

# Washington University Law Quarterly

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VOLUME 72

NUMBER 1

1994

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## ARTICLES

### THE POSITIVE POLITICAL DIMENSIONS OF REGULATORY REFORM\*

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For valuable help, I would like to thank John Ferejohn, Jay Hamilton, Emerson Tiller, Jan Vetter and Barry Weingast.

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## I. INTRODUCTION

This Article is concerned with two critical and interrelated questions in American public law. The first question is how the law should regulate politics. Specifically, how can legal doctrine be brought to bear on processes of politics and political decisionmaking in order to produce superior outcomes and to improve the operations of political process? This question has been central to the agenda of public law scholars in modern

times.<sup>1</sup> During the 1960s and 70s, when the Legal Process movement commanded the attention of public law scholars, the question whether and to what extent law could perfect politics was *the* core question of the field.<sup>2</sup> What was fundamentally at stake in the question of how best to construct a system of public law—constitutional law, administrative law, federal jurisdiction, regulatory law—was the efficacy and competence of American political and legal institutions under alternative doctrinal regimes and rules of law. Throughout the era in which the courts continually revisited questions concerning the desirability of judicial intervention to reign in the pernicious offspring of flawed political processes,<sup>3</sup> was the driving Legal Process theme that courts could perform the task of improving politics and political decisionmaking. The notion of courts as capable of credible interventions into process failures survived the decline of Legal Process as the dominant organizing principle in public law doctrine and theory.<sup>4</sup>

The second question is how the law should deal with the modern regulatory process. We live, as we are constantly reminded, in an administrative state.<sup>5</sup> Regulation and administration are an ever-present

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1. See, e.g., LOUIS FISHER, *CONSTITUTIONAL DIALOGUES* (1988); ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* (2d ed. 1986); JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* (1980); JOHN H. ELY, *DEMOCRACY AND DISTRUST* (1980); MARTIN SHAPIRO, *LAW AND POLITICS IN THE SUPREME COURT: NEW APPROACHES TO POLITICAL JURISPRUDENCE* (1964); Paul S. Edwards & Nelson W. Polsby, *Introduction: The Judicial Regulation of Political Processes—In Praise of Multiple Criteria*, 9 *YALE L. & POL'Y REV.* 190 (1991); Jon G. Deutsch, *Neutrality, Legitimacy, and the Supreme Court: Some Intersections Between Law and Political Science*, 20 *STAN. L. REV.* 169 (1968).

2. See generally Henry M. Hart, Jr. & Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Laws* (tent. ed. 1958) (on file with author). There have been a number of pathbreaking scholarly analyses of the Legal Process movement published in the past five years. See, e.g., Neil Duxbury, *Faith in Reason: The Process Tradition in American Jurisprudence*, 15 *CARDOZO L. REV.* 601 (1993); William N. Eskridge, Jr. & Gary Peller, *The New Public Law Movement: Moderation as a Postmodern Cultural Form*, 89 *MICH. L. REV.* 707 (1991); Gary Peller, *Neutral Principles in the 1950's*, 21 *U. MICH. J.L. REF.* 56 (1988). See also EDWARD PURCELL, *THE CRISIS OF DEMOCRATIC THEORY* (1973); Jan Vetter, *Postwar Legal Scholarship on Judicial Decisionmaking*, 33 *J. LEGAL EDUC.* 412 (1983).

3. See, e.g., *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976); *Buckley v. Valeo*, 424 U.S. 1 (1976); *Powell v. McCormack*, 395 U.S. 486 (1969); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Baker v. Carr*, 369 U.S. 186 (1962). See generally Hans A. Linde, *Due Process of Lawmaking*, 55 *NEB. L. REV.* 197 (1976).

4. See, e.g., Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 *VA. L. REV.* 747 (1991).

5. See THEODORE J. LOWI, *THE END OF LIBERALISM* (2d ed. 1980); Edward L. Rubin, *Law and Legislation in the Administrative State*, 89 *COLUM. L. REV.* 369 (1989); Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 *HARV. L. REV.* 421 (1987).

source of policies and programs.<sup>6</sup> There was a time, certainly, when this question was approached with a studied skepticism. The bulk of the Progressive era and New Deal architects thought that law was inconsistent with sound administration of the regulatory state.<sup>7</sup> The thrust of American public law should, in the thinking of an earlier generation of public law scholars, be concerned with, as the song says, “get[ting] out of the way if you can’t lend a hand.”<sup>8</sup> It is well known that American public law made a sharp turn in the late 60s and 70s and, in caselaw and commentary, the energies of American administrative law were directed toward constructing rubrics and regimes of legal control.<sup>9</sup> The question of how law should deal with the regulatory state remains central to the agenda of American public law scholarship.

Each of these questions is fundamentally about the relationship between law and government. Yet, legal scholars have been frequently ambivalent in absorbing the thoughts and insights of those political scientists whose job it is to think carefully about precisely this relationship. The separation of functions, with legal scholars thinking about law and political scientists thinking about politics, cannot be easily maintained where the very underpinnings of the subject call for simultaneous attention to both elements and to the intersections between the two.<sup>10</sup> The most fruitful efforts to understand the contours of American public law—its possibilities, its limits, its normative foundations—have grown out of the collaborative efforts of lawyers and social scientists to understand the phenomena that underlies their respective disciplines. For lawyers, this has generally meant critically examining the dimensions of politics and political

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6. See generally CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* 74-110 (1990); Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 *STAN. L. REV.* 1189 (1986).

7. For a classic statement, see JAMES LANDIS, *THE ADMINISTRATIVE PROCESS* (1938). See also Sunstein, *supra* note 5, at 422-25.

8. BOB DYLAN, *THE TIMES THEY ARE A-CHANGIN* (Columbia Records 1964). Dylan scholars will note that the precise quotation is the following: “Your old road is rapidly aging/Get out of the new one if you can’t lend a hand . . .”

9. See, e.g., LOUIS L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* (1965); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 *HARV. L. REV.* 1667 (1975). For a discussion of this era, see generally WALTER GELLHORN ET AL., *ADMINISTRATIVE LAW: CASES AND COMMENTS* 475-503 (8th ed. 1987).

10. See Richard A. Posner, *The Decline of Law as an Autonomous Discipline: 1962-87*, 100 *HARV. L. REV.* 761 (1987).

decisionmaking;<sup>11</sup> for political scientists, this has meant examining the nature and qualities of law, legal rules, and legal institutions.<sup>12</sup> Mutually reinforcing attention to law and government is crucial to tackling the two interrelated questions.

One of the more interesting and important set of perspectives on politics and regulation over the past thirty years has been the use of rational choice theory to study regulatory decisionmaking and political processes.<sup>13</sup> Although styled as an analytical paradigm, rational choice theory has moved off in many different directions. Some scholars have concentrated on the use of interest group theory to study the demand for and the supply of regulatory policy by administrative agencies and the legislature.<sup>14</sup> Others have considered whether "democratic" decisionmaking in multi-member, collective institutions is possible within certain conditions.<sup>15</sup> Still others have considered the economic organizations of bureaucratic institutions from the perspective of the "new economics of organization."<sup>16</sup> This disparate body of work is held together by the underlying rational choice heuristic, the assumption that political decisionmakers act rationally with an eye toward accomplishing certain aims and that there exist certain conditions and constraints on politicians' ability to pursue these aims within their institutions.<sup>17</sup> Rational choice theories of politics are centrally concerned with the same fundamental issue as are public law scholars: the relationship between law and government.

In recent years, a growing number of political economists have brought together a number of these strands of rational choice theories and, in particular, the technologies of collective choice theory, principal-agent theory and game theory, in order to develop a comprehensive positive

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11. See, e.g., JERRY L. MASHAW & DAVID L. HAREFT, *THE STRUGGLE FOR AUTO SAFETY* (1990); SUNSTEIN, *supra* note 6.

12. See, e.g., GERALD ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991); MARTIN SHAPIRO, *WHO GUARDS THE GUARDIANS? JUDICIAL CONTROL ON ADMINISTRATION* (1988); R. SHEP MELNICK, *REGULATION AND THE COURTS* (1983); Robert Kagan, *Adversarial Legalism and American Government*, 10 J. POL'Y ANALYSIS & MGMT. 369 (1991).

13. For a valuable survey of some important currents of theory, see DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* (1991). See generally *infra* part III.B.

14. See FARBER & FRICKEY, *supra* note 13, at ch. 2. See generally *infra* part III.B.

15. See FARBER & FRICKEY, *supra* note 13, at ch. 3. See generally *infra* part IV.B.2.

16. See, e.g., Terry M. Moe, *The New Economics of Organization*, 28 AM. J. POL. SCI. 739 (1984). See generally *infra* part III.C.

17. See Roger G. Noll, Introduction to Symposium, 57 LAW & CONTEMP. PROBS. (forthcoming June 1994).

theory of politics.<sup>18</sup> Among the various dimensions to this ambition, two are especially relevant to the purposes of this Article. One is the concern with understanding systematically, and with the aid of formal theory, the nature of the political institutions that are involved in regulatory decisionmaking.<sup>19</sup> Too often, public law scholars have accepted descriptions of Congress, the President, the judiciary, and the administrative agencies as monolithic entities, essentially categorizable by how much they are, and properly should be, concerned with politics or law. Moreover, they have described the essential differences among the branches mainly at the level of *power*—that is, what sort of powers Congress, the President, the agencies, and the courts can exercise—as though the lines are severe and the distribution of power immutable. Positive political theories of legislation and regulation question the premises of these assumptions and principles. By contrast to traditional public law scholarship, attention in positive political theory is drawn to questions of how institutions are constructed and how they function; they are treated as neither monolithic nor immutable. Instead, they both reflect and shape the course of regulatory decisionmaking as instruments of politicians' rational strategies and as constraints on the exercise of such strategies. A second dimension that is especially relevant is the consideration of the dynamic qualities of the regulatory process.<sup>20</sup> Regulatory policymaking is considered, in the positive political theory framework, as a series of processes in which institutions compete with one another for regulatory influence and control. Regulation and administration are merely the outputs of political processes. The creation of a regulatory program represents the setting in motion of a process which presents to politicians sources of opportunities, as well as risks. Understanding how regulatory policy is shaped requires understanding how politicians take advantage of these opportunities and deal with these risks. Positive political theory provides frameworks for thinking about the dynamics of regulatory policymaking in a system comprised of competing institutions and loci of power.

The prospect that we can incorporate the insights from positive political theory into our thinking about the questions of how law should regulate

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18. For a breezy, but useful, discussion of the phrase "positive political theory," see Daniel A. Farber & Philip P. Frickey, *Foreword: Positive Political Theory in the Nineties*, 80 GEO. L.J. 457 (1992) (defining positive political theory as "non-normative, rational-choice theories of political institutions").

19. See discussion *infra* part IV.B-D.

20. See discussion *infra* part IV.E.

politics and deal with the administrative state depends upon premises that are ultimately more normative than positive. Rational choice theory has no recommendations for legal reform. Positive theory cannot replace normative theory. Recommendations for regulatory reform, whatever their content, must be built on a construction of normative principles and positive analysis in which the basic question to which we always return is: How does this positive analysis or description help us to think about the potential or limits of this strategy of legal reform?

Still yet, positive political theory can help us rethink our premises. One critical premise that underlies this Article is that law and the institutions that make law are embedded within politics. This is not meant to sound like a variation on the critical theme that "law is politics." Rather, the thrust of the premise is conservative; law should not be thought of as an exogenous set of principles that can be shaped to rescue important normative principles from legislative and administrative politics. The farther we try and move from the realities of American government and administration in establishing our normative principles of law, the less likely we are to improve (or, if you prefer, "perfect") the legislative and administrative processes that supply public policy.<sup>21</sup> Law does not merely reflect politics; but it does fundamentally and inescapably grow out of politics and the structure of political decisionmaking. Accordingly, sustained empirical and theoretical attention to the American political system—whether from the perspective of positive political theory—is necessary to undergird normative public law.

The object of this extended consideration of positive political theory as a source of frameworks for thinking about legislative politics and regulation is to examine why efforts at reforming political processes and regulation frequently run up against the realities of politics and the limits of public law. Politics constrain regulatory reform; at the same time, a key part of the agenda of regulatory reform is to reconstruct politics. This Article brings positive political theory to bear in appraising this dilemma.

Part I sets out some of the basic elements of the problem. The objectives of regulatory reform are to improve the product of regulation and administration. The increasing urgency with which scholars speak of the regulatory predicament and of regulatory paradoxes suggests that contemporary regulation has failed in important ways. These failures are, as is suggested in Part I, significantly the product of the institutional dimensions

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21. See discussion *infra* part V.B.

of regulatory politics.

In Part II, I examine the efforts to understand institutions and the dimensions of institutional decisionmaking from the perspective of rational choice theory. Part II claims that the two principal efforts to understand the role of institutions in regulation—interest group theory and the new economics of organization—are seriously flawed. Specifically, neither effort directly confronts the pivotal roles of politics and law in enabling and constraining rational political actors and in framing regulatory choices.

Part III represents an extended examination of the strands of positive political theory. Following a discussion of the basic themes and technologies of positive political theory, I consider a number of different positive theories of legislative, presidential, and judicial institutions. The message of these eclectic theories is that political institutions represent the product of rational, strategic choices made by political actors within an environment made up of competing institutions, of uncertainty concerning the nature and effect of politicians' choices, and of limits imposed by law. At the end of Part III, I consider the dynamics of regulatory policymaking from the perspective of positive political theories of inter-institutional competition for regulatory influence and control.

In Part IV, I consider the applications of positive political theory to some normative issues in statutory interpretation and administrative law. The basic theme is that positive political theories of legislation and regulation can shed important light on the prospects and limits of regulatory reform; to appreciate this, I focus attention on two particular aspects of public law: statutory interpretation and administrative law.

This Article strikes a tone that reflects attention to the trees, often at the expense of the forest. The object, however, is more ambitious than merely surveying a part of the rational choice terrain. While I am concerned with understanding many of the debates that rage within a particular part of a particular paradigm—positive political theory as a branch of rational choice theory—and how they help us in understanding politics and regulation, I have in mind, at the same time, the larger questions with which I began this introduction. The issue is not primarily whether we should venerate positive political theory as a method for understanding the politics of regulation and for grounding normative public law scholarship. Instead, the issue is broader: How can public law scholars make use of the contributions of positive theory and social science in order to develop more sophisticated and analytically rich normative theories of public law? The state of the two fields that are considered in Part IV—statutory interpretation and administrative law—suggest that public law scholars have not

always made the most use of contemporary social science, much less rational choice theory. Let us put it this way: If positive political theory could do for public law what, say, finance theory has done for corporate law, we would have made progress indeed. The interpenetration of finance theory into the legal literature on corporate law has not *replaced* prescriptive theory with positive analysis and data. Rather, it has provided another window for the fundamental questions that have defined the theory. Positive political theory likewise furnishes a fresh view at the same essential cathedral.<sup>22</sup>

## II. THE OBJECTIVES OF REGULATORY REFORM

### A. *Perspectives on Regulatory Failure*

By nearly all accounts, we are in the grips of a regulatory predicament.<sup>23</sup> We want governmental regulation designed to fulfill a number of critical social needs, such as making consumer products, the workplace, and the roads safer; cleaning the environment; and improving the conditions of the socially and economically disadvantaged.<sup>24</sup> We have had a taste of success; regulation over the course of the past two decades has yielded significant benefits.<sup>25</sup> Yet, modern regulation has fallen far short of accomplishing its objectives. While measuring regulatory success or failure is notoriously difficult,<sup>26</sup> resort to a familiar cadre of evaluative criteria has helped scholars construct a critical picture of contemporary regulation. This picture suggests that, by a number of different measures, regulation has fallen short of its intended goals and, in some important respects, has actually left us worse off.

There are different dimensions to this critique. Perhaps the most common basis for criticizing contemporary regulatory policy has been that regulation, taken as a whole, imposes significant costs on the economy that

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22. See, e.g., Eugene F. Fama, *Agency Problems and Residual Claims*, 26 J.L. & ECON. 327 (1983).

23. See, e.g., STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* (1993); SUNSTEIN, *supra* note 6; AARON WILDAVSKY, *SEARCHING FOR SAFETY* (1988).

24. See SUNSTEIN, *supra* note 6, at ch. 2.

25. See *id.* at 77-81.

26. See *id.* at 75-77. See also Robert W. Hahn & John A. Hird, *The Costs and Benefits of Regulation: Review and Synthesis*, 8 YALE J. ON REG. 233 (1991). On cost/benefit analysis generally, see R. Shep Melnick, *The Politics of Cost-Benefit Analysis*, in *VALUING HEALTH RISKS, COSTS, AND BENEFITS FOR ENVIRONMENTAL DECISION MAKING: REPORT OF A CONFERENCE* (P. Hammond & R. Coppock eds., 1990).

are not justified by its corresponding benefits.<sup>27</sup> These costs include the decline in productivity of American enterprise as a result of complying with federal and state regulations. Often this decline is styled, albeit with some hyperbole, as a threat to America's "competitiveness."<sup>28</sup> Every critic has his or her favorite parade of horrors. John Mendeloff, for example, has described the tremendous investment the Occupational Safety and Health Administration (OSHA) made to eradicate vinyl chloride in the workplace, a project that expended around \$40 million for each life saved.<sup>29</sup> The regulation of asbestos is another common scapegoat.<sup>30</sup> OSHA's 1986 exposure limit on asbestos in the workplace cost an estimated \$71 million per statistical life saved.<sup>31</sup> Perhaps the all-time champion for the greatest mismatch between costs and benefits in the health and safety area is, according to the federal government's 1992 regulatory report, the EPA's hazardous waste listing for wood-preserving chemicals, a regulation with an estimate \$5.5 billion price tag per life saved.<sup>32</sup>

Beyond the objection that regulation's costs exceed its benefits, critics argue that the techniques constructed by politicians are unsuited to the regulatory goals established via the program.<sup>33</sup> The problem is one of regulatory "mismatch," described as the use of inapt regulatory methods and strategies in the pursuit of regulatory goals.<sup>34</sup> Sometimes the problem is with the particular regulatory device that the politicians have chosen. Reliance on rent control, for instance, as a means of ensuring greater distributional equity among the population of renters or rentees has been criticized as a counterproductive method of accomplishing its intended goals.<sup>35</sup> A standard economic objection is that limiting the owners' profits limits the supply of available rental units, thus driving up the rents of the remaining units. Moreover, limiting the owner's profit limits the incentives

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27. See, e.g., S. REP. NO. 1080, 97th Cong., 1st Sess. 17 *passim* (1981) (collecting and describing studies). See also LESTER B. LAVE, *THE STRATEGY OF SOCIAL REGULATION: DECISION FRAMEWORKS FOR POLICY* (1981); Hahn & Hird, *supra* note 26, at 261-78.

28. See MARK PORTER, *THE COMPETITIVE ADVANTAGE OF NATIONS* 507-41 (1990).

29. JOHN M. MENDELOFF, *THE DILEMMA OF TOXIC SUBSTANCE REGULATION: HOW OVERREGULATION CAUSES UNDERREGULATION AT OSHA* 22 (1988).

30. See BREYER, *supra* note 23, at 12-15, 26-27 (citing *Regulatory Program of the United States Government, April 1, 1991—March 31, 1992*, at 12).

31. *Id.*

32. *Id.* at 26-27.

33. See *infra* text accompanying notes 59-64 (describing the flaws with this argument).

34. See STEPHEN BREYER, *REGULATION AND ITS REFORM* (1982).

35. See, e.g., Edgar Olson, *Is Rent Control Good Social Policy?*, 67 CHI.-KENT L. REV. 931 (1991).

of owners to invest in upkeep and improvement, thus reducing the quality of the units. In a similar vein is the economic objection to the minimum wage, that it reduces employment by making it more expensive for an employer to hire marginal workers.<sup>36</sup> Additionally, consider the argument that the use of particular price control strategies to regulate air travel before deregulation in the late 1970s preserved inefficiencies in the industry and harmed consumers.<sup>37</sup>

More generally, the use of command-and-control strategies of regulation has come under fire.<sup>38</sup> In the past two decades, government prohibitions and restrictions, often imposed through administrative regulation and, occasionally, through judicial decree have been the favored strategy of regulation. In any case, these "regulation by directive" approaches have constricted the ability of regulated industries to adapt creatively and more efficiently to the social and economic goals underlying regulation's imperatives. As with the critique of modern regulation generally, the concern is that command-and-control regulation is neither cost effective nor cost beneficial when weighed against alternative regulatory techniques.<sup>39</sup> Specifically, command-and-control strategies perform poorly when called upon to regulate imperfectly perceived, polycentric risks.<sup>40</sup> When regulators are fairly low down on the technological learning curve, reliance on direct and particular techniques of regulation risks significant error. Recent calls for a more sophisticated approach to risk regulation<sup>41</sup> or,

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36. See, e.g., FINIS WELCH, *MINIMUM WAGES: ISSUES AND EVIDENCE* (1978).

37. See, e.g., ALFRED E. KAHN, *THE ECONOMICS OF REGULATION: PRINCIPLES AND INSTITUTIONS* 209-20 (1988). For a lively discussion of Professor Kahn's role in deregulating the airlines, see THOMAS K. MCCRAW, *PROPHETS OF REGULATION* ch. 7 (1984).

38. See, e.g., IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION* (1992); MASHAW & HARFST, *supra* note 11, at 233-47; Bruce A. Ackerman & Richard B. Stewart, *Reforming Environmental Law: The Democratic Case for Market Incentives*, 13 COLUM. J. ENVTL. L. 171 (1988); Richard B. Stewart, *Regulation, Innovation, and Administrative Law: A Conceptual Framework*, 69 CAL. L. REV. 1256 (1981).

39. The conspicuous debate over the use of transferable emission permits as a substitute for classic command-and-control regulation illustrates the nature of the disagreement. See, e.g., Robert W. Hahn & Roger G. Noll, *Environmental Markets in the Year 2000*, 3 J. RISK & UNCERTAINTY 351 (1990); Robert W. Hahn & Gordon L. Hester, *Where Did All the Markets Go? An Analysis of EPA's Emissions Trading Program*, 6 YALE J. ON REG. 109 (1989); Roger G. Noll, *Implementing Marketable Emissions Permits*, 72 AM. ECON. REV. 120 (1982).

40. See, e.g., Donald T. Hornstein, *Lessons from Federal Pesticide Regulation on the Paradigms and Politics of Environmental Law Reform*, 10 YALE J. ON REG. 369 (1993); John S. Applegate, *The Perils of Unreasonable Risk: Information, Regulatory Policy, and Toxic Substances Control*, 91 COLUM. L. REV. 261 (1991).

41. BREYER, *supra* note 23, at ch. 3; Clayton P. Gillette & James E. Krier, *Risks, Courts, and Agencies*, 138 U. PA. L. REV. 1027 (1990).

more ambitiously, for a "reconstitutive law" for the modern regulatory state,<sup>42</sup> have been grounded on the view that modern command-and-control strategies frequently fail to accomplish their purported aims.<sup>43</sup>

In addition, we are plagued, argues Cass Sunstein, by a series of regulatory paradoxes.<sup>44</sup> One paradox is that regulating new risks aggressively leaves in place old, and more threatening, risks.<sup>45</sup> For instance, the Environmental Protection Agency's (EPA) regulations requiring installation of anti-smog devices in cars built after a certain year means that older, more polluting cars stay on the road longer.<sup>46</sup> Relatedly, the requirement in air pollution statutes that polluters use the "best available technology" in controlling pollution retards the development of newer, more effective technologies for pollution control.<sup>47</sup> Moreover, requiring stringent regulation may, paradoxically, result in underregulation.<sup>48</sup> The idea here is that regulators will be reluctant to act when their only options are no regulation or extremely strict regulation. Consider the example of toxic substances regulation.<sup>49</sup> The Occupational Safety and Health Act of 1970 (1970 Act) is a classic command-and-control regulatory statute,<sup>50</sup> it creates an agency and charges it with the responsibility of regulating with precision and energy substances that create a "material impairment of health."<sup>51</sup> In its early years, OSHA moved slowly to regulate toxic substances in the workplace. When it acted, however, the standards were quite strict on the theory that the 1970 Act obliged the agency to regulate risks up to the point at which the regulated industry would collapse. This was its understanding of the "all regulation that is feasible" command of the 1970 Act.<sup>52</sup> Ten years after its enact-

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42. See Richard B. Stewart, *Reconstitutive Law*, 46 MD. L. REV. 86 (1986). Cf. SUSAN ROSE-ACKERMAN, *REFORMING ADMINISTRATIVE LAW* (1991).

43. This concept of "regulatory aims" is quite slippery as we will consider in more detail below. See *infra* text accompanying notes 59-64.

44. See, e.g., Cass R. Sunstein, *Paradoxes of the Regulatory State*, 57 U. CHI. L. REV. 407 (1990).

45. See *id.* at 417-19; Peter Huber, *The Old-New Division in Risk Regulation*, 69 VA. L. REV. 1025 (1983).

46. See BRUCE A. ACKERMAN & WILLIAM T. HASSLER, *CLEAN COAL/DIRTY AIR* 27 (1981).

47. See Sunstein, *supra* note 44, at 420-21; Bruce A. Ackerman & Richard B. Stewart, *Reforming Environmental Law*, 37 STAN. L. REV. 1333 (1985).

48. See, e.g., MENDELOFF, *supra* note 29; Sunstein, *supra* note 44, at 413-16.

49. On OSHA and toxic substances, see generally GRAHAM WILSON, *THE POLITICS OF SAFETY AND HEALTH* (1985); BENJAMIN W. MINTZ, *OSHA: HISTORY, LAW AND POLICY* (1984).

50. For a good account of the political origins of the 1970 Act, see Mark Kelman, *Occupational Safety and Health Administration*, in *THE POLITICS OF REGULATION* 236 (James Q. Wilson ed., 1980).

51. 29 U.S.C. §§ 651-678 (1988).

52. See MENDELOFF, *supra* note 29.

ment, however, the Supreme Court created a limitation to the apparently limitless scope of the regulatory charge to the agency, holding that OSHA was responsible for regulating only "significant" risks.<sup>53</sup> OSHA's statutory responsibilities after this decision, however, remained very stringent; OSHA took on the responsibility to construct a web of command-and-control regulation in order to eradicate workplace risks.<sup>54</sup> The result of this concerted strategy—a strategy formulated through the agency's interpretation of the language and history of the 1970 Act—was an underregulation of the most severe risks and an overregulation of those risks which, on balance, posed less substantial threats to worker health.<sup>55</sup> Hence a regulatory paradox: Heavy-handed regulation resulted in underregulation and therefore seemed to undermine the very purposes for which this strict statute was created.

Beyond the paradoxical quality of contemporary regulatory strategy, some commentators insist that the main problem is underenforcement and underregulation or, even more simply, the failure of agencies to regulate adequately the risks and harms that come within their programmatic mandates. The classic whipping-boy of this category has been the Consumer Products Safety Commission (CPSC) and its statutory charge under the Consumer Product Safety Act of 1972 to regulate risks to consumers. Created with fanfare in the midst of the burst of new social regulation in the early 1970s, the CPSC has remained in virtual desuetude.<sup>56</sup> Few consumer risks have been regulated; the CPSC has concentrated its rare efforts on rather obscure risks, such as lawn darts and disposable lighters, while eschewing regulation of those risks that are

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53. *Industrial Union Dep't. v. American Petroleum Inst.*, 448 U.S. 607 (1980) (The Benzene Case).

54. Prior to the *Benzene* decision, OSHA was reluctant to attempt to quantify the risk presented by substances, and generally devoted little attention to the significance of the risks presented by these various substances. Since the Supreme Court has compelled the agency to change these policies, however, OSHA's determinations of significant risk have been among the most coherent of all such federal regulatory decisions. Frank B. Cross, *Beyond Benzene: Establishing Principles for a Significance Threshold on Regulatable Risks of Cancer*, 25 EMORY L.J. 1, 12-13 (1986).

55. See MENDELOFF, *supra* note 29, at 119-21. John Dwyer disagrees with Mendeloff's assessment that the *Benzene* decision exacerbated underregulation. John P. Dwyer, *Overregulation*, 15 ECOL. L.Q. 719, 730-32 (1988) (book review). He notes that OSHA was quite slow to adopt regulatory standards before the Court's decision. *Id.* at 730. Moreover, the case, in proffering the opaque "significant risk" standard accorded significant latitude to agencies to regulate at their own pace. *Id.* at 730-31. In recent years, however, the (increasingly conservative) D.C. Circuit has strengthened the "significance" criterion. See, e.g., *United Auto Workers v. OSHA*, 938 F.2d 1310 (D.C. Cir. 1991).

56. See, e.g., Teresa M. Schwartz, *The Consumer Product Safety Commission: A Flawed Product of the Consumer Decade*, 51 GEO. WASH. L. REV. 32 (1982).

widely regarded as more significant.<sup>57</sup> As a result, the CPSC has been perceived as something of a laughing-stock, an agency that reacts slowly and ineptly to public outcry but generally remains in the shadows. Another prominent target has been the Federal Trade Commission (FTC), the agency assigned to regulate unfair trade practices and to implement important parts of the federal antitrust laws.<sup>58</sup> During the 1970s, the FTC was mostly dormant, declining to pursue regulatory initiatives such as restrictions on certain forms of children's advertising and regulation of the funeral industry. The FTC was, for all practical purposes, fair game to critics writing in the 1980s that the agency had eschewed its statutory responsibilities to regulate aggressively. The FTC was seen as a rogue agency, shielded from punishment by its legislative and executive benefactors and irresponsible in its unwillingness to tackle head-on the significant regulatory issues under its ken.<sup>59</sup>

Underlying many of the critiques described above is the notion that the goals of the regulatory program are not being met.<sup>60</sup> This is seen as a principal element of the so-called regulatory predicament. Agencies and administrators as creatures of Congress and the President are falling short of their missions and disappointing their makers by their incompetence and opportunistic behavior. The consequence is not merely poor regulation in some sort of objective terms, but an incommensurability between the structure and purpose of the regulatory program and its implementation.

However, the notion that Congress establishes regulatory goals and aims that the agency struggles to meet is problematic. To begin with, there is no monolithic "Congress" to which we can ascribe overarching intentions,<sup>61</sup> Congress conducts its business through a combination of institu-

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57. Examples might include cigarettes and firearms.

58. See KENNETH W. CLARKSON & TIMOTHY J. MURIS, *THE FEDERAL TRADE COMMISSION SINCE 1970: ECONOMIC REGULATION AND BUREAUCRATIC BEHAVIOR* (1981); Ernest Gellhorn, *Regulatory Reform and the Federal Trade Commission's Antitrust Jurisdiction*, 49 TENN. L. REV. 471 (1982); Robert A. Katzmann, *Federal Trade Commission*, in *THE POLITICS OF REGULATION* 152 (James Q. Wilson ed., 1980).

59. A revisionist interpretation of the FTC's behavior during this era, an interpretation illustrative of some of the positive political theory themes discussed in this Article, is provided in Barry P. Weingast & Mark J. Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 J. POL. ECON. 765 (1983).

60. See sources cited in *supra* notes 56-58.

61. Kenneth A. Shepsle aptly titled his contribution to a recent positive political theory symposium, *Congress Is a "They" Not an "It."* See Kenneth A. Shepsle, *Congress Is a "They" Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239 (1992). See also discussion *infra* note 195 and accompanying text.

tions and coalitions.<sup>62</sup> Insofar as regulatory statutes are the product of this complex web of lawmaking interactions, these statutes will have multiple purposes.<sup>63</sup> They will set regulatory goals, but may have different understandings and predictions concerning how (and if) these regulatory goals should be met.<sup>64</sup> We should be wary of these critiques. We should not declare that an agency is eschewing its statutory responsibilities by simply identifying an agency and claiming that it has not engaged in what we deem sufficiently aggressive regulation as measured by, say, the number of rules issued or the agency's vigor in pursuing enforcement actions.<sup>65</sup> Rather, we must attempt to understand the dimensions of these responsibilities. Is the regulatory program constructed with an eye toward setting a minimal level of enforcement? Has Congress left to the agency—and to future legislative coalitions—the responsibility to hammer out the proper level and techniques of regulation in the future? To assess the degree to which the agency has “complied” with its regulatory goals, we must understand, and not merely speculate about, the nature and conditions of the regulatory program as constructed by legislators and the President.

The hypothesis at the core of the positive political theory of legislation and regulation is that this process of construction represents exercises in rational, strategic political action. Positive political theory stresses the role of politics and political action in the construction of the regulatory program's construction, implementation, and interpretation.<sup>66</sup> From the perspective of regulatory reform, understanding the role of strategic, political action within the structure of institutions and legal rules helps us understand both what is possible in terms of reforming regulation. Judging what is desirable is, of course, a normative enterprise; all that positive

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62. See *infra* text accompanying notes 278-84 (describing Congress as collection of institutions and coalitions).

63. Recall the example of toxic substances and OSHA. The lesson of the *Benzene* decision was that the Occupational Safety and Health Act of 1970, containing both the section which defined “occupational safety and health standard” as that standard which is “reasonably necessary or appropriate,” 29 U.S.C. § 3(8) (1988) and the section which required the agency to “set the standard which most adequately assures . . . that no employee will suffer material impairment of health or functional capacity . . .,” 29 U.S.C. § 655(b)(5) (1988), embodied multiple purposes. This threatens the sort of sweeping delegation that was held in the *Benzene* decision to be constitutionally problematic. See *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607, 640-46 (1980).

64. On the dilemmas faced by agencies and courts in connection with a statute with multiple purposes, see John P. Dwyer, *The Pathology of Symbolic Legislation*, 17 *ECOL. L.Q.* 233 (1990).

65. This is also the case in the various critiques of the CPSC and the FTC. See discussion *infra* part V.A.

66. See discussion *infra* part IV.D.

theory can provide is the tools, the perspectives, and the frameworks. For prescription, we need to examine the nature and scope of the system's ailments to determine what sort of investments we want to make in regulatory reform.

If we cannot leap to the conclusion that contemporary regulation fails to fulfill its statutory promises, is there any basis to criticize regulation and to call for reform? Yes, but the perspective is more objective and, for that reason, more certain. The real predicament is that regulation seems to yield a declining set of benefits for its costs. Regulation is not clearly making us better off. Regulatory administration is used as a means of expanding the political influence and opportunities of rational politicians rather than as a means of improving the state of the economy and society. It is against the standard of an improved quality of life that contemporary regulation fails, and not against some politically bounded standard of political infidelity and undemocratic conduct.<sup>67</sup>

No one could tackle the overarching question begged by general critiques of regulation: Is contemporary regulation on balance a good or a bad thing? The question is too general and abstract to yield a studied answer. There *are*, however, real questions that lie at the heart of most critiques of regulation in modern America.<sup>68</sup> These questions concern why the

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67. The normative focus here is admittedly on the measurable cost/benefits elements of regulatory performance. What is elided are the issues concerning whether there are other values associated with regulatory policymaking that modern regulation subserves or subverts. For example, a perspective on regulation that stresses the "democratic values" dimension of regulation and administration would presumably evaluate the questions of regulatory failure and regulatory reform much differently. *See, e.g.,* Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1512 (1992); Christopher Edley, Jr., *The Governance Crisis, Legal Theory, and Political Ideology*, 1991 DUKE L.J. 561, 588-98; Robert B. Reich, *Public Administration and Public Deliberation: An Interpretive Essay*, 94 YALE L.J. 1617 (1985). *Cf.* Gerald C. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276 (1984). In another light, the objectives of regulatory reform would be tied to a different set of philosophies. It is not the task of this Article to set out a comprehensive defense of the use of an economic value conception of regulation. Instead, it is to consider seriously the positive political dimensions of regulation and regulatory reform in connection with the practical, economic concerns that are, at least in part, implicated by regulatory policymaking in modern government.

68. I appreciate the extent to which this discussion is focused exclusively on the United States. Of course, there are a wealth of critiques directed at regulation in other industrialized countries and at regulation across a range of countries including the United States. *See, e.g.,* DAVID VOGEL, NATIONAL STYLES OF REGULATION: ENVIRONMENTAL POLICY IN GREAT BRITAIN AND THE UNITED STATES (1986). Studying regulation comparatively is, I would readily concede, quite useful in understanding both the nature of regulatory failure in the United States and also what sort of reforms are possible and desirable. On the other hand, I would insist—for reasons that will hopefully become clearer later in this Article—that the structure of regulation in the United States is, in significant measure, the product of

contemporary structure of regulation seems unable to respond systematically to the problems that call for government response. Beyond the "horror" stories—the Savings and Loan crisis, the scandal in HUD, and so forth—are the vexing dilemmas arising within those programs that seem unable to match appropriate regulatory means to ends. They are unable to accomplish regulatory tasks without expending resources and energies of government agencies and officials for little product and payoff.

### *B. Institutions, Environment, and Regulatory Reform*

As critiques of regulation and the performance of regulatory agencies have burgeoned, legal scholars have tackled questions concerning the appropriate strategies for regulatory reform. A tacit assumption of this normative enterprise is that changes in legal rules and the structures of legal institutions matter; that legal reform can have salutary impacts on the process and substance of regulation. To see whether and how this is so, we must understand the dimensions of the regulatory predicament of which we are so repeatedly reminded by scholars.

There are, as one would expect, nearly as many different explanations for the causes of regulatory failure as regulatory programs themselves.<sup>69</sup> The half century since the New Deal's regulatory experiments were put in place has failed to yield a consensus theory of how and why regulation fails; nor has agreement been reached in light of the attention paid to regulatory problems plaguing the social regulation of the 1960s and 70s. Nonetheless, there are competing perspectives on the nature of regulatory failures. Marver Bernstein's famous theory of the "lifecycle" of regulatory policy and the "capture" theories fashionable among political economists over the past couple of decades are two conspicuous examples of general theories that purport to explain the nature of systematic regulatory failures.<sup>70</sup>

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a set of political institutions and political choices that are distinctly American. Indeed, it is one of the core theses of this Article that the nature and function of American political institutions, as constructed over the course of 200 years, and as functioning in modern America, represent the driving engine(s) of regulatory performance. Put another way, in considering regulatory reform we should look, first, to the characteristics of American political institutions—how they are constructed and what are their important traits. I do not mean to suggest that we turn away from comparative examinations of regulatory policy across a range of different states and societies but, rather, that we appreciate the extent to which American regulation is so much the product of American government and its institutions.

69. For a thorough survey, see Roger G. Noll, *Government Regulatory Behavior: A Multidisciplinary Survey and Synthesis*, in *REGULATORY POLICY AND THE SOCIAL SCIENCES* 9 (Roger G. Noll ed., 1985).

70. MARVER BERNSTEIN, *REGULATING BUSINESS BY INDEPENDENT COMMISSION* (1955); ANTHONY DOWNS, *INSIDE BUREAUCRACY* (1967).

Moreover, organizational theory of the past half-century, beginning with the work of Chester Barnard,<sup>71</sup> Herbert Simon,<sup>72</sup> Philip Selznick<sup>73</sup> and others,<sup>74</sup> while not expressly concerned with crafting a theory of regulatory failure, has contributed to the development of theories concerned with exploring how and why regulation succeeds or fails.

Much of this eclectic body of scholarship, which includes Marxist accounts of regulation's origins,<sup>75</sup> theories of organizational learning and behavior,<sup>76</sup> rational choice accounts of agencies as cartels or as hostages, and organized interest groups,<sup>77</sup> understands the principal determinants of agency performance, good or bad, as the product of the "internal" dimensions of agency performance. Attention may be focused on the individual components of the agency and its policymaking scheme, that is, on the humans involved in running the program. Or, as is more common, the focus is on the complex interrelationships among individuals, groups, roles, rules, and organizational structure, where the task is to understand how these elements of organizational function work (or do not work) together.<sup>78</sup> The task of these explanations is to assess regulatory performance within a framework that concentrates on the structure, incentives, and functions of the organization and its members.<sup>79</sup> Insofar as the

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71. CHESTER I. BARNARD, *THE FUNCTIONS OF THE EXECUTIVE* (1938). For descriptions of Barnard's contributions to the "science" of administration, see, e.g., Oliver E. Williamson, *Chester Barnard and the Incipient Science of Organization*, in *ORGANIZATION THEORY: FROM CHESTER BARNARD TO THE PRESENT AND BEYOND 173-78* (Oliver E. Williamson ed., 1990) [hereinafter *ORGANIZATION THEORY*].

72. HERBERT A. SIMON, *ADMINISTRATIVE BEHAVIOR* (2d ed. 1957). On Simon's contributions, see Williamson, *supra* note 71, at 178-81.

73. See PHILIP SELZNICK, *LAW, SOCIETY, AND INDUSTRIAL JUSTICE* (1969); Philip Selznick, *An Approach to a Theory of Bureaucracy*, 8 *AM. SOC. REV.* 47 (1943).

74. See, e.g., HAROLD SEIDMAN & ROBERT GILMOUR, *POLITICS, POSITION AND POWER* (4th ed. 1986); W. RICHARD SCOTT, *ORGANIZATIONS: RATIONAL, NATURAL, AND OPEN SYSTEMS* (1981); AARON WILDAVSKY, *THE POLITICS OF THE BUDGETARY PROCESS* (1964). For a thumbnail sketch of the role of organization theory in understanding bureaucratic processes, see the discussion in Terry M. Noll, *Politics and the Theory of Organization*, 7 *J. L. ECON. & ORG.* 106, 107-15 (1991).

75. See, e.g., GABRIEL KOLKO, *RAILROADS AND REGULATION, 1877-1916* (1965). See also Noll, *supra* note 69, at 25-26.

76. See, for example, the collection of essays in JAMES G. MARCH, *DECISIONS AND ORGANIZATIONS* (1988).

77. See, e.g., WILLIAM A. NISKANEN, JR., *BUREAUCRACY AND REPRESENTATIVE GOVERNMENT* (1971); WILDAVSKY, *supra* note 74.

78. JAMES G. MARCH & JOHAN P. OLSON, *REDISCOVERING INSTITUTIONS* (1989).

79. See Jerry L. Mashaw, *Improving the Environment of Agency Rulemaking: An Essay on Management, Games, and Legal and Political Accountability*, 57 *LAW & CONTEMP. PROBS.* (forthcoming June 1994).

relevant organization in most regulatory policymaking is the administrative agency (or agencies) obliged to create and implement the regulatory programs, it is the agency and its members that is the principal subject of study.<sup>80</sup>

Exclusive focus on the internal aspects of organizational decisionmaking as a basis for assessing regulatory performance is too narrow, however. There are important "external" components to the regulatory process as well. Regulatory policy takes place within a political environment, an environment that has substantial effects on the functions of the agency and the performance of the program.<sup>81</sup> This external environment consists of a variety of elements. Most central is the legislature, an institution which shapes the world in which regulatory decisions are made in many different ways.<sup>82</sup>

Legislative coalitions fashion statutes and establish the regulatory program, along with the implementation mechanisms with which the program is carried out.<sup>83</sup> Drafted in fairly specific terms, the statute creates the framework within which the regulatory process is set. It is the regulatory program's core.<sup>84</sup> Accordingly, issues concerning the nature and scope of a given program grow out of the choices made by legislative coalitions in the course of designing and shaping the agency's "organic" statute. The external environment is also made up of various nonstatutory forms of legislative decisionmaking.<sup>85</sup> Oversight and budgetary control are two of the most obvious examples.<sup>86</sup> Beyond the legislature, the

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80. Examples of studies by legal scholars that focus on the internal dynamics of regulatory decisionmaking within agencies include JERRY L. MASHAW, *BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS* (1983); Thomas O. McGarity, *The Internal Structure of EPA Rulemaking*, 54 *LAW & CONTEMP. PROBS.* 57 (1991); Peter L. Strauss, *Rules, Adjudications and Other Sources of Law in an Executive Department: Reflections on the Interior Department's Administration of the Mining Law*, 74 *COLUM. L. REV.* 1231 (1974).

81. For recent studies that stress the external environment as the principal determinant of regulatory performance, see MASHAW & HARFST, *supra* note 11; Mashaw, *supra* note 79. For a detailed discussion of the positive political theory studies see *infra* part IV.

