

## APA: PAST, PRESENT, FUTURE

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SOME years ago I was reading a final exam in an administrative law class, and a student who had been busily stroking the cases for a half dozen pages or so suddenly interrupted his writing and provided this parenthesis: "(My God, I just actually read part of the APA. Please ignore all I've written so far.)" I've never been sure that reading the APA really did help the poor soul. It often doesn't help me very much. We are gathered here in the pages of the Virginia Law Review neither to bury nor to praise the APA but to take account of it in our search for what each of us would like American administration and its law to be. What emerges from this taking of account by a number of leading scholars and practitioners is a clearer picture than I would have anticipated of two contending visions. One is a vision of an administrative law that facilitates correct, public interest-oriented administrative decisions. The other is a vision of an administrative law that at any given moment approximates the play of political forces among the interests and institutions of the American policymaking process and itself serves as both a prize and a tool in the pursuit of various and competing visions of the good. It is to the place of the APA in these two visions that this article is addressed.

### I. THE INCEPTION OF THE APA: NEW DEAL IDEOLOGY AND A PARLIAMENTARY MODEL OF AMERICAN GOVERNMENT

The contributions by Walter Gellhorn and Alan Morrison introducing this symposium reveal much about how the Administrative Procedure Act came about and why it has survived substantially unchanged for so long. Indeed, they tell us far more than they purport to state, because they are even more revealing in what they do not say than in what they do. It would be foolish to accuse Walter Gellhorn, who has been active on the Washington scene since the 1930s, or Alan Morrison, one of the most successful contemporary

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public interest litigators, of political naiveté. Indeed, both of their pieces explicitly mention politics from time to time. Nevertheless, both exhibit a curious apoliticism or surface antipoliticism that portrays administrative law as a progressive unfolding of "lawyers' law." They depict the process as a virtuous, dynamic evolution toward workable, due process-oriented, fair, equitable, and balanced results, in spite of attempts to interfere by outsiders motivated by dubious political ideologies. In short, they adopt the common law model, saying that the law in our hands, the hands of working lawyers and judges, has "developed" wondrously well, rather than saying that we have made the law we like.

Their surface apoliticism actually expresses a deep commitment to a particular political ideology, and it is the wide consensus in American politics about this ideology that was the essential factor in engendering and preserving the APA and that has made amending it so difficult. (I use the term "ideology" not at all in a pejorative sense. By ideology I mean a coherent set of principles or ideas that guide political action. And by "political" I mean having to do with government.)

Professor Gellhorn nicely points the way to this ideology by portraying the struggle over administrative law in the 1930's as one between those pursuing an abstract anti-big government ideology, who labeled the other side Communists, and those studying carefully the actual workings of the various government agencies. The latter group, Gellhorn says, sought to devise pragmatic solutions to whatever procedural problems they actually encountered in each agency. He quite fairly reports Roscoe Pound's charges that those who favored the creation of an administrative law sought to write existing agency practices into law rather than to subject those practices to the rules of traditional private law. Gellhorn does not refute Pound's charges because he sees them as simply part of an abstract, ideological (in the pejorative sense), know-nothing kind of ranting. When confronted with the demand to create procedural law for agencies, what else could any sensible lawyer do but study how the agencies actually worked and suggest rules to improve their operation? If the drafters of the APA had derived abstract legal rules from abstract legal principles and then blindly imposed them on the agencies, the result would have been an unworkable government.

Gellhorn makes this response almost without mentioning Republicans and Democrats and even more importantly, almost without mentioning the New Deal. He is not, of course, engaging in a rhetorical trick. Instead, he is exhibiting the characteristic of one truly devoted to a particular political ideology, expressing it not as an ideology but rather as an obviously correct vision of the world as it is and ought to be. Gellhorn's view is a conflation of New Deal ideology with good, common law lawyering. In fact, Professor Gellhorn was one of a cohort of New Deal lawyers who did precisely what Pound accused them of doing. They created a body of administrative law that rationalized and legitimated the administrative state that the New Deal created and that the New Deal ideology defended.

One basic element of the New Deal ideology was a dedication to that most American cluster of political ideas—the pragmatism of James and Dewey that engendered and became combined with the Progressives' notion that powerful central political authorities guided by technical expertise could develop good working solutions to major social and economic problems. Professor Gellhorn quite rightly and modestly says that he and his colleagues examined the administrative agencies' operations carefully and suggested pragmatic, working adjustments to correct unfairness and generally to improve procedures without hampering the agencies in fulfilling their missions. This was the New Deal's favorite method: pragmatic adjustment of existing values and institutions. Furthermore, the method protected from further rightwing attack the ability of New Deal agencies to carry out the New Deal agenda—increasing the size and concentrating the power of government so that it could intervene more often, more comprehensively, and more effectively in the affairs of the citizen than any previous American government.

One of Professor Gellhorn's footnotes nicely reveals another major element of New Deal ideology.<sup>1</sup> Gellhorn makes fun of the anti-New Dealers' Red-baiting, and adds a footnote illustrating his opponents' further odd tendency to accuse those constructing the new administrative law of seeking to establish parliamentary government in America. Their charge, however, was not bizarre. The New Deal and New Deal administrative law indeed were on a par-

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<sup>1</sup> Gellhorn, *The Administrative Procedure Act: The Beginnings*, 72 Va. L. Rev. 219, 223 n.12 (1986).

liamentary track, a track customarily labeled as the Democratic theory, the strong theory, or more recently the imperial theory of the presidency. Like many other New Deal ideas, this one is easily traced to the Progressives.

Parliamentary government has two basic features. The first feature is parliament's absolute control of the executive. Whenever prime ministers lose their majority in parliament, they must leave office. The second feature is strong executive leadership. Because prime ministers lead the majority party in parliament, they can determine what policies are enacted into law.

Woodrow Wilson, the great Progressive-Democratic President, seized upon the parliamentary model as the perfect theory for a Progressive President<sup>2</sup> because in its Americanized form the President enjoys all of the benefits and none of the costs of the parliamentary model. Under the Constitution, Presidents serve four-year terms and do not leave office if their party loses its majority in Congress. Therefore, if Presidents can persuade Americans to concentrate power and leadership in the chief executive the way the English do, Presidents can get all the sweet with none of the bitter.

Roosevelt and his academic supporters took up this theory of the strong presidency, which reached its pinnacle in the real world in the first 100 days after Roosevelt's inauguration as Congress enacted presidential proposals it had not even read. The theory reached its academic pinnacle in the forties and fifties in the writings of Arthur Schlesinger, Jr.,<sup>3</sup> James MacGregor Burns,<sup>4</sup> Clinton Rossiter,<sup>5</sup> and Richard Neustadt.<sup>6</sup> It fell into academic disfavor only when it was vividly borne home to New Deal academics by Richard Nixon that not only Democrats but also Republicans could be President.<sup>7</sup> But one half of a parliamentary theory indeed it was—the half in which the executive commands the legislature.

The administrative law created by Professor Gellhorn and company spoke to the theory of the strong presidency only rarely and in a limited way. Most of the time it simply assumed a strong presidency, but it strongly and explicitly endorsed an ancillary feature

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<sup>2</sup> See W. Wilson, *Constitutional Government in the United States* 53-81 (1908).

<sup>3</sup> See A. Schlesinger, *The Age of Roosevelt (1957-1960)* (three volumes).

<sup>4</sup> See J. Burns, *Roosevelt: The Lion and the Fox* (1955).

<sup>5</sup> See C. Rossiter, *The American Presidency* (2d ed. 1960).

<sup>6</sup> See R. Neustadt, *Presidential Power: The Politics of Leadership* (1964).

<sup>7</sup> See, e.g., A. Schlesinger, *The Imperial Presidency* (1973).

of parliamentary government—the delegation of enormous law-making power to the executive. In parliamentary systems this delegation is natural for several reasons. First, the executive can get through parliament any law he wants anyway, so insisting that he go through parliament is useless. Second, if the executive makes laws the parliament does not like, the parliament can always throw the executive out. Third, because the executive is a member of parliament and must come to the floor of the parliament each day to debate about what he is doing, he is always quite literally and immediately answerable to parliament for the laws he makes.

The administrative law invented by Professor Gellhorn and company adopted the executive delegation aspect of parliamentary government by rejecting the nondelegation doctrine. (Of course, it rejected the nondelegation doctrine only after a New Deal Congress rejected the doctrine.) The new administrative law also managed the Wilsonians' trick of having the sweet without the bitter because the executive got the delegated lawmaking power but was not directly answerable to Congress for the laws it made.

Parliamentary theory, however, has relatively little place for judicial review. One reason executive lawmaking in Britain is so powerful is that British courts do little review of it. The U.S. was different at the time of the New Deal: American courts did a lot of review, both constitutional and statutory. The New Deal lawyers, however, had two solutions to this problem. On the constitutional side, they developed the theory of judicial self-restraint, which directed unelected judges to defer to elected legislatures. Meanwhile, New Deal historians and political scientists were developing the theory of the strong presidency, which directed the legislature to defer to the President. Put all together, it spelled Roosevelt. Courts should defer to Congress, Congress should defer to the President. So courts really were to defer to the Executive. Q.E.D.

To solve the statutory as opposed to the constitutional review problem, the New Deal lawyers borrowed another Progressive idea, government by experts, which directed nonexpert courts to defer to administrative expertise. The administrative law of the forties and fifties was the culmination of this theory. Reviewing courts routinely deferred to whatever law the agencies made.

In summary, Professor Gellhorn has given us a clear picture of what administrative law derived from New Deal ideology should have been and was. His one final touch is that to be truly a law of

the New Deal era, the APA should not have been congressional law at all. For Professor Gellhorn does not celebrate the APA itself but instead the blocking of the bad legislation proposed in the thirties. Put more positively, he says that he prefers the pre-1946 situation in which the administrative law proposed by the Attorney General's Committee on Administrative Procedure (guided so skillfully by Professor Gellhorn) and embodied in the Attorney General's Memorandum on Administrative Procedure, was the administrative law of the United States. That law was the law of the New Deal executive, by the New Deal executive, and for the New Deal executive.

## II. EVOLUTION OF THE APA

### A. *The Original Political Bargain*

Turning to the APA itself, Professor Gellhorn and most other contributors to this symposium rightly characterize it as a deal struck between opposing political forces. One should consider, however, who struck the deal and what its terms were. The battle of the thirties was between Republicans and conservative Democrats on the one hand and New Deal Democrats on the other, at a time when the New Deal consensus was not yet dominant in American politics. Consequently, the New Dealers were loath to compromise and loath to allow congressional initiatives against the president. The war was still in doubt; every battle had to be fought to the finish. The New Dealers were forced to make the tactical retreat of taking some action on agency procedures, but they then fought the battle out. They won it by blocking congressional action, keeping administrative procedure firmly in the hands of the executive branch itself, and imposing only the thinnest restraints on agency action.

