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CAPTURE THEORY AND THE COURTS: 1967-1983

THOMAS W. MERRILL*

The Administrative Procedure Act ("APA")[1] is a framework statute, not a complete code. Its central provisions are rather spare, and a number of important questions are not covered at all. It comes as no surprise, therefore, that the judicial gloss on the APA has taken on a large significance over time. It should also come as no surprise that this interpretative mantle has assumed a different shape with different generations of judges. In this respect, our experience with the APA parallels that with the Constitution. Occasionally there is a feint in the direction of enforcing the "original understanding" of the APA.[2] But the dominant trend has been toward the creation of a kind of common law of administrative procedure, with each generation of judges reworking the law in accordance with its perception of the "felt necessities of the time."[3]

With the benefit of a half century of hindsight, undoubtedly the most remarkable period of administrative common-lawmaking was the one that started in the late 1960s and lasted until the early 1980s. To be more precise, although artificially so, it was the period bracketed by *Abbott Laboratories v. Gardner*[4] in 1967—announcing a strong presumption in favor of judicial review of agency action—and *Motor Vehicle Manufacturers Ass'n. v. State Farm Mutual*[5] in 1983—ratifying the "hard look" doctrine developed by the courts of appeals in the preceding decade. During this window of about 16 years, the federal courts significantly transformed the law of administrative procedure. In addition to the presumption in favor of judicial review and

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1. 5 U.S.C. §§ 551-59, 701-06 (1994 & Supp. II 1996).

2. *See* Director, Office of Workers' Compensation Programs v. Greenwich Collieries, 512 U.S. 267, 272 (1994) (meaning of "burden of proof" in APA determined by "ordinary meaning of 'burden of proof' in 1946, the year the APA was enacted"); Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 523 (1978) (APA was "a legislative enactment which settled 'long-continued and hard-fought contentions, and enacts a formula upon which opposing social and political forces have come to rest.'") (citation omitted).

3. OLIVER WENDELL HOLMES, THE COMMON LAW 5 (Howe ed. 1963, originally published 1881).

4. 387 U.S. 136 (1967).

5. 463 U.S. 29 (1983).

the hard look doctrine, some of the prominent innovations of this era include: the expansion of standing to include competitors and public interest groups;[6] the rise (and fall) of "procedural review" in complex rulemaking cases;[7] the recognition of due process hearing rights in a wide range of informal administrative contexts;[8] the creation of an action for damages against federal agents who commit violations of the Constitution;[9] the articulation of a broad preference for disclosure under the Freedom of Information Act ("FOIA");[10] and the judicial interpretation of the National Environmental Policy Act ("NEPA") as imposing a powerful general constraint on agency actions affecting the environment.[11]

The most obvious common theme in these innovations is expanded judicial oversight and control of agency action. What we see during this period, in effect, is a general shift in authority over regulatory policy from agencies to courts. One is tempted to go farther, and say that the apparent motivation for this shift was to give "public interest" groups greater leverage over agency policy. But without denying that a desire to promote progressive causes may have influenced some of these decisions, the reforms were in fact poorly designed to achieve such a targeted result. Each reform was articulated at a level of generality that permitted a wide variety of groups, including not just public interest intervenors but also regulated businesses and their competitors, to enlist the aid of the courts in their struggles with agency regulators. Judged by what the reforms actually accomplished, the common thread is simply a shift in power from the agencies to the courts.

If we can agree, at least provisionally, that this was the central thrust of administrative common law from 1967 to 1983, then how does this era differ from what went before and what came after? It is difficult to generalize in the same way about the twenty years that preceded the period in question and the nearly fifteen years that have followed. Neither of the book end periods has the same thematic clarity as the middle era.

6. *See infra* text accompanying notes 143-48.

7. *See infra* text accompanying notes 240-58.

8. *See infra* text accompanying notes 259-76.

9. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 395 (1971).

10. *See, e.g.*, NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 136-37 (1975); EPA v. Mink, 410 U.S. 73, 79-80 (1973).

11. *See* Calvert Cliffs' Coordinating Comm., Inc. v. United States Atomic Energy Comm'n, 449 F.2d 1109, 1111-12, 1122 (D.C. Cir. 1971).

On the whole, however, the judicial doctrines that played a prominent role during the first twenty years under the APA tended to be ones that enhanced (or at least preserved) the power of the agencies relative to the courts. Illustrations would include the practice of deferring to agency interpretations of law, arguably outlawed by the APA[12] but rescued and perpetuated in the 1946-1966 era;[13] adoption of a generally deferential understanding of the substantial evidence standard of review;[14] widespread invocation of the doctrines of primary jurisdiction and exhaustion of administrative remedies;[15] and the expansion of antitrust immunities so as to favor positive regulation over judicial liability rules.[16]

Characterization of the post-1983 era is even more problematic, if only because it is always difficult to perceive patterns or generalities in periods close to one's own. One thing, however, is clear: judicial innovations that would expand the authority of the courts at the expense of agencies have almost entirely disappeared. To the contrary, there has been a significant retrenchment from the outer perimeter of judicial authority established during the period of innovation. The most dramatic retreat came with the Supreme Court's *Vermont Yankee* decision,[17] which ended the lower courts' practice of imposing procedures on agency rulemaking beyond the Section 553 minimum. (This of course occurred within the time frame that I have adopted for the period of innovation, thus underscoring the imprecision of these dates.) Additional retrenchments include: the *Chevron* doctrine,[18] which is generally thought to have shifted authority from courts to agencies in the interpretation of law; new restrictions in the law of standing;[19] and the development of important exceptions to the presumption in favor of judicial review.[20]

Yet most of the innovations spawned during the 1967-1983 period have endured. For example, we still have a general presumption in favor of judicial review, the hard look doctrine, a presumption of dis-

12. *See infra* text accompanying notes 204-06.
13. *See infra* text accompanying notes 207-11.
14. *See* Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951).
15. *See, e.g.,* United States v. Western Pac. R.R., 352 U.S. 59 (1956) (questions of tariff interpretation should be submitted to the agency when national transportation policy implicated); Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938) (agency action outside its jurisdiction may not be enjoined prior to exhaustion of remedies before the agency).
16. *See infra* text accompanying notes 277-96.
17. Vermont Yankee Nuclear Power Corp. v. Nuclear Regulatory Comm'n, 435 U.S. 519 (1978).
18. Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc. 467 U.S. 837 (1984).
19. *See infra* text accompanying notes 149-56.
20. *See infra* text accompanying notes 168-78.

closure under FOIA, NEPA review of major federal actions affecting the environment, and so forth. On balance, perhaps the most accurate way to characterize the modern era is that there is no clearly discernible tilt either toward agencies (as arguably existed during the first two decades after the adoption of the APA) or toward courts (as happened during the middle period). The modern judiciary appears to have no strong commitments—or at least no consistently held strong commitments—either to the autonomy of the administrative state or to judicial control of the administrative state. We are, in effect, in a kind of holding pattern. Administrative law has become (or has become again) a rather dull subject, at least compared to the heady days of 1967-1983.

The purpose of this paper is to provide an explanation for this historical pattern, and especially for the emergence and then the recession of activist judicial control of administrative action that prevailed during the middle years under the APA. There is widespread agreement among administrative law scholars that the administrative common law of the recent era has assumed a different character from that of the 1967-1983 period. Commentators have given various names to this phenomenon, such as "neoclassical revival."[21] But there is very little consensus about what has caused this latest turn by the courts, other than that it is a reaction to the excesses of the prior period.[22] My attempt to account for these changes is not intended to provide a balanced or complete explanation, such as one would expect to find in a work of intellectual history. Instead, I will set forth a fairly reductionistic theory, in the hope that this will prove more provocative and will perhaps stimulate amplifying or alternative explanations.[23]

21. *See generally* Keith Werhan, *The Neoclassical Revival in Administrative Law*, 44 ADMIN. L. REV. 567 (1992) (divding modern administrative law into three periods—the "classical period," the "interest representation" period, and the "neoclassical revival"). Werhan's account closely parallels the historical typology presented here.

22. *See id.* at 620.

23. Several additional factors would surely receive emphasis in a more complete account. One would be the rise of the "public interest" bar in the 1960s. *See* Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1272-1278 (1986). Another would be the emergence of the environmental movement around 1970. Courts responded to the environmental movement with great enthusiasm, and many of the procedural innovations of the middle period were justified in part based on the need to protect what were perceived to be the uniquely important interests at stake in such cases. *See, e.g.*, International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 631 (D.C. Cir. 1973). Sometime around 1976 the Supreme Court's environmental ardor cooled, *see* Richard E. Levy & Robert L. Glicksman, *Judicial Activism and Restraint in the Supreme Court's Environmental Law Decisions*, 42 VAND. L. REV. 343, 358-362 (1989), and this may have contributed to the shift toward greater restraint in ensuing years.

My colleague Steve Calabresi has also suggested that the pattern of party control of different branches of government may have played a role in the historical pattern I describe. The

My thesis, which is set forth more fully in Part I, is that the 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. There was during this period no loss of faith in activist government. But a key instrumentality of activist government—the administrative agency—came to be regarded as suffering from pathologies not shared by other governmental institutions such as legislatures or courts. The principal pathology emphasized during these years was "capture," meaning that agencies were regarded as being uniquely susceptible to domination by the industry they were charged with regulating. Starting in the late 1960s, many federal judges became convinced that agencies were prone to capture and related defects and—more importantly—that they were in a position to do something about it. In particular, these judges thought that by changing the procedural rules that govern agency decisionmaking and by engaging in more aggressive review of agency decisions they could force agencies to open their doors—and their minds—to formerly unrepresented points of view, with the result that capture would be eliminated or at least reduced.

Why then did this period of judicial activism fizzle out as the 1980s wore on? I will suggest that the reasons we do not see a similar pattern of activism in the most recent period are very different from those of the pre-1967 period. The first two decades under the APA were years when the "public interest" theory of the administrative state associated with the New Deal still held considerable sway over the public and the judicial imagination. Given the prevalence of this attitude, it was only natural that courts would look benignly on agency authority and autonomy, and would adopt a generally deferential stance toward agency decisionmaking.

period of activism in administrative law was one in which Congress was controlled by Democrats and the judiciary (especially the D.C. Circuit) by Democratic appointees, while the executive branch was mostly in Republican hands (Nixon and Ford). This might explain the D.C. Circuit's vigorous scrutiny of administrative action during this period, without any concomitant questioning of the legislative branch. By the mid-1980s, the pattern had changed to one in which Congress remained in the hands of the Democrats, but now both the executive (Reagan and Bush) and the judiciary (especially the Supreme Court, where there had been no Democratic appointments since 1968) were Republican. This arguably translated into a Supreme Court repudiation of the D.C. Circuit and a movement toward greater deference toward agencies, along with a new note of judicial skepticism about Congress. Professor Calabresi's explanation would suggest, of course, that we should see another burst of activism in administrative common law beginning around 1994, when the White House was in Democratic hands (Clinton) but the courts and now the Congress were both Republican. Although I have detected no signs of such renewed activism so far, it is probably too early to tell for sure.

The decline of judicial assertiveness in the recent period, and the partial return of authority and autonomy to agencies, I will argue, cannot be considered in any sense a revival of the public interest conception of the administrative state, or a rehabilitation of administrative agencies as institutions in the eyes of the judiciary. Rather, it is a product of a deeper and more generalized pessimism about the administrative state, and in particular, of a spreading disenchantment with all forms of activist government. I will refer to this shift in attitudes as a movement toward a "public choice" conception of the administrative state, although I hasten to add that I do not mean to imply that (most) judges have either studied or become practitioners of formal public choice theory. By public choice conception of the administrative state, I simply mean a conception that is skeptical about the capacity of *any* governmental institution to serve the public interest, primarily because all governmental institutions—agencies, legislatures, the White House, and even the courts—are subject to manipulation by organized groups, and hence cannot be regarded as dispassionate guardians of the public interest.

What we see in the contemporary era of administrative common law, therefore, is not so much the substitution of one model of activist government for another, but rather a general loss of faith in governmental ordering of social and economic life. This, I think, accounts for the general revival of formalism in administrative law,[24] as reflected in the turn to textualism and away from legislative purpose under the *Chevron* doctrine,[25] the infusion of common law concepts into the law of standing and reviewability,[26] and the insistence on following old doctrines of primary jurisdiction even when they are disavowed by the agency.[27] The contemporary attitude seems to be that if nothing good can be expected to come from government, then perhaps the best we can do is to avoid wasting resources debating the rules. Thus, modern administrative common law often seems committed to making the rules as simple, mechanical, and common-law like as possible, in the hope that this will minimize the temptation to seek strategic advantage through further changes in the rules, and the deadweight loss that such a process of "rule churning" likely entails.

24. Werhan, *supra* note 21, at 568.

25. *See infra* text accompanying notes 220-38.

26. *See infra* text accompanying notes 138-78.

27. *See* Maislin Indus., U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116 (1990) (ICC lacks authority to modify judicially created filed rate doctrine); *cf.* MCI Telecomms. Corp. v. AT&T Co., 512 U.S. 218 (1994) (FCC lacks authority to modify statutory tariff filing requirements long identified by courts as being fundamental to Act).

Everyone is entitled to his or her own theory of history; the problem comes in persuading others that it has merit. After setting forth my thesis in somewhat greater detail in Part I, I will attempt to adduce evidentiary support for the two halves of the thesis: first, that each of the three eras I have delineated can be characterized as being "dominated" by a different conception of the administrative state; second, that the administrative common law of each era is a product of these conceptions.

The first half of the thesis, considered more fully in Part II, is difficult if not impossible to prove. It is undoubtedly true, for example, that each of the three strands of thinking I have identified—the public interest, capture theory, and public choice conceptions—can be found in the academic and judicial writing of each of the three eras. Thus, any attempt to point to particular writings from any era as proof that a particular attitude was "dominant" in that era is subject to the charge of selection bias. Nevertheless, I will try to show, primarily by focusing on some especially influential academic and judicial writings, that there is reason to believe this half of my thesis is plausible.

The second half of the thesis, that these changing conceptions of the administrative state can account for the changes in administrative common law, is the subject of Part III. Here, I trace in longitudinal fashion a number of judicial doctrines in an effort to show a common pattern: judicial deference to agency processes from 1946 to 1967, greater judicial control and oversight from 1967 to 1983, and a shift backward in some degree toward agency autonomy or at least to less judicial intrusion after 1983. I will try to show how the forms of enhanced judicial control and oversight that emerged during the 1967-1983 period were consistent with what a preoccupation with agency pathology, especially agency capture by industry, would indicate is appropriate. And I will suggest that the retrenchment in administrative law in the most recent period contains elements consistent with what a pessimistic public choice theory would produce. The doctrinal shifts catalogued in Part III are ones that virtually all observers would agree have taken place; the fact that the change in attitudes toward the administrative state I have hypothesized can explain these shifts provides inferential support that the thesis is correct.

I will close with some thoughts about the implications of my historical thesis for some current controversies in administrative law, and for the future of administrative law.

I. THE THESIS

My explanation for the shifts in judicial implementation of the APA over the last fifty years is based on changes in judicial ideology. By "ideology," I do not mean ideology in the narrow sense of Republicans versus Democrats or liberals versus conservatives, but rather ideology in the more fundamental sense of changes in attitudes about the role of administrative agencies in a system of democratic government. I do not rule out the possibility that these changes in attitudes may, in turn, reflect some deeper shift in economic and social forces.[28] For the moment at least, I have no theory to offer on that front. So I will take changes in judicial ideology, understood to mean changes in attitudes toward the administrative state, as my primary datum and explanatory variable.

A number of observers have perceived that public attitudes toward the administrative state have changed dramatically between 1946 and the present.[29] The usual characterization of this change is a shift from a "public interest" conception of the administrative state to the belief that the administrative state largely serves the ends of narrow "interest groups."[30] Thus, the standard historical account hypothesizes a more-or-less linear evolution in the post-World War II era from public optimism to pessimism about the central tendencies of administrative government.

I do not quarrel with this characterization, if taken as two snapshots of public opinion, one from the early 1950s, the other from the late 1990s. But the problem with hypothesizing such a linear progression from the one set of attitudes to the other is that it cannot account for the perceived pattern of judicial implementation of the APA, and

28. *Cf.* Theodore J. Lowi, *The State in Political Science: How We Became What We Study*, 86 AM. POL. SCI. REV. 1, 6 (1992) (suggesting that the rise of public choice theory in contemporary political science reflects the dominance of conservative economic forces in American society).

29. *See* Daniel B. Rodriguez, *The Positive Political Dimensions of Regulatory Reform*, 72 WASH. U. L. REV. 1, 3 (1994); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1681-88 (1975); Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 422-52 (1987); Werhan, *supra* note 21. For a general overview of the history of administrative law, see Rabin, *supra* note 23.

30. For a recent work that reflects this dichotomous view of attitudes toward the administrative state, see William E. Nelson, *The Growth of Distrust: The Emergence of Hostility Toward Government Regulation of the Economy*, 25 HOFSTRA L. REV. 1 (1996); *see also* Robert Glicksman & Christopher H. Schroeder, *EPA and the Courts: Twenty Years of Law and Politics*, 54 L. & CONTEMP. PROBS. 249, 257, 276 (1991) (contrasting "optimistic pluralism" and "pessimistic pluralism"); Michael E. Levine & Jennifer L. Florrence, *Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis*, 6 J. L. ECON. & ORG. 167 (1990) (special issue) (contrasting "public interest" and "capture theory" views).

in particular for the extraordinary burst of judicial energy and creativity devoted to reform of administrative law that occurred between 1967 and 1983. The perceived pattern of judicial doctrine takes the dialectical form of thesis-antithesis-synthesis, not a steady movement from one pole to another. This suggests the need for a more complex theory about the movement of judicial ideology with regard to the administrative state during the period in question.

My suggestion for a revised historical account is that judicial attitudes proceeded in three stages.[31] Thus, I would start, like the standard account, with the understanding that in the first two decades after the adoption of the APA the dominant assumption was that all institutions, including administrative agencies, generally act to promote the public interest. Then I would hypothesize an intermediate stage in evolving judicial attitudes, in which agencies were seen as entities uniquely prone to capture by interest groups and other pathologies. This loss of faith in agencies, however, was not accompanied by a similar loss of faith in activist government; in particular, other institutions of government—including the courts and the legislature—were still regarded as capable of advancing the public interest. Finally, this intermediate period gave way to the present state of affairs, where I again would rejoin the standard account and see the dominant attitude as one of pessimism about all institutions of the administrative state—agencies, legislatures, and to a considerable degree even the courts themselves.

The advantage of hypothesizing a step-like spread of pessimism about governmental institutions is that it can explain the surge of judicial activism that takes place in the middle period of this fifty-year evolution. If one imagines a period when judges regard agencies as being uniquely prone to interest group capture and other pathologies, but the legislature and the courts are regarded as being immune from these effects, then this describes an ideal set of conditions for judicial activism designed to "perfect" administrative agencies so that these pathologies can be overcome. Or, to put it slightly differently, a set of conditions in which there would be significant support for judicial ef-

31. Other accounts suggest somewhat analogous stages. *See* JERRY L. MASHAW, GREED, CHAOS, & GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 6-25 (1997) (dividing recent history into (1) progressive and New Deal political science; (2) optimistic activism; and (3) pessimism); Alfred C. Aman, Jr., *Administrative Law in a Global Era: Progress, Deregulatory Change, and the Rise of the Administrative Presidency*, 73 CORNELL L. REV. 1101, 1104 (1988) (dividing the last fifty years into (1) the New Deal-APA era; (2) the Environmental era; and (3) the Global-Deregulatory era); Werhan, *supra* note 21, *passim*.

forts to remake agencies so that they conform more closely to the idealized image of the public interest model of the preceding era.

In somewhat greater detail, my thesis envisions the following relationship between judicial attitudes toward the administrative state and administrative law doctrine in each of the three periods.

A. The Public Interest Era

During the 1946-1966 period, the dominant understanding of the administrative agencies was that they were instruments for promoting the public interest. In this sense, the first two decades under the APA reflect a continuation of the philosophy that rationalized the expansion of the administrative state under the New Deal. To be sure, there were other strands of thought at work during these years. There was, perhaps most prominently, the conservative rule-of-law ideology associated with the American Bar Association, which wanted administrative agencies brought under a greater degree of judicial control in order to preserve traditional rights of property and autonomy.[32] This perspective, of course, was a force behind the enactment of the APA itself,[33] and it was by no means fully spent in the 1950s and 1960s.[34] In addition, these years witnessed a rebirth of interest in group theory, albeit in a much more benign and optimistic version than that which has become familiar in the public choice era.

Notwithstanding these qualifications, however, I would maintain that the dominant attitude toward the administrative state continued to be the public interest conception. This was the mindset of the men (they were almost all men) in their thirties and forties who had served in the New Deal, and who fanned out to fill administrative, academic, and judicial posts in the 1950s and early 1960s. They viewed their task as "domesticating" the APA, so as to preserve the legacy of the New Deal in the face of threats by the defenders of corporate wealth.

The public interest theory is a species of rationalism—that is, the faith that complex problems can be mastered by human reason.[35] The

32. *See* Rabin, *supra* note 23, at 1263-1266.

33. *See* Nicholas S. Zeppos, *The Legal Profession and the Development of Administrative Law*, 72 CHI.-KENT L. REV. 1119 (1996).

34. *See, e.g.*, Morgan Thomas, *The Selection of Federal Hearing Examiners: Pressure Groups and the Administrative Process*, 59 YALE L.J. 431 (1950) (recounting efforts of the organized bar—ultimately unsuccessful—to influence the selection of new hearing examiners under the APA).