82. See *infra* part IV.B.

83. See Rubin, *supra* note 5, at 418-23 (describing the significance of implementation mechanisms).

84. See Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 *U. PA. L. REV.* 549 (1985).

85. Understanding the dimensions of the external environment of agency decisionmaking requires that we carefully examine the interaction of statutory and non-statutory decisionmaking. See discussion *infra* part V.B.

86. See JOEL D. ABERBACH, *KEEPING A WATCHFUL EYE: THE POLITICS OF CONGRESSIONAL OVERSIGHT* (1990); CHRISTOPHER H. FOREMAN, JR., *SIGNALS FROM THE HILL: CONGRESSIONAL*

President and his preferences shape regulatory decisionmaking.<sup>87</sup> The President participates in the enactment of the regulatory statute.<sup>88</sup> Moreover, he wields a fairly substantial role in superintending regulatory policymaking through personnel, budgetary, and oversight controls.<sup>89</sup> Courts and judicial doctrine also make up substantial elements of regulation's external environment.<sup>90</sup>

The choice between the internal and external environment as the principal locus of regulatory policymaking and its successes and failures is, of course, not either/or. The internal structure of the agency and the external environment in which the program is carried out are both critical to the program's performance.<sup>91</sup> They will, in combination, determine whether regulation succeeds or fails. Moreover, the internal and external (organizational and environmental) aspects of regulatory policymaking are intertwined. The structure of agency decisionmaking will affect how its decisions are considered by political institutions. Correspondingly, the shape of the external environment will have effects on the internal aspects of agency decisionmaking. As Jerry Mashaw puts it: "The signals that an agency receives from its external, legal and institutional environment will ultimately cause the internal procedural and managerial environment of the agency to adapt in order for the agency to survive or to prosper."<sup>92</sup> For example, if the court evinces a will to review command-and-control-type rules issued by an agency more stringently than other forms of agency action, such as recalls or issuance of non-binding policy guidelines, then we could expect the agency to adapt their internal procedures accordingly. Or suppose an agency operates in a shadow of an intrusive and bellicose legislative committee. In such an environment, an agency may react by performing more of their tasks in secret. Greater stealth removes, to some

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OVERSIGHT AND THE CHALLENGE OF SOCIAL REGULATION (1989); Matthew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlook: Police Patrols versus Fire Alarms*, in CONGRESS: STRUCTURE AND POLICY 426 (Matthew D. McCubbins & Terry Sullivan eds., 1987).

87. See, e.g., THOMAS O. MCGARITY, REINVENTING RATIONALITY: THE ROLE OF REGULATORY ANALYSIS IN THE FEDERAL BUREAUCRACY (1991); Terry M. Moe, *Presidents, Institutions, and Theory*, in RESEARCHING THE PRESIDENCY 337 (George C. Edwards et al. eds., 1993). See also sources cited *infra* notes 356-60.

88. See Terry M. Moe & Scott A. Wilson, *Presidents and the Politics of Structure*, 57 LAW & CONTEMP. PROBS. (forthcoming June 1994).

89. See sources cited *infra* notes 90-91.

90. See, e.g., MASHAW & HARFST, *supra* note 11; MELNICK, *supra* note 12. See also *infra* part IV.D.

91. See Mashaw, *supra* note 79, at 61-66.

92. *Id.*

extent, the agency from the constant surveillance of legislators. A legion of examples could be marshalled to illustrate the straightforward point: External influences will affect the agency's decisions regarding its institutional structure and procedures. Hence, in juxtaposing the external environment with internal agency organization, we should keep firmly in mind the intersection between these two dimensions. Structure affects environment and environment affects structure, in ways that any complete theory of regulatory decisionmaking must take into account.

The linchpin of both dimensions, internal and external, organizational and environmental, is institutional theory. To begin with, we must come to regulatory reform armed with a theoretical understanding of how regulatory organizations are formed. What choices are made by those responsible for constructing and operating regulatory institutions? Are there limits built into the structure of the institutions that cripple their capacity to realize their programmatic goals? Next, we must understand how they function within an external environment made up of other organizations, each with their own form, function, and legal controls. How do the interactions among these institutions affect agency decisionmaking? How does competition among organizations facilitate or thwart regulatory change? In short, we need a theory of each institution and its behavior; we also need a theory of institutional competition that folds in and revisits the theories of each institution taken separately.

The core premise of positive political theory is that regulatory decisions are a product, in substantial part, of the strategic decisions made by politicians acting within the structure of political institutions.<sup>93</sup> It is important to understand that the regulatory system is just that—a system. Decisions (threatened and real) made by one institution will have an impact on decisions made by others; regulatory agencies will respond to the signals, influences, pressures, rewards, and sanctions of a variety of politicians and political institutions; no one institution is the master of all regulatory policymaking. The American governmental structure, in design and in practice, ensures that power is dispersed and that political influence and control over regulatory policymaking is complicated and unstable.<sup>94</sup>

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93. See *infra* part IV, especially part IV.E.

94. The complexities of modern regulatory policy have generated a number of different analytical approaches. Positive political theory aims toward a comprehensive and theoretical explanation; other strands of rational choice theory, as described in more detail *infra* part III.B-C, aim for general theory as well. Other political scientists, most notably James Q. Wilson, have pioneered a more eclectic, empirically grounded, and less sanguine, approach to analyzing the dimensions of regulatory policy.

### III. INSTITUTIONAL THEORY AND RATIONAL CHOICE

#### A. Rational Choice Theory and the "Discovery" of Institutions

Recent scholarship on the nature and causes of regulatory failure has been characterized by a greater attention to the role of institutions.<sup>95</sup> Institutional theories have come into fashion as social scientists construct explanations for regulatory failure and as public law scholars develop strategies for regulatory reform. This growing focus on institutions is a general characteristic of contemporary social science; the call for institutional theory has come from a variety of different directions, including sociology, political science, economics, and public law.<sup>96</sup>

The most ambitious of these trends is the so-called "new institutionalism,"<sup>97</sup> a phrase sociologists James March and Johan Olson coined to describe a multi-layered perspective on studying political institutions. Earlier political science theories tended to reduce political behavior to the summation of individual behaviors and to see politics as a rather indistinct element of society generally,<sup>98</sup> instead of as a unique, peculiar process.

See JAMES Q. WILSON, *BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT* (1989). Consider Professor Wilson's comments on the ambition for a comprehensive theory of organizations:

After all these decades of wrestling with the subject, I have come to have grave doubts that anything worth calling 'organization theory' will ever exist. Theories will exist, but they will usually be so abstract or general as to explain rather little. Interesting explanations will exist, some even supported with facts, but these will be partial, place- and time-bound insights.

*Id.* at xi.

95. See generally MARCH & OLSON, *supra* note 78.

96. See, e.g., OLIVER E. WILLIAMSON, *THE ECONOMIC INSTITUTIONS OF CAPITALISM: FIRMS, MARKETS, RELATIONAL CONTRACTING* (1985) (economics); JOHN W. MEYER & W. RICHARD SCOTT, *ORGANIZATIONAL ENVIRONMENTS: RITUAL AND RATIONALITY* (1983) (sociology); STEPHEN SKOWRONEK, *BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES* (1982) (political science/history); Rogers Smith, *Political Jurisprudence, the "New Institutionalism," and the Future of Public Law*, 82 AM. POL. SCI. REV. 89 (1988) (political science/public law).

97. James G. March & Johan P. Olson, *The New Institutionalism: Organizational Factors in Political Life*, 78 AM. POL. SCI. REV. 734 (1984). See also MARCH & OLSON, *supra* note 78.

98. March and Olson explain these reductionist tendencies:

[S]ubstantial elements of modern theoretical work in political science assume that political phenomena are best understood as the aggregate consequences of behavior comprehensible at the individual or group level. . . . Such theories depend on two presumptions. The first presumption is that a political system consists of a number (often a large number) of elementary actors. Human behavior at the level of these elementary actors may be seen as conscious, calculated, and flexible, or as unconscious, habitual, and rigid. In either case, the preferences and powers of the actors are exogenous to the political system, depending on their

In contrast, new institutionalist perspectives stress the importance of examining institutions as the principal arenas in which critical decisions of politics (including not only strategic decisions, but also symbolic, expressive activities) are made.<sup>99</sup> Political institutions are considered, in the new institutionalist frameworks as autonomous, yet interdependent, entities which are worthy of studying systematically and theoretically.

This new institutionalism illustrates one take on the revival of institutional analysis in the social sciences. Overall, there is a heightened attention paid to institutional theory in a dual sense: First, more often than before, social scientists consider the nature and functions of institutions and the role of individuals acting within institutions; accordingly, perspectives on institutions are incorporated into theories of regulation and normative scholarship on regulatory reform. Second, social scientists frequently set out to develop institutional theories that are distinct from the tendencies to view political behavior in terms of the specific behavior of the individual politicians making up the institution that is the subject of study.<sup>100</sup> While it is really in this second sense that March and Olson write of the "new institutionalism" and its role in reshaping political science, the growing attention paid to institutions in a variety of disciplines and theoretical contexts is itself significant, regardless of whether or not it is described as a disciplinary movement or paradigm shift.<sup>101</sup>

positions in the social and economic system. The second presumption is that collective behavior is best understood as stemming from the (possibly intricate) interweaving of behavior understandable at a lower level of aggregation. Discovering, or deducing, the collective consequences may be difficult, even impossible; but the central faith is that outcomes at the collective level depend only on the intricacies of the interactions among the individual actors, that concepts suggesting autonomous behavior at the aggregate level are certainly superfluous and probably deleterious.

March & Olson, *supra* note 97, at 735-36. The interest group theories of regulation, described at *infra* part III.B, are reductionist in just the way March and Olson describe.

99. See MARCH & OLSON, *supra* note 78, at 39-52. Cf. PHILIP SELZNICK, *THE MORAL COMMONWEALTH* 231-64 (1992) (describing non-strategic functions of institutions within a sociological framework); WILSON, *supra* note 94, at 31-110 (describing heterogenous circumstances, beliefs, interests, and culture of bureaucratic institutions).

100. Moe, *supra* note 74 (discussing the interpenetration of organizational theory into political theory).

101. The label of "new" has been attached to a variety of recent institutionalist scholarship. See, e.g., *A NEW CONSTITUTIONALISM: DESIGNING POLITICAL INSTITUTIONS FOR A GOOD SOCIETY* (S. Ellein & K. Soltan eds., 1993); John A. Ferejohn, *Law, Legislation, and Positive Political Theory* 32 (1993) (on file with author) ("institutional neo-realism"); *Symposium on the New Institutional Economics*, 146 *J. INSTITUTIONAL & THEORETICAL ECON.* 1 (1990); *Symposium on the New Public Law*, 89 *MICH. L. REV.* (1991); Daniel B. Rodriguez, *The Substance of the New Legal Process*, 77 *CAL. L. REV.* 919 (1989) (reviewing WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* (1988)); Moe, *supra* note 16.

The turn toward institutions in contemporary social science has also included political economists.<sup>102</sup> The focus on institutions among political economists is distinct, however, from other new institutionalist scholarship in important respects. Sociology and mainstream political science always had at their cores an appreciation for the role of groups and a skepticism about the potential of the atomistic "rational actor" heuristic to explain the sum and substance of political behavior. Political economy on the other hand, was traditionally less patient with explanations that looked past the individual and his rational, strategic, and perfectly informed decisions. In its most extreme Chicago School form, politics was seemingly a black box, a forum in which self-interest and organized interest groups fought for advantage.<sup>103</sup>

This myopia characterized much of the political economy literature on regulation. One would think, reading the political economy scholarship of the past three decades on regulation and bureaucracies, that political institutions such as Congress, the President, and courts hardly mattered except for such responsibilities as creating and perhaps dissolving the agency and its program.<sup>104</sup> The concern was with administrative discretion. The image of the "rogue agency" animated discussions of regulation's discontents. And administrative discretion was viewed as the product of a political process in which self-interested politicians were supplicants for demanding interest groups. We could, in this light, no more expect the political process to reign in the rogue agency than we could expect interest groups to look out for the public interest. The linchpin of the political economy of regulation was rational action by utility-maximizing individuals played out on a field made-up of political organizations. Among the consequences of disregarding the autonomous aspects of institutions and institutional decisionmaking was the constricted ability of political economists to speak to the issues of concern to political scientists who struggled to understand the institutional dimensions of American government, including Congress, the Presidency, the bureaucracy, and the judiciary.

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102. For a useful survey of recent economic analyses of institutions, see Terry M. Moe, *Political Institutions: The Neglected Side of the Story*, 6 J.L. ECON. & ORG. 213 (1990); Kenneth A. Shepsle, *Institutional Equilibrium and Equilibrium Institutions*, in *POLITICAL SCIENCE: THE SCIENCE OF POLITICS* 51 (Herbert F. Weisberg ed., 1986).

103. See, for example, the various contributions in *CHICAGO STUDIES IN POLITICAL ECONOMY* (G. Stigler ed., 1988).

104. See generally *infra* part III.B (discussing interest group theories).

Also myopic was the tendency in rational choice theory to disregard the role of legal rules and doctrines as determinants of, and constraints on, institutional decisionmaking. The role of law was rather opaque in the political economy literature. Law was considered as immutable, something "out there," which politicians and interest groups had to deal with, work around, and try to manipulate.<sup>105</sup> Or else law was a "good" that interest groups and politicians would haggle over and construct in the normal strategic way.

By contrast, legal scholars understood that neither legal rules nor the institutions which framed and implemented these rules could be characterized in either of these extreme ways. Rules represented both the product of political choice and the constraints on that choice. What was perennially at issue for normative public law scholarship was what function legal rules could serve as forms of constraints on political behavior and policymaking; but this did not presuppose that law was completely separate from politics. It did presuppose, though, that law could usefully serve as a source of constraints on political decisionmaking within institutions. However, in the worldview of classic political economy, it is difficult to see exactly how law could play this function. It was as if political economists and legal scholars were talking entirely past one another, with the former concentrating on the client-broker relationships among interest groups and legislators, and the latter emphasizing the ways in which the regulatory process is circumscribed by a web of legal constraints.

To the extent that the role of institutions and of law were two massive concepts that were nearly entirely absent from rational choice accounts of regulation and its administration, a substantial gap existed between the concerns at the core of rational choice theory and the concerns of lawyers doing normative scholarship. However, recent years have witnessed a wealth of rational choice theory that attempts to examine and explain the significance of institutions and institutional structure for regulatory decisionmaking. At least one of the valuable lessons of this renewed interest among political economists in institutions and law is that there is nothing inherently inconsistent about rational choice theory and perspectives on institutions and on law.

Much of the dissonance between contemporary rational choice theory and public law scholarship comes from the erroneous equation of rational

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105. See, e.g., William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. ECON. 875, 885-87 (1975).

choice theories of politics with the economic theory of legislation that frequently travels under the banner "public choice."<sup>106</sup> Similarly, rational theories of regulatory politics are often viewed as merely an extension of the Chicago School theories of interest group formation and influence that dominated the economics scholarship on regulation in the 1970s and early 80s.<sup>107</sup> Yet, rational choice theories of legislation are not necessarily synonymous with public choice or with interest group theories of regulation. Rational choice theories of politics are not monolithic. Such theories include several different perspectives on legislation and regulation in the modern administrative state. Microeconomics and the rational choice heuristic provide a set of tools for use in understanding politics and regulation. However, scholars can adapt these tools in different ways; some tools are more serviceable than others.

To understand the distinct contributions of positive political theory to the political economy literature on legislation and regulation, I will examine two important rational choice perspectives on legislation and regulation: interest group theories and the new economics of organization. In reviewing these theories, the reader should keep in mind the two critical dimensions of regulatory policymaking that have been so often inscrutable to rational choice theory: the role of institutions and institutional decisionmaking and the role of legal rules.

### *B. Interest Group Theories*

Interest-group theories of legislation grow out of a political economy literature in which it is hypothesized that individuals will organize into pressure groups in order to achieve benefits through the production of regulatory policy and that politicians will facilitate this self-interested behavior through the legislative and administrative processes.<sup>108</sup> The crux of interest group theories has concerned how and why such groups form and organize to pursue their self-interested aims.<sup>109</sup> At the core of interest group theories of regulation is the idea that interest groups form out

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106. For useful surveys of these latter two theories, see, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF THE LAW* (4th ed. 1992); FARBER & FRICKEY, *supra* note 13.

107. See discussion *infra* part III.B.

108. See Gary Becker, *A Competition Among Pressure Groups for Political Influence*, 98 Q.J. ECON. 371 (1983); Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & ECON. 211 (1976); George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971). Good descriptions of this literature include FARBER & FRICKEY, *supra* note 13, POSNER, *supra* note 106; Noll, *supra* note 69.

109. See, e.g., MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* (1965).

of individuals' rational decisions to come together in order to influence public policy.<sup>110</sup> The benefits at stake are ubiquitous; they range from direct cash subsidies to restrictions on entry by firms into existing markets. Naturally, these benefits accrue to different individuals and firms in different amounts. The organization of interest groups—and, critically, the size of the group and political muscle of the group—will be a function of the value of the benefits at stake in regulation. Sam Peltzman summarizes the crux of the “demand” side of the interest group theory of regulation:

To summarize the argument briefly, the size of the dominant group is limited in the first instance by the absence of something like ordinary-market-dollar voting in politics. Voting is infrequent and concerned with a package of issues. In the case of a particular issue, the voter must spend resources to inform himself about its implications for his wealth and which politician is likely to stand on which side of the issue. That information cost will have to offset prospective gains, and a voter with a small per capita stake will not, therefore, incur it. In consequence the numerically large, diffuse interest group is unlikely to be an effective bidder, and a policy inimical to the interest of a numerical majority will not be automatically rejected. A second major limit on effective group size arises from costs of organization. It is not enough for the successful group to recognize its interests; it must organize to translate this interest into support for the politician who will implement it. This means not only mobilizing its own vote, but contributing resources to the support of the appropriate political party or policy: to finance campaigns, to persuade other voters to support or at least not oppose the policy or candidate, perhaps occasionally to bribe those in office. While there may be some diseconomies of scale in this organization of support and neutralization of opposition, these must be limited. The larger the group that seeks the transfer, the narrower the base of the opposition and the greater the per capita stakes that determine the strength of opposition, so lobbying and campaigning costs will rise faster than group size. The cost of overcoming “free riders” will also rise faster than group size. This diseconomy of scale in providing resources then acts as another limit to the size of the group that will ultimately dominate the political process.<sup>111</sup>

The consequence of this “law of diminishing returns to group size in politics” is that optimally sized groups will form and wield substantial control over the political process.<sup>112</sup> The essential idea is that groups will

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110. For the classic, early statement of interest group theory, see James Madison's discussion in THE FEDERALIST No. 10 (James Madison) (Roy P. Fairfield ed., 1966).

111. Peltzman, *supra* note 108, at 236.

112. *Id.*

form only where they predict that they will successfully be able to provide the sort of benefits that justify the costs of organizing and influencing.<sup>113</sup>

The empirical part of the theory is devoted to showing that politicians accede to the demands of the most effectively organized and, therefore, the most powerful, groups. After all, "there are many bidders, but only one is successful."<sup>114</sup> The political process that yields regulatory decisions is described, in the interest group account, as essentially a political auction, in which politicians transact with organized groups for benefits in the form of "votes" and "resources" and, in return, reward groups with various goods such as cash benefits and restrictions on entry.<sup>115</sup> The basic connection between the consumers and the producers of these regulatory goods is a reciprocity of interests: Interest groups secure economic rents through manipulation of the political process while legislators secure reelection through careful attention to interest group demands.<sup>116</sup>

Interest groups manipulate the political process in a variety of ways.<sup>117</sup> The more powerful groups may capture the administrative agency that is responsible for implementing the regulatory program.<sup>118</sup> The result is that the agency becomes a mouthpiece for the goals of the interest groups, responding to pressures and demands through the administrative process. Regulatory capture may be manifested in several different ways. An interest group may infiltrate the processes the agency follows in formulating a rule or order. Administrative staff may be made up of members of the targeted regulatory industries or members of organizations representing regulatory beneficiaries. Additionally, interest groups may wield influence through supplying carrots or applying sticks to administrators during the decisionmaking process. For instance, interest groups often possess a virtual monopoly of information that is vital to the formulation of an

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113. See OLSON, *supra* note 109, at 11-16. See also RUSSELL HARDIN, *COLLECTIVE ACTION* (1982).

114. Peltzman, *supra* note 108.

115. See Stigler, *supra* note 108.

116. See, e.g., MORRIS P. FIORINA, *CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT* (2d ed. 1989); MICHAEL T. HAYES, *LOBBYISTS AND LEGISLATORS: A THEORY OF POLITICAL MARKETS* (1981); DAVID R. MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* (1974).

117. See, e.g., Robert D. Tollison, *Public Choice and Legislation*, 74 VA. L. REV. 339, 351-63 (1988).

118. In addition to the sources cited in *supra* note 7, see Gordon Tullock, *Concluding Thoughts on the Politics of Regulation*, in *PUBLIC CHOICE AND REGULATION* 334 (Robert J. Mackay et al. eds., 1987).

agency decision.<sup>119</sup> Groups may supply to administrators benefits of a more traditional sort, say, valuable perquisites such as jobs after the administrator's tour of duty is completed.<sup>120</sup>

In addition to agency capture, interest groups may influence the regulatory process at the threshold, by influencing legislators' decisions concerning the structure of the agency's organic statute in order to ensure that the regulatory program and agency structures are designed to aid the groups' regulatory agenda.<sup>121</sup> The language of the statute, as well as its legislative history, may reflect the imprint of the winning interest group acting through a legislative coalition. Once the program is in place, interest groups can wield ongoing influence by monitoring agency action and influencing legislators to intervene or to refrain from intervening in the decisionmaking process over time.<sup>122</sup> Legislative oversight of the activities of the agency may facilitate these aims.<sup>123</sup>

Interest groups have available a large collection of strategies and tactics they can use to influence the course of regulatory policy. They may deliver votes, campaign contributions, or outright bribes.<sup>124</sup> They may extract rents from legislators who would receive value from having information which the groups exclusively possess.<sup>125</sup> Additionally, they may threaten to support a legislator's opponent in the next election.

While the interest group theory, often called the "Chicago School" theory of regulation,<sup>126</sup> purports to account for both the demand and supply sides of regulatory decisionmaking, fundamentally, the theory speaks to the demand side. To be sure, the theory, taken on its own terms, explains why political decisionmakers would trade with interest groups and why we observe a range of regulatory decisions that benefit a class of individuals and firms (hence the interest group theory is also labeled the "producer

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119. See, e.g., Sam Peltzman, *An Evaluation of Consumer Protection Legislation: The 1962 Drug Amendments*, 81 J. POL. ECON. 1049 (1973).

120. See BERNSTEIN, *supra* note 70.

121. See, e.g., Geoffrey P. Miller, *Public Choice at the Dawn of the Special Interest State: The Story of Butter and Margarine*, 77 CAL. L. REV. 83 (1989).

122. See, e.g., Fred S. McChesney, *Rent Extraction and Rent Creation in the Economic Theory of Regulation*, 16 J. LEGAL STUD. 101 (1987).

123. It may also defeat these aims, though, for the reasons spelled out in *infra* text accompanying notes 506-12.

124. See, e.g., Pablo T. Spiller, *Politicians, Interest Groups, and Regulators: A Multiple-Principals Agency Theory of Regulation, or "Let Them Be Bribed,"* 33 J.L. & ECON. 65 (1990).

125. See, e.g., McChesney, *supra* note 122.

126. See CHICAGO STUDIES IN POLITICAL ECONOMY, *supra* note 103.

protection" view).<sup>127</sup> However, the political machinery that is implemented to set the structure and rules for this political auction is opaque in the Chicago School account. In interest group theories, public policy is an output in a process that is driven by the mechanism of interest group control and influence. There is no internal logic to the function of certain political institutions; politicians will simply do what is necessary to facilitate the aims of their benefactors. What, then, explains why the political process is structured as it is? Is the legislature, for instance, designed in the manner that facilitates regulatory transactions? Does the constitutional structure of government aid or inhibit strategic bargaining? The interest group account carefully examines the structure of interest group organization, considering such questions as what is the optimal size of a powerful group and what sort of groups benefit from certain regulatory decisions; no such attention is paid to the structure of the political organizations that furnish benefits and extract rents from these interest groups.

Interest group theories of regulation flatten out political and legal institutions. Legislative and administrative institutions are regarded as transmission belts, performing the rather mechanical function of translating interest group demands into public policy.<sup>128</sup> The origins and functions of political institutions are explained, in interest group theories, as instruments of interest group control. The explanation of the "supply" side in interest group theory, therefore, has a distinctly axiomatic quality; the notion is that interest groups will demand, and politicians will provide, whatever institutions are necessary to facilitate efficient transactions among the producers and consumers of these regulatory goods. Institutions such as the committee system, the structure of legislative voting, and critically, the administrative agency, are seen as designed to respond efficiently to the rent-seeking demands of powerful interest groups.<sup>129</sup> Rational legislators,

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127. See Peltzman, *supra* note 108, at 235. See also William A. Jordan, *Producer Protection, Prior Market Structure and the Effects of Government Regulation*, 15 J.L. & ECON. 151 (1972).

128. The description of the legislature-agency relationship as a transmission belt comes from Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1675 (1975). Richard Stewart's seminal article on administrative law incorporates much of the important interest group scholarship of the 1960s and early 1970s and is interesting in, among other respects, the anthropological sense in which it reflects the influence of these then-fashionable positive theories of regulation on public law scholarship. See *id.* at 1681-88 (discussing interest group theories of regulation in relation to the "problem of discretion").

129. See Jonathan R. Macey, *Public Choice: The Theory of the Firm and the Theory of Market Exchange*, 74 CORNELL L. REV. 43 (1988).

argue interest group theorists, will construct institutions to enable them to respond effectively to the demands of organized groups and also to mediate the competing demands of such groups.<sup>130</sup> The classic interest group theories of regulation, while representing a critical step in understanding why certain regulatory decisions are made and why and how regulation fails, have expended most of their explanatory energies in crafting sophisticated explanations for the demand side of public policy. Institutional theory has played a rather peripheral role. As a result, much of the supply side of regulation—the institutional matrices of decisions representing the regulatory environment—has remained inscrutable to interest group theories.

Consider, as an example of a theoretical insight culled from interest group theories of regulation, the two different perspectives on the legislative delegation of regulatory power to administrative agencies. One perspective explains delegation as a response to the competing demands of interest groups.<sup>131</sup> Delegation, in this account, represents the passing of the buck to the agency; legislators can thereby claim the credit that goes along with the enactment of a regulatory program while eschewing the blame that goes along with deleterious (from the interest group's standpoint) policies made by the agency in the future.<sup>132</sup> Legislators will be anxious to delegate power when the costs and benefits of a program are both relatively concentrated so that vigorous interest group competition on both sides of the issue is likely. Delegating, in this account, creates a "policy lottery" in which the substantive outcome of regulatory policy is unclear *ex ante*.<sup>133</sup> Another perspective emphasizes the role that the legislature plays in manipulating administrative processes in the service of interest group demands.<sup>134</sup> In this account, agencies are interest group supplicants once removed. Regulation through administrative decision is a means by which legislators can tailor their responses more effectively and more economically to interest group demands. Even where the delegation

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130. See, e.g., HAYES, *supra* note 116; MAYHEW, *supra* note 116.

131. See, e.g., Peter H. Aranson et al., *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1 (1982).

132. See Morris P. Fiorina, *Group Concentration and the Delegation of Legislative Authority*, in REGULATORY POLICY AND THE SOCIAL SCIENCES, *supra* note 69; Aranson et al., *supra* note 131.

133. See Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 YALE J.L. ECON. & ORG. 81, 90 (1985).

134. See, e.g., Morris P. Fiorina, *Legislative Choice of Regulatory Forms: Legal Process or Administrative Process?*, 39 PUB. CHOICE 33 (1982); McChesney, *supra* note 122; Richard A. Posner, *The Behavior of Administrative Agencies*, 1 J. LEGAL STUD. 305 (1972).

to the agency is ambiguous and thus the final regulation uncertain, the device of administrative regulation enables interest groups to converge on the administrative process and fight for their agenda with the blessing—and the help—of self-interested legislators.

The essential dynamics of the relationship between legislators and the agencies they have created are largely left out of this interest group picture. What explains the design of particular regulatory structures and the choice by legislators and administrators to pursue one strategy rather than another in response to demands from outside constituents and groups? Again, legislative institutions are regarded as devices by which interest group demands are transformed into public policy. The past decade has brought an enormous quantity and range of critiques against this approach to understanding regulation and regulatory politics.<sup>135</sup>

Consider a key problem upon which positive political theory has shed light. Interest group theories suppose that the history of legislation is essentially the *winner's* history; the most powerful interest group will prevail upon a majority of the legislature and will establish its preferred regulatory policy; or else the legislature will react to competing interest group pressures by delegating regulatory responsibilities to another institution, such as an agency or the court.<sup>136</sup> What interest group theory does not seem to contemplate is that the regulatory policy created by statute will reflect a bargain among legislators who collect themselves into coalitions and hammer out a deal amongst one another. The regulatory policy, including both the substantive decisions made in the statute and the process for implementing these policies, reflects this deal. It may provide a suitable set of benefits to one or more interest groups; it may give little more than half a loaf to all concerned. However, the important point is that the final outcome—the regulatory statute and administrative program—will reflect a combination of forces and influences; groups may win

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135. Empirical critiques of interest group theories include KAY L. SCHLOZMAN & JOHN T. TIERNEY, *ORGANIZED INTERESTS AND AMERICAN DEMOCRACY* (1986); Joseph P. Kalt & Mark A. Zupan, *Capture and Ideology in the Economic Theory of Politics*, 74 *AM. ECON. REV.* 279 (1984); James B. Kau & Paul H. Rubin, *Self-Interest, Ideology and Logrolling in Congressional Voting*, 22 *J.L. & ECON.* 365 (1979); Mark Kelman, *On Democracy-Bashing: A Skeptical Look at the Theoretical and "Empirical" Practice of the Public Choice Movement*, 74 *VA. L. REV.* 199 (1988); Daniel Shaviro, *Beyond Public Choice and Public Interest: A Study of the Legislative Process as Illustrated by Tax Legislation in the 1980s*, 139 *U. PA. L. REV.* 1 (1990). Normative critiques include STEVEN KELMAN, *MAKING PUBLIC POLICY: A HOPEFUL VIEW OF AMERICAN GOVERNMENT* (1987); ARTHUR MAASS, *CONGRESS AND THE COMMON GOOD* (1980).

136. See Aranson et al., *supra* note 131.

and lose.<sup>137</sup> These groups may eschew the legislative process altogether, if they lose confidence in their ability to put their exclusive stamp on the regulatory statute.<sup>138</sup> In other words, groups may decide, in light of the significant costs of playing the regulatory game in the legislature, to decline to play. But what interest group theories of legislation suppose is the norm—a victorious interest group capturing the statute and the regulatory program created under the statute’s rubric—is more likely the exception, rather than the rule. One searches in vain for many instances in which we can confidently describe a regulatory statute as the creation of a particular interest group.<sup>139</sup> Much more common are those statutes that represent a combination of interest group pressures filtered through legislative processes and ameliorated through the struggle within the legislature and with legislators and their constituents, all of which results in a statute with multiple winners and losers.<sup>140</sup> The role of these so-called “losers” in constructing the regulatory program is nearly entirely missing in interest group theories of legislation.<sup>141</sup>

Another problem with interest group theories is that they do not clearly explain the origins and maintenance of the political arrangements that currently exist. Difficult to explain are those institutional structures and rules that, rather than facilitating interest group demands for policy in the way that the theories predict, actually hinder these demands. The system of institutional checks and balances, for example, and for that matter, much of the constitutional structure of government, is hard to reconcile with the view that the structure of government is designed to ensure the low cost supply of goods to aggressive interest groups.<sup>142</sup>

One response to this seeming anomaly, however, has been to flip this

137. See Terry M. Moe, *Toward a Theory of Public Bureaucracy*, in ORGANIZATION THEORY, *supra* note 71, at 116, 125-27.

138. They may, for instance, concentrate their efforts on influencing the administrative agency charged with implementing the statutory program.

139. For episodes of legislative compromises in connection with regulatory statutes, see the essays in THE POLITICS OF REGULATION, *supra* note 58.

140. For example, Gabriel Kolko has described the Interstate Commerce Act of 1887 as an instance of decisive interest group influence. KOLKO, *supra* note 75. Thomas Gilligan, William Marshall, and Barry Weingast persuasively show, however, that the Interstate Commerce Act of 1887 was not a railroad “relief” bill but, instead, reflected a combination of cross-cutting factors. The final product reflected compromises and bargains made among critical players in the legislative process. See Thomas W. Gilligan et al., *Regulation and the Theory of Legislative Choice: The Interstate Commerce Act of 1887*, 32 J.L. & ECON. 35, 54-59 (1989).

141. See discussion *infra* part V.A.3.b.

142. See DAVID F. EPSTEIN, THE POLITICAL THEORY OF THE FEDERALIST 126-46 (1988).

argument around and to view the structure of political institutions, enshrined in the Constitution and implemented through two centuries of judicial decisions, as the machinery by which the regulatory auction described by interest group theories is controlled and regulated.<sup>143</sup> This is where legal rules and institutions come into the interest group picture. Part of the project of public law scholars steeped in interest group theories of legislation has been to explain how the framers wisely designed the Constitution to control what would otherwise be the norm—competition among interest groups for political influence and the provision of disproportionate benefits to powerful groups—and to counsel courts to construct rules and doctrines to implement the framers' vision of a purer and fairer political process. The basic normative idea is that courts act as a last resort against a dysfunctional regulatory process. Courts can perform this function in a variety of different ways: steering statutes, through instrumental interpretations, towards more public-regarding aims;<sup>144</sup> maintenance of institutional devices, especially the separation of powers, in order to fragment governmental power and interest group influence;<sup>145</sup> and more stringent constitutional review of legislation.<sup>146</sup> While I will say more about this vision later in the Article,<sup>147</sup> for now it is enough to notice that this represents a normative project that is situated within interest group theories. These theories remain rather agnostic concerning the nature and function of political institutions and the role of legal rules in framing regulatory decisions.<sup>148</sup>

### C. *The New Economics of Organization*

A competing model of regulatory behavior is emerging from the literature on the new economics of organization and, in particular, the

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143. For starters, see James Madison's discussion in THE FEDERALIST No. 51 (James Madison) (Roy P. Fairfield ed., 1981).

144. See, e.g., William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275 (1988); Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223 (1986).

145. See Jonathan R. Macey, *Transaction Costs and the Normative Elements of the Public Choice Model: An Application to Constitutional Theory*, 74 VA. L. REV. 471 (1988).

146. See, e.g., William H. Riker & Barry R. Weingast, *Constitutional Regulation of Legislative Choice: The Political Consequences of Judicial Deference to Legislatures*, 74 VA. L. REV. 373 (1988).

147. See *infra* part IV.A.

148. For a multi-layered argument against the expansion of judicial review to combat the evils described in interest group theory, see Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31 (1991).

developing applications of transaction cost economics to the study of organizational design and functions.<sup>149</sup> This account takes off from positive theories of the organization of business firms. The question asked is the same one asked by Ronald Coase in writing *The Nature of the Firm* in 1937.<sup>150</sup> Why would rational competitors choose the business firm as a method of economic organization rather than entrusting their business decisions solely to the market? The answer given by the new economics of organization is that rational decisionmakers will construct the organization of the firm in order to solve various contracting problems that arise.<sup>151</sup> However, once the organization is in place, how will rational decisionmakers structure it in order to facilitate their interests and the ends of the organization? In general, the new economics of organization sets out to explain, first, when and why firms (hierarchies) replace markets as a form of economic organization and, second, the structural choices made by the firm's decisionmakers to ensure the efficient carrying out of the tasks for which the organization is formed under conditions of opportunism and given ubiquitous transaction costs.<sup>152</sup>

The central hypothesis is that rational decisionmakers will choose the firm as their mechanism of economic organization instead of entrusting transactions and business decisions to the market in order to reduce the transaction costs associated with making business transactions in the market and with enforcing these transactions once made.<sup>153</sup> Once decisionmakers have chosen firms as their organizational form, they face critical problems that they must overcome in order to fulfill the purposes for which the organization was created.

The key problem faced by rational decisionmakers who must decide whether and how to form an economic organization is *opportunism*.<sup>154</sup>

149. See generally Moe, *supra* note 74.

150. Ronald H. Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386 (1937).

151. See, e.g., Oliver Williamson, *Transaction Cost Economics and Organization Theory*, 2 *J. INDUS. & CORP. CHANGE* 107 (1993); Williamson, *The Evolving Science of Organization*, 149 *J. INSTITUTIONAL & THEORETICAL ECON.* 36 (1993); Douglass C. North, *The New Institutional Economics*, 142 *J. INSTITUTIONAL & THEORETICAL ECON.* 230 (1986); Mayer Zald, *Review Essay: The New Institutional Economics*, 93 *AMER. J. SOC.* 701 (1987); Oliver E. Williamson, *The Logic of Economic Organization* 4 *J.L. ECON. & ORG.* 65 (1988) [hereinafter Williamson, *Logic of Economic Organization*]; WILLIAMSON, *supra* note 96; OLIVER E. WILLIAMSON, *MARKETS AND HIERARCHIES: ANALYSIS AND ANTITRUST IMPLICATIONS* (1985).

152. See WILLIAMSON, *supra* note 96.

153. Williamson, *Logic of Economic Organization*, *supra* note 151.

154. See Arman A. Alchian & Harold Demsetz, *Production, Information Costs, and Economic Organization*, 62 *AM. ECON. REV.* 777 (1972).

Individuals within the firm who have incentives to shirk and in various ways depart from the purposes underlying the firm and its structure.<sup>155</sup> An advantage of the firm as a method of organizing business decisions and transactions is that the firm's supervisor has an incentive to monitor the performance of subordinates who have incentives to shirk. The incentives may be financial: Perhaps he can capture the residual profits left after he has compensated the employees of the firm for their efforts.<sup>156</sup> To the extent that shirking reduces the size of the pie that can be distributed among the firm's members, rational managers have an incentive to construct economic organizations in which they may maintain their marketable title to the output of the organization and in which they can effectively increase the output in order to assure a larger profit in the form of the difference between the compensation paid to employees and the total output.<sup>157</sup> Beyond this economic incentive, the firm's managers may well owe obedience to another set of goals; in the vernacular of principal-agent theory, the managers may be principals with respect to the agents working below them, but agents with respect to others higher up the chain of command. Facing opportunistic subordinates, rational managers must construct strategies to cabin disobedience in order to facilitate their ability to meet their obligations. Under either scenario, the managers of the firm must guard against opportunistic behavior and shirking.

Rational decisionmakers will design their firm with an eye toward addressing these risks of opportunism and with an eye toward facilitating their economic aims.<sup>158</sup> With the theory of the firm as a conceptual building block, the new economics of organization has set out to explain why decisionmakers would construct particular types of firms and particular types of rules and strategies within these firms. In considering how individuals will make decisions to create certain organizational forms, the new economics of organization borrows the concept of *bounded rationality* from an earlier generation of organizational theorists, led by Herbert Simon.<sup>159</sup> "Bounded rationality refers to behavior that is 'intendedly

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155. See *infra* notes 214-19 (describing principal-agent theory).

156. See Alchian & Demsetz, *supra* note 154, at 781-83. See also JOE B. STEVENS, *THE ECONOMICS OF COLLECTIVE CHOICE* 280-81 (1993).

157. Alchian & Demsetz, *supra* note 154, at 780-81.

158. See generally WILLIAMSON, *supra* note 96.

159. See generally SIMON, *supra* note 72; Herbert A. Simon, *Theories of Bounded Rationality*, in *DECISION AND ORGANIZATION* 161 (C.B. McGuire & Roy Radner eds., 1972). For discussions of "bounded rationality" in the new economics of organization, see Williamson, *supra* note 71, at 178.

rational, but only *limitedly* so."<sup>160</sup> Decisionmakers in institutions, including those who are designing these institutions, have limited foresight and skill. Reliance on organizations can be a means of *satisficing*, if not maximizing, certain goals and ambitions.<sup>161</sup> Organizational structures, it is suggested, will be designed to "adapt to disturbances . . . in ways that economize on bounded rationality"<sup>162</sup> while safeguarding the transactions in question against the hazards of opportunism."<sup>163</sup> Governance structures arise in order to facilitate contracting and to reduce the incentives and opportunities to act opportunistically.<sup>164</sup>

Administrative agencies are treated, in this account, like business firms. They are distinct types of firms, to be sure, but firms nonetheless.<sup>165</sup> The organization of a bureaucratic agency will trace the organization of a business firm in that they both face similar problems in regulating the actions of "employees" within the firm. The contracting problems that arise are distinct because bureaucratic firms are not really competitors in a market for their products or services. Fundamentally, they do not *have* the choice of eschewing a hierarchy and choosing a market form.<sup>166</sup> Nonetheless, the new economics of organization stresses the analogies between bureaucratic and business firms. Contracting problems arise in connection with the relationship between the agency and the legislature.<sup>167</sup> The legislature designs the agency/firm in order to economize the costs of ensuring that the agency acts in accordance with the legislature's goals; in other words, that it adheres to the contract between the legislature and the agency. The contract, however, is incomplete.<sup>168</sup> Legislators cannot foresee future exigencies and circumstances; it is in their interest to

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160. See Williamson, *supra* note 71, at 178 (quoting SIMON, *supra* note 72, at xxiv).

161. See *id.* at 178-79.

162. See, e.g., James G. March, *Bounded Rationality, Ambiguity, and the Engineering of Choice*, in RATIONAL CHOICE 142 (J. Elster ed., 1986).

163. Oliver E. Williamson, *Economic Institutions: Spontaneous and Intentional Governance*, 7 J.L. ECON. & ORG. 159, 176 (Special Issue 1991).

164. See WILLIAMSON, *supra* note 96.

165. See Oliver E. Williamson, *Political Institutions: The Neglected Side of the Story—Comment*, 6 J.L. ECON. & ORG. 263 (Special Issue 1990).

166. See Moe, *supra* note 74; Moe, *supra* note 137.

167. See *infra* part IV.B.

168. On incomplete contracting, see, e.g., Gillian K. Hadfield, *Commentary: Incomplete Contracts and Statutes*, 12 INT'L REV. L. & ECON. 257 (1992); David M. Kreps, *Corporate Culture and Economic Theory*, in PERSPECTIVES ON POSITIVE POLITICAL ECONOMY 90 (James Alt & Kenneth Shepsle eds., 1990); Oliver D. Hart, *Incomplete Contracts and the Theory of the Firm*, 4 J.L. ECON. & ORG. 119 (1988).

enter into agreements with other legislators and with the agency, but it is not in their interest to entrust all regulatory decisions to a nexus of contracts.<sup>169</sup> Like business firms, bureaucratic hierarchies face contracting problems. These problems can be redressed by a scheme of organization and a regime of contract law that is tailored to the purposes of the bureau and the problems that it faces in its external environment. As Oliver Williamson explained: “[S]tudies of economic organization and of political organizations are both similar and different. They are similar in that both work out of an ‘incomplete contracting in its entirety’ orientation. They are both different in that each generic mode of governance, bureaus included, requires its own distinctive contract law.”<sup>170</sup> The “contract law” of bureaus consists of civil service law, which regulates the conduct of employees within the organization as well as the relationship between managers and employees;<sup>171</sup> it also includes administrative law, which regulates the decisionmaking processes of the agency.<sup>172</sup>

To the extent that the theory emerging from the new economics of organization is not a theory of public bureaucracy as much as it is an application of a general theory of economic organization to public agencies,<sup>173</sup> the application elides important differences between public agencies and private business firms. The two most fundamental differences are the distinct role of politics and the role of law. In the new institutional economics, firms are established by actors in order to carry out transactions; by contrast, the organizations which form the structure of regulatory policymaking have a complex set of goals. Administrative agencies are the products of political choices.<sup>174</sup> An agency may be designed to facilitate efficient transactions, but this is not necessarily so. Moreover, regulatory programs are the products of political compromises; a program may be constructed in order to produce a limited regulatory output.<sup>175</sup> Politicians, constrained by the demands of interest groups and constituents, may be willing to trade off efficiency and efficacious regulation for other political

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169. On the firm as a nexus of contracts, see Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976). This approach is criticized in Oliver D. Hart, *An Economist's Perspective on the Theory of the Firm*, in ORGANIZATION THEORY, *supra* note 71, at 159-60.