By 1946, the New Deal consensus was absolutely and unassailably established, so the battle was by then really an internal one among New Dealers—between conservative and liberal Democrats, both of whom were firmly harnessed to the New Deal vision of the administrative state. At this point, the liberal New Dealers could afford to compromise in a statute that no longer appeared to threaten the strong presidency.

The law of the APA is thus largely a congressional affirmation of the scheme worked out by the executive branch's New Deal law-

yers. They formulated a modified and softened version of the pre-war vision of Pound and the American Bar Association and fitted it into a basically New Deal plan. It is very important to understand the compromise because it engenders the basic tensions that plague administrative law today.

The APA as originally enacted divided all administrative law into three parts. For matters requiring adjudication, in which government action was directly detrimental to the specific legal interests of particular parties, the compromise was heavily weighted in favor of the conservatives. The Pound-ABA demand for totally separate tribunals was ignored: the agencies themselves adjudicated these matters. But the agencies' processes were to be considered quasi-adjudication and were to be governed by adjudicative-style procedures, presided over by a relatively independent hearing officer, and freely subject to relatively strict judicial review.

The second part, rulemaking, constituted an almost total victory for the liberal New Deal forces. Congress' delegation of vast law-making power to the agencies was acknowledged and legitimated. Rulemaking was to be quasi-legislative, not quasi-judicial. No adjudicatory-style hearings or hearing officers were required. Those not directly and immediately affected by the rule could not easily obtain judicial review. Under the APA rulemaking generated no record to be reviewed, and the standard of review made an agency's decisions irreversible unless it had acted insanely. Although the agencies were acting in a quasi-legislative capacity, they were not required to jump through as many procedural hoops as Congress typically did in legislating. Congress normally held oral hearings on pending legislation, a full draft of which was already on the docket, and issued a rather elaborate committee report to explain a bill as it went to the floor of the House or Senate. In contrast, the APA simply required an agency to give notice only of its intention to make a rule. It did not have to submit a draft. It had to receive written comments, but no hearing was required. It merely had to provide a "concise" and "general" statement accompanying its rule.<sup>8</sup>

In the absence of a rulemaking record, reviewing courts were forced to presume that the agency had the facts to support its

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<sup>8</sup> 5 U.S.C. § 553(c) (1982).

rule.<sup>9</sup> Given the extremely broad and standardless delegations in most of the New Deal legislation of the thirties and forties, courts rarely found that a rule violated the terms of its parent statute. And it was rare indeed for a New Deal-appointed judge reviewing the work of a New Deal-staffed agency to find that the agency had acted like a lunatic, that is that it had been, in the words of the APA, "arbitrary" and "capricious."<sup>10</sup> Therefore, in the political bargain judicial review of rulemaking is about all the conservatives got, and they got very little of that.

The third part of administrative law originally conceived by the APA included everything that government did that was neither adjudication nor rulemaking. On this point, the liberal New Dealers won almost complete victory, labeling agency action in this area as "committed to agency discretion."<sup>11</sup> No procedures were prescribed. The liberals made only one small mistake: although one section of the APA precluded judicial review of matters committed to agency discretion, another subjected agency actions to review for "abuse of discretion."<sup>12</sup>

### *B. Since the APA: The Evolution of Administrative Law and the Bonding Between Agencies and Courts*

In his review of the APA's evolution since the initial New Deal-influenced compromise, Mr. Morrison adopts the theme that the APA has been a constitution-like statute. If I suspected Mr. Morrison of one ounce of irony, I would guess that he uses this analogy to suggest that the APA today means all kinds of things that its drafters could not possibly have intended it to mean. Like Professor Gellhorn, Mr. Morrison embraces a common law methodology. He focuses on the law. It has been flexible and it has developed in a neutral, benevolent, and pragmatic way to solve workaday problems as they arise, guided by lawyers working at their trade. In Mr. Morrison's words, "the Act, as construed by the courts and implemented by the agencies, has produced workable solutions"<sup>13</sup>

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<sup>9</sup> See, e.g., *Pacific States Box & Basket Co. v. White*, 296 U.S. 176, 186 (1935).

<sup>10</sup> 5 U.S.C. § 706(2)(A) (1982).

<sup>11</sup> *Id.* § 701(a)(2).

<sup>12</sup> *Id.* § 706(2)(A).

<sup>13</sup> Morrison, *The Administrative Procedure Act: A Living and Responsive Law*, 72 Va. L. Rev. 253, 268 (1986).

and institutionalized due process in the administrative setting.<sup>14</sup>

In Mr. Morrison's administrative law, courts "construe" and agencies "implement," those wonderful code words of the common law that disguise lawmaking by judges and bureaucrats. Furthermore, Mr. Morrison's world contains Republicans but no Democrats. The Republicans are among the several outsiders trying to disrupt the orderly progress of the insiders (namely, we lawyers in our capacity as litigators, agency counsel, and judges) toward an ideal due process.

Mr. Morrison displays the perfect conflation of good lawyering and New Deal politics that is one of the strongest features of the New Deal consensus. The consensus rests on the following balanced elements: big government, high levels of regulation, welfare state minimums, collective bargaining, and private property rather than government ownership. In spite of early flirtations with both right and left socialism, the New Deal remains firmly capitalist. An essential feature in reaching this odd balance between public control and private ownership is that the regulatory system must be staffed on both the government side and on the private side by lawyers (and lawyer-judges) who so firmly believe in the New Deal ideology that they take it as an integral part of law itself. If one surveys Washington lawyers and judges, no matter whom their clients or employers, they are overwhelmingly liberal Democrats, and they are even more overwhelmingly the products of law schools that for the past fifty years have deliberately infused New Deal ideology into what they teach their students is "the Law." In a sense, then, Mr. Morrison is quite right in painting a picture of harmonious development rather than radical change since the APA's enactment. Then and now, New Deal lawyering is the central feature of government regulation, so from his point of view, all is right with the world.

Professor Sunstein's contribution to this symposium discusses the enormous changes in administrative law that have occurred since the APA's passage, and clearly few people understand those changes better than Mr. Morrison. Mr. Morrison, however, interprets these changes not as a reversal of the APA compromises, or as a fundamental rejection of the structure of the APA, but instead simply as an orderly development of its constitutional qualities. I

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<sup>14</sup> See *id.* at 269.

suggest he takes this position because, from his point of view, not only have the actors, namely New Deal lawyers, remained the same, but the good guys, namely the New Dealers, have continued to win. So long as the good guys keep winning, the law of the APA is developed, not broken.

As Mr. Morrison points out, much of that development occurred in the rulemaking sector, largely because the new health, welfare, safety, and environmental statutes of the sixties and seventies demanded more rulemaking and often established detailed substantive and procedural standards for rulemaking. From his point of view, Mr. Morrison correctly characterizes these changes as harmonious developments rather than radical changes. The statutes themselves rested firmly on the New Deal consensus—big government, high levels of regulation, and private property. The later New Dealers had discovered, however, that agencies regulating a single industry were often captured and that older agencies often sank into bureaucratic inertia as their initial complement of young New Dealers turned into middle-aged civil servants. Therefore, the later New Dealers established new regulatory agencies, staffed by young enthusiasts, with jurisdiction not over one industry but over one subject matter in all industries. The new regulatory statutes still contained huge delegations of lawmaking power, but they also contained specific provisions designed to force the agencies into vigorous regulatory action. Nevertheless, all of these changes were merely incremental adjustments designed to facilitate higher levels of New Deal-style regulation. Thus, Mr. Morrison can gently fold them into his constitutional APA.

Now in all of this, one curious feature stands out. Clearly, Mr. Morrison knows that since the APA's enactment, one fundamental change in administrative law ranks above all others. The courts went from a position of doing almost nothing in the forties and fifties to doing almost everything in the sixties and seventies, including creating a whole new procedure for rulemaking that is not in the APA. Like all the other contributors to this symposium, Mr. Morrison acknowledges this change, but he characterizes it as showing that the good old APA really was very, very good indeed because it enabled courts to assure that the beneficiaries as well as the regulated parties have the protection of the laws.<sup>15</sup>

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<sup>15</sup> See *id.* at 261.

Is this a display of goody two shoes naiveté? Is Mr. Morrison so preoccupied with the fact that the good guys have usually won that he is insensitive to the importance of fundamental shifts in political and policymaking power that have occurred since 1946, particularly shifts from agencies to courts? I do not think so. And Mr. Morrison's section so frankly titled "Warding Off Outside Interferences"<sup>16</sup> proves his perceptiveness.

At first glance, Mr. Morrison's analysis seems strange because it endorses an activist role for courts, whereas the New Deal ideology originally required courts to defer to administrative expertise. To understand Morrison's strategy, one must return to the New Deal's political evolution. Enthusiasm for the strong-presidency theory waned among New Dealers once it became clear that Eisenhower was not simply a postwar aberration and that Republicans might often gain the presidency. The presidency became the imperial presidency to be feared rather than the strong presidency to be loved, once it became the Republican presidency. The President, initially praised by New Dealers as chief legislator, and his Office of Management and Budget, a much-lauded tool designed to make the President truly the chief administrator, are for Mr. Morrison "outside interference" seeking to pressure agencies to produce different results from what would otherwise have occurred.<sup>17</sup>

The presidency was the first thing the New Dealers realized they could lose. Next came Congress. Today the House is overwhelmingly Democratic and the Senate is split about even. But since the heydays of the sixties and seventies, Congress has sporadically taken on an anti-regulation, anti-big government mood. It can no longer be trusted completely. The New Dealers of the sixties and seventies, facing an overwhelmingly liberal Congress and a partially captured and lethargic old bureaucracy, trusted Congress to enact detailed agency-forcing statutes. Today, facing the new agencies staffed with their friends and with a sporadically conservative Congress, the same New Dealers want to preserve the spirit of the Congress of the sixties and seventies and get the new Congress out of the way. They love the sixties and seventies' statutes, so long as their friends "construe" and "implement" them, but they do not

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<sup>16</sup> *Id.* at 264.

<sup>17</sup> See *id.* at 266-67.

want the new Congress to impose its own "construction" and "implementation."

This hostility to congressional control explains Mr. Morrison's active role in and self-congratulation about destroying the legislative veto. It is not good form in academic writing to use the word "stupid." Nevertheless, stupid is the right word for the Reagan Administration's opposition to the legislative veto and for various conservative academic commentators' joy at its demise. Apparently, conservatives are even more easily confused than New Dealers. Once conservatives realized they could win the presidency frequently but the whole Congress almost never, they began to babble about the merits of the strong presidency themselves. They characterized the legislative veto as a presidency-versus-Congress issue on which they should take the President's anti-veto side. They were foolish enough to buy the old theory of President as chief legislator at just the time that New Dealers were smart enough to abandon it.

