, at 72 (invoking notion of "balances and checks"); The Federalist No. 51 (James Madison), supra note 345, at 320 (describing "interior structure of the government" as one in which "its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places").

350. See INS v. Chadha, 462 U.S. 919 (1983) (legislative veto); Bowsher v. Synar, 478 U.S. 714 (1986) (congressional removal); Clinton v. City of New York, 524 U.S. 417 (1998) (line item veto).

tion of powers.[351] The congressional removal provision is more puzzling. It would seem to give Congress no more authority than the President may possess over agency officials. Moreover, Congress always possesses authority to effectively remove an official by terminating the office or even cutting the budget through statute—which is precisely the amount of political capital that the congressional removal provision required.[352] Nevertheless, the Court invalidated the congressional removal provision on separation of powers grounds, seemingly convinced that it gave one branch an edge in influencing agency action that other mechanisms do not.[353]

None of the foregoing suggests that congressional preferences always diverge from presidential ones, or that the President will not be entitled to judicial deference in the ordinary case. For one thing, Congress and the President do not always disagree. Members of Congress may believe that the White House or the agencies will represent their interests with respect to particular policies. For another, Congress may have no view at all, despite access to information about agency action. In such cases, judicial deference would serve both Congress and the President. Procedural formality, though furnishing a possible source of information for Congress, would not change the outcome.[354] The point in this Article is more general. Administrative law should be understood to track the practical reality that the political branches *may* disagree and to furnish a check in such an event. It therefore should be understood to promote a normative vision of collaboration and reconciliation.

In sum, we might understand administrative law, and administrative procedures within administrative law, as fitting into a broader conception. Under that conception, Congress may influence agency action and discipline White House control of agency action. This conception makes sense of the practical operation of agencies—as situated somewhere between the political branches of government—and the role of the Court,

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351. See John A. Ferejohn & Barry R. Weingast, A Positive Theory of Statutory Interpretation, 12 Int'l Rev. L. & Econ. 263, 263 (1992) (observing that "capacity to react is a fundamental feature of the political process"); Segal, supra note 139, at 32 (noting that in ordinary politics, no one branch or political actor has the final say). But cf. Eskridge & Ferejohn, Article I, Section 7 Game, supra note 144, at 540–43, 562 (using PPT model to show that legislative veto may restore the legislative-executive balance, and that at least two-house vetoes are desirable); William N. Eskridge, Jr. & John Ferejohn, Making the Deal Stick: Enforcing the Original Constitutional Structure of Lawmaking in the Modern Regulatory State, 8 J.L. Econ. & Org. 165, 167, 177–79 (1992) (same).

352. See *Bowsher*, 478 U.S. at 767–68 (White, J., dissenting) (explaining that removal provision requires joint resolution, which in turn requires presidential signature or supermajority support, no different than ordinary legislation).

353. See Bressman, Beyond Accountability, supra note 9, at 522 (suggesting reasons why removal provision might have given Congress more power to influence Comptroller General than the threat of statutory amendment or budget cut).

354. See Nzelibe, supra note 345, at 1266 ("[W]hen there is no explicit indication from Congress as to its preferences, the next best available indicator of majoritarianism in the administrative state is likely to be presidential endorsement of agency behavior.").

as ensuring that the political branches respect the control interests of the other.

VI. OBJECTIONS

Some may argue that, as a normative matter, administrative law should not aim to strengthen congressional control of agency action through procedural principles because such control is flawed in various ways. This Part shows that congressional control is no more flawed than the leading political contender: presidential control. It therefore argues that congressional control should remain a factor in agency decisionmaking, particularly as presidential control increases.[355] More so than ever, the two combined are better than either alone.