35. This faith did not originate with the New Deal, of course. In the American context, it played a large role in the progressive movement that flourished in the late 19th and early 20th centuries. For a representative statement, see WALTER LIPPMAN, DRIFT AND MASTERY (1914). The classic statement of rationalism during the New Deal era is JAMES M. LANDIS, THE ADMIN-

administrative agency was regarded as an institution specifically designed to achieve this ideal. The agency is a centralized source of governmental authority that can bring coordinated solutions to social and economic problems throughout its jurisdiction (which in the case of a federal agency, is the entire country). It combines all governmental powers, legislative, executive, and judicial, under one convenient roof. Its leadership is expected to be nonpolitical or at least bipartisan. And its staff is expected to have the specialized information and systematic knowledge—in other words, the expertise—to comprehend complex problems and to fashion rational solutions to them.

The public interest theory also includes, at least implicitly, a theory of comparative institutional advantage. The other institutions to which one might turn for bringing complex problems under the control of human reason are all wanting in some critical respect. Markets collectively embody a great deal of specialized information, but they are decentralized and uncontrolled. Courts can obtain specialized information about isolated controversies, but they too are decentralized and lack expertise. The legislature is a potential source of centralized authority, but it typically lacks specialized information and expertise. Thus, administrative agencies are more likely to achieve the objective of bringing complex phenomena under the control of human reason than are any of these rival institutions.

The public interest theory acknowledges that sometimes the administrative process will misfire. This is the public interest rationale for judicial review of administrative action as provided for by the APA—to backstop administrative performance and to correct the occasional errant decision by expert agencies. On the whole, however, this perspective suggests that courts should proceed with great caution in reviewing agency action, because as a rule agencies are better at achieving the public interest (as defined) than are courts. Thus, courts should not substitute their judgment for that of the agency, and should take care not to interfere with agency processes by hamstringing agencies with needless procedural impediments.

If the public interest theory was indeed the dominant attitude toward the administrative state, then we would expect to find an administrative common law during the 1946-1966 period that would maximize the sphere of authority of agencies in setting policy relative

ISTRATIVE PROCESS (1938). *See also* BRUCE A. ACKERMAN & WILLIAM T. HASSLER, CLEAN COAL/DIRTY AIR 4-7 (1981) (characterizing the "New Deal ideal"); THOMAS K. MCCRAW, PROPHETS OF REGULATION 153-221 (1984) (recounting Landis' role in formulating New Deal theory of administration); Sunstein, *supra* note 29.

to courts. Thus, in interpreting provisions governing the availability and scope of judicial review, courts would tilt toward a restrictive view of availability of review and a narrow scope of review. With respect to the larger constitutional framework, we would expect interpretations that would downplay separation of powers objections to the creation of administrative agencies as a "fourth branch" of government, and general caution about any ruling that might interfere with the design and operation of agencies.

B. The Capture Theory Era

During the period from roughly 1967 to 1983, the public interest theory gave way to a different paradigm of the administrative state. The rationalist ideal of the preceding period was displaced by what might be called a populist ideal. The public interest conception pointed toward government by supposedly nonpolitical agency experts, who could gather the information and develop solutions to complex problems that could be imposed on a centralized basis. The new populist mood that emerged around 1967 did not question the need for governmental solutions to social and economic problems. But it was deeply disturbed by the notion that those solutions should emerge from insulated agency experts.

The primary pathology of agency government emphasized during the era was that agencies were likely to become "captured" by the business organizations that they are charged with regulating. Other pathologies were cited as well. For example, agencies were commonly regarded as mindless "bureaucracies" more concerned with expanding their budgets and making life comfortable for tenured civil servants than with attending to the needs of the beneficiaries of regulation.[36] Whatever malady was chosen for emphasis, "[t]he image of the 'rogue agency' animated discussions of regulation's discontents."[37] Formerly regarded as the best hope for bringing complex social phenomena under the control of human reason, the agency was now viewed as a uniquely vulnerable governmental institution highly susceptible to failure.

It is important not to overstate the degree of ideological discontinuity from the first period to the second. The basic ideal of the first period—correcting the failures of the marketplace and the inequities

36. *See, e.g.*, WILLIAM A. NISKANEN, JR., BUREAUCRACY AND REPRESENTATIVE GOVERNMENT 81 (1971) (hypothesizing that agencies act always so as to try to maximize the size of their budget).

37. Rodriguez, *supra* note 29, at 24.

of private power through government regulation—was not abandoned. Indeed, if anything, suspicion of private ordering and faith in government grew during the second era relative to the first. However, the New Deal's chosen instrument for realizing governmental control—the administrative agency—was now seen as being seriously flawed. What was needed, consequently, was reform and renewal of the administrative state, not a reconceptualization of the role of government altogether. Those institutions which had not fallen under a cloud of disrepute—the legislature and the courts—were therefore required to step forward to modify the incentives and processes of agencies so that they could be reconstituted in a way more likely to lead to success in achieving the basic goal of public interest regulation.

This new conception of the administrative state was embraced with the greatest fervor by radical reformers whose attitudes were forged in the civil rights and antiwar struggles of the 1960s. But it also affected the attitudes of many men in their fifties and sixties who started life as committed New Dealers, but had spent a consideration portion of their careers observing administrative agencies at firsthand and had become disenchanted. James Landis fit this description almost perfectly.[38] Of greater importance, however, were the aging lions of the D.C. Circuit—men like Judges Bazelon, Leventhal, McGowan, and Wright—who had started their legal careers in the New Deal and now watched in dismay as administrative agencies increasingly came under fire.

Notice that capture theory, as I describe it, also contains a theory of comparative institutional advantage. Implicit in capture theory is the understanding that the central problem of the administrative state is a relatively limited one. Only administrative agencies are subject to the unique pathologies of bureaucracy such as interest group capture. Rival institutions, like the legislature and the courts, were implicitly regarded as being immune from these pathologies or at least as suffering from them to a significantly diminished degree. Moreover, in terms of interest group influence, the problematic actor was seen to be the business lobby. Other groups, such as labor unions or advocates

38. After authoring the definitive defense of New Deal style administrative agencies in 1938, *see* LANDIS, *supra* note 35, Dean Landis prepared a report for President-elect Kennedy in 1960 that was highly critical of the performance of administrative agencies and urged that they be brought under closer Presidential control. *See* JAMES M. LANDIS, REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT, printed for use of the Senate Committee on the Judiciary, 86th Cong., 2d Sess. (1960). *See generally* MCCRAW, *supra* note 35, at 153-221 (recounting Landis's career and influence).

for civil rights or the environment, were tacitly assumed to be champions of the public interest.

Capture theory's limited view of institutional pathology and inappropriate group influence created an ideal atmosphere for vigorous reform efforts. For example, one solution might be for Congress to enact more detailed legislation, thereby helping to ensure that policy is made by a healthy democratic institution (the legislature), and leaving comparatively little room for the corrupted institution (the agency) to undermine that policy. And in fact, there was a decisive move in the early 1970s toward enacting longer and more detailed regulatory statutes, in order to constrain the discretion of agencies.[39] These statutes typically provided for policy to be made by informal rulemaking open to all, and included strict deadlines for the adoption of rules that could be enforced by citizen suits in court.[40]

More importantly for present purposes, capture theory also suggests that aggressive judicial oversight and control of agencies is needed in order to counteract the distortions of the administrative process introduced by interest group capture and other pathologies. Specifically, by forcing agencies to adopt an administrative process that is more open and to give greater consideration to underrepresented viewpoints in that process, courts may be able to counteract the distortions emphasized by the theory.

If capture theory was indeed the dominant attitude toward the administrative state in the period from roughly 1967 to 1983, then we would expect to see a very different administrative common law during this period. Generally speaking, the balance of power should shift perceptibly from agencies to courts. Thus, courts should tilt toward an expansive view of the availability of review and perhaps also a more intrusive scope of review. With respect to the larger constitutional framework, we might see some movement toward limiting congressional power to delegate policymaking authority to administrative agencies; it is doubtful, however, that courts would call into question the very constitutionality of agencies, because the underlying objective of the New Deal—bringing complex social phenomena under the control of activist government—still remained very much alive.

39. *See* ACKERMAN & HASSLER, *supra* note 35 at 7-12 (describing "ends-forcing" strategy of the Clean Air Act); MARTIN SHAPIRO, WHO GUARDS THE GUARDIANS? 78-87 (1988) [hereinafter SHAPIRO, WHO GUARDS THE GUARDIANS?]; Sidney A. Shapiro & Robert L. Glicksman, *Congress, the Supreme Court, and the Quiet Revolution in Administrative Law*, 1988 DUKE L.J. 819, 821-845 (detailing trend to greater statutory specificity in the 1970s and 1980s).

40. *See* MASHAW, *supra* note 31, at 22-23.

C. *The Public Choice Era*

Finally, in the period from roughly 1983 to the present, a new conception of the administrative state, which I will call the public choice conception, has been ascendent. In adopting this label, I am not suggesting that the academic school of thought called public choice theory[41] has been studied and absorbed by most judges or other public figures. I am, instead, using this label as a shorthand for a general skepticism about activist government in all its forms. Today, the "public interest" is seen as something more likely to emerge from the decentralized decisions of individually rational actors pursuing their own interest, i.e., through market ordering, than as coming about either through government regulation guided by human reason or government regulation guided by a more genuinely representative administrative process.

Public choice theory itself emphasizes two reasons for harboring this pessimism about the administrative state. One concern is with the coherence of decisionmaking by political institutions, and in particular with the possibility of "cycling" among different preferences with the result that no stable outcome is realized by political institutions.[42] Another concern is that compact groups whose members have high per capita stakes in a controversy will out-organize and out-influence larger and more diffuse groups, resulting in a pervasive "minoritarian bias" on the part of decisionmakers.[43]

But the precise reason for pessimism about government is less significant, for purposes of my theory, than the fact of its existence. For whatever reason, the recent era has been characterized by widespread pessimism about the capacity of any governmental institution to achieve results that will promote the public interest. In effect, capture theory's pessimism about the performance of administrative agencies has been generalized to include all political institutions.[44]

41. For overviews of the literature, see DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE (1991); Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?,* 101 YALE L.J. 31 (1991); Jerry L. Mashaw, *The Economics of Politics and the Understanding of Public Law*, 65 CHI.-KENT L. REV. 123 (1989).

42. FARBER & FRICKEY, *supra* note 41 at 38-62.

43. *See* NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS AND PUBLIC POLICY (1994); MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION (1965).

44. The critical importance of the spread of pessimism to include the legislature is rightly stressed in Glicksman & Schroeder, *supra* note 30, at 276-81. Once the legislature, no less than the agency, is seen as a forum of interest group intrigue, courts lose enthusiasm for enforcing the "purposes" of statutes against agency decisions, and begin viewing statutes as reflecting "ordinary" values rather than something entitled to judicial solicitude. *Id.* at 281-286.

This is the mindset of the Young Turks who grew up during the post-War boom years, and entered into responsible administrative, journalistic, and judicial positions during the "Reagan Revolution" of the 1980s.

Public choice theory has its own theory of comparative institutional advantage, but it is one that is startlingly different from the perspective to the two prior conceptions of the administrative state.[45] Public choice theory suggests that the public interest will best be served by transferring decisional authority away from political institutions altogether, including not just administrative agencies but also from legislatures and possibly courts as well. The prime candidate for receiving such authority is, of course, "the market," understood to mean a social arrangement whereby outcomes are reached through the decentralized action of individual actors presumed to be rationally pursuing their own interests. This explains, among other things, the rise of the deregulation movement, which began in the Carter Administration, accelerated during the Reagan years, and shows no signs of abating.

Given the "pox on all houses" attitude of the public choice conception of the administrative state, its implications for administrative common law are highly uncertain. Perhaps the most apparent prediction would be that where issues arise that implicate the market or market-mimicking mechanisms as an alternative to traditional regulation, we would expect courts to endorse a movement away from traditional regulation. More importantly, because all government institutions are suspect, we would expect to see little judicial enthusiasm for shifting authority from one institution to another. To the contrary, we might find courts attracted to formalistic rules that may minimize uncertainty about the availability and scope of judicial review, because this would avoid deadweight losses associated with disputing issues that have no clearly preferred answers. Otherwise we would very likely see a general lack of enthusiasm for judicial innovation, and a drift in doctrine with no clear preference for either agencies or courts. With respect to the larger constitutional framework, we might see a revival of separation of powers theory that would discourage public regulation altogether, or interpretations that would encourage private property and market ordering. But we would not expect to see a revival of ideas like the nondelegation doctrine that

45. *See generally* KOMESAR, *supra* note 43, at 3-13 (drawing upon public choice theory to develop a "participation-centered approach" to comparative institutional analysis).

would discourage the use of administrative agencies as an alternative to congressional government, because there is no clear preference for legislatures relative to agencies.

II. Changing Conceptions of the Administrative State

What evidence can be adduced in support of my hypothesis that public and judicial attitudes toward the administrative state have gone through three stages from 1946 to the present, roughly translated as global optimism, disenchantment with agencies, and global pessimism—or (simplifying even more radically), as rationalism, populism, and libertarianism? Obviously, it would be a Herculean task—well beyond the limited space I have here not to mention my limited capacities—to offer anything like a definitive account of what political scientists, economists, law professors, and journalists were saying about the administrative state during each of the three eras in question, and how these ideas may have filtered into the minds of the judges. Moreover, as noted above, any catalogue of the views of individual thinkers is open to the charge of selection bias. There is also the problem that just because academics are entranced with an idea, it does not follow that it registers with the members of the judiciary. For example, Kenneth Arrow wrote *Social Choice and Individual Values* in 1951, but it does not follow that judges in the 1950s (or later) ever heard of the book, let alone that they had absorbed the thesis that institutions faced with deciding multiple issues and governed by majority voting rules are prone to decisional incoherence.

I know of no easy way around these problems. By way of partial reassurance, I would note that what follows is fairly conventional, in the sense that different aspects of the three conceptions of the administrative state I bring together have been noted by many others before.[46] The only novelty lies in the tripartite synthesis, the suppression of complicating detail and subthemes (at least I contend they are details and subthemes), and the treatment of the most recent period in a descriptive rather than normative spirit (which for the lawyers, at

46. In addition to the articles by Aman, Rabin, Rodriguez, Stewart, Sunstein, and Werhan cited *supra* nn.21, 23, 29 & 31, useful historical reviews that cover the themes here include Christopher F. Edley, Administrative Law: Rethinking Judicial Control of Bureaucracy (1990); Daniel J. Gifford, *The New Deal Regulatory Model: A History of Criticisms and Refinements*, 68 Minn. L. Rev. 299 (1983); McCraw, *supra* note 35, at 210-221; Richard J. Pierce, Jr. *The Role of Constitutional and Political Theory in Administrative Law*, 64 Tex. L. Rev. 469 (1985); Thomas O. Sargentich, *The Reform of the American Administrative Process: The Contemporary Debate*, 1984 Wis. L. Rev. 385; Cass R. Sunstein, *Changing Conceptions of Administration*, 1987 BYU L. Rev. 927.

least, almost always means hostile or critical spirit—administrative law scholars are generally very unhappy with the recent turn of events).

A. 1946-1966

During the APA's first two decades, the understanding of the administrative state was overwhelmingly influenced by the after-glow of the New Deal. Generalizing broadly, the political science of the era was optimistic about the nature of the administrative state and the capacity of administrative agencies to serve the public interest. In particular, concern about interest groups, which has recurred at regular intervals in American history,[47] seems to have been largely muted during this period. Academic commentators were generally confident that the political institutions of democracy could either neutralize or harness the parochialism of groups and thereby develop policies in the public interest.

The foregoing generalization lumps together two otherwise disparate strands of thought. It includes, on the one hand, neo-progressives who thought that the answer to interest group influence was to insulate expert administrative agencies from ordinary politics. The most obvious example is James Landis, whose 1938 lectures entitled *The Administrative Process*[48] became the classic defense of the New Deal agencies and was widely cited during this period. The generalization also covers a newer post-War generation of pluralist thinkers, such as David Truman, Earl Latham, and Robert Dahl.[49] The unifying theme among these political scientists was that competition among groups within the political arena would produce a kind of equilibrium roughly coincident with the public interest.

With respect to legal literature, the overall picture was also overwhelmingly supportive of positive regulation and the New Deal-style administrative agencies. The administrative law scholarship of the era was dominated by an energetic corps of academics—including Clark Byse, Kenneth Culp Davis, Louis Jaffe, Walter Gellhorn, Nathaniel Nathanson, and Bernard Schwartz—most of whom had served in the New Deal in one capacity or another. Their work was generally in the mode of Legal Process school, with an emphasis on elucidating "principled" rules that would define the respective roles of courts and agen-

47. *See, e.g.*, THE FEDERALIST No. 10 (James Madison).

48. LANDIS, *supra* note 35.

49. *See* ROBERT A. DAHL, WHO GOVERNS? (1961); EARL LATHAM, THE GROUP BASIS OF POLITICS (1952); DAVID B. TRUMAN, THE GOVERNMENTAL PROCESS (1951).

cies.[50] The overall objective was to legitimize the discretionary powers of agencies by assimilating them into a legal process that emphasized the importance of clearly articulated agency standards and the availability of judicial review as a check on abuses of agency discretion.[51]

The legal scholarship of the era is epitomized by Judge Henry Friendly's Holmes Lectures on federal administrative agencies delivered at Harvard in 1962.[52] Friendly acknowledged that administrative agencies are often criticized. But he argued that almost all the shortcomings of agencies would disappear if they could only be induced to articulate more definite legal standards to guide their decisions.[53] Significantly, he rejected out of hand the possibility that these standards should come from reviewing courts.[54] The primary source would have to be the agencies themselves. This, in turn, would require

> the appointment of commissioners of higher intellectual power and moral courage, establishing a longer term and pursuing a tradition of reappointment, affording the commissioners more opportunity for study and reflection by freeing them from the multitude of routine tasks that now encroach so heavily upon their time, and enforcing individual responsibility for opinions.[55]

He added that encouraging agencies to make greater use of policy statements and rulemaking would also help.[56]

Friendly was aware of the incipient literature on agency capture,[57] and also understood the interest group theory of legislation.[58] But like Landis before him, he was wedded to a faith "in discretionary government carried on by an assumed enlightened and apolitical

50. For valuable discussion of the tenets of the Legal Process school, see William N. Eskridge, Jr. & Philip P. Frickey, *An Historical and Critical Introduction to The Legal Process, in* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW li (1994); Jan Vetter, *Postwar Legal Scholarship on Judicial Decisionmaking,* 33 J. LEGAL EDUC. 412 (1983); G. Edward White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change,* 59 VA. L. REV. 279 (1973).

51. Other commentators have also noted the connection between the Legal Process school and the administrative law of the 1950s and 1960s. *See* Gerald E. Frug, *The Ideology of Bureaucracy in American Law,* 97 HARV. L. REV. 1276, 1334-55 (1984); Werhan, *supra* note 21, at 576-83.

52. HENRY J. FRIENDLY, THE FEDERAL ADMINISTRATIVE AGENCIES: THE NEED FOR BETTER DEFINITION OF STANDARDS (1962).

53. *Id.* at 5-6.

54. *Id.* at 141.

55. *Id.* at 142-43 (citations omitted).

56. *Id.* at 145.

57. *Id.* at 2 n.6, 4 n.13 (citing MARVER H. BERNSTEIN, REGULATING BUSINESS BY INDEPENDENT COMMISSION (1955)).

58. *Id.* at 167-68.

elite."[59] Simply put, Friendly took the existence of the administrative state in its post-New Deal configuration as a given. It could use some rejuvenation, mostly in the form of the appointment of "better men" who would adopt more far-sighted policies. But in its basic conception he regarded the administrative state as sound and beyond questioning.

Perhaps more revealing than an establishment thinker like Friendly, even the mavericks of the time betrayed the influence of the public interest conception of the administrative state. One of the most provocative articles of the period appeared in the *Yale Law Journal* in 1952 under the title *The Marasmus of the ICC*.[60] Samuel Huntington, then an untenured instructor in government at Harvard, argued that the Interstate Commerce Commission had become increasingly dependent on the railroads for political support. Consequently, it had lost its claim to impartiality, whether in mediating between the interests of railroads and shippers, or railroads and competing modes of surface transportation. This in turn had alienated these other potential sources of political support, with the result that the ICC "may be said to suffer from administrative marasmus," that is, a gradual and continuous wasting away of the body from disease.[61]

Huntington's analysis was directly inspired by the new pluralist theories of the early 1950s.[62] By suggesting that the ICC was responsive to group demands, and that its political support in Congress was a function of the balance of rival group demands, Huntington was advancing a conception of the administrative state considerably at odds with the dominant legal process vision. Not surprisingly, therefore, the *Marasmus* article stimulated a heated rejoinder from an ICC staffer[63] and a milder rebuke from a former general counsel of the Commerce Department,[64] which in turn led to a further roundtable discussion.[65]

59. A. SUTHERLAND, THE LAW AT HARVARD 305 (1967), quoted in GELLHORN ET AL., ADMINISTRATIVE LAW 7 (8th ed. 1987).

60. Samuel P. Huntington, *The Marasmus of the ICC: The Commission, the Railroads, and the Public Interest*, 61 YALE L.J. 467 (1952).

61. *Id.* at 470.

62. *See id.* at 470 n.10 (citing TRUMAN, *supra* note 49).

63. Charles S. Morgan, *A Critique of "The Marasmus of the ICC: The Commission, the Railroads, and the Public Interest,"* 62 YALE L.J. 171 (1953).

64. C. Dickerman Williams, *Transportation Regulation and the Department of Commerce*, 62 YALE L.J. 563 (1953).

65. *See* Samuel P. Huntington, C. Dickerman Williams, & Charles S. Morgan, *The ICC Reexamined: A Colloquy*, 63 YALE L.J. 44 (1953).

