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## "Relative Checks": Towards optimal Control of Administrative Power

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“RELATIVE CHECKS”: TOWARDS OPTIMAL CONTROL OF  
ADMINISTRATIVE POWER

DAVID S. RUBENSTEIN\*

ABSTRACT

*Administrative agencies wield a necessary but dangerous power. Some control of that power is constitutionally required and normatively justified. Yet widely discordant views persist concerning the appropriate means of control. Scholars have proposed competing administrative control models that variably place the judiciary, the President, and Congress at the helm. Although these models offer critical insights into the institutional competencies of the respective branches, they tend to understate the limitations of those branches to check administrative power and ultimately marginalize the public interest costs occasioned by second-guessing administrative choice. The “relative checks” paradigm introduced here seeks to improve upon existing models in at least two critical respects. First, it posits the existence of an optimal control point within the shared values of two sometimes competing missions in administrative law: that of promoting the public interest and that of legitimizing administrative power within our constitutional scheme. Next, the paradigm argues that the optimal control ideal can be best realized by tailoring both the source and degree of administrative control to particular types of administrative actions with sensitivity to the institutional competencies of the respective checking bodies. Prescriptively, this framework seeks to apportion control among the respective branches in a way*

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*that capitalizes on each branch's competencies while democratically promoting the public interest. Descriptively, looking through a relative checks lens may also enhance our understanding of existing administrative practices and the academic critiques thereof.*

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## INTRODUCTION

Administrative agencies wield a necessary but dangerous power.<sup>1</sup> Some control over that power is constitutionally required and normatively justified.<sup>2</sup> But widely discordant views persist concerning the appropriate *means* of administrative control. The problem is complex, and the stakes are escalating: Congress recently armed agencies with unprecedented sums of money;<sup>3</sup> President Obama is restructuring executive review of agency policy in response to perceived failures of the Bush administration;<sup>4</sup> and the financial and health industries are targeted for sweeping regulatory growth.<sup>5</sup> As both the necessity and danger of administrative power reach new levels, a more tailored approach to administrative control than presently exists is desperately needed. The “relative checks” paradigm introduced here seeks to fill that void.

The administrative-control puzzle is complicated by the need to balance the virtues of administrative power against the costs of over- or underchecking it by the various branches of government.

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1. See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2255 (2001) (noting that many regulatory statutes confer agencies “open-ended grants of power,” which may include “major questions of public policy”); Richard J. Pierce, Jr., *The Role of Constitutional and Political Theory in Administrative Law*, 64 TEX. L. REV. 469, 472-81 (1985) [hereinafter Pierce, *Constitutional and Political Theory*] (concluding that agency discretion in formulating social policy is virtually unbounded).

2. See *infra* Part II.

3. See Editorial, *A Congressional Bonus*, WALL ST. J., Feb. 26, 2009, at A12 (reporting the 8 percent increase in administrative funding approved for Fiscal Year 2009); Recovery.gov, Agency Reported Data, <http://www.recovery.gov/Transparency/agency/Pages/AgencyLanding.aspx> (select individual agencies from pull-down menu) (last visited Mar. 4, 2010) (listing Recovery Act funds appropriated to federal agencies); see also Elizabeth Williamson & Melanie Trotman, *Federal Workers, Regulations To Increase*, WALL ST. J., May 8, 2009, at A4 (discussing Obama’s request for increased funding).

4. See Exec. Order No. 13,497, 74 Fed. Reg. 6113 (Jan. 30, 2009) (repealing Bush’s Executive Order concerning executive review); Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 5977 (Feb. 3, 2009) (instructing the Director of the Office of Management and Budget, in consultation with executive agencies, to propose restructured presidential oversight of administrative policy).

5. See, e.g., Helene Cooper, *Obama Pushes Financial Regulatory Overhaul*, N.Y. TIMES, Jun. 21, 2009, at A20 (reporting on Obama’s mission to overhaul the financial regulatory system); Robert Pear & David M. Herszenhorn, *As Bombast Escalates, a Primer on the Details of the Health Care Overhaul*, N.Y. TIMES, Aug. 10, 2009, at A8 (noting the “sweeping” regulatory changes envisioned by health reform bills).

Scholars have proposed competing models of administrative control that variably place the judiciary, President, or Congress at the helm. The judicial-control model posits that courts, by virtue of their political independence and sensitivity to legal norms, provide an essential check on administrative action.<sup>6</sup> The presidential-control model, instead, relies on the President's national accountability and influence over administrative policy as democratizing forces.<sup>7</sup> Meanwhile, the congressional-control model boasts of Congress's lawmaking pedigree and its ability to control administrative action through legislative power, committee pressure, and other modes of influence.<sup>8</sup> These models, insofar as they aim to legitimize administrative power, offer critical insights into issues of administrative control. But their shortcomings are twofold: they tend both to overstate the institutional competencies of the respective branches to control administrative power, and they tend to marginalize the public-interest costs occasioned by second-guessing administrative choice.

The relative checks paradigm seeks to improve upon existing administrative-control models in at least two critical respects. First, the paradigm posits the existence of an optimal-control point that strikes a balance between the costs and benefits of administrative control. Next, I argue that the optimal-control ideal can be best realized by (1) tailoring both the source and degree of adminis-

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6. See LOUIS L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 320 (1965) ("The availability of judicial review is the necessary condition, psychologically if not logically, of a system of administrative power which purports to be legitimate, or legally valid."). See generally Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452 (1989) [hereinafter Farina, *Statutory Interpretation and the Balance of Power*] (arguing for independent judicial review of administrative interpretations of law).

7. See generally Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23 (1995) [hereinafter Calabresi, *Some Normative Arguments*] (making the case for a strong unitary executive generally and in our burgeoning administrative state particularly); Kagan, *supra* note 1 (arguing that the presidential-control model provides transparency about administrative issues and ensures responsiveness to the public).

8. See, e.g., Jack M. Beer mann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61, 103 (2006) [hereinafter Beer mann, *Congressional Administration*]; see also Mark Seidenfeld, *A Big Picture Approach to Presidential Influence on Agency Policy-Making*, 80 IOWA L. REV. 1, 9-10 (1994) [hereinafter Seidenfeld, *A Big Picture Approach*] ("[C]ongressional monitoring and after-the-fact restraints provide an important check on agency decision-making.").

trative control (2) to particular types of administrative actions (3) with sensitivity to the institutional competencies of the respective checking bodies.<sup>9</sup> Prescriptively, this approach seeks to apportion control among the tripartite branches in a way that democratically promotes the public interest. Descriptively, looking through a relative checks lens may also enhance our perspectives on existing administrative practices and the critiques thereof.

Part I of this Article contextualizes the rather uneasy place of the administrative state within our tripartite system of government and highlights the potential virtues of administrative power. As free-market solutions prove inadequate to deal with emerging economic and social conditions, Congress assumes increasing regulatory responsibility.<sup>10</sup> But Congress’s ability or desire to legislate with specificity over this broadened public law spectrum wanes in negative proportion.<sup>11</sup> The result is significant policy vacuums within the regulatory territories staked by Congress.<sup>12</sup> In filling that void, agencies offer resources, expertise, and flexibility not generally enjoyed by the judicial or political branches.<sup>13</sup> Indeed, for these

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9. See *infra* Part III.

10. See Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 363 (1986) [hereinafter Breyer, *Questions of Law and Policy*]; see also JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 14 (1938) (noting the rise of congressional regulation during the New Deal Era); Yvette M. Barksdale, *The Presidency and Administrative Value Selection*, 42 AM. U. L. REV. 273, 274 (1993) (“Administrative agencies address value-laden issues ranging from conflicts between environmental, health and safety, and economic values, to conflicts between different moral, ethical, or political versions of society.”).

11. Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1518 (1992) [hereinafter Seidenfeld, *A Civic Republican Justification*] (“[T]he New Deal contemplated that Congress should identify an area in need of regulatory control and turn the expert agency loose to regulate.”); Richard B. Stewart, *Administrative Law in the Twenty-First Century*, 78 N.Y.U. L. REV. 437, 440 (2003) (“The New Deal Congress created a raft of new federal regulatory agencies and endowed them with very broad powers through open-ended statutes.”).

12. Breyer, *Questions of Law and Policy*, *supra* note 10, at 363 (“[G]overnmental intervention... means regulation by administrators acting under generally worded congressional delegations of broad policymaking authority.”); Jonathan T. Molot, *Reexamining Marbury in the Administrative State: A Structural and Institutional Defense of Judicial Power over Statutory Interpretation*, 96 NW. U. L. REV. 1239, 1242 (2002) (“[W]hen Congress’s statutory instructions are ambiguous, interpreting those instructions necessarily requires interpreters to make their own ‘policy choices,’ not just to carry out Congress’s.”); Seidenfeld, *A Civic Republican Justification*, *supra* note 11, at 1519 (using the Federal Communications Commission as an example of “congressional reliance on agency expertise to set policy”).

13. See Barksdale, *supra* note 10, at 274 (“Although agencies’ governing legislation



reasons, agencies are potentially the best vehicles to promote the public interest.

The legitimacy of administrative power, however, is sharply questioned on both constitutional and normative grounds. The once heralded ideal of administrative objectivity is now widely regarded as myth.<sup>14</sup> Administrative policymaking is now understood to be as much or more about politics as it is about expertise and science.<sup>15</sup> Although necessity and convenience are understood as the *causes* of congressional delegations of authority to administrative bureaucrats, these considerations fall short in *justifying* administrative power within our separated-and-balanced government system.<sup>16</sup> Thus, it is generally argued, administrative power must be legitimized through its oversight and control.<sup>17</sup>

Part II explores the claims and critiques of existing administrative-control models. Several important themes and lessons emerge from their study. Most importantly, each oversight branch offers unique competencies and perspectives for controlling administrative power. But their respective attributes are more usefully put to work in some contexts than in others. For example, a court may be well suited to resolve legal questions but not scientific or political ones, whereas the President may be better suited to resolve political questions rather than scientific or legal ones.

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sometimes prescribes these value choices, often the legislation fails to identify relevant values or instead acknowledges conflicting goals and values yet fails to resolve the conflicts. Thus, the legislation leaves the agency to fill in the gaps." (footnotes omitted)).

14. See Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 422 (1987) [hereinafter Sunstein, *Constitutionalism*] ("In the New Deal period, reformers believed that administrative officials would serve as independent, self-starting, technically expert, and apolitical agents of change."); see also Kagan, *supra* note 1, at 2262 (reporting skeptics' insistence that administrative officials "possess[ed], along with expertise, political views, interest group affiliations, and bureaucratic interests"); Seidenfeld, *A Civic Republican Justification*, *supra* note 11, at 1520 ("When all is said and done ... expertise rarely eliminates the need for the agency to choose among competing values—a choice that is the essence of political decisionmaking.").

15. Kagan, *supra* note 1, at 2262.

16. Seidenfeld, *A Civic Republican Justification*, *supra* note 11, at 1513 ("The New Deal ... granted agencies policymaking authority that clearly exceeded the bounds justified by necessity.").

17. Breyer, *Questions of Law and Policy*, *supra* note 10, at 395 (noting the "growth of agency power that gave rise to the demand for control" (emphasis omitted)). See generally *infra* Part II.

Building on the insights and critiques of the existing control models, Part III develops a more cohesive “relative checks” framework for analyzing issues of administrative control. The paradigm rests on an important pairing of principles. First, just because a checking body should control administrative action does not mean it properly can in light of logistical or constitutional limits.<sup>18</sup> Second—and conversely—just because a checking body can control administrative action does not mean normatively that it should. Accepting, however, that oversight and control are necessary conditions of administrative power, the predicate questions that the relative checks paradigm addresses are: (1) from what source, and (2) in what degree should such checks come?

I approach the problem by conceptualizing an optimal control point within the shared values of two sometimes competing missions in administrative law: that of *legitimizing* administrative power within our constitutional structure, the “legitimacy mission,” and that of promoting an objective *public interest*, the “public-interest mission.”<sup>19</sup> While the legitimacy and public-interest missions are not mutually exclusive, neither are they mutually dependent. Whatever public-interest values administrative agencies may promise, our constitutional structure cannot countenance autonomous power by unelected agency bureaucrats. At some point, however, legitimacy concerns—upon being translated into oversight and control—might yield a decision by the checking body that has worse public outcomes than the one administratively adopted. The relative-checks paradigm thus conceives of optimal control at the intersection between the public interest and the constitutional imperative to check administrative action.

Next, I argue that the optimal control ideal may best be realized by tailoring administrative control. Because administrative outputs vary between law, science, politics, and discretion, checking

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18. See *INS v. Chadha*, 462 U.S. 919, 951 (1983) (“The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted.”).

19. These missions are close cousins of the “two conflicting themes” surrounding the administrative state noted by then-Judge Breyer: the theme of “the need for regulation” to solve “[c]omplex modern social, economic and technical problems” and the theme of “the need for checks and controls.” Breyer, *Questions of Law and Policy*, *supra* note 10, at 363 (internal quotation marks omitted).

administrative policy should not be a one-size-fits-all enterprise. Rather, both the source and degree of administrative control should be relative to the type of administrative output at issue. Under this approach, tailoring the *source* of control is informed by the institutional competencies of the respective checking bodies *in relation to one another*, whereas tailoring the *degree* of control is informed by the competencies of the checking bodies *in relation to the agency*.

Finally, Part IV of this Article puts relative checks to work. It capitalizes on the paradigm's prescriptive and descriptive qualities to examine and critique existing administrative law doctrine through a relative checks lens.

#### I. CONTEXTUALIZING ADMINISTRATIVE POWER WITHIN OUR CONSTITUTIONAL STRUCTURE

The United States Constitution institutionalizes three repositories of federal power. Under Article I, Congress is vested with "legislative" power to make "Law" over certain enumerated subjects.<sup>20</sup> Under Article II, the Chief Executive is vested with the "executive" power, which includes the enforcement function to "take Care that the Laws be faithfully executed."<sup>21</sup> And under Article III, the Supreme Court is vested with the "judicial" power over certain types of "Cases" and "Controversies."<sup>22</sup>

This tripartite structure stands at the core of our separation of powers system, but it represents only half the matrix. The other half rests in the related system of checks and balances, whereby power is shared and offset.<sup>23</sup> Both separation of powers and checks and balances work toward a common end: resistance to governmental tyranny that might otherwise accrue from a concentration of power in any one branch.<sup>24</sup>

As was intended and understood at the time of the Constitution's framing, the abstractness of the vested "legislative," "executive," and "judicial" powers, coupled with our structured system of commingled

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20. U.S. CONST. art. I, §§ 1, 8.

21. *Id.* art. II, §§ 1, 3.

22. *Id.* art. III, §§ 1-2.

23. See Farina, *Statutory Interpretation and the Balance of Power*, *supra* note 6, at 495-96.

24. See *Commodities Futures Trading Comm'n v. Schor*, 478 U.S. 833, 859-60 (1986); *Buckley v. Valeo*, 424 U.S. 1, 122 (1976).

and counterbalanced power, yields a dynamic tension among the branches of government. That dynamism, in turn, has provided fertile ground for the development of the modern administrative state. This Part analyzes the source of administrative power and explains the important yet sensitive role that agencies play within our federal system.

### *A. Congressional Delegation of Authority*

The power plays surrounding the administrative state are triggered, in the first instance, by congressional delegations of authority. Although Congress is constitutionally empowered to make the law, it is also handicapped in that function by the Constitution’s requirements that identical legislation be passed by both houses and presented to the President for potential veto.<sup>25</sup> Apart from these structural obstacles in the lawmaking process, there are at least five reasons Congress might turn elsewhere—whether intentionally, unintentionally, or by default—to complement its lawmaking function.

First is the significant transaction costs associated with lawmaking. These costs include the need for information, which Congress might obtain but can digest only with considerable expenditure of time and resources.<sup>26</sup> Second, Congress might not provide legislative details for reasons of “political expediency.”<sup>27</sup> Under this “public-choice” conception, legislators intentionally choose not to resolve policy disputes because making hard choices threatens to alienate constituencies.<sup>28</sup> By leaving the details to others—whether the courts or agencies—legislators can satisfy a broader range of constituents by promoting and taking credit for a general policy

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25. See U.S. CONST. art. I, §§ 1, 7; see also *INS v. Chadha*, 462 U.S. 919, 945-49 (1983).

26. David B. Spence & Frank Cross, *A Public Choice Case for the Administrative State*, 89 GEO. L.J. 97, 135 (2000) (“The transaction cost explanation [for delegations] involves the need for information.”).

27. *Id.*

28. Richard J. Pierce, Jr., *The Role of the Judiciary in Implementing an Agency Theory of Government*, 64 N.Y.U. L. REV. 1239, 1245 (1989) [hereinafter Pierce, *The Role of the Judiciary*].

without expending the political capital necessary to achieve consensus on more discrete policy objectives.<sup>29</sup>

Third, legislators may perceive delegation as a solution to legislative impasse.<sup>30</sup> So understood, “passing the buck” is not necessarily done out of a desire to maximize constituent support.<sup>31</sup> Rather, or in addition, it is guided by a legislative consensus that *some* directional movement from the status quo is preferable, even if the resulting legislation is imperfect or incomplete.<sup>32</sup> Fourth, delegation may be an attractive option because legislators cannot foresee all of the issues that will arise in the implementation of a statute.<sup>33</sup> Finally, “public-interest” theorists understand delegation as a congressional self-recognition of its institutional limitations.<sup>34</sup> Under this understanding, the congressional pedigree for lawmaking yields to the institutional reality that others may be better suited to formulate sound public policy.<sup>35</sup>

Whatever the combination of reasons, Congress does not—and probably cannot—legislate with anything approaching absolute specificity.<sup>36</sup> That is equally true for important public issues.<sup>37</sup> The fallout is an untapped residue of significant policy-making power.

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29. *Id.* at 1245-46; Spence & Cross, *supra* note 26, at 138 (“Legislators wish to please the public by taking action, but are well aware that they lack the information necessary to foresee all the consequences of their policy choices and that all policies have some negative consequences for which they may be blamed.”).

30. David B. Spence, *Administrative Law and Agency Policy-Making: Rethinking the Positive Theory of Political Control*, 14 *YALE J. ON REG.* 407, 426-27 (1997) [hereinafter Spence, *Rethinking Positive Theory*].

31. *Id.*

32. Spence & Cross, *supra* note 26, at 133. Of course, if no consensus can be reached by democratically elected representatives, a delegation to unelected administrative officials is democratically objectionable. See JAFFE, *supra* note 6, at 41.

33. Spence, *Rethinking Positive Theory*, *supra* note 30, at 422 (“This foreseeability problem goes to the heart of the delegation issue and is the key reason why politicians delegate policy-making authority to agencies in the first place.”).

34. Pierce, *The Role of the Judiciary*, *supra* note 28, at 1245.

35. *See id.*

36. Pierce, *Constitutional and Political Theory*, *supra* note 1, at 482-83 (noting that even if Congress wanted to address the issue of delegation, it cannot conceivably address all major policy issues).

37. Barksdale, *supra* note 10, at 284; Spence, *Rethinking Positive Theory*, *supra* note 30, at 427 (“The temptation to ‘pass the buck’ ... means not only that agencies face many policy questions on which legislation is silent, but also that many of these policy questions will be important, or at least controversial.”).