A. *Partiality*

Critics of congressional control might argue that fire-alarm oversight does not register the views of Congress, but instead the more limited views of an undetermined subset of legislators. Individual constituents sound the alarm, and a committee or subcommittee responds to it. As one commentator has stated, "[t]he fire alarms triggering congressional review of agency action go off in the committee and subcommittee rooms of Congress, not on the floor of the House or Senate."[356] Thus, neither the whole of Congress nor even the median legislator is represented. By contrast, many argue that presidential control reflects the views of the President.

This distinction is overstated. Fire-alarm oversight may register the views of a small number of legislators. But presidential control may not reflect the views of the President, but rather, the views of members of his staff. As advocates of presidential control have known all along, and recent empirical work has confirmed, the President is rarely involved in directing agency action.[357] Rather, that responsibility falls to multiple political officials and career staff within the White House.[358] Among them, no one is elected. Relatively few are even subject to Senate confirma-

355. See Jack M. Beerman, Congressional Administration, 43 San Diego L. Rev. 61, 140–44 (2006) (arguing that congressional control of agency decisionmaking is important counterweight to presidential control).

356. Kagan, supra note 19, at 2259; see Barry R. Weingast, The Congressional-Bureaucratic System: A Principal-Agent Perspective (with Applications to the SEC), 44 Pub. Choice 147, 150 (1984) (noting that congressional committees, not entire Congress, review agency action).

357. See Bressman & Vandenbergh, supra note 331, at 68 (reporting results of empirical study of political appointees at EPA, including that as many as nineteen different White House offices, in addition to OIRA, were involved in EPA rulemaking); Kagan, supra note 19, at 2307 (noting that President Clinton took interest only in selected issues).

358. See Bressman & Vandenbergh, supra note 331, at 64 n.107 (listing the offices involved in EPA rulemaking); Kagan, supra note 19, at 2338 (noting that White House officials are ones exercising presidential control).

tion.[359] They may hold conflicting views of regulatory policy, with no clear indication of which (if any) represents the official White House position. Thus, presidential control may not reflect the views of the President, and it cannot claim victory over congressional control on this basis alone.

B. *Faction*

Critics of congressional control might continue that Congress is plagued by faction, while the President conveys a national perspective. Fire-alarm oversight raises a concern for faction for the same reason that it raises a concern for partiality.[360] It is triggered by constituents, who may pursue their own interests at public expense, and answered by committees or subcommittees, which are notoriously beholden to narrow interests.

This distinction also is overstated. Professor Jide Nzelibe has exposed the "fable" of the nationalist President, arguing that the President is more susceptible to faction than scholars assume.[361] He demonstrates that under the winner-take-all system of the Electoral College, the President will often have an incentive to cater to a narrower geographical and population constituency than that of the median legislator. Professor Nzelibe does not deny that Congress is susceptible to short-term or factional interests.[362] Rather, he argues that neither is purer than the other, and that they are better together than apart.[363] Others have offered empirical evidence to suggest that the President often serves a narrow constituency rather than a national one.[364] Professor Nzelibe acknowledges

359. The Administrator of OIRA, however, is subject to Senate confirmation.

360. See Kagan, supra note 19, at 2259–60 (discussing shortcoming of fire-alarm oversight); id. at 2336 (asserting that "members of congressional committees and subcommittees [are] almost guaranteed by their composition and associated incentive structure to be *unrepresentative* of national interests"); see also David Schoenbrod, Power Without Responsibility 9–12 (1993) (applying public choice theory to show that Congress delegates in broad strokes to shift blame for results that favor private interests); Peter Aranson et al., A Theory of Legislative Delegation, 68 Cornell L. Rev. 1, 43 (1982) ("It is now a [sic] commonplace among modern political analysts that members of Congress are the primary agents responsible for generating and perpetuating the collective production of private benefits.").

361. Nzelibe, supra note 345, at 1231–46; see also Araiza, supra note 206, at 613–15 (noting that OMB review has raised concern about "the executive acting as a confidential partner of and conduit for regulated parties seeking to influence agency action"); Farina, Undoing the New Deal, supra note 102, at 231–32 (expressing skepticism that, even under public choice theory, presidential involvement reduces faction); Shane, supra note 102, at 202–04 (voicing doubt that presidential control is proof against faction); Strauss, Presidential Rulemaking, supra note 102, at 971–73 (providing examples from Clinton administration that "political controls still embody the potential for corruption").