Of greater interest than the defense of the idea of agency expertise elicited from mainstream lawyers, however, is the recommendation that Huntington himself developed from his group analysis. Huntington proposed that the ICC be abolished and replaced with a client-oriented agency that, along with similar entities representing other surface transportation modes, would be folded together into the Commerce Department. The result would be to place authority over transportation policy in an body that would possess "a broader outlook and a broader basis of political support," and which therefore would be "better able to act in the public interest."[66] In other words, Huntington himself did not deny the public interest ideal; he simply redefined it in terms of an appropriate balance of group forces mediated through pluralist compromise, as opposed to something to be discovered through the application of neutral expertise.

If the public interest conception had a solid hold on academic thought during these years, there can also be little doubt that it was also thoroughly assimilated by the judiciary. The Supreme Court was itself heavily populated with former New Deal lawyers, including Justices Frankfurter, Jackson, Reed, Murphy, Douglas, Goldberg, and Fortas. And it would be easy to collect passages from leading administrative law cases of the era that speak with conviction about the need to resolve policy questions in accordance with "administrative expertise."[67] Judge Friendly's attitudes, although more nuanced than the views reflected in these statements, are probably fairly representative of those of the more influential judges of the era. The public interest theory was simply an unshakable postulate, part of the mental furniture that judges brought with them in deciding contested issues of administrative law.

B. 1967-1983

If the unifying assumption of the first period was a desire to integrate administrative agencies into a larger vision of legal regularity

66. Huntington, *supra* note 60, at 508-09.

67. In *SEC v. Chenery*, for example, the Court concluded with the following observations:

> The Commission's conclusion here rests squarely in that area where administrative judgments are entitled to the greatest amount of weight by appellate courts. It is the product of administrative experience, appreciation of the complexities of the problem, realization of the statutory policies, and responsible treatment of the uncontested facts. It is the type of judgment which administrative agencies are best equipped to make and which justifies the use of the administrative process.

332 U.S. 194, 209 (1947) (Chenery II). For similar statements, see United States v. Western Pac. R.R., 352 U.S. 59, 65-67 (1956); Far East Conference v. United States, 342 U.S. 570, 574-75 (1952).

and legitimacy, the unifying theme of the second was disenchantment with agency performance and urgent demands for reform. The 1960s and 1970s were of course a time of great turmoil, what with the War in Vietnam, the civil rights movement, riots in the cities and on campuses, and the Watergate scandal. Thus, it is probably no accident that David Halberstam's best selling account of the origins of the War in Vietnam[68]—which heaped scorn on the Kennedy and Johnson Administrations for their exaggerated faith in the judgments of defense and foreign policy experts—appeared at about the same time that courts seemed to lose their faith in agency experts. Few were ready to turn their backs on activist government: the New Frontier and Great Society suggested to most observers that activist government could do many good things. But the idea that effective government means management by a politically neutral technocratic elite fell into deep disfavor.

In the academic literature, the loss of faith in agency expertise was commonly expressed in terms of capture theory.[69] The idea of agency capture can be traced to a book published by Marver Bernstein in 1955.[70] Building in part on Huntington's work on the ICC, Bernstein posited that agencies go through a natural "life cycle." The early stages of the cycle are characterized by vigorous and independent regulation, not unlike the role for agencies imagined by the public interest literature. But in the later stages of the cycle, which Bernstein called agency "senescence," the agency often becomes closely identified with and dependent upon the industry it is charged with regulating. Thus, agency capture was seen by Bernstein as a natural but exceptional phenomenon that occurred primarily in the waning days of an agency's existence.

By the time the late 1960s rolled around, agency capture had come to be regarded as something more akin to the universal condition of the administrative state.[71] One influential work of political science that helped to popularize the new perspective was Theodore Lowi's *The End of Liberalism*.[72] Lowi's ideas defy easy summary, but

68. DAVID HALBERSTAM, THE BEST AND THE BRIGHTEST (1969).

69. Not exclusively, of course; some academic treatments reflected a loss of faith in expertise for other reasons. *See, e.g.*, Julius G. Getman & Stephen B. Goldberg, *The Myth of Labor Board Expertise*, 39 U. CHI. L. REV. 681 (1972) (criticizing the National Labor Relations Board for not using social science methods to investigate workplace realities).

70. BERNSTEIN, *supra* note 57, at 79-94.

71. The account of the rise of capture theory here parallels that in John Shepard Wiley Jr., *A Capture Theory of Antitrust Federalism*, 99 HARV. L. REV. 713, 723-725 (1986).

72. THEODORE J. LOWI, THE END OF LIBERALISM (1969).

there was no mistaking his tone. Without questioning the expanded sphere of government produced by the New Deal, he was nonetheless scathingly critical of the "interest group liberalism" that was its modern legacy. He characterized the existing administrative state as incoherent and unjust, and called for radical reform to restore genuine democracy serving the interests of the people. One startling proposal was that courts should revive the nondelegation doctrine, in order to force Congress to remain accountable for key policy decisions.[73]

Another, and very different, critique of the administrative state, this time associated with the Chicago School of Economics, also began to gain currency about this time. Chicagoans like Milton Friedman and George Stigler argued that much government regulation is designed to restrict entry and thus confer monopoly profits on industry incumbents.[74] Although the Chicago critique was broad enough to include legislative as well as administrative capture, in practice during this period it tended to concentrate on examples drawn from the world of administrative agencies, such as public utility commissions and professional licensing boards.[75] Before long, "other economic scholars began to treat as naive and faintly amusing any approach to regulation that did not incorporate notions of producer capture."[76]

By a curious symmetry, New Left economists and historians soon began espousing a similar critique of administrative agencies. Gabriel Kolko, perhaps the most prominent member of this group, published an important study of the Interstate Commerce Commission,[77] in which he argued that the agency had been formed for the very purposes of cartelizing railroad rates, thereby allowing wealthy capitalist robber barons to bilk small farmers and businesses.

These various strands of academic capture theory roiled together into a general pot of discontent, out of which emerged a new popular muckraking literature. The principal purveyors of this populist strain

73. *See id.* at 297-98.

74. *See, e.g.*, MILTON FRIEDMAN, CAPITALISM AND FREEDOM 125-128, 137-160 (1962); George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971), *reprinted in* GEORGE J. STIGLER, THE CITIZEN AND THE STATE: ESSAYS ON REGULATION 114-134 (1975).

75. See the various studies collected in CHICAGO STUDIES IN POLITICAL ECONOMY (George J. Stigler ed., 1988). Another contemporaneous strand of economic literature that contributed to the general disenchantment with administrative agencies posited that agencies seek continually to expand their budgets. *See* NISKANEN, *supra* note 36.

76. Wiley, *supra* note 71, at 725.

77. GABRIEL KOLKO, RAILROADS AND REGULATION 1877-1916 (1965); *see also* GABRIEL KOLKO, THE TRIUMPH OF CONSERVATISM: A REINTERPRETATION OF AMERICAN HISTORY, 1900-1916 (1963) (arguing that the policies of the progressive era were generally designed to serve the interests of big business).

of capture theory were the so-called "Nader Raiders," who produced a string of monographs and associated publicity in the late 1960s and early 1970s castigating various agencies for cozying up to big business and ignoring the public interest.[78] It is safe to assume that this Naderite version of capture theory was familiar to journalists and editorial writers, and thus began to enter the public consciousness around this time.

The legal literature of the late 1960s and early 1970s inevitably displays greater caution and continuity with the past. One reason is that administrative law scholarship continued to be dominated by the same cadre of New Deal veterans who had been the leading legal figures in the prior period. A particularly instructive example is Louis Jaffe, who at the threshold of the period published an influential book drawing on his considerable experience and erudition.[79] The book opens by sounding a number a themes of the social science literature. Jaffe notes that the defenders of the New Deal are "disillusioned," and that agency bias toward the industry it is charged with regulating has come to be regarded as a pervasive problem.[80] Some of Jaffe's specific ideas about administrative law doctrine—such as his "rash" proposition that there should be a "presumption of a right to judicial review"[81]—also were clearly influential with courts in the second era. But overall, Jaffe's analysis was far too nuanced, far too concerned with achieving an integration with historical materials, to be regarded as triggering a revolution. In terms of temperment, his work, like Friendly's, must be regarded as more the swan song of the old era, rather than the tocsin heralding in the new.

As the 1960s came to a close, however, and the Naderites were at the peak of their influence, the legal literature begun to take on an edge that was missing in the prior era. In 1969, for example, Professor Kenneth Culp Davis published a monograph on the same general theme as Judge Friendly's Holmes lectures—the need to structure agency discretion through the adoption of legal standards.[82] Yet while Friendly had adopted the reassuring tone of one member of an elite institution reflecting on the wellbeing of another elite institution, Davis' book reads like a stump speech delivered at a campus rally.

78. *See, e.g.*, EDWARD F. COX, ET AL., THE NADER REPORT ON THE FEDERAL TRADE COMMISSION (1969); JOHN C. ESPOSITO, VANISHING AIR (1970); JAMES S. TURNER, THE CHEMICAL FEAST (1970); DAVID ZWICK & MARCY BENSTOCK, WATER WASTELAND (1971).

79. LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION (1965).

80. *Id.* at 3-27.

81. *Id.* at 336.

82. KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY (1969).

Agency discretion unguided by legal standards is "tyranny."[83] Abuses and illegalities abound. Police and prosecutors are extreme examples of administrative agencies operating without any meaningful legal constraints on their discretion. In substance, there was little here that was not canvassed by Friendly and others in the prior period. The mood of the Davis book, however, was agitated and activist—and entirely different than that of Judge Friendly's.

Another influential work by a mainstream legal scholar was Professor James Freedman's *Crisis and Legitimacy*.[84] Freedman argued that the administrative state throughout American history has alternated between periods of crisis and periods of relative quiescence and, of course, that the current era was a period of crisis. He cited a number of reasons for this, including the widespread perception of agency capture[85] as well as renewed concerns about agency legitimacy. What is especially telling about Freedman work, again, is the sense of urgency about the need for vigorous reform of the administrative state in order to restore a sense of its legitimacy.

For present purposes, however, undoubtedly the most illuminating piece of legal scholarship in the period was Professor Richard Stewart's magisterial article, *The Reformation of American Administrative Law*, which attempted to understand and evaluate the new administrative law then taking shape.[86] Stewart's analysis of these developments is more original and sophisticated than anything produced by the older generation of administrative law scholars. And there can be no gainsaying the influence of the article: it is the most widely cited administrative law article ever written.[87]

Stewart characterized the administrative law of the first twenty years under the APA as the "traditional model," in which the key task of administrative law was seen as reconciling the discretionary power of administrative agencies with norms of legislative supremacy. In contrast, the new administrative law was based on an "interest representation" model, in which administrative law is seen to be bringing previously excluded or underrepresented interests into the administrative process, thereby producing a more broadly acceptable and pub-

83. *Id.* at 3.

84. JAMES O. FREEDMAN, CRISIS AND LEGITIMACY: THE ADMINISTRATIVE PROCESS AND AMERICAN GOVERNMENT (1978).

85. *Id.* at 8, 35.

86. Stewart, *supra* note 29.

87. *See* Fred R. Shapiro, *The Most-Cited Law Review Articles Revisited*, 71 CHI.-KENT L. REV. 751, 767 (1996) (ranking Stewart's article the eighth-most cited law review article of all time).

licly interested result.[88] In both cases the central objective was to reconcile the administrative state with the ideals of democracy. The difference was that the traditional model sought to accomplish this from the outside, by positing a "transmission belt" in which the people vote for legislators, who vote for laws, which then structure agency discretion.[89] The new administrative law, in contrast, sought to achieve the reconciliation from the inside, by transforming agencies into institutions that would themselves be democratically responsive and accountable to popular desires.

Two aspects of Stewart's analysis are especially supportive of the thesis being advocated here. First, he expressly associated the rise of the new administrative law with a decline of faith in agency expertise and a growing perception of agency capture. As he observed:

> It has become widely accepted, not only by public interest lawyers, but by academic critics, legislators, judges, and even by some agency members, that the comparative overrepresentation of regulated or client interests in the process of agency decision results in a persistent policy bias in favor of these interests.[90]

It was largely this perceived distortion in favor of "regulated or client" interests, according to Stewart, that had triggered the demand for a new conception of administrative law that would produce a more balanced or accurate representation of interests.

Second, Stewart clearly perceived that the prominent administrative law developments of the late 1960s and early 1970s—such as the expansion of standing, the presumption in favor of judicial review, and the extension of due process hearing rights to new classes of interests—were consistent with, and causally related to, this new interest representation model of administrative law.[91] Courts were expanding the availability of judicial review, and were imposing new rights of intervention and hearing requirements, precisely in order to make agency processes more representative, and thereby to counteract the effects of agency capture.

In short, Stewart's analysis, written in the middle of what I have called the second era of administrative common law, directly supports the thesis that the upsurge in judicial activism from 1967 to 1983 was related to the populist mistrust of agencies that emerged during those

88. Stewart, *supra* note 29, at 1711-13.

89. *Id.* at 1675-76.

90. *Id.* at 1713 (citations omitted); *see also id.* at 1683 (recounting increasing doubt about the existence of an objective "public interest" separate from "the essentially legislative process of adjusting the competing claims of various private interests").

91. *See, e.g., id.* at 1728 (standing doctrine); *id.* at 1761 (rights of participation).

years.[92] Stewart's analysis is also instructive because of what it does not assert. Although Stewart discusses the limitations of legislatures and courts as instruments of policymaking, he does so almost entirely in terms of agenda-setting limitations: legislatures have limited space available on their agenda, and courts have limited control over their agenda.[93] In contrast, there is relatively little discussion in the article of the possibility that the pathology of interest group capture might also affect legislatures and courts. The problem of capture was thus implicitly viewed as one limited largely to administrative agencies, not a phenomenon afflicting government more generally.

If capture and agency pathologies were widespread themes in academic literature by the late 1960s and early 1970s, is there any evidence that these concerns were shared by courts? In at least one case, there is considerable evidence. Judge J. Skelly Wright, one of the leading activists on the D.C. Circuit, alluded to the problem of agency capture in many judicial opinions and extra-judicial writings.[94] One especially telling example is his opinion for the court in *Home Box Office, Inc. v. FCC*,[95] a landmark decision imposing new restrictions on ex parte communications made to agencies during informal rulemaking. Wright explained his objection to ex parte communications this way:

> Although it is impossible to draw any firm conclusions about the effect of *ex parte* presentations upon the ultimate shape of the pay cable rules, the evidence is certainly consistent with the often-voiced claims of undue industry influence over Commission proceedings, and we are particularly concerned that the final shaping of the rules we are reviewing here may have been by compromise among contending industry forces, rather than by exercise of the independent discretion in the public interest the Communications Act vests in individual commissioners.[96]

92. Other commentators have perceived this connection as well. *See* MASHAW, *supra* note 31, at 21-23; R. SHEP MELNICK, REGULATION AND THE COURTS: THE CASE OF THE CLEAN AIR ACT 12-13 (1983); SHAPIRO, WHO GUARDS THE GUARDIANS?, *supra* note 39, at 72. For a recent normative analysis that derives the main tenets of 1967-1983 administrative law from an analysis of capture theory, see Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1512, 1570 (1992).

93. *See* Stewart, *supra* note 29, at 1788-89, 1806 (legislature); *id.* at 1804, 1808 (courts).

94. *See, e.g.*, Calvert Cliffs' Coordinating Comm., Inc. v. United States Atomic Energy Comm'n, 449 F.2d 1109, 1111 (D.C. Cir. 1971) (Wright, J.); Moss v. Civil Aeronautics Bd., 430 F.2d 891, 893 (D.C. Cir. 1970) (Wright, J.); J. Skelly Wright, *The Courts and the Rulemaking Process: The Limits of Judicial Review*, 59 CORNELL L. REV. 375, 397 (1974) [hereinafter Wright, *The Courts and the Rulemaking Process*].

95. 567 F.2d 9 (D.C. Cir.), *cert. denied*, 434 U.S. 829, *reh. denied*, 434 U.S. 988 (1977).

96. *Id.* at 53.

This passage encapsulates all the key features of the capture theory era: a concern with undue industry influence over agency decision-making; the adoption of new common law procedural rules in an effort to open up or "ventilate" agency processes so as to neutralize this influence; and the underlying commitment to salvaging the New Deal ideals of activist government.[97]

One judge, of course, does not a movement make. But Judge Wright was an exceptionally influential judge. He was the author of many of the most important administrative law decisions of the era, many of which bear the imprint of capture theory ideas.[98] And his prestige was so great that all he had to do each year was pick up the telephone, and invite the newly elected editor-in-chief of the Harvard, Yale or Chicago law reviews to serve as his law clerk after graduation.[99] A very high percentage of these clerks went on to clerk on the Supreme Court, presumably there to disseminate the gospel of capture theory when the occasional administrative law decision came before the high Court.

Other judges on the D.C. Circuit also betrayed in their writings an awareness of capture theory, although they were more circumspect than Judge Wright.[100] There is also, significantly, evidence in the rhetoric of some of the Supreme Court's decisions of the era that the idea of agency capture, or at least severe disenchantment with agencies, had an influence on the Court's decisions.[101]

Before we leave the middle period, one general observation about the pathway of intellectual influence is in order. There is very

97. Judge Wright's attachment to capture theory also explains his advocacy of a revived nondelegation doctrine. *See* J. Skelly Wright, *Beyond Discretionary Justice,* 81 YALE L.J. 575, 579 (1972) (reviewing KENNETH CULP DAVIS, DISCRETIONARY JUSTICE (1971)) [hereinafter Wright, *Beyond Discretionary Justice*]. Recall that Theodore Lowi made a similar proposal as a way of transferring decisional authority from "captured" agencies to the legislature, presumed to be less susceptible to interest group intrigue. *See* LOWI, *supra* note 72, at 297-98.

98. In addition to the decisions cited *supra* in notes 94 and 95, see MCI Telecomms. Corp. v. FCC, 561 F.2d 365, 380 (D.C. Cir. 1977); Wilderness Soc'y v. Morton, 479 F.2d 842 (D.C. Cir.) (en banc), *cert. denied,* 411 U.S. 917 (1973).

99. *See* Bill Monroe, *In Memoriam: J. Skelly Wright*, 102 HARV. L. REV. 369, 373 (1988).

100. *See* David L. Bazelon, *Coping with Technology Through the Legal Process*, 62 CORNELL L. REV. 817, 829 (1977) (endorsing Professor Stewart's "interest representation" theory as a proper characterization of the objectives of administrative law); Harold Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. PA. L. REV. 509, 555 (1974) (endorsing hard look review based in part on the need to force "mission oriented agencies" to take due cognizance of environmental values); *see also* Glicksman & Schroeder, *supra* note 30, at 264-268 (collecting a variety of environmental law opinions from the late 1960s and early 1970s that reflect the influence of capture theory).

101. John Wiley collects numerous statements from antitrust immunity decisions in support of his thesis, parallel to mine, that capture theory influenced the Court during these years. *See* Wiley, *supra* note 71, at 727-728.

little evidence that the revolution in administrative law that started around 1967 was caused by changes in legal scholarship. This does not mean that changes in ideology were not critical. But the "transmission belt" of influence, to borrow Professor Stewart's metaphor, seems to have been from social science scholarship to popular literature to courts. The first judicial decisions that reflect the new administrative law date from 1965 or 1966.[102] However, the earliest law review article I have been able to identify arguing in favor of expanded access and heightened review on the basis of capture theory bears the date 1971.[103] And that article was not written by a legal academic but by two public interest lawyers. Thus, it appears that legal scholars got into the act only *after* the courts started changing administrative law.

This, of course, is what one would expect, as long as legal scholarship takes as its primary data the decisions of courts. Legal scholars who take their cues from courts will always end up playing "catch-up," attempting to integrate judicial innovations with previously established understandings and (perhaps) with social science literature. But they will rarely serve as catalysts for change.[104]

C. 1983-Present

There is little question that the period from roughly 1967 to 1983 was characterized by widespread disillusionment with agencies, focusing in particular on the problem of capture. From the vantage point of a legal academic, however, it is difficult to perceive any sharp discontinuity between the intellectual preoccupations of the middle era and those of today; nor is it easy to identify a dominant "paradigm" that has emerged to replace the concerns of that era. Part of the problem, no doubt, is that law schools have become a veritable cornucopia—or perhaps cacophony is a better word—of "theory." Thus, starting in the 1970s and accelerating into the 1980s and 1990s, the law school world has seen political science and economics perspectives supplemented by critical legal studies, the civic republican revival, feminist theory, critical race theory, postmodernist theory, libertarian political

102. *See* Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994, 1003-04 (D.C. Cir. 1966); Scenic Hudson Preservation Comm. v. FPC, 354 F.2d 608 (2d Cir. 1965), *cert denied*, 384 U.S. 941 (1966).

103. Simon Lazarus & Joseph Onek, *The Regulators and the People*, 57 VA. L. REV. 1069 (1971).

104. For more general reflections consistent with this observation, see Ronald A. Cass & Jack M. Beermann, *Throwing Stones at the Mudbank: The Impact of Scholarship on Administrative Law*, 45 ADMIN. L. REV. 1 (1993).

theory, and so forth.[105] Not surprisingly, normative administrative law scholarship has drawn on these alternative intellectual perspectives to develop various rivalrous conceptions of the proper role of administrative common law, which academics have then urged on the courts.[106]

One lesson of our review of the intellectual climate of the 1967-1983 period, however, is that legal scholarship may not provide a very good guide to the sources of influence on courts. Courts are perhaps more likely to absorb their attitudes from something that can be called "public opinion," which in turn is shaped by journalistic and popular accounts, which in turn may derive ideas from the work of social scientists. With this possibility in mind, let us then turn (at least momentarily) from the jumble of perspectives reflected in the legal literature and ask what is happening to the social science literature on political institutions in the 1980s.