170. Williamson, *supra* note 165, at 265-66.

171. *Id.* at 266. Oliver E. Williamson, *Public and Private Bureaus* (1993) (on file with author).

172. Williamson, *supra* note 165, at 265-66.

173. See Moe, *supra* note 74; Moe, *supra* note 137.

174. See Moe, *supra* note 74; Moe, *supra* note 137.

175. See generally *infra* part V.A.3.

goals and interests.<sup>176</sup> The result is a regulatory program that is not necessarily designed to economize on transaction costs through a nexus of intra-agency and inter-institutional (Congress-agency) agreements, but a program that is purposefully limited in its scope and objectives. In sum, economic organizations are, by hypothesis, designed by their makers to succeed; public organizations may be designed to fail.<sup>177</sup>

In addition, the new economics of organization largely ignores the role of persistent political competition for control. Political competition makes the predicament facing regulatory agencies far different from that confronting private economic organizations.<sup>178</sup> The application of the economic theory of the business firm to public bureaucracies supposes that the main structural relationship is among the managers and the employees of the firm. It is a *hierarchical* relationship to which principal-agent theory

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176. See Moe, *supra* note 74; Moe, *supra* note 137.

177. Terry Moe suggests a number of other respects in which public agencies and regulatory programs are importantly distinct from business firms. See Moe, *supra* note 137. One concerns the role of political uncertainty. Central to the economic explanation of the origins and functions of the private firm is the notion that the firm's managers possess property rights in the ownership of the firm's assets; relatedly, firm members will make important investments in assets specific to the purposes of the firm. For instance, an employer will design a retirement plan to create incentives for the employees to stay on the job. These features—stable property rights and asset specificity—provide, respectively, the bases upon which the economic organization can be formed and the economic reasons for its creation and maintenance. By contrast, in regulatory programs involving public agencies, both sources of stability and certainty are missing. The relevant "property rights" are the elements of authority in regulatory decisions. These elements of authority are complex and only partially within the control of the agency-organization. For instance, an agency may be required, per a statutory instruction, to carry out a task. The governing law, then, is public law; it is not the sort of private law represented by contract law in which the law provides a source of guidance for firm managers to follow in making bargains with one another. The property right, in the instance of the public agency, is held by the maker of the laws, not by the members of the agency-organization. With respect to asset specificity, the decisions involving what sort of investments the agency will make may well be within the purview of political decisionmakers and only within the discretion of the agency at the sufferance of those decisionmakers.

So how will administrative agencies exercise this authority? While we cannot confidently predict, we can be reasonably sure that they will not necessarily regard their decisions as driven by the need to facilitate efficient transactions. The governance structures put in place by rational political decisionmakers will be designed to carry out certain political goals; efficient economic organization will become, unless part of the regulatory goal of the program, an incidental factor.

This is not to say, though, that the analogy of political institutions and business firms is not appropriate in other contexts. For example, efficient transacting may still be a goal for certain political institutions, such as legislatures. See Barry R. Weingast & William Marshall, *The Industrial Organization of Congress; or Why Legislatures, Like Firms, Are Not Organized as Markets*, 96 J. POL. ECON. 132 (1988).

178. See *infra* text accompanying notes 315-51 (providing a positive political theory analysis of political control).

is applied. The aim is to understand how decisionmakers structure this relationship and, specifically, how they reduce the agency costs associated with managing opportunistic subordinates and increasing the productive capacity of the organization.<sup>179</sup> By contrast, decisionmakers in public agencies are involved in a myriad of different relationships. In addition to the hierarchy of administration within the agency, there are relationships among the agency and its regulatory constituents. For example, the administrator of the EPA must pay attention not only to opportunistic assistant administrators, but also to environmental interest groups, important members of Congress, and to the President and his agents. To understand the environment in which public organizations operate, we must understand the dimensions of political competition among those who are battling for influence over the agency.<sup>180</sup> To the extent that we view these relationships in principal-agent terms, there are multiple principals and agents.<sup>181</sup> However, there are relationships among political actors that are not clearly amenable to analysis within the standard principal-agent frameworks. For instance, in competing for control over the regulatory process, Congress and the President are concerned partially with controlling opportunistic behavior by the agency and its members.<sup>182</sup> But this is only part of the dilemma that Congress and the President face; they are also concerned with the agency's obedience to their competitor. Hence, it may be precisely in that situation in which an agency is perfectly obsequious to Congress, that the President will assert his powers and therefore threaten to upset the balance.

The new economics of organization's underappreciation of the interrelationship between the agency and its "clients" is part of a larger tendency in this theory to disregard important elements of the external environment within which the organization functions. Certainly, the new economics of organization has acknowledged the critical role of law in providing a matrix in which the functions of the agency are carried out.<sup>183</sup> The law that is germane to the theory as it is applied to private organizations is contract law; the notion is that decisionmakers made organizational decisions in the

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179. See generally John W. Pratt & Richard J. Zeckhauser, *Principals and Agents: An Overview*, in *PRINCIPALS AND AGENTS: THE STRUCTURE OF BUSINESS I* (John W. Pratt & Richard J. Zeckhauser eds., 1992) [hereinafter *PRINCIPALS AND AGENTS*].

180. See discussion *infra* part IV.D.

181. On multiple principals, see Kenneth Arrow, *The Economics of Agency*, in *PRINCIPALS AND AGENTS*, *supra* note 179, at 37.

182. See *infra* Part IV.E.

183. See generally WILLIAMSON, *supra* note 96.

shadow of the legal rules governing how their agreements will be interpreted and enforced. From the perspective of transaction cost economics and the new economics of organization, the external environment represented by legal rules remains opaque. At times, it appears almost as an independent variable, existing as a ubiquitous set of constraints on the organizational choices of boundedly rational actors. This suggests a dichotomy between decisions that are within the domain of the organization and its members (*i.e.*, which governance structures it can create) and decisions that are out of their hands (*i.e.*, the law that governs certain arrangements and transactions). At other times, law is described as the product of rational decisionmakers who aim to facilitate efficient transactions. Contract law, for instance, functions as a set of useful instructions to firm managers to use in making and enforcing agreements.<sup>184</sup> In this sense, legal rules enforced by courts represent the rules that rational actors would construct and implement themselves if it were efficient for them to do so.

The view of law as exogenous and constraining and the view of law as a set of rules that merely map the preferences of the rational decisionmakers are irreconcilable. At bottom, the problem is that the new economics of organization lacks a sophisticated theory of the law and the nature and function of legal rules. Oliver Williamson candidly conceded this point when he wrote that the incipient science of organization “puts emphasis on governance structures (which mainly implicates economics and organization) rather than on the institutional environment (where the law is more salient).”<sup>185</sup> With such an emphasis, the new economics of organization cannot satisfactorily explain how the “institutional environment” in which regulatory decisions are made affects the performance of agencies and the decisions made by rational actors to design the institution in a certain way. For example, how would the new economics of organization explain the performance of the EPA, an agency constantly pulled and tugged in different directions by a web of legal restrictions, constructed by Congress and applied (and occasionally created) by courts?<sup>186</sup> We could not, surely, evaluate the EPA’s performance without incorporating these environmental factors and, especially, the role of law

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184. *See id.*

185. Williamson, *supra* note 71, at 200 n.3.

186. *See, e.g.*, ROBERT G. HARRIS & SIDNEY MILKIS, *THE POLITICS OF REGULATORY CHANGE: A TALE OF TWO AGENCIES* (1989); MELNICK, *supra* note 12. *Cf.* JERRY L. MESHAW & DAVID L. HARTFST, *THE STRUGGLE FOR AUTO SAFETY* (1990).

and legal rules. Governance structures, while important, would capture only part of the regulatory story.

Although the new economics of organization is limited in its ability to explain the political dimensions of regulatory politics, it does illuminate important aspects of organizational structure and function. Accordingly, it sheds useful light on how institutional form affects regulatory performance. At best, the new economics of organization can help to develop theories of each political organization standing alone;<sup>187</sup> what it cannot do—and, in fairness, has no pretense to do—is explain the interactions of each rationally constructed organization in an environment made up of political factors and legal commands.<sup>188</sup>

Neither one of these rational choice theories has thus far considered adequately the interdependence among institutions and the dynamics of inter-institutional competition for regulatory control. Myopic is the view that, with regard to regulatory policymaking, the legislature and administrative agencies act either as passive translators of interest group demands or as autonomous organizations. The regulatory environment is made up of elements that we must understand separately as well as interactively. What has been missing from rational choice theories until now is suitable appreciation of the role of institutions outside the agency, namely, Congress, the President, and the courts. These institutions are outside the agency but are very much inside the regulatory process. They have their own agendas, incentive structures, and methods of regulatory intervention and influence. What is needed is a complex theory of institutions which would help make sense of the dynamics of the regulatory process by closely examining the functions and activities of each institution that participates in this process.<sup>189</sup> What is also needed is an examination of the role of law and legal rules in the regulatory policy process. It is to the role that positive political theory plays in elucidating these issues that we now turn.

#### IV. TOWARD A POSITIVE POLITICAL THEORY OF POLITICAL INSTITUTIONS

The previous Parts have framed, respectively, the regulatory predicament and the ambitions of contemporary rational choice theory. The general aim

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187. See Weingast & Marshall, *supra* note 177.

188. See generally Williamson, *supra* note 171.

189. See Terry Moe, *Political Institutions: The Neglected Side of the Story*. 6 J.L. ECON. & ORG. 213 (Special Issue 1990).

is to enable legal scholars to consider more rigorously public law questions that concern the prospects and limits of regulatory reform. In Part I, I surveyed some of the elements of the general regulatory predicament. To the extent that effective regulation is thwarted by improper political and legal interventions, as I discussed in Part II, scholarship within the tradition of rational choice theory has helped us understand the nature and consequences of these interventions. Yet the principal efforts by economists to develop institutional theory—or, in the case of interest group theory, theory *about* institutions—have thus far failed to develop a sufficiently rich analysis of the interrelationships among various political institutions and the role of law in both enabling and constraining regulatory decisionmaking within institutions.

The objective of this Part is to evaluate the contributions of positive political theory with regard to these issues. The description of positive political theory in this Part is selective. Without question, the discussion of positive theory herein is filtered through the author's interpretations of the scholarly literature. The objective of the positive political theory literature is to explain political-institutional phenomena; my objective in this Article is to examine the potential intersections between positive political theory and prescriptions for regulatory reform. Consequently, the project in this Part is not to report comprehensively a line of research. It is to draw out of a burgeoning positive literature on governmental decisionmaking within political institutions a series of complementary perspectives on regulatory policy in order to consider whether and to what extent we can better understand the prospects for real regulatory reform.

### *A. The Elements of Positive Political Theory*

#### *1. Themes*

The signal contribution of positive political theory is its attention to the dynamics of political behavior within institutions. Positive political theory describes regulatory policymaking as a part of a world in which political actors function within institutions rationally and strategically in order to accomplish certain goals.<sup>190</sup> These rational actors compete for power and influence within these institutions; moreover, these institutions compete

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190. See generally Farber & Frickey, *supra* note 18 (defining positive political theory as “non-normative, rational choice theories of political institutions”). An early use of the phrase was in WILLIAM H. RIKER & PETER C. ORDESHOOK, AN INTRODUCTION TO POSITIVE POLITICAL THEORY (1973).

against one another, on behalf of their members, for control. The contribution of this body of work is to consider more rigorously and theoretically, and with the use of the technologies of microeconomic theory, the notion that much of regulation and public policy can be understood as products of strategic action.

Nearly twenty years ago, two prominent political economists described the basic underpinnings of what would become the principal project of positive theorists of politics and its processes.<sup>191</sup> The notion was that legislators act purposively and will structure their institutions and procedures to facilitate their goals. These goals are heterogenous. Legislators may covet job security; if so, they will act to maximize their chances of becoming reelected.<sup>192</sup> They may covet greater influence within the legislature, in which case they will orient their behavior to maximize intra-legislative influence.<sup>193</sup> Or they may simply aim to implement their vision of proper public policy through the lawmaking and regulatory processes.<sup>194</sup> Whatever their goals, legislators would act purposively in order to improve the conditions for the accomplishment of their aims.<sup>195</sup> The most significant of these conditions are the institutions in which the legislature carried out its activities and the rules and procedures that govern legislative decisionmaking. These institutions and rules range from the committee system to political parties to amendment rules. They also include, significantly, the institutions with which legislators interact in the course of regulatory decisionmaking, such as the President, administrative agencies, and the courts.

Purposive models of legislative behavior do not suppose that legislators would have some sort of collective intent or purpose. Legislatures, after all, are made up of individuals and groups.<sup>196</sup> They did suppose, however, that legislators would share an interest in acting rationally and strategically to pursue their ambitions in the legislative system. As a result of this shared purposivism, legislative institutions and rules would become things to fight over, just as legislators fight over substantive policies.

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191. John A. Ferejohn & Morris P. Fiorina, *Purposive Models of Legislative Behavior*, 65 AM. ECON. REV. 407 (1975).

192. See MAYHEW, *supra* note 116.

193. For an excellent examination of the various goals that legislators may pursue, see Richard Fenno's pathbreaking CONGRESSMEN IN COMMITTEES (1973). See also R. DOUGLAS ARNOLD, THE LOGIC OF CONGRESSIONAL ACTION 3-36 (1990).

194. See, e.g., ARTHUR MAAS, CONGRESS AND THE COMMON GOOD (1983).

195. See, e.g., WILLIAM H. RIKER, THE ART OF POLITICAL MANIPULATION (1976).

196. See, e.g., Shepsle, *supra* note 61.

Structure is not something immutable; it is subject to manipulation and to strategic behavior. Most structural features of political institutions are, in the vernacular of political economy, endogenous to politics. They are not the remnants of some deterministic political history or some precise constitutional rulebook. Instead, they represent the creation of rational decisionmakers determined to facilitate their political goals. Purposive models help to explain the past and present, that is, why we observe the creation and maintenance (or, in some cases, the destruction and recreation) of certain forms of decisionmaking within legislatures. Purposive models resist treating the legislative process as a *deus ex machina*, inherited by legislators and basically impervious to change. For that reason, purposive models help us predict the future: How will legislators adapt their institutions and rules in light of changing circumstances?

Positive political theory represents the modern incarnation of Ferejohn and Fiorina's early survey of purposive models of legislative behavior. It has, as its general ambition, the construction of a comprehensive theory of politics. To that end, positive political theory employs theories of all the institutions that make up the political process. It is especially concerned with the politics of regulation.<sup>197</sup> The regulatory process incorporates the decisions and behavior of each part of government: the legislature that enacts the regulatory statute and the legislature over time as it confronts changing regulatory policies; the President who appoints regulatory officials and supervises aspects of administrative decisionmaking; the courts who review agency decisions; and the agencies themselves.

Regulation presents a set of opportunities and risks for rational politicians acting within political institutions. Regulation presents, as the political economy of regulation has stressed, a set of goods to be fought over.<sup>198</sup> Decisions to regulate, to not regulate, or to deregulate, implicate politicians' preferences. Moreover, once the structure of regulatory policy is set, the administrative process can function as an arena in which politicians compete with one another for political advantage.<sup>199</sup> However, pursuing these opportunities through aggressive strategic action presents risks. For example, legislators may pass a statute that creates a regulatory program, an agency to implement it, and a general delegation which

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197. See Noll, *supra* note 17.

198. See KEITH KREHBIEL, INTERNATIONAL LEGISLATIVE ORGANIZATION 23-60 (1991) (describing "distributive" theories of legislative organization). See generally *infra* text accompanying notes 299-303.

199. See *infra* part IV.E.

enables them to exercise flexible control over regulatory decisions as they arise. Such a decision, while presenting opportunities for legislators who are parties to the original bargain, is subject to manipulation by others who not only share different goals but may confound the expectations and hopes of the program's creators in order to suit their own purposes. Broad delegations leave agencies some discretion; politicians may limit this discretion by intervening in agency decisions, but they will not necessarily do so in order to ensure that the agency is acting in accordance with the will of the regulation's creators.<sup>200</sup> Delegations designed to ensure flexibility may empower political competitors and therefore risk defeating the purposes of the program's original creators.

Positive political theories have had two different agendas. The first is to construct positive theories of political institutions.<sup>201</sup> Not all of these theories resemble all others. Positive political theory is methodologically eclectic. There are different positive perspectives on studying institutional phenomena. For example, controversies over the purpose of committees and committee power rage among political economists who remain committed to the basic rational choice underpinnings and methodologies of positive political theory. The second agenda is to put the pieces of these institutional theories together into a general theory of inter-institutional decisionmaking. The question is: How do rational politicians construct their institutions and regulatory processes to facilitate their individual goals and, at the same time, expand the domain of influence of the institutions to which politicians' own fates are tied?

Both of these agendas are relevant to normative public law scholarship and efforts to reform regulation. To understand the potential and limits of various prescriptions, we must build on a positive understanding of the nature of the institutions to which these prescriptions are directed. In addition, we must understand the relationship between reform suggestions

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200. See discussion *infra* part IV.B.2.

201. By far the richest positive analyses of political processes have been the studies of decisionmaking within Congress. Until very recently, positive political theory was formal studies of the legislature and legislative institutions. See Terry M. Moe, *An Assessment of the Positive Theory of Congressional Dominance*, 12 LEGIS. STUD. Q. 475 (1987) (criticizing political economists' singular focus on Congress and neglect of the Presidency). By now, there are positive analyses of presidential and judicial decisionmaking; accordingly, positive political theory has a substantially more catholic bent—and, for that reason, much more to offer to those interested in the sections between positive and normative theory. See *supra* part IV.B-C. Nevertheless, there is simply much more ground covered by positive political theories of legislative processes and, as a result, a considerably richer picture of legislative decisionmaking with which to work.

and the dynamics of regulatory processes.

Political economists and legal scholars working within the positive political theory framework strive to understand and explain two components of regulatory policymaking. The first, and more “internal” component, is the structure of institutional design and organization. The question here is the same one asked by organization theorists, including the new economists of organization: Why are institutions designed the way they are? What purposes are being subserved? And how might rational decisionmakers construct institutional structures, rules, and procedures in order to facilitate efficiently and efficaciously the purposes of the institution? To the extent that one of the principal aims of each political institution is to increase its power, positive political theory aims at explaining how political institutions are designed to facilitate these goals.

However, the power of any institution is limited in crucial ways. These limits implicate a second, and more “external,” aspect of regulatory decisionmaking: What are the constraints on the power wielded by self-interested institutions? The first category of constraints involves political checks, largely defined with reference to the strategic decisions made by institutions who compete with one another for political influence and control. In the positive political theory vision, politics becomes a sort of marketplace in which institutions compete with one another for economic rents. Where institutional power is unequal, the political marketplace becomes a game in which the fittest survive and in which political actors are sensitive to the appropriate design and structure of their institutions in order to improve their ability to compete for control.

In addition to these ubiquitous checks, inter-institutional competition is controlled by means of legal rules, enforced (and occasionally constructed) by courts. Hence, positive political theories of regulatory policymaking demand attention to the role of *politics* and the role of *law*.

## 2. *Technologies*

Positive political theory is squarely within the tradition of rational choice theory, and builds on its standard assumptions.<sup>202</sup> It considers political processes by examining the choices made by rational actors in institutions. It supposes that politicians act rationally, possess perfect information about

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202. For a useful introduction, see JOE B. STEVENS, *THE ECONOMICS OF COLLECTIVE CHOICE* (1993). A more critical survey is provided in DAVID FARBER & PHILIP FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* (1991).

the preferences of other politicians in government, and will, accordingly, attempt to carry out their own interests within the boundaries set by the decisions made by their competitors and the rules of law. As previously mentioned, positive political theory does not rest on a particularly strong conception of what politicians maximize;<sup>203</sup> all that is assumed is that politicians will strive to maximize their own interests through rational, strategic decisions made within their institution and in competition with other institutions in the political "marketplace."

Positive political theory is not synonymous, however, with what has been described in the law and in economics literature as collective choice or public choice. Collective theory concentrates on the difficulties posed for democratic-majoritarian decisionmaking by the impossibility theorems described by, among others, Kenneth Arrow and Duncan Black.<sup>204</sup> Public choice theory, although the basic definition is general,<sup>205</sup> has become associated with interest group theories of legislation in which, as described above, regulation is viewed as the output of a process driven by interest group pressures on reelection-maximizing legislators. Positive political theory breaks from both the collective choice and public choice traditions. It directly challenges the basic collective choice insight that decisionmaking within multi-member institutions is unstable and that, broadly speaking, anything can happen.<sup>206</sup> Positive political theory examines the role of institutions in ameliorating the problems described in collective choice theory. It also challenges, albeit more ambivalently, the thrust of public choice theory in its conclusion that regulatory outcomes are mere wealth transfers from the public fisc to interest groups.<sup>207</sup> Positive political theory draws attention away from the relationship between legislators and constituents and toward the relationship among politicians, who have heterogeneous goals, within the matrices of strategically constructed institutions and practices.

One of the ways in which positive political theory focuses attention on inter-institutional relationships is through the application of game theory.<sup>208</sup> The game-theoretic models employed in positive political

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203. See *supra* notes 191-95.

204. See *infra* part IV.B.2 (discussing collective choice).

205. See DENNIS L. MUELLER, *PUBLIC CHOICE II* (1989).

206. See, e.g., Richard McKelvey, *Intransitivities in Multidimensional Voting Models and Some Implications for Agenda Control*, 12 J. ECON. THEORY 472 (1976).

207. See *supra* part III.B (describing interest group theory of legislation).

208. For useful introductions to the assumptions and insights of game theory, see ERIC RASMUSSEN, *GAMES AND INFORMATION: AN INTRODUCTION TO GAME THEORY* (1989); DAVID M. KREPS, *GAME*

theory rest on the idea that political institutions will make regulatory choices as moves in a game involving each institution as a player and in which there is a payoff associated with particular regulatory outcomes. The standard regulatory game is a perfect information game.<sup>209</sup> It proceeds in sequence with each institution making its decision, that is, its “move,” in light of the decisions that other institutions will make in response to this move. A rational player will anticipate the future course of the game and, planning accordingly, will make his decisions in light of the entire sequence of the game. The notion of a subgame perfect equilibrium expresses the idea that we can describe the outcome of the game by working backwards, that is, by considering what would be the *ex ante* choices made by institutions given the game’s scenario.<sup>210</sup> In the simplest positive political theory games, the game is modeled in a series of decisions made by actors on a set of policies within a one-dimensional space where the actors are supposed to have “single-peaked” preferences.<sup>211</sup>

Game theory provides an interesting, yet highly stylized, perspective on inter-institutional decisionmaking in the regulatory process.<sup>212</sup> Although the game theory apparatus is not always easily accessible to the average consumer of legal scholarship, or at least, is not the common fare of law reviews, the game-theoretic models used in most contemporary positive political theory scholarship are rather simple. Indeed, part of the problem is that they may be *too* simple to account for the complexities of the regulatory process. For example, prominent positive political theorists have

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THEORY AND ECONOMIC MODELLING (1990); Ann E. Cudd, *Game Theory and the History of Ideas About Rationality: An Introductory Survey*, 9 *ECON. & PHIL.* 101 (1993).

209. See RASMUSSEN, *supra* note 208, at 50-51.

210. See *id.* at 85. Equilibrium is short-hand for “Nash equilibrium.” A Nash equilibrium “is an array of strategies, one for each player, such that no player has an incentive (in terms of improving his own payoff) to deviate from his part of the strategy array.” KREPS, *supra* note 208, at 28.

211. See generally Amartya Sen, *Social Choice and Justice: A Review Article*, 23 *J. ECON. LITERATURE* 1764, 1770-74 (1985).

212. Although the positive political theory literature I will describe herein follows the standard tenets of non-cooperative game theory, and the assumptions about rationality that underlie it, contemporary game theory is a field very much in flux. See generally Cudd, *supra* note 208. For example, through the work of Amartya Sen and others, there are developing theories that suggest modifications in rational choice economists’ assumptions about rational behavior. See, e.g., AMARTYA SEN, *CHOICE, WELFARE AND MEASUREMENT* (1982); Amitai Etzioni, *The Case for a Multiple-Utility Conception*, 2 *ECON. & PHIL.* 159 (1986). Moreover, there are new models developing under the banner “information theory” that may lead to important reconstructions of game theory and its methodologies. These issues are well beyond the scope of my Article. Suffice it to say here that positive political theory, in its reliance on game theory, borrows from a tradition that is in serious methodological ferment.

recently used imperfect information, or “signalling” models, to construct pictures of regulatory policymaking. The idea in this literature is that information is held in different amounts by different institutions. I will examine these signalling models in more detail later as we discuss congressional efforts to control administrative agencies through procedural and structural devices.<sup>213</sup>

Principal-agent theory is another analytic technology employed by positive political theory.<sup>214</sup> The basic idea is that political institutions are principals, trying through various means to control the actions of their agents.<sup>215</sup> The most literal iteration of this principal-agent relationship is between a majority legislative coalition and an administrative agency.<sup>216</sup> There may, though, be a myriad of other principal-agent relationships critical to the positive political analysis of the regulatory process, including, for example, the relationship between legislative coalitions and political parties or committees, and the relationship between the legislature and the courts.<sup>217</sup>

The use of a principal-agent framework to describe the relationship among political institutions, and specifically, the relationship among Congress, the President, and the courts, in the process of regulatory decisionmaking is problematic. It is difficult, as an initial matter, to define who are the principals and who are the agents. The relationship between Congress and an administrative agency might be accurately characterized

213. See *infra* part IV.B.3.

214. See generally Pratt & Zeckhauser, *supra* note 179; Eugene F. Fama, *Agency Problems and the Theory of the Firm*, 88 J. POL. ECON. 288 (1980). See also sources cited in *supra* note 169.

215. See, e.g., BARRY M. MITNICK, *THE POLITICAL ECONOMY OF REGULATION* (1980) [hereinafter MITNICK, *ECONOMY OF REGULATION*]; Barry M. Mitnick, *Regulation and the Theory of Agency*, 1 POL'Y STUD. REV. 442 (1981-82).

216. See *infra* part IV.B.3.

217. Terry Moe offers a lucid account of the basic elements of the principal-agent framework:

The principal-agent model is an analytic expression of the agency relationship in which one party, the principal, considers entering into a contractual agreement with another, the agent, in the expectation that the agent will subsequently choose actions that produce outcomes desired by the principal. . . . [A] principal may seek out an agent for various reasons. Often he may lack specialized knowledge or legal certification that the agent possesses, and sometimes the size or complexity of the task simply requires coordinated action by persons other than himself. But . . . the principal's decision problem is far more involved than simply locating a qualified person—for there is no guarantee that the agent, once hired will . . . choose to pursue the principal's best interests. . . . The agent has his own interests at heart, and is induced to pursue the principal's objectives only to the extent that the incentive structure imposed in their contract renders such behavior advantageous.

Moe, *supra* note 16, at 756. See also D. RODERICK KIEWIET & MATHEW D. MCCUBBINS, *THE LOGIC OF DELEGATION: CONGRESSIONAL PARTIES AND THE APPROPRIATIONS PROCESS* 22-38 (1991).

in hierarchical terms: Congress acts, as a principal, to control the actions of its agency-agent. However, when we introduce the President into this mix, the relationship becomes more complicated. Perhaps the President is a competing principal; in this scheme, two principal-agent relationships exist, each with a separate incentive structure and, therefore, with its own basis for predicting patterns of regulatory decisions. Moreover, one could think about the President as an agent of Congress; after all, the President is obliged to execute faithfully the laws enacted by Congress.<sup>218</sup> Accordingly, Congress acts, through its laws, as a principal in a hierarchical relationship in which the President is, at least with respect to his obligations under legislative commands, an agent of Congress. Thus, in the same regulatory scenario, the President can act as both (competing) principal and agent.<sup>219</sup>

The relationship among Congress, an agency, and the judiciary has a similarly complicated character. On one theory of legislative supremacy and judicial restraint, the court is clearly the agent of Congress; it is obliged to obey Congress' will and, insofar as the court faces the same incentives as does any other agent to shirk, Congress must structure its principal-agent relationship with the same attention to proper incentives and controls. However, even in this scenario, the courts wield substantial control over the actions of agencies. Are they a principal, acting to control the behavior of "their" regulatory agents? Can a court simultaneously be a principal and an agent? Perhaps there is a different way to think about the judiciary and its role in regulatory administration altogether. To the extent that the judiciary has its own distinct economic organization and incentives, it may behave like a principal competing with Congress for control over their agents.

Positive political theory brings an eclectic set of methodologies to the study of political phenomena. Its catholic approach is, in an important sense, a welcome relief from the tendencies in other rational choice theories to rest their entire analyses on a particular framework or analytic technology. However, there are potential tensions among the frameworks and technologies upon which positive political theory relies. The detailed examination of positive political theory in the remainder of this Part illustrates some of these tensions.

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218. U.S. CONST. art. II, § 3.

219. Cf. Kenneth J. Arrow, *The Economics of Agency*, in PRINCIPALS AND AGENTS, *supra* note 179, at 42-43 (discussing principal-agent problems associated with multiple principals).

## B. Legislatures

### 1. Constitutional Structure and the Possibilities for Rational Choice

In the American lawmaking system, there is little in the way of a constitutional template for proper legislative decisionmaking. Legislators' strategic decisions fill a vacuum left by the absence of explicit constitutional arrangements regarding the structure, rules, and practices of the federal legislature. Perhaps this vacuum was intentional,<sup>220</sup> or perhaps the Constitution's framers underestimated both the capacities of rational legislators to construct institutions to facilitate their opportunistic aims and the dangers posed by these strategic decisions.<sup>221</sup> In any event, the Constitution's structure sheds precious little light on the important decisions made by legislators within institutions.

Where the Constitution provides the most guidance is with respect to Congress' powers. However, the depiction of Congress' legislative powers in Article I is inchoate. Congress' regulatory powers derive from its more

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220. There are positive political theories explaining certain constitutional arrangements. The gist of these explanations is that the framers were more prescient than is generally credited and that they deliberately constructed mechanisms to regulate political advantage-taking. See, e.g., William H. Riker, *Rhetorical Interaction in the Ratification Campaigns*, in AGENDA FORMATION 81 (William H. Riker ed., 1993); John A. Ferejohn & William N. Eskridge, Jr., *The Article I, Section 7 Game*, 80 GEO. L.J. 523 (1992) [hereinafter Ferejohn & Eskridge, *Article I*]; John A. Ferejohn & William N. Eskridge, Jr., *Making the Deal Stick: Enforcing the Original Constitutional Structure of Lawmaking in the Modern Regulatory State*, 8 J.L. ECON. & ORG. 165 (1992) [hereinafter Ferejohn & Eskridge, *Making the Deal Stick*]. Cf. Saul Levmore, *Bicameralism: When Are Two Decisions Better than One?*, 12 INT'L REV. L. & ECON. 145 (1992); Robert Cooter, *The Minimax Constitution as Democracy*, 12 INT'L REV. L. & ECON. 292 (1992).

221. Of course, this merely hints at a large subject of inquiry, namely, the framers' purposes in choosing the constitutional structure reflected in the United States Constitution. While this subject is mainly beyond the scope of this Article, it is worth noticing that the observation in text—that the framers provided little in the way of a precise template for legislative decisionmaking—could be explained by a number of distinct theories. One perspective would stress the extent to which the framers were concerned, in their constitutional architecture, with fostering deliberation and public-spiritedness, and in that connection, fashioned a document that accomplishes these aims rather well. See, e.g., HARVEY C. MANSFIELD, JR., *AMERICA'S CONSTITUTIONAL SOUL* 137-62 (1991); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985). Another perspective would emphasize how the framers set out to construct a Constitution that would restrict lawmakers' self-interest—a purpose described lucidly by James Madison, see THE FEDERALIST No. 51 (James Madison) (Roy P. Fairfield ed., 1981), but failed. See, e.g., Macey, *supra* note 145. A third perspective, and surely the one that is most interesting from the standpoint of positive political theory, would suggest that the framers constructed exactly what they wanted, that is, a system that would leave most important issues of the lawmaking process indeterminate. The Constitution would preserve, thusly, "an invitation to struggle."

specific powers to regulate and its general power to enact legislation “necessary and proper” to carry out the powers enumerated elsewhere.<sup>222</sup> Legislators’ strategic decisions are constrained by this ascription to the legislature of certain powers in three ways: first, through the principle of limitation embodied in the theory of American constitutionalism and incorporated into the structure of Article I; second, through the Constitution’s separation of powers; and, finally, through the right described in the first ten amendments of the Constitution.<sup>223</sup>

Congress has only limited powers—those enumerated, and those necessary and proper to implement the basic powers. The basic principle, then, is that legislators cannot make choices that would expand the scope of legislative powers beyond that permitted by Article I. If the operative metaphor in positive political theory for legislators’ institutional choices is a competitive marketplace, it is a marketplace regulated by the Constitution’s core principle of limited government and enumerated powers.<sup>224</sup> Of course, the boundaries are imprecise; *McCulloch v. Maryland* and its progeny ensure that what is “necessary and proper” within the meaning of Article I will receive a capacious interpretation.<sup>225</sup> Positive political theory suggests that legislators will push the edges of these boundaries. Yet, the delineation of legislative powers assures that legislator strategizing will occur within some sort of constitutional architecture.

Politicians’ exercise of regulatory powers is also circumscribed through the Constitution’s separation of powers. The core idea is separation and specialization of function; the reality is, however, much more complex. The American lawmaking system is characterized more accurately by a structure of checks and balances, with institutions exercising overlapping powers and in which structure excesses are controlled through the checks and balances provided by political controls.<sup>226</sup> Separation of powers has

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222. U.S. CONST. art. I, § 8, cl. 18. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) (construing “necessary and proper” clause).

223. For recent attempts to integrate these sources of limitation into a more comprehensive theory of the American Constitution than the traditional rights/power distinction has permitted, see Geoffrey P. Miller, *Liberty and Constitutional Architecture: The Rights-Structure Paradigm*, 16 HARV. J.L. & PUB. POL’Y 87 (1993); Akhil Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131 (1991); Michael W. McConnell, *Contract Rights and Property Rights: A Case Study in the Relationship Between Individual Liberties and Constitutional Structure*, 76 CAL. L. REV. 267 (1988).

224. See Cooter, *supra* note 220, at 292-94.

225. See generally LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* ch. 2 (2d ed. 1988).

226. See, e.g., Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984).

operated as a constitutional doctrine—as a rule of law—only sporadically.<sup>227</sup> This is because of the uncertain contours of each branch's respective powers and because of the courts' reticence to intervene in disputes among the branches over regulatory issues. The exceptions, of which the Supreme Court's decision striking down the legislative veto is perhaps most notable,<sup>228</sup> are striking in part because they are so rare. Thus, while the Constitution's separation of powers might well have functioned as an orderly constraint on the strategic behavior of rational politicians acting within the institutions of government, the history of American constitutional law gives little indication that the courts are prepared to enforce separation of powers to such effect. As a result, there is little in the way of reliable legal controls on the encroachments by legislators, the President, and the agencies on the assigned powers of the other branches.<sup>229</sup>

With respect to the procedural components of legislative and presidential decisionmaking, the Constitution is mostly silent. The Constitution delineates the specific procedures legislators must follow in order to pass a statute.<sup>230</sup> Beyond this relatively brief set of rules, legislators are left to their own devices. "Each House," the Constitution states, "may determine the Rules of its Proceedings . . . ."<sup>231</sup> The courts have persistently taken this injunction rather literally, seldom intervening to restrict the discretion of legislators to develop their own institutions, rules, and practices.<sup>232</sup> The President's discretion in structuring the executive branch is, if anything, even more broad. The labyrinthine executive branch is a product of two centuries of political practice;<sup>233</sup> so long as the President has acted within the capacious scope of his constitutional powers

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227. See, e.g., Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513 (1991); Martin H. Redish & Elizabeth J. Cisar, "If Angels Were to Govern," *The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 DUKE L.J. 449 (1991).

228. *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983).

229. Perhaps this statement would appear less controversial than it seems on its face if the reader understood me to be making merely an empirical point about the state of separation of powers jurisprudence, that is, the point that the courts rarely strike down an action of a governmental decisionmaker on the grounds that such action violates the Constitution's separation of powers. It is concededly another matter to make the more ambitious point that the Constitution, in its text and history, *could not* provide any satisfactory legal controls on the exercise by politicians of lawmaking powers.

230. See U.S. CONST., art. I, § 7.

231. U.S. CONST., art. I, § 5, cl. 2.

232. *But see Powell v. McCormack*, 395 U.S. 486 (1969).

233. See generally Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153 (1992).

under Article II, decisions concerning proper executive structures are reserved to the political process, that is, to decisions of the President and Congress.<sup>234</sup> In short, the Constitution delegates most important structural decisions to politicians.

The remaining potential source of lawmaking instructions is the Constitution's Bill of Rights. In principle, the Constitution's enumerated rights could provide the same sort of structural constraints as the Fourth and Fifth Amendments provide with respect to the criminal justice system. The Bill of Rights is largely silent, however, with respect to the lawmaking processes of the legislative, executive, and judicial branches. The most ambitious attempt to construct a web of Constitutional rules for proper lawmaking has been the proposal for, in Hans Linde's words, a "due process of lawmaking."<sup>235</sup> The idea, broadly speaking, is to subject legislation to a procedural test whereby "the central function of judicial review [would be] to guarantee the democratic legitimacy of political decisions by establishing essential rules of the political process." The source of this test would be, as with judicial or administrative decisionmaking, the Constitution's guarantees of procedural due process.<sup>236</sup> While there have been occasional moves by the Supreme Court in the direction of a right to due process in lawmaking, the proposal has fallen on mostly deaf ears.<sup>237</sup>

We are back, then, to the basic theme of positive political theory: structural choice is political choice; decisions about procedure are decisions made within the political process and for the same sorts of instrumental reasons as other, more substantive, decisions. The task of the next three

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234. The principal constitutional restraint on presidential power is provided in Article II, which obliges the President to ensure that the laws are faithfully executed. See generally Calabresi & Rhodes, *supra* note 233.

235. Hans Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197 (1976). See also Terrence Sandalow, *Judicial Protection of Minorities*, 75 MICH. L. REV. 1162 (1977); Laurence Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269 (1975).

236. More recently, Cass Sunstein has suggested the Equal Protection Clause of the Fourteenth Amendment as a source of regulation on the legislature's lawmaking functions. Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984); Cass R. Sunstein, *Public Values, Private Preferences, and the Equal Protection Clause*, 1982 SUP. CT. REV. 127. Sunstein's proposal would, even if adopted, provide little in the way of a lawmaking template, for all that is required is that the legislature indicate that they have deliberated over the proposed legislation; in other words, they must demonstrate that the law has a rational justification and is not merely a manifestation of the legislature's "naked preferences." Sunstein's procedural suggestions have largely concerned matters formally outside the legislative process, for instance, greater restrictions on campaign spending.

237. *But see* Fullilove v. Klutznick, 448 U.S. 448, 549 & n.24 (1980) (Stevens, J., dissenting); Hampton v. Mow Sun Wong, 426 U.S. 88 (1976).

sections is to examine how politicians make these structural-institutional choices.

## 2. *Bargaining, Information, and Legislative Design*

At the core of rational choice theories of politics is the insight that the structure of legislative institutions is the product of rational, informed choices made by legislators acting within the domain of Congress and with the tools and resources they possess as elected officials. While positive political theories do not presume any particular legislative motivations, they do insist—and explain with the aid of formal models—that legislators act strategically to expand the scope of their own power and the power of the institutions that they create and work within. There are two different dimensions to these strategies. First, legislators must settle on the appropriate institutional structure of Congress; that is, what sort of rules and structures will best facilitate their interests. Majorities must agree to legislative initiatives; hence, legislators must make decisions with an eye toward convincing equally strategic legislators to go along. Second, these legislative coalitions must make decisions regarding the appropriate scope of delegated power to other institutions, outside the formal parameters of Congress, to carry out their interests and aims.

The scholarly effort by political economists to craft positive theories of legislative institutions was set in motion by a theoretical paradox. Legislative decisionmaking should ensure that the final policy reflects the will of a majority of legislators voting on the proposal. Whatever other objections we may have to the policy on the merits, we can be confident that it reflects the outcome of a process that is, broadly speaking, democratic. However, a core tenet of collective choice theories of legislative decisionmaking is that the policy outcomes voted upon by legislators need not reflect majoritarian processes. On the contrary, there is no guarantee that the process will yield coherent choices on any decisionmaking process in which the majority rules.<sup>238</sup> The lawmaking process is chaotic.<sup>239</sup> An 18th-century French mathematician, Marquis de Condorcet, pointed out how in a situation in which a collection of decisionmakers is choosing a policy from among three or more alternatives,

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238. See KENNETH ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (2d ed. 1963). For a useful survey of the literature, see FARBER & FRICKEY, *supra* note 13, at 38-62.

239. See the discussion in William H. Panning, *Formal Models of Legislative Processes*, in *HANDBOOK OF LEGISLATIVE RESEARCH* 689 (Gerard Lewenberg et al., eds., 1985); and in MUELLER, *supra* note 205, at 384-99.

a majority-rule voting procedure can lead to arbitrary results.<sup>240</sup> Two centuries later, political economists such as Duncan Black and Kenneth Arrow constructed theories that explained how, in the absence of certain restrictive conditions, in all forms of decisionmaking in which votes are aggregated, including legislatures, outcomes will be arbitrary and hence the process chaotic.<sup>241</sup>

This voters' paradox does not indicate, of course, that decisionmaking in legislatures is impossible. It only supposes that legislators must choose some method to reach decisions on policy outcomes with the understanding that majority-rule voting is prone to cycling.<sup>242</sup> Under certain conditions, these decisionmaking choices need not be incoherent. There are two primary categories of conditions in which coherent choices can prevail. One is what we might label *voter properties* conditions, the substance of which are more or less outside the scope of contemporary positive political theory.<sup>243</sup> The other set of conditions are *institutional* conditions. The

240. MARQUIS DE CONDORCET, *ESSAI SUR L'APPLICATION DE L'ANALYSE À LA PROBABILITÉ DES DECISIONS RENDUES À LA PLURALITÉ DES VOIX* (1785).

241. See ARROW, *supra* note 238; DUNCAN BLACK, *THE THEORY OF COMMITTEES AND ELECTIONS* (1958).

242. See McKelvey, *supra* note 206.

243. One condition for coherence is the existence of single-peaked preferences. Technically, the notion of preferences that are single-peaked refers to a two-dimensional model of voter utility (vertical axis) and policy choices (horizontal axis) in which there is only one "peak" in terms of utility, and hence, one can consistently rank their preferences/utilities for each policy choice. See STEVENS, *supra* note 156, at 146-47. Basically, where preferences of legislators are single-peaked, they can rank their preferences from top to bottom in a way that, when aggregated, will reveal a coherent majority outcome. See BLACK, *supra* note 241. However, the conditions for single-peakedness are quite restrictive. First, *all* legislators must have single-peaked preferences; and, second, the issues that give rise to the choice must be single-dimensional issues, that is, they must rest on a single underlying evaluative dimension adhered to by all voters. STEVENS, *supra* note 156, at 147. For example, suppose the issue is a choice for a health care proposal among several alternatives, including "managed care," "Canadian style," and "pay or play." In choosing from among the alternatives, each voter must adhere to a single criterion, say, economic efficiency, in order to adhere to the single-peakedness condition. Suppose I support "managed care" because of its cost-effectiveness, but also support, albeit less, "Canadian Style health care" because of its equity and fairness qualities. If you value "Canadian Style" over "managed care" based on an efficiency criterion, then, given additional policy choices and additional voters, we are no longer adhering to the single-peaked preferences condition and are back to incoherence.