362. See Nzelibe, supra note 345, at 1249, 1260.

363. See id.

364. See Bressman & Vandenbergh, supra note 331, at 84–91 (finding, on basis of empirical study of political appointees at EPA during relevant period, that White House is more likely to favor business interests than is EPA). But cf. Steven Croley, White House

that individual members of Congress may be susceptible to shortsighted and factional interests. But, he maintains, the collective may represent more national and stable interests than any single elected officials. Fire-alarm oversight is compatible with this view of Congress. Although individual members may threaten intervention at the behest of favored constituents, larger numbers may band together or support the efforts of the few. In any event, this argument does not militate as decisively in favor of presidential control as scholars might think.

C. *Selectivity*

Critics of congressional control might argue that legislative oversight is too sporadic.[365] Oversight is invoked by constituents, only as they see fit. Political scientists have not been able to demonstrate that fire-alarm oversight reliably occurs.[366] By contrast, the White House has an established regulatory review process, which it utilizes regularly to monitor agency rules and other policies. In addition, the White House maintains continuous contact with agency officials in less formal ways.

It would be worth knowing more about the extent to which Congress engages in fire-alarm oversight. If Congress does not engage in it regularly, then such laxity may fuel the argument that procedures are a game that is not worth the candle. The costs become harder to justify, though perhaps even a seldom used check is an important one to have.

In any event, there is a difference between frequency and selectivity. Congress may get involved only in politically salient issues. But no scholar claims that the President touches every matter of public importance or even comes close.[367] Congressional control does not decrease the number of actions that receive political scrutiny, and it may increase the number.

Review of Agency Rulemaking: An Empirical Investigation, 70 U. Chi. L. Rev. 821, 874–85 (2003) (finding, based on review of OIRA rulemaking documents, that White House does not favor narrow interests).

365. See Kagan, supra note 19, at 2260 (arguing that congressional oversight is reactive because triggered by party complaints); Lessig & Sunstein, supra note 19, at 105–06 ("[B]ecause the President has a national constituency—unlike relevant members of Congress, who oversee independent agencies with often parochial agendas—[he] appears to operate as an important counterweight to factional influence over administration."); Edward L. Rubin, It's Time to Make the Administrative Procedure Act Administrative, 89 Cornell L. Rev. 95, 101–03 (2003) (arguing that party participation under APA is selective and reactive).

366. See Terry M. Moe, An Assessment of the Positive Theory of 'Congressional Dominance,' 12 Legis. Stud. Q. 475, 486–90, 513 (1987) (noting theoretical reasons to question efficacy of Congressional oversight).

367. See Bressman & Vandenbergh, supra note 331, at 70 (raising possibility, based on empirical data on White House involvement in EPA regulations during relevant period, that such involvement was selective in its focus); Kagan, supra note 19, at 2250 (acknowledging that "no President (or his executive office staff) could, and presumably none would wish to, supervise so broad a swath of regulatory activity").

D. *Responsibility*

Critics of congressional control might further contend that Congress, for the reasons above, cannot be held responsible for agency action that departs from popular preferences. Only some members are ever involved. They are unlikely to expose their role to public view, particularly to the extent that they are responding to the complaints of narrowly interested constituents. As a result, they may escape blame for their participation. The President, by contrast, may be held responsible for an agency action in the executive branch.