Both the degree of congressional delegation and the policy-making potential it carries raise questions about the constitutional legitimacy of these power transmissions.<sup>38</sup> Although the Constitution itself does not expressly preclude delegations of policy-making power to administrative agencies,<sup>39</sup> structural arguments rooted in separation of powers and democratic theory provide support for the claim that such delegations are prohibited.<sup>40</sup> Specifically, some argue that because Article I vests “[a]ll legislative Powers herein granted” to Congress, the legislature may not in turn delegate its powers to the executive branch.<sup>41</sup> To do so, the argument goes, results not only in an undue concentration of power antithetical to our structured government, but also runs afoul of democratic principles by conferring a legislative power upon unelected representatives.<sup>42</sup> That is, “delegation allows elected politicians to produce policy choices that might never have been produced otherwise, and ought be produced if we remain faithful to the Founders’ vision.”<sup>43</sup>

The Supreme Court has recognized these nondelegation arguments, but to such a limited degree as to effectively reject them. In particular, the Court’s recognition that the Article I Vesting Clause prohibits the delegation of “legislative” authority turns out to be a

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38. See, e.g., Marci A. Hamilton, *Representation and Nondelegation: Back to Basics*, 20 CARDOZO L. REV. 807, 809-14 (1999). Scholars have also debated the desirability of such delegations on normative grounds. Compare Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 91-98 (1985) [hereinafter Mashaw, *Prodelegation*] (defending delegations as desirable for promoting public preferences and public welfare), with Peter H. Aranson, Ernest Gellhorn & Glen O. Robinson, *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 43, 62-63 (1982) (making a case that a reinvigorated delegation doctrine would enhance the public welfare).

39. Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 335 (2002).

40. See Farina, *Statutory Interpretation and the Balance of Power*, *supra* note 6, at 478-79.

41. *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 472-73 (2001) (emphasis added) (alteration in original); *Mistretta v. United States*, 488 U.S. 361, 371-72 (1989); see also Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1743-44 (2002).

42. SOTIRIOS A. BARBER, *THE CONSTITUTION AND THE DELEGATION OF CONGRESSIONAL POWER* 24 (1975) (noting that nondelegation is more frequently linked with separation of powers than with any other concept). *But cf.* 1 KENNETH CULP DAVIS, *ADMINISTRATIVE LAW TREATISE* § 2.02, at 79 (1958) (insisting that the nondelegation doctrine is a judicial invention with no true constitutional character).

43. Spence & Cross, *supra* note 26, at 131-33 (outlining and rebuking the constitutional case for nondelegation).

hollow observation.<sup>44</sup> According to the Court, when the executive branch creates policy through statutory gap-filling, the executive is performing the Article II “executive” function, not the Article I “legislative” function.<sup>45</sup> To be sure, this is a fine line to draw. The legal effect of legislation on the one hand and of substantive executive policy on the other is generally indistinguishable.<sup>46</sup>

But under long-standing Court doctrine, all that Congress need do to keep within constitutional bounds is to provide an “intelligible principle” to guide administrative enforcement of the law.<sup>47</sup> To appreciate the generosity of the intelligible-principle standard in application, one need only take note that: (1) the Court has found an unconstitutional delegation in exactly two cases, both decided in 1935 at the height of judicial contempt for the New Deal;<sup>48</sup> and (2) delegations to agencies to create binding rules in the “public interest” and of similar breadth have been upheld by the Court against nondelegation attack.<sup>49</sup>

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44. See, e.g., *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 406 (1928) (“[I]t is a breach of the National fundamental law if Congress gives up its legislative power and transfers it to the President, or to the Judicial branch.”); *Field v. Clark*, 143 U.S. 649, 692 (1892) (“That Congress cannot delegate legislative power ... is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution.”).

45. See *Whitman*, 531 U.S. at 474-76 (explaining there really is no such thing as a lawful “delegation” of legislative power from Congress to agencies, but rather that “[a] certain degree of discretion, and thus of lawmaking, inheres in most executive or judicial action” (citation omitted)).

46. Spence & Cross, *supra* note 26, at 133 (“[P]ublic administration and public management scholars have long viewed as ridiculous the notion that there is some sort of bright line distinction between making and implementing the law; implementation implies policy choice.” (footnote omitted)).

47. See, e.g., *Whitman*, 531 U.S. at 472; *Mistretta v. United States*, 488 U.S. 361, 374-75 (1989).

48. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 534-42 (1935) (striking provision of National Industrial Recovery Act of 1933 (NIRA) that empowered the President to approve “codes of fair competition” for a “trade or industry” on the ground that the term “fair competition” was undefined, thus impermissibly leaving the President “virtually unfettered” discretion in implementing the law); *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 430 (1935) (striking provision of NIRA on the grounds that it failed to sufficiently define the conditions under which petroleum products could be legally transported and that it did not place limitations on the executive’s power to regulate such transportation).

49. See, e.g., *Nat’l Broad. Co. v. United States*, 319 U.S. 190, 225-26 (1943); *N.Y. Cent. Sec. Corp. v. United States*, 287 U.S. 12, 24-25 (1932); see also *Yakus v. United States*, 321 U.S. 414, 420, 423-26 (1944).

*B. The Policy-Making Power*

“The power to interpret statutes in the administrative state ... carries with it the power to make policy choices that Congress itself has not.”<sup>50</sup> In this role, agencies are not limited to the political preferences of the President or Congress but rather apply their expertise and judgment to solve public problems.<sup>51</sup> As Professor Stewart explains, “Even where seemingly precise standards are provided, the translation of such standards into operational realities may involve such large measures of discretion that their practical effect in restraining agency choice may be extremely limited.”<sup>52</sup>

Normatively, administrative policymaking can be a boon or bust to public interests depending on *how* the agency exercises the delegated authority.<sup>53</sup> In a most positive light, agencies carry the potential for promoting an objective public interest by virtue of their: (1) expertise with the issues presented and the relation of those issues to other considerations within the regulatory scheme,<sup>54</sup> (2) resources to collect and digest large volumes of information, (3) flexibility to respond to changing information or political conditions,<sup>55</sup> and (4) a degree of accountability to the political

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50. Molot, *supra* note 12, at 1241.

51. Spence, *Rethinking Positive Theory*, *supra* note 30, at 422; *see also* Friedrich v. City of Chicago, 888 F.2d 511, 517 (7th Cir. 1989) (Posner, J.) (“The question what a statute means is only in part a function of what the legislators thought it meant.”).

52. Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1697 n.132 (1975) [hereinafter Stewart, *Reformation*] (citing *Yakus*, 321 U.S. at 414; *United States v. Rock Royal Co-op., Inc.*, 307 U.S. 533 (1939)).

53. As Professor Jaffe explains:

Policy means choice, decision, direction; and if policy is to have any stability or weight, any creative drive, it will almost inevitably be a choice of one interest over others. Administration, then, as the active principle of choosing, or preferring (be it for the most part wisely, fairly, kindly) has in it the inherent power to hurt, to awaken resentment, to stir the sense of injustice.

JAFFE, *supra* note 6, at 323.

54. *See id.* at 576-77 (noting importance of expertise “in determining the application of statutory purpose to the case at hand”); Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 589 (1985) [hereinafter Diver, *Statutory Interpretation*] (“Successful implementation requires that individual policy choices harmonize with the position taken on related issues.”).

55. *See, e.g.*, David Epstein & Sharyn O’Halloran, *The Nondelegation Doctrine and the Separation of Powers: A Political Science Approach*, 20 CARDOZO L. REV. 947, 954 (1999) (noting that “one of the primary reasons for delegating” is “the ability of agencies to respond flexibly to changing conditions”).



branches.<sup>56</sup> Indeed, these perceived virtues are often cited as the source of the administrative state's ascendancy to prominence in our modern government.<sup>57</sup> And, as explained above, they help explain, if not justify, the Court's tolerance of this rise to power.

These potential virtues in application often are pitched in *relativistic* and *general* terms.<sup>58</sup> Thus conceived, agencies generally have more expertise with regulatory issues than do Congress, the President, or the courts.<sup>59</sup> Moreover, agencies generally have better information to draw from in making policy than do the political or judicial branches.<sup>60</sup> Further, agencies generally can be more flexible in responding to changing conditions than Congress, which is hampered by the "finely wrought" bicameralism and presentment requirements,<sup>61</sup> and can be more flexible than the judiciary, which is constrained by principles of stare decisis.<sup>62</sup> Finally, agencies

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56. See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865-66 (1984) (noting that agencies have more political accountability than the courts). *But cf.* Farina, *Statutory Interpretation and the Balance of Power*, *supra* note 6, at 515-20 (arguing that the President's accountability provides a poor justification for a deferential judicial role in interpreting regulatory statutes).

57. DAVIS, *supra* note 42, at 12-13 (ascribing the rise of administrative agencies to the fact that Congress and the courts are "ill-suited for handling masses of detail, or for applying to shifting and continuing problems the ideas supplied by scientists or other professional advisers").

58. See, e.g., Cass R. Sunstein, *Beyond Marbury: The Executive's Power To Say What the Law Is*, 115 YALE L.J. 2580, 2583 (2006) [hereinafter Sunstein, *Beyond Marbury*] ("For the resolution of ambiguities in statutory law, technical expertise and political accountability are highly relevant, and on these counts the executive has significant advantages over courts. Changed circumstances, involving new values and new understandings of fact, are relevant too, and they suggest further advantages on the part of the executive.").

59. See, e.g., Michael Asimow, *The Scope of Judicial Review of Decisions of California Administrative Agencies*, 42 UCLA L. REV. 1157, 1195 (1995) (noting that at least where regulation encompasses matters of fact and policy, "agencies have developed the sort of expertise and technical knowledge that gives them a comparative advantage in interpreting such texts over a generalist court that lacks such qualifications").

60. See Spence & Cross, *supra* note 26, at 128 n.133 (arguing that "agency decisions might be better decisions, because agencies tend to be better informed and have the opportunity to deliberate").

61. Seidenfeld, *A Civic Republican Justification*, *supra* note 11, at 1522 (reporting how an "agency not bogged down by the requirement of strict separation of powers or the need for majority approval by two large bodies of elected legislators can act more quickly and efficiently than Congress"); see also *INS v. Chadha*, 462 U.S. 919, 946-49 (1983) (outlining the "finely wrought" legislative process).

62. See, e.g., Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2079 (1990) [hereinafter Sunstein, *Law and Administration*].

generally are more accountable than the politically independent judiciary because, although administrators are not directly answerable to “We the People,” they are answerable to the President and Congress, who in turn are politically accountable.<sup>63</sup>

Current legal doctrine surrounding the administrative state is very much the product of the ongoing debate between those touting the administrative “virtues” and the skeptics who disavow them. In the New Deal era, something approaching agency autonomy was the ideal for those like James Landis. Upon his return from the New Deal Securities and Exchange Commission to the legal academy, he argued that “[w]ith the rise of regulation, the need for expertness became dominant; for the art of regulating an industry requires knowledge of the details of its operation.”<sup>64</sup> Under Landis’s view, both political and judicial control threatened to stifle needed “expertness”: administration was science, executed by professionals best suited to ascertain and implement an objective public interest.<sup>65</sup>

Landis’s ideal broke down in the wake of the New Deal as his optimism failed to comport with competing perceptions of administrative policymaking. As then-Dean Kagan summarized:

At the heart of the critique [of administrative power] lay a growing skepticism about the possibility of neutral or objective judgment in public administration. Whereas the questions of what and how to regulate seemed to Landis matters of fact and science, they appeared to his detractors, ever more numerous as time passed, to involve value choices and political judgment, thus throwing into question the legitimacy of bureaucratic power.<sup>66</sup>

With this change in perception, the proffered administrative virtues became, and for many remain, dubious justifications for administrative power. For example, an agency’s ability to obtain information calls into question the *reliability* of that information. To the extent information is provided principally or exclusively by

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63. See generally Mashaw, *Prodelegation*, *supra* note 38, at 95-96 (defending broad delegations, in part, based on the existence of presidential oversight and accountability).

64. LANDIS, *supra* note 10, at 23.

65. See *id.*

66. Kagan, *supra* note 1, at 2261.

private interests and would-be objects of proposed regulatory action, this potentially biased information becomes a blinding rather than illuminating force. This critique is prominently reflected in public choice's "capture theory," under which agencies are perceived to be influenced to the point of capture by the industries they regulate.<sup>67</sup>

Moreover, to the extent that policymaking takes on a *political* dimension,<sup>68</sup> questions of public accountability—in particular, the lack of it by unelected bureaucrats—become a central focus of concern.<sup>69</sup> As explained below, many criticize the notion that the President is meaningfully held accountable for administrative action, thus derailing the agency's best claim to a democratic pedigree superior to courts.<sup>70</sup> In addition, the administrative virtue of flexibility suffers when viewed through a democratic lens. For those who would seek to resist change, administrative flexibility is criticized as an end-run around the filtering legislative process.<sup>71</sup>

## II. LEGITIMIZING ADMINISTRATIVE POWER THROUGH OVERSIGHT AND CONTROL

Professor Farina has aptly described the modern administrative state as "a brash but deeply insecure adolescent—outwardly insisting that it needs no one's approval but secretly longing for a settled constitutional home."<sup>72</sup> For those who view administrative

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67. See, e.g., John Ferejohn, *The Structure of Agency Decision Processes*, in CONGRESS: STRUCTURE AND POLICY 441 (Matthew McCubbins & Terry Sullivan eds., 1987). For excellent summaries of the emergence and transformation of capture theory in public choice literature, see Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1283-85 (2006); David B. Spence, *Agency Discretion and the Dynamics of Procedural Reform*, 59 PUB. ADMIN. REV. 425, 425-26 (1999).

68. See, e.g., CHRIS MOONEY, *THE REPUBLICAN WAR ON SCIENCE* 239-43 (2005) (contending that policy judgments are often driven by politics rather than expertise); Kagan, *supra* note 1, at 2261-62.

69. Kagan, *supra* note 1, at 2261-62.

70. See, e.g., Ronald M. Levin, *Understanding Unreviewability in Administrative Law*, 74 MINN. L. REV. 689, 738 n.240 (1990) ("As regards many policy decisions ... the likelihood that the President would suffer political reprisals if his administration made the wrong choice seems infinitesimal.").

71. Patricia G. Chapman, *Has the Chevron Doctrine Run Out of Gas? Senza Ripieni Use of Chevron Deference or the Rule of Lenity*, 19 MISS. C. L. REV. 115, 137 (1998) (describing how agency flexibility can be considered undemocratic).

72. Cynthia R. Farina, *Undoing the New Deal Through the New Presidentialism*, 22 HARV. J.L. & PUB. POL'Y 227, 228 (1998) [hereinafter Farina, *Undoing the New Deal*].

policymaking as either normatively or democratically objectionable, the first line of attack is to sever administrative policymaking at its source, that is, at the delegation stage. As explained above, however, that effort has proved futile and is unlikely to gain meaningful traction anytime soon.<sup>73</sup> Accordingly, the tide has shifted to cries for increased oversight and control of administrative action. Or, stated more generically, the debate has turned from strict separation of powers to one of checks and balances.<sup>74</sup>

This Part surveys various models that aim to legitimize administrative power through oversight and control. The models roughly divide into: (1) judicial-control, (2) presidential-control, and (3) congressional-control models. As will be seen, these models not only seek to legitimize administrative action but in some measure struggle for primacy in that role. Like separation of power principles more generally, these models coexist symbiotically and do not neatly lend themselves to distinct categorization. Nevertheless, I attempt as best as possible to present them as discrete modes of control. Both the insights and the shortcomings of these models set the stage for a new relative checks paradigm.

#### A. *Judicial-Control Model*

It is almost impossible to find or describe a universally accepted “judicial role.” It means different things to different people in different contexts. However, the conventional view in the administrative-law context is that the courts’ “primary” and “fundamental” function is to protect individual rights against unlawful government action.<sup>75</sup> As Louis Jaffe famously remarked, “The availability of

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73. *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 474-75 (2001) (“[W]e have ‘almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.’” (quoting *Mistretta v. United States*, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting))); Posner & Vermeule, *supra* note 41, at 1722-23 (“We hope to lay the [nondelegation] doctrine to rest once and for all, in an unmarked grave.”).

74. Farina, *Statutory Interpretation and the Balance of Power*, *supra* note 6, at 487 (“The administrative state became constitutionally tenable because the Court’s vision of separation of powers evolved from the simple (but constraining) proposition that divided powers must not be commingled, to the more flexible (but far more complicated) proposition that power may be transferred *so long as* it will be adequately controlled.”).

75. See, e.g., JAFFE, *supra* note 6, at 459 (“[T]he *primary* role of judicial review is the protection of interests specially affected by allegedly illegal official action; its articulation for

judicial review is the necessary condition, psychologically if not logically, of a system of administrative power which purports to be legitimate, or legally valid.”<sup>76</sup>

### 1. *The Legitimizing Judiciary*

The legitimizing force of judicial review finds its strongest roots in the political independence of Article III judges.<sup>77</sup> Indeed, the very purpose of the constitutional protections of judicial life tenure and salary maintenance is to insulate judges from the political pressures facing the legislative and executive branches.<sup>78</sup> This judicial independence, some believe, can counterbalance administrative policymaking that, if left unchecked, may violate the rule of law.<sup>79</sup> This rule-of-law justification for judicial control harkens back to generalized concerns of bureaucratic lawlessness, agency capture by

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this purpose has been highly developed by the courts.” (emphasis added)); Thomas O. Sargentich, *The Critique of Active Judicial Review of Administrative Agencies: A Reevaluation*, 49 ADMIN. L. REV. 599, 601 (1997) (noting the “fundamental values served by judicial review, including upholding the ideal of the rule of law, protecting individual rights under the law, and imposing checks and balances on agency discretion” (emphasis added)); see also *Stark v. Wickard*, 321 U.S. 288, 310 (1944) (“[U]nder Article III, Congress established courts to adjudicate cases and controversies as to claims of infringement of individual rights whether by unlawful action of private persons or by the exertion of unauthorized administrative power.”).

76. JAFFE, *supra* note 6, at 320; see also *id.* at 321 (“[T]here is in our society a profound, tradition-taught reliance on the courts as the ultimate guardian and assurance of the limits set upon executive power by the constitutions and legislatures.”).

77. Molot, *supra* note 12, at 1277 (arguing that “judicial independence positions judges to make [decisions of statutory interpretation] in a way that neither of the political branches could”); see also Cass R. Sunstein, *On the Costs and Benefits of Aggressive Judicial Review of Agency Action*, 1989 DUKE L.J. 522, 527 [hereinafter Sunstein, *On the Costs and Benefits*] (reporting that courts, precisely because of their independence, will provide a “crucial deterrent and ex post corrective”).

78. *United States v. Raddatz*, 447 U.S. 667, 704 (1980) (Marshall, J., dissenting).

79. See, e.g., Linda R. Hirshman, *Postmodern Jurisprudence and the Problem of Administrative Discretion*, 82 NW. U. L. REV. 646, 666-68 (1988) (arguing that judicial review is necessary to ensure that agencies follow authorizing statutes); Thomas O. Sargentich, *The Reform of the American Administrative Process: The Contemporary Debate*, 1984 WIS. L. REV. 385, 397-402 (discussing the “rule of law” justification for judicial review of agency actions); Peter L. Strauss, *Legislative Theory and the Rule of Law: Some Comments on Rubin*, 89 COLUM. L. REV. 427, 442-43 (1989) (reporting that judicial review lies “at the heart of a commitment to the rule of law”).

the regulated industries, and the perception of policymaking as politics rather than some objective science.<sup>80</sup>

Judicial review of administrative action is also understood to promote Congress’s lawmaking supremacy.<sup>81</sup> By ensuring administrative fidelity to legislative bounds, the judiciary tethers agency action to the source of administrative authority. This reinforcement of congressional primacy infuses, albeit indirectly, democratic legitimacy into administrative policymaking.<sup>82</sup>

Complementing these constitutionally-based legitimizing functions are an array of perceived judicial competencies.<sup>83</sup> Chief among them is the judiciary’s perceived expertise in interpreting the law.<sup>84</sup> Although courts may not be expert in the subject matter facing agencies, courts have a historical pedigree to “say what the law is”<sup>85</sup> and are experts at gleaning meaning from statutes using interpretive canons and other traditional tools of construction.<sup>86</sup>

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80. Public choice scholars tend to prefer judicial review of administrative action principally for these reasons. See Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 33 (1991) (listing numerous prominent legal scholars contending that public choice theory “justifies changing judicial review to make it less deferential to political outcomes”); Bernard Grofman, *Public Choice, Civic Republicanism, and American Politics: Perspectives of a “Reasonable Choice” Modeler*, 71 TEX. L. REV. 1541, 1543 (1993) (observing that public choice provides “a rationale for remedying alleged deficiencies of electoral and legislative politics through judicial intervention”).