Another *voter properties* condition is the role of ideology. Here the idea is that voters can align their preferences from left to right on a single policy dimension based on their ideology. See ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* 115-16 (1957). Suppose the criterion is the level of government intervention in the economy. This ideological criterion can be mapped along a single-dimensional spectrum so that we can plot all voters somewhere on this line. We can then align the policy choices on this spectrum based on the degree to which it is interventionist. Again, this conception runs into the problem of single-dimensionedness. Voters can rarely be plotted along a

notion underlying these conditions is that some degree of coherence can be obtained through legislator choices that carefully consider the consequences of choices made under certain decision rules.<sup>244</sup> One way a legislator can adapt to potentially arbitrary outcomes is by voting strategically, that is, calculating how the structure of his votes will play out given a particular voting scheme. Suppose we observe the following preference ordering:

A prefers  $X > Y > Z$

B prefers  $Y > Z > X$

C prefers  $Z > X > Y$

Assuming the first vote pits X versus Y and the second vote pairs the winner versus Z, Z would win. For A to avoid getting Z, his last choice, he can vote strategically for Y in the first round. The final outcome will then become Y, his second-best choice, even though he preferred X to Y in the first round. By voting strategically, legislators can ameliorate the effects of voting intransitivities and can secure better, if not ideal, outcomes.<sup>245</sup> Of course, strategic voting (or "sophisticated voting") does not make the process any more stable or democratic. It only adds another layer to the already chaotic process; given strategic voting, we cannot tell *what* legislators' true preferences are. Voting becomes a process of legislators' calculating each others' preferences and strategies and taking advantage of voting rules to implement the best results possible under the circumstances.

Related to strategic voting as a means of limiting chaos is the manipulation of legislative agendas in order to stack the deck in favor of preferred outcomes.<sup>246</sup> Legislators can limit the possibility of cycling by structuring the agenda in order to ensure that the most desirable pairwise vote will occur at the end. The agenda in the modern Congress, where the final proposal is pitted against the status quo, is a simple example of how the agenda can influence the final outcome.<sup>247</sup> The collective choice literature is full of theoretical and empirical examinations of the manipulation

single-dimensional spectrum in the way that Downs supposed. Nor can issues be so clearly mapped.

244. See, e.g., Bernard Grofman et al., *Stability and Centrality of Legislative Choice in the Spatial Context*, 81 AM. POL. SCI. REV. 539 (1987).

245. See, e.g., Kenneth A. Shepsle & Barry R. Weingast, *Uncovered Sets and Sophisticated Voting Outcomes with Implications for Agenda Institutions*, 28 AM. J. POL. SCI. 49 (1984).

246. See RIKER, *supra* note 195; McKelvey, *supra* note 206; Charles Plott, *A Notion of Equilibrium and Its Possibility Under Majority Rule*, 57 AM. ECON. REV. 787 (1967).

247. We can say that the status quo is "privileged" in the voting sequence. Although legislators can introduce various amendments to the proposal on the floor during deliberation, the final version of the proposal must defeat the status quo to become enacted.

by rational legislators of agendas in the service of political advantage-taking.<sup>248</sup>

While each of these devices—strategic voting and agenda manipulation—is a way of limiting voting cycles, these devices are not ideal, either from the perspective of democratic theory<sup>249</sup> or, as is more relevant for our purposes in this section, from the perspective of the legislators themselves. Each legislator can vote strategically and participate in agenda manipulation.<sup>250</sup> Therefore, legislators will want to take full account of the incentives and opportunities for such manipulations when they make their choices concerning the rules and structures of decisionmaking in the legislature. As a general matter, legislators can appreciate the extent to which strategic behavior can promote chaos. Cycling is replaced by strategic voting and agenda manipulation; the result, however, is still undemocratic decisionmaking.<sup>251</sup>

Chaotic decisionmaking means that policy outcomes would be uncertain. It is therefore in each legislator's interest to limit the extent of chaos. There are several reasons for this. One reason concerns the relationship between legislators and their constituents. Legislators survive to the extent that they provide benefits to constituents. The inability of legislators to ensure that their constituent demands will be fulfilled through their legislative efforts decreases the value of the legislator's services. Thus devalued, constituents will be inclined to turn their attention elsewhere, either to a different legislator or to a different political institution, with the informed hope that an alternative decisionmaking forum would provide a more fruitful source of benefits. Another reason for legislators to prefer stability to chaos involves the interest of legislators in the relative power of their institution. The idea is the legislature's relative power—their ability to compete against other political institutions for influence and

248. See generally FARBER & FRICKEY, *supra*, note 13; Panning, *supra* note 239.

249. See, e.g., WILLIAM H. RIKER, *LIBERALISM AGAINST POPULISM* (1982); AMARTYA SEN, *COLLECTIVE CHOICE AND SOCIAL WELFARE* (1970).

250. However, some legislators may be more equal than others. A legislator's position in the institution may determine his relative ability to manipulate successfully legislative agendas with regard to policy outcomes.

251. However, such decisionmaking need not be unstable. As Kenneth Shepsle notes:

[E]ven in voting processes victimized by the Arrow result, we are sometimes able to identify equilibria. These equilibria, however, are strongly affected by the underlying incoherence of majority preferences and, because of this, lack a compelling normative justification. Arrow's theorem does not necessarily entail constant flux and indeterminacy; rather, it implies that the manner in which majority cycling is resolved is arbitrary or otherwise morally indefensible.

Shepsle, *supra* note 61, at 242 n.6.

control over the regulatory process—is a function of the structure of legislative decisionmaking. If legislating is an inherently unpredictable activity, then policymaking through other institutions, such as the bureaucracy, the Presidency, and the courts, becomes much more attractive. Persistently chaotic decisionmaking devalues the legislative function and, therefore, decreases the relative power of the legislature vis-a-vis other branches in government. Legislators would, therefore, share an institutional interest in restricting the scope of chaotic decisionmaking in order to preserve the overall power of Congress in the governmental system.<sup>252</sup>

Starting with the assumption that legislators will expend efforts to avoid the chaos produced by voting intransitivities and agenda manipulation, formal theorists have described how legislators could construct institutions that would defeat cycling and, at the same time, facilitate the interests of all legislators in reaping benefits through mutually beneficial exchanges with one another concerning policies. Attention to these institutional efforts was especially appropriate for an empirical reason: The modern legislature was, despite the dire predictions of collective choice theory, observed to be a rather stable institution. Gordon Tullock, one of the founding fathers of Public Choice, asked at the beginning of the 1980s: Why do we observe so much stability in the modern Congress?<sup>253</sup> Theoretically, such stability seemed implausible given the chaos theorems described in the collective choice literature; empirically, though, legislative decisionmaking in the modern Congress appeared fairly stable.

A seminal theoretical contribution is the concept of “structure-induced equilibrium.”<sup>254</sup> The basic idea starts with a dichotomy between two different dimensions of rational choice: the choice among *policies* and the choice among *institutions*. Given that legislators will have heterogeneous preferences about policies, they avoid chaos by rationally choosing institutions that manage uncertainty and secure stability. To the extent that

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252. To be sure, a sophisticated legislator might well profit from a chaotic environment. For instance, a legislator in the position to regularly manipulate the policymaking agenda in order to take advantage of voting intransitivities would welcome a certain degree of chaos. However, it is unlikely, given the interests of all other legislators in the chamber, that the scenario in which a legislator can act as a de facto dictator would remain stable. It is far more likely that all rational legislators would seek measures to restrict the extent of chaos and to manufacture rules, institutions, and procedures to limit the scope of arbitrariness and uncertainty.

253. Gordon Tullock, *Why So Much Stability?*, 37 PUB. CHOICE 189 (1981).

254. Shepsle, *supra* note 102; Kenneth A. Shepsle & Barry R. Weingast, *Structure-Induced Equilibrium and Legislative Choice*, 37 PUB. CHOICE 509 (1981); Kenneth A. Shepsle, *Institutional Arrangements and Equilibrium in Multidimensional Voting Models*, 23 AM. J. POL. SCI. 27 (1979) [hereinafter Shepsle, *Multidimensional Voting*].

legislators are concerned with reaping benefits, they will construct institutions in order to capture their share of benefits. Stability is still possible, though, to the extent that *all* legislators share the same interest in manufacturing institutions that facilitate agreements over policy outcomes. Agreement on institutional design and procedural detail will yield an institutional equilibrium from which legislators would find it costly to defect.

The most conspicuous example of such an institution is the standing committee in the United States Congress.<sup>255</sup> The significance of the committee and committee power in the modern Congress is attributable, according to positive theorists, to the strategic decisions of legislators to manufacture and maintain such power in place of entrusting all policy decisionmaking to floor debate and voting.<sup>256</sup> Committees act as critical "gatekeepers," ensuring that there is substantial and persistent support for a legislative initiative before it can clear the committee hurdle.<sup>257</sup> The antidemocratic qualities of committee decisionmaking described by critics are, in this perspective, precisely the point: legislators place themselves on those committees in which they have an extraordinary interest. So long as other committees are also open to such self-selection, a reciprocity of interests exists. This reciprocity is manifested through a structure which is itself the product of rational, reflective choice.<sup>258</sup> This structural arrangement is reinforcing; legislators will gravitate to those committees that coincide with their electoral needs and interests and will preserve the system that enables this mutually advantageous specialization of function.

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255. See generally STEVEN S. SMITH & CHRISTOPHER J. DEERING, *COMMITTEES IN CONGRESS* (1984); Heine Eulau & Vera McCluggage, *Standing Committees in Legislatures: Three Decades of Research*, 9 LEGIS. STUD. Q. 195 (1984). For an early analysis of the role of committee government, see WOODROW WILSON, *CONGRESSIONAL GOVERNMENT* (1885).

256. See Kenneth A. Shepsle & Barry R. Weingast, *Why are Congressional Committees So Powerful?*, 81 AM. POL. SCI. REV. 935 (1987); Kenneth A. Shepsle & Barry R. Weingast, *The Institutional Foundations of Committee Power*, 81 AM. POL. SCI. REV. 85 (1987) [hereinafter Shepsle & Weingast, *Institutional Foundations*].

257. See Shepsle & Weingast, *Institutional Foundations*, *supra* note 256, at 87.

258. See KENNETH A. SHEPSLE, *THE GIANT JIGSAW PUZZLE: DEMOCRATIC COMMITTEE ASSIGNMENTS IN THE MODERN HOUSE* (1978) [hereinafter SHEPSLE, *THE GIANT JIGSAW PUZZLE*]; Shepsle, *Multidimensional Voting*, *supra* note 254; David A. Rohde & Kenneth A. Shepsle, *Democratic Committee Assignments in the House of Representatives: Strategic Aspects of a Social Choice Process*, 67 AM. POL. SCI. REV. 889 (1973). For different perspectives on committee selection and membership, see Keith Krehbiel, *Are Congressional Committees Composed of Preference Outliers?*, 84 AM. POL. SCI. REV. 149 (1990); Richard L. Hall & Bernard Grofman, *The Committee Assignment Process and the Conditional Nature of Committee Bias*, 84 AM. POL. SCI. REV. 1149 (1990).

Once on the committee,<sup>259</sup> legislators wield various powers to ensure control over proposals. The most critical source of power flows from the committee's role as gatekeeper, limiting the bills that come to the floor for consideration. Committees are well known graveyards for a large percentage of bills in any given legislative session.<sup>260</sup> Committees enjoy other critical powers as well. The so-called "ex post veto" device—the power of the committee to have a second chance to review a proposal after it works its way through both Chambers and the inter-Chamber conference committee—enhances the power of committee members by insulating committee proposals from destruction at the hands of the legislative body as a whole.<sup>261</sup>

The structure of rules governing floor debate once a bill emerges from a committee also facilitates the legislators' distributive decisions.<sup>262</sup> The congressional literature describes a dichotomy between so-called "open" and "closed" rules.<sup>263</sup> Open rules leave legislators more or less unrestricted in their ability to introduce amendments to a bill brought to the floor of the House or Senate for consideration.<sup>264</sup> Closed rules limit, to varying degrees, legislator prerogatives. The decision to give a reported bill an

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259. For the purpose of this discussion, "committee" includes "subcommittee" as well.

260. Two excellent descriptions of the role and significance of the standing committee in modern congressional government are RICHARD FENNO, *CONGRESSMEN IN COMMITTEES* (1973) and Nelson W. Polsby, *The Institutionalization of the U.S. House of Representatives*, 62 AM. POL. SCI. REV. 144 (1968).

261. Shepsle & Weingast, *Institutional Foundations*, *supra* note 256, at 93-100. "The ex post veto power of a committee follows from the fact that it represents the chamber in conference proceedings and may refuse to agree to a conference settlement." *Id.* at 95.

262. See, e.g., Barry R. Weingast, *Fighting Fire With Fire: Amending Activity and Institutional Change in the Postreform Congress*, in *THE POSTREFORM CONGRESS* 142 (Roger H. Davidson ed., 1992) [hereinafter Weingast, *Fighting Fire with Fire*]; Barry R. Weingast, *Floor Behavior in the U.S. Congress: Committee Power under the Open Rule*, 83 AM. POL. SCI. REV. 795 (1989).

263. See, e.g., STEVEN S. SMITH, *CALL TO ORDER: FLOOR POLITICS IN THE HOUSE AND SENATE* (1989) [hereinafter SMITH, *FLOOR POLITICS*]; STANLEY BACH & STEVEN S. SMITH, *MANAGING UNCERTAINTY IN THE HOUSE OF REPRESENTATIVES* (1988); Steven S. Smith, *New Patterns of Decisionmaking in Congress*, in *THE NEW DIRECTION IN AMERICAN POLITICS* (John E. Chubb & Paul E. Peterson eds., 1985); Stanley Bach, *The Structure of Choice in the House of Representatives: The Impact of Complex Special Rules*, 18 HARV. J. ON LEGIS. 553 (1981).

264. "Open" need not mean completely unrestricted, however. As Weingast points out:

The *open rule* is not a free-for-all that allows anything to happen; rather, it is a highly managed process that provides important advantages to the proponents of legislation. The open rule embodies a large number of constraints, including restrictions on the number of motions in order on the floor at any one time and, critically, rules governing the order of recognition.

Weingast, *Fighting Fire With Fire*, *supra* note 262, at 144. See also WALTER J. OLESZEK, *CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS* (3d ed. 1978).

open or closed bill is, explains positive political theorists, a strategic judgment.<sup>265</sup> Indeed, the very structure by which legislation is considered, including the right of committee majorities to restrict the scope of legislative debate through the use of more or less restrictive rules, is the product of rational, self-interested choices. As with the committee system generally, legislators share in common an interest in maintaining a structure by which they can regulate the legislative process in particular policy contexts.

Committee power and rules of debate often work in tandem. In recent articles, Barry Weingast sets out to explain an apparent anomaly, namely, the persistent power of subcommittees in an institutional environment in which floor politics has taken an increasingly significant role.<sup>266</sup> Increasing floor behavior, facilitated through more frequent floor amendments, need not be inconsistent with the maintenance of subcommittee power. While it is true that permitting more opportunities to opponents of the subcommittee's bill to introduce amendments on the floor threatens to undermine subcommittee power, rational legislators are capable of adapting to the new situation. One way they have adapted is to come to the floor prepared to fight fire with fire, that is, to respond to threatening amendments with counter-amendments.<sup>267</sup> The evidence suggests that this strategy is largely successful; bills emerging from committee prove remarkably resilient in the face of reforms that decentralized the committee structure and increased the power of legislators who opposed committee proposals.<sup>268</sup>

One of the lessons of this story is that rational legislators will adapt to institutional changes and reforms. The substantial reforms of the 1970s were hailed as the dawn of a new "postreform" era in which legislative power would be redistributed and legislative decisionmaking would be substantially different.<sup>269</sup> While the postreform Congress was not merely business as usual, rational choice theories of Congress have stressed the phenomenon of institutional adaptation, pointing out that rational legislators will adapt their rules and institutions in order to maintain their power, and

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265. See Weingast, *supra* note 262; David P. Baron & John A. Ferejohn, *Bargaining in Legislatures*, 3 AM. POL. SCI. REV. 181 (1989).

266. See Weingast cites in *supra* note 262. On the increasing role of floor activity, see, e.g., SMITH, FLOOR POLITICS, *supra* note 263.

267. Weingast, *Fighting Fire With Fire*, *supra* note 262, at 148-53.

268. See *id.*

269. See Roger H. Davidson, *The Emergence of the Postreform Congress*, in THE POSTREFORM CONGRESS, *supra* note 262, at 3.

the relative power of Congress generally.<sup>270</sup> Structure-induced equilibria will persist even in the face of attempted and real reforms. This is so because legislators maintain a continuing interest in constructing means of facilitating and preserving their power. So long as decisions concerning the nature and scope of reform are within their hands, structural and procedural choices will reflect these self-interested concerns.

The structure-induced equilibrium literature has provided a wealth of insights regarding the structure of the modern federal legislature. However, serious questions remain. First, what ensures that legislators will remain committed to these institutional arrangements? It is surely not some abstract interest in stability for its own sake. If the idea was that the structure-induced equilibrium was the product of rational, self-interested decisions by legislators, what would keep a legislator from abjuring his commitment to rules and procedures when it served his interest to do so? A second, and related, issue, concerns what we may label the inheritability paradox. As William Riker pointed out, decisions by legislators to construct and maintain institutions are presumably susceptible to the same sort of instabilities that plague decisions over policy.<sup>271</sup> Hence, institutional choices "inherit" the problems that plague policy choices.<sup>272</sup> The third question is more general: Is it correct to think of legislators as acting, through institutions, only to increase their share of legislative goodies?<sup>273</sup> Is the driving engine behind institutional design and maintenance the redistribution of resources and power? Or can we explain legislators' rational decisions to construct certain political institutions as driven by other, nondistributional, goals?<sup>274</sup>

The most recent spate of literature on the foundations of institutional power in Congress has been directed toward answering these sets of questions.<sup>275</sup> The question of what mechanisms ensure legislator fidelity to the institutional structure they have created has been considered from the

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270. See Kenneth A. Shepsle, *The Changing Textbook Congress*, in *CAN THE GOVERNMENT GOVERN?* 238 (John E. Chubb & Paul E. Peterson eds., 1989).

271. William H. Riker, *Implications from the Disequilibrium of Majority Rule for the Study of Institutions*, 74 *AM. POL. SCI. REV.* 432 (1980).

272. In addition to Riker, *id.*, see KEITH KREHBIEL, *INFORMATION AND LEGISLATIVE ORGANIZATION* 32-33 n.12 (1991).

273. See KREHBIEL, *supra* note 272, at 23-60.

274. See *infra* text accompanying notes 299-303.

275. See the discussion in Kenneth A. Shepsle & Barry R. Weingast, *Positive Theories of Congressional Institutions* (Nov. 1992) (on file with author).

perspective of the new economics of organization.<sup>276</sup> The basic thesis is that legislators will construct their organization in order to facilitate the making of bargains and legislative deals. The risks of defection from institutional commitments are akin to the problems of moral hazard faced in any organization.<sup>277</sup> The task, then, is to maintain legislator commitment in the face of incentives to renege. These issues were thoroughly addressed in a 1988 article by Barry Weingast and William Marshall.<sup>278</sup> The authors argued that legislators face severe contracting problems. The structure of logrolling, for instance, involves persistent risks of renegeing. Except where legislators can trade with each other in one bill, legislator performance of their respective bargains is nonsimultaneous; legislators give benefits to colleagues in exchange for behavior that will occur in the future.<sup>279</sup> Without the ability to enforce their trades and fearing legislators' incentives to renege after they have received their benefits, legislators will discount the present value of the benefit to be received from trade.<sup>280</sup> The upshot is fewer legislative bargains; only where the discounted benefits exceed the costs of trading, including the significant transaction costs entailed in reaching agreements episode by episode, will legislation get enacted.<sup>281</sup>

Weingast and Marshall point out, however, that legislators need not accept the playing field as they find it. They will design institutions and rules to facilitate trading, that is, to decrease the transaction costs and ensure the durability of legislative bargains.<sup>282</sup> "In the face of uncertainty over the future status of today's bargain," they argue, "legislators will devise institutions for long-term durability of agreements that ensure the flow of benefits beyond this session of the legislature."<sup>283</sup> Requiring proposals to cross through a number of institutional gates increases the durability of the final bargain, thus raising the value of the legislative deal to legislators. Most particularly, committees with exclusive jurisdiction

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276. On the new economics of organization, see *supra* part III.C.

277. See Moe, *supra* note 16, at 754-55.

278. Weingast & Marshall, *supra* note 177.

279. See *id.* at 138-39. See also Macey, *supra* note 129, at 53.

280. Weingast and Marshall do not consider systematically the role of reputation as a means of guarding against ex post renegeing. See David M. Kreps & Robert Wilson, *Reputation and Imperfect Information*, 27 J. ECON. THEORY 253 (1982).

281. Weingast & Marshall, *supra* note 177, at 139 ("Rational coalition partners, therefore, discount the potential gains from a proposed trade by the probability that these benefit flows will be curtailed by renegeing.").

282. *Id.* at 136-37.

283. *Id.* at 139.

over policy domains and agenda power create a mechanism for solidifying legislative bargains. "Institutionalizing rights over agenda power—control over the design and selection of proposals that arise for a vote—substitutes for purchasing the votes of others in an explicit market."<sup>284</sup> This mechanism facilitates coalition formation in two ways: First, in order to form, coalitions must secure the support of the critical members of the relevant committee; committee power is thus both necessary and sufficient (along with the support of a large enough coalition of the committee to meet the majority-rule criterion) to defeat the status quo; accordingly, legislators will, in order to maintain their own bargaining power concerning those issues that matter to them, self-select committees that correspond with their policy preferences.<sup>285</sup> Second, committee power rigidifies the coalition formation process by making it more difficult to change policy. Small changes in political circumstances are unlikely to generate changes in policy; committees with exclusive jurisdiction and agenda power stand as bulwarks against policy changes.<sup>286</sup>

The industrial organization perspective represents a step forward from earlier positive theories insofar as it begins to explain why legislators would both construct and maintain institutional apparatuses in the face of incentives to defect. In a similar vein is the theory of legislative bargaining sketched out by David Baron and John Ferejohn in recent articles.<sup>287</sup> They use noncooperative game theory to illustrate how legislators construct an institutional system to facilitate vote trading. They describe how the result of this game is an equilibrium which satisfies the distributional interests of all legislators in the chamber—or at least satisfies them enough so that they will resist disrupting the equilibrium through defections or institutional change or both.<sup>288</sup> Baron and Ferejohn set out to explain whether rational legislators would prefer to send proposals to the floor with an open or closed rule. The key lies in the gains that can be captured by the rule choice that increases the likelihood that: (1) a majority will agree as soon as possible, thus reducing the transaction costs associated with

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284. *Id.* at 145.

285. *See, e.g.,* SHEPSLE, THE GIANT JIGSAW PUZZLE, *supra* note 258. *But see* Krehbiel, *supra* note 258.

286. Weingast & Marshall, *supra* note 177, at 146-47. They notice how this second phenomenon, policy durability through committee power, parallels some of the advantages of vertical integration in business firms. *Id.* at 147 n.17.

287. Baron & Ferejohn, *supra* note 265; David P. Baron & John A. Ferejohn, *The Power to Propose*, in *MODELS OF STRATEGIC CHOICE IN POLITICS* 343 (P. Ordeshook ed., 1989).

288. *See* Baron & Ferejohn, *supra* note 265, at 187-89.

continuous bargaining; and (2) the proposer will capture a greater share of benefits under one type of rule than another, in which case the proposer would be more inclined to invest in bringing such a proposal forward.<sup>289</sup> The conclusion is that legislators would, with complete information, choose a closed rule for distributive legislation.<sup>290</sup> Again, the effort of this game-theoretic approach is to explain how and why legislators would tether themselves to the institutional choices made *ex ante*. The basic answer is the same as in the industrial organization perspective: Legislators will strive to construct a system for efficient bargaining.

The collective interest in facilitating bargaining forms part of an answer to the second issue of concern, the inheritability paradox. The paradox concerns the risk that institutional choices will inherit the instabilities that would, collective choice theory predicts, plague policy choices. Although this paradox has thus far been largely ignored in positive theory literature, the tacit assumption underlying many of these theories seems to be that legislators share a collective interest in structural stability, regardless of their heterogeneous preferences over policies. The key, suggests Kenneth Shepsle, lies in legislators' interests in hedging against policy uncertainty.<sup>291</sup> There are several dimensions to this uncertainty and the notion that institutional stability responds to uncertainty is more plausible with respect to some dimensions than to others.

One source of uncertainty concerns the risk that changes in institutional structure will backfire; legislators risk leaving themselves worse off with respect to implementing their policy goals when they tinker with existing structure. "It is risky," argues Shepsle, "to try to change institutional arrangements in a manner adverse to the interests of those currently in control. Failure has its consequences so that anyone initiating such attempts at change must weigh the expected benefits of success against the certainty of sanctions if he fails."<sup>292</sup> Risk-averse legislators may well agree to keep their bird in the hand, even where they see on the horizon the potential for institutional change that would facilitate their immediate policy aims.

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289. *Id.*

290. Legislators may still prefer open rules in instances in which less fettered floor debate restrains the power of the committees that legislators distrust. See David P. Baron, *Majoritarian Incentives, Pork Barrel Programs, and Procedural Control*, 35 AM. J. POL. SCI. 57 (1991). Baron explains that this will be especially true when legislators have an incentive to facilitate pork barreling, but still wish to reduce the inefficiencies associated with this inherently inefficient type of legislation.

291. See Shepsle, *supra* note 102, at 69-70.

292. *Id.* See also KREHBIEL, *supra* note 272, at 32-33.

Another source of instability concerns the prospect that the other legislators will begin to reflect different sets of policy preferences and goals. To the extent that legislators build their institutional choices—and hence their *institutions*—around assumptions and expectations concerning their colleagues' agendas, the shift in legislator preferences may reveal itself in the fracturing of existing legislative coalitions. As a result, the commitment to existing institutional arrangements may waver. Still, the benefits of eschewing commitments to the institutions of the status quo must be weighed against the short-term and long-term costs—both the immediate costs borne by legislators who take the first steps to renege on the structural bargains and the long-term reputational effects associated with demonstrating disloyalty to existing legislative arrangements.<sup>293</sup> Both sets of costs may be worth bearing in light of the reconstruction of legislative preferences and coalitions. Indeed, even addressing the issue as one that involves a cost-benefit tradeoff introduces an important element of instability.

This phenomenon of shifting coalitions and resulting instabilities has been described by the father of structure-induced equilibrium theory, Kenneth Shepsle. He starts by noting the inherent instability in any given policy decision made by a majority coalition of legislators. Legislators cannot see into the future. Accordingly, the reasons that drive them to support one or another policy may evaporate over time. This is true regardless of whether their decision was based on what a majority of their constituents wanted, the demands of especially powerful interest groups, or their sense of what the public interest properly requires. This uncertainty may be manifested, says Shepsle, in a *coalitional drift*.<sup>294</sup> Legislative coalitions that have succeeded in enacting their preferences into law may become obsolete as a result of elections and the corresponding replacement of old legislators and hence the replacement of a previous pattern of legislator preferences.<sup>295</sup>

With respect to the stability of structure, the risk of coalitional drift—a

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293. See Kreps & Wilson, *supra* note 280 (discussing reputation as a constraint on reneging).

294. Kenneth A. Shepsle, *Bureaucratic Drift, Coalitional Drift, and Time Consistency: A Comment on Macey*, 8 J.L. ECON. & ORG. 111 (1992) [hereinafter Shepsle, *Bureaucratic Drift*]; 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 (1989). See also John A. Ferejohn & Barry R. Weingast, *A Positive Theory of Statutory Interpretation*, 12 INT'L REV. L. & ECON. 263 (1992) (discussing the difference between the enacting and sitting legislature and the significance of the difference for statutory interpretation).

295. See Shepsle, *Bureaucratic Drift*, *supra* note 294, at 114.

form of uncertainty—may cut in two different directions. On the one hand, it may be precisely because of the risk that coalitions will drift away from one set of policy preferences that legislators will cherish institutional rigidity. This, after all, is the main point of the structure-induced equilibrium theory, as well as of the new economics of organization to theories of legislative bargaining.<sup>296</sup> From this perspective, coalitional drift provides yet another reason to suppose that legislators will adhere to durable, persistent institutional forms.<sup>297</sup> Legislators will want to preserve what they have; victorious coalitions will want to maintain this precarious victory in the face of future uncertainties, which threaten to break apart the coalition. On the other hand, coalitional drift may signal the danger that legislators' preferences concerning institutions may drift over time. With new information, new constituents, and changing patterns of interest group influence, legislators who today support a particular policy may later change their tune. Moreover, the makeup of the legislature may change in ways that dissolve the original commitments to certain organizational forms. Surely the legislative reforms of the 1970s, which ushered in the modern "postreform" Congress, reflect the capacity of the legislature to change its way of doing business.<sup>298</sup> Perhaps the impetus for much of this change was the sort of coalitional drift Shepsle describes.

Legislators face a tradeoff between preserving structures that strengthen the position of the coalition that has enacted the statute and creating structures flexible enough to ensure that new bargains can be struck when circumstances change in ways that make current structures anachronistic. The problem, in short, may not be merely renegeing, in the sense of failing to hold up one's end of the bargain in a logroll, but that legislators may modify or abandon their *own* policies when their preferences change. The role of uncertainty in structural choice represents an important area of future inquiry in the literature on positive theories of the legislature.

Keith Krehbiel, an important contributor to the theoretical and empirical literature on legislative organization, has offered one perspective on

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296. See Weingast & Marshall, *supra* note 177 and accompanying text.

297. This point about durability has an analogue in public choice. See, e.g., Landes & Posner, *supra* note 105, at 877-79. The public choice argument is that policy durability generates a larger amount of rents to legislators from interest groups. What interest groups are willing to pay is a function of the value of the legislative product they will receive, which is naturally a function of its durability. *Id.*

298. See THE POSTREFORM CONGRESS, *supra* note 262 (collecting various essays describing the postreform Congress).

uncertainty in legislative decisionmaking.<sup>299</sup> Krehbiel criticizes the focus in the positive political theory literature on the “distributive” or “demand side” of institutional choice.<sup>300</sup> By doing so, the theories fail to capture important elements of legislative decisionmaking that are not concerned with the competition among legislators over a fixed sum of goods.<sup>301</sup>

Krehbiel argues that legislative decisionmaking can be understood as a series of rational choices to facilitate the gathering and processing of information that can be used to make better policy choices. Politics, in the informational account, is not zero-sum; legislators can and do create institutions that expand the set of opportunities available to them.<sup>302</sup> Indeed, some of the very same institutions that are the subjects of study in the distributive accounts are considered through the lens of informational theories with very different results.<sup>303</sup>

Krehbiel describes the structure and function of standing committees in

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299. See KREHBIEL, *supra* note 272, at 61-103.

300. See generally *id.* The critique is descriptively accurate in ascribing to the bulk of the positive political theory literature on legislative institutions a distributive, legislative rent-seeking perspective. See, e.g., SHEPSLE, *THE GIANT JIGSAW PUZZLE*, *supra* note 258; John A. Ferejohn, *Logrolling in an Institutional Context: A Case Study of Food Stamp Legislation*, in CONGRESS AND POLICY CHANGE (Gerald C. Wright, et al., eds., 1986); Weingast & Marshall, *supra* note 177. The structure-induced equilibrium literature focuses on the efforts made by legislators to reap certain electoral advantages through institutional design and structural choice. The idea is that legislators are preoccupied with distributive politics, that is, the capturing of benefits available through the policy process. The policy game is, in this view, zero-sum, with legislators gaining benefits at the expense of others. The conflictual nature of legislative politics drives legislator behavior in two senses. First, legislators will act to maintain structures and procedures that will enable them to capture their share of benefits. Although legislative structure may seem to reflect consensual decisionmaking within the legislature, in distributive terms, it reflects a marriage of convenience in which legislators agree upon structures that will preserve for each their ability to compete for influence and power. Second, legislators will try to compete for control vis-a-vis other institutions; they therefore share a *collective* interest in structuring their institution in order to increase its potential force.

301. Keith Krehbiel discusses a number of different perspectives on legislative policies which he labels broadly as distributive, including James Q. Wilson, *The Politics of Regulation*, in THE POLITICS OF REGULATION 357 (James Q. Wilson ed., 1980) and Theodore J. Lowi, *American Business, Public, Case-Studies, and Political Theory*, in 16 WORLD POL. 676 (1964). What is ruled out of the broad definition of distributive is the “prospect of passing policies that make everyone better off.” KREHBIEL, *supra* note 272, at 30-31 n.11.

302. KREHBIEL, *supra* note 272, at 30-31.

303. While the focus in this discussion is on Krehbiel's perspectives as elaborated in his recent book on legislative organization, the informational perspective draws on his earlier articles with Thomas Gilligan. See Thomas W. Gilligan & Keith Krehbiel, *Organization of Informative Committees by a Rational Legislature*, 34 AM. J. POL. SCI. 531 (1990); Thomas W. Gilligan & Keith Krehbiel, *Asymmetric Information and Legislative Rules with a Heterogenous Committee*, 33 AM. J. POL. SCI. 459 (1989); Thomas W. Gilligan & Keith Krehbiel, *Collective Decision-Making and Standing Committees: An Informational Rationale for Restrictive Amendment Procedures*, 3 J.L. ECON. & ORG. 287 (1987).

informational terms.<sup>304</sup> A beginning assumption is that legislators have incomplete information about the relationship between policies and the effects of policies upon their enactment and implementation. Legislators are also incompletely informed about the preferences of other legislators.<sup>305</sup> Legislator information is not only incomplete, but is also *asymmetric*, simply meaning that some legislators have better knowledge than others concerning the connection between policies and the results of these policies.<sup>306</sup> Committees perform the function of processing information for the benefit of the Chamber as a whole. Members working within the institutional structure of committees act as experts to help their colleagues become informed regarding the relationship between policies and outcomes. Therefore, they will be able to make better decisions.<sup>307</sup> Krehbiel models the committee-Chamber relationship as a legislative signalling game in which the object is to structure the process in order to encourage legislators to convey to their colleagues any private information that would be useful in making a decision.<sup>308</sup> One way to so encourage legislators is to arrange the committee so that it reflects, in its membership, a spectrum of viewpoints that more or less mirrors the body as a whole.<sup>309</sup> A representative committee provides more information, because the interests of its members coincide with the interests of the Chamber as a whole.<sup>310</sup>

304. See sources cited *supra* notes 272, 303.

305. See KREHBIEL, *supra* note 272, at 66-68. On the incomplete information assumption, see Cudd, *supra* note 208, at 111.

306. See KREHBIEL, *supra* note 272, at 68. See also Arthur Lupia & Mathew D. McCubbins, *Designing Bureaucratic Accountability*, 57 LAW & CONTEMP. PROBS. (forthcoming June 1994); David Austen-Smith & William H. Riker, *Asymmetric Information and the Coherence of Legislation*, 81 AM. POL. SCI. REV. 897 (1987). See generally RASMUSSEN, *supra* note 208, at 53-54.

307. See KREHBIEL, *supra* note 272.

308. See generally JEFFREY BANKS, *SIGNALLING GAMES IN POLITICAL SCIENCE* (1991). Cf. A. MICHAEL SPENCE, *MARKET SIGNALLING: INFORMATION TRANSFER IN HIRING AND RELATED SCREENING PROCESSES* (1974) (describing signalling games in economic markets).

309. See KREHBIEL, *supra* note 272, at 81-84, 95-96; see also Krehbiel, *supra* note 258.

310. In two separate commentaries to a 1987 article by Gilligan and Krehbiel, two political scientists question the claim that committee members will have the incentives to provide reliable information to the legislative body. Morris Fiorina argues that the informational rationale for restrictive amendment procedures works only where there are unified, homogenous committees and a likewise unified body. Morris P. Fiorina, *Comment: Alternative Rationales for Restrictive Procedures*, 3 J.L. ECON. & ORG. 337 (1987). During periods of great social, economic, and technological change, there is unlikely to be the sort of common interest between committee members and the body that would lead the body to trust the work of the committee and therefore to install restrictive amendment procedures. *Id.* at 339-40.

Even more damaging to the assumptions underlying the informational rationale is Martin Shapiro's

. Another crucial element of the committee's role as an efficient signaller is the use of restrictive rules for the consideration of legislative proposals on the floor. The notion is that committee members will "invest" in accumulating expertise and in developing mechanisms with which to provide information to the Chamber. Rules that restrict the scope of amending on the floor will increase the value of the committee's proposal and therefore the value of the committee as expert.<sup>311</sup> Specialization of function, crucial to the role of the committee in providing information to legislators, requires the sort of enforced deference that restrictive rules provide.

This informational, or "supply-side," theory of legislative decisionmaking, is offered by Krehbiel as a direct competitor to distributive, "demand side" views.<sup>312</sup> The conceptual conflict is apparent. Distributive views see politics as a zero-sum game in which legislators fight with one another for a share of the pie; informational views see the goal of the legislative process as the production of net social benefits; the legislators' task is to construct the legislative process to facilitate the reaching of agreements on policies that will make everyone better off. However, as two important contributors to the distributive view argue, when we look deeper into this potential conflict, we see that demand side and supply side views can be reconciled.<sup>313</sup> The key is the dynamic, multi-dimensional characteristics of policymaking in the modern Congress. Legislators can and do make trades with one another across different bills, different committee jurisdictions, and even across different titles within the

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argument that committee members will have strategic incentives to offer to the chamber selective information in order to increase the chances of the committee bill passing the "yes" threshold. Martin Shapiro, *The Concept of Information: A Comment on Gilligan and Krehbiel's "Collective Decisionmaking and Standing Committees,"* 3 J.L. ECON. & ORG. 345 (1987). In the Gilligan-Krehbiel signalling model, the chamber benefits as its information increases. The model does not contemplate that a committee may vary the quality of information to steer the final outcome in its preferred direction; this committee members will do to the extent that their preferences diverge from the Chamber as a whole. Shapiro states:

[T]he floor ought to be as much concerned about the quality as about the quantity of the data on consequences it receives. As it stands, the model provides no account of the quality dimension and, therefore, an unsatisfactory account of a rationale for closed rules based on the real-world transfer of knowledge.

*Id.* at 347-48.

311. See KREHBIEL, *supra* note 272, at 97-98.

312. See *id.*

313. See Shepsle & Weingast, *supra* note 275, at 24-27.

same bill.<sup>314</sup> One of the principal reasons they do this is because some issues are more important, in electoral or ideological terms, to one legislator than to another. Indeed, the essence of logrolling across different issues and bills rests on a conception of legislation as a sequence of policy choices made within a multi-dimensional framework. Such logrolling requires a mechanism to facilitate the transfer of information within the legislature concerning the nature and scope of members' preferences across a range of issues. Legislative committees can play an important role in supplying this information to legislators in order to facilitate trades. The distributive approach to legislative decisionmaking suggests that these trades often will *not* be Pareto optimal; and yet, even when policy is seen as zero-sum, legislators may still construct committees with an eye toward performing the informational functions described by Krehbiel.

This reconciliation is, in a sense, artificial. It explains how the informational functions of committees *may* serve the purpose of facilitating members' distributive goals. Theorists who insist, however, that the distributive perspective is conceptually narrow and empirically inaccurate will maintain that committees supply information to the legislature for reasons *other* than the facilitating of efficient logrolling. As the current controversy over distributive versus informational rationales for legislative structure and rules indicates, fundamental disagreements remain among positive theorists of congressional institutions over the nature of legislator behavior and the function of institutional rules. It remains to be seen whether these disagreements can be resolved at the level of institutional theory.

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314. Krehbiel's account, by contrast:

[R]elies explicitly and crucially on the assumption of a single policy dimension. . . . This argument depends upon unidimensional reasoning in two respects. First, Krehbiel's reference to the 'chamber's interest' only makes sense in a unidimensional world. Second, even if there were some multidimensional meaning to 'chamber interest,' Krehbiel's argument presumes that committees must persuade the chamber jurisdiction by jurisdiction, issue by issue, bill by bill, even title by title in terms of this notion of chamber interest. This perspective ignores the possibility of gains-from-exchange as a result of cross-jurisdictional, cross-issue, cross-bill, or cross-title trades. It is as though one looked at separate items and concluded that each of them must be defended in terms of the 'chamber interest' *separately and independently*. In a multidimensional world, however, it is conceivable that, though none could be defended in this manner, an omnibus of otherwise indefensible items might well be defensible in this manner.

Shepsle & Weingast, *supra* note 275, at 24, 27. Krehbiel concedes that the assumption of unidimensionality is a restrictive one: "The assumption of unidimensionality is variously regarded as overly simple, as locking the Arrow problem in the closet, or as rigging the theory against the standard multidimensional logrolling view." KREHBIEL, *supra* note 272, at 261.

### 3. *Delegation and Control*

A central dilemma for rational legislators is how to control decisionmakers who function outside the legislative process. The problem is fundamentally a principal-agent one, but with significant wrinkles. The most important of these wrinkles concerns the unique nature of the relationship between legislators and the bureaucracy. As Terry Moe points out, the relationship between these institutions is grounded in political authority, not voluntary exchange.<sup>315</sup> The basis of the regulatory structure is not primarily economic efficiency, with the creation of the agency representing an attempt to replace “markets” with “hierarchies” in order to maximize the joint profits of all parties to the firm and its nexus of contracts.<sup>316</sup> Instead, legislators’ decisions to create administrative structures reflect their judgments that such structures represent means by which they can implement their aims (which, of course, will probably include profit-maximizing or “rent-seeking”) more efficaciously. Accordingly, the explanation of how legislators structure their relationships with agencies is essentially a political one.

Explanations of why Congress chooses to delegate responsibilities to entities—whether institutions within Congress or agencies outside Congress—are eclectic. Debate rages in the literature over how legislators make their choices concerning whether and to what extent to delegate.<sup>317</sup> Early in the positive political theory literature, Morris Fiorina proposed that legislators respond to variegated pressures from inside and outside the process by delegating policymaking responsibilities to agencies in order to shift the blame for “bad” policies to another institution.<sup>318</sup> At the same time, the fact of the enactment of the regulatory program, however contentless it is in substance, enables legislators to claim credit from these pressure groups for doing *something*.<sup>319</sup> In a later article, he added that the element of legislative uncertainty as an explanation for the choice

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315. See Moe, *supra* note 137. See generally *supra* text accompanying notes 174-82.

316. See discussion *supra* part III.C.

317. See, e.g., Daniel F. Spulber & David Besanko, *Delegation, Commitment, and the Regulatory Mandate*, 8 J.L. ECON. & ORG. 126 (1992); Spiller, *supra* note 124; David P. Baron, *Regulation and Legislative Choice*, 19 BELL J. ECON. 467 (1988); Fiorina, *supra* note 132; Aranson et al., *supra* note 131.

318. See Fiorina, *supra* note 132, at 186-88.

319. *Id.*

between administrative agencies and courts as regulatory instruments.<sup>320</sup> He proposed that the choice is a choice between two lotteries, one taking a chance on agency enforcement and the other on court enforcement.<sup>321</sup> What determines whether legislators will take one chance rather than the other is their calculations concerning the risk that one method of enforcement will threaten to unravel the statutory bargain. This will reflect a judgment about both the relative qualities of these two institutions and about how much they care whether the policy passes or not.<sup>322</sup>

More recently, positive political theorists have refocused attention on the delegation question, emphasizing the extent to which the *ex ante* decision to delegate is tied to decisions about how optimally to control the institutions which act under this delegation. The question *whether* to delegate is intimately bound up with the question *how* to delegate, that is, how to construct measured controls on the exercise of regulatory power.<sup>323</sup> Particularly pivotal to the debate over what sort of rational strategies legislators design to control regulatory decisionmaking within agencies has been the work of Mathew McCubbins, in collaboration with various co-authors.<sup>324</sup> McCubbins considers, from the perspective of principal-agent

320. Morris P. Fiorina, *Legislator Uncertainty, Legislative Control, and the Delegation of Legislative Power*, 2 J.L. ECON. & ORG. 33 (1986).

321. *Id.* See also Mashaw, *supra* note 133, at 90.