It is doubtful that any member of Congress will ever be held responsible for influencing agency action at the behest of individual constituents. Thus, it is more likely that the President will be held responsible for influencing agency action. But that likelihood may still be remote. While the President is more visible than any given member of Congress, those officials who most often influence agency action are not. Within the White House, many different officials are involved in regulatory review, and few often reveal their participation to the public.[368] Of course, the President may be held responsible for the actions of the executive branch, even if he is not directly involved. He may be voted out of office on that basis. The reality, however, is that electoral accountability may be a weak check on presidential involvement in agency action.[369] The President is evaluated on the basis of an amalgam of issues, or on singularly important issues.[370] Thus, the likelihood that the President will be held responsible for any agency policy or even collection of agency policies is small, even if it is significantly greater than the likelihood with respect to members of Congress.

E. *Bias*

Finally, critics of congressional control might argue that fire-alarm oversight is likely to skew agency action in an antiregulatory direction. Constituents will more often seek to block regulatory requirements or prohibitions rather than to demand more regulatory benefits, such as en-

368. See Bressman & Vandenbergh, supra note 331, at 68, 78–84 (documenting number of officials involved in review of EPA rulemaking during relevant period and views of EPA political appointees that their actions were more visible to public than those of White House officials).

369. See Cynthia R. Farina, The Consent of the Governed: Against Simple Rules for a Complex World, 72 Chi.-Kent L. Rev. 987, 1002–07 (1997) (expressing skepticism that public understands what President is implementing through his agency vision and votes on that basis); Shane, supra note 102, at 197 (noting disconnect between President Reagan's strong electoral support and public's apparent rejection of his policy positions on key issues).

370. See Nina A. Mendelson, Agency Burrowing: Entrenching Policies and Personnel Before a New President Arrives, 78 N.Y.U. L. Rev. 557, 617–19 (2003) (describing reasons why election does not ensure that President will reflect popular preferences on specific issues); Edward L. Rubin, Getting Past Democracy, 149 U. Pa. L. Rev. 711, 758 (2001) (noting that "many observers tend to overestimate the significance of elections").

vironmental protection or worker safety.[371] As a result, Congress will suppress agency action rather than stimulate it. The President, by contrast, is willing and able to energize agency action.[372]

The difficulty with this argument, again, is that is cuts both ways. Many argue that White House regulatory review is inherently deregulatory because it employs a tool, cost-benefit analysis, that is inherently deregulatory, and because it is run by staffers with heavily cost-based training.[373] Congress, too, may have a deregulatory tendency, but it has also taken actions consistent with a proregulatory bent. To stick with the procedural theme, it has enacted citizen-suit provisions, allowing environmental groups to bring suit, and informational statutes, allowing parties to learn about agency inaction as well as agency action.[374]

F. *Judicial Overreaching*

The remaining arguments against congressional control are not so much about the shortcomings of such control as about the consequences of administrative procedures. Administrative procedures depend on judicial review, and judicial review creates a risk that courts will impose their own preferences of wise policy (notwithstanding the Court's admonitions against such conduct). Thus, administrative procedures may pursue political balance in theory, but they permit judicial hegemony in practice. This concern is longstanding among political scientists.[375] Legal scholars also have weighed in, arguing that the only way to address the problem is through a strict rule of judicial deference.[376] Such a rule favors the President.[377]

This argument reflects a deep pessimism about the federal courts and, for that reason alone, we might resist it. When the courts no longer can be depended upon at any level for independent and impartial judg-

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371. See Kagan, supra note 19, at 2260 (arguing that constituents will trigger alarms "more often when an agency changes than when it maintains existing policy" and "resulting congressional oversight thus will tend to have a conservative (in the sense of status quo-preserving) quality").

372. See id. at 2339 (arguing that President "can synchronize and apply general principles to agency action").

373. See, e.g., Nicholas Bagley & Richard L. Revesz, OMB and the Centralized Review of Regulation, 106 Colum. L. Rev. 1260, 1265 (2006) (arguing that OMB review is inherently deregulatory).

374. See supra Part IV.E.

375. See, e.g., McNollgast, Administrative Procedures, supra note 12, at 245 (noting that both Congress and President must control courts as well as agencies).