What we find is that something called public choice theory is clearly ascendent. To be sure, public choice theory traces its origins back at least to the 1950s, when Kenneth Arrow published his book on social choice theory[107] and Anthony Downs published *An Economic Theory of Democracy*.[108] Major refinements were then offered in the 1960s by James Buchanan and Gordon Tullock,[109] Mancur Olson,[110] and others. In the 1970s, however, the volume of public choice literature produced by political scientists and economists started to take off,[111] and shows no signs of abating. Today, even political scientists hostile to the public choice movement concede that it has become

105. For overviews, see Richard A. Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 HARV. L. REV. 761 (1987); Edward L. Rubin, *The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions*, 109 HARV. L. REV. 1393 (1996). *See also* Symposium, *The Legacy of the New Deal: Problems and Possibilities in the Administrative State*, 92 YALE L.J. 1083 (1983) (twenty articles and commentaries reflecting a wide diversity of perspectives on the current state of administrative law and divergent prognostications about the future).

106. *See, e.g.*, Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276 (1984) (critical legal studies framework); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994) (strict originalist framework); Seidenfeld, *supra* note 92 (civic republican framework).

107. KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (1951).

108. ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY (1957).

109. JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT (1962).

110. MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION (1965).

111. For an overview, see Robert G. Noll, *Government Regulatory Behavior: A Multidisciplinary Survey and Synthesis*, *in* REGULATORY POLICY AND THE SOCIAL SCIENCES 9 (Roger G. Noll ed., 1985). For comprehensive bibliographies, see DONALD C. GREEN & IAN SHAPIRO, PATHOLOGIES OF RATIONAL CHOICE THEORY 205-232 (1994); DENNIS C. MUELLER, PUBLIC CHOICE II 466-504 (1989).

the most influential school of thought in modern political science departments.[112]

In the social science literature of the 1970s and 1980s there is no sharp analytical break between capture theory and public choice theory; indeed, what I call capture theory would be regarded today as a quaint species of public choice theory.[113] Yet for our purposes there are very important differences between the Naderite capture theory of the 1970s and the public choice perspective of the 1980s. Capture theory, at least in the form familiar to judges and legal academics in the 1970s, was about the disproportionate influence of one type of group—business or producer groups—and focused almost exclusively on the influence that this type of group wielded over one governmental institution—the administrative agency. In contrast, mature public choice theory, as it emerged in economics and political science departments in the 1980s, works with a far more general model of governmental action that disregards these implicit limitations. Modern public choice theory regards all organized groups demanding services from political institutions—including not just business and producer groups, but also environmental groups, labor unions, civil rights groups, and rent control activists—as being subject to a unitary logic of collective action. And modern public choice theory regards not just administrative agencies but also legislatures, the President, and to an increasing degree even the courts, as institutions that should be modeled on the assumption that they seek to maximize their own self-interested ends in the way they respond to these multifarious groups.

Although most often deployed in the service of positive or descriptive analysis of the behavior of political institutions, modern public choice theory has profound (if often unstated) normative implications.[114] It suggests that wherever possible, collective ordering of social phenomena should be transferred from governmental institutions to the market or to "market-mimicking" forms of regulation.

112. *See* Lowi, *supra* note 28.

113. An interesting exchange between John Wiley and Matt Spitzer over antitrust federalism captures this evolution in understanding perfectly. Wiley explains the Supreme Court's expansion of antitrust scrutiny of businesses regulated by state and local governments in the mid-1970s in terms of capture theory, which Wiley understands to mean disproportionate influence by *producer* groups. Wiley, *supra* note 71, at 715. Spitzer, who has a Ph.D. in economics and is a prominent purveyor of modern public choice theory, criticizes Wiley on the ground that the logic of organizational influence he invokes extends to a far wider array of groups that may act in an anti-competitive fashion, including, for example, consumers seeking rent controls. Matthew L. Spitzer, *Antitrust Federalism and Rational Choice Political Economy: A Critique of Capture Theory*, 61 S. CAL. L. REV. 1293, 1302-18 (1988).

114. *See generally* MASHAW, *supra* note 31 (developing this point).

And where some form of government intervention remains necessary, it suggests that the proper inquiry is a comparative analysis to see which institution is the "least worst" in providing the needed services in the inevitably flawed fashion.[115] Either way, the effect of the analysis is to encourage cynicism about governmental institutions, and to promote hostility toward any invocation of the coercive powers of the state. In a word, those who have thoroughly assimilated public choice analysis tend to be libertarians.

How the rise of academic public choice theory in the 1980s eventually translated into journalistic accounts and public opinion is a story that remains to be told.[116] However, I agree with Jerry Mashaw's assessment that somewhere along the line just such a translation took place.

> While not cast in the same technical jargon, the basic views of the public choice fraternity are replicated in popular discourse. The idea that politicians, administrators, 'public interest groups,' and the like are just 'in it for themselves' has become a staple of political belief . . . . Since 1970, presidential election campaigns have tended to be waged not on issues of policy but on competing claims concerning who will be better at limiting public spending, reducing 'the deficit,' and downsizing the 'bureaucracy.' These campaigns have responded to a strong and growing sentiment in the populace that government is bloated, unresponsive, ineffectual—and often corrupt.[117]

Mashaw adds that "[w]hile making government better so that it can do more still animates some, reform has recently come to mean limiting the damage that public institutions can do or, if possible, dismantling them in favor of market solutions."[118]

Not surprisingly, when we turn to legal scholarship it is also possible to discern the spreading influence of the public choice perspective—even in work that explicitly adopts some alternative normative framework.[119] For some legal scholars, their first exposure was through a series of provocative articles by Frank Easterbrook, written before he became a judge, applying the Arrow theorem and the inter-

115. *See* KOMESAR, *supra* note 43, at 204.

116. For a recent journalistic account of American government and institutions that adopts an extreme public choice perspective, see JONATHAN RAUCH, DEMOSCLEROSIS: THE SILENT KILLER OF AMERICAN GOVERNMENT (1994).

117. MASHAW, *supra* note 31, at 23-24.

118. *Id.*

119. *See generally* David A. Skeel, Jr., *Public Choice and the Future of Public-Choice-Influenced Legal Scholarship*, 50 VAND. L. REV. 647, 659-660 (1997) (reviewing MAXWELL L. STEARNS, PUBLIC CHOICE AND PUBLIC LAW: READINGS AND COMMENTARY (1997)) (noting that "[i]t was not until the mid-1970s that legal scholars first explored the implication of public choice" but since then "public choice has taken the legal literature by storm.").

est group theory of politics to the behavior and practices of judges.[120] Others may have encountered the theory by following debates over the work of Richard Epstein, who gained notoriety by relying on the interest group theory of politics to justify a revival of *Lochner*-style judicial review.[121] By the mid-1980s, the theory was impossible to ignore. Several important law review symposiums featured public choice theory;[122] accessible summaries of the literature quickly followed.[123]

The rapid spread of public choice arguments unquestionably has had a strong impact on administrative law scholarship. Many prominent administrative law scholars have wrestled with public choice theory in their work, among them Harold Bruff, Daniel Farber, Jerry Mashaw, Richard Pierce, Susan Rose-Ackerman, Matthew Spitzer, Maxwell Stearns, Peter Strauss, and Cass Sunstein. Although there are of course competing interdisciplinary influences, it is safe to say that public choice theory has had by far the most extensive and transforming impact on mainstream administrative law scholarship overall.

The prolific Cass Sunstein provides an instructive illustration of how modern administrative law scholars can reject the normative position generally associated with public choice theory (deregulation), and yet still be strongly influenced by public choice analysis. Much of Sunstein's work is concerned with finding ways to promote governmental decisionmaking that reflects a deliberative, civic republican search for the public interest or "public values."[124] Yet Sunstein clearly views this as a heroic, almost desperate struggle against the inherent tendencies of the administrative state. He believes that the pursuit of narrow self interest and a civic republican style of decisionmaking are locked in a continuing struggle for the hearts and minds of legislators and agency administrators. But he admits that "there is mounting evidence that the pluralist understanding captures a signifi-

120. *See* Frank H. Easterbrook, *Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4 (1984); Frank H. Easterbrook, *Statutes Domains*, 50 U. CHI. L. REV. 533 (1983); Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802 (1982) [hereinafter Easterbrook, *Ways of Criticizing the Court*].

121. *See* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985); Richard A. Epstein, *Toward a Revitalization of the Contract Clause*, 51 U. CHI. L. REV. 703 (1984).

122. *See Symposium on the Theory of Public Choice*, 74 VA. L. REV. 167 (1988); *Symposium on Post-Chicago Law and Economics*, 65 CHI.-KENT L. REV. 3 (1989); Symposium, *Positive Political Theory and Public Law* (pts. 1 & 2), 80 GEO. L.J. 457, 1737 (1992).

123. *See* FARBER & FRICKEY, *supra* note 41; MAXWELL L. STEARNS, PUBLIC CHOICE AND PUBLIC LAW (1997).

124. *See, e.g.*, Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985).

cant component of the legislative process and that, at the descriptive level, it is far superior to its competitors."[125] Thus, Sunstein's understanding of the way the administrative state actually operates, as opposed to how it ideally should operate, is largely a product of public choice scholarship.[126]

Although public choice theory has penetrated deeply into modern administrative law writing, any judge who cared to wade into this literature would come away with no clear program for administrative common law. Public choice scholarship reveals no consensus about the implications of the theory for critical questions involving the administrative state. For example, public choice scholars are divided about whether administrative agencies should be regarded as being primarily controlled by the legislature or the executive, or whether they should be modeled as having policy preferences independent of those of the major political branches.[127] They are also divided over whether broad delegations of power to agencies will increase or decrease rent-seeking behavior in the political system, relative to what we would observe if Congress decided more issues itself.[128] Finally, they are divided over whether intrusive judicial review of agency action, for example through independent interpretations of statutory mandates, would increase or decrease rent-seeking or other pathologies, relative to what we would observe if courts deferred to agency interpretations.[129]

The uncertain implications of public choice theory applies also to courts. The proper role of the courts from the perspective of public choice thinking is a matter of considerable debate. In the late 1970s, a number of legal scholars influenced by public choice theory hypothesized that common law courts, like the market, are a decentralized source of social control that has an innate tendency to reach socially desirable outcomes.[130] This image of the courts encouraged some

125. *Id.* at 48.

126. In addition to his Stanford Law Review article, see also CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION (1990); Sunstein, *supra* note 29, at 483; Cass R. Sunstein, *Deregulation and the Hard-Look Doctrine*, 1983 SUP. CT. REV. 177.

127. For discussion, see Matthew D. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431 (1989).

128. *Compare* Peter H. Aranson et al., *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1 (1983), *with* Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81 (1985).

129. *See* Elhauge, *supra* note 41.

130. *See, e.g.*, George L. Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 J. LEGAL STUD. 65 (1977); Paul H. Rubin, *Why is the Common Law Efficient?*, 6 J. LEGAL STUD. 51 (1977).

scholars to offer a set of prescriptions, the tenor of which was "sanguine, and at times utopian, in believing that courts can perfect the political process by interpreting statutes and constitutions and reviewing administrative agency decisions in order to cabin noxious interest group influence."[131]

More recently, however, it has been argued that the same factors that public choice theory identifies as undermining our confidence in legislative and administrative decisionmaking also apply to judicial decisionmaking.[132] Specifically, courts may be subject to cycling as much as agencies or legislatures,[133] and the forces of minoritarian bias will strongly influence, if not the outcomes reached, then at least what issues are presented to courts for their consideration.[134] Thus, public choice theory, in its current incarnation, does not appear to constitute the clear mandate for the transfer of decisional authority from legislatures and agencies to courts that some early devotees imagined. This skepticism about judicial activism has been reinforced by numerous case studies highlighting the unintended consequences of heightened judicial review during the 1967-83 period.[135] Among these consequences is the "ossification" of the rulemaking process, in effect defeating the very objectives that the reformers of 1967-1983 were striving to achieve.[136]

Any judge who conscientiously scoured this literature would be unlikely to respond any differently than a judge who had simply adsorbed today's general climate of pessimism about government: the response would be one of deep skepticism about all government insti-

131. Rodriguez, *supra* note 29, at 111 (citing examples).

132. *See* KOMESAR, *supra* note 43, at 123-50; Elhauge, *supra* note 41, *passim.*

133. *See* Easterbrook, *Ways of Criticizing the Court, supra* note 120.

134. *See* KOMESAR, *supra* note 43, at 123-150. For some qualifications on this insight, see Thomas W. Merrill, *Institutional Choice and Political Faith,* 22 J.L. & SOC. INQ. (forthcoming Fall 1997) (reviewing NEIL K. KOMESAR, IMPERFECT ALTERNATIVES (1994)).

135. For an overview, see R. Shep Melnick, *Administrative Law and Bureaucratic Reality*, 44 ADMIN. L. REV. 245 (1992). As Melnick's own study of judicial review under the Clean Air Act concluded: "Ironically, while the new administrative law [of 1967-1983] was in part a response to academic critiques of bureaucratic policymaking, the courts' attempt to alleviate the shortcomings of administrative agencies has attracted a spotlight revealing similar defects in judicial decisionmaking." MELNICK, *supra* note 92, at 343-44. Similar conclusions have been reached with respect to judicial review of OSHA workplace safety regulations, *see* JOHN M. MENDELOFF, THE DILEMMA OF TOXIC SUBSTANCE REGULATION: HOW OVERREGULATION CAUSES UNDERREGULATION AT OSHA 115-122 (1988) and with respect to judicial review of automobile safety standards, *see* JERRY L. MASHAW & DAVID L. HARFST, THE STRUGGLE FOR AUTO SAFETY (1990).

136. *See* Harold J. Krent, *Reviewing Agency Action for Inconsistency with Prior Rules and Regulations,* 72 CHI.-KENT L. REV. 1187 (1997); Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385 (1992); Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59 (1995).

tutions, combined with very little sense that judges have any tools that allow them to do something about it.

III. Changing Judicial Doctrines

In this section, I will consider a variety of judicial doctrines, some directly implicating the interpretation of the APA, others more properly regarded as administrative common law. The point of the discussion in each case is to show that the outcomes the courts have reached in each of my three eras are roughly congruent with what one might expect given the changing conceptions of the administrative state sketched in Parts I and II. I am not claiming that direct causal linkage can be shown between changing notions about the administrative state and any particular decision. The only claim is that the larger aggregate pattern provides support for the hypothesis that the administrative law developed by courts reflects the influence of the foregoing changes in the dominant conception of the administrative state.

A. Availability of Review

One set of doctrines of obvious import are those that regulate access to court to complain about, or obtain enforcement of, administrative action. I will consider three such doctrines here—standing, reviewability, and implied private rights of action—although there are others that also reveal similar patterns.[137] In each case, one would expect access to courts to serve as a barometer of the different conceptions of the administrative state adumbrated above. The public in-

137. Three obvious additional candidates are primary jurisdiction, exhaustion, and sovereign immunity. With respect to primary jurisdiction, *compare* United States v. Western Pac. R.R., 352 U.S. 59, 63-69 (1956) (primary jurisdiction doctrine requires resort to commission for interpretation of tariff), *with* Nader v. Allegheny Airlines, Inc., 426 U.S. 290, 305-07 (1976) (primary jurisdiction does not require resort to commission to determine whether common law right of action exists for airline passenger (Ralph Nader no less!) bumped from flight pursuant to overbooking practice), *with* Maislin Indus., U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116, 130-31 (1990) (primary jurisdiction doctrine enforced even if disavowed by agency). With respect to exhaustion, *compare* Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 51 (1938) (administrative exhaustion required even for allegation that agency was acting unconstitutionally beyond its jurisdiction), *with* McKart v. United States, 395 U.S. 185, 197 (1969) (administrative exhaustion not required when Selective Service determined individual was eligible for draft and issue was purely one of statutory interpretation), *with* Darby v. Cisneros, 509 U.S. 137, 153-54 (1993) (exhaustion of discretionary right of appeal within agency not required by the "plain meaning" of the APA). With respect to sovereign immunity, *compare* Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 703-05 (1949) (broad conception of sovereign immunity invoked to deny relief), *with* Schlafly v. Volpe, 495 F.2d 273, 280-81 (7th Cir. 1974) (APA interpreted to constitute a broad waiver of sovereign immunity even for suit that would compel expenditure of funds by the government), *with* United States v. Nordic Village, Inc., 503 U.S. 30, 33-34 (1992) (waiver of sovereign immunity must be set forth expressly in text of statute).

terest conception dominant from 1946 to 1966 should produce a fairly restrictive set of access rules, providing recourse to courts only for those most directly injured by the administrative process, and discouraging access by "officious bystanders" likely to distract agency experts from the business at hand. Capture theory, in contrast, should yield a vastly expanded notion of judicial access, encouraging public interest intervenors and other underrepresented parties to go to court and blow the whistle on agencies that have been captured by big business or are otherwise succumbing to bureaucratic pathologies. Public choice theory, on the other hand, should undermine the confidence that expanded access is an unqualified good thing. Indeed, if public choice theory leads to the insight that judicial action is also likely to be affected by minoritarian bias, then one possible judicial response might be a quest for more formal and "law-like" criteria for granting or refusing access to different groups, in order to constrain the discretion of lower courts in responding to such interest group entreaties.

1. Standing

One important common law doctrine provides that individuals or groups may invoke the powers of the courts to set aside agency action only if they have "standing to sue." In considering the evolving contours of this doctrine over the last fifty years, what we see is strikingly consistent with the expected pattern.

The APA was widely regarded as having codified the law of standing in effect prior to its adoption.[138] It provided that individuals were entitled to judicial review of agency action if they had "suffer[ed] legal wrong because of agency action," or alternatively, if they were "adversely affected or aggrieved by agency action within the meaning of a relevant statute."[139] The "legal wrong" test was most commonly understood to refer to the situation where the agency action, if not legally warranted, would constitute an injury to a recognized common law right of liberty or property.[140] The alternative test referred to situations where Congress had created a cause of action allowing certain "adversely affected or aggrieved" parties to sue even though they had

138. *See* U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 96 (1947); JAFFE, *supra* note 79, at 528-31.

139. 5 U.S.C. § 702 (1994).

140. *See* Tennessee Elec. Power Co. v. TVA, 306 U.S. 118, 137, 140 (1939). Admittedly, other cases seemed to give the phrase a broader and more ambiguous signification. *See, e.g.*, The Chicago Junction Case, 264 U.S. 258, 267 (1924).

not suffered an injury recognized at common law.[141] From 1946 to 1967, the courts interpreted Section 702 of the APA more or less consistently with this original understanding.[142]

Then, starting in the late 1960s, the courts of appeals began to manipulate the second test ("adversely affected or aggrieved by agency action within the meaning of a relevant statute") by creatively interpreting individual regulatory statutes as incorporating an intention to permit nontraditional intervenors to seek judicial review.[143] Professor Sunstein has speculated, consistently with the thesis of this article, that these decisions were a response to "empirical literature" suggesting that agencies are often prone to capture, and hence that regulated entities would have disproportionate influence over agencies if the beneficiaries of these statutes (i.e., public interest intervenors) were not permitted to challenge agency decisions in Court.[144]

Soon, the Supreme Court had a chance to ratify these lower court decisions; instead, it took it upon itself to re-write the APA provisions on standing. In *Association of Data Processing Service Organizations, Inc. v. Camp*,[145] the Court in effect jettisoned the "legal wrong" test, even though it is set forth in the text of the APA.[146] Henceforth, the Court indicated, the only questions would be whether the claimant is sufficiently "aggrieved" to establish a "case" or "controversy" within the meaning of Article III of the Constitution, and whether "the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."[147]

The net effect of this rewriting was to transform the APA standing provisions from a screen against bystander suits into an open sieve. No longer did one have to show injury to a common law right or the existence of a special legislatively created cause of action. It was enough to show some connection to the government decision be-

141. The leading cases were *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4 (1942) and *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940).

142. *See, e.g.*, Kansas City Power & Light Co. v. McKay, 225 F.2d 924, 932-33 (D.C. Cir.), *cert. denied*, 350 U.S. 884 (1955).

143. *See* Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920, 932-37 (2d Cir. 1968); Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994, 1000-06 (D.C. Cir. 1966); Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608, 615-17 (2d Cir. 1965).

144. Cass R. Sunstein, *What's Standing After* Lujan? *Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 183-84 (1992).

145. 397 U.S. 150 (1970).

146. *Id.* at 153.

147. *Id.*

ing challenged and to make arguments bearing some relationship to a federal regulatory scheme. Ensuing decisions made clear that public interest groups could readily obtain standing under these standards; for example, environmental plaintiffs could establish standing merely by pleading that they use the natural area in controversy for recreational purposes.[148]

The move toward liberalization of standing eventually crested, however, and by the mid-to-late 1980s a correction set in.[149] The three most important recent decisions for APA purposes have all been authored by Justice Scalia. In *Lujan I*,[150] the Court held that environmental plaintiffs must pinpoint the exact area they use for recreational purposes, and can challenge agency action only insofar as it affects that area.[151] In *Lujan II*,[152] the Court ruled that environmental plaintiffs must allege that they intend "imminently" to visit the area in controversy, not that they intend to do so in the indefinite future.[153] Most recently, in *Bennett v. Spear*,[154] the Court held that landowners have standing under the APA to challenge an agency decision taken under the Endangered Species Act that might deprive them of water to irrigate their lands.[155]

Taken together, the three recent decisions suggest an effort to move the law of standing back in the direction of protecting common law interests, as under the discarded "legal wrong" test. Thus, the standing of environmentalists is limited to situations where they have experienced a direct "assault" on their senses, in the form of environmental depredations that occur in their presence while they are recreating outdoors. This suggests a desire to conform the circumstances in which environmentalists have standing to the paradigm of a common law tort.[156] Private property owners, in contrast, are allowed to chal-

148. *See* United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 683-90 (1973); Sierra Club v. Morton, 405 U.S. 727, 731-41 (1972).