322. Specifically, it depends upon how close their policy preferences are to the median. Outliers will strongly favor or strongly oppose administrative regulation to the extent that such regulation threatens to unravel the statutory bargain. Legislators bunched closer at the middle will be more agnostic concerning the choice between agencies and courts. Fiorina, *supra* note 320, at 44-45. "Legislators far from the median who foresee a pattern of agency enforcement to their liking will favor administrative regulation more than their opposites who regard that pattern as unfavorable." *Id.* at 45.

323. McCubbins and Page reduce the delegation question to the level of a tautology: "[T]he legislative choice to delegate authority to an administrative agency in preference to judicial enforcement of a legislative enactment follows when the act of delegating disguises the costs of the regulation to a larger extent than it disguises the benefits." Mathew D. McCubbins & Talbot Page, *A Theory of Congressional Delegation*, in CONGRESS: STRUCTURE AND POLICY (M. McCubbins & T. Sullivan eds., 1987).

324. See, e.g., GARY COX & MATHEW D. MCCUBBINS, *LEGISLATIVE LEVIATHAN: PARTY GOVERNMENT IN THE HOUSE* (1993); KIEWIET & MCCUBBINS, *supra* note 217; Arthur Lupia & Mathew D. McCubbins, *Learning from Oversight: Fire Alarms and Police Patrols Reconstructed* (1993) (on file with author). Lupia & McCubbins, *supra* note 306; Mathew D. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431 (1989) [hereinafter McCubbins et al., *Structure and Process*]; Mathew D. McCubbins et al., *Administrative Procedures as Instrument of Political Control*, 3 J.L. ECON. & ORG. 243 (1987) [hereinafter McCubbins et al., *Administrative Procedures*]; McCubbins & Page, *supra* note 323; McCubbins & Schwartz, *supra* note 86.

theory,<sup>325</sup> the dilemma posed to legislative coalitions by the practice of delegating broad regulatory power to agencies. Legislators are concerned with managing uncertainty.<sup>326</sup> Uncertainty is an inevitable property of a regulatory process that includes shifting coalitions, different levels of constituent and interest group demands, and changing states of the world. Legislators are also concerted to minimize conflict, in particular, the various incentives and opportunities of agents to hide their actions and information as well as the standard moral hazard problems that plague principal-agent relationships.<sup>327</sup>

Faced with these twin problems of uncertainty and conflict, legislators will pay attention to arranging regulatory structures and managing legislative-administrative conflict in order to ensure that their agents carry out the aims of the legislators who are the architects of the original program. The most important locus of regulatory policymaking in the modern administrative state is the regulatory agency.<sup>328</sup> From the legislature's standpoint, the central question is how to design structures and procedures to control administrative agencies. In a series of articles, Matthew McCubbins, Roger Noll, and Barry Weingast describe how administrative procedures established by statute and, in particular, by the Administrative Procedure Act (APA) function to enable legislative coalitions to control agencies.<sup>329</sup> McCubbins, Noll, and Weingast begin by describing why ex post monitoring and control devices are necessary, yet imperfect and expensive, for making agencies more accountable to the preferences of the enacting legislative coalition.<sup>330</sup> What legislators can do, instead or in addition, is structure the procedures the agency must follow in enacting rules and enforcing policies.<sup>331</sup> For example, the requirement contained in the APA that a proposed agency regulation must be announced in the Federal Register ("notice"), with an opportunity for

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325. See STEVENS, *supra* note 156, at 281-87. See also sources cited *supra* notes 214-19 and accompanying text (describing principal-agent theory).

326. See McCubbins & Page, *supra* note 323, at 415-17.

327. KIEWIET & MCCUBBINS, *supra* note 217, at 25-26. See also STEVENS, *supra* note 156, at 284-87.

328. See, e.g., Rubin, *supra* note 5, at 418-23.

329. See sources cited *supra* note 329.

330. McCubbins et al., *Administrative Procedures*, *supra* note 324. They emphasize, in particular, the economic and political costs of ex post monitoring. See also KIEWIET & MCCUBBINS, *supra* note 217, at 31-33.

331. McCubbins et al., *Structure and Process*, *supra* note 324, at 440-44; McCubbins et al., *Administrative Procedures*, *supra* note 324, at 253-55.

public participation (“comment”),<sup>332</sup> will function to provide information to legislators in advance of the issuance of regulations, that can be used to sound out interest groups and to mobilize coalitions to influence administrative action.<sup>333</sup> Procedures that publicize agency action ameliorate the information advantage that the agency has as the institution practically in control of the nuts-and-bolts of the regulatory process. Procedures that facilitate the ability of legislative coalitions to react to agency decisions and procedures that increase the hurdles the agency must surmount to establish policy work to reinforce the structure of the regulatory bargain originally established.<sup>334</sup> Moreover, such procedures enable legislators to respond in the context of agency policymaking to changes in the legislators’ own changing preferences and interests.<sup>335</sup>

The positive political models concerning the ways in which legislators control agencies have considerably enriched our understanding of the dimensions of legislators’ strategic decisions in a world in which the most conspicuous source of regulatory policy is made by administrative agencies pursuant to a broad delegation of power.<sup>336</sup> Positive political theories of regulation equip us to consider, from the perspective of normative theory, what sort of institutional and doctrinal remedies are appropriate to respond to the overlapping dilemmas faced by legislators and agencies in an environment in which both institutions are inclined to act strategically and neither institution feels the necessity to maintain a system of efficient, cost-effective, and fair, economic and social legislation.

The linchpin of this positive description of administrative control through

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332. 5 U.S.C. § 553 (1988).

333. See McCubbins et al., *Administrative Procedures*, *supra* note 324; McCubbins et al., *Structure and Process*, *supra* note 324.

334. Jon Macey has argued that rational legislators can serve their purposes by careful attention to the jurisdictional design of the agency. See Jonathan R. Macey, *Organizational Design and Political Control of Administrative Agencies*, 8 J.L. ECON. & ORG. 93 (1992) [hereinafter Macey, *Organizational Design*]. Congress can design the regulatory structure in order to “hardwire” the agency to the original coalition of interest groups whose support was critical in getting the original statute passed. As the preferences of interest groups change, and as new coalitions of interest groups form, the structure of agency preferences will change along with the preferences of the enacting coalition. See also Jonathan R. Macey, *Separated Powers and Positive Political Theory: The Tug of War Over Administrative Agencies*, 80 GEO. L.J. 671 (1992) [hereinafter Macey, *Separated Powers*].

335. In this sense, administrative procedures can act to blunt the force of “coalitional drift.” See sources cited in *supra* note 294 and accompanying text.

336. For an extended critique of the McNollgast “structure and process” hypothesis, see Glen O. Robinson, *Commentary on ‘Administrative Arrangements and the Political Control of Agencies’: Political Uses of Structure and Process*, 75 VA. L. REV. 483 (1989).

procedures is the role of information.<sup>337</sup> Agencies have more, and better, information than Congress and the President about the content and consequences (political and otherwise) of their regulatory policies. Legislative decisions concerning administrative structure, then, will be grounded in an effort to correct this information imbalance.<sup>338</sup> Earlier political economy models were sufficiently pessimistic about the prospect of legislators remedying this imbalance given the structure and incentives of the regulatory process and the ubiquitous principal-agent problems that arose in connection with multiple institutions. However, McCubbins and his colleagues have been more optimistic about the ability of legislators to design structures and processes to ameliorate these vexing information problems.

This optimism is striking in light of the character of the information problems that are described in the positive literature on regulation and politics. The problem is not only that the bureaucracy has access to information that legislators lack; the potentially more serious problem concerns the *quality* of the information in the hands of the agency.<sup>339</sup> Simply put, the agency has incentives to hold back truthful information from other politicians (including, most particularly, their “principals”) and to furnish politicians with “cheap talk.”<sup>340</sup> Doing so strengthens the hands of bureaucrats and weakens the abilities of legislative coalitions to maintain adequate control over agencies. Why would legislators invest time and energy in trying to control agency decisionmaking given the insurmountable information advantages of these agencies?

The answer that McCubbins and company give is that these strategic information problems are not insurmountable.<sup>341</sup> Legislators must pay careful attention to procedures and structures that enable them to monitor the opportunistic behavior of agencies and, in particular, the tendencies of agencies to hide their actions—to lie—from legislators in order to strengthen the agency’s position in the regulatory process. The “administrative procedures” hypothesis advanced by McCubbins, Noll and Weingast is part of the answer. Politicians can ameliorate the ability of agencies to

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337. Cf. KREHBIEL, *supra* note 272, app. A at 269-70; BANKS, *supra* note 308.

338. See Lupia & McCubbins, *supra* note 306. Cf. Arthur Lupia, *Busy Voters, Agenda Control and the Power of Information*, 86 AM. POL. SCI. REV. 390 (1992).

339. See Lupia & McCubbins, *supra* note 306. Cf. Shapiro, *supra* note 310.

340. See Lupia & McCubbins, *supra* note 306 (describing concept of “cheap talk”).

341. See *id.* Cf. KIEWIET & MCCUBBINS, *supra* note 217 (discussing information problems in connection with congressional institutions).

furnish information selectively and strategically by creating a process that requires the agency to provide *all* information on equal terms to all "interested persons."<sup>342</sup> Moreover, by enfranchising certain groups and thereby placing burdens on agencies' abilities to act without consequence, Congress can increase the costs to agencies of taking certain actions. When an agency takes action that is costly—say it issues a regulation that is subject to burdensome paperwork requirements under the National Environmental Policy Act (NEPA)<sup>343</sup>—this provides a signal to legislators concerning the agency's *real* preferences. The legislative coalition can then respond with whatever set of ex post monitoring devices it has at its disposal. The key point is that the legislature can *learn* from the choices made by agencies, once it knows what sort of costs the agency must bear in acting and therefore what it is giving up by deciding to move the policy from the status quo.<sup>344</sup>

The difficulty with extrapolating from these models of how rational legislators would design bureaucratic accountability and regulatory control is that they explain only one corner of the real regulatory world. The procedures and structures that Congress and the President have adopted in statutes like the APA, NEPA, and the Freedom of Information Act,<sup>345</sup> impose a web of requirements on agencies in making and enforcing policy. However, these requirements are seldom clear and never self-interpreting. The efficacy of these procedures rests on a large body of law—administrative law—which is concerned with controlling the exercise of administrative power.<sup>346</sup> The trouble is, from the standpoint of rational legislators, much of administrative law is judge-made law, the product of decisions made by courts to expand or contract the scope of procedural and substantive requirements on agency decisionmaking.<sup>347</sup> Administrative law scholars have frequently insisted that courts have constructed their approaches to review political decisions or to help the legislature in its task of reigning in bureaucratic miscreants.<sup>348</sup> Jerry Mashaw contrasts

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342. The phrase is the one used in the APA. 5 U.S.C. § 553(c) (1988).

343. 42 U.S.C. §§ 4321-4370a (1988).

344. See Lupia & McCubbins, *supra* note 306 (discussing concept of "learning").

345. 5 U.S.C. § 552 (1988).

346. See generally CHRISTOPHER F. EDLEY, JR., *ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREAUCRACY* (1990); MARTIN SHAPIRO, *WHO GUARDS THE GUARDIANS? JUDICIAL CONTROL OF ADMINISTRATION* (1988).

347. See discussion *infra* part V.B.

348. See, e.g., Richard J. Pierce, Jr. *The Role of the Judiciary in Implementing an Agency Theory of Government*, 64 N.Y.U. L. REV. 1239 (1989).

normative models of administrative law with positive models, and criticizes the tendencies of positive theorists of legislative delegation to simply subsume procedural and substantive requirements imposed on courts into the general rubric of positive political action.<sup>349</sup> However, I need not go as far as Mashaw does to make the cautionary note that administrative law represents an admixture of judge-made and legislative law.<sup>350</sup> Judge-made administrative law is manufactured and applied in the shadow of political decisions; it is, in that regard, not inherently exogenous, above the political fray. At the same time, legislative-made administrative law is subject to interpretations by courts. The political structure of administrative law, as described in more detail in Part IV, ensures that legislators must consider how much they can rely on fidelity by courts to their control aspirations when they decide how to design their techniques of bureaucratic accountability.

This question may be considered at the level of positive political theory. What is required is a positive political theory of legislative control and delegation that builds into the models of control and decisionmaking under uncertainty the role of administrative law, defined as a set of rules that are the product of legislative *and* judicial choices which are naturally and frequently in tension with one another. This basic point is fundamentally one of the respective roles of each political institution in the regulatory environment.<sup>351</sup>

### C. *Presidency*

The President plays a critical role in the construction and implementation of regulatory policy.<sup>352</sup> The President is a pivotal player in the process by which legislation is enacted, both formally, through the power to veto legislation, and informally, through a variety of devices used to influence and shape regulatory policies.<sup>353</sup> Yet, despite this central role, positive theorists have been slow to incorporate elements of presidential

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349. Jerry L. Mashaw, *Explaining Administrative Process: Normative, Positive, and Critical Stories of Legal Development*, 6 J.L. ECON. & ORG. 267 (1990).

350. See discussion *infra* part V.B.

351. See *infra* part V.B.

352. See, e.g., WILSON, *supra* note 94, at 257-76.

353. For useful descriptions of the President's role in modern regulation, see JOHN P. BURKE, *THE INSTITUTIONAL PRESIDENCY* (1992); THOMAS O. MCGARITY, *REINVENTING RATIONALITY: THE ROLE OF REGULATORY ANALYSIS IN THE FEDERAL BUREAUCRACY* (1991); WILSON, *supra* note 94, at 257-76.

decisionmaking into their models of politics.<sup>354</sup> This probably says more about the current state of positive political theory than it does about the inherent nature of the theory; that is, studies of presidential decisionmaking are likely to be forthcoming as positive political theorists develop the pieces of their comprehensive theories of regulatory politics.<sup>355</sup> For now, however, the Presidency remains a rather inscrutable piece. The previous section offered an extended analytical survey of a large body of literature on the institutional dimensions of legislative decisionmaking. The absence of a similarly rich body of work with respect to the President makes the description of positive political theory in this section necessarily more speculative. With that caveat, I will speculate about two distinct aspects of the President's place in positive political theories of regulation: (1) The President's discretion to pursue regulatory aims; and (2) the forms of presidential decisionmaking.

We start by assuming that the President has, like legislators, regulatory ambitions and goals. You will recall that the regulatory ambitions of the legislators are considered by positive political theory as heterogenous. Legislator preferences may derive from an electoral constraint,<sup>356</sup> or grow out of their ideological commitment to sound regulatory administration. The distributive models of legislative performance in an institutionalized Congress stress, however, the interests of legislators in reaping benefits from making and enforcing deals. Hence, although the underlying motivations may be selfish or selfless, legislators are supposed to act purposively and strategically in the pursuit of these goals. Similarly, rational choice theories of politics suppose that, like legislators, the

354. "The hallmark of modern American government is presidential leadership. Yet positive theorists have never known quite what to do with presidents. . . . [M]ost of the time . . . they just get left out—a datum so well known among positive theorists that they informally refer to presidents as 'the P-word.'" Moe & Wilson, *supra* note 88.

355. See, e.g., *id.*; Moe, *supra* note 87; Terry M. Moe, *The Politics of Bureaucratic Structure, in CAN THE GOVERNMENT GOVERN?* *supra* note 270, at 279-82 [hereinafter Moe, *Bureaucratic Structure*]; Terry M. Moe, *The Politicized Presidency, in THE NEW DIRECTION IN AMERICAN POLITICS* 235 (John G. Chubb & Paul G. Peterson eds., 1985) [hereinafter Moe, *Politicized Presidency*].

356. The President's utility has always been difficult to model. Because of the Constitution's limit on consecutive terms, he faces an electoral constraint once, that is, when (and if) he runs for reelection; hence, presidential behavior during the entire second term is difficult to model using the standard public choice assumption of reelection-maximizing behavior. Moreover, even this one-time electoral constraint is opaque. With a heterogenous national constituency, it is quite unlikely that the President will believe himself hemmed in by particular interest group demands. Faced with a complex web of competing demands and interests, he is likely to pursue policies that facilitate his presidential agenda, keeping, to be sure, an eye on preserving his political capital with legislators and opinion leaders. However, it is still difficult to reduce this agenda to the standard terminology of rational choice.

President has regulatory goals and is prepared to pursue these goals through rational, strategic action and that the forms of presidential decisionmaking will reflect this purposive action.

The differences between purposive action by the President and such action by legislators, however, may be significant. Terry Moe emphasizes the dissimilarities between the incentives of legislators in superintending regulatory administration and the incentives of the President. Legislators are mostly concerned with intervening episodically in regulatory decisions, usually on behalf of constituents and in pursuit of discrete, particular benefits. In contrast, Presidents are concerned with governance.<sup>357</sup> “All presidents, regardless of party, are expected to govern effectively and are held responsible for taking action on virtually the full range of problems facing society.”<sup>358</sup> Effective governance requires that the President take charge of the bureaucracy; unlike legislators, “[t]hey are the only participants who are directly concerned with how the bureaucracy as a whole should be organized.”<sup>359</sup> To Moe, this fundamental difference creates a dilemma for the other participants in the regulatory process. Agencies, legislators, and interest groups face political uncertainty as the President makes regulatory decisions without an eye toward mollifying constituencies and appeasing outside interests but, instead, with the goal of constructing a comprehensive regulatory strategy through administrative control.<sup>360</sup>

One imagines, in this framework, the President looking down from a throne on the machinations of legislators, interest groups, and agencies and deciding whether and to what extent to pretermitt this political process. In the picture of the President offered by Moe, the President is both powerful and strategic. Moreover, presidential strategies are directed toward effectuating sound governance and, therefore, are likely to be more benevolent than what legislators and agencies will offer. But there is another side to this coin. What Moe elides in his description of the President’s role in regulatory decisionmaking is the scope of presidential discretion or, to put it the other way, the power of Congress to control presidential decisionmaking. In the constitutional and statutory structure

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357. Moe, *Bureaucratic Structure*, *supra* note 355, at 278-79. See also Moe, *Politicized Presidency*, *supra* note 355.

358. Moe, *Bureaucratic Structure*, *supra* note 355, at 279.

359. *Id.* at 280.

360. See Moe & Wilson, *supra* note 88, at 10-12; Moe, *Bureaucratic Structure*, *supra* note 355, at 281-82.

of regulatory policy, the President rarely gets to do what he wants. The President may lack the same sort of exogenous and endogenous constraints imposed on legislators and agencies. Nevertheless, there are other constraints on the President. To appreciate the role of the President within a framework of positive political theory, we must consider, as a critical dimension of presidential decisionmaking, the scope of the President's policymaking discretion.

On the whole, the President's regulatory discretion is considerable but not unlimited. Moreover, precisely because the President has both the prerogatives to expand the scope of regulatory influence as well as the means and incentives to do so, pressures will be brought to bear from other places in the regulatory process. The result will be, in theory at least, some sort of equilibrium in which the President acts within the political and legal limits constructed by loci of competing institutional power and by legal doctrine. Consider the example of President Bush's efforts to consolidate the strategies of regulatory review created in the past few administrations and extended by his predecessor, Ronald Reagan, in the early 1980s.<sup>361</sup> The basic goal of this regulatory review experiment was to construct a regime of executive control, in the name of improving the cost-effectiveness of regulation,<sup>362</sup> over regulatory agencies in their role as promulgators of regulations. In the early years of his administration Bush established a Council on Competitiveness (Council).<sup>363</sup> Its stated purpose was to ensure that proposed regulations would not undermine the competitive position of American business firms by imposing regulations whose benefits did not outweigh their costs. Among the controversies generated by the Council was the argument that the executive branch could, through the Council, steer regulatory agencies away from the instructions given to them by legislators, both through the statutes enacted by Congress and through the episodic, ex post influence of interested legislators.<sup>364</sup>

The President's power to establish this Council and to charge it with these review responsibilities fell within a lacuna of presidential regulatory

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361. See generally MCGARITY, *supra* note 87; GEORGE C. EADS & MICHAEL FIX, *RELIEF OR REFORM? REAGAN'S REGULATORY DILEMMA* (1984).

362. Many have pointed out, though, that the underlying reasons for this regulatory review may have been considerably more sinister. See, e.g., Alan B. Morrison, *OMB Interference with Agency Rulemaking: The Wrong Way to Write a Regulation*, 99 HARV. L. REV. 1059 (1986).

363. See, e.g., John H. Cushman, Jr., *Federal Regulation Growing Despite Quayle Panel's Role*, N.Y. TIMES, Dec. 24, 1991, at A1.

364. See, e.g., Clifford Krauss, *House Votes to Eliminate Money for Regulatory Council Headed by Quayle*, N.Y. TIMES, July 2, 1992, at A16.

power. The President is obliged, under the Constitution, to see that the laws are faithfully executed;<sup>365</sup> at the same time, the President has the discretion—indeed, the responsibility—to implement the laws and supervise the regulatory process. The controversy over the Council was just another illustration of the difficulties associated with reconciling these two responsibilities. The important positive political point is that Congress responded aggressively to the President's use of this regulatory review strategy. Ultimately, it did not much matter that the President was acting legally in establishing this structure of regulatory control; the dispute was not finally resolved by appeal to law. Instead, the resolution was political: Congress threatened to cut off its direct appropriations to the Council in an attempt to stop its efforts; the executive branch responded by leaving the Council to operate on part of the appropriation directed by Congress for use by the Office of the Vice-President.<sup>366</sup> In regulatory disputes of this type, which are by no means uncommon, the President wins and loses. The outcome does not usually turn on the question of what powers the President has, whether the President is entitled, as commander of the executive branch, to direct his subordinates and to control regulatory policy.<sup>367</sup> Rather, the outcome reflects political choices.

The regulatory review story is an example of an episodic response to presidential innovation. Political choices that implicate the scope of presidential influence occur at the level of regulatory structure as well. For example, the scope of the President's influence over institutions of the executive branch turns not only on the question of what *powers* the President has under the Constitution and under statute; it also turns on what sort of opportunities are presented to the President for the expression of this power. If we start with the principle that the President is the master of the presidential domain, which includes all parts of the executive branch, then Congress can substantially pretermit the exercise of this mastery by structuring parts of the regulatory process outside of the executive branch. Establishing a so-called "independent" agency reshuffles presidential influence without disturbing the essential structure of the President's

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365. U.S. CONST., art. II, § 3.

366. See 138 CONG. REC. S13,214-15 (daily ed. Sept. 10, 1992) (statement of Sen. Glenn).

367. See generally Calabresi & Rhodes, *supra* note 233; Saikrishna Bangalore Prakash, Note, *Hall to the Chief Administrator: The Framers and the President's Administrative Powers*, 102 YALE L.J. 991 (1993). For a recent, critical analysis of the President's role in regulatory policymaking, see Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1 (1994); Yvette M. Barksdale, *The Presidency and Administrative Value Selection*, 42 AM. U. L. REV. 273 (1993).

“powers.”<sup>368</sup> The struggle over the creation of the Consumer Product Safety Commission (CPSC) in the early 1970s illustrates the dimensions of political choice. The President’s first proposal for a consumer safety agency lodged this agency in the executive branch, in the Department of Health, Education, and Welfare.<sup>369</sup> Consumer groups prevailed in their battle to bring the agency out from under the President’s direct control. The result was the establishment of a formally independent agency, the CPSC.<sup>370</sup> None of the President’s regulatory powers was disrupted by this arrangement; rather, the creation of an independent agency merely made it more costly for the President to employ these powers to control the CPSC. In this way, Congress limited presidential discretion in a very practical way—by constructing a regulatory arrangement that is less susceptible to control by its principal competitor for regulatory influence: the President.

There are two critical ways in which this structural strategy is, from the perspective of Congress, quite imperfect. One is that the President’s powers are not some immutable object.<sup>371</sup> The Constitution’s description of presidential power is capacious; moreover, the legal doctrine of separation of powers, as we observed earlier in connection with legislative decisionmaking, is a weak constraint on the President’s behavior.<sup>372</sup> Creating structures that are more impervious to presidential influence and control definitely increases the costs of presidential action. However, it rarely disempowers the President altogether. The experience of presidential activities in the regulatory process over the past half century indicates that Presidents demonstrate great creativity in developing new techniques of regulatory control in the face of legislatively imposed restrictions and conditions.<sup>373</sup>

The second way in which legislative efforts to cabin the scope of presidential influence are risky concerns the effect on *Congress* of certain

368. See Geoffrey P. Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41. A recent symposium contains a number of excellent discussions of the dimensions of Presidential power in the administrative state. See Symposium, *Administrative Law and “The Uneasy Constitutional Status of the Administrative Agencies”*, 36 AM. U. L. REV. 277 (1987). See also Lessis & Sunstein, *supra* note 367.

369. See Moe, *Bureaucratic Structure*, *supra* note 355, at 289-92.

370. See Schwartz, *supra* note 56.

371. See generally STEPHEN SKOWRONEK, *THE POLITICS PRESIDENTS MAKE: LEADERSHIP FROM JOHN ADAMS TO GEORGE BUSH* (1993).

372. See *supra* text accompanying notes 226-29.

373. See, e.g., SKOWRONEK, *supra* note 371; HARRIS & MILKIS, *supra* note 186, at 97-140; EADS & FIX, *supra* note 361; RICHARD P. NATHAN, *THE ADMINISTRATIVE PRESIDENCY* (1983).

structural decisions. Structural choices frequently have consequences for all political institutions. Let us revisit the example of the CPSC. The legislative history of the Consumer Product Safety Act of 1972 suggests that legislators were not uniformly enthusiastic about creating an independent agency.<sup>374</sup> One reason was that independence does not mean merely independence from the President but, a degree of independence from political controls from whatever direction. When Congress pushes for the creation of an independent agency, it runs the risk of establishing an institution that is more insulated from both presidential *and* legislative control. Like other aspects of regulatory policy, the choice involves a tradeoff between certain patterns of control. Many regulatory choices involve this risk of backfiring, of limiting a competitor's power in an effort to preserve the upper hand, only to discover that decisions to restrict certain forms of political power cannot be kept easily within their intended bounds.<sup>375</sup>

This discussion focuses on the nature of the President's discretion in regulatory policymaking. But what of the actual techniques of regulatory control? How does the President in fact participate in the regulatory process? Broadly speaking, the President participates at two different places in the regulatory process. First, the President is an active participant in the process by which the regulatory program is set in place, that is, in the process of statute-making. Second, the President participates in the

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374. See, e.g., Moe, *Bureaucratic Structure*, *supra* note 355, at 289-92.

375. Martin Shapiro has pointed out an example of this in connection with the controversy over the legislative veto that was ultimately settled in *Chadha*. See Shapiro, *supra* note 310. The President made the choice in that instance to align himself with those interest groups challenging the constitutionality of the legislative veto device. In positive political theory terms, we might imagine that the President was driven by his desire to restrict the domain of congressional influence over regulatory policy and believed that the invalidation of the legislative veto would do that, by essentially lopping off one important source of congressional influence and leaving the rest of the structure of regulatory control intact. What the President risked in making this choice, however, was that the rationale of a Court decision striking down legislative power over agencies would extend to *all* efforts at controlling agencies, including presidential efforts. Indeed, it was not entirely clear how the Court could limit the scope of a decision striking down one aspect of political control, on separation of powers grounds, without casting doubt on the vitality of other aspects.

This story suggests that, although the President dodged a bullet in *Chadha*—the Court ultimately rested its decision on a highly formalistic reading of constitutional structure and elided the larger questions of separation of powers raised in the case—the President possibly made a mistake in joining forces to challenge the legislative veto. Cf. Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421 (1987).

regulatory process once set in motion by the statute.<sup>376</sup> Positive political theory can shed light on both dimensions of presidential participation.

The President's role in the creation of the regulatory statute is more complicated than standard positive political theory models indicate. For example, John Ferejohn and Charles Shipan's model of political influence over administrative agency decisions supposes that the President's role is limited to the ability to sign or veto the policy presented by Congress.<sup>377</sup> Ferejohn and Shipan describe a simple, one-dimensional game in which the President threatens to move the status quo by making a policy decision. Other game-theoretic models building on the Ferejohn-Shipan game have a similarly narrow conception of the President's policy role.<sup>378</sup> A more complete treatment of the President's role would include the various manners in which the President contributes to the shape of the regulatory program. This includes proposing regulatory initiatives, testifying on behalf or against certain proposals, offering to legislators various carrots and sticks.<sup>379</sup> One of the difficulties with incorporating these eclectic strategies into positive political theories of legislation is methodological: It is quite difficult to model these formal and informal mechanisms of presidential participation. Thus, simplicity is one factor driving positive models that reduce the President's role in the creation of regulatory programs to the sign/veto choice.

However, there is another important aspect of presidential participation in regulatory policymaking that *is* presumably subject to formal modelling—that is, the President's role in bargaining over legislative proposals. In a multidimensional model of regulatory policymaking, we can suppose that the President can trade across a range of issues. The President has a vote for trade and can deal with legislators on the same terms and conditions as other legislators in the process of making policy through statutory "deals." Cross-issue trading enables us to see the ways in which the sign/veto dichotomy presents an incomplete picture of the dimensions of presidential power. Once we admit the possibility of

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376. See ROBERT J. SPITZER, *PRESIDENT AND CONGRESS: EXECUTIVE HEGEMONY 'AT THE CROSSROADS OF AMERICAN GOVERNMENT* (1993); JON R. BOND & RICHARD FLEISHER, *THE PRESIDENT IN THE LEGISLATIVE ARENA* (1990).

377. John A. Ferejohn & Charles R. Shipan, *Congressional Influence on Administrative Agencies: A Case Study of Telecommunications Policy*, in *CONGRESS RECONSIDERED* 393 (Lawrence C. Dodd & Bruce J. Oppenheimer eds., 4th ed. 1989).

378. See, e.g., Ferejohn & Eskridge, *Article I*, *supra* note 220; William N. Eskridge, Jr., *Reneging on History? Playing the Court/Congress/President Civil Rights Game*, 79 CAL. L. REV. 613 (1991).

379. See sources cited *supra* note 376.

presidential logrolling, we have a much more complicated picture of the scope of presidential participation in lawmaking. We also can ask a number of questions concerning the President's structural choices. The executive branch can presumably be considered in industrial organization terms. Certainly, the considerations that drive presidential structure are different from those that drive legislative organization. For one thing, the President moves as one actor and need not construct the same network of procedural rules and institutional structures for the facilitation and maintenance of intra-institutional bargains. Yet, the President *does* face a ubiquitous principal-agent problem; a rational chief executive will be sensitive to the need to control executive branch subordinates through attention to structural design.<sup>380</sup> Moreover, the President does engage in bargaining and will presumably structure an institution to facilitate opportunities for bargaining with legislators. There is a sense in which the President bargains within the legislative institution; as a practical matter, the President's vote can be considered that of the 536th legislator.<sup>381</sup> At the same time, the President is fundamentally separate from the legislature; he therefore bargains as a distinct institution, with separate tactics and strategies.<sup>382</sup> This dual sense of President-Congress bargaining raises complicated issues for positive political theory.<sup>383</sup> Suffice it to say for

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380. The dilemmas faced by Presidents in controlling their subordinates in the executive branch bureaucracy has been explored by a number of political scientists. See, e.g., BURKE, *supra* note 353, at 24-53; SKOWRONEK, *supra* note 371, at 17-32; RICHARD ROSE, *THE POSTMODERN PRESIDENT: GEORGE BUSH MEETS THE WORLD* 162-85 (2d ed. 1991); WILSON, *supra* note 94, at 257-76.

381. The President can bargain with members of Congress but may be limited in his ability to deliver. He can agree to exchange his vote for a legislator's vote on a bill, but the simple arithmetic of the legislature (535 members) and the Presidency (one "member") suggests why it would be very difficult for the President to make such a bargain. It will rarely be possible to identify the marginal legislator whose vote will mean the difference between defeat or success for the President. On the other hand, the President's vote is nearly always the marginal vote. His vote will therefore be tremendously more valuable, in nearly every legislative situation, than the vote of one legislator. Even if we are talking about a party leader or committee head, the value of what any one legislator has to trade will usually fail to approximate the value of the President's vote.

382. But not, strictly speaking, his own resources. Again, we should be reminded of the dependence of the President on Congress' appropriations decisions. See *supra* text accompanying note 366 (discussing Congress' threatened cut-off of funds to Competitiveness Council). Positive political theory emphasizes the legislature's ability to compete with the President for administrative control by controlling the agency, but what is often underemphasized is the extent to which Congress can control the President *directly*.

383. To take just one of these issues: What is the significance of the fact that the President has more to trade with legislators than merely his vote? The issue is, as we might put it, one of the relevant *currency of exchange*. The President can trade those policymaking services that do not require the passage of legislation but, instead, lie within the discretion of the President. For instance, the President

now that this dimension of presidential participation can be incorporated into positive political theories of lawmaking in order to generate a much richer picture than thus far exists of the nature of regulatory decisionmaking in a complex political environment.

The other main dimension of presidential participation in regulation is presidential influence over the implementation of regulatory programs by administrative agencies and administrators. The President's role in this regard is more commonly explored in the positive literature. The basic message is that the President has tremendous advantage over Congress in controlling agencies.<sup>384</sup> Reasons for this involve both the inherent strengths of the President and the endemic weaknesses of the legislature. Among the former are the absence of significant electoral constraints on presidential action. The President, as mentioned above, is more free than Congress to be concerned with governance and the "big picture."<sup>385</sup> Among the latter are the tendencies of legislators to focus on particularistic, narrow interests and, in addition, the collective actions that plague decisionmaking in the multi-member legislature.<sup>386</sup>

An important element of the President's strategy of regulatory control is

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may issue an executive order in return for a vote on a bill. While this evens out somewhat the currency of trade, the President has to be careful in cutting such deals. These deals usually involve zero-sum transfers, that is, the giving of some sort of benefit to one legislator and thereby removing the benefit from the supply of goods available. Perhaps the most promising type of currency is the services that the President can provide through his role as chief administrator. He can, for instance, help untangle bureaucratic red tape for a member, or agree to throw some favorable publicity his way. Trading services for votes is a means by which the President can limit his disadvantageous position with respect to legislative logrolling.

384. See, e.g., Moe & Wilson, *supra* note 88, at 18-27; Ferejohn & Eskridge, *Making the Deal Stick*, *supra* note 220.

385. See Moe, *Bureaucratic Structure*, *supra* note 355.

386. See Moe & Wilson, *supra* note 88, at 23-26. Moe and Wilson note that these collective action problems trouble legislator interests to the extent that legislators "take action in their own best interests as individuals—which may conflict with the best interests of the institution as a whole." *Id.* at 23. However, the conflict may be more apparent than real. The thrust of positive political theory is that politicians will act to reconcile these two interests; that is, they benefit from institutions which provide them with benefits within their institution; they also benefit from choices made within an institution which is powerful relative to other institutions in government. They will be reticent to sacrifice institutional interests for more narrow interests.

The imperative of protecting the power of Congress as a whole also suggests why the problem of legislators' focusing on particularistic, narrow interests may be overstated. In order to properly "serve" the individuals and groups who request legislative action, the legislature must secure the power of their institution vis-a-vis competitors. Interest groups will hardly be mollified by the legislators' excuse that they did their best, but the President defeated their initiatives. Hence, the capacity of each legislator to pursue narrow aims is related to the capacity of the institution to resist presidential encroachments (defensive strategies) and to pursue legislative interests.

the creation of a favorable (from the President's standpoint) climate for regulatory policy through careful attention to structural design.<sup>387</sup> Administrative agencies are often the product of presidential initiative, even when the policies implemented by these agencies are set by Congress. President Nixon's creation of the EPA, which preceded the passage of the watershed environmental statutes of the 1970s and 80s, ensured that the President's impact would be felt on the construction of future environmental policy.<sup>388</sup> Moreover, the creation of watchdog agencies such as the Office of Management and Budget (OMB) and the late Council on Competitiveness ensure structural mechanisms for constant presidential influence in the policymaking process.<sup>389</sup>

Different structures serve different functions. Creating a particular form of administrative agency provides for different sorts of presidential influence.<sup>390</sup> For example, the structure of the EPA, an executive branch agency headed by a single administrator answerable to the President, was more amenable to presidential control than a commission-form agency constructed by Congress with sources of political independence.<sup>391</sup> Regulatory supervision through an executive branch department like OMB facilitates presidential prerogatives in a way that would not be possible under the rubric of a "management" agency outside the aegis of the executive branch.<sup>392</sup> The point is that the President's structural choices are made with an eye toward maintaining influence over regulatory policy and, at the same time, safeguarding prerogatives from encroachments by equally self-interested legislators.

The question of how successful the President is in superintending regulatory decisionmaking is ultimately an empirical one. Positive theory sheds light on the issue by suggesting that the President has both the means and the incentives to structure an institution in the service of regulatory aims. The ideal normative picture painted by some positive political theorists is one in which presidential strategizing is checked and balanced by congressional actions and vice versa. The positive picture that emerges from what little positive scholarship currently exists on the Presidency does

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387. See, e.g., McCubbins et al., *Structure and Process*, *supra* note 324; Macey, *Organizational Design*, *supra* note 334.

388. See HARRIS & MILKIS, *supra* note 186.

389. See, e.g., EADS & FIX, *supra* note 361.

390. See Francis E. Rourke, *The Presidency and the Bureaucracy*, in *THE PRESIDENCY AND THE POLITICAL SYSTEM* (Michael Nelson ed., 1984). See also sources cited *supra* notes 353, 376.

391. See HARRIS & MILKIS, *supra* note 186, at 225.

392. See MCGARITY, *supra* note 87.

not fit this ideal; instead, the Congress-President relationship is described as out of balance, with the President exercising considerable discretion in regulatory decisionmaking. Electoral imperatives, constitutional structure, and collective action problems all ensure that the President possesses considerable advantages in the regulatory process which resist congressional checks.<sup>393</sup> To make matters worse, argue Eskridge and Ferejohn, the Supreme Court has facilitated, through its constitutional and statutory interpretation decisions, the expansion of presidential power.<sup>394</sup>

I conclude this section on the Presidency with the rather ambivalent observation that the jury is still out; positive political theory has yet to train seriously its models on the Presidency and the President's role in regulatory policymaking. The future of positive political theory surely involves a greater attention to these questions.

#### D. Judiciary

Political economists have never known entirely where to put courts in their theories. The judiciary has therefore remained largely an enigma. Positive political theories of judicial behavior are troublingly axiomatic. Moreover, the axioms are often in conflict. One group of positive theorists tends to view courts as merely another political institution driven by the same concerns and interests that motivate other politicians. In the regulatory game, the court is seen as just another player, moving at its designated time and having, along with other political actors, the same interest in implementing its own preferences into law.<sup>395</sup> Others view courts as a source of exogenous constraints on decisionmaking by the legislative and executive branches.<sup>396</sup> Strategic politicians act in the shadow of restrictions created and enforced by the judiciary, with the judiciary representing the only independent and non-political institution in the political process. These inconsistent conceptions of judicial decision-making represent a central difficulty in contemporary positive political

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393. See Moe & Wilson, *supra* note 88.

394. See Eskridge & Ferejohn, *Making the Deal Stick*, *supra* note 220; Ferejohn & Eskridge, *Article I*, *supra* note 220. Cf. Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452 (1989).

395. See, e.g., Edward P. Schwartz et al., *A Positive Theory of Legislative Intent*, 57 LAW & CONTEMP. PROBS. (forthcoming June 1994); Rafael Gely & Pablo T. Spiller, *A Rational Choice Theory of Supreme Court Statutory Decisions with Applications to the State Farm and Grove City Cases*, 6 J.L. ECON. & ORG. 263 (1990). The seminal contribution is Brian Marks, *A Model of Judicial Influence of Congressional Policy Making: Grove City College v. Bell* (Hoover Working Paper, 1988).

396. See, e.g., Macey, *supra* note 144; Landes & Posner, *supra* note 105.

theories of regulation. While both views describe something important about the nature and qualities of judicial decisionmaking, neither of these conceptions captures the essential elements of the judicial role. Courts are political and strategic, but not only that; courts are the source of some constraints on political decisions. However, courts are not the only source of constraints and, moreover, are themselves constrained by cross-cutting rules, doctrines, and practices.<sup>397</sup> Positive political theory has yet to provide a coherent theory of judicial behavior and decisionmaking; without it, a comprehensive positive theory of politics is impossible. The effort to construct a coherent theory of judicial decisionmaking represents one of the important tasks of contemporary positive political theory.

We start with a perennial question in rational choice theory: Why do judges behave the way they do? Even when reduced to a level of the basic heuristic assumption at the heart of rational choice theory, the question is confounding.<sup>398</sup> Fortunately, it is largely irrelevant. The question of what sort of utilities judges maximize is far less important than, and not necessarily connected to, the question of how judges participate in the regulatory process within the institution of the courts. In the context of this larger, and more institutionally focused question, judicial motives represent an intangible and peripheral set of data.

The focus in positive political theory is on how and why the institution is constructed and on how it operates within an environment made up of

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397. See *infra* text accompanying notes 418-19.

398. To begin with the more obvious part of the confusion, it is quite difficult to analogize judges to legislators and other politicians at the level of incentives and motives. The structure of judicial incentives is different from other political actors in ways that make comparisons problematic. Federal judges face no electoral constraint; nor can they realistically be expected to covet promotion. Being appointed to the Supreme Court is surely no more likely than being struck by lightning—even for those select elite judges whose names pop up like clockwork whenever there is a Supreme Court vacancy. In addition, great wealth through judging is hardly something to which a judge can aspire. An obvious free rider problem exists in the federal judiciary: A judge's salary cannot be *individually* increased without a special statutory appropriation, which will never happen. See Macey, *supra* note 145, at 497-98. Moreover, the Constitution expressly forbids the diminution of judicial salaries during the term of office. A judge must seek riches elsewhere. The hypothetical profit maximizing judge is, for that reason, probably somewhere other than in black robes.

The observation that judges have incentives different from other politicians goes only so far. Describing the unique incentive structures of the judiciary suggests only that judges are not constrained in the same way as are legislators. If, however, we still believe that judges are concerned with maximizing their individual utilities, then we can assume that judges will take advantage of any discretion with which they are left. It may be that judges are concerned simply with implementing their personal preferences—ideological, idiosyncratic, whatever—through their decisions. If so, they can act accordingly, without regard for what electoral or pecuniary incentives exist. We are thus back where we started: Why do judges behave they way they do?

other institutions, each with its own agenda and own set of constraints, internal and external. Positive political theories can absorb different perspectives on legislative, executive, and judicial behavior. The assumptions of rationality and (in some cases) foresight in positive political theory are not trivial; yet, there is a studied agnosticism in the positive political theory account concerning the underlying motivations of judges, legislators, and executives acting within institutions and within a political environment.<sup>399</sup> Instead, there are two central questions that must be understood and answered in the course of developing a positive theory of politics, neither of which presupposes a resolution of this “judicial motives” conundrum: The first question is what exactly is the zone of discretion within which judges have the ability to exercise their own judgment free of reversal by other political institutions? The second question is what factors affect how judges exercise their discretion within this zone? That is, what motivates a judge to choose one strategy or another in a situation in which she has both the discretion to decide and the resources that enable her to implement her desired aims?

Positive theory’s core maxim of judicial discretion is that a court<sup>400</sup> will decide with reference to the likelihood that its decision will be reversed by another political institution, whether it is another court on appeal or Congress through the enactment of legislation. In spatial terms, a court will pick a policy within a space representing the zone of discretion within which other political institutions will permit the court to decide without reversal.<sup>401</sup> Suppose we think of the relationship among the three lawmaking institutions—the House, the Senate, and the President<sup>402</sup>—in

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399. For a criticism of this agnosticism, see Michael E. Levine, *Comment on Macey*, 8 J.L. ECON. & ORG. 119 (1992).

