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Any system of administrative law in a modern democracy must come to grips with a fundamental dilemma. It must acknowledge and seek to accommodate, in an optimal manner, two competing and often conflicting societal needs: the need for effective and professional public administration; and the need to maintain a healthy and responsive political democracy.[1] The precise way in which a society will, or perhaps should, strike a balance between the two depends upon an assessment of a number of values, many of which reflect a particular country's constitutional structure, traditions, and basic cultural attitudes. One way to examine the values that so influence the shape of administrative law is to trace the law's development in relation to one administrative practice. Due to its tremendous significance and its relatively recent maturation, the administrative rule-making process in the United States presents an ideal subject for evaluation.

During the last forty years, the United States Congress and federal courts have fashioned a comprehensive legal system dealing with informal rule-making by federal agencies. An analysis of this system reveals three primary values at work. First, the exercise of administrative power must be legitimate — must be legally valid — in light of a government's basic constitutional structure. This concern with the rule of law in the United States has placed fidelity to congressional intent at the centre of our administrative law. Beyond this fundamental guiding principle, however, lies another basic notion.

Administrative rule-making — like all administrative action — should appear fair and legitimate to the public. Due to American notions of individualism and political egalitarianism, this means notice and meaningful public participation.[2] It also means that judicial review must be available since Americans have grown to rely upon courts as the ultimate guardians of constitutional and legislative limits placed upon administrative power.[3] Of course, external scrutiny, if taken to extreme lengths, could stifle the kind of creativity and professionalism which we expect from expert agencies. In most of these instances, moreover, Congress has delegated particular policy decisions to the bureaucracy, and that legislative decision must be honoured.

Any rule-making system, therefore, should respect the positive role played by administrative action in the achievement of social progress. Most Americans, for instance, have come to rely upon governmental action to protect the environment, provide a safe workplace, and to guarantee basic civil rights. As a result, administrative agencies must be given the opportunity to make good public policy decisions—decisions that further human dignity and reflect the exercise of expert and reasoned discretion.

The challenge, then, was to develop the best way to control and guide administrative rule-making while not crippling the ability of agencies to regulate effectively. While exploring the manner in which Congress and the federal courts have responded to this challenge, I will also examine the merits of the resulting process. Although some allege that the process inhibits regulatory innovation as well as introducing additional cost and delay,[4] I will argue that the value of the process itself outweighs its disadvantages. Moreover, I will try to show how meaningful public participation and judicial review not only complements, but even encourages rational policy-making.

THE RISE OF INFORMAL RULE-MAKING

Perhaps the most important development in federal administrative practice during the last twenty years has been "the constant and accelerating flight away from individualized, adjudicatory proceedings to generalized disposition through rule-making."[5] In the vanguard of this trend, of course, were the major new substantive statutes such as the *Clean Air Act*[6] and *Clean Water Act*[7] that relied heavily upon uniform national regulations to achieve their goals. In fact, the superiority of informal (or quasi-legislative) rule-making procedures in the formulation of general rules is quite broadly accepted today, not only by Congress, but by many agencies[8] and the courts as well.[9]

Informal rule-making has the clear advantage of clarifying the law in advance; thus, regulated entities do not necessarily have to await an adjudication to learn, sometimes to their astonishment, what the law is. In addition, agencies often manage to avoid the unattractive prospect of imposing a new liability retroactively—while also shortening and simplifying the adjudicatory process. Legislative-type rule-making, moreover, opens up the policy-making process to all interested persons, not just the parties to an adjudication. The agency will thus receive the benefit of more data and broader advice, making the process of policy creation both more rational and fairer. Finally, informal rule-making may be more efficient than incremental law-making through adjudication because an agency can establish, at its own initiative and all at once, a comprehensive set of norms for future application.

Despite its obvious advantages over case-by-case adjudication in terms of policy formulation and law-making, informal rule-making was rather late to grow into a major administrative tool. The law governing informal rule-making was even slower to develop. In that respect, however, rule-making was not unique. Administrative law in the United States has always seemed to muddle along, developing bit by bit, in pursuit—sometimes fervent, sometimes not—of current administrative practice. That may not be an altogether bad thing, of course, since the law should reflect and accommodate, to a large extent, actual administrative practice. Such delay may also have been inevitable due to the rather awkward position which public administration occupies in the American constitutional framework.