One can understand the strange bedfellows thrown together by the legislative veto issue by recalling a fact that everyone sometimes understands: the "executive branch" does not really exist, but actually is only a conflation of the presidency and the federal bureaucracy. Conservatives were confused in thinking that by attacking the veto they were defending a Republican "executive branch" against a Democratic House of Representatives. The offspring of the New Deal, such as Mr. Morrison, correctly understood the issues and knew that destruction of the veto would protect the federal bureaucracy against Congress, thus bolstering the independence of the bureaucratic branch. That, of course, is why Mr. Morrison rightly couples an attack on the legislative veto with an attack on the Office of Management and Budget. He is trying to protect the bureaucracy from both congressional and presidential control.

New Dealers were always fond of bureaucracy, but they were fond of it initially because it was an army of experts commanded by the strong President. Today they are fond of it for quite a different reason—because it is the last bastion of New Deal big government, big regulation ideology in Washington. New Deal lawyers are very busy assembling the constitutional and legal theory of the independent fourth branch of government.

In this light it becomes clear why Mr. Morrison is not troubled

by what would have troubled earlier New Dealers: judicial activism, especially in reviewing agencies' rulemaking. It also becomes clear why he wants to depict this activism as a development harmonious with the APA. First of all, Mr. Morrison's career has consisted of making liberal arguments before liberal judges appointed by liberal Presidents and, not surprisingly, winning his cases. One might, therefore, be tempted to ascribe his indifference to the erosion of the earlier New Deal preference for judicial self-restraint to the favorable treatment proregulation forces have received in court. On this reasoning, one might accuse Mr. Morrison of shortsightedness because in the future he might have to deal with more conservative judges appointed by conservative Presidents.

Although some element of opportunism may mark Mr. Morrison's equanimity toward increased judicial activity, he is actually engaged in a far more profound enterprise than merely praising his friends. If the new New Dealers are working so hard to shield the bureaucracy from both President and Congress and to create an independent fourth branch of government, why not be equally zealous in shielding the bureaucracy from the third branch, the courts? Originally, the New Deal ideology advocated a united executive branch, President and bureaucracy bonded together with the President in the driver's seat. Having lost the presidency, however, modern New Dealers are attempting nothing less than a fundamental reconstruction of the branches. The bureaucracy is to be torn loose from the presidency and bound to the courts to create a new branch—the due process, rule of law, construing and implementing branch. The new New Dealers do not view judicial activism with the alarm of the old New Dealers because the new New Dealers are trying to cement this agency-court partnership. For the new New Dealers, increased judicial review does not raise the specter of third branch incursion on the strong presidency but of increased activity by one of the partners in their new and favored due process branch.

The desire for such a branch arises from the regulatory history of the last three decades. James DeLong's contribution to this symposium notes a number of factors common to much modern congressional legislation that are especially prevalent in the great safety, health, and environmental statutes of the sixties and seventies. Those statutes often contained an extremely absolutist rhetoric of values and goals, proclaiming that some particular good was

paramount, beyond compromise, and not subject to niggling over costs and secondary consequences. Such statutes generally were drafted by zealous, single-minded, and interlocking agency and congressional staffs. Furthermore, their proponents were adept at creating legislative history to confirm and extend the most vigorous overtones of the statutory language. Although the actual statute when examined in all its details might be full of potential constraints and compromises, its crusading mandate appeared to be central. Agencies created under these statutes were not charged with maintaining the health of a particular industry while regulating it in the public interest. Instead they were authorized to pursue their goals across all industries and even in disregard of the continued existence of the industries. DeLong points out that the appropriations process imposes practical limits on the ringing, declaratory language of most statutes. Congressional appropriations imposed fewer limits on these statutes, however, than on other sorts because the regulated industries—not the Treasury—would bear the burden of the huge social expenditures that the statutes' sweeping language suggested.

Nevertheless, as deregulation replaced regulation in political vogue, the proponents of the new statutes sensed danger. Although the statutes of the sixties and seventies were agency-forcing and technology-forcing and contained many specific statutory standards and commands, they also exhibited two major weaknesses from the point of view of those favoring high levels of regulation. First, like most statutes, they were the product of congressional compromises and therefore contained some language suggesting that cost, economic efficiency, business or local interests, or job loss should be considered in formulating regulatory policy. Second, although their statutory language generally was more specific than the broad delegations of early New Deal statutes, these new statutes nonetheless delegated vast rulemaking powers to the regulatory agencies. Thus, the statutes left open the opportunity for substantial modification of government policy in the direction of deregulation. Although Congress as a whole, acting in the public spotlight, could still be trusted to refuse open attempts to amend most of these statutes in deregulatory directions, Congress could no longer be trusted vigilantly to block piecemeal erosion of the statutes by the President and by its own committees. And the

presidency was likely, as often as not, to be in the hands of deregulators.

The task then was to keep alive the regulatory fervor of the sixties and seventies in the face of deregulatory pressure and in light of some contrary language in the statutes of that era. "Construing" and "implementing" thus became the crucial arenas, and proregulation forces immediately seized upon their greatest strategic advantage. The bureaucracy was central to the eighties' construction of the sixties' and seventies' statutes because of its rulemaking authority. And glory be, it was in the new bureaucracies of the agencies, created and staffed in the sixties and seventies, that the last great proregulatory fervor in official Washington survived. If the regulatory bureaucracies could establish themselves as an independent branch of government, then they could preserve the sixties' and seventies' style of regulation against the inattentiveness of Congress and against the deregulators who infested the presidency and certain congressional committees.

Law, particularly complex, procedural, lawyers' law, is a wonderful weapon if one is losing in the less esoteric realms of politics. Professor Gellhorn vividly describes the conservatives resorting to this weapon in the thirties, and now the regulators have used it in the seventies and eighties. They have done so in two ways, one broadly institutional, the other more narrowly doctrinal.

On the institutional front, proponents of the sixties' and seventies' style of regulation have been the self-conscious and brilliantly alert beneficiaries of one of those major unintended consequences that are commonplace in political life. This event, however, is particularly ironic. In the pervasive climate of distrust of "captured" and "lethargic" regulatory bureaucracies in the sixties and seventies, the courts (most particularly the D.C. Circuit), assisted by Congress and cheered on by academic commentators, did something that Mr. Morrison carefully denies that they did. They amended the APA in a way that fundamentally altered its structure, its early New Deal ideology, and the various compromises with that ideology that had been struck originally.

Recall that the original compromise called for quasi-adjudication for all matters of particular impact on the particular legal interests of individual parties. More general matters were to be handled by quasi-legislation, allowing maximum scope for executive branch initiative and agency expertise. Everything else was left to broad

agency discretion. In the sixties and seventies and on into the eighties, however, courts have greatly reduced the scope of the discretion category. More importantly, they changed rulemaking from quasi-legislative to quasi-judicial. They invented a host of procedural requirements that turned rulemaking into a multiparty paper trial. They also imposed a rulemaking record requirement that allowed courts to review minutely every aspect of that trial. They invented a "dialogue" requirement and a "hard look" requirement that turned the agency from a legislative rulemaker into a party at its own proceedings. They converted the "arbitrary and capricious" test specified by the APA as the standard of judicial review of rulemaking from a lunacy test into the "clear error" standard<sup>18</sup> that empowers a court to quash a rule not only when it is crazy but also when the judges simply believe it is wrong. The courts did all these things to reduce the independence and discretionary scope of a mistrusted bureaucracy and to subordinate it to more control by the regulated, the beneficiaries of regulation, and the public at large. Mr. Morrison applauds all of this.

Now, however, comes the irony, which is best illustrated by a brief true story. Some years ago, after guiding students in an administrative law course through the complex courts of appeal decisions on the procedural innovations of notice and comment rulemaking, I turned briefly to the then very open legislative veto issue. I made the elementary point that when an agency promulgates a rule, it exercises lawmaking power delegated to it by Congress so that it seemed reasonable to allow Congress to reserve the right to review a rule made in its name and under its authority before it becomes the law of the land. To which a student immediately replied that, after a long and complex proceeding in which every interested party had had its say, after the agency had shaped a decision responsive to all they said, and after an impartial judicial tribunal had reviewed the decision for fairness and legality, he was loath to allow a congressional committee to overturn the outcome arbitrarily. This response is, of course, one that Mr. Morrison would applaud. But how did it come about that a legal movement originally motivated by distrust of agencies ultimately resulted in confidence in the agency and a distrust of Congress?

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<sup>18</sup> See *National Lime Ass'n v. EPA*, 627 F.2d 416 (D.C. Cir. 1980); 5 K. Davis, *Administrative Law Treatise* 350-56 (2d ed. 1984).

With the benefit of hindsight, the answer is clear. Deep-seated in American legal ideology is an identification of legislatures and legislating with the arbitrary, and courts and judging with the reasoned, the principled, and (although this is ultimately self-contradictory) the pragmatically correct. Put another way, we openly acknowledge that legislators do and ought to have broad discretion to enact into law any one of a wide range of policy alternatives. We do not, however, acknowledge similar discretion for judges. The public at large does not know about the legal realists, and those of us who do either wash them away with Dworkin or Fiss or Ackerman or Tribe or fudge by talking about statutory "construction" or "interpretation" instead of the dirty shovel of lawmaking. If rulemaking is quasi-legislative, it is quasi-arbitrary and, like any other arbitrary and thus "political" power, ought to be subjected to checks and balances by every politician handy: presidents, congressmen, the works. If, however, rulemaking is, holy of holies, quasi-judicial, then it ought not to be subjected to dirty, dirty political checks and balances. At most it ought to be checked only by higher priests in the principled, neutral cult of rationality—judges.

Moreover, if rulemaking is quasi-legislative, then it involves choices among equally legitimate options. The option chosen today is not right or wrong; it is just the one we choose today. Tomorrow another may be chosen that everyone will treat as equally good. Every legislature is free to repeal a law made by a previous one and put a different law in its place, so one rule may replace another as well. If rulemaking is quasi-judicial, however, the story is quite different. Judges still pretend that they have chosen the legally correct solution for all time, not just what pleases them at the moment. Furthermore, even after we have destroyed each and every theory of *stare decisis*, we still pretend along with them. Thus, if rulemaking is quasi-judicial, then the rule made yesterday is the right rule and may not be changed or even repealed at will. It may be changed only by going through another judicial song and dance and coming up with stuff good enough to prove that the old rule was "wrong" and that the new rule is "right."

When the courts of the sixties and seventies found that they mistrusted the agencies, the only solutions they could think of were to force the agencies to act more like courts and to heighten the level of judicial review, thus forcing them to act even more like courts. The result was the creation of a quasi-judicial rulemaking

process (what contributors to this symposium call a "hybrid" process) and thus, given American legal ideology, the creation of a quasi-independent rulemaking process with which Mr. Morrison's "outsiders" must not interfere.

By making the agencies courtlike and by tying themselves closely to the agencies in a "hard look" partnership, the courts clothe the agencies in their own independence mythology and create a bureaucratic-judicial entity whose "constructions" and "implementations" are "institutionalized due process in the administrative setting" and thus beyond reproach. The administrative state has been transmuted from the ravaging monster of Pound and the ABA, through the servant of peerless New Deal Presidents, and on to something far better and nobler than politics.