376. See Frank B. Cross & Emerson H. Tiller, Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals, 107 Yale L.J. 2155, 2159 (1998); Thomas J. Miles & Cass R. Sunstein, Do Judges Make Regulatory Policy? An Empirical Investigation of *Chevron*, 73 U. Chi. L. Rev. 823, 825–27 (2006); Richard L. Revesz, Environmental Regulation, Ideology, and the D.C. Circuit, 83 Va. L. Rev. 1717, 1717–19 (1997).

377. See Sunstein, Beyond *Marbury*, supra note 106, at 2588.

ment, democracy is broken.[378] Furthermore, judicial deference may not fix the problem. Reviewing courts may avoid judicial deference through other means, for example by holding that a statute clearly prohibits a particular interpretation or policy. Justice Scalia has declared success in using this strategy.[379] If scholars are right that democracy is broken, revising the rules will not significantly help. We may as well maintain the rules that we have in hope that courts will apply them responsibly and in hope that the reality is not as grim as it seems. The judiciary is, after all, a coequal branch.

G. *Administrative Cost*

A final issue is the cost of administrative procedures. Many have argued that administrative procedures, as interpreted, are responsible for the "ossification" of the administrative process.[380] Agencies spend their resources sorting party comments and compiling voluminous records rather than addressing public problems. As a result, agencies often delay or forgo action. Thus, these scholars essentially argue that the cost of administrative procedures is prohibitive, not merely excessive in relation to the benefit.

Scholars have offered empirical studies that undermine the conventional wisdom that administrative procedures ossify the administrative process.[381] Professor Anne Joseph O'Connell has completed an empiri-

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378. This argument among administrative law scholars has a counterpart in constitutional scholarship. Many scholars argue that we must either abandon judicial review (and allow "popular constitutionalism") or sharply constrain it (through devices such as originalism or textualism). For a broader defense of judicial review as principled and largely nonpolitical, see generally Daniel A. Farber & Suzanna Sherry, A Call to Judgment: Separating Law from Politics in Constitutional Cases (forthcoming 2008) (manuscript on file with the *Columbia Law Review*).

379. See Antonin Scalia, Judicial Deference to Administrative Interpretations of Law, 1989 Duke L.J. 511, 521 ("One who finds *more* often (as I do) that the meaning of a statute is apparent from its text and from its relationship with other laws, thereby finds *less* often that the triggering requirement for *Chevron* deference exists.").

380. See, e.g., Stephen Breyer, Breaking the Vicious Circle 49 (1993) (finding that even the "very threat of judicial review" has created "complex, time consuming" rulemaking procedures that are unable to keep pace with rapidly changing scientific advances); Jerry L. Mashaw & David L. Harfst, The Struggle for Auto Safety 19, 199–200, 224–54 (1990) (arguing that legal review made achievement of National Highway Traffic Safety Administration rulemaking goals nearly "impossible"); Thomas O. McGarity, Some Thoughts on "Deossifying" the Rulemaking Process, 41 Duke L.J. 1385, 1385–87, 1436–62 (1992) (noting problem and offering remedies); Pierce, Seven Ways, supra note 164, at 71 (noting problem).

381. See Cary Coglianese, Empirical Analysis and Administrative Law, 2002 U. Ill. L. Rev. 1111, 1125–31 (showing that "empirical evidence for a retreat from rulemaking in the face of stringent judicial review is not nearly as clear as has been generally supposed"); William S. Jordan, III, Ossification Revisited: Does Arbitrary and Capricious Review Significantly Interfere with Agency Ability to Achieve Regulatory Goals Through Informal Rulemaking?, 94 Nw. U. L. Rev. 393, 403–07 (2000) (disputing on empirical grounds contention that judicial review ossifies administrative process).

cal study indicating that such procedures do not deter or delay agency regulation as much as previously thought.[382] Professor Cary Coglianese is engaged in an ongoing empirical project about the effects of judicial review on agency action, with early results also contrary to the ossification thesis. More work will be done on this issue, but even as it stands, administrative procedures may not impose prohibitive costs.