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THE POSITION OF ADMINISTRATION IN A SYSTEM OF CHECKS AND BALANCES

In the United States, the structure of the federal government is predicated upon the separation of powers, or, to put it more accurately, upon a system whereby separate institutions share powers.[10] Throughout history, many governments, perhaps most, had oppressed and abused their citizens. Hence, although our constitutional framers believed that government should be strong enough to rule effectively, they took care to tailor a system which would "limit the legal authority allocated to any person and to set one power against another."[11] Each institutional actor—Congress, the President, and the courts—is checked by another.[12]

The resulting diffusion of power and overlapping of function created what has been called "a harmonious system of mutual frustration."[13] Presidents, for instance, are empowered to veto legislation, Congresses may block presidential appointments, and the courts may hold the other branches accountable for any lapse from constitutional norms. Congress, the President, and the courts do not function simply in hermetically sealed and separated chambers. The framers institutionalised their distrust of power, their fear of governmental abuse, not only by setting one branch against another, but by forcing them to share authority over many tasks.

Despite their foresight on many subjects, the framers of the United States Constitution failed to anticipate the growth of a strong administrative apparatus. The Constitution, therefore, provides little or no instruction on how our governmental structure should accommodate such a large, unelected, and essentially elitist institution. This omission, however, did not develop into a serious problem until the twentieth century.[14]

Although administrative agencies had existed from the beginning of the Republic,[15] the question of their legitimacy — their proper role in our system — was not widely contemplated until the New Deal and the Second World War had transformed a rather sleepy bureaucracy into a hub of activity and power. The "nexus of policymaking", in fact, was shifting "from the constitutionally designated branches of government to the bureaucracy."[16] Questions of control and legitimacy rose to the forefront of public concern.

Twice in the decade of the 1930s, the Supreme Court had to confront a basic constitutional limit on the authority that administrative agencies may wield. And twice the Court applied the constitutional principle that legislative power resides primarily in Congress.[17] Thus, it cannot delegate law-making authority to administrative agencies unless Congress has provided some intelligible standards to guide the exercise of administrative discretion. Congress must make basic policy decisions governing domestic affairs; only more particularised policy matters may be assigned to the bureaucracy.

Although the Supreme Court has not used the delegation doctrine to strike down any legislation since the 1930s, and despite the fact that it has upheld some very generous grants of legislative authority,[18] the principle remains fundamental. If statutes set forth standards to guide administrative action, then the courts can "ascertain whether the will of Congress has been obeyed."[19] It also serves to ensure that administrators will have some guidance for the exercise of their delegated authority.[20] Most significantly, however, the delegation doctrine underscores the fact that the most important policy decisions made in our society will be made by the institution most responsible to the people—Congress—and not by appointed officials.[21]

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Viewed broadly, the delegation doctrine lies near the core of our commitment to the rule of law. In order to be legitimate, agency action must conform with the principles established by Congress. Agency lawyers spend tremendous amounts of time demonstrating in briefs, memoranda, and rule-making preambles that the action proposed or taken by their agency is indeed authorised by law. Authority must be demonstrated; behaviour justified. And from this duty, a number of other legal obligations logically flow—the need to show consistency, procedural regularity, the exercise of reasonable discretion.[22]

INFORMAL RULE-MAKING DURING THE NEW DEAL AND THE POST-WAR PERIOD

Administrative action, however, must still appear to be fair and legitimate to the public at large. One way to assure the public that agencies are proceeding in a legal manner is to regularise bureaucratic decision-making through *ex ante* procedural requirements. And procedural reform was near the top of the political agenda during the 1930s and much of the 1940s due to the enormous growth of the federal bureaucratic apparatus.[23]

The *Administrative Procedure Act* of 1946 (APA) attempted to address many of the most immediate procedural problems facing the administrative state. With regard to formal administrative adjudication, the Act sets forth a rather elaborate scheme of trial-like requirements through which agencies could resolve quasi-judicial matters.[24] Adjudicatory action, however, had been extremely common and had been the most controversial of issues.[25] Consequently, it is hardly surprising that the APA treats it with relative thoroughness and precision.

By contrast, informal rule-making—the quasi-legislative model for the making of substantive law[26]—was not extensively addressed. While agencies had always engaged in rule-making,[27] it was far less common than adjudication, and much less was known about how to conduct rule-makings.[28]

As a result, the APA establishes a fairly simple, quasi-legislative model for informal rule-making. First, an agency must publish notice of any proposed rule-making in the Federal Register setting forth, *inter alia*, the terms or substance of the proposal.[29] Following this notice, the agency must provide interested persons with an opportunity to participate in the rule-making through written comments and, if the agency so chooses, through a public hearing. After considering the relevant material presented by the public, the agency must publish both the final rule and "a concise general

statement of basis and purpose" in the Federal Register.[30] Such rules are then subject to judicial review,[31] in accordance with the "arbitrary and capricious" standard of review. For many years, however, this standard was thought so liberal *vis-a-vis* administrative discretion that it amounted to little more than a bar against complete lunacy.