In addition to the institutional changes discussed above, the regulators of the seventies and eighties used procedural law to effect a doctrinal change, a point that is relevant to Professor Sunstein's contribution. This doctrinal change involved the concept of "statutory duty." For reasons that are examined later, in the last few years the federal courts have become less concerned with procedural and evidentiary review of agency rulemaking and considerably more concerned with the substantive question of whether the rule is in accord with the provisions of the statute under which the rule is made.<sup>19</sup> In other words, does the rule satisfy the statutory duty imposed on the agency to implement the statute? By using one of the necessary anomalies of the American constitutional system, the statutory duty doctrine has been a powerful tool for keeping alive the flame of the sixties' and seventies' statutes and for insulating agencies from presidential control.

Under the most simplistic view of the Constitution, Congress makes laws and the executive branch carries them out. But exactly who in the executive branch? The President is the Chief Execu-

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<sup>19</sup> See, e.g., *Community Nutrition Inst. v. Young*, 757 F.2d 354 (D.C. Cir.), cert. granted, 106 S. Ct. 565 (1985); *Public Citizen Health Research Group v. Aucter*, 702 F.2d 1150 (D.C. Cir. 1983); *Lead Indus. Ass'n v. EPA*, 647 F.2d 1130 (D.C. Cir.), cert. denied, 449 U.S. 1042 (1980); *Adams v. Richardson*, 480 F.2d 1159 (D.C. Cir. 1973). Although most of the cases cited here are particularly dramatic examples because they involve a court finding that an agency's inaction violates its statutory duty to act, I do not mean to limit the concept to such cases. In every case in which a court finds that an agency rule is unlawful because it is in conflict with the court's reading of the statute under which the rule was made, the court is enforcing a statutory duty. See *Garland, Deregulation and Judicial Review*, 98 *Harv. L. Rev.* 505, 562-73 (1985). *Lead Industries* is an example of both aspects of statutory duty.

tive, so in a sense everybody in the executive branch works for the President. On the other hand, congressional statutes create the agencies of the executive branch. Although the Constitution gives the President the general duty of enforcing all the laws, congressional statutes give particular agencies the particular duty of enforcing particular laws. So to whom are the agencies answerable in implementing the laws—the President or Congress? Of course, no clear answer exists under our constitutional system of checks and balances. The emphasis merely falls one way or the other at various times.

In the heyday of the New Deal, the emphasis fell toward the President, and because Congress wrote general statutes delegating power to the agencies so broadly, few direct clashes could occur between the desires of the Chief Executive and the explicit commands of Congress. In contrast, the statutes of the sixties and seventies are more explicit and clash frequently with the desires of a deregulation-minded Chief Executive of the eighties. Thus, emphasis on statutory duty rather than duty to the Chief Executive bolsters the agencies' quasi-judicial independence against presidential intervention. Such an emphasis might open the way to greater congressional intervention, but as noted earlier, Congress has not exhibited much interest in deregulating the new regulatory areas of the sixties and seventies.

The bureaucracy, however, is not yet home free. It is shackled in its new independent branch to the judiciary's determination of the agencies' statutory duties. The shortsighted inheritors of the New Deal may say, "So what? The judges are pro-sixties, and seventies' regulation, too. The bureaucrats and the judges will be happy partners in keeping the flame burning brightly." The longer sighted will worry about Reagan appointments. Nevertheless, other events are unshackling the bureaucrats from the judges and making bureaucrats very much the senior partners in their own branch. In the end, they may be able to steal the judges' cloak of independence, enabling them to do what they please no matter what Reaganite judges say.

Historically, agencies have been very good at self-defense. As the courts demanded more and more of the agencies, they were actually demanding two things at once. First, they were demanding that rulemaking agencies hold more complete quasi-trials. The classic trial, as Fuller and company have reminded us, involves two

parties.<sup>20</sup> The rulemaking trial is multiparty. As a result, the courts' demands for more and more complete trials were simultaneously, and at first probably unintentionally, demands for more and more synoptic<sup>21</sup> decisionmaking processes. Taking into account more and more of the information parties offered came closer and closer to taking everything into account as more and more parties offered more and more evidence. As a result, today an agency can prove it has been sufficiently quasi-judicial only by presenting the reviewing court with an enormous, synoptic rulemaking record. Moreover, once courts, in enforcing dialogue requirements, became accustomed to making what turned out to be nearly synoptic demands, they easily made the leap to making synoptic demands quite apart from requiring the agencies to respond to all comments. *Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Automobile Insurance Co.*,<sup>22</sup> a case Mr. Morrison applauds, shows that courts now decide when an agency must go beyond complete dialogue to total synopticism. Because agencies cannot know in advance when reviewing courts will make such demands, they have a reason beyond demonstrating dialogue to produce synoptic rulemaking records.

When courts require agencies to pretend to be judges rather than legislators, they are requiring agencies to pretend they are right rather than to claim they are prudently exercising policy discretion. So agencies these days do not say to courts that they had a number of policy options open to them and chose the one they liked best. Instead, they say they applied the right procedures to all the knowable facts and chose the policy alternative that best achieved precisely those values specified in the statute.

The early New Deal style emphasized deference to agency expertise because most of the agencies were new and full of New Deal drive. As these agencies got older and lost their regulatory enthusi-

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<sup>20</sup> See Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv. L. Rev. 1281, 1282 (1976); Fuller, *The Forms and Limits of Adjudication*, 92 Harv. L. Rev. 353, 393-405 (1978).

<sup>21</sup> "Synoptic" as used in the text means a decisionmaking process that requires all facts to be known, all alternative policies to be considered, all values to be identified and placed in an order of priorities and that then selects the alternative that best achieves the values given the facts. See M. Shapiro, *The Supreme Court and Administrative Agencies* 73-91 (1969); Diver, *Policymaking Paradigms in Administrative Law*, 95 Harv. L. Rev. 393, 396-99 (1981).

<sup>22</sup> 463 U.S. 29 (1983).

asm, the middle period New Deal style emphasized agency capture and agency lethargy and thus the need for agency-forcing statutes. Today, with the new regulatory enthusiasts embedded in the bureaucracies of the new agencies, I expect a return to enthusiasm for agency expertise. Courts will use the statutory duty doctrine to ward off deregulatory moves by the President and his appointees and to force the agencies to make rules. The rules must be synoptic and so must be made by the only people who can meet synoptic demands for information gathering and processing: the proregulation agency experts. Confronted by enormous synoptic rulemaking records packed with technical data and analysis they cannot understand, both New Deal and Reaganite judges will find deferring to administrative expertise inevitable and so will celebrate it again as a judicial virtue. The judicial shackle will be broken, except for court orders to the agencies to do their statutory duty. The new regulatory bureaucracies of health, safety, and environment then will be very much the senior partner in the new due process, judicial, independent, apolitical, correct, and noble agency-court branch. Just as John Marshall's branch preserved federalism in the dark night of Jeffersonianism, so the new branch will preserve regulation in the dark night of deregulation—the brief faltering of enthusiasm for big government that the inheritors of the New Deal hope, and not without good reason, will soon pass away.

*C. Professor Sunstein's "Deliberative" Review as Economic Substantive Due Process Review*

If all this constitutional, historical, ideological, jurisprudential, and social science paraphernalia seems like too much of a load to heap upon Mr. Morrison's nicely informal tour of post-APA developments, I have two excuses—if not defenses. The first is that his piece fits rather neatly into, and gains added significance from, the larger campaign of those who believe that a vigorous regime of government regulation best serves the public interest. The second is that it gives the necessary background to my comments on Professor Sunstein's contribution.

Mr. Morrison's and Professor Sunstein's readers might be struck by the authors' shared equanimity toward stringent judicial review of administrative action. For an older generation of scholars, review was the most controversial issue of administrative law because courts were viewed as a significant check on the regulatory

enthusiasms of the agencies. These articles, however, are products of a fairly long period in which agencies and courts have been partners in imposing high levels of regulation and of an immediate time in which the courts have fended off the deregulation movement. Indeed, Sunstein pushes heavily the notion of courts ensuring that agencies obey their statutory duties, and he argues at length that both courts and agencies can find very strict and precise duties embodied in statutes whose express language does not contain such duties. If one read only the early portions of his contribution, the conclusion surely would be that he is busy building up the same independent regulatory branch that Mr. Morrison is so anxious to create to preserve the regulatory spirit of the sixties and seventies. Advocating active judicial announcement of statutory duties, even where they are not apparent on the face of the statute, is the major tool for preserving the regulatory fervor of the sixties into the nineties by imposing it on the agencies and sealing them off from contemporary political control. Reading the latter portions of his article, however, shows this conclusion to be too facile, if not exactly wrong. Sunstein does not expressly endorse protecting high levels of regulation by creating an autonomous court-bureaucracy partnership, yet whatever his intention, much of his analysis leads in that direction.

The DeLong analysis supports this conclusion. The language of the great regulatory statutes of the sixties and seventies tends toward ringing absolutes, particularly when unsoftened by the kind of appropriations history that so often reveals that Congress did not really mean what it so enthusiastically said. Even qualified by Sunstein's emphasis on broad public interest concerns, the "deliberations" of an agency about its own program and the subsequent judicial "deliberations" about that program of the sort Sunstein espouses necessarily will focus more on those enthusiasms than on the countervailing demands of other programs in other statutes for which other agencies are responsible. Single-agency deliberation followed by discrete judicial review of discrete agency decisions is never likely to shake off the particular enthusiasm that engendered the main thrust of the statute in the first place.

Like Morrison, can Sunstein be accused of being short-sighted in terms of his own interests? Does he naively favor judicial activism in the next decade because the judges of the last two have been liberal regulators? Has he failed to anticipate that Reagan appoin-

tees may not give him the same liberal product but instead a product he dislikes?

Such an accusation would fail to take into account a peculiar utopian flavor that marks the school of administrative law commentary to which Professor Sunstein belongs and which is exhibited in the writings of his sometime collaborator, Richard Stewart, who Sunstein cites liberally throughout his own work. Sunstein and Stewart want neither low regulation nor high regulation; they want the *right* level of regulation. Neither of them are concerned with maximizing the outcomes for the beneficiaries of regulatory statutes. Both want regulation that maximizes the public interest, which they do not equate with the beneficiaries' interests. Both advocate decision roles and rules for courts and agencies that reasonably objective persons of good will could follow to perform the "functions" and avoid the "malfunctions" of regulation. Neither is concerned with the ability of administrative law's equivalent of Holmes's bad man—the administrator or judge hellbent to impose his own policy preferences—to manipulate their prescriptions.