149. For an overview of the manifold developments in standing law during these years see Maxwell L. Stearns, *Standing and Social Choice: Historical Evidence*, 144 U. PA. L. REV. 309, 404-459 (1995); William Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, *passim* (1988).

150. Lujan v. National Wildlife Fed'n, 497 U.S. 871 (1990).

151. *Id.* at 889.

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

153. *Id.* at 564.

154. 117 S. Ct. 1154 (1997).

155. *Id.* at 1160-69.

156. *See also* Maxwell L. Stearns, *Standing Back from the Forest: Justiciability and Social Choice*, 83 CAL. L. REV. 1309, 1320-1323 (1995) (noting the analogy between tort law and modern standing doctrine). Stearns offers an explanation for the constriction of standing under recent cases based on public choice theory that is different than that suggested here. He attributes the doctrine to the Court's perception that premature adjudication of issues should be avoided in

lenge agency action that more remotely threatens their land with potential future harm. Private property owners, however, are obviously seeking to protect a common law right, and hence recognizing their standing to contest more remote and contingent injuries is fully compatible with a world view that generally privileges private rights recognized at common law over statutory causes of action ("public rights").

Still, none of the three recent decisions abandons the framework for APA standing established in the 1970s. If there has been a retrenchment, it has been a modest one. And although it is possible to interpret the Court's recent cases as evidencing a preference for "old property" rights over "new property" regulatory entitlements, it may also be that the Court has gravitated to a more common-law like doctrine simply because it seems more "law like" and hence apolitical and predictive than the open-ended formulations of the middle era.

2. Reviewability

Another threshold doctrine that has an important influence on the balance of authority between agencies and courts concerns what kinds of agency decisions are judicially reviewable. The APA makes reviewable any "final agency action for which there is no other adequate remedy in a court"[157] subject to two exceptions: where "statutes preclude judicial review" or where "agency action is committed to agency discretion by law."[158] During the first twenty years under the APA, the Court applied these provisions with no presumption either for or against the reviewability of agency action.[159]

In 1967, however, the Court "announced a major doctrinal change in the law governing review of agency action."[160] *Abbott Laboratories v. Gardner*[161] stated that henceforth the APA would be regarded as incorporating a presumption in favor of reviewability, and that "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should courts restrict access to judicial review."[162] Subsequent decisions indicated that the Court was indeed committed to expanding the domain of issues subject to judicial re-

order to prevent having outcomes determined by path dependency, given that preferences among the Justices are often multi-peaked. *Id. passim.*

157. 5 U.S.C. § 704 (1994).

158. 5 U.S.C. § 701(a)(1), (a)(2).

159. *See* 3 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE 127 (3d ed. 1994).

160. *Id.* at 127.

161. 387 U.S. 136 (1967).

162. *Id.* at 141.

view. In *Citizens to Preserve Overton Park, Inc. v. Volpe*,[163] the Court held that the decision of the Department of Transportation to authorize funding for a highway was reviewable at the behest of a citizens group.[164] And in *Dunlop v. Bachowski*,[165] the Court held reviewable a decision by the Labor Department not to file a civil action against a union that allegedly had violated federal union election laws.[166] Lower courts, not surprisingly, took these decisions as a signal to subject a larger range of administrative action to judicial oversight. For example, older precedents holding that adverse decisions of the United State Parole Board were not reviewable were abandoned, and a rule of reviewability of parole denials was adopted in its place.[167]

In 1984, a backlash of sorts set in. In *Block v. Community Nutrition Institute*,[168] the Supreme Court stated that *Abbott Laboratories* did not require "'clear and convincing' evidence . . . in the strict evidentiary sense."[169] Instead, the Court explained, the question was whether "congressional intent to preclude judicial review is 'fairly discernible'" in the details of the legislative scheme.[170] Based on its analysis of the legislative scheme, the Court held that milk-marketing orders issued by the Secretary of Agriculture were not reviewable at the behest of a consumer group complaining of higher prices.[171] *Community Nutrition* thus holds unreviewable (at least by consumers) an administrative decision that reflects the very paradigm of "agency capture" that so exercised the previous generation of judges.

The next year, in *Heckler v. Chaney*,[172] the Court recognized an even more striking exception to reviewability, holding that agency decisions not to institute enforcement proceedings are presumptively unreviewable.[173] The Court reasoned that decisions not to enforce are based on a complicated balancing of multiple factors; that agency inaction does not involve the exercise of coercive powers over individuals; and that decisions not to enforce are analogous to decisions not to

163. 401 U.S. 402 (1971).
164. *Id.* at 409-13.
165. 421 U.S. 560 (1975).
166. *Id.* at 566-67.
167. *See* KENNETH CULP DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES: SUPPLEMENTING ADMINISTRATIVE LAW TREATISE 632-633 (1976) [hereinafter DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES] (collecting decisions).
168. 467 U.S. 340 (1984).
169. *Id.* at 350-51.
170. *Id.* at 351.
171. *Id.* at 352-53.
172. 470 U.S. 821 (1985).
173. *Id.* at 827-38.

prosecute, which were traditionally regarded as unreviewable at common law.[174]

Chaney in particular appears to reflect a very different world view than *Overton Park* and *Bachowski*. The decisions of the middle era proceed on the assumption that judicial review is nearly always a healthy corrective to agency action or inaction. *Chaney*, in contrast, assumes that as long as the agency is not regulating, that is, as long as it is not intruding into private or market relationships, then there is no need for judicial intervention. Thus, it is not too far-fetched to read *Chaney* as reflecting a preference for market ordering[175]—the one domain presumed by public choice theory to be free of pathologies like minoritarian bias.

Later decisions have continued the trend toward greater restrictiveness in permitting judicial review.[176] As in the case of standing doctrine, however, there has been no wholesale repudiation of the new learning of the 1967-1983 period. The Court has occasionally found agency action reviewable in contested cases,[177] and the lower courts have applied the new exceptions to reviewability unevenly.[178] Overall, what we find is a loss of faith in the unequivocal value of judicial review, which translates into a pattern of general drift in the doctrine coupled with moderate retrenchment and adoption of common law formalisms in selected areas.

3. Implied Private Rights of Action

A third doctrine that has an important influence on the respective sphere of influence of agencies and courts is one that permits the beneficiaries of a regulatory regime to go directly to court to obtain enforcement of a regulatory statute, typically by suing another private party for damages for violating the beneficiary's regulatory rights. The APA does not mention this possibility, but instead proceeds on the assumption that all actions in court will be between the government and private citizens. Consistent with this understanding, rela-

174. *Id.* at 831-32.

175. *See* Cass Sunstein, *Reviewing Agency Inaction After* Heckler v. Chaney, 52 U. CHI. L. REV. 653, 666 (1985).

176. *See, e.g.*, Lincoln v. Vigil, 508 U.S. 182 (1993) (termination of children's health program by Indian Health Service not reviewable).

177. *See, e.g.*, Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667 (1986) (narrowly interpreting preclusion of review provision to permit judicial review of agency regulations).

178. *See* Ashutosh Bhagwat, *Three-Branch Monte*, 72 NOTRE DAME L. REV. 157 (1996) (discussing the lower courts' application of the *Chaney* exception).

tively few decisions recognizing implied private rights of action can be found from 1945 to the mid-1960s.[179] The Supreme Court in particular tended to reject arguments in favor of implied private rights of action, especially where such an action was perceived as interfering with an administrative agency's exclusive policymaking authority.[180]

The attitude changed dramatically in the 1960s, perhaps somewhat earlier than with respect to the other innovations in administrative common law under consideration. The watershed case was *J.I. Case Co. v. Borak*,[181] in which the Court permitted investors to bring a private action for damages against companies who issue proxy statements containing false or misleading information in violation of federal securities laws.[182] *Borak* itself was probably motivated more by a version of the public interest theory than by capture theory. The decision was justified primarily in terms of the need to supplement the inadequate resources of the Securities and Exchange Commission ("SEC") for reviewing proxy statements.[183] The SEC told the Court that it was incapable of uncovering fraud given the volume of filings and the short time for review, and the agency itself enthusiastically endorsed the idea of supplementing regulatory oversight with a private cause of action in order to "make effective the congressional purpose."[184]

Whatever the motivations for the decision, lower courts in the latter part of the 1960s and early 1970s seized on the precedent as justification for creating new implied rights of action in a host of areas.[185] When the Court in 1975 adopted a four-prong "test" for determining in any case whether it was appropriate to create an implied

179. One commentator has found that while decisions recognizing implied rights of action were not unheard of during these years, the Court—operating in the Legal Process tradition—required a showing that such a right would be necessary to effectuate the purposes of a statutory scheme. H. Miles Foy, III, *Some Reflections on Legislation, Adjudication, and Implied Rights of Action in the State and Federal Courts*, 71 CORNELL L. REV. 501, 557-561 (1986).

180. *See* T.I.M.E., Inc. v. United States, 359 U.S. 464 (1959) (no implied right of action to challenge the reasonableness of past motor carrier rates); Montana-Dakota Utils. Co. v. Northwestern Pub. Serv. Co., 341 U.S. 246 (1951) (same—gas rates); *cf.* Hewitt-Robins Inc. v. Eastern Freightways, Inc., 371 U.S. 84 (1962) (*T.I.M.E., Inc.* distinguished because at issue was shipper's choice of route, not rates charged). In the lower courts, securities legislation was the "most fruitful source of implied rights of action." Note, *Implying Civil Remedies from Federal Regulatory Statutes*, 77 HARV. L. REV. 285, 286 (1963).

181. 377 U.S. 426 (1964).

182. *Id.* at 430-31.

183. *Id.* at 432.

184. *Id.* at 433.

185. *See* Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1196 (1982) ("[a]fter the Supreme Court enthusiastically endorsed this form of federal common law in its 1964 decision in *J.I. Case Co. v. Borak*, lower federal courts recognized private rights of action under regulatory statutes with increasing frequency").

private action,[186] the volume of lower court litigation increased even further.[187]

In the early 1980s, the wave of implied rights of action suddenly crested. Writing in 1982, Professors Stewart and Sunstein reported "a sharp reversal" in the Supreme Court's attitude. As they characterized it, "[t]he Supreme Court has all but repudiated *Borak* and has created a strong presumption against judicial recognition of private rights of action."[188] The reversal took the form of a de-emphasis on the four-part test of *Cort v. Ash* in favor of an inquiry that focused on congressional intent.[189] This shift in emphasis, however, did not entirely staunch the flow of new implied private rights of action—lower courts were reasonably adept at discovering "intentions" to create such actions in broad statements about the purposes of statutes and in statements made by the proponents of regulation in the legislative history.[190]

Certain Justices wanted to go further, and would have abolished implied rights of action altogether. Justice Powell voiced his opposition to implied private rights of action in the form of a separation of powers argument.[191] He argued that determining the available remedies for the enforcement of a federal statute is a fundamental policy choice that should be made by Congress rather than by the courts.[192] Later, Justice Scalia took up the crusade, and sharpened the argument.[193] As he noted, only those proposals concerning remedies that have received the approval of both Houses of Congress and the assent of the President should be regarded as law; "implied" remedies cannot claim to have surmounted this arduous process.[194] The Powell-Scalia position can be seen as reflecting an implicit public choice conception

186. Cort v. Ash, 422 U.S. 66, 78 (1975).

187. At least this is my impression based on the number of Supreme Court opinions and the volume of scholarly commentary devoted to the issue in the late 1970s and early 1980s.

188. Stewart & Sunstein, *supra* note 185, at 1196.

189. *See* Middlesex County Sewerage Auth. v. Sea Clammers Ass'n, 453 U.S. 1, 13 (1981); *see, e.g.,* Transamerica Mortgage Advisors, Inc. (TAMA) v. Lewis, 444 U.S. 11 (1979); Touche Ross & Co. v. Redington, 442 U.S. 560 (1979).

190. *See, e.g.,* Howing Co. v. Nationwide Corp., 826 F.2d 1470, 1474-76 (6th Cir. 1987) (recognizing implied right of action under section 13(e) of Securities Act of 1934); Meyer v. Oppenheimer Management Corp., 764 F.2d 76, 87-88 (2d Cir. 1985) (recognizing implied right of action under Investment Company Act); Local Div. 1285, Amalgamated Transit Union v. Jackson Transit Auth., 650 F.2d 1379, 1383-87 (6th Cir. 1981) (recognizing implied right of action under section 13(c) of the Urban Mass Transportation Act).

191. Cannon v. University of Chicago, 441 U.S. 677, 742-49 (Powell, J. dissenting).

192. *Id.* at 748-49.

193. Thompson v. Thompson, 484 U.S. 174, 191-92 (1988) (Scalia, J., concurring in the judgment).

194. *Id.*

of the administrative state. Unlike the Court in *Borak*, which viewed the securities acts as serving the public interest, the Powell-Scalia arguments presuppose that the legislative process is based on compromises between contending interest groups, with one critical element of the compromise being the package of enforcement tools given to beneficiaries. Under this conception of legislation, for courts to step in and create a new remedy in addition to the compromise package would upset the original interest group "deal," and give one contending group more than it was able to obtain through interest-group bargaining.[195]

Although never embraced by a majority of the Court, the Powell-Scalia position has in effect become the law of the land.[196] Disputes about implied rights of action that reach the Court today almost all involve appeals to stare decisis or congressional ratification of prior judicial decisions.[197] The creation of wholly new implied rights of action has largely passed from the scene.[198] Once again, we see a familiar pattern: expansion of judicial oversight has stopped, but the innovations of the prior era have not been fully repudiated. Meanwhile, the style of judicial decisionmaking has become more formal, with any discussion about furthering the purposes of statutes or reinforcing important public policies a fading memory.

195. *See* Frank H. Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85, 112-15 (spelling out this argument).

196. The story of how this happened is very curious, and remains to be told. Justice Powell's separation of powers argument was expressly rejected by a majority of the Court. *See* Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 375-378 (1982). Similarly, the Court has not endorsed Justice Scalia's argument based on the presentment and bicamerialism requirements. *See* Wisconsin Public Intervenor v. Mortier, 501 U.S. 597, 610-12 n.4 (1991) (expressly rejecting Justice Scalia's call to abandon any reliance on legislative history). Yet the position they both urged—abandoning the practice of recognizing new implied rights of action—has in effect become the position that best explains the outcomes reached by the Court.

197. *See* Morse v. Republican Party of Va., 116 S. Ct. 1186, 1198-1206 (1996) (recognizing an implied right of action under section 10 of Voting Rights Act based on precedent that recognized such an action under section 5 of the Act); Herman & MacLean v. Huddleston, 459 U.S. 375, 380-87 (1983) (relying on congressional ratification of implied action under Rule 10b-5); Merrill Lynch, Pierce Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 378-88 (1982) (relying on congressional ratification of implied right of action under Commodities Exchange Act); *cf.* Franklin v. Gwinnett County Pub. Schs., 503 U.S. 60, 65-76 (1992) (recognizing that where an implied right of action for injunctive relief had been previously recognized by the Court, action for damages was also appropriate).

198. *See* Thompson v. Thompson, 484 U.S. 174, 190 (1988) (Scalia, J., concurring) (noting that in nine of last eleven Supreme Court cases in which the Court was asked to recognize an implied right of action, the Court had declined to do so); *see e.g.*, Suter v. Artist M., 503 U.S. 347 (1992); Karahalios v. National Fed'n of Fed. Employees, Local 1263, 489 U.S. 527 (1989).

B. Scope of Review

When we turn from doctrines determining the availability of judicial review to those that define the degree to which courts will substitute their judgments for those of the agency, we discover a somewhat more complicated pattern. Nevertheless, the three-part sequence of development is clearly discernible, as is the plausible relationship between this development and the underlying conceptions of the administrative state I have posited.

1. Judicial Review of Agency Interpretations of Law

In cases where judicial review is available, it is clear today that statutory interpretation is the most important variable in determining the allocation of authority between agencies and courts. If courts can freely substitute their judgments for those of the agency about the meaning of the statutes the agency implements, then the courts will have significant power in determining the direction of agency policy. On the other hand, if the courts defer to agency interpretations in most cases, then the agency will be relatively free (at least as far as judicial interference is concerned) to chart its own course.

The issue today is debated largely in terms of the *Chevron* formula,[199] which strikes a compromise of sorts between the two extremes. Courts will substitute their judgment for agencies where they can discern a clearly preferred answer to the question presented using "traditional tools of statutory construction."[200] Otherwise, courts will defer to agency determinations as long as the agency's interpretation can be said to be "permissible" or "reasonable."[201] Stimulated by the appearance of this new formula, the general question of when courts

199. Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc. 467 U.S. 837 (1984). In case the reader has forgotten the two-step formula, this is it:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. 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.

Id. at 842-43 (citations omitted).

200. *Id.* at 843 n.9.

201. *Id.* at 843-44.

should defer to agency interpretations of statutes has become the most hotly contested issue in administrative law.[202]

Looking back over fifty years, it is striking to realize that it has not always been so. During the first twenty years under the APA, relatively few cases ventured strong views about the division of interpretational authority between agencies and courts. There was some commentary in the law reviews,[203] but it was intermittent, and the issue was clearly not perceived as burning or urgent. In the middle period, which I have fixed as 1967-1983, there was, if anything, even less attention in judicial decisions and commentary given to the division of interpretational authority. The first question that needs to be answered, therefore, is why what we today regard as the most important question in administrative law had such low visibility during the first two periods under review.

One reason the question was avoided is that it was embarrassing. Both the APA and the received tradition that modeled administrative law on the relationship between judge and jury suggested that courts should decide all questions of law de novo. Indeed, the APA appears to compel this conclusion. It provides that "[t]o the extent necessary to decision and when presented, the reviewing court shall decide *all* relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning and applicability of the terms of any agency action."[204] It further provides that courts shall hold unlawful and set aside agency action found to be "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right."[205] On the other hand, the Act says that the reviewing court shall hold unlawful and set aside agency action found to be a "arbitrary, capricious, and an abuse of discretion,"[206] suggesting that reviewing courts are to defer to agency determinations when they constitute reasonable exercises of "discretion." Overall, the review provisions of the APA appear to presuppose that issues of law interpretation are for courts, while courts are to defer to agencies when they exercise their discretion, i.e., when they are not constrained by law.

The judicial doctrine therefore started out in 1946 against a baseline of understanding that quite arguably required de novo judicial

202. *See* Ronald M. Levin, *The Anatomy of* Chevron: *Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253 (1997).

203. *See, e.g.*, Louis Jaffe, *Judicial Review: Question of Law*, 69 HARV. L. REV. 239 (1955).

204. 5 U.S.C. § 706 (1994) (emphasis added).

205. 5 U.S.C. § 706(2)(C).

206. 5 U.S.C. § 706(2)(A).

review of all questions of law. Such a baseline was substantially at odds with the public interest conception of the administrative state, because it would impose a significant straightjacket on agencies in formulating policy within their areas of expertise. Not surprisingly, therefore, courts tip-toed around the general question of the division of court-agency authority, looking for ways to give agencies greater breathing space while avoiding open defiance of the APA. One common avoidance device, reflected in the leading pre-APA decision *NLRB v. Hearst Publications, Inc.*,[207] was to characterize agency determinations of law as being merely the "application" of law to facts, and hence as coming within the standard for review of discretionary decisionmaking.[208] Another move, reflected for example in the second *Chenery* decision,[209] was to assert that the statutory language is sufficiently broad as to admit multiple interpretations, and to uphold the agency's decision as an exercise of expertise in making the "discretionary" choice among different interpretative options.[210] The later move, as Justice Jackson noted in dissent, is directly contrary to the principle that "what action is, and what is not, within the law must be determined by courts . . . ."[211]

Somewhat more puzzling is the continued silence about the subject during the second era, when courts in general were intruding much more aggressively into the administrative process. One might expect such an atmosphere to produce a "rediscovery" of the language of the APA suggesting that courts must review all questions of law de novo. This would have given the courts an extremely powerful weapon in forcing agencies into line. But this did not happen.[212] Instead, the courts as before studiously ignored the language of the APA, and continued to avoid any sweeping pronouncements on the subject.

207. 322 U.S. 111, 130-32 (1944).

208. *See* 4 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE 189-213 (1st ed. 1958) (reviewing decisions that cast questions of law as questions of law application or fact in order to defer to agency action).

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

210. *Id.* at 207-08.

211. *Id.* at 213-14 (Jackson, J., dissenting).

212. In fact, Senator Dale Bumpers proposed an amendment to the APA in the mid-1970s that would have expressly commanded courts to decide all issues of statutory interpretation de novo. *See* Carl McGowan, *Congress, Court, and Control of Delegated Power*, 77 COLUM. L. REV. 1119, 1162-65 (1977) (discussing the proposed amendment and responses to it). Most administrative law scholars and proponents of the new representation-reinforcing administrative law opposed the idea. *Id.* at 1164-65.

This is confirmed by Kenneth Culp Davis' *Administrative Law of the Seventies*,[213] an "interim" edition of his Treatise rushed into print in 1976 to summarize the revolutionary changes in administrative law then taking place. Although nearly 700 pages in length overall, the Davis volume contains only six pages on the subject of judicial review of agency determinations of law.[214] Professor Davis noted that the decisions of the 1970s reflect a blurring of distinctions thought to be important in the preceding era—such as the distinction between judicial review of questions of law and of fact, and the distinction between legislative rules and interpretative rules. Overall, however, his treatment suggests that the dominant judicial attitude was one of indifference to the larger question of the proper allocation of interpretative power.