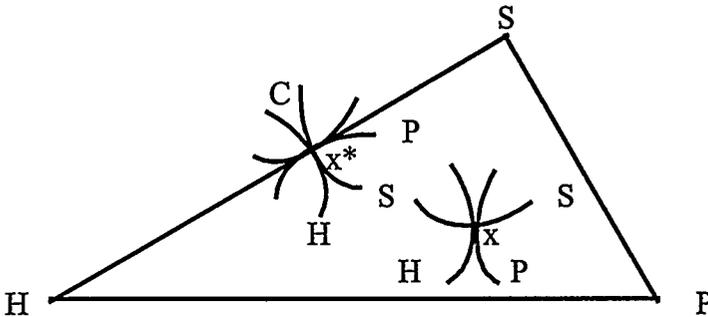
400. In this discussion, I use the term “court” and “judge” interchangeably. Of course, courts are often made up of more than one judge; in such instances, intriguing questions arise concerning the relationship among judges in multi-member institutions. Leading law and economics scholars have shed interesting light on this question over the years. See, e.g., Lewis A. Kornhauser & Lawrence G. Sager, *Unpacking the Court*, 96 YALE L.J. 82 (1986); Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802 (1982).

401. See, e.g., Gely & Spiller, *supra* note 395, at 268-73.

402. One reason it is useful to think in terms of three institutions rather than the conventional two “political branches” is because each institution has a veto over the decision of the other. In a sense, the disfunction between the House and the Senate is even greater than between either legislative house and the President. After all, the President’s veto can be overridden by the House and the Senate. Hence, both institutions can cooperate and form a coalition to overturn a presidential decision. By contrast, if one house refuses to act, nothing can happen, regardless of the size of the legislative majority. See Levmore, *supra* note 220.

terms of a two-dimensional policy space.

[Figure 1]



Each point represents the institution's ideal point.<sup>403</sup> The preferences over policies decline in distance from the ideal points. The surface of the triangle represents the Pareto optimal set of policy choices, that is, those choices that will make a majority better off without making the other harmed. The curves intersecting points  $x$  and  $x^*$  represent the indifference curves of the three institutions.<sup>404</sup> The court's ideal point is represented by  $C$ . If it were to implement  $C$  through its decision, then the remaining institutions would concur on a reversal to bring the policy back to an equilibrium because, after all,  $x$  is better than  $C$ . But, if the court were to decide  $x^*$ , closer to its ideal point than  $x$ , but still within the Pareto optimal set of  $HSP$ , then its decision would stand. Consequently, a court that sets out to bring its decision as close as possible to its ideal has some discretion (the area within  $HSP$ ) but not complete discretion.

To understand the sort of political constraints that bind judges it is important to understand the temporal dimensions of political decisionmaking or, as Ken Shepsle usefully puts it, the potential of

403. We are assuming, as is standard, that the ideal point of the institution reflects the ideal of the median member. But we could relax the assumption and still use the model. If we suppose, along with structure-induced equilibrium theory, that the committees operate as "veto gates" keeping certain legislation from floor consideration, we might regard the  $H$  and  $S$  in the model as representing the median memo of the gatekeeping committee.

404. The indifference curve connects all points equidistant from the institution's most preferred point.

coalitional drift.<sup>405</sup> Courts are constrained by the threat of reactions by Congress and the President. However, it is not the enacting coalition that poses the threat but, rather, the coalition that is in place at the time the court makes its decision. Legislative preferences and coalitions may change over time.<sup>406</sup> At the very least, there is uncertainty in the minds of all political institutions, including the courts, concerning whether and to what extent the preferences of the House, Senate, and the President reflect the will of the parties to the original bargain. In the two-dimensional model described above, the HSP refers to the *sitting* coalition, not necessarily the *enacting* coalition. The effect of this changing structure of political preferences on judicial discretion is described by John Ferejohn:

[I]nsofar as courts in particular have allegiance to statutes—that is, to the duly encoded preferences of the *enacting* Congress—they should be careful to devise interpretive methods that protect statutes from contemporary political responses, and in particular do not provoke congressional responses that are very far from the statutory desires of the enacting coalition. Such courts would engage in what might be called “strategic jurisprudence,” in that they would have to take account of the preferences of the sitting Congress in interpreting statutes. Only by doing so would such courts be able to act as “sophisticated honest agents” of the enacting Congress.<sup>407</sup>

Accepting this theoretical description as far as it goes, all that it suggests is that judicial discretion is bounded and that, if we set out to predict judicial patterns, we can describe a zone of discretion within which courts can operate without disturbance. This basic thesis about the dimensions of judicial discretion rests on two assumptions. The first is that the court has adequate information concerning the likelihood that its decision will be overturned. In the standard positive political theory models, the assumption is 1 or 0; that is, a judicial decision will be overturned or it will not.<sup>408</sup> More realistic, and substantially more complicated, models would consider overruling as a probabilistic estimate.<sup>409</sup> Courts would need information both about the extent to which the preferences of lawmakers have moved

405. See Shepsle, *Bureaucratic Drift*, *supra* note 294.

406. See *id.* See also Ferejohn & Weingast, *supra* note 294.

407. See Ferejohn, *supra* note 101, at 24-25. See also John A. Ferejohn & Barry R. Weingast, *Limitation of Statutes: Strategic Statutory Interpretation*, 80 GEO. L.J. 565 (1992) [hereinafter Ferejohn & Weingast, *Strategic Statutory Interpretation*]; Ferejohn & Weingast, *supra* note 294.

408. In technical terms, these are full information models. See, e.g., Ferejohn & Shipan, *supra* note 377; Marks, *supra* note 395.

409. For an important exception to this standard assumption, see Schwartz et al., *supra* note 395 (using signalling model).

from where they were in the original coalition; in other words, the court must determine how far, if at all, the coalition has in fact drifted. However, in addition, courts would consider the probability that this current coalition will invest their energies into overruling the court decision. Current positive political theory models seem to assume that legislators will overturn any decision that is outside the Pareto optimal set of preferences. But surely there are transaction costs associated with overruling. Whether they will invest the resources necessary to overturn the decision will depend upon, among other factors, the importance of the issue to a legislative majority and the opportunity costs of attempting to overrule the decision.<sup>410</sup> While more complexity may be added to the picture, the basic point is the same—courts can pick a point within the space created by the political preferences of institutions which have the power to overturn the courts' decisions if they stray outside the policy space.<sup>411</sup>

Another critical assumption is that courts care about whether they are overturned. Of course, all things being equal, we can agree that a judge would rather win than lose. But the real question is whether, at the margin, the court's decision will be influenced by the likelihood that the decision will survive scrutiny. The assumption is quite strong; it supposes that courts will shape their judgments around predicted political consequences; that they will, in a particular case, decline to decide as they want to, or think they ought to, because to do so would risk a reaction by Congress and the President. To be plausible, the assumption must rest on a positive theory of judicial decisionmaking or, at the very least, a theory of why courts act with regard to political decisions made by others.<sup>412</sup> There are two distinct pathways which such positive political theory can travel. The first expresses an economic efficiency rationale for judicial sensitivity to the political dimensions of its decisions; the second expresses a more strategic, political opportunism rationale.

The efficiency argument rests on the same sort of internally focused arguments that underlie the new economics of organization and its

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410. This is not, I would insist, merely an empirical point, but a theoretical one that goes to the efficacy of the "zone of discretion" model. Once we build into the model the feature of transaction costs, then there may well be a different calculation for political actors regarding whether they will overturn or let stand a judicial decision.

411. See Pablo T. Spiller & Emerson Tiller, *Invitations to Override: Congressional Reversals of Supreme Court Decisions* (1993) (on file with author).

412. See Levine, *supra* note 399. See also Frank H. Easterbrook, *Some Tasks in Understanding Law Through the Lens of Public Choice*, 12 INT'L REV. L. & ECON. 284, 286 (1992).

application to the study of political institutions.<sup>413</sup> To understand why judges tie their decisions to the preferences of legislators and the President we begin with the basic structure of judicial decisionmaking. We start by assuming that a court has a greater or lesser amount of discretion over both the cases that it decides and the issues framed within the case that it resolves. At one extreme, of course, is the Supreme Court of the United States, a judicial institution that has control over its docket. The Court, acting through coalitions of justices, can pick and choose from among the hundreds of cases that are brought before it for decision.<sup>414</sup> The Court faces costs every time it decides a case—indeed, every time it tackles any one of the number of issues presented in a case. An important task of the Court is to economize the costs of deciding. These costs include the opportunity costs of spending resources on one issue and case at the expense of the many others that could be considered. In light of these costs, it would seem prudent for the Court to take account of the risks that its decision will be overturned by Congress. Why, after all, would it waste its time on a decision that would not survive long after its decision when it could spend its resources on a decision that matters to it as much and will prove more durable? So, one reason to expect a court with some control over its docket to pay attention to the prospect of overruling concerns the costs (including the opportunity costs) of deciding cases.<sup>415</sup>

The second rationale rests on a distinct, and more externally focused, perspective on judicial decisionmaking. Whereas the economic efficiency argument described above reflects an outgrowth of the sort of industrial organization perspective on political institutions that is useful but limited in its approach to considering the range of issues in regulation and public law, this rationale coincides with the positive political theories of legislative and executive behavior. The notion is that the court is concerned with implementing its own preferences through decided cases.<sup>416</sup> Underlying motives and incentives are irrelevant; the judge may be concerned with prestige, money, social justice, or something else. He will act, however, to implement his policy preference and will, in that regard, take account of

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413. See *supra* part III.C (discussing new economics of organization); *supra* part IV.B.1 (applying industrial organization theory to Congress).

414. For a positive political model of the Supreme Court's certiorari process, see Edward P. Schwartz, *Information, Agendas, and the Rule of Four: Nonmajoritarian Certiorari Rules for the Supreme Court* (1992) (on file with author).

415. Cf. Spiller & Tiller, *supra* note 411, at 16-21.

416. See sources cited *supra* note 387.

the risk that his preference will be replaced by the preferences of other politicians acting within their institutions. The judge understands that he may not be able to accomplish what he ideally would want; to pick his ideal point would result in a reaction that may leave him worse off than if he did nothing.<sup>417</sup> Instead, if he acts at all, he will pick that point that is as close to his ideal point as he can get without being overturned by Congress and the President.

However, the notion that the judge will roam freely within the boundaries of this policy space is questionable. The point about the strategic concerns of the opportunistic judge simply indicates that the judge will try to avoid being overruled. One constraint on judicial discretion, then, will be the threat of political reaction. The judge may also feel constrained by other factors, such as her belief that the intent of the framers of the statute must be implemented,<sup>418</sup> or her belief in precedent.<sup>419</sup> In spatial terms, the preferences of the Congress that enacted the statute may be represented by another set of boundaries which are not necessarily congruent with the preferences of legislators currently. These boundaries do not represent the risk of being overturned *now*, but merely the zone of discretion that the enacting legislature intended to leave to courts in the first instance.

Suppose that we have settled on the boundaries that limit the scope of judicial discretion. What does positive political theory say about what decision a judge will reach within this zone? The most common approach to answering this question in the positive political theory literature regards judges as concerned with implementing their own preferences through their decisions.<sup>420</sup> Once the court has determined the boundaries of its discretion, it will proceed to pick the outcome that matches most closely its policy preferences. Those preferences may be ideologically driven; or they may be bound up with the judge's pecuniary interests; or, more

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417. This is because an overruling can move the policy to someplace other than the status quo. *See, e.g.,* Pablo T. Spiller, *A Rational Choice Theory of Certiorari: Hierarchy, Strategy and Decision Costs at the Courts* (1992) (on file with author). Positive political theorists have been slow to take into account the spectral quality of judicial choice. Models usually consider judicial choice as either/or (*i.e.,* affirm v. reverse). *See, e.g.,* Pablo T. Spiller & Mathew L. Spitzer, *Judicial Choice of Legal Doctrine*, 1 J.L. ECON. & ORG. 8 (1992). For a useful discussion—and defense—of this assumption, see Schwartz et al., *supra* note 395, at 233.

418. *See* discussion *infra* part V.A.3a.

419. This "belief" may be strategically-driven. *See* Schwartz et al., *supra* note 395. *See also* Lewis A. Kornhauser, *An Economic Perspective on Stare Decisis*, 65 CHI.-KENT L. REV. 63 (1989); Jonathan R. Macey, *The Internal and External Costs and Benefits of Stare Decisis*, 65 CHI.-KENT L. REV. 93 (1989).

420. *See supra* text accompanying notes 398-99, 416 (discussing judicial motives).

amorphously, with her interests in increasing her "prestige." In any event, positive political theories in this vein are hardly innovative in their description of the behavioral motivations of judges; they track standard rational choice descriptions of judges as utility maximizers in the same way and essentially for the same reasons as any other actor in the political process.<sup>421</sup>

Needless to say, these hypotheses rest on a controversial conception of the judicial role in the structure of American government. But even supposing that this idea of a judge as a political actor captures something important about the nature of judging,<sup>422</sup> the idea does not provide a sufficient basis for drawing positive conclusions about judicial decisionmaking. For one thing, the notion of preferences is ambiguous.<sup>423</sup> Does the judge have preferences merely about policy outcomes? Or does he also have preferences about decisional rationales, the content of legal rules, and precedent? The notion of outcomes is too ambiguous to yield the sort of hypothesis that is capable of being examined theoretically. Even among those positive political theorists that take the idea of the judge as a political, strategic actor as a given, disagreement exists over what judges prefer, what goals they pursue, and the means of implementing these goals.

More recently, positive theorists have incorporated richer, more complicated, conceptions of judicial behavior into their models of how courts participate in the political process. In one interesting, recent model, Emerson Tiller and Pablo Spiller describe how courts can pursue strategies to implement their own policy preferences through judicial decisions and, simultaneously, implement their preferences concerning particular doctrines and procedures.<sup>424</sup> A judge may, for instance, desire less regulation; certain policy outcomes will follow from this desire. At the same time, this judge may prefer to interpret a statute in accordance with its precise language because the judge is committed to a narrow, "textualist" approach

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421. See the discussion in POSNER, *supra* note 106.

422. The notion of the judge (particularly the Supreme Court justice) as a political actor antedates, of course, positive political theory. See, e.g., GLENDON SCHUBERT, *THE JUDICIAL MIND: THE ATTITUDES AND IDEOLOGIES OF SUPREME COURT JUSTICES 1946-1963* (1965); SHAPIRO, *supra* note 1. See also JEFFREY SEGAL & HAROLD SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* (1993).

423. See, e.g., Spiller & Tiller, *supra* note 411; Schwartz et al., *supra* note 395; Jonathan R. Macey & Geoffrey P. Miller, *The Canons of Statutory Construction and Judicial Preferences*, 45 VAND. L. REV. 647 (1992); Gely & Spiller, *supra* note 395.

424. See Spiller & Tiller, *supra* note 411.

to interpretation.<sup>425</sup> These two sets of preferences may complement one another; or they may reflect preferences that are incommensurate because they are about two distinct types of issues. In any case, to understand judicial strategies we must, so this model goes, understand these two dimensions of judicial strategy.

Among the implications of this important insight is the one mined by Tiller and Spiller, namely, that strategic judges may be willing to have their decisions overruled by Congress, if the desideratum of the overruling is that one dimension of their preferences (say, their preference for textualist interpretation) is preserved.<sup>426</sup> Another implication that might be considered in light of thinking about judicial preferences and strategies in a more complex way is whether and to what extent courts will sacrifice a substantial amount of the utility they get from implementing their policy preferences in order to achieve other, more long-lasting goals. Moreover, how does the multi-dimensionality of judicial decisionmaking alter the political strategies of legislators and the President, both in terms of their decisions whether to overrule and in terms of their decisions how to influence judicial decisionmaking *ex ante*?<sup>427</sup>

In addition to the complexities added to the positive account of the judiciary by a richer conception of preferences, another critical feature of judging that is beginning to be incorporated into positive political theory is the institutional-decisionmaking structure of the judiciary. This structure of judicial decisionmaking, which makes the assumption that the judge is a strategist, is only the beginning of the story. The preferences of a judge can be implemented only through his decisions; these decisions require an appropriate institutional structure. In multi-member institutions, including the courts of appeals and the Supreme Court, the judge must receive the support of his colleagues; even in a single-member institution, a judge's power is institutionally dependent.<sup>428</sup> In recent years, positive political

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425. On "textualism," see William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990).

426. Albeit under the conditions spelled out by Spiller & Tiller. See Spiller & Tiller, *supra* note 411.

427. See, e.g., Daniel B. Rodriguez, *Statutory Interpretation and Political Advantage*, 12 INT'L REV. L. & ECON. 217 (1992) (discussing political strategies for controlling process of statutory interpretation).

428. For example, the judge has only limited control over the issues that come before him. Technically, the problem is one of "path-dependence." See Lewis A. Kornhauser, *Collegial Courts I*, 12 INT'L REV. L. & ECON. 169 (1992). Cf. Gillian K. Hadfield, *Bias in the Evolution of Legal Rules*, 80 GEO. L.J. 583 (1992) (describing how biases in the cases that come before courts can skew decisionmaking process).

theorists, most notably, Lewis Kornhauser, have contributed rich theories of decisionmaking in collegial courts.<sup>429</sup>

The lesson drawn from these efforts to craft more complicated theoretical models of judicial decisionmaking is that courts must be examined as unique political institutions; they participate, along with other institutions, in the construction, implementation, and interpretation of law and legal doctrine. However, their responsibilities in carrying out these functions are importantly distinct from other institutions. These distinctions are the product of constitutional arrangements; they are also the product of shared understandings, historical situations, and jurisprudential philosophies, characteristics which are each difficult to reduce to rational choice theoretical frameworks. However, these characteristics nonetheless channel judicial discretion in important ways which are thus far underappreciated by positive political theory.

One prominent positive political theorist has begun to sketch out a framework for considering the nature and scope of judicial decisionmaking.<sup>430</sup> Like earlier positive political theory efforts, the linchpin of this effort is the concept of judicial discretion. The notion is that the shape of judicial decisions will be a function of the "interpretive regime" in which judicial decisionmaking takes place.<sup>431</sup> John Ferejohn writes:

The notion of an interpretive regime is intended to suggest that the methods of judicial interpretation in use at a particular point in time tend to have some degree of coherence or structure. This coherence might arise from the hierarchical nature of the appellate court system, or perhaps from some tendency to systematization in legal community. Whatever the source, an interpretive regime permits the coordination of legal expectations both within the legal community of judges, lawyers and commentators, and beyond it to agencies, legislators and ordinary citizens.<sup>432</sup>

This regime is no mere artifact of history; it is neither accidental nor evolutionary. It is, instead, the product of rational, political choices made

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429. See, e.g., Lewis A. Kornhauser, *Modelling Collegial Courts II: Legal Doctrine*, 8 J.L. ECON. & ORG. 441 (1992); Kornhauser, *supra* note 428; Kornhauser & Sager, *Unpacking the Court*, *supra* note 400; Pablo T. Spiller, *Rationality, Decision Rules, and Collegial Courts*, 12 INT'L REV. L. & ECON. 186 (1992); Schwartz et al., *supra* note 395; Easterbrook, *supra* note 400.

430. See Ferejohn, *supra* note 101. Related themes are developed in William N. Eskridge, Jr. & John A. Ferejohn, *Politics, Interpretation, and the Rule of Law* (1993) (on file with author).

431. There are some similarities between Ferejohn's theory of "interpretive regimes" and the analysis of constitutional interpretation and history in BRUCE T. ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991). See Ferejohn, *supra* note 101, at 20 n.21.

432. Ferejohn, *supra* note 101, at 27.

within an institutional and historical context. The results of these choices form the institutional regime in which judicial decisionmaking takes place.

The concept of an interpretive regime as a constraint on judicial decisionmaking and as a means of channeling discretion in a certain direction is enticing, yet inchoate. What determines whether a set of common judicial techniques of decision rise to the level of an interpretive regime, a shared community of decisionmaking strategies? What factors ensure that an interpretive regime remains stable?

The definition of a regime turns not only on the interpretive practices we observe (e.g., narrow versus strict statutory construction; broad federal power versus states' rights), but also on the extent to which judges share a commitment to a homogenous set of decisionmaking strategies. Commitment within the judiciary to a "plain meaning" rule of interpretation, for example, would indicate the creation of an interpretive regime; similarly, commitment to an expansive reading of the national government's regulatory powers would represent the makings of an interpretive regime built around a particular approach to federalism issues. For the purposes of ascribing to a particular judicial epoch the moniker "interpretive regime," it does not matter what *causes* the regime; suffice it to say that judges within an interpretive regime share a common set of decision principles and interpretive conventions.<sup>433</sup>

The precise point at which an eclectic set of interpretive practices come together to form an interpretive regime is unclear. For example, William Eskridge, Jr., recently described the revival of an approach to statutory interpretation—what he labels "the new textualism"—among a growing number of federal judges and justices.<sup>434</sup> The new textualism has substantially affected judicial decisionmaking and, as a consequence, the structure of the regulatory state. But does this new textualism constitute the development of a distinct interpretive regime? Perhaps the emergence of an intense commitment to a particular method of interpretation among a number of judges reflects the ambition of those judges to expand the scope of their own power and influence in an environment in which the regime of interpretation is strongly contested and in which judicial agendas are closely divided. In any event, what constitutes the emergence or the collapse of an interpretive regime is not apparent.

A more serious concern is one that brings us back to the roots of positive

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433. *See id.*

434. Eskridge, *supra* note 144.

political theory. What ensures the proper level of commitment to a certain interpretive regime? John Ferejohn's tentative answer is *stability*—that is, the interests of judges in maintaining a stable set of interpretive conventions. Stability is the product of the rational choices of judges to create and obey these conventions. The basic reason is judicial economy. Common decisionmaking conventions represent “internal constraints on judicial action.”<sup>435</sup> These constraints “arise from the incapacity of courts, responding to disputes in real time, to commit themselves to future courses of action. Judges might prefer to decide cases by developing interpretive regimes, making them publicly known, and then deciding cases through the application of these rules.”<sup>436</sup> By doing so, judges can make their decisions more predictable to other politicians and ordinary citizens. It remains unclear exactly why courts crave predictability and certainty in the way described by Ferejohn. Perhaps the reason is that predictability enables judges to economize on deciding cases. Reducing decision costs through reliance on off-the-rack interpretive conventions is, in this view, an important objective of rational judges.<sup>437</sup> So, too, is there value associated with reducing the risk of erroneous decisions—that is, error costs—and, accordingly, judges will construct interpretive regimes within which they can rely on tried-and-true rules of decision.<sup>438</sup> However, this economic rationale for interpretive regimes is rather imprecise. Certain rules of interpretation do not reduce, to a substantial extent, the costs of deciding. Nor do we observe, as the economic rationale clearly predicts, choices for more efficient interpretive regimes. In a sense, we are returned to the judicial motives conundrum that we had left aside: Why would judges construct and maintain interpretive regimes in order to reduce or generate predictable outcomes?

Whether or not there emerges an adequate positive theory to explain the design and maintenance of interpretive regimes, there is still something enormously useful in thinking about public law in the ways suggested by this “regimes” framework. Several conceptual ideas that seem to float around rather loosely in positive political theory are brought together. The first is the nature of judicial discretion, that is, the notion that courts are

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435. Ferejohn, *supra* note 101, at 30.

436. *Id.*

437. See Spiller & Tiller, *supra* note 411; cf. Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533 (1983).

438. See Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 SUP. CT. REV. 231.

constrained in the ways that they implement their will through judicial decisions. The underlying constraints are political; judicial decisions outside the zone of discretion may be overruled. But the constraints in practice, the day-to-day boundaries on judicial decisionmaking, are constructed by interpretive rules and norms. Legal scholars are much more likely to ascribe constraints on judicial decisions to the rule of law and principles such as *stare decisis* and textualist statutory construction than we are to pivotal members of the 103rd Congress. But this need not reflect a dichotomy between a *political* conception of judicial discretion and a *legal* conception. Instead, the notion that judicial decisions will reflect the interpretive regimes in which the judges decide reconciles both conceptions. Thinking about judicial decisionmaking within a interpretive regimes framework also helps shape the inquiry into judicial organization and structure. Courts make rational institutional decisions as do other actors in the political process. These choices reflect their calculations in two ways. The first concerns hierarchical decisions about how to control the members of the organization in which the judge operates. (Of course, some judges are more equal than others with regard to their ability to make organizational choices on behalf of the institution.)<sup>439</sup> The second concerns decisions about how to insulate its decisions from political controls, that is, from disruptions by competitor political institutions. A framework, such as that provided by the notion of interpretive regimes, that focuses attention on the content of judicial rules and the nature of interpretive strategies can be integrated into theories of judicial organization to integrate positive theories of the judiciary in a way that has not yet been done. The integration would involve bringing together perspectives on the “external” aspects of judicial decisionmaking, including political controls and commitments to jurisprudential principles, with the “internal” aspects of judicial decisionmaking, including the structure of judicial incentives and the costs of reaching agreement in multi-member institutions. The effort at such an integration brings us full circle to the critique in Part II of previous rational choice theories of politics and the description in the first section of this Part of the ambition of positive political theory. What is needed is studied attention to the role of institutions in constructing the conditions for, and the strategies of, political decisionmaking, including decisionmaking by courts and judges. What is also needed is an apprecia-

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439. For example, an important locus of authority within the courts is the Federal Judicial Conference, a body whose membership includes members of the federal judiciary at all levels.

tion, grounded in positive theory, for the role of law and legal rules in shaping political action.<sup>440</sup>

### *E. Putting the Pieces Together: The Dynamics of Regulatory Competition*

The regulatory process reflects a confluence of ingredients. The discussion in the previous sections of this Part suggests that these ingredients—legislative, administrative, presidential, and judicial action—are both distinct and similar. Positive political theory has contributed to our understanding of the regulatory process both in its construction of positive theories of political institutions and in its consideration of how these institutions work in an institutional environment.

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440. Another important task is to explain, from a more reflectively normative perspective, what sort of role we would want courts to play in a regulatory system dominated by the sort of rational, strategic action described above. This normative task intersects with the concerns of both positive political theorists and legal scholars. What positive political theory aims principally to provide is a positive framework within which we can tackle these normative questions. At its most ambitious, however, positive political theory is an analytical engine behind a particular normative perspective on public law.

There is a different way of considering the relationship between positive political theory and the judiciary than that sketched out in this section. That is to see judges as members of an audience to which prescriptive suggestions that take into account positive political theories of legislation and regulation are directed. The final part of this Article explores some of the ways in which normative legal scholarship may integrate and apply the insights of positive political theory. See *infra* part V. For now, it is merely worth noticing that positive political theorists are beginning to tackle a number of normative questions raised by the theory and, in doing so, their prescriptions tend to be directed toward judges. Of course, this reflects the tendency of normative legal scholarship generally to view courts as the consumers of our scholarly output. See generally Edward L. Rubin, *The Practice and Discourse of Legal Scholarship*, 86 MICH. L. REV. 835 (1988). But it also reflects something about positive political theory distinctly—namely, its theoretically-grounded skepticism concerning the capacities of the legislative and executive branches to reform themselves, given the ubiquitous incentives and opportunities for rational, strategic action. Cf. Elhauge, *supra* note 148 (discussing relationship between interest group theories and proposals for stronger judicial review); Charles Silver, *Public Choice and Judicial Review*, 18 L. & SOC. INQ. 165 (1993) (same).

Among the efforts to construct prescriptive suggestions that are grounded in positive political theory, two stand out. One is the effort by William Eskridge, Jr., and John Ferejohn to defend an approach to construing the Constitution and statutes in order to cabin excessive presidential influence over the process of regulatory decisionmaking. See Eskridge & Ferejohn, *Making the Deal Stick*, *supra* note 220; Eskridge & Ferejohn, *Article I*, *supra* note 220. The second is the effort of the collective “McNollgast” to develop rules of statutory construction for use by courts in order to safeguard the bargain struck by coalitions in the legislature and therefore protect the enacting Congress from its diabolic successor—the “sitting” Congress. See McNollgast, *Legislative Intent: The Use of Positive Political Theory in Statutory Interpretation*, 57 LAW & CONTEMP. PROBS. (forthcoming June 1994) [hereinafter McNollgast, *Legislative Intent*]; McNollgast, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 GEO. L.J. 705 (1992) [hereinafter McNollgast, *Positive Canons*].

In examining the dynamics of regulatory decisionmaking, positive political theories often describe the process sequentially.<sup>441</sup> The first step is the enactment of the regulatory statute. Statutory decisions reflect the rational choices of legislators and the President. Each lawmaker shares an interest in constructing a favorable (from her own separate perspective) regulatory climate; decisions about which regulatory policy to support will reflect these interests. Decisions by lawmakers concerning the contours of the regulatory statute will be affected by two broad categories of concerns, the first of which includes the *institutional constraints* on the decisions of lawmakers. The second includes the role of *uncertainty* in making regulatory decisions.

The basic elements of these concerns have already been spelled out in different contexts above. To recap, institutional constraints include the variety of structures and procedures that limit the ability of individual lawmakers and collections of lawmakers from implementing their preferences through the regulatory statute. Of course, many of these institutions are, by hypothesis, the product of rational choice. Yet, these rational choices are made to channel statutory decisions and, in some cases, to circumscribe the actions of strategic legislators in the future. We considered in section III(B)(2), for instance, how the standing committee can function to tie the hands of opportunistic legislators who would, in the absence of the gatekeeping function of the committee, renege on responsibilities to other legislators in bargaining situations.<sup>442</sup> Institutional constraints include the force of legal rules.<sup>443</sup> A rule of statutory construction that eschews reliance on legislative history and, instead, interprets the statute in accordance with its literal words will limit the opportunities for legislators who are part of a majority coalition to put their spin on the legislative bargain of which they are a part.<sup>444</sup> Furthermore, a rule that limits the scope of Congress's power to restrict the authority of courts to review administrative agency decisions represents another institutional constraint on legislators' ability to structure the legislative bargain on their own terms and conditions.<sup>445</sup> Institutional constraints are

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441. This is especially true, of course, with respect to the use of game theory in developing regulatory decisionmaking models. See, e.g., Ferejohn & Shipan, *supra* note 377; Marks, *supra* note 395.

442. See *supra* text accompanying notes 282-86.

443. For an interesting philosophical treatment of the role and function of legal rules, see FREDERICK SCHAUER, *PLAYING BY THE RULES* (1991).

444. See Shepsle, *supra* note 61.

445. Both of these issues are taken up more systematically in the next two sections.

ubiquitous; they arise in connection with virtually all important lawmaking decisions. The shape and scope of each regulatory statute, therefore, will reflect both the interests and abilities of lawmakers to pursue rational strategies through statutory design as well as the constraints on such strategizing that emerge from the collection of institutional rules, structures, and procedures that regulate the lawmaking process.

Lawmakers are also hemmed in by their uncertainty about the effect of policy decisions. Rational choice models suppose that decisionmakers have enough information to make effectively rational decisions.<sup>446</sup> Lawmakers may be limited, though, in their capacity to make knowledgeable choices, not because of any failures in cognition, but because of their inability to anticipate and respond to the unintended consequences of their *ex ante* regulatory choices and, separately, their inability to predict the future. Unintended consequences include broadly those circumstances and features of regulatory implementation that are hardly susceptible to control through statutory detail. For example, the effects of a regulatory strategy on aspects of the economy may be difficult to foresee, even by rational legislators with a great amount of available information.<sup>447</sup> The predicament faced by political decisionmakers who would regulate synoptically, but settle for regulating incrementally has been described lucidly in the literature on regulation.<sup>448</sup> Positive political theory suggests a different framework for lawmakers' rational choices, but the predicament is still palpable. Moreover, the inability to forecast the future is an important source of political uncertainty. This uncertainty continually jeopardizes the hard-won accomplishments of those who collect themselves to enact a regulatory statute; this uncertainty therefore casts a shadow on the statutory decisions made by lawmakers *ex ante*. In light of this uncertainty, "the task of designing political organization is not simply a technical problem of finding an efficient governance structure linking current power-holders to their creations. The more fundamental task for political actors is to find and institute a governance structure that can protect their public organizations from control by opponents."<sup>449</sup>

Once the regulatory program is set in place by statute, the regulatory

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446. *But see* KREHBIEL, *supra* note 272.

447. *See* R. DOUGLAS ARNOLD, *THE LOGIC OF CONGRESSIONAL ACTION* 19-20 (1990) (describing difference between single-stage and multi-stage policies).

448. *See, e.g.*, SHAPIRO, *supra* note 12; Colin Diver, *Policymaking Paradigms in Administrative Law*, 95 HARV. L. REV. 393 (1981).

449. Moe, *supra* note 137, at 125.

process—or, in the jargon of positive political theory, the regulatory “game”—will reflect the rational, strategic decisions of legislators and the President to influence regulatory decisionmaking through the various techniques at their respective disposals. In addition to the fact that such decisions are made after the statute is enacted, there are two potentially major differences that may exist between the structure of regulatory competition *ex post* and *ex ante*. The interests of the program’s creators may diverge from the interests of politicians who are in a position to influence regulatory policy in the future.<sup>450</sup> As discussed earlier, two important consequences flow from the fact that the creators of the regulatory program in the legislative and executive branches are not necessarily the same as the supervisors of that program as it is carried out over time. Changes in preferences and in personnel may significantly affect the direction of the regulatory process. Perhaps it would be ideal if these changes could be manifested in a systematic reconsideration of the regulatory program in the legislature. Not only is this not guaranteed to happen, but positive political theories of legislative and presidential decisionmaking suggest that it is unlikely to happen, given the institutional constraints on legislative change. These constraints are themselves largely the product of legislators’ rational choices *ex ante* to make it quite difficult to unravel a statutory bargain.<sup>451</sup> As a consequence, there is a constant risk that the structure of the regulatory bargain will be jeopardized by strategic decisions made by subsequent legislators and Presidents to influence administrative agencies and courts in order to bring these institutions into alignment with the *current* structure of political preferences.

The other major difference with respect to *ex post*, as opposed to *ex ante*, regulatory competition involves the impact of the conduct of the two institutions on the regulatory landscape: the agencies and the courts.<sup>452</sup> Each institution poses distinct problems for lawmakers. With agencies, the principal problems are two-fold. First, there are persistent principal-agent problems associated with the efforts by the legislative coalition to cabin agency opportunism.<sup>453</sup> This opportunism may take the form of agencies acting to pursue their own self-interest;<sup>454</sup> or it may involve agency

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450. See Shepsle, *Bureaucratic Drift*, *supra* note 294; Moe, *supra* note 137.

451. See discussion *supra* part IV.B.2.

452. See discussion *supra* parts IV.B.3, IV.D.

453. See McCubbins et al., *supra* note 324; STEVENS, *supra* note 156, at 281-83.

454. See, e.g., NISKANEN, *supra* note 77.

obedience to the will of other legislators or the President;<sup>455</sup> or the problems may stem from the inability of the legislative coalition to fashion a regulatory statute that instructs the agency with any precision concerning their aspirations and aims.<sup>456</sup> Most regulatory programs will involve all three of these problems in varying amounts. The legislators can take steps to control the causes and effects of these principal-agent problems. What is intriguing, though, is how these steps play out in the dynamics of the regulatory process. As we saw earlier, legislative and presidential efforts to reign in agencies yield their own set of problems. Tradeoffs and second-best choices are an omnipresent feature of politicians' decisions with respect to administrative agencies which are constructed and managed through regulatory statutes and through the *ex post* decisions of lawmakers.

No less vexing problems are raised by politicians' efforts to control judges. To the extent that judicial decisionmaking represents a significant element of the regulatory process, it is worth the energies and efforts of politicians to consider how best to deal with the judiciary's role in regulatory policymaking.<sup>457</sup> Lawmakers have substantial tools at their disposal to manage the courts.<sup>458</sup> On the other hand, courts have their own sources of power and have proved rather resourceful in maintaining some independence from politicians' encroachments. Fundamentally, politicians appreciate the extent to which nearly every significant regulatory decision will eventually reach the courts, in some form or another. Accordingly, politicians will fold into their regulatory decisions, rational choices concerning how best to manage judicial conduct or, failing that, how best to *cope* with the persistent role of the judiciary in regulatory policymaking. Dealing with courts, institutions that are at the same time self-reliant and dependent, free to choose but constrained in their actions, represents a continuous dilemma for legislators and Presidents.

The portrait of regulatory competition among rational politicians has many different elements. The previous description of positive theories of political institutions suggests that the principal elements are the institutions that participate in the regulatory process. From another view, these elements represent the different sequences in the regulatory "game," beginning with the enactment of the regulatory program and continuing through the implementation process. In this view, all institutions are part

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455. See discussion *supra* part IV.C.

456. See *supra* notes 61-65 and accompanying text.

457. See discussion *supra* part IV.D.

458. See, e.g., Rodriguez, *supra* note 427.

of the policymaking milieu; understanding the dynamics of the regulatory process, then, means understanding how these institutions interact with one another at each stage in the process. Each represents different takes on the same essential portrait, a portrait of regulation and the regulatory process as political, partisan, manipulable, and disheveled.

The task of this Part was to examine in detail the underpinnings and insights of positive political theory. The regulatory process is treated, in this account, as a dynamic process in which institutions compete with one another for control and influence. To the extent that these institutions are designed with an eye toward facilitating the opportunities of their members, institutional structure and decisionmaking rules will reflect both the individual interest of the institution's members and the collective interest of the institution in maintaining its power in an environment made up of other institutions with similar interests and agenda.

In Part V, I turn to some applications of this theory to critical issues in the contemporary debates over regulatory reform. The regulatory predicament described in Part II of this Article is multidimensional.<sup>459</sup> The current regulatory process has been criticized from a variety of perspectives and with a variety of different remedies.<sup>460</sup> Changing the structure of legal rules that affect the regulatory process is only part of the remedy—for some, perhaps only the tip of the iceberg. Yet, in considering the application of positive political theory to questions concerning the law governing regulatory administration, we can learn something important about the prospects of regulatory reform and the extent to which rational choice theory, as reflected in the efforts of political economists and legal scholars working on positive political theory, can profitably inform debates among legal scholars on the causes of, and possible cures for, regulatory predicaments. The two issues considered in the remainder of this Article—statutory interpretation and administrative law—reflect aspects of public law that cross the entire range of regulatory issues.

## V. POSITIVE POLITICAL THEORY AND PERSPECTIVES ON REGULATORY REFORM

The impact of rational choice theories of legislation on normative theories of public law has been significant, but incomplete.<sup>461</sup> In this

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459. See *supra* part II.A.

460. See discussion *supra* parts II, III.

461. See generally Elhauge, *supra* note 148. As his title suggests, Einer Elhauge considers only part of rational choice theory—the interest group theory of legislation and decision (or collective choice)

Part, we revisit this question of rational choice/normative theory intersection, but in a very different light. The tenor of prescriptions grounded in an appreciation of rational choice theory has been sanguine, and at times utopian, in believing that courts can perfect the political process by interpreting statutes and constitutions and reviewing administrative agency decisions in order to cabin noxious interest group influence.<sup>462</sup> The instinct to construct normative theories that respond to the more pernicious elements of strategic lawmaking is understandable; at the same time, such proposals create their own problems and have, as a general matter, an uncertain impact on the functioning of the political process as a whole.<sup>463</sup>

However insightful these proposals have been from the standpoint of redressing the problems of interest group influence, different issues are raised by the efforts to consider prescriptions from the perspective of positive political theory. While scholars who have undertaken these normative efforts appeal to the same broad principle—that the regulatory process must be *saved* from the lethal effects of rational, strategic behavior—the object of the enterprise is necessarily different. Whereas a crucial part of the prescriptive agenda of scholars in traditional public choice is to cleanse political processes from poison brought from outside—for instance, leave legislators free to pursue “public-regarding” legislation by making it more difficult to enact “private-regarding” laws<sup>464</sup>—positive political theory insists that many of the dilemmas are

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theory.

462. See, e.g., FARBER & FRICKEY, *supra* note 13; Macey, *Separated Powers*, *supra* note 334; Gary Minda, *Interest Groups, Political Freedom, and Antitrust: A Modern Reassessment of the Noerr-Pennington Doctrine*, 41 HASTINGS L.J. 905 (1990); Jerry L. Mashaw, *The Economics of Politics and the Understanding of Public Law*, 65 CHI.-KENT L. REV. 123 (1989); Eskridge, *supra* note 144; Macey, *supra* note 144; Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985); Richard A. Epstein, *Toward a Revitalization of the Contract Clause*, 51 U. CHI. L. REV. 703 (1984); Richard A. Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263 (1982).

463. See Elhauge, *supra* note 148, at 48-87.

464. See Macey, *supra* note 144. While Jon Macey's Article is deservedly celebrated for its thorough consideration of one important potential connection with rational choice theories of legislation and theories of statutory interpretation, it makes an important undefended assumption: that raising the costs to interest groups of demanding private-regarding legislation by forcing the legislature to express an explicit private-regarding purpose for its law will decrease the demand for such legislation and thus reduce the supply of it. We should expect, then, that the *ratio* of private-regarding to public-regarding legislation will change. But what Macey never really explains is why the legislature would proceed to enact a greater *quantity* of public-regarding legislation. As Frank Easterbrook has recently pointed out, public choice theory “needs a theory of scarcity.” Easterbrook, *supra* note 412, at 286. The most conspicuous scarce good for a legislator is *time*. *Id.* at 285. Legislators bear opportunity costs when they legislate; they could just as well do something else. Why, when faced with a reduced demand by

found *outside* the system. The key problems are institutional problems and the legal solutions need be institutional solutions.

In providing a more institutionally rich focus on the political dynamics of regulation and regulatory policymaking, positive political theory provides a different sort of perspective on questions of regulatory reform. If, for the moment, we strip away the jargon of political economy that undergirds positive political theory, we see that the question at issue is perennial in public law scholarship—how should courts confront the intersecting elements of political control and influence when considering how to interpret statutes and review administrative agency decisions?<sup>465</sup> Though infused with formal models and theories of political decisionmaking, the basic question remains the same: How can and should courts address the politics of regulation?

#### A. *Statutory Interpretation*

Long considered a rather mundane aspect of public law, recent years have brought renewed attention by legal scholars to positive and normative questions concerning the role of statutory interpretation in government.<sup>466</sup> The first major wave of scholarship concentrated on developing normative theories of statutory interpretation and critiquing current judicial approaches to interpreting statutes.<sup>467</sup> The second wave emphasized important positive elements of statutory interpretation and, in particular, the way in which statutory interpretation intersected with the decisions of non-judicial

interest groups for his services, would a legislator transfer his energies into supplying public-regarding legislation which provides him with, by hypothesis, less economic rents?

465. See, e.g., Richard J. Pierce, Jr., *The Role of the Judiciary in Implementing an Agency Theory of Government*, 64 N.Y.U. L. REV. 1239 (1989); Peter L. Strauss, *Legislative Theory and the Rule of Law: Some Comments on Rubin*, 89 COLUM. L. REV. 427 (1989).

466. See generally Philip P. Frickey, *From the Big Sleep to the Big Heat*, 77 MINN. L. REV. 241 (1992); Richard A. Posner, *Legislation and its Interpretation: A Primer*, 68 NEB. L. REV. 431 (1989).

467. See, e.g., RICHARD A. POSNER, PROBLEMS IN JURISPRUDENCE 262-309 (1990); SUNSTEIN, *supra* note 6; Daniel R. Farber, *Legislative Deals and Statutory Bequests*, 75 MINN. L. REV. 667 (1991); William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321 (1990); Nicholas S. Zeppos, *Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation*, 76 VA. L. REV. 1295 (1990); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405 (1989); William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007 (1989); William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987) [hereinafter Eskridge, *Dynamic Interpretation*]; T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 97 MICH. L. REV. 20 (1988); Earl M. Maltz, *Statutory Interpretation and Legislative Power: The Case for a Modified Intentionalist Approach*, 63 TUL. L. REV. 1 (1988).

institutions.<sup>468</sup> This scholarship helped to explain how different approaches to statutory interpretation and the results of different interpretations affected policymaking and the structure of government.<sup>469</sup> The effect of these mutually-reinforcing approaches to studying interpretation was to focus sharp attention on a long-neglected aspect of public law. Positive political theory has contributed to this revival of attention; legal scholars interested in studying statutory interpretation continue to profit from these contributions.