This utopianism creates a curious yin and yang in Sunstein's position. Even where Congress is silent, agencies and courts are to discover the duties the statute intended. Agencies do not have political discretion not to enforce statutes. Narrow conceptions of cost-benefit analysis ought not excuse failures to implement statutory purposes fully. Interest groups ought not be allowed to capture agencies and dictate duties to the public. Moreover, even government should not impose a duty on the public simply because government thinks it is good for the public. On the other hand, where a statute truly is silent or ambiguous or lists multiple independent duties, courts ought to defer to agency discretion to choose among the lawful alternatives the statute has created. Perhaps greater presidential control of agency rulemaking would better coordinate regulatory policy if the OMB conducted sound regulatory analysis instead of mechanical cost-benefit analysis that systematically underestimates intangible benefits. Interest groups must not capture the agency yet also must have access to agency decision processes. Although government should not impose on the people what is good for them, sometimes the people may legitimately impose what is good for them on themselves.

The tendency of judges to read their own policy preferences into statutes does not discourage Sunstein from proposing activist stat-

utory construction. Nor does he wish to reduce interest group access to agencies simply because, as he notes, maximizing access sometimes facilitates capture. Nor is he suspicious of the people imposing duties on themselves simply because paternalistic governments always impose their paternalisms in the name of the people. Nor does he dismiss OMB regulatory analysis and presidential control simply because the Reagan Administration may do them badly. The wise bureaucrat and the wise judge can make the necessary distinctions.

The centerpiece of Sunstein's idealism is his notion of the "deliberation" that should be central to rulemaking. Although if pressed he might come up with some differences in the way agencies and reviewing courts deliberate, he pretty much envisions both of them as carrying on the same deliberative activity. Almost twenty years ago I wrote a book with the central theme that agencies and reviewing courts necessarily decide issues in roughly the same way,<sup>23</sup> and at the time I was pretty badly manhandled by a legal academic establishment still searching for the holy grail of adjudication as a unique enterprise. Perhaps twenty years of the D.C. Circuit announcing that it was in a partnership with agencies in taking a hard look now allows us to accept this part of Sunstein's argument as a simple statement of fact. I argued twenty years ago that because courts simply make the same decision that the agency has already made and in the same way, courts need some special excuse for doing so. Sunstein's excuse is that courts are politically more insulated and less subject to capture, so they are good overseers of whether agencies have truly deliberated. I do not find that position very realistic. It returns to an idealistic belief in very good judges who do not confuse their own policy preferences with those of Congress or with the self-evident good.

A second interesting feature of Sunstein's "deliberation" is that it purports to incorporate political factors into administrative and judicial rulemaking. Sunstein rejects the Progressive tradition of administration as wholly neutral, objective expertise. At the same time he decries the contemporary tendency to describe administration as nothing but politics. I am not sure exactly how Sunstein mixes politics and objectivity in his deliberation, but the following factors are surely involved. First, where a statute presents a range

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<sup>23</sup> M. Shapiro, *supra* note 21.

of alternative means or ends rather than a single legislative intention, administrators include political considerations in choosing among the lawful alternatives. Second, both agencies and courts must consider the interests of the targets and beneficiaries of regulation. Both of these considerations, however, must be subordinated to an assessment of what would best serve the public interest, particularly in light of the objective knowledge of the proper functions and the malfunctions of regulation as outlined in the initial section of his article.

When Sunstein turns from politics to the public-interest-regarding core of deliberation, the reader discovers a somewhat startling, and to me personally gratifying, development. In a piece written before this one,<sup>24</sup> I made the following argument. Despite the alleged demise of economic substantive due process, the doctrine is alive and well. By developing the preferred position doctrine and by treating the "new" property in government jobs and benefits and in racial and sexual antidiscrimination protections as "civil rights and liberties" rather than economic rights, the courts have effectively stripped economic substantive due process (and equal protection) benefits from Republican clients and transferred them to Democratic clients. Many fundamental economic rights such as the right to a certain job or to a welfare check are protected unless the government can give a very good reason (a "compelling government interest") for taking them away. Just as in *Lochner v. New York*,<sup>25</sup> the ultimate question is whether government's encroachment on an individual's economic interests is reasonable in light of the public interest. I went on to argue that various legal areas exist between the realm of the Constitution and individual statutes in which the same kind of economic substantive due process and equal protection analysis is done and even extended to protection of the "old" property. An illustration of such economic substantive due process analysis is judicial review of rulemaking, in which courts inextricably mix procedural and substantive review in applying the arbitrary and capricious test and in holding agencies to their statutory duties. The ultimate administrative law question in judicial review of rulemaking is identical to the ultimate constitu-

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<sup>24</sup> Shapiro, The Supreme Court "Returns" to Economic Regulations, in *American Political Development* (K. Orren & S. Skowrenck eds., forthcoming).

<sup>25</sup> 198 U.S. 45 (1905).

tional question in economic substantive due process review—is the rule reasonable? In both instances what is or is not reasonable depends on a judicial assessment of the legitimacy and importance of the government's purposes, the appropriateness of the means chosen to achieve those purposes, and the costs to other legitimate interests those means will generate.

I purposely stated the argument in that paper as radically as possible because it is directed to political scientists specializing in American politics, who are even more captive to New Deal legal clichés than are academic lawyers. Even there, however, I felt forced to concede one major point. Recent Supreme Court cases such as "*Benzene*,"<sup>26</sup> "*Cotton Dust*,"<sup>27</sup> and *State Farm*,<sup>28</sup> and even much of the Chicago-style, laissez-faire commentary<sup>29</sup> admit that when courts evaluate the reasonableness question, they must acknowledge that Congress is legitimately entitled to favor some interests over others and that courts should defer to congressional choices.

Professor Sunstein's proclamation of deliberation as a shared style of agency rulemaking and judicial review is nothing less than a hymn to substantive economic due process, and one that reaches higher notes on the scale of judicial activism than I dared attempt. For Sunstein clearly states that one of the malfunctions of regulation that deliberation should prevent is the instance in which the public interest does not justify favoring some private interest. I think Professor Sunstein is saying that courts ought to bar absolutely any rule exhibiting such a malfunction, even when the congressional statute commands it. I am certain he wants courts to interpret congressional statutes as avoiding such a malfunction if possible. Professor Sunstein's favorable citations of Arthur Maass's new book<sup>30</sup> are instructive because that book is the only major recent work on Congress that challenges on both empirical and normative grounds the various fashionable interest-group-serving in-

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<sup>26</sup> *Industrial Union Dept. v. American Petroleum Inst.*, 448 U.S. 607, 641 (1980).

<sup>27</sup> *American Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 512 (1981).

<sup>28</sup> *Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 44-46 (1983).

<sup>29</sup> See, e.g., Easterbrook, *The Supreme Court, 1983 Term—Forward: The Court and the Economic System*, 98 Harv. L. Rev. 4, 45-51 (1984).

<sup>30</sup> A. Maass, *Congress and the Common Good* (1983).

terpretations of Congress and argues that Congress should and does serve the general interest.

Thus, Professor Sunstein's deliberation, conducted in the light of objective knowledge of the functions and malfunctions of regulation, demands from courts a full-scale analysis and decisive determination of the reasonableness of each and every regulatory rule. This is not the old *laissez-faire* reasonableness in which entrepreneurial freedom is the rule and regulation is the exception to be justified by good reasons. It is a more demanding standard of reasonableness: the right rule to achieve the right level of a congressionally mandated public interest. It requires a grant of freedom to the entrepreneur to be justified just as much as an infringement on that freedom. Deliberation is full-scale, complete, objective regulatory analysis conducted first by an agency and then by a reviewing court. In the jargon of decision theory, it is synoptic analysis: it requires an explicitly ordered list of all relevant values, a knowledge of all facts, a canvassing of all alternative policies and their possible consequences, and a choice of the alternative that maximizes the values at the least cost. Only if a correct reading of the statute and a full-scale regulatory analysis lead to the conclusion that a number of alternative rules would be *equally* legitimate may the courts grant the agency some discretion to choose among these alternatives. That discretion may be informed by political considerations, such as interest group desires and presidential policies.

Deliberation allows no exception to the rule that no interest group may be favored at the expense of others without a public interest rationale for doing so. Or perhaps Professor Sunstein would prefer to say that there is a special public interest rationale for some groups. He writes, "regulation may protect interests that are now considered entitlements—with the class of entitlements being defined by reference to values apart from positive law. The best example is protection against discrimination on the basis of race and sex."<sup>31</sup> In short, rights are trumps. If a particular rule serves the interests of a particular group at the expense of other groups without an offsetting public benefit, the rule is unlawful unless somehow that group has acquired a special characteristic, a

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<sup>31</sup> Sunstein, *Factions, Self-Interest, and the APA: Four Lessons Since 1946*, 72 Va. L. Rev. 271, 272-73 (1986).

right or entitlement to its particular interest. If it has such a right or entitlement, then serving its interest at the expense of others is by definition in and of itself in the public interest. Thus, Professor Sunstein imports the preferred position doctrine into administrative law. Whatever special interests an agency or a reviewing judge likes enough become transformed into rights and avoid having their rules subjected to the deliberative criteria applied to all other groups. (Forgive me, that is the bad man speaking. There is no doubt a more idealistic way to put this.)

The deliberative process's favoritism for those endowed with extra-statutory entitlements or rights is one of three places where it is particularly clear that Professor Sunstein's deliberation comes down to helping the good guys. He argues that redistribution of wealth is a legitimate goal of regulation. If, however, redistribution "benefit[s] particular classes for no reason other than political power,"<sup>32</sup> it is not legitimate. And, as noted earlier, the public may bind itself through laws that prohibit the satisfaction of individual consumption choices, but for the government to do so is paternalistic and highly controversial.

Throughout his treatment of deliberation, Sunstein is a genuine child of his time and his environment. He combines an enthusiasm for social justice and equality with an acute Chicago School awareness of regulation's potential to serve special interests and to grant quasi-monopolistic regulatory rents. Deliberators will combine a knowledge of economics and political science with a respect for democratic processes. They will grasp the relevant facts, alternatives, and values. Guided by the purpose of the statute (not the motives of the legislators) found on the face of the statute or through objective construction, deliberation derives *the* correct—or at the minimum *a* correct—rule.

Before turning to the question of where one finds these wonderful people called deliberators, I had better ease the anxiety of those who think they are reading a symposium on the APA and keep mumbling "yes-yes, but what has all this to do with the APA?" There is actually a lot of continuity in the first three contributions to this symposium. Professor Gellhorn alleges that the APA is all right because it did not upset the law actually created by the New Dealers in the thirties when they blocked rightwing

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<sup>32</sup> Id. at 274.

legislation and substituted a well-lawyered committee report and Attorney General memorandum. Mr. Morrison says the APA is fine because its constitution-like flexibility has allowed good lawyers and judges to derive workable procedures. Lastly, Professor Sunstein equates his deliberation requirement with the requirements for dialogue, hard looks, and reasoned decisionmaking that the D.C. Circuit has demanded in APA review for many years.