81. Molot, *supra* note 12, at 1282 (noting that judicial review “reinforce[s] Congress’s constitutional lawmaking authority but also protect[s] citizens from unlawful government action”).

82. *Id.*; see also Jack M. Beer mann, *The Turn Toward Congress in Administrative Law*, 89 B.U. L. REV. 727, 742-43 (2009) [hereinafter Beer mann, *Turn Toward Congress*]; Lisa Schulz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1805 (2007) [hereinafter Bressman, *Procedures as Politics*].

83. See Molot, *supra* note 12, at 1247, 1292-319 (looking to the judiciary’s “internal institutional attributes” as justifying a robust judicial role in administrative review).

84. Sunstein, *On the Costs and Benefits*, *supra* note 77, at 523 (arguing that “courts have a comparative advantage over agencies in deciding what the law is”).

85. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); see also THE FEDERALIST NO. 78, at 93-94 (Alexander Hamilton) (J.R. Pole ed., 2005) (“The interpretation of the laws is the proper and peculiar province of the courts.”).

86. David S. Law, *A Theory of Judicial Power and Judicial Review*, 97 GEO. L.J. 723, 748 (2009) (“Courts are ... specialists and experts in the interpretation and application of law.”).

Moreover, courts may bring a level of objectivity and perspective that mission-centric administrators are perceived to lack.<sup>87</sup> As Professor Molot explains,

Interpretation by judges differs from interpretation by political officials not only because judges have no role in legislation or execution, but also because judges are subject to a host of institutional constraints that lead them to value stability and consistency in interpretation in a way that political officials do not.<sup>88</sup>

In particular, the principle of stare decisis and other internal pressures tend to favor judicial decision making moored to the rule of law rather than to political whim.<sup>89</sup>

## *2. Critiques of the Judicial-Control Model*

Professor Levin remarks that “[a] generation ago, scholars could assume without much soul-searching that judicial review was fundamental to the sound governance of the regulatory system. Today, some of the most respected commentators in the field offer pointed and often biting criticisms of the courts’ place in the administrative process.”<sup>90</sup> Much of the critique of the judicial role in

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87. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 103 (1980) (remarking that because Article III judges “are comparative outsiders in our governmental system” they are “in a position objectively to assess claims”).

88. Molot, *supra* note 12, at 1247.

89. See David L. Shapiro, *Courts, Legislatures, and Paternalism*, 74 VA. L. REV. 519, 556 (1988) [hereinafter Shapiro, *Paternalism*] (observing that paternalism serves to “deter the imposition of judges’ personal values”); see also Donald H. Zeigler, *Gazing into the Crystal Ball: Reflections on the Standards State Judges Should Use To Ascertain Federal Law*, 40 WM. & MARY L. REV. 1143, 1190 (1999) (“Stare decisis is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.’ In addition, stare decisis keeps law from changing erratically based on the ‘proclivities of individuals.’” (internal citations omitted)).

90. Levin, *supra* note 70, at 690 (footnote omitted); see also *id.* at 743 (listing some of the “burgeoning literature on the shortcomings of judicial review”); Thomas O. McGarity, *Judicial Review of Scientific Rulemaking*, 9 SCI. TECH. & HUM. VALUES 97, 97-103 (1984); Richard J. Pierce, Jr., *Two Problems in Administrative Law: Political Polarity on the District of Columbia Circuit and Judicial Deterrence of Agency Rulemaking*, 1988 DUKE L.J. 300, 303-13; Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court’s Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1135-36 (1987)

administrative law centers on some combination of the following themes: (1) judicial-realist accounts of judicial decision making; (2) the indeterminacy of Congress’s intended “Law”; (3) the job security of Article III judges, which affords them a safe haven to promote their own ideological preferences; (4) the disparateness of judicial review, which yields a balkanizing effect on national policy; (5) structural and practical obstacles to keeping judicial errors in check; and (6) normative critiques of the judiciary’s institutional capacities for law interpretation and policymaking relative to other government bodies. Each is discussed in more detail below, all leading to a central concern: with court intervention, “the price of containing agency aggrandizement is very likely to be judicial aggrandizement.”<sup>91</sup>

*a. Judicial-Realist Critiques*

The Supreme Court has emphasized that federal courts are not “empowered to rewrite legislation in accord with their own conceptions of prudent public policy.”<sup>92</sup> As Professor Clark has argued, “[L]aw ‘made’ by the federal judiciary lacks the constitutional legitimacy of measures adopted pursuant to constitutionally prescribed lawmaking procedures.”<sup>93</sup> Judgment must instead turn on judicial fidelity to Congress’s intent or purpose.<sup>94</sup> Rising to satisfy this ideal, the conventional model of judicial legitimacy positions the

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[hereinafter Strauss, *One Hundred Fifty Cases*].

91. Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 994 (1992).

92. *United States v. Rutherford*, 442 U.S. 544, 555 (1979).

93. Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1403 (2001); see also Frank B. Cross, *Shattering the Fragile Case for Judicial Review of Rulemaking*, 85 VA. L. REV. 1243, 1273 (1999) (“It is virtually axiomatic that, under our Constitution, judges should not be making political decisions.”).

94. John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 116 (1998) (noting that, “at least under classical schools of interpretation, courts deciding statutory cases are bound to follow commands and policies embodied in the enacted text—commands and policies that the courts did not create and cannot change”); John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 419-26 (2005) (outlining different theories of judicial review tied to legislative purpose and intent).



courts and Congress in a principal-agent relationship,<sup>95</sup> in which the courts act as the “faithful agent” of Congress in law interpretation.<sup>96</sup>

While the faithful-agent theory provides a fairly robust defense of judicial legitimacy, it is roundly criticized as an unrealistic account of judicial decision making in the administrative law context.<sup>97</sup> Under the legal-realist “attitudinal” model,<sup>98</sup> judges “decide cases based upon their fixed policy preferences ... and are not meaningfully constrained from voting in accord with those views by doctrine, text, or institutional setting.”<sup>98</sup> Even for those who defend judicial decision making as a more nuanced enterprise,<sup>99</sup> there tends to remain some recognition—or concession—that a judge’s ideology has the potential to, and often does, influence judicial outcomes.<sup>100</sup> This concession has become almost unavoidable in the face of recent empirical studies of judicial behavior that

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95. John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 5 (2001) (“In our constitutional system, it is widely assumed that federal judges must act as Congress’s faithful agents.”).

96. See, e.g., *id.*; see also Frank H. Easterbrook, *The Supreme Court 1983 Term—Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 60 (1984) (“Judges must be honest agents of the political branches. They carry out decisions they do not make.”).

97. See Beermann, *Congressional Administration*, *supra* note 8, at 103 (reporting that judges are “far from perfect” agents of Congress in administrative law, “whether because their independence allows them, at least to some extent, to pursue their own preferences or because Congress’s instructions are often not clear enough for even the most faithful agent to act upon without making errors”); Theodore W. Ruger et al., *The Supreme Court Forecasting Project: Legal and Political Science Approaches To Predicting Supreme Court Decisionmaking*, 104 COLUM. L. REV. 1150, 1155-60 & nn.20-36 (2004).

98. Ruger et al., *supra* note 97, at 1157; see also Harold Spaeth, *The Attitudinal Model*, in CONTEMPLATING COURTS 296, 296 (Lee Epstein ed., 1995) (reporting that “evidence overwhelmingly supports the attitudinal model and, equally overwhelmingly, fails to support the legal model as an explanation of why the justices decide their cases as they do”).

99. See, e.g., Barry Friedman, *The Politics of Judicial Review*, 84 TEX. L. REV. 257, 263, 280-329 (2005) (arguing the Court is sensitive to “strategic interaction with other judges ..., the pressures imposed by judges on the judicial hierarchy’s lower rungs who have their own views of how things should be, interbranch struggles over legal outcomes with significant policy implications, and popular opinion regarding judicial outcomes and the practice of judicial review”).

100. Richard A. Posner, *The Role of the Judge in the Twenty-First Century*, 86 B.U. L. REV. 1049, 1053 (2006) (stating that judges must decide cases expediently and that many factors, in addition to judges’ political preferences, are relevant to that task, including “feasibility of a particular judicial intervention ..., the effect on the law’s stability and the court’s reputation if its attitude toward precedent and statutory text is seen as too cavalier, and the judge’s desire for ideological consistency (which is different from, though often correlated with, political preference)”; Ruger et al., *supra* note 97, at 1163.

report that courts decide administrative cases along political lines to a statistically significant degree.<sup>101</sup>

*b. The Indeterminacy of Law*

Justifying judicial review on “rule-of-law” grounds also becomes suspect insofar as administrative policy stems from vague and aspirational congressional delegations.<sup>102</sup> The courts, if they are to be a legitimizing force, can enforce the rule of law only if there *is* some law. But regulatory law created by Congress is often indeterminate.<sup>103</sup> As Professor Seidenfeld explains, judges cannot accomplish the ideal of adhering to congressional intent because Congress may not have “indicated how that balance is to be struck,” leaving judges “to import their own notions of the values that appropriately underlie the statute.”<sup>104</sup> It is within this zone of indeterminacy that judges venture into the role of policymaker,<sup>105</sup> a role that strains judicial competence.<sup>106</sup>

Moreover, within this zone of indeterminacy, the policy-making function that devolves upon executive officers tends to be “trans-legal” in nature; that is, one that blends elements of politics and science. According to Professor Cross, “When extralegal factors are at issue, the justification for a judicial role largely disappears. Indeed, judicial legitimacy itself largely disappears, as a reviewing

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101. See Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155 (1998); Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823, 826 (2006) [hereinafter Miles & Sunstein, *An Empirical Investigation of Chevron*]; Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717 (1997).

102. Cross, *supra* note 93, at 1258.

103. See *supra* notes 25-37 and accompanying text; see also Cross, *supra* note 93, at 1261.

104. Seidenfeld, *A Big Picture Approach*, *supra* note 8, at 9; see also Cross, *supra* note 93, at 1258 (explaining that, in the penumbra of legal meaning, “the formalist rule of law gives way to discretionary choice”).

105. “Courts frequently resolve policy issues through a process that purports to be statutory interpretation but which, in fact, is not.” Richard J. Pierce, Jr., *Chevron and Its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VAND. L. REV. 301, 305-06 (1988).

106. See JAFFE, *supra* note 6, at 476 (explaining how the judiciary “strain[s] its competence” the more it drifts into matters of public policy about which the legislature has not spoken, or has not clearly spoken).

court can ‘interpret’ substantive standards of this type only by making the policy decision Congress declined to make.”<sup>107</sup>

The result, according to Professor Bressman, is that reviewing courts “may simply swap one principal-agent problem (between Congress and agency) for another (between Congress and courts).”<sup>108</sup> This result is democratically suspect, insofar as the court may be substituting its judgment for that of a more politically accountable administrator.<sup>109</sup> Judicial policy swapping is also normatively suspect, insofar as it may not result in better public outcomes. As between agency and court, the agency may be better positioned to make policy choices falling in the interstices of congressional command.<sup>110</sup>

*c. The Problem of Political Independence*

While advocates of the judicial-control model look to judicial independence as a legitimizing factor both on constitutional and normative grounds, the political insulation that courts possess allows them to shun the preferences of Congress.<sup>111</sup> Political independence thus becomes a dangerous commodity in the hands of judges who might use legal indeterminacy as an invitation to promote personal or political ideologies.<sup>112</sup> Even apart from legal-realist attack, however, the political independence of judges arguably renders judicial review of administrative action undemocratic.<sup>113</sup> As policymaking transcends from law to politics, judicial

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107. Cross, *supra* note 93, at 1264 (internal quotation marks omitted).

108. Bressman, *Procedure as Politics*, *supra* note 82, at 1777.

109. Beermann, *Turn Toward Congress*, *supra* note 82, at 730 (“[T]here was no account of why judges would act on Congress’s preferences rather than their own preferences, and if they were acting on their own preferences, the question then became whether judicial preferences were likely to be closer to Congress’s or to the preferences of the executive branch.”).

110. JAFFE, *supra* note 6, at 576-77 (noting importance of administrative expertise “in determining the application of statutory purpose to the case at hand”); Diver, *Statutory Interpretation*, *supra* note 54, at 587-88 (explaining how agencies have a comparative advantage over courts in discerning the intent of Congress and in giving effect to the law).

111. Beermann, *Congressional Administration*, *supra* note 8, at 101-02.

112. Molot, *supra* note 12, at 1241 (“Because judges are politically insulated officials who lack legislative authority under the Constitution, it is far from clear that we should rely on them to make federal policy.”).

113. See, e.g., Shapiro, *Paternalism*, *supra* note 89, at 556 (“[T]he fact that judges are protected in significant ways from the popular will does make it inappropriate for them to reach outcomes on the basis of their personal (and possibly idiosyncratic) values.”).

review becomes imbued with political judgments that courts lack the constitutional backing to decide.<sup>114</sup> While some still defend judicial review as democratically reinforcing Congress’s lawmaking supremacy,<sup>115</sup> the points of critique remain: the best-intentioned judges may simply be wrong about what Congress intended, and, in many cases, there simply is no legislative bargain to enforce.<sup>116</sup>

*d. The Problem of Checking-the-Checker and the “Balkanization” of National Policy*

To some, judicial review is particularly dangerous because, if a reviewing court “incorrectly” decides an administrative issue, the court’s error may remain unchecked by Congress or the Supreme Court indefinitely. For its part, Congress may not even be aware of a particular judicial decision. Indeed, empirical studies prove this to be the rule rather than the exception.<sup>117</sup> Even assuming that the appropriate members of Congress are notified, the legislative bicameral and presentment requirements make it logistically difficult to congressionally override a judicial decision.<sup>118</sup> Moreover, given congressional desire for political expediency, many legislators may,

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114. See Clark, *supra* note 93, at 1403; Cross, *supra* note 93, at 1332-33 (providing a historical argument based on the debates and outcome of the Constitutional Convention).

115. See *supra* notes 83-89 and accompanying text.

116. Charles H. Koch, Jr., *Judicial Review of Administrative Discretion*, 54 GEO. WASH. L. REV. 469, 487 (1986) (reporting that “the difficulty of distinguishing between policy and law sometimes misleads courts into overly active review”); Pierce, *Constitutional and Political Theory*, *supra* note 1, at 485 (criticizing how courts “too frequently overreach, without an explicit congressional invitation to do so, by finding meaning in statutory language that has no meaning”).

117. See Robert A. Katzmann, *Bridging the Statutory Gulf Between Courts and Congress: A Challenge for Positive Political Theory*, 80 GEO. L.J. 653, 654-55 (1992) (observing that “while it may be in the interests of legislators to track what courts do in appellate statutory cases, they tend not to do so; they tend not to concern themselves very much with how courts will interpret their legislation when writing statutes”); see also Robert A. Katzmann & Stephanie M. Herseth, *An Experiment in Statutory Communication Between Courts and Congress: A Progress Report*, 85 GEO. L.J. 2189, 2190, 2192 (1997) (highlighting a study which found that Congress was unlikely to clarify certain statutes because it was unaware the problematic rulings existed).

118. Charles R. Shipan, *Interest Groups, Judicial Review, and the Origins of Broadcast Regulation*, 49 ADMIN. L. REV. 549, 555 (1997) (“[I]t can be difficult to overturn court decisions. Even if majorities in both houses want to overturn a court decision, they may be blocked by institutional features of Congress. Deference to the courts and congressional inattentiveness also decrease the likelihood that Congress will overturn a court decision.” (footnotes omitted)).

given a judicial “resolution,” be content to pass the buck—this time, to the reviewing court.<sup>119</sup> Judicial decisions also tend to be more resistant to legislative correction than administrative policymaking alone because judicial review is not subject to some of the informal checks that Congress exerts on agencies.<sup>120</sup> Thus, it “turns out to be exceedingly difficult for a majority coalition in Congress to succeed in overturning a judicial decision even where there would not be a majority for enacting the legislation reflecting the court’s decision.”<sup>121</sup>

The Supreme Court, for its part, is also unlikely to reverse any particular judicial decision for reasons that may be entirely divorced from the merits of decision.<sup>122</sup> While the Court is more likely than Congress to be made aware of controversial judicial decisions via the certiorari process and is not burdened by the grind of political forces, it is burdened with a crush of work that weighs upon its ability to correct, or, at least, to timely correct, aberrant lower court decisions.<sup>123</sup>

The lack of a logistically-suitable check on lower court decisions is exacerbated by the effect those decisions may have on administra-

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119. Cross, *supra* note 93, at 1301 (noting that “an accountable Congress may avoid hard decisions by deferring to the courts”).

120. In this regard, Professor Cross explains that “[t]he most frequent and useful congressional check upon agency action is through informal contacts and jawboning” which are “checking techniques ... generally unavailable for judicial actions.” *Id.* at 1303. The view is also supported by positive political theory models. See, e.g., Matthew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 445 (1989) [hereinafter McNollgast, *Structure and Process*].

121. Daniel B. Rodriguez, *Statutory Interpretation and Political Advantage*, 12 INT’L REV. L. & ECON. 217, 224 (1992).

122. John P. Dwyer, *The Pathology of Symbolic Legislation*, 17 ECOLOGY L.Q. 233, 306 (1990) (observing, as a practical matter, that “most cases challenging agency interpretations of statutes begin and end in the courts of appeals”); Peter H. Schuck & E. Donald Elliott, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 1027 (remarking that “the probability that the Supreme Court will review, much less reverse, any particular decision by a circuit court is very low”).

123. See, e.g., Cross, *supra* note 93, at 1250 (arguing that “the Supreme Court’s review does not resolve the problem for judicial review of administrative action” in part because “[t]he Court’s annual docket is quite limited and constrained by the plethora of constitutional and other issues demanding the Justices’ attention”); Diver, *Statutory Interpretation*, *supra* note 54, at 586 (observing that, “because of the nature of the Supreme Court’s certiorari jurisdiction, that solution is time-consuming, expensive, and, largely for those reasons, unreliable”).

tive policy. One of the principal aims of federal regulatory programs is to generate a *national* solution to a perceived social or economic condition. Although judicial review of certain administrative actions is channeled to the D.C. Circuit, most administrative actions are tested in the regional courts of appeals throughout the country.<sup>124</sup> Circuit splits are both inevitable and common, owing largely to differing judicial philosophies of administrative review, the indeterminacy of the law under review, and, perhaps to a lesser extent, “geographical factors” that may “influence the ways in which courts view facts or weigh the various considerations affecting the resolution of a complex dispute.”<sup>125</sup>

Circuit splits yield conflicting treatments of similarly situated persons or entities, depending on the venue in which a case happens to arise.<sup>126</sup> Such balkanization is a poor result, both for an administrative system designed to promote national policy, and for a “rule of law” system purporting to promote consistency and fairness.<sup>127</sup> Although the Supreme Court eventually may resolve a circuit split, the harm persists in the interim.<sup>128</sup>

*e. Other Normative Critiques*

Other normative critiques plaguing the ideal of judicial review include the institutional reality that courts must rely on litigants to bring administrative problems within their jurisdiction.<sup>129</sup> This, it is argued, tends to give judges a limited—or worse, skewed—perspective of how a law fits in the regulatory scheme as a whole.<sup>130</sup>

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124. Cross, *supra* note 93, at 1249 (reporting that “most agency rules are appealed directly to a United States Court of Appeals”).

125. Strauss, *One Hundred Fifty Cases*, *supra* note 90, at 1107.

126. Cross, *supra* note 93, at 1249 (“[C]ircuit splits may ‘persist for years, leading to confusion and unequal treatment of citizens living in different judicial districts.’” (quoting R. SHEP MELNICK, *REGULATION AND THE COURTS: THE CASE OF THE CLEAN AIR ACT* 16 (1983))).