It was clear by 1946, however, that informal, substantive rule-making had to conform to two basic procedural requirements in order to appear legitimate. Rules must be made public, and the public is entitled to participate in the law-making exercises conducted by administrative agencies. Moreover, recourse to judicial review must be available generally in order to assure the public that agencies are not above the law.[32] The very legitimacy of the administrative state, after all, depends upon its harmonisation with the rule of law.

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Over the next twenty years, very little development occurred with regard to informal rule-making. Agencies fell into the familar practice of fashioning principles of law through case-by-case adjudication—ignoring to a large extent the statutory authority many of them possessed to proceed by substantive rule-making. This phase of administrative lethargy soon ended.

AN ERA OF BURGEONING REGULATION: 1970-1980

The decade of the 1970s witnessed enactment of more regulatory statutes than had been passed during the entire previous history of the Republic.[33] Many of these statutes demanded that agencies promulgate informal regulations according to specific schedules and deadlines.[34] Other agencies, prompted by the promise of more objective and more efficient decision-making, dusted off their long-neglected rule-making powers.[35] And Congress,[36] as well as the courts,[37] liberalised access to the courts by relaxing the requirements of standing.

The courts, therefore, soon began to confront a broad array of rule-making cases dealing with such subjects as environmental protection, occupational safety, and consumer protection. What role were the courts going to play: passive observer or active monitor?

It soon became obvious that the federal courts were not going to be rubber stamps for administrative action. Judge Skelly Wright's opinion in *Calvert Cliffs' Coordinating Comm. Inc. v Atomic Energy Comm'n*[38] perhaps best exemplifies the mood of judicial review which would dominate the following years. He declared that it was the duty of the federal judiciary "to see that important legislative purposes, heralded in the halls of Congress, are not lost or misdirected in the vast hallways of the federal bureaucracy."[39]

This mood was not an alien conception. It is deeply rooted in the American character. Americans have always been uneasy about the proper place of public administration in policy formation since the administration is not democratically elected; it is appointed.[40] This unease grew during the 1960s and 1970s as theories of agency "capture" caught on, and fears mounted that agencies might be inclined to do what is best for regulated industries, not the public.[41] Furthermore, faith in experts and expertise had been seriously eroded by the nuclear arms race, Vietnam, and the pollution and ecological devastation which so tarnished the achievements of an advanced industrial society.

While agencies had lost a lot of their glitter, the federal courts had risen in stature during the two decades leading up to the 1970s. Their role in the civil rights revolution underscored the central place that most Americans believe the judiciary should occupy in the protection of the individual against the state. As Justice Hugo Black wrote: "Under our constitutional system, courts stand against any winds that blow as haven for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement."[42] Many Americans viewed as heroes, therefore, those courageous, but unassuming jurists who, despite scorn and ridicule, insisted upon desegregating the institutions of the American South in accordance with the dictates of law.[43]

While *Calvert Cliffs'* may have best expressed the mood, *Citizens to Preserve Overton Park v Volpe*[44] gave it substance. In *Overton Park*, the Supreme Court through Justice Thurgood Marshall announced that agency decisions such as informal rule-making are subject to "thorough, probing, in-depth [judicial] review."[45] Such review extends to three areas of concern. The first inquiry is whether the agency has acted within the scope of authority that Congress has delegated to the agency. Second, a reviewing court must determine whether the agency has complied with the applicable procedural requirements. And finally, the court's attention must be addressed to the substantive merits in order to determine whether the agency decision was arbitrary, capricious, or an abuse of discretion.[46]

This substantive judicial inquiry must focus upon whether the agency considered all of the relevant factors and whether there had been a "clear error of judgment." While this involves "searching and careful" scrutiny, a court ultimately is "not empowered to substitute its judgment for that of the agency."[47] To this end, the focal point of review is the full administrative record that was made before the agency (preambles, comments, technical support documents, etc), not a new record generated during the course of judicial review.[48]