Therefore, for those who keep murmuring, "Where's the APA?" the answer from Gellhorn, Morrison, and Sunstein is "everywhere *except* in the APA." The substance of the APA really is in the stuff we proregulatory lawyers did seven or eight years before the APA was enacted and the stuff we proregulatory lawyers and judges did twenty or thirty years after its passage. The fact is ignored that the structure of the APA, its sketchy language, the political and administrative ideologies of the times, the compromise nature of the statute, the compromisers' interests, and the contemporaneous statutory interpretation support nothing like today's shift from the quasi-legislative to the quasi-judicial model of rules, reduction in administrative discretion, and judicially enforced demands for synopticism. Gellhorn, Morrison, and Sunstein do not emphasize what William Allen's contribution emphasizes: that Congress and the federal courts have fundamentally changed the rulemaking provisions of the APA through piecemeal statutory provisions and piecemeal judicial decisions. Not only does Professor Sunstein equate deliberation with the case law of the D.C. Circuit, but he follows that circuit by cramming all of his requirements into the words "arbitrary and capricious," thus denying that the statute has been changed. Since *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*,<sup>33</sup> of course, it is no longer fashionable to acknowledge openly that the circuits have created a whole new law of "hybrid" rulemaking. Instead, the circuits' decisions must be packed back into the few relevant words of the APA.

Professor Sunstein does not, however, simply finesse the question of judicial amendment of the APA. Relying on earlier work by Professor Nathanson<sup>34</sup> and recent work of his own,<sup>35</sup> he argues that

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<sup>33</sup> 435 U.S. 519 (1978).

<sup>34</sup> See Nathanson, *Probing the Mind of the Administrator: Hearing Variations and Standards of Judicial Review Under the Administrative Procedure Act and Other Federal Statutes*, 73 Colum. L. Rev. 721 (1975).

<sup>35</sup> See Sunstein, *Interest Groups in American Public Law*, 38 Stan. L. Rev. 29 (1985).

the framers of the APA intended very strict judicial review of rulemaking, perhaps even *de novo* review, because the framers shared the basic deliberation ethic that no interest group should be allowed to capture an agency or otherwise receive benefits at a cost to others without a public interest rationale. Clearly, capture theories were well known to Congress by 1946. The framers of the APA surely intended that agencies not be captured and that they act in the public interest. Not much of this is expressed in the statute, but the framers would no doubt have professed it if asked. Of course, the APA's legislative history, written in the heyday of the New Deal, is full of denunciations of special interests—meaning the business community. And of course the agencies were supposed to serve the public interest as defined by the New Deal.

The question of judicial conduct, however, is a different matter. When Sunstein packs *de novo* review and an independent determination of whether the agency has made a synoptically correct rule into the words "arbitrary and capricious," he certainly proves Mr. Morrison's point that the APA is constitution-like—that one can find any intent of the framers if one looks hard enough. But how hard is it to find this particular intent in the APA? Professor Sunstein finds that the APA did not incorporate the New Deal theory of the thirties and forties of judicial deference to administrative expertise or the sixties' pluralist theory of group struggle, but instead intended to set forth the specific theory of judicial review—deliberative synoptic review—that has become fashionable in the eighties. What a coincidence. In my view the structure, language, New Deal ideology, contemporaneous interpretation, and political compromise background of the APA point in quite a different direction. The basic and in my view insurmountable objection to the argument that the APA requires a very aggressive judicial review of rulemaking, however, rests on the ground that the essential arrangements for such review did not come into existence until at least twenty-five years after its enactment.

There are really two versions of *de novo* review in common law countries. In one, the reviewing court conducts a new trial, collecting its own evidence and compiling a trial record that it then evaluates. In the other, which is only quasi-*de novo* review, the review-

ing court makes its own independent evaluation of the facts, but it does so on the basis of the trial record compiled by the original finder of fact. No one has ever suggested that the framers of the APA intended courts reviewing rulemaking to conduct a new trial to gather facts. Such an expectation would have run counter to the entire structure of the APA. It would have required courts to conduct a more complete adjudicatory proceeding in rulemaking review than in judicial review of agency adjudications, where courts were specifically instructed to act on the basis of the agency-compiled record. No court has ever felt called upon to conduct a *de novo* review of a rulemaking proceeding in this sense. Indeed, most statutes providing for direct review of rules vest jurisdiction for such review in the courts of appeal—courts ill-suited to conduct trials.

Since the mid-1960's, many courts have declared that in reviewing rules they will review the sufficiency of factual evidence and act as a partner to the agency in evaluating factual issues. These courts could not undertake this task, however, until they had invented a practice that clearly is not in the APA, namely the rulemaking record. The reviewing courts of the sixties were not prepared to hold trials. They could not conduct *de novo*-style independent fact determination unless they had an agency rulemaking fact record to review.<sup>36</sup> So they invented the rulemaking record requirement. The APA of 1946 could not function as a legitimator of quasi-*de novo* review until this invention of the sixties, an invention that was clearly seen at the time as an innovation and was recognized as such by Congress when it began to use special language requiring such a record in some regulatory statutes.

The APA clearly requires a record in adjudications. In contrast, it omits any record requirement from the closely juxtaposed sections on rulemaking, and it specifically requires only that the agency accompany its rule with a "concise general statement of basis and purpose."<sup>37</sup> It was the orthodox teaching of administrative law for many years that when Congress used the word "record" in a new regulatory statute it intended adjudicatory procedures, and the absence of the word indicated its intent to authorize notice and comment rulemaking. Of course, given the nature of the APA as a

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<sup>36</sup> See 5 K. Davis, *supra* note 18, at 458-464, 488-496.

<sup>37</sup> 5 U.S.C. § 553(c) (1982).

compromise between those on the New Deal left desiring the dominance of administrative discretion and expertise and those on the New Deal right seeking to rein in the administrative state, there are necessarily bits and pieces of praise for judicial review in the legislative history. It is a complete anachronism, however, to read the 1946 words "arbitrary and capricious" as requiring a level of review that did not and could not have existed until the judicial innovations of the sixties. To do so completely reverses the traditional understanding of the APA compromise by insisting that agency rulemaking is subject to more judicial review than agency adjudication.

If one is no more persuaded by Nathanson and Sunstein on the intent of the framers of the APA than by dozens of major commentators on the intent of the Constitution's framers, one arrives at the real question more directly. Were the courts right in moving to deliberative review? Should the APA be amended to approve this judicial lawmaking?

Professor Sunstein's deliberative review is economic substantive due process review. Ultimately, courts simply decide whether the rule being reviewed is reasonable or unreasonable. Deliberative review also is the hinge of synopticism. Courts dictate whether a given rule need or need not be based on completely certain knowledge of all facts, values, alternatives, and consequences. Courts decide whether the uncertainties are so irresolvable that the agency will not have to know everything perfectly before it makes a rule. And courts demand of themselves that they learn everything or at least everything knowable, for otherwise they cannot judge whether the agency has deliberated well.

Professor Sunstein is an idealist. He believes that two deliberative heads, an agency and a court, are better than one. He does not see either of the dark sides to deliberation that I see. The first has already been noted—that the demand for synoptic deliberation encourages agencies to disguise exercises of discretion as exercises of objective synopticism. The second is the obvious one that judges doing economic substantive due process review historically have tended to confuse their own policy preferences with deliberative truth. Indeed, to the degree that judges are encouraged to deliberate, Presidents are surely going to be inclined to appoint right-thinking deliberators, particularly to the D.C. Circuit. Thus, preaching deliberation as a judicial role is likely to be self-defeat-

ing because it undermines the apparent political neutrality of judges, which is the rationale Professor Sunstein offers for giving reviewing courts a second round of deliberation after the agencies have conducted a first round.

I emphasize, however, that no matter how little the proponents of judicial restraint may be convinced by Professor Sunstein's reading of the APA or by his proposals for a deliberative style of judicial review, much of Sunstein's program is now being carried out in the courts and applauded by many influential commentators. Courts reviewing rulemaking have forced agencies at least to pretend they are deliberative in Sunstein's sense, and the courts themselves are trying to deliberate in Sunstein's sense. Economic substantive due process as substantive review of the reasonableness (read correctness) of rules is alive and well in the D.C. Circuit's clear error/hard look, synopticism-demanding version of "arbitrary and capricious," a version the Supreme Court ringingly endorsed in the *State Farm* decision.<sup>38</sup>

By only slightly different routes Mr. Morrison and Professor Sunstein converge to present a picture of a deliberate, due process, synoptic fourth branch of government that does the right thing under the vigorous regulatory statutes of the sixties and seventies no matter what has happened in the elected branches since those years. Morrison and Sunstein may have some family arguments over the relative power of agencies and courts within this branch, but they agree on the essential features of independence. Courts and agencies should unite in their joint duty of vigorously, completely, and correctly serving the intentions of Congress that they discern in the statutory language of the sixties and seventies, no matter what the current political climate may be. Together they should construct an administrative law of statutory duty that empowers courts to order agency staffs to execute those duties even when their political superiors try to stop them. Courts should im-

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<sup>38</sup> See *Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 40-44 (1983). Sunstein, like Morrison, applauds *State Farm*, but he denigrates *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), because it deferred to the agency. One should not pretend to be fooled by the language of *Chevron*, however, because obviously the Court does not defer to the agency. It simply agrees that the regulatory policy adopted by the agency is a good one. *Chevron* is as much an example of deliberation as *State Farm*, although some of us may like the outcome in one better than the outcome in the other.

pose synoptic demands that place ultimate power in the technical personnel who are the only people with the expertise to meet such demands. Both Morrison and Sunstein insist on "public interest"-oriented "deliberation" by the agencies as opposed to obedience to outside political influence. Accordingly, the fourth branch will not only preserve the great enthusiasms of the sixties and seventies but also can finally wash away the unprincipled concessions to the special interests that were necessary at the time to get the bills passed. The statutory language and legislative history planted then can come to full fruit now.

The only possible shadow on this vision is that deliberating courts might be prepared to see the ambiguity of the statutes that Mr. DeLong highlights rather than reading only the statutes' editorial sections. Some risks of this kind just may be a price the agencies have to pay if they use the courts to keep the political executives off their backs.

### III. THE FUTURE OF THE APA: PROPOSALS FOR AMENDMENT

The contributions of Professors Gellhorn and Sunstein and Mr. Morrison tell us an enormous amount about administrative law's past and the current state of its evolution. What of its future? In his contribution to this symposium, Marshall Breger sets the stage for a discussion of amending the APA. The symposium as a whole, however, says little about doing so. It is worth investigating this uncharacteristic bashfulness among lawyers writing about a major statute.

Mr. Breger, echoed by Mr. DeLong and by Mr. Allen's talk of oxen being gored, argues that administrative law questions have now been revealed to be political questions. He says that today's political scene contains too many powerful political actors with too many conflicting interests to allow an easy recasting of the old balance of interests represented by the original APA. Breger and Allen make this point in the course of describing various attempts to amend the APA. Before discussing those attempts, however, it may be well to digress to point out the obvious. The basic reason there is little attention anywhere to amending the APA is that most of the administrative law we are interested in preserving or changing is not in the APA but in subsequent law made by the courts, by Congress in recent statutes establishing and modifying new agencies and programs, by the agencies themselves, and by the presi-

dency. Mr. Allen's analysis is particularly acute in his discussion of the chaos of special provisions in post-APA legislation and in his descriptions of courts' creative interpretation. Those who want to amend the APA for the most part really mean that they wish to use amendments to the APA to reinforce or modify post-APA developments.