127. *Id.* (stressing that “[a] central feature of the rule of law is its horizontal consistency of application”).

128. Strauss, *One Hundred Fifty Cases*, *supra* note 90, at 1094 n.4 (explaining that the Court can resolve only a fraction of the circuit splits).

129. Molot, *supra* note 12, at 1284.

130. See CASS SUNSTEIN, *THE PARTIAL CONSTITUTION* 148 (1993) (“[T]he focus on the litigated case makes it hard for judges to understand the complex, often unpredictable effects of legal intervention. Knowledge of these effects is crucial but sometimes inaccessible.”); Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 GEO. L.J. 833, 861 (2001)

Judges are thus in a worse position than administrative officials whose exposure to the relevant legal and practical considerations generally surpasses that of a court.<sup>131</sup>

In addition, because “[c]ourts are reactive and have their agenda set by litigants,” courts—as much as agencies—can be “readily manipulated by [special] interests.”<sup>132</sup> Courts, it must be remembered, are fed information from litigants and, unlike agencies, do not have the resources or authority to undertake independent investigations.<sup>133</sup> While judges may not be cognizant of their “capture” by special interests—thus, removing an air of impropriety often attributed to agency capture—a judge’s ignorant complicity becomes a dangerous ally for special interests.<sup>134</sup>

The foregoing critiques of judicial review tend to be related and cumulative. For example, insofar as judges decide cases based on attitudinal preferences, it is a result largely *occasioned* by the law’s indeterminacy and simultaneously *shielded* by judicial independence and the improbability of a corrective check. What stems from these collective critiques are a series of debatable questions. Are courts the proverbial “bull in the legal china shop,”<sup>135</sup> clumsily bringing more harm than good to public law? If so, should judicial review be jettisoned or limited in the administrative context? Assuming that administrative power even needs legitimization, from what other source(s) might legitimacy come?

As explained in the following two sections, prominent scholars have argued that oversight and control by the President or Congress

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(“[F]ederal statutory programs have become so complex that it is beyond the capacity of most federal judges to understand the full ramifications of the narrowly framed interpretational questions that come before them.”).

131. See, e.g., Cross, *supra* note 93, at 1281 (noting that “agencies may have a comparative advantage” in interpreting regulatory statutes); Strauss, *One Hundred Fifty Cases*, *supra* note 90, at 1126 (comparing the “sporadic and case-specific character of judicial encounters with issues of statutory meaning” with “an agency’s continuing responsibilities and policy-implementing perspectives”).

132. Spence & Cross, *supra* note 26, at 140-41.

133. See Breyer, *Questions of Law and Policy*, *supra* note 10, at 389-90 (noting that courts lack the authority and resources to undertake independent factual investigations).

134. See Spence & Cross, *supra* note 26, at 140-41 (“Through strategic selection of cases for litigation, the special interest groups can control the path of precedent. This ability to manipulate courts explains why special interest groups are insistent about expanding their opportunities for judicial review of delegated agency decisions.” (footnote omitted)).

135. Strauss, *One Hundred Fifty Cases*, *supra* note 90, at 1129.

or both offers the democratic anchor and normative qualities wanting in the judicial-control model.<sup>136</sup> Moreover, these political models have gained momentum in recent years due to the introduction of new theories and mechanisms of political-branch oversight.<sup>137</sup>

### *B. Presidential-Control Model*

As perceptions take hold that “agencies are not simply ‘finding’ the policy of the law in the statute, but to a significant degree ‘making’ the policy of the law from their own views, ... the need for presidential engagement becomes stronger.”<sup>138</sup> There are two principal elements to the presidential-control model. The first is a “checking function,” under which a politically accountable head—namely, the President—acts to curb the forces of arbitrary and factional influences.<sup>139</sup> The second half of the model espouses a harmonizing/effectiveness function; that is, “the promotion of ... interagency coordination, rational priority setting, and cost-effective rulemaking.”<sup>140</sup> As will be seen, the presidential-control model is heavily criticized.<sup>141</sup> Yet in relatively short order, it has for many become the “prevailing view” of administrative legitimacy.<sup>142</sup>

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136. See, e.g., Cross, *supra* note 93, at 1290 (“Agencies are regularly held accountable by the President and the Congress, who are, in turn, accountable to voters. Both elected institutions possess considerable ability to check the agencies’ exercise of rulemaking power. The delegation of rulemaking authority to the bureaucracy is thus ‘a device for improving the responsiveness of government to the desires of the electorate.’” (quoting Mashaw, *Prodelegation*, *supra* note 38, at 95)).

137. See, e.g., Kagan, *supra* note 1, at 2317 (noting the “general trend” for increased presidential “capacity to oversee, to supervise, and even to direct administrative action”).

138. Peter L. Strauss, *Presidential Rulemaking*, 72 CHI.-KENT L. REV. 965, 978 (1997) [hereinafter Strauss, *Presidential Rulemaking*].

139. Bagley & Revesz, *supra* note 67, at 1261; see, e.g., Kagan, *supra* note 1, at 2335 (explaining that “because the President has a national constituency, he is likely to consider, in setting the direction of administrative policy on an ongoing basis, the preferences of the general public, rather than merely parochial interests”); see also Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 105-06 (1994) (distinguishing the President’s national constituency from the constituencies of Congress members); Thomas O. Sargentich, *The Emphasis on the Presidency in U.S. Public Law: An Essay Critiquing Presidential Administration*, 59 ADMIN. L. REV. 1, 25 (2007) [hereinafter Sargentich, *Emphasis on the Presidency*].

140. Bagley & Revesz, *supra* note 67, at 1261.

141. See *infra* notes 159-67 and accompanying text.

142. See, e.g., Lisa Schultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47, 91 (2006).



### 1. *Presidential Control and Oversight*

Constitutionally speaking, the President has a duty to “take Care that the Laws be faithfully executed.”<sup>143</sup> Our Constitution affords the President at least three formal modes of control (and a highly debatable “dictative” authority) in fulfilling that function in the regulatory state. The President also utilizes a number of informal means to oversee and influence administrative action.

The President’s first mode of formal control over the administration is his constitutional power to appoint agency heads.<sup>144</sup> The appointment power affords the President a form of ex ante control, by which he preemptively shapes policy by placing it in the hands of officials who are able and willing to promote the President’s agenda.<sup>145</sup> Complementing this appointment power comes the well-settled, but limited, presidential power to remove “executive” officers at will.<sup>146</sup> Of course, removals of this sort as an ex post corrective of administrative action are rare; the expenditure of political capital necessary to remove an agency head can be significant and thus not worth the cost.<sup>147</sup> Even so, the removal

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143. U.S. CONST. art. II, § 3.

144. *Id.* § 2. This power is sometimes conditioned upon Senate consent and approval, although Congress can waive its consenting authority for the appointment of inferior executive officers. *Id.*

145. See David B. Spence, *Managing Delegation Ex Ante: Using Law To Steer Administrative Agencies*, 28 J. LEGAL STUD. 413, 445 n.100 (1999).

146. See *Santana v. Calderon*, 342 F.3d 18, 26 (1st Cir. 2003) (“[I]t is well-established that ‘in the absence of any specific provision to the contrary, the power of appointment to executive office carries with it, as a necessary incident, the power of removal.’” (quoting *Myers v. United States*, 272 U.S. 52, 126 (1926))). The implicit power to remove executive officers derives from the President’s obligation under Article II, Section 3 to assure that the laws are faithfully executed. *Myers*, 272 U.S. at 126. In *Humphrey’s Executor v. United States*, however, the Court held that the President’s removal power was not illimitable, such that Congress could place restrictions on that power with respect to officials who were not performing purely executive functions. 295 U.S. 602, 624-28 (1935). Later, in *Morrison v. Olson*, the Court held that in determining whether Congress could limit the President’s removal power, “the real question is whether the removal restrictions are of such a nature that they impede the President’s ability to perform his constitutional duty [to take care that the Law be faithfully executed], and the functions of the officials in question must be analyzed in that light.” 487 U.S. 654, 691 (1988).

147. Sargentich, *Emphasis on the Presidency*, *supra* note 139, at 8 (recognizing that “[t]here is an outer limit on the number or frequency of terminations that any administration can tolerate without suffering the negative political repercussions of instability”).

power may provide a meaningful ex ante deterrent for the heads of executive agencies.<sup>148</sup>

Another mode of formal presidential control emerges from the Constitution’s “Opinions” clause, which empowers the President to require the written opinion “of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices.”<sup>149</sup> Pursuant to the “Opinions” and “Take Care” clauses, modern Presidents have collected colossal amounts of information relating to administrative rulemaking through the presidential Offices of Management and Budget (OMB) and Information and Regulatory Affairs (OIRA).<sup>150</sup> The scope and degree of information collected by these offices, the authority they purport to have, and the degree of influence they in fact exert have varied among recent Presidents.<sup>151</sup> Since President Reagan, however, these offices, at a minimum: (1) have served as the presidential vehicle for overseeing much of administrative policy, and (2) have proven to be influential in shaping it.<sup>152</sup>

Whether Presidents may *dictate* administrative policy—rather than merely influence it—is the controversial fourth control mechanism referred to in the introduction to this Part. In this sense, dictation refers to the power to decide administrative policy, even, or especially, in the face of a competing policy advanced by the responsible agency head. Such dictative authority generally is

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148. *Id.* (noting that an appointee’s “tempt[ation] to negotiate strongly with the White House on a particular issue” may be tempered by “the reality ... that the President can remove an executive agency head for any reason”).

149. U.S. CONST. art. II, § 2.

150. See Kagan, *supra* note 1, at 2324-25. For early commentary on whether centralized presidential review is proper in light of Congress’s usual practice of delegating regulatory authority to particular agency heads, see, for example, Colin S. Diver, *Presidential Powers*, 36 AM. U. L. REV. 519 (1987). For more recent commentary on the justifications, effects, and limits on centralized presidential review, see, for example, William D. Araiza, *Judicial and Legislative Checks on Ex Parte OMB Influence over Rulemaking*, 54 ADMIN. L. REV. 611 (2002); Steven Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. CHI. L. REV. 821 (2003); John O. McGinnis, *Presidential Review as Constitutional Restoration*, 51 DUKE L.J. 901 (2001).

151. For comparative discussions, see, for example, Sargentich, *Emphasis on the Presidency*, *supra* note 139; Peter M. Shane, *Political Accountability in a System of Checks and Balances: The Case of Presidential Review of Rulemaking*, 48 ARK. L. REV. 161 (1995); Peter L. Strauss, *Overseer, or “the Decider”? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696 (2007) [hereinafter Strauss, *Overseer or “the Decider”*].

152. See, e.g., Kagan, *supra* note 1, at 2285-90.

promoted and defended under the rubric of the “unitary executive” theory, with advocates promoting the power as constitutionally required, normatively justified, or both.<sup>153</sup> Much impassioned ink has been spilled debating the constitutional merits of the unitary executive. Yet the conventional view—and the one most supported by Court precedent—is that a President’s power of oversight and control theoretically stops somewhere short of a power to actually dictate policy to agency heads.<sup>154</sup> Rather, when Congress delegates authority to administrative heads, Congress intends for such heads—not the President—to exercise the authority.<sup>155</sup>

Even apart from a directive authority, a “President has many resources at hand to influence the scope and content of administrative action.”<sup>156</sup> For example, the very existence of the oversight functions carried out by OMB and OIRA “causes the agencies to do a better job in thinking through and documenting support for their proposals.”<sup>157</sup> Moreover, whether directly or indirectly through these offices, the President has the means to—and often does—make his policy preferences known to administrative officials. As then-Dean Kagan explained: “Agency officials may accede to [the President’s] preferences because they feel a sense of personal loyalty and

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153. For constitutional justifications, see, for example, Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power To Execute the Laws*, 104 YALE L.J. 541, 570-90 (1994); Christopher S. Yoo et al., *The Unitary Executive in the Modern Era, 1945-2004*, 90 IOWA L. REV. 601, 730 (2005). For normative justifications, see, for example, Calabresi, *Some Normative Arguments*, *supra* note 7; Kagan, *supra* note 1, at 2332-33 (arguing that a President with decision-making authority carries the potential to increase accountability and administrative effectiveness); Lessig & Sunstein, *supra* note 139, at 2-3.

154. See, e.g., Kagan, *supra* note 1, at 2250 (reporting that under “[t]he conventional view ... Congress can insulate discretionary decisions of even removable (that is, executive branch) officials from presidential dictation—and, indeed, that Congress has done so whenever (as is usual) it has delegated power not to the President, but to a specified agency official”); see also Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1755-1810 (1996) (arguing that unitary executive is incorrect as a matter of original understanding).

155. See Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 24-25 (1995) (noting that the generally accepted view is that “the President has no authority to make the decision himself, at least if Congress has conferred the relevant authority on an agency head”); Thomas O. Sargentich, *The Administrative Process in Crisis—The Example of Presidential Oversight of Agency Rulemaking*, 6 ADMIN. L.J. AM. U. 710, 716 (1992) (stating that “the power to regulate remains where the statute places it: the agency head ultimately is to decide what to do”).

156. Kagan, *supra* note 1, at 2298.

157. Sally Katzen, *A Reality Check on an Empirical Study: Comments on “Inside the Administrative State,”* 105 MICH. L. REV. 1497, 1507 (2007).

commitment to him; because they desire his assistance in budgetary, legislative, and appointments matters; or in extreme cases because they respect and fear his removal power.”<sup>158</sup>

## 2. Critiques of the Presidential-Control Model

As with the judicial-control model, the theory undergirding presidential control does not necessarily comport with practice. And it is from this chasm, between theory and practice, that the central critiques of the presidential-control model spring.

First, critics argue, notions of presidential accountability are misguided and are otherwise overstated. Much of the so-called “presidential” influence is actually performed by politically unaccountable surrogates in OMB, OIRA, or by other White House officials.<sup>159</sup> Apart from the fact that these officials are not democratically elected, they may be just as or more susceptible to the narrow interests that threaten agency objectivity.<sup>160</sup> Moreover, even to the extent that the President may personally influence administrative action, it is mythical to believe—except perhaps at the very margins of economic or social policy—that the electorate votes for a President based on any particular policy preference.<sup>161</sup>

It is further argued that claims to legitimacy resting on the President’s appointment and removal powers are similarly misguided and overstated. Although presidents might hope to preemptively control administrative action through the appointment power, agency heads, once appointed, are subject to a multitude of competing forces.<sup>162</sup> These may include a sense of responsibility from promises or concessions made to senators during the confirmation process, pressure from congressional oversight committees, insti-

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158. See Kagan, *supra* note 1, at 2298.

159. See, e.g., Strauss, *Overseer or “the Decider,” supra* note 151, at 718 (“Realists understand that much presented to them as the President’s wishes may in fact be only the imaginings of a White House functionary pursuing her own agenda.”).

160. See Farina, *Undoing the New Deal, supra* note 72, at 231-32.

161. *Id.* at 231 (“In its claims that the President possesses paramount democratic legitimacy because he alone is elected by the entire nation, it oversimplifies ... the degree of true citizen consensus on public policy questions manifested in presidential electoral politics.”).

162. Strauss, *Overseer or “the Decider,” supra* note 151, at 718 (noting the “space for agency heads to pursue their own responsibilities” resulting from competing influences).

tutional pressure from “lifers” at the agency, public pressure, or simply by a personal sense of trying to do the right thing.<sup>163</sup> Moreover, as noted, the draconian measure of the removal power makes it rarely used as a corrective measure. And even when it is, there can be no assurance that the replacement official will succumb to the President’s policy preference.<sup>164</sup> Most notably, however, the formal removal power and whatever shadow of influence it casts do not extend to independent agencies, which represent a considerable portion of the administrative state.<sup>165</sup>

Further, the sheer volume of administrative action turns the ideal of presidential review on its logistical head. There is simply too much for the President to review, undercutting notions of both accountability and effectiveness of control.<sup>166</sup> Finally, on normative grounds, presidential control in the form of politicking may unduly interfere with agency expertise, leading to worse public results.<sup>167</sup>

### C. Congressional-Control Model

Congress’s political accountability and constitutional pedigree for lawmaking makes it a very natural source of administrative control.<sup>168</sup> Indeed, to some like Professor Jaffe, congressional oversight is a necessary, though generally insufficient, condition of administrative legitimacy.<sup>169</sup> As Jaffe explains,

The legislature must be ready to intervene when administration runs into crucial issues for the settlement of which the existing

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163. *See id.*

164. President Nixon’s removal of Watergate special investigator Archibald Cox provides an historic example. *See* Strauss, *Presidential Rulemaking*, *supra* note 138, at 973-74.

165. *See* *Mistretta v. United States*, 488 U.S. 361, 410-11 (1989).

166. *See, e.g.*, Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 492-515 (2003) (arguing that the model does not adequately prevent arbitrary agency action).

167. Thomas O. McGarity, *Presidential Control of Regulatory Agency Decisionmaking*, 36 AM. U. L. REV. 443, 452-53 (1987) (arguing that presidential control interferes with agency independence); Sidney A. Shapiro, *Political Oversight and the Deterioration of Regulatory Policy*, 46 ADMIN. L. REV. 1, 24 (1994) (arguing that presidential control interferes with agency expertise).

168. Farina, *Statutory Interpretation and the Balance of Power*, *supra* note 6, at 514 (“[A] vision of the administrative state that retained Congress as the control center of domestic public policy making was, if ultimately unrealistic, essentially true to the legitimacy ideal.”).

169. For Jaffe, judicial review is also generally required. JAFFE, *supra* note 6, at 320-21.

standard is an inadequate guide. When such issues arise, there is no longer the excuse that the legislature is without the time, the information, or the competence to deal with them.<sup>170</sup>

Again, however, the problem lies in implementation. “For many years, political scientists and other observers of government agreed that once Congress made [administrative] delegations, it could not, or at the least did not, exercise any *effective* control over administrative policymaking.”<sup>171</sup> This perception grew from “the rarity of any visible use by Congress” of its “levers of control, ... as well [as] the widespread lack of knowledge and interest among members of Congress.”<sup>172</sup>

More recently, however, some scholars have returned their focus to Congress as a legitimizing force.<sup>173</sup> In part, this trend is reactive to the perceived failings of the foregoing models of control and of the evolving perceptions of Congress’s ability to afford an effective check over administrative action.<sup>174</sup> Like the presidential modes of oversight and control, congressional influence stems from a combination of formal and informal measures. But, just like the judicial- and presidential-control models, the congressional-control model is roundly criticized.

### *1. Congressional Oversight and Control*

Chief among Congress’s formal control mechanisms is the legislative power. Most significantly, Congress can override administrative policy *ex post* by passing or amending a statute through the normal legislative channels of bicameralism and presentment.<sup>175</sup>

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170. *Id.* at 41; *see also* Farina, *Statutory Interpretation and the Balance of Power*, *supra* note 6, at 514 (“The creation of the administrative state was thus legitimated by moving from a model in which the legislature controls policy making through initiation to a model in which it controls policy making through supervision and reaction.”).

171. Kagan, *supra* note 1, at 2256 (emphasis added).

172. *Id.*

173. *See generally* Beermann, *Turn Toward Congress*, *supra* note 82 (arguing that the combinations of Congress’s formal and informal controls affords legitimacy to administrative power).

174. *See id.* at 727 (“Congress engages in an extensive and ever-increasing level of oversight of the activities of the executive branch.”).