Armed with this mandate, the federal courts, but especially the Court of Appeals for the District of Columbia Circuit, began to refine a number of rule-making procedures to help the courts perform their supervisory function. In *Kennecott*

Copper Corp. v Environmental Protection Agency,[49] Judge Harold Leventhal insisted that agencies articulate in reasonably thorough detail the factual and policy bases for a rule-making decision. Although he admitted that this new requirement exceeded the simple APA requisite of a "concise general statement," Judge Leventhal held that it was absolutely necessary to enable judges to fulfil their judicial function without engaging in speculation as to the actual reasoning for the agency's decision.[50] In this way, Leventhal furthered the collaborative partnership that he envisioned between courts and agencies in the furtherance of congressional intent and the public interest.[51]

Soon the courts also expanded upon the public participation elements of the rule-making process. In order to permit the public to comment effectively upon a rule-making, the D.C. Circuit held in *Portland Cement Ass'n v Ruckelshaus*,[52] once again through Judge Leventhal, that an agency had to give the public an opportunity to see the actual data upon which the agency decision is predicated. "It is not consonant with the purpose of a rule-making proceeding to promulgate rules on the basis of ... data that ... [are] known only to the agency."[53] Furthermore, the agencies would have to prove that they indeed listened to public comments. Consequently, the court also held that agencies had to respond in the rule-making preamble to every significant comment which had been submitted by the public.[54]

Over the course of the 1970s, the "probing" standard of merits-oriented review first enunciated in *Overton Park* was transformed into the now familiar "hard look" doctrine of judicial review. According to Judge Leventhal, with whom the phrase originated,[55] it means that, once a rule has been challenged as arbitrary or an abuse of discretion, a reviewing court must engage in careful scrutiny of the agency's record and reasoning to determine whether the agency's decision was irrational or contrary to the ascertainable intent of Congress.[56] Thus, as Judge Wright wrote, "[t]he more technical the case, the more intensive must be the court's effort to understand the evidence, for without an appropriate understanding of the case before it the court cannot properly perform its appellate function."[57]

Such review is not meant to supplant the role of the agency as the expert decision-maker. "We must look at the decision not as the chemist, biologist or statistician that we are qualified neither by training nor experience to be, but as a reviewing court exercising our narrowly defined duty of holding agencies to certain minimal standards of rationality."[58] In the final analysis, the court must affirm even a decision with which it disagrees as long as it is neither arbitrary nor capricious.[59]

Reviewing courts, hence, are not strangers to administrative process. They are involved in order to assure Congress and our society that broad delegations of law-making authority are neither exceeded nor abused. On the other hand, this supervision must take place with full appreciation of the fact that Congress delegated policy-making and fact finding to expert agencies, not courts. The hard-look doctrine thus seems well-designed to balance the vital role of judicial supervision with the requisite amount of judicial restraint.[60]

Although some judges favoured further "improvements" to rule-making procedures rather than relying upon the judicial hard look,[61] the era of procedural innovation ended abruptly in 1978. In *Vermont Yankee Nuclear Power Corp. v Natural Resources Defense Council*,[62] the Supreme Court firmly rejected an apparent attempt by the D.C. Circuit to impose formal adjudicatory requirements — such as cross-examination at hearings—upon the informal rule-making process. According to the Court, the D.C. Circuit had erred because it had interfered with the congressionally prescribed process for promulgation of informal rules.[63]

The Supreme Court, fortunately, had prevented the over-judicialisation of a quasi-legislative process for the formulation of law and policy. Equally as fortunate, however, the Court has never repudiated the procedural requirements developed in *Kennecott Copper* and *Portland Cement*.[64] Those requirements were simply logical refinements of the informal rule-making procedures already found in section 553 of the APA and were completely in accord with the spirit of the applicable provisions of the APA. The rule-making process, therefore, should remain open, responsive, and accountable, while avoiding the quagmire of formal procedures which are more suited to individual adjudications than the generation of rules of general applicability.

Properly understood and applied, however, the hard-look doctrine never pretended to empower federal judges to make these basic political choices. It has merely required an agency to explain a rule-making decision in terms that are logical, consistent with the authorising statute, and based upon facts that find support in the administrative record.