This is not to suggest that the intrusive judicial spirit of the age did not spill over into individual cases involving questions of statutory interpretation. It is easy to catalogue decisions of the second period in which courts freely substituted their views of statutory meaning for those of the agency. The Supreme Court's decisions in *Overton Park*,[215] *TVA v. Hill*,[216] and the *Benzene* case[217] come to mind. Moreover, lower courts during this period often used statutory interpretation to override longstanding agency practices such as permitting clearcutting in national forests[218] or allowing pipelines to be constructed and maintained on public lands.[219] There is a theme of sorts in these decisions: courts occasionally used statutory interpretation to try to "correct" for perceived agency bias in favor of groups having a close client relationship to the agency (highway builders in *Overton Park*, dam builders in *TVA v. Hill*, unions in *Benzene*, the timber industry, the oil industry, etc.). In other words, courts on occasion used statutory interpretation to try to correct for agency capture. But the most striking feature of the era remains the fact that when the courts

213. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES, *supra* note 167.

214. *Id.* at 688-693.

215. Citizens to Preserve Overton Park v. Volpe, Inc., 401 U.S. 402, 405 (1971) (reading highway funding act as incorporating a preference for avoiding new construction in parks).

216. 437 U.S. 153, 173 (1978) (reading Endangered Species Act as eliminating all discretion in enforcing the statutory mandate against federal agencies).

217. Industrial Union Dep't v. American Petroleum Inst. (Benzene), 448 U.S. 607, 614-15 (1980) (plurality opinion) (creatively reading the OHS Act to incorporate a "significant risk" threshold for regulation of carcinogenic substances).

218. West Virginia Div. of the Izaak Walton League of Am., Inc. v. Butz, 522 F.2d 945, 955 (4th Cir. 1975).

219. Wilderness Soc'y v. Morton, 479 F.2d 842, 846 (D.C. Cir.) (en banc), *cert. denied*, 411 U.S. 917 (1973).

did substitute judgment, they did not assert a general prerogative to "say what the law is" to the exclusion of the agency.

The fact that courts failed to invoke their power to interpret law de novo as a source of expanded judicial authority during this period is highly instructive in understanding the temper of the times. It suggests that the judges of this era did not believe that they had a comparative advantage relative to agencies in resolving questions of policy. What they did believe was that agencies were flawed institutions subject to capture and related pathologies, and that these flaws could be overcome, at least in part, through the use of improved procedures and more intensive oversight by courts. Thus, the judicial project was to seek to perfect the administrative process through procedural innovations and heightened review; it was not, for the most part, to shift the formulation of substantive policy from agencies to courts.

As is obvious, judicial avoidance of the general question of court-agency relations in interpreting law came to a crashing end during the third period. The *Chevron* decision[220] contains what has come to be regarded as a canonical formulation of the appropriate division of responsibility between agencies and courts. A tremendous amount of ink has been spilled in assessing the pros and cons of *Chevron*, and I do not propose to enlarge the puddle here. I will confine myself to three observations about how the decision fits into the explanatory hypothesis under consideration here about the larger evolution of administrative law.

First, there are strong hints of a public choice-like understanding of the political process in the Court's opinion. In a famous passage near the end, the Court discusses a number of reasons why Congress may have failed to include a precise definition of "stationary source" in the Clean Air Act, the issue that gave rise to the controversy in the case.[221] One possibility, the Court said, was that Congress consciously wanted the EPA to supply a definition, based on a perception of its superior expertise—the classic public interest justification for delegation to an agency.[222] Another possibility was that Congress simply "did not consider the question at this level"[223]—the classic justification for delegation based on the impossibility of foreseeing all questions that will arise in the future. A third possibility, however, was

220. Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).
221. *Id.* at 865.
222. *Id.*
223. *Id.*

that "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"[224]—essentially the public choice explanation for delegation. Immediately after listing these possibilities, the opinion rather chillingly announces: "For judicial purposes, it matters not which of these things occurred."[225]

Chevron thus acknowledges the possibility of a public choice explanation for political behavior, including now not just administrative agency behavior but also that of the Congress. And its response to this possibility is to say that the judicial role must be defined in such a way as to accommodate this possibility.

Second, *Chevron* was not born an influential precedent. When the decision was announced, the Court itself did not appear to believe it had offered any major restatement of administrative law.[226] And contemporaneous commentary betrays no sense that the decision had significantly altered the legal landscape.[227] Rather, it was only when the lower courts, especially the D.C. Circuit, read *Chevron* as a canonical pronouncement,[228] and only after Justice Scalia (a former D.C. Circuit judge) ascended to the high court, that the Court itself began treating *Chevron* as the authoritative statement regarding judicial review of administrative interpretations of law. Thus, one must explain what it is about *Chevron*—as opposed to dozens of other decisions that address the same general issue—that made it so compelling for judges in the third era.

One possibility, of course, is that *Chevron* became influential because it required increased deference to agencies in disputes over statutory interpretation, and judges were sympathetic to such a transfer of decisionmaking authority to agencies.[229] The problem with this expla-

224. *Id.*

225. *Id.*

226. *See* Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 976 (1992).

227. *See, e.g.*, Colin S. Diver, *Statutory Interpretation in the Administrative Strate*, 133 U. PA. L. REV. 549 (1985) (treating *Chevron* as simply one more precedent in a long line of decisions).

228. *See* Peter H. Schuck & E. Donald Elliott, *To the* Chevron *Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 1041-42.

229. *Chevron*'s formula for allocating responsibility between courts and agencies appears, at least on its face, to represent a tilt away from courts to agencies. Under pre-*Chevron* law, some affirmative justification was required for deferring to agency interpretations of law, such as an express delegation of rulemaking authority to agencies or the existence of a longstanding and consistent agency understanding. The default rule was independent judicial judgment. Under the two-step *Chevron* analysis, in contrast, courts must affirmatively justify a decision to substitute their judgment for agencies, in the form of finding a specific answer to the interpretational question in conventional statutory interpretation materials. The default rule is now deference. *See* Merrill, *supra* note 226, at 977.

nation for *Chevron*'s popularity, however, is that there is very little evidence that *Chevron* has in fact resulted in greater deference to agencies. Certainly at the level of the Supreme Court, the evidence is at best inconclusive.[230] Evidence regarding the D. C. Circuit is similarly mixed. An early study found increased deference to agencies under *Chevron*;[231] subsequent studies however have found lower rates of deference.[232]

A more plausible basis for the popularity of the *Chevron* formula lies in its depiction of the courts as performing a narrow, nonpolitical, lawfinding role in reviewing agency interpretations of statutes. In explaining the rationale for the deference doctrine, *Chevron* invokes a sharp distinction between law and politics. Political choices, the opinion suggests, should be made by politically accountable bodies. Ideally, this means Congress; but if not Congress, then such choices be made, if possible, by administrative agencies rather than courts. The Court explained: "While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intently left to be resolved by the agency charged with the administration of the statute in light of everyday realities."[233] In contrast, the Court continued, federal judges "have no constituency;" it is thus their duty when political issues have been left unresolved by Congress "to respect legitimate policy choices made by those who do."[234]

The narrow, lawfinding role of courts is also implicit in the Court's statement of the two-step formula. The inquiry at step one "is the question whether Congress has directly spoken to the precise question at issue."[235] This suggests a careful scouring of text and legislative history in an effort to discover the "smoking gun" directly on point. If the telltale evidence is not found, the court shifts to step two, and upholds the agency interpretation if it is a reasonable one.

230. *See* Thomas W. Merrill, *Textualism and the Future of the* Chevron *Doctrine*, 72 WASH. U. L.Q. 351, 358-63 (1994).

231. *See* Schuck & Elliott, *supra* note 228.

232. *See* John F. Belcaster, *The D.C. Circuit's Use of the* Chevron *Test: Constructing a Positive Theory of Judicial Obedience and Disobedience*, 44 ADMIN. L. REV. 745 (1992).

233. Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 865-66 (1984).

234. *Id.* at 866.

235. *Id.* at 842.

Such a strong distinction between law and politics has deep roots in our legal culture, of course. But the appeal of such a distinction may be enhanced once the public choice vision of the administrative state gains wide currency. One response to such an understanding on the part of courts is to seek to avoid any appearance that they, like the political branches, have become the targets of the machinations of interest groups. *Chevron* offers an escape from this prospect, by allowing courts to disclaim any responsibility for regulatory policy. The role of the courts is simply to follow the trail of instructions laid down by Congress. If Congress has left specific instructions about an issue, then the courts as faithful agents must enforce such instructions. If no specific instructions can be found, then the courts presume that Congress intended the agency to fill in gaps and resolve ambiguities, and the courts will accept whatever answer the agency reaches so long as it is minimally rational. In either case, the role of the courts is simply to "find" the proper instructions; the court plays no active or creative role in the process of forming regulatory policy, viewed now as interest group politics.

Third, if one assumes that statutes and regulations are the product of interest group pressure and accidents of timing, then it is foolish to expect to find any coherence or "comprehensive rationality" in the law.[236] And in fact *Chevron*'s division of authority has a highly random aspect to it that seems to mirror this underlying chaos. Judicial power trumps agency power if and only if the court can discern a clear answer to the precise question of interpretation using traditional interpretational tools. This in turn will depend largely on the fortuity of whether the drafter of the statute happened to think of the issue and to insert some language on point, or whether dictionaries show that the words chosen by the drafter have single or multiple meanings. As a result, judicial intervention is like Russian roulette: one never knows in advance when the chamber will fire, but when it does the result will often be fatal to agency policy. But so what? One more source of randomness is unlikely to change in any fundamental way a system that, from a public choice perspective, is essentially random to begin with.

Contrast this approach to the Legal Process philosophy of the first era, when courts saw their task as ascertaining the "purpose" of the statute and whether the agency has remained faithful to it, and

236. *See* Colin S. Diver, *Policymaking Paradigms in Administrative Law*, 95 HARV. L. REV. 393, 396 (1981).

preserving what Jaffe called "the integrity and coherence of the legal system."[237] Or contrast it with the attitude of second era, when courts often saw their task as providing a corrective to agency biases or agency blindness to the public purposes underlying the law. In both cases, the courts saw themselves as playing a purposive, constructive role in managing the administrative state. Under *Chevron*, the courts see the process of review as more like a game of "gotcha." If the court can find the right scrap of text or dictionary definitions or the right structural inference to be drawn from the text, then the agency loses; otherwise it wins. Either way, the consequences for policy are ignored.[238]

2. Review of Rulemaking

A second issue implicating the scope of review concerns the role of the courts in reviewing informal rules by agencies, particularly those that require the agency to resolve contested issues of fact. The APA, reflecting the conventional views of the day, viewed agencies as bodies that would behave either like courts or like legislatures. Consequently, when agencies adopted legislative rules, they were to follow procedures modeled on legislative committee hearings.[239]

This legislative-type procedural format created little controversy during the first twenty years under the APA, when most agencies preferred to make policy by adjudication.[240] But during the 1960s, as agencies began to expand their range of activities to include such things as industry-wide rate regulation,[241] rulemaking became increasingly popular. With the coming of the environmental revolution in the

237. JAFFE, *supra* note 79, at 589. *See* Peter L. Strauss, *On Resegregating the Worlds of Statute and Common Law*, 1994 SUP. CT. REV. 429, 436-42.

238. As one recent commentary puts it, the attitude is: "it's not my job to care [about policy]." Karin P. Sheldon, *"It's Not My Job to Care": Understanding Justice Scalia's Method of Statutory Interpretation Through* Sweet Home *and* Chevron, 24 B.C. ENVTL. AFF. L. REV. 487 (1997).

239. First, they were to provide the Federal Register notice of the time, place and nature of the proceedings, a reference to the legal authority for the proposed rule, and either the terms of the proposed rule or a description of the subjects involved. 5 U.S.C. § 553(b). Next, they were to give "interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments with or without opportunity for oral presentation." 5 U.S.C. § 553(c). Finally, after "consideration of the relevant matter presented, the agency [was to] incorporate in the rules adopted a concise general statement of their basis and purpose" and publish the final rules in the Federal Register. 5 U.S.C. § 552(a)(1)(D), 553(c).

240. *See* 1 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE 360-61 (1st ed. 1958) [hereinafter DAVIS, 1 ADMINISTRATIVE LAW TREATISE].

241. *See* The Permian Basin Area Rate Cases, 390 U.S. 747, 768-90 (1968) (FPC could regulate maximum field prices of natural gas by area-wide rulemaking rather than adjudication); FPC v. Texaco, Inc., 377 U.S. 33, 44 (1964) (rate issues resolved in rulemaking may not be relitigated in subsequent enforcement actions); *cf.* United States v. Florida E. Coast Ry. Co., 410 U.S. 224,

1970s, agency rulemaking began to take on an even more prominent role, often by the express direction of Congress.

As rulemaking moved to stage center in administrative law, the courts in the late 1960s and early 1970s became concerned about whether agencies would deploy this new tool so as to give adequate consideration to the interests of the beneficiaries of regulation. Starting in the mid-1960s, the D.C. Circuit began to suggest that additional procedures beyond those specified in the APA—such as cross examination or an oral hearing—might be required in order to insure "fundamental fairness" in informal rulemaking.[242] As these pronouncements moved from dicta, to directives limited to specific factual situations, to more general pronouncements, the understanding emerged that the informal rulemaking procedures of the APA might be regarded as only a "floor." Depending on the nature of the issues involved, the stakes, and the probable value of greater formality, agencies would be expected to employ procedures that moved closer to the adjudicatory model rather than the legislative model.

The emergence of this "procedural review" was controversial, and an intramural dispute soon erupted among the judges of the D.C. Circuit over how courts should best implement a strategy of heightened scrutiny of rulemaking in order to insure the openness and integrity of the process. At one extreme stood Judge Bazelon, who argued that, at least in cases involving scientific uncertainty, courts should forego "substantive" review altogether and simply review the decision to see if procedures of sufficient formality were followed to illuminate the underlying controversies.[243] At the other extreme (on this debate only) stood Judge Wright, who argued that courts should stick to the procedural requirements and substantive review standards of the APA, but should apply them in an aggressive way so as to "open the agencies to outside information, challenge, and scrutiny."[244] In the middle was Judge Leventhal, who thought that additional procedures might be useful in some cases but who also endorsed a standard of

236 (1973) (formal rulemaking not required for setting rates unless the statute specifies that the proceeding is to be held "on the record after opportunity for an agency hearing").

242. For an analysis of the progression of the case law in the D.C. Circuit, see Antonin Scalia, Vermont Yankee: *The APA, the D.C. Circuit, and the Supreme Court,* 1978 SUP. CT. REV. 345.

243. Ethyl Corp. v. EPA, 541 F.2d 1 (D.C. Cir.) (en banc), *cert. denied* 426 U.S. 941 (1976) (Bazelon, C.J., concurring); David L. Bazelon, *Coping with Technology Through the Legal Process*, 62 CORNELL L. REV. 817, 822-24 (1977).

244. Wright, *The Courts and the Rulemaking Process, supra* note 94, at 397.

review that would ask whether the agency had taken a "hard look" at the contending submissions about disputed issues of fact and policy.[245]

One way to view the Supreme Court's decision in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*[246] is that it resolved this intramural dispute over *what kind* of common law response to the emergence of widespread rulemaking was appropriate. In the decision under review, Judge Bazelon had applied his idiosyncratic ideas about procedural review to a Nuclear Regulatory Commission ("NRC") rulemaking proceeding that dealt with the environmental hazards of long term nuclear waste disposal.[247] He found that the procedures followed by the NRC—the APA minimum plus oral presentation—were inadequate. In a sharply worded opinion by Justice Rehnquist, the Supreme Court unanimously reversed. Rehnquist seemed at times to characterize the APA as compromise legislation that had fixed the procedural requirements for informal rulemaking once and for all.[248] These passages suggest that it was illegitimate for reviewing courts to go beyond the bare-bones procedural requirements laid down in 1946. On the other hand, the opinion also appeared to endorse the approach of Judge Tamm's concurring opinion in the court below,[249] which was a species of hard look review. And Rehnquist cited with approval a law review article by Judge Wright that advocated vigorous judicial review of rulemaking.[250]

After some hesitation, the D.C. Circuit and other lower courts read these mixed signals as precluding "procedural review," but not foreclosing reviewing courts from insisting that agencies take a "hard look" at the factual underpinnings of the rule and alternatives to the proposed action suggested by the parties. The commitment to transforming agencies through more intensive judicial review was simply too strong in 1978 to allow the Supreme Court in one sharply worded opinion to turn the tide. On the whole, therefore, *Vermont Yankee* should not be regarded as marking the end of the capture era; it was at most an early harbinger of the end.

245. Ethyl Corp., 541 F.2d at 69 (concurring opinion); *see* Harold Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. PA. L. REV. 509, 511-12 (1974); Greater Boston Television Corp. v. FCC, 444 F.2d 841, 851 (D.C. Cir. 1970), *cert. denied*, 433 U.S. 929 (1971) (Leventhal, J.).

246. 435 U.S. 519 (1978).

247. Natural Resources Defense Council, Inc. v. Nuclear Regulatory Comm'n, 547 F.2d 633 (D.C. Cir. 1976).

248. *E.g.*, Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 523, 545-46 (1978).

249. *Id.* at 549.

250. *Id.* at 547 n.20.

This assessment is confirmed by the fact that the Supreme Court itself eventually endorsed the new hard look idea, although it came rather late in the day. Shortly after the Reagan Administration took office, newly appointed officers of the National Highway Traffic Administrative rescinded a mandatory air bag rule promulgated by the outgoing Carter Administration. In *Motor Vehicle Manufacturers' Association v. State Farm Mutual Automobile Insurance Company*,[251] the Supreme Court intimated that the decision fwas a product of industry capture:

> For nearly a decade, the automobile industry waged the regulatory equivalent of war against the airbag and lost—the inflatable restraint was proven sufficiently effective. Now the automobile industry has decided to employ a seatbelt system which will not meet the safety objectives of [the prior standard]. This hardly constitutes cause to revoke the Standard itself. Indeed, the Act was necessary because the industry was not sufficiently responsive to safety concerns.[252]

Following the lead of the D.C. Circuit, the Court held that the cure for this type of pathology was to impose a very strict reason-giving requirement on the agency. The agency would have to explain in detail why the mandatory rule was rescinded, and why other possibilities like automatic seatbelts were not considered. *Vermont Yankee* was not inconsistent with such a requirement, the Court explained, because the Court was not dictating "specific procedures;" it was simply calling for more and better explanations, pursuit to the "arbitrary and capricious" standard of review. Judge Wright's strategy for dealing with capture through review of rulemaking was thus fully and officially vindicated.[253]

Since 1983, however, the idea of hard look review has gradually withered on the vine. The Supreme Court has invoked *State Farm* to reverse an agency action only once, in 1986.[254] Since then, the decision has been cited only sporadically by the Court, usually for the proposition that agencies are allowed to change their minds as long as they give reasons for doing so.[255] In effect, the *State Farm* approach to review of agency action has been largely superseded by the *Chevron*

251. 463 U.S. 29 (1983).

252. *Id.* at 49 (citation omitted).

253. *See also* Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 654-55 (1990) (explaining why *Vermont Yankee* does not foreclose a heightened reason-giving requirement under the arbitrary and capricious standard).

254. Bowen v. American Hospital Ass'n, 476 U.S. 610, 626-29 (1986).

255. *See, e.g.*, Smiley v. Citibank, 116 S. Ct. 1730, 1734 (1996); Rust v. Sullivan, 500 U.S. 173, 186-87 (1991).

doctrine. The Supreme Court's administrative law docket consists largely of *Chevron* decisions, and they turn on statutory interpretation, not an examination of agency procedures or reason-giving.[256] The pattern is less pronounced in the lower courts, but the same general trend is unmistakable.[257]

There is no logical reason why this should be so: the Court could easily fold the hard look idea of *State Farm* into the second step of the *Chevron* analysis, giving content to what it means to adopt a reasonable interpretation of a statute.[258] The reason *State Farm* has atrophied while *Chevron* has flourished must be sought not in logic but in changes in the underlying conception of the administrative state. Hard look review presupposes that one agency of government—the agency—can be redeemed by having another agency of government—the courts—engage in more intrusive review of its decisions. Once the faith in a radical asymmetry in the decisionmaking qualities of these institutions starts to fade, so does enthusiasm for the hard look doctrine. In fact, as the public choice understanding spreads, and courts begin to perceive interest groups all around them, they begin to harbor serious doubts about whether more intrusive judicial review designed to assure adequate representation of all views in the administrative process is enough to rescue big government from the charges of interest group dominance. In this environment, a conception of the legal function that allows courts to retreat into an apolitical, lawfinding function (i.e., the *Chevron* doctrine) has much greater relative appeal than one that seems to inject them in the middle of the policymaking process (*State Farm*'s hard look review).

3. Due Process Hearing Rights

A third line of cases bearing on the scope of review concerns whether the Due Process Clause mandates an adjudicatory hearing in administrative contexts where either no hearings or more informal hearings have been prescribed by statute. During the first period, the answer to this question was framed by the rights-privilege distinction.

256. A LEXIS search reveals that *Chevron* has been cited by the Supreme Court in 107 subsequent cases, *State Farm* in 21.

257. A LEXIS search indicates that the D.C. Circuit has cited *Chevron* in 687 cases, and has cited *State Farm* in 284.

258. *See* Gary Lawson, *Outcome, Procedure and Process: Agency Duties of Explanation for Legal conclusions*, 48 RUTGERS L. REV. 313 (1996); Levin, *supra* note 202; Mark Seidenfeld, *A Syncopated* Chevron: *Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV. 83 (1994).

In *Bailey v. Richardson*,[259] for example, the D.C. Circuit held that a federal public employee dismissed because of concerns about her loyalty was not entitled to a pre-termination hearing because public employment was a privilege, not a right. The case law of the era by no means uniformly rejected due process claims, and courts often found some way to require a hearing even where the entitlement would have traditionally been regarded as a "privilege."[260] Nevertheless, the general rights-privilege framework operated to deny due process claims in many cases.