175. Beermann, *Congressional Administration*, *supra* note 8, at 71 (“Congress’s most important formal method of influencing the administration of the law is legislation, that is,

Pursuant to the Congressional Review Act (CRA),<sup>176</sup> Congress also is authorized, within a certain period of time, to *override* an administrative rule by joint resolution *without* having to modify any statutory language.<sup>177</sup> Under the CRA, all federal agencies are required to submit each proposed final and interim final rule for review by Congress and the General Accounting Office (GAO) before it can take effect.<sup>178</sup> The CRA creates “an automatic process for generating legislative consideration of disapproval in *every* case of agency rulemaking, that brings *all* rules before Congress for review immediately upon their adoption.”<sup>179</sup> Although the constitutional requirements of bicameralism and presentment for legislating are not circumvented by this procedure, the CRA eases Congress’s own rules,<sup>180</sup> making it easier for overriding legislation to make it to the floor of each House of Congress for votes.<sup>181</sup>

Apart from the foregoing statutory correctives, political scientists Matthew McCubbins, Roger Noll, and Barry Weingast (collectively known as “McNollgast”) famously hypothesized that Congress exerts *ex ante* control over administrative policy through statutorily created administrative procedures.<sup>182</sup> Such procedures—for example, the Administrative Procedure Act’s (APA) notice-and-

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by passing a bill through both Houses of Congress and presenting it to the President for signature or veto.”); *see also* Molot, *supra* note 12, at 1287 (noting that “Congress always retains power to pass new legislation overruling statutory constructions with which it disagrees”).

176. 5 U.S.C. §§ 801-808 (2006).

177. *See id.* § 801(a)(3)(B). The CRA provides the mandatory text of any joint resolution disapproval: “That Congress disapproves the rule submitted by the [agency] relating to \_\_\_\_\_, and such rule shall have no force or effect.” *Id.* § 802(a). For a recent discussion of the CRA, *see* Note, *The Mysteries of the Congressional Review Act*, 122 HARV. L. REV. 2162, 2167-68 (2009).

178. 5 U.S.C. § 801 (a)(1)(A)-(B).

179. Peter L. Strauss, *From Expertise to Politics: The Transformation of American Rulemaking*, 31 WAKE FOREST L. REV. 745, 768 (1996).

180. *See* 5 U.S.C. § 802.

181. Beermann, *Congressional Administration*, *supra* note 8, at 84 (“Substantively, the CRA is unnecessary because Congress always had the power to legislatively override agency rules. The main innovations of the CRA are procedural, primarily consisting of the advance notice to Congress of proposed rules and the expedited procedure for a resolution disapproving an agency rule to reach the floor of each House of Congress for a vote.”).

182. McNollgast, *Structure and Process*, *supra* note 120, at 440. But, of course, judicial review is necessary for the procedure-as-oversight mechanism to work because “courts force agencies to comply with the procedures that facilitate fire-alarm oversight.” Bressman, *Procedure as Politics*, *supra* note 82, at 1767-71.

comment requirements of administrative rulemaking<sup>183</sup>—are intended to promote fairness, open deliberation, and discourse among the targets and beneficiaries of administrative action.<sup>184</sup> In one important sense, this public participation promotes sound public policy by incorporating diverse viewpoints.<sup>185</sup> Moreover, as a congressional oversight function, members of the engaged public present a pool of potential whistleblowers who—with “fire-alarm” effect—may report back to Congress if dissatisfied with administrative choice.<sup>186</sup>

Congress also holds the power of the purse.<sup>187</sup> Under the Constitution’s Appropriations Clause, “[n]o Money shall be drawn from the Treasury,” except through the normal legislative channels of bicameral passage and presidential presentment.<sup>188</sup> Congress sometimes uses what are known as “appropriations riders” to “single out a specific regulatory activity and prohibit the expenditure of funds for carrying out that regulatory activity or plan.”<sup>189</sup> Ultimately, Congress’s power of the purse offers a simple truth: an unfunded agency is a powerless one.

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183. See 5 U.S.C. § 553.

184. JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 186 (3d ed. 1998); see also *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 741 (1996) (noting that the APA notice-and-comment procedure is “designed to assure due deliberation”).

185. Richard J. Pierce, Jr., *Seven Ways To Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 86 (1995) [hereinafter Pierce, *Seven Ways To Deossify*] (explaining that notice-and-comment rulemaking increased likelihood that agencies will “make wise and well-informed policy decisions if they solicit, receive, and consider data and views from all citizens who are likely to be affected by a policy decision”).

186. McNollgast, *Structure and Process*, *supra* note 120, at 434 (“[A] politician who was a member of the coalition that enacted a program can rely on ‘fire alarms’ sounded by the targeted beneficiaries as a mechanism to trigger formal investigations and/or legislative responses to noncompliance.”).

187. See generally HAROLD J. KRENT, PRESIDENTIAL POWERS 77-83 (2005) (discussing strength of and limits on Congress’s power over appropriations). In the Budget and Accounting Act of 1921, ch. 18, 42 Stat. 20 (codified as amended in scattered sections of 31 U.S.C.), Congress relinquished some *control* over the budget process by requiring the President (and his increased budgetary staff) to prepare the annual budget. “However, as a formal matter, Congress retains the *power* of the purse.” Beermann, *Congressional Administration*, *supra* note 8, at 85 (emphasis added).

188. U.S. CONST. art. I, § 9, cl. 7.

189. For examples of congressional use of appropriation riders to target specific administrative action, see Beermann, *Congressional Administration*, *supra* note 8, at 85-88; see also Seidenfeld, *A Civic Republican Justification*, *supra* note 11, at 1551-52 (“Appropriations subcommittees frequently specify which programs are to receive funds.”).



The foregoing modes of control are complemented by more informal ones.<sup>190</sup> The greatest source of informal control comes from committee and subcommittee oversight.<sup>191</sup> Professor Beermann explains that the committee hearing process “facilitates tacit agreements between committees and agencies requiring agencies to handle matters in an agreed-upon way in the future.”<sup>192</sup> Although such directives are not legally binding on agencies, committee members often make strongly worded suggestions or may even insist on assurances to the same effect “in exchange for foregoing legislative action or further investigation.”<sup>193</sup> In light of the leverage Congress enjoys by virtue of its formal modes of control, administrators have a strong incentive to—and often do—listen.<sup>194</sup>

Outside of committee hearings, which are generally open to the public, Congress monitors agencies through informal staff contacts.<sup>195</sup> Although the law is unsettled regarding whether *ex parte* communications between congressional staff and administrative staff are permissible when administrative proceedings are *pending* on a particular issue, “members of Congress may communicate freely with agency personnel and urge the agency to take or forego action” when no proceedings are pending.<sup>196</sup>

## 2. Critiques of the Congressional-Control Model

Although Congress enjoys unyielding supremacy in lawmaking, critiques of congressional control of administrative action arise at

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190. Beermann, *Congressional Administration*, *supra* note 8, at 121.

191. *See id.* at 122-23 (reporting that “[i]t is apparently very easy for members of Congress with an interest in a particular agency to assume an oversight function within the structure of a committee or subcommittee”).

192. *Id.* at 125.

193. *Id.*

194. As Professor Beermann explains, the power of informal influence lies in the threat of a formal response. *Id.* at 121, 136; *see also* *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1816 n.4 (2009) (recounting ongoing committee pressures that resulted in a dramatic change in the FCC’s enforcement policy regarding broadcast indecency).

195. *See* Steven P. Croley, *Public Interested Regulation*, 28 FLA. ST. U. L. REV. 7, 12 (2000); Molot, *supra* note 12, at 1289 (observing that “individual legislators often intervene informally in the administrative process on behalf of constituents or special interests”).

196. Beermann, *Congressional Administration*, *supra* note 8, at 130. For a discussion of the issues surrounding the propriety of *ex parte* communications in the context of informal agency adjudication, *see id.* at 133-35.

the intersection of practice and democratic theory: Congress’s formal modes of control cannot meet the challenges of *effective* administrative control, whereas efforts to compensate through informal means strain democratic norms.

As explained above, Congress’s ability to veto administrative policy through a legislative amendment is always an option. But it is exercised only sporadically.<sup>197</sup> As a threshold matter, Congress generally is unaware of—or otherwise does not take meaningful interest in—administrative issues except at the margins of public saliency.<sup>198</sup> Although “fire-alarms” pulled by constituents may potentially trigger a legislative reaction, congressional interest in any particular issue is subject to die on the committee-system vine before garnering widespread support.<sup>199</sup> Moreover, the hypothetical appeal of fire-alarm oversight may be overstated in practice; “[p]olitical scientists have not been able to demonstrate that fire-alarm oversight reliably occurs.”<sup>200</sup>

Even when administrative policy has sparked wide congressional interest, a legislative fix is rare. Many of the forces conspiring toward congressional delegation at the front end of the process<sup>201</sup> obstruct a corrective response on the back end.<sup>202</sup> Indeed, reaching a legislative consensus on the back end may be even *more* difficult because, “[i]f the administration has already made a decision, it will

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197. See Mashaw, *Prodelegation*, *supra* note 38, at 96 (“The high transactions costs of legislating specifically suggests that legislative activity directed to the modification of administration mandates will be infrequent.”); Seidenfeld, *A Civic Republican Justification*, *supra* note 11, at 1551.

198. See Farina, *Statutory Interpretation and the Balance of Power*, *supra* note 6, at 502-03, 508-09.

199. Cf. Mark Seidenfeld, *Bending the Rules: Flexible Regulation and Constraints on Agency Discretion*, 51 ADMIN. L. REV. 429, 482 (1999) (“Legislative inertia and the gatekeeping function of congressional committees can prevent Congress from responding even when there is a general consensus on the need for legislative action.”).

200. Bressman, *Procedures as Politics*, *supra* note 82, at 1816; see also Terry M. Moe, *An Assessment of the Positive Theory of “Congressional Dominance.”* 12 LEGIS. STUD. Q. 475, 486-90, 513 (1987).

201. See *supra* notes 25-35 and accompanying text.

202. Spence, *Rethinking Positive Theory*, *supra* note 30, at 436 (“As a practical matter ... Congress is handicapped by the very same collective choice problems that impede ex ante controls. Indeed, it is not uncommon for Congress to be unable to muster a majority in support of an ex post legislative response to agency provocation, even when a majority is unhappy with the agency policy.”); see also McNollgast, *Structure and Process*, *supra* note 120, at 441 (“Legislation can reverse the agency, but not before a new constituency is mobilized in support of the new policy.”).

necessarily have the support of some powerful force in the community.<sup>203</sup> Further, even if a majority coalition forms in Congress to override an administrative policy, the prospect of a presidential veto is quite real under the fair assumption that the President is likely to support the policy choice of his administration. In addition, Congress has limited time and resources to deal with the myriad of issues presented to it. Thus, errant administrative policies—even when the necessary conditions for correction exist—must wait in the legislative queue.

The CRA, which provides the procedural vehicle for congressional oversight and streamlined legislation, has generally failed to live up to its potential.<sup>204</sup> The sheer volume of proposed rules submitted to the GAO staggers meaningful review of any particular one.<sup>205</sup> Indeed only *one* administrative rule has been struck pursuant to the CRA's procedure since its passage in 1996.<sup>206</sup>

The result is that agencies, cognizant of the rather empty threat of congressional override via the CRA or otherwise, simply may “not factor in congressional disapproval as part of [the] rule development process.”<sup>207</sup> Because a legislative check is most likely to occur “only when the agency's position has incited widespread or well-organized discontent,”<sup>208</sup> agencies may create policy beyond what a statute intends, so long as the policy avoids extreme provocation.<sup>209</sup> It is in the ether between congressional intent, if there is one, and political

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203. JAFFE, *supra* note 6, at 45.

204. For many of the reasons examined below, Professor Rosenberg proposes a “complete overhaul” of the CRA to include a requirement that all covered rules be subject to congressional approval as opposed to mere rejection, as well as a “severe” limitation of judicial review of statutorily approved rules. Morton Rosenberg, *Whatever Happened to Congressional Review of Agency Rulemaking?: A Brief Overview, Assessment, and Proposal for Reform*, 51 ADMIN. L. REV. 1051, 1075 (1999).

205. *Id.* at 1052.

206. The one example occurred in the transition between the Clinton and Bush administrations, when a Republican Congress blocked an OSHA rule on ergonomic injuries that President Clinton probably would have supported. Act of Mar. 20, 2001, Pub. L. 107-5, 115 Stat. 7; *see also* Statement on Signing Legislation To Repeal Federal Ergonomics Regulations, 1 PUB. PAPERS 269 (Mar. 20, 2001).

207. Rosenberg, *supra* note 204, at 1063; accord Spence, *Rethinking Positive Theory*, *supra* note 30, at 435 (observing that “the agency often has no reason to believe that a particular policy choice will trigger a veto, and its policy choice will not be constrained by its anticipation of a veto”).

208. Farina, *Statutory Interpretation and the Balance of Power*, *supra* note 6, at 509.

209. *Id.*

saliency that the legislative power generally remains static as a check on administrative policy.<sup>210</sup>

Congress's harnessing of the purse strings is also a debatable means of administrative control. Some argue that Congress has, in practice, effectively abdicated its budgetary responsibilities by ceding too much of the budgetary process to the President.<sup>211</sup> Others note, on related grounds, that “congressional control of regulatory policy through the budget tends to be sporadic and very particularized.”<sup>212</sup> Apart from these underutilization critiques,<sup>213</sup> congressional use of appropriation riders has been attacked on constitutional and democratic grounds. Professor Steven Calabresi deems appropriations riders constitutionally suspect insofar as they “affect directly the President's exercise of what would otherwise appear to be his core executive powers.”<sup>214</sup> Others view riders as undemocratic substitutes for substantive lawmaking.<sup>215</sup> Riders “often fly below the political radar, placed in the bill by a few connected members of Congress and voted on by members who may not even be aware of their presence in the bill.”<sup>216</sup>

Finally, the use of congressional oversight committees can be problematic. Oversight committees tend to be effective in their informal influence because of the gate-keeping function they serve

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210. Cf. Cross, *supra* note 93, at 1297 (“Realistically, agencies have some autonomy to make policy decisions, but agencies cannot go outside the mainstream of political positions, nor can they ignore public opinion on salient issues without being checked by the political branches of government.”); Spence, *Rethinking Positive Theory*, *supra* note 30, at 443.

211. See, e.g., Louis Fisher, *Congressional Abdication: War and Spending Powers*, 43 ST. LOUIS U. L.J. 931, 932 (1999) (“[F]rom World War II to the present, Congress has repeatedly abdicated fundamental ... spending powers to the President.”).

212. Farina, *Statutory Interpretation and the Balance of Power*, *supra* note 6, at 508.

213. For an argument denying that Congress has abdicated its responsibility for the budget, see Neal Devins, *Abdication by Another Name: An Ode to Lou Fisher*, 19 ST. LOUIS U. PUB. L. REV. 65, 70-74 (2000).

214. Calabresi, *Some Normative Arguments*, *supra* note 7, at 53.

215. See Neal E. Devins, *Regulation of Government Agencies Through Limitation Riders*, 1987 DUKE L.J. 456, 464-68; Sandra B. Zellmer, *The Devil, the Details, and the Dawn of the 21st Century Administrative State: Beyond the New Deal*, 32 ARIZ. ST. L.J. 941, 995-96 (2000) (suggesting that if the nondelegation doctrine were strengthened, Congress would use appropriations riders as one method of avoiding accountability).

216. Beermann, *Congressional Administration*, *supra* note 8, at 88; see also DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY* 52-57 (1993); Neal E. Devins, *Appropriations Redux: A Critical Look at the Fiscal Year 1988 Continuing Resolution*, 1988 DUKE L.J. 389, 396-99, 404-05 (criticizing secretive nondeliberative process for passing continuing resolutions).

and because committees do not face the same resource constraints or procedural hurdles facing Congress as a whole. But some of the very qualities that make committee oversight so appealing also make it highly objectionable on democratic and normative grounds.<sup>217</sup> As committee influence approaches coercion, it disrupts, if not circumvents, the “finely wrought” bicameralism and presentment staples of the legislative process.<sup>218</sup> These “lawmaking procedures promote a particular kind of government accountability and a particular kind of democratic deliberation” that is likely to be lost when committee influence is wielded to bring about social or economic change.<sup>219</sup> The problem is only exacerbated to the extent that the policy preferences of oversight committees are tailored to special interests or otherwise fail to reflect the views of the whole Congress.<sup>220</sup>

#### *D. Themes and Lessons of Existing Administrative-Control Models*

Three important themes emerge from the existing administrative-control debates. First, there is the general consensus that administrative legitimacy depends on *some* form of oversight and control.

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217. “From the perspective of someone [like Professor Steve Calabresi] who believes in the unitary executive both as a matter of constitutional design and normative desirability, the oversight process, as carried out by congressional committees, is a disaster.” Beermann, *Congressional Administration*, *supra* note 8, at 124 n.292 (citing Calabresi, *Some Normative Arguments*, *supra* note 7, at 50-55).

218. *Cf.* *INS v. Chadha*, 462 U.S. 919, 951, 959 (1983) (striking the “legislative veto” as unconstitutional insofar as it circumvented the “finely wrought” legislative process).

219. Molot, *supra* note 12, at 1291; see Mark Seidenfeld, *The Psychology of Accountability and Political Review of Agency Rules*, 51 DUKE L.J. 1059, 1076-77, 1081-82 (2001) (arguing that committee oversight is undemocratic insofar as it bends administrative action in the direction of powerful legislators or key committees).

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A partial answer to this challenge to oversight is that it all takes place within a structure created by Congress and that Congress as a whole has, in effect, delegated oversight powers to the individuals and groups that exercise them, with tacit agreements that make individual members and committees free to act without interference from others as long as they do not stray too far from overall congressional preferences.

Beermann, *Congressional Administration*, *supra* note 8, at 141; accord D. RODERICK KIEWIET & MATHEW D. MCCUBBINS, *THE LOGIC OF DELEGATION: CONGRESSIONAL PARTIES AND THE APPROPRIATIONS PROCESS* 232 (1991) (arguing that the majority parties in Congress have effectively delegated power through the committee system in a way that yields “a strong and systematic influence” by the parties over Congress as a whole).

Whatever public value the administrative state offers modern government, such value is an insufficient justification for administrative power within our constitutional framework. Second, each branch offers unique capacities and perspectives as a checking body. But these attributes are more effectively put to work in some contexts than in others. Third, the capacity of each branch of government to oversee and control administrative action can be understood in both constitutional and functional terms: a branch's constitutional capacity is a measure of its *power* as a checking authority, whereas a branch's functional capacity is a measure of its *logistical ability* to check administrative action.

From these themes emerge two important lessons. First, difficulties emerge when models of administrative control blur or ignore the difference between the constitutional and functional dimensions of administrative oversight and control. For example, though Congress may functionally influence administrative action through committee pressure, dictating administration policy through this means threatens the constitutional legitimacy of the outcome. Second, attempts to legitimize administrative action through oversight and control should be sensitive not only to the institutional capacities of each branch of government as a checking authority but also to their institutional *limitations*. This sensitivity is vital to promoting the integrity of the system, which suffers a blow when a branch exerts control beyond the limits of its institutional competency. It is also vital to the objective public interest because it is within the heartland of competence that better public choices emerge.

### III. DEVELOPING A RELATIVE CHECKS PARADIGM

The judicial-, presidential-, and congressional-control models attempt to legitimize administrative power within our constitutional structure of separated-and-balanced power. For the reasons discussed above, however, none alone seem to meet the challenge. Of course, the models might simply be aggregated to maximize administrative control. But such a crude approach could prove too much. Namely, it could result in the substitution of one problem (administrative legitimacy), for others (institutional overreaching or undermining the public interest).

The “relative checks” paradigm, developed herein, offers reconciliation. As will be seen, the paradigm seeks to strike a balance between the costs and benefits of control by apportioning checking responsibilities among the respective branches, in a manner consistent with their respective competencies and with sensitivity to constitutional norms. Although legitimizing administrative power is critical, legitimization is not to be taken as an end to itself. Otherwise, the virtues of administrative power might be unnecessarily, and imprudently, lost. A consensus solution to the administrative puzzle is unlikely to emerge, at least not on the terms of the current debate. Yet—it is hoped—progress might be made through reconceptualization.