JUDICIAL REVIEW IN THE 1980s

The hard look doctrine has not only survived the passage of time, it seems to have fairly thrived. In 1982, the D.C. Circuit extended a form of hard look review to deregulatory action in *State Farm Mutual Automobile Insurance Co v Department of Transportation*.[65] On review, the Supreme Court agreed with the lower court's conclusion that the Reagan administration had failed to supply a reasoned analysis for rescinding a prior rule that required the use of passive restraints in automobiles.[66] In doing so, the Supreme Court, for the first time in its history, referred in approving fashion to the hard look,[67] thereby validating the continued application of this intensive form of judicial review.[68]

The Supreme Court, nevertheless, also emphasised in 1983 that there are limits to how "active" judicial review can be. In *Baltimore Gas & Electric Co. v Natural Resources Defense Council*,[69] the Court cautioned the lower federal courts not to forget the fact that the resolution of "fundamental policy questions" should be left to Congress and the agencies to which Congress has delegated policy-making authority.[70] Properly understood and applied, however, the hard-look doctrine never pretended to empower federal judges to make these basic political choices. It has merely required an agency to explain a rule-making decision in terms that are logical, consistent with the authorising statute, and based upon facts that find support in the administrative record.

THE IMPACT OF JUDICIAL REVIEW

It is certainly harder and more expensive to promulgate an informal rule today than it was in, say, 1960.[71] It also takes a good deal longer, especially if someone, perhaps both industry and "public interest" groups, files a judicial challenge. The federal government, therefore, has lost some of its ability to react quickly to perceived social, economic, and environmental ills.[72] The loss of some "efficiency" and "flexibility" is real and not insignificant. The key question, however, is whether the loss is outweighed by the advantages of this new process for policy formulation. I believe it clearly is.

Open and meaningful participation in agency rule-making is an ideal closely wedded to fundamental American notions of individualism and fair play. It may complicate the transaction of government business, but Americans by and large believe that they should have direct access to government decision-makers, irrespective of whether they are elected to office or hold an appointive post. This follows from the fact that all Americans—rich and poor, weak and powerful—are equal, or should be equal, in the eyes of the law. "There may be winners and losers, but the game should be fair. Access to the seat of power should be open to all."[73]

The hard-look doctrine, consequently, has contributed to the overall efficiency and rationality of agency rule-making by serving as a constant reminder to agency officials that, if sought, judicial review will flush out serious analytical errors, as well as personal bias and impermissible political motivations. Wider public participation also enhances the rationality of the process by providing an agency with more data and a broader array of opinion. Agency decisions thus should be better informed.

Access to judicial review also responds to a basic American belief, namely that all institutional power should be checked by the power of another institution. Although most civil servants are well-intentioned and keen to do the "right" thing, there always lurks the possibility that administrative power can be abused or distorted in order to serve narrow personal or political goals. We look, therefore, to the judiciary as the ultimate guardian of our system of limited and shared powers.[74] The very fact that administrative agencies are subject to judicial supervision proclaims "the premise that each agency is to be brought into harmony with the totality of law..."[75]

It is true that judicial review is only invoked episodically. It is also true that reversal rates do not suggest that the "hard look" is having a great deal of impact.[76] The "spectre" of judicial review, however, has had a really positive impact upon the way in which agencies do business. In an effort to avoid the public embarrassment of judicial criticism and remand, agencies have internalised to a large degree the demands of open and rational decision-making.[77] As the former Deputy General Counsel of the U.S. Environmental Protection Agency has written:

> It is a great tonic to discover that even if a regulation can be slipped or wrestled through various layers of internal ... review, the final and most prestigious reviewing forum of all—a circuit court of appeals—will inquire into the minute details of methodology, data sufficiency and test procedure and will send the regulations back if these are lacking.[78]

In fact, strict judicial review has given those agency officials and lawyers "who care about well-documented and well-reasoned decisionmaking a lever with which to move those who do not."[79]

The hard-look doctrine, consequently, has contributed to the overall efficiency and rationality of agency rule-making by serving as a constant reminder to agency officials that, if sought, judicial review will flush out serious analytical errors, as well as personal bias and impermissible political motivations. Wider public participation also enhances the rationality of the process by providing an agency with more data and a broader array of opinion. Agency decisions thus should be better informed.

Furthermore, the courts have made it virtually impossible for an agency to ignore "troublesome" comments. As long as the comment is material, an agency must respond to it during the course of the rule-making proceeding. Not only does this make an agency listen, it makes it much more difficult for industry or other interest groups to try to throw their weight around within the administrative process. After all, the agency will have to respond in writing and in some reasonable fashion to the relevant arguments made by any person or group, regardless of wealth, status, or the size of any group's membership.[80] Thus the value and significance of persuasive, rational discourse is elevated in the process.