There remains the issue of whether the costs of administrative procedures, as interpreted by the Court, nevertheless outweigh the benefits. This determination requires subjective judgment, but it bears emphasis that our democracy values procedures despite the costs. The Constitution prizes the legislative process, although it is onerous. Indeed, its costs serve a purpose, diminishing the production of improvident law.[383] The President endorses the White House regulatory review process, though resource intensive, so much so that President Bush has recently expanded it to include guidance documents.[384] Finally, Congress has not streamlined administrative procedures in response to the cases expanding them.[385] These are all indications that our elaborated administrative procedures, though burdensome, are worth the price.

To summarize: The criticisms of congressional control may not be as damaging as some scholars may think, and, in any event, may be no more damaging than the criticisms of presidential control. The foregoing arguments are not meant to suggest that we should cultivate a system of one-sided congressional control. The recommendation is quite the contrary. If each branch has weaknesses, then neither branch has a superior claim to control agency action. Moreover, each branch might work to keep the other on track, exactly as the Framers envisioned. All things considered, a system of mutual checks is not a cure-all but simply a safe bet.

CONCLUSION

This Article has joined the insights of positive political theorists about the purpose of administrative procedures with the aim of legal scholars to understand administrative law in a way that makes agencies

382. See Anne Joseph O'Connell, The Regulation Clock and Political Transitions: An Empirical Portrait of the Modern Administrative State 29 (U.C. Berkeley Pub. L. Research Paper No. 999099, 2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=999099 (on file with the *Columbia Law Review*) (finding that "procedural costs to [agency] rulemaking are not so high as to prohibit significant regulatory activity by agencies" based on analysis of data from Unified Agenda of Federal Regulatory and Deregulatory Actions (1983–2003)); see also Jason Webb Yackee & Susan Webb Yackee, Is Federal Agencies Rulemaking "Ossified"? The Effect of Procedural Constraints on Agency Policymaking 3, 24 (April 9, 2007) (unpublished manuscript, on file with the *Columbia Law Review*) (finding little support for ossification thesis based on analysis of similar data).

383. See Eskridge & Ferejohn, Article I, Section 7 Game, supra note 144, at 528–33.

384. See Exec. Order No. 13,422, 72 Fed. Reg. 2763 (Jan. 23, 2007).

385. See Stephen P. Croley, The Administrative Procedure Act and Regulatory Reform: A Reconciliation, 10 Admin. L.J. 35, 39 (1996).

acceptable in our constitutional structure. In so doing, it has produced a descriptively superior and normatively defensible picture of administrative law. It has shown that administrative law can be understood as providing Congress with access to information about agency action before it is final, and even with access to information about agency inaction. It does not contend that the standard legal account of administrative procedures—as promoting due process and rule-of-law values—is inaccurate. Rather, it maintains that the alternative account has explanatory power that the conventional account lacks.

As for why administrative law looks this way, this Article does not rule out political science explanations, but it finds them lacking. It therefore argues that the Court is operating more as lawyers tend to think, as trying to forge the best rules for agency action. Yet it does not view the Court as confined to the pursuit of typical legal values. Rather, it understands the Court as cognizant of strategic political interests. In interpreting administrative procedures and forging administrative law more generally, the Court has accommodated the practical needs of politicians to control agency action within a broader constitutional system of checks and balances. The Court thus has positioned itself as mediator of the political branches in the administrative process.

After years of cycling between procedures and politics in administrative law, this account moves us forward. We can combine the democratic theory that legal scholars seek with the practical reality that positive political theorists identify. We can gain a better understanding of the Court's cases. The overall result is that we can deepen our sense of the Court's role in the regulatory state. Rather than seeing the Court as rejecting politics, we can see it as accepting politics, but still committed to ensuring core constitutional values.