#### *A. Reconceptualizing the Administrative Puzzle*

The conflict surrounding the administrative state is one about power. This is simple enough, until it is recognized as a conflict with two fronts, four players, and shifting alliances. Further complicating matters, the terms of conflict mutate as the operational missions change: the players may be engaged for different reasons and may be working toward different ends. Only by better understanding the relationship between the fronts, players, and missions can we hope to improve the system.

##### *1. Missions*

Perhaps more than any other factor, it is the existence of variable missions that accounts for so much discord and confusion in the dialogues shaping administrative control. On the one hand, there is a definitive sense of promoting some objective *public interest*, the “public-interest mission.”<sup>221</sup> On the other hand, there is the equally definitive sense of the need to *legitimize* administrative power through oversight and control, the “legitimacy mission.”<sup>222</sup>

To be sure, these missions are not mutually exclusive. Controlling administrative power may be undertaken for the purpose of—and may in fact achieve—the public-interest ideal. Although not

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221. Molot, *supra* note 12, at 1256 n.69.

222. *See supra* Part II.

mutually exclusive, neither are the legitimacy and public-interest missions mutually dependent. At some point, the use of oversight and control to legitimize administrative power as an end in itself may undermine the public welfare.<sup>223</sup> For example, oversight and control can create biases for or against administrative action not necessarily in the public’s objective interest. Legitimacy concerns, upon being translated into oversight and control, might also result in a decision with worse public results than the one adopted by the agency. Given the independence of these operational missions, there exists an unsettling and very real possibility of the parties playing on the same field but in different games and with different rules.

As long as we operate within this dual system, a cohesive and coherent approach to understanding and resolving the power struggles surrounding the administrative state is made all the more unlikely. As developed more fully in Section B below, part of the solution may rest in (1) recognizing the shared values of the legitimacy and public-interest missions, and (2) tailoring government behavior toward those shared values.

## 2. *Fronts and Players*

The power struggle surrounding the administrative state is pitched on two fronts. One front hosts the *horizontal* struggle among the tripartite branches. The judiciary, Congress, and the President will tend to respond to each other depending on the mission, which in turn may be influenced by the subject matter or politics of the underlying regulatory issue. On the vertical front, the power game takes on new dimension with the introduction of a hydra-headed fourth player—the administrative state.<sup>224</sup> In general, though not always, an agency’s tendency will be to fill whatever power vacuum is left for it and, perhaps beyond that, to assume whatever addi-

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223. See generally Cross, *supra* note 93 (arguing that judicial review over administrative policy is constitutionally and normatively unjustified); Seidenfeld, *A Civic Republican Justification*, *supra* note 11 (arguing that administrative agencies may be the best government institutions for realizing the civic republican ideal).

224. See *FTC v. Ruberoid Co.*, 343 U.S. 470, 487 (1952) (Jackson, J., dissenting) (espousing one of the first views of the administrative state as a “veritable fourth branch of the Government”); see also Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 578 (1984).



tional power it can grab.<sup>225</sup> Vertically, the respective branches will respond—whether collectively or individually—as appropriate. But, again, the “appropriate” response will very much be influenced by the mission. If the mission is to legitimize administrative power, one might expect a greater collective push back from the oversight branches than if the mission is simply to promote the public interest, in which case a greater degree of administrative independence might be in order.<sup>226</sup>

### 3. *Revisiting the Questions*

The foregoing reconceptualization is intended to better map the complexities in the administrative power struggle and to provide the contextual framework of the analysis that follows. None of this, however, disturbs the one principle upon which most, if not all, commentators agree: *some* control and oversight of administrative action is constitutionally required, normatively justified, or both.<sup>227</sup> But if oversight and control are the answers, the critical predicate questions that a system of relative checks seeks to address are: (1) from what source, and (2) in what degree, should such oversight and control come? As will be seen, these questions should be asked together because the answers are intimately related.

### B. *Foundational Principles*

A relative checks approach rests on a set of related principles. To begin, the paradigm accepts—perhaps naively or incorrectly—that agencies are not inherently or necessarily tyrannical, but rather have at least the *potential* to best promote the public interest within the democratic bounds set by Congress.<sup>228</sup> That is, in setting policy

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225. See, e.g., David B. Spence, *A Public Choice Progressivism, Continued*, 87 CORNELL L. REV. 397, 408 (2002) (summarizing the argument that “agency bureaucrats were primarily maximizers of their own resources and power who used their expertise to take advantage of their political overseers, rather than conscientious professionals discharging a statutory duty”); Paul B. Stephan, *Accountability and International Lawmaking: Rules, Rents and Legitimacy*, 17 NW. J. INT’L L. & BUS. 681, 706 (1997) (noting that “all things being equal, bureaucrats seek to maximize their budgets”).

226. See, e.g., Seidenfeld, *A Civic Republican Justification*, *supra* note 11.

227. See *supra* Part II.

228. *But cf.* Stewart, *Reformation*, *supra* note 52, at 1675 (noting that “judicial review is

and in exercising discretion, agencies might just get it “right” (or right enough).

Further, a relative checks approach recognizes the costs and risks associated with checking administrative action.<sup>229</sup> As noted, those potentially include: (1) the diversion of limited government resources; (2) the substitution of a more harmful public policy than the one administratively adopted; and (3) biases for or against certain types of administrative action, when such biases may not be normatively desirable.<sup>230</sup> Moreover, to the extent that checks from the respective branches strain their constitutional or functional competencies, such checks threaten the integrity of our institutions of government or its structure as a whole.<sup>231</sup>

At the same time, however, the relative checks paradigm recognizes the risks associated with not checking, or underchecking, administrative action. Checks provide a deterrent effect on administrative agencies that—absent the check—might otherwise operate closer to or beyond the threshold of law.<sup>232</sup> In addition, not checking

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not a logical necessity” because a “combination of legislative supervision, popular opinion, and bureaucratic tradition might conceivably be adequate to ensure a tolerable degree of agency compliance with legislative directives,” but reasoning that “such a view would rest on assumptions that ... appear too optimistic”).

229. See, e.g., William N. Eskridge, Jr., *All About Words: Early Understandings of the “Judicial Power” in Statutory Interpretation, 1776-1806*, 101 COLUM. L. REV. 990, 1051 (2001) (noting agency costs associated with having an independent judiciary).

230. See, e.g., John D. Echeverria & Julie B. Kaplan, *Poisonous Procedural “Reform”: In Defense of Environmental Right-To-Know*, 12 KAN. J.L. & PUB. POL’Y 579, 609 (2003) (“Agency staff naturally deliberates with particular care about those problems and questions likely to produce litigation against the agency. Therefore ... an agency will often shape its policies to deflect the potential for litigation.”); see also William S. Jordan, III, *Ossification Revisited: Does Arbitrary and Capricious Review Significantly Interfere with Agency Ability To Achieve Regulatory Goals Through Informal Rulemaking?*, 94 NW. U. L. REV. 393, 394 (2000) (“According to the ossification hypothesis, the prospect of facing hard look review by the courts has caused administrative agencies to become reluctant to use the informal rulemaking process, with its attendant benefits of clear prior notice, widespread public participation, and comprehensive resolution of issues affecting large numbers of people or economic activities.”).

231. See, e.g., Charles H. Koch, Jr., *Judicial Review of Administrative Policymaking*, 44 WM. & MARY L. REV. 375, 390 (2002) (“A mistaken characterization of the agency action under review permits a court to arrogate power, not only in degree and nature of its review, but additionally in taking from the agency a decision assigned to it by Congress.”).

232. See Cass R. Sunstein, *Factions, Self-Interest, and the APA: Four Lessons Since 1946*, 72 VA. L. REV. 271, 289 (1986) (contending that judicial review is appropriate because it will decrease the chance that the administrative body will act in its own interest or in the interest of private groups).

or underchecking administrative action by any branch may be taken as an improper abdication of its constitutional duty.<sup>233</sup>

Finally, the paradigm rests on the principle that our constitutional structure does not demand or presuppose full-throttled control by the three branches of government over every type of administrative action.<sup>234</sup> That is, although our constitutional structure undoubtedly contemplates some measure of control and oversight of administrative action,<sup>235</sup> it does not in every case require a compendium of the maximum oversight and control that each branch may offer.

### *C. Tailoring Review Toward “Optimal Control”*

If the foregoing principles are sound—and I believe them to be—two critical conceptions emerge: First, there is a theoretically optimal level of control over administrative power. Second, checking administrative action should not be a one-size-fits-all enterprise.

#### *1. Optimal Control Point*

What the optimum level of control actually is will depend on any number of considerations.<sup>236</sup> The immediate point I wish to make, however, is that there is a theoretically optimal control point that strikes a proper balance between the costs and benefits of administrative review.<sup>237</sup> In any given context, for example, too much control

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233. JAFFE, *supra* note 6, at 41 (“When [critical] issues arise, there is no longer the excuse that the legislature is without the time, the information, or the competence to deal with them.”); Barry Friedman, *A Revisionist Theory of Abstention*, 88 MICH. L. REV. 530, 534 (1989) (“As a general rule, a court possessing jurisdiction must exercise it to resolve a properly presented dispute.”); Sunstein, *Constitutionalism*, *supra* note 14, at 476 (“The ‘take Care’ clause is a duty .... It does not authorize the President or administrative officials to violate the law through ‘inaction’ any more than it authorizes them to do so through ‘action.’”).

234. See, e.g., *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 625-26, 628 (1935) (recognizing Congress’s authority to limit the President’s removal power); ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* § 2.1, at 44 (2008) (noting prudential justiciability doctrines by which the Court declines to exercise its Article III power); cf. *INS v. Chadha*, 462 U.S. 919, 951, 959 (1983) (striking the “legislative veto” as unconstitutional insofar as it circumvented the “finely wrought” legislative process).

235. See, e.g., John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 637 (1996).

236. A full accounting of these considerations is beyond the scope of this Article.

237. Cf. Matthew C. Stephenson, *Optimal Political Control of the Bureaucracy*, 107 MICH.

over administrative action might result in worse public policy or deviate further from original congressional intent at the hands of the checking authority, whereas too little might result in like harms at the hands of the agency.

Of course, what is optimal will largely depend on how one defines the mission. As an entry to the dialogue, I suggest that optimal control lies within the shared values of the legitimacy and public-interest missions. That is, legitimizing administrative power through oversight and control should not be an end to itself but rather a means to be used as necessary to promote the public interest.

What is optimal should also depend, in part, upon the procedures used by the agency in reaching a decision or policy. Insofar as procedures contain built-in mechanisms for public and administrative deliberation, less control from the oversight bodies may be warranted from both a legitimacy and public-interest perspective.<sup>238</sup> For example, through a legitimacy lens, administrative procedures—such as APA’s notice-and-comment rulemaking—serve an indirect democratizing function by promoting public participation.<sup>239</sup> Increasing the public input also increases the likelihood of better public choices as more viewpoints are accounted for.

To be clear, this is at best a partial development of the optimal control conception. More work is needed and intended. For present purposes, however, locating optimal control within the shared values of the legitimacy and public-interest missions and tying it to

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L. REV. 53, 55-56 (2008) (explaining that some level of agency insulation is preferable to absolute presidential control for maximizing the overlap between voters’ policy preferences and agencies’ policy decisions). Professor Stephenson’s model focuses solely on presidential control and equates optimal control with majoritarian preferences. *Id.* at 55.

238. See Cynthia R. Farina, *The Consent of the Governed: Against Simple Rules for a Complex World*, 72 CHI.-KENT L. REV. 987, 1028-32 (1997) (discussing the legitimizing potential of administrative procedures); see also Seidenfeld, *A Civic Republican Justification*, *supra* note 11, at 1533, 1541 (arguing that administrative agencies have the best potential for realizing the civic republican ideal, but that structural and procedural adaptations are required).

239. See, e.g., William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1147 (2008) (“[A]n agency following notice-and-comment rulemaking procedures, pursuant to congressional authorization, might produce legal directives that are perceived of as relatively more *legitimate* than the typically ad hoc directives issued in administrative adjudications.”).

administrative procedures provides a principled approach toward steadying the target, which may help intuit, if not dictate, optimal control in particular cases.

### *2. Need for Tailored Control*

As noted, the second pillar of the relative-checks paradigm holds that administrative oversight should not be one-size-fits-all. Rather, administrative control should be tailored to administrative action. In the enforcement of regulatory law, agencies engage in law interpretation, policymaking, fact-finding, and discretionary judgments.<sup>240</sup> In any of their actions, agencies may get it right, or at least right enough. But the *likelihood* of them doing so may depend on what the agencies are being called upon to decide and the procedures used to decide it. That is simply to say, agencies may be more likely in some contexts than in others to produce sound policy within the bounds set by Congress. Relatedly, the risks and costs associated with checking administrative choice may depend on the type of the administrative action at issue. A checking body may be more likely to produce harm than good with respect to certain types of administrative action. A tailored approach to administrative control that is relative to both (1) the institutional competencies of the relevant actors, and (2) the type of administrative output at issue might hope to strike a proper balance.

### *3. Source and Degree Dimensions*

Tailoring administrative review through a relative checks paradigm occurs in two related dimensions. The first dimension looks to the *source* of control—whether from the Court, Congress, or the President. In general terms, this dimension is informed by the institutional capacities and limitations of the tripartite branches *relative to one another*. The second dimension concerns the *degree* of control—whether heightened, neutral, or deferential. In general terms, this dimension reflects the competencies of the respective

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240. See generally M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1386-90 (2004) (describing the policymaking and other administrative tools available to federal agencies).

branches relative to the *administrative agency*. These checking dimensions parallel the horizontal and vertical fronts of the power game envisioned earlier: the source determination involves a horizontal institutional comparison, the degree determination a vertical one.

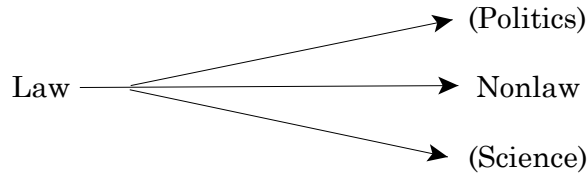
If the source of administrative control is thought of in terms of an on-off switch, the degree of control exercised by each branch provides an important, correlative, dimming function in a relative checks system. As noted, full-throttled review by any branch may be constitutionally or normatively undesirable.<sup>241</sup> Depending on circumstances, reducing the degree of control by any or all branches may help to optimally tailor administrative control to administrative output without having to turn off a checking source completely.

#### *4. Type of Administrative Output*

Critically, the horizontal and vertical institutional comparisons are not to be undertaken in isolation but rather in relation to the administrative action at issue. As a starting point for categorizing types of substantive administrative action, we might begin by positioning them along a “law”-“nonlaw” spectrum. At the law end of the spectrum, administrative actions are based on purely legal grounds—for example, an administrative interpretation of a statute using traditional tools of construction. At the nonlaw end of the spectrum, administrative actions are not based on any legal consideration, but rather on information, science, politics, or some combination thereof—for example, an administrative policy regulating benzene levels in the workplace, in which the regulatory statute provides no standards for setting the appropriate level. In between the law and nonlaw poles lay a range of administrative actions that combine legal and extra-legal considerations—for example, an interpretation of a regulatory statute that requires or accounts for scientific judgment. Those issues falling near or at the nonlaw end of the spectrum may be further subdivided—to the extent feasible—between politics and science.

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241. See *supra* Part II.D.



To be clear, this illustration is intended neither as an exhaustive nor mathematical metric. Rather, it is offered as a conceptual guide to help inform what type of administrative review may be most appropriate and effective. For example, and as explored further in Part IV, administrative action falling at or closer to the law end of the spectrum might warrant a greater judicial role. And the appropriate level of oversight from the political branches at the nonlaw end of the spectrum may be informed by whether the administrative action is politically or scientifically based. With respect to scientific outputs, less political (and judicial) oversight might be warranted.

### *5. Combining the Elements*

Finally, under a relative-checks paradigm, the source and degree of control by the respective branches should be considered in conjunction when possible.<sup>242</sup> For example, in cases in which the judiciary is deprived of jurisdiction—thereby eliminating a source of control—the political branches may consider adjusting the degree of their control as may be appropriate to reach optimal control. Or, for example, Congress and the judiciary may have an interest in upwardly adjusting the degree of their oversight and control over independent agencies to compensate for the lack of meaningful presidential control.<sup>243</sup> Of course, in reacting to the control—or lack thereof—exerted by the coordinate branches, each must seek to remain faithful to the institutional competencies of the collective actors. It is hoped that such a collective approach to administrative

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242. Cf. Farina, *Undoing the New Deal*, *supra* note 72, at 238 (“[W]hatever we may conceive as the appropriate level of regulatory activity, we have a common stake in articulating a vision of the regulatory state that encourages us to understand legitimacy and competence as a collaborative enterprise that must be pursued through a variety of official actors and institutional practices.” (italics omitted)).

243. See *infra* notes 296-97 and accompanying text.

control may temper overreaching by the respective branches at the margins of their functional and constitutional competencies, while at the same time promoting the public interest.

In sum, a system of relative checks posits the existence of an optimal control point within the shared values of the legitimacy and public-interest missions. The system further seeks to tailor administrative oversight along both source and degree dimensions, with appropriate sensitivity to the institutional competencies of the respective players, in relation to the type of administrative output at issue.

Many of the ingredients reflected in this paradigm are familiar to administrative law. As reflected in Part II, for example, comparative institutional analyses are the bedrocks of modern dialogues surrounding administrative control. Moreover, the tension between controlling administrative power and meeting some public-interest ideal through agency (semi)autonomy has been recognized.<sup>244</sup> Lacking before now, however, was a much-needed cohesive framework to harmonize and reconcile these and related themes. That is what the relative checks paradigm hopes to contribute.

#### IV. RELATIVE CHECKS IN ACTION

The foregoing Part established the general framework of a relative checks approach. This next and final Part puts relative checks to work, both prescriptively and descriptively. Reference is made throughout to existing government practices and doctrines, with an emphasis on three seminal administrative law doctrines: (1) the presumption of reviewability, (2) the *Chevron* doctrine, and (3) the hard-look doctrine. As will be seen, the first provides an example along the source axis; the latter two along the degree axis. Although these examples typify *aspects* of a relative checks approach, none completely capture it. To that end, refinements to these doctrines are suggested.

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244. See, e.g., Breyer, *Questions of Law and Policy*, *supra* note 10, at 394.



### A. *Source of Control*

Congress is generally the first mover in the horizontal melee over administrative control. This privilege originates from Congress's constitutional authority to both structure the administrative state<sup>245</sup> and to control the jurisdiction of the courts.<sup>246</sup> Congress exercises these powers in any number of ways. For example, Congress seeks to cabin presidential influence over the so-called "independent" agencies by placing limits on the President's power to remove the heads of such agencies.<sup>247</sup> Although there are different reasons Congress might opt to do so, in many instances Congress perceives a need or desire to depoliticize the actions of the agency at issue.<sup>248</sup> By weakening presidential influence, agencies have more freedom to pursue policy ends on scientific and other nonpartisan grounds.<sup>249</sup>

Congress also provides for and precludes judicial review of administrative action as it sees fit. Congress tends to do so when the perceived costs of judicial review outweigh the potential benefits, when judicial review threatens to displace the exercise of a discretionary power entrusted to the agency, or for other policy reasons.<sup>250</sup>

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245. U.S. CONST. art. I, § 8, cl. 18; *see also* Beermann, *Congressional Administration*, *supra* note 8, at 108 (noting Congress's authority to create and structure the administrative state).

246. U.S. CONST. art. III, § 1, cl. 1; CHEMERINSKY, *supra* note 234, at 191-207 (discussing Congress's power to control the jurisdiction of lower courts). For a discussion on the potential limits on Congress's authority to control lower court jurisdiction, *see generally* Martin H. Redish, *Constitutional Limitations on Congressional Power To Control Federal Jurisdiction: A Reaction to Professor Sager*, 77 NW. U. L. REV. 143 (1982); Lawrence Gene Sager, *Foreword: Constitutional Limitations on Congress' Authority To Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17 (1981).