Above all, these reforms serve to validate the necessary and pragmatic delegation of informal rule-making power to administrative agencies. As long as the rule-making process is as open as possible to outside participation and the opportunity for arbitrary decision-making is reduced by the requirement of a reasonably articulated analysis and the availability of rigorous judicial review, Americans will probably continue to have enough confidence in the system to accept the transfer of so much policy making authority. In a real political and moral sense, therefore, the current procedural system, together with the hard look, enable Congress as well as the administrative agencies to take full advantage of this powerful legal instrument.

CONCLUSION

The critics say that this process for administrative rule-making is too time-consuming and too expensive. They also say that a reviewing court may on occasion stray beyond the judicial province and substitute its own policy judgments for those of an agency. In my view, however, the increase in fair and rational decision-making is worth the price, as well as the time. And the federal courts have shown little inclination to second-guess administrative policy decisions.

This process, nevertheless, does take some time and money, and it does involve some risk. But the delay and cost are not so excessive nor the dangers so great as to overcome the constitutional, cultural, and traditional values of American life that seem to mandate an open, rational, and accountable system of administrative rule-making.

ENDNOTES

1. See Aberbach and Rockman, "Mandates or Mandarins? Control and Discretion in the Modern Administrative State," 48 *Pub. Ad. Rev.* 606, 606 (1988).
2. See J. Mashaw, *Due Process in the Administrative State*, 22-3 (1985).
3. See L. Jaffee, *Judicial Control of Administrative Action*, 321 (1965).
4. See e.g., Stewart, "Regulation, Innovation, and Administrative Law: A Conceptual Framework," 69 *Calif. L. Rev.* 1256, 1275-77, 1364-65 (1981).
5. Scalia, "Vermont Yankee: The APA, The D.C. Circuit, and the Supreme Court," *1978 Sup. Ct. Rev.* 345, 376.
6. 42 USCA §§ 7401-7642 (West 1983 & Supp. 1990).
7. 33 USCA §§ 1251-1387 (West 1986 & Supp. 1990).
8. See "The Contribution of the D.C. Circuit to Administrative Law," 40 *Ad. L. Rev.* 507, 514-15 (1987)(presentation by Chief Judge Patricia Wald of the Circuit Court of Appeals for the District of Columbia)[hereinafter cited as Wald]. Even agencies that traditionally have relied heavily upon adjudication, like the Social Security Administration, are increasingly resorting to informal rule-making to set binding policy. See, e.g., *Heckler v Campbell*, 461 US 458 (1983). The National Labor Relations Board, by contrast, remains obstinate in its refusal to use rule-making authority. According to Jerry Mashaw, "Neither the fulminations of commentators nor the prodding of courts has convinced it that any of its vague adjudicatory doctrines can bear particularisation ... in regulatory form. ... And some suggest that exclusive reliance on adjudication has seriously inhibited the development of sensible labor policies." *Bureaucratic Justice*, 122 (1983).
9. See, e.g., *Securities & Exchange Comm'n v Chenery Corp.*, 332 US 194, 202 (1947)(declaring that the "function of filling in the interstices of the Act should be performed, as much as possible, through this quasi-legislative promulgation of rules to be applied in the future"); *National Petroleum Refiners Ass'n v Federal Trade Comm'n*, 482 F.2d 672, 679-84 (D.C. Cir. 1973) (discussing the normative advantages of informal rule-making in an opinion by Judge Skelly Wright), *cert. denied*, 415 US 951 (1974).
10. R. Neustadt, *Presidential Power: The Politics of Leadership with Reflections on Johnson and Nixon*, 101 (3rd edn. 1976).
11. R. Dahl, *Democracy in the United States: Promise and Performance*, 73 (1976).
12. As Kenneth Dyson has written: "The American liberal tradition is profoundly individualistic and anti-bureaucratic; it begins with the autonomous individual and with a populist belief that all authority emanates from the people. A dispersal of public power was seen as necessary in order to maintain the supremacy of the popular will and to protect the individual." *The State Tradition in Western Europe: A Study of an Idea and Institution*, 271 (1980).
13. J. Burns, *The Deadlock of Democracy: Four Party Politics in America*, 22 (1963) (quoting Richard Hofstadter).
14. See J. Aberbach, *Keeping a Watchful Eye: The Politics of Congressional Oversight*, 187 (1990).
15. See *Final Report of the Attorney General's Committee on Administrative Procedure, Administrative Procedure in Government Agencies*, S. Doc. No. 8, 77th Cong., 1st Sess. 8 (1941)[hereinafter cited as Final Committee Report].
16. Strauss, "Legislative Theory and the Rule of Law: Some Comments on Rubin," 89 *Colum. L. Rev.* 427, 427 n.1 (1989).
17. *Schechter Poultry Corp. v United States*, 295 US 495 (1935); *Panama Refining Co. v Ryan*, 293 US 388 (1935). Although the Court struck down a third piece of legislation on delegation grounds in the 1930s, the case did not concern the delegation of congressional power to an administrative agency. *Carter v Carter Coal Co.*, 298 US 238 (1936), dealt rather with a clearly impermissible delegation of legislative authority to private persons.
18. See, e.g., *Arizona v California*, 373 US 546 (1963); *Yakus v United States*, 321 U.S. 414 (1944).
19. *Yakus*, 321 US at 425 (opinion by Chief Justice Stone).