Until very recently, the legal literature on statutory interpretation had not really confronted the distinct issues raised by regulatory statutes and their interpretation. In a *Harvard Law Review* Article and a book, Cass Sunstein offered the first major, systematic treatment of statutory interpretation in the modern regulatory state.<sup>470</sup> Among the ways in which Sunstein's grand analysis of statutory interpretation and regulation moved public law scholarship forward was his deemphasis of the tedious focus on Interpretation Theory as a methodological source of guidance.<sup>471</sup> Sunstein interposed himself into the debates among theorists such as Ronald Dworkin and Stanley Fish, both of whom rested their ambitious and brilliant exegeses into the nature of legal interpretation on Interpretation Theory, hermeneutics, and jurisprudence.<sup>472</sup> The message was not atheoretical; instead, the principles—and, for Sunstein, there were most assuredly principles that properly drove interpretation—were drawn from the history, purposes, and structure of the regulatory state.<sup>473</sup> This “re-vision” brings statutory interpretation theory to where it should be: the place where we consider interpretive principles and approaches to interpretation from the

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468. See, e.g., R. SHEP MELNICK, *BETWEEN THE LINES* (1994); Ferejohn & Weingast, *Strategic Statutory Interpretation*, *supra* note 407; Eskridge, *supra* note 144; Ferejohn & Shipan, *Congressional Influence*, *supra* note 377.

469. Useful empirical analyses of statutory interpretation include Robert F. Rasmussen, *A Study of the Costs and Benefits of Textualism: The Supreme Court's Bankruptcy Cases*, 71 WASH. U. L.Q. 535 (1993); William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331 (1991); Nicholas S. Zeppos, *The Use of Authority in Statutory Interpretation: An Empirical Analysis*, 70 TEX. L. REV. 1073 (1992); Eskridge, *supra* note 144.

470. Sunstein, *supra* note 467; SUNSTEIN, *supra* note 6.

471. See Sunstein, *supra* note 467, at 411 (describing tendencies in modern interpretation theory, in which “debates about statutory interpretation . . . often dissolve into fruitless and unilluminating disputes about the constraints supplied by language ‘itself’ (as if such a thing could be imagined)”).

472. See, e.g., RONALD DWORKIN, *LAW'S EMPIRE* 337-38 (1986); STANLEY FISH, *DOING WHAT COMES NATURALLY* (1989).

473. For a criticism of Sunstein's interpretive principles, see Eben Moglen & Richard J. Pierce, Jr., *Sunstein's New Canons: Choosing the Fictions of Statutory Interpretation*, 57 U. CHI. L. REV. 1203 (1990).

perspective of sound regulatory policy and where our ambition is to promote, in Sunstein's words, "constitutional purposes and to improve the operation of deliberative government in the post-New Deal period."<sup>474</sup>

### 1. *The Stakes of Statutory Interpretation*

Statutory interpretation is a principal means by which the structure of a regulatory program and the obligations of each participant in the regulatory process are shaped.<sup>475</sup> As we saw earlier, the construction of the statute involves the strategic actions of lawmakers, who are driven by their rational interest in pursuing their regulatory aims but are, at the same time, cabined by various institutional constraints and by uncertainty.<sup>476</sup> Interpretation creates meaning; as such, it affects the agendas, and hence the power, of the political actors in the regulatory process. It may, for instance, implement the original statutory bargain according to its express terms, in which case the concerns of the majority coalition that their bargain would become unraveled are mollified.<sup>477</sup> In addition, it may update the statute to bring it into alignment with contemporary mores or with the political preferences of current lawmakers.<sup>478</sup> However courts and agencies approach the task of interpretation, the *stakes* of interpretation are quite high.<sup>479</sup>

Public law scholars insist that modern regulatory statutes reflect broad delegations of power to administrative agencies and are far from the sort of clear directives that traditional legal theory supposed was part of the

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474. See Sunstein, *supra* note 467, at 463.

475. See, e.g., MELNICK, *supra* note 468.

476. See *supra* part IV.B.2.

477. See McNollgast, *Positive Canons*, *supra* note 440.

478. See, e.g., Aleinikoff, *supra* note 467; Eskridge, *Dynamic Interpretation*, *supra* note 467.

479. Consider, as an example of how statutory interpretation affects the structure of regulatory policymaking, the case of OSHA and the regulation of toxic substances. OSHA's regulatory machine was set in motion with a new purpose following the Supreme Court's decisions in *Industrial Union Dep't v. American Petroleum Inst. (The Benzene Case)*, 448 U.S. 607 (1980) and *American Textile Manufacturer Inst. v. Donovan (The Cotton Dust Case)*, 452 U.S. 490 (1981). In both cases, business groups had challenged OSHA's decision to impose stringent regulations on two toxic substances. In the *Benzene* case, OSHA interpreted its statutory charge under the Act to require it to set an exposure limit that achieved the maximum level and to require the agency to find a risk "significant" before it turned its regulatory attention to it. 448 U.S. at 615. Such a construction, argued Justice Stevens, was necessary to avoid the sort of sweeping delegation of lawmaking power to the agency that was regarded several decades earlier as unconstitutionally broad. *Id.* at 617. In the *Cotton Dust* case decision, however, the Court declined to construe the Act to require OSHA to determine whether the proposed regulation's costs exceeded its benefits as a precondition for the issuance of the rule. 452 U.S. at 500.

essential quality of statutes under the rule of law.<sup>480</sup> Modern regulatory statutes tend to be, in Edward Rubin's phrase, rather intransitive; they represent broad directions to administrative agencies to make law.<sup>481</sup> The statutory deals, then, are frequently little more than agreements to refrain from making policy and instead to assign to agencies the responsibility to construct policies *seriatim*.<sup>482</sup> Positive political theories of delegation and control, described in section III(B)(3) above, suggest that rational reasons exist for this strategy.<sup>483</sup> The buck is not *really* passed; lawmakers assign roles and responsibilities to agencies, but, at the same time, take care to assure that their wishes will be carried out as discrete policy issues arise over time.<sup>484</sup> Moreover, lawmakers pursue their regulatory ambitions *ex post*, through various tactics of supervision, influence, and control. The statute represents the template with which agencies understand and fulfill their responsibilities; however, the real regulatory action is in connection with the exercise by legislators and the President of strategic power linked to policymaking after the statute is in place.<sup>485</sup>

Neither of these phenomena—the increasing reliance on intransitive

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480. See Rubin, *supra* note 5. See also Thomas Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1 (1985). For a classic statement of the traditional (what Rubin calls “pre-modern”) view, see F.A. HAYEK, *LAW, LEGISLATION AND LIBERTY: RULES AND ORDER* (1973).

481. Rubin, *supra* note 5, at 380-82. Cf. Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65 (1983).

482. For some qualifications to this assertion, as well as some explanations of its causes, see, e.g., Strauss, *supra* note 465.

483. See *supra* part IV.B.3.

484. See text accompanying *supra* notes 323-27.

485. In addition, many regulatory statutes are quite detailed in describing the boundaries of agency decisionmaking. The recently amended Clean Air Act, for example, spans dozens of pages in “Statutes at Large.” When compared with their modern cousins, the new social regulation statutes of the 1960s, such as the Motor Vehicle Safety Act of 1966 and the Consumer Product Safety Act of 1970 look ecumenical. Indeed, if there is any trend to statutory structure in the contemporary administrative state it is toward more, rather than less, detail and complexity. See Strauss, *supra* note 465, at 434.

This prolixity is a reflection of a number of factors, not the least of which is the legislators' sense that statutory precision is often the most efficacious method of tethering agency action to legislative preferences, especially in light of the threat of presidential encroachment on the regulatory interests of the legislature. Naturally, there is a tradeoff between certainty on the one hand, and flexibility on the other. As I described in an earlier section, there are rational reasons for legislators to leave statutes vague and to delegate to other institutions, including courts, the prerogatives to take a first crack at policymaking. What the tension between proximity and vagueness reveals is that legislators face difficult tradeoffs; different coalitions of legislators resolve these tradeoffs in different ways. What the trend toward more specificity perhaps suggests is that legislators increasingly appreciate the extent to which *ex post* control is expensive and unreliable and *ex ante* control is frequently preferable as a means of ensuring that their “agents” will continue to do their bidding over time. See Spulber & Besanko, *supra* note 317.

lawmaking and on ex post regulatory influence—should diminish the significance of statutory interpretation in the modern regulatory state. Statutory interpretation is not merely, or even especially, about constructing the details of regulatory policy but, rather, about establishing the scope and limits of institutional power. The notion that lawmakers frequently resort to broad delegations of regulatory policy to agencies reflects, in the positive political theory framework, a tactic, a series of rational choices. However, statutory interpretation still functions to establish both the limits on these choices generally and the precise limits of the scope of the delegation, however broad in style and form, to the implementation mechanism. Consider a classically intransitive statute: the Federal Communications Act of 1934.<sup>486</sup> The assignment of authority to the Federal Communications Commission to, among other things, regulate “in the public interest” is broad.<sup>487</sup> It is not contentless, however, even in statutory design. The interpretive choices involve various approaches to imputing meaning to the phrase public interest or, conversely, of refraining to impute such a meaning. To refrain, though, is to make a choice. It chooses to assign responsibility to the implementation mechanism—the agency—to construct a body of law under the rubric of the Communications Act. Whether the agency must do so by resort to the legislative history and purposes of the statute, or whether the courts understand the agency’s responsibility as creating a body of federal common law,<sup>488</sup> involves an interpretive choice.<sup>489</sup> Interpretation gives meaning and makes policy, even if that

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486. 47 U.S.C. §§ 151-613 (1988).

487. See generally GLEN O. ROBINSON ET AL., *THE ADMINISTRATIVE PROCESS* 324-45 (4th ed. 1993).

488. See Merrill, *supra* note 480.

489. A good example of how the tension between understanding statutory ambiguity as a delegation to the agency to make laws and understanding it as, rather, an instruction to interpret the statute and its history in light of this ambiguity is the Supreme Court’s struggle to construct a rule concerning the proper deference to give to an agency’s statutory interpretations. In one early case, *Skidmore v. Swift*, 323 U.S. 134 (1944), the Supreme Court understood its role, where there was no instruction regarding either how the agency was to exercise its interpretive role or how much deference the courts should pay to the agency’s interpretations, as creating its own approach. In its critical paragraph, Justice Jackson wrote that “the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.” 323 U.S. at 139. In *Addison v. Holly Hill Fruit Prod., Inc.*, 322 U.S. 607 (1944), decided the same term as *Skidmore*, the Court regarded the statute—the Fair Labor Standards Act of 1938—as delegating the ultimate policy choice to the agency. Justice Frankfurter wrote: “In view . . . of the variety of agricultural conditions and industries throughout the country, the bounds of these areas could not be defined by Congress itself. Neither was it deemed wise to leave such economic determination to the contingencies and inevitable

meaning and policy represent little more than a declaration that all relevant policy choices are made by the agency assigned to implement the statute. The stakes of statutory interpretation, then, do not turn on the degree to which a statute is more or less specific.

Nearly every regulatory story in the modern administrative state involves, as a vital part, a chapter on how the regulatory statute was construed and how such constructions affected the shape and scope of the program. It is clear that statutory interpretation will affect the structure of the regulatory program. What is more interesting is how interpretations affect regulatory decisions and the regulatory process. Statutory interpretation is a dynamic process. It begins with the architecture of the statute, that is, the product of choices made by coalitions of legislators in the course of creating the statutory bargain. The framework of interpretation is set by statute and also by the courts' approach to the interpretive enterprise. Legislators and the courts may work in tandem to establish the conditions and rules governing statutory interpretation; yet, the positive political theory of legislation suggests that they will frequently work at cross-purposes. Hence, while statutory interpretation will always form an important part of the regulatory process, the way in which interpretations and interpretive rules function within this process is, if not always up for grabs, at least contingent on a number of interlocking factors which factors are as much part of politics as any other aspect of regulatory policymaking.

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diversities of litigation. And so Congress left the boundary-making to the experienced and informed judgment of the Administrator. Thereby Congress gave the Administrator appropriate discretion to assess all the factors relevant to the subject matter, that is, the fixing of the minimum wages and minimum hours." 322 U.S. at 610.

A distinct approach was sketched out by the Court in *Batterton v. Francis*, 432 U.S. 416 (1977), a case concerning a regulation determining what constituted "unemployment" for purposes of benefits eligibility under the Aid to Families with Dependent Children-Unemployed Fathers Statute. In this case, the fact that the Secretary's interpretation was embodied in a regulation, a regulation promulgated pursuant to the agency's delegated powers, was dispositive. In contrast to earlier cases in which the Court had given administrative interpretations "important but not controlling significance," *see, e.g., Social Security Bd. v. Nierotko*, 327 U.S. 358, 369 (1946), this regulatory program posed a situation in which Congress has "expressly *delegated* to the Secretary the power to proscribe standards for determining what constitutes 'unemployment' for purposes of AFDC-UF eligibility. In a situation of this kind, Congress entrusts to the Secretary, rather than to the courts, the primary responsibility of interpreting the statutory term." 432 U.S. at 432. By the time of *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984), the Supreme Court had apparently backed away from the rulemaking/adjudication distinction as the talisman for its deference doctrine. *See generally* Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 *YALE J. ON REG.* 1 (1990). *See also infra* part V.A.4.

## 2. *Statutory Interpretation and Political Strategy*

In light of the significant role of statutory interpretation in the regulatory process, it is not surprising that legislators and the President invest substantial energies in creating (and often fine-tuning) regulatory statutes. Nor is it surprising that legislators and the President invest energies in trying to influence the process by which the statute is interpreted by agencies and courts.<sup>490</sup> Statutory interpretation is an aspect of regulatory policymaking that is well worth fighting over.

Legislators fight over what is at stake in the interpretations of statutes primarily through the creation of legislative history. Statutory interpretation takes, to a greater or lesser degree, account of information compiled during the course of legislative deliberations over a statute.<sup>491</sup> Courts regard this information as evidence of what Congress meant by ambiguous statutory language;<sup>492</sup> courts are guided by this information—this legislative history—as they make their statutory interpretations.<sup>493</sup> Knowing this, rational legislators will manufacture legislative information with an eye toward shaping judicial interpretations. Each judge and commentator has his favorite example of a legislative statement, report, or colloquy in which one or more legislators set out to stack the deck in favor of a certain statutory outcome by communicating a message to future interpreters.<sup>494</sup> Strategic action by legislators is inevitable in a regulatory process in which other politicians seek to control policy outcomes and, accordingly, seek to influence statutory interpretations. Manipulation of legislative histories, essentially a form of strategic communication, is part of both the offensive and defensive arsenal of rational legislators.<sup>495</sup>

In a sense, we can understand the creation of legislative history as an

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490. See generally *supra* note 427 and accompanying text.

491. For a useful examination, relying on various examples, of how courts take into account legislative histories in construing statutes, see WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 696-828 (1988).

492. See any one of the hundreds of cases in which courts rely on legislative history.

493. Of course, this discussion elides questions concerning the questions taken up in part IV.D, namely, what is the positive political theory of courts and judicial behavior that underlies our beliefs that courts will rely on legislative history? All that is suggested in this part is that we observe that courts usually *do* use legislative history in interpreting statutes. It remains as an ambition for positive political theory to explain *why* they do.

494. For a number of interesting examples, as well as an illuminating discussion of legislative intent in a public choice framework, see Daniel A. Farber & Philip P. Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423 (1988).

495. On strategic communication, see the discussion in *supra* part IV.B.3.

institution. Legislators design statutory histories in order to carry out policy aims. Insofar as each legislator fears the strategic actions of the others in the shaping of legislative history, they will all structure their efforts to facilitate their ability to influence future interpretations. Like tangible institutions such as the committee or party, legislators can take advantage of the institution of legislative history by paying careful attention to its process and potential.<sup>496</sup>

The President also strategizes.<sup>497</sup> The President is seldom agnostic concerning the regulatory program which has been signed into law. Interpretation also affects the President's regulatory agendas. Accordingly, the President will take advantage of strategies and tactics to influence the process of statutory interpretation. One tactic is the use of presidential statements to shape the meaning of the statute and, more specifically, to influence the interpretation of that statute in cases brought before the courts.<sup>498</sup> Another tactic is the strategic use of the presidential power to appoint federal judges.<sup>499</sup> During the Reagan and Bush years, both Presidents put judges on the bench who eschewed, to a greater degree than their predecessors, reliance on legislative history in interpreting statutes.<sup>500</sup> Others have described the connection between this textualist approach to interpreting statutes and the expansion of presidential power and influence.<sup>501</sup> While there may have been other reasons for these judicial appointments, positive political theory suggests that the President makes strategic judgments concerning the prospect that the judges appointed will facilitate the President's regulatory agendas. To the extent that these judges check the efforts of legislators to influence interpretation and, perhaps also aid the President's efforts, they are fulfilling the President's purposes and strategies.

Regarding the interaction between statutory interpretation and political strategy, consider an example from the recent annals of regulatory politics and the Federal Communications Commission (FCC). One of the priorities of the FCC under the Reagan administration was to relax the restrictions imposed on broadcasters through the fairness doctrine. The constitutionality of the fairness doctrine was considered by the Supreme Court in *Red*

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496. See generally *supra* text accompanying notes 254-70.

497. See Rodriguez, *supra* note 427, at 224-26.

498. *Id.* at 226-28.

499. See Eskridge, *supra* note 144, at 290-93.

500. *Id.*

501. See, e.g., Stephen F. Ross, *Reagan Realism Comes to Detroit*, 1989 U. ILL. L. REV. 399.

*Lion Broadcasting v. FCC*<sup>502</sup> and was resolved in favor of the government.<sup>503</sup> The fairness doctrine was never expressly required by statute;<sup>504</sup> the FCC had proceeded for years under a rule requiring that broadcasters afford "reasonable opportunity for the discussion of conflicting views on issues of public importance."<sup>505</sup>

In the early years of the Reagan administration, the FCC issued a lengthy study in which the bottom line was that the fairness doctrine had outlived its usefulness.<sup>506</sup> Poised ready to rescind the fairness doctrine, influential legislators came into the picture. In particular, Senator Ernest Hollings and Representative Timothy Wirth, as members of a powerful committee with FCC oversight responsibility called the Commissioners on the carpet. He insisted that the 1934 statute did not permit, but *required* the fairness doctrine.<sup>507</sup> To reverse the administrative policy, then, would violate the statute.<sup>508</sup> Among the ways in which Senator Hollings made his intentions clear was his grilling of FCC nominees. A typical colloquy in a confirmation hearing would involve Senator Hollings attempting to glean reassurance from the putative commissioner that the commissioner would not participate in the unraveling of the fairness doctrine.<sup>509</sup>

502. 395 U.S. 367 (1969).

503. The rationale was the same as that adduced by the commission, namely, the importance, "In view of the scarcity of broadcast frequencies, the Government's role in allocating those frequencies, and the legitimate claims of those unable without government assistance to gain access to those frequencies for expression of their views . . ." *Red Lion*, 395 U.S. at 400.

504. Another related requirement, the equal-time rule, was an express provision of the Communications Act. See 47 U.S.C. § 315 (1988).

505. 395 U.S. at 371.

506. See *In the Matter of Inquiry into section 73.1910 of the Commission's Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licenses*, 102 F.C.C.2d 143 (1985). See generally Thomas Krattenmaker & Lucas Powe, *The Fairness Doctrine Today: A Constitutional Curiosity and an Impossible Dream*, 1985 DUKE L.J. 151.

507. See, e.g., *Federal Communications Commission Oversight Hearing Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce*, 98th Cong., 2d Sess. 53 (1984) (statement of Rep. Timothy Wirth); *Reauthorization and Oversight of the FCC: Hearings Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transportation*, 99th Cong., 1st Sess. (1985) (statement of Sen. Ernest Hollings). See generally Matthew Spitzer, *The Constitutionality of Licensing Broadcasters*, 64 N.Y.U. L. REV. 990, 1000-01 (1989).

508. See sources cited *supra* note 507.

509. In an important oversight hearing, Senator Hollings declared:

I have often said that there is no education in the second kick of a mule. During the last Congress, the Chairman of the FCC proved that old adage correct. He, however, appears to be showing that three kicks might do the trick. . . .

I am particularly concerned about the various proceedings concerning the fairness doctrine, including the proposals to repeal or alter the personal attack and political editorializing rules.

Although I am just speculating here, it seems rather clear that Senator Hollings and his supporters lacked the votes in Congress to establish the fairness doctrine statute,<sup>510</sup> certainly, they could not have overcome a certain presidential veto.<sup>511</sup> However, they were not disempowered. Instead, legislative advocates of the fairness doctrine strategized by trying to influence the manner in which the agency would interpret the statute, given the ambiguity in the FCA concerning the fairness doctrine. The legislative gambit ultimately failed; not because of any special intervention by the President nor because Senator Hollings and his supporters' interests had flagged. Rather, the United States Court of Appeals for the District of Columbia Circuit ruled that the fairness doctrine was *not*, in fact, required by the statute.<sup>512</sup> As we will consider in more detail below, this judicial ruling gave the FCC the shield it needed to free it from the strategizing of the legislature.

The point of the story is to suggest a number of lessons about statutory interpretation and political strategy. First, neither the legislature nor the President is limited in its ability to try to influence the process of statutory interpretation *ex post*. There are no institutional constraints on their influence devices within either institution. Second, the agency *cares* what current legislators have to say. One listened in vain for an FCC nominee announcing "Well, Senator Hollings, I am afraid that you have interpreted the 1934 statute quite incorrectly. You can rest assured that I will interpret the statute the *correct* way once I am confirmed." Nor was the agency in a secure position to challenge the administration's interpretations, if one was preferred. Third, political strategizing will perhaps eventually run up against an institutional constraint in the form of a judicial decision. In the FCC example, a court sided with the administration; another example might well reveal that current legislators' preferences are accorded weight—perhaps at the expense of both the administration's views and the views of the original coalition that enacted the statute. Finally, this judicial determination will change the circumstances in a way that can, depending

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Since the beginning of Chairman Fowler's tenure, I have put him on notice not to weaken in any way the various political broadcasting laws or rules. So that there is no misunderstanding, the Chairman should consider such notice to be again issued.

*Reauthorization and Oversight Hearings, supra* note 507, at 2-3.

510. I am grateful to Matthew Spitzer for conversations about the Hollings/fairness doctrine episode.

511. I am assuming that President Bush would have vetoed a fairness doctrine amendment to the Federal Communications Act.

512. *Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989). See Spitzer, *supra* note 507, at 1007-13.

upon the court's approach and its result, facilitate, hinder, or have no effect upon, the structure of legislative-presidential strategy.

### 3. *The Functions of Interpretive Rules*

Rational politicians, as the FCC story illustrates, will construct strategies to enact their preferences into regulatory policy. The extent to which courts can limit these strategic actions through their interpretations of statutes is unclear. Statutory interpretation is just one part of the regulatory process; as such, it is subject to political actions and reactions as well as any other form of regulatory participation. Judicial attempts to cabin political influence may ultimately become unstable; lawmakers may act *ex ante* and *ex post* to limit the damage that courts can do to their agendas through interpretations. Still, statutory interpretation that is sensitive to the institutional structure of lawmaking, including the incentives and opportunities of lawmakers to act strategically, can ameliorate some of the more troubling aspects of political control.

Such sensitivity can be manifested by attention to interpretive rules. These rules include the so-called "canons" of statutory construction.<sup>513</sup> They also include, somewhat less glamorously, the methodologies that are brought to bear in reading and interpreting statutes, such as how the interpreter incorporates, if at all, the legislative history of the statute into his interpretations.

#### a. *Legislative Intent, Statutory Purposes, and the Interpretive Dilemma*

What is meant by the statutory bargain? The structure of any regulatory statute will reflect the political choices made by lawmakers acting within coalitions and in the shadow of institutional constraints and uncertainty. That the result will often be statutes with multiple purposes, which seem to push regulatory policy in different directions, is a consequence of the complicated and fractured nature of the system. A statute is not like a novel or a play.<sup>514</sup> It does not have to have a theme; it needs no beginning, middle, and end. It is a web of interlocking deals among legislative coalitions. By definition, the statutory deal has hung together

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513. For several different perspectives on these canons, see contributions in Symposium, *A Reevaluation of the Canons of Statutory Interpretation*, 45 VAND. L. REV. 533 (1992). See also SUNSTEIN, *supra* note 6.

514. See Sunstein, *supra* note 467. For a rather different perspective; see Heidi M. Hurd, *Sovereignty in Silence*, 99 YALE L.J. 945 (1990).

adequately to command the support of a majority of legislators at the end of the process. However, the legacy of that dealmaking, ratified by a legislative majority, is frequently a negotiated settlement more akin to an incomplete contract<sup>515</sup> than to a coherent and comprehensive regulatory enterprise.

Prolix statutes such as the Clean Air and Water Acts aptly illustrate this quality of compromise and dealmaking. But this incomplete contract quality is found even in those statutes that are held up as models of legislative craft and of public-regarding policymaking in action. Take, for instance, the Civil Rights Act of 1964.<sup>516</sup> The 1964 Civil Rights Act represents a compromise struck among various legislators and legislative coalitions.<sup>517</sup> In an environment in which legislators, like the constituents they represented, were deeply divided over civil rights, the passage of a significant piece of civil rights legislation represented a remarkable achievement. It was not an achievement that emerged full-blown, as an unfolding of a grand and inevitable social vision, as, in the words of Victor Hugo that were quoted in connection with the Act, "an idea whose time has come."<sup>518</sup> Rather, the achievement reflected the strategic efforts of legislators who were willing and able to cut deals and make compromises across a range of issues encompassed in legislative proposals.<sup>519</sup> Especially critical was the role of moderate legislators who, coming to the legislative debate without strong commitments for or against civil rights, were in a position to steer the course of debate and shape the contours of

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515. See *infra* notes 523-24 and accompanying text.

516. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.).

517. This discussion of civil rights legislation draws heavily on Daniel B. Rodriguez & Barry R. Weingast, *Interpreting the Second Reconstruction: Perspectives on Law and Politics in the Civil Rights Era* (1993) (on file with author).

518. Commentators have tended to view civil rights legislation as special, as a regulatory policy distinct from other policies enacted by Congress. The "exceptionalist" approach to civil rights legislation has both a positive and a normative component. The positive point is that the legislature considered its role in debating and passing civil rights legislation in a fashion different than in other contexts. So, they understood they were enacting a special, distinct statute, that would deserve a special construction and implementation. Normatively, the exceptionalist approach to civil rights policy stresses the extent to which courts and agencies *should* treat civil rights differently, perhaps a sort of quasi-constitutional legislation. See Daniel B. Rodriguez, *Introduction: Civil Rights Politics as Interest-Group Politics*, 14 HARV. J.L. & PUB. POL'Y 1 (1991).

519. The unsung hero in our account is Senator Everett Dirksen. See Rodriguez & Weingast, *supra* note 517. See also ROBERT D. LOEY, *TO END ALL SEGREGATION: THE POLITICS OF THE PASSAGE OF THE CIVIL RIGHTS ACT OF 1964* 225-54 (1990); NEIL MACNEIL, *EVERETT DIRKSEN: PORTRAIT OF A PUBLIC MAN* (1970).

the final bill.<sup>520</sup> Absent a legislative majority for either a pure version of a civil rights bill or a complete rejection of such a bill, the moderates proved pivotal in structuring the final version of the civil rights bill.<sup>521</sup>

The final structure of the statutory bargain reflects the political choices made in the course of fashioning a coalition in support of a bill. Recently, scholars have noticed the connection between this vision of legislation and the formation of contracts.<sup>522</sup> Further, the analogy is drawn between regulatory statutes, which are frequently open-ended and rife with gaps, and incomplete contracts.<sup>523</sup> The analogy is appealing; yet, there are differences in the nature and elements of legislation enacted by public authorities and incomplete contracts negotiated by private parties who rely on public authorities to implement their will.<sup>524</sup> What is needed instead is an approach to interpreting statutory bargains that is attentive to the issues that arise in connection with any incomplete bargain, but is also sensitive to the particular political qualities of statutory and regulatory policymaking.

### *b. Enforcing the Statutory Bargain*

The principle that courts should interpret statutes in order to facilitate the will of the framers of the statute has a pedigree as old as the federal Constitution.<sup>525</sup> This is no accident; the premise of legal positivism that

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520. Rodriguez & Weingast, *supra* note 517. For accounts of the origins of civil rights legislation see, e.g., LOEVY, *supra* note 519; HUGH B. GRAHAM, *THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY 1960-1972* (1988); CHARLES WHELAN & BARBARA WHELAN, *THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT* (1985).

521. For a description of the "moderates" in the context of civil rights legislation, see Rodriguez & Weingast, *supra* note 517. Basically, the definition relies on a prediction, calculated through a standard regression analysis, of who would be likely to fall in the middle of the views of the ardent supporters of a strong civil rights bill and the ardent opponents of such a bill. For a discussion of this method, see *id.*

522. See, e.g., McNollgast, *Positive Canons*, *supra* note 440; Farber, *supra* note 467.

523. See McNollgast, *Positive Canons*, *supra* note 440, at 708-10; Shepsle, *supra* note 61; Strauss, *supra* note 465; Rodriguez & Weingast, *supra* note 517. Cf. Kreps, *supra* note 168.

524. See, e.g., Hadfield, *supra* note 168. To take just one difference: The incomplete contracting literature stresses the need for courts to fill gaps by interpreting the contract to maximize the joint profits of the parties. See, e.g., Charles J. Geertz & Robert E. Scott, *Principles of Relational Contracts*, 67 VA. L. REV. 1089 (1981). It is not at all clear, however, that we would instruct a court interpreting an incomplete statute similarly.

525. See THE FEDERALIST No. 78, at 78 (Alexander Hamilton) (R. Fairfield ed., 1981) ("It can be of no weight to say that the courts may substitute their own pleasure to the constitutional intentions of the legislature."); THE FEDERALIST No. 83, at 256 (Alexander Hamilton) (R. Fairfield 2d ed., 1981) ("The rules of legal interpretation are rules of *common-sense*, adopted by the courts in the construction of the laws. The true test, therefore, of a just application of them is its conformity to the source from

underlies this principle is rooted in the framers' understanding of the rule of the law, the nature of interpretation, and the proper limits on judicial discretion.<sup>526</sup> Modern statutory interpretation scholars seem to often sneer at this principle, claiming that it cannot ground proper interpretation, it is unworkable in practice, and it ossifies public policy by securing the status quo even when circumstances and public values have changed considerably.<sup>527</sup> Nonetheless, there is more agreement on this principle than immediately meets the eye. Interpretation scholars seldom disagree that a contemporary statute that speaks plainly and directly to the facts raised should be interpreted to give force to a bargain struck by the framers.<sup>528</sup> The difficult issues, naturally, occur at the margin, where questions arise concerning the inscrutability of the framers' will and the question whether this will should be interpreted in light of other important public values or social aims. The bargain principle, though, represents a profound practical constraint on interpretive ingenuity and attempts to, in William Eskridge's words, "spin legislative supremacy."<sup>529</sup>

It is also a sound constraint. Consider the dilemma posed by political strategies constructed by current lawmakers to rechart the course of regulatory policy. The regulatory relationship is tripodal: legislators acting within the matrix of the legislature and its institutions, the President acting as master of the executive branch, and the administrative agency. The agency is surely the most vulnerable institution, subject to influences and pressures from all sides, unable to wield any substantial independent authority, and concerned to maintain whatever practical regulatory authority it has by steering clear of political controversy. Of course, the situation may not be this bleak. The agency need not be pitied; it may be little more than, after all, a mouthpiece for the political preferences of its creators. On the other hand, it may represent an independent source of opportunistic behavior and self-interested strategizing.<sup>530</sup> Effective regulatory policy may, then, be thwarted as much or more by the strategizing and opportunism of the agency than by the political choices of legislators and the

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which they are derived.").

526. Cf. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

527. See, e.g., Sunstein, *supra* note 467; Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 279 (1985); Hurd, *supra* note 514.

528. See, e.g., Earl M. Maltz, *Rhetoric and Reality in the Theory of Statutory Interpretation: Underenforcement, Overenforcement, and the Problem of Legislative Supremacy*, 71 B.U. L. REV. 767 (1991); Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281 (1989).

529. William N. Eskridge, Jr., *Spinning Legislative Supremacy*, 78 GEO. L.J. 319 (1989).

530. See *supra* note 338 and accompanying text.

President.

It does not matter from whence the threat comes, however, if we consider the potential of instrumental statutory interpretation to ameliorate the effects of political strategy. Approaching interpretation as a project of recovering the substance of the original regulatory bargain can limit the scope of strategizing, whether primarily carried out by legislators and the President, or the agencies, or all three. Recall that the dilemma arises because politicians threaten to break from the understanding of the bargain reached by coalitions formed at the time the statute was enacted. With no political reasons for fealty to the original bargain, politicians are unconstrained in their attempts to direct regulatory outcomes. Thus, the constraints must come, if at all from outside the process. Agencies are unlikely sources of these constraints; they operate, after all, within the *sturm und drang* of politics. Nor is the President likely to save the original bargain from politics. Judicial interpretations that are sensitive to the structure of the original bargain can cabin ex post political influence by decreasing the benefits of such attempts at influence. If we suppose that the agencies are looking for political cover from legislative or executive coercions or both, then an interpretation of the statute that gives force and effect to the structure of the original bargain will strengthen the hand of the agency facing strategic lawmakers. For instance, the commissioner nominees would be better situated in hearings before Hollings' subcommittee with an interpretation of the Communications Act of 1934 that addressed and resolved the fairness doctrine issue.<sup>531</sup> One interpretation would protect commissioners from Senator Hollings and like-minded legislators; another interpretation would protect commissioners from President Reagan. In either case, the court could, through its interpretations, limit the scope of ex post political influence.<sup>532</sup>

What interests are being served by such fidelity to the original bargain? Beyond the constitutional interests at stake in enforcing the will of the statute's framers, commitment to the original bargain increases the costs to lawmakers of practicing political influence. To be sure, strategic politicians can take steps: They can attempt to influence the interpretive process ex ante by, say, scrutinizing nominees to the bench; they can influence the

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531. See *supra* text accompanying notes 502-12.

532. Cf. Richard L. Revesz, *Specialized Courts and the Administrative Law-Making System*, 138 U. PA. L. REV. 1111 (1990); Strauss, *supra* note 465, at 436-37.

process *ex post* by overturning statutory interpretations.<sup>533</sup> Each of these actions is expensive, however, and rather public. They involve rational judgments concerning the worth of cabining the judiciary's statutory interpretations. Styled as a principal-agent problem, political principals must expend precious resources to control recalcitrant agents. The costs may not be worth it; strategic legislators may back off. Moreover, courts are, as described above, particularly powerful agents.<sup>534</sup> They can protect themselves more effectively than administrative agencies.<sup>535</sup> An interpretive approach that ties the hands of current lawmakers enables the court to run interference for administrative agencies; they can take the heat from politicians who find their control efforts crippled by interpretations that track the original bargain.

The other interests that are facilitated by this interpretive approach are the interests of the legislators who were part of the original coalition. The case for according weight to the wishes of these legislators rests on an instrumental, process-based view of the lawmaking process. Legislators have many alternative uses of their time and energies. Lawmaking through bargaining and coalition-formation are not the only functions of the legislature. Legislators face a range of distinct pressures and influences. Although quite busy, they enjoy great discretion over how they spend their time: They can devote their energies to "casework,"<sup>536</sup> essentially untangling bureaucratic red tape on behalf of their constituents; they can trade with one another on pure pork barrel legislation in order to generate a continuous stream of benefits to each other;<sup>537</sup> they can form fruitless coalitions in order to curry favor with some elements of the electorate ("I did my best in voting for your bill") while not alienating others too much

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533. The most comprehensive empirical analysis of statutory overrulings is Eskridge, *supra* note 469.

534. *See supra* part IV.D.

535. To the extent I am making an empirical point about the relative independence of courts versus agencies, there is quite obviously much more that needs to be said beyond the flat assertion in the text. A couple of thoughts will suffice for the purposes of this argument. First, the Constitution establishes the institution of the Supreme Court and protects, at least at a minimum level, the Court from legislative evisceration. *See* U.S. CONST. art. III, § 1. The independence of the "inferior courts" is, naturally, a considerably more controversial issue. Second, Article III judges are guaranteed lifetime tenure "during good Behavior" and protection against diminution of salary. *Id.* Agencies have no such protection. Any additional remarks about the greater relative independence of courts from legislative control would raise larger questions which I here will elide.

536. *See* FIORINA, *supra* note 116.

537. *See id.* *See also* JOHN A. FERREJOHN, PORK BARREL POLITICS: RIVERS AND HARBORS LEGISLATION 1947-1968 (1974).

("after all, the bill did not pass so you should be relieved"); or, finally, they can do nearly nothing, occupying their time with matters other than participating in lawmaking. Given these alternatives, it is no small matter to construct institutions and legal regimes to facilitate the processes by which legislators reach agreement, especially when such agreements produce truly majestic legislative accomplishments, such as the civil rights legislation of the past quarter century.

To be sure, the appropriate methods are controversial. Theodore Lowi and others have suggested that lawmaking should involve the construction of more specific legislation in order to safeguard the rule of law.<sup>538</sup> From the perspective of political theory, exhorting legislators to draft more pointed statutes may serve the important function of constraining the opportunities for ex ante political control. The argument here, though, need not rest on an overall vision of how we want statutes to look, on what we regard as a statutory demonstration by Congress of "comprehensive rationality" in lawmaking.<sup>539</sup> Instead, it rests on the idea that legislation is accomplished through a process of bargaining and coalition-formation. Good ideas fall by the wayside without a process for bringing together two separate majorities in the two houses of Congress and the support of the President. Politics, as the saying goes, is the art of the possible; compromise, not consensus, is the order of the day in the modern lawmaking system. One might look at pieces of legislation like the Civil Rights Act of 1964 and the National Environmental Policy Act of 1970 and imagine that they sprung forth, as though from the head of Zeus, and all the legislature did was to quickly stamp its imprimatur on these "ideas whose time has come." But that, positive political theory suggests, is unrealistic.

Methods of statutory interpretation that give weight to the expressed judgments of legislators, who have formed into the coalitions which have successfully passed legislation, encourage the formation of such compacts. They create incentives for legislators to work together on construing public policy. Certainly, the reasons behind the decision of rational, strategic legislators to enact such policy may be less than appealing. But what we want is not a collection of "angels," to recall Madison's message in Federalist No. 51,<sup>540</sup> but a collection of lawmakers who are willing, for

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538. See LOWI, *supra* note 5, at 92-126.

539. See Edward L. Rubin, *Beyond Public Choice: Comprehensive Rationality in the Writing and Reading of Statutes*, 66 N.Y.U. L. REV. 1 (1991).

540. THE FEDERALIST No. 51, at 160 (James Madison) (Roy P. Fairfield 2d ed., 1981) ("If men were angels, no government would be necessary. If angels were to govern men, neither external nor

whatever reasons, to overcome the practical difficulties associated with making deals, reaching agreements, and making policy.

Public law scholars Cass Sunstein and Jon Macey chafe at the characterization of legislation as mere dealmaking. Jon Macey embraces the strong form of the interest group theory of legislation as a description of legislation in the modern regulatory state.<sup>541</sup> His solution, though, is to reinforce the "public-regarding" qualities of the legislative process through, for example, process-perfecting theories of statutory interpretation.<sup>542</sup> The ambition is to make it harder for legislators to make such deals; the result would, he suggests, be a more purified, public-regarding process. Cass Sunstein is even more critical of the characterization of legislation as a process of dealmaking and bargaining.<sup>543</sup> "[T]he 'deals' approach tends to break down," says Sunstein, "if conceptions of politics rooted in interest-group pluralism cannot be defended on normative grounds."<sup>544</sup> Yet, the positive political theory of legislation suggests that legislation is not merely, or even especially, the product of interest group influence—in Sunstein's words, "naked interest-group transfers."<sup>545</sup> Legislation is an admixture of different aims, ambitions, geneses; just as legislators have heterogenous preferences and motives, legislation will reflect this heterogeneity.<sup>546</sup> But statutory outcomes still remain deals in the sense that legislators hammer out compromises, make trades, act strategically, and engage in the practice of what the late William Riker aptly labelled "the art of political manipulation."<sup>547</sup> The normative argument that Sunstein rightly calls for is that facilitating the processes of legislative dealmaking enables the legislature to produce legislation, to grapple with difficult policy issues, and to generate prescriptions.

The tenor of public choice analyses of the legislative process is, as Macey and Sunstein both recognize, pessimistic. They emphasize the wealth-transferring and private-regarding aspects of the process. If we think of dealmaking not like some publicly established system of organized

internal controls on government would be necessary.").

541. See, e.g., Macey, *supra* note 144.

542. See *id.* See also Macey, *supra* note 145 (proposing that Constitution's separation of powers limits noxious interest-group influence).

543. See Sunstein, *supra* note 467, at 446-51.

544. *Id.* at 449. See also Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984).

545. See Sunstein, *supra* note 467, at 449.

546. See ARNOLD, *supra* note 447, at 8-16, 60-87.

547. RIKER, *supra* note 195.

crime, but, instead, like a system of contract formation and (through agency and judicial interpretations) enforcement, then some of the taint associated with viewing legislative deals through the lens of interest group theory may be ameliorated.

With the normative argument (tentatively) in place, we can consider the function of interpretive rules. The incentives to spend energies on coalition formation and statute-making will be a function of the extent to which the products of such activities are respected and enforced. Fidelity to the original bargain will encourage legislators to take seriously that bargain as a preferred method of lawmaking. It will also restrain their tendencies to respond to the risks of future uncertainties by declining to confront and resolve vexing statutory questions. To the extent that respect is accorded to the bargain as such, rather than to only a particular type of legislative form, say, a narrow, precise delegation, then instrumental interpretation along these lines will not encourage or discourage lawmakers from making their own rational choices concerning how to structure the statutory bargain; it will, however, encourage them to make their rational choices within the frameworks of statutes rather than through other means.

Regulatory policy should be made primarily through legislation, that is, through attention by legislators and the President to statutory design. This does not suggest necessarily a preference for transitive, over intransitive, legislation.<sup>548</sup> We are concerned here with encouraging the legislature to make basic structural decisions concerning the form and shape of regulatory policymaking. We are not arguing that the details of such policies should be made in the statute, rather than through administrative regulation. Establishing the structure of regulatory policy through statutes and through statutory interpretation that is sensitive to the concerns of the original parties to the deal disables strategic actors—particularly future legislators and Presidents—from pursuing regulatory aims freely and without regard to the choices made by elected representatives in the legislative arena. Of course, positive political theory teaches us not to be pollyannish about the system of lawmaking within the legislative and executive branches.<sup>549</sup> Perhaps there will be little of the sort of public-regarding deliberation that one sees often supposed by public law scholars in making recommendations about regulation and administration.<sup>550</sup> Admittedly, proposing that courts act in a politically sophisticated fashion does not facilitate such deliberation

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548. See Rubin, *supra* note 5; Strauss, *supra* note 465.

549. See *supra* part IV.C-D.

550. See, e.g., Sunstein, *supra* note 462.

(but nor, it should be emphasized, does it hinder it). Yet, even assuming that the legislative and executive processes are plagued by strategic behavior and political advantage-taking, the choice is invariably a comparative one: What sort of regulatory process is replaced by reestablishing the primacy of statute-making and regulatory design through legislation?<sup>551</sup> What is replaced is a profoundly political process that lacks many of the checks and balances provided by the lawmaking system described in Article I. Ex post influence lacks many of the critical institutional constraints that exist with respect to ex ante lawmaking. Judicial interpretations that strengthen the original bargain establish yet another important institutional constraint. The choice of enforcing the structure of the original bargain is not a choice of *law over politics*; instead, it is a choice for a certain type of politics. It is a type of politics that is arranged to foster coalition formation, rather than individual strategic initiatives, and to reward attention to institutional detail and legislative design rather than generating pressures for ongoing monitoring and supervision by future legislators, Presidents, and interest groups.

Thus far, we have spoken of enforcing the statutory bargain through interpretations as though the mechanisms of such a strategy are apparent. They are decidedly not so, however, as a large body of statutory interpretation scholarship that is critical of intentionalist theories of interpretation attest. The most recent effort to construct a mechanism for implementing the objectives sketched out here has to been to develop so-called *positive canons* of statutory construction.