247. *Mistretta v. United States*, 488 U.S. 361, 410-11 (1989) ("[C]ongressional limitation on the President's removal power ... is specifically crafted to prevent the President from exercising 'coercive influence' over independent agencies." (citations omitted)).

248. *See* HAROLD H. BRUFF, *BALANCE OF FORCES: SEPARATION OF POWERS LAW IN THE ADMINISTRATIVE STATE* 423 (2006) (reporting that the Federal Trade Commission (FTC) served as a model for later independent agencies and that, in setting up the FTC, "Congress ha[s] attempted to create a nonpartisan and impartial body of experts"); Neal Devins & David E. Lewis, *Not-So Independent Agencies: Party Polarization and the Limits of Institutional Design*, 88 B.U. L. REV. 459, 463 (2008) ("Some combination of concerns about expertise, due process, and the likely administrative actions of Presidents explains Congress's decision to constrain the President this way.").

249. *See* BRUFF, *supra* note 248, at 423; *see also* *Humphrey's Ex'r v. United States*, 295 U.S. 602, 625-26 (1935) (stating that Congress intended the FTC to be "independent of executive authority ... and free to exercise its judgment without leave or hindrance of any other official or any department of the government").

250. In the immigration context, for example, Congress has precluded judicial review of (1)

Although Congress is the first to act, it may not be the last. The President, though limited in the ability to remove independent agency heads, might nevertheless seek to influence these agencies through other means—for example, by subjecting them to reporting and other procedural requirements.<sup>251</sup> Moreover, in some cases the judiciary prudentially declines to exercise its jurisdiction, while in others it undertakes judicial review when Congress may have intended to preclude it.<sup>252</sup> Although different considerations may motivate these judicial responses, the theme of institutional competency provides a common thread.

The presumption of judicial review is illustrative.<sup>253</sup> The APA provides that, “except to the extent that ... statutes preclude judicial review[,] ... a person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.”<sup>254</sup> Whether jurisdiction exists under this giveth-unless-taketh-away provision depends, of course, on the lens through which a court discerns whether Congress has precluded judicial review.

In *Abbott Laboratories*, the Court understood the APA as supporting a presumption of reviewability: a presumption that could be overcome only upon clear and convincing evidence.<sup>255</sup> Although the Court in more recent years has tempered the strength of the presumption of reviewability,<sup>256</sup> it continues to serve the function of

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a number of discretionary determinations that might be made by the Attorney General in the course of an alien’s removal proceeding, 8 U.S.C. § 1252(a)(2)(B) (2006); (2) administratively unexhausted claims, *id.* § 1252(d); and (3) claims brought by certain categories of criminals, *id.* § 1252(a)(2)(C).

251. Devins & Lewis, *supra* note 248, at 464-65.

252. See BRUFF, *supra* note 248, at 423-24.

253. Another example is the administrative exhaustion doctrine, which generally requires parties to exhaust agency-prescribed remedies before seeking review in federal court. See *McCarthy v. Madigan*, 503 U.S. 140, 144-45 (1992). *But cf.* *Darby v. Cisneros*, 509 U.S. 137, 153-54 (1993) (holding that Congress effectively codified the doctrine of exhaustion in the APA but a prudential exhaustion requirement continues to apply in administrative cases not governed by the APA).

254. Administrative Procedure Act, 5 U.S.C. §§ 701-02 (2006).

255. Professor Levin explains that “[*Abbott Laboratories*] is a symbol of society’s deeply ingrained commitment to the availability of judicial review as a check on administrative action.” Levin, *supra* note 70, at 702.

256. See RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE 1281 (4th ed. 2002) (noting that the U.S. Supreme Court has continued to gradually reduce the scope and strength of the presumption of reviewability); *see, e.g.*, *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 349-51

making judicial review of administrative action the rule rather than the exception.<sup>257</sup>

Professor Jaffe observed that the premise of judicial review in the administrative context “may be more easily grounded in English constitutional history than in our own” because, “[u]nder our system of separation of powers, the judiciary and the executive are coordinate, and it is therefore not so easy to derive a judicial power to control the executive.”<sup>258</sup> This leads to the inexorable question of *why* the Court has engrafted a presumption of judicial review.

The answer appears most tethered to “rule-of-law” principles<sup>259</sup>—more pointedly, to the perception that administrators would be lawless without oversight<sup>260</sup> and the historic understanding that it is “emphatically the province and duty of the judicial department to say what the law is.”<sup>261</sup> As Justice Brandeis explained in *St. Joseph Stockyards, Co. v. United States*, “The supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied.”<sup>262</sup> In the end, the presumption of judicial review is just that—a presumption. But it stands and operates as a guiding principle of judicial control in cases in which Congress has been less than clear in its intent to preclude judicial review.<sup>263</sup>

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(1984) (finding the presumption had been overcome, and explaining that the presumption favoring judicial review of administrative action “may be overcome by inferences of intent drawn from the statutory scheme as a whole” and that the “clear and convincing evidence standard” is met “whenever the congressional intent to preclude judicial review is fairly discernible in the statutory scheme” (internal quotation marks omitted)).

257. JAFFE, *supra* note 6, at 153-54 (“There stands [a] major premise that the judiciary is the ultimate guarantor of legality, that judicial control of official action is, therefore, the rule, and exclusion the exception.”).

258. *Id.* at 154.

259. *See, e.g.*, *Am. Sch. of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 108 (1902) (“The acts of all ... officers must be justified by some law, and in case an official violates the law to the injury of an individual the courts generally have jurisdiction to grant relief.”); Farina, *Statutory Interpretation and the Balance of Power*, *supra* note 6, at 473 (“Prompted by the perception that the New Deal’s regulatory fervor had bred a chaotic and unaccountable world of administrative power, the APA represented a conscious congressional determination to strengthen judicial control over the administrative system.”).

260. Jerry L. Mashaw, *Organizing Adjudication: Reflections on the Prospect for Artisans in the Age of Robots*, 39 UCLA L. REV. 1055, 1056 (1992) (noting the fear of “runaway” administrative adjudicators).

261. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

262. 298 U.S. 38, 84 (1936) (Brandeis, J., concurring).

263. In *Dunlop v. Bachowski*, for example, the Court reaffirmed that the presumption of

Through a relative checks lens, the presumption-of-review doctrine may be understood as a judicial effort to tailor the *source* of administrative review to its institutional competency. That is an important directional step toward meeting the optimal control point. But it is incomplete because it is not sensitive to the *type* of administrative action at issue. From an institutional perspective, the judiciary is better positioned to oversee administrative outputs at the law end of the spectrum, and less well-suited—both functionally and democratically—to oversee administrative outputs at the spectrum’s nonlaw pole. In applying the presumption of review, then, courts can and should be more sensitive to where on the spectrum the administrative action at issue lies. For example, in determining whether to exercise jurisdiction when Congress has been less than clear in its jurisdictional intent, the scales might tip toward declining jurisdiction when the administrative output at issue is a factual or discretionary one at or near the nonlaw pole of the spectrum. Or, the scales may tip more toward exercising jurisdiction when the administrative output is at or near the law pole. Such an approach is not only more likely to meet Congress’s intent in the judicial review provision before the court but is also more likely to avoid the potential costs of judicial intervention.

### *B. Degree of Control*

Along the degree dimension, again Congress generally will be the first to act. To begin with, Congress determines its own level of oversight and control—for example, through committee oversight and the more recent processes of the Congressional Review Act. Congress also reaches to adjust the *courts’* degree of control by establishing judicial standards of review. For example, in the APA, Congress provides for de novo judicial review over administrative legal determinations, arbitrary and capricious review over other determinations, and a review of certain factual determinations for “substantial evidence.”<sup>264</sup> These standards may be understood to

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reviewability places the burden squarely on Congress to affirmatively indicate by clear and convincing evidence that it intends to preclude judicial review. 421 U.S. 560, 567 (1975); see also Daniel B. Rodriguez, *The Presumption of Reviewability: A Study in Canonical Construction and Its Consequences*, 45 VAND. L. REV. 743, 747 (1992).

264. 5 U.S.C. § 706 (2006).

roughly coincide with the law-nonlaw spectrum—with greater judicial scrutiny towards the law pole and less at the nonlaw pole. Meanwhile, Congress’s funding for OMB,<sup>265</sup> as well as its limitations on the President’s appointment and removal of independent agency heads,<sup>266</sup> provide examples of congressional attempts to control the degree of presidential oversight.

Again, however, Congress’s first say is not necessarily the last. For example, in *Chadha*, the Supreme Court famously struck as unconstitutional Congress’s legislative-veto statutes, in which Congress sought to reserve for itself the right to veto administrative action without having to satisfy the “finely wrought” bicameralism and presentment requirements.<sup>267</sup> Moreover, when Congress sought to sabotage President George H.W. Bush’s administrative oversight by delaying funding for OIRA and by rejecting his first nominee to head the agency, Bush responded by giving prominence to the oversight Council on Competitiveness chaired by then-Vice President Dan Quayle.<sup>268</sup> And, of course, the Court’s seminal *Chevron* and hard-look doctrines provide examples of judicial adjustments toward optimal control. As explained further below, the *Chevron* doctrine stands as a self-imposed dimmer on judicial control, and the hard-look doctrine as a self-imposed intensifier.

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265. See Jerry Brito & Veronique de Rugy, *Midnight Regulations and Regulatory Review*, 61 ADMIN. L. REV. 163, 195 (2009) (“[T]he ceiling on the number of regulations that can be processed by OIRA in a given time period can be raised by increasing the resources available to it.”); see also Robert Hahn & Robert E. Litan, *Why Congress Should Increase Funding for OMB Review of Regulations*, BROOKINGS INST., Oct. 2003, [http://www.brookings.edu/opinions/2003/10\\_ombregulation\\_litan.aspx](http://www.brookings.edu/opinions/2003/10_ombregulation_litan.aspx) (arguing that OIRA’s resources at present are inadequate and should be increased).

266. See Devins & Lewis, *supra* note 248, at 459 (“By placing limits on the President’s power to appoint and remove independent agency heads as well as mandating limits on the number of the President’s own partisans that can be appointed, Congress made use of an institutional design that sought to limit presidential control of independent agencies.”).

267. *INS v. Chadha*, 462 U.S. 919 (1983).

268. See Bagley & Revesz, *supra* note 67, at 1310-11; see also Kagan, *supra* note 1, at 2281 (describing structure and role of the Council).

### 1. *Chevron Doctrine*

In *Chevron*, the Supreme Court articulated a two-step framework for “review[ing] an agency’s construction of the statute which it administers.”<sup>269</sup>

First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.<sup>270</sup>

In short, under *Chevron*’s first step, courts are directed to perform an independent evaluation of regulatory statutes for “clear” meaning, and, if none is found, to defer to any permissible—that is, reasonable—interpretation by the administering agency.<sup>271</sup> This bifurcated approach to judicial review is based on a compendium of institutional and democratic recognitions discussed below.<sup>272</sup> *Chevron*, of course, did not speak in terms of reaching optimal control. Yet the *Chevron* doctrine goes a long way toward reaching that ideal through sensitivity to the relative capacities of the courts and agencies in respect to certain types of administrative out-

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269. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984).

270. *Id.* at 842-43.

271. *Id.*; see also Peter L. Strauss, *Within Marbury: The Importance of Judicial Limits on the Executive’s Power To Say What the Law Is*, 116 YALE L.J. POCKET PART 59, 60-61 (2006), [http://thepocketpart.org/images/pdfs/63\\_a.pdf](http://thepocketpart.org/images/pdfs/63_a.pdf) [hereinafter Strauss, *Within Marbury*] (describing the court’s role at step one as defining the bounds of a set of permissible interpretations and at step two in determining whether the agency’s interpretation fell within those bounds).

272. See, e.g., Sunstein, *Law and Administration*, *supra* note 62, at 2087-88 (1990) (“*Chevron* is best understood and defended as a frank recognition that sometimes interpretation is not simply a matter of uncovering legislative will, but also involves extratextual considerations of various kinds, including judgments about how a statute is best or most sensibly implemented.”).

puts—namely, agency interpretations of clear versus ambiguous statutes.<sup>273</sup>

First, *Chevron* implicitly recognized the limitations of the rule-of-law justification for judicial review.<sup>274</sup> As explained above, the central critique of the rule-of-law justification is that it should extend only so far as there is some definitive “law” to apply.<sup>275</sup> *Chevron*’s step one, which looks for clear statutory meaning, reserves in full the judicial function of enforcing law in cases where it clearly exists.<sup>276</sup>

Second, *Chevron* recognizes those occasions when there *is* no “law” to enforce—that is, when statutory language is silent or ambiguous.<sup>277</sup> Indeed, *Chevron* itself observes that such statutory gaps may have resulted from any number of factors, including an overt congressional preference to leave resolution of a controversial issue to administrators.<sup>278</sup> Regardless of why Congress fails to

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273. The *Chevron* doctrine has evolved—mostly by retreat—since its date of decision. Most notably, in *United States v. Mead Corp.*, the Court held that in order for *Chevron* deference to apply, courts must determine whether Congress’s intent to delegate is present in any given case. 533 U.S. 218, 229 (2001). That is, *Mead* instructs courts to no longer presume that Congress implicitly delegated authority to the administrative agency charged with administering that statute from statutory silence or ambiguity alone. *Mead* thus further returns a degree of primacy to legislative intent: if the justification for *Chevron* deference is because Congress intends for it, then evidence of such intent must be shown. See Beermann, *Turn Toward Congress*, *supra* note 82, at 743 (“Although the *Chevron* doctrine is often thought of as a doctrine requiring a very high level of deference to administrative agencies, in application, it has become largely a device for maintaining congressional primacy in contested matters of statutory meaning.”).

274. See Strauss, *Within Marbury*, *supra* note 271, at 60 (“With *Chevron*, the Court gave up the illusion that each question of statutory meaning has one sole determinate answer.”).

275. See *supra* notes 102-10 and accompanying text.

276. See JAFFE, *supra* note 6, at 575 (“The ‘rule of law’ imposes on [the judge] the duty to curb and correct action contrary to law. If to him the meaning is ‘clear,’ it matters not that the contrary is ‘reasonable.’”); Molot, *supra* note 12, at 1245 (noting that, under *Chevron*, judges “must decide for themselves where legislative instructions end and administrative leeway begins”).

277. See Molot, *supra* note 12, at 1242 (“The *Chevron* Court reasoned that when Congress’s statutory instructions are ambiguous, interpreting those instructions necessarily requires interpreters to make their own ‘policy choices,’ not just to carry out Congress’s.”).

278. See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984) (“Perhaps [Congress] consciously desired the Administrator to strike the balance at this level, thinking that those with great expertise and charged with responsibility for administering the provision would be in a better position to do so; perhaps it simply did not consider the question at this level; and perhaps Congress was unable to forge a coalition on either side of the question, and those on each side decided to take their chances with the scheme devised by the agency. For judicial purposes, it matters not which of these things occurred.”).

resolve a particular statutory gap, however, the Court recognized that—whether undertaken by an agency or a court—the output of the interpretative exercise is likely to reflect a policy choice rather than some divivable legislative bargain.<sup>279</sup>

Third, *Chevron* recognized that insofar as statutory interpretation requires a policy choice among plausible alternatives, administering agencies—relative to courts—are better suited to make that choice. That is true regardless of whether the administrative policy is influenced by politics or scientific expertise.<sup>280</sup> To the extent administrative policy is influenced by politics, administrators have a democratic pedigree superior to courts.<sup>281</sup> The Court explained that, “[w]hile agencies are not directly accountable to the people,” the President, positioned at the apex of the executive branch, is directly accountable.<sup>282</sup> And to the extent that policymaking requires scientific expertise, administrators have a technocratic edge.<sup>283</sup>

Still, *Chevron* recognized the potential dangers of giving administrators carte blanche discretion in policymaking. By deferring only to “reasonable” interpretations, *Chevron* obliges agencies to operate within the permissible bounds of statutory text.<sup>284</sup> In this way,

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279. *See id.* at 843 (“The power of an administrative agency to administer a congressionally created ... program necessarily requires the formulation of policy.”(alterations in original) (internal quotation marks omitted) (quoting *Morton v. Ruiz*, 415 U.S. 199, 231 (1974))); *see also* Farina, *Statutory Interpretation and the Balance of Power*, *supra* note 6, at 502 (“*Chevron*’s deferential model openly converts statutory interpretation into an aspect of policy making.”).

280. *See* Bernard W. Bell, *Using Statutory Interpretation To Improve the Legislative Process: Can It Be Done in the Post-Chevron Era?*, 13 J.L. & POL. 105, 141 (1997) (noting that *Chevron* reflects a “judicial determination that agencies, by virtue of their democratic pedigree and expertise, are more competent to interpret ambiguous statutes than are courts”); Sunstein, *Beyond Marbury*, *supra* note 58, at 2588 (stating that executive interpretations may benefit from a “special competence”).

281. *See Chevron*, 467 U.S. at 865; *see also* Bressman, *Procedures as Politics*, *supra* note 82, at 1765 (“*Chevron*, more than any other case, is responsible for anchoring the presidential control model. It recognized that politics is a permissible basis for agency policymaking.”).

282. *Chevron*, 467 U.S. at 865.

283. *See id.* (asserting that the regulatory scheme at issue was “technical and complex,” and suggesting that Congress may have consciously wanted the EPA Administrator to strike the balance among the competing interests, “thinking that those with great expertise and charged with responsibility for administering the provision would be in a better position to do so”); *see also* Richard W. Murphy, *Judicial Deference, Agency Commitment, and Force of Law*, 66 OHIO ST. L.J. 1013, 1033 (2005) (noting that *Chevron* deference is predicated in part on the fact that “agencies generally possess greater technocratic expertise than courts”).

284. Diver, *Statutory Interpretation*, *supra* note 54, at 569 (“Courts retain the authority to control administrative abuses of power; deferential review simply recasts the question of ‘law’



courts continue to promote Congress's primacy in lawmaking as well as the core judicial function of promoting administrative fidelity to Congress's loosely expressed commands.

The *Chevron* doctrine may be best understood as blending separation of powers principles with important recognitions of the institutional capacities—and limitations—of all three branches of government.<sup>285</sup> On separation of powers grounds, the Court seems concerned with “judicial usurpation” of power.<sup>286</sup> In particular, if the judiciary were to displace the policy choice of the legislature's chosen administrative delegate, it would “frustrate[] the will of a coordinate branch for [the courts'] own aggrandizement.”<sup>287</sup> But separation of powers alone cannot fully account for the deference that *Chevron* affords. That is, it is difficult to maintain that the court is somehow without the *power* to independently resolve statutory ambiguities.

*Chevron*, then, also should be understood to rest on the concern that judicial intervention may do more harm than good. This concern is based on the translegal nature of most regulatory policy, as well as the comparative advantage agencies have over courts in reaching a conclusion that is both administratively sound and democratically justifiable.<sup>288</sup> Of course the agency may get it “wrong,” and the court may compound the error by deferring. But because the political branches remain to correct any resulting harm, or to be held accountable for failing to do so, something less than full-throttled judicial review is sufficient when a regulatory statute is silent or ambiguous. Moreover, judicial deference to agency interpretations offers the venerable potential to reduce circuit splits because courts are more likely to agree under *Chevron*'s “reasonable-ness” standard than under a standard of independent review.<sup>289</sup>

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as whether the agency's interpretation is ‘reasonable.’”).

285. See Farina, *Statutory Interpretation and the Balance of Power*, *supra* note 6, at 466.

286. *Id.*

287. *Id.*

288. See Sunstein, *Beyond Marbury*, *supra* note 58, at 2588.

289. See Diver, *Statutory Interpretation*, *supra* note 54, at 586 (“Since deferential review is more likely to result in acceptance of the agency's choice, differences of opinion among multiple reviewers is less likely than under an independent standard.”); Strauss, *One Hundred Fifty Cases*, *supra* note 90, at 1121.