20. See *Industrial Union Dept., AFL-CIO v American Petroleum Inst.*, 448 US 607, 685-86 (1980) (Justice Rehnquist concurring in the judgment).
21. See *Arizona*, 373 US at 626 (partial dissent by Justice Harlan).
22. See Strauss, *supra* note 16, at 442-43.
23. See Gellhorn, "The Administrative Procedure Act: The Beginnings," 72 *Va. L. Rev.* 219 (1986).
24. See 5 USCA §§ 554, 556-57 (West 1977 & Supp. 1990). Agency adjudications, moreover, are ultimately subject to judicial review. See 5 USCA §§ 701-06 (West 1977).
25. See Final Committee Report, *supra* note 15, at 43.
26. See *United States v Nixon*, 418 US 683, 695 (1974); *Pacific Gas & Electric Co. v Federal Power Comm'n*, 506 F.2d 33, 38 (D.C. Cir. 1974).
27. Ibid. at 97-8.
28. See M. Shapiro, *Who Guards the Guardians? Judicial Control of Administration*, 41 (1988).
29. 5 USCA § 553(b) (West 1977).
30. 5 USCA § 553(c).
31. 5 USCA §§ 701-06 (West 1977). The APA recognised, however, that Congress may by statute preclude judicial review over particular kinds of administrative decisions. 5 USCA § 701(a)(1).
32. See Jaffee, *supra* note 3, at 327.
33. See Wald, *supra* note 8, at 510.
34. See, e.g., *Clean Air Act* §§ 108-09, 42 USCA 7408-09 (West 1983); *Clean Water Act* §§ 301, 304, 306-07, 33 USCA §§ 1311, 1314, 1316-17 (West 1986).
35. See, e.g., 20 CFR Pt. 404, Subpt. P, app. 2 (1984) (medical-vocational guidelines promulgated by the Social Security Administration).
36. See, e.g., *Clean Water Act* § 509(b), 33 USCA 1369(b) (granting standing to "any interested person" to challenge many agency rule-makings); *Toxic Substances Control Act* § 19(a), 15 USCA § 2618(a) (West 1982 & Supp. 1990) (granting standing to "any person").
37. See, e.g., *Association of Data Processing Service Organizations v Camp*, 397 U.S. 150 (1970); *United States v Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 US 669 (1973).
38. 449 F.2d 1109 (D.C.Cir. 1971).
39. Ibid. at 1111.
40. See S. Kelman, *Making Public Policy: A Hopeful View of American Government*, 92-3 (1987).
41. While some agencies aged very badly in the years following the New Deal, the proponents of the capture theory most likely overstated their case. While the Interstate Commerce Commission may have been "captured," I doubt seriously that anyone could have contended that the Securities and Exchange Commission had been. Moreover, some agencies were intended to represent certain constituencies more than others. Nevertheless, it is true that power to decide can be power to hurt; thus, society should be vigilant to guarantee that administrative power is not misused. See Jaffee, *supra* note 2, at 322-23.
42. *Chambers v Florida*, 309 US 227, 241 (1940).
43. See, e.g., J. Bass, *Unlikely Heroes* (1982) (focusing upon the lives and decisions of a number of judges of the U.S. Fifth Circuit Court of Appeals who served during the 1950s and 1960s); F. Read & L. McGough, *Let Them Be Judged* (1978). It may seem strange that Americans look to an unelected branch of government, the courts, to control a bureaucracy which is also unelected. It is not really so strange, however, if you consider Judge Skelly Wright's credo: It is claimed that judicial review is anomalously undemocratic, and if by that one means that it is often counter-majoritarian, the point must be conceded. But in another sense, the courts are the most democratic institutions we have ... It is in the nature of courts that they cannot close their doors to individuals seeking justice ... The judiciary is thus the only branch of government which can truly be said to have adopted Dr Seuss' gentle maxim—'A person's a person, no matter how small'. Wright, "No Matter How Small," 2 *Hum. Rts.* 115, 116-18 (1972).
44. 401 US 402 (1971).
45. Ibid. at 415.
46. See ibid. at 415-17. The course of inquiry as set forth by the Court follows the generally applicable standards of § 706 of the APA. 5 USCA § 706 (West 1977).
47. Ibid. at 416.
48. See ibid. at 420; *Camp v Pitts*, 411 US 138, 142 (1973).
49. 462 F.2d 846 (D.C. Cir. 1972).
50. Ibid. at 849-50.
51. See *Greater Boston Television Corp. v Federal Communications Comm'n*, 444 F.2d 841, 851-52 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971).
52. 486 F.2d 375 (D.C. Cir. 1973), cert. denied, 417 US 921 (1974).
53. Ibid. at 393.
54. See ibid. at 393-94.
55. See *Greater Boston Television*, 444 F.2d at 850.
56. See *Ethyl Corp. v Environmental Protection Agency*, 541 F.2d 1, 68-9 (D.C. Cir. 1975) (Judge Leventhal concurring), cert. denied, 426 US 941 (1976).
57. Ibid. at 36.
58. Ibid.
59. See ibid. at 36-7.
60. As Judge Leventhal wrote: "On issues of substantive review, on conformance to statutory standards and requirements of rationality, the judges must act with restraint. Restraint, yes, abdication, no." Ibid. at 69 (Judge Leventhal concurring). See generally Leventhal, "Environmental Decisionmaking and the Role of the Courts," 122 *U. Pa. L. Rev.* 509 (1974) (setting forth in comprehensive fashion Judge Leventhal's thoughts on the "hard look" doctrine).
61. Chief Judge David Bazelon believed that substantive review by "technically illiterate judges" was "dangerously unreliable." *Ethyl Corp.*, 541 F.2d at 67 (Judge McGowan concurring). Thus, he urged courts to strengthen administrative procedures to ensure that the decision-making process is "held up to the scrutiny of the scientific community and the public." Ibid. at 66.
62. 435 US 519 (1978).
63. Ibid. at 541-48.
64. See Wald, *supra* note 8, at 517.
65. 680 F.2d 198, 220-22, 228-30 (D.C. Cir. 1982).