Nevertheless, the participants in this symposium do suggest one kind of relatively routine, relatively nonpolitical amendment of more or less the original APA itself, and that is in the area of formal adjudication. In reviewing past attempts to amend the APA, Mr. Breger and Mr. Allen note an increasing interest since the fifties in strengthening parties' procedural guaranties in agency adjudications. And Professor Bonfield's review of state experience suggests that the APA probably errs in establishing a single and very rigorous set of procedures for all types of "formal" adjudications and ignoring all those that we call "informal."<sup>39</sup>

Reading some of the Bonfield and Breger comments together, one might argue for the following. The APA should be amended to recognize three general types of administrative adjudication. The first is characterized by a very large number of claims, typically for pension, welfare, disability, or health benefits, most of which involve basic fact determinations that recur in case after case and infrequently raise questions of policy or law. For such proceedings, APA amendments might provide for greater separation of functions, slightly stricter procedural rules, and somewhat more stringent judicial review than is currently provided. A second type of adjudication concerns the mix of particularized considerations of past conduct with considerations of agency policy and expertise that characterize most regulatory agency adjudication under sections 556 and 557. The current APA provisions are appropriate and ought to remain in force for this type of adjudication. Informal adjudication is the third type of adjudication, and the APA might be amended here to provide some modest procedural rules. Such rules should be constructed through a specific inquiry into existing agency practices, similar to the inquiry Professor Gellhorn describes as leading up to the original sections 556 and 557.

In addition, Professor Bonfield suggests a return to the problem

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<sup>39</sup> See 5 U.S.C. §§ 556-557 (1982).

of *NLRB v. Bell Aerospace Co.*<sup>40</sup> Perhaps APA amendments should make exceptions for the particular situation of the NLRB and a few other agencies and require all others to promulgate general policies by rulemaking subject, of course, to whatever exceptions Congress wishes to make in future statutes establishing new agencies and programs.

Such a program of amendments to the APA's adjudicatory provisions would not be entirely noncontroversial, but it at least seems reasonable and feasible, unlike nearly every proposal for modifying the APA's rulemaking provisions that has ever come up. If one dared propose a program to modify the law of rulemaking, it would divide roughly into five parts: rulemaking procedures; standards of judicial review; regulatory analysis, coordination of regulation, and interbranch relations; court authority to order the agencies to make rules; and agency discretion.

### A. Rulemaking Procedures

Mr. DeLong's distinction between procedures and processes is relevant to the first part of the program, rulemaking procedures. Although the surface message of *Vermont Yankee* is that courts cannot go beyond the minimum procedural demands of the APA,<sup>41</sup> the courts have still done so, and the Supreme Court's *State Farm* decision supports the practice.<sup>42</sup> Mr. Allen prefers to emphasize the expanded concise and general statement requirement. I have emphasized the rulemaking record requirement. None of the contributors would deny that hybrid rulemaking procedures are now in place.

The Breger-Allen review of congressional developments and Mr. DeLong's comments on regulatory statutes demonstrate that congressional attempts to provide statutory backing for these expanded procedures began in the sixties, were central to the omnibus procedures bills nearly enacted in the late seventies and early eighties, and became piecemeal parts of many other statutes authorizing particular agencies and programs. Yet I doubt that the

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<sup>40</sup> 416 U.S. 267 (1974).

<sup>41</sup> See *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 523-25 (1978).

<sup>42</sup> See *Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 46-51 (1983).

logical, progressive thing to do today is to lock the court cases of the sixties and seventies into a statute.

A growing consensus now exists that informal rulemaking has become too formal and thus too cumbersome and time-consuming, but almost no one is inclined to make definitive corrections. The disinclination is a result of a basic political dilemma. In the sixties and seventies those favoring very vigorous environmental, safety, and health regulation favored the elaboration of procedure because more procedure slowed down what they wanted to slow down: the licensing of drugs, the granting of new construction permits, the draining of swamps, and so on. By the eighties these proregulatory forces had reached the stage where they wanted the government to move not slower but faster—faster in making rules implementing the great statutory victories of the previous two decades. They began to talk about negotiated rulemaking and environmental mediation to expedite regulation.<sup>43</sup> On the other hand, they must worry that if procedures are simplified and streamlined, then deregulation can come faster too. Speeding up regulatory response time is not worthwhile until there is reasonable assurance that the deregulation movement has subsided. Similarly, deregulatory forces necessarily and rightly continue their fear of quick and easy rulemaking processes. As annoying as hybrid procedures may be at the moment in hampering the dismantling of rule structures, they nonetheless help keep them from coming back.

Beyond procedures, the same things may be said for what Mr. DeLong calls processes. Proregulatory forces spearheaded the demand for synoptic decisionmaking processes when such demands would prevent the Nuclear Regulatory Commission from ever issuing a nuclear power license. Now when they demand that an agency meet its statutory duty to make new rules, the Reagan deregulators respond that a really perfect analysis of the problem will take a month of Sundays. Both sides have learned to use synoptic demands to delay their opponents. Neither side likes such demands, but neither is willing to give them up.

Even those, like myself, who wish to cut back on synoptic process would be hard put to know how to amend the APA to do so.

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<sup>43</sup> See, e.g., Harter, *Negotiating Regulations: A Cure for Malaise*, 71 *Geo. L.J.* 1 (1982); Stewart, *Regulation, Innovation, and Administrative Law: A Conceptual Framework*, 69 *Calif. L. Rev.* 1256, 1263 (1981).

The synoptic demand is not in the APA but in the case law. The case law expresses the demand so elliptically that specific changes in the procedural provisions of the APA probably could not cut back on it.

### B. *Standards of Judicial Review*

A concern for synoptic processes brings up the second item in the reform program, judicial review standards. It is notoriously difficult for Congress to find statutory language to instruct courts on the precise level of review desired. Nevertheless, it is possible to find language for statutes and for committee reports that clearly tells courts that Congress wants more or less review than the current practice. For instance, Congress could explicitly reject the clear error standard and state that "arbitrary and capricious" means a conclusion that no reasonable person could accept. It could explicitly state that an agency need not respond to all imaginable issues but need only respond to those that parties raise. It could even instruct courts that the agency need not respond to all issues raised but need only present some good reasons for doing what it is doing—that is, that "arbitrary and capricious" demands less of an agency than does "substantial evidence," rather than vice versa, as the courts currently have it.

Alternatively, Congress could explicitly enact the hard look concept in less colloquial language. Or perhaps the President can better convey such messages through his appointment power. Jawboning the courts with law review articles and briefs may be effective, too. Whatever the route chosen, however, we have to decide on more or less judicial review both in terms of how much "deliberation" a court itself actually does and how much synopticism it demands of the agency. I leave further discussion of synopticism to the section on discretion,<sup>44</sup> but even the deliberation question is tough enough.

Deliberation raises too many self-contradictory urges among the political actors to promise easy APA amendment, consensual jawboning of the courts, or effective presidential appointment strategies. As Mr. Breger notes, congressional conservatives pushed

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<sup>44</sup> See *infra* text accompanying notes 51-56.

the Bumpers Amendment<sup>45</sup> in the sixties and seventies. It required that courts defer neither to agency discretion in rulemaking nor to agencies' statutory interpretations. Frankly, one wonders why conservatives supported the Amendment during that period. Given the composition of the D.C. Circuit, a transfer of policymaking power from agencies to courts would have been out of the frying pan and into the fire seven cases in ten. Maybe the Bumpers Amendment did not become law because it did not seem like a good idea to smart conservatives, given the composition of the bench at the time.

The antibureaucratic forces who supported the Bumpers Amendment failed to understand some crucial facets of internal agency affairs and their relation to the presidency. The President's appointees to an agency often have grave difficulties controlling the substantive details of proposed rules because those details depend on the technical knowledge and analytical skills of the agency's long-term employees. The political appointees can better control the agency's general position toward the meaning of the statutes governing its programs, however, and they can use that influence to control their technocratic subordinates. Thus, directing courts not to defer to agencies' statutory interpretations sets the stage for an alliance between judges and technocrats that will interpose judicially defined statutory duties to shield long-term employees from the control of their political superiors and ultimately from presidential control.<sup>46</sup>

If some conservatives were smart enough not to pass more power to liberal D.C. Circuit judges, liberals saw no reasons to tamper with the existing level of review. Judicial review tended to help liberal causes, at the first stage to delay private economic initiatives requiring government approval, and at the second stage to flavor the new regulatory statutes with the D.C. Circuit's agency-

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<sup>45</sup> S. 1080, 97th Cong., 2d Sess. § 5, 128 Cong. Rec. 5302 (1982).

<sup>46</sup> It is for this reason that Professor Sunstein expresses such great concern for *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and other similar cases in his contribution to this symposium and in an earlier article, Sunstein, *Reviewing Agency Inaction After Heckler v. Chaney*, 52 U. Chi. L. Rev. 653, 660-61 (1985). He understands the paradox that the doctrine of independent judicial statutory interpretation actually strengthens the agency's long term independence by giving it a statutory duty beyond presidential control and that the doctrine of deference to agency statutory interpretation actually reduces that independence by giving more power to presidential appointees.

forcing. Today, liberals find the courts helpful in delaying and even preventing deregulation. The Bumpers-style, anachronistic, sentimental hope that the courts will go back to saving citizens (read corporations) from bureaucrats is kept alive only by the appointment potential of a Republican President.

Those who have oxen to be gored will not settle on either preserving or cutting back on the current high level of judicial review until they are certain of the D.C. Circuit's political composition. After the Democrats captured the Supreme Court in 1937, they broke into two wings (judicial self-restraint versus preferred position judicial activism) that fought for the next thirty years about whether they should shut the Court down or use it to Democratic advantage. If conservatives capture the D.C. Circuit, the same thing is likely to occur. Those scarred by the activism of the sixties and seventies will opt for judicial deference to the agencies. Happier conservative warriors will want to use the court to do battle with the liberal bureaucrats. The political picture simply is not clear enough to get a consensus among liberals or conservatives, let alone both, as to whether more or less review in general is desired.

### *C. Regulatory Analysis, Coordination Among Agencies, and Interbranch Relations*

The third element of the reform program concerns the very complex issues of regulatory analysis, executive versus congressional control of the agencies, and the independence of the bureaucratic fourth branch. A major feature of the various proposals for APA reform and, as Mr. Breger shows, one of the main reasons for their failure, has been an interest in regulatory analysis. Professor Sunstein rightly warns against the more crude forms of cost-benefit analysis. To the degree that Mr. DeLong is correct in describing the regulatory statutes of the sixties and seventies, regulatory analysis tends to undercut their technology-forcing and agency-forcing vigor and their inattention to costs when stating their goals. In addition, most proposals to expand regulatory analysis place large responsibilities for that function in the Executive Office of the President, usually in the OMB. To the extent that regulatory analysis requires attention to the interaction between diverse regulatory programs conducted by a large number of agencies, regulatory analysis proposals inevitably also tend to strengthen the presidency vis-à-vis the multitude of bureaucracies. Coordination can

be accomplished at no other level. Thus, those interested in creating an independent fourth branch are not much in favor of regulatory analysis per se.