While the *Chevron* doctrine typifies aspects of a relative checks approach, the shortcoming of *Chevron* is in its implementation.<sup>290</sup> Empirical studies—most recently by Professors Miles and Sunstein—report that courts decide *Chevron* cases along ideological lines in a statistically alarming number of cases.<sup>291</sup> This split generally occurs by judges finding “clear” meaning at *Chevron*’s first step in more cases than it should or by not finding such “clear” meaning in order to defer to administrative interpretation at step two.<sup>292</sup> Although judges themselves may be to blame for such attitudinal decision making, part of the blame also rests in the indeterminacy of the *Chevron* doctrine itself. Most notably, *Chevron* instructs courts to determine whether the meaning of a statute is “clear”<sup>293</sup> and invites courts to use “traditional tools” of statutory interpretation in determining clarity.<sup>294</sup> Yet *Chevron* and its progeny leave open three fundamental questions: How clear? To what degree of confidence? Using which “tools of statutory construction”?<sup>295</sup> Until these questions are resolved, judges will more easily escape

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290. See Miles & Sunstein, *An Empirical Investigation of Chevron*, *supra* note 101, at 823 (noting that *Chevron*’s “call for judicial deference to reasonable interpretations was widely expected to have eliminated the role of policy judgments in judicial review of agency interpretations of law” but “this expectation has not been realized”).

291. See *id.* at 825-26 (reporting “a strong relationship between the justices’ ideological predispositions and the probability that they will validate agency determinations”).

292. See generally Linda Jellum, *Chevron’s Demise: A Survey of Chevron from Infancy to Senescence*, 59 ADMIN. L. REV. 725 (2007) (explaining how determinations under *Chevron*’s step one often depend on whether a textualist or intentionalist approach to statutory construction is used); Patricia M. Wald, *Judicial Review in Midpassage: The Uneasy Partnership Between Courts and Agencies Plays On*, 32 TULSA L.J. 221, 243 (1996) (citing cases demonstrating the high frequency with which judges disagree about whether there is an ambiguity for the agency to resolve and noting that this suggests reviewing courts may manipulate the *Chevron* decision to reach desired results).

293. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984).

294. *Id.* at 843 n.9. See generally WILLIAM N. ESKRIDGE, JR. ET AL., *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* ch. 7 (3d ed. 2001) (discussing the different types and uses of canons of statutory interpretation).

295. See Brian G. Slocum, *The Immigration Rule of Lenity and Chevron Deference*, 17 GEO. IMMIGR. L.J. 515, 540 (2003) (“While most would agree that at least some canons of statutory construction are ‘traditional tools of statutory construction,’ the question of which canons are applicable and how they should be incorporated into the *Chevron* framework, if at all, is a subject of much debate and confusion.”); Mark Burge, Note, *Regulatory Reform and the Chevron Doctrine: Can Congress Force Better Decisionmaking by Courts and Agencies?*, 75 TEX. L. REV. 1085, 1096 (1997) (“The outcome using the ‘traditional tools of statutory construction’ ... depends largely on who gets to choose the tools.”).

accusations of attitudinal decision making and thus may be expected to continue engaging in it.

Another potential shortcoming of the *Chevron* doctrine, from a relative checks perspective, is that *Chevron* does not distinguish between the outputs from executive and independent agencies. Under *Chevron*'s own terms, deference rests at least in part on the separation of powers principle that Congress has implicitly chosen the administering agency to resolve statutory ambiguities, and the institutional-comparative principle that agencies are more accountable through the President than are the courts.<sup>296</sup> But the second half of this equation may be less true with respect to *independent* agencies. This observation has prompted some commentators to argue for less judicial deference over interpretations by such agencies.<sup>297</sup>

Under a relative checks approach, less deference *may* in fact be warranted to offset the lack of effective presidential control. Yet it is too blunt to suggest that independent agencies deserve less judicial deference for that reason alone. The lack of presidential influence should raise a relative checks flag but should not be determinative. Congress, it must be recalled, may pick up the political slack and review the policy choices of independent agencies. Moreover, Congress often creates independent agencies to resolve technical and scientific issues, which not only the President, but also the *courts*, are less competent to resolve. Thus, to the extent that independent agencies are being called upon to make sound policy judgments based on scientific information and expertise, a greater, not lesser, degree of judicial deference might be warranted. Deference should depend on the nature of the administrative output.

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296. *Chevron*, 467 U.S. at 865.

297. Barry Friedman, *The Birth of an Academic Obsession: The History of the Counter-majoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 164 n.31 (2002) (suggesting that the decisions of independent agencies should perhaps receive less deference in light of *Chevron*'s political accountability rationale); Kagan, *supra* note 1 (arguing that less *Chevron* deference should be due to agency interpretations over which the President has little input, and extending this principle to interpretations by independent agencies); Randolph S. May, *Defining Deference Down: Independent Agencies and Chevron Deference*, 58 ADMIN. L. REV. 429, 442-51 (2006) (arguing that independent agencies should receive less judicial deference than executive branch agencies).

## 2. *Hard-Look Doctrine*

The hard-look doctrine provides an important counterexample to *Chevron* from a relative checks perspective. Unlike *Chevron*, which reflects a downward adjustment in the degree of judicial control, the hard-look doctrine reflects an upward judicial adjustment.<sup>298</sup> Hard-look review contains two complementary components: First, it requires *agencies* to take a hard-look at the issues and information before them. Second, it requires *courts* to take a hard-look to ensure that the policy settled upon by the agency is reasonable.<sup>299</sup> These components—individually and collectively—represent significant departures from what the APA requires on its face.<sup>300</sup>

Judicial review of agency policymaking is governed by the APA’s requirement that courts set aside “arbitrary” and “capricious” administrative decisions.<sup>301</sup> As initially conceived, this standard was highly deferential—akin to mere “rationality” review.<sup>302</sup> Under this conception, all that was required to survive judicial scrutiny under arbitrary and capricious review was for the agency to provide a plausible nexus between the means and ends of its policy choice.<sup>303</sup>

However, judicial scrutiny under the arbitrary and capricious standard increased in the late 1960s and 70s as perceptions of administrative capture took hold<sup>304</sup> and as agencies increasingly

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298. May, *supra* note 297, at 452 (noting that hard-look review departs from the traditionally deferential model of judicial review of agency actions); *see also* Sidney A. Shapiro & Richard E. Levy, *Heightened Scrutiny of the Fourth Branch: Separation of Powers and the Requirement of Adequate Reasons for Agency Decisions*, 1987 DUKE L.J. 387, 419.

299. *See* Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U. CHI. L. REV. 761, 761-62 (2008) [hereinafter Miles & Sunstein, *Arbitrariness Review*].

300. Patrick M. Garry, *Judicial Review and the “Hard Look” Doctrine*, 7 NEV. L.J. 151, 153 (2006) (noting under the hard-look doctrine that “courts engage in a judicial review that is much more searching and skeptical than that of the traditionally deferential ‘arbitrary and capricious’ review provided for in the APA”).

301. 5 U.S.C. § 706 (2006).

302. STEPHEN BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY 348 (6th ed. 2008).

303. *See* Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505 (1985); Note, *Rationalizing Hard Look Review After the Fact*, 122 HARV. L. REV. 1909, 1911 (2009); *see also* Pac. States Box & Basket Co. v. White, 296 U.S. 176, 186 (1935).

304. Breyer, *Questions of Law and Policy*, *supra* note 10; Thomas W. Merrill, *Capture Theory and the Courts: 1967-1983*, 72 CHI.-KENT L. REV. 1039, 1043 (1997) (“[T]he courts’ assertiveness during the period from roughly 1967 to 1983 can be explained by judicial disenchantment with the idea of policymaking by expert and nonpolitical elites.”).

turned to more informal modes of policymaking in a way that threatened to alienate broader public input.<sup>305</sup> In response to these trends, the D.C. Circuit launched a decisional campaign to engraft both procedural and substantive requirements on the arbitrary and capricious standard.<sup>306</sup> As Judge Levanthal unapologetically announced, there are some instances in which “the minimum requirements of the [APA] may not be sufficient” to provide meaningful review of administrative policy.<sup>307</sup> Judge Bazelon further opined that courts should not defer to “the mysteries of administrative expertise.”<sup>308</sup> Rather, he believed, courts should exercise “strict judicial scrutiny,” which he hoped would encourage agencies to meaningfully consider public input in the policy-making process and adequately explain the reasoning behind the policies it settled upon.<sup>309</sup>

In its seminal *Overton Park* and *State Farm* decisions, the Supreme Court condoned a hard-look approach to the review of informal administrative policymaking. Specifically, in *Overton Park*, the Court articulated that the arbitrary and capricious standard requires courts to conduct a “substantial inquiry” that does not “shield [the agency] from a thorough, probing, in depth review.”<sup>310</sup> To that end, the Court also essentially required the agency to create a record of its decision-making process in order to enable judicial review, even though the governing APA provisions did not require the compilation of a record.<sup>311</sup>

Later, in *State Farm*, the Court explained that a decision would count as arbitrary if:

[T]he agency has relied on factors which Congress has not intended to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that

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305. Merrill, *supra* note 304, at 1093.

306. See Miles & Sunstein, *Arbitrariness Review*, *supra* note 299, at 761; see also Ethyl Corp. v. EPA, 541 F.2d 1, 35 (D.C. Cir. 1976); *Kennecott Cooper Corp. v. EPA*, 462 F.2d 846, 850 (D.C. Cir. 1972).

307. See *Kennecott Cooper Corp.*, 462 F.2d at 850.

308. *Env'tl. Def. Fund, Inc. v. Ruckelshaus*, 439 F.2d 584, 597-98 (1971).

309. *Id.* at 598.

310. See *Citizens To Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971).

311. See *id.* at 419-21; see also Edward Rubin, *It's Time To Make the Administrative Procedure Act Administrative*, 89 CORNELL L. REV. 95, 127 (2003).

runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.<sup>312</sup>

The hard-look doctrine’s requirement that agencies consider and address public concerns has a trickle-down effect. It provides an incentive for the agency to solicit the comments of those who might be affected by a policy in advance so that the agency may deal with those comments in a neutral forum rather than in the context of a judicial challenge.<sup>313</sup> Engaging the public, in turn, increases the class of potential whistleblowers who may bring objections to the attention of elected officials or the courts.<sup>314</sup> Finally, by requiring that a record be created, courts are afforded at least a fighting chance of understanding the technical complexities of the relevant substantive issues and of the process leading to the agency’s ultimate decision.<sup>315</sup>

The hard-look doctrine stands as a judicial expression that Congress, in the APA, did not provide enough of a judicial check on administrative policies reached by informal means. Of course, whether *Congress* has provided adequate means for review generally is not for the *Court* to decide. Indeed, the Court itself made this point abundantly clear in its seminal *Vermont Yankee* decision, in which it reversed and chastised the D.C. Circuit for imposing procedural duties on agencies beyond those required by the APA.<sup>316</sup> The palpable tension between *Vermont Yankee*, on the one hand, and *Overton Park* and *State Farm*, on the other, has been sufficiently developed in the literature and is beyond the scope of this

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

313. Bressman, *Procedures as Politics*, *supra* note 82, at 1781.

314. *Id.* at 1810 (noting that hard-look review indirectly provides “the mechanism for constituents to invoke a congressional check on executive-branch action in particular contexts”).

315. See *Overton Park*, 401 U.S. at 419-20. *But cf.* Breyer, *Questions of Law and Policy*, *supra* note 10, at 389-90 (noting that it is unrealistic to think that a judge has the time, capacity, or resources to digest such records in a way that will lead to significantly better policy).

316. See *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 549 (1978) (chastising the D.C. Circuit for fundamentally misconceiving the nature of the standard for judicial review of an agency rule and for imposing on the agency “its own notion of which procedures are ‘best’ or more likely to further some vague, undefined public good”).

Article to resolve.<sup>317</sup> Yet it is this very tension that serves to highlight the rather audacious approach of the hard-look doctrine.

Under a relative checks conception, hard-look review may be understood as the Court's creative solution to two separate, but related, judicial perceptions. The first perception is one of general distrust or skepticism of administrative power.<sup>318</sup> The second recognizes the courts' institutional limitations when it comes to meaningfully checking the substance of administrative policies.<sup>319</sup> As administrative outputs become more technical or political, the courts' competency to control those outputs wane in proportion.<sup>320</sup> By requiring agencies to account for a wider range of public comments, courts effectively channel critical substantive analysis, in the first instance, to the better-informed and expert agencies.

Like the *Chevron* doctrine, the hard-look doctrine implicitly recognizes the existence of an optimal control point. Viewed through a relative checks lens, however, the problem with hard-look review is the *means* chosen by the court to meet the optimal control ideal. Insofar as policy questions subject to APA arbitrary-and-capricious review are ones of science and politics, the courts should be more, not less, deferential.<sup>321</sup> As then-Judge Breyer reported, it is unrealistic to think that a judge has the time, capacity, or resources to digest administrative records in a way that will lead to significantly better policy.<sup>322</sup> These shortcomings are only exacerbated by judicial tendencies to decide hard-look cases on ideological grounds, as recently reported in the empirical work of Professors Miles and Sunstein.<sup>323</sup>

The deleterious effects of a judicial substitution of judgment for that of the agency under hard-look review may be partially offset by the remedy chosen by the court. Rather than overturn an agency

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317. See Breyer, *Questions of Law and Policy*, *supra* note 10; Paul R. Verkuil, *Judicial Review of Informal Rulemaking: Waiting for Vermont Yankee II*, 55 TUL. L. REV. 418 (1981).

318. See, e.g., R. SHEP MELNICK, REGULATION AND THE COURTS: THE CASE OF THE CLEAN AIR ACT 11-12 (1983) (asserting that judges no longer trust agencies and use judicial review to push agencies to be more sensitive to citizens' interests).

319. See, e.g., Breyer, *Questions of Law and Policy*, *supra* note 10, at 389, 394.

320. See *id.* (arguing that judges lack the technical knowledge and independent access to information necessary to make a well-informed judgment about agency decisions).

321. See *id.*

322. See *id.* at 389-90.

323. Miles & Sunstein, *Arbitrariness Review*, *supra* note 299; see also Revesz, *supra* note 101, at 1719.

policy that it finds inadequate, courts may simply remand the matter to the agency for further proceedings.<sup>324</sup> This approach seems especially appropriate when the agency’s failure under the hard-look standard was its failure to adequately consider public comments or to adequately explain why it chose the policy it did.<sup>325</sup> Such “remand without vacation” provides a type of compromise that permits “courts to exercise a heightened scrutiny of the agencies, while at the same time allowing the agencies some freedom to act.”<sup>326</sup>

Even then, however, courts might still go too far. A principal critique of hard-look review is that it has the potential to “ossify” administrative rulemaking.<sup>327</sup> That is, hard-look review may, from the agencies’ perspective, render rulemaking too expensive or time consuming so as not to be worth the effort.<sup>328</sup> This, in turn, creates a bias in favor of the status quo<sup>329</sup> or, for agencies that have adjudicatory authority, a bias in favor of policymaking through ad hoc administrative adjudications.<sup>330</sup>

From either a legitimacy or public-interest perspective, neither of these biases seems justified. Compared to agency action, agency *inaction* is much less likely to be reviewed and corrected by the po-

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324. See, e.g., *Norinsberg v. U.S. Dep’t of Agric.*, 162 F.3d 1194, 1199 (D.C. Cir. 1998).

325. Garland, *supra* note 303, at 569; Pierce, *Seven Ways To Deossify*, *supra* note 185, at 76-78. For examples of remands without vacation, see *Norinsberg*, 162 F.3d at 1199; *A.L. Pharma, Inc. v. Shalala*, 62 F.3d 1484, 1492 (D.C. Cir. 1995).

326. Garry, *supra* note 300, at 164.

327. For general debate surrounding the ossification critique, see Thomas O. McGarity, *The Courts and the Ossification of Rulemaking: A Response to Professor Seidenfeld*, 75 TEX. L. REV. 525 (1997); Mark Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals To Modify Judicial Review of Notice and Comment Rulemaking*, 75 TEX. L. REV. 483 (1997).

328. JERRY L. MASHAW & DAVID L. HARFST, *THE STRUGGLE FOR AUTO SAFETY 95-97* (1990); see also Breyer, *Questions of Law and Policy*, *supra* note 10, at 391-93; Pierce, *Seven Ways To Deossify*, *supra* note 185, at 65.

329. MASHAW & HARFST, *supra* note 328, at 95.

330. Michael A. Livermore, *Reviving Environmental Protection: Preference-Directed Regulation and Regulatory Ossification*, 25 VA. ENVTL. L.J. 311, 338 (2007) (“Fear of adverse judicial or OMB review keeps agencies hemming closely to the *status quo*, fearful of innovation. Where innovation is possible, it takes the form of guidance documents, case-by-case administrative adjudication, or other informal mechanisms that lack the transparency or democratic legitimacy of the rulemaking process.”). Professor Cornelius Kerwin has noted that the number of final rules adopted by federal agencies declined from 6329 in 1982 to 4074 by 2004. Cornelius Kerwin, Professor, Am. Univ., Remarks at the Opening Session of the Conference on the State of Rulemaking in the Federal Government 6 (Mar. 16, 2005), available at <http://www.american.edu/rulemaking/openingpanel05.pdf>.



litical branches.<sup>331</sup> Moreover, compared to rules generated through the notice-and-comment process, policymaking via ad hoc administrative adjudication is much less likely to be reviewed and corrected by the political branches. While both Congress and the President have mechanisms in place for reviewing administrative notice-and-comment rulemaking, through the CRA and OIRA, respectively,<sup>332</sup> comparable political mechanisms of oversight and control are as yet unavailable for agency inaction and administrative adjudications.<sup>333</sup> Thus, from a relative checks perspective, hard-look review is problematic.

### CONCLUSION

Controlling administrative power has become the necessary condition for legitimizing the administrative state within our separated-and-balanced government structure. But if oversight and control are to provide the solution, the question remains: from what source and in what degree should such oversight and control come? The answers are frustratingly complex, as reflected in the ongoing dialogues surrounding the existing administrative-control models. The relative checks paradigm introduced herein collects from several, sometimes competing, administrative law principles to offer an enhanced perspective for addressing the vital but messy issues surrounding administrative power.

To this end, relative checks first posits the existence of an optimal control point, as yet imprecisely located within the shared values of the legitimacy and public-interest missions. Relative checks then seeks to tailor administrative control along both source and degree dimensions, with appropriate sensitivity to the institutional competencies of the respective players and in relation to the type of administrative output at issue.

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331. For a discussion of judicial review of agency inaction, see Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 N.Y.U. L. REV. 1657 (2004).

332. See *supra* notes 176-81 and accompanying text (discussing the CRA); *supra* notes 150-58 and accompanying text (discussing OMB and OIRA).

333. Bagley & Revesz, *supra* note 67, at 1268 (noting that OIRA does not review agency inaction).

Prescriptively, it is hoped that this framework will lead to better means of administrative control by apportioning checking responsibilities among the respective branches in a way that democratically promotes the public interest. Descriptively, looking through a relative checks lens may help us to better understand existing government practices and doctrines, as well as the critiques thereof. Much of the debates surrounding the *Chevron* and hard-look doctrines, for example, may be understood as disagreement about the courts' placement of the optimal control point and/or the means chosen to reach it.

Whether as a prescriptive or descriptive framework, the vitality of relative checks may be enhanced as progress is made toward better locating the optimal control point and in refining the categories of administrative output. This Article offers an entry to those dialogues. Even as currently conceived, however, the relative checks paradigm hopes to offer a much-needed, tailored framework for approaching problems of administrative power and control.