66. *Motor Vehicle Manufacturers Ass'n of the United States, Inc. v. State Farm Mutual Automobile Insurance Company*, 463 U.S. 29 (1983).
67. See ibid. at 43, 57.
68. See Wald, *supra* note 8, at 520.
69. 463 US 87 (1983)
70. Ibid. at 97 (citing a similar warning that was issued in *Vermont Yankee*).
71. See Costle, "Brave New Chemical: The Future Regulatory History of Phlogiston," 33 *Ad. L. Rev.* 195, 199-200 (1981).
72. See Kelman, *supra* note 40, at 95.
73. Mashaw, *supra* note 2, at 27-8.
74. Both Congress and the President also possess a number of tools—more detailed legislation, oversight hearings, the appointments process, review by the Office of Management and Budget, and so on—which those two branches can use to try to influence administrative rule-making. A discussion of these institutional "controls," however, lies outside the scope of this article.
75. Jaffee, *supra* note 3, at 327.
76. See W. Gellhorn, C. Byse, P. Strauss, T. Rakoff & R. Schotland, *Administrative Law* 484 (8th ed. 1987). Reversal rates, however, are higher than before 1970 and many instances of glaringly arbitrary decision-making have not escaped judicial censure. See, e.g., *State Farm*, 463 US 29. For an analysis of a recent empirical study on judicial reversals and remands of agency decisions, see Schuck and Elliott, "Studying Administrative Law: A Methodology For, and Report On, New Empirical Research," 42 *Ad. L. Rev.* 519 (1990).
77. See Sunstein, "Constitutionalism After the New Deal," 101 *Harv. L. Rev.* 421, 471-72 (1987); Jaffee, *supra* note 3, at 325.
78. Pedersen, "Formal Records and Informal Rulemaking," 85 *Yale L.J.* 38, 60 (1975).
79. Ibid.
80. See Kelman, *supra* note 40, at 109.