Nevertheless, what we are getting, willy nilly, is more and more agency-by-agency regulatory analysis without its coordinating aspects and thus without its President-strengthening aspects. For as courts insist that agencies act synoptically, the agencies must do more and more analysis. This analysis, however, empowers the technocrats rather than providing a coordinating or a political brake on them. Regulatory analysis, *done within each agency*, gives power to the technicians within each agency who necessarily must conduct it.

Regulatory analysis is therefore inevitably a President-versus-technocrat issue. Certainly no consensus exists on this issue either in or out of Congress, so a major statutory amendment is unlikely. As a number of the contributors note, Presidents since at least the Ford Administration have increasingly used the Executive order to impose regulatory analysis requirements and centralize them in OMB. In an earlier article Professor Bonfield has noted increased centralized clearance of new rules in many states.<sup>47</sup> Only if those favoring an independent fourth branch can persuade courts that agencies are exclusively the servants of their statutes and not the servants of the President is there likely to be a major change from the status quo—congressional silence and presidential action. Courts enamored of fourth branch theories could, of course, radically reduce the OMB's power over rulemaking. Again, presidential judicial appointments may be the crucial avenue for controlling the direction of administrative law.<sup>48</sup>

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<sup>47</sup> Bonfield, *State Law in the Teaching of Administrative Law: A Critical Analysis of the Status Quo*, 61 *Tex. L. Rev.* 95, 114-15 (1982).

<sup>48</sup> Regarding changes in administrative law that implicate relations among the branches, one should also note that in spite of *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919 (1983), Congress continues to use the legislative veto device. See Fisher, *Judicial Misjudgments About the Lawmaking Process: The Legislative Veto Case*, 45 *Pub. Admin. Rev.* 705 (1985). It remains to be seen whether the Supreme Court will accept the newer versions. Here again Congress' style is piecemeal legislation rather than amendment of the APA. And those who wish to sustain the veto must do so not by amending the APA but by persuading judges, particularly conservative judges, not to see the issue as one pitting Congress against the President but as one of political control over technocratic autonomy.

#### D. *Judicial Authority to Order Rulemaking*

Mr. DeLong vividly describes one of the most important new phenomena in administrative law, the mustering of proregulation forces to invent a new body of case law authorizing courts to compel agencies to make rules. Professor Sunstein also briefly summarizes the thoughts on this subject he has offered at greater length in an earlier article.<sup>49</sup> The development of such a body of law is essential for those who want to stop Reagan-style deregulation and establish an independent fourth branch. Ordering rulemaking empowers technocrats because the choice between making or not making a rule is far more subject to the control of agency political appointees than the substance of a rule once the duty to enact it is imposed. Here again, sufficient political conflict exists to make unlikely an amendment to the APA, which is basically silent on the question, and the case law will probably remain as mixed as the Supreme Court's decisions in *State Farm*<sup>50</sup> and *Heckler v. Chaney*.<sup>51</sup>

Quite apart from the lack of political consensus, courts face a kind of Catch-22 in this area. The more synopticism the courts demand in agency rulemaking, the more difficult it is for courts to order agencies to make rules. Agencies ordered to make a rule will reply that they must first complete a synoptic analysis, which may take an indefinite period of time. Moreover, agencies hold the hole card: they may make a rule as ordered but do it so badly that the rule flunks synoptic judicial review tests. *State Farm* and the whole situation teach that wise courts should never order agencies to make rules unless the agency itself so hates the existing rule or the absence of any rule that it has incentives to do a good job of making a new rule.

#### E. *Agency Discretion*

In a sense the concern over orders to agencies to make rules is part of a larger concern with judicial supervision of agency discretion. If one constructed a very broad evolutionary analysis from

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<sup>49</sup> See Sunstein, *supra* note 46.

<sup>50</sup> *Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).

<sup>51</sup> 105 S. Ct. 1649 (1985).

Professor Gellhorn's, Mr. Breger's, and Mr. Allen's discussions of the history of the APA and Mr. DeLong's analysis of the discretion issue, the following picture would emerge. The APA generally codified the best preexisting agency practices and case law concerning adjudication, even though some amendment of sections 556 and 557 might now be in order. The APA took some initial stabs at rulemaking, and although the prospects that Congress will complete the job are dim, later case law and piecemeal procedural provisions in the newer regulatory statutes have more fully fleshed out the law of rulemaking. Finally, the picture shows that the APA was almost totally silent about agency discretion. Thus, the next logical place for administrative law to advance is discretion—the last area that has not been brought under a detailed regime of law.<sup>52</sup>

Some movements in that direction have already occurred. Federal courts have steadily narrowed the boundaries of agency action that are within the domain of nonreviewable discretion. Several attempts to amend the APA have sought to eliminate some of its exceptions from judicial review. Some things that might be called discretion are today spoken of instead as informal adjudication, and the interest in extending the categories of APA-regulated adjudication has already been noted. Furthermore, there is increased interest in agency discretion not to make a rule and in waiver and exceptions procedures.

In examining what might be next, one must consider two aspects of discretion: the discretion embedded in rulemaking and discretion in the residual sense of all other government decisions that are not adjudication or rulemaking. As for discretion in rulemaking, I interpret the synoptic demands that courts have made as an attempt to eliminate discretion. To say that an agency must derive the correct decision in the correct way is to deny that it has discretion. Colin Diver has recently advised courts to impose synopticism when synopticism is appropriate and not to impose it when it is not.<sup>53</sup> Professor Sunstein pretty clearly agrees with him. The defenders of synoptic deliberation, however, would say that they are not reading political judgment out of rulemaking. Their synoptic decisionmaker must heed all relevant values, but his political position may determine the priority he assigns them. I think this view

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<sup>52</sup> See Shapiro, *Administrative Discretion: The Next Stage*, 92 *Yale L.J.* 1487 (1983).

<sup>53</sup> See Diver, *supra* note 21, at 396-99.

underestimates certain dynamics of the relationship between courts and agencies when synoptic demands are made.

One of these dynamics was raised above. Agencies subjected to synoptic demands are likely to disguise their discretion in selecting high- or low-end estimates of risks or of costs and benefits, and in choosing which of a series of highly uncertain scenarios to use to predict the outcomes of alternative rules. They will tend to say they have considered everything and reached the right result rather than they have considered everything and made their best guess, the guess partly determined by political preferences. Thus, synoptic demands are likely to drive rulemaking discretion underground where it will be less subject to any kind of control.

Second, synoptic demands combined with adjudicatory-style rulemaking leads to a curious "blanketing in" phenomenon. When civil service reformers pressed the bad old political machines, the machines gave their supporters every government job in sight, then put those jobs under the new civil service regime with the provision that the current job holder keep the job and be fired only for good cause. Similarly, when courts turn rulemaking into an adjudicatory process, they begin to pretend that an existing rule is not just the product of the last administration's discretion but is the right answer to the legal questions posed by the statute. Thus, it is not enough for a new administration to say, "If it had been us making the rule back then, we would have made a different rule, so now we make a different rule." Instead, courts tend not to allow a new administration to change a rule, just as judges cannot overrule precedent, unless it can prove that the old rule was wrong and the new rule is right.

Synopticism aggravates this phenomenon in two ways. First, because agencies pretend they are right when they make a rule, the old rule looks more right than it would if the old administration had admitted its discretion. Second, the new administration cannot change the old rule unless it successfully pretends that it has acted more synoptically than the old administration and thus has come to an even more right answer. Consequently, the first rule made gets blanketed in, to be "fired" only for good cause. That is, whatever politically motivated rule is made first stays in effect, even if the other side wins the next election, unless and until the other side comes up with good reasons for jettisoning the rule. That the rule is Democrat and the administration is Republican

does not count as a good reason.

Although the *State Farm* decision pays lip service to the importance of whether the Republicans or the Democrats control the presidency, its basic structure is adjudicative-synoptic. It treats the old rule as the precedent, as the law, not as simply one discretionary choice made at one time by one administration among an array of possible rules, many of which would have been lawful then and would be lawful now. The decision also prevents the current administration from changing the old rule unless it can prove that the old rule is wrong. Furthermore, it prohibits agencies from changing the old rule unless it engages in a fully synoptic process that proves the new rule is more right than the old rule.

For those of us who want to resist the courts' wholesale synoptic attack on rulemaking discretion, probably the only route open is the one taken here. We must simply persuade judges and lawyers to reemphasize the political, discretionary, incremental nature of rulemaking.

The second type of discretion is discretion in the more general sense of the whole range of government decisions that are neither rulemaking nor adjudication. From the standpoint of those who see administrative law as the progressive enfolding of all administration under a regime of judicially supervised rules, discretion is the last great frontier for further development of the APA and of administrative law generally. There is a growing body of academic writing on the subject. The Supreme Court itself opened the issue in *Citizens to Preserve Overton Park v. Volpe*,<sup>54</sup> where it suggested that discretionary decisions ought to be made by a procedure similar to notice and comment rulemaking procedures. The recent uneasiness with the cumbersomeness of notice and comment procedures, however, probably indicates that little enthusiasm exists for this solution. Nor has the substitution of a regime of strict rules for one of professional, expert discretion in welfare administration proven very popular.<sup>55</sup> I would be foolish to venture far beyond this point, particularly because none of the other contributors to the symposium have discussed discretion at length. Yet, at least for the record, it ought to be said that the APA almost completely

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<sup>54</sup> 401 U.S. 402, 413-14 (1971).

<sup>55</sup> See J. Handler, *Protecting the Social Service Client: Legal and Structural Controls on Official Discretion* 3-72 (1979).

ignores discretion, and so has the subsequent case law. One of the great tasks of future revisors of the APA is to specify what kinds nonadjudicatory, nonrulemaking acts of government are to be subjected to what kind of procedural rules and judicial review. Perhaps it is nearly time for another Walter Gellhorn to take a careful look at all the agencies, select the best examples of all their procedures, and then tell us what to do.<sup>56</sup>

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<sup>56</sup> Given the nature of the rest of the symposium, I have not really had a chance to comment on Ronald Cass's more theoretical, speculative, and exploratory piece. Clearly his attack on the extreme models of rulemaking and adjudication and his alternative model, see Cass, *Models of Administrative Action*, 72 Va. L. Rev. 363, 395-98 (1986), may prove of great value in any future attempt to do something about the law of discretion, both the discretion employed in the rulemaking process and the general residual area of discretion that lies outside adjudication and rulemaking.