Then in 1970 the Court decided *Goldberg v. Kelly*,[261] and the due process revolution was launched. As the Court soon announced, *Goldberg* "fully and finally rejected the wooden distinction between 'rights' and 'privileges' that once seemed to govern the applicability of procedural due process rights."[262] Freed of its doctrinal shackles, the Court proceeded to recognize a right to a hearing in a variety of contexts previously left to administrative discretion. In the span of only a few years, the Court legislated minimal hearing procedures for terminated welfare beneficiaries, revocations of parole or probation, loss of public employment, suspension of a driver's license, suspension and discipline of students, and prison discipline.[263] As Judge J. Henry Friendly observed at the time, "we have witnessed a greater expansion of procedural due process in the last five years than in the entire period since ratification of the Constitution."[264]

In *Mathews v. Eldridge*,[265] the Court endorsed the use of a judicial balancing test for determining what procedures are required in any given context by due process. This test is extremely open-ended, and allows the courts freely to substitute their judgment for that of the legislature or the agency as to whether pre- or post-termination hearings are required, and at what level of procedural formality. Indeed, the Court specifically rejected the argument that the procedures specified by the legislature serve to define the nature of the property or

259. 182 F.2d 46, 58 (D.C. Cir. 1950), *aff'd by an equally divided court*, 341 U.S. 918 (1951).

260. *See, e.g.*, Schware v. Board of Bar Exam'rs, 353 U.S. 232 (1957); Slochower v. Board of Higher Educ., 350 U.S. 551 (1956); Wieman v. Updegraff, 344 U.S. 183 (1952).

261. 397 U.S. 254 (1970).

262. Board of Regents v. Roth, 408 U.S. 564, 571 (1972).

263. *See* DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES, *supra* note 167, at 242-60 (summarizing thirteen Supreme Court decisions since 1970 covering these subjects).

264. Henry J. Friendly, *"Some Kind of Hearing,"* 123 U. PA. L. REV. 1267, 1273 (1975).

265. 424 U.S. 319 (1976).

liberty interest at stake, and hence must be considered in the due process analysis.[266]

The third period has not witnessed any major repudiation of the due process revolution launched in *Goldberg*. As in other areas of administrative law, however, further expansion of the range of interests protected by due process has been almost completely halted. In general, the Court has become far more protective of common law "liberty" or "property" interests than it has been of "new liberty" or "new property" interests.[267] In those cases where due process protections for "new" liberty or property are recognized, it is usually because the interests are indistinguishable from those given due process protection in the 1970s.[268] And in one frequently litigated area—prison discipline—there has been a significant retrenchment, with the Court disavowing the analysis of earlier cases and holding that prison regulations will be regarded as creating a protected liberty interest only if they involve measures that impose "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life."[269]

All in all, one could say that the Court has implicitly differentiated between interests protected at common law and interests that used to be called "privileges," and that it has afforded a much greater measure of de facto protection to the former than the latter. The old rights-privileges doctrine has quietly returned, although it has not been acknowledged as such.

Where the Court has found a protected interest, it continues to use the *Mathews v. Eldridge* balancing test.[270] But there are signs of

266. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985); Arnett v. Kennedy, 416 U.S. 134 (1974).

267. In cases involving common law liberty or property interests, the Court has frequently invalidated statutory or regulatory procedures on due process grounds. *See* United States v. James Daniel Good Real Property, 510 U.S. 43 (1993) (forfeiture of real estate); Connecticut v. Doehr, 501 U.S. 1 (1991) (prejudgment attachment of real estate); Burns v. United States, 501 U.S. 129 (1991) (longer prison sentence than indicated by Sentencing Guidelines); Zinermon v. Burch, 494 U.S. 113 (1990) (commitment of mentally ill without prior determination of competence to agree to commitment); Brock v. Roadway Express, Inc., 481 U.S. 252 (1987) (employer's right to terminate employee for cause). On the other hand, the Court has tended to uphold statutory or regulatory procedures in which new liberty or new property interests were involved. *See* Sandin v. Conner, 115 S. Ct. 2293 (1995) (prison discipline); Kentucky Dep't of Corrections v. Thompson, 490 U.S. 454 (1989) (prison visitation privileges); Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305 (1985) (veterans' benefits).

268. *See, e.g.*, Young v. Harper, 117 S. Ct. 1148 (1997) ("pre-parole" program indistinguishable from parole program deemed to trigger due process in *Morrissey v. Brewer*, 408 U.S. 471 (1972), also protected by due process).

269. Sandin v. Conner, 515 U.S. 472, 484 (1995).

270. *See, e.g.*, Gilbert v. Homar, 117 S. Ct. 1807 (1997); James Daniel Good Real Property, 510 U.S. 43; Heller v. Doe, 509 U.S. 312 (1993); Doehr, 501 U.S. 1; Brock, 481 U.S. 252.

unease with the open-ended judicial discretion conferred by the test. For example, the Court has carved out significant areas of due process inquiry where the *Mathews* test does not apply, including criminal law and military law.[271] Where a due process violation is found, often it is on the basis of other precedent that allows the Court to pretermit any balancing of interests under *Mathews*.[272] And when the *Mathews* test is applied, the result usually gives significant deference to the procedures prescribed by legislatures and agencies.[273] One gets the impression that the Court is not especially enthusiastic about the *Mathews* test, even though it is probably too well-established at this point to be overruled.

Although the *Golderg v. Kelly* revolution and its aftermath follow the same general pattern as we see in other areas of administrative law, in one sense the due process cases represent a departure from my general thesis. There is very little rhetoric in the *Goldberg* line of cases suggesting that the Court was concerned in the 1967-1983 period with agency capture. Rather, the rhetorical focus was on the individual rights perspective—the importance to the individual of the underlying administrative determination and whether the individual interest was outweighed by some countervailing governmental concern. And if there is any academic influence entitled to credit for *Goldberg* and its progeny, it would seem to be Charles Reich's articles on the "new property" that were cited by the Court in *Goldberg*.[274] Those articles are not grounded in capture theory, but rather in Reich's idiosyncratic ideas about how the administrative state has become a new type of feudalism, requiring an expanded notion of private property to protect the individual from state oppression.

At a somewhat broader level, however, there is no doubt that the *Goldberg* revolution was fueled by a perception of agency pathology. To be sure, it was a different pathology than the one emphasized in most other regulatory contexts. Borrowing the terminology of Neil Komesar, the traditional administrative law questions were dominated

271. Weiss v. United States, 510 U.S. 163, 177 (1994) (military law); Medina v. California, 505 U.S. 437, 446 (1992) (criminal law).

272. *See, e.g.*, M.L.B. v. S.L.J., 117 S. Ct. 555 (1996) (invalidating statute requiring prepayment of costs for appeal of decision terminating parental rights); Burns v. United States, 501 U.S. 129 (1991) (invalidating upward departure from Sentencing Guidelines without notice).

273. *See, e.g.*, Heller, 509 U.S. 312 (applying *Mathews* and upholding Kentucky statutory procedures for commitment of the mentally retarded); Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305 (1985) (applying *Mathews* and upholding $10 limit on counsel fees in Veterans Benefit proceedings).

274. Charles A. Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245 (1965); Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964).

by concern with "minoritarian bias"—capture of agencies by well-organized groups representing parochial interests at odds with the public purposes reflected in the statutory scheme.[275] In the due process line of cases, however, the courts were concerned with "majoritarian bias"—the possibility that agencies would ignore the interests and needs of unpopular and poorly represented groups whose well-being was a matter of no concern to the general public.[276] In both instances, however, revolutionary changes occurred in administrative law for the same general reason: agencies were seen as being afflicted with pathologies whereas courts were not. And in both instances, the bloom on the revolution quickly faded once courts came to doubt the stark dichotomized view that pictured agencies as uniquely problematic.

C. *Antitrust Immunities*

Although one step removed from the history of the APA, the subject of antitrust immunities is also highly instructive in assessing changes in the judicial attitude toward the administrative state in the last fifty years. The issue arises in three settings: the *Parker v. Brown*[277] state action immunity; various implied federal immunities;[278] and the *Noerr-Pennington* immunity.[279] Each of these immunities is a product of judicial lawmaking, and the scope of each turns to a large degree on the judicial attitude toward the relative desirability of agency regulation of economic activity as opposed to judicial liability rules. Thus, each serves as an interesting barometer of the judicial attitude about the relative competence of agencies as opposed to courts. If my historical thesis is correct, changes over time in the common law of antitrust immunities should mirror changes we see in administrative law doctrine.

In the interest of economy, I will concentrate here on the state action immunity, because it has the largest body of Supreme Court cases. But I believe similar patterns could be shown under the federal immunities and the *Noerr-Pennington* case law.

275. KOMESAR, *supra* note 43, at 56.

276. *Id.* at 57.

277. 317 U.S. 341 (1943).

278. *See* 9 EARL W. KINTNER & JOSEPH P. BAUER, FEDERAL ANTITRUST LAW 31, 77, 144 (1997) (discussing public utilities, communications, and securities industry immunities).

279. *See* United Mine Workers of Am. v. Pennington, 381 U.S. 657, 670 (1965); Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127, 135 (1961).

The state action immunity stems from the decision in *Parker v. Brown*, which dates from about the same time as the APA. *Parker* spoke in sweeping terms: the Court stated that nothing in the Sherman Act restrains state action or state officials engaged in activities directed by the state legislature; the Act was designed to control "business combinations," not state governments.[280] The Court thus upheld a California statute that in effect established a state-supervised cartel among raisin producers.

As John Wiley has written, *Parker* was a product of the Depression and of "the existing intellectual climate."[281] In that climate

> [t]he nation's faith in competition was at its nadir; its hope in the promise of economic regulation was at its zenith . . . . Regulation was viewed both as essential to a working economy and as a victory of public interest over private advantage—the very defining characteristic of a progressive era . . . . In this intellectual climate, *Parker*'s states' rights premise that federal courts should keep their preemptive hands off state legislated regulation must have seemed blindingly self-evident.[282]

Not surprisingly, relatively few antitrust preemption cases arose during the next twenty years, the general assumption being that *Parker* had settled the matter for most purposes in favor of state regulation.[283]

This assumption began to shift in the 1970s. In a series of decisions starting with *Goldfarb v. Virginia State Bar*,[284] the Court adopted a narrow reading of *Parker*, and ruled that various types of price fixing undertaken under the auspices of state institutions were subject to the Sherman Act.[285] These decisions caused the Court to recast the *Parker* doctrine in 1980: henceforth state regulations would be shielded from federal preemption only if their anticompetitive policy is "clearly articulated" and "actively supervised" by the state.[286]

As Wiley has persuasively argued, the dramatic narrowing of the *Parker* doctrine in the 1970s and early 1980s can be attributed to the rise of capture theory:

280. 317 U.S. at 350-51.

281. Wiley, *supra* note 71, at 718.

282. *Id.* at 718-19.

283. *But see* Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951) (liquor price affirmation statute not authorized by Miller-Tydings Act preempted by federal antitrust laws).

284. 421 U.S. 773 (1975).

285. *See, e.g.*, City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978); Cantor v. Detroit Edison Co., 428 U.S. 579 (1976); Bates v. State Bar of Arizona, 433 U.S. 350 (1977).

286. California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980).

> [T]he shift in doctrine toward wider application of federal antitrust policy fits well with the evolution of broader social attitudes during the same period. Regulation, formerly conceived of as a method of advancing public interest over private advantage, in many instances came to be conceived of as a method of subsidizing private interests at the expense of the public good . . . . [T]his change in intellectual climate caused the Court to perceive state regulatory policy from a different perspective than that of the *Parker* Court.[287]

And indeed, although the two criteria reflected in the Court's new doctrine are otherwise puzzling to antitrust scholars,[288] they make sense from the perspective of a simplistic version of capture theory. Vague delegations to agencies are often thought to facilitate capture; hence requiring that the anticompetitive policy be "clearly articulated" will make it less likely that the policy reflects the preferences of a narrow interest group.[289] Another common warning sign of capture is where government regulatory authority is delegated to private groups; the "active supervision" requirement can be seen as opening this type of statute up to antitrust scrutiny.

In the mid-1980s, the Court's attitude to antitrust preemption again perceptibly changed, as its decisions "mark[ed] a shift toward greater availability of the 'state action' defense."[290] In *Town of Hallie v. City of Eau Claire*,[291] for example, the Court distinguished cases in which the actor is a private party acting pursuant to state policy and cases in which the actor is a municipality. The Court held that the "active supervision" requirement does not apply to the latter class of cases, nor is it necessary to show that the State compelled the municipality to act.[292]

Although some of the Court's rhetoric in *Hallie* seemed to harken back to the public interest era,[293] more recent decisions which have continued the process of retrenchment have sounded themes consistent with the public choice conception. Most prominently, in *Columbia v. Omni Outdoor Advertising, Inc.*,[294] the Court rejected a "conspiracy exception" to the *Parker* doctrine, even if limited to cases

287. Wiley, *supra* note 71, at 723.

288. *See id.* at 729; Spitzer, *supra* note 113, at 1298.

289. *See* William H. Page, *Interest Groups, Antitrust, and State Regulation:* Parker v. Brown *in the Economic Theory of Legislation*, 1987 DUKE L.J. 618, 640-42; Spitzer, *supra* note 113, at 1308-09.

290. 10 EARL W. KINTNER & JOSEPH P. BAUER, FEDERAL ANTITRUST LAW 141 (1994).

291. 471 U.S. 34 (1985).

292. *Id.* at 38-47.

293. "We may presume, absent a showing to the contrary, that the municipality acts in the public interest. A private party, on the other hand, may be presumed to be acting primarily on how or her own behalf." *Id.* at 45 (citations omitted).

294. 499 U.S. 365 (1991).

where public officials are found by the jury to have taken "corrupt or bad faith decisions."[295] The Court explained:

> Few governmental actions are immune from the charge that they are 'not in the public interest' or in some sense 'corrupt.' The California marketing scheme at issue in *Parker* itself, for example, can readily be viewed as the result of a 'conspiracy' to put the 'private' interest of the State's raisin growers above the 'public' interest of the State's consumers. The fact is that virtually all regulation benefits some segments of society and harms others; and that it is not universally considered contrary to the public good if the net economic loss to the losers exceeds the net economic gain to the winners. *Parker* was not written in ignorance of the reality that determination of 'the public interest' in the manifold areas of government regulation entails not merely economic and mathematical analysis but value judgment, and it was not meant to shift that judgment from elected officials to judges and juries.[296]

Here, we see in starkest form the influence of the public choice conception of the administrative state. It makes no sense to tailor legal doctrines to try to mitigate the effects of interest group capture, because interest group influence is ubiquitous. The only refuge is to fashion legal doctrine in accordance with the traditional concept of separation of powers. Courts can do no more than enforce the rules as written, and thereby protect their own claim to be oracles of the law. Whether the law makes sense or conduces to justice is someone else's problem.

D. Constitutional Framework

The administrative state has always existed in tension with the framework of government established by the Constitution. The framers of that document did not contemplate a federal government of scale and scope of the one we have today. Nevertheless, it has been settled since the late 1930s that the administrative state and the Constitution can co-exist. In reviewing some of the constitutional developments of the last fifty years, it is clear that there have been no transformative changes in this basic understanding; the administrative state is here to stay. Still, it is possible to detect shifts in constitutional understanding that provide some confirmation for the historical thesis being advanced here.

295. *Id.* at 374-79.
296. *Id.* at 377.

1. The Nondelegation Doctrine

The Court has reaffirmed many times that Congress may not delegate the "legislative powers" conferred by Article I to some other entity.[297] This understanding, if taken seriously, would call into question the constitutionality of any delegation of power to promulgate legislative rules or otherwise make policy having binding effect on the public. For better or worse, however, this understanding has not been taken seriously. Instead, the Court has held that Congress may delegate broad policymaking discretion to nonlegislative bodies as long as it lays down an "intelligible principle" that guides the exercise of such discretion.[298] Only if Congress were to delegate broad rulemaking or policymaking power to an agency without any such an intelligible principle would this—in theory at least—violate the so-called "nondelegation doctrine."[299]

Given my hypothesis concerning the evolution of judicial views about the administrative state, one might predict the following pattern of implementation of the nondelegation doctrine in the last fifty years. During the first or public interest era, one would expect little or no enforcement of the doctrine. James Landis, in his paean to government by agency experts, characterized separation of powers doctrine as an anachronism;[300] in an era that largely concurred in this assessment, one would not expect to see robust enforcement of a principle that might inhibit the granting of broad discretionary powers to agencies.

With the coming of the capture period, one would expect to witness a revival of the nondelegation doctrine. If agencies are prone to capture, but the legislature is not, then one might see an improvement in the quality of public policy if critical policy decisions were made by Congress, and agencies were reined in so as to make capture harder to achieve.[301]

As we move into the third period, characterized by a loss of faith in all forms of activist government, one might predict that interest in the nondelegation doctrine would again subside. The public choice

297. Mistretta v. United States, 488 U.S. 361, 371-72 (1989); Field v. Clark, 143 U.S. 649, 692 (1892); Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 43 (1825); The Cargo of the Brig Aurora v. United States, 11 U.S. (7 Cranch) 382, 388-89 (1813).

298. J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928).

299. The Court has enforced the intelligible principle requirement only twice, in both cases in striking down New Deal era legislation. *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935).

300. LANDIS, *supra* note 35, at 1-5, 47-48.

301. *See* Lowi, *supra* note 28, at 155.

perspective yields no clear preference for legislative policymaking relative to agency policymaking; thus, there would be no obvious improvement in social welfare from enforcing a vigorous nondelegation requirement.

The pattern of decided cases more-or-less conforms to these predictions. In the period 1946-1966, the nondelegation doctrine reached its all time nadir. Although the Court continued to mouth the "intelligible principle" requirement, fair minded observers at the time had to concede that in a number of cases it would be more accurate to say that the Court upheld statutes which contained no principle at all.[302]

During the capture theory phase, interest in the nondelegation doctrine began to perk up. An early and influential decision by Judge Leventhal suggested that the separation of powers foundation for the intelligible principle requirement could be dispensed with, leaving a kind of all-purpose anti-vagueness doctrine.[303] Although this suggestion did not ultimately catch on, it did succeed in associating the nondelegation doctrine with the dominant concern of the time—the need for greater control of unfettered agency discretion.

Shortly thereafter, the Supreme Court in two cases said it would interpret regulatory statutes narrowly in order to avoid nondelegation questions, which the Court implied should be taken seriously.[304] In one of these cases and a follow-on case raising a similar issue, Justice Rehnquist, joined the second time around by Chief Justice Burger, actually voted to invalidate a provision of the Occupational Safety and Health Act on nondelegation grounds.[305] Two highly respected judges on the D.C. Circuit weighed in with law review articles urging that the nondelegation doctrine be taken more seriously.[306] Highly esteemed constitutional law scholars agreed.[307]

302. *See* DAVIS, 1 ADMINISTRATIVE LAW TREATISE, *supra* note 240, at 87-94; Louis Jaffe, *An Essay on Delegation of Legislative Power: II*, 47 COLUM. L. REV. 561, 568-78 (1947).

303. Amalgamated Meat Cutters & Butcher Workmen v. Connally, 337 F. Supp. 737 (D.D.C. 1971). *See also* Kenneth Culp Davis, *A New Approach to Delegation*, 36 U. CHI. L. REV. 713 (1969) (arguing that delegation doctrine be reformulated as a general requirement that administrative discretion be governed by legal standards); Harold Leventhal, *Principled Fairness and Regulatory Urgency*, 25 CASE W. RES. L. REV. 66, 70 (1974) ("The contemporary approach is one not of invalidating even the broadest statutory delegations of power, but of assuring that they are accompanied by adequate controls on subsequent administrative behavior").

304. Industrial Union Dept. v. American Petroleum Inst. (Benzene), 448 U.S. 607, 646 (1980); National Cable Television Ass'n. v. United States, 415 U.S. 336, 342 (1974).

305. American Textile Mfrs. Inst. v. Donovan, 452 U.S. 490, 543-48 (1981) (Rehnquist, J. dissenting, joined by Burger, C.J.); Industrial Union Dept. (Benzene), 448 U.S. at 671-88 (Rehnquist, J., concurring in the judgment).

306. Carl McGowan, *Congress, Court, and Control of Delegated Power*, 77 COLUM. L. REV. 1119, 1166, 1174 (1977); Wright, *Beyond Discretionary Justice*, *supra* note 97, *passim*.

307. JOHN HART ELY, DEMOCRACY AND DISTRUST 131-34 (1980).

To be sure, this boomlet of interest never went so far as actually to yield a decision invalidating a statute on nondelegation grounds. The key problem may have been that a majority of the Court was wary of reviving a doctrine that had no easily implemented operational principles. Still, it cannot be gainsaid that the doctrine suddenly regained a degree of legitimacy, and was taken far more seriously than was the case in the early years under the APA.

By the early 1980s, there were signs that legal academic sentiment was again beginning to shift. Bruce Ackerman and William Hassler published an influential study of the Clean Air Act Amendments of 1977 arguing that broad delegations might produce better policy than highly detailed statutes, because agencies may be less prone to capture than is Congress.[308] Jerry Mashaw also wrote a more theoretical article challenging the conventional wisdom that a revived nondelegation doctrine would result in less capture.[309]

Whether directly influenced by this change in academic sentiment or not, when a new series of nondelegation cases eventually came before the Court in the late 1980s and the early 1990s, the challenge was overwhelmingly rejected in each case.[310] Only in the first decision, *Mistretta v. United States*,[311] which upheld the delegation of authority to the Sentencing Commission to develop federal sentencing guidelines, did Justice Scalia issue a lone dissent. Thereafter, both he and Chief Justice Rehnquist—who had briefly urged greater enforcement of the doctrine in the early 1980s—acquiesced in relatively perfunctory analyses of whether Congress in each case had legislated a sufficient "intelligible principle" to overcome the nondelegation challenge.[312] Today, it is clear that no revival of the nondelegation doctrine is imminent. Although there is no direct evidence that public choice theory has influenced this shift back in the direction of the attitude of the 1950s,[313] the shift is at least consistent with the eclipse of capture theory as a dominating influence on the courts.