### c. *Positive Canons*

Interpreting the statutory bargain need not entail the mere application of conspicuous statements of legislative intent scattered through the pages of legislative reports. Nor need it entail relying on a purely textualist method of construction which takes literally the meaning (what is often labelled the "plain meaning") that ordinary users of language would give to the statutory text that is interpreted. Both of these conventional approaches have their respective problems.<sup>552</sup> Instead, what is offered is a set of interpretive rules that are designed to assist the project of determining the contours of the statutory bargain.

These "positive canons" include rules that help untangle which

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551. See *infra* part V.A.4 (discussing comparative institutional competence).

552. See, e.g., Eskridge, *Dynamic Interpretation*, *supra* note 467.

legislators, in the course of the legislative process concerning a particular statute, played the critical roles in fashioning the final bargain. The idea is not that some legislators are entitled to speak for the legislature on the whole. Rather, the point is that the construction of a statute entails the formation of different coalitions of legislators, some of whom can be bought rather cheaply, either because they will support the final bill no matter what the form or because they do not care about the issue one way or another.<sup>553</sup> The legislative history of the statute will reveal in part the nature of these coalitions and will shed light on how a majority group was cobbled together to support the bill that was finally enacted.<sup>554</sup> In the course of understanding which roles respective legislators played in the coalitional politics surrounding a legislative enactment, certain legislative actions and statements should be given different weights. Consider an example from the civil rights statute described above. During the course of the legislative debates over H. R. 7152, the version of the Civil Rights Act of 1964 that was passed by the House and sent to the Senate for consideration, Senators Joseph Clark, a Democrat from Pennsylvania, and Clifford Case, a Republican from New Jersey, attached a lengthy memorandum containing a detailed analysis of various provisions of the proposed bill.<sup>555</sup> Although the bill to which their memo referred was replaced by the so-called Mansfield-Dirksen substitute,<sup>556</sup> a substitute which was passed by the Senate and the House and signed into law, the famous Clark-Case memorandum was relied upon frequently by courts in cases interpreting Title VII of the Act.<sup>557</sup> The positive political theory of the legislative enactment process that considers the ways in which legislators form coalitions, suggest compromises, and give their own interpretations of these compromises during the course of the legislation's consideration, remains quite skeptical about the use of this memo as evidence of what the coalition that fashioned and implemented the substitute bill that was enacted into law meant by their proposal.

The Clark-Case memorandum has been described by positive political theorists as a form of "cheap talk," that is, a form of strategic communication to an audience which includes implementing agencies and courts in

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553. See McNollgast, *Positive Canons*, *supra* note 440.

554. See Rodriguez & Weingast, *supra* note 517.

555. 110 CONG. REC. 7213 (1964).

556. See LOEVY, *supra* note 519, at 225-55.

557. See, e.g., *Steelworkers v. Weber*, 443 U.S. 193 (1979); *Teamsters v. United States*, 431 U.S. 324 (1977).

order to steer regulatory policy in their preferred direction.<sup>558</sup> The bulk of the positive canons described in the positive political theory literature on statutory interpretation are designed to blunt the effects of this cheap talk and to take seriously in interpreting statutes only those statements and actions which reflect the investment of resources and commitments that give them veracity.

The use of positive canons to give effect to certain legislative decisions does not rest on a distinction between the legislature acting in a public-regarding, rather than rent-seeking, capacity. Most lawmaking behavior is presumed to be strategic. Interpretive rules that separate information that is nothing more than cheap talk from information that is probative with regard to the actual understandings of legislators in the course of shaping coalitions and making final legislative agreements aim to constrict the scope of lawmaking strategies which threaten to undermine the structure of the legislative bargain. Positive canons thus function to preserve the agreement reached by legislators within coalitions and institutions that reflect strategic choices against threats from opportunistic legislators (inside and outside the coalitions).

#### 4. *Statutory Interpretation and Institutional Choice*

The description of the process of statutory interpretation in the proceeding sections covers only part of the role and relevance of statutory interpretation in regulatory policymaking. Decisions about statutory interpretation involve choices not only about *method*, but also about *institutions*. As long as administrative agencies have been around as instruments of regulatory implementation, the question of what role agencies play in interpreting statutes has been pressing.<sup>559</sup> Congress, the President and, ultimately, the courts, make judgments concerning the proper distribution of interpretive responsibility among the institutions in government. This distributive judgment has taken on particular importance in the last decade following the Supreme Court's decision in *Chevron v. Natural Resource Defense Council*.<sup>560</sup> In *Chevron*, as is tediously well known by now, the Supreme Court articulated a two-step process for

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558. See Rodriguez & Weingast, *supra* note 517. See generally McNollgast, *Legislative Intent*, *supra* note 440 (discussing concept of "cheap talk").

559. For early examples of how courts deal with this issue (no, the problem did not arise *tabula rasa* with *Chevron* in 1984), see, e.g., *Packard Motor Car Co. v. NLRB*, 330 U.S. 485 (1947); *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944); *Gray v. Powell*, 314 U.S. 402 (1941).

560. 476 U.S. 837 (1984).

determining whether an agency's statutory interpretation will be accepted by the reviewing court as correct. First, the court must consider whether the statute clearly resolves the issue; if it does, the court's work is at an end. If the statute does not resolve the issue, the agency's interpretation will be accepted so long as it reflects a "permissible construction of the statute."<sup>561</sup> The notion that *Chevron* reflects a fair judgment concerning the intent of Congress and the President regarding the proper assignment of interpretive authority has been rightly criticized as misleading.<sup>562</sup> At the very least, we would be hard pressed to attribute to lawmakers a *comprehensive* rule of interpretation for all statutes and all agencies; surely, the lawmakers' response to the question, "does *Chevron* reflect the proper approach to discerning the scope of the agency's interpretive discretion?" will be some version of "it depends." No overarching conclusion concerning Congress and the President's wishes across an entire range of statutes and agencies seems sustainable.<sup>563</sup>

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561. 467 U.S. at 476.

562. See, e.g., Farina, *supra* note 394.

563. Cass Sunstein argues, however, that the *Chevron* decision is inconsistent with section 706 of the Administrative Procedure Act. If he is right, then Congress *did* make a comprehensive choice in 1946 to limit the reviewing courts' ability to defer to agency judgments. See Cass R. Sunstein, *Law and Administration after Chevron*, 90 COLUM. L. REV. 2071, 2080-81 & 2081 n.46 (1990). However, his argument is not supportable on the facts he describes. To begin with, the language of section 706 is question-begging; it states: "To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, [and] interpret constitutional and statutory provisions." 5 U.S.C. § 706 (1988). The reviewing Court *does* fulfill the responsibility, under *Chevron*, to interpret the statute. That, after all, is the essence of step one. What should be the proper attitude of the reviewing court toward the agency's interpretation cannot be answered by the direction to "decide" and "interpret." As to the legislative history, nowhere in the history of the APA is there an instruction to the courts to interpret statutes *de novo*. Sunstein takes from the wealth of statutory materials the strongest statements in support of aggressive judicial review. Yet, not even in these statements are there indications that the courts were meant to eschew deference to agencies. The only place the statement *de novo* appears is in the Attorney General's manual, a document that has traditionally been regarded as an important piece of historical evidence concerning the meaning of the statute. In the manual, the Attorney General's committee presents *de novo* as an alternative which the court is free to reject in favor of the agency's interpretation, especially "when the legislation deals with complex matters calling for expert knowledge and judgment." FINAL REPORT OF THE ATTORNEY GENERAL'S COMM. ON ADMINISTRATIVE PROCEDURE, *in* ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES, S. DOC. NO. 8, 77th Cong., 1st Sess. 90-91 (1941).

Sunstein follows this mention of the Attorney General's manual with a rather curious statement: "Moreover, the Committee may well have been biased against independent judicial review because it was allied with the institutional interests of the executive branch, and because it consisted in large part of the New Deal enthusiasts skeptical about judicial checks on administration." Sunstein, *supra*, at 2081 n.46. Perhaps. But, then, so would Congress be allied; if the APA's judicial review provisions have a theme that grows out of the politics of the era and the political choices made by Congress and the President at the time, it would seem to be a skepticism about strong judicial review borne of the

But what about resting *Chevron* on a judgment, grounded in positive political theory, that judicial deference is prudent along the lines described in the case? The positive political case is strong given a set of conditions; without these conditions, *Chevron* is not only not prudent, but threatens to disrupt the regulatory process by strengthening the hand of strategic politicians, sometimes legislators and other times the President, at the expense of sensible regulatory policy.

Both conditions involve considering how agencies and courts fulfill their respective responsibilities under each of *Chevron*'s two prongs. First let us consider the agencies. Agencies interpret statutes continuously; although constantly overlooked, a critical component of regulatory decisionmaking is agencies' own interpretations of the statutes they are charged with implementing. This has not, in the first instance, anything to do with authority or proper role; it is simply a fact of administrative life that agencies consider the scope of their statutory responsibilities by reading and applying the language and history of their organic statutes. Peter Strauss has lucidly described both the persistence and the unique nature of agency statutory interpretations. As to whether this unique nature tends to push the agency in the direction of fealty to the original statutory bargain or toward obedience to the episodic political influences of current lawmakers, Strauss notes both tendencies. There is obviously a real tension here. Administrative expertise, a concept we might think to scoff at in light of the positive political stories discussed earlier, has a role to play. Agencies are the institutional memories of the bargains struck by legislators in the original regulatory statutes. While their incentive structure is messy in light of the

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experience with conservative federal judges substituting their judgments for the judgments of administrative agencies. Why, in this political light, Congress and the President would express an intent to require courts to interpret regulatory statutes (passed, after all, by the New Deal Congress) de novo is counter-intuitive.

This exegesis into Sunstein's APA argument is an excuse to raise a larger point: The structure of administrative law, and in particular the APA, reflects the political choices made by rational, partisan decisionmakers acting in the shadow of a particular political environment. That environment was made up of quite liberal legislators and a liberal Democratic President (FDR) along with conservative federal judges (appointees of the string of Republican presidents proceeding Roosevelt). Many of the choices made in the APA were reflections of those political choices. See Martin Shapiro, *APA: Past, Present, and Future*, 72 VA. L. REV. 447 (1986). However, the historiography on the origins of modern administrative law and the APA either elide the political dimensions of this story altogether or else interpret the episode in an opposite way, namely, as an instance of Congress and the President recognizing the imperative of bringing administrative agencies under the supervision of federal courts through fortified judicial review. See, e.g., MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW: 1870-1960* ch. 8 (1977); Walter Gellhorn, *The Administrative Procedure Act: The Beginnings*, 72 VA. L. REV. 219 (1986).

cross-cutting political pressures they confront, their comparative advantage over other institutions is their understanding of the legislative history (both the *real* and the *manufactured* history) of the statute. Strauss contrasts this expertise with the generalist judge:

Responsible in some sense for all law, a court has infrequent occasion to consider the meaning of any particular part of the law, and no responsibility for continuing, proactive attention to its development. If it comes to the legislative history at all, it comes to that history cold, without a developed institutional sense of the state of play. It does not participate in, indeed very likely is utterly unaware of, what occurs in drafting, hearings, debates, or a continuing course of oversight hearings, presidential guidance, and frustrated efforts at securing legislative change . . . . For the agency, of course, the reverse is generally true; its closeness to the legislative process, continued involvement, and responsibility are . . . precisely the reasons the courts have long given its readings of statutory meaning special weight.<sup>564</sup>

If we think of interpretation in terms of the positive canons described earlier, the advantages of these interpretive qualities are all the more significant. The court brings off-the-rack interpretive rules to bear in construing statutes which have distinct political histories. Such interpretive rules function like Occam's razor, synthesizing the body of statutory law into a structure of bargaining and deal-making that courts can understand from one statutory case to another. Agencies can invest in expertise; indeed, they must be especially immersed in the political history of the statute that frames their regulatory responsibilities. The agency's interpretive expertise, then, is a notable element of its role in regulatory decisionmaking; to the extent that courts can craft doctrines allocating interpretive responsibilities across institutions, this expertise element is important.

The process of agency interpretation is also unique because agencies are peculiarly placed between two competing loci of power—Congress and the President. This is the other side of the tension alluded to earlier. The political machinations triggered by the agency's location in the political process counsels caution in deploying a legal rule that changes the allocation of power between two institutions—in the case of *Chevron*,

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564. Peter L. Strauss, *When the Judge is Not the Primary Official With Responsibility to Read: Agency Interpretation and the Problem of Legislative History*, 66 CHI.-KENT L. REV. 321, 346-47 (1990). See also Richard J. Pierce, Jr., *The Role of Constitutional and Political Theory in Administrative Law*, 64 TEX. L. REV. 469 (1985); Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093 (1987).

between agencies and courts. In the legal literature on separation of powers, we often return to the image of the Congress and the Presidency in perfect balance, with each institution checking the other and agencies mediating between these two Leviathans.<sup>565</sup> The reality is, needless to say, much more complicated.<sup>566</sup> Recently, critics of *Chevron* have insisted that the result of an austere agency deference rule is to nurture greater presidential control and influence at the expense of both Congress and of sound regulatory policy generally.<sup>567</sup> But surely this critique underestimates the vitality of legislative efforts to counteract presidential strategies. From the perspective of positive political theory, the problem is not that administrative agency deference enables the President to dominate the regulatory process without any check or balance; rather, it is that we may recoil from the political fallout generated by this change in the legal landscape. Congress' reaction to a deference rule that increases presidential power in the short term may take the form of pulling and tugging agencies toward the agendas of legislators;<sup>568</sup> or it may take the form of constraining presidential power through statutory and non-statutory controls.<sup>569</sup> In order to gauge whether we are willing to bear, at the system level, the costs associated with this pattern of presidential action/congressional reaction we need to know about the tactics and strategies each institution is prepared to bring to the fight. If the desideratum of a *Chevron*-like rule of judicial deference is intensified competition among legislators and the President, we may want to construct legal constraints on this competition or abandon the rule altogether.

Now what of the courts? The sources of judicial constraints and discretion were considered in subpart IV(D).<sup>570</sup> The extent to which we should commit to a *Chevron* deference rule or commend to courts a different, and more de novo-type, approach, turns on our view concerning whether courts will in fact exercise their interpretive responsibilities. If we can depend upon a court to interpret statutes in accordance with the

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565. See Macey, *supra* note 145.

566. See, e.g., Sunstein, *supra* note 5; Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984).

567. Two especially perceptive critiques of *Chevron* from this perspective are Sunstein, *supra* note 563; Farina, *supra* note 394.

568. See *supra* notes 502-12 and accompanying text (discussing the FCC/fairness doctrine example).

569. See *supra* notes 363-67 and accompanying text (discussing the Competitiveness Council example).

570. See *supra* part IV.D.

principles described earlier,<sup>571</sup> paying attention to the structure of the original statutory bargain, and relying upon positive canons to illuminate the nature and structure of the bargain, then the advantages of a more independent, nondeferential approach are greater. In this light, the choice is between a conscientious, politically sensitive, but still largely independent, court and an expert, but politically dependent, agency. There is no uniform criteria we can use to make the choice between the two. Political independence gives us one answer. Expertise gives another. But we are at least armed with information that enables us to consider wisely the positive political implications of making allocative decisions concerning courts and agencies.<sup>572</sup>

Allocating interpretive responsibility is merely one such choice. The law frequently makes such allocative decisions. Courts must decide continually how to apportion responsibilities for making different types of regulatory decisions. Many of these decisions intersect statutory and administrative law in ways that are interesting to consider from the perspective of positive political theory. This subpart considered statutory law in the course of interpreting statutes. The next subpart considers administrative law.

## B. *Administrative Law*

### 1. *The Stakes of Administrative Law*

The debate over the proper normative strategy for controlling, through legal rules, the conduct of regulatory policymaking recreates the perennial debate over the role of administrative law in regulatory government. Much of the recent literature has reflected a growing concern with the use of vigorous legal controls on administrative action.<sup>573</sup> Such controls risk

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571. See *supra* text accompanying notes 552-58.

572. To restate this point at a somewhat higher level of abstraction, in order to know how to make this institutional choice, we need to have a more richly developed theory of proper public administration and the rule of law. The tensions and tradeoffs between expertise and political independence are, of course, a perennial theme in the literature on public administration in American history. See, e.g., DWIGHT WALDO, *THE ADMINISTRATIVE STATE: A STUDY OF THE POLITICAL THEORY OF AMERICAN PUBLIC ADMINISTRATION* (2d ed. 1984). My point here is merely that one cannot decisively settle the issue of institutional choice—what we might call the *Chevron* conundrum—without a more complete theory that accounts for, and at some level resolves, these tensions and tradeoffs.

573. See, e.g., MASHAW & HARFST, *supra* note 11; SHAPIRO, *supra* note 12; Thomas O. McGarity, *Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385 (1992); Richard J. Pierce, Jr., *Unruly Judicial Review of Rulemaking*, 5 NAT. RES. & ENV. 23 (1990); Peter L. Strauss, *Revisiting Overton Park: Political and Judicial Controls Over Administrative Actions Affecting the Community*, 39 UCLA L. REV. 1251 (1992).

“ossifying” the regulatory process, distorting regulatory decisions, leaving us with too much or too little regulation, and in various ways transmogrifying regulatory policymaking into a legalistic, and overly cautious, system.<sup>574</sup> Unlike earlier versions of this debate in which the core of the disagreement concerned whether or not courts should look hard at agency decisions or whether courts should impose stricter procedural burdens on agencies in enacting policy,<sup>575</sup> the more modern iteration of this debate zeros in on the mechanisms and styles of judicial control.<sup>576</sup> In this sense, the structure of the modern debate is both more specific and more abstract than much of what has come before.<sup>577</sup>

It is more specific because arguments exist for and against particular legal strategies for controlling regulatory action. The tacit (and accurate) assumption seems to be that much of contemporary administrative law is made in small bits, that is, through various doctrines concerning how and when one secures forms of administrative law review. Jerry Mashaw, for instance, has recently mapped out the case for significantly curtailing the use of preenforcement review of administrative regulations as the cornerstone of a strategy for cabining the effects of strategic action by politicians.<sup>578</sup> Moreover, debate rages over the proper rules of standing for parties challenging administrative regulations.<sup>579</sup> The effect of the two recent *Lujan* decisions is to establish greater barriers to judicial relief for administrative agency decisions.<sup>580</sup> Such restrictions have generated

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574. See McGarity, *supra* note 573. See also Colin Diver, *Policymaking Paradigms in Administrative Law*, 95 HARV. L. REV. 393, 428-34 (1981).

575. See, e.g., Carl Auerbach, *Informal Rulemaking: A Proposed Relationship Between Administrative Procedures and Judicial Review*, 72 NW. U. L. REV. 15 (1977); Martin Shapiro, *Administrative Discretion: The Next Stage*, 92 YALE L.J. 1487 (1983); Stewart, *supra* note 128; Cass R. Sunstein, *Deregulation and the Hard-Look Doctrine*, 1983 SUP. CT. REV. 17 (1983).

576. See, e.g., CHRISTOPHER F. EDLEY, JR., *ADMINISTRATIVE LAW* (1990); Mashaw, *supra* note 79.

577. For the criticism that administrative law scholars have relied too heavily on courts and judicial review in considering issues of regulation and public administration, see R. Shep Melnick, *Administrative Law and Bureaucratic Rationality*, 44 ADMIN. L. REV. 245 (1992).

578. *Id.* Mashaw's Article relies on some of the same analytical technologies as positive political theory. Indeed, the thrust of this recent Article is that judicial review doctrine (pre-enforcement review, at least) should be constructed in order to check the strategic elements of politics. Elsewhere, Mashaw has been more critical of reliance on rational choice theory as a positive and normative basis for public law reform. See Mashaw, *supra* note 349; Mashaw, *supra* note 462.

579. See, e.g., Gene R. Nichol, Jr., *Justice Scalia, Standing, and Public Law Litigation*, 42 DUKE L.J. 1141 (1993); Richard J. Pierce, Jr., *Lujan v. Defenders of Wildlife: Standing as a Judicially Imposed Limit on Legislative Power*, 42 DUKE L.J. 1170 (1993); Cass R. Sunstein, *What's Standing After "Lujan"? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163 (1992).

580. *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130 (1992); *Lujan v. National Wildlife Fed'n*, 497 U.S. 871 (1990). See generally Sunstein, *supra* note 579.

critical heat, with administrative law scholars debating the wisdom of these and other "availability" restrictions on judicial relief in regulatory matters. Meanwhile the debate over *Chevron* and the question of administrative interpretations and judicial deference chugs along unabated.<sup>581</sup> As these debates illustrate, disagreements over administrative law are frequently had at the margin, with energies invested in describing how reconstructing one part of the contemporary administrative law edifice would have salutary effects.

To some extent, the debates recreate the patterns of administrative law scholarship generally, with many arguing for more generous access to federal courts and more searching judicial scrutiny and others suggesting a parsimonious role for the federal courts in the regulatory process. At another level, however, the doctrine-specific debates, taken collectively, illustrate a critical point of the discussion in this Part; namely, that decisions concerning how best to regulate politics and the role of politics in the regulatory process are often decisions at the margin. They entail picking institutional and doctrinal devices that are suited to accomplishing the objective of reforming regulation without recreating the political interferences that distort and disrupt the regulatory process.<sup>582</sup>

There is a larger set of issues, however, than those raised by disagreements over the content of particular administrative law rules and doctrines. These issues concern the approach courts take to scrutinize the content and processes of agency decisionmaking. Administrative law encapsulates many of these large issues under the capacious category "scope of review."<sup>583</sup> Yet, the issues resist even this large category. What is at

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581. Three recent contributions to the massive literature on *Chevron* are especially noteworthy. Thomas Merrill, 72 WASH. U. L.Q. 351 (1994); Peter Schuck & E. Donald Elliott, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984; Linda Cohen & Matthew Spitzer, *The Chevron Puzzle*, 57 L. & CONTEMP. PROBS. (forthcoming, June 1994). The latter article is the most comprehensive effort thus far to bring positive political theory to bear in illuminating the *Chevron* issue.

582. This doctrinal heterogeneity in contemporary administrative law is a point often underappreciated in political scientists' commentaries on the state of administrative law scholarship. Latent in the criticisms of political scientists that legal scholars are too obsessed with judicial review and the courts in writing about regulation, see Melnick, *supra* note 577, is the mistaken belief that judicial review is nonolithic. Some aspects of judicial scrutiny of administrative decisionmaking are connected to critical issues of politics and decisionmaking within political institutions; judicial scrutiny is not always mere courts "second-guessing" agency decisionmaking through various forms of hard-look review. See, e.g., Stewart, *supra* note 128. Just as legal scholars frequently ignore important issues of politics in writing about regulation, political scientists frequently fail to appreciate the multifaceted legal dimensions of administrative law.

583. See 5 U.S.C. § 706 (1988). See generally JAFFE, *supra* note 9.

stake, as well, is the question of what sort of attitudes and approaches courts bring to bear in scrutinizing agency decisions. It is not merely the choices between “hard” versus “soft” looks or “synoptic” versus “incremental” review that is germane. In addition, it is how courts approach their task of appraising the dimensions of regulatory policymaking when they confront it at the level of reviewing an agency decision.

## 2. *The (Properly) Political Structure of Administrative Law*

Politics persist in a legal environment in which courts exercise their control through broad directives to agencies to act better, more reasonably, and more cost-effectively. The purpose of these broad directives, as suggested earlier, may be to recreate the political struggles that bore the regulatory program initially. From this perspective, judicial intervention would seem essential to limit the scope of destructive political competition. But the counsel in this section is for caution and judicial modesty. Administrative law as a set of doctrinal strategies for courts to use in checking agency decisionmaking under situations in which the statute represents no source of constraint can be an ill-tailored tool for blunting the impact of politics and political strategy.

The problem is not merely, or especially, that agencies will *ignore* the instructions of courts, or that agencies cannot gauge how courts are likely to treat their particular regulatory decisions upon review. Rather, the problem is that the action-forcing decisions of courts under the rubric of administrative law/scope of review carve out a piece of the vast political puzzle, leaving the rest of the puzzle intact; they intervene at one stage and with respect to only one aspect of a multi-faceted regulatory process. The result is that the political structure of the agency decision is left intact. The *reasons* that gave rise to the agency decision with which the court quarrels, persist without disturbance.

Consider, as an example of this, the Supreme Court’s intervention into the decision by the Secretary of Transportation during the Reagan administration to rescind the passive restraint requirement issued by the National Highway Traffic Safety Administration (NHTSA).<sup>584</sup> The regulatory story has many different parts, but the thrust of it is rather easy to comprehend. After campaigning on the platform of getting government off the backs of industry, President Reagan was determined to reconstruct the approach to safety regulation that had characterized previous adminis-

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584. See the description in MASHAW & HARFST, *supra* note 11.

trations.<sup>585</sup> In that connection, his transportation secretary quickly rescinded the passive restraint requirement on the grounds that it was expensive and that it was no longer clear that the rule would provide significant safety benefits.<sup>586</sup> In *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*, the Supreme Court reversed the agency's decision, finding the decision arbitrary and capricious.<sup>587</sup>

The nub of the Court's complaint was that the agency had not furnished sufficient reasons justifying its action.<sup>588</sup> Underlying the Court's analysis is the idea that agency decisionmaking should not turn, as it seemed to in this case, on political considerations, on the reactions of a new President who expresses his regulatory agenda by forcing the agency to change its policies.<sup>589</sup> Even if we accept the premise, the means by which the Court implements this vision of apolitical administration is naive. NHTSA remains an agency subject to the political strictures of legislative and presidential decisions within a particular political environment after the *State Farm* decision.<sup>590</sup> The Court declined, in *State Farm*, to read the Motor Vehicle Safety Act of 1966 to require the passive restraints standard or even to require that the agency follow a process of regulatory decisionmaking that would insulate it somewhat from the political pressures of its principals. Instead, the Court reviewed the product of this political process and declared "Your reasons are not good enough."

What were the Court's alternatives? One was to leave the issue to the political process. To be sure, the NHTSA was buffeted by political considerations and, in particular, the interests of the Reagan administration. Yet, there were constraints built into the executive branch process that limited some of the strategizing that the Court apparently feared. Among the institutional constraints were the choices that the administration had to make among the various regulatory causes with which it was concerned.

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585. *Id.*

586. *Id.* at 207-08.

587. *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29 (1983).

588. *Id.* at 43. Left was the implication that the agency may well be able to provide an adequate set of reasons to insulate its rescission decision from review. However, as Merrick Garland wrote soon after the *State Farm* decision, it seems highly unlikely that a reviewing court would have upheld a rescission under the circumstances described by the Supreme Court in the case. See Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505 (1985).

589. *But see Motor Vehicle Manufacturers*, 463 U.S. at 53 (Rehnquist, J., dissenting) ("A change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations"). See also EDLEY, *supra* note 576, at 182-84.

590. See MASHAW & HARFST, *supra* note 11.

The necessity of developing regulatory priorities in an environment in which resources bind choice reflects one sort of institutional constraint that would limit the ability of the President to gut the NHTSA's regulatory agenda.<sup>591</sup> Another institutional constraint involves the role of uncertainty. Reenacting a regulation like the passive restraint rule is difficult and expensive. To rescind a rule is to invest in a policy outcome in an environment in which the administration's political calculus may change.<sup>592</sup> For this reason, inertia or caution may govern the administration's approach to influencing regulatory outcomes. Beyond intra-institutional constraints lie the constraints imposed by other political institutions, notably Congress. Perhaps there were no legislative coalitions that had enough of a stake in the passive restraints rule to generate reactions to the administration's action.<sup>593</sup> However, in other regulatory situations, such coalitions may well form; and the President's regulatory strategies may well be checked by legislators' reactions to presidential initiatives. To be sure, the Court's decision to leave this issue to the regulatory process would, naturally, have the effect of leaving the President's passive restraint decision intact. It is not at all clear, however, that the general concern that animated critics of President Reagan's regulatory strategies—the concern that the rescission of the passive restraint rule represented the opening salvo in a march toward deregulation—were well-founded.<sup>594</sup> We should resist thinking of the choice before the Court in *State Farm*, however, as between no constraints on politics and the type of constraint imposed by this style of judicial review. The choice, always, is among which institutional constraints are appropriate. Another alternative for the Court in *State Farm*, that is frequently available, was to rest its decision on a reading of the statute, on a statutory interpretation, rather than an administrative law rationale. The rationale would be that the instruction in the Motor Vehicle Safety Act of 1966 to reduce fatalities and

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591. Of course, the administration might still regard, as was probably the case here, an issue like "passive restraints" to be sufficiently important to prioritize. The point is simply that we cannot conclude from the rescission of *this* rule that the administration would be able to—even if it wanted to—carry out a *pogrom* against auto safety regulation *writ* large.

592. Cf. Shepsle, *Bureaucratic Drift*, *supra* note 294 (discussing role of uncertainty in connection with legislature).

593. It was surely, after all, *no fait accompli*, since the agency rescinded the rule after a full notice and comment rulemaking proceeding.

594. For an excellent analysis of the pitfalls facing presidential efforts to deregulate, see MARTHA DERTHICK & PAUL J. QUIRK, *THE POLITICS OF DEREGULATION* (1985). For an interesting, recent case study, see Thomas McCraw's chapter on Alfred Kahn and the demise of the Civil Aeronautics Board in THOMAS K. MCCRAW, *THE PROPHETS OF REGULATION* 222-299 (1984).

injuries on the nation's highways restricts the domain of agency discretion to rescind a rule without convincing evidence that such a rescission would result in equal or greater safety. The problem with this reading, though, is that the history of the Act does not clearly indicate that the legislative coalitions that settled on this statutory bargain contemplated that NHTSA would implement the strictest possible safety regulations.<sup>595</sup>

The choice is between two doctrinal pegs, statutory interpretation and administrative law. The first peg rests on a studied interpretation of the statute and its history, which may lead the Court to cabin the discretion of the agency (and, therefore, the President) in order to secure the bargain that was struck among a majority of the legislature circa 1966 and President Johnson. Such a strategy would accomplish the aims described in the proceeding section. It is quite dependent, however, on the structure of the original statutory bargain. How did Congress communicate its intent through the original statute? Is there the sort of evidence and data that we can use, through use of positive canons and politically sophisticated interpretive approaches, to discern enough of the structure of regulatory bargain to resolve issues like the NHTSA rescission of passive restraints? Fundamentally, the use of statutory interpretation as a strategy of constraining political strategy and regulatory control is dependent upon the specific statute—its history, structure, and design.<sup>596</sup>

The other peg—administrative law—has the advantage of generality. Once they have articulated the “reasonableness” requirement of *State Farm*, all agencies are on notice that reviewing courts will subject regulatory decisions to some harder level of scrutiny. Even if this scrutiny expresses little more than a mood or an attitude, it still provides an important signal to agencies in designing their regulations and regulatory strategies. The Court's approach to review becomes an important part of the environment in which the agency makes policy. Its comparative advantage, however, is also its critical flaw. Administrative law constructs a web of *general* requirements on decisions made by heterogeneous agencies acting within cross-cutting, yet *particular*, political environments. The political environment in which NHTSA operates is not the same as the political environment in which the EPA conducts its regulatory business. This is not to say that general judicial scrutiny through administrative law is uniformly unworkable or undesirable. It just says that review strategies of

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595. See MASHAW & HAFST, *supra* note 11; Elizabeth Drew, *The Politics of Auto Safety*, 218 ATLANTIC MONTHLY 96 (1966).

596. See the discussion of statutory interpretation in *supra* part V.A.3.

the sort illustrated by the *State Farm* decision are ill-suited to plumb the depths of the political contours of a particular political relationship as it arises in a distinct regulatory context.

Another example of the limits of administrative law as a strategy for grappling with complex political situations comes from a classic administrative law case, *Citizens to Preserve Overton Park v. Volpe*.<sup>597</sup> The case involved a decision by the Secretary of Transportation to approve a permit for building an expressway through Overton Park in Memphis, Tennessee.<sup>598</sup> In reviewing the Secretary's decision, the Court emphasized the history of the statute and its command to the federal government to refrain from building roads through parks unless absolutely necessary.<sup>599</sup> The flaw in the Secretary's decision, argued the Court, stemmed from his failure to consider seriously and systematically the relevant issues and facts that may well have led him to deny the permit. "Some explanation" is necessary "to determine if the Secretary acted within the scope of his authority and if the Secretary's action was justifiable under the applicable standard."<sup>600</sup> The argument that the Secretary signed the permit without considering either his statutory obligations under the Department of Transportation Act of 1966 and the Federal-Aid Highway Act of 1968 missed important elements of the story. The critical elements of the story were political.<sup>601</sup>

As Professor Strauss describes the complex facts underlying the case, the controversy over the decision to build a highway through Overton Park was caught up in a swirl of national and local politics.<sup>602</sup> At the national level, legislative coalitions and the President vigorously fought over the structure and details of these two federal transportation statutes. Crucial to

597. 401 U.S. 402 (1971).

598. Peter Strauss has recently offered an extremely useful account of the *Overton Park Case*. The discussion in the text relies largely on his account. See Strauss, *supra* note 573.

599. The source of this alleged command was section 4(f) of the Department of Transportation Act of 1966 and section 18 of the Federal-Aid Highway Act of 1968. Both sections state:

[T]he Secretary shall not approve any program or project which requires the use of any publicly owned land from a public park . . . unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park . . . resulting from such use.

Department of Transportation Act of 1966, Pub. L. No. 89-670, § 4(f), 80 Stat. 931, 934 (1966) (codified at 23 U.S.C. § 138 (1988)); Federal-Aid Highway Act of 1968, Pub. L. No. 90-495, 518, 82 Stat. 815, 823-24 (1968) (codified as amended at 23 U.S.C. § 138 (1988)).

600. *Overton Park*, 401 U.S. at 418.

601. See Strauss, *supra* note 573.

602. See *id.* at part II.

the debate over these Acts were disagreements over the factors the Secretary of Transportation was to take into account in making building decisions. The result was a legislative compromise in which the legislature constructed a framework of regulatory authority in which the Secretary of Transportation would exercise substantial discretion.<sup>603</sup> In one telling passage of the House Conference Report quoted by Strauss, the floor managers of the legislation in the House described their understanding of section 4(f) of the Transportation Act: "This amendment of both relevant sections of law is intended to make it unmistakably clear that *neither* section constitutes a mandatory prohibition against the use of the enumerated lands, but rather, is a discretionary authority which must be used with both wisdom and reason."<sup>604</sup>

Politics at the local level also shaped the political environment in which the Secretary acted.<sup>605</sup> As controversy raged through Memphis for many years over the issue of highway construction through Overton Park,<sup>606</sup> the implementing agency modulated the serious political noise coming through various parts of the political processes that were implicated by these decisions. Meanwhile, the Secretary of Transportation was constantly considering, evaluating, and balancing information and influences from within the structure of local politics.<sup>607</sup> The decision to grant the permit came at the end of a long political process in which the regulatory decisionmaker had been pulled and tugged in various directions. In this light, the vantage point of the Supreme Court seemed rather remote.

The *Overton Park* decision, which spawned an enormous body of caselaw establishing "hard look" review of agency decisions,<sup>608</sup> is striking in its broad paean to aggressive review of decisions on the grounds that such review is necessary to guard against arbitrary and capricious action. As the facts of *Overton Park*, and perhaps many other "hard look"-era cases, suggest, the real problem with the agency's decision is not principally inept decisionmaking, decisions made lazily by agencies without sensitivity to the difficult factual and legal issues raised by the case.

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603. *Id.* at 1271-76.

604. H.R. CONF. REP. NO. 1799, 90th Cong., 2d Sess. 32 (1968), *quoted in* Strauss, *supra* note 573, at 1287.

605. *See* Strauss, *supra* note 573, at 1290-1317.

606. *Id.*

607. *Id.*

608. *See, e.g.,* Greater Boston Television Corp. v. FCC, 444 F.2d 841 (D.C. Cir. 1970), *cert. denied* 403 U.S. 923 (1971). For a comprehensive discussion, see generally ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, *ADMINISTRATIVE LAW* 504-515 (1993).

Rather, the concern seems to be that the agency's decision was wrong because it adhered to principles and factors that had no support in the statute or in principles of sound administrative policymaking.<sup>609</sup>

There may yet be another perfectly good reason for the sort of scrutiny contemplated by the Court in *Overton Park*. Perhaps it was precisely the existence and persistence of the political whirlwind in which the agency operated that called for some restraint through administrative law. This vision of courts rescuing agencies from politics through administrative law is, of course, just another element of the view that courts should perfect political and regulatory processes through more searching judicial scrutiny.<sup>610</sup> Restyled as a process-perfecting decision, *Overton Park* is problematic for two different reasons. First, it is not at all clear that the politics that drove the Secretary's decision reflected a political process that needed correcting. By normatively appealing standards of effective interest representation and checks and balances,<sup>611</sup> the process that gave rise to the granting of the permit by Secretary Volpe seemed rather good. We need not attribute this to the public-regarding behavior of the 90th Congress or the Memphis City Council. Instead, the institutional constraints that bind strategic political action seemed to work in this instance. Other instances may, naturally, be much more problematic. Perhaps, ironically, the hard look review set in motion by *Overton Park* has much more applicability to a different set of facts and a different political context.

In these situations of flawed politics, correction through administrative law review is deeply problematic. The problem, as illustrated by cases like *Overton Park* and *State Farm*, is that the courts are unwilling to construct the sort of comprehensive political histories of these regulatory statutes that would enable them to consider systematically the character of the regulatory decision and the efficacy of political controls. Such attention is vital in understanding the full dimensions of the problem with which the court is concerned.<sup>612</sup> In *State Farm*, the Court did not consider whether political controls can work to cabin the partisan political strategizing by the President. Perhaps it extrapolated from what happened with Standard 208 that the process had broken down. But, significantly, what the Court purported to do in *State Farm* was not merely to reverse the

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609. See Shapiro, *supra* note 575.

610. See ELY, *supra* note 1; CHOPER, *supra* note 1; Klarman, *supra* note 4.

611. See, e.g., Stewart, *supra* note 128.

612. See generally WILSON, *supra* note 94 (discussing multifaceted nature of regulatory decisionmaking).

administration's decision, but to make general administrative law, to create an approach to regulating political influence across a range of cases and political contexts. The examination of politics and political controls in *Overton Park* is even more myopic. The Court seriously underestimated the prospect that legal interventions through the device of searching administrative law review could not only fail to perfect politics, but could undermine the political-institutional balances that constrict strategic excesses of the sort that threaten to disrupt regulatory policymaking—both *ex post*, in the course of making regulations and resolving disputes, and *ex ante*, in the course of making regulatory statutes. The legacy of hard look review after twenty years suggests that such underestimations can lead to inauspicious results.<sup>613</sup>

Holmes' aphorism is apt here: Hard cases make bad law. What makes cases involving regulation so frequently hard is the fact that they arise in a complicated political context that is difficult to disentangle in the peculiar arena of litigation and appellate court review.<sup>614</sup> It is not that judges cannot understand or appreciate the elements of politics. Rather, it is that the thrust—perhaps even the basic theme—of administrative law is that courts must step in and speak *law to politics*; they must develop and apply general principles of law, asking what is reasonable, arbitrary, or an abuse of discretion, in situations involving particular, fact-dependent, politically rich, and institutionally bounded patterns of regulatory decisionmaking.<sup>615</sup>

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613. Although his concerns are somewhat different, Robert Kagan has recently described important features of American public policy—what he labels “adversarial legalism”—and its negative effects on policy outcomes. A basic theme in his analysis is that the increasing reliance on legalistic, adversarial methods of dispute resolution has hobbled progress in various aspects of public policy. Robert A. Kagan, *Adversarial Legalism and American Government*, 10 J. POL’Y ANALYSIS & MGMT. 369 (1991). The discussion of cases such as *State Farm* and *Overton Park* suggests that there may be a basis to fear that a similar phenomenon is going on in the area of administrative law and regulation. That is, the reliance on similar processes with respect to judicial review of agency action may well have had similar sorts of negative effects on policy outcomes as has adversarial legalism in the policy areas that Kagan describes. See, e.g., DONALD HOROWITZ, *THE COURTS AND SOCIAL POLICY* (1977); R. SHEP MELNICK, *REGULATION AND THE COURTS: THE CASE OF THE CLEAN AIR ACT* (1983); JEREMY RABKIN, *JUDICIAL COMPULSIONS: HOW PUBLIC LAW DISTORTS PUBLIC POLICY* (1989).

614. Cf. Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978) (discussing limited capacities of ordinary litigation to resolve polycentric disputes).

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The risks created by accepted judicial participation in the political process should lead judges to pay serious attention to the realities of political controls over administrative action before acting on the assumption that such controls will not prove effective. . . . Even if the court concludes that political controls cannot be relied upon to encourage balanced outcomes, it would be preferable for it directly to address the institutional causes of imbalance—seeking to restore the effectiveness of the political controls, rather than transforming the judicial

Often the political dimensions of regulatory decisionmaking call upon the courts to develop forms of political controls—to speak *politics* back to *politics*.

The result is, naturally, still law. That is, courts enact legal constraints on the actions of agencies and, thereby, on the strategic activities of legislators and Presidents. But the underpinnings of the courts' approaches, their own strategies, must rest on politically sophisticated judgments and on an appreciation for the right legal device at the right time.

## VI. CONCLUSION

In his book, *The End of Physics*, David Lindley describes the underpinnings of the belief—the myth—that all the basic questions of physics will soon be answered through the development of an abstract and comprehensive theory, exquisite in its mathematical simplicity and powerful in its hegemony over an entire field of scientific inquiry. Lindley argues that the belief is a myth.

Perhaps physicists will one day find a theory of such compelling beauty that its truth cannot be denied; truth will be beauty and beauty will be truth—because, in the absence of any means to make practical tests, what is beautiful is declared ipso facto to be the truth. . . . The theory of everything will be, in precise terms, a myth. A myth is an explanation that everyone agrees on because it is convenient to agree on it, not because its truth can be demonstrated. This theory of everything, this myth, will indeed spell the end of physics. It will be the end not because physics has at last been able to explain everything in the universe, but because physics has reached the end of all the things it has the power to explain.<sup>616</sup>

What Lindley describes is the reification of a methodology—in the case of physics, abstract mathematics—and the way in which such reification crowds out complexity, messiness, empirical tests, and other considerations that threaten the pristine integrity of the theory. Positive political theory represents, in its scope and pretensions, the same sort of ambition for a “theory of everything.” It poses the same danger as do those proclaiming an imminent end to physics, namely, the embrace of a simplifying myth in the name of answering all the big questions even where such a pathway leads away from incremental progress. It is the choice for the “big picture” over the “real world.” The danger of swallowing the corpus of positive

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review process into a surrogate political process.

Strauss, *supra* note 573, at 1329.

616. DAVID LINDLEY, *THE END OF PHYSICS* 255 (1993).

political theory whole is that, as with the quest for a perfect theory of physics, we are likely to chase mathematical simplicity and analytical symmetry at the expense of rigor and complexity.

And not without reason. There *is* a certain beauty to positive political theory. It provides a comprehensive framework for thinking about issues of regulation, politics, and public law. Its technologies and, particularly, its formal models, are subject to hypothesis testing and careful scrutiny. What we are likely to find with such testing and scrutiny is that the simple models described in the positive political theory literature must be modified to take account of the complex qualities of regulatory politics and administration. Even so, positive political theory is useful in forming the sort of empirical tests that should be completed and the types of analyses that must be done.

Since the decline of the legal process, and with it the end of any serious interpenetration of cutting-edge currents of political science into prescriptive public law, we are hungry for a positive foundation to the normative analysis that circulates and recirculates in public law discourse. Positive political theory represents an important strand in the contemporary studies of politics and regulation. It is rapidly becoming part of the mainstream of political science. For that reason alone, it deserves careful scrutiny by those who study law and government.

While positive political theory has yet to prove itself as a “theory of everything,” it is perhaps at the stage now of being a set of “theories about a lot of things.” As such, it marks an important step forward in understanding the nature and functions of regulation, governmental processes, and political behavior. It provides a framework of analysis within which we can learn a great deal in the course of developing prescriptive strategies for regulatory reform and institutional change. The aim of this Article has been to consider, from the perspective of positive political theory, some of the dimensions of such reform and change.