308. ACKERMAN & HASSLER, *supra* note 35, at 123-24.

309. Mashaw, *supra* note 128.

310. Touby v. United States, 500 U.S. 160, 165-66 (1991). Skinner v. Mid-America Pipeline Co., 490 U.S. 212, 218-19 (1989); Mistretta v. United States, 488 U.S. 361, 371-74 (1989).

311. 488 U.S. 361 (1989).

312. *Touby*, 500 U.S. at 165; *Skinner*, 490 U.S. at 218-220.

313. Legal academic sentiment, however, continues to include voices expressing strenuous support for revival of the doctrine. *See, e.g.*, DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION (1993).

2. Presidential Removal Power

A second constitutional question of abiding significance for the administrative state concerns whether, or to what extent, Congress can create administrative entities that operate independently of presidential control and oversight. When the APA was adopted, the issue was framed by two landmark decisions concerning the President's power to dismiss subordinate employees at will. *Myers v. United States*[314] held that a statute purporting to require the President to seek the advice and consent of the Senate before dismissing a local postmaster was unconstitutional, given that the "executive power" and the duty to "take care" that the laws be faithfully executed were vested exclusively in the President.[315] *Humphrey's Executor v. United States*,[316] in contrast, upheld a statute giving Federal Trade Commissioners fixed terms in office and requiring a presidential finding of cause to support a dismissal before the end of a term. *Myers* was distinguished on the ground that the FTC exercised "quasi-legislative" and "quasi-judicial" powers, unlike the purely "executive" power exercised by the postmaster in *Myers*.[317] Together, *Humphrey's Executor* and *Myers* suggested that independent regulatory agencies are constitutional, at least insofar as they do not exercise purely executive functions.

What might one expect of the fate of this understanding, given the three different understandings of the administrative state I have outlined? During the first era, obviously one would expect to see further evisceration of *Myers* and an expansion or reaffirmation of the notion that the Constitution does not stand in the way of the creation of a fourth branch of government. This follows directly from the postulate that insulation of agencies from political oversight and interference is necessary in order to promote the public interest.

The implications of capture theory are much less clear. Capture theory was mistrustful of agency independence, but sought a solution primarily through judicially imposed procedural reforms. However, at least some commentators influenced by capture theory also advocated enhanced presidential oversight as a potential solution to the prob-

314. 272 U.S. 52 (1926).
315. *Id.* at 163-64.
316. 295 U.S. 602 (1935).
317. *Id.* at 626-32.

lem.[318] To the extent this viewpoint was assimilated by courts, it might result in a tilt back in the direction of *Myers*.

Public choice theory would appear to harbor considerable sympathy for presidential control of independent agencies. One theme of public choice-influenced scholarship is that the unitary executive is more likely to resist interest group pressures than is a multi-member Congress, because the President tends to be held accountable for the overall performance of the economy.[319] For example, public choice-influenced scholars have tended to favor vigorous OMB review of regulatory initiatives of independent agencies,[320] and integrating the independent agencies more thoroughly into the Executive Branch.[321]

When we examine the leading cases, we find a degree of support for these predictions. The one prominent decision of the first era, *Wiener v. United States*,[322] takes the process of eviscerating *Myers* a step beyond *Humprhey's Executor*. The Court held that a commissioner of an Article I war claims tribunal could not be removed by President Eisenhower without a showing of cause.[323] The Court reached this conclusion even though the statute creating the commission (unlike the Federal Trade Commission Act in *Humphrey's Executor*) was silent on the question of removal.[324] In effect, the Court created a presumption that an agency engaged in adjudicatory as opposed to purely executive functions should be independent of political oversight. Independence was presumed to be a good thing.

The capture theory era produced no major decisions concerning the presidential power of removal. The most important precedent for the issue of presidential control was *Buckley v. Valeo*,[325] which invalidated a provision of the Federal Election Act providing that the appointment of members of the Federal Election Commission was to be divided among the President, the President pro tem of the Senate, and the Speaker of the House. The Court held that the commissioners were "Officers" of the United States, and hence had to be appointed

318. *See* Lloyd N. Cutler & David R. Johnson, *Regulation and the Political Process*, 84 YALE L.J. 1395, 1414-17 (1975).

319. *See* Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 99-102 (1995). The Court's emphasis in *Chevron* on the greater political accountability of agencies because they are subject to Presidential control reinforced these arguments.

320. *See* Christopher C. DeMuth & Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075 (1986).

321. *See* Geoffrey P. Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41.

322. 357 U.S. 349 (1958).

323. *Id.* at 356.

324. *Id.* at 352.

325. 424 U.S. 1 (1976).

by the President with the advice and consent of the Senate.[326] It is difficult to know what significance to read into this decision; the violation of the Appointments Clause seems quite plain and possibly would have been identified by virtually any court.[327] Note, however, that the provision dividing the appointment authority among three powerful political leaders could be viewed as a kind of recipe for capture of the FEC by political insiders.[328] It is thus perhaps not too far-fetched to see the invalidation of the appointments provision as reflecting the general concerns of the capture theory era.

In contrast to the general dormancy of separation of powers concerns during the first two eras, the public choice era has been characterized by a sharp revival of judicial concern with separation of powers ideas. The period opened with the landmark decision in *INS v. Chadha*,[329] invalidating the legislative veto of administrative action. *Chadha* seemed to signal a new attitude of rectitude on the part of the Court about preserving the original constitutional structure. As Justice White complained in his dissent, the majority opinion seemed intent on interpreting the Constitution as if the administrative state did not exist.[330] If the Court was going to insist on preserving the original constitutional structure, then it would seem that the idea of a "fourth branch" of government consisting of independent agencies might be vulnerable to constitutional challenge.

The question came to the fore in *Bowsher v. Synar*.[331] At issue were provisions of the Gramm-Rudman Act which authorized the Comptroller General, generally regarded as a legislative officer, to certify the need for certain spending reductions, which the President was then obligated to implement.[332] The district court held that the statute violated the *Myers* principle—it required the Comptroller General to perform a purely executive act but the Comptroller General was not subject to dismissal by the President.[333] The Supreme Court, however, invalidated the statute on the different ground that it represented an impermissible aggrandizement of congressional

326. *Id.* at 140-41.

327. Except for the D.C. Circuit, which had rejected the Appointments Clause challenge in the decision below. *See* Buckley v. Valeo, 519 F.2d 821, 888-96 (D.C. Cir. 1975) (en banc).

328. This factor did not escape mention by the Court. 424 U.S. at 134.

329. 462 U.S. 919 (1983).

330. *Id.* at 984 (White, J., dissenting).

331. 478 U.S. 714 (1986).

332. *See id.* at 717-19.

333. Synar v. United States, 626 F. Supp. 1374, 1403 (D.D.C. 1986).

power.[334] Thus, the Court avoided any ruling that might have called into question the constitutionality of the independent agencies.

The question of the continuing validity of *Myers* could not be avoided in *Morrison v. Olson*,[335] however. The circumstances could hardly have been less auspicious for a broad ruling supporting executive power. At issue was the constitutionality of the independent counsel provisions of the Ethics in Government Act. Invalidation would have meant that the President and top executive branch officials could be investigated for wrongdoing only by officials subject to dismissal at will by the President. Not surprisingly, the Court drew back from endorsing any such result. Moreover, the Court disavowed the understanding, which had been widely accepted since the decision in *Humphrey's Executor*, that the President's removal power turns on whether the agent is performing purely executive as opposed to "quasi-legislative" or "quasi-judicial" functions.[336] The "real question," the Court said, "is whether the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty, and the functions of the officials in question must be analyzed in that light."[337]

The Court thus discarded *Myers*' categorical rule that all executive officers must be subject to dismissal at the will of the President. The decision in *Morrison* therefore effectively put an end to the effort to overrule *Humphrey's Executor*, and bring the independent agencies within direct presidential control.

It would be a mistake to read too much into the Court's decision in *Morrison*, however, and in particular to conclude that public choice ideas have had no impact on decisions regarding constitutional structure. When we step back from the two issues that have the most direct bearing on the constitutional status of administrative agencies—the nondelegation doctrine and the presidential removal cases—we can see in the broader sweep of recent constitutional rulings much greater support for the proposition that the Court is disenchanted with the modern administrative state.

3. Recent Trends in Constitutional Law

One indication of this is the line of decisions dealing with attempts by Congress to influence policy without adhering to the pre-

334. *See Bowsher*, 478 U.S. at 726-27, *see id.* at 760-61 (White, J., dissenting).
335. 487 U.S. 654 (1988).
336. *Id.* at 689-91.
337. *Id.* at 691.

sentment and bicameralism requirements of Article I, Section 7. The Court has consistently struck down attempts by Congress to "aggrandize" its powers in this manner.[338] These decisions betray a deep suspicion of the legislative branch—and arguably of activist government more generally—and thus betray a very different attitude than that found in either the public interest or capture theory periods.

Another indication is the dramatic revival of federalism as a constitutional value. The Court has struck down legislation on the ground that it exceeds Congress' power under the Commerce Clause;[339] it has recognized a new non-text-based limitation on the power of Congress to commandeer state legislatures and state executive officials;[340] it has refused to permit Congress to legislate under the authority of Section Five of the Fourteenth Amendment when this would intrude more deeply into local authority than the Court itself is prepared to go;[341] it has held that Congress has no power under Article I to abrogate state sovereign immunity from suit in federal court;[342] and it has recognized a variety of clear statement rules and other constructional principles designed to minimize federal intrusion into state affairs.[343] Although not directly concerned with administrative agencies, these decisions cumulatively reflect an intense suspicion of broad federal governmental power. As such, they are consistent with a more general anti-governmental attitude, such as one would expect to find in a public choice-influenced era.

A third indication is the enhanced status and protection given to the Takings Clause of the Fifth Amendment.[344] The Takings Clause is especially significant because it acts both as a brake on the expansion of governmental power, and as a symbolic reaffirmation of the importance and value of private property rights. The Court's new takings jurisprudence is thus also consistent with what one would expect to see in an era characterized by general suspicion of government and preference for the market over government as an instrument of social organization.

338. *See* Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252 (1991); *Bowsher*, 478 U.S. 714; *Chadha*, 462 U.S. 919.

339. *See* United States v. Lopez, 514 U.S. 549 (1995).

340. *See* Printz v. United States, 117 S. Ct. 2365 (1997); New York v. United States, 505 U.S. 144 (1992).

341. *See* City of Boerne v. Flores, 117 S. Ct. 2157 (1997).

342. *See* Seminole Tribe of Fla. v. Florida, 116 S. Ct. 1114 (1996).

343. *See, e.g.*, Gregory v. Ashcraft, 501 U.S. 452 (1991).

344. *See, e.g.*, Dolan v. City of Tigard, 512 U.S. 374 (1994); Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992); Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987); First Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987).

E. Summary

The foregoing *tour d'horizon* of administrative law doctrine is necessarily superficial, and omits many important doctrines and details. But enough has been said, I think, at least to sustain the proposition that broad developments in administrative law in the last fifty years are consistent with the three-stage development in judicial ideology I have hypothesized. Admittedly, "consistent with" does not prove caused by, and it is possible that some other explanation is available that is more parsimonious or provides a better fit with the data. It is also possible that my description of the relevant beliefs is either too narrow or too broad. I will happily revise my views when a better theory comes along.

The survey of judicial doctrine also suggests the need for a few clarifications or refinements in the original hypothesis. The posited causal connection between capture theory and the jurisprudence of 1967-1983 seems on the whole better demonstrated than the connection between public choice theory and the jurisprudence of 1983 to the present. My own view is that this is because the anti-governmental attitude associated with the public choice perspective yields few clear conclusions about what judges should do in administrative law cases. But it could also be that the public choice perspective is less securely or universally embraced by the judiciary than capture theory was in the middle period, resulting in a greater degree of variation in judicial behavior.

The survey also suggests that in terms of doctrinal development, the break between public interest theory and capture theory circa 1967 is sharper than that between capture theory and public choice circa 1983. The fact that *Vermont Yankee* (repudiating a capture theory innovation) was decided in 1978 and *State Farm* (endorsing a capture theory innovation) was decided in 1983 highlights the point that, at the very least, the doctrinal response was in flux over a period of years. This too may suggest a greater degree of underlying ambivalence in judicial attitude—at least for a significant stretch of time from the mid-1970s to the mid-1980s—than my original hypothesis presupposes.

IV. IMPLICATIONS/PROGNOSTICATIONS

I have argued in this paper that ideas matter, and in particular that ideas about the nature of the administrative state matter to judges as they tinker with the common law of the administrative process.

The general insight is not new, of course, nor is its application to administrative law. James Q. Wilson, for example, came to a similar conclusion after reviewing the state of administrative law at the threshold of the Reagan era: "[W]e must be struck at every turn by the importance of ideas. Regulation itself is such an idea; deregulation is another. . . . To the extent [that] an agency can choose, its choices will be importantly shaped by what its executives learned in college a decade or two earlier."[345]

Nevertheless, although others have previously explored the relationship between political ideas and administrative practice, with the passage of time some things become perceptible that were only dimly seen in the past. Thus, I believe it is worth revisiting the historical record in an effort to discern lines of influence. I do not pretend to have offered the last word on the subject, and invite others to develop alternative characterizations or hypotheses that explain more data or provide a better fit with the data that I have presented.

If the argument advanced here about the importance of ideas like capture theory and public choice theory is correct, if only approximately, then it has a number of implications for the future of administrative law and for scholars and teachers of administrative law. One thing to note is that although I have focused on the influence of political ideas on judicial doctrine, this is not the only, or perhaps even the most important, influence that political ideology may have on administrative law. Wilson, with the example of Alfred Kahn at the Civil Aeronautics Board before him,[346] thought that changing political ideas would have the greatest impact on agencies themselves as they formulate policy within the discretion left them by Congress.[347] In this, he may be right. Certainly today there are other examples of agencies initiating far-reaching changes—such as the Federal Energy Regulatory Commission's efforts to bring competition to the natural gas and electric power industries—which are obviously shaped by ideas and are likely to have far-reaching impacts on society well beyond anything that will come about because of the *Chevron* doctrine.

345. James Q. Wilson, The Politics of Regulation, *in* THE POLITICS OF REGULATION 393 (James Q. Wilson ed., 1980). Wilson's comments echo those of Lord Keynes, who also warned about "[m]admen in authority, who hear voices in the air, . . . distilling their frenzy from some academic scribbler of a few years back." JOHN MAYNARD KEYNES, THE GENERAL THEORY OF EMPLOYMENT INTEREST AND MONEY 383 (1936).

346. *See* Bradley Behrman, *Civil Aeronautics Board, in* THE POLITICS OF REGULATION, *supra* note 345, at 75 (noting "[f]ew regulatory agencies—if any—have ever altered their policies as rapidly or radically as did the Civil Aeronautics Board (CAB) between 1974 and 1978.").

347. Wilson, *supra* note 345, at 393; *see also* Aman, *supra* note 31, at 1105 (also noting that agencies frequently took the lead in promoting deregulation during the 1980s).

In addition to their impact on agencies, ideas about regulation obviously affect decisionmakers in Congress and the White House as well. In this regard, Keith Werhan has recently written an interesting article arguing that we are witnessing a general movement toward the "delegalization" of administrative law.[348] He includes within this characterization the Clinton Administration's continuation of centralized review of regulations by the White House's Office of Management and Budget ("OMB") under a cost-benefit standard, the endorsement by Vice President Al Gore's National Performance Review ("NPR") of market mechanisms over command and control regulation, the NPR's advocacy of negotiated rulemaking over traditional notice-and-comment procedures, and its support for alternative dispute resolution in place of traditional adversary adjudication by agencies.[349] He notes that these proposals share in common a preference for decentralized, voluntary, contractual solutions to public problems, as opposed to centralized, legislated, compulsory solutions.[350]

Werhan does not relate this program of reform to public choice ideas, but it is not too difficult to see a connection. If all political institutions fail or are prone to failure, then perhaps the solution is to get government out of the way altogether, or at least to adopt mechanisms that produce decisions that mimic the outcomes a decentralized market would reach. If the public choice conception of the administrative state is now driving a general program of delegalization, this could have a far greater impact on administrative law than the occasional Supreme Court decision on standing. This again underscores the importance of remembering that changes in political ideas affect administrative law in a pervasive way that goes well beyond changes in judicial doctrine.

What then about the future of administrative law? Our little excursion into the history of ideas suggests that if one thing is constant, it is that ideas about the administrative state change. Thus, it would be a grave mistake to think that the public choice paradigm that is currently ascendent is here to stay. What will take its place is anybody's guess. Perhaps public choice will evolve into something different, call it the "new institutionalism" or "positive political theory,"[351] which adopts a more interactive view of political institutions, and is

348. Keith Werhan, *Delegalizing Administrative Law*, 1996 U. ILL. L. REV. 423.

349. *Id.* at 429-41.

350. *Id.* at 440-41.

351. *See* Rodriguez, *supra* note 29, at 138-49.

less despairing about politics because it starts with lower expectations. But I have no crystal ball.

Indeed, the story of the relatively sudden rise of capture theory in the late 1960s, and the more gradual but equally important spread of public choice ideas in the 1980s, suggests that an administrative law professor is one of the last persons one should consult about the future of administrative law. An administrative law professor is someone who makes a living dissecting and commenting on judicial opinions that discuss the role of the courts in reviewing agency action. Such a person's reputation is based on a capital stock of knowledge grounded in the past. Not uncommonly, the organizing principles such a person will use to comprehend this information will also be grounded in political controversies of the past. A legal scholar is thus unlikely to detect a change in the political wind until it has manifested itself in multiple Supreme Court decisions. By then, the shooting will be over, and it is not unlikely that some new change in political thinking will be brewing.

Consider in this light Judge Friendly's lectures in 1962[352] or Louis Jaffe's *Judicial Control of Administrative Action*[353] published in 1965. Both are immensely learned, sophisticated, nuanced analyses of the then-contemporary administrative law. But neither had a clue that administrative law was about to undergo a fundamental transformation. Or think of the legal literature of the early 1980s celebrating the hard look doctrine, and urging its use to slow down the pace of deregulation.[354] One would never guess from reading this literature that hard look review was about to be displaced as the central mechanism of judicial oversight by the *Chevron* doctrine with its focus on narrowly conceived statutory interpretation. I am not faulting these writers for failing to be clairvoyant; the point rather is that legal scholars should not be expected (and should not try) to be clairvoyant, because they have, if anything, a comparative disadvantage in seeing the future. If one wants to predict the future of administrative law, the place to start is not to ask a law professor but to examine the reading lists for introductory political science courses at the better colleges.

Which brings me to my final thought: if law professors are not very good at engineering changes in administrative law, or in predicting changes in administrative law, what ought they be doing? The

352. *See* FRIENDLY, *supra* note 51.

353. *See* JAFFE, *supra* note 78.

354. *See, e.g.*, Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505 (1985); Cass R. Sunstein, *Deregulation and the Hard Look Doctrine*, 1983 SUP. CT. REV. 177.

short answer is that they should play to their strength, which is studying and teaching about legal doctrine. Even if administrative law evolves in response to changes in political ideas, it does so against a backdrop of doctrine into which the changes must be integrated. The lawyer's task is to perform the integration, so that the changes sought and resisted by others can take place (or not take place) within a process we call law. New generations of lawyers need to be taught about the doctrinal conventions that govern different fields of law, such as administrative law. And administrative law professors can perform a service to the profession, the judiciary, and the agencies by synthesizing pockets of doctrine and pointing out the potentialities for movement in different directions.[355]

In addition to studying and teaching doctrine, I think there is also a role for studying the history of administrative law, including the relationship between political ideas and administrative law doctrine. If lawyers and law professors can do little to influence the future, at least it may be helpful for their students to have some understanding about what factors do influence judges and administrators, gleaned from a study of the past. Indeed, I am not at all sure that the effect of studying the relationship between law and political ideas would make students (who include in their number future agency administrators and judges) more "political."[356] It might have exactly the opposite effect: understanding how judges and administrators are influenced by political ideas, often in ways that seem silly or misguided in retrospect, may make students less enthusiastic about using legal arguments to achieve social reforms.[357] At the very least, it should make students less naive about the law, and hence more effective lawyers on behalf of their clients.

The one thing I think we could use less of from administrative law scholars is normative advice-giving on a grand scale. Proposals from law professors to transform administrative law so as to conform with some fashionable normative vision probably fall on deaf ears, if only because they are written after the wellsprings of judicial behavior

355. Ron Levin's article for this symposium is an admirable example of the kind of scholarship administrative law professors should be doing. Levin, *supra* note 202.

356. After all, the ascendancy of legal realism in the 1920s and 1930s—which taught that law was politics—was followed by a period of judicial passivism; the ascendancy of the Legal Process school in the 1950s and 1960s—which taught the need for law to be principled—was followed by Warren Court activism.

357. For some reflections along these lines, directed to the behavior of Supreme Court Justices, see Thomas W. Merrill, *A Modest Proposal for a Political Court*, 17 HARV. J.L. & PUB. POL'Y 137 (1994).

have already been fixed. Indeed, these exercises can have unintended consequences, as when a smorgasbord of proposals to combat the (perceived) public choice tendencies of the administrative state end up communicating nothing but the message that the administrative state is most plausibly described by public choice theory. It is not surprising that law professors are tempted to play God (or at least a preacher of the gospel), lecturing to empty pews about how the world ought to ordered. But it is a temptation to be